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BOOK REVIEW

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ABSTRACTS

ARTICLE

In constitutional liberties cases, the Supreme Court has tried to reduce balancing, understood loosely to mean determining a right's contours based on sweeping political-moral considerations, not just text and history. It fears that today's balancing would displace a balance struck by the Founders. Balancing is indeed problematic—but this campaign to end it is bound to fail. Though avoidable for many constitutional rights, balancing is inevitable for general liberties like religion, the Second Amendment, and speech. This inevitability arises not from gaps in text or history but from these liberties' special role.

General liberties are irreducibly open-ended—not reducible to finite lists of specific laws or regulatory motives to be excluded. Thus, free speech is more than the sum of discrete rights to parade, burn flags, and give offense. Such liberties curb laws that differ unforeseeably in which interests they advance and how much. This makes it impossible for the Founders or anyone to say in advance when general liberties might (if applied categorically) come to block laws too important to give up. Hence the greater need to fix these rights' scope over time—not just through close analogical reasoning when text or history is vague but through looser normative reasoning in core cases. The task of drawing these rights' contours is thus always and necessarily unfinished. This account powerfully explains many otherwise bizarre features of the doctrinal histories of guns, religion, and speech. And it leaves foes of judicial balancing one option: to embrace more popular enforcement of liberties.

NOTES

In spring 2023, the Federal Deposit Insurance Corporation (FDIC) resolved three of the four largest bank failures in U.S. history. When the FDIC resolves failed banks, this Note argues, it (unselfconsciously) allocates coordination rights—that is, the right to legally permitted economic coordination. Specifically, by reflexively merging failed banks into larger banks, the FDIC adopts antitrust law's preference for hierarchical firm-based coordination. Recent scholarship challenges that pattern in antitrust law. In banking, it is especially

BOOK REVIEW

Ever since the 1970s when BigLaw firms began to hire Black lawyers into their associate ranks, these firms have wrestled with problems in both recruiting and retaining Black associates. During the ensuing decades, BigLaw firms have minimally increased the low numbers of Black attorneys who have become partners, particularly equity partners, within their organizations. Numerous scholars have explored how racial bias and discrimination, both within BigLaw firms and greater society, have contributed to such failures in the recruitment, retention, and promotion of Black lawyers. In his new book The Black Ceiling: How Race Still Matters in the Elite Workplace*, Professor Kevin Woodson, a Black law professor and sociologist who once worked as an associate at a large, elite law firm, offers his own theory about how "racial discomfort," and specifically "social alienation" and "stigma anxiety" related to race, have functioned together to create and maintain racial disparities in BigLaw attrition and partnership. This Book Review examines Woodson's insights against the backdrop of recent high-profile employment discrimination litigation embroiling BigLaw firms across the country, focusing on one recent case,* Cardwell v. Davis Polk & Wardwell LLP*, in which the plaintiff, a Black former associate, alleged he had been fired in retaliation for raising concerns about racial discrimination at his law firm. The Book Review extends Woodson's research by identifying and assessing innovative firm- and industry-wide policies that can mitigate the impact of racial discomfort on Black associates' prospects for thriving in and attaining partnership at BigLaw firms.*

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ARTICLE

UNFINISHED LIBERTIES, INEVITABLE BALANCING

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In constitutional liberties cases, the Supreme Court has tried to reduce balancing, understood loosely to mean determining a right's contours based on sweeping political-moral considerations, not just text and history. It fears that today's balancing would displace a balance struck by the Founders. Balancing is indeed problematic—but this campaign to end it is bound to fail. Though avoidable for many constitutional rights, balancing is inevitable for general liberties like religion, the Second Amendment, and speech. This inevitability arises not from gaps in text or history but from these liberties' special role.

General liberties are irreducibly open-ended—not reducible to finite lists of specific laws or regulatory motives to be excluded. Thus, free speech is more than the sum of discrete rights to parade, burn flags, and give offense. Such liberties curb laws that differ unforeseeably in which interests they advance and how much. This makes it impossible for the Founders or anyone to say in advance when general liberties might (if applied categorically) come to block laws too important to give up. Hence the greater need to fix these rights' scope over time—not just through close

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analogical reasoning when text or history is vague but through looser normative reasoning in core cases. The task of drawing these rights' contours is thus always and necessarily unfinished. This account powerfully explains many otherwise bizarre features of the doctrinal histories of guns, religion, and speech. And it leaves foes of judicial balancing one option: to embrace more popular enforcement of liberties.

INTRODUCTION

Legal conservatives have long opposed balancing in constitutional cases, and the Supreme Court has taken up the cause.[1] Everyone agrees that rights should be "balanced" to serve good ends at tolerable costs. The question is whether rights will be balanced not just by their framers but also by those applying them over time. The Court is trying to avoid balancing in application—which it seems to understand loosely to mean determining a right's contours based on highly general political-moral considerations (like competing public interests), not just text, history, and narrow analogies.[2] The effort to avoid balancing reached a crescendo in *New York State Rifle & Pistol Ass'n v. Bruen*,[3] which replaced circuit courts' Second Amendment balancing with a "history and tradition" test.[4] That's unsurprising: Circuit courts' particular sort of balancing in gun cases needed reforming, having hollowed out an enumerated right.[5] (Lower court decisions upholding the law in *Bruen* proved the point.[6]) But the Court also hoped to avoid balancing more broadly, based on democratic legitimacy concerns that this author shares. For deep reasons, however, the broader campaign to avoid balancing is bound to fail.

True, as *Bruen* noted, some rights provisions—like the Confrontation[7] and Establishment Clauses[8]—can be applied without balancing except at

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1. See, e.g., Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1185 (1989) [hereinafter Scalia, The Rule of Law] (condemning "standardless balancing" by judges); see also N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129 (2022) (rejecting "any 'judge-empowering "interest-balancing inquiry"'" (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008))).

2. See infra section I.B. Some reserve the word "balancing" for direct cost–benefit analysis, which is just one instance of the category of analysis that this Article shows one cannot avoid *every* instance of: freeform political-moral reasoning about when the interest underlying a right is too light or when enforcing the right would unacceptably undermine other aspects of the common good. The narrower, cost–benefit sense of "balancing" may be more natural, and I doubt balancing in *that* sense is coherent in many cases, much less inevitable. See infra note 160. Still, conservative Justices use "balancing" to mean the broader category, and it's their campaign that this Article addresses, so "balancing" will be used to state this Article's inevitability thesis. Thanks to Professor Larry Solum for helpful discussion on this point among many.

3. 142 S. Ct. 2111 (2022).

4. See infra section III.B.2.a.

5. See United States v. Rahimi, 144 S. Ct. 1889, 1909 (2024) (Gorsuch, J., concurring) ("How did the government fare under [the pre-*Bruen*] regime? In one circuit, it had an 'undefeated, 50–0 record.'" (quoting Duncan v. Bonta, 19 F.4th 1087, 1167 n.8 (9th Cir. 2021) (en banc) (VanDyke, J., dissenting))).

6. See infra note 340 and accompanying text (arguing that *Bruen* should have rested on the fact that the challenged law blocked most people's ability to carry at all).

7. U.S. Const. amend. VI; see also infra note 238 and accompanying text.

8. U.S. Const. amend. I; see also Stephanie H. Barclay, Replacing *Smith*, 133 Yale L.J. Forum, 436, 442 (2023), https://www.yalelawjournal.org/pdf/BlarclayYLJForumEssay_33fxoyey.pdf [https://perma.cc/TJ4V-XCHN] [hereinafter

the semantic margins.[9] But balancing at the right's semantic core is inevitable for what this Article will call *general liberties*, including free speech,[10] free exercise,[11] and Second Amendment rights.[12] General liberties are rights that shield some conduct from indefinitely varied regulations. They differ from the kinds of rights *Bruen* held up as examples: rights defined by the specific regulations they exclude (like religious establishments) and positive rights to government resources (like a chance to confront witnesses).[13] With general liberties especially, the framers cannot do the needed balancing and adjusting of scope. So the rights' implementers must balance on a rolling basis. It's not that they must inevitably apply *their own* high-level moral theory (say, Judge Richard Posner's wealth-maximization view[14]).[15] They might channel a rights theory ascribed to the framing generation.[16] But they will inevitably rely on *some* broad normative considerations (competing rights or public interests) to draw and redraw the right's contours—which falls within the Court's critique of balancing as a way of "decid[ing] . . . case-by-case . . . whether the right is *really worth* insisting upon."[17] This inevitability flows not from general liberties' vagueness, breadth, or sparse text or history,

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Barclay, Replacing *Smith*] ("The Establishment Clause generally gives rise to categorical, rather than rebuttable, prohibitions.").

9. See N. Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022) (noting that courts consult history, not balancing tests, when enforcing the Confrontation and Establishment Clauses).

10. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

11. Id. ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

12. Id. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

13. See *Bruen*, 142 S. Ct. at 2156. Though some reserve the word "right" for categorical protections, here it will also cover presumptive protections that can be overridden. "Liberties" will denote rights against regulation of private conduct. And "balancing a liberty against public interests" will be shorthand for so balancing the *interests underlying* a liberty. Nothing substantive turns on these terminological choices.

14. For an account of Judge Posner's normative legal theory of wealth maximization, see generally Richard A. Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Stud. 103 (1979).

15. See infra notes 164–170 and accompanying text (arguing that it is not inevitable, and is undesirable, that courts apply their own moral theories).

16. See Steven J. Heyman, Righting the Balance: An Inquiry Into the Foundations and Limits of Freedom of Expression, 78 B.U. L. Rev. 1275, 1279–80 (1998) (contrasting "natural rights theory," which would limit free speech "by the rights of others" with "utilitarianism, which repudiated the concept of natural rights" and framed cases "as clashes between free speech and 'social interests'").

17. *Bruen*, 142 S. Ct. at 2129 (internal quotation marks omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)). For a survey of legal conservatives' compelling concerns about balancing, see infra section I.B.1; see also infra notes 164–170 and accompanying text (arguing that those concerns are not fully assuaged by restricting judges to relying on the framers' moral theory of rights).

but from their special role. Their purpose doesn't preclude balancing, as critics say,[18] but compels it.

General liberties offer adaptive protection, guarding certain conduct against whatever threats it might face as regulatory needs change.[19] So while all constitutional norms are "adaptive" in applying to many entities in many times and places, a general liberty varies in another way: in the *types of regulation* it protects against. For this, it must be irreducible to any finite list of specific regulations excluded. The liberty's scope cannot be concretely specified at its framing or any later point[20]—not even to a close approximation (which might've cabined later balancing to close analogical reasoning at the margins).[21] For example, free speech is not just shorthand for discrete rights to burn flags,[22] parade,[23] and preach at street corners.[24] Nor does it just forbid laws clearly serving illicit goals like the quashing of offensive speech.[25] Its scope can only be defined in presumptive terms that invoke the values or "rationale underlying" it.[26]

The special need to balance arises from this *irreducible open-endedness* of general liberties: their being defined so that they could always adapt to

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18. See, e.g., Laurent B. Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424, 1449 (1962) (arguing that balancing undercuts the First Amendment's "function as a constitutional limitation" and "virtually converts that amendment into its opposite" by turning "[a] prohibition against abridgment" into "a license to abridge"); see also *Bruen*, 142 S. Ct. at 2129 (arguing that "[t]he very enumeration of the right" precludes balancing and that "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all" (first alteration in original) (internal quotation marks omitted) (quoting *Heller*, 554 U.S. at 634)).

19. See infra section II.A.1.

20. Cf. United States v. Rahimi, 144 S. Ct. 1889, 1925–26 (2024) (Barrett, J., concurring) (noting that the Second Amendment "does not apply only to the catalogue of arms that existed in the 18th century, but rather to all weapons satisfying the '*general definition*' of 'bearable arms'" (emphasis added by *Rahimi*, 144 S. Ct. at 1926) (quoting *Bruen*, 142 S. Ct. at 2132)).

21. A right specified to a close approximation might be defined as, say, "protection from religious tests for office and their close analogues." See infra section I.B.2 (defining the "close analogical reasoning" needed to apply such a right and its contrasts with the balancing that legal conservatives oppose).

22. See Texas v. Johnson, 491 U.S. 397, 399 (1989) (invalidating a conviction for flag-burning in protest).

23. See Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 559 (1995) (protecting parade organizers' discretion to reject floats bearing messages they oppose).

24. See Cantwell v. Connecticut, 310 U.S. 296, 306–07 (1940) (invalidating a licensing requirement for religious solicitation).

25. See *Johnson*, 491 U.S. at 414 ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

26. Frederick Schauer, Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L.J. 899, 909 (1979) [hereinafter Schauer, Speech and "Speech"]; see also Frantz, supra note 18, at 1442 ("As treated by the balancing test, 'the freedom of speech' . . . is not affirmatively definable. It is defined only by the weight of the interests arrayed against it and it is inversely proportional to the weight accorded to those interests.").

block new laws, laws serving different aims to different degrees. Since *by design* the framers couldn't have foreseen which laws might be blocked, they couldn't have shrunk the liberty to allow for laws that would prove crucial. They could not have done the balancing and trimming up front even with endless time, precise words, and reams of text. That's why implementers will need to balance over time.[27] It's why general liberties' creation—the shaping of their core based on political-moral reasoning—is always necessarily *unfinished*.[28]

The Court's anti-balancing effort is abetted by a surprising dearth of arguments that balancing is inevitable.[29] Landmark works debate whether balancing is desirable,[30] thus presupposing it's avoidable (why else bother

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27. See infra section II.A.3.

28. Many critics of balancing think that a norm is purely *legal* only insofar as it can be applied without moral or policy reasoning. See infra notes 126–129 and accompanying text. It's against this backdrop that one might call a legal norm "unfinished" if its application requires some additional political-moral reasoning.

29. Three related works are worth flagging.

Professor Richard Fallon's book on rights takes "strict scrutiny as a starting point" and uses "reverse-engineering" to "work out what is or must be true about the nature of constitutional rights for them to be defined and applied" using that test, which Fallon then shows (at length) will involve balancing. See Richard H. Fallon, Jr., The Nature of Constitutional Rights: The Invention and Logic of Strict Judicial Scrutiny 4, 67 (2019) [hereinafter Fallon, Nature of Constitutional Rights]. Fallon then shows (at length) that this test will involve balancing. See id. This Article questions what Fallon's analysis takes as fixed. It asks whether some alternative to strict scrutiny or other balancing tests could be used—and answers "no" for certain rights based on their function. If Fallon shows that strict scrutiny involves balancing, this Article shows that one cannot avoid balancing by replacing strict scrutiny and similar tests.

Professor Fred Schauer argues that the scope of free speech makes it hard to build all needed exceptions "into our definition of a [free speech] right absolute in strength." Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 277 (1981) [hereinafter Schauer, Categories and the First Amendment]. This Article clarifies the kinds of scope that do and don't induce balancing, see infra sections II.A.1–.2; explains why a balancing-inducing scope is crucial to the function of not just speech but also other general liberties, see infra section II.A.1; shows how the resulting balancing runs afoul of the vision of judging behind the originalist movement, see infra Part I; and canvasses solutions for judicial balancing's foes, see infra Part IV.

Finally, an unpublished essay by Professor Larry Sager, brought to my attention by a reader, argues that some rights create Kantian "imperfect duties" that are defined "by an underlying set of values and desired outcomes rather than by a catalog of specific behaviors" and that therefore require "judgement and discretion" in core applications. See Larry Sager, Imperfect Constitutional Duties 1–2 (March 2024) (unpublished manuscript) (on file with the *Columbia Law Review*).

30. See Jamal Greene, How Rights Went Wrong: Why Our Obsession With Rights Is Tearing America Apart 89–90 (2021) [hereinafter Greene, How Rights Went Wrong] ("The rights Americans enjoy should depend on what the government has done to us and why it has done it . . . ."); see also Aharon Barak, Proportionality: Constitutional Rights and Their Limitations 8 (2012) ("[P]roportionality suffers from many shortcomings; still, none of the alternatives is better—or even as good as—proportionality itself."). For two bookends to voluminous scholarship, see generally T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943 (1987); Joseph Blocher, Categoricalism and Balancing in

arguing for or against it?). Some scholars suggest that balancing is required by a right's vague language, broad readings,[31] or thin historical records.[32] But many texts with these features are implemented with little balancing beyond modest analogical reasoning in marginal cases.[33] So arguments stressing these factors have left it open to balancing's critics to say that looser balancing, and balancing in core cases, should be as rare for religion, speech, and guns as it is for Confrontation Clause rights.[34] To prove *that* campaign hopeless, this Article identifies obstacles more peculiar to general liberties. While that more specific inevitability claim might strike some as obvious, to half the judiciary and many scholars such balancing seems obviously worth avoiding.[35] That's why the Court is trying to reduce it, with leading judges pressing it to go farther.[36]

I share critics' concerns about balancing. I do not think that balancing is endemic to constitutional law or that the law/politics distinction is everywhere hopelessly porous. As an originalist,[37] I think federal judges have only those powers lawfully delegated to them by the people and that

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First and Second Amendment Analysis, 84 N.Y.U. L. Rev. 375 (2009). For early interventions, see Frantz, supra note 18, at 1429–49 (critiquing the Supreme Court's balancing approach to free speech that was spearheaded by Justice Felix Frankfurter); Wallace Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance, 50 Calif. L. Rev. 821, 821 (1962) (responding to Frantz's critique). For a recent book-length treatment of the desirability of balancing in speech cases, see generally Alexander Tsesis, Free Speech in the Balance (2020).

31. See Philip Hamburger, More Is Less, 90 Va. L. Rev. 835, 837 (2004) ("[W]hen the right of free exercise of religion came to be defined broadly, it was rendered conditional on government interests.").

32. See, e.g., Mendelson, supra note 30, at 821 (noting the First Amendment's "highly ambiguous" "language" and "history"); see also Hugo L. Black, The Bill of Rights, 35 N.Y.U. L. Rev. 865, 867 (1960) (critiquing balancing but bracketing questions about "the marginal scope of each" right); cf. Timothy Endicott, Proportionality and Incommensurability, *in* Proportionality and the Rule of Law: Rights, Justification, Reasoning 311, 324 (Grant Huscroft, Bradley W. Miller, & Grégoire Webber eds., 2014) (finding balancing unavoidable in private law and sentencing).

33. See infra section I.B.2.

34. See infra section I.A.

35. See infra Part I; see also Joel Alicea & John D. Ohlendorf, Against the Tiers of Constitutional Scrutiny, Nat'l Affs., Fall 2019, at 72, 73 (critiquing a balancing approach to rights as faithless to the Constitution and inappropriate for judges); John O. McGinnis & Michael B. Rappaport, The Abstract Meaning Fallacy, 2012 U. Ill. L. Rev. 737, 767 (arguing against leaving the balancing of free speech "to future interpreters").

36. See Nat'l Republican Senatorial Comm. v. Fed. Election Comm'n, 117 F.4th 389, 398–401 (6th Cir. 2024) (Thapar, J., concurring) (calling for the replacement of tiers of scrutiny with a *Bruen*-style history-and-tradition approach in free speech cases); Club Madonna Inc. v. City of Miami Beach, 42 F.4th 1231, 1261 (11th Cir. 2022) (Newsom, J., concurring in part and concurring in the judgment) (critiquing First Amendment "doctrinal bloat" and arguing for a "text and history" approach akin to *Bruen*'s).

37. For a discussion of the sort of originalism I find compelling, see generally Jeffrey Pojanowski & Kevin C. Walsh, Enduring Originalism, 105 Geo. L.J. 97 (2016) (developing, with some modifications, the theory propounded in Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J. L. Pub. Pol'y 817 (2015)).

these include no general power to balance constitutional norms. Judges' doing so generally usurps the people's right to make major policy choices not settled by higher law. (While some rights were originally understood to require balancing in application, their enshrinement was not originally understood to authorize *judges* to do the balancing.[38]) And some courts have clearly overstepped by using balancing to gut, rather than carefully implement, enumerated rights.[39] Courts should do all they can to avoid or tame balancing, consistent with the Constitution's original understanding and stare decisis.[40] But having come to think balancing is inevitable for *general liberties*, I doubt courts can avoid it while remaining the sole enforcers of these rights.[41] (And yet rights should and will be enforced *somehow*.[42]) Other critics of judicial balancing who agree might support the kinds of popular enforcement sketched below.[43] Meanwhile, analyzing liberties as unfinished rights bears theoretical fruit. It crisply explains a remarkable range of patterns and pathologies in speech, religion, and Second Amendment law.

Part I reviews the Court's recent recapitulation of an enduring critique of judicial balancing: that it usurps the people's role and departs from a balance struck by the framers. This critique impugns doctrines that would have courts weigh costs and benefits case-by-case but also the "definitional balancing" by which courts settle on a rule meant to then

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38. See infra section III.A. If originalism and distaste for broad judicial discretion pulled in opposite directions—because the Constitution, as originally understood, gave judges broad discretion—I would follow the lead of originalism. Professor Joel Alicea has argued that the Second Amendment does delegate broad discretion. See J. Joel Alicea, *Bruen* Was Right, 174 U. Pa. L. Rev. (forthcoming 2025) (manuscript at 65–66), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5122492 [https://perma.cc/K2ER-XAH8] [hereinafter Alicea, *Bruen* Was Right]. Yet Alicea believes that courts' resulting reliance on highly general normative principles does not run afoul of *Bruen*'s critique of balancing because *Bruen* left room for analogical reasoning. See id. (manuscript at 67–68). By contrast, I read *Bruen* as insisting that such reasoning use only fairly narrow, concrete standards. That reading is reinforced by writings in other cases by some members of *Bruen*'s majority, as Alicea notes, see id. (manuscript at 34), but also by *Bruen*'s embrace of accounts of analogical reasoning that make such narrowness and concreteness integral to it—and by the need to distinguish the reasoning that *Bruen* meant to allow from the looser analogical reasoning that defines originalism's arch-rival, common law constitutionalism. See infra section I.B.2.

39. See supra notes 5–6 and accompanying text.

40. For ways to discipline balancing doctrines, see Gabrielle M. Girgis, Taming Strict Scrutiny, 76 Fla. L. Rev. (forthcoming 2025) (manuscript at 26–39), https://ssrn.com/abstract=4742225 [https://perma.cc/CEY3-FPNV] [hereinafter G. Girgis, Taming Strict Scrutiny].

41. As noted above and discussed below, courts *can* avoid applying their own overarching moral theory, as by channeling the Founders'. See supra text accompanying notes 14–17; infra notes 164–169 and accompanying text. But it *is* inevitable that they will often lack concrete guidance on what the relevant abstract theory requires, creating many of the same problems as more idiosyncratic judging.

42. See infra section IV.A.

43. See infra Part IV.

apply categorically.[44] It reaches strict and intermediate scrutiny, as many have shown[45] and section I.B confirms against those who think heightened scrutiny less problematic.[46] And the balancing critique reaches some, though not all, forms of judicial analysis often described as "analogical reasoning."[47] Yet it's not clear that general liberties have been enforced without balancing in these senses—not in our early practice or modern doctrine or in other democracies.[48]

Part II explains why. To offer adaptive protection for conduct as regulatory needs evolve, general liberties have to curb laws that will differ—unforeseeably—in which public interests they advance and how much. That makes it impossible to say in advance when these rights might undercut laws too valuable to give up. So what heightens these rights' need for balancing in implementation[49] (or "construction"[50]) is their special function, not just a general tendency of wooden rules to break down or a need to preserve political legitimacy,[51] justify popular precedents,[52] or deal with vagueness or broad scope.[53] After all, some broad norms can avoid

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44. See Aleinikoff, supra note 30, at 979–81 (critiquing definitional balancing).

45. See infra section I.A.

46. See, e.g., Barclay, Replacing *Smith*, supra note 8, at 448–61 (advocating "a version of strict scrutiny" that attempts to avoid criticisms of ahistoricism and judicial intervention).

47. See infra section I.B.2.

48. See infra section I.C.

49. See generally Richard H. Fallon, Jr., Implementing the Constitution 4 (2001) (observing that Justices "must craft doctrines and tests that reflect judgments of constitutional meaning but are not perfectly determined by it" to implement the Constitution).

50. Originalists distinguish interpretation (discerning meaning) from construction (giving legal effect to that meaning). See Randy E. Barnett & Evan D. Bernick, The Letter and the Spirit: A Unified Theory of Originalism, 107 Geo. L.J. 1, 10–13 (2018) (tracing the distinction's origins and influence).

51. See Jack M. Balkin, Living Originalism 29–34, 41, 59–64, 282 (2011) (urging reading certain texts this way to ensure that their application reflects each generation's moral vision, for the sake of political legitimacy). Balkin also touts flexible standards as giving governments leeway to meet evolving needs as "social, economic, and technological [conditions] change[]." Id. at 145. But to show a need for flexibility is not to show a need for balancing, or thus the "unfinishedness" of the legal norm, as this Article shows for certain rights. See infra note 227 (exemplifying this contrast with separation of powers). Moreover, Balkin's argument about the benefits of flexible standards leaves it open to critics to respond that their harms are greater. Cf. Scalia, The Rule of Law, supra note 1, at 1185 (condemning "standardless balancing" for undermining rule-of-law values). This Article makes a descriptive argument immune to that response: that for some rights, our legal culture has so persistently assigned them a job that creates such a felt *need* to balance that even those most critical of balancing cannot quash it. See infra Part III.

52. See Ronald Dworkin, The Moral Reading of the Constitution, N.Y. Rev. Books (Mar. 21, 1996), https://www.nybooks.com/articles/1996/03/21/the-moral-reading-of-the-constitution/ (on file with the *Columbia Law Review*) (arguing that reading rights provisions as embodying principles is needed to justify canonical cases).

53. See supra note 31 and accompanying text.

balancing (and some narrow ones can't).[54] And while rights defined in vague terms will have uncertain application at their semantic edges, courts in those cases need only use a cabined *sort* of analogical reasoning or give political actors the benefit of the doubt.[55] Both tacks presuppose a core in which analogical reasoning and deference are unnecessary. That's what general liberties lack. Though some of their doctrines may be categorical, there will always be core applications that require balancing.

Open-endedness doesn't plague many criminal procedure rights[56] or rights against discrete types of regulation like religious establishments as currently applied.[57] So these rights' costs are more constant and easier to anticipate; framers can shrink their scope to avoid intolerable costs, reducing the need to balance later. It's no accident that the balancing-free rights *Bruen* held up involved the Confrontation and Establishment Clauses.[58] General liberties' distinctive role demands a different approach.

The inevitability claim is not conceptual.[59] It's not that our notions of "right" or "liberty" imply balancing or that we can't *imagine* other implementations. It's about the incompatibility of two aims. We can't avoid ex post balancing of a right while also having it shield conduct from unforeseeably varying laws. With rights playing that adaptive role (more than with others), applying them categorically is as predictably untenable as following rules designed by someone who could see only their benefits, not their costs. It's like following a rule that wasn't balanced ex post *or* ex ante. While some have floated ways to avoid freeform balancing and categoricity alike, Part II offers related reasons to expect the failure of the two main proposals. One approach tries to stick to close analogical reasoning. The other would have the law list which regulatory goals will justify burdening these rights, in hopes of avoiding extralegal balancing by courts. Both predictably face a dilemma—between crippling the ability to

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54. See infra section II.A.2. To preview: A right could be broad but not open-ended if the regulations it covered were numerous but concretely specifiable. Then balancing over time would not be inevitable as it is for open-ended rights.

55. See James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 151 (1893) (urging that laws be upheld unless they are "unconstitutional beyond a reasonable doubt").

56. Not *all* other rights are balancing-free. For example, some contain normative terms that invite case-by-case balancing. See, e.g., U.S. Const. amend. IV (barring "unreasonable" searches and seizures).

57. See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022) (referring to a few discrete historic "hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment"); see also Shurtleff v. City of Boston, 142 S. Ct. 1583, 1608–10 (2022) (Gorsuch, J., concurring in the judgment) (discussing six concrete practices as constitutive of religious establishments under the First Amendment).

58. See supra note 9.

59. Cf. Robert Alexy, A Theory of Constitutional Rights, at xviii, 47–56 (Julian Rivers trans., 2002) (arguing that balancing is required because, as a conceptual matter, rights are "optimization requirements").

regulate or destroying these rights' open-endedness—that pushes implementers back to balancing.[60]

All this has prima facie upshots for interpretation and judging. Since categorically applying open-ended rights is predictably untenable, we should not lightly assume their creators made them categorical. And if judges try to apply them categorically anyway, we should expect their efforts to fail. The same impulse—to avoid untenable outcomes—that suggests designers likely *defined* these rights to require balancing, would eventually move judges to apply them that way despite their scruples.

Part III confirms these upshots historically. Our legal culture,[61] including originalists, has long treated three texts as enshrining adaptive, open-ended liberties: the U.S. Constitution's free exercise, free speech, and Second Amendment rights. The Founders read these to capture rights that would guard against indefinitely varied laws and be regulable for sufficiently weighty public interests.[62] (A word will be added about unenumerated liberties like the abortion right announced in *Roe v. Wade*.[63]) And these rights' modern judicial enforcement over eight decades has had just the features predicted by the "unfinished" model.[64] Attempts to eliminate open-endedness have always sparked counterreactions.[65] Categorical rules have repeatedly cratered.[66]

For long stretches after the Founding, to be sure, the First and Second Amendments were not vigorously enforced by courts. The transition to courts' enforcing them as sources of open-ended rights may have been contingent on various historical factors and so initially avoidable. But since courts have done so,[67] Part III shows, our legal culture has resisted efforts to reread these texts as enshrining more discrete rights. The Roberts Court, the keenest of all to stamp out balancing,[68] has consistently reintroduced it sub silentio under all three rights. Even scholarly proposals for ending balancing would do the same—precisely to preserve these rights' open-endedness.[69] Thus, Part III offers strong inductive evidence

60. See infra section II.A.3.

61. The term "legal culture" signals that even if not every official holds this view, enough do that all attempts to stray from it are overtaken by counterreactions—as when Congress moves to counteract a Supreme Court case rejecting the view or when the Court's own doctrine soon evolves to do so. See infra section III.B.

62. See infra section III.A.

63. See infra note 280.

64. See infra section III.B.

65. See infra section III.B.1.a.

66. See infra section III.B.3.a.

67. This Article does not attempt to defend that initial interpretation, so it needn't take a position on the proper method of constitutional interpretation. It shows only that once we *have* committed to reading these texts to ground open-ended rights, balancing in their application will be inevitable.

68. See infra note 415 and accompanying text.

69. See infra sections III.B.1.b (showing this with scholarly proposals for free exercise), III.B.2.b (showing the same for gun rights), III.B.3.b (showing the same for speech).

that *our legal culture is firmly committed* to the role for these rights that then makes balancing inevitable.

Part IV sketches ways out for foes of judicial balancing. We should not cease rigorous enforcement of these rights. But while balancing must therefore happen, not all balancing need be done by judges. Courts can hold each state to the protections offered by a majority of states[70] or standards set by Congress in statutes framed to match each liberty's scope.[71] That would keep judges' balancing revisable by the people's representatives. While this Article can't exhaustively assess such proposals, it needn't. Each is explored elsewhere. Part IV puts those proposals in conversation with this Article's core analysis about the inevitability of balancing. It casts them as solutions to concerns the anti-balancing Court has raised but cannot resolve for itself.

I. THE CAMPAIGN AGAINST BALANCING

This Part breaks down the Court's concerns about balancing, uses those concerns to define the kinds of balancing the Court aims to curb, and ends on a note of caution about that aim: There is no clear example of a regime enforcing general liberties without balancing, whether here or abroad, present or past.

A. *The Court's Concerns*

The anti-balancing campaign came to full bloom in *Bruen*.[72] That case held invalid under the Second Amendment a law requiring those seeking to carry guns to show a special need for self-defense.[73] The Court spent pages inveighing against circuit court doctrines calling for strict or intermediate scrutiny,[74] requiring gun laws to be substantially related to an important state interest or narrowly tailored to a compelling one.[75] *Bruen* leveled two objections to these tiers of scrutiny and any test asking "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[76]

First, in an originalist vein, *Bruen* warned that judges balancing might contradict a balance struck by the framers. Constitutional rights are "the very *product* of an interest balancing by the people," which it is judges' job

70. See infra section IV.B.

71. See infra section IV.C.

72. See N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022).

73. Id. at 2156.

74. See id. at 2125–30.

75. Id.

76. Id. at 2129 (internal quotation marks omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (Breyer, J., dissenting)).

to follow.[77] "[T]he very enumeration of the right" thus disempowers judges "to decide on a case-by-case basis whether the right is *really worth* insisting upon."[78] Faithful judges will only apply a right's "original contours" as revealed by history, Justice Amy Coney Barrett later explained.[79]

Every recent conservative Justice has embraced this point. Justice Antonin Scalia wrote for a majority that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," even if "future judges think that scope too broad."[80] Chief Justice John Roberts, for a nearly unanimous Court, declared balancing in free speech cases "startling and dangerous" because "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."[81] Justice Brett Kavanaugh, citing an influential piece by Professor Joel Alicea and John Ohlendorf, stressed in *United States v. Rahimi* that tiers of scrutiny depart from "original meaning."[82] Others in *Rahimi* agreed.[83]

Of course, this originalist concern assumes the framers struck a balance that speaks to the case at hand. *Bruen*'s second concern is more general: that it's improper for unelected judges to make moral and policy choices between rights and public interests or other political-moral norms.[84] *Bruen* declared such reasoning "legislative" and less "legitimate" for judges.[85] "In a functioning democracy," Justice Neil Gorsuch later wrote, "policy choices" among moral and social goods "usually belong to the people and their elected representatives."[86] Justice Kavanaugh in *Rahimi* likewise wrote that "reliance on history is more consistent with the properly neutral judicial role than" heightened scrutiny, which has judges "subtly (or not so subtly) impose their own policy views."[87] And his

77. Id. at 2131 (internal quotation marks omitted) (quoting *Heller*, 554 U.S. at 635).

78. Id. at 2129 (internal quotation marks omitted) (quoting *Heller*, 554 U.S. at 634).

79. See United States v. Rahimi, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring) (internal quotation marks omitted).

80. *Heller*, 554 U.S. at 634–35; see also *Bruen*, 142 S. Ct. at 2129 (quoting *Heller*, 554 U.S. at 634).

81. United States v. Stevens, 559 U.S. 460, 470 (2010).

82. See *Rahimi*, 144 S. Ct. 1889, 1921 (2024) (Kavanaugh, J., concurring) (internal quotation marks omitted) (quoting Alicea & Ohlendorf, supra note 35, at 73).

83. See, e.g., id. at 1908–09 (Gorsuch, J., concurring).

84. These concerns can come apart. If the right's designers framed it in moral terms, judges might have to choose between moral neutrality and fidelity to original meaning. See supra note 38.

85. *Bruen*, 142 S. Ct. at 2130–31.

86. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1160 (2023) (plurality opinion). While *National Pork Producers* involved claims rooted in the dormant Commerce Clause, not an individual right, id. at 1161, the point quoted here applies to rights cases, too.

87. See *Rahimi*, 144 S. Ct. at 1912 (Kavanaugh, J., concurring).

concerns were echoed separately by Justices Thomas, Gorsuch, and Barrett.[88]

B. *When Balancing Raises Those Concerns*

When does judicial analysis trigger these worries about balancing, especially the concern about judges playing lawmakers? Two types of moral analysis fall *outside* this critique and this Article's definition of "balancing." One needs a moral argument for adopting a method of interpretation, originalist or otherwise.[89] And when law "runs out"—when the legal text or doctrine is semantically vague—judges may have to make normative judgments about whether a case within the vague concept's "penumbra" is analogous to cases within its "core"[90] meaning.[91] But *Bruen*'s critique does cover any broad political-moral (as opposed to textual or historical) assessment of when the interest in a right is too light to vindicate or when enforcing the right would unacceptably undermine other elements of the common good (unless the case falls in a right's semantic margins).

1. *Heightened Scrutiny* and *Utilitarian Reasoning.* — *Bruen*'s condemnation of balancing is illuminated by an opinion by then-Judge Kavanaugh that *Bruen* repeatedly cited, which was interpreting *Heller*'s critique of balancing (which *Bruen* also invoked).[92] For Kavanaugh, judges

88. See id. at 1908 (Gorsuch, J., concurring) ("As judges charged with respecting the people's directions in the Constitution . . . our only lawful role is to apply them . . . ."); id. at 1924–26 (Barrett, J., concurring) (urging reliance on history to identify the rights' contours); id. at 1946 (Thomas, J., dissenting) ("The Second Amendment is 'the very *product* of an interest balancing by the people.' It is this policy judgment . . . 'that demands our unqualified deference.'" (citations omitted) (first quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008); then quoting *Bruen*, 142 S. Ct. at 2131)).

89. See J. Joel Alicea, Practice-Based Constitutional Theories, 133 Yale L.J. 568, 579 (2023) ("It is widely accepted among scholars that . . . only a normative argument can justify telling judges that they *ought* to follow a particular theory of adjudication." (footnotes omitted)).

90. Here, "core" means "nonpenumbral" cases—those falling squarely within the semantic range of a text or implementing doctrine or other canonical formulation of the right, and not in a zone of vagueness created by a (nonnormative) concept in such a formulation. Cf. H.L.A. Hart, The Concept of Law 251 (Paul Craig ed., 3d ed. 2012) (defining penumbral cases in terms of semantic vagueness). Some use "core" instead to mean a right's *most important* exercises. See, e.g., Wrenn v. District of Columbia, 864 F.3d 650, 657 (D.C. Cir. 2017) (equating the "Amendment's 'core'" with exercises of the right "where the need for [self-defense] is 'most acute'" (first quoting Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1257 (D.C. Cir, 2011); then quoting *Heller*, 554 U.S. at 628)). This Article sets aside the second use of "core" because it doesn't track all that matters to balancing's critics. They oppose balancing anytime it substitutes for the people's policy judgments (more than is inevitable given the limits of language). So the question here is not whether judges can avoid balancing in cases involving the most important conduct, but whether they can avoid it in cases involving conduct our system is unwilling to exclude from the right's coverage.

91. See infra section I.B.2.

92. See, e.g., *Bruen*, 142 S. Ct. at 2129 n.5 (citing *Heller II*, 670 F.3d at 1277 (Kavanaugh, J., dissenting)).

"balanc[e]" whenever they make "some assessment of whether the law in question is sufficiently important to justify infringement on an individual constitutional right."[93] This surely happens in case-by-case ("ad hoc") balancing[94] and utilitarian "cost–benefit analysis"[95] that tries to reduce all costs and benefits to a single metric. But it also occurs when judges balance in creating rules meant to then apply categorically to some cases ("definitional" or "categorical" balancing)[96]—which the Court has recently denounced as "dangerous."[97]

Even strict scrutiny was for then-Judge Kavanaugh "undoubtedly" a balancing test in the sense of "requir[ing] a contemporary judicial assessment of the strength of the asserted government interests in imposing a particular regulation."[98] Justice Scalia agreed, calling strict scrutiny a "balancing test" when gutting decades-old free exercise precedents precisely to stop judicial balancing.[99] Justices Thomas and Gorsuch made similar points in *Rahimi*, in which Justice Kavanaugh again stressed that tiers of scrutiny, like other forms of balancing, ask judges to decide whether a regulation "is sufficiently reasonable or important," a "highly subjective judicial evaluation[]."[100]

Some think courts balance problematically only when deciding if a law's benefits outweigh its costs.[101] That inquiry is unconstrained because

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93. *Heller II*, 670 F.3d at 1282 (Kavanaugh, J., dissenting).

94. See, e.g., Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (addressing the free speech claims of public employees by balancing "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs").

95. Id.

96. See New York v. Ferber, 458 U.S. 747, 763–64 (1982) (holding that the harms of child sexual abuse material "so overwhelmingly outweigh[] the expressive interests . . . that no process of case-by-case adjudication is required"). A court also balances "categorically" if it holds (without supporting text or history) that a liberty does not "cover" certain conduct—does not even require heightened scrutiny of the legal burdens on it—because the conduct does not sufficiently realize the interests underlying the right. See Frederick Schauer, Codifying the First Amendment: *New York v. Ferber*, 1982 Sup. Ct. Rev. 285, 303 [hereinafter Schauer, Codifying the First Amendment] ("[T]he determination of lack of coverage is made solely on the basis of the First Amendment value of the utterance itself . . . ."); cf. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (deeming certain "classes of speech" to be "of such slight social value" that their regulation poses no constitutional problem).

97. United States v. Stevens, 559 U.S. 460, 470 (2010).

98. *Heller*, 670 F.3d at 1282 (Kavanaugh, J., dissenting).

99. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 883 (1990) (rejecting a reading of free exercise that would require judicial balancing for its application).

100. United States v. Rahimi, 144 S. Ct. 1889, 1920–21 (2024) (Kavanaugh, J., concurring) (condemning "means-end scrutiny, heightened scrutiny, tiers of scrutiny, rational basis with bite, or strict or intermediate or intermediate-plus or rigorous or skeptical scrutiny" as "policy" tests "requir[ing] judges to weigh the benefits against the burdens" and decide if "the law is sufficiently reasonable or important").

101. Cf. Stephanie H. Barclay, Constitutional Rights as Protected Reasons, 92 U. Chi. L. Rev. (forthcoming) (manuscript at 18) (on file with the *Columbia Law Review*) [hereinafter

it tries to compare incommensurables—say, educational benefits against religious burdens.[102] By contrast, it might seem coherent and more lawlike for courts to say whether a law's benefits clear a fixed threshold like strict scrutiny's "compelling interest" test—especially if this test is almost categorically "fatal."[103] But whatever the most natural use of the *word* "balancing,"[104] strict scrutiny should raise many of the same substantive concerns as looser normative reasoning. Indeed, everything captured in this Article's definition of "balancing"[105] raises *the* concern that has always powered legal conservative thought: that judicial review should apply law, not make it.

First, strict scrutiny is not effectively fatal, with courts of appeals applying it to uphold laws "nearly one third of the time, typically without reversal."[106] Courts that do treat it as fatal make exceptions to its application based on unstated policy concerns.[107] And as "a cottage industry"[108] of scholarship has documented, the supposedly well-defined tiers of scrutiny routinely "break[] down"[109] into a "sliding scale" of balancing through the "creation over and over again of" intermediate tiers.[110] Whole books explain how strict scrutiny "requires judges to engage recurrently in only minimally structured appraisals of the significance of competing values or interests."[111]

Second, since the "compellingness" of a law's benefits can be judged only against alternatives, strict scrutiny asks whether there are less restrictive means of serving a law's goals.[112] But there almost always are.

Barclay, Protected Reasons] (defining balancing to involve a comparison of "the weight or value of the government interference with a weight or value of the right"). Barclay's preferred approach to adjudicating rights would *not* simply ask whether a challenged law is necessary to serve a "compelling" interest. Barclay's nuanced view is discussed in section III.B.1.b.

102. See id. (manuscript at 18–21).

103. Cf. Gerald Gunther, The Supreme Court, 1971 Term–Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972) (stating that the Warren Court's application of strict scrutiny was, in the equal protection context, "fatal in fact").

104. See supra note 2.

105. See infra note 159 and accompanying text.

106. Fallon, Nature of Constitutional Rights, supra note 29, at 43 (citing Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 796 (2006)).

107. See infra section III.B.3.a (discussing endless cratering of free speech rules).

108. See Paul Yowell, Proportionality in United States Constitutional Law, *in* Reasoning Rights: Comparative Judicial Engagement 87, 98 (Liora Lazarus, Christopher McCrudden & Nigel Bowles eds., 2014) [hereinafter Yowell, Proportionality].

109. See id. at 98.

110. Kathleen M. Sullivan, Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing, 55 Alb. L. Rev. 605, 606 (1992).

111. See Fallon, Nature of Constitutional Rights, supra note 29, at 67.

112. See R. George Wright, Electoral Lies and the Broader Problems of Strict Scrutiny, 64 Fla. L. Rev. 759, 771 (2012) (internal quotation marks omitted).

Thus, as shown below,[113] the question becomes whether alternatives could advance a law's goals enough and without intolerable costs: balancing.

Third, the compellingness inquiry itself raises some of the concerns invoked against cost–benefit analysis. If costs and benefits are incommensurable, neither is greater, so judges weighing them would have to make policy judgments not drawn from legal materials. And doing that in a conflict between rights and democratically enacted laws would undermine the democratic value of having citizens make major policy choices.[114] But so would compelling-interest determinations.

Nor can preexisting law set benchmarks regarding "compellingness" that could seriously constrain courts. Regulatory goals are too varied for that. Suppose a precedent called some vaccine mandate's quantum of health benefit sufficient. That would tell us nothing about how to assess the marginal educational benefits of two years of schooling[115] or the security benefits of some prison protocol[116] or the health benefits of prohibiting tobacco advertisements within one thousand feet of schools rather than some smaller radius.[117] The *Bruen* majority seems to agree that precedents on what counts as "compelling" are little help. Its members later denied that courts could consistently assess the compellingness of benefits of affirmative action that were "question[s] of degree."[118] They saw no neutrally identifiable "point at which there exists," say, "sufficient 'innovation and problem-solving.'"[119]

Of course, many doctrines require line-drawing.[120] For this Court, line-drawing here is worse. It involves not just some arbitrariness, or narrow moral reasoning about a private-law dispute, but a political-moral judgment about the worth of a democratically supported law. To say whether an interest is "compelling" is not like saying whether a five-foot-

113. See infra sections I.A, III.B.1.b.

114. See Barclay, Protected Reasons, supra note 101 (manuscript at 21–24).

115. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 217–29 (1972) (analyzing the state's interest in requiring compulsory education until age sixteen).

116. See, e.g., Holt v. Hobbs, 574 U.S. 352, 362 (2015) (reviewing a prison security measure).

117. See, e.g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561–63 (2001) (invalidating such a rule because its marginal benefits over a smaller-radius ban were insufficient to justify the costs).

118. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2166–67 (2023).

119. Id. (quoting Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 656 (M.D.N.C. 2021), rev'd by *Students for Fair Admissions*, 143 S. Ct. 2141). As this example shows, moreover, while the Court sometimes sidesteps the "compellingness" inquiry by skipping to the question of whether a challenged law is narrowly tailored, there are important cases in which the Court has declared the state's interest not compelling. See, e.g., Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 357–60 (holding as much of an asserted "anticorruption interest" in campaign finance regulations).

120. See G. Girgis, Taming Strict Scrutiny, supra note 40 (manuscript at 34) (discussing the injury-in-fact requirement for Article III standing).

eleven-inch man is "tall." The former question would, as Justice Kavanaugh observed, elude "neutral" benchmarks in "disputed and controversial areas in law"[121] and could contradict the policy judgments of the people's representatives.[122]

Justice Kavanaugh is not idiosyncratic in tracing concerns about balancing to an ideal—morally neutral judicial review—that would cut against compelling-interest inquiries as much as cost–benefit analysis. The neutrality ideal has driven the conservative legal movement for a half-century. It stretches from Justice William Rehnquist's 1970s insistence that judges shouldn't inquire into which "governmental objectives" are "'important,' and which are not,"[123] to Justice Barrett's 2020s refusal to "second-guess[] the moral judgments" of voters or "policy decisions reserved for politicians."[124] This norm reflects two ideas: (1) A judge's job is to say only what the law is,[125] and (2) law is sharply distinct from politics (or political morality).[126] Professor Larry Alexander, calling the second premise "formalism,"[127] argues that law *must* be nonmorally specified because its whole point is to get around political-moral disagreement. When we have to coordinate but disagree on what is morally best to do, law offers a nonmorally specified basis for convergence like original intent.[128] In fact, Alexander thinks a norm is pure positive law *only* to the

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121. Brett M. Kavanaugh, Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions, 92 Notre Dame L. Rev. 1907, 1915 (2017).

122. Indeed, absent any benchmark fixed across all cases, judges may tacitly set the benchmark for a given law's benefits based on their assessment of its costs—thus weighing costs against benefits after all.

123. See Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).

124. See Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1167 (2023) (Barrett, J., concurring in part).

125. See United States v. Rahimi, 144 S. Ct. 1889, 1921 (Kavanaugh, J., concurring) (2024) ("The subjective balancing approach forces judges to act more like legislators who decide what the law should be, rather than judges who 'say what the law is.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))); see also Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation: Federal Courts and the Law 3, 22 (Amy Gutmann ed., new ed. 2018) [hereinafter Scalia, Common-Law Courts] ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

126. See Larry Alexander, "With Me, It's All er Nuthin'": Formalism in Law and Morality, 66 U. Chi. L. Rev. 530, 530–31 (1999) [hereinafter Alexander, Formalism] (arguing that "[l]aw is essentially formalistic, and morality is not in the slightest degree formalistic" and defining "formalism" as "adherence to a norm's prescription without regard to the background reasons the norm is meant to serve," even in case of conflict).

127. See id. at 531.

128. See Larry Alexander, Originalism, the Why and the What, 82 Fordham L. Rev. 539, 539–40 (2013) (defending originalism on the grounds that "[w]e do not agree about what we ought to do," as a matter of "first-order" (i.e., moral and political) "reasoning," "but we do agree that we need to settle the matter," and originalism does that).

extent that it can be applied without fresh political-moral reasoning.[129] So while a law's creators should weigh values in deciding what society will do, Alexander thinks, applying the law means following their decision without reopening that moral dispute. Adding the first premise—that judges must only apply law—yields the ideal: judges should be morally neutral.

From this angle, judges overstep when deciding whether a law's marginal benefit is compelling, not just whether benefits outweigh costs. Both determinations reopen the "quintessentially political"[130] question—how to square private interests with democratically supported laws—that liberties exist to displace (assuming they are legal norms, not aspirations[131]). Both make law in the formalist's sense rather than applying the political-moral conclusions of the framers—the resounding charge of balancing critics.[132]

2. *Only Some "Analogical" Reasoning*. — Does *Bruen*'s critique of balancing reach analogical reasoning? A form of analogical reasoning pervades all law. When vague words create borderline applications of a legal text or doctrine,[133] most agree judges may ask if a case is analogous to those within the legal concept's core.[134] Then-Judge Kavanaugh wrote that for "close questions at the margins" of gun rights, courts should "reason by analogy."[135] *Bruen* called such reasoning "a commonplace task for any lawyer or judge."[136]

But how does this lawyerly analogical reasoning differ from the common-law reasoning conservatives condemn as illegitimate in public law,[137] and which is *the* defining feature of originalism's rival, living

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129. See Alexander, Formalism, supra note 126, at 531.

130. Alicea & Ohlendorf, supra note 35, at 81.

131. Some argue that these rights were originally understood not as making law but as declaring natural rights for political actors to heed. See infra section III.A.

132. Patrick M. McFadden, The Balancing Test, 29 B.C. L. Rev. 585, 641 (1988) ("Balancing test opponents have often asserted that it is the *legislator's* task to balance the interests of social groups . . . [to] establish a rule of law to govern future behavior; judges are to take those rules and apply them as written, the balance already having been struck."); see also id. at n.299 (offering a "small sampling" of judicial and scholarly quotations in support).

133. See Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 415 (1985) ("Prototypically, a vague, ambiguous, or simply opaque linguistic formulation of the relevant rule generates a hard case.").

134. As noted above, others might say that in such marginal cases, courts should defer to the political actors. See Thayer, supra note 55, at 151 (urging that courts uphold laws unless their unconstitutionality is beyond a "reasonable doubt"). But this would not avoid balancing when balancing is required to identify the right's core in the first place. See infra section II.A.3 (arguing that this is so for general liberties).

135. See Heller v. District of Columbia, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

136. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).

137. See, e.g., Kavanaugh, supra note 121, at 1915 (lamenting that balancing tests involve "old-fashioned common-law judging"); id. at 1917 (arguing that the "compelling interest" test "is inherently a common-law test," and "common-law tests almost by definition

constitutionalism?[138] After all, common law analogizing (if cases *A* and *B* involved a tort, so must *C*) is thought to involve political-moral analysis: Since any two cases are alike and different in many ways, the question is whether they are alike in *normatively relevant* ways.[139] If *Bruen* rejects political-moral analysis in liberties cases, what analogical reasoning does it accept?

Bruen cited two accounts as guides.[140] For Professor Cass Sunstein, analogical reasoning rejects (a) top-down analysis (deduction) from moral principles that are (b) general enough to cover all questions and (c) thorough enough to provide complete justifications from first principles.[141] It reflects, among other things, a "focus on particulars; incompletely theorized judgments; and principles operating at a low or intermediate level of abstraction."[142] The other work cited in *Bruen*, by Professors Barbara Spellman and Fred Schauer, finds empirical-psychological support for the difference made by this focus on concrete examples.[143] When judges start with concrete examples, certain factual features will strike them as salient (thanks to their education and training) and lead to different and more convergent outcomes than purer policy reasoning would.[144] The examples drive the identification of principles and not vice versa,[145] thus limiting discretion.[146] Call this "close" analogical

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call on judges to assess whether they think the law is important enough to uphold in light of the larger values at stake").

138. See generally David A. Strauss, The Living Constitution (2010) [hereinafter Strauss, The Living Constitution] (giving a common-law-based account of living constitutionalism).

139. See William Gummow, The Strengths of the Common Law, 44 Hong Kong L.J. 773, 777 (2014) (noting that "the common law method of adjudication [puts an] emphasis upon balancing competing interests"); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 900 (1996) [hereinafter Strauss, Common Law Constitutional Interpretation] ("Moral judgments—judgments about fairness, good policy, or social utility—have always played a role in the common law, and have generally been recognized as a legitimate part of common law judging."); see also supra note 137.

140. See *Bruen*, 142 S. Ct. at 2132.

141. See Cass R. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 746–50 (1993) [hereinafter Sunstein, On Analogical Reasoning]; see also *Bruen*, 142 S. Ct. at 2132 (citing Sunstein, On Analogical Reasoning, supra).

142. Sunstein, On Analogical Reasoning, supra note 141, at 746 (emphasis omitted).

143. See Frederick Schauer & Barbara A. Spellman, Analogy, Expertise, and Experience, 84 U. Chi. L. Rev. 249, 250 (2017) (discussing existing research); see also *Bruen*, 142 S. Ct. at 2132 (citing Schauer & Spellman, supra).

144. See Schauer & Spellman, supra note 143, at 265 (noting that "judges may . . . see legally infused analogies that others would ignore").

145. See id. at 265–66. For a related account of analogical reasoning, see generally Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 Harv. L. Rev. 923 (1996).

146. See Darrell A.H. Miller, Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second, 122 Yale L.J. 852, 936 (2013) ("[F]orcing the judge to engage at some level with the historical materials, even at the level of analogical reasoning, controls discretion to a degree that is absent without such a process.").

reasoning. Since it falls beyond the Court's critique, this Article limits "balancing" to political-moral reasoning *less* constrained by legal sources than what Sunstein, Schauer, and Spellman describe.

Examples illustrate the contrast. Close analogical reasoning drove a recent case involving a borderline application of the ministerial exception, a First Amendment doctrine exempting from antidiscrimination law a church's choice of ministers.[147] The Court reasoned that if ministers include church employees who are *called* "ministers" and are duty-bound to convey the faith, it should reach teachers who have the duty without the label.[148] In finding the two analogous, the Court did not weigh costs and benefits or generate a political-moral theory of church autonomy. It did not say the interests served by church autonomy there fell above some threshold or that the antidiscrimination interest fell below another.[149] It inferred from historical examples that our legal traditions care about church control over "faith and doctrine," not labels.[150] The history constrained the moralizing. The Court might need to invoke broader moral principles if a case's facts differ along many more dimensions from any historical analogues. For just such reasons, one scholar has argued, free speech cases reviewing social media regulations cannot rely on historical analogues and must apply looser standards.[151]

As these examples suggest, the close analogical reasoning blessed by *Bruen* might differ only in degree from the looser reasoning it condemned. (Compare rules allowing players to move along a checkerboard three spaces per turn versus five.) But even if the two sit on a spectrum, they sit at opposite ends, which could matter. If close analogical reasoning is more determinate and hews closer to political traditions, it might produce more convergence and better honor popular sovereignty. That's the theory.[152]

A more bright-line difference could also separate close analogical reasoning from looser forms: whether courts consult only framing-era analogues or ones found in later precedents, too. The first approach informs Seventh Amendment jury right cases. To decide if that right extends to some adjudication, the Court draws analogies to examples in

147. See Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020) (describing the ministerial exception doctrine and new question presented under it).

148. See id. at 2066.

149. Of course, even "close" analogical reasoning is not wholly morally neutral. See, e.g., Miller, supra note 146, at 917–27 (discussing the challenges of synthesizing messy traditions).

150. See *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2061–64.

151. See Gregory M. Dickinson, Beyond Social Media Analogues, 99 N.Y.U. L. Rev. Online 109, 127 (2024), https://nyulawreview.org/wp-content/uploads/2024/03/99-NYU-L-Rev-Online-109.pdf [https://perma.cc/SV7U-J7WW] ("Online platforms are a generational technology that defies analogy and requires fresh consideration via appropriate doctrinal tools.").

152. If there isn't a real difference in *practice* between close analogical reasoning and what *Bruen* opposes, then it is even easier to show that what *Bruen* opposes is inevitable.

place in 1791 and not the growing cache found in precedents.[153] This matters because "closely analogous to" is not transitive, just as "close to" isn't. Sometimes, Founding-era case *A* is closely analogous to precedent *B*, and *B* is to *C*, but *A* is *not* closely analogous to *C*. Then the jury right will not extend to *C* even if *B* might have favored that. So forcing judges to find a framing-era analogue for a general-liberty claim[154] could limit the influence of their moral analysis on outcomes.[155] It could prevent judges from layering fresh moral assessments upon earlier ones by other judges. (Compare rules letting players move one space along a checkerboard from a fixed starting-point versus from wherever they had landed in the last turn. Ranges would differ dramatically.)

That judicial layering of moral assessments may be why living constitutionalism, though claiming to rely on analogical reasoning, is anathema to legal conservatives. Its hallmark is reasoning not just from Founding-era history but "most heavily [from] earlier judicial decisions,"[156] as its purveyors have stressed.[157] That's what Scalia condemned as "preeminently a common-law way of making law, and not the way of construing a democratically adopted text."[158] That's balancing.

* * *

Judges balance in the sense that offends *Bruen* when they

(1) go beyond *close* analogical reasoning, as defined above, in

(2) determining based on broad political-moral considerations (rather than reading off legal sources *without* such normative reasoning),

(3) in nonmarginal (non-semantic-borderline) cases,

(4) whether (a) the private interests normally served by a right are too light to vindicate or (b) enforcing the right would unacceptably undermine other aspects of the common good (including competing rights or public interests), in a given case or range of cases.[159]

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153. See Miller, supra note 146, at 872–92 (describing Seventh Amendment analogical reasoning).

154. Imagine requiring free speech challenges to show that a law is closely analogous to the licensing regimes condemned as prior restraints at the Founding. See Near v. Minnesota, 283 U.S. 697, 733 (1931) (Butler, J., dissenting) (stressing the centrality of prior restraints to Founding-era free speech).

155. See Miller, supra note 146, at 886 (noting the limited extent of policy analysis in Seventh Amendment cases).

156. Strauss, The Living Constitution, supra note 138, at 62.

157. See Strauss, Common Law Constitutional Interpretation, supra note 139, at 879, 892 (noting that the common law approach "rejects the notion that law must be derived from some authoritative source" and holds that "relatively new practices that have slowly evolved . . . from earlier practices deserve acceptance more than practices that are older but that have not been subject to testing over time").

158. See Scalia, Common-Law Courts, supra note 125, at 40.

159. Cf. United States v. Rahimi, 144 S. Ct. 1889, 1920 (2024) (Kavanaugh, J., concurring) (stating that "[w]hatever the label[,] . . . [a] balancing approach is policy by

That is what this Article means by "balancing."

Three caveats. First, this Part has defined "balancing" as broadly as demanded by the concerns driving judicial and scholarly critiques. But even if balancing is inevitable, not everything that falls under those critiques is inevitable. (It's inevitable that courts will use *some* form of reasoning that falls in the balancing category, but not that they will use *each* form that does. Some forms can be avoided entirely.) *Truly* comparing incommensurable costs and benefits isn't inevitable since it's impossible.[160] The peculiarities of intermediate and strict scrutiny may be inapt and avoidable for certain rights (like the Second Amendment[161]). What will be inevitable are political-moral determinations that applying the right would be unacceptable. Those needn't rest on utilitarianism. That free exercise shouldn't cover human sacrifice could rest on natural rights theory. That free speech shouldn't destroy trial subpoenas or the trademark system[162] may rest on moral intuitions about the needs of "any well-governed society."[163] Still, when these conclusions cannot be read off legal materials, judges invoking them are doing what offends *Bruen*.

Second, it isn't inevitable that interpreters balance using their *own* overarching political-moral theory (and judges shouldn't). An interpreter might be a utilitarian but consult a natural-rights theory ascribed to the right's framers (or, say the "evolving standards of decency" held by "society," not by themselves).[164] Still, it will be the *interpreter's* understanding and application of a highly general political-moral theory (even if not their *own* theory) that often controls. For with general liberties, *by design*,[165] cases at the right's core will more often raise normative questions that go far beyond any that the framers considered (or recorded answers to). In those cases, perhaps interpreters trying to channel the framers' high-level moral theory would diverge less, and their

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another name" if it requires judges to decide whether, given a law's "benefits" and "burdens," "the law is sufficiently reasonable or important").

160. More precisely, costs and benefits in rights cases are often incomparable with respect to the most plausibly relevant governing values, making it impossible to judge one simply greater (or the two equal) in *relevant* respects.

161. Compelling interest tests are an odd fit for weeding out invalid "gun laws," which "almost always aim at the most compelling goal—saving lives." See Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017).

162. See infra note 418 (describing a case in which a refusal to balance would have called all of trademark law into question).

163. Kunz v. New York, 340 U.S. 290, 300 n.3 (1951) (Jackson, J., dissenting) (internal quotation marks omitted) (quoting Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 18 (1948)) (noting that Alexander Meiklejohn, known as an absolutist about free speech, uses this phrase to justify certain exceptions to the right).

164. See Trop v. Dulles, 356 U.S. 86, 101 (1958); see also Heyman, supra note 16, at 1279 (discussing framing-era natural rights thinking). This will not be possible when a judge thinks the alternative moral theory meaningless or incoherent. Cf. Germain Grisez, Against Consequentialism, 23 Am. J. Juris. 21, 41–49 (1978) (arguing that consequentialism is "incoherent" and "literally meaningless").

165. See infra section II.A.1.

own retail moral intuitions would do less work, than if they were applying their own general theory. But they would still diverge and act on their moral intuitions more than interpreters following *non*morally specified instructions, thus triggering formalist concerns about balancing.[166] That's why Justice Scalia thought that even judges' attempts to apply *our legal order's* moral values would yield "judicial personalization of the law."[167] Besides, whatever the theoretical difference between applying one's own overarching moral theory and applying the Founders', in practice, the difference may be small. Founding-era moral theories left interpreters great discretion to use freeform political-moral reasoning, recognizing the same highly general justifications for burdening rights as modern balancing tests: public health, safety, morals, and the like.[168] Both sets of approaches would make public safety the main touchstone for reviewing gun laws, for instance.[169] If the modern tests raise democratic legitimacy concerns when applied by judges, as the Court thinks, so must older rights theories (especially if the Founders did not authorize judges to apply them, as section III.A recounts).

Finally, the thesis isn't that balancing is inevitable in every general-liberties case. Some implementing doctrines *can* be read off original understandings and applied categorically—including for quite important protections like the rule against laws driven on their face by hostility to religion.[170] And some existing balancing tests can be discarded. The thesis is that categorical rules can't *exhaust* a general liberty's core. Balancing will be inevitable in many core (non-semantic-borderline) cases that our legal culture is unwilling to push outside the right's coverage.

C. *Reason to Doubt the Campaign: The Track Record*

Bruen's effort to banish judicial balancing of general liberties runs into a striking fact: It's never been done.

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166. As noted, see supra notes 126–129, formalists like Alexander think that law is necessary when and because we have to coordinate our actions but disagree on what is morally best to do. But Alexander stresses that even people who "generally agree about the content of their moral rights and duties at a high level of abstraction" will often disagree on the more specific "moral questions" that law must settle. See Alexander, Formalism, supra note 126, at 532.

167. See Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 863 (1989).

168. See infra sections III.A (discussing the Founders' general approach), III.B.1.b (discussing Founding-era thought on free exercise), III.B.2.b (discussing Founding-era thought on gun rights).

169. See infra section III.B.2. One key difference is that Founding-era thought had a backstop against laws that would prevent most people from exercising the right at all, see infra note 381 and accompanying text, which some modern courts have allowed, see supra note 5 and accompanying text.

170. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993) (calling the principle "well understood").

Abroad, while a few *non*liberty rights are absolute (like the right against torture[171]), general liberties are defined in charters to allow exceptions expressed in moral terms.[172] They're enforced through proportionality analysis,[173] which first asks whether a regulation burdens a right, is rationally related to an important purpose, and impairs the right as little as necessary; it then asks whether the margin of benefit realized is disproportionate to the burden.[174] The last two prongs require the fresh assessment of degrees of value condemned by the conservative critique of balancing, and they prove crucial in practice. Courts invalidating laws do so "nearly always under the rubric of 'necessity' or 'balancing'" or both together, such that "a single test of means-end . . . 'balancing'" controls.[175] And this method's reach is vast. Professor Francisco Urbina writes, citing scholars from different systems:

> [Proportionality analysis] is the default test for adjudicating human rights disputes in jurisdictions from all five continents, both national and international, and in civil and common law legal traditions. . . . [It is] a 'near universal' legal test, a 'staple of adjudication on fundamental rights in international and domestic courts[,]' . . . and 'unquestionably the dominant mode of resolving public law disputes in the world today[.]'[176]

Finally, at home, as shown below, balancing pervaded Second Amendment law before *Bruen* and the modern doctrine and early history of other liberties.[177] *Bruen*'s attempt to banish it faced such serious challenges that two years later, the Court's revisions to it re-invited balancing.[178] And more trial and error won't help because, as the next Part shows, balancing is compelled by the purpose we assign general liberties.

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171. Paul Yowell, Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review 25 (2018) (calling this the "classic example of an absolute right" in many systems).

172. See Barclay, Protected Reasons, supra note 101 (manuscript at 56–57) (noting that "limitation clauses" of this sort are found in "the Universal Declaration of Human Rights, . . . the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms, [and] the South African Bill of Rights," as well as in several "statutory bills of rights" (footnotes omitted)).

173. See Vicki C. Jackson, Constitutional Law in an Age of Proportionality, 124 Yale L.J. 3094, 3110–21 (2015) (noting that Canadian courts use a "proportionality test to determine whether" rights may be limited). Globally, proportionality analysis is used for many rights, not just liberties.

174. See id. at 3111–14.

175. Yowell, Proportionality, supra note 108, at 91 .

176. Francisco J. Urbina, A Critique of Proportionality and Balancing 1 (2017) (citations omitted).

177. See infra sections III.A–.B.

178. See infra section III.B.2.a.

II. THE INEVITABILITY OF BALANCING LIBERTIES

Any sensible creators of a legal norm will try to "balance" by designing the norm to serve worthy ends at tolerable costs from the outset. But that's more feasible for some norms than others. Any norm will create *some* pressure to balance ex post as well. But the need for that is higher for general liberties: rights defined by reference to conduct to be shielded from state interference of all sorts. These can be contrasted with liberties defined by direct reference to the regulations they forbid (like religious tests for office) and positive rights to government resources (like confronting witnesses).[179]

This Part uses a thought experiment to explore why constitutional designers might opt for general liberties and shows that what makes them appealing also requires greater-than-usual balancing in their enforcement. Part III will then show that the Free Speech and Free Exercise Clauses and Second Amendment have in fact been treated as enshrining general liberties.

A. *General Liberties: Unfinished Protections*

General liberties' point is to provide adaptive protection. This forces on them a structure—irreducible open-endedness—that requires balancing in core applications, making them "unfinished." After explaining these features of general liberties and how they differ from vagueness or breadth, this section explains *why* open-endedness heightens the need to balance ex post.

1. *Adaptive and Irreducibly Open-Ended.* — To see why a system might constitutionalize a general liberty for, say, religious conduct, consider the limits of three alternative forms of protection.

First, lawmakers could carve custom accommodations for religion into each regulation at its drafting—as by adding a religious exemption clause to a military draft bill. This wouldn't help when lawmakers don't care enough to avoid burdening religion.

A second approach would offer *constitutional* protection, but more narrowly than a free exercise clause. The ban on religious establishments, as currently interpreted, binds political actors, unlike the first approach. But it blocks only a narrow range of threats and requires constitutional designers to have foreseen those threats with specificity (in this example, laws compelling religious attendance, choice of church leaders, and

179. General liberties are typically enshrined in laws guarding "the freedom of *X*" or "the right to do *X*" or forbidding laws "prohibiting *X*," for some private conduct *X*. Of course, a particular constitution's framers might use such language to enshrine a more discrete right, in which case what this Part argues about general liberties would not apply.

funding of religious ministers).[180] Such protection offers no help against unforeseen harms.[181]

Of course, even such specific rights will be vague at the margins. So *some* currently unforeseen harms could be blocked—if they fall in the zone of vagueness created by the word "establishment" or a key word in one of its defining doctrines (like "minister" in the ministerial exception doctrine). Judges may use close analogical reasoning to count a new kind of employee as a "minister,"[182] for instance. But what this second form of protection cannot do is block laws that are not establishments *or* close analogues.

A third protection would be constitutionalized, too, but it wouldn't specify the protected acts or excluded laws. It would declare some specific and readily identifiable *state motives* so at odds with a private interest as to be always fatal. An example is the bar on laws driven by religious animus.[183]

While this right would govern regulations covering a wide range of conduct, it faces other limits. In focusing on impermissible motives for regulation, it could not stop laws that burden religion for reasons that are *legitimate but insufficiently weighty*—like a ban on beards for Muslim prisoners, which only slightly increases security.[184] It's impossible to foresee with specificity all the laws that might appeal to lawmakers as social conditions change, in hopes of saying which wouldn't do *enough* good to justify burdens on religion.[185]

So designers opt for a general liberty—rather than the three devices above—to bind political actors in ways they cannot concretely spell out now. Rather than identify specific laws or motives to exclude, they name a general category of conduct to shield (religious exercise) or a general set of state interests to preclude (those not compelling). And they resist efforts to reduce that protection to more concrete ones that could be exhaustively listed. They regard the right as *irreducibly open-ended* ("irreducibly" because the open-endedness cannot be eliminated without destroying the right's function).

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180. See Shurtleff v. City of Boston, 142 S. Ct. 1583, 1609 (2022) (Gorsuch, J., concurring in the judgment).

181. Constitutionalizing a preexisting right—as *Bruen* said the Second Amendment did—might be a special case of this second approach. If free speech were understood to exclude just prior restraints and bans on seditious libel, then it would be a special case of forbidding discrete policies—it forbade *two* discrete policies.

182. See supra notes 147–150 and accompanying text.

183. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729–31 (2018) (invalidating a state action that putatively reflected religious hostility).

184. See Holt v. Hobbs, 574 U.S. 352, 363–64 (2015) (finding such a rationale for regulation compelling in principle but insufficiently threatened in the case at hand).

185. Moreover, while such a right can easily guard against laws that are *on their face* driven by illicit goals, those applying such a right to block laws with *hidden* illicit motives would have to engage in balancing, as seen below. See infra sections III.B.1.b, III.B.3.b.

Open-endedness makes the right adaptive. It's not just that such rights are "intended to endure for ages to come,"[186] applying to varied entities, times, and places. Even the ban on religious tests for office is "adaptive" in that sense, protecting new religions as they arise. Rather, irreducibly open-ended rights vary in the *types of regulations* they guard against (as the ban on religious tests does not). They provide relief even as regulatory needs change—relief from threats that aren't even close analogues of today's.

Some interests demand this flexibility. Given the variety of faiths and religious rules, it's impossible to spell out the conduct needed for everyone's adequate religious exercise. For the right to keep and bear arms, technological and social changes make "ample alternative" means of self-defense a moving target.[187] And the sheer variety of human activities that involve speech or realize self-expression makes a standing general protection appealing.[188]

Those creating adaptive rights are "guess[ing] about the future" and not just drawing on their "know[ledge] about the past and the present and what they want to avoid,"[189] to use Professor Kim Lane Scheppele's framework. Scheppele calls shields against known dangers (like religious tests for office) "aversive" and rights against unknown harms "aspirational."[190] General liberties are at the far aspirational end. Or in Professor Jed Rubenfeld's terms, general liberties are more like commitments than contractual duties.[191] While the latter are knowable with specificity as fruits of a careful bargain, "[c]ommitments characteristically turn out to require more than the parties who made them bargained for."[192] General liberties' *distinctive value* is to outrun initially foreseeable duties by a comfortable margin.

This structure gives these rights political import, which might shape their legal development.[193] Since general liberties must be expressed with

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186. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413–16 (1819).

187. This is the D.C. Circuit's gloss on the substance of gun rights protections in Wrenn v. District of Columbia, 864 F.3d 650, 662–63 (D.C. Cir. 2017) (internal quotation marks omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008)).

188. See Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting) (noting that "much, perhaps most, human behavior takes place through speech" and "much, perhaps most, law regulates that speech in terms of its content").

189. Kim Lane Scheppele, Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models, 1 Int'l J. Con. L. 296, 298 (2003) (emphasis omitted).

190. See id. at 299 (emphasis omitted) (contrasting aversive and aspirational constitutionalism).

191. See Jed Rubenfeld, Revolution by Judiciary: The Structure of American Constitutional Law 114 (2005) [hereinafter Rubenfeld, Revolution].

192. Id.

193. Of course, some concrete rights have political import, too. But concreteness reduces political significance, *holding the subject-matter constant*. There are national advocacy groups for the Free Exercise but not Religious Test Clause.

bold colors and majestic sweep, they easily align with moral principles simple enough to resonate with the public (or be opposed by it). They can be written on a napkin and become rallying points for national movements,[194] advocacy groups, and impact-litigation firms. The Free Speech Clause has the ACLU[195] and the Foundation for Individual Rights and Expression.[196] The Free Exercise Clause has the Becket Fund for Religious Liberty[197] and Americans United for the Separation of Church and State.[198] The Second Amendment has the NRA and Sandy Hook Promise.[199] A reticulated rights scheme with a dozen exception clauses could not so resonate with hearts and minds. And this resonance might sustain pressure to *keep* general liberties open-ended,[200] working against lawyers' tendency to reduce abstractions to technical doctrines.[201]

2. *Not Just Broad or Vague at the Margins.* — A right's irreducible open-endedness should not be confused with the text's sparseness or vagueness or the right's breadth, factors that do *not* generally induce balancing in core cases.

Though constitutions cannot "partake of the prolixity of a legal code,"[202] brief texts don't always yield open-ended norms or balancing, as proven by examples in section II.B. Nor is irreducible open-endedness about vagueness in the (non-normative[203]) words of the right's text or other canonical formulation.[204] Words are vague if they have borderline

194. See Greene, How Rights Went Wrong, supra note 30, at 18 (calling "[t]he Second Amendment[] . . . a rallying cry for an entire political party"); Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1790 (2004) [hereinafter Schauer, Boundaries] (describing the Free Speech Clause's "considerable rhetorical power and argumentative authority" in American public life).

195. See Free Speech, ACLU, https://www.aclu.org/issues/free-speech [https://perma.cc/839R-MXVK] (last visited Mar. 10, 2025).

196. See What We Defend: Free Speech, FIRE, https://www.thefire.org/defending-your-rights/free-speech [https://perma.cc/Z6JG-L5BK] (last visited Mar. 10, 2025).

197. See Religious Communities, Becket, https://becketfund.org/area-of-practice/religious-communities/ (on file with the *Columbia Law Review*) (last visited Mar. 10, 2025).

198. See Americans United for Separation of Church and State, http://www.au.org [https://perma.cc/S3BV-BVCF] (last visited Oct. 30, 2024).

199. See NRA, http://home.nra.org [https://perma.cc/NT9W-9EFB] (last visited Oct. 30, 2024); Sandy Hook Promise, https://www.sandyhookpromise.org/ (on file with the *Columbia Law Review*) (last visited Oct. 30, 2024).

200. See infra section III.B.1.a (describing popular opposition to a case attempting to narrow free exercise).

201. See infra section III.B.3.a (exploring this tension in free speech law).

202. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

203. Vague *normative* terms—like "reasonable" or "public interest"—plainly require normative reasoning for their application. Here, open-endedness is being contrasted instead with vague *non*normative terms that might define a right: terms like "speech" and "religion."

204. If the constitutional text refers to the right by a term of art, then the text's ordinary meaning does not define the right's substance. Perhaps the contours of "the freedom of

applications (is seventy-six degrees Fahrenheit "hot" weather?). Since "religion" is vague (does deep ecology count?), so is "religious exercise." But almost all texts have vague terms[205] where "law runs out"[206] and close analogical reasoning is needed.[207] Yet general liberties are more prone to balancing and not just at those semantic margins, as shown below.[208] And many questions about them don't arise from linguistic vagueness. When courts decide whether paintings or political donations are protected speech, they aren't mulling the boundaries of the dictionary definition of "speech" (since those things clearly fall outside it).[209] The same is true when courts hold that subpoenas to testify do not interfere with free speech (since what subpoenas compel *is* "speech").[210] Vagueness cannot be the whole story or even the better part of it.

Third, open-endedness is not breadth if that means a large number or variety of excluded regulations.[211] A right defined by a long catalog would be broad but not open-ended if all barred regulations could be listed with concreteness ("no ban on flag burning"). Then little balancing would be required for its implementation. Broad powers provisions most clearly illustrate the difference between breadth and open-endedness. In applying the Necessary and Proper Clause, courts have read "necessary" broadly to let Congress regulate in new ways as conditions change.[212] But they have not had to balance the harms and benefits of different readings of the Clause; the power it creates isn't "unfinished."

In short, irreducible open-endedness is not about a right having fuzzy borders or encompassing numerous activities (or excluded laws). It exists when the set of activities or laws (numerous or not) that fall within the right's semantic borders (fuzzy or not) cannot be listed because *the borders*

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speech" cannot be traced by looking up "freedom" and "speech" in laymen's dictionaries. Still, whatever the right's substance, it could in principle be captured more directly using *some* proposition. As to that canonical formulation, the points being made here would apply.

205. Cf. Roy Sorenson, Vagueness, Stan. Encyc. Phil. (Edward N. Zalta & Uri Nodelman eds., Feb. 8, 1997), https://plato.stanford.edu/entries/vagueness/ [https://perma.cc/QH2S-4TW7] (last updated June 16, 2022) (explaining what makes a term vague).

206. Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).

207. See supra note 135 and accompanying text.

208. See infra section II.B, Part III.

209. Cf. Schauer, Categories and the First Amendment, supra note 29, at 270 (arguing that it would make the First Amendment absurdly expansive to "define 'speech' by reference to Webster's dictionary" since "we fix prices with speech, . . . make contracts with speech, commit perjury with speech, discriminate with speech, extort with speech, threaten with speech, and place bets with speech").

210. See infra note 427.

211. Cf. McGinnis & Rappaport, supra note 35, at 748–49 (distinguishing "general" meaning, which is broad and encompasses unforeseen cases, from "abstract meaning," which gives "future decision makers discretion to determine what it covers").

212. See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414–19 (1819).

are, by design, not fully drawn. The right's contours simply aren't settled—not in terms one could read off without balancing.

Such a right must be framed in presumptive terms—as presumptively covering whatever satisfies a general description (or vague *normative* terms) reflecting a right's "rationale"[213]: religiously motivated conduct, speech advancing autonomy or truth-seeking, arms fit for self-defense. As new weapons are made, new religions arise, and new forms of communication and self-expression emerge, such rights come to cover regulations implicating public interests in new ways and to different degrees. And whether to override the presumption is decided by those applying the right.

By analogy, suppose Jones lists groceries for their housemate Smith to buy, trying to balance nutritional value against cost. The list would contain vagueness if an entry used words with borderline applications—like "crackers," which might or might not cover matzah. Close analogical reasoning would be needed to apply a request for "tuna or, if they're out of that, a close substitute," which would force Smith to decide if salmon offers similar nutrients at comparable cost. The list would be broad if it had many items spanning many food groups but still not open-ended if each were as specific as "the Costco brand of 2% milk." But the list would be open-ended if Jones couldn't specify items to a close approximation. Not knowing the store, Jones might ask for "the best fish there, unless too pricy" or "other cheap and healthy enough items." General liberties' guidance is like that.

3. *Why the Shaping (and Hence Balancing) of Irreducibly Open-Ended Norms Is Always Unfinished*. — To see why an open-ended liberty requires ex post balancing, consider an extreme and fanciful example of the dynamic. Suppose the President, ravenous for deregulation but too lazy to make case-by-case choices, has asked a supportive Congress to repeal all laws passed on Wednesdays. Once Congress gets to work, it will feel enormous pressure to balance that instruction against the value of some of the laws on the chopping block—like the Social Security Act of 1935.[214] That pressure to balance will not come from vagueness in the President's charge (regarding, say, laws passed at midnight between Tuesday and Wednesday). Nor from breadth: the pressure to balance would remain if the instruction's scope were slashed in half and applied only to Wednesdays in odd-numbered years. Rather, the issue is that the President's instruction—effectively a regulation of regulations—would cut against an *unforeseen* set of laws serving different interests to different degrees. So the costs of implementing it would vary unforeseeably, with some proving unacceptable. (A law's being passed on a Wednesday is no reason to think it dispensable.) This would push those applying the norm, Congress, to save laws that proved too important to lose.

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213. See Schauer, Speech and "Speech," supra note 26, at 909.

214. See Pub. L. No. 74-271, 49 Stat. 620 (1935).

Thus, it's more realistic to expect Presidents proceeding in such broad strokes to issue a standard, not a rule—requesting repeal of, say, all laws passed on Wednesdays that could be forgone *without undue cost*.

A still more refined approach would have the President going statute by statute. The costs of each potential repeal would be more apparent since each law's discrete benefits would be easier to assess. And so the President could do the balancing when drawing up requests, reducing the need or pressure for Congress to balance when implementing them.

General liberties are far less blunt than the first approach, but more like the first two than the last. Unlike rights against a discrete regulation, a general liberty's point is to offer roving protection from an unforeseen range of laws that, if allowed to stand, would have served different interests to different degrees. (And the affected interests would vary because they concern conduct out in the world—like speech or religious exercise—and not just an internal government process like cross-examination.) True, a liberty's trigger for presumptively blocking laws—"does this regulate speech/religious exercise/armed self-defense?"—is not *as* useless an indicator of the laws' importance as "passed on a Wednesday." But it doesn't bring the liberty's potential implications into sharp enough focus to allow the framers to make the needed exceptions themselves.

That leaves two possibilities. First, framers might make the right categorical, in which case its appliers would feel intense pressure to balance anyway, as new costs came to light. The pressure would come from a desire to limit blowback or real-world harms.[215] It's the sort of pressure the *Rahimi* Court was expected to feel to find *some* way to uphold laws disarming those subject to domestic violence restraining orders.[216] It's the motivation that the Court recently had to avoid blowing up the trademark system in the name of free speech even if there was no balancing-free basis for saving it.[217]

Of course, constitutional amendment is preferable to faithless application. But if adaptive, open-ended rights were framed in categorical terms, an "apply faithfully, amend as necessary" approach would be

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215. Professor Richard Fallon describes the relevant sort of pressure thus:

> In order to justify claims to obedience in their resolution of reasonably disputable cases, judges and Justices must implicitly represent that acquiescence in their decisions will produce better outcomes than would result otherwise, either generally or in a particular case. The pressure to produce morally attractive results for the future encourages the imputation of supporting interests and purposes to constitutional provisions that explain and justify morally attractive results for the future.

Fallon, Nature of Constitutional Rights, supra note 29, at 81 (footnote omitted).

216. See Josh Blackman, A Reversal in *Rahimi* Will Be Tougher to Write Than Critics Admit, Volokh Conspiracy (Nov. 21, 2023), https://reason.com/volokh/2023/11/21/a-reversal-in-rahimi-will-be-tougher-to-write-than
-critics-admit/ [https://perma.cc/Z7YC-6NGX].

217. See infra note 418 and accompanying text.

unworkable. For the combination of adaptive function and categorical design would provide a *predictably endless series* of needs for amendment. As with a self-driving car programmed to miss oncoming traffic at intersections, the solution for such a right wouldn't be to keep sending it to the repair shop (through amendment) but to reprogram it (making it noncategorical) or retire it (perhaps by underenforcing it in favor of flexible statutory protection[218]).

The second possibility is thus likelier: the framers would formulate the right to direct its appliers to balance to avoid undue costs as they emerged—say, by defining a right to free exercise absent a compelling state interest.

Either way, no preexisting materials—text, history, traditions—will settle the right's scope in a way likely to prove sustainable. The shaping of the right's contours based on political-moral reasoning will remain always unfinished.

Courts cannot avoid this by sticking to close analogical reasoning. Such reasoning begins with early concrete examples and decides new cases using *low-level-of-generality* rules of relevant similarity.[219] This will fail whether courts work from examples of protected conduct or permitted regulation.

First, hewing to discrete early protections (like the rule against prior restraints on speech) would destroy liberties' power to shield against unforeseeable laws as society's needs changed—the ability for which these liberties were, by hypothesis, selected. So interpreters would have to rely on *broad* principles of similarity to early protections, principles that more directly apply the interests behind the right (like autonomy or democracy).[220] That's balancing. This drift is confirmed over and over below.[221]

Second, presuming broad protection and identifying exceptions using close analogies to those early *regulations* (like obscenity laws) would intolerably shrink the state's ability to regulate, as also confirmed below.[222] So appliers would fall back on broader principles of relevant similarity that more directly capture the public interests in regulating: balancing again.

The unworkability of close analogical reasoning is guaranteed by the problem that general liberties are tailored to solve: managing needs for (a) versatile protection for certain conduct and (b) varying regulation.

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218. See infra Part IV.

219. See supra section I.B.2 (distinguishing close from looser analogical reasoning).

220. See Schauer, Speech and "Speech", supra note 26, at 909 (emphasizing that free speech coverage is determined by the "rationale underlying" the right).

221. See infra sections III.B.2.b, III.B.3.b, and IV.A (discussing examples of this proposed approach to defining gun rights and free speech).

222. See infra section III.B.2.a (discussing this approach to defining permissible gun laws).

Hewing to early protections would give short shrift to (a), and early regulations, (b).

A similar dilemma dooms efforts to have the law specify in advance which regulatory goals will justify overriding a right, in hopes of preventing courts from having to decide afresh. The ends declared sufficient will be defined either broadly (like "health") or narrowly ("the quantum of health advanced by this smallpox vaccine mandate"). Narrow definitions would hamstring regulation. Broad ones would gut the right, allowing almost any regulation to stand. And attempts to draw lines—by allowing, say, "laws that promote health *enough*"—would induce balancing.[223]

Nor could interpreters avoid balancing through Thayerian deference—deference to regulations outside the right's core—if that core can't be identified without balancing.[224]

Thus, assuming that to create law is to supplant political-moral reasoning,[225] an adaptive legal norm's creation is never finished. So if First and Second Amendment rights are adaptive, the search for their "original contours"[226]—discernible from ratification without balancing—is a mistake.

B. *Why Most Regulations and Other Constitutional Rights Differ*

While some other rights or ordinary regulations also induce balancing, most differ systematically from general liberties in this respect.[227]

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223. See infra section III.B.1.a (identifying examples of this dynamic).

224. Cf. Richard W. Garnett, The Political (and Other) Safeguards of Religious Freedom, 32 Cardozo L. Rev. 1815, 1826 (2011) (arguing that balancing can be avoided through the identification of the Free Exercise Clause's "core commands"); Thayer, supra note 55, at 151 (urging deference when a law is not clearly unconstitutional).

225. See supra notes 126–129 and accompanying text.

226. United States v. Rahimi, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring) (noting that in *Rahimi*, "the Court uses history" to determine "the scope of the pre-existing right that the people enshrined in our fundamental law"); see id. ("Call this 'original contours' history: It looks at historical gun regulations to identify the contours of the right.").

227. This section focuses on rights and regulations, but it's worth adding a word about constitutional powers. Professor Shalev Gad Roisman, who thinks balancing should be used in the separation of powers, admits that it has historically been much rarer there than in rights cases. See Shalev Gad Roisman, Balancing Interests in the Separation of Powers, 91 U. Chi. L. Rev. 1331, 1371 (2024) ("Although interest balancing is an entirely commonplace mode of constitutional analysis, it has yet to take hold in the separation of powers."). But there's an obstacle to separation of powers balancing, which may explain its absence: While it's hard enough to project the concrete harms and benefits of allowing certain actions in the world (like flag burning, see Texas v. Johnson, 491 U.S. 397, 419–20 (1989)), it seems much harder to project the impact on people's interests of allowing a certain allocation of interbranch powers (like letting Congress interfere in the President's recognition of foreign powers, see Zivotofksy v. Kerry, 576 U.S. 1, 32 (2015)). See, e.g., Adrian Vermeule, Does the Separation of Powers Protect Liberty?, New Dig. (Sept. 30, 2024), https://thenewdigest.substack.com/p/does-the-separation-of-powers-protect

When regulations prohibit specific private conduct for specific ends, it's easier for drafters to limit their overinclusiveness and need for later balancing. (Exceptions prove the rule: laws that are less defined—covering behaviors of unknowably varying costs—include generic exemptions letting courts balance.[228]) General liberties differ in that they are, again, *regulations of* regulations, and of very different ones, each of which would prohibit its own specific conduct to advance its own public ends.

Second, rights other than general liberties—as against religious establishments (six discrete forms of eighteenth-century support for state churches[229] or their close analogues)—forbid state actions one can list more concretely. This concreteness makes it easier to foresee the public goals these rights might hinder and shrink the rights to head off intolerable costs. The same goes for rights against regulations manifestly driven by illicit motives (like religious hostility[230]). Since their motives can't justify even small burdens and don't require balancing to ferret out,[231] the norm can apply categorically.

Third, many criminal procedural rights—like confrontation or double jeopardy—do not directly shield private conduct or thus hamper the state's pursuit of interests affected by conduct out in the world.[232] They concern a governmental process, prosecution, occurring in controlled environments.[233] So their costs—like nonpunishment of some percentage

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[https://perma.cc/7TRX-A4BZ] (stressing the near-impossibility of predicting the impact on individual liberty of various separation of powers rules); cf. Daryl J. Levinson, Law for Leviathan: Constitutional Law, International Law, and the State 139–62 (2024) (arguing that balance of powers doctrines hardly constrain officials).

Even if interpreters don't *balance harms and benefits* in cases defining powers, they may feel a need to promote flexibility otherwise—as by adopting a broad reading of "necessary" in the Necessary and Proper Clause, to let Congress regulate in new ways as societal needs change. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413–16 (1819) (doing so). That is different from supposing that the legal norm created by the Clause is "unfinished"—that its legal content inevitably changes, requiring balancing for its enforcement.

228. Thus, the Civil Rights Act of 1964, which bars certain types of discrimination for a wide range of employers, includes a general exception for bona fide occupational qualifications. See Jane Wells May, Recent Development, The Bona Fide Occupational Qualification Exception—Clarifying the Meaning of "Occupational Qualification," 38 Vand. L. Rev. 1345, 1348–49 (1985).

229. See supra note 57 and accompanying text.

230. See Sherbert v. Verner, 374 U.S. 398, 402 (1963) (defining such a right).

231. But see infra section III.B.3.b (arguing that balancing *is* required if free speech protects against laws driven by illicit motives even when those motives are *not* so manifest).

232. See Jeffrey L. Fisher, Categorical Requirements in Constitutional Criminal Procedure, 94 Geo. L.J. 1493, 1533 (2006) (contrasting in this regard "provisions that directly regulate how the government may treat its citizens" with rights about "what procedures they must follow in order to treat them in certain ways"). At least one criminal procedural right—the Fourth Amendment—plausibly requires balancing by its terms, which bar "*unreasonable* searches and seizures." U.S. Const. amend. IV (emphasis added).

233. See Fisher, supra note 232, at 1535 ("Trials raise a fairly limited and predictable set of permutations for any particular problem, as compared to the messy, unstructured world . . . .").

of guilty persons—are easier to predict and more constant. Technology hasn't transformed the price of capping prosecutions as it has transformed the risks of allowing access to arms in common use.[234] Thus, with rights like double jeopardy, the balancing to settle on a sensible scope can be done up front, after which "the propriety of challenged regulations is not judged by strict scrutiny"[235] "or anything resembling heightened review."[236] The Self-Incrimination Clause has "a hard core which, once located, does not yield to accommodate 'competing interests.'"[237] And the confrontation right "admit[s] only those exceptions established at the time of the founding."[238] It's unsurprising that an early balancing critic cited self-incrimination[239] and *Bruen* singled out confrontation as model rights without balancing.[240]

The contrast between general liberties and process-focused norms is proven by the exceptions. Take *Mathews v. Eldridge*,[241] which read the Due Process Clause to guarantee some process for deprivations of "property" spanning a wide and not-entirely-foreseeable set of government benefits.[242] This required balancing (to determine what's "due") that wasn't necessary when protecting traditional property forms.[243] Balancing also became necessary when the Takings Clause was read to require something more open-ended than payment for outright dispossession—compensation for regulations of all sorts that might diminish property value.[244] Whether these developments were sound or inevitable is irrelevant to this Article's

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234. See id. ("The dynamics of criminal trials . . . are a great deal more static. . . . [Thus,] bright-line procedural rules, enforced as categorical requirements, are far more likely to weather well than bright-line substantive rules.").

235. Cf. Lawrence Rosenthal, The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control, 92 Wash. U. L. Rev. 1187, 1234 (2015).

236. Cf. Adam Winkler, Scrutinizing the Second Amendment, 105 Mich. L. Rev. 683, 694 (2007).

237. See Frantz, supra note 18, at 1437.

238. Crawford v. Washington, 541 U.S. 36, 54 (2004).

239. See Frantz, supra note 18, at 1437 ("No amount of sloganizing against 'absolutes' can explain why a hard core is possible for the fifth amendment, but not for the first.").

240. See N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022) (citing favorably the use of history rather than policy reasoning in Confrontation and Establishment Clause cases).

241. 424 U.S. 319 (1976).

242. See Jud Campbell, Natural Rights and the First Amendment, 127 Yale L.J. 246, 316 n.319 (2017) [hereinafter Campbell, First Amendment] ("[P]rocedural due process rights have vastly expanded in scope (covering 'new property,' for instance), while now providing only a 'flexible' degree of 'procedural protections as the particular situation demands,' rather than an inflexible set of common-law procedural rules." (citation omitted) (quoting *Mathews*, 424 U.S. at 321)).

243. See *Mathews*, 424 U.S. at 321 (weighing the private value of the denied benefit against the risk of error and cost to the government of providing the requested process).

244. See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124–25 (1978) (defining a multifactor balancing test for determining when a regulatory taking has occurred).

thesis about general liberties.[245] But they support this Article's point that once a norm is treated as open-ended, balancing ensues.

Equal protection deserves its own article, but it may be fair to note how that norm, too, is in transition, though in the opposite direction—toward a more "finished" state.[246] Suppose equal protection means freedom from distinctions that are arbitrary or subordinate or inflict stigma, which means *insufficiently justified*. Then cases will be rife with balancing.[247] The Court has cabined such balancing by hanging back—identifying just a few "suspect classifications," or grounds for legal action triggering special scrutiny, and declining for decades to add any.[248] On this reading, the Court curbed equal protection balancing by underenforcing equal protection.[249]

Now, even as to the ur-suspect classification, race, the Court has become increasingly formalist, as seen in the arc of its affirmative action cases. Rather than draw lines between plainly invidious racial policies and affirmative action for ostensibly good ends, as it once tried, the Court has adopted a near-categorical bar on race-based sorting for college admission.[250] It's done so partly *because* a more equivocal approach might require a weighing of interests too "standardless" for any "court [to] resolve."[251] And rather than rest this categorical rule on prior balancing, the Court has claimed to read it directly off the history of the Fourteenth Amendment, understood as a measure to banish "any distinctions of law

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245. This Article argues only that (1) our legal culture stubbornly expects general *liberties* to be open-ended and (2) *any* open-ended right will require balancing. *Mathews* and *Penn Central* reinforce (2) without touching on (1).

246. Equal protection is not a "general liberty" in this Article's sense because it is not defined in terms of a form of private conduct to be protected from state interference of varied sorts. It's defined in terms of certain forbidden grounds for distinguishing among persons.

247. See, e.g., Craig v. Boren, 429 U.S. 190, 208–09 (1976) (rejecting a generalization underlying a sex-based law, not as false or irrational, but as insufficient to justify the cost of reinforcing sex stereotypes); see also Aleinikoff, supra note 30, at 968 (describing equal protection tiers of scrutiny beginning to "crack[]" and give way to "a sliding-scale balancing approach").

248. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015) (invoking the Equal Protection Clause against laws denying same-sex marriage recognition without imposing heightened scrutiny of orientation-based classifications); Romer v. Evans, 517 U.S. 620, 623–24, 630–36 (1996) (doing likewise for a state constitutional provision targeting gay and lesbian people).

249. But see infra Part IV (proposing underenforcement of constitutional norms, in favor of statutory norms mimicking them, to allay concerns about judicial balancing in general liberties cases).

250. Compare California v. Bakke, 438 U.S. 265, 311–15 (1978) (Powell, J., concurring) (declaring the educational benefits of diversity a compelling interest capable of justifying race-based affirmative action in university admissions), with Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2166 (2023) (rejecting similar proposed interests as "not sufficiently coherent for purposes of strict scrutiny").

251. See *Students for Fair Admissions*, 143 S. Ct. at 2167–68.

based on race or color."[252] The more plausible it is to enforce equal protection through categorical rules supported by history alone, the more "finished" a norm it might be.

III. THE ACCOUNT'S EXPLANATORY POWER

The last Part identified a function that makes certain kinds of rights appealing: adaptive, open-ended protection for conduct. As this Part shows, the Free Exercise and Free Speech Clauses and Second Amendment were originally expected to enshrine such protection (though not mainly through courts). After a period of judicial nonenforcement, they've been read the same way by courts and scholars, both originalist and nonoriginalist.[253] The resulting case law confirms Part II's hypothesis that such rights require balancing. And having come to expect such protection, this Part also shows, our legal culture has resisted efforts to reread these texts as enshrining more discrete rights, with even the most determined foes of balancing repeatedly failing to avoid it. All this is strong inductive evidence that our legal culture is firmly committed to the open-endedness that in turn makes ex post balancing under these Amendments inevitable.

A. *Early American Practice*

Early America regarded free speech, free exercise, and the right to keep and bear arms as open-ended and pervasively subject to balancing.

Professors Jud Campbell and Jamal Greene have highlighted late-eighteenth and early-nineteenth-century understandings.[254] The Founders' social-contract theory distinguished between natural and positive rights.[255] Natural rights concerned private conduct possible in "a world without government,"[256] including speech, religion, and the use of arms. *Positive* rights were "defined in reference to governmental action" like jury trials.[257] While positive rights were "determinate rules about what the government had to do or could not do, regardless of [lawmakers']

252. See id. at 2159 (internal quotation marks omitted) (quoting Supplemental Brief for the United States on Reargument at 41, Brown v. Bd. of Educ., 348 U.S. 886 (1954) (No. 1), 1953 WL 78291).

253. As a result, this Article needn't wade into debates about methods of interpretation.

254. See, e.g., Campbell, First Amendment, supra note 242, at 264–94; see also Greene, How Rights Went Wrong, supra note 30, at 7–57.

255. See Campbell, First Amendment, supra note 242, at 252–53, 268 (noting that for American elites in the Founding era, "rights were divided between *natural rights* . . . and *positive rights*").

256. See id. at 268.

257. Jud Campbell, Natural Rights, Positive Rights, and the Right to Keep and Bear Arms, 83 Law & Contemp. Probs. 31, 39 (2020) [hereinafter Campbell, Right to Keep and Bear Arms].

assessments to the contrary,"[258] natural rights were not so "absolute."[259] They "were regulable in promotion of the public good,"[260] though "[d]ecisions about the public good . . . were left to the people and their representatives—not to judges."[261]

This confirms Part II many times over. General liberties like religion, armed self-defense, and speech were open-ended and subject to balancing: "expansive in scope . . . but weak in their legal effect."[262] So they were unfinished norms, with their "boundaries" set more by "policy-driven analysis" over time than by "judicial judgments"[263] finding original content. And as section II.A.1 argued that open-ended rights would resonate with moral principles enjoying popular support, early Americans saw these liberties as "constitutional lodestar[s]"[264] or "hortatory" "reminder[s]" of moral principles.[265] Finally, as section II.B predicts, procedural rights—"bans on bills of attainder, religious tests for holding public office," and the "right to a jury" and other "judicial process"—were thought easier for judges to enforce categorically as "supreme law, superseding any contrary legislation."[266]

To be sure, natural rights (general liberties) were thought to have *some* "unalienable" elements that lawmakers could not violate. But first, even those were often defined by a moral standard, not a rule. The expressive right to make "well-intentioned statements of one's thoughts," for instance, was "subject . . . to the natural-law proscription against abridging the rights of others."[267] Second, "legal 'trumps'" against specific regulations (like "prior restraints on the press")[268] were enforced by courts "only after the polity itself—through a political settlement—had already rejected" them.[269] So even determinate rules weren't fixed at ratification but arose in ways responsive to changing social needs. And most important, no liberty's protections were fully exhausted by such rules. Each remained a font of new protections to be specified through political-moral reasoning over time. This held true for speech but also religious

258. Id.

259. Campbell, First Amendment, supra note 242, at 276.

260. Id. at 255.

261. Id. at 276.

262. Id. at 259.

263. Id.

264. See Campbell, Right to Keep and Bear Arms, supra note 257, at 36.

265. See Campbell, First Amendment, supra note 242, at 266–67.

266. See Jud Campbell, Judicial Review and the Enumeration of Rights, 15 Geo. J.L. & Pub. Pol'y 569, 577–78 (2017) [hereinafter Campbell, Judicial Review].

267. Campbell, First Amendment, supra note 242, at 306–07.

268. Id. at 253.

269. Campbell, Right to Keep and Bear Arms, supra note 257, at 33.

exercise[270] and the keeping and bearing of arms;[271] for federal liberties but also their state law cousins.[272]

So the Court's vision of a balance struck once and for all by the Founders was not the Founders' vision. While the Court speaks "as if the Speech Clause contains a full set of doctrinal rules" and new rules "would 'revise th[e] [policy] judgment' that '[t]he First Amendment itself reflects,'" the Clause enshrined no such "judgment" and "recognized only a few established rules, leaving broad latitude for" politicians "to determine which regulations of expression would promote the public good."[273]

This modest role for judges "survived into the early twentieth century."[274] When courts assumed more exclusive responsibility for enforcement, the doctrine evolved as one would expect if these rights continued to be seen as open-ended. The first ad hoc balancing rights case arose in 1939,[275] only eight years after the first Court case upholding a free speech claim.[276] And judicial balancing quite generally began to spread in the 1930s and 1940s,[277] just as the Court was starting to enforce liberties.

B. *Modern Doctrine*

With the shift to judicial enforcement, Part II's account would make several predictions. First, courts would apply these liberties against widely varied regulations. Second, to combine indefinite scope and ex post limitation, judges would have to proceed in two steps: deciding if a law falls in the liberty's ambit ("coverage"[278]) and then, if so, whether the law should prevail anyway. The latter or both would apply a standard.[279]

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270. See Campbell, Judicial Review, supra note 266, at 588–89 (noting that beyond a "core protection" against "religious persecution," "the Founders did not suggest that judges had primary authority to determine the proper bounds of natural liberty when governmental powers collided with religious concerns in other ways").

271. See Campbell, Right to Keep and Bear Arms, supra note 257, at 34–39 (describing implications for the Second Amendment).

272. See id. at 41–48 (discussing state law cases).

273. See Campbell, First Amendment, supra note 242, at 257 (first and third alterations in original) (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).

274. See id. at 259.

275. See Frantz, supra note 18, at 1425 (identifying Schneider v. New Jersey, 308 U.S. 147 (1939), as the first free speech balancing case).

276. See Strauss, The Living Constitution, supra note 138, at 66 ("The Court did not actually uphold a free speech claim until 1931 . . . .").

277. See Aleinikoff, supra note 30, at 948.

278. See Schauer, Speech and "Speech," supra note 26, at 905 n.33.

279. Standards "identify a set of purposes or values and rely on downstream decisionmakers to conform the law to those purposes or values." Jamal Greene, The Supreme Court, 2017 Term—Foreword: Rights as Trumps?, 132 Harv. L. Rev. 28, 60 (2018) [hereinafter Greene, Rights as Trumps?]. By contrast, a rule "requires for its application nothing more than the determination of the happening or non-happening of physical or mental events—that is, determinations of *fact*." Id. (internal quotation marks omitted)

Third, resulting doctrines would fall into three buckets. A doctrine might be too specific to capture the liberty's full scope, applying to a narrow set of regulations whose benefits were clear enough to be taken into account by the court devising the doctrine. Or a doctrine might direct future judges to decide whether to withhold protection case-by-case. And doctrines both general and rigid would crumble under pressure to balance anyway.

Fourth, attempts to avoid balancing through close analogical reasoning would face a dilemma—between truncating the right or crippling the state's ability to regulate—that pushed right back to looser balancing.

These predictions capture modern liberties doctrine perfectly.[280] They fit the conduct of individual jurists—like Justice Hugo Black—who espoused absolutism but strayed from it.[281] Indeed, they fit the trajectory

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(quoting Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 139 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

280. How does this Article's analysis bear on unenumerated liberties—to privacy, contraception, sexual intimacy, abortion under *Roe*, and the like? For a discussion of privacy rights, see generally Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737 (1989). These face the same forced choice as enumerated liberties. Each will be either open-ended and subject to balancing, or so specific as to bar just a concretely specified set of regulations, allowing the weighing to be done by the court announcing the doctrine. Privacy as such is open-ended, and cases applying it have balanced to derive its concrete implications. See Roe v. Wade, 410 U.S. 113, 152–56 (1973), overruled by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). But some of those implications—like the right to contraception, see Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965)—were rights against a concrete type of regulation (bans on using contraceptives). Since the costs and benefits seemed apparent, up front, and constant, *Griswold* could do the balancing itself. Likewise for the right to same-sex sexual conduct. See Lawrence v. Texas, 539 U.S. 558, 567 (2003). These are "finished" norms.

Roe lies between *Griswold*'s definiteness and free speech's open-endedness, but closer to *Griswold*. While *Roe* applied strict scrutiny to abortion laws, see 410 U.S. at 154, it could do most of the balancing itself. Because the right was primarily to a discrete procedure, the countervailing state interests were foreseeable and constant: fetal life and the safety of the procedure itself. See id. Still, *some* balancing proved necessary when courts reviewed regulations advancing a foreseen interest like safety *to different degrees* (as with clinic regulations), see Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016), abrogated by *Dobbs*, 142 S. Ct. 2228, or pursuing the rare state interest *un*addressed in *Roe*, see Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from the denial of rehearing en banc) (noting that precedents had not addressed "anti-eugenics" justifications for bans on abortions sought because of fetal sex or race).

281. Justice Black insisted that having judges balance enumerated rights would upset the "very object of adopting" them as rights, see Konigsberg v. State Bar of Cal., 366 U.S. 36, 61–65 (1961) (Black, J., dissenting), but he was led "to vote to sustain many laws believed to be unconstitutional under the first amendment even by more conservative colleagues not sharing his 'absolute' commitment." William Van Alstyne, A Graphic Review of the Free Speech Clause, 70 Calif. L. Rev. 107, 114 n.15 (1982). Justice Black often "trimmed the most problematic results of his absolutist test by finding categorical exceptions to the categorical rule," in the end proving "quicker than many balancing-inclined Justices to find that certain

of scholars writing *without* the pressures of judging. Of those like Alexander Meiklejohn who defined free speech in narrow, absolutist terms (centered on political speech), almost all came to construe it more broadly and support some balancing.[282] Even today's scholars trying to cabin balancing's role invariably end up reinforcing it. And these efforts' failure is inductive evidence of one final point. Not only do open-ended rights resist reduction to a list of discrete protections, as Part II would predict; but having read the First and Second Amendments as enshrining such open-ended rights, our legal culture seems firmly committed to continuing to read them so.[283]

1. *Free Exercise*

a. *Doctrinal Whiplash.* — The Court inaugurated modern free exercise doctrine in *Sherbert v. Verner*.[284] *Sherbert* read free exercise as open-ended—a presumptive shield from any substantial burden on religion, whatever the law's intent or the type of conduct regulated.[285] Since very different behaviors can be religious—including "compliance with sumptuary rules governing dress, diet, the use of property; the observance of sacred times (feasts and holy days) and places (pilgrimages to shrines); rites connected with important events in the believer's life (birth, death, maturity, marriage)"[286]—the range of countervailing regulatory interests was vast: antidiscrimination laws;[287] grooming regulations;[288] prison protocols;[289] food-inspection regulations;[290] historic preservation laws;[291] truancy

speech acts fell completely outside the bounds of the First Amendment." Blocher, supra note 30, at 384.

282. See Schauer, Categories and the First Amendment, supra note 29, at 275 n.46 (explaining that such scholars eventually "expanded" the category far beyond political speech and concluding that "Professor Bork is the only one left" defending the narrow-but-absolute view).

283. This is somewhat more questionable as to the Second Amendment, whose modern doctrine has the shallowest roots and remains controversial, but even there, a major overhaul seems unlikely. See infra section IV.A.

284. 374 U.S. 398 (1963).

285. See id. at 406–08 (imposing heightened scrutiny on such laws).

286. John H. Garvey, What Are Freedoms For? 49 (1996).

287. Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 190 (2012) (holding a minister's employment discrimination suit against a religious institution to be barred by the First Amendment).

288. See, e.g., Singh v. McHugh, 109 F. Supp. 3d 72, 74–75 (D.D.C. 2015) (challenging the military's refusal to accommodate a Sikh student's religious practice of wearing a turban), amended and superseded by 185 F. Supp. 3d 201 (D.D.C. 2016).

289. See Abdulhaseeb v. Calbone, 600 F.3d 1301, 1306 (10th Cir. 2010) (involving the denial of a halal diet for an incarcerated Muslim individual).

290. See James E. Ryan, Note, *Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407, 1446 (1992) ("[E]xemptions exist in food inspection laws for the ritual slaughter of animals, and for the preparation of food in accordance with religious practices.").

291. See Colin L. Black, Comment, The Free Exercise Clause and Historic Preservation Law: Suggestions for a More Coherent Free Exercise Analysis, 72 Tul. L. Rev. 1767, 1767–68 (explaining how historic preservation laws can lead to free exercise challenges).

laws;[292] and so on. As Part II would predict, this right was repeatedly balanced. Though substantial burdens triggered strict scrutiny, the scrutiny applied was feeble.[293] And soon exceptions to scrutiny were made without a basis in *Sherbert* or the text—as for regulations of governmental affairs, even when they "virtually destroy[ed]" a religion.[294]

The Court sought to end that balancing in *Employment Division v. Smith* by reducing free exercise to something definite: a shield against only regulations that target religion.[295] But just as one would predict if the open-endedness of liberties were a deep-seated commitment of our system, that change unleashed "[t]orrents of legal criticism" and "almost universal displeasure"[296] among advocates, scholars, and lawmakers protesting that "the free exercise guarantee in the Religion Clause of the First Amendment has been declared null and void."[297] In response, Congress did what it had "never" done: "enact[] a statute imposing on the federal and state judiciary an obligation to"[298] undo the ruling's effect. The Religious Freedom Restoration Act (RFRA),[299] codifying *Sherbert*'s strict scrutiny and exemptions from incidental burdens, "was supported by one of the broadest bipartisan coalitions in recent political history," including religious-minority groups and secular outfits.[300] It passed by voice vote in the House and 97-3 in the Senate and was signed into law by President Bill Clinton.[301]

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292. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 216–18 (1972) (highlighting the clash between Amish religious values and compulsory education).

293. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 881–82 (1990) (noting a paucity of cases granting exemptions from neutral and generally applicable laws); see also Michael A. Helfand, Religious Institutionalism, Implied Consent, and the Value of Voluntarism, 88 S. Cal. L. Rev. 539, 583 (2015) ("[The Supreme Court's] trajectory toward widening the scope of interests that could be considered compelling captured the core intuition that religious liberty claims must be, in fact, balanced against other important and compelling government interests.").

294. See Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (internal quotation marks omitted) (quoting Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F. 2d 688, 693 (9th Cir. 1986)).

295. See 494 U.S. at 879 (finding that the right to free exercise didn't "relieve an individual of the obligation to comply with" generally applicable laws). This Article takes no position on whether *Smith* was rightly decided on prudential grounds rooted in concerns about judicial balancing.

296. See Eugene Gressman & Angela C. Carmella, The RFRA Revision of the Free Exercise Clause, 57 Ohio St. L.J. 65, 67 (1996).

297. See, e.g., Richard John Neuhaus, Polygamy, Peyote, and the Public Peace, First Things (Oct. 1, 1990), https://www.firstthings.com/article/1990/10/polygamy-peyote-and-the-public-peace [https://perma.cc/28GG-CW8P].

298. Gressman & Carmella, supra note 296, at 67.

299. Pub. L. No. 103–141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (2018)).

300. See Stephanie H. Barclay & Mark L. Rienzi, Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions, 59 B.C. L. Rev. 1595, 1603 (2018).

301. See Bill Clinton, President, Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 Weekly Comp. Pres. Doc. 2377–78 (Nov. 16, 1993),

Eventually, a counterreaction to *Smith* emerged within the judiciary, too. While some cases after *Smith* were consistent with it, granting relief from ordinances or enforcement actions that applied *only* to religiously motivated conduct[302] or seemed to reflect disparagement of religion,[303] the Court didn't stop there. Under the Most Favored Nation (MFN) theory, which purports to honor *Smith*'s rule allowing generally applicable laws, the Court applies strict scrutiny to laws burdening religion if they exempt even one secular activity that equally affects the state's interests.[304] Because no law pursues its goals at all costs, each can be understood to leave out some secular conduct.[305] So to give MFN theory limits, courts balance.[306] Not only does MFN theory require strict scrutiny; balancing is also latent in the premise of its *trigger* for scrutiny: religion's being "devalued."[307] Religion is devalued only when denied exemptions that have been given to secular conduct that is just as harmful *and not more important*.[308] These

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https://www.govinfo.gov/content/pkg/WCPD-1993-11-22/pdf/WCPD-1993-11-22-Pg2377.pdf [https://perma.cc/PU7F-BLHS].

302. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (invalidating an ordinance "gerrymandered" to suppress religious conduct).

303. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1726–31 (2018) (invalidating a state agency order reflecting "hostility toward [petitioner's] sincere religious beliefs").

304. See Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (demanding scrutiny of regulations "treat[ing] *any* comparable secular activity more favorably than religious exercise" (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam))).

305. See, e.g., Alan Brownstein, Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality, 18 J.L. & Pol. 119, 199 (arguing that "the very foundation for the most favored nation framework is intellectually incoherent"); Zalman Rothschild, Free Exercise's Lingering Ambiguity, 11 Calif. L. Rev. Online 282, 283–87 (2020), https://www.californialawreview.org/online/free-exercises-lingering-ambiguity [https://perma.cc/V8AL-BTVG] (summarizing debates).

306. See Andrew Koppelman, The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty, 108 Iowa L. Rev. 2237, 2245–56 (2023) (explaining why letting any secular exception trigger scrutiny leads to balancing); Christopher C. Lund, Second-Best Free Exercise, 91 Fordham L. Rev. 843, 863–69 (2022) (crediting *Tandon*'s MFN approach with reviving free exercise balancing). For a description of problems with MFN theory, see generally Zalman Rothschild, The Impossibility of Religious Equality, 125 Colum. L. Rev. 453 (2025).

307. See Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2614 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (warning against "'devalu[ing] religious reasons' for [conduct] 'by judging them to be of lesser import than nonreligious reasons'" (quoting *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 537–38)). "Devalued" is the word used by then-Judge Samuel Alito in an opinion widely credited with promoting an MFN approach, as explained by Gabrielle Girgis, An Architect of Religious Liberty Doctrines for the Roberts Court, Harv. J.L. & Pub. Pol'y Per Curiam, Spring 2023, at 1, 4, https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2023/04/Girgis-Gabrielle-vFF1.pdf [https://perma.cc/6EZ3-ZR5L].

308. After all, to devalue something is to treat it less well than it deserves—or less well than *equally deserving* things. See Lund, supra note 306, at 865 ("You cannot say whether the government has devalued religion without first deciding, either implicitly or explicitly, what the true value of religion really is."); see also Mark L. Movsesian, Law, Religion, and the

ultimately political-moral criteria have led to "politically polarized results."[309] So the balancing has reemerged in a doctrine supposedly implementing *Smith*, which had tried to flee balancing. The institution keenest to banish balancing from free exercise has confirmed the right's open-endedness and need for balancing.

b. *Objections and Counterproposals.* — Courts cannot avoid balancing by just stretching some existing categorical doctrines or shrinking free exercise to a right against certain specific motives or justifications for regulation.

One categorical doctrine, the ministerial exception, protects churches' choices of ministers "no matter how important the government interest" in interfering.[310] Yet this is the opposite of an open-ended protection. It applies to one concretely specified regulation—employment antidiscrimination law—and only for religious organizations and only as to their ministers.[311] It's no broader than an accommodation written directly into antidiscrimination statutes. It offers no reason to hope that all free exercise protections could be rendered categorical.

Professor Stephanie Barclay would avoid balancing by reducing free exercise to a shield against laws not necessary to serve select state interests.[312] It's established that religious hostility cannot justify laws burdening religion,[313] nor can the goal of setting religious orthodoxy.[314] Barclay would capture free exercise with a few more delineations of which interests can and can't justify burdens on religion, based on which "specific government interests . . . were viewed at the Founding as inherent limitations on" the right.[315]

COVID-19 Crisis, 37 J.L. & Religion 9, 18–19 (2022) (arguing that in COVID-19 lockdown cases, Justices' determinations rested "on whether the authorities had fairly excluded worship services from the set of activities they had permitted," which "necessarily entailed implicit balancing and 'value judgments' about the importance of religious exercise, compared to things like grocery shopping and dining out" (quoting Note, Constitutional Constraints on Free Exercise Analogies, 134 Harv. L. Rev. 1782, 1790 (2021))).

309. Movsesian, supra note 308, at 23 ("A study by Zalman Rothschild of more than 100 [COVID-19-related] cases in the federal courts reveals that not a single Democratic-appointed judge has ruled in favor of religious plaintiffs in any of them. By contrast, '66% of Republican-appointed judges' have done so, and '82% of Trump-appointed judges.'" (footnote omitted) (quoting Zalman Rothschild, Free Exercise Partisanship, 107 Cornell L. Rev. 1067, 1068 (2022))).

310. Barclay, Replacing *Smith*, supra note 8, at 442–43.

311. See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 180–89 (2012) (describing the ministerial exception).

312. See Barclay, Replacing *Smith*, supra note 8, at 448–60.

313. See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 n.1 (2022); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729–31 (2018).

314. See Sherbert v. Verner, 374 U.S. 398, 402, 410 (1963) (explaining that the people cannot be punished for having religious beliefs contrary to those of the governmental authorities).

315. See Barclay, Replacing *Smith*, supra note 8, at 460.

This important proposal ultimately reintroduces balancing at two stages. First, to leave enough leeway to regulate, Founding-era sources defined sufficient justifications broadly: "peace," "safety," and the curbing of "licentiousness or immorality."[316] These categories include almost any legitimate purpose, such that only irrational laws would violate free exercise.[317] Allowing "too general" a "justification" could sanction "[n]early all" regulations.[318] So judges would have to ask if a law advances these interests *enough*. Fine-grained questions of degree arise regarding all police-power interests[319]—health,[320] safety,[321] morals,[322] and the general welfare.[323] Addressing them requires political-moral reasoning: balancing.[324]

Balancing also arises under Barclay's proposal when courts decide whether a law is "necessary" for some purpose.[325] As Barclay concedes, "[p]roving necessity" often requires asking "whether the government has other means of accomplishing its goal that don't involve burdening religion."[326] But there are always alternatives. The real question, as John Hart Ely observed long ago, is whether they're good enough—realizing

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316. Id. at 457 (internal quotation marks omitted) (quoting Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1461–62 (1990)).

317. Barclay makes a related point in rejecting a proposal to uphold only laws analogous to ones accepted at the Founding. See id. at 466–67. Barclay objects that this would vindicate a parent's right to "beat[] her seven-year-old son with a coat hanger," since "[t]here is no strong historical pedigree of child-protection laws at the Founding Era." Id. And anticipating that someone might respond by going more general and identifying a tradition of "protect[ing] public safety," Barclay warns that this would gut free exercise since "government could tie just about any regulation in any context to public safety." Id. at 468.

318. United States v. Rahimi, 144 S. Ct. 1889, 1938 (2024) (Thomas, J., dissenting); see also id. at 1908 (Gorsuch, J., concurring) (warning against "extrapolat[ing]" too general a value from the text (internal quotation marks omitted) (quoting Giles v. California, 554 U.S. 353, 375 (2008) (plurality opinion) (Scalia, J.))); id. at 1926 (Barrett, J., concurring) ("[A] court must be careful not to read a principle at such a high level of generality that it waters down the right.").

319. See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 390–95 (1926) (describing police powers).

320. See supra note 117 and accompanying text (discussing a case questioning the benefits of regulation limiting tobacco-product advertising near children).

321. See supra note 116 and accompanying text (discussing a case questioning the benefits of prison security rules).

322. See Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 801–03 (2011) (questioning the benefits of a regulation limiting children's exposure to violent or offensive video games).

323. See Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2166–67 (2023) (observing that the effect of affirmative action policies on diversity is "a question of degree" that "no court could resolve").

324. See supra section I.B.2 (defining "balancing" based on the Court's critique).

325. See supra note 312 and accompanying text.

326. See Stephanie H. Barclay, Strict Scrutiny, Religious Liberty, and the Common Good, 46 Harv. J.L. & Pub. Pol'y 937, 948 (2023).

the interest enough without being too costly.[327] Deciding that means balancing.

Justice Kavanaugh made related points in a case pitting a death row inmate's religious request to have his pastor lay hands on him during execution against the state's interest in reducing security risks.[328] Texas allowed only the pastor's presence.[329] In-between options included allowing "touch on a part of the body away from IV lines,"[330] letting the minister speak but not touch the inmate, and many others. Justice Kavanaugh asked "where to draw the line—that is, how much additional risk of great harm is too much for a court to order the State to bear[?]"[331] Indeed, since security concerns stemmed from the execution chamber's cramped size,[332] another alternative was razing the chamber and building a larger one. Yet that would have been so costly that no court would cite the state's failure to pursue it as evidence of ignoring less restrictive alternatives. (The Court has conceded that "cost may be an important factor in the least-restrictive-means analysis,"[333] and it comes in degrees.) Thus, proving a regulation's necessity is not just an empirical inquiry but involves an assessment of costs and benefits.

Thus, on this approach, judges would ultimately decide if a regulation advances peace, safety, or public morals to a sufficient degree, in part by seeing if alternatives would promote the same interest without too much loss to its degree of realization and without imposing undue side costs: balancing.

2. *The Second Amendment*

a. *From Deference to Chaos (and Back?).* — Second Amendment doctrine's compressed history vividly exemplifies the legal system's commitment to general liberties' open-endedness and the untenability of close analogical reasoning (as opposed to balancing). But with this right, the open-endedness flows less from variety in the types of interests served by gun laws than from variety in *how* and, especially, *how much* they serve their aims.

Modern Second Amendment enforcement began when *District of Columbia v. Heller*[334] announced a right to possess and carry arms for self-defense. So defined, the right is open-ended, covering conduct implicating state interests in different ways and degrees. Cases have

327. See John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1486–87 (1975).

328. See Ramirez v. Collier, 142 S. Ct. 1264, 1287 (2022) (Kavanaugh, J., concurring).

329. Id. at 1272–73 (majority opinion).

330. Id. at 1281.

331. Id. at 1288 (Kavanaugh, J., concurring).

332. Cf. id. ("[M]any executions historically were outdoor public hangings where the presence of religious advisors did not raise the same risks to safety, security, and solemnity that their presence in a small execution room does.").

333. See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 730 (2014).

334. 554 U.S. 570 (2008).

featured clashes with zoning ordinances, age limits, domestic violence restraining orders, bail conditions, people's control over their land, bans on carrying near courthouses and preschools and stadiums and health centers, and regulations of bump stocks, drug use, immigration, mental illness, and much else.[335]

That open-endedness has required balancing. Given the text's generality, a wooden application "would be cataclysmic," encompassing "[a] man strolling along Pennsylvania Avenue with a tactical nuclear warhead under his arm."[336] While *Heller* gave little guidance, what it did say illustrated the pressure to make exceptions ex post for regulations not embraced at the Founding: *Heller* treated as presumptively lawful some "longstanding" regulations that it is very hard to imagine courts invalidating (like bans on carrying in schools—or courthouses!) but that only arose quite recently.[337] When lower courts tried to fill the doctrinal gaps, all adopted tests that openly balanced self-defense against a law's benefits.[338] And since gun laws serve public safety to indefinitely varying degrees, the Second Amendment's framers couldn't have specified in concrete *non*moral terms how *much* safety benefit was required. In a recent case illustrating the point, the Eighth Circuit invalidated an age restriction on carrying. It acknowledged empirical evidence that younger people are more dangerous but questioned whether the age limit would "reduce the risk of danger" by *enough*, relative to existing restrictions.[339]

Bruen failed to end the balancing. *Bruen* itself could (and should) have been decided on categorical grounds: that the law requiring a special need to carry for self-defense destroyed most people's ability to bear arms *at all*.[340] Such categorical reasoning will suffice when challenged

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335. For scholarship surveying cases following *Bruen*, see generally Jacob D. Charles, The Dead Hand of a Silent Past: *Bruen*, Gun Rights, and the Shackles of History, 73 Duke L.J. 67, 122–45 (2023); Eric Ruben, Rosanna Smart & Ali Rowhani-Rahbar, One Year Post-*Bruen*: An Empirical Assessment, 110 Va. L. Rev. Online 20 (2024), https://virginialawreview.org/wp-content/uploads/2024/02/Ruben_Book.pdf [https://perma.cc/DS6M-RNXR].

336. Miller, supra note 146, at 897.

337. See *Heller*, 554 U.S. at 626; see also Michael P. O'Shea, The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms, 26 Tex. Rev. L. & Pol. 103, 128–29 (2021) (explaining that some of the putatively "longstanding" gun prohibitions date back only to the 1960s).

338. See N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2174–75 (2022) (Breyer, J., dissenting) (describing the courts' of appeals "consensus" two-step framework post-*Heller*).

339. See Worth v. Jacobson, 108 F.4th 677, 694 (8th Cir. 2024).

340. See Wrenn v. District of Columbia, 864 F.3d 650, 665 (D.C. Cir. 2017) (holding that conditioning the right to carry on establishing a special need for self-defense "*completely* prohibits most residents from exercising the constitutional right to bear arms" and so must fail on categorical grounds as an "obliteration[] of an enumerated constitutional right" (citing *Heller*, 554 U.S. at 629)).

regulations are sweeping—as in *Heller*, too.[341] But it won't suffice for review of most gun laws, so *Bruen* issued broader guidance. It declared lower courts' two-step analysis (triggering and then applying heightened scrutiny), shown above to be inevitable for some applications of open-ended rights,[342] was "one step too many."[343] Yet *Bruen*'s test also had two steps—asking whether the plaintiff's conduct fell within the text's plain meaning and, if so, whether it should stand anyway.[344] *Bruen* simply tried to avoid policy reasoning at step two by having judges defer to the people's balance as reflected in political traditions: A law would survive only if analogous to regulations with a long history.[345] About this test, two points: It was criticized as unsound and even baffling, though the Court's motivation to use it is explained by this Article's account of general liberties as open-ended. And the test proved unstable in ways also predicted by that account and confirmed by the revisions made in *Rahimi*.

First, *Bruen*'s test was criticized for assuming that the historical absence of a law suggests it was long thought unconstitutional—as if lawmakers always "legislated to the maximum extent of their constitutional authority."[346] Lawmakers might fail to adopt a regulation for many other reasons[347]—like high costs or lack of need.[348] Why assume that historical absence suggests invalidity?[349]

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341. See *Heller*, 554 U.S. at 628 (holding that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights," the challenged "total[] ban[]" on "handgun possession in the home" would have to fail muster).

342. See supra notes 278–279 and accompanying text.

343. See *Bruen*, 142 S. Ct. at 2127–30.

344. See id.

345. See id.

346. See Charles, supra note 335, at 111.

347. See Leah M. Litman, Debunking Antinovelty, 66 Duke L.J. 1407, 1468 (2017) (listing several).

348. See id. at 1428 (describing alternative explanations for legislative choices).

349. Alicea thinks *Bruen* avoids this assumption by requiring a historical analogue only when plaintiffs have shifted the burden of proof onto the government by showing that their conduct falls under the plain text. See Alicea, *Bruen* Was Right, supra note 38 (manuscript at 30). But the problem remains: Why assume that regulations *of conduct within the plain text* that were never adopted must have been thought unlawful? Once it's accepted that the right has nontextually specified limits, why assume that all such limits have been exemplified by past regulations? Alicea contends that *Bruen* allows evidence other than early regulations to support a challenged law, but Justice Thomas, *Bruen*'s author, treated the lack of "a single historical regulation" as dispositive in United States v. Rahimi, 144 S. Ct. 1889, 1930 (2024) (Thomas, J., dissenting), in which Justice Gorsuch also stressed that under *Bruen*, "the government must establish that . . . the challenged law" is comparable to "a historically recognized regulation," id. at 1907 (Gorsuch, J., concurring) (citing *Bruen*, 142 S. Ct. at 2133). Alicea adds that, in any event, he hadn't found principles defining the right's scope that did *not* register in prior positive law, see Alicea, *Bruen* Was Right, supra note 38 (manuscript at 30), but he was able to tie any principle to some early regulation only by defining principles at a high level of generality, in a way that both depends on fairly unconstrained political-moral reasoning and would justify more of it by judges, id.

This Article's account of liberties as open-ended rights explains *Bruen*'s choice. Once the Court decided to use historical-analogue reasoning (to avoid balancing), it could require a history of one of two things: specific regulations analogous to the challenged one, or specific rights claims analogous to the challenger's.[350] But the latter would've reduced this general liberty to a finite list of concrete practices historically protected or those plus their close analogues. That would have destroyed the right's open-endedness. So it was to keep the right protective against indefinitely many unforeseen laws that *Bruen* had to define it abstractly (based on plain text) and require a regulatory tradition to support the rare exception. In other words, the Court was cornered into adopting a test lacking any apparent *theoretical* justification by two desires: to keep the right open-ended and to avoid the balancing that would ordinarily ensue. The second goal required a historical-analogue test, and the first required a default of broad protection, with history being used to justify narrow exceptions, not vice versa.

Second, *Bruen*'s test was unworkable and required balancing.[351] It produced "discrepan[t]" results with "statistically significant gap[s]" in outcomes reached by "Republican- and Democratic-nominated judges."[352] *Bruen* did "not meaningfully constrain[]"[353] judicial policy reasoning partly because its criteria for drawing analogies—"how and why the regulations burden a law-abiding citizen's right to armed self-defense"[354]—are easily reduced to cost and benefit. And courts can easily view these "at a high level of abstraction—treating all [gun] regulations as serving the same broad purpose of reducing gun violence," for example.[355] All this reinvites balancing, as Justice Stephen Breyer noted in dissent.[356]

True, *Bruen* urged deference to "the balance struck by the founding generation,"[357] not today's judges. And one might think this standard determinate because here harms and benefits are of the same quantifiable kind. Gun laws' benefits are the lives saved from accidental or unlawful shootings; their harms are the lives lost from hampered self-defense. So if

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(manuscript at 35–42). For related concerns, see infra notes 358–359 and accompanying text.

350. Cf. Schauer, Categories and the First Amendment, supra note 29, at 280–81 (discussing "the choice between" determining the scope of free speech by "defining [protected conduct] in" versus "defining [regulable conduct] out").

351. See Joseph Blocher & Eric Ruben, Originalism-by-Analogy and Second Amendment Adjudication, 133 Yale L.J. 99, 105 (2023) (noting "wildly manipulable and unpredictable case outcomes" under *Bruen*).

352. Ruben et al., supra note 335, at 24.

353. See id. at 25.

354. *Bruen*, 142 S. Ct. at 2132–33.

355. See Charles, supra note 335, at 138.

356. See *Bruen*, 142 S. Ct. at 2179 (Breyer, J., dissenting) ("Ironically, . . . the Court believes that the most relevant metrics of comparison are a regulation's means (how) and ends (why)—even as it rejects the utility of means-end scrutiny.").

357. See id. at 2133 n.7 (majority opinion).

a longstanding law saved thirteen lives for every twelve it took by curbing self-defense, perhaps new laws are analogous if their ratio of lives saved to lost is 13:12 or better. That *empirical* criterion isn't balancing, *Bruen*'s defenders might argue.

The problems with this rescue effort are manifold. For one thing, it's so hard to count lives saved and lost due to any gun law—much less a series of older ones—that judges trying to eyeball the matter might end up making normative judgments after all. More important, harms and benefits cannot be reduced to a ratio of lives to lives because other goods are at stake. For example, bans on carrying near sensitive sites implicate people's peace of mind and liberty interests in visiting stadiums and theaters.

Finally, this test, too, is unjustified. If the historical absence of a particular regulation doesn't mean it was thought unlawful,[358] the same goes for the absence of regulations with a certain burden-to-benefit ratio. A sound doctrinal test could not be: "Do past regulations have a ratio of cost to benefit at least as unfavorable to self-defense as this one?" It would have to be: "Does this regulation have a ratio of cost to benefit that the principles enshrined in the Second Amendment would condemn?" But that is the question this test was supposed to help answer.[359]

Bruen had to be revised in *Rahimi* in ways that confirm the prediction above[360] that efforts to stick to close analogical reasoning either truncate the right or cripple the state's ability to regulate, pushing courts back to looser balancing. *Rahimi* upheld a law disarming people subject to domestic-violence restraining orders.[361] Justice Thomas, *Bruen*'s author, dissented, saying the law had no close historical analogues.[362] The majority

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358. See supra notes 346–348 and accompanying text.

359. Justice Barrett seems to read *Bruen* as imposing only the latter, less informative test. She warns that early regulations cited by *Bruen* "do not themselves have the status of constitutional law." United States v. Rahimi, 144 S. Ct. 1889, 1925 n.* (2024) (Barrett, J., concurring). They "help illuminate [the right's] original scope" by spotlighting its limits—and only *some* of its limits, since there is no reason to "assume[] that founding-era legislatures maximally exercised their power to regulate." Id. at 1925 & n.*. But if early laws are only evidence, and avowedly partial evidence, of what the right leaves out, the right's positive content recedes further into the mist. If text and early laws don't capture all the right's contours, how else to identify them? If the right's substance is a set of principles, which early regulations only partially illustrate, where do the principles come from? If it's assumed that all the principles just happened to be mentioned in debates about early regulations, is that any better than "assum[ing] that founding-era legislatures maximally exercised their power to regulate"? See id. at 1925. In all events, any principles defining the right would have to allow for balancing, for reasons given in section II.A.3.

360. See supra section II.A.3 (discussing the unworkability of sticking to close analogical reasoning).

361. See *Rahimi*, 144 S. Ct. at 1902–03.

362. The *Rahimi* majority cited traditions of enacting surety laws, which made dangerous persons post bonds they would lose if they harmed others, and going-armed laws, which barred the public brandishing of dangerous weapons. See id. at 1900–01. *Rahimi* took these to establish a tradition of disarming dangerous persons. See id. at 1901. Justice Thomas

reaffirmed the right's open-endedness (the impossibility of defining its scope by practices "that could be found in 1791"[363]) and so widened the focus from historical analogues to "*the principles that underpin* our regulatory tradition."[364] As Justice Sonia Sotomayor observed, this marked a change toward more responsiveness to modern conditions.[365]

Other opinions reinforced the inadequacy of close analogical reasoning. When Justice Barrett rejected a demand for close historical analogues as too restrictive for lawmakers,[366] Justice Thomas warned that the alternative—reliance on "general principles"—would defer *too much*, gutting the right.[367] Justice Barrett seemed confident that judges could "pull[] " sufficiently narrow and determinate "principle[s] from . . . history."[368] Besides, she wrote in a free speech case days earlier, hewing close to historical analogues just "delays the inevitable," for "[e]ventually, the Court will encounter a restriction without a historical analogue and be forced to articulate a test for analyzing it."[369] But if open-ended liberties guard against laws that aren't even close analogues of past threats, it's also true that "trying to stick to low-level or determinate principles" pulled from history, as Justice Barrett would, "only delays an inevitable move to broader principles" that require balancing.[370] Scholarly attempts to stick to close analogues confirm as much.[371]

b. *Objections and Counterproposals.* — Professors William Baude and Robert Leider have argued that *Bruen* avoided problematic balancing by treating the Second Amendment as a general-law right elaborated through anodyne analogical reasoning.[372] The general law was "common to Anglo-American legal systems rather than . . . the creation of local law" and was rooted in "history and custom," not legislative fiat.[373] General law was identified "by looking to a wide range of cases, parsing the close cases,

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argued that neither involved total disarmament. See id. at 1933, 1942–43 (Thomas, J., dissenting).

363. Id. at 1897 (majority opinion).

364. Id. at 1897–98 (emphasis added) (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131–33 (2022)).

365. See id. at 1905–06 (Sotomayor, J., concurring).

366. See id. at 1925 (Barrett, J., concurring) (arguing that demanding close historical analogues for challenged regulations would "assume[] that founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority").

367. See id. at 1945 (Thomas, J., dissenting).

368. See id. at 1925–26 (Barrett, J., concurring).

369. Vidal v. Elster, 144 S. Ct. 1507, 1532 (2024) (Barrett, J., concurring in part).

370. Sherif Girgis, Originalism's Age of Ironies, 138 Harv. L. Rev. Forum 1, 15 (2024), https://harvardlawreview.org/wp-content/uploads/2024/11/138-Harv.-L.-Rev.-F.-1.pdf [https://perma.cc/54VN-FDSS] [hereinafter S. Girgis, Age of Ironies].

371. See infra note 466.

372. See William Baude & Robert Leider, The General-Law Right to Bear Arms, 99 Notre Dame L. Rev. 1467, 1488–95 (2024).

373. Id. at 1472, 1475.

setting aside unusual outliers, and trying to distill the general principles."[374] This was not a problematic sort of balancing but "a common task for a treatise writer, a restatement reporter, or a traditional common-law judge."[375] Does that show that Second Amendment rights require only close analogical reasoning? A close look suggests not.

Under general-law principles, a gun law could fall if it lacked "a fair relation to the preservation of the public peace and safety"[376] or was "disproportionate to the legitimate ends sought to be achieved."[377] This, like Barclay's free-exercise proposal,[378] requires judges to apply general moral standards. Indeed, Baude and Leider conceded that "some form of interest balancing" is necessary even though "*Bruen* seemed to deny [this]."[379] But they thought *Bruen* opposed only "modern utilitarian balancing tests (such as intermediate scrutiny)."[380] Those differ from "[t]raditional rights-based interest balancing," under which a state can "regulate a right for limited purposes, such as to protect the rights of others," but cannot act on "disagreement with the value of the right" or obliterate the right.[381] But as Part I shows, *Bruen*'s concerns reach beyond intermediate scrutiny and cost–benefit analysis. They cover any fresh assessment of the sufficiency of a law's benefits or reliance on broad principles leaving ample room for judges' moral analysis to shape outcomes.

Baude and Leider's framework requires moral reasoning of both kinds. A core general-law principle was that "the legislature may regulate and limit the mode of carrying arms."[382] As Baude and Leider concede, a principle so broad would warrant analogies that "may seem odd and loose," as between bans on groups parading with firearms and bans on concealed carry.[383] Indeed, today, scores of laws can be described as regulating and limiting the mode of carrying. Are they all permissible? If not, what will judges consider if not the extent of the regulatory burden and the public benefit?

3. *Free Speech*

a. *Sprawling Tests and Cratering Rules.* — Our legal culture's commitment to open-ended liberties is on most flamboyant display in free speech. This right is invoked in diverse and originally unforeseeable

374. Id. at 1488.

375. Id.

376. Id. at 1489 (internal quotation marks omitted) (quoting Britt v. State, 681 S.E.2d 320, 322 (N.C. 2009)).

377. Id.

378. See supra section III.B.1.b.

379. See Baude & Leider, supra note 372, at 1491.

380. See id.

381. Id. at 1491–92.

382. See id. at 1490 (internal quotation marks omitted) (quoting Commonwealth v. Murphy, 44 N.E. 138, 138 (Mass. 1896)).

383. See id.

regulatory contexts. Its doctrines ask whether the speech is valuable enough or the regulation too valuable. Broad rules are riddled with exceptions. The right has resisted scholarly attempts to reduce it to protections concrete enough to obviate balancing. Indeed, as one would predict if open-endedness breeds balancing, this right's *unparalleled* open-endedness, implicating myriad public interests, has spawned "by far the most complex" rights doctrine "in all of United States constitutional law."[384]

Protected conduct includes "profanity, pornography, blasphemy, nude dancing, paintings, . . . advertising, campaign financing, insults, falsehoods concerning public figures, and the advocacy of unlawful conduct short of imminent incitement."[385] It spans video games,[386] tattoos,[387] atonal instrumental music,[388] wedding websites,[389] social media posts,[390] campaign donations,[391] union dues,[392] advertisements,[393] the burning of flags,[394] and the wearing of armbands.[395] The right protects some speech on public property,[396] some public school teacher and student speech, and some public employee speech.[397] It protects associations from disclosing memberships.[398] It covers speech unimaginable to past generations—data sets, search engine results, software codes, modern-professional speech.[399] And so it implicates many public interests. A hopelessly underinclusive sampling might mention

384. See Vikram David Amar & Alan Brownstein, Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine, 2020 U. Ill. L. Rev. 1, 5.

385. Rubenfeld, Revolution, supra note 191, at 21.

386. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011).

387. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1060 (9th Cir. 2010).

388. See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) (calling the "music of Arnold Schoenberg" "unquestionably shielded").

389. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2312 (2023).

390. See Lindke v. Freed, 37 F.4th 1199, 1201–02 (6th Cir. 2022) (considering whether a governmental official's deletion of a citizen's social media comments violated the First Amendment), vacated and remanded, 144 S. Ct. 756 (2024).

391. Buckley v. Valeo, 424 U.S. 1, 14–23 (1976) (per curiam).

392. Janus v. AFSCME, 138 S. Ct. 2448, 2463–64 (2018).

393. See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980) (noting that the First Amendment protects promotional advertising).

394. Texas v. Johnson, 401 U.S. 397, 399 (1989).

395. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969).

396. See Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939) ("The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; . . . but it must not, in the guise of regulation, be abridged or denied.").

397. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

398. NAACP v. Alabama, 357 U.S. 449, 466 (1958).

399. See David S. Han, Compelled Speech and Doctrinal Fluidity, 97 Ind. L.J. 841, 862 (2022) ("[C]ourts have extended First Amendment protection to, for example, search engine results, computer code, scientific and technical details, professional speech, and factual instructions for illegal or dangerous activities." (footnotes omitted)).

success in war, suppression of violence, privacy, aesthetics, fair trials, electoral integrity, workplace efficiency, the character of children, health and safety through product warnings and informed consent, and much more.[400]

Most of the central doctrines involve judicial balancing.[401] Content- and viewpoint-based regulations survive only if they're the least restrictive means to advancing a compelling state interest.[402] Content-neutral laws face intermediate scrutiny.[403] Expressive-conduct regulations must substantially advance an important interest unrelated to expressive content.[404] Public employee speech regulations must "arrive at a balance" between the employee's interest and the state's interest in managing the workplace.[405]

Because the trigger for strict scrutiny is officially wide (any content-based regulation) and stringent (nearly fatal), it has seen endless manipulation.[406] Even when laws clearly regulate speech for its communicative content, courts sometimes withhold strict scrutiny—in cases involving antidiscrimination, securities, antitrust, labor, evidence, and commercial law "and countless other areas."[407] Likewise for "regulation of . . . prescription drugs," "of doctor-patient confidentiality," "of income tax statements," "of commercial airplane briefings," "of signs at petting zoos," "and so on."[408] "[E]ven the briefest glimpse at the vast universe of widely accepted content-based restrictions on communication

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400. See R. George Wright, Why Free Speech Cases Are as Hard (and as Easy) as They Are, 68 Tenn. L. Rev. 335, 350–52 (2001) (listing these and fifteen other interests and related cases).

401. The most salient categorical speech doctrines *exclude* speech from protection. See United States v. Stevens, 559 U.S. 460, 468–69 (2010) (listing obscenity, defamation, fraud, incitement, and speech integral to criminal conduct as excluded categories of speech). It's no surprise that those are more stable: Since they permit regulation, judges don't have to scale them back to make room for regulations made pressing by new social conditions.

402. See Reed v. Town of Gilbert, 576 U.S. 155, 159 (2015) (finding that a law concerning political signage could not survive strict scrutiny).

403. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (allowing that "government may impose reasonable restrictions on the time, place, or manner of protected speech").

404. See United States v. O'Brien, 391 U.S. 367, 377 (1968) (demanding such a justification).

405. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

406. See, e.g., Vidal v. Elster, 144 S. Ct. 1507, 1525 (2024) (Barrett, J., concurring in part) ("[I]n certain situations, this presumption [against the constitutionality of content-based regulations] is inapplicable . . . ." (citation omitted)); see also Randy J. Kozel, Content Under Pressure, 100 Wash. U. L. Rev. 59, 64–65 (2022) (describing the cratering of legal presumptions against content-based regulation); cf. Greene, Rights as Trumps?, supra note 279, at 33 ("When an ex ante choice of category largely determines the ex post decision, manipulation of that choice is to be expected . . . .").

407. Schauer, Boundaries, supra note 194, at 1766–68.

408. Reed v. Town of Gilbert, 576 U.S. 155, 177–78 (2015) (Breyer, J., concurring in the judgment).

reveals that" speech covered by the right "is the exception and the speech that may routinely be regulated is the rule."[409] Attempts to explain this using doctrinal exceptions for speech integral to illegal conduct have reflected not lines drawn at ratification but balancing by courts.[410]

Even within the First Amendment's coverage, nothing is sacred. Content regulations are allowed under the secondary effects doctrine.[411] Regulations designed to curb offensive speech—striking at the bedrock of free speech—are allowed under a "captive audience" doctrine.[412] The supposedly absolute bar on prior restraints has seen cratering.[413] And the Court has been busy "recategorizing, reclassifying, and misapplying scrutiny in ways that have impaired the significance of each step of the process and of each level of scrutiny."[414] These changes reflect new rounds of definitional balancing, creating rules meant to apply to a subset of cases categorically. But the ever-present "possibility of" further exceptions means that even cases applying a doctrine by its terms are relying on a tacit "substantive" judgment "that the application is not bizarre or unjust."[415]

One might object that the Roberts Court, which has tried to avoid free speech balancing,[416] is different. But it hasn't managed to avoid balancing. It has upheld content-based restrictions on communication for interests it deemed important enough (like antiterrorism).[417] It has avoided absurd results (like collapse of the trademark system) only by relying on precedents that could rely on nothing more than their own balancing.[418] Even in opinions staking absolutist positions, it has hedged, making powerful exceptions traced not to text or history but, one supposes, a fresh policy choice.

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409. See Schauer, Boundaries, supra note 194, at 1768.

410. See Eugene Volokh, The "Speech Integral to Criminal Conduct" Exception, 101 Cornell L. Rev. 981, 985–87 (2016) (explaining that the court's jurisprudence around speech integral to illegal conduct serves as a "guide to generating other exceptions").

411. See, e.g., John Fee, The Pornographic Secondary Effects Doctrine, 60 Ala. L. Rev. 291, 292 (2009) (describing the secondary effects doctrine, which justifies some content-discriminatory regulation of pornography).

412. See Caroline Mala Corbin, The First Amendment Right Against Compelled Listening, 89 B.U. L. Rev. 939, 943–51 (2009).

413. See Melville B. Nimmer, Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment § 4.06 (student ed. 1984) (giving examples).

414. Alex Chemerinsky, Tears of Scrutiny, 57 Tulsa L. Rev. 341, 393 (2022).

415. See Cass R. Sunstein, Problems With Rules, 83 Calif. L. Rev. 953, 987–88 (1995).

416. See United States v. Stevens, 559 U.S. 460, 470 (2010) (rejecting the use of a balancing test for free speech coverage as "startling and dangerous" and endorsing a historical inquiry instead).

417. See, e.g., Holder v. Humanitarian L. Project, 561 U.S. 1, 39 (2010).

418. See S. Girgis, Age of Ironies, supra note 370, at 15–16 (showing that a recent Roberts Court case would have had no way to assess the constitutionality of trademark restrictions without relying on a precedent resting on freeform balancing and that demanding a Founding-era analogue would have required it to declare all trademark law unconstitutional).

Take *NIFLA v. Becerra*, which held that forcing "crisis pregnancy centers" to tell clients about low-cost abortions would unconstitutionally compel speech.[419] Dissenting, Justice Breyer argued that if forcing professionals to speak is presumptively unconstitutional, myriad regulations would be imperiled, including "securities law or consumer protection law," medical disclosure laws, building safety codes, and food safety regulations.[420] The majority attempted to leave room for "purely factual and uncontroversial disclosures about commercial products."[421] Yet it offered no legal basis for the constitutional lines drawn by that "generally phrased disclaimer,"[422] as Justice Breyer described it. Thus, one of the Roberts Court's most categorical-sounding free speech cases made a significant ad hoc exception reflecting a partial balancing away.

The same duality—vast categorical protection with unexplained hedges—appeared in *303 Creative LLC v. Elenis*.[423] The Court affirmed a web designer's right not to create wedding websites for same-sex couples even if she made such websites for opposite-sex couples.[424] The Court ruled on rule-like grounds: the website was "pure speech," which "the First Amendment categorically prohibit[ed] government from compelling persons to engage in."[425] And the Court understood "pure speech" to include any custom-created words expressing the creator's ideas.[426] Yet this combination of breadth and absoluteness, Professor Robert Post argued, would undercut subpoenas; malpractice regulation of doctors, lawyers, and accountants; and "a raft of statutory obligations to report various events and circumstances" like workplace injuries.[427] The Court didn't explain how such regulations could survive its analysis except to quote *NIFLA*'s vague disclaimer.[428]

There's reason to think that if pressed, the Court would balance. *303 Creative* rejected the dissent's charge that it was gutting antidiscrimination law.[429] But applied by its categorical terms, a rule against compelling pure speech would seem to affect "almost every application of public

419. See 138 S. Ct. 2361, 2368 (2018).

420. See id. at 2380 (Breyer, J., dissenting).

421. See id. at 2376 (majority opinion).

422. Id. at 2381–83 (Breyer, J., dissenting).

423. 143 S. Ct. 2298 (2023).

424. See id. at 2321–22.

425. Robert Post, Public Accommodations and the First Amendment: *303 Creative* and "Pure Speech", 2023 Sup. Ct. Rev. 251, 271 (2024).

426. See id. at 264.

427. See id. at 273.

428. *303 Creative*, 143 S. Ct. at 2317–18 (allowing that "the government may sometimes 'requir[e] the dissemination of purely factual and uncontroversial information'" (alteration in original) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995))).

429. See id. at 2318 (rejecting dissent's claim that *303 Creative* would grant businesses "a 'right to refuse to serve members of a protected class'" (quoting id. at 2322 (Sotomayor, J., dissenting))).

accommodations laws."[430] In Post's example, real-estate brokers barred from selling homes only to white clients would be forced to "*speak* to Black clients in the same way."[431] So to vindicate its assurances in *303 Creative*, the Court would have to find such a claim unworthy—not harmful enough to free speech interests or too harmful to public ones. This fits an enduring pattern in which courts treat compulsions of speech as either fatal or "not implicating the right . . . at all," in both cases on "inscrutable" grounds.[432]

Unreasoned complexity is everywhere in free speech. To peek down one rabbit hole—libel law, governed by *New York Times Co. v. Sullivan*[433] and its progeny—is to glimpse a "bewildering variety of constitutional standards" drawing lines between public and private figures, public and private concerns, compensatory and punitive damages.[434] Many other areas—child sexual abuse material, invasion of privacy, symbolic speech, offensive speech—boast their own "corpus of subrules, principles, categories, qualifications, and exceptions."[435] Efforts to simplify have repeatedly "broken down," producing doctrine "rival[ing] the Internal Revenue Code in its complexity."[436] The continual spinning off of new rules for new contexts confirms this right's irreducible open-endedness and the need to balance any open-ended norm as new applications arise.

b. *Objections and Counterproposals.* — Scholars have tried to show that current doctrine isn't as broad or committed to balancing as it seems. Consider the efforts of then-Professor Elena Kagan and Professors Rick Pildes and Jed Rubenfeld.

Pildes argued[437] and Kagan elaborated[438] that free speech cases are about policing governmental motives. According to Kagan's influential argument, the case law's point is to flush out "improper governmental motives,"[439] excluding laws driven by people's wish "to suppress ideas that challenge (just because they challenge) and to privilege ideas that ratify (just because they ratify) their own belief systems."[440] This might suggest free speech is not open-ended—that it only forbids (categorically) laws with a specific motive.

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430. Post, supra note 425, at 284.

431. Id. at 284.

432. See Amar & Brownstein, supra note 384, at 6.

433. 376 U.S. 254 (1964).

434. See Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 473 & n.165 (1996).

435. Schauer, Codifying the First Amendment, supra note 96, at 308–09.

436. Vincent A. Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449, 471 (1985).

437. See Richard H. Pildes, Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law, 45 Hastings L.J. 711, 727–29 (1994) (noting that "*justifications* behind governmental actions must become paramount to judicial evaluation").

438. See Kagan, supra note 434, at 414–15.

439. See id. at 414.

440. Id. at 434.

Kagan's account explains a great deal, but it doesn't challenge the thesis that speech is irreducibly open-ended and requires balancing. First, Kagan doesn't argue that this account can explain doctrines applied "when the government performs the increasingly important functions of speaker, employer, and educator."[441] So if it would violate widespread notions of free speech to eliminate protection for public employees or public school students, Kagan's account did not show free speech to be less than open-ended. More important, her proposal could not and did not try to explain when speech is "covered" and so subject to this no-illicit-motive norm in the first place. Those coverage determinations, highlighted by Schauer[442] and discussed above,[443] involve balancing.

Finally, even for issues clearly within her sights, Kagan did not say the case law excludes only laws that *actually* owe their existence to illicit motives. She thought that would be too hard to establish; courts need proxies.[444] And—here's the key—the doctrines used as proxies for illicit motive are, Kagan admitted, rife with balancing.[445] They effectively ask if the balance of a law's cognizable harms and benefits is so unattractive that only a further, illicit motive could explain the law's adoption. So even if the case law's *purpose* is just motive-policing, Kagan conceded that it necessarily *operates* by means of balancing. Fully spelled out, the doctrine asks whether speech deemed valuable enough to warrant coverage has been restricted for marginal benefits deemed great enough (and at marginal costs deemed light enough) that lawmakers should not be suspected of having the wrong motives.

Consider, finally, Rubenfeld's paradigm-case method.[446] Rubenfeld argued that constitutional framers intend for a norm to have certain concrete applications. Courts should honor those but also apply the norm to analogous situations. If free speech law has this structure,[447] can it stick to the close analogical reasoning *Bruen* allowed?

No. Rubenfeld's free speech account requires more freewheeling use of moral principles. He identified two paradigm applications: forbidding prior restraints[448] and (soon after ratification) protecting the criticism of government that was targeted by the Alien and Sedition Acts.[449] To get from these two discrete applications to today's wildly varied protections,

441. See id. at 432.

442. See Schauer, Speech and "Speech", supra note 26, at 95 n.33 (defining free speech "coverage" as the scope of speech upon which burdens will trigger heightened scrutiny in the first place, and distinguishing it from free speech "protection," or cases in which the court applying heightened scrutiny will rule for the free speech claimant).

443. See supra note 278 and accompanying text.

444. See Kagan, supra note 438, at 434.

445. See id. at 442–43, 453–54.

446. See Rubenfeld, Revolution, supra note 191, at 15–18.

447. Id. at 21–29.

448. See id. at 21.

449. See id. at 23.

Rubenfeld dialed up the level of generality. He inferred a vast anticensorship principle.[450] That principle sweeps in the polar opposite direction of prior restraints—not just executive action to stop ideas from going to press but legislation to punish speech afterward.[451] It protects not just criticisms of officials, or speech about the government, or about matters of public interest, or all public discourse, but every expression of opinion on empirical or theoretical matters and the nonpropositional expression in abstract art and video games and other entertainment.[452] Yet the norm somehow also lets government control speech involving "facts" rather than opinions, and presumably in tax and securities filings, subpoenas, and the like.[453]

Whatever might be said of the move from two discrete points to a far-reaching anticensorship norm applying only when it wouldn't do too much harm, it cannot be said to involve the close, incompletely theorized, low-level-of-generality reasoning that *Bruen* insisted on.[454] Indeed, Rubenfeld conceded that implementing his proposed principle would require continual balancing[455] that sounds in "policy[] and justice" and reflects "ineluctably normative, even ideological judgment."[456]

IV. WAYS OUT: BALANCING BY THE PEOPLE

To avoid all judicial balancing, one would have to make liberties more definite or take judges entirely out of their enforcement. Neither is realistic. But it is possible to make judicial enforcement more answerable to political actors, as favored by critics.[457] Though this Part can't provide a complete account of how, none is necessary. Each proposal below draws on other work, which this Part puts in conversation with this Article's core inevitability claim. If balancing is inevitable but judicial balancing is problematic, the schemes discussed here are partial solutions. This Part

450. See id. at 25.

451. Id.

452. Id. at 21; see also Jed Rubenfeld, The First Amendment's Purpose, 53 Stan. L. Rev. 767, 788, 818–19 (2001) [hereinafter Rubenfeld, The First Amendment's Purpose].

453. See Rubenfeld, The First Amendment's Purpose, supra note 452, at 820; see also id. at 819 (explaining it is "tolerable for state actors to declare the truth about how many miles a certain car has been driven, but not how many gods there are" because "an injunction against false statements of fact is" something that "no legal system—indeed no communicative system—can do without").

454. See supra notes 141–146 and accompanying text.

455. See Rubenfeld, The First Amendment's Purpose, supra note 452, at 786.

456. See Rubenfeld, Revolution, supra note 191, at 16.

457. For a general exploration of legislative specification of rights, see generally Grégoire Webber, Paul Yowell, Richard Elkins, Maris Köpcke, Bradley W. Miller & Francisco J. Urbina, Legislated Rights: Securing Human Rights Through Legislation (2018). On the benefits of legislative rights-balancing, see William N. Eskridge & Christopher R. Riano, Marriage Equality: From Outlaws to In-Laws 688–702 (2020).

canvasses each one's strengths and weaknesses after first discussing what *won't* work.

A. *False Starts*

It seems unrealistic to remake general liberties as less than open-ended. The Court tried and failed to do so with free exercise.[458] Since then, it has shown interest only in expanding protection.[459] For free speech, too, the trajectory has been relentlessly expansionist,[460] and two conservatives at the Court's center have ruled out any overhaul to avoid balancing.[461]

A revamping might seem more feasible for gun rights because that doctrine is "younger than the first iPhone"[462] and in flux.[463] The revision most consonant with *Bruen*'s spirit would say that Second Amendment cases should be resolved through analogical reasoning, but of a more justified sort than *Bruen*'s. Recall that *Bruen* requires the government to establish an analogy between the challenged law and historically prevalent ones.[464] But past generations' failures to adopt a regulation don't prove that they would've thought it unlawful. So a revised test might flip the presumption and require a closely analogous *rights claim* with deep historical roots.

But that is unlikely to happen in the foreseeable future. First, eliminating the open-endedness of Second Amendment rights but not others would be seen as making gun rights "second-class," which some

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458. See supra section III.B.1.a.

459. See Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring, joined by Kavanaugh, J.) (finding "textual and structural arguments against *Smith* are more compelling"); id. at 1883 (Alito, J., concurring in the judgment, joined by Thomas & Gorsuch, JJ.) (calling for *Smith* to be overruled).

460. See Han, supra note 399, at 861 (describing "a story of steady and rapid expansion"); see also Leslie Kendrick, First Amendment Expansionism, 56 Wm. & Mary L. Rev. 1199, 1212–19 (2015).

461. See Vidal v. Elster, 144 S. Ct. 1507, 1524–25 (2024) (Barrett, J., concurring in part) (favoring the adoption of broad principles, rather than historical tests, to implement free speech rights); see also United States v. Rahimi, 144 S. Ct. 1889, 1921 (2024) (Kavanaugh, J., concurring) ("To be clear, I am not suggesting that the Court overrule cases where the Court has applied those heightened-scrutiny tests. . . . [But] I am arguing against extending those tests to new areas . . . ."); Amy Coney Barrett, A Conversation With Justice Amy Coney Barrett Transcript, Ctr. for the Const. & the Cath. Intell. Tradition (Feb. 15, 2024), https://cit.catholic.edu/a-conversation-with-justice-amy-coney-barrett-transcript/ [https://perma.cc/P9Z4-BZRD] ("[T]he world as we find it is full of these tests, is full of the [tiers] of scrutiny. . . . [I]n the First Amendment area, I don't think the answer is to say, 'We're going to strip all this down.'").

462. Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017) (citing District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).

463. See United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023) ("Considering the issue afresh, we conclude that *Bruen* requires us to re-evaluate our Second Amendment Jurisprudence . . . . "), rev'd and remanded by 144 S. Ct. 1889 (2024); see also supra section III.B.2.a (describing *Rahimi*'s apparent revision of *Bruen*).

464. See supra section III.B.2.a.

Justices denounced earlier courts for doing.[465] Second, to limit gun claims to close analogues of protections recognized at ratification, the latter would need to be numerous enough to avoid shrinking the right into oblivion. But they'd also need to be concrete enough to allow for close analogical reasoning rather than a return to broad principles and balancing. And the most sophisticated effort to explain how that might go, by Professor Darrell Miller, shows that the ratification-era analogues are not numerous and determinate enough.[466] So Second Amendment rights, too, are likely to stay open-ended.

Thus, one might wonder if the only way to avoid having judges balance liberties is to stop them from enforcing liberties at all. Yet it's too late for that. For eighty years, the United States' legal culture has taken it for granted that, as Justice Robert Jackson put it in an iconic First Amendment case, "The very purpose of a Bill of Rights was to *withdraw* certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials[,] and to establish them as legal principles *to be applied by the courts*."[467] It is a commonplace that unelected judges need to enforce these liberties' protections for minorities and dissidents.[468]

But hybrid approaches—sharing power between courts and legislatures—may be available.

B. *Shifting Power to States*

The Court often uses history and tradition to gloss liberties.[469] *Bruen* made regulatory traditions central to Second Amendment cases, as had

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465. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022) ("The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" (quoting McDonald v. City of Chicago, 561 U.S. 742, 780 (2010))).

466. See Miller, supra note 146, 918–25 (noting that the level of generality at which analogues are described is crucial). After finding specific historical support for a few modest protections, as against laws "destroying" the right, id. at 925, especially at home, id. at 920, Miller floats as alternatives some highly general moral standards that would reintroduce balancing—including a right to carry "anywhere one has a reasonable apprehension of violence," id. at 921. While Miller also identifies intermediate options—for example, allowing carrying "in any circumstance in which one is threatened with imminent injury or death"—he admits none has unique support in the sources. Id. at 920. And the last position Miller considers, requiring a showing of imminent harm, would be too restrictive for *Bruen*, which rejected a law requiring a special need for self-defense.

467. See West Virginia. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added).

468. Greene, How Rights Went Wrong, supra note 30, at 9 (describing widespread view that "it is the peculiar province of a judge to uphold the constitutional rights of minorities, dissenters, and the oppressed against the majoritarian preferences of the legislature or the executive").

469. Professor Marc DeGirolami has written extensively on this. See, e.g., Marc O. DeGirolami, Traditionalism Rising, 24 J. Contemp. Legal Issues 9, 9–21 (2023) (documenting recent uses of traditionalist interpretation).

Heller, in blessing certain regulations as longstanding.[470] A recent free speech case held that local school board members could be sanctioned for certain speech partly because of a long history of such sanctions.[471] Earlier cases have held that the First Amendment protects public university professors' academic freedom because it had long been protected by states.[472] Others held that a public setting was not a "public forum" subject to stringent speech protections because states had not traditionally allowed speech there.[473] Some have proposed taking a similar approach to free exercise.[474]

Traditionalist cases effectively outsource judgments about general liberties' scope from federal courts to states by holding each state to the majority practices of the states generally. The rationale may be that longstanding state practice makes an activity protected under the federal Constitution, so that outlier states that keep regulating it are violating a new strain of a federal right.[475] Or perhaps state practice is evidence of a right's contours.[476] Either way, states can do the needed rights-balancing, as someone must, but not courts, as *Bruen* preferred.[477] Having judges look to state practices may also better fit the originalist expectation that the rights' judicially enforceable elements would reflect political settlements.[478]

Still, this approach has its limits. If a regulation became popular enough to spread to most states, it couldn't be held invalid. Yet some laws that might be popular with lawmakers should fall—like bans on speech that criticizes incumbents. Relatedly, if courts take their cues from the majoritarian practices of a majority of states, minorities might be overlooked. If only a small minority uses peyote religiously, states will rarely exempt it from drug laws.[479] And this method of legal change is slow. It

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470. See supra note 337 and accompanying text.

471. See Hous. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1259 (2022).

472. See Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (citing the nation's tradition of "safeguarding academic freedom" as grounds to deem this "freedom . . . a special concern of the First Amendment"); see also Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion) ("The essentiality of freedom in the community of American universities is almost self-evident.").

473. See Burson v. Freeman, 504 U.S. 191, 215 (1992) (Scalia, J., concurring in the judgment).

474. See William J. Haun, Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition, 46 Harv. J.L. & Pub. Pol'y 419, 444–50 (2023) (urging the use of historical analogues to elaborate the scope of free exercise rights).

475. See Sherif Girgis, Living Traditionalism, 98 N.Y.U. L. Rev. 1477, 1512–13 (2023) [hereinafter S. Girgis, Living Traditionalism] (explaining this rationale for traditionalist adjudication of rights claims).

476. See id. at 1519.

477. Cf. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (arguing that evolving historical traditions capture "the balance struck by this country").

478. See supra section III.A.

479. Cf. Emp. Div. v. Smith, 494 U.S. 872, 889 n.5 (1990) (condemning such balancing when undertaken by judges).

may take decades for majorities within a majority of states to change laws for long enough to move court doctrines. Meanwhile, minorities suffer without judicial relief.

Finally, traditionalist judicial interpretation might allow balancing by political actors only up to an arbitrary point.[480] If states reject a certain regulation as too unimportant to justify a burden on speech, and courts endorse this judgment, but later social changes increase the need for that law, states will be stuck. The first to try to revive the law would see it struck down under precedent. So once a traditionalist precedent is in place, it may be hard to ensure that the doctrine on that issue *remains* responsive to the popular will, thus undercutting traditionalism's purpose.[481] As a way of having the people do the balancing, traditionalism might undermine itself over time.

C. *Shifting Power to Congress*

A better approach might combine judicial enforcement with political checks. To protect minorities, courts could keep enforcing general liberties. But they could enforce them as a matter of *statutory* law so that their balancing could be more easily changed by the people. And to subject all the states at once to these protections and make them revisable directly rather than through slow evolution across many states, the statutes could be adopted by Congress under Section Five of the Fourteenth Amendment.[482] In short, courts could give Congress leeway to enforce each liberty's substance through statutes and apply those while underenforcing the related constitutional texts in the spirit of the Last Resort Rule, which urges courts to prefer nonconstitutional grounds of decision whenever possible.[483] (But to ensure continuity of vigorous enforcement, courts should underenforce these rights *only* when Congress has offered statutory protection.)

Underenforcement is nothing new. As Professor Lawrence Sager has shown, the Court sometimes underenforces a constitutional norm on the ground that courts lack competence to administer it fully.[484] This occurs in equal protection and political question doctrine cases. In a similar vein, *Bruen*'s concern that balancing is beyond courts' competence, plus the inevitability of balancing for general liberties, could lead the Court to underenforce those rights constitutionally. The Court could enforce

480. See S. Girgis, Living Traditionalism, supra note 475, at 1520–23, 1529–54.

481. See id. at 1539–54.

482. See U.S. Const. amend. XIV, § 5.

483. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (urging that courts "not 'formulate a rule of constitutional law'" if there are other grounds for decision (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885))).

484. For discussion of the institutional concerns driving underenforcement, see generally Lawrence G. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978).

whatever components of a liberty can be applied with only modest balancing[485] while letting Congress protect it more widely.

Congress attempted just that after *Employment Division v. Smith*, which eliminated free exercise protections from incidental burdens.[486] As noted, Congress passed RFRA to apply the pre-*Smith* standard to federal and state actors.[487] Professor Eugene Volokh touted this approach.[488] Because RFRA was framed in general terms, it gave judges leeway to consider the needs of minorities or other parties whom lawmakers might have overlooked. (Indeed, a disproportionate number of religious liberty claimants have been religious minorities.[489]) But since RFRA was statutory, Congress retained an override if it became unhappy with courts' handling of some issue.[490] Still, overriding exemptions by statutory amendment would require concentrated political will—another insulation for minorities, especially if the Equal Protection Clause would bar responses clearly reflecting animus.

This approach—extended to other liberties, like speech—could give minorities the benefits of judicial implementation while giving lawmakers final say on policy balancing. It would also keep faith with original understandings if Campbell and Greene are right.[491] Under free exercise, Campbell wrote, judges would enforce the norm against laws based on religious hostility but otherwise give lawmakers the lead in balancing liberties against public interests.[492] Judges could do the same now, and not just for free exercise.

One might object that a different approach would be needed when it comes to defining liberties' scope against Congress itself. But while it may

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485. While some aspects of each liberty will always require balancing, some are categorical (like the free exercise ministerial exception). See supra notes 147–151 and accompanying text.

486. See 494 U.S. 872, 882 (1990).

487. See City of Boerne v. Flores, 521 U.S. 507, 515 (explaining Congress's goals in passing RFRA).

488. See Eugene Volokh, A Common-Law Model for Religious Exemptions, 46 UCLA L. Rev. 1465, 1469–70 (1999) (noting that this approach "let[s] courts decide in the first instance whether an exemption is to be granted" while also ensuring that "courts' decisions aren't final").

489. See Luke W. Goodrich & Rachel N. Busick, Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases, 48 Seton Hall L. Rev. 353, 369–77 (2018) (finding that many religious minorities are "represented in a disproportionately high share of religious liberty decisions" in the Tenth Circuit).

490. Some have criticized RFRA as potentially protecting unjust discrimination. See, e.g., Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 Yale L.J. 2516, 2574–78 (2015) (arguing that religious refusals can cause dignitary harm). Those contested applications, whatever their merits, are not essential to this proposal. One could reject them and still embrace the proposal wholesale. Indeed, part of the proposal's value is to make unjust applications of the right revisable by political action.

491. See supra section III.A.

492. See supra note 270 and accompanying text.

seem optimistic to expect Congress to tie its own hands—and no Congress can formally bind the next—this concern should not be exaggerated. RFRA applied the same free exercise standard to the states, federal regulations, and federal statutes except when the latter expressly exempted themselves.[493] There would likely be political pressure to treat federal and state governments similarly, due to the unthinkability[494] of a bifurcated approach. Still, this uneasy application to Congress is one disadvantage relative to the states-first approach above.

City of Boerne v. Flores[495] might seem an obstacle to applying a RFRA-like statute to the states. *Boerne* held that RFRA's application to the states overstepped Congress's Section Five powers, which let Congress prevent or remedy constitutional rights violations *only as those rights are understood by the Court*.[496] Under *Boerne*, Congress may not take a broader view of liberties than the Court's,[497] as RFRA had done by assuming, contra *Smith*, that free exercise bars some incidental burdens on religion.[498]

But conflict with the Court on a right's presumptive scope is not essential to this proposal. When Congress and the Court agree on a right's presumptive reach, *Boerne* needn't be read to bar Congress from tinkering with the balancing done in courts' retail implementation of it. On the contrary, *Boerne* said statutes need only bear "congruence and proportionality"[499] to preventing or curing rights-violations. So Congress may ban conduct that "is not itself unconstitutional"[500] and "must have wide latitude in determining"[501] the line between permissible prophylactic measures under Section Five and improper ones "that make a substantive change in the governing law."[502] Since *Boerne* allows Congress to be somewhat over- and under-inclusive in enforcing liberties by statute, it might let Congress revise the balancing done by judges applying such statutes.[503]

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493. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 6(a), 107 Stat. 1488, 1489 (codified as amended at 42 U.S.C. § 2000bb–3(a)).

494. Cf. Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

495. 521 U.S. 507 (1997).

496. See id. at 536 (declaring that when Congress "act[s] against the background of a judicial interpretation of the Constitution already issued, . . . in later cases and controversies the Court will treat its precedents with the respect due them under settled principles").

497. See id. ("[T]he courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution.").

498. See id. at 515 (explaining Congress's motivations).

499. Id. at 508.

500. Id. at 518.

501. Id. at 508.

502. Id. at 519–20.

503. This proposal requires Congress to act first by passing RFRA-like statutes for other liberties. Could the Court instead make the first move toward sharing power? Professor Henry Monaghan proposed that when the Court went beyond identifying a right's substance and engaged in policy reasoning to fashion implementing rules, it should declare its policy

If there remains tension with *Boerne*, trimming it might be warranted based on original meaning or prior precedent. As Professors Robert Post and Reva Siegel showed at the time, *Boerne* departed from decades of precedent more favorable to Congress's Section Five power,[504] which had fostered a "dialogue between the Court's legal interpretation of the Constitution and the constitutional ideals democratically embraced by the nation."[505] *Boerne* has also been criticized by originalists like Professor Michael McConnell.[506] And Professors Jud Campbell, William Baude, and Stephen Sachs have uncovered evidence that some members of Congress at ratification expected that laws passed under Section Five, "reflecting Congress's constitutional interpretation[,] would receive significant deference from the courts."[507] That is all this proposal would ask.

CONCLUSION

The anti-balancing campaign is misconceived. It treats as finished at the Founding what must remain unfinished: liberties flexible enough to curb indefinitely many unforeseen laws. Unfinished rights collide over time with new public interests or rights, some pressing—so limits are imposed ex post. If courts are the main enforcers, those limits will come from courts, and any effort to eliminate judicial balancing will backfire.[508] The Court must think bigger—or more modestly. To defer to balances struck by the people when the people who adopted these rights didn't settle their scope, the people's representatives over time should play some role.

The unfinished-rights account carries other lessons about constitutional reasoning and rights. First, until there is a shift toward more popular enforcement, the inevitability of *judicial* balancing will undercut one argument for originalism in these rights cases: that it shrinks judges' discretion in matters of high politics. In fields in which no approach can serve that instrumental function, originalism has to stand on more

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premises subconstitutional and open to congressional revision. See Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 31 (1975). But it's unlikely that today's Court, averse to balancing and criticized for playing politics, would avow that some of its decisions rest on policy conclusions not dictated by the Constitution.

504. See Robert C. Post & Reva B. Siegel, Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power, 78 Ind. L.J. 1, 30–45 (2003) (reviewing decades of precedent).

505. Id. at 3.

506. See Michael W. McConnell, Institution and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 174–81 (1997) (critiquing *Boerne* from an originalist perspective).

507. See William Baude, Jud Campbell & Stephen E. Sachs, General Law and the Fourteenth Amendment, 76 Stan. L. Rev. 1185, 1246 (2024).

508. See supra section III.B.

formalist arguments or none.[509] To be sure, the fact that balancing and evolution are inevitable under the First and Second Amendments would not mean that originalism falls silent there. But it would suggest something suggested by Campbell's work on those texts' original understanding: that cases applying them are ones in which originalism and living constitutionalism, though they differ in theoretical foundations, converge in their practical implementation.[510]

Second, this Article's account saps force from one of the most common and potent critiques of major rights cases: that they drew novel, ahistorical constitutional lines. For one target, take *New York Times Co. v. Sullivan*[511] which, as noted, declared it contrary to free speech to allow libel suits against public (but not private) figures unless the defendants acted with knowledge or recklessness (but not negligence).[512] Against this oddly specific rule, Justice Thomas recently lodged a familiar battery of charges[513]: *Sullivan* didn't apply "the First Amendment as it was understood by the people who ratified it" but "fashioned its own" rules "by balancing the 'competing values at stake,'" making it a "policy-driven decision[] masquerading as constitutional law."[514] *Sullivan* did draw policy lines. But if our system resists all efforts to erase those from general-liberties law, that objection cannot be fatal.

Finally, the "unfinished" idea sheds light on design choices, doctrinal development, and critique elsewhere. General liberties are unusual but not unique. With other unfinished norms, too, the magma of political-moral reasoning will keep breaking through the rock of legal formalism. Balancing not admitted will happen, only less transparently. And deference to political settlements will offer one way out of the morass.

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509. Cf. J. Joel Alicea, *Dobbs* and the Fate of the Conservative Legal Movement, City J., Winter 2022, https://www.city-journal.org/article/dobbs-and-the-fate-of-the-conservative-legal-movement [https://perma.cc/K7AQ-7ST2] (distinguishing originalism advocates "who saw [it] as a means to achieving some other substantive end" like judicial restraint and those who thought it "logically entailed by the Constitution and the principles on which it rested"); cf. also S. Girgis, Age of Ironies, supra note 370, at 12–13 (comparing Justices Kavanaugh's and Barrett's more instrumental and more formalist arguments for originalism, respectively).

510. Cf. S. Girgis, Age of Ironies, supra note 370, at 18 (arguing that Justice Barrett's theoretically purer originalism leads to an application of the Free Speech Clause that looks similar to that recommended by nonoriginalist scholars like Ronald Dworkin and David Strauss).

511. 376 U.S. 254 (1964).

512. See id. at 279–80.

513. See McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari) (critiquing *Sullivan*, 376 U.S. 254).

514. Id. (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974)).

NOTES

COORDINATION RIGHTS AFTER BANK FAILURE

*Daniel Hawley**

In spring 2023, the Federal Deposit Insurance Corporation (FDIC) resolved three of the four largest bank failures in U.S. history. When the FDIC resolves failed banks, this Note argues, it (unselfconsciously) allocates coordination rights—that is, the right to legally permitted economic coordination. Specifically, by reflexively merging failed banks into larger banks, the FDIC adopts antitrust law's preference for hierarchical firm-based coordination. Recent scholarship challenges that pattern in antitrust law. In banking, it is especially problematic. Yet even according to antitrust and bank resolution orthodoxy, the FDIC's allocation of coordination rights is incoherent as such. This Note proposes instead that the FDIC self-consciously disperse coordination rights after banks fail. The Agency can do so without new law, turning failed banks into quasi-worker cooperatives.

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INTRODUCTION

Spring 2023 saw the second, third, and fourth largest bank failures in U.S. history. Within six weeks of the first failure, First Republic Bank ($229 billion in assets), Silicon Valley Bank (SVB) ($209 billion), and Signature Bank ($110 billion) were each sold to other banks.[1] Academic and popular commentary on the 2023 banking crisis has covered its

1. Bank Failures: 2023 in Brief, FDIC, https://www.fdic.gov/resources/resolutions/bank-failures/in-brief/2023 [https://perma.cc/MKF4-DYZD] (last visited Jan. 14, 2025).

regulatory background,[2] supervisory shortfalls,[3] deposit insurance coverage,[4] cryptocurrency entanglement,[5] lender of last resort activity,[6] and more.[7] The Federal Deposit Insurance Corporation (FDIC) responded with a report on deposit insurance reform and an amendment to its 2012 resolution plan rule.[8] The suite of banking agencies proposed

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2. See Christine Desan, Lev Menand, Raúl Carrillo, Rohan Grey, Dan Rohde & Hilary J. Allen, Six Reactions to the Silicon Valley Bank Debacle, LPE Blog (Mar. 23, 2023), https://lpeproject.org/blog/six-reactions-to-the-silicon-valley-bank-debacle/ [https://perma.cc/FDR7-F7FY] (noting shortcomings in bank supervision, regulation, deposit insurance, technology, and more).

3. See A Failure of Supervision: Bank Failures and the San Francisco Federal Reserve: Hearing Before the Subcomm. on Health Care & Fin. Servs. of the H. Oversight Comm., 118th Cong. 9 (2023) (statement of Kathryn Judge, Harvey J. Goldschmid Professor of Law, Columbia Law School), https://www.congress.gov/118/chrg/CHRG-118hhrg52572/CHRG-118hhrg52572.pdf [https://perma.cc/7LPK-383J] ("Shortcomings in bank supervision . . . played a meaningful role contributing to the recent bank failures."); Jeanna Smialek & Emily Flitter, Federal Reserve and Lawmakers Eye Bank Rules After Collapse, N.Y. Times (Mar. 15, 2023), https://www.nytimes.com/2023/03/15/business/economy/silicon-valley-bank-federal-reserve-regulation.html (on file with the *Columbia Law Review*) ("The Federal Reserve is facing criticism over Silicon Valley Bank's collapse, with lawmakers and financial regulation experts asking why the regulator failed to catch and stop seemingly obvious risks.").

4. Compare Michael Ohlrogge, Why Have Uninsured Depositors Become De Facto Insured?, 100 N.Y.U. L. Rev. (forthcoming 2025) (manuscript at 43), https://ssrn.com/abstract=4624095 [https://perma.cc/6L43-GMFK] ("FDIC mission creep is the best available explanation for the recent rise in FDIC resolution costs and in uninsured depositor rescues."), with Lev Menand & Morgan Ricks, Scrap the Bank Deposit Insurance Limit, Wash. Post (Mar. 15, 2023), https://www.washingtonpost.com/opinions/2023/03/15/silicon-valley-bank-deposit-bailout/ (on file with the *Columbia Law Review*) [hereinafter, Menand & Ricks, Deposit Insurance] ("Large depositors are both bad at monitoring banks and perfectly capable of engaging in destabilizing runs.").

5. See Amy Castor & David Gerard, Crypto Collapse: Silvergate Implosion Continues, Signature Bank, Tether Lied to Banks, Voyager, Celsius, Amy Castor: Blog (Mar. 4, 2023), https://amycastor.com/2023/03/04/crypto-collapse-silvergate-implosion-continues-signature-bank-tether-lied-to-banks-voyager-celsius/ [https://perma.cc/A3TC-AWE3] ("There were two banks critical to US crypto. Silvergate on the West Coast and Signature Bank in New York.").

6. See Hal S. Scott & Connor R. Kortje, Lender of Last Resort: The 2023 Banking Crisis and COVID, at 9 (Sept. 8, 2023) (unpublished manuscript), https://ssrn.com/abstract=4566160 [https://perma.cc/XB2X-DTH4] ("[O]perational and procedural shortcomings, as well as an ostensible assessment by the Fed that SVB's assets were insufficient to collateralize a loan of sufficient size to stem the run, prevented the FHLB and Fed from acting as effective lenders of last resort.").

7. See Nathan Tankus, Every Complex Banking Issue All at Once: The Failure of Silicon Valley Bank in One Brief Summary and Five Quick Implications, Notes on the Crises (Mar. 14, 2023), https://www.crisesnotes.com/every-complex-banking-issue-all-at-once-the-failure-of-silicon-valley-bank-in-one-brief-summary-and-five-quick-implications/ [https://perma.cc/8M5L-URT5] (covering the Federal Reserve's collateral schedule, Bank Term Funding Program, and 13(3) emergency lending authority; the least cost test and systemic risk exception; tying arrangements and their banking law exceptions; and more).

8. 12 C.F.R. § 360.10 (2024); FDIC, Options for Deposit Insurance Reform (2023), https://fdic.gov/system/files/2024-07/options-deposit-insurance-reform-full.pdf [https://perma.cc/WNH7-JHY5]; see infra note 287 and accompanying text.

new long-term debt requirements.[9] But there is a problem yet to be examined: Bank resolution law allocates coordination rights—the right to legally permitted economic coordination[10]—and it does so on an incoherent basis.

Coordination rights are primarily allocated by antitrust law.[11] Antitrust favors vertical coordination of economic activity with concentrated control (e.g., within hierarchical firms) rather than horizontal coordination of economic activity between firms or individuals (e.g., cartels or cooperatives).[12] For example, rideshare drivers who collectively set prices for their services may be illegally conspiring under antitrust law, but it is presumptively legal for Uber or Lyft to set prices for those same rideshare services.[13] Orthodox accounts justify this pattern by appealing to competition, consumer welfare, and efficiency.[14]

Meanwhile, when commercial enterprises suffer financial distress, they often enter federal bankruptcy.[15] Bankruptcy triggers an automatic stay, shielding enterprise assets from creditors.[16] This process favors vertical coordination to some extent: Firms are reorganized, not liquidated (i.e., sold off in pieces to other firms), if they have value as a going concern, and reorganized firms retain decisionmaking hierarchy.[17]

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9. Long-Term Debt Requirements for Large Bank Holding Companies, Certain Intermediate Holding Companies of Foreign Banking Organization, and Large Insured Depository Institutions, 88 Fed. Reg. 64,524 (proposed Sept. 19, 2023) (to be codified at 12 C.F.R. pts. 3, 54, 216–17, 238, 252, 324, 374).

10. See Sanjukta Paul, Antitrust as Allocator of Coordination Rights, 67 UCLA L. Rev. 378, 380 (2020) [hereinafter Paul, Allocator]; Sanjukta Paul & Nathan Tankus, The Firm Exemption and the Hierarchy of Finance in the Gig Economy, 16 U. St. Thomas L.J. 44, 45 (2019). In other words, coordination rights are the set of legal permissions and restrictions governing how people work together to provide goods and services.

11. See Paul, Allocator, supra note 10, at 380.

12. See id. at 383, 424–25; Paul & Tankus, supra note 10, at 44.

13. See Paul & Tankus, supra note 10, at 46–47; see also 15 U.S.C. § 1 (2018) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); Marshall Steinbaum, Uber's Antitrust Problem, Am. Prospect (May 11, 2016), https://prospect.org/labor/uber-s-antitrust-problem/ [https://perma.cc/7Q2X-NML9] (discussing a challenge to this pattern in a lawsuit filed by Uber drivers, which was subsequently moved to arbitration by Uber without a decision on the merits); infra note 27.

14. See infra section I.A.1.

15. See generally Chapter 11—Bankruptcy Basics, U.S. Cts., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics [https://perma.cc/R5BE-GZPZ] (last visited Oct. 15, 2024) (describing the "reorganization" bankruptcy process from start to finish).

16. See 11 U.S.C. § 362 (2018).

17. See, e.g., Richard M. Hynes & Steven D. Walt, Why Banks Are Not Allowed in Bankruptcy, 67 Wash. & Lee L. Rev. 985, 1037 (2010) ("[A] traditional Chapter 11 reorganization can resolve a failed firm without an actual sale of its assets.").

But banks do not enter bankruptcy.[18] When a bank fails, it triggers a legal process known as resolution.[19] Resolution is governed by the Federal Deposit Insurance Act (FDIA).[20] Although the FDIA does not expressly address how coordination rights should be allocated, in practice, the FDIC prefers to use a resolution method that transfers as much as possible of a failed bank's balance sheet to another bank, increasing the concentration of coordination rights compared to the status quo ante.

This Note makes two claims. First, bank resolution allocates coordination rights. It decides which parts of the failed bank's balance sheet it will transfer, to whom it will be transferred, and thus how the post-resolution balance sheet and bank charter will be controlled. The FDIC's preference for merging a failed bank into another bank privileges hierarchical firm-based coordination for banks, just like antitrust does for nonbank firms. But resolution's allocation of coordination rights need not follow antitrust's default allocation. Instead, failed banks could be reconstituted with different firm boundaries or more horizontal intrafirm relations. In other words, a failed bank could be broken up or reorganized as a quasi-worker cooperative—both outcomes that would disperse coordination rights.

Second, resolution's reflexive concentration of coordination rights is unsupported. While it mirrors antitrust's allocation, it is not justified by antitrust's orthodox criteria: competition, consumer welfare, and productive efficiency. Nor is it justified by the rationales underlying banking law, or even by those internal to resolution law. In fact, all these criteria clash with the FDIC's resolution-by-merger preference.[21] This reveals that, without good reason, the Agency defers to antitrust's favor for hierarchical firms.

This Note argues the FDIC can solve this problem by reallocating coordination rights after banks fail. One option is to disperse interfirm coordination rights. The FDIC could draw firm boundaries such that resolution no longer results in one bank where previously there were two. Another option is to disperse intrafirm coordination rights. A new resolution method outlined herein—the intrafirm reallocation transaction (IRT)—could do both, breaking up banks and flattening intrafirm hierarchy as desired. Doing so would better fulfill the criteria of antitrust, banking, and resolution law.

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18. See id. at 993–94 (contrasting bankruptcy with bank resolution).

19. See, e.g., FDIC, Resolutions Handbook 5 (2019), https://www.lb7.uscourts.gov/documents/18c8697.pdf [https://perma.cc/PG9V-9DKA] ("Resolution activities begin when an institution's primary regulator notifies the FDIC of the potential failure.").

20. Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, §§ 11, 13, 64 Stat. 873, 884–89 (codified at 12 U.S.C. §§ 1811–1835a (2018)). Note that the FDIC itself was created by an earlier statute, the Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (codified as scattered sections of 12 U.S.C.).

21. See infra Part II.

This Note proceeds as follows. Part I explains what coordination rights are, how they are allocated, and why. It also describes the basic structure and aims of banking law and bank resolution. Part II searches for, but struggles to find, justification for the FDIC's approach to allocating coordination rights in bank resolution. Part III explores alternatives. It shows how the banking agencies could use tools already at their disposal to disperse coordination rights and bring coherence to resolution law. It proposes a new resolution method, IRT, which it argues would best align the practice of bank resolution with the goals of antitrust and banking.

I. COORDINATION RIGHTS, BANKING, AND BANK RESOLUTION

After a bank fails, the FDIC reconstitutes the bank as a going concern.[22] In doing so, it redraws firm boundaries and (unselfconsciously) allocates coordination rights.[23] The primary allocator and ultimate arbiter of coordination rights is antitrust law. Understanding how and why antitrust allocates coordination rights is crucial for understanding the patterns of coordination that emerge from the FDIC's resolution process, resolution law's specific allocative role, and whether its allocation is justified.

A. *Antitrust Law and Coordination Rights*

Coordination rights refer to the set of legal permissions and restrictions governing economic coordination.[24] Antitrust law at once allocates coordination rights and serves as an "appellate body" for the set of coordination rights that emerge from all other areas of law.[25] In other words, it "makes private decisions to engage in economic coordination subject to public approval."[26] Property law, for example, may give an actor the right to use, exclude others from, and transfer an asset, such as a machine. And contract and employment law may grant that actor the ability to hire an employee. Putting these privileges together, the actor can hire someone to use the machine to produce a good, and thereby begin to coordinate social provisioning. But property, contract, and employment privileges are insufficient for legally permitted coordination. That is

22. See infra section I.C.

23. See infra section II.A.

24. See generally Paul & Tankus, supra note 10, at 45 (describing allocating coordination rights as deciding "who gets to engage in economic coordination, and who doesn't" and listing examples of economic coordination such as joint bargaining, production, market allocation, resource allocation, and price setting).

25. Nathan Tankus & Luke Herrine, Competition Law as Collective Bargaining Law, *in* The Cambridge Handbook of Labor in Competition Law 72, 78–79 (Sanjukta Paul, Shae McCrystal & Ewan McGaughey eds., 2022).

26. Paul, Allocator, supra note 10, at 382. "Because private actors cannot contract among each other to generate [coordination] rights, the rights are a dispensation from the public." Id. at 400.

because antitrust law stands ready to veto coordination it disfavors. So which types of coordination are favored, which types are disfavored, and why?

1. *The Firm Exemption.* — Whether two actors can coordinate to produce and sell goods and services depends on the coordination rights allocated to their relationship.[27] If those two actors are a manager and nonmanagement employee in a firm, then their coordination (e.g., setting prices for their joint output) is permitted. But if they do not belong to a single firm, then their coordination may be illegal. This pattern is known as the "firm exemption."[28]

The firm exemption reflects a disfavor of horizontal coordination across firm boundaries and a preference for vertical interfirm and intrafirm coordination. Because firms are internally structured by relations of command and therefore suppress business rivalry,[29] the firm exemption's breadth varies inversely with the number of firms in a given market: If fewer firms control the same resources, then those resources are governed less by business rivalry and more by intrafirm command.[30] Further, neither firm boundaries nor the firm exemption itself can be derived from corporate law, property law, or contract law.[31] Rather, it is a designation internal to antitrust law.[32] So how does antitrust conceive of the firm?

Professor Sanjukta Paul, the legal scholar who coined the term "coordination rights,"[33] finds only one noncircular explanation for antitrust's firm exemption: an ex ante commitment to "concentrated

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27. Paul uses the example of truck drivers who coordinate among themselves to set prices for their services, versus truck drivers who work for a firm that sets prices for their services: The latter is "uncontroversially permitted," yet the former is considered price-fixing. See Paul, Allocator, supra note 10, at 395.

28. Sanjukta M. Paul, Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications, 38 Berkeley J. Emp. & Lab. L. 233, 256 (2017); Paul & Tankus, supra note 10, at 45.

29. See infra notes 45, 86 and accompanying text.

30. See Sanjukta Paul, The Case for Repealing the Firm Exemption to Antitrust, *in* The Cambridge Handbook of U.S. Labor Law for the Twenty-First Century 88, 91 (Richard Bales & Charlotte Garden eds., 2019) [hereinafter Paul, Firm Exemption] ("[A]ntitrust permissiveness [with respect to both unilateral conduct and mergers] is best understood as an *expansion* of the underlying allocation of coordination rights to the business firm, rather than as just a failure to regulate.").

31. Paul, Allocator, supra note 10, at 396–400. For example, incorporating a price-fixing ring does not exempt it from antitrust liability. "[I]ndeed, if it were not true, then virtually any arrangement at risk of liability under Section 1 of the Sherman Act could use incorporation as a shield . . . ." Paul & Tankus, supra note 10, at 46. And "[p]ositing the firm as a collection of contracts does not explain th[e] fundamental difference in legal treatment among sets of contracts." Paul, Allocator, supra note 10, at 399.

32. Paul, Allocator, supra note 10, at 396.

33. Tankus & Herrine, supra note 25, at 78.

ownership and control rather than cooperation."[34] Where ownership and control are sufficiently concentrated, antitrust designates a "single entity," or firm.[35] It therefore assigns coordination rights based on existing patterns of concentrated control.[36] But because antitrust stands ready to veto any coordination it disfavors, existing control rights are never enough to generate coordination rights on their own. Instead, antitrust makes a "separate and additional legal judgment" to assign coordination rights based on "the right to *control* while denying the right to *cooperate*."[37] What justifies that decision?

2. *Orthodox Criteria.* — Central to antitrust law's firm exemption are the theories of competition, consumer welfare, and productive efficiency articulated by Robert Bork's 1978 book *The Antitrust Paradox*.[38] Bork's definition of competition is distinct from the intuitive concepts of business rivalry or a neoclassical ideal state of the economy.[39] Instead, Borkian

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34. Paul, Allocator, supra note 10, at 407. One such circular articulation begins by asking if two coordinating actors are competitors. But that is a question "antitrust's conferral or denial of firm status *decides*; [it is] not [an] independent bas[i]s for deciding firm status." Id. Otherwise, "if applied literally and in a noncircular manner, the potential competitor standard would imply that firms cannot employ large classes of people who perform the same service, which the firm goes on to sell." Id. at 408.

35. Id. at 401. Antitrust law can set firm boundaries both wider and narrower than corporate law. See Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 196 (2010) (finding multiple entities when corporate law recognized one: individual NFL teams in relation to NFL Properties); Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984) (finding a single entity when corporate law recognized two: a parent–subsidiary relationship); Paul, Allocator, supra note 10, at 402–09 (discussing *American Needle*, *Copperweld*, and the single entity doctrine). Because a single entity's internal actions are—by definition—independent and not concerted, they are not subject to section 1 of the Sherman Act.

36. See Paul, Allocator, supra note 10, at 408 ("More precisely, antitrust imports the control rights inherent in the law of the employment relation into its *own* set of criteria for allocating coordination rights.").

37. Id. at 405.

38. See id. at 415 (discussing Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself (1978)). While the preferences for hierarchical, firm-based, and ownership-based coordination existed in antitrust law prior to Bork, his arguments played a crucial role in their intensification and entrenchment. See id. at 422–23; Sanjukta Paul, Solidarity in the Shadow of Antitrust: Labor and the Legal Ideal of Competition (forthcoming) (manuscript at 61–63) (on file with the *Columbia Law Review*) [hereinafter Paul, Solidarity] (arguing that the Clayton Act's "labor exemption" was based on post-Sherman Act ideas about a self-coordinating market baseline). As Paul notes, "[t]ransaction cost analysis . . . effectively served to extend and purify th[e] already-existing [New Deal settlement's] legal and economic preference for firm-based coordination." Sanjukta Paul, On Firms, 90 U. Chi. L. Rev. 579, 603 (2023) [hereinafter Paul, Firms].

39. See Paul, Allocator, supra note 10, at 415–17 & n.131 (describing Bork's treatment of competition). Bork described this neoclassical sense of competition as "utterly useless" for antitrust law. Id. at 416 (internal quotation marks omitted) (quoting Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself 59 (1978)). That many think of neoclassical competition when they think of antitrust's pro-competitive aims is rhetorically useful. See id. at 417. The ideal state definition of competition "provided the broader

competition rests entirely on consumer welfare, meaning lower prices or greater output (compared to a benchmark) for consumers as a class.[40] For him, lower prices come from lower costs; and lower costs come from "efficient" coordination.[41] So just as competition as a desideratum relies on consumer welfare, consumer welfare in turn relies on efficiency.

Specifically, Bork's argument turns on a prioritization of *productive* efficiency.[42] Professor Paul writes: "Productive efficiencies, per Bork, are cost savings realized from firm-based coordination, in theory passed onto consumers as lower prices."[43] This argument rests on an empirical presumption, namely that vertical coordination is less costly than horizontal coordination.[44] Yet its proponents do not marshal empirical proof. Rather, they rely on a theoretical argument, made by Ronald Coase, Oliver Williamson, and other "neo-institutionalists," that hierarchy reduces transaction costs, resulting in cost savings and thus productive efficiency.[45]

For example, Coase took for granted that the employment law relation—based on "the command relation inherent to master–servant

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warrant for [Bork's] preferred form of economic coordination. This warrant derived from the intellectual prestige of neoclassical economics on the one hand, and also from the intuitively appealing ordinary language sense of business rivalry on the other." Id.

40. See id. at 416 ("'Competition' may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs by judicial decree." (quoting Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself 61 (1978))); id. at 418 (noting that, in practice, most understand consumer welfare to mean "lower prices in reference to existing reality"). Still, note that Bork equivocated about the meaning of consumer welfare, sometimes identifying it with allocative efficiency, but also "embrac[ing] the conception of consumer welfare as substantively ordering consumers' interests over others." See id. at 418.

41. See id. at 418–20 ("Indeed, actual lower consumer prices are Bork's and Williamson's professed justification for considering productive efficiencies in antitrust decisionmaking in the first place.").

42. See id. According to Paul, "[t]he conventional story is that [concentrated intrafirm control] succeeded because it offered technical efficiency benefits, which ultimately 'grew the pie' for everyone, even as both coordination rights and pecuniary benefits associated with productive activity were concentrated in fewer hands." Paul, Firms, supra note 38, at 593–94.

43. Paul, Allocator, supra note 10, at 419.

44. See id. at 419–20 (noting that Bork's view of "productively efficient coordination may consist in the vertical, hierarchically organized coordination presumed to take place within a firm, or it may be vertical, hierarchical coordination beyond firm boundaries, as for example when a large firm gives direction to a small subcontracted firm").

45. Paul identifies neo-institutionalists with the theory-of-the-firm or transaction cost literature, beginning with Ronald Coase in 1937. Paul, Firms, supra note 38, at 600–01. The name evokes earlier "institutional" economists (themselves responding to the classicals), but the core neo-institutionalist project was to explain what *neoclassical* economists did not: What is a firm? See id. For a richer account of these arguments, see Paul, Allocator, supra note 10, at 420–25; Paul, Firms, supra note 38, at 600–20.

law"—produced productive efficiency.[46] For Williamson, hierarchy was most efficient because it reduced costs of association, mainly by "prescreening workers . . . and . . . policing 'malingering and other ex post manifestations of moral hazard.'"[47] Other neo-institutionalists like Armen Alchian and Harold Demsetz "ultimately also shared the focus on 'shirking' and insufficient effort by workers."[48] By contrast, Henry Hansmann thought worker-ownership did better in terms of shirking, instead focusing his critique on "the simple time and effort costs of democratic and horizontal decision-making."[49] Still, all shared the premise, in the words of Williamson, that "[t]he organization of work is, predominantly, a transaction cost issue."[50]

The neo-institutionalists also argued that intrafirm hierarchy solves "holdup" problems—an actor's opportunistic abuse of control over a complementary resource (i.e., a resource another relies on).[51] Centralization—enclosing ownership and control of resources subject to holdup problems inside firm boundaries—purportedly solves such bottlenecks by changing the actors' relationship from contract to command, disappearing the coordination problem inside firm boundaries.

3. *Rebuttal.* — Paul gives us good reason to doubt both the analytical and theoretical bases for the "Borkian allocation of coordination rights."[52] This section begins by unsettling the assumption that hierarchy is, in fact, less costly than other forms of coordination. Yet even accepting that premise, other theoretical problems trouble productive efficiency as a keystone concept and, with it, the neo-institutionalist theory of the firm.

a. *Analytical Problems.* — The question whether centralized control produces cost savings is empirical, not theoretical. Therefore, Paul argues, productive efficiencies "exist . . . if and only if an empirical claim about organizing human activity and technological functioning in time and space is correct. This specificity, which quite clearly implicates technological, social and historical contingencies, is also why we should be

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46. See Paul, Firms, supra note 38, at 606–07 (discussing Ronald Coase's *The Nature of the Firm*).

47. Id. at 607–08 (emphasis omitted) (quoting Oliver E. Williamson, Markets and Hierarchies: Some Elementary Considerations, 63 Am. Econ. Rev. 316, 321–24 (1973)).

48. Id. at 608 (citing Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 Am. Econ. Rev. 777, 784 (1972)).

49. Id. at 612; see also Henry Hansmann, The Ownership of Enterprise 114–17 (1996) (addressing the lack-of-skill and -experience arguments against employee governance).

50. See Oliver E. Williamson, The Organization of Work: A Comparative Institutional Assessment, 1 J. Econ. Behav. & Org. 5, 35 (1980).

51. See Paul, Firms, supra note 38, at 615–17; Morgan Ricks, Ganesh Sitaraman, Shelley Welton & Lev Menand, Networks, Platforms, and Utilities: Law and Policy 15–16 (2022) [hereinafter Ricks et al., NPU] (describing similar "particularized value extraction" problems, in which enterprises can "appropriate some or all of the economic value of the businesses that rely on them").

52. See Paul, Allocator, supra note 10, at 419.

skeptical of how universally such productive efficiencies exist."[53] Yet even without detailed empirics, the neo-institutionalist cost analysis is flawed because it is both under- and overinclusive.

Begin with underinclusivity. First, hierarchical decisionmaking has costs typically excluded from transaction cost analysis.[54] At the highest level, the political costs of managerial control go unaccounted for.[55] Values such as autonomy, antioligarchy, or antidomination simply aren't legible.[56] At a less abstract level, the theory is biased toward "outputism" and fails to account for the costs of *too much* labor effort.[57] The abstract and direct problems relate: A framework equipped with autonomy and antidomination norms, for example, might more readily recognize the costs of overwork and relegate the importance of maximizing value-neutral "output."[58] Moreover, an antioligarchy norm could make dispersed

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53. Id. at 421. Historically, the technological advances of the industrial revolution began under "the older, supposedly inefficient guild system." Paul, Firms, supra note 38, at 594. So, at the very least, concentrated control is not a necessary condition for technical advance. For a thorough account of this debate, including its historical and theoretical foundations, see generally Stephen A. Marglin, What Do Bosses Do?: The Origins and Functions of Hierarchy in Capitalist Production, 6 Rev. Radical Pol. Econ. 60 (1974); Paul, Firms, supra note 38.

54. For example, a centralized decisionmaking structure "has a basic weakness—that is, very few individuals are entrusted with a great number of complex decisions. . . . Because the members of the central office spend most of their business careers within a single functional activity, they have little experience or interest in understanding . . . the enterprise as a whole." Frederic S. Lee, Microeconomic Theory: A Heterodox Approach 80 (Tae-Hee Jo ed., 2018).

55. Cf. Ricks et al., NPU, supra note 51, at 19–21 ("[M]any of the largest individual fortunes have been amassed through ownership and control of NPU enterprises. . . . [E]conomic influence can create a vicious cycle in which the wealthy and powerful use their influence to gain special privileges from the government and then those privileges make them . . . wealthier and more powerful . . . ."); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynsky & K. Sabeel Rahman, Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis, 129 Yale L.J. 1784, 1806 (2020) (describing the second law and economics movement's expulsion of "certain commitments in our law . . . either reflecting or calling forth certain kinds of political values, or . . . taking a side in disputes that were inevitably struggles for power"); Paul, Firms, supra note 38, at 620 (noting "the tendency of existing differentials in coordination rights and flows of income to intensify themselves"); Lina M. Khan, The End of Antitrust History Revisited, 133 Harv. L. Rev. 1655, 1668–69 (2020) (reviewing Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age (2018)) ("[A] price theory approach to antitrust necessarily privileges efficiency criteria over, say, concerns about justice or fairness.").

56. By contrast, norms engaging with power relations *were* legible to both Congress and the judiciary at the passage of the Sherman Act. See Paul, Solidarity, supra note 38 (manuscript at 3–9, 51–53); infra section I.A.4.

57. See Paul, Firms, supra note 38, at 609 (internal quotation marks omitted) (quoting John M. Newman, The Output-Welfare Fallacy: A Modern Antitrust Paradox, 107 Iowa L. Rev. 563, 569 (2022)).

58. Notably, as Louis Brandeis's analysis did. See Paul, Solidarity, supra note 38 (manuscript at 68–71). Coming at this problem from another angle, one might say that transaction cost analysis fails to account for dynamic costs to political economy over time.

control desirable in a negative sense, as an intrinsic prophylactic good.[59]

Second, as Paul argues, neo-institutionalist thought "overly discount[s] . . . [the] objective, substantive benefits for productive efficiency when all participants in a productive process are able to contribute their insights and experiences to decision-making that will direct that process."[60] Figures as diverse as Louis Brandeis and Adam Smith agreed. Brandeis thought it was "economically rational" to incorporate worker expertise into business decisionmaking,[61] while Smith acknowledged "that the variety of tasks and requisite skill levels required in production contexts where the 'division of labor' has not yet become too minute fosters a climate of innovation and invention."[62] The orthodox analysis, therefore, is underinclusive because it fails to count important costs of hierarchy and benefits of participatory decisionmaking.

An illustrative (if anecdotal) example is Citibank ("Citi") ($1,678 billion[63]), which was recently fined $136 million for submitting inaccurate

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Cf. Ricks et al., NPU, supra note 51, at 21–22 (contrasting static and dynamic efficiency and noting the importance of accounting for dynamic costs (i.e., costs over time)).

59. Cf., e.g., Katharina Pistor, The New Washington Consensus, Project Syndicate (Jan. 28, 2025), https://www.project-syndicate.org/commentary/trump-business-controls-government-means-autocracy-instead-of-democracy-by-katharina-pistor-2025-01 (on file with the *Columbia Law Review*) (framing dispersed firm control as a necessary prophylactic for political freedom: "Now that we have watched business take over government in broad daylight, the only alternatives are to democratize business or abandon any pretense of democracy"); Katie Thornton, The Green Bay Packers: Where Fans Rather Than a Billionaire Are the Owners, The Guardian (Sept. 30, 2023), https://www.theguardian.com/sport/2023/sep/30/the-green-bay-packers-where-fans-rather-than-a-billionaire-are-the-owners [https://perma.cc/PR6D-49WM] (discussing the benefits of fan "ownership" in terms of prophylaxis against dominant owners, including preventing threatened or actual team relocation). Hence, antioligarchy qua prophylaxis can be a bulwark against spiraling concentrations of political economic power. See supra note 55; infra note 128.

60. Paul, Firms, supra note 38, at 614 & n.145; see also supra note 53. Instead, they variously acknowledge that cooperative forms of organization may create productivity-enhancing "team spirit," Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 Am. Econ. Rev. 777, 790–91 (1972), or "mobilizing energies" and "atmosphere," Oliver E. Williamson, Markets and Hierarchies: Some Elementary Considerations, 63 Am. Econ. Rev. 316, 317, 321 (1973); see also Paul, Firms, supra note 38, at 614 (noting the subjective factors above).

61. Paul, Solidarity, supra note 38 (manuscript at 66).

62. Paul, Firms, supra note 38, at 594 n.54 (citing Marglin, supra note 53, at 64).

63. See BankFind Suite: Find Institution Financial & Regulatory Data, FDIC, https://banks.data.fdic.gov/bankfind-suite/financialreporting/report [https://perma.cc/U58J-ZHZN] (last visited Oct. 16, 2024) (sorting by total assets in descending order). "Citibank" is the bank subsidiary of the bank holding company "Citigroup." Citigroup Material Legal Entities (May 16, 2024), https://www.citigroup.com/rcs/citigpa/akpublic/storage/public/corp_struct.pdf (on file with the *Columbia Law Review*).

reports to the Federal Reserve.[64] Citi hired CEO Jane Fraser in 2021 to solve "chronic technology and regulatory issues" that had "built up over the course of many years and acquisitions."[65] But as the *Financial Times* reports:

> Former Citi executives say Fraser has failed to change a culture where many employees search for short-term, least-cost fixes to deep-rooted problems, or try to avoid addressing them altogether. "At Citi, there are a lot of committees and working groups that get set up so people can sit around and talk about the issues," one former executive said.[66]

As Citi's committees sputtered, the bank turned to "heavy use" of expensive consultants, like McKinsey.[67] Before long, Citi terminated the relationship amid "widespread internal dissatisfaction" with McKinsey's work, which insiders blame for the inaccurate Federal Reserve filings.[68] Rather than the cost-efficient firm of neo-institutionalist imagination, conglomeration and hierarchy at Citi disempowered employees, creating high associational costs, shirking, and wasteful outsourcing.

On the flipside, the neo-institutionalist account is overinclusive. Even though, as Hansmann argues, participatory governance can be time-consuming, digital technology has dramatically reduced its transaction costs.[69] Further, explicit public support can spur innovation, making cooperative association less, not more, costly.[70]

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64. Stephen Gandel & Ortenca Aliaj, How Citi's Error-Riddled Loan Reports Led to a $136mn Fine, Fin. Times (July 25, 2024), https://www.ft.com/content/7f9d7dba-9c87-48c7-9b15-40a4b4c15692 (on file with the *Columbia Law Review*).

65. Id.; see also Stephen Gandel & Joshua Franklin, Citigroup Erroneously Credited Client Account With $81tn in 'Near Miss', Fin. Times (Feb. 28, 2025), https://www.ft.com/content/9921925e-5a32-48cc-a3e3-3f77042477d2 (on file with the *Columbia Law Review*) ("The series of near misses at Citi highlights how the Wall Street bank is struggling to repair its operational troubles nearly five years after it mistakenly sent $900mn to creditors engaged in a contentious battle over the debt of cosmetics group Revlon."); Joe Miller & Stephen Gandel, Citi Was Money Launderers' Favourite Bank, US Law Enforcement Officials Say, Fin. Times (July 1, 2024), https://www.ft.com/content/0187827b-f755-47fd-91ff-c3e755548097 (on file with the *Columbia Law Review*) ("Drug traffickers chose to launder money through Citigroup because they believed the bank was 'more favourable', with less robust fraud controls, according to senior US law enforcement officials.").

66. Gandel & Aliaj, supra note 64.

67. Id.

68. Id.

69. See Jerry Davis, Is This the End of Corporate Capitalism?, LPE Blog (Nov. 8, 2023), https://lpeproject.org/blog/is-this-the-end-of-corporate-capitalism/ [https://perma.cc/NAW9-GLEM].

70. See Sandeep Vaheesan, Selling Power: The Design of Energy Finance, From the New Deal to the IRA, Phenomenal World (Jan. 8, 2025), https://www.phenomenalworld.org/analysis/selling-power/ [https://perma.cc/HC9Z-VPKH] [hereinafter Vaheesan, Selling Power] ("The [Rural Electrification Administration] not only funded [power] line constructions but also provided vital technical assistance, such as

It is also wrong to assume hierarchical firms arose in the first place due to technological superiority.[71] As Paul notes, the economist Stephen Marglin "concluded that instead of technical efficiency gains, the best explanation for emergent hierarchy at the firm level was simply about interested parties seeking to entrench a distributional arrangement that benefitted them."[72] Intrafirm hierarchy more likely emerged as a way to supervise and discipline labor than as an empirically superior organizational form.[73] The orthodox analysis, therefore, is overinclusive because it overstates the costs of participatory decisionmaking and the historical benefits of hierarchy.

b. *Theoretical Problems.* — Even if the empirical fact of productive efficiency-from-hierarchy were true and the cost analysis sound, that would be insufficient to prove hierarchy increases consumer welfare. For example, firms might not pass along cost savings to consumers through lower prices.[74] To this critique, Bork responds: Cost savings imply unused resources available to serve consumer wants elsewhere, even if price decreases never materialize.[75] But this reply asks more questions than it answers. It assumes resources are fungible and zero-sum instead of nonscarce and socially determined.[76] And it still ignores the possibility that

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developing lower-cost designs for rural power lines and drafting model state laws to support the formation of electric cooperatives.").

71. See supra note 41.

72. Paul, Firms, supra note 38, at 595 & n.56 (citing Marglin, supra note 53, at 70) (noting that "Marglin drew in detail from available empirical evidence both before and after the organizational changes in question, in addition to dissecting the conventional story as advanced by [Adam] Smith and others"). In other words, "it is simply an instance of people and groups who already enjoy legally and socially sanctioned power over others using legal and social tools to entrench and expand that power." Id. at 596; cf. Lee, supra note 54, at 189 (describing the business enterprise as a social organization "[h]ierarchical in structure and authoritarian in terms of social control" that functions to "reproduce[] the capitalist class").

73. See Marglin, supra note 53, at 82–84, 114 ("The key to the success of the factory, as well as its inspiration, was the substitution of capitalists' for workers' control of the production process; discipline and supervision could and did reduce costs *without* being technologically superior."); Paul, Firms, supra note 38, at 595 ("[H]ierarchy did not so *distinctively* solve technical efficiency problems across a variety of very different sectors around roughly the same time, that neutral solutions to operational problems—rather than the human urge to consolidate power in interaction with favorable existing legal and social tools—mainly explains its entrenchment.").

74. Cost savings could simply accrue to retained earnings.

75. See Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself 108 (1978).

76. The economist Fred Lee is worth quoting at length:

> [T]he absence of scarcity . . . do[es] not mean that nature (qua resources) is not fixed or exhaustible in some sense. . . . [It means] the 'fixity' of nature is not a constraint on production and a limit to the social provisioning process, which in turn implies that the concepts of production possibility frontier, opportunity cost, and the trade-off in the production of goods and services have no meaning in heterodox economics. The absence of original factors of production and scarcity

cost savings owe to an *increase* in input use (e.g., the problem of too much labor effort[77]) or a decrease in input *price* (e.g., cutting wages or squeezing suppliers[78]). Even more fundamentally, by slipping from the intuitive sense of technical efficiency (i.e., more output per input) to productive efficiency (i.e., more output per input cost),[79] Bork is vulnerable to the critique that the neoclassical price mechanism does not exist.[80]

Bork's argument is also logically incoherent. Benchmark prices (and output) can only exist *after* coordination rights have been allocated.[81]

> means that with circular production, the restraints on the social provisioning process are not given quantities of scarce factor inputs located in production, but are located in the decisions (agency) and values that affect the production of the surplus . . . and its distribution.

Lee, supra note 54, at 44 (citations omitted).

77. See Paul, Firms, supra note 38, at 610 ("True technical efficiencies consist in deriving more output while holding inputs—including labor effort—fixed. They do not consist in increasing output simply by *increasing inputs*."). By contrast, Paul notes that "Brandeis and the original institutionalists" *did* account for the problem of too much labor effort. Id. at 610 n.122.

78. See Sanjukta Paul, On Merger Policy and Labor, Money on the Left (June 9, 2023), https://moneyontheleft.org/2023/06/09/on-merger-policy-and-labor/ [https://perma.cc/72RB-X5T7] [hereinafter, Paul, Merger Policy] ("[C]onsider the difference between a machine that allows two workers to produce more (at the same quality) with the same effort, versus a new institutional or organizational arrangement that pays those two workers less to produce the same amount . . . . The second thing simply is not a technical efficiency."). Notice that a decrease in input prices—whether it be labor or supplier contracts—therefore, may be caused in the first place by the concentration of coordination rights and its concomitant economic power. Also note that Bork ignores the effect of a decrease in wage income on consumption: If workers are paid less and therefore face tighter budget constraints as consumers, they must either consume or save less. Both outcomes reduce their ability to serve their wants and thus *harm* consumer welfare. See supra note 75 and accompanying text.

79. See Luke Herrine, What Do You Mean by Efficiency? An Opinionated Guide, LPE Blog (Oct. 11, 2023), https://lpeproject.org/blog/who-cares-about-efficiency/ [https://perma.cc/MK5A-P38N] (defining technical efficiency as "producing more outputs with the same (or fewer) inputs"); Paul, Merger Policy, supra note 78 (contrasting technical with productive efficiency).

80. See, e.g., Tae-Hee Jo, What If There Are No Conventional Price Mechanisms? 1 J. Econ. Issues 327, 329–33 (2016) (rejecting the neoclassical price mechanism and substituting a heterodox approach to social provisioning); Paul, Allocator, supra note 10, at 417–18 (noting the assumption—made by the version of consumer welfare operationalizing allocative efficiency—that "higher prices are presumed to correspond to reduced output"); Sabiou M. Inoua & Vernon L. Smith, Neoclassical Supply and Demand, Experiments, and the Classical Theory of Price Formation *passim* (Econ. Sci. Inst., Working Paper No. 20-19, 2020) (rejecting the neoclassical price mechanism and substituting a classical price mechanism); Luke Herrine, Piercing the Monetary Veil, LPE Blog (May 13, 2019), https://lpeproject.org/blog/piercing-the-monetary-veil/ [https://perma.cc/5SMG-XGY8] (critiquing the Hayekian price mechanism for "[t]reating money as a neutral arbiter of values"); Nathan Tankus (@NathanTankus), X https://x.com/NathanTankus/status/1875279611334144165 (Jan. 3, 2025) [https://perma.cc/3VFA-T96F] (rejecting both the neoclassical and classical price mechanisms).

81. See Paul, Allocator, supra note 10, at 380 ("[T]his process of market allocation, which the law is supposed to facilitate but not displace, itself has no existence independent

Prices cannot be set, and thus benchmark prices cannot be formed, until the law decides who can participate in price setting in what forms and in which circumstances. One might counter that coordination rights can be allocated to best approximate a theoretical equilibrium,[82] accepting deviations (e.g., labor unions) and adjusting for imperfections (e.g., market concentration) as necessary. But that still fails as a logical matter. As Paul argues in her forthcoming book, assuming a self-coordinating market and working out special exceptions leaves no independent referent to decide which exceptions should be allowed or when they go too far.[83] In any case, logic requires first specifying normative criteria and *then* allocating coordination rights toward those ends.[84]

Similarly, Bork's notion of competition cannot ground allocative decisions.[85] Competition as a social process can only happen after the basic forms of coordination are specified. Before drawing firm boundaries, one must first decide whether a given form of coordination should be governed by rivalry, cooperation, or command.[86] Moreover, competition relies on the "contestability criterion"—that the threat of entry by new

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of prior *legal* allocations of economic coordination rights."); Tankus & Herrine, supra note 25, at 81. In other words, as soon as one associates a theoretical equilibrium with real price and output values, they admit endogeneity into the system because all real price and output values depend on prior allocations of coordination rights and other forms of market governance. See infra text accompanying note 83.

82. Bork writes, for example:

> [Equilibrium] has never been and can never be achieved. . . . But the forces of competition in open markets cause the actual allocation of resources to be ever shifting in pursuit of the constantly moving equilibrium point. And the more closely the economy approximates this limiting condition, the more closely do we approach the maximization of consumer welfare.

Bork, supra note 75, at 98.

83. See Paul, Solidarity, supra note 38 (manuscript at 16).

84. Id. This method appeared in common law antitrust cases, the early antimonopoly movement, and the work of Louis Brandeis. See Sanjukta Paul, Recovering the Moral Economy Foundations of the Sherman Act, 131 Yale L.J. 175, 183–204 (2021) [hereinafter Paul, Sherman Act]; Sanjukta Paul, The First New Deal: Planning, Market Coordination, and the National Industrial Recovery Act of 1933, Phenomenal World (Mar. 28, 2024), https://www.phenomenalworld.org/analysis/the-first-new-deal/ [https://perma.cc/DM3M-F6QD] ("Brandeis understood competition as rivalry, and he had no interest in welfare maximization in the technical sense, preferring to directly articulate the normative goals of policy. He also understood economic rivalry to be necessarily conditioned by legal rules . . . to ensure that competition actually served pro-social aims.").

85. For one, as just shown, its content relies on the circular notion of "consumer welfare."

86. Paul, Allocator, supra note 10, at 382. This makes sense considering firms themselves suppress competition. Id. at 420; Paul, Firms, supra note 38, at 597. But see Alchian & Demsetz, supra note 60, at 795 (countering that firms are defined by intrafirm competition between inputs).

firms prevents existing firms from charging supracompetitive prices.[87] Yet as Paul notes, the criterion applies "as forcefully or more forcefully" to forms of horizontal coordination, like cartels, as to forms of vertical coordination, like firms.[88] So even on its own terms, contestability—and thus Bork's theory of competition—provides no basis for allocating coordination rights in any particular way.[89] Like consumer welfare, then, drawing firm boundaries based on competition begs the question.

Paul also shows that other forms of coordination can solve the same problems intrafirm hierarchy is predicated on solving. Holdup problems, for example, can be solved "[i]f instead we disperse decision-making rights to the same numerical extent but *across* those [complementary] assets,"[90] as in the case of internally democratic organizations. Also sufficient are market governance measures such as "fair contracting and even pricing norms (enforced by law, regulation, or a public-private governance body)."[91] And as Paul points out, when facing demand or supply shocks in intermediate input markets (e.g., during the COVID-19 pandemic), overreliance on firm-based coordination can "worsen holdup problems by encouraging firm-level hoarding (that in turn intensifies bottlenecks)."[92]

In sum, the neo-institutionalist theory of the firm—and with it, the Borkian allocation of coordination rights—overrates hierarchy as a form of economic organization. On its own terms, the analysis excludes important costs of hierarchy and benefits of dispersed control while overstating the costs of dispersed control and the historical benefits of hierarchy. Its theoretical argument generates circular and inadequate answers to the question of how to allocate coordination rights. And, as Paul's work shows,

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87. See Paul, Allocator, supra note 10, at 396 & n.59 (internal quotation marks omitted) (quoting John E. Davies & Frederic S. Lee, A Post Keynesian Appraisal of the Contestability Criterion, 11 J. Post Keynesian Econ. 3, 22 (1988)) ("[L]ogic demands that acceptance of the usefulness of perfect competition implies acceptance of its more generalized form—the contestability criterion." (alteration in original) (internal quotation marks omitted) (quoting John E. Davies & Frederic S. Lee, A Post Keynesian Appraisal of the Contestability Criterion, 11 J. Post Keynesian Econ. 3, 22 (1988))).

88. See id. at 395–96 ("On the logic of contestable markets, a cartel ought to respond to potential competitors in exactly the same manner as would a large corporation of the same size and the same market share.").

89. Bork acknowledged as much: "Bork freely and repeatedly told us that [competition as an ideal state] is not what the consumer welfare standard meant, and also admitted that this sense of competition could not explain or generate the preference for top-down, ownership-based coordination." Id. at 422–23.

90. Paul, Firms, supra note 38, at 617.

91. Paul, Firms, supra note 38, at 617. Indeed, such measures are common in the law of networks, platforms, and utilities, of which banking is a part. See Ricks et al., NPU, supra note 51, at 24–30 (including in the NPU regulatory toolkit: price and profit rules (e.g., nondiscrimination, rate setting, and profit sharing rules), access and service rules (e.g., equal access, universal service, exit, interconnection, and quality of service rules), and industry structure rules (e.g., structural, entry, and ownership and control rules)); infra note 138.

92. See Paul, Firms, supra note 37, at 617.

it fails to consider how different allocations of coordination rights can solve the same problems that centralized control is predicated on solving.

Productive efficiency, consumer welfare, and competition are insufficient decision criteria for allocating coordination rights, and there are good reasons to be skeptical of hierarchical firms as the default form of economic organization. How should law allocate coordination rights instead?

4. *Alternative Criteria.* — Undertaking a normative reconstruction of the Sherman Act, Paul argues that the landmark antitrust law aimed to *disperse* economic coordination rights.[93] Contrary to Bork's account, the legislation did not "aim primarily at consumer welfare, nor productive efficiency, nor even competitive markets in an abstract sense."[94] Instead, it adopted a moral economy approach to social coordination, prioritizing fair dealing, just price, and an overall goal of fair competition.[95] As Paul recovers, Congress focused on defending the coordination of small players while attacking domination by centers of "aggregated wealth."[96] Importantly, concerns about domination and concentrated control extended to intrafirm coordination.[97]

Rather than treat coordination as a simple optimization problem, Paul foregrounds law and political economy.[98] Hence the values relevant to economic organization include "fairness, democratic governance, [and] economic security . . . *alongside* an appropriate conception of productive efficiency."[99] Law should operationalize those aims, Paul

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93. Paul, Sherman Act, supra note 84, at 205. For a meta discussion of this method, better described as a "broad[] normative reconstruction" than narrow statutory interpretation, see id. at 225–26.

94. Id. at 204–05. Further, Congress did not delegate a broad policymaking authority to the judiciary or seek to establish a per se rule against horizontal price coordination. See id. at 213, 238 & n.284.

95. See id. at 203–04.

96. See id. at 212–13 (quoting 21 Cong. Rec. 1768 (1890) (statement of Sen. George)).

97. See id. at 214 ("The point for us is to consider whether . . . it is safe in this country to leave the production of property, the transportation of our whole country, to depend on the will of a few men sitting at their council board . . . ?" (alterations in original) (emphasis omitted) (quoting 21 Cong. Rec. 2570 (statement of Sen. Sherman))); id. at 215–16 (noting Senator Hoar's concern with "large corporations who are themselves but an association or combination or aggregation of capital" (internal quotation marks omitted) (quoting 21 Cong. Rec. 2728 (statement of Sen. Hoar))). Senator Sherman adopted Senator Hoar's view about the legislation's animating concerns as his own. See id.

98. To the extent that law exists in the neo-institutionalist theory, it involves only basic contract and property concepts. Unlike the neo-institutionalists, Bork draws on law, albeit by ahistorically projecting a bespoke consumer welfare standard onto the Sherman Act. See Paul, Sherman Act, supra note 84, at 204 ("As Christopher Leslie put it, a 'clear consensus exists among economic historians and legal scholars that Bork misconstrued the legislative history of the Sherman Act.'" (quoting Christopher R. Leslie, Antitrust Made (Too) Simple, 79 Antitrust L.J. 917, 924 & n.47 (2014))); infra section I.A.4.

99. Paul, Firms, supra note 38, at 621; see also Paul, Sherman Act, supra note 84, at 179, 183, 185, 186 n.36, 220–22. For the pre-Sherman Act antimonopoly movement,

argues, by containing domination, promoting democratic coordination, and setting rules of fair competition.[100]

To recap, antitrust law allocates coordination rights to construct entities with concentrated ownership or control—firms—as its basic units. It justifies this pattern by arguing that top-down firms generate cost savings that are passed on to consumers in the form of lower prices or more resources available to satisfy consumers' wants. But recent scholarship casts doubt on the coherence of this argument, including its purported analytical, theoretical, and legislative support. Paul, for example, rejects the top-down firm as necessarily superior to other forms of coordination and instead proposes that antitrust law disperse coordination rights.

B. *Banking*

Understanding bank resolution and its relationship to coordination rights first requires attention to the broader banking law of which it is a part. What is a bank? Why can banks create money? How does banking law view concentration? And is it attentive to coordination rights?

1. *Banks and Bank Charters.* — The term "bank" can refer to all depository institutions: national and state commercial banks, thrifts, and nonprofit banks such as credit unions.[101] Banks are monetary institutions. By virtue of its charter, a bank can create highly receivable money in the form of notes and deposits.[102] A variety of public governance measures facilitate the receivability of bank money,[103] as well as the liquidity, solvency, and stability of the banking system and its periphery.[104]

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containing domination and promoting democratic association were two sides of the same coin. At once, they strove to reduce the extractive power emanating from the centralized control of the trust, and instantiate horizontal, egalitarian cooperative governance. See id. at 200.

100. See Paul, Sherman Act, supra note 84, at 247.

101. See Richard Scott Carnell, Jonathan R. Macey, Geoffrey P. Miller & Peter Conti-Brown, The Law of Financial Institutions 172 (7th ed. 2021); Ricks et al., NPU, supra note 51, at 836–40.

102. Banks do not need pre-accumulated deposits to make loans. They perform credit analysis to determine whether a loan meets their strategic objectives. If it does, the bank seeks funding (on an ongoing basis at scale) afterward.

103. See, e.g., Stephanie Bell, The Hierarchy of Money 14–18 (Jerome Levy Econ. Inst., Working Paper No. 231, 1998), https://ssrn.com/abstract=96845 [https://perma.cc/EE94-RM9L] ("It is because bank money is accepted at State pay-offices that it, along with State-issued currency, is considered . . . the 'decisive' money of the system."); Nathan Tankus, Banks as Payment Plumbing Monetary Policy 101, Notes on the Crises (May 6, 2020), https://www.crisesnotes.com/banks-as-payment-plumbing-monetary/ [https://perma.cc/SM5L-GDEW] ("What's valuable about a bank deposit, or a bank note, is that it can be used to make a payment to another individual, a financial institution or the government.").

104. See Tim Barker & Chris Hughes, Bigger Than *Penn Central*: The Financial Crisis of 1970 and the Origins of the Federal Reserve's Systemic Guarantee, 5 Capitalism: J. Hist. & Econ. 14, 17 (2024) (documenting the Federal Reserve's shift toward supporting the "*entire* financial system" as early as the 1970 Penn Central Railroad crisis); Lev Menand & Joshua

Banks, in turn, provide a variety of public goods and services,[105] such as meeting commercial demand for money[106] and processing payments.[107] Thus, the basic bank balance sheet consists of loan assets, deposit liabilities, and longer-term debt and equity funding. To operate, a bank needs information technology (IT), labor, and some brick-and-mortar.

For simplicity, this Note focuses on national commercial banks. Like most corporations, national commercial banks are internally hierarchical

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Younger, Money and the Public Debt: Treasury Market Liquidity as a Legal Phenomenon, Colum. Bus. L. Rev. 224, 269–88 (2023) (examining how the Federal Reserve supports the moneyness of nonbank liabilities); Policy Tools, Bd. of Governors of the Fed. Rsrv. Sys., https://www.federalreserve.gov/monetarypolicy/policytools.htm [https://perma.cc/PLX2-KDV8] (last updated May 20, 2024) (listing monetary policy tools such as open market operations, the discount window, interest on reserve balances, the overnight reverse repurchase agreement facility, the term deposit facility, central bank liquidity swaps, and the foreign and international monetary authorities (FIMA) repo facility).

105. See Ricks et al., NPU, supra note 51, at 813 ("Money is an infrastructure on which all other infrastructure depends."); Saule T. Omarova, Bank Governance and Systemic Stability: The "Golden Share" Approach, 68 Ala. L. Rev. 1029, 1035 (2016) ("Banks are said to be special in that they perform certain important public functions: they provide transactional accounts, operate payment systems, and serve as channels for transmission of monetary policy.").

106. Commercial banks create money for loan applicants who are liable to repay the loan. Grant funding and appropriations are a better fit for money creation aimed principally at social good. (That said, all money creation should be consistent with the public interest.) Nevertheless, grant-making and other monetary institutions could evolve alongside loan-making institutions, whether as standalone or federated entities, subsidiaries, or through asset-specific public backstopping. See Nathan Tankus, The New Monetary Policy: Reimagining Demand Management and Price Stability in the 21st Century 19–21 (Michael Brennan ed., 2022), https://publicmoneyaction.org/wp-content/uploads/2023/07/M3F000001.pdf [https://perma.cc/6RCL-88CJ] [hereinafter Tankus, The New Monetary Policy] (seeking to return "banks to their core role of doing proper underwriting to ensure the borrower's likelihood of repayment" and tie all money creation to "specific social purposes"); Rohan Grey, Financial Regulation, Price Stability, and the Future, LPE Blog(Mar. 22, 2022), https://lpeproject.org/blog/financial-regulation-price-stability-and-the-future/ [https://perma.cc/L3HJ-PRUN] ("Decisions about how to extend liquidity support, to whom, and under what conditions necessarily implies value decisions—i.e. picking winners or losers—in much the same way as traditional fiscal and budgetary policy."); Nathan Tankus, Do We Have Alternatives to Public Governance of Resources in a Crisis?, Notes on the Crises (May 25, 2020), https://www.crisesnotes.com/do-we-have-alternatives-to-public/ (on file with the *Columbia Law Review*) ("The ability to create money could be franchised to democratic grant-making institutions rather than hierarchical loan-making institutions."); The Uni Currency Project: Resource Page, Money on the Left, https://moneyontheleft.org/the-uni-currency-project-resource-page/ [https://perma.cc/2S5H-HFVK] (last visited Mar. 7, 2025) (proposing university-based money creation); Vaheesan, Selling Power, supra note 70 (noting the public benefits of grant finance and contrasting energy sector grantmaking in the Inflation Reduction Act and the New Deal's Rural Electrification Administration).

107. See Nathan Tankus, Banks as Payment Processors. Monetary Policy 101, Notes on the Crises (May 13, 2020), https://www.crisesnotes.com/banks-as-payment-processors-monetary/ [https://perma.cc/AJ5A-EK8Q].

with boards of directors elected by shareholders.[108] The board appoints executive officers, and the officers typically appoint senior management. Bank charters are thus controlled by hierarchical firms. Unlike corporate charters, however, bank charters do not allow banks to engage in "any lawful business" but rather limit banks to a specific set of powers.[109] A bank charter, then, bestows a unique set of unilateral coordination rights on those who control it.[110]

The core bank powers come from two sources: the Constitution and the National Bank Act of 1864. The Constitution authorizes Congress to coin money and regulate its value.[111] It forbids states from coining money or emitting bills of credit.[112] Together with the Necessary and Proper Clause,[113] these powers laid the groundwork for a federal monopoly on money creation.[114] Soon after the Constitution was ratified, Congress chartered a national bank—the Bank of the United States—delegating, in part, the authority to create money to a hybrid public–private corporation.[115] As Professors Lev Menand and Morgan Ricks argue, dispersing control of money creation in this way was not done "out of a desire to create private businesses and generate shareholder returns . . . but rather as a governance mechanism . . . to insulate the monetary framework from the danger of political interference."[116] Eventually, Congress opened national bank charter applications to the public,

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108. See 12 U.S.C. § 71 (2018) ("The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders . . . .").

109. See, e.g., Saule T. Omarova & Graham S. Steele, Banking and Antitrust, 133 Yale L.J. 1162, 1221 (2024) (highlighting the same distinction between bank and corporate charters). Compare Del. Code tit. 8, § 101(b) (2025) ("A corporation may . . . conduct or promote any lawful business or purposes . . . ."), with 12 U.S.C. § 24 (enumerating eleven bank powers, including the "business of banking").

110. As the Supreme Court has recognized, the special power of a bank charter lends itself to special restrictions. See United States v. Phila. Nat'l Bank, 374 U.S. 321, 327 (1963) ("[T]he proper discharge of these [banking] functions is indispensable to a healthy national economy, as the role of bank failures in depression periods attests. It is therefore not surprising that commercial banking in the United States is subject to a variety of governmental controls, state and federal."). This Note focuses on control of the bank charter to avoid mistaking share ownership for ownership of the corporate entity and to avoid overstating the control rights vested in voting shares.

111. U.S. Const. art. I, § 8, cl. 5.

112. Id. § 10, cl. 1; see also Jakob Feinig, Moral Economies of Money: Politics and the Monetary Constitution of Society 14–68 (2022) (appraising the monetary politics of bills of credit before and after ratification of the Constitution).

113. U.S. Const. art. I, § 8, cl. 18.

114. See Gerald T. Dunne, Monetary Decisions of the Supreme Court 16–20 (1960).

115. See Ricks et al., NPU, supra note 51, at 821 ("[The First Congress] chartered a parastatal instrumentality, the Bank of the United States, to expand the money supply beyond [metal coins].").

116. Lev Menand & Morgan Ricks, Federal Corporate Law and the Business of Banking, 88 U. Chi. L. Rev. 1361, 1392 (2021); see also James Willard Hurst, A Legal History of Money in the United States, 1774–1970, at 31 (1973) (discussing the policy of dispersing control of money creation).

replacing the singular Bank of the United States with many national banks.[117]

2. *Outsourcing the Bank Charter.* — Like much of American law, banking in the United States began as an English import. Two features defined the English banking enterprise: delegation and separation.[118] Two more elements—supervision and diffusion—were added by the National Bank Act of 1864, forming the core of our present banking law.[119] Delegation moved intrafirm control of the bank enterprise from the government to the public.[120] Separation, supervision, and diffusion restrained that power, aiming to channel it toward the public interest.[121]

Separation aimed to prevent unfair competition between banks and their customers by keeping banks out of commerce.[122] While modern attention to separation focuses on stability, Professor Menand argues that "[t]his rationale . . . tends to take the distributional politics out of monetary system design."[123] He notes that "[u]ntil the Great Depression, the animating legislative purpose behind separation was to prevent unfair trade practices and the undue concentration of private power."[124] Meanwhile, supervision ensured a degree of public control over the delegated bank charter. It "allowed the government to influence bank note issuance, examine books and records, and revoke charters at any sign of trouble."[125] Thus, banks are always cooperatively governed by both bank

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117. See infra section I.B.2.

118. See Lev Menand, The Logic and Limits of the Federal Reserve Act, 40 Yale J. on Regul. 197, 207–09 (2023) [hereinafter Menand, Federal Reserve].

119. See National Bank Act of 1864, Pub. L. No. 38-106, 13 Stat. 99 (1864) (codified in scattered sections of 12 U.S.C. (2018)); see also Lev Menand & Morgan Ricks, Rebuilding Banking Law: Banks as Public Utilities, 41 Yale J. on Regul. 591, 597 (2024) ("The [National Bank Act] remains the core of U.S. banking law.").

120. The principal concern of government control was political overissuance of credit. See Menand, Federal Reserve, supra note 118, at 212–13 & nn.73–75. While delegation "limits the role of the government in credit allocation and the power of political majorities to redistribute resources[,] [i]t also entrenches elites, who tend to control banks and hence access to money and credit." Id. at 212. As this Note will uncover, however, elite entrenchment is contingent on the allocation of coordination rights.

121. See id. at 220 ("With the government no longer handpicking its franchisees, and with so many franchisees spread about the country, legislators commissioned officials to coordinate banks to ensure that they worked together and in the public interest.").

122. Because banks have the unique power to create and allocate credit, business rivalry with commercial enterprise is inherently unfair.

123. Menand, Federal Reserve, supra note 118, at 215.

124. Id. (citing 133 Cong. Rec. 6805 (1987) (statement of Sen. Proxmire) ("At the foundation of American financial law is a longstanding tradition of separating banking and commerce. This separation has served to preserve the equal availability of credit in the United States and minimize the concentration of financial and economic power.")); see also Saule T. Omarova, The Merchants of Wall Street: Banking, Commerce, and Commodities, 98 Minn. L. Rev. 265, 274–78 (2013) (discussing the separation regime).

125. Lev Menand, Why Supervise Banks? The Foundations of the American Monetary Settlement, 74 Vand. L. Rev. 951, 984 (2021) [hereinafter Menand, Supervise]. That the

decisionmakers and government supervisors.[126] Finally, by diffusing the bank charter, Congress aimed to combat special privileges, prevent conglomeration, and disperse control over credit as well as its allocation.[127]

In terms of coordination rights, delegation advanced participatory control of bank charters, separation contained bank domination of commerce, supervision made the public grant of coordination rights subject to continued public oversight and control, and diffusion dispersed interfirm coordination rights within the monetary system as a bulwark against the concentration of private power and the subversion of republican government.[128] Putting together banking law's specific commands to delegate and diffuse bank charter coordination rights and antitrust law's general command to disperse economic coordination rights, banks are subject to a *double* dispersal command.[129]

3. *Bank Concentration.* — Banking law's attention to concentrated coordination rights extends beyond its focus on outsourcing and diffusing the bank charter.[130] For example, recognizing the potential for recursion between concentrated intrafirm control and concentrated credit flows, banking law limits lending to bank insiders.[131] Similarly, in part to limit

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government retained the ability to control banks was particularly important because Congress made bank charter applications open to all. See Menand, Federal Reserve, supra note 118, at 218 (citing 12 U.S.C. §§ 21, 26, 27 (2018)).

126. Cf. Menand, Supervise, supra note 125, at 965 n.56; id. at 982 n.136 ("As [Alexander] Hamilton put it, an incorporated 'bank is not a mere matter of private property, but a political machine of the greatest importance to the state.'" (quoting Alexander Hamilton, The Report of the Secretary of the Treasury, (Alexander Hamilton), on the Subject of a National Bank, reprinted in 7 Charles Brockden Brown & Robert Walsh, American Register, or General Repository of History, Politics, and Science 225, 243 (Philadelphia, G & A. Conrad & Co. 1811))).

127. See Menand, Federal Reserve, supra note 118, at 218 & n.112 (pointing to statutes "authorizing national banks to branch, but only to the extent permitted by state law and only within the state in which the bank is situated" and "prohibiting, among other things, a company that owned a bank in one state from acquiring a bank in another state"). This was an especially salient concern because one president of the Bank of the United States used his position to "curry favor with the press, influence elections, and support his allies, including lending to his family members and members of Congress." Ricks et al., NPU, supra note 51, at 833; see also Menand, Federal Reserve, supra note 118, at 209 (noting anti-oligarchy critiques of the Bank).

128. See Menand, Federal Reserve, supra note 118, at 210–22 (expanding on delegation, separation, supervision, and diffusion). Recall that the Sherman Act responded to a concentration of coordination rights in the legal forms of the trust and early corporation by commanding their dispersal. See supra notes 93–99 and accompanying text. Thus, decades before the Sherman Act, Congress had regulated coordination rights in banking.

129. Double refers to heightened normative force, not legal obligation. In other words, antitrust law aims to disperse coordination rights generally; banking law aims to disperse control of bank charters specifically.

130. See, e.g., Omarova & Steele, supra note 109, at 1169–71.

131. See 12 U.S.C. §§ 375a–375b (2018). The flipside of preventing concentrated credit flows is a command for their dispersal.

recursion between concentrated credit flows and firm concentration, it caps loans to one borrower.[132] Quantitative deposit caps also limit both national and state firm concentration.[133] And, although eroded over time, the National Bank Act sought to limit firm concentration by restricting banks to one geographic location, a regime known as unit banking.[134]

Banks are also subject to federal antitrust laws like the Sherman Act and the Clayton Act.[135] In fact, unlike other enterprises, banks must obtain preapproval from the relevant banking agency to consummate a merger.[136] Further, in response to the global financial crisis (GFC), Congress passed the Dodd–Frank Consumer Protection and Wall Street Reform Act ("Dodd–Frank"), requiring the relevant banking agency to consider how any bank acquisition might lead to greater or more concentrated systemic risk.[137]

Taken as a whole, banking law expresses a clear idea about how to govern the bank charter: disperse, regulate, and supervise control.[138] Yet

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132. See 12 U.S.C. § 84.

133. See 12 U.S.C. §§ 1831u(b)(2)(A), 1842(d)(2)(B). But see § 1842(d)(2)(A); Carnell et al., supra note 101, at 172 (noting exceptions to the ten percent deposit control cap contained in § 1842(d)(2)(A), such as "internal deposit growth, branching, acquiring a bank in its home state, and acquiring a thrift institution").

134. See Carnell et al., supra note 101, at 26–28, 40–42, 46–47 (documenting the origins and rollback of unit banking); Kathryn Judge, Response, Brandeisian Banking, 133 Yale L.J. Forum 916, 917–18, 935–36 (2024), https://www.yalelawjournal.org/pdf/JudgeYLJForumResponse_cqrz963m.pdf [https://perma.cc/54W4-DAEX] [hereinafter Judge, Brandeisian Banking] (noting Justice Louis Brandeis's and unit banking's coextensive focus on "decentralized power, small-scale enterprise, and community orientation"). Geographical restrictions suppressed competition qua rivalry between banks. See Jeffrey N. Gordon & Wolf-Georg Ringe, Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take, 115 Colum. L. Rev. 1297, 1317 (2015) ("The preexisting geographic restrictions that limited bank branching also protected local deposit gathering and loan-making from competitive encroachments."). Thus, competition qua rivalry is not a lodestar for bank coordination rights like it is for orthodox accounts of antitrust law.

135. See, e.g., Carnell et al., supra note 101, at 416.

136. This is required by both the Bank Merger Act, 12 U.S.C. § 1828(c), and the Bank Holding Company Act, 12 U.S.C. § 1842(c). Other enterprises, at most, must give notice under the Hart–Scott–Rodino Act. 15 U.S.C. § 18a (2018). This special regime is enforced by concurrent jurisdiction between the relevant banking agencies and the Department of Justice. Carnell et al., supra note 101, at 425–27.

137. An explicit goal of Dodd–Frank was "to end 'too big to fail.'" Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, pmbl., 124 Stat. 1376, 1376 (2010); see also id. § 604(d), 124 Stat. 1601 (codified as amended at 12 U.S.C. § 1842(c)(7)) ("In every case, the Board shall take into consideration the extent to which a proposed acquisition, merger, or consolidation would result in greater or more concentrated risks to the stability of the United States banking or financial system."); id. § 604(f), 124 Stat. 1602 (codified as amended at 12 U.S.C. § 1828(c)(5)) (providing that the responsible agency should consider "the risk to the stability of the United States banking or financial system" in merger cases).

138. Another way to think about banking's regulatory and supervisory regime, then, is one in which public and public–private institutions play a more important role than

in the last thirty years, banking has rapidly consolidated, in small part because purchase and assumption (P&A) transactions have dominated bank resolution.[139] In fact, even after Dodd–Frank, acquisitions made in bank resolution are exempt from banking law's concentration limits.[140] Case in point: A P&A transaction was the only way JPMorgan could acquire First Republic.[141]

C. *Bank Resolution*

Banks are special and so there is a special regime to deal with their failure: bank resolution. To understand the possibilities and limits of bank resolution—and ultimately, how bank resolution allocates coordination rights—this section examines its purpose, legal constraints, methods, and technical standards.

1. *Purpose*. — When commercial enterprises suffer financial distress, they often enter bankruptcy. Not so with banks.[142] Instead, for three

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hierarchical firms in coordination. So, to the extent the banking system would suffer coordination defects from alternative forms of organization, there is a sophisticated regime to pick up the slack.

Beyond the scope of this Note, but also important, are the ways that public institutions like the Federal Reserve, rather than dominant firms, coordinate prices. See generally Tankus & Herrine, supra note 25 (discussing price leadership by dominant firms and alternative coordination mechanisms).

139. See John Armour, Dan Awrey, Paul Davies, Luca Enriques, Jeffrey N. Gordon, Colin Mayer & Jennifer Payne, Principles of Financial Regulation 363 (2016); Omarova & Steele, Banking and Antitrust, supra note 109, at 1197. A P&A transaction effectively merges a failed bank with another bank. See infra section I.C.3. The authors identify two other driving forces: the elimination of federal hindrances to interstate mergers in the early 1990s, and Glass–Steagall's 1999 partial repeal, allowing commercial banks to affiliate with investment banks. See Riegle–Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (codified in scattered sections of 12 U.S.C.); Gramm–Leach–Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 U.S.C.); see also Jeremy C. Kress, Reviving Bank Antitrust, 72 Duke L.J. 519, 551 (2022) ("[In] 2008 . . . the federal government encouraged a handful of comparatively strong banks to absorb weaker institutions flirting with insolvency. As a result, JPMorgan acquired Bear Stearns and Washington Mutual, Bank of America added Merrill Lynch and Countrywide Financial, and Wells Fargo merged with Wachovia." (footnote omitted)).

140. See 12 U.S.C. §§ 1831(e), 1842(d)(5). Note, however, that banking law's unit banking regime and its concern with bank concentration previously trumped bank resolution law. See infra note 191; infra section II.C.2.

141. Nupur Anand, Anirban Sen, David French & Isla Binnie, Insight: How JPMorgan's Dimon Won the First Republic Deal, Reuters (May 2, 2023), https://www.reuters.com/business/finance/how-jpmorgans-dimon-won-first-republic-deal-2023-05-02/ [https://perma.cc/GP3S-TCZL].

142. Although bank holding companies are eligible for bankruptcy, their bank subsidiaries are not. See, e.g., Hynes & Walt, supra note 17, at 993. Prior to 1933, banks were subject to the standard bankruptcy process and depositors were treated like unsecured creditors. Dan Awrey, Unbundling Banking, Money, and Payments, 110 Geo. L.J. 715, 742 (2022). The resolution regime began with the FDIC's creation in 1933. Id. at 743.

standard reasons, banks enter resolution.[143] First, bankruptcy is not well suited for dealing with the bank enterprise.[144] Bankruptcy freezes the bankrupt enterprise's balance sheet, undermining the legal essence of bank deposits, which are defined by their payment on demand.[145] Second, a bank's franchise value quickly declines, so lengthy legal proceedings are particularly costly for bank stakeholders.[146] Third, "negative externalities" from bank failure, also known as "contagion," threaten further bank failures, payments system disruptions, and a sharp decline in access to credit for individuals and businesses.[147]

2. *Legal Constraints.* — The FDIC's primary role in resolution is to act as a receiver of the failed bank.[148] In effect, the FDIC steps into the shoes of the failed bank, using a wide range of tools to marshal its balance sheet and operations.[149] As an insurer, the FDIC always pays claims to the failed bank's insured depositors first.[150] Only if asset disposition is sufficient to cover insured claims can it then pay claims to all other bank

143. See Armour et al., supra note 139, at 341–42; see also Phoebe White & Tanju Yorulmazer, Bank Resolution Concepts, Trade-Offs, and Changes in Practices, Fed. Rsrv. Bank N.Y. Econ. Pol'y Rev., Dec. 2014, at 153, 156–58 (contrasting corporate bankruptcy and bank resolution).

144. See Armour et al., supra note 139, at 341. Bank resolution, by contrast, can transfer deposit liabilities in addition to assets. See John Armour, Making Bank Resolution Credible, *in* The Oxford Handbook of Financial Regulation 453, 461 (Niamh Moloney, Ellís Ferran & Jennifer Payne eds., 2015).

145. See 11 U.S.C. § 362 (2018) (automatic stay); Banking Act of 1933, Pub. L. No. 73-66, § 21(a)(2), 48 Stat. 162 (1933) (commonly known as the "Glass–Steagall Act") (codified at 12 U.S.C. § 378) (prohibiting engaging in the business of receiving deposits subject to repayment at the request of the depositor without a bank charter).

146. See Armour et al., supra note 139, at 341.

147. Id. at 341–42; see also Awrey, supra note 142, at 742–44.

148. The FDIC also acts an insurer and conservator. See Carnell et al., supra note 101, at 369–70 (focusing primarily on the FDIC's receivership function in resolution for simplicity). For a description of receivership powers and processes, see 12 U.S.C. § 1821(c). Additional grounds for receivership include probable or unacceptable risk of failure; violations of a statute, regulation, or cease-and-desist order; unsafe and unsound condition; consent; and more. See id. § 1821(c)(5). This Note uses "failure" to capture all the above receivership triggers.

In practice, almost all depository institutions are resolved by the FDIC except for credit unions, which are resolved by the National Credit Union Administration (NCUA). Carnell et al., supra note 101, at 87.

149. See 12 U.S.C. § 1821(d)(2)(A)(i) ("The [FDIC] shall . . . by operation of law, succeed to—all rights, titles, powers, and privileges of the insured depository institution . . . ."); id. § 1823(c)(1) (authorizing the FDIC, "in its sole discretion and upon such terms and conditions as the Board of Directors may prescribe, to make loans to, to make deposits in, to purchase the assets or securities of, to assume the liabilities of, or to make contributions to, any insured depository institution").

150. See id. § 1811. For the statutory priority of unsecured claims, see id. § 1821(d)(11)(A).

stakeholders, including uninsured depositors, other general creditors, and shareholders.[151]

The FDIC's broad receivership authority has a few key constraints.[152] In selecting and administering a resolution method, the FDIC must comply with the least cost test.[153] Added via amendment to the FDIA by the Federal Deposit Insurance Corporation Improvement Act (FDICIA) in 1991, the least cost test forbids using a resolution method if it is more costly to the FDIC's Deposit Insurance Fund (DIF)—the account from which depositors are paid[154]—than any alternative method.[155] As commonly understood, FDICIA sought to deter moral hazard and thus combat the rise of "too-big-to-fail" banks.[156] By guarding against losses to

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151. Secured claims are paid first from the value of the underlying collateral. Any remaining claim becomes unsecured. See id. § 1821(d)(5)(D)(ii).

152. For example, in disposing of the failed bank's assets, the FDIC must comply with five statutory factors: maximizing net present value, minimizing loss, ensuring adequate competition and fair treatment of offerors, prohibiting discrimination in the disposition process, and maximizing affordable housing. See id. §§ 1821(d)(13)(E)(i)–(v), 1823(d)(3)(D).

153. See id. § 1823(c)(4).

154. See id. § 1821(a)(4). Banks pay "risk-based assessments" or insurance premiums into the DIF. See id. § 1817(b). These assessments are functionally a tax. For more on the accounting treatment of deposit insurance premiums and the DIF, see Nathan Tankus, The Dizzying Array of Accounting Gimmicks Preventing Silicon Valley Bank's Failure From Affecting the Debt Ceiling, Notes on the Crises (Mar. 19, 2023), https://www.crisesnotes.com/the-dizzying-array-of-accounting-gimmicks-preventing-silicon-valley-banks-failure-from-affecting-the-debt-ceiling/ [https://perma.cc/2JM7-NLW5].

155. See 12 U.S.C. § 1823(c)(4)(A)(ii). Between 1982 and the passage of FDICIA, the FDIC could use any resolution method less costly than an insured deposit payout and asset liquidation. See Garn–St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified in scattered sections of 12 U.S.C.) (adding an explicit cost test to the FDIA); see also FDIC, The First Fifty Years: A History of the FDIC 1933–1983, at 86–87 (1984) [hereinafter FDIC, 1933–1983] (discussing the regimes predating FDICIA: the 1951–1982 de facto cost test and the Garn–St. Germain explicit cost test); infra section I.C.3 (discussing the payout and liquidation (PO) method).

FDICIA responded to the Savings and Loan (S&L) crisis of the 1980s, during which the FDIC routinely provided direct financial support to distressed institutions and protected noninsured claimants. Jeffrey N. Gordon & Christopher Muller, Confronting Financial Crisis: Dodd–Frank's Dangers and the Case for a Systemic Emergency Insurance Fund, 28 Yale J. on Regul. 151, 186 (2011); Randall S. Kroszner & Philip E. Strahan, Obstacles to Optimal Policy, The Interplay of Politics and Economics in Shaping Bank Supervision and Regulation Reforms, *in* Prudential Supervision: What Works and What Doesn't 233, 243–44 (Frederic S. Mishkin ed., 2001).

156. See Carnell et al., supra note 101, at 67, 368; 1 FDIC, History of the Eighties, 104–05 (1997). Yet many legislators "were more offended by the disparate treatment of large banks—whose depositors were commonly fully protected—and small banks—where protection was commonly limited to insured depositors—than they were by the moral hazard issues of 'too big to fail.'" Gordon & Muller, supra note 155, at 188 n.107. Rather than solve that problem, however, FDICIA's systemic risk exception entrenched it. See infra notes 160–163.

the DIF, the least cost test seeks to impose more losses on noninsured stakeholders such as uninsured depositors, other general creditors, and shareholders.[157]

The least cost test nevertheless affords the FDIC "substantial discretion" in implementing the resolution process.[158] Determining the least cost resolution method necessarily relies on a counterfactual, so the statute only directs the FDIC to document its evaluation of alternatives, and the assumptions on which the evaluation is based, on a present-value basis, using a realistic discount rate.[159]

In addition, the least cost test can be suspended upon invocation of the "systemic risk exception."[160] The exception is invoked when the FDIC, the Board of Governors of the Federal Reserve, and the Treasury Secretary in consultation with the President agree that adherence to the least cost test "would have serious adverse effects on economic conditions or financial stability."[161] Most recently, the systemic risk exception was used to resolve SVB and Signature Bank.[162] Bypassing the least cost test, the

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Moral hazard refers to the diminished incentive of a party with insurance to prevent losses they are insured against. Carnell et al., supra note 101, at 205. In regulating monetary and financial institutions, too much downside support is said to create moral hazard. Id. But see, e.g., Maziar Peihani, Resolution of Small and Medium-Sized Deposit-Taking Institutions: Back to Basics?, 60 Am. Bus. L.J. 419, 466–68 (2023) (finding the moral hazard problem overstated).

157. Gordon & Muller, supra note 155, at 188–89 ("Over the 1986–1991 period, the height of open bank assistance, uninsured depositor losses in resolution cases averaged approximately 12%; in the period immediately following, 1992–1994, the average losses were 65%."). The FDIC recounts that:

> [T]here had been a general opposition to [temporary unlimited] deposit insurance because of moral hazard, but . . . during the [2008] crisis, expansion of the insurance guarantee was thought to be warranted because, without it, there could be rapid deposit outflows from smaller banks into banks that were perceived to be too big to fail.

See FDIC, Crisis and Response: An FDIC History, 2008–2013, at 38 (2017) [hereinafter FDIC, 2008–2013].

158. Memorandum from Jonathan McKernan, Member, FDIC Bd. of Dirs., on Board Approval of Midsized-and-Large Failed-Bank Sales, to the FDIC Board of Directors 3 (Aug. 23, 2023) (on file with the *Columbia Law Review*).

159. 12 U.S.C. § 1823(c)(4)(B)(i). The legislative history, Professor Michael Ohlrogge argues, suggests documentation with a mandated retention period of five years was intended to make the FDIC's analysis available by FOIA. Ohlrogge, supra note 4 (manuscript at 43) (citing 138 Cong. Rec. 3114 (1992)).

160. See 12 U.S.C. § 1823(c)(4)(G)(i).

161. Id. The FDIC and Federal Reserve must approve with a supermajority vote of their boards. Id. Invoking the exception must "avoid or mitigate" the least cost test's harm. Id. And subsequent DIF losses must be recovered with a "special assessment" (i.e., a one-time tax) on banks. Id. § 1823(c)(4)(G)(ii).

162. See Press Release, Bd. of Governors of the Fed. Rsrv. Sys., FDIC, & Dep't of the Treasury, Joint Statement by the Dep't of the Treasury, Fed. Reserve, and FDIC (Mar. 12, 2023), https://www.fdic.gov/news/press-releases/2023/pr23017.html [https://perma.cc/43SD-TS2Q]. The systemic risk exception authorities based their decision on anticipated

FDIC—aiming to discourage further bank runs and payments system disruptions—made whole every SVB and Signature depositor.[163]

3. *Methods.* — In the post-FDICIA era, the FDIC uses two primary methods to resolve failed banks: purchase and assumption (P&A) transactions and payouts (PO).[164] In P&A, an acquiring institution "purchases" the assets and "assumes" the liabilities of the failed bank. It is, in essence, a merger.[165] P&A has two permutations depending on which deposit liabilities the acquirer assumes. It either assumes "all" deposits (PA) or only "insured" deposits (PI). In PO, on the other hand, assets are sold on a secondary market, insured deposits are paid by check, and all other claims are paid their pro rata share if liquidated assets exceed insured deposits.[166] Empirically, there is a clear hierarchy to the FDIC's post-FDICIA methods.[167] PA transactions are used seventy-five percent of the time, resolving ninety-two percent of bank assets; PI transactions are used fifteen percent of the time, resolving six percent of assets; and PO is

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"contagion" risk from further bank runs and failures as well as broader economic effects, including sensitivity to the fact that SVB's customers included several payroll companies. U.S. Gov't Accountability Off., GAO-23-106736, Bank Regulation: Preliminary Review of Agency Actions Related to March 2023 Bank Failures 29–31 (2023), https://www.gao.gov/assets/gao-23-106736.pdf [https://perma.cc/QPG4-4M78].

Unlike the other two major failures in March 2023, First Republic Bank did not receive a systemic risk exception and so was bound by the least cost test. Yet it was resolved with a type of P&A transaction that makes whole all uninsured depositors. See Bid Summary for First Republic Bank, San Francisco, CA, FDIC, https://www.fdic.gov/bank-failures/bid-summary-first-republic-bank-san-francisco-ca [https://perma.cc/F9MT-YF4Y] [hereinafter FDIC, First Republic Bid Summary] (last updated May 31, 2023); infra section I.C.3.

163. See Press Release, FDIC, FDIC Acts to Protect All Depositors of the Former Silicon Valley Bank, Santa Clara, California (Mar. 13, 2023), https://www.fdic.gov/news/press-releases/2023/pr23019.html [https://perma.cc/TU6V-HY77] [hereinafter FDIC, SVB Bridge Bank].

164. In assistance transactions—a popular method in the 1980s that has fallen out of favor post-FDICIA—the FDIC makes loans, contributions, or deposits; purchases assets; or assumes bank liabilities. See 12 U.S.C. § 1823(c)(1); 1 FDIC, Managing the Crisis: The FDIC and RTC Experience 20 & n.17 (1997), https://www.fdic.gov/resources/publications/managing-the-crisis/documents/managing-the-crisis.pdf [https://perma.cc/75MV-CUCX] [hereinafter FDIC, Crisis]. Assistance transactions were first authorized in 1950 but sat unused until 1971. See Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, 64 Stat. 873 (codified at 12 U.S.C. §§ 1811–1835a); FDIC, Crisis, supra, at 66 (citing FDIC, 1933–1983, supra note 155, at 94). The most famous assistance transaction resolved Continental Illinois in 1984, popularizing the "too-big-to-fail" moniker. See FDIC, Crisis, supra, at 560.

165. In fact, when Congress added the P&A authority to the FDIA in 1935, "most banking observers felt that there were too many banks in operation and that it would be desirable if the FDIC could facilitate an orderly reduction in their number through increased mergers." FDIC, 1933–1983, supra note 155, at 81.

166. See FDIC, 2008–2013, supra note 157, at 185. Uninsured depositors and other general creditors may receive advanced dividends if the FDIC forecasts recoveries for them in liquidation. See FDIC, Resolutions Handbook, supra note 19, at 28.

167. See, e.g., Ohlrogge, supra note 4 (manuscript at 41) ("FDIC resolution methods have shifted dramatically, to essentially always favor whole-bank or all-deposit P&A deals that rescue uninsured depositors.").

used only five percent of the time, resolving one percent of assets.[168] PA is the favored method, while PI, and especially PO, are disfavored alternatives.[169]

The FDIC begins a P&A transaction by marketing the failed bank franchise to a pre-approved list of third-party institutions.[170] The FDIC offers at least one preselection of assets, liabilities, and contractual provisions—together known as the conforming bid criteria.[171] The acquirer's bid consists of naming its desired assets and liabilities and the cash it will pay or receive to complete the transaction.[172] A more competitive bid purchases more assets, assumes fewer uninsured deposits, and pays more cash to the FDIC. The assets not acquired in P&A are liquidated—sold in a secondary market—in separate transactions.[173]

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168. See BankFind Suite: Bank Failures & Assistance Data, FDIC, https://banks.data.fdic.gov/bankfind-suite/failures [https://perma.cc/BMV4-GADJ] [hereinafter FDIC, Bank Failures Data] (last visited Oct. 15, 2024) (filtering for post-FDICIA resolution data from January 1, 1992, to January 1, 2025). Post-FDICIA, the same hierarchy in terms of assets exists both before 2008—PA: 57%; PI: 39%; PO: 2%—and after— PA: 95%; PI: 3%; PO: 1%. In terms of the number of banks resolved, PI outnumbers PO before 2008—PA: 146, or 48%; PI: 114, or 37%; PO: 24, or 8%—but not after—PA: 500, or 91%; PI: 12, or 2%; PO: 18, or 3%. See id. (filtering for resolution data from January 1, 1992, to December 31, 2007, and January 1, 2008, to January 1, 2025; excluding two GFC assistance transactions involving Bank of America and Citibank). PO, however, has not been used since 2013; PI was most recently used in 2024, 2019, and 2017. See id (filtering for resolution data by "Pay Out" and "Purchase and Assumption (PI)" transaction types).

169. See id. (filtering for data showing post-FDICIA use of PA, PI, and PO in ninety-five percent of all resolution transactions, resolving over ninety-nine percent of assets, excluding two GFC assistance transactions involving Bank of America and Citibank); see also White & Yorulmazer, supra note 143, at 159–60 (describing bank resolution methods).

170. See FDIC, 2008–2013, supra note 157, at 187. Most often, the third-party acquirer is another bank. But in late 2008, the OCC and FDIC opened P&A bidding to private equity firms. Id. at 198. Between 2008 and 2013, excluding Washington Mutual, private equity purchased twenty-two percent of the FDIC's receivership assets. Id. at 199.

171. See id. at 185, 187 n.30. Because the FDIC's methods for setting conforming bid criteria and selecting the winning bid are secret, banks are incentivized to submit conforming bids. Ohlrogge, supra note 4 (manuscript at 19). But submitting a conforming bid is not a necessary condition for winning a P&A auction. See, e.g., Bid Summary for Republic First Bank dba Republic Bank, Philadelphia, PA, FDIC, https://www.fdic.gov/bank-failures/bid-summary-republic-first-bank-dba-republic-bank-philadelphia-pa [https://perma.cc/4FE4-XMN2] (last updated May 3, 2024) (showing a winning bid that was not a conforming bid).

172. If assets exceed liabilities, the acquirer pays the FDIC for the difference; if liabilities exceed assets, as is typical, the FDIC pays the acquirer instead. Therefore, for a given amount of deposits assumed, the cash difference reflects both the quantity and valuation of assets acquired. See FDIC, 2008–2013, supra note 157, at 187. In addition, bidders may make multiple bids. See, e.g., FDIC, First Republic Bid Summary, supra note 162 ("There may be more bids than bidders because one or more bidders submitted more than one bid.").

173. When the acquirer assumes at least ninety percent of assets (implying at most ten percent are liquidated) the transaction is called "whole-bank" P&A. See FDIC, 2008–2013, supra note 157, at 199 & n.57.

The disfavored alternative to P&A is PO. On the liability side, the FDIC pays insured depositors by check.[174] Then they liquidate the failed bank's assets, just like unpurchased P&A assets. Unlike P&A, PO extinguishes the franchise value of the failed bank. This loss puts PO at an asset-side cost disadvantage to P&A. But in the absence of a systemic risk exception, PO is as or less costly than P&A on the liability side because no uninsured deposits are paid from the DIF.[175]

The FDIC has two additional authorities to facilitate smooth resolution: deposit insurance national banks (DINBs) and bridge banks.[176] These are best considered instrumental or intermediate resolution methods because they stabilize the failed bank until one of the primary resolution methods is viable.[177] A DINB is a temporary bank with a limited charter.[178] It makes insured deposits immediately available for withdrawal or transfer.[179] Bridge banks are like DINBs but with a broader scope.[180] Instead of merely making insured deposits available, they are chartered to continue normal bank operations for up to five years.[181] Bridge banks are typically used when a P&A transaction is not immediately viable, like in the case of SVB.[182] No matter which intermediate method the FDIC uses, the

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174. Checks typically arrive by Monday or Tuesday following a Friday bank closure, so depositors lose access to their funds over the weekend. FDIC, 2008–2013, supra note 157, at 185 n.a.

175. Uninsured deposits paid from the proceeds of asset liquidation are not a net cost to the DIF.

176. See 12 U.S.C. § 1821(m)–(n) (2018).

177. Until falling out of use in 1995, the FDIC also prevented depositor disruption with an "insured deposit transfer" (IDT) method in which a third-party bank would assume all the failed bank's insured deposits. IDT disappeared from the FDIC's primary resolution methods as P&A—and PA, in particular—became dominant. See FDIC, Crisis, supra note 164, at 44, 75; FDIC, Bank Failures Data, supra note 168.

178. FDIC, 2008–2013, supra note 157, at 184.

179. Soon after SVB's failure, the FDIC determined there were too many uninsured deposits and too much uncertainty about SVB's assets to implement any of its primary resolution methods. It chartered the DINB of Santa Clara to give depositors immediate access to their insured deposits. Press Release, FDIC, FDIC Creates a Deposit Insurance National Bank of Santa Clara to Protect Insured Depositors of Silicon Valley Bank, Santa Clara, California (Mar. 10, 2023), https://www.fdic.gov/news/press-releases/2023/pr23016.html [https://perma.cc/6EM7-BXDW].

180. In effect, the failed bank is temporarily nationalized. See Hyman P. Minsky, Stabilizing an Unstable Economy 52 n.5 (2008) [hereinafter Minsky, Stabilizing] (calling the resolution of Continental Illinois a "covert nationalization").

181. A bridge bank charter has an initial lifespan of two years, but it can be renewed for three additional one-year periods. 12 U.S.C. § 1821(n)(9).

182. One day after invoking the systemic risk exception, the FDIC disbanded the DINB of Santa Clara and chartered the Silicon Valley Bridge Bank (SVBB). See FDIC, SVB Bridge Bank, supra note 163. Thirteen days later, SVBB was sold to First-Citizens Bank by loss-share PA at a projected loss of $20 billion. See Press Release, FDIC, First-Citizens Bank & Trust Co., Raleigh, NC, to Assume All Deposits and Loans of Silicon Valley Bridge Bank, N.A., From the FDIC (Mar. 26, 2023), https://www.fdic.gov/news/press-releases/2023/pr23023.html [https://perma.cc/WWH8-Z4DB].

Agency appoints its own board of directors after firing the failed bank's directors, officers, and senior management.[183]

The FDIC also draws on its broad disposition powers to create additional tools as needed.[184] For example, loss-share agreements—in which the FDIC commits to share in the acquirer's downside risk—were deployed during the GFC.[185] They enabled greater P&A asset transfers to a single acquirer by reducing the risk of loss from acquiring low-quality assets.[186] The FDIC quickly paired loss-share agreements with "true-up" payment provisions.[187] These provisions allow the FDIC to share in the asset's upside in addition to its downside.[188] When an asset returns greater

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183. See 12 U.S.C. § 1821(n)(1)(D), (2)(D), (4)(A) (2018); FDIC, 2008–2013, supra note 157, at 184 & n.25 ("The FDIC routinely replaces the failed bank's senior management . . . ."). By contrast, bankruptcy does not reflexively fire corporate controllers, instead retaining them as the "debtor in possession." See Barry E. Adler, Anthony J. Casey & Edward R. Morrison, Baird and Jackson's Bankruptcy: Cases, Problems, and Materials 32 (5th ed. 2020).

184. For example, in the 1980s, the FDIC created income maintenance agreements to assist merger transactions. See FDIC, Crisis, supra note 164, at 72. If the acquirer's return on acquired assets fell short of the average cost of savings bank funds, the FDIC would pay them for the difference. See id. If the acquired asset return exceeded the cost of funds, the acquirer would pay the FDIC. See id. This arrangement was a precursor to the tandem of loss-share agreements and true-up provisions later developed to share in losses and gains more broadly with acquirers. See infra notes 185–189 and accompanying text. Similarly, net worth certificates buttressed assistance transactions as a direct source of equity. See FDIC, Crisis, supra note 164, at 74.

185. Loss-shares date to 1991. FDIC, Crisis, supra note 164, at 80. The FDIC's default loss-share agreements during the GFC covered eighty percent of losses on acquired assets and went as high as ninety-five percent. FDIC, 2008–2013, supra note 157, at 195. The FDIC stopped offering loss-share agreements in their conforming bid criteria at the end of 2013, id. at 196, but they appear to have reemerged. See, e.g., FDIC, First Republic Bid Summary, supra note 162; Bid Summary for Heartland Tri-State Bank, Elkhart, KS, FDIC, https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/heartlandtristate-bid-summary.html [https://perma.cc/Q8ZV-CJKJ] (last updated Aug. 8, 2023) (showing a "Commercial Shared-Loss Tranche" bid category and categorizing the transaction as "All Deposits Whole Bank with Shared-Loss").

186. See FDIC, Crisis, supra note 164, at 16. Because P&A transactions come together very quickly, acquirers often do not have time for thorough due diligence and thus are at a significant information disadvantage. See FDIC, 2008–2013, supra note 157, at 185; infra note 314. Mitigating this risk reduces the risk premium demanded by acquirers. See FDIC, 2008–2013, supra note 157, at 190. This results in a "higher" bid and thus a lower cost to the FDIC up front, even as it increases costs on the back end as losses are incurred. Id. at 191. Often, these agreements enable P&A transactions that otherwise would not be viable, saving the cost of liquidating. And on cost terms, a loss in the future is preferable to a loss today because the least cost test is calculated in present value terms. See 12 U.S.C. § 1823(c)(4)(B)(i)(I), (d)(3)(D); id. § 1821(d)(13)(E)(i).

187. Loss-share P&A became the FDIC's dominant resolution method by the middle of 2009; true-up payments were added that October. There were 304 loss-share transactions between 2008 and 2013, and 215—or seventy-one percent—used true-up provisions. FDIC, 2008–2013, supra note 157, at 195, 200.

188. Id. at 191.

than its expected value, the acquirer pays part of the gain to the FDIC.[189] Shelf charters are yet another modern resolution law innovation.[190] They allow a nonbank entity to bid on and acquire a failed bank in a P&A transaction.[191] The Office of the Comptroller of the Currency (OCC) grants preliminary approval of a national bank charter to the nonbank, and the charter remains inactive, or "on the shelf," until the nonbank wins a P&A auction.[192]

The FDIC's primary resolution methods—PA, PI, and PO—give it flexibility to prevent insured deposit losses and dispose of failed bank assets within the bounds of the least cost test. Its intermediate methods—DINBs and bridge banks—fill the gap between failure and primary method viability. And to strengthen its favored method, the FDIC draws on broad powers to create tools such as loss-share agreements, true-up provisions, and shelf charters.

4. *Technical Standards.* — What makes one resolution method better than another? Answering that question requires enumerating technical standards for the resolution process: administrative burden, speed, orderliness, scale, and resilience.

Administrative burden refers to staffing, expertise, and management costs.[193] Speed means minimizing customer disruption without triggering fire-sale or asset overhang dynamics.[194] Orderliness refers to a smooth

189. Like loss-share agreements, true-up provisions appear to have recently reemerged. See FDIC, First Republic Bid Summary, supra note 162 (showing an "Equity Appreciation Offer" bid feature).

190. See supra note 170.

191. The modern shelf charter is predated by ad hoc chartering of new banks. Ad hoc chartering may have been a workaround for a unit banking regime in which bank acquisitions were not allowed. See FDIC, 1933–1983, supra note 155, at 86 ("[Between 1945 and 1953,] there were 24 assumptions, including cases in Illinois, Missouri, Texas, and Wisconsin—all essentially unit banking states. The FDIC was able to arrange assumption transactions with newly chartered banking groups in several of these cases."); supra note 134 and accompanying text (referencing unit banking).

192. Press Release, OCC, OCC Approves First Use of "Shelf Charter" to Acquire Failed Bank (Jan. 22, 2010), https://www.occ.gov/news-issuances/news-releases/2010/nr-occ-2010-8.html [https://perma.cc/7XFZ-BFMW] (internal quotation marks omitted); see also FDIC, 2008–2013, supra note 157, at 135 & n.60 ("A shelf charter is a conditional banking charter granted to an organizing group for the specific purpose of acquiring one or more failing banks. It is conditional on the organizing group's being selected as the winning bidder for the failing bank or banks."). This also means that a pre-existing firm exemption is not necessary to win a P&A auction.

193. Cf. Armour et al., supra note 139, at 349–50 (enumerating speed, purpose, administrative process, and subordinated creditor and shareholder rights as "core characteristics of a resolution procedure"). The FDIC's desire to minimize administrative burdens stems from the S&L crisis of the 1980s and early 1990s. During that crisis, "[t]he FDIC retained and managed a large share of the assets and found the experience to be both costly and operationally complex." FDIC, 2008–2013, supra note 157, at 179.

194. For a discussion of fire-sale and asset overhang dynamics, see FDIC, 2008–2013, supra note 157, at 207–08 (noting that optimal resolution speed is a balancing act).

process that minimizes bank runs, broader disruptions to the community, and financial instability.[195] A scalable resolution method works well with small, medium, and large bank failures alike. And a resilient method works well in times of both financial market calm and stress. All else equal, a resolution method that minimizes the FDIC's administrative burden, works faster, is more orderly, can be scaled up and down, and is resilient to financial market stress is a more technically proficient method. How technically proficient are the FDIC's primary methods?

The two P&A transactions—PA and PI—are administered by the same, relatively easy processes of asset auctions and liquidations, and deposit transfers and payouts. Their speed is contingent on financial market conditions: In times of stress, bidders are scarce, so P&A may not be viable, and an intermediate method may be required. In terms of orderliness, PI transactions give uninsured depositors essentially the same incentive to run as PO transactions, while PA transactions eliminate that incentive entirely.[196] However, P&A causes longer-term disruptions because acquirers tend to reduce lending to the failed banks' former customers, lower their deposit rates, and close their branches.[197] Further, P&A does not scale well with bank size.[198] Generally, only other large banks can afford to purchase and quickly integrate the assets of another large bank. Thus, the largest banks are poor candidates for P&A because there are few, if any, bidders available.[199]

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195. See, e.g., FDIC, Crisis, supra note 164, at 211 ("To maintain confidence in the banking system and to maintain stability of the financial system . . . resolution of failed depository institutions was designed to promote the efficient, expeditious, and orderly liquidation of failed banks and thrift institutions.").

196. Collectively, uninsured depositors have a greater incentive to run in PO transactions when PI asset sales generate greater receipts than PO asset liquidations (or vice versa). Still, they are unlikely to be made whole in either case. So, an ex ante commitment to PA resolution can reduce the incentive for an uninsured depositor to run from a failing bank prior to resolution.

197. See Siddharth Vij, Acquiring Failed Banks 2–4, 24, 26–27 (Oct. 9, 2020) (unpublished manuscript), https://papers.ssrn.com/abstract=3234435 [https://perma.cc/F7JD-5MJJ].

198. See Armour supra note 144, at 466 ("[A] purchase and assumption transfer requires that a transferee be found with the financial resources to underwrite the liabilities that have been transferred. The bigger—and consequently, more systemic—the firm that has been resolved, the more difficult it will be to find a suitable transferee.").

199. "Hence, bank size can lead to a systemic crisis" because "larger and more complex [banks are] . . . more difficult to resolve." White & Yorulmazer, supra note 143, at 160 n.13, 163.

Finally, P&A is not resilient.[200] Empirically, P&A transactions are more costly than liquidation in times of industry distress.[201]

On the other hand, PO transactions may require prolonged receivership management if assets cannot be sold quickly. But they are primarily burdened only by liquidating assets and mailing deposit checks.[202] PO can be inferior in terms of speed because funds are not immediately available without use of an intermediate method.[203] On the liability side, PO is administratively scalable, although larger bank failures will magnify deposit access disruptions. On the asset side, PO scales poorly with bank size because large asset sales can depress market prices.[204] Indeed, because liquidation relies on a secondary market for bank assets, PO shares an important resilience deficiency with P&A.[205] Nevertheless, PO asset liquidations are more resilient than P&A because piecemeal asset sales are less complex and draw on a larger pool of bidders, including many from outside the banking system.[206]

In sum, the FDIC's primary methods are relatively good at minimizing administrative burden and balancing resolution speed. They can prevent the most serious disruptions such as bank runs, but they tend to hurt the failed bank's customers over time. Further, they do not scale well with

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200. "Because of uncertainty about the value of the failed-bank assets, the whole-bank [P&A] option was rarely cost-effective at the height of the crisis: the risk premiums demanded by potential acquirers were simply too great." FDIC, 2008–2013, supra note 157, at 190.

201. See Rosalind L. Bennett & Haluk Unal, Understanding the Components of Bank Failure Resolution Costs, 24 Fin. Mkts., Insts. & Instruments 349, 382 (2015) (finding P&A more costly than liquidation in periods of industry distress even after adjusting for selection bias); Jason Allen, Robert Clark, Eric Richert & Brent Hickman, Banking Fragility and Resolution Costs 14 (April 29, 2023) (unpublished manuscript), https://ssrn.com/abstract=4434353 [https://perma.cc/E8PS-BEHX] (finding "during crises resolution costs can spiral as the set of unconstrained bidders shrinks" due to health-of-bidder restrictions on P&A auctions).

202. The FDIC also estimates noninsured claimant recoveries to determine whether advanced dividends are viable, and if so, how much to pay. See FDIC, Crisis, supra note 164, at 20 & n.14, 44–45; supra note 166.

203. On the other hand, PO may allow more time for due diligence on the part of both the FDIC and buyers in secondary markets.

204. See FDIC, 2008–2013, supra note 157, at 185.

205. See Minsky, Stabilizing, supra note 180, at 86 (discussing the need for secondary markets in position-making instruments for normal functioning of the banking system); Hyman P. Minsky, Suggestions for a Cash Flow-Oriented Bank Examination 150, 152 (1967), https://digitalcommons.bard.edu/cgi/viewcontent.cgi?article=1174&context=hm_archive (on file with the *Columbia Law Review*) ("[A] bank's viability . . . depends upon the normal or proper functioning of some financial markets. . . . Thus . . . whenever cash flows from operations are insufficient to meet financial commitments: a unit can be in a cash flow bind . . . because it cannot sell assets . . . to raise cash.").

206. FDIC, 2008–2013, supra note 157, at 185; see also supra note 170. Smaller asset purchases also require less due diligence. See FDIC, 2008–2013, supra note 157, at 191.

larger bank failures, and they are not resilient to financial market stress.[207]

These technical standards, together with resolution's core purpose and legal constraints, form resolution law's criteria. Missing from this set are competition, consumer welfare, and productive efficiency. Thus, resolution law does not adopt antitrust law's orthodox criteria. So when it comes to allocating coordination rights, one would expect resolution to allocate coordination rights independently from antitrust, independently justify its allocation, or benefit from antitrust's criteria.[208]

II. CONTESTING RESOLUTION'S DEFAULT ALLOCATION OF COORDINATION RIGHTS

This Part argues that resolution law's allocation of coordination rights mirrors antitrust law's allocation without good reason. First, resolution allocates coordination rights like antitrust. All else equal, resolution prefers to preserve concentrated intrafirm control and expand a given instance of the firm exemption. That resolution chooses to mirror antitrust's default allocation is noteworthy because antitrust does not command the FDIC to allocate intrafirm coordination rights or draw firm boundaries in a particular way.[209] As Part I showed, the FDIC has broad authority to marshal the failed bank's balance sheet, including creating new tools out of broad powers as desired. The Agency can merge the failed bank to sustain its franchise value, liquidate the bank, charter a new entity to run the bank, or run the bank on its own for up to five years.[210] And it can fire management and appoint its own board of directors who can write new bylaws governing enterprise operations.[211] Crucially, then, the FDIC defines the "single entit[ies]" or firms that emerge from resolution.[212] It plays an active role in allocating post-resolution bank coordination rights.

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207. This is particularly troubling because bank failures tend to be clustered. See White & Yorulmazer, supra note 143, at 156.

208. In other words, given the distinct policy rationales of antitrust and resolution law, it makes sense that the two fields might differently support their allocation of coordination rights. But if resolution law can't articulate a reason for its allocation based on criteria internal to resolution or banking, then it should at least find support from antitrust's criteria.

209. See infra section II.A.1.

210. The least cost constraint is addressed in section II.A.3.

211. See 12 U.S.C. § 1821(n)(2)(E) (2018) ("The board of directors of a bridge depository institution shall adopt such bylaws as may be approved by the Corporation."); Del. Code tit. 8, § 109(b) (2025) ("The bylaws may contain any provision . . . relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."); FDIC, 2008–2013, supra note 157, at 184 & n.25 ("The FDIC routinely replaces the failed bank's senior management . . . .").

212. See Paul, Allocator, supra note 10, at 401; see also supra note 35 and accompanying text.

Second, despite replicating antitrust's allocation,[213] resolution's allocation does not derive from the criteria of antitrust, banking, or resolution law itself. In particular, preserving concentrated intrafirm control and expanding a given instance of the firm exemption are not necessary for a technically proficient resolution process, nor are they necessary to comply with the least cost test.[214] Further, both intrafirm concentration and a broader firm exemption disturb the double dispersal command of antitrust and banking law.[215]

A. *Resolution*

This section argues that resolution defers to antitrust's allocation of coordination rights even though that allocation does not fulfill the criteria internal to resolution law. As a preliminary matter, it is important to distinguish between how a particular resolution *method* may or may not fulfill resolution's criteria, and how that method's *particular allocation of coordination rights* may or may not do so. The FDIC's default allocation is only derivable from resolution's criteria if the *allocation* is what fulfills the aim. If its criteria are fulfilled by something other than the allocation—such as the method's administrative process—then they owe to the method, not the allocation.

1. *Resolution Mirrors Antitrust.* — First, the FDIC's resolution method hierarchy—PA > PI > PO—proceeds in order of the most concentrated intrafirm control to the least.[216] PA transfers the greatest amount of assets and deposits to a single enterprise. PI necessarily transfers fewer deposits and often fewer assets. And PO disperses both assets and liabilities wider and so transfers the least amount to a single enterprise.[217] Because bank enterprises are internally hierarchical,

213. Recall antitrust's deference to ownership- and control-based coordination rights. See Paul, Allocator, supra note 10, at 406–07 (observing how antitrust law takes existing property rights and allocates a new right to economic coordination). Resolution law takes pre-failure relations defined by employment and antitrust law and allocates a new right: reconstitution in the image of antitrust's firm.

214. Although preserving or reducing the number of firms that emerge from resolution can help satisfy the least cost test, it is not clear that preserving intrafirm concentration does the same. See infra section II.A.3.

215. See supra notes 129, 137 and accompanying text.

216. Resolution law prefers P&A transactions to all other resolution methods nine to one, and PA to PI five to one. See supra notes 167–169 and accompanying text.

217. Depositors of the failed bank are free to redeposit their money with any bank they choose, or even no bank at all. In practice, most deposits flow back to centers of concentrated control. See Steven Kelly, Where Was the Last Place You Saw the Deposits?, Without Warning (July 18, 2023), https://www.withoutwarningresearch.com/p/where-was-the-last-place-you-saw [https://perma.cc/NW69-T9KL]. Still, PO necessarily disperses the failed bank balance sheet more than PA or PI.

resolution's default allocation tends to concentrate intrafirm control.[218] In other words, resolution creates fewer and larger internally hierarchical banks than before, channeling control of bank charters into fewer hands at the top of firms.

Second, resolution's hierarchy proceeds from greatest expansion of a given instance of the firm exemption to smallest.[219] Again, because PA transfers the greatest amount of the failed bank's balance sheet to a single firm, and because it alone can transfer the failed bank's franchise value, it expands a given instance of the firm exemption more than PI and PO. And again, PO's dispersal of the failed bank balance sheet is the least likely to expand an instance of the firm exemption.[220]

In sum, resolution's hierarchy mirrors the ability of each method to concentrate intrafirm control and expand the firm exemption. PA sits atop the hierarchy because merging two firms into one expands the firm exemption and concentrates intrafirm control more than PI and PO.[221]

2. *Non-Least-Cost Criteria.* — Neither preserving intrafirm hierarchy nor expanding the firm exemption is necessary to serve resolution's core purpose or fulfill its technical standards. Although resolution's *methods* may serve those non-least-cost criteria, resolution's *allocation* does not.

First, recall resolution's core purpose: avoiding bankruptcy.[222] Resolution as a process, not resolution's allocation of coordination rights, serves that aim. Intrafirm hierarchy and a broader firm exemption are irrelevant to keeping banks out of bankruptcy.

Similarly, the degree to which the resolution method hierarchy fulfills resolution's technical standards owes to its process, not its allocation. For example, the fact that P&A transactions are less burdensome, faster, and more orderly than PO transactions owes somewhat to P&A's ability to move a large chunk of the failed bank's balance sheet to a single entity.[223] But that does not depend on the entity's degree of intrafirm hierarchy or the existence of a pre-existing firm exemption.[224] A P&A transaction that transferred the balance sheet to an internally horizontal entity would not

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218. If there were previously two decisionmaking centers, after an all-asset PA, there is only one. After all other P&A transactions, there are between two and one decisionmaking centers, varying inversely with the number of deposits assumed and assets liquidated.

219. See supra notes 28–30 and accompanying text. If one wants to curtail the firm exemption and promote other forms of coordination, a narrower firm exemption should be preferable to a broader one.

220. See supra note 217 and accompanying text.

221. See supra note 45 and accompanying text.

222. See supra section I.C.1.

223. Resilience and scale are not analyzed here because P&A transactions, and thus resolution's default allocation, have resilience and scale deficiencies and so cannot justify the default allocation.

224. See supra note 192 and accompanying text. An alternative resolution method that does not require or expand a given instance of the firm exemption is proposed in section III.A.

necessarily perform worse in terms of those same technical standards of burden, speed, or orderliness. Nor would a transaction that transferred the balance sheet to a newly chartered entity (i.e., one without a pre-existing firm exemption). Thus, intrafirm hierarchy and a firm exemption are not necessary to serve resolution's technical standards. The only remaining justification for resolution's default allocation in terms of its own criteria could be that it better fulfills the FDIC's least cost obligation.

3. *Least Cost Criterion.* — Recall that cost to the DIF depends on the receipts from disposition of the failed bank's balance sheet.[225] It depends on asset bids and the amount of deposits assumed, not the productive efficiency of the acquirer.[226] Only if, holding balance sheet size constant, less hierarchical or newly chartered enterprises necessarily made less competitive bids would the FDIC's default allocation be justified on least cost terms. One might further argue that expanding an existing firm exemption is necessary to generate funds from the private sector.[227] A close review of the FDIC's resolution powers, however, admits another option.

True-up provisions allow the FDIC to trade payments now for payments later, reducing the cost of P&A transactions to the DIF.[228] And shelf charters allow entities without a pre-existing firm exemption to submit P&A bids.[229] So, for example, employees of the failed bank could obtain a shelf charter from the OCC and bid on the bank's balance sheet, promising to remit future profits to the DIF with a true-up provision in exchange for recapitalization.[230] It's true that an empirical determination of least cost must be done on a case-by-case basis, and a large enough enterprise could outbid the shelf charter enterprise's true-up provision.[231] Still, this example shows that intrafirm hierarchy and a pre-existing firm exemption are not necessary to comply with the least cost test.

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225. See supra section I.C.3.

226. While both insured and uninsured deposits count as costs to the DIF, only the assumption of uninsured deposits matters for determining the least cost resolution method because insured deposits are a cost common to all resolution methods.

227. In other words, so the argument might go, because least cost requires another actor to acquire the failed bank's balance sheet, expanding the acquirer's balance sheet and thus the resources over which it can legally coordinate is necessary to satisfy the least cost test.

228. See supra section I.C.3. Not inconsistent with FDIC practice, this tool could be expanded such that payments are made to the DIF regardless of the rate of return on the acquired assets.

229. See supra section I.C.3.

230. This is the essence of the intrafirm reallocation transaction (IRT). Section III.A.2 elaborates its prospects for least cost test compliance.

231. For example, given JPMorgan's desire to integrate First Republic's high net worth customer base into its wealth advisor operations and its inability to make acquisitions outside of bank resolution, it may have been willing to pay a premium over the net present value of profits a new enterprise could generate and thus pay to the FDIC with a true-up provision. See First Republic Deal Beefs Up JPMorgan's Affluent Customer Ecosystem, PYMNTS (May 1, 2023), https://www.pymnts.com/news/banking/2023/first-republic-deal-beefs-up-jpmorgans-affluent-customer-ecosystem/ [https://perma.cc/6GXY-CAQE].

Therefore, a merger between a failed bank and a less hierarchical or newly chartered entity is not necessarily more costly than a merger with a more hierarchical entity of the same size.[232] The least cost test, then, does not command a particular allocation of intrafirm coordination rights, nor does it require a pre-existing firm exemption, even if P&A merger tends to be the least cost alternative among the FDIC's existing methods.[233] Just like resolution's technical standards do not explain the FDIC's preference for hierarchical firm-based coordination, neither does the least cost test.

B. *Antitrust*

Resolution law struggles to explain its allocation of coordination rights in terms of its own criteria. Yet it is not clearly supported by antitrust's criteria either.

1. *Orthodox Criteria.* — Antitrust law allocates coordination rights with "a preference for economic coordination that is accomplished by means of the concentration of ownership, control, or both."[234] Productive efficiency, consumer welfare, and competition ostensibly justify that allocation. Yet resolution law's preferred method—the P&A transaction—may be the least likely to produce benefits along those dimensions.

First, recall that there is good reason to doubt that the theory of productive efficiency can explain intrafirm hierarchy.[235] In practice, it is even more difficult to isolate *hierarchy-justifying* productive efficiencies—that is, cost savings owing to hierarchy itself rather than merely scale of production.[236] And, as in the case of Citibank, hierarchy (and conglomeration) can make for feckless executives, internal committees, and external consultants.[237]

A closer look at P&A transactions further puzzles productive efficiency as a resolution criterion. To start, the P&A acquirer does not bid on the failed bank because of an a priori belief that it can more efficiently organize and manage its balance sheet and operations. Empirically, acquirers bid on failed banks primarily to assume their deposits and

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232. Section III.A discusses how to implement a resolution method that results in deconcentrated intrafirm control and complies with the least cost test.

233. It is uncertain whether P&A, in fact, tends to be the least cost method of resolution. See Ohlrogge, supra note 4 (manuscript at 42) (noting the FDIC's secrecy regarding asset valuations and conforming bid criteria). Although it may not be a conscious commitment of the resolution authorities, the firm exemption and intrafirm hierarchy are deeply embedded in thinking about economic and market governance, and so it is worth considering the degree to which antitrust's default allocation unconsciously structures the resolution method hierarchy. A parallel claim explains, in part, why the antitrust problems posed by Uber and Lyft are so difficult to see. See Paul & Tankus, supra note 10, at 50.

234. Paul, Allocator, supra note 10, at 405.

235. See supra section I.A.3.

236. See infra note 243.

237. See supra notes 63–68 and accompanying text.

associated customers and goodwill, as well as boost their stock price.[238] None of these are hierarchy-justifying efficiencies, nor can they distinguish PA from PI or PO.[239] Moreover, P&A transactions are often consummated within a few weeks after failure, if not within a single day or weekend.[240] Thorough due diligence is difficult, if not impossible, so identifying pre-bid cost-saving synergies is unlikely.[241] If such cost savings exist, then, they must be necessary consequences of P&A mergers rather than intentional business plans.

In general, mergers are typically defended on grounds that they can improve productive efficiency and discipline bad management.[242] But empirical support for the efficiency claim is suspect, including in the context of bank consolidation.[243] Perhaps the most intuitive efficiency—

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238. Vij, supra note 197, at 4–5, 29; see also supra note 231. Deposits, though not required for making loans, are a common funding source for banks. They are particularly attractive because banks can pay very little interest without losing them to another bank and they create no additional capital requirements. See 12 C.F.R. § 3.32 (2014) (classifying a deposit as a "sovereign exposure" with a zero-percent risk weight); John C. Driscoll & Ruth A. Judson, Sticky Deposit Rates 2–3 (Fin. & Econ. Discussion Series, No. 2013-80, 2013), https://ssrn.com/abstract=2357993 [https://perma.cc/PL3L-KASA] (finding deposit rates "upwards-sticky" but "downwards-flexible," especially for larger bank branches). Thus, P&A allows a bank to acquire cheap funding that is inexpensive to retain.

239. See supra section I.A.2.

240. See, e.g., Press Release, FDIC, Iowa Trust & Savings Bank, Emmetsburg, Iowa, Assumes All of the Deposits of Citizens Bank, Sac City, Iowa (Nov. 3, 2023), https://www.fdic.gov/news/press-releases/2023/pr23091.html [https://perma.cc/7B6F-77Z4] (announcing a bank closure and consummated P&A transaction in the same day).

241. See FDIC, 2008–2013, supra note 157, at 186.

242. See, e.g., Holger Spamann & Jens Frankenreiter, Corporations 181–82 (3d ed. 2023) ("Takeovers have a direct effect on governance when a better-governed firm takes over a worse-governed firm. After the takeover, both firms' assets will be managed under the former's better governance structure.").

243. See Kress, supra note 139, at 561 ("Empirical analyses of larger bank mergers generally 'fail to find any significant cost savings' from consolidation." (quoting Joel F. Houston & Michael D. Ryngaert, The Overall Gains From Large Bank Mergers, 18 J. Banking & Fin. 1155, 1155 (1994))); Paul, Firms, supra note 38, at 620 ("[C]ontrol groups within firms [may] engage in merger and acquisition activity not in order to realize pure operational efficiencies, but in order to realize the pecuniary benefits to themselves (and shareholders) that so often flow from merger activity but do not (necessarily) reflect any particular operational business reality . . . ."); Melissa A. Schilling, Potential Sources of Value From Mergers and Their Indicators, 63 Antitrust Bull. 183, 186 (2018) ("[A] substantial body of research on whether mergers create value for the firm's shareholders concludes that most mergers do not create value for anyone, except perhaps the investment bankers that have negotiated the deal."); J.W. Mason, Acquisitions as Corporate Money Hose, The Slackwire (Sept. 26, 2018), https://jwmason.org/slackwire/acquisitions-as-corporate-money-hose/ [https://perma.cc/62XX-GDJH] (finding cash mergers a more substantial way to disperse corporate income to shareholders than share repurchases). But see Anna Kovner, James Vickery & Lily Zhou, Do Big Banks Have Lower Operating Costs?, Fed. Rsrv. Bank N.Y. Econ. Pol'y Rev., Dec. 2014, at 1, 22 (finding that larger bank holding companies tend to have lower noninterest expense ratios, possibly from economies of scale in some but not all categories of noninterest expense). The analysis by Kovner et al., however, does not distinguish between cost savings due to scale and cost savings due to intrafirm hierarchy.

reducing redundant IT systems—in fact creates a significant downside risk. Over the past few decades, bank mergers have entrenched vulnerable IT systems running programming language dating to 1959 (COBOL) on mainframe computers.[244] These Frankenstein systems are vulnerable not only because they are old, but also—crucially—because as "legacy" systems, they require "deep contextual knowledge."[245] Integrating them to effect a bank merger takes time and system-specific expertise. This is a particularly acute problem with P&A transactions because they often arise with little advance notice.[246] Thus, in addition to direct integration costs, P&A creates and magnifies systemic IT risk.[247]

Further, even if P&A mergers reduce "redundant" systems or employees, PO should be preferred on that score. In PO, the FDIC permanently closes the failed bank, leading to the termination of the remaining employees and the retirement of the IT system.[248] Yet preferring PO to P&A would *reverse* the resolution method hierarchy. Productive efficiency, therefore, can't explain the FDIC's preference for P&A over PO, nor how it allocates coordination rights.

Thus, it does not provide evidence of hierarchy-justifying efficiency. See id.; see also supra section I.A.3.

244. See Mar Hicks, Built to Last, Logic(s) (Aug. 31, 2020), https://logicmag.io/care/built-to-last/ [https://perma.cc/9END-F5K4]; Odd Lots, Why Corporate America Still Runs on Ancient Software That Breaks (Jan. 26, 2023), https://www.bloomberg.com/news/articles/2023-01-26/odd-lots-podcast-how-software-explains-the-southwest-airlines-outage (on file with the *Columbia Law Review*) ("[I]f you look at what a big bank is, it's . . . a series of mergers and acquisitions. . . . [E]very time they acquire a new bank, they have to integrate another [IT] system into their own [IT] system."); Yves Smith, COBOL and Legacy Code as a Systemic Risk, Naked Capitalism (July 19, 2016), https://www.nakedcapitalism.com/2016/07/cobol-and-legacy-code-as-a-systemic-risk.html [https://perma.cc/T7KE-E8HW] ("Major banks run their transactions on mainframes, and significant portions of the software is both ancient and customized.").

245. Nathan Tankus, Day Five of the Trump–Musk Treasury Payments Crisis of 2025: Not "Read Only" Access Anymore, Notes on the Crises (Feb. 4, 2025), https://www.crisesnotes.com/day-five-of-the-trump-musk-treasury-payments-crisis-of-2025-not-read-only-access-anymore/ [https://perma.cc/J8U5-SL2V].

246. See Michael Roddan, A Tangled Mess of Tech: JPMorgan's Tall Task to Integrate First Republic, The Info. (Aug. 31, 2023), https://www.theinformation.com/articles/a-tangled-mess-of-tech-jpmorgans-tall-task-to-integrate-first-republic (on file with the *Columbia Law Review*) ("The [First Republic] business JPMorgan bought was hamstrung by a tangle of old tech systems that held together a patchwork of hundreds of individual applications enabling basic tasks such as depositing and lending."); Melanie Woodrow, Former First Republic Bank Customers Say They Can't Access Chase Accounts Online After Migration, ABC 7 News (June 4, 2024), https://abc7news.com/post/small-business-owners-access-chase-accounts-online-after/14911383/ [https://perma.cc/XHJ6-G9GS] ("Some products like business lines of credit won't transition to JPMorgan Chase systems until later this year."). This raises the question whether resolution law needs a process for "IT receivership," and, more broadly, whether banking law would benefit from standardizing IT across firm boundaries—thus distinguishing administrative from legal boundaries of the firm.

247. See Roddan, supra note 246; Smith, supra note 244. Consider, too, how this creates an independent conflict with Dodd–Frank. See infra section II.C.2.

248. See supra text accompanying notes 174–175.

Next, recall the common definition of consumer welfare: substantive gains to consumers as a class from lower prices or greater output compared to some benchmark.[249] Neither resolution authorities nor scholars defend P&A transactions on grounds of lower prices or greater output. In general, consolidation in the banking industry has harmed consumers.[250] In P&A specifically, acquirers tend to reduce lending to the failed banks' former customers, lower their deposit rates, and close their branches.[251] And as established, the theoretical link between consumer welfare and productive efficiency is weak.[252] So without clear empirical gains to consumer welfare, that criterion does not justify resolution's method hierarchy either.

Finally, the ideal state sense of competition is especially weak in the field of banking.[253] Recall that competition as an ideal state relies on the contestability criterion.[254] Contestability relies on entry—or the threat of entry—to discipline prices set by existing firms. While weak in general, this criterion is particularly weak in banking because unlike corporate law's free-chartering regime, entry into banking is restricted.[255] In the six years from 2011 to 2016, for example, only two new banks were chartered.[256]

The FDIC's resolution hierarchy also runs counter to the business rivalry sense of competition. P&A results in one bank where previously there were two. In fact, shareholders of losing bidders "react positively to the potential anticompetitive effects" of "increased market power as a result of the resolution process."[257] Further, in PO, banks must compete to

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249. See supra section I.A.2.

250. See Kress, supra note 139, at 555–57 ("Under the current bank merger framework, consolidation has increased the cost and reduced the availability of consumer loans, inflated the fees banks charge for basic financial services, and depressed the interest rates banks pay to their accountholders.").

251. See supra note 197.

252. See supra section I.A.3.

253. Recall that competition is not a lodestar for banking law anyway. See supra note 134.

254. See supra notes 87–89 and accompanying text.

255. See Camp v. Pitts, 411 U.S. 138, 142–43 (1973) (upholding the Comptroller's denial of a national bank charter); Ricks et al., NPU, supra note 51, at 843 ("In banking law today, *Pitts* stands for the proposition that the Comptroller enjoys wide ranging discretion to deny applications for national bank charters.").

256. Carnell et al., supra note 101, at 107. The FDIC received only nine applications for deposit insurance between 2013 and 2016. See Bank Application Actions, FDIC, https://www.fdic.gov/regulations/applications/actions.html [https://perma.cc/VUK3-T7QL] (last updated Jan. 13, 2025) (filtering for dates January 1, 2013, through December 31, 2016, and application type: Deposit Insurance–New Bank). Application data prior to 2013 is not publicly available. Between 2013 and 2023, the FDIC received 148 applications for new bank deposit insurance; sixty-six were approved, an approximately forty-five percent approval rate. See id. (filtering by date for January 1, 2013, through December 31, 2023, and by application type for "Deposit Insurance–New Bank").

257. Tim M. Zhou, Auctions of Failed Banks: An Analysis of Losing Bidders, 61 Rev. Quantitative Fin. & Acct. 155, 156, 174; see also Vij, supra note 197, at 4–5 ("[T]he acquiring

attract the failed bank's depositors. They may do so by offering more attractive rates, products, services, stability, or brand recognition. Conversely, the FDIC's favored PA method transfers deposits by fiat rather than by choice of the depositor.[258] Thus, the resolution method that best promotes business rivalry is PO, the second best is PI, and the worst is PA. Like productive efficiency, this *reverses* the resolution method hierarchy—so competition cannot justify it.

In sum, none of antitrust's three orthodox justifications for channeling coordination into top-down firms (productive efficiency, consumer welfare, and competition) support that same allocation in bank resolution.

C. *Banking*

Neither the criteria of antitrust nor the criteria of resolution justify resolution law's allocation of coordination rights. Yet neither does the broader banking law of which resolution is a part.

1. *Diffusion.* — The core of American banking law can be characterized as an outsourcing of the bank charter paired with its separation, supervision, and diffusion.[259] The FDIC's resolution methods have little or no impact on outsourcing, separation, and supervision.[260] They do, however, play a role in diffusion.

Recall that diffusion instructs credit to be controlled and allocated in many (rather than few) hands.[261] Another way to read diffusion, then, is as a command to disperse bank charter coordination rights.[262] And yet, once again, this criterion clashes with resolution's preference for hierarchical, firm-based coordination. P&A concentrates control over credit creation, as well as its allocation,[263] in few—rather than many—hands, harming diffusion. Thus, just as the resolution method hierarchy runs in reverse to antitrust's criteria, it similarly frustrates banking law's structural focus on diffusion.

2. *Dodd–Frank.* — Resolution's default allocation has an additional deficiency: It conflicts with Dodd–Frank with respect to bank

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bank is able to reduce deposit rates more than in unconsolidated markets, reflecting the acquirer's increased market power.").

258. First Republic depositors automatically became JPMorgan depositors. See supra note 231. But see supra note 217 (noting that deposits tend to flow back to centers of concentrated control).

259. See supra section I.B.2.

260. P&A and PO do not change the ability of banks to create ad hoc credit or engage in commercial activity, and they do not change the ability of the government to exercise public oversight. Dispersing coordination rights, however, may have separation and supervision benefits. See infra section III.B.1.

261. See supra section I.B.2.

262. See supra notes 128–129 and accompanying text.

263. See supra notes 197, 251 and accompanying text.

conglomeration. Dodd–Frank cautions against bank mergers that might magnify or concentrate systemic risk.[264] Meanwhile, resolution law says the best way to resolve a crisis is to facilitate a bank merger.[265]

Some argue that conglomeration is a net positive for financial stability because gains to "diversification, profitability, and regulatory stringency . . . offset . . . systemic costs."[266] But that argument ignores the "more concentrated" clause of the statute.[267] "Greater" systemic risk may be offset by stability gains, but concentration cannot be offset. Dodd–Frank, consistent with the broader aim of diffusion, recognizes concentration as a harm unto itself.[268]

One might also argue that no conflict exists because resolution is exempt from banking law's concentration limits.[269] But that imprudently fails to recognize how concentration dynamically harms the resolution process.[270] It also reveals a deeper conceptual insight: Resolution's allocative preference is so strong that it trumps Dodd–Frank's concerns with conglomeration and systemic risk.[271] Importantly, resolution law did not always trump banking law's concern with concentration. The reverse was often true during the unit banking regime, when standard P&A transactions were disfavored.[272] Instead of merging failed banks with unit banks, the FDIC chartered new banking entities on an ad hoc basis.[273]

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264. See supra note 137 and accompanying text.

265. See supra section I.C.3.

266. See Greg Baer, Bill Nelson & Paige Pidano Paridon, Bank Pol'y Inst., Financial Stability Considerations for Bank Merger Analysis 13 (2022), https://bpi.com/wp-content/uploads/2022/05/Financial-Stability-Considerations-for-Bank-Merger-Analysis.pdf [https://perma.cc/K4Z3-7QUJ].

267. See 12 U.S.C. § 1842(c)(7) (2018) ("In every case, the Board shall take into consideration the extent to which a proposed acquisition, merger, or consolidation would result in greater or more concentrated risks to the stability of the United States banking or financial system.").

268. Further, Dodd–Frank explicitly aimed to prevent too-big-to-fail. See supra note 137 and accompanying text. And it added language to bank merger provisions to give banking agencies a new ground for denying mergers: concentrated systemic risk. See supra note 137 and accompanying text. It is hard to reconcile this statutory structure with the argument that mergers should be approved because of net benefits to stability. See supra note 137 and accompanying text.

269. See supra note 140 and accompanying text.

270. See supra note 199 and accompanying text; see also Fin. Stability Bd., 2023 Bank Failures: Preliminary Lessons Learnt for Resolution 29 (2023), https://www.fsb.org/uploads/P101023.pdf [https://perma.cc/XWQ9-V4V6] (noting that in P&A, "the risk of large systemic banks becoming more systemic should also be considered").

271. Resolution's concentration exemption is based on administrability: Without the exemption, bank resolution would be impracticable. But that is only true if no resolution methods can reallocate coordination rights to counter concentration. As Part III shows, such a method is possible. See infra note 311 and accompanying text.

272. See supra notes 140, 191 and accompanying text.

273. See supra notes 140, 191 and accompanying text.

To recap, in reconstituting failed banks, the FDIC sets new firm boundaries and governs their intrafirm relations. The Agency is under no command from antitrust law to draw firm boundaries or direct intrafirm relations in a particular way, yet it defers to antitrust's default allocation of coordination rights.[274] It does so without justification from the criteria of antitrust, resolution, or banking law. In fact, those three sets of criteria prescribe *reversing* the FDIC's resolution method hierarchy, preferring PO to PI to PA rather than the other way around.

III. (RE-)ALLOCATING COORDINATION RIGHTS AFTER BANK FAILURE

This Note identifies a problem with the practice of bank resolution: It incoherently allocates coordination rights. This Part considers alternative allocations of coordination rights after banks fail. Accounting for the aims and constraints of antitrust, banking, and resolution law, it finds that a new resolution method—the intrafirm reallocation transaction (IRT)—may be the most promising.

A. *How to Disperse Coordination Rights*

Currently, bank resolution creates one top-down firm where previously there were two. Instead, it could reconstitute the failed bank with a different charter or draw firm boundaries such that the total number of banks emerging from resolution remains constant or increases. It could also reshape intrafirm relations such that bank decisionmakers are spread out throughout the enterprise rather than concentrated at the top. This section briefly considers each approach. Then it proposes a new resolution method, IRT, that can reconcile these aims with the various goals of antitrust, banking, and resolution law.

1. *Resolution Methods*

a. *Charter Conversions.* — First, resolution could reconstitute the failed bank with a different type of charter under new leadership.[275] For example, a commercial bank could become a credit union with an FDIC-appointed board. This method prevents a contraction in the number of firms that exist after failure while changing the set of permissions and restrictions vested in hierarchical control.[276] For instance, credit unions are nonprofits, they are exempt from nearly all federal and state taxation,

274. See supra section II.A.1.

275. See Carnell et al., supra note 101, at 174 (discussing charter conversions). Further modulation of unilateral coordination rights—such as new restrictions on bank powers—may be desirable too. But those changes should apply to the entire banking system rather than only post-failure banks. Otherwise, inter alia, post-failure banks will be at a competitive disadvantage.

276. Changing, in other words, the set of unilateral coordination rights vested in the hierarchical bank-firm. See supra text accompanying notes 110, 128.

they are regulated and supervised by the National Credit Union Administration, and their members must share a common bond.[277]

Technical challenges may arise, however, as the new enterprise manages the failed bank's commercial loan portfolio at the same time as it reorients its lending toward households.[278] This method also does worse in terms of scale and resiliency because a larger portfolio, especially in times of stress, is more difficult to quickly transition. Moreover, it does not resolve the various problems with intrafirm hierarchy.[279]

b. *Breakups.* — Alternatively, the FDIC could disperse interfirm coordination rights by breaking up a failed bank into multiple banks while retaining intrafirm hierarchy. Indeed, the FDIC has done so in the past.[280] This method, consistent with a neo-Brandeisian approach to antitrust and banking law, can stall or reduce conglomeration in the banking system.[281] Like the charter conversion method above, however, it fails to address intrafirm coordination rights, replicating the problems with firm hierarchy.[282] In addition, it may have trouble complying with the least cost test because the franchise value of the failed bank is extinguished for at least one of the multiple new firms.

c. *Cooperatives.* — Third, the FDIC could disperse intrafirm coordination rights by reconstituting a failed bank as a single new bank

277. See 12 U.S.C. § 1759(b) (2018); Carnell et al., supra note 101, at 83–84; see also Letter from Debbie Matz, Chair, NCUA, to All Federal Credit Unions (Sept. 2013), https://ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/potential-violations-common-bond-advertising-requirements [https://perma.cc/8N3V-DNQC] ("Advertisements that include language to the effect that 'anyone can join' or 'membership is open to everyone'—without any qualifying language—can give the impression that the Federal Credit Union Act's single or multiple common bond requirements do not apply. When this occurs, the advertisements are inaccurate or deceptive."). But see 12 U.S.C. § 1759(d)(2)(B) (creating exceptions to the membership requirement for multiple common-bond credit unions when created through a merger with another credit union).

278. See Carnell et al., supra note 101, at 81–84 (describing the differences between commercial banks, thrifts, and credit unions).

279. See supra section I.A.3.

280. See FDIC, 1933–1983, supra note 155, at 93 (noting two such examples: "Banco Credito in Puerto Rico in 1978 and American City Bank in California in 1983").

281. See, e.g., Zephyr Teachout, Break 'Em Up: Recovering Our Freedom From Big Ag, Big Tech, and Big Money 15–16 (2020) (calling for the breakup of Citibank and Bank of America); Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 104–06 (2018) (setting the neo-Brandeisian antitrust agenda to include firm breakups); Judge, Brandeisian Banking, supra note 134, at 918–19 (highlighting the Brandeisian character of unit banking and calling for neo-Brandeisian policymaking to enhance the viability of small banks and promote "small business and other community development lending"); Omarova & Steele, supra note 109, at 1243 (highlighting various ways banking and antitrust law cohere and proposing, inter alia, breakups of bank holding companies).

282. See supra section I.A.3.

(or multiple banks[283]) with a more horizontal or participatory decisionmaking structure. The remainder of Part III explores how resolution law could adopt this approach using a new resolution method: IRT.[284]

2. *The Intrafirm Reallocation Transaction (IRT).* — IRT would proceed as follows: After the FDIC is appointed receiver, the failed bank's officers and directors are fired and new directors are appointed.[285] The next business day, everyone shows up to the same building to do the same job they did when the bank was put into receivership.[286] The only difference is that after IRT, coordination rights are dispersed such that employees control the bank enterprise.

Before failure, banks will extensively plan for their IRT resolution. In fact, large banks already plan for their failure by filing living wills describing their "strategy for rapid and orderly resolution."[287] Next, at the time of resolution, the FDIC will keep the failed bank enterprise operating by

283. IRT can complement the neo-Brandeisian approach insofar as the least cost test permits. It may be desirable, for example, to split a failed JPMorgan into many new, internally participatory banks. At the same time, it may be undesirable to do so for the smallest banks. Of course—although beyond the scope of this Note—it may also be desirable to repeal the least cost test. See text accompanying infra notes 316–317.

284. In sum, the charter conversion method changes unilateral—but not interfirm or intrafirm—coordination rights; the neo-Brandeisian method changes interfirm—but not unilateral or intrafirm—coordination rights; and IRT changes intrafirm—while accommodating changes to unilateral or interfirm—coordination rights.

285. The FDIC uses the same process when it deploys a bridge bank. See 12 U.S.C. § 1821(n)(1)(D), (2)(D) (2018) (providing for at least five but no more than ten interim bridge bank directors); FDIC, 2008–2013, supra note 157, at 184 & n.25 ("The FDIC routinely replaces the failed bank's senior management . . . .").

286. This is not atypical for both bridge banks and P&A transactions. For example, SVB employees were guaranteed forty-five days of employment at 1.5x or 2x pay, according to reports. See Dan Primack, Silicon Valley Bank Paid Out Bonuses Hours Before Seizure, Axios (Mar. 11, 2023), https://www.axios.com/2023/03/11/silicon-valley-bank-paid-bonuses-fdic (on file with the *Columbia Law Review*); see also Your Bank Has Failed: What Happens Next?, 60 Minutes (May 31, 2009), https://www.fdic.gov/news/editorials/60minutes.html [https://perma.cc/854B-LSE7] (showing the bank closure process in action).

287. See Living Wills (or Resolution Plans), Bd. of Governors of the Fed. Rsrv. Sys., https://www.federalreserve.gov/supervisionreg/resolution-plans.htm [https://perma.cc/RY5Q-B7SN] (last updated Mar. 14, 2022); see also 12 U.S.C. §§ 5325, 5365(a), (d) (requiring, per Dodd–Frank section 165(d), living wills for "nonbank financial companies supervised by the Board of Governors and bank holding companies with total consolidated assets equal to or greater than $250,000,000,000"); 12 C.F.R. § 360.10 (2024) (amending the FDIC's 2012 resolution plan rule); Resolution Plans and Informational Filings Required for Certain Insured Depository Institutions, 89 Fed. Reg. 56,620, 56,621–22 (July 9, 2024) (codified at 12 C.F.R. pt. 360.10) (citing resolution planning shortcomings with SVB and Signature Bank, and contrasting the Dodd–Frank resolution planning regime with the FDIC's regime); see also White & Yorulmazer, supra note 143, at 166 (discussing living wills). IRT living wills would include detailed participatory bank management contingency plans.

chartering a bridge bank, like it did with SVB.[288] The FDIC will also appoint a board of directors whom it will instruct to write new bylaws.[289] Next, the bridge bank employees will obtain a shelf charter from the OCC, allowing them to participate in a typical P&A auction. If they win the auction, the bank's balance sheet will be recapitalized,[290] the bridge bank charter will terminate, and the employees will control a solvent national commercial bank.[291]

Because IRT can be agnostic with respect to the amount of uninsured deposits covered, it necessitates no liability-side subsidy beyond status quo resolution. And on the asset side, it is not necessarily more costly than the FDIC's preferred PA transaction because the IRT enterprise can include a true-up provision in their bid, trading recapitalization for the FDIC's claim on future profits.[292] Most importantly, since the FDIC appoints the bridge bank's board of directors and approves its bylaws, it can also reconfigure intrafirm coordination by vesting all employees with equal decisionmaking authority.[293]

Like other corporate enterprises, IRT employs a board of directors to oversee enterprise operations carried out by various committees.[294] The

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288. See supra note 182. Recall that a bridge bank is an intermediate resolution method in which the FDIC appoints a new board of directors while the failed bank's employees continue operations. See supra section I.C.3.

289. See supra note 183, infra note 292 and accompanying text.

290. In the favored PA transaction, the FDIC sells assets at a discount and pays cash to the acquirer, functionally recapitalizing the balance sheet while transferring control to a third party. In the disfavored PI and PO, the balance sheet is only recapitalized sufficient to pay insured deposits.

291. See 12 U.S.C. § 1821(n)(10).

292. For further discussion of IRT, true-up provisions, and the least cost test, see infra text accompanying notes 309–316.

293. See 12 U.S.C. § 1821(n)(1)(D), (2)(E); supra note 211 and accompanying text. Bylaws structure employee rights, permissions, and obligations. See Del. Code tit. 8, § 109(b) (2025) ("The bylaws may contain any provision . . . relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.").

294. See OCC, Director's Book: Role of Directors for National Banks and Federal Savings Associations 95–101 (2020), https://www.occ.gov/publications-and-resources/publications/banker-education/files/directors-book.html [https://perma.cc/4WYQ-G8AN]. Core to the bank enterprise are the credit, risk, and asset-liability committees. See id. Although one could imagine further intrafirm dispersal, national banks are required to have boards of directors. See 12 U.S.C. § 71 ("The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders . . . ."). One might further argue that § 71 implies an IRT enterprise must have shareholders. (Although one could then counter that the FDIC violates § 71 when it directly appoints bridge bank directors.) If so, one share can be assigned to each employee (or committee member) at the outset. Because IRT is agnostic with respect to income distribution decisions, the employees can collectively decide whether to issue additional shares and to whom. See infra notes 300–303 and accompanying text. If they issue shares to third parties, though, they must create a dual-class structure to retain full control. See, e.g., Spamann &

board's principal duties include achieving strategic objectives, risk management, and enterprise oversight. Meanwhile, committees focus on day-to-day operations and decisionmaking.[295] They take on special importance for the IRT enterprise as the core site of its participatory governance.[296] Each employee can participate in decisionmaking for one committee at a time.[297] Where participation by each employee is not feasible, committees can be selected by sortition.[298] The sortition pool might also include community members, especially to sit on the bank's credit committee.[299]

Employees will decide how to distribute enterprise income, just as firm controllers do in a hierarchical intrafirm regime.[300] Thus, IRT could

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Frankenreiter, supra note 242, at 30 (discussing how dual-class shares allow founders to raise equity without diluting their voting power).

295. See OCC, supra note 294, at 22–23.

296. Participatory governance models have received scholarly and popular attention in the context of both enterprise and democratic governance. See, e.g., Bernard Harcourt, Cooperation: A Political, Economic, and Social Theory *passim* (2023) (articulating a new model for society based on cooperation); R. Trebor Scholz, Own This!: How Platform Cooperatives Help Workers Build a Democratic Internet 9–14 (2023) (referring to a "recent renaissance of cooperatives"); Paul, Firms, supra note 38, at 579 n.1 (noting a resurgence of corporate law scholarship interested in "workers' participation in intrafirm decision-making"); Alexander Kolokotronis, Three Ways to Design a Democratic Job Guarantee, Truthout (May 20, 2018), https://truthout.org/articles/three-ways-to-design-a-democratic-job-guarantee/ [https://perma.cc/X5XT-MKLY] [hereinafter Kolokotronis, Job Guarantee] (describing worker cooperatives as a "participatory institutional form[]" in which "workers have real voice, power and creativity alongside and with the communities they serve"); Alexander Kolokotronis, Towards an Anarchist Money and Monetary System: An Interview with Nathan Cedric Tankus, New Politics (Nov. 5, 2016), https://newpol.org/towards-anarchist-money-and-monetary-system-interview-nathan-cedric-tankus/ [https://perma.cc/63PQ-68XX] (noting that a distinctive feature of capitalism is hierarchy, which limits the agency of "ordinary people").

297. Employees may sit on multiple committees and rotate between committees, but they may only participate in decisionmaking for one committee at a time in accordance with the principle of one worker, one vote. See Sandeep Vaheesan & Nathan Schneider, Cooperative Enterprise as an Antimonopoly Strategy, 124 Penn St. L. Rev. 1, 41–42 & nn.241–243 (2019) (expanding on the cooperative principles of the Capper–Volstead Act of 1922, Pub. L. No. 67-146, 42 Stat. 388 (codified at 7 U.S.C. §§ 291, 292 (2018))); Kolokotronis, Job Guarantee, supra note 296 (discussing one worker, one vote cooperative governance).

298. See Kolokotronis, Job Guarantee, supra note 296 (discussing sortition governance).

299. See Michael Brennan, The Democracy Collaborative, Constructing the Democratic Public Bank: A Governance Proposal for the Los Angeles Public Bank 19–24 (Thomas M. Hanna & Isaiah J. Poole eds., 2021), https://thenextsystem.org/sites/default/files/2021-07/Constructing-democratic-public-bank-final.pdf [https://perma.cc/ZJ75-5JNF]. This would further disperse coordination rights beyond firm boundaries and concomitantly combat monetary silencing. See infra note 320.

300. Compare Hansmann, supra note 49, at 11, 35 (defining firm "ownership" as the formal rights to control the firm and "appropriate the firm's profits, or residual earnings"), with Lee, supra note 54, at 79 (identifying four principal decisions made by the going concern enterprise, including financial decisions, which concern "dividends, retained earnings, mergers and acquisitions, and financing real and monetary activities"), and Lynn

approximate a labor regime in which unions are "permitted . . . to coordinate not only regarding wages and working conditions but also regarding prices, operational decisions, and more."[301] In doing so, they have the same incentive as any other bank enterprise: meet strategic objectives and preserve their status as a going concern by making good loans.[302] At the same time, IRT is not limited to any strict form of intrafirm organization. Employees can decide which sets of people can make ad hoc decisions about what sorts of things and what needs broader involvement. In fact, sufficient business rivalry together with intrafirm experimentation can "push democratically constituted entities in the direction of operational efficiency, without the law micromanaging it."[303]

IRT is administrable, but is it legal? Yes. IRT is unlikely to incur antitrust liability, requires no new banking or resolution law, and can comply with the least cost test.

First, while participatory governance runs counter to antitrust's preference for concentrated coordination rights, it is unlikely to risk antitrust liability.[304] The best argument for antitrust liability would analogize to *American Needle, Inc. v. NFL*, arguing that antitrust law should recognize the IRT enterprise as multiple entities where corporate law sees one.[305] But unlike the individual NFL teams in *American Needle*, post-IRT bank employees do not have separate business interests or property rights.[306] Similarly, the IRT employees are unlike the hypothetical

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Stout, The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public 40–41 (2012) (noting that boards of directors are not required to pay dividends and can distribute firm income by "allowing accounting profits to increase" or by "raising executives' salaries, starting an on-site childcare center, improving customer service, beefing up retirement benefits, [or] making corporate charitable contributions"). See also supra note 35 (citing antitrust law's construction of the firm around concentrated decisionmaking).

301. Paul, Firms, supra note 38, at 599.

302. See Lee, supra note 54, at 79 ("[S]eeking profits is not an end in itself. Rather, profits are needed to maintain the going enterprise . . . . Consequently, business leaders are not seeking to maximize profits in the short-term but to generate a long-term flow of business income needed to meet their goals and access to social provisioning . . . .").

303. Paul, Firms, supra note 38, at 587. If we think this process applies to hierarchical firms, then it ought to apply at least as forcefully to dispersed forms of business organization, too. See supra notes 87–88 and accompanying text.

304. See Vaheesan & Schneider, supra note 297, at 34 ("[C]ooperatives that engage in more than collective bargaining and operate as integrated firms in production, distribution, or retail face much less antitrust risk. Indeed their risk of antitrust liability is comparable to that faced by investor-owned firms.").

305. See supra note 35.

306. See Paul & Tankus, supra note 10, at 50. Thus, the post-IRT bank is not an entity "controlled by a group of competitors [which] serve[s], in essence, as a vehicle for ongoing concerted activity." Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191 (2010). Nor are the employees "independent centers of decisionmaking." Id. at 197 (internal quotation marks omitted) (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984)).

rideshare drivers' worker cooperative in which drivers coordinate their services while owning their own cars, paying their own expenses, and earning their own revenue.[307] Instead, bank employees centralize expenses and revenues and distribute profits based on collective decisions not derivable from individual property rights.[308]

Second, the banking agencies can implement IRT with three existing tools: P&A auctions, shelf charters, and bridge banks. Because bridge banks have a maximum life of five years,[309] one might counter that IRT violates the spirit of the FDIA's bridge bank provision by endowing going concern status on an enterprise intended to have a limited life. But the shelf charter divests both the bank and the FDIC from substantial bridge bank powers, changing the enterprise's legal character.[310] More importantly, the current resolution regime performs the same legal gimmick, assigning new corporate boundaries, bank powers, and coordination rights to the same balance sheet and set of employees.[311]

Third, IRT need not violate the least cost test. Recall that neither intrafirm hierarchy nor a pre-existing firm exemption is necessary to satisfy least cost.[312] Further, true-up provisions can compensate for recapitalization by remitting future profits to the DIF.[313] IRT also has a key structural cost advantage: The failed bank's employees do not need to revise their bids downward to account for uncertainty about asset quality and

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307. See Paul & Tankus, supra note 10, at 47–48.

308. Thus, IRT creates a worker cooperative that qualifies for antitrust's firm exemption without being a mere "academic possibility" like a comparable rideshare drivers' cooperative. Id. at 49. The FDIC's ability to recapitalize the failed bank in its IRT transition solves a primary problem for worker cooperatives: access to finance. See id. at 51–53. Still, the FDIC cannot unilaterally permit horizontal coordination across firm boundaries. So to the extent that non-firm-based coordination is socially desirable, antitrust law must first change course.

309. See 12 U.S.C. § 1821(n)(9) (2018). At expiration of the bridge bank charter, it must be wound down or sold. See id. § 1821(n)(11)–(12).

310. These include the bank's exemption from capital requirements and the FDIC's ability to issue capital stock, purchase assets, and provide financial assistance. Id. § 1821(n)(1)(B), (5).

311. Carnell et al. describe the current regime:

> [T]he receiver can structure the sale so as to maintain substantial practical continuity with the failed bank: [A] different corporate entity may continue the failed bank's business at the same locations, with the same employees, and with many of the same assets and liabilities. Most people would, understandably enough, regard the new bank as a continuation of the old, yet a fundamental legal change would have occurred.

Carnell et al., supra note 101, at 376.

312. See supra section II.A.3.

313. See supra section II.A.3. Further, IRT enterprises are less likely to distribute income to shareholders, thus retaining more earnings capable of distribution to the FDIC without a comparative disadvantage in equity.

complexity.[314] With the balance sheet at their fingertips, employees already have the best available information about the remaining bank assets. Unlike P&A, then, IRT requires no risk premium to transfer complex assets.[315]

Over time, however, IRT may become more costly. If IRT enterprises push out other bidders, the shelf charter controllers may reduce their bids in response to the declining competitiveness of P&A auctions.[316] For example, they may reduce the amount of profits they are willing to remit to the DIF with true-up provisions. While it is beyond the scope of this Note to weigh the incommensurable goals of antitrust, banking, and resolution law against the social good of the least cost test—and therefore assess whether declining DIF receipts over time are a just price for dispersing coordination rights—IRT nevertheless shows that the least cost test is not an insurmountable barrier to reallocating coordination rights in bank resolution.

B. *Fulfilling the Criteria of Banking and Resolution Law*

Given Paul's rebuttal to the orthodox antitrust criteria, resolution law should aim to disperse coordination rights.[317] Such an allocation, consistent with the cooperative decisionmaking structure outlined above, "permits *cooperation* with others, rather than favoring only economic coordination that is achieved by means of power *over* others."[318] Doing so takes advantage of both the affirmative benefits of participatory decisionmaking and the negative or prophylactic benefits of preventing concentrated control.[319]

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314. See FDIC, Crisis, supra note 164, at 87–88 ("Loans have unique characteristics, and prospective purchasers need to gather information about the loans to properly evaluate them. Such 'information cost' is factored into the price that the outside parties are willing to pay for the loans."); Rosalind L. Bennett & Haluk Unal, The Effects of Resolution Methods and Industry Stress on the Loss on Assets From Bank Failures, 15 J. Fin. Stability 18, 19, 23 (2014) [hereinafter Bennett & Unal, Loss on Assets] ("As the volume of nonperforming loans and defaulted loans increases, bidders may be more risk-averse which results in lower bids."); White & Yorulmazer, supra note 143, at 162 ("[L]arge and complex assets held by the failed institution may lead to lower bids by potential successors, who incorporate large discounts to compensate for the uncertain asset value.").

315. See White & Yorulmazer, supra note 143, at 162.

316. For example, bidders "know that during periods of industry distress they face less competition and therefore offer lower bids." Bennett & Unal, Loss on Assets, supra note 314, at 19. Bidders are also incentivized to reduce their bids when there are fewer bidders. See Vij, supra note 197, at 9, 20 (finding that in first-price sealed bid auctions (e.g., P&A auctions), "the selling price should increase with the number of bidders").

317. See supra section I.A.3. While antitrust may be able to significantly accomplish dispersal on its own, it will always be incomplete without changes to bank resolution. And because resolution law allocates coordination rights, the banking agencies need not wait for antitrust reform.

318. Paul, Firm Exemption, supra note 30, at 96.

319. See supra section I.A.3.

Beyond reorganizing the firm itself, IRT may be the best way to disperse coordination rights after banks fail because it can also fulfill the criteria of banking and resolution law better than the FDIC's favored PA transaction.

1. *Banking Criteria.* — IRT creates participatory control of the bank enterprise and, thus, the credit provisioning process.[320] As a result, IRT coheres with the core structure of banking law in a way the FDIC's existing resolution regime does not. Specifically, IRT can advance the aims of diffusion, separation, and supervision without compromising outsourcing.

First, because the government does not take control of the bank enterprise any more than it already does in resolution, outsourcing is not compromised. Second, diffusion is strengthened by dispersing coordination rights. Recall that the goal of diffusion is to prevent the banking system from being controlled by only a few individuals.[321] That goal is thwarted by the FDIC's strong preference for vertical intrafirm coordination, which results in an "increased consolidation of control over the social provisioning process among a relatively small group of decision-makers."[322] By contrast, participatory control of bank charters puts provisioning decisions in many, rather than few, hands.

Further, IRT can remedy existing separation deficiencies.[323] To the extent that a failed bank was not sufficiently separate from commerce, IRT

320. Participation in money creation has a rich history that has been "silenced" in modern monetary politics. See Feinig, supra note 112, *passim*; Sandeep Vaheesan, Money as an Instrument for Justice, 71 UCLA L. Rev. Discourse 24, 36–38 (2023), https://www.uclalawreview.org/money-as-an-instrument-for-justice/ [https://perma.cc/9CDV-RZ93]. Dispersing intrafirm coordination rights can reinvigorate this tradition. It initially repoliticizes money creation by making it visible to bank employees, as well as to community members included in the credit committee sortition pool. See supra note 299 and accompanying text. Instead of merely accepting or rejecting the loan applicant put before them, employees (and community members) will have a say in which kinds of loan applicants are sought in the first place. For example, they might see their bank as a source of strength for other cooperatives, see infra note 333, or a site for immediate climate action, with the power to implement qualitative credit controls even if regulators do not. See Paul, Firms, supra note 38, at 595 n.55 (noting potential benefits to worker safety and the environment from worker participation in firm decisionmaking); Tankus, The New Monetary Policy, supra note 106, at 17, 19–20 (proposing a qualitative credit regulation regime and discussing its ability to achieve climate goals).

321. As of June 2024, the four largest banks control approximately forty-three percent of large commercial bank consolidated assets. See Large Commercial Banks, Fed. Rsrv. Stat. Release (June 30, 2024), https://www.federalreserve.gov/releases/lbr/20240630/default.htm [https://perma.cc/E8UM-VDWF]. Reallocating coordination rights is a modest bulwark against such consolidation. See supra note 139 and accompanying text.

322. Tankus & Herrine, supra note 25, at 80 (citing Paul, Allocator, supra note 10, at 419–25).

323. A post-IRT enterprise is also likely to seek less risk and thus less likely to expand beyond core banking activities in the first place. Although not a perfect analog, credit unions—which are owned by their members—seek less risk and fared better in the GFC. See Johnston Birchall, The Comparative Advantages of Member-Owned Businesses, 70 Rev. Soc. Econ. 263, 270, 282 (2012) ("The more members are involved in governance the more

can sell its unduly commercial lines of business to a nonbank enterprise.[324] Without IRT, separation issues will fester because P&A transfers the commercially entangled part of the balance sheet to another bank enterprise. IRT can also improve supervision. Enterprise-wide committee representation paired with director oversight makes it easier to identify and communicate issues in the first place.[325]

Beyond the banking law core, IRT solves the tension between banking law's concern with conglomeration and resolution law's conglomeration reflex. First, because multiple bridge banks can be created out of one failed bank, the bridge-bank-plus-shelf-charter IRT method can unwind bank conglomeration as desired.[326] And unlike P&A, there is no risk that IRT will produce a greater concentration of systemic risk because no existing firms are expanded and no IT systems are integrated. In fact, IRT can reduce excessive risk-taking.[327] Further, IRT intrafirm organization can

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likely it is that the organization will avoid excessive risk-taking."); Christine Naaman, Michel Magnan, Ahmad Hammami & Li Yao, Credit Unions vs. Commercial Banks, Who Takes More Risk?, Rsch. Int'l Bus. & Fin., Jan. 2021, at 1, 15 ("[I]n general, credit unions engage in less risk-taking than banks . . . .").

324. The FDIC can either separate the unduly commercial assets before creating the IRT bridge bank, or it can create two or more bridge banks: one for IRT and the others for the unduly commercial assets. See infra note 326. Either method would likely comply with the least cost test because both preserve the franchise value of the commercial lines of business. Both would be, in effect, a form of qualitative direct credit regulation. See Tankus, The New Monetary Policy, supra note 106, at 19–21.

325. For one, it eliminates the risk of control fraud. See William K. Black, The Best Way to Rob a Bank Is to Own One: How Corporate Executives and Politicians Looted the S&L Industry 2 (updated ed. 2013) (noting that CEOs can defeat internal and external controls to "optimize[] the firm as a fraud vehicle and . . . optimize the regulatory environment" for fraud).

326. See 12 U.S.C. § 1821(n)(13) (2018) ("[T]he [FDIC] may, in the [FDIC]'s discretion, organize 2 or more bridge depository institutions . . . to assume any deposits of, assume any other liabilities of, and purchase any assets of a single depository institution in default."). Thus IRT can also achieve interfirm dispersal as desired, such as in the forms contemplated at the beginning of section III.A.1. As previously noted, however, this approach makes compliance with the least cost test more difficult. See supra section III.A.1.b.

327. See Naaman et al., supra note 323, at 15; Vaheesan & Schneider, supra note 297, at 16–26. Participatory governance affirmatively reduces the likelihood of excessive risk-taking while also curtailing the perverse incentives from shareholders to take excessive risk (to the extent IRT banks rely less on equity financing). See Birchall, supra note 323, at 282; Da Lin & Lev Menand, The Banker Removal Power, 108 Va. L. Rev. 1, 58 (2022) ("In fact, a substantial body of empirical evidence suggests that investors were actually the culprits that pressured banks to take on high risk before 2008, not the victims."). In general, shareholders have an incentive to pursue riskier investments after interest rates on debt are locked in. Michael C. Jensen & Williams H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305, 334–35 (1976). "Investor-owned" banks are particularly prone to risk-taking because depositors are the primary bank creditors and they tend not to negotiate deposit rates.

build on a rich tradition of cooperative enterprise in American economic life.[328]

2. *Resolution Criteria.* — IRT is also promising in terms of the criteria internal to resolution law. First, IRT satisfies the core aim of avoiding bankruptcy. Next, IRT fairs just as well or better than both P&A and PO in terms of the technical standards of speed, resilience, and scale. Because it disposes of the failed bank balance sheet using the P&A mechanism, it is just as speedy. And IRT is more resilient than both P&A and PO because it less reliant on a secondary market for financial assets.[329] Also unlike P&A, IRT does not need to find a bigger enterprise to buy the failed bank, so it can scale from the smallest bank failures to the largest.[330]

IRT does pose some challenge in terms of administrative burden. Organizing participatory control of monetary institutions is no small feat. Still, while IRT requires FDIC-appointed directors and participatory governance planning, the FDIC has experience appointing directors and meeting staffing requirements in resolution.[331] In fact, previous resolution regimes saw the FDIC successfully manage exotic failed bank assets far outside their expertise with little preparation.[332] Moreover, the FDIC's administrative burden is mitigated by the planning done by the pre-IRT bank and the post-IRT labor of bank employees.[333]

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328. "[T]he cooperative model is arguably the oldest and most well-proven form of social enterprise." Vaheesan & Schneider, supra note 297, at 16. See Hansmann, supra note 49, at 66–69 ("[E]mployee ownership has long been the prevailing mode of organization in the service professions, including law, accounting, investment banking, management consulting, advertising, architecture, engineering, and medicine."); Harcourt, supra note 296, at 31–53 (surveying the study and organization of cooperatives in fields including banking); Vaheesan & Schneider, supra note 297, at 17–19 (finding successful cooperatives in industries such as insurance, agriculture, retail, public utilities, and nonprofit banks such as credit unions).

329. See supra note 205 and accompanying text. It is still somewhat reliant on secondary financial markets because undesirable assets will be liquidated rather than transferred in P&A with the rest of the failed bank's balance sheet. Nevertheless, this is also true of PA, PI, and PO.

330. Both P&A and IRT can resolve Iowa Trust & Savings, but only IRT can resolve JPMorgan.

331. See FDIC, 2008–2013, supra note 157, at 181, 205.

332. For example, the FDIC has managed failed bank assets such as an abandoned gold mine—which it converted to a "successful tourist attraction" and then sold—as well as "hotels, motels, condominiums, office buildings, restaurants, a bakery and a kennel." FDIC, 1933–1983, supra note 155, at 104.

333. See supra note 287 and accompanying text. The FDIC can also hire cooperative experts and station them on-site like other bank examiners. See Carnell et al., supra note 101, at 317–18 (discussing field examination); What We Do, UW Ctr. for Cooperatives, https://uwcc.wisc.edu/about-uwcc/what-we-do/ [https://perma.cc/8VAQ-SCFH] (last visited Jan. 7, 2025) (describing research, education, and outreach resources for new and existing cooperatives, including co-op member training). Federating with other cooperatives can also be a source of expertise and resilience. See, e.g., Emerging Cooperatives, Cooperation Jackson, https://cooperationjackson.org/prospective-coops [https://perma.cc/YLK6-TGX9] (last visited Jan. 29, 2025) (seeking to build a federated

Although IRT can provide immediate access to deposits without a check-mailing interruption like PO,[334] its primary technical weakness is uncertainty in terms of orderliness. IRT risks depositor flight, depending on how uninsured depositors are treated and how depositors view the prospect of banking with an IRT enterprise.[335] Yet new research casts doubt on the likelihood that a bank run would cause bank failure absent balance sheet deterioration—an outcome more likely after a P&A transaction than IRT.[336] In any case, IRT requires only officer, director, and management-level discontinuity, which is nearly universal among resolution methods. Plus, IRT does not risk the kinds of long-term customer disruptions imposed by P&A.[337] And to mitigate IRT's orderliness deficiencies, the FDIC can continue to set conforming bid criteria consistent with PA bids, simulate IRT transitions, and take seriously its obligation to supervise IRT before, during, and after resolution.

In sum, IRT has the potential to be a more technically proficient resolution process. P&A and PO may initially pose less of an administrative burden than IRT, but IRT fairs better in terms of scale and resiliency—important qualities for responding to sudden, massive bank failures, like the 2023 crisis. IRT's proficiency in resolving banks, at least, is not a major impediment to using it to reallocate coordination rights and harmonize resolution with the double dispersal command of antitrust and banking law.[338]

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network of cooperatives). Indeed, this makes Jackson, Mississippi, an especially attractive place to implement IRT.

334. Thus, it obviates the need for DINBs.

335. Congress, for example, could solve the problem once and for all by lifting the cap on deposit insurance. See Menand & Ricks, Deposit Insurance, supra note 4 ("Removing the [deposit insurance] cap would lessen large depositors' incentives to flock to the largest, 'too big to fail' banks . . . ."). Better yet, Congress can make deposit insurance obsolete by substituting the bank's liability to the depositor with a direct liability of the government. See Rohan Grey, Banking in a Digital Fiat Currency Regime, *in* Regulating Blockchain: Techno-Social and Legal Challenges 169, 177 (Philipp Hacker, Ionnis Lianos, Georgios Dimitropoulos & Stefan Eich eds., 2019).

336. See Sergio A. Correia, Stephan Luck & Emil Verner, Failing Banks 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32907, 2024) (finding bank runs a symptom, not a cause, of bank failures in all but the rarest cases). The post-PA bank enterprise might be vulnerable because it uses existing balance sheet space to finance an acquisition, whereas the IRT enterprise primarily finances its acquisition out of future profits. See, e.g., Stephen Gandel, Shares Plunge for Saviour of Failed Signature Bank, Fin. Times (Jan. 31, 2024), https://www.ft.com/content/858c4184-981d-49fb-b21c-31e6eaa1633d (on file with the *Columbia Law Review*) (describing the acquirer of Signature Bank—New York Community Bank—as one such case).

337. See supra note 197.

338. See supra note 129 and accompanying text.

CONCLUSION

If scholars and policymakers want to think clearly about reform in the wake of the 2023 banking crisis, they must start by recognizing that resolution law allocates coordination rights, and its allocation is unreasoned. Then, rather than sleepwalking into antitrust law's default allocation, bank resolution should self-consciously reallocate coordination rights to fulfill the various aims of antitrust, banking, and resolution law itself. Most promising is a new resolution method, IRT, which can disperse intrafirm coordination rights, pass the least cost test, reduce systemic risk, and effectively resolve failed banks.

More broadly, banking scholars should bring their work up to date by theorizing through the coordination rights lens. It is out of date to assume hierarchical firms are uniquely productively efficient or the only market governance institution capable of solving coordination problems. Worse still is the blinkered acceptance of productive efficiency as the sole aim relevant to economic organization. Doing so naturalizes the hierarchical bank-firm and represses normative criteria foundational to antitrust and banking law and political economy favoring dispersed bank coordination rights.

This Note uncovers extant resolution law as a tool to transition failed banks to participatory control. Beyond the moment of bank failure, it prescribes a positive vision for intrafirm bank coordination in general. Our choice is whether to proceed with the fragile and incoherent status quo or to disperse bank coordination rights to repair—or, better yet, forestall—the next crisis.

SAVING THE AMERICAN DREAM: ADAPTING ANTI-CORPORATE FARMING LAWS TO PROTECT SINGLE-FAMILY HOUSING

*Reilly E. Knorr**

Throughout the twentieth century, several states adopted a new type of laws: Anti-Corporate Farming (ACF) laws. These laws generally prohibit corporations from owning farmland or engaging in the business of farming. They were originally intended to "encourage and protect the family farm as a basic economic unit" and "insure it as the most socially desirable mode of agricultural production." While subject to criticism, these laws generally pass constitutional muster and remain active components of state-level corporate regulatory schemes.

Today, America faces a new wave of corporate consolidation—in single-family rental (SFR) housing. In the wake of the Great Recession, institutional investors, taking advantage of new financial instruments and federal government policy, purchased large numbers of homes out of foreclosure, a trend that continues today. Most proposed solutions to this problem have been evenhanded regulations that focus on tenants: expanded rent control laws, stronger eviction protections, and financial disincentives for Corporate Landlords.

This Note argues that states should consider restricting corporate ownership of SFRs, using ACF laws as a model. Previous scholarship has identified expanded ACF laws as a solution to current trends of consolidation in rural land. But this Note is the first to argue that ACF laws can also be adapted to the residential context to limit corporate ownership of single-family rental housing.

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INTRODUCTION

Throughout the twentieth century, several states adopted a new type of laws: Anti-Corporate Farming (ACF) laws. These laws, adopted in waves throughout the century,[1] generally prohibit corporations from owning farmland or engaging in the business of farming.[2] Some early ACF laws were passed during the Great Depression, when corporations consolidated massive tracts of land through farm foreclosures.[3] More recent ACF laws were enacted in the 1970s, when similar patterns of consolidation led lawmakers to seek to "encourage and protect the family farm as a basic economic unit" and to "insure it as the most socially desirable mode of agricultural production."[4] ACF laws, while subject to constitutional challenges[5] and criticism,[6] still stand as valid constraints on corporate activity.[7] And they remain active parts of state legislative schemes—North Dakota, which enacted one of the first ACF laws, made sweeping amendments to its law in April 2023.[8]

Today, America faces a new wave of corporate consolidation—in single-family rental (SFR) housing. In the wake of the Great Recession,[9] institutional investors, taking advantage of new financial instruments and federal government policy, purchased large numbers of homes out of foreclosure.[10] This "financialization" push continues today. Private equity firms, banks, and other financial institutions (collectively, "Corporate Landlords") buy up single-family houses—either directly or by purchasing packages of mortgages—and convert them into rental property to earn a

1. See infra section I.A.
2. E.g., Minn. Stat. § 500.24 subdiv. 3 (2024).
3. See infra section I.A.
4. See Minn. Stat. § 500.24 subdiv. 1.
5. See infra section I.C.
6. See infra section I.D.
7. See infra section I.C.
8. See Burgum Signs Bill Modernizing State Law to Encourage Growth in Animal Agriculture in North Dakota, N.D. Off. of the Governor (Apr. 28, 2023), https://www.governor.nd.gov/news/burgum-signs-bill-modernizing-state-law-encourage-growth-animal-agriculture-north-dakota [https://perma.cc/YX49-PHJV].
9. "Great Recession" refers broadly to the financial crisis starting in 2007, when a series of foreclosures caused a collapse in the mortgage-backed securities market and a broader economic recession. See John Weinberg, The Great Recession and Its Aftermath, Fed. Rsrv. Hist. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-recession-and-its-aftermath [https://perma.cc/NE98-E9PT].
10. See infra section II.A.

profit.[11] This financialization of single-family rentals has been cited as the source of increased rents, heightened rates of eviction, and increased costs of living.[12]

Most proposed solutions to this problem have been evenhanded regulations that focus on tenants—expanded rent control laws, stronger eviction protections, and financial disincentives for Corporate Landlords.[13] Yet, with the exception of a lone bill proposed in Minnesota,[14] policymakers overlook another solution: restricting corporations from acting as landlords entirely. This Note argues that states should consider adopting such restrictions, using ACF laws as a model. Previous scholarship has identified expanded ACF laws as a solution to current trends of consolidation in rural land.[15] But this Note is the first to argue that ACF laws can also be adapted to the residential context to limit corporate ownership of single-family rental housing.

This Note proceeds as follows: Part I introduces ACF laws and their history, reviews their main provisions, and discusses challenges to their constitutionality and normative validity. Part II then explains the financialization of single-family housing in the United States: its genesis in the wake of the Great Recession, the costs of financialization, and the solutions that have previously been proposed. Finally, Part III argues that legislatures can use ACF statutes as a model for restrictions on Corporate Landlords, offers normative arguments for their effectiveness, and proposes statutory language for legislators to consider.

I. THE ANTI-CORPORATE FARMING LAWS

This Part introduces the ACF laws from the states that have adopted them. It begins with the legislative history of the ACF laws[16] and surveys their main provisions.[17] Next, it turns to the legal challenges that have

11. See infra section II.A.

12. See infra section II.B.

13. See infra section II.C.

14. See H.F. 685, 93d Leg. (Minn. 2023). Minnesota's bill only bans one specific activity—corporations *converting* single-family housing into rental property. Id.; see also infra section II.C.6.

15. See, e.g., Vanessa Casado Pérez, Ownership Concentration: Lessons From Natural Resources, 117 Nw. U. L. Rev. 37, 59–61 (2022) (evaluating ACF laws for conservation contexts); Megan Dooly, Note, International Land Grabbing: How Iowa Anti-Corporate Farming and Alien Landowner Laws, as a Model, Can Decrease the Practice in Developing Countries, 19 Drake J. Agric. L. 305, 318–21 (2014) (applying ACF laws in international agricultural contexts); Stephen George, Comment, Not for Sale: Why Congress Should Act to Counter the Trend of Massive Corporate Acquisitions of Real Estate, 6 Bus. Entrepreneurship & Tax L. Rev. 97, 112–13 (2022) (arguing for a federal ACF law to protect farms).

16. See infra section I.A.

17. See infra section I.B.

been levied against these ACF laws, both successful and unsuccessful.[18] Finally, it concludes by reviewing normative criticisms of the ACF laws.[19]

A. *History of the Anti-Corporate Farming Laws*

Nine states have enacted ACF laws:[20] Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin.[21] These laws have taken two forms: statutes[22] and constitutional provisions.[23]

Oklahoma was the first state to adopt an ACF law, including one in its original constitution in 1907.[24] Kansas and North Dakota came next, both enacting their laws during the Great Depression.[25] Each of these laws was seen as a protective measure for farmers in the state.[26] After a several-decade lull, Minnesota and Wisconsin enacted their ACF laws in 1973.[27] Minnesota's law became the model for similar laws in Missouri, Iowa, and South Dakota.[28] Finally, Nebraska enacted its ill-fated law through a constitutional referendum in 1982.[29]

These laws have not been stagnant since their enactment. Oklahoma, whose original law prohibited only ownership of farmland, expanded its law to prevent corporations from operating farms, even if management is

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18. See infra section I.C.

19. See infra section I.D.

20. Other states have enacted limits on alien corporate ownership of farmland or size restrictions on corporate farms. These are often considered a type of ACF law but are outside the scope of this Note. See Micah Brown & Nick Spellman, Statutes Regulating Ownership of Agricultural Land, Nat'l Agric. L. Ctr., https://nationalaglawcenter.org/state-compilations/aglandownership/ [https://perma.cc/8F77-JRSZ] (last updated Feb. 27, 2025) (compiling and classifying various state restrictions on land ownership).

21. Neb. Const. art. XII, § 8(1) (repealed 2006); Okla. Const. art. XXII, § 2; Iowa Code § 9H.4 (2024); Kan. Stat. Ann. § 17-5904(a) (West 2025); Minn. Stat. § 500.24 (2024); Mo. Ann. Stat. § 350.015 (2024); N.D. Cent. Code § 10-06.1 (2024); Okla. Stat. tit. 18, § 955 (2024); S.D. Codified Laws § 47-9A-3 (2025); Wis. Stat. & Ann. § 182.001(1) (2025). Nebraska's law has since been invalidated. See Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006).

22. See, e.g., Minn. Stat. § 500.24.

23. See, e.g., Okla. Const. art. XXII, § 2.

24. See Brian F. Stayton, A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes, 59 UMKC L. Rev. 679, 682–83 (1991).

25. Id. at 681–83.

26. North Dakota was reacting to financial institutions that had foreclosed on agricultural land. T.P. McElroy, North Dakota's Anti-Corporate Farming Act, 36 N.D. L. Rev. 96, 96 (1960). Kansas reacted to a large farming corporation that was ousted from the state for exceeding its corporate charter. Stayton, supra note 24, at 681; see also State ex rel. Boynton v. Wheat Farming Co., 22 P.2d 1093, 1102 (Kan. 1933).

27. Stayton, supra note 24, at 683–84.

28. Id. at 683.

29. See id. at 684.

detached from ownership.[30] North Dakota has amended its laws multiple times, first in 1981[31] and most recently in 2023.[32] South Dakota also attempted to strengthen its ACF law by codifying it in the state's constitution.[33]

B. *Anatomy of an ACF Law*

This section addresses the various provisions of the ACF laws. Each of these ACF laws is unique: They were passed by legislatures in different states with different policy goals. Given these differences, this section does not comprehensively catalog the ACF laws. Rather, it identifies illustrative examples from the laws and highlights differences with legal significance.

1. *Statement of Purpose.* — Two of the ACF laws begin with a statement of their purpose, which describes the states' belief in the importance of the family farm and the dangers posed by corporate farming.[34] These sections provide useful color and introduce the restrictions that follow.

2. *Restricted Entities.* — The ACF laws then define the entities that the prohibition applies to ("restricted entities"). The ACF laws all begin with broad definitions and provide specific exemptions in later provisions. Some laws only include corporations and limited liability companies (LLCs) within their scope.[35] Others are much more expansive, also restricting pension or investment funds, trusts, and limited partnerships.[36] And the broadest law bars any "person, corporation, association or any other entity" from engaging in the business of farming or owning farmland, unless it meets an exception.[37]

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30. See id. at 682 ("After [a 1969 state supreme court decision,] the Oklahoma legislature amended its statute to provide for several limitations upon corporations engaged in agricultural production.").

31. Id. at 682–83. Before 1981, North Dakota generally restricted *all* corporations from farming. The 1981 amendments created exceptions for domestic family farm corporations that earned most of their income from farming operations. See id.

32. H.B. 1371, 68th Leg. Assemb., Reg. Sess. (N.D. 2023). The 2023 amendment adds additional exemptions for LLCs and corporations that primarily engage in farming, even if the LLC members are unrelated. See N.D. Off. of the Governor, supra note 8.

33. See S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 587–88 (8th Cir. 2003) (describing the provisions of "Amendment E," passed through a constitutional referendum).

34. Compare S.D. Codified Laws § 47-9A-1 (2025) ("The Legislature of the State of South Dakota recognizes the importance of the family farm to the economic and moral stability of the state, and the Legislature recognizes that the existence of the family farm is threatened by conglomerates in farming."), with Minn. Stat. § 500.24 subdiv. 1 (2024) ("The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society . . . .").

35. E.g., S.D. Codified Laws §§ 47-9A-2 to -3; N.D. Cent. Code § 10-06.1-02 (2024).

36. E.g., Minn. Stat. § 500.24 subdiv. 3.

37. See Okla. Stat. tit. 18, § 955 (2024). Despite its apparently broad scope, the first exception in Oklahoma's statute excepts "[n]atural persons" from the prohibition. Id.

3. *Prohibited Activities*. — After defining the restricted entities, each ACF law identifies a list of prohibited activities. Oklahoma and South Dakota prohibit any restricted entity from being chartered or licensed for the purpose of undertaking prohibited activities.[38] Oklahoma does not allow restricted entities to "engage in farming or ranching, or own or lease any interest in land to be used in the business of farming or ranching."[39] Iowa's law, in contrast, only provides that a covered entity may not "acquire or otherwise obtain or lease any agricultural land in [Iowa]."[40] The other ACF laws adopt a mix of these restrictions, using various terms to describe "owning" land.[41]

4. *Excepted Entities*. — Each of the ACF laws excepts several entities that meet certain qualifications from the law's scope. These exceptions reflect the policies of the state legislatures in favoring certain types of organizations that they feel would not offend the law's purpose.[42]

For example, most ACF laws exclude some type of "family farm corporation"[43] from the scope of their application. Generally, these corporations may only have a limited number of shareholders; all shareholders must be natural persons; and a majority of them must be related by kinship.[44] They also often limit the corporate purpose to farming activity and require at least one member of the family to be actively engaged in farming.[45]

ACF laws also often exempt "[a]uthorized farm corporations."[46] These exemptions also require a connection to farming but replace the kinship requirement with stricter limits on the corporate structure. Minnesota requires shareholders to be natural persons[47] and limits the total number of shareholders to five.[48] Owners of a majority of the shares must also actively engage in farming, and the corporation must only have

38. See Okla. Const. art. XXII, § 2; Okla. Stat. tit. 18, § 951; S.D. Codified Laws § 47-9A-1.

39. Okla. Stat. tit. 18, § 955.

40. Iowa Code § 9H.4 (2024).

41. See, e.g., Okla. Const. art. XXII, § 2 (applying the restriction to "real estate [not] located in incorporated cities and towns"); S.D. Codified Laws § 47-9A-3 (prohibiting taking an interest, whether "legal, beneficial or otherwise, in any title to real estate . . . capable of being used for farming").

42. Nebraska, for example, in its invalidated law, exempted "tribal corporations." Neb. Const. art. XII, § 8(C) (repealed 2006). South Dakota, meanwhile, exempts bank and trust companies in the state. S.D. Codified Laws § 47-9A-4.

43. E.g., Minn. Stat. § 500.24 subdiv. 2(c) (2024).

44. See, e.g., id. Minnesota lets other limited liability entities—partnerships, trusts, and LLCs—claim similar exceptions. Id. subdiv. 2(d), (f).

45. E.g., id. subdiv. 2(c).

46. E.g., id. subdiv. 2(e) (internal quotation marks omitted).

47. Id. subdiv. 2(e)(2) (also allowing a "family farm trust").

48. Id. subdiv. 2(e)(1) (counting a married couple as only one shareholder).

one class of shares, make at least 80% of its income from farming, and not control more than one thousand five hundred acres of farmland.[49]

Many of the ACF laws exempt corporate farms whose activity isn't commercial, such as "research or experimental" farms.[50] Corporations cannot use this provision to skirt the law: ACF laws often require an administrative review before corporations can claim this exception.[51] Other exceptions—for preferred industries—may include aquatic farms,[52] religious farms,[53] and breeding stock farms.[54]

Finally, some ACF laws exempt nonprofit corporations from their scope. For example, Minnesota's law allows nonprofits to own agricultural land if they do not use it for farming or lease it to another exempt farming operation.[55] The law does allow some active farming by nonprofit corporations, but it limits the amount of land that can be farmed and requires all profits be used for educational purposes.[56]

5. *Exempted Activities.* — ACF laws often allow entities to participate in activities that would otherwise be restricted, usually to prevent interfering with other commercial activity. These include owning land that is necessary for the corporation's purpose, such as when utility companies own land for their power transmission infrastructure[57] or property developers own land for development.[58] They may also allow restricted

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49. Id. subdiv. 2(e). Minnesota's ACF law also has an exception for an "[a]uthorized livestock farm corporation." See id. subdiv. 2(f) (internal quotation marks omitted) (requiring a higher threshold—75%—of owners to be farmers, with a majority of the shares held by individuals who operate the *specific* farm). As with family farms, Minnesota's law also allows "authorized" partnerships and LLCs. Id. subdiv. 2(k), (m).

50. See, e.g., id. subdiv. 2(p) (defining the term as farms that "own[] or operate[] agricultural land for research or experimental purposes" and whose commercial sales are "incidental to the . . . objectives" of the farm); id subdiv. 3 (creating the exemption).

51. In Minnesota, any corporation seeking to claim this exception must submit its proposed research objectives to the Commissioner of Agriculture. Id.

52. These are corporate farms that "cultur[e] private aquatic life in waters" that the "farmer has exclusive control of." Minn. Stat. § 17.47 subdiv. 3 (2024).

53. These are corporate farms "formed primarily for religious purposes" and "whose sole income is derived from agriculture." Minn. Stat. § 500.24 subdiv. 2(s).

54. These are farms that raise breeding stock—both plants and livestock—for sale to other farms for that use, rather than for commercial processing or consumption. Id. subdiv. 2(q).

States also exempt certain preferred farming activities. Missouri, in a notably precise exemption, exempts swine producers in very rural counties. See Mo. Ann. Stat. § 350.016–.017 (2024). Kansas also exempts swine and dairy farming, subject to each county's approval. Kan. Stat. Ann. §§ 17-5907 to -5908 (West 2025).

55. Minn. Stat. § 500.24 subdiv. 2(z).

56. See id. (limiting newly-acquired land holdings to only forty acres).

57. See, e.g., id. subdiv. 2(t) (defining these companies); id. subdiv. 3 (creating the exemption).

58. See, e.g., id. subdiv. 2(u) (requiring an active plan for development and restricting corporations from using land for agriculture pending the development).

entities to receive land through gifts, repossession, or debt collections.[59] These exemptions are not indefinite, though: Corporations are often required to sell or convert any such land within a defined period of time.[60]

6. *Effective Date.* — The period of effectiveness for ACF laws also varies. Some ACF laws have only prospective effect, exempting corporate landholdings acquired before the law's enactment.[61] Some laws also allow a corporation to expand its pre-existing holdings in a controlled manner.[62] Other states make their laws completely retroactive, requiring corporations to divest all holdings as soon as the law becomes effective (and the state brings an enforcement action).[63]

7. *Monitoring Systems.* — Many of the laws likewise have monitoring systems that allow the government to track potential violations. Kansas, for example, requires any corporation or partnership that holds agricultural land to file information including: the tracts of agricultural land owned or leased, the purposes for which the land is used, the date the land was acquired, the relative value of agricultural to non-agricultural land, and the number of shareholders.[64] Minnesota requires substantially the same information from its excepted entities, but also requires annual reporting.[65]

8. *Enforcement Actions.* — Finally, the enforcement actions allowed by ACF laws vary between the states. Most ACF laws allow the state's Attorney General to bring an action in a district court for violations.[66] Others extend

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59. See, e.g., id. subdiv. 2(w)–(x).

One issue on which states notably differ is whether corporations can maintain mineral rights on agricultural land. Compare Neb. Const. art. XII, § 8(I) (repealed 2006) (exempting mineral rights from the ACF law's restrictions), and Kan. Stat. Ann. § 17-5904(a)(13) (allowing coal mining corporations to farm land that has previously been strip-mined for coal), with N.D. Cent. Code § 10-06.01-03 (2024) (prohibiting restricted entities from retaining their mineral interests when they divest from agricultural land).

60. See, e.g., Minn. Stat. § 500.24 subdiv. 2(u) (requiring development corporations to complete their projects within six years of acquiring the land); id. subdiv. 2(w) (requiring gifted land to be sold within ten years); id. subdiv. 2(x) (requiring repossessed land to be sold within five years).

61. See, e.g., Kan. Stat. Ann § 17-5904(a)(7) (exempting land holdings that predate July 1, 1965).

62. See, e.g., Mo. Ann. Stat. § 350.015(3) (2024) (exempting land holdings that predate September 28, 1975, and allowing corporations to grow those holdings by up to 20% over a five-year period).

63. See, e.g., N.D. Cent. Code § 10-06.1-24 (providing no exemption for preexisting holdings). North Dakota does, however, give nonprofits a grace period to divest their holdings. Id. § 10-06.1-10. It also allows corporate farms the opportunity to convert their corporate charters as necessary to become one of the exempted farming corporations. Id. § 10-06.1-04.

64. Kan. Stat. Ann. § 17-7503(d).

65. Minn. Stat. § 500.24 subdiv. 4 (calling for filing with the Commissioner of Agriculture, rather than the Secretary of State).

66. E.g., S.D. Codified Laws § 47-9A-21 (2025).

this authority to local district attorneys,[67] and a few laws also allow private enforcement.[68] As a remedy for a violation, all states require divestment of the property by the corporate owner.[69] Some states also provide for civil penalties for failures to divest.[70]

C. *The Constitutionality of ACF Laws*

ACF laws have been challenged since their inception but have withstood most challenges. This section explores the three main types of challenges: those arising under the Equal Protection,[71] Due Process,[72] and dormant Commerce Clauses.[73] Of these, only dormant Commerce Clause challenges have found success.[74] Early challenges to the ACF laws were decided by the Supreme Court,[75] but the Court has not yet considered the dormant Commerce Clause question.[76]

1. *Equal Protection Clause.* — State ACF laws are presumptively valid under the Equal Protection Clause of the Constitution.[77] An early equal protection challenge was levied against North Dakota's ACF law in the 1940s.[78] The petitioner, Asbury Hospital, was a Minnesota corporation that had acquired land in North Dakota through mortgage foreclosure.[79] Under North Dakota's ACF law, Asbury Hospital had ten years to sell the land.[80] Because of the lingering effects of the Great Depression, though, Asbury Hospital doubted that it could recoup its investment.[81] So the

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67. E.g., Wis. Stat. & Ann. § 182.001(4) (2025).

68. E.g., N.D. Cent. Code § 10-06.1-25 (allowing any authorized corporation or resident to bring the action); Okla. Stat. tit. 18, § 956 (2024) (allowing *only* a resident of the county where the land is located to bring an action).

69. E.g., N.D. Cent. Code § 10-06.1-24(1)(c) (providing that, upon the judicial finding of a violation, a corporation "shall, within . . . one year from the date of the court's final order, divest itself of the farmland [held] . . . in violation of [the ACF law]").

70. E.g., Wis. Stat. & Ann. § 182.001(4) (providing for daily penalties of up to one thousand dollars).

71. See infra section I.C.1.

72. See infra section I.C.2.

73. See infra section I.C.3.

74. See infra section I.C.3.

75. See, e.g., Asbury Hosp. v. Cass County, 326 U.S. 207 (1945).

76. All the relevant cases have been within the Eighth Circuit. See Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006); S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003); N.D. Farm Bureau, Inc. v. Stenehjem, 333 F. Supp. 3d 900 (D.N.D. 2018). This circuit concentration is not surprising: Six of the states that have enacted ACF laws (Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) are in the Eighth Circuit. See 28 U.S.C. § 41 (2018).

77. The Equal Protection Clause provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. art. XIV, § 1.

78. See *Asbury Hosp.*, 326 U.S. at 207.

79. Id. at 209–10.

80. Id.

81. Id. at 210.

hospital challenged the law, claiming that the law denied it equal protection of the laws as guaranteed by the Fourteenth Amendment.[82]

The Supreme Court disagreed. Chief Justice Harlan Fiske Stone, writing for the Court, recognized that "[t]he Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it."[83] The Court also rejected the hospital's argument that, by allowing them to do business in the state, North Dakota could not later restrict the scope of this business.[84] "Subsequent legislation excluding such a corporation from continuing in the state has been sustained as an exercise of the general power to exclude foreign corporations," so North Dakota's law did not violate the Equal Protection Clause.[85]

The Court also upheld North Dakota's authorized farm exception under the Equal Protection Clause.[86] "The ultimate test of [a discriminatory statute's] validity," the Court reasoned, "is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made," so long as "any state of facts could be conceived which would support it."[87] In applying its review, the Court recognized that restrictions on corporate activities are the types of social and economic policies that are within a permissible legislative purpose, even when those laws make distinctions between different classes of corporations—such as family corporations.[88]

Courts have continued to apply this equal protection rationale, though using more modern doctrinal terminology. Nebraska's ACF amendment was challenged on equal protection grounds six years after it was first enacted by popular referendum.[89] The Eighth Circuit, applying rational basis review, held that "[t]he people of Nebraska have made a reasonable judgment that prohibiting non-family corporate farming serves

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82. Id.

83. Id. at 211.

84. Id. The business in question being the ownership of farmland in North Dakota.

85. Id. at 211–12.

86. See id. at 214–15. (noting that the statute exempted "lands belonging to cooperative corporations, seventy-five percent of whose members or stockholders are farmers residing on farms, or depending principally on farming for their livelihood").

87. Id. (citing Carmichael v. S. Coal Co., 301 U.S. 495, 509 (1937); Metro. Cas. Co. v. Brownell, 294 U.S. 580, 583 (1935); Rast v. Van Deman & Lewis Co., 240 U. S. 342, 357 (1916)). This holding is consistent with modern-day "rational basis review." See, e.g., Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

88. See *Asbury Hosp.*, 326 U.S. at 214–15.

89. See MSM Farms, Inc. v. Spire, 927 F.2d 330, 331 (8th Cir. 1991) (noting that the referendum occurred in 1982 and MSM brought suit in 1988).

the public interest in preserving an agriculture where families own and farm the land" and upheld the amendment.[90] Later cases have also recognized this principle.[91] From these cases, it seems settled that a state may both enact an ACF law and include exceptions for preferred entities without violating the Equal Protection Clause.

2. *Due Process Clause.* — Litigants often bundle due process challenges with their equal protection challenges to the ACF laws. By requiring sales of certain property without judicial process, ACF laws change the status quo of corporate landholders without notice or a hearing.[92]

Asbury Hospital v. Cass County involved just such a challenge.[93] Asbury Hospital argued that the economic downturn caused by the Great Depression prevented it from recouping its investment.[94] The Court disagreed, ruling that states' general power to restrict corporations' activities within their borders means they can also mandate transactions that those restrictions necessitate.[95] The Court also noted that "[t]he due process clause does not guarantee that a foreign corporation when lawfully excluded as such from ownership of land in the state shall recapture its cost."[96] Rather, the law must only "afford[] [the corporation] a fair opportunity to realize the value of the land," and "the sale, when required, [must] be under conditions reasonably calculated to realize [the land's] value at the time of sale."[97]

Later courts have looked favorably on this holding. In *MSM Farms, Inc. v. Spire*, the Eighth Circuit reasoned that, since MSM had acquired land after the Nebraska amendment was enacted, a court would be hard-pressed to find that MSM had not been "'afforded a fair opportunity to realize the value of the land' if divestiture is subsequently ordered."[98] And the most recent cases have declined to review this issue—instead focusing

90. Id. at 335. Nebraska's Amendment would later be struck down on dormant Commerce Clause grounds. See infra section I.C.3.

91. See, e.g., S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 597 (8th Cir. 2003) ("We have previously concluded that promoting family farms is a legitimate state interest [in equal protection challenges] . . . .").

92. See, e.g., Kan. Stat. Ann. § 17-5904(a)(4) (West 2025) (requiring corporations that acquired land through debt settlement to sell it within ten years).

93. See 326 U.S. at 212–13.

94. Id. at 210.

95. Id. at 212.

96. Id.

97. Id. at 212–13.

98. 927 F.2d 330, 335 (8th Cir. 1991) (quoting *Asbury Hosp.*, 326 U.S. at 212). The plaintiffs had not raised the argument at trial, so the court declined to consider it on appeal. This dictum nonetheless suggests the durability of this interpretation of the Due Process Clause. See id. at 334.

on the dormant Commerce Clause[99]—likewise suggesting that *Asbury Hospital*'s due process rationale is here to stay.

3. *Dormant Commerce Clause.* — The final—and only successful—grounds on which ACF laws have been challenged is the dormant Commerce Clause.[100] Before exploring these cases and their holdings, it is useful to review the basic structure of the dormant Commerce Clause and challenges to it.

a. *The Dormant Commerce Clause Explained.* — The U.S. Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."[101] Under current doctrine, this "serves as an affirmative grant of authority to Congress to regulate interstate commerce, and . . . has a 'dormant' or 'negative' component that prohibits the states from impairing interstate commerce."[102] The doctrine has shifted from asking whether a state's regulation affects interstate commerce to whether a state law treats in-state entities and out-of-state entities differently.[103]

In its modern application, the dormant Commerce Clause has a two-step mode of analysis. The court first identifies whether a law discriminates against out-of-state entities—either on its face, in its effect, or in its purpose.[104] If such discrimination is found, the law is presumptively invalid.[105] The only way a state may overcome this presumption is to "show, under rigorous scrutiny, that it has no other means to advance the legitimate state interest."[106]

But even a nondiscriminatory statute does not automatically pass constitutional muster. Under the balancing test set out in *Pike v. Bruce Church, Inc.*, a nondiscriminatory law is nevertheless invalid if "the burden

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99. See infra section I.C.3.

100. E.g., Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006); S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003); N.D. Farm Bureau, Inc. v. Stenehjem 333 F. Supp. 3d 900 (D.N.D. 2018).

101. U.S. Const. art. I, § 8, cl. 3.

102. Dawinder Sidhu, Interstate Commerce x Due Process, 106 Iowa L. Rev. 1801, 1805 (2021).

103. Compare Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 239–40 (1824) (striking down a New York law that sought to regulate instrumentalities of interstate commerce), with City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978) (striking down a New Jersey law that prohibited importation of waste from out-of-state waste haulers).

104. See Sidhu, supra note 102, at 1808; see also *N.D. Farm Bureau*, 333 F. Supp. 3d at 915.

105. See Sidhu, supra note 102, at 1808.

106. *N.D. Farm Bureau*, 333 F. Supp. 3d at 915 (citing Jones v. Gale, 470 F. 3d 1261, 1270 (8th Cir. 2006); S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593 (8th Cir. 2003)); see also Sidhu, supra note 102, at 1808 ("The state may overcome this presumption by showing . . . : first, the statute's ends are legitimate . . . ; second, the source of the problem is out-of-state; and third, no non-discriminatory alternatives were viable . . . ."). This rarely includes economic protectionism. See *City of Philadelphia*, 437 U.S. at 624 ("[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.").

imposed on such commerce is clearly excessive in relation to the putative local benefits."[107]

b. *Application to South Dakota*. — In 1998, South Dakota codified its ACF law into the state constitution by public referendum.[108] This "Amendment E" prohibited "corporations and syndicates" from acquiring farmland.[109] As with many of the ACF laws, though, South Dakota's provided for a family farm exception.[110] This exception required at least one of the family members to "reside on or be actively engaged in the day-to-day labor and management of the farm."[111]

In *South Dakota Farm Bureau, Inc. v. Hazeltine*, a group of plaintiffs argued that this exception violated the dormant Commerce Clause by discriminating against interstate commerce.[112] The Eighth Circuit agreed, finding a discriminatory purpose behind Amendment E.[113] The court first reviewed statements in favor of the amendment, which said that Amendment E would prevent "[d]esperately needed profits [from] be[ing] skimmed out of local economies and into the pockets of distant corporations."[114]

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107. 397 U.S. 137, 142 (1970). Invalidated laws include "statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." See id. at 145 (collecting cases).

Pike's doctrine has been hotly debated in recent years. See Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1158 (2023) (reading *Pike* and its progeny as a mere "practical effects" test to ""smoke" out a hidden' protectionism" (quoting Richard Fallon, The Dynamic Constitution 311 (2d. ed. 2013))); id. at 1159–61 (plurality opinion) (Gorsuch, J.) (rejecting the Court's competence to apply *Pike* balancing when the perceived benefits—upholding public values regarding animal protection—are "noneconomic"); id. at 1165–66 (Sotomayor, J., concurring in part, joined by Kagan, J.) (arguing that courts can, and often do, weigh benefits and burdens of different types and affirming the judgment for insufficiently pleading a burden that would outweigh the benefits under *Pike*); id. at 1168–72 (Roberts, C.J., concurring in part and dissenting in part, joined by Alito, Kavanaugh & Jackson, JJ.) (arguing that *Pike* can weigh economic and noneconomic effects and requires consideration of both "compliance costs" and other "economic harms to the interstate market" (citing Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959))).

108. See *Hazeltine*, 340 F.3d at 587.

109. Id.

110. See supra section I.B.4–.5.

111. *Hazeltine*, 340 F.3d at 588 (quoting S.D. Const. art. XVII, § 22, cl. 1). The challenged section further provided that "[d]ay-to-day labor and management shall require both daily or routine substantial physical exertion and administration." Id. (quoting S.D. Const. art. XVII, § 22, cl. 1).

112. See id. at 592.

113. See id. at 596.

114. See id. at 594 (first alteration in original) (internal quotation marks omitted) (quoting Charlie Johnson & Dennis Wiese, Pro—Constitutional Amendment E, 1998 Ballot Question Pamphlet, https://sdsos.gov/elections-voting/election-resources/election-history/1998/1998_amendment_e.aspx [https://perma.cc/T24A-L3Y5] (last visited Oct. 16, 2024)) (describing the statement as "brimming with protectionist rhetoric" (internal quotation marks omitted) (quoting SDDS, Inc. v. South Dakota, 47 F.3d 263, 268 (8th Cir. 1995))).

The court also looked at the drafting history of the amendment, finding that some drafters wanted to stop out-of-state hog producers from building facilities in South Dakota.[115] This history also included indirect evidence of discrimination: The drafters did not show how the amendment furthered the proffered state interests of preserving family farms and protecting the environment,[116] nor did they estimate how well the amendment furthered those interests.[117] This all convinced the court that Amendment E had a discriminatory purpose.[118]

Finding discriminatory purpose, the Eighth Circuit next considered whether the state had shown that no reasonable nondiscriminatory alternatives existed to carry out its interests.[119] In finding that the state failed to meet its burden, the court highlighted the state's failure to consider *any* alternative solutions in drafting Amendment E.[120] Because the state had not considered any alternatives, it could not show that no nondiscriminatory alternatives existed.[121]

The Supreme Court denied certiorari on the case, rendering this decision final.[122]

c. *Application to Nebraska.* — The second ACF law challenged under the dormant Commerce Clause was Nebraska's constitutional amendment.[123] Several farmers brought suit, challenging the family farm exception's requirement that at least one family member live or work on the farm.[124] The Eighth Circuit here found facial discrimination against interstate commerce.[125] The panel decided that the amendment "on its face . . . favors Nebraska residents, and people who are in such close proximity to Nebraska farms and ranches that a daily commute is physically and economically feasible for them."[126] In its decision, the

115. See id. at 594–95.

116. Id. at 594.

117. See id. at 595 ("[T]he evidence in the record demonstrates that the drafters made little effort to measure the probable effects of Amendment E and of less drastic alternatives.").

118. See id. at 596.

119. See id. at 597.

120. Id.

121. Id. at 597–98. The court identified several alternatives from a report prepared by the USDA but did not pass on their merits since the state had not met its burden of identifying these alternatives. See id.

122. See Dakota Rural Action v. S.D. Farm Bureau, 541 U.S. 1037 (2004) (mem.), denying cert. to *Hazeltine*, 340 F.3d 583. Notably, however, the Eighth Circuit's opinion did not invalidate the underlying statute, which provides the same restrictions on corporate farms and is still in effect. See S.D. Codified Laws § 47-9A (2025).

123. See Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006).

124. Id. at 1264.

125. Id. at 1268.

126. Id. at 1267–68 (internal quotation marks omitted) (quoting Jones v. Gale, 405 F. Supp. 2d 1066, 1081 (D. Neb. 2005)).

Eighth Circuit expressly rejected the state's argument that this language was broad enough to apply to individuals who lived or worked on out-of-state farmland that was also owned by the in-state family farm corporation.[127]

The court also found a discriminatory intent behind the amendment.[128] The court summarily considered the factors from *Hazeltine* and analyzed the ballot initiative's title, which said the challenged exception applied to "Nebraska family farm corporation[s]."[129] This language helped convince the court that the amendment intended to favor Nebraska corporations over out-of-state corporations.[130] And the court again found that the state did not prove that it had no other nondiscriminatory means to advance its interests.[131]

d. *Application to North Dakota.* — A final—and recent—challenge to ACF laws on dormant Commerce Clause grounds came in 2018 in North Dakota.[132] Again at issue was the validity of a family farm exception.[133] The district court found that the statute's reference to "domestic" family farm corporations was facially discriminatory and necessarily gave it discriminatory effect, but North Dakota's long history of ACF laws undermined any claim of discriminatory intent.[134] Likewise, the court found that the requirement that at least one family member must be "actively engaged in operating the farm or ranch" was not a geographic requirement, in contrast to Nebraska's "day-to-day labor" provision, so this

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127. See id. ("[The state] assert[s] that a Colorado family farm corporation, for example, could operate on land in Nebraska as long as its majority shareholder or one of his or her family members lived or worked at the location of the corporation's Colorado farm. This argument is meritless."). The court participated in a lengthy statutory interpretation exercise to support its finding that a discriminatory interpretation was the "most natural and obvious meaning." See id.

For a general discussion of the differing interpretations of "the farm" in the ACF law context and their application in *Jones*, see generally Anthony B. Schutz, Corporate-Farming Measures in a Post-*Jones* World, 14 Drake J. Agric. L. 97, 116–23 (2009).

128. See *Jones*, 470 F.3d at 1268–69.

129. Id. at 1269–70 (internal quotation marks omitted). The court's review was based on Nebraska's ballot initiative law, which requires the title to state the amendment's purpose. See id. (citing Neb. Rev. Stat. § 32-1410(1) (2006)).

130. See id.

131. Id. at 1270. The court did not deny that the amendment's purpose—to remedy the threat of "absentee owners of land, negative effects on the social and economic culture of rural Nebraska, and a lack of good stewardship of the state's . . . natural resources"—was legitimate. Id. But it recognized that there could be nondiscriminatory ways to counter those threats that the state hadn't precluded. See id. ("Were the state interests more clearly defined, we would be able to discern whether specific regulations could address the particular difficulties that frustrate the promotion of those interests.").

132. See N.D. Farm Bureau, Inc. v. Stenehjem, 333 F. Supp. 3d 900 (D.N.D. 2018).

133. Id. at 906.

134. Id. at 915–17, 922–25 ("The Commerce Clause does not guarantee access to the corporate form." (citing State v. J.P. Lamb Land Co., 401 N.W.2d 713, 717 (N.D. 1987)).

provision of the statute was not facially discriminatory.[135] The state conceded the rigorous scrutiny test, so the court invalidated the family farm exception.[136]

4. *Conclusion*. — Before moving on, it is worth briefly synthesizing the preceding discussion into a concise statement of ACF laws' constitutionality and discussing the risks that state legislators might avoid in drafting corporate restrictions. ACF laws are presumptively constitutional. The Equal Protection Clause allows state laws to treat individuals and corporations differently, as long they are rationally linked to a legitimate state interest.[137] The Due Process Clause likewise only requires that corporations have a reasonable opportunity to sell their land in a manner that allows them to realize its fair value.[138] The dormant Commerce Clause provides the only roadblock for ACF laws.[139] ACF laws have run afoul of dormant Commerce Clause review on all three grounds: facial discrimination, discriminatory purpose, and discriminatory effect.

Careful drafting can avoid these pitfalls. Legislators can avoid a finding of facial discrimination and discriminatory effect by ensuring that any exceptions do not contain geographic components.[140] Likewise, they should take care that the purpose of their ACF laws is based in legitimate state interests—such as rural values, land stewardship, or the environment—and not merely economic protectionism.[141]

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135. Id. at 917–22.

136. Id. at 925. The court found that the family farm exception was severable from the rest of the ACF law, and therefore only enjoined the exception from being applied to domestic corporations. Id. at 925–27. North Dakota subsequently amended its law, eliminating any reference to "domestic" family farming corporations. See S.B. 2210, 67th Leg. Assemb., 2021 N.D. Laws 327, 328–29 (codified at N.D. Cent. Code § 10-06.1-12 (2024)).

137. See supra section I.C.1.

138. See supra section I.C.2.

139. See supra section I.C.3.

140. See *N.D. Farm Bureau*, 333 F. Supp. 3d at 917–22 (differentiating between "day-to-day labor" and active engagement in holding that the latter required no geographic link); Schutz, supra note 127, at 123–34 ("States have at least two options for modifying their corporate-farming restrictions: (1) remove all qualifying-activities criteria and focus on income testing and size restrictions or (2) ensure that their qualifying activities have no geographic implications relative to the state's border.").

141. See Schutz, supra note 127, at 140 ("[T]he advice to states is simple: be careful of the record created. States must avoid the imprimatur of hostility toward outsiders." (footnote omitted)).

D. *Criticisms of ACF Laws*

ACF laws have been criticized for their ineffectiveness in achieving their policy goals. This section reviews some of these criticisms[142] in order to later evaluate them within the Corporate Landlord context.[143]

1. *Structural Criticisms.* — One criticism of ACF laws addresses the gaps that many of them have in their scope, which allow corporations to exercise control over farming operations. ACF laws generally only restrict land ownership and operation of a farm.[144] They often do not limit corporations further up the supply chain from effectively controlling a farm by contracting with individual producers to provide the necessary raw materials and purchase their output.[145] These "production contracts" reduce the risk for the individual producers, but they also take away many of the benefits of independent farming.[146] Farmers lose the power to make independent decisions and pledge their livestock or crops as security for loans.[147] And the disparity in economic interests between the farmer and the corporation has been likened to modern-day serfdom.[148] Similarly, some ACF laws allow family-owned corporations to rent out their farmland rather than farming it themselves. In Iowa, this has led to thirty-four percent of farmland being farmed by nonowners.[149]

Other criticisms target inconsistencies within the ACF laws, especially those that have been amended piecemeal over the years.[150] Critics argue

142. This section does not seek to be a comprehensive survey of the policy debate surrounding ACF laws. Rather, it serves as a primer on the post-enactment impacts of these laws.

143. See infra section III.A.2.

144. See supra section I.B.2–.3.

145. See, e.g., Kan. Stat. Ann. § 17-5904(b) (West 2025) (exempting such contracts). In these production contracts, "the [individual] feedlot owner will furnish facilities and labor in exchange for payment by the [corporate] livestock owner for the livestock's care and feeding. Such payment is usually made after care and feeding is rendered." Keith D. Haroldson, Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts, 41 Drake L. Rev. 393, 413 (1992).

146. See Haroldson, supra note 145, at 413–14 ("The producer entering a production contract may gain a person or entity with whom risk may be shared, but forfeits two important characteristics of entrepreneurship—ownership and control.").

147. Id.

148. Id. at 414.

149. Pérez, supra note 15, at 60–61. Pérez argues that this indirect consolidation of land has undermined Iowa's ACF law. See id. Pérez's criticism does not identify whether the nonowner farmers are corporations or individuals. See id. But since Iowa's ACF law limits corporations from even leasing farmland, see Iowa Code § 9H.4(1) (2024), it is likely the latter.

150. See, e.g., Richard F. Prim, Saving the Family Farm: Is Minnesota's Anti-Corporate Farm Statute the Answer?, 14 Hamline J. Pub. L. & Pol'y 203, 216 (1993) ("After nearly thirty amendments, as well as its numerous exceptions, the statute is extremely inconsistent, confusing, and complicated.").

that inconsistent statutory text creates conflicting obligations[151] and muddies the scope of these laws.[152]

2. *Outcome-Based Criticisms.* — Different criticisms focus on the effect of the laws. Critics suggest that ACF laws create barriers to entry for new farmers: Where land costs are too high for a sole farmer to purchase, ACF laws prevent groups of farmers from using the corporate form to pool their resources.[153] Others argue that ACF laws are ineffective because their policy goals are really to support small family farms, yet the ACF laws generally don't limit the size of farms that can qualify for the family farm exceptions.[154] Critics also argue that the benefits of the corporate form—for retirement planning, inter vivos transfers, and estate planning—outweigh any social costs.[155]

In livestock contexts, critics often suggest that ACF laws overlook the connected and global nature of modern farming:[156] Gone are the days when Minnesota's farmers would be selling their products only within Minnesota.[157] These criticisms often rely on empirical data to support their claims. Minnesota reportedly lost half of its beef production market share and nearly all of its beef packing market share in the first twenty years after enactment of its ACF law.[158] Similar effects have been noted in other states.[159] This trend, critics argue, indicates that ACF laws do not protect

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151. See id. (describing contradictory language that suggests that family farm corporations are *both* exempt from the state's annual reporting requirement *and* required to file annual reports).

152. See id. at 218 (noting that Minnesota defines "agricultural land" as both "land used for farming" and land "capable of being used for farming" (internal quotation marks omitted)).

153. Id. at 220. Prim fails to consider that most ACF laws allow small corporations to own farmland and generally do not restrict collective ownership through unlimited liability entities, such as general partnerships. See supra section I.B.4.

154. See, e.g., Matthew M. Harbur, Anti-Corporate, Agricultural Cooperative Laws and the Family Farm, 4 Drake J. Agric. L. 385, 392 (1999).

155. Id. at 393 (arguing that "[s]tates should consider regulating undesirable aspects of corporations, rather than abolishing those corporations altogether").

156. See Prim, supra note 150, at 220–221.

157. Cf. id. ("Minnesota farmers must deliver to and sell their products in the same markets as the restriction free states and countries such as Canada.").

Notably, this interconnected nature of the modern agricultural economy animated the debate between the justices in *National Pork Producers Council v. Ross*. See supra note 107 for more discussion.

158. See Prim, supra note 150, at 221. Prim also notes, however, that Minnesota's poultry industry, which is exempt from the ACF law, remained healthy over the same period, while the pork industry's future in the state was "uncertain." See id.

159. See Matt Chester, Note, Anticorporate Farming Legislation: Constitutionality and Economic Policy, 9 Drake J. Agric. L. 79, 87–88 (2004) (comparing a decline in livestock market share for Nebraska, South Dakota, and Wisconsin after ACF law enactment to a significant rise in market share for Colorado and North Carolina, states without ACF laws).

family farms and domestic farming; rather, they merely shift patterns of corporate investment to states without ACF laws.[160]

A third outcome-based criticism appeals to economic optimization. Put simply, "large corporate farms dominate the marketplace . . . by producing a higher volume[] and . . . reducing their unit costs through lower raw material costs."[161] Thus, ACF laws undermine market efficiency, which raises prices for consumers. But these arguments overlook the purpose of the statutes. ACF laws were not enacted to ensure low-cost food production. Rather, legislators felt that "the family farm . . . [is] the most socially desirable mode of agricultural production" and is vital to the "stability and well-being of rural society."[162] There is one relevant economic criticism, though: The ACF laws have apparently corresponded with a "dramatic increase" in farmland prices in most of the states with ACF laws.[163] While this increase in land prices benefits current owners, the increase can also "lock in" farmers, because the corporate farms that could afford to buy land at the increased prices are legally prohibited from doing so.[164]

II. THE FINANCIALIZATION OF HOUSING

This Part introduces the problem of the "financialization" of housing,[165] and the related rise of Corporate Landlords. It begins by exploring the origins of financialization in the Great Recession, when the collapse of housing prices and favorable government policies made housing attractive to institutional investors.[166] It then turns to the impacts of financialization: Institutional investors became absentee landlords who rented out homes to individuals and families. In search of profit, they drove up costs, slashed basic services, decreased quality of life, and reduced rates of home ownership.[167] Then, at the height of the COVID-19 pandemic, they engaged in predatory practices to eliminate existing tenants, in contravention of federal, state, and local eviction moratoria.[168]

160. See, e.g., id. at 87–88, 96.

161. Prim, supra note 150, at 221 (citing A.V. Krebs, The Corporate Reapers: The Book of Agribusiness 76 (1991)).

162. See Minn. Stat. § 500.24 subdiv. 1 (2024).

163. Chester, supra note 159, at 96–97.

164. See supra note 153 and accompanying text.

165. Financialization of housing has been defined as the process by which "massive amounts of global capital have been invested in housing as a commodity, as security for financial instruments that are traded on global markets, and as a means of accumulating wealth." Leilani Farha (Special Rapporteur on Adequate Housing), Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context 1, U.N. Doc. A/HRC/34/51 (Jan. 18, 2017) [hereinafter U.N., Adequate Housing].

166. See infra section II.A.

167. See infra section II.B.1.

168. See infra section II.B.2.

Finally, this Part reviews the various policy proposals to remedy this problem and discusses their shortcomings.[169]

A. *The History of Financialization*

In the wake of the 2008 financial crisis, the housing market was turned on its head.[170] Between foreclosures and short sales, some 5.7 million homeowners lost their houses.[171] The housing market collapsed.[172] Institutional investors—hedge funds, private equity firms, and other money managers—saw an opportunity to buy houses at a steep discount, have renters cover the mortgages, and hold them until they could realize the capital gains.[173] Whereas previous investment strategies had focused on multi-unit housing,[174] after the financial crisis, at least twenty-five institutional investors made investments in single-family real estate, together totaling $60 billion.[175] The largest of these investors—Invitation Homes, which began as a Blackstone subsidiary—reportedly owned 82,500 homes at its peak.[176] And Corporate Landlords have not been idle—the period since 2011 has been marked with home sales, mergers, and acquisitions as the new SFR market has consolidated.[177] As recently as the fourth quarter of 2023, investors bought 28% of all single-family homes sold.[178]

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169. See infra section II.C.

170. For a contemporary discussion of the history and causes of the financial crisis, see generally Eamonn K. Moran, Wall Street Meets Main Street: Understanding the Financial Crisis, 13 N.C. Banking Inst. 5 (2009).

171. See Francesca Mari, A $60 Billion Housing Grab by Wall Street, N.Y. Times Mag. (Mar. 4, 2020) https://www.nytimes.com/2020/03/04/magazine/wall-street-landlords.html (on file with the *Columbia Law Review*) (last updated Oct. 22, 2021) ("From 2007 to 2011, 4.7 million households lost homes to foreclosure, and a million more to short sale.").

172. Id.

173. See id.

174. Cf. id. ("Before 2010, institutional landlords didn't exist in the single-family-rental market . . . .").

175. See id. (noting that this "real estate grab" has "fuel[ed] a housing recovery without a homeowner recovery").

176. Id.

177. In one notable example, a man named Chad Ellingwood, whose foreclosure in the housing crisis led him to rent his former home from a Corporate Landlord, reportedly had four different landlords in an eight-year period, each with different policies and lease terms. See id.

178. Thomas Malone, US Home Investor Share Reached New High in Q4 2023, CoreLogic (Apr. 9, 2024), https://www.corelogic.com/intelligence/us-home-investor-share-reached-new-high-q4-2023/ [https://perma.cc/VS4V-ZQQ7]. For broader discussion of this trend, see Jessica A. Shoemaker, Re-Placing Property, 91 U. Chi. L. Rev. 811, 850 (2024) (describing the current trend of single-family home sales to "landlords, aspiring Airbnb tycoons, and other types of investors" (internal quotation marks omitted) (quoting Amanda Mull, The HGTV-ification of America, The Atlantic (Aug. 19, 2022),

These investment strategies were supported by market forces. Former homeowners still needed housing, so rental demand was high.[179] Meanwhile, the accompanying stock market crash and the interest rate cuts by the Federal Reserve made these alternative investments more appealing to investors, who happily gave money to these burgeoning Corporate Landlords.[180]

Corporate investments in SFR have been geographically distributed throughout the country. Atlanta,[181] Boston,[182] Charlotte,[183] Houston,[184] Indianapolis,[185] Los Angeles,[186] Minneapolis[187] New York,[188] San

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https://www.theatlantic.com/technology/archive/2022/08/hgtv-flipping-houses-cheap-redesign/671187/ (on file with the *Columbia Law Review*))).

179. See Desiree Fields & Manon Vergerio, Corporate Landlords and Market Power: What Does the Single-Family Rental Boom Mean for Our Housing Future? 11 (2022), https://escholarship.org/uc/item/07d6445s [https://perma.cc/GSH8-H92U] (describing the "surging rental demand and constrained mortgage credit" that "assured both customers . . . and little competition from other buyers" in the wake of the housing crash (footnote omitted)).

180. See id. ("This market turn benefited alternative investment funds . . . by giving them access to capital they could deploy to acquire distressed real estate.").

181. See Mari, supra note 171 (noting that institutional investors own 8.4% of single-family rental homes in Atlanta).

182. See Sarah Rosenkrantz, Harvard and the Housing Crisis: The Non-Profit Corporate Landlord Behind Boston's Housing Crisis, The Flaw (Nov. 21, 2022), https://theflaw.org/articles/harvard-and-the-housing-crisis-the-non-profit-corporate-landlord-behind-bostons-housing-crisis/ [https://perma.cc/X953-G2SJ] (noting that, as of 2020, Corporate Landlords owned 32% of rental units in Boston, though not distinguishing between single- and multi-family housing).

183. See Mari, supra note 171 (noting that institutional investors own 11.3% of single-family rental homes in Charlotte).

184. See Danielle A. Koelling, Financialization of Housing in the Single-Family Rental and Build-to-Rent Markets, a Houston Case Study 28–69 (Feb. 20, 2023) (Master Thesis, Vienna University of Economics and Business) (on file with the *Columbia Law Review*) (studying the motivations, mechanisms, and strategies underlying the rising trend of institutional investment in SFR and build-to-rent housing in metropolitan Houston).

185. See IU McKinney Health & Human Rights Clinic, Cassidy Segura Clouse, Katie Whitley, Samantha Kannmacher & Emily Tyner, Reaffirming Housing as Infrastructure in Indiana, 55 Ind. L. Rev. 767, 770 (2022) ("In Indianapolis, 19% of residential, single-family homes are owned by institutional investors, the highest rate of all tracked markets.").

186. See Mari, supra note 171 (describing the rise of Corporate Landlords in Los Angeles).

187. See Roshan Abraham, Minneapolis Tenants Are Taking on Corporate Landlords by Putting Their Rent in Escrow, Next City (June 23, 2022), https://nextcity.org/urbanist-news/minneapolis-tenants-are-taking-on-corporate-landlords-by-putting-their-rent (on file with the *Columbia Law Review*) (describing a wave of anti-landlord activism in Minneapolis and St. Paul, where investors own 4.1% of single-family rental homes).

188. See Sateesh Nori, Opinion, Corporate Landlords Are Taking Over NYC—The Numbers Don't Lie, City Limits (May 31, 2022), https://citylimits.org/2022/05/31/opinion-corporate-landlords-are-taking-over-nyc-the-numbers-dont-lie/ [https://perma.cc/BH4Y-S9AY] (discussing how "corporate acquisitions overtook individual purchases [of residential property] shortly after the 2008 economic recession" and how

Antonio,[189] and Tampa[190] have all received attention for their significant growth of corporate-owned rentals. But Corporate Landlords do not buy just any houses that come on the market. They focus on a "strike zone" of cheap housing in areas of high rental demand, often isolating specific neighborhoods within a city.[191] Once targets are identified, they swoop in, "outcompeting would-be owner occupiers with all-cash, no-contingency offers and effectively gatekeeping access to particular neighborhoods and public schools."[192] These investments continue today. In September 2023, Arrived, a platform that allows individuals to own fractional shares in SFR housing, announced a new "Single Family Residential Fund," offering retail investors "an even more passive way to build a diverse real estate portfolio."[193]

The free market did not act alone in creating this trend; federal government policy during the Great Recession encouraged corporate SFR investment. Fannie Mae and Freddie Mac—government-sponsored entities that were created to expand access to affordable housing by securitizing mortgage portfolios from lenders[194]—auctioned off more than 95% of their distressed mortgage portfolios to institutional investors.[195] These sales were intended to create a bottom for an otherwise

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"since 2011, corporate landlords have remained the primary type of residential real estate transaction"); Angela Stovall, The Corporatization of NYC Real Estate, Medium (May 25, 2022), https://medium.com/justfixorg/corporatization-of-nyc-real-estate-83e2bf191b73 [https://perma.cc/YK3S-FPLV] (noting that "89% of all units registered with the [NYC] Department of Housing Preservation and Development . . . list a corporate owner").

189. See Luis Escalante, Corporate Landlord Activity in The Housing Market: An Exploratory Analysis of San Antonio, TX 1, 22 (May 2023) (M.S. thesis, University of Texas at San Antonio) (on file with the *Columbia Law Review*) (discussing how Corporate Landlords in Bexar County increased their ownership of single-family residential property by 42.4% between 2021 and 2022).

190. See Mari, supra note 171 (noting that institutional investors own 9.6% of single-family-rental homes in Tampa).

191. Mari, supra note 171. For example, this strike zone could focus on neighborhoods with mid-sized, single family homes valued at the median local price. See Fields & Vergerio, supra note 179, at 22.

192. Fields & Vergario, supra note 179, at 22.

193. Arrived Single Family Residential Fund, Arrived (Aug. 29, 2024) https://arrived.com/blog/arrived-single-family-residential-fund/ [https://perma.cc/AY56-GK9K]; see also Arrived SFR Genesis Fund, LLC, Offering Circular (Form 253G2) (Sept. 25, 2023). As of October 2024, the fund has raised more than $17 million from investors. Single Family Residential Fund, Arrived, https://arrived.com/properties/the-single-family-residential-fund [https://perma.cc/T84Q-RSUC] (last visited Oct. 18, 2024).

194. Affordable Homeownership, Fannie Mae, https://singlefamily.fanniemae.com/originating-underwriting/affordable [https://perma.cc/AY56-GK9K] (last visited Oct. 18, 2024); About Us, Freddie Mac, https://www.freddiemac.com/about?nav=overview [https://perma.cc/H9BX-RYVC] (last visited Oct. 18, 2024).

195. Mari, supra note 171.

collapsing housing market,[196] and assets were sold to the highest bidders.[197] In doing so, they did not consider the needs of the people who lived in these houses.[198] And this Corporate-Landlord-friendly policy has continued. As recently as 2017, Fannie Mae guaranteed a $1 billion loan to Invitation Homes.[199]

B. *The Costs of Financialization*

1. *The Economic Costs of Financialization.* — Financialization of housing has economic costs for renters. Research suggests that corporate-owned rentals tend to have above-market rent increases.[200] This is because Corporate Landlords target areas of high job growth and limited housing—where tenants must be price takers and have few alternatives.[201] One report, reviewing revenue growth strategies of the three largest Corporate Landlords, described double-digit quarterly rent increases throughout 2021,[202] as landlords sought to "find the 'sweet spot'—namely,

196. See id. ("Rather than protecting communities and making it easy for homeowners to restructure bad mortgages or repair their credit after succumbing to predatory loans, the government facilitated the transfer of wealth from people to private-equity firms.").

197. See id. ("Fannie Mae and Freddie Mac's books were auctioned off to Wall Street investors without any meaningful stipulations . . . .").

198. See ACCE Inst., Ams. for Fin. Reform & Pub. Advocs., Wall Street Landlords Turn American Dream Into a Nightmare 16 (2018), https://assets.nationbuilder.com/acceinstitute/pages/1153/attachments/original/1570049936/WallstreetLandlordsFinalReport.pdf [https://perma.cc/6V7M-N8S7] (explaining how Wall Street investors target neighborhoods where they can set high rents, impose high rent increases, and outcompete individual purchasers in the market).

199. Mari, supra note 171 (noting that this was the first SFR loan guaranteed by any government-backed organization and that it was collateralized by over seven thousand rental homes); see also ACCE Inst. et al., supra note 198, at 37 ("This federal backing allowed Invitation Homes to benefit from lower interest rates and more favorable loan terms than the single-family rental industry had ever received before, and appears to have been a result of sustained industry lobbying.").

200. See Carlos Waters, Wall Street Has Purchased Hundreds of Thousands of Single-Family Homes Since the Great Recession. Here's What That Means for Rental Prices, CNBC (Feb. 21, 2023) https://www.cnbc.com/2023/02/21/how-wall-street-bought-single-family-homes-and-put-them-up-for-rent.html [https://perma.cc/67LQ-6R3R] (last updated Feb. 22, 2023) ("Between January 2020 and January 2023, rents for a two-bed detached home increased about 44% in Tampa, Florida, 43% in Phoenix, and 35% near Atlanta. That's compared with a 24% increase nationwide."); see also ACCE Inst. et al., supra note 198, at 18 (noting that Wall Street landlords charge nearly double the national average in some markets).

201. See ACCE Inst. et al., supra note 198, at 16–17 (explaining that targeting neighborhoods with these characteristics makes it easier for Corporate Landlords "to set high rents and to impose high rent increases over time").

202. See Fields & Vergerio, supra note 179, at 32–35 (reporting that, in the third quarter of 2021, Tricon Residential raised rent on new leases by 19.1% and by 5.7% on lease renewals).

how much they can increase rents until it becomes more cost effective for tenants to go out and buy their own place."[203]

Additionally, Corporate Landlords crowd out other would-be homeowners, as their cash offers are often more attractive to sellers than individual buyers, whose mortgage-based financing may fall through before closing.[204] This crowding-out has downstream effects. Home values have largely recovered since 2011,[205] but corporate ownership of housing means that these gains have accrued to the benefit of corporations and shareholders, rather than the individuals who otherwise would have owned these homes.[206]

Increased rents are not the only cost Corporate Landlords place upon their tenants. Corporate Landlords make varied efforts to maximize their investment returns. These include charging for late payments, "smart home" features—which tenants may not want or even use—and "chargebacks" for utilities paid by the landlords.[207] Corporate Landlords also shift maintenance costs back to tenants and charge a fee for that "service," too.[208] These tactics have largely worked. Corporate Landlords reaped massive revenue and profit growth in 2022 as compared to 2021.[209]

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203. Id. at 35.

204. ACCE Inst. et al., supra note 198, at 9–10.

205. By spring 2020, median home prices had reportedly recovered by 46% relative to their 2011 low point. Mari, supra note 171.

206. See id. (describing how Blackstone profited off the rebounding housing market by selling its shares in Invitation Homes for $ 7 billion). For a cross-doctrinal discussion of how American law favors homeownership and how these increased rates of tenancy reinforce racial disparities, see generally Sarah Schindler & Kellen Zale, The Anti-Tenancy Doctrine, 171 U. Pa. L. Rev. 267 (2023) ("[B]ecause the majority of Black and Latinx families are renters, they are disproportionately impacted by policies that disfavor renters.").

207. See ACCE Inst. et al., supra note 198, at 23 (summarizing a "broader industry strategy of maximizing profits through the aggressive pursuit of 'ancillary revenue opportunities' such as fees, tenant charge backs (when a landlord pays for a repair and charges the tenant later for the cost) or new service charges for surveillance technology and other 'smart home' features"); Mari, supra note 171 (describing how Colony American mandated tenants pay rent via on online portal, which they were charged a $121 "convenience fee" to use).

208. See ACCE Inst. et al., supra note 198, at 25–27 ("[A]ccording to the contract, residents are required to pay for routine maintenance and minor repairs with serious health and safety implications such as drainage, fumigation, and carbon monoxide or smoke detector replacements. Residents are also responsible for fixing appliances such as stoves and refrigerators . . . ."). Some of these fees are distinctly predatory: Invitation Homes reportedly charged tenants up to $20 per month for a "smart lock" service, but waived the first month's fee, so tenants missed their opt-out window before they learned the fee existed. Mari, supra note 171.

209. Julia Conley, Corporate Landlords Reap Big Profits as Rents in Many U.S. Cities Soar by Double Digits, Salon (Apr. 18, 2023), https://www.salon.com/2023/04/18/corporate-landlords-reap-big-profits-as-rents-in-many-us-cities-soar-by-double-digits_partner [https://perma.cc/3BN4-TD25]. Invitation Homes forecasted that their 2022 ancillary service revenues would be close to $30 million, while American Homes 4 Rent realized $178

Corporate Landlords also show a lack of concern for housing quality. News stories have described renters who move into a building needing major repairs and whose repeated calls for maintenance go unanswered by their Corporate Landlords.[210] Some tenants who tried to withhold rent to force repairs found their apartments listed on Zillow and had eviction actions filed against them.[211]

2. *The Social Costs of Financialization.* — Financialization has caused myriad social problems beyond just its economic impacts. Financialization "displac[es] communities for the sake of profit, and 'disconnect[s] housing from its social function of providing a place to live in security and dignity.'"[212] Corporate Landlords have furthered this disparity as they seek new opportunities. Their recent investments have shifted from buying existing homes to buying land for development and constructing purpose-built single-family rentals, a so-called "build-for-rent" (BFR) strategy.[213] Critics of these investments have highlighted their unsustainable impacts on both urban development and the environment.[214]

Other impacts include increased racial disparities in housing. Prior to the Great Recession, subprime lending schemes targeted minority borrowers with illicit and predatory lending tactics,[215] which caused minority homeowners to be disproportionately impacted by foreclosures

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million for ancillary services in 2021, nearly 16% of their overall revenues. Fields & Vergerio, supra note 179, at 37.

210. See, e.g., Marisa Peñazola, Amid a Housing Crisis, Renters Challenge Firms They Say Are Being Exploitative, NPR (Feb. 10, 2022), https://www.npr.org/2022/02/10/1078968784/amid-a-housing-crisis-renters-challenge-firms-they-say-are-being-exploitative [https://perma.cc/DM9A-UXQD] (describing a renter's sewage backup, broken dishwasher, and broken kitchen appliances).

211. See Mari, supra note 171 ("By claiming not to receive the checks or by refusing to cash them on the grounds that 'they weren't for the full amount owed' . . . the company could still evict [a tenant] for nonpayment.").

212. David Birchall, Human Rights on the Altar of the Market: The Blackstone Letters and the Financialisation of Housing, 10 Transnat'l Legal Theory 446, 448 (2019) (footnote omitted) (quoting U.N., Adequate Housing, supra note 165, at ¶¶ 35–37).

213. See Fields & Vergerio, supra note 179, at 40–41 (noting that, by the end of 2021, American Homes for Rent had 12,132 lots in development and had invested nearly $ 1 billion in BFR).

214. See, e.g., id. ("[T]his consolidation of land, technology, and power in the hands of private corporations could have significant implications for environmental and development regulations . . . . [S]ome of the 'hottest' markets attracting SFR investors . . . are also plagued by climate change and environmental vulnerabilities . . . ."). These criticisms echo the rationales offered in support of Anti-Corporate Farming laws. See supra section I.D.

215. See Nemoy Lewis, Off. of the Fed. Hous. Advoc., The Uneven Racialized Impacts of Financialization 12 (2022), https://publications.gc.ca/collections/collection_2023/ccdp-chrc/HR34-2-2022-eng.pdf [https://perma.cc/3YDS-2KNV] (noting that 48% of the lending in Black neighborhoods consisted of subprime loans and that Black borrowers were three times as likely to be offered a subprime mortgage).

in the financial crisis.[216] By selling mortgage portfolios to Corporate Landlords, Fannie Mae and Freddie Mac recreated racial disparities in the same way that policies of redlining did in the past.[217] "The Wall Street takeover [of] homes across the country often happens in neighborhoods that have higher levels of Latino and African American residents—stripping wealth and ownership from communities of color . . . while creating a continued barrier for those communities to rebuild the wealth lost from the foreclosure crisis."[218]

Finally, Corporate Landlords have shown a willingness to flout rules limiting evictions to earn a profit. During the COVID-19 pandemic and the resulting federal eviction moratorium, four large Corporate Landlords rejected federal rental assistance programs and filed eviction actions in spite of federal and local moratoria.[219] These Corporate Landlords harassed tenants, lied about the moratoria, and underreported their eviction filings to federal watchdogs.[220] This practice wasn't unique to private-equity backed Corporate Landlords, though—Milwaukee's largest Corporate Landlord, owned by a single individual shareholder, filed 225 eviction actions within a single week.[221] These evictions were likely profit motivated. In states like New York, where rent stabilization laws mainly protect existing tenants from rent hikes, evictions are a way to remove tenants from rent-stabilized units in order to raise rents for their replacements.[222]

3. *Proposed Solutions to Financialization.* — Several solutions have been proposed as remedies to the financialization of housing. This section

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216. ACCE Inst. et al., supra note 198, at 30; see also Elora Lee Raymond, Ben Miller, Michaela McKinney & Jonathan Braun, Gentrifying Atlanta: Investor Purchases of Rental Housing, Evictions, and the Displacement of Black Residents, 31 Hous. Pol'y Debate 818, 821 (2021) ("Predatory subprime lending and the subsequent foreclosure crisis devastated historically Black neighborhoods in Atlanta, which had some of the highest foreclosure and vacancy rates in the nation . . . .").

217. See ACCE Inst. et al., supra note 198, at 10, 30–32 ("The concentration of institutional investment in Black communities will likely hinder wealth building and result in greater racial disparities.").

218. Id. at 30.

219. See Staff of Sel. Subcomm. on the Coronavirus Crisis, H. Comm. on Oversight & Reform, 117th Cong., Examining Pandemic Evictions: A Report on Abuses by Four Corporate Landlords During the Coronavirus Crisis 2–3 (2022), https://www.govinfo.gov/content/pkg/GOVPUB-Y4_OV2-PURL-gpo190651/pdf/GOVPUB-Y4_OV2-PURL-gpo190651.pdf [https://perma.cc/V89C-QV65] [hereinafter Examining Pandemic Evictions].

220. See id. at 7–23.

221. Abigail Higgins, One Millionaire Landlord Was Behind Half of Milwaukee's Evictions During Covid Lockdowns Last June. Here's the Story of How Corporate Landlords Helped Drive the Evictions Crisis, Bus. Insider (Mar. 26, 2021), https://www.businessinsider.com/how-corporate-landlords-helped-drive-the-covid-evictions-crisis-2021-3 [https://perma.cc/9CEH-D83].

222. See Stovall, supra note 188.

reviews some of these proposals, briefly describes each one's scope and intended effect, and identifies some of their limitations.

a. *Rent Control Laws.* — Some commentators and policy advocates have promoted broader state and federal rent control laws, which would limit the amount by which property owners can increase rents.[223] These proposals would increase properties that are subject to rent control and expand protections to include both rent and other ancillary fees.[224] While some states have revised their rent control laws in light of the growth of Corporate Landlords,[225] federal action in this space has been limited, drawing criticism from tenants' rights groups.[226] These rent control laws, however, as evenhanded regulations on landlords, do not recognize the specific impacts of Corporate Landlords, and they do nothing to decrease rents that are inflated at the start of a tenancy, so tenants moving between homes may not receive effective protection.

b. *Tax Policy Changes.* — Another proposed solution would change tax policy to disincentivize Corporate Landlords. The appeal of real estate as an investment comes from its higher expected returns in volatile markets,[227] so by reducing returns through higher tax costs, lawmakers decrease the attractiveness of these investments. One such proposal would eliminate the mortgage interest tax deduction for large Corporate Landlords and impose a 100% excise tax when they sell single-family homes.[228] Other proposals, touted by some as bans,[229] would impose a tax on the mere ownership of single-family homes by certain corporations and hedge funds.[230]

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223. See, e.g., ACCE Inst. et al., supra note 198, at 41, 43.

224. See, e.g., Fields & Vergerio, supra note 179, at 48–49.

225. See, e.g., Housing Stability and Tenant Protection Act of 2019, ch. 36, 2019 N.Y. Laws 153; Stovall, supra note 188 (describing New York's revised law).

226. See Press Release, Revolving Door Project, Statement: Landlords Celebrate Biden's Weak 'Renter Protection' Plan (Jan. 26, 2023), https://therevolvingdoorproject.org/release-landlords-celebrate-bidens-weak-renter-protection-plan/ [https://perma.cc/39YP-NUFZ].

227. See supra note 180 and accompanying text.

228. See Stop Wall-Street Landlords Act of 2022, H.R. 9246, 117th Cong. (2022). The bill's taxes apply only to "specified large investors," which are taxpayers with more than $ 100 million in assets. Id.

229. See Ronda Kaysen, New Legislation Proposes to Take Wall Street Out of the Housing Market, N.Y. Times (Dec. 6, 2023), https://www.nytimes.com/2023/12/06/realestate/wall-street-housing-market.html (on file with the *Columbia Law Review*).

230. See End Hedge Fund Control of American Homes Act, S. 3402, 118th Cong. (2023) (providing for an excise tax of $50,000 per each single-family rental owned by hedge funds); American Neighborhoods Protection Act of 2023, H.R. 6630, 118th Cong. (2023) (providing for a $10,000 fine for each home over 75 homes owned by corporations and earmarking the revenues for down payment assistance grants); Press Release, Congressman Jeff Jackson, Reps. Jeff Jackson and Alma Adams Introduce American Neighborhoods

These proposals might not effectively shift investment patterns. The proposed tax on sales by Corporate Landlords might create a retrenchment in the SFR market, as increased costs from selling could make continued rental income an equally appealing investment return. And the other taxes assume that corporations are rational actors driven by economic incentives.[231]

c. *Lawsuits.* — Others have taken more direct action to fight Corporate Landlords, by bringing lawsuits in state and federal court. One such lawsuit, brought by Minnesota's Attorney General, alleges that a Corporate Landlord systematically violated the state's warranty of habitability and its unfair trade practices law.[232] In a pattern that echoes the trend across the United States,[233] the defendants allegedly maximized profits by neglecting repairs, cutting costs, and making false representations to tenants.[234] When local governments responded by revoking rental licenses, tenants were left on the hook, often having only forty-five days to vacate their homes.[235]

Another lawsuit, a class action brought in Maryland, alleges that a Corporate Landlord's investment and property management strategies violate the Fair Housing Act by discriminating against minorities.[236] The plaintiffs claim that the defendant has engaged in a pattern of buying rental properties and letting them fall into disrepair, while taking advantage of the acquiescence of their majority-minority tenants who were less likely to object.[237]

Both of these lawsuits were brought under existing housing law frameworks. And both lawsuits implicitly presume that Corporate Landlords are not per se bad actors. Rather, it is only when their practices leave the bounds of existing legal norms that they need to be reined in. As

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Protection Act (Dec. 6, 2023), https://jeffjackson.house.gov/media/press-releases/reps-jeff-jackson-and-alma-adams-introduce-american-neighborhoods-protection [https://perma.cc/WMK4-MLAK] (describing the bill).

231. See infra notes 283–289 and accompanying text.

232. See Complaint at 35–38, State ex rel. Ellison v. HavenBrook Homes, LLC, 996 N.W.2d 12 (Minn. Ct. App. 2023) (No. 62-cv-22-780), 2022 WL 445685 [hereinafter *Havenbrook Homes* Complaint]. The defendants allegedly own and manage fifteen thousand single-family rental homes. Id. at 5.

233. See supra section II.B.

234. See *Havenbrook Homes* Complaint, supra note 232, at 8–25.

235. Id. at 25.

236. See First Amended Complaint and Demand for Jury Trial at 141–47, CASA de Md., Inc. v. Arbor Realty Tr., Inc., No. DKC 21-1778 (D. Md. Mar. 11, 2024). The complaint includes several pictures of boarded-up windows, holes in walls, mold, bedbugs, rodents, rusted appliances, and piled garbage, all in occupied apartments. See id. at 2–29.

237. Id. at 55–81. Plaintiffs argue that this pattern of discrimination is shown, in part, by the fact that defendants invest in rehabilitating properties in neighborhoods that are considered "desirable." Id. at 72–81.

both lawsuits show, this reining in only comes after countless tenants have incurred the social and economic costs that Corporate Landlords create.

d. *Eviction Protections.* — Some have proposed eviction protections that would limit the bases upon which landlords can evict tenants —including in SFRs—to "just cause" grounds.[238] They would also ban discrimination based on the source of income used to pay rent.[239] These proposals overlook the fact that Corporate Landlords have been willing to disregard eviction moratoria and use intimidation and deceit to remove tenants.[240] Furthermore, landlords disappointed by reimbursement rates under federal rental assistance programs have refused to participate, favoring evictions and seeking new tenants willing to pay a higher price.[241] This suggests that Corporate Landlords would not be deterred by stronger laws.

e. *Regulatory Oversight.* — Another call is for stronger regulatory oversight by state and federal governments.[242] These proposals would increase transparency in SFR ownership and help the public identify who to blame for issues in local housing markets.[243] To this end, proponents have called for local governments to expand rental registries and licensing schemes for better monitoring.[244] The federal government has also taken informal steps toward oversight. Congress requested information from Fannie Mae and Freddie Mac regarding the "troubling trend of rent increases and resident displacement" in communities with high levels of private equity ownership.[245] Additionally, the Biden administration announced greater oversight on trade practices to promote rental affordability.[246]

Like lawsuits, these policies assume that Corporate Landlords are legitimate if they follow the consumer protection norms the government establishes for the industry in general. These proposals only provide post

238. See ACCE Inst. et al., supra note 198, at 41.

239. Id.

240. See supra notes 219–222 and accompanying text.

241. Examining Pandemic Evictions, supra note 219, at 5.

242. See ACCE Inst. et al., supra note 198, at 41–42.

243. Fields & Vergerio, supra note 179, at 48. Corporate Landlords frequently use entities with obscure names to own their properties, limiting the public attention they receive. Id.

244. See id.

245. Letter from Sen. Sherrod Brown, Senate Comm. on Banking, Hous., & Urb. Affs., to Hugh R. Frater, CEO, Fed. Nat'l Mortgage Ass'n (Jan. 10, 2020); Letter from Sen. Sherrod Brown, Senate Comm. on Banking, Hous., & Urb. Affs., to David Brickman, CEO, Fed. Home Loan Mortgage Corp., (Jan. 10, 2020).

246. Fact Sheet: Biden-Harris Administration Announces New Actions to Protect Renters and Promote Rental Affordability, White House (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/6VHF-UFDU].

hoc accountability, requiring enough tenants to be harmed to garner public attention before corrective action is taken, and they do not provide for separate enforcement.

f. *Rental Conversion Bans.* — There has only been one recent proposal that would directly restrict Corporate Landlords. In 2023, lawmakers in Minnesota introduced a bill that would prohibit any corporation from buying homestead property and converting it into a single-unit rental property.[247] While this proposal would have gone further than others in proactively regulating Corporate Landlords, its effect would have been limited. It would not unwind existing corporate ownership of SFRs, nor would it stop corporations from buying pre-existing SFRs.[248] The law also only provided for enforcement by the Attorney General,[249] which could have resulted in nonenforcement for political purposes.

III. CREATING AN ANTI-CORPORATE LANDLORD LAW

This Part turns to the legislative proposal at the heart of this Note: the Anti-Corporate Landlord (ACL) laws. It begins by presenting a normative case for ACL laws—that Corporate Landlords warrant specific regulation and that other proposed solutions[250] are insufficient to achieve these goals.[251] It then proposes a model ACL law based on the various ACF laws and discusses concerns as to the validity of these laws that legislators should consider.[252]

A. *The Normative Case for Anti-Corporate Landlord Laws*

As a legislative solution, ACL laws require some measure of normative validity to be politically viable. This section argues that ACL laws are valid based on two linked arguments: Corporate Landlords should be separately

247. See H.F. 685, 93d Leg. (Minn. 2023). This bill contains a substantially similar structure to Minnesota's ACF law. Compare id. ("The legislature finds that it is in the interests of the state to encourage and protect home ownership and the single-family home as a basic housing option . . . ."), with Minn. Stat. § 500.24 (2024) ("The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit . . . .").

248. There also seems to be some ambiguity in the scope of the restriction—the text prohibits "purchas[ing] . . . [and] subsequently convert[ing]" property. See H.F. 685, subdiv. 3(a)(1)–(2). This seemingly would not prevent a corporation from converting homes it already owned into SFRs. See Rob Hahn, Minnesota Legislature's Anti Corporate Landlord Bill, Notorious ROB (Mar. 21, 2023), https://notoriousrob.com/2023/03/minnesota-legislatures-anti-corporate-landlord-bill/ [https://perma.cc/X2QD-6Y5E].

249. See H.F. 685, subdiv. 4.

250. See supra section II.C.

251. See infra section III.A.

252. See infra section III.B.

regulated in the SFR market,[253] and incentive-based regulations are not sufficient to limit Corporate Landlord misbehavior.[254]

1. *Corporations Warrant Separate Regulation.* — The first element of this argument is that Corporate Landlords warrant specific regulation. Scholars have offered various arguments on this point. Some focus on the goals of Corporate Landlords and the structures they use to carry out those goals. The corporate form allows landlords to hide behind "veil[s] of anonymity," using LLCs and other entities to "turn[] on its head . . . the ability to determine true ownership of real property . . . [and] to hold accountable the actual human beings responsible for decisions that play . . . a critical role in determining housing outcomes for millions of households."[255] Likewise, many Corporate Landlords are purely profit motivated and focus on shareholder returns.[256] Even when Corporate Landlords don't cut costs and raise revenues by increasing rents and deferring maintenance, they may pursue "alternative mechanisms to increase profits," such as evictions.[257] These distinct incentives militate in support of separate regulatory schemes.

Other arguments for specific regulation of Corporate Landlords focus on their disruptive effect in property theory. Professor Jessica Shoemaker identifies a "placemaking" framework of property rights, whereby property ownership gives people a connection to the places they own.[258] This sense of place leads people to form a geography-based identity.[259] This sense of connection, Shoemaker argues, promotes better land stewardship by property owners.[260] Corporate landlords disrupt this connection by representing a form of "[a]ttachment-less ownership."[261] Private equity firms, enabled by "technology and algorithmic management," "invest in land without having to know anything about specific parcels."[262] While

253. See infra section III.A.1.

254. See infra section III.A.2.

255. See Brandon Weiss, Corporate Consolidation of Rental Housing and The Case for National Rent Stabilization, 101 Wash. U. L. Rev. 553, 554–55, 565 (2023) ("[Land] registries . . . have served the function of providing a modicum of transparency into ownership rights . . . . Tenants were thus able to identify and, in some cases, mobilize against the owners of their properties.").

256. See id. at 562 ("Private equity firms . . . commonly promise double-digit returns to investors over limited time horizons. This results in pressure to rapidly increase the profits from acquired assets . . . ." (footnote omitted)).

257. Id. at 563. Weiss surveys a number of studies showing the eviction rates of Corporate Landlords in different cities: In Atlanta, they are sixty-eight percent more likely to file eviction actions than smaller landlords; in Boston, they are two to three times more likely; and in Kentucky, they are at least twice as likely to proceed to a final eviction judgment. Id. at 563–64.

258. See Shoemaker, supra note 178, at 854.

259. Id. at 855–58.

260. Id. at 867.

261. Id. at 870.

262. Id.

tenants may form the attachments that Shoemaker describes, their unattached Corporate Landlords extract local benefits while depriving tenants of opportunities for governance and stewardship.[263] While these factors may not be unique to corporations—individuals may also be absentee landlords—Shoemaker's argument that "[a]ttachment-less ownership is characterized by . . . commodification[] and often financialization and assetization" echoes the effects of Corporate Landlords on single-family housing.[264]

Proponents of Corporate Landlords may argue that individuals can just as easily be predatory, absentee, and detached from their properties. One relevant example of individual landlords' treatment of their tenants describes impoverished slums, retaliatory evictions, and absentee landowners.[265] But even in this example, individual landlords are depicted as capable of sympathy and compassion for their tenants,[266] and tenants understand that their individual landlords are better than a Corporate Landlord would be.[267]

When landlords misbehave, the corporate form can also limit recoveries for harmed tenants in undesirable ways. While Corporate Landlords may have more financial resources to pay judgments,[268] corporate law and

263. See id. at 870–71

264. Id. at 870; see also supra section II.A.

265. See Matthew Desmond, Evicted: Poverty and Profit in the American City (2016) (describing, in journalistic narrative, the relations between impoverished tenants in Milwaukee and their landlords). For specific examples of predatory individual landlords, see id. at 10–11 (evicting a double-amputee tenant); id. at 18–19 (evicting tenants for calling city building inspectors); id. at 72–73, 255–56 (ignoring code violations in their properties); id. at 102–04 (seeking uncollectible money judgments in eviction court to limit tenants' future rental opportunities); id. at 156–57 (offering tenants a rent-to-own scheme to flip their properties, knowing the tenants are likely to face eventual foreclosure).

266. Desmond's narrative shifts between landlord and tenant viewpoints to express both the landlords' claims of sympathy, as well as the tenants' feelings that their individual landlords are fair negotiators. See id. at 38–41 (telling a story of a landlord accepting a payment plan rather than evicting a tenant); id. at 128–30 (quoting a landlord as saying "[y]ou're loyal to the people who are loyal to you" and allowing a tenant to work off their back rent by helping with repairs and maintenance (internal quotation marks omitted) (quoting Tobin)). To be sure, Desmond is no landlord apologist; the thrust of his work is to explore the human cost and financial burden of evictions on impoverished tenants, and his book concludes by arguing for pro-tenant reforms. See id. at 304 (right to counsel in eviction); id. at 308–12 (universal housing vouchers).

267. Desmond offers an example of a trailer park owner who hires a professional management company to comply with a consent order from the Milwaukee housing authority to keep his license—in light of the new faceless corporate management, tenants fear that they will lose any goodwill and leniency that they have received from their previous property managers. Id. at 128–30.

268. For example, Invitation Homes held over $174 million in cash as of December 31, 2024, and generated $1.08 billion in operating cash flows. Invitation Homes Inc., Annual Report (Form 10-K) F-3, F-7 (Feb. 27, 2025). This cash balance is down from the $701 million in cash Invitation Homes held as of December 31, 2023, in large part due to net

tort law generally restrict the liability that corporations incur. Corporations are generally liable for torts committed by their employees, but punitive damages may only be available if the tortious act is "authorized, ratified, or committed by an officer, director, or managing agent."[269] Corporations can also use layers of subsidiaries—even down to the per-property level—to limit the assets accessible to pay a recovery.[270] While it is sometimes possible to "pierce the corporate veil" to access the assets of the parent corporation,[271] this option may be practically unavailable to tenants taking on powerful Corporate Landlords.[272]

These arguments provide a clear argument in favor of regulating Corporate Landlords. Corporate Landlords have unique motivations that they pursue without regard for tenants; they have a detachment that is inconsistent with social theories of property; and they use an anonymous approach to management that contrasts the humanity of individual landlords.[273]

2. *Restrictions are a Better Regulatory Scheme.* — The next normative argument that supports ACL laws is that other proposed solutions are ineffective at preventing Corporate Landlord misbehavior. Advocates of ACL laws can appeal both to theories of corporate law and corporate behavior but should also be ready to address other criticisms that may be levied against ACL laws.[274]

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repayments of outstanding loan principal of $750 million. See id. at 65 (describing the use of "excess cash" and new financing to repay an outstanding credit facility); see also id. at F-3, F-7 to F-8.

269. See Martin Petrin, Reconceptualizing the Theory of the Firm—From Nature to Function, 118 Penn. St. L. Rev. 1, 26–29 (2013) ("[S]tatutory provisions and case law in a number of states provide that punitive damages can only be awarded upon a showing of involvement by those higher-level corporate officials that control and represent the corporation itself.").

270. See, e.g., Mark Kohler, How Many Properties Should I Put in My LLC?, Mark J. Kohler (Nov. 26, 2024), https://markjkohler.com/how-many-properties-should-i-put-in-my-llc/ [https://perma.cc/UDQ4-Y997] ("Forming and maintaining a single LLC is significantly cheaper than creating separate entities for each property. However, the downside is that all properties within that LLC share liability. For example, if Property #1 is sued, the equity in Properties #2, #3, and beyond could also be at risk.").

271. See Petrin, supra note 269, at 20–22 (discussing the usual grounds on which courts reject the corporate fiction and allow unlimited liability).

272. Courts have repeatedly recognized the power disparities between landlords and their tenants. See Daniel D. Barnhizer, Inequality of Bargaining Power, 76 U. Colo. L. Rev. 139, 170 n.130 (2005) (collecting cases).

273. See supra notes 255–267 and accompanying text.

274. This Note assumes that many of the criticisms levied against ACL laws will echo those that have been offered against ACF laws. See supra section II.C for a discussion of these criticisms.

Corporate theory supports ACL laws. Theories on the *nature* of the corporation have evolved over time,[275] but the dominant view of the *purpose* of a corporation is shareholder focused: A corporation's purpose is to maximize returns for its shareholders.[276] Lawmakers can argue that this purpose is inconsistent with what a landlord's should be. They may recognize a landlord's need to maintain their properties, treat tenants fairly, and create benefits for communities that do not maximize profit. This shift in focus has been recognized in corporate theory—under the name "stakeholderism"[277]—but critics highlight that stakeholderism has existed since at least 1932 and has failed to supplant shareholder primacy theory.[278] Implementing stakeholderism would require a paradigm shift in the norms that guide corporate governance theory,[279] the legal regimes which define fiduciary duties of corporate managers,[280] and the widely accepted metaphysical views about corporations.[281] ACL laws—which are

275. See, e.g., Petrin, supra note 269, at 2–13. Petrin describes three theories of the corporation: The legal fiction theory, whereby corporations only have the rights and duties granted to them by the state; the real entity theory, in which corporations are equivalent in rights and will to natural persons; and the aggregate theory, whereby corporations have only the rights and duties of their shareholders, which are channeled through the corporate form. Id.

276. See Lisa M. Fairfax, Stakeholderism, Corporate Purpose, and Credible Commitment, 108 Va. L. Rev. 1163, 1167–68 (describing the debate between stakeholderists and "shareholder primacy" adherents and noting that the latter theory generally prevails (internal quotation marks omitted)); Milton Friedman, A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits, N.Y. Times Mag., Sept. 13, 1970, at 32 (on file with the *Columbia Law Review*).

277. See Fairfax, supra note 276, at 1171–75 (describing stakeholderism in its current form as focusing on customers, employees, and communities, in addition to corporate profits).

278. See id. at 1167.

279. See id. at 1227–41 (arguing that corporations need to shift their norms and to embrace "credible commitments" in order to effectively implement stakeholderism).

280. See Elisa Scalise, Comment, The Code for Corporate Citizenship: States Should Amend Statutes Governing Corporations and Enable Corporations to Be Good Citizens, 29 Seattle U. L. Rev. 275, 277 (2005) ("[T]he Code [of Corporate Conduct] should be adopted in every state because the current [profit maximizing] configuration of the corporate fiduciary duty inadequately governs corporate decision-making at an unacceptable cost to society.").

281. Compare Brian M. McCall, The Corporation as Imperfect Society, 36 Del. J. Corp. L. 509, 528–36 (2011) (reading Roman corporate structures as supporting the notion that corporations are a "community"), with Petrin, supra note 269, at 4 (reading Roman law as supporting only traditional "fiction" and "legal entity" theories of the corporation). Professor Brian McCall argues that a corporation, as a "community," should serve the common good, writing:

> Shareholder profit, like employee wages, is part of the common good, but not the whole common good of the corporation. Without paying employees or returning profit to shareholders, the corporation could not exist. But the ability to do both is contingent upon serving the customer. Just as the pursuit of shareholder profit cannot be achieved

only an industry-specific restriction on corporations—are less disruptive than a complete upheaval of corporate law and theory, and therefore better reconcile corporate incentives with public policy.

Another argument in favor of ACL laws is that other proposals to limit Corporate Landlords—tax policy, lawsuits, and eviction protections[282]—erroneously focus on either directly regulating or creating disincentives for corporate misbehavior.[283] These policies, Professor Vincent Di Lorenzo argued, are based on the theory that corporations are committed to legal and ethical conduct.[284] This theory assumes that market participants "will comply with legal requirements if all potential costs of noncompliance exceed its benefits."[285] On the contrary, Di Lorenzo identified the specific nature of the legal regime,[286] corporate business models,[287] and behavioral heuristics[288] as multiple factors that interact to influence corporate behavior. Therefore, economic regulations—which only address a single variable—"are almost always doomed to be incomplete and inadequate."[289] In broader criticisms, some have argued that even voluntary shifts in corporate culture are unlikely to incentivize ethical behavior.[290] These theories all support the argument that an outright restriction is the only effective way to rein in Corporate Landlords.

> without the common good of the other members of the community, so too the pursuit of the common good, the satisfaction of customer need, cannot be achieved without shareholder profit.

McCall, supra, at 547 (footnote omitted).

282. See supra section II.C.

283. Lawsuits and eviction protection laws seek to create monetary penalties for violations of the law, whereas tax policy changes increase the tax burden for engaging in a disfavored activity. For further discussion on balancing corporate regulation and corporate incentives, see generally Margaret Ryznar & Karen E. Woody, A Framework on Mandating Versus Incentivizing Corporate Social Responsibility, 98 Marq. L. Rev. 1667 (2015).

284. See Vincent Di Lorenzo, Corporate Wrongdoing: Interactions of Legal Mandates and Corporate Culture, 36 Rev. Banking & Fin. L. 207, 209 (2016).

285. Id.

286. See id. at 236–37 (describing the legal standard itself, the precision of the standard, the frequency of sanctions, and the severity of sanctions as factors that influence corporate behavior).

287. See id. at 237–38 (referencing cost–benefit analyses, which include the assessed risk of noncompliance and potential reputational impact).

288. See id. at 239–40 (discussing skewed risk perception, simplified decisionmaking, and the representativeness heuristic as behavioral barriers to compliance).

289. Id. at 236 (internal quotation marks omitted) (quoting Robert A. Kagan, Neil Gunningham & Dorothy Thornton, Explaining Corporate Environmental Performance: How Does Regulation Matter?, 37 Law & Soc'y Rev. 51, 76–78 (2003)). Di Lorenzo uses the mortgage crisis of 2008 as a case study of regulators applying a "light-touch" approach and financial sanctions, resulting in "recurrent violations of law and recidivist behavior" within the financial services and mortgage lending industries. See id. at 218, 220–21, 226–28.

290. See Michael B. Runnels, Dispute Resolution and New Governance: Role of the Corporate Apology, 34 Seattle U. L. Rev. 481, 482 (2011) ("[T]he modern corporate social responsibility (CSR) movement[] is unlikely to incentivize ethical corporate behavior.").

Finally, proponents of ACL laws should be prepared to respond to outcome-based criticisms. With regard to ACF laws, critics have attacked them for economic effects, such as driving up the price of large tracts of farmland, shifting patterns of agriculture investment out of state, and preventing economies of scale.[291] With respect to Minnesota's proposed ACL law,[292] one critic has argued that the loss of corporate investor demand will drive down property values and hurt homeowners trying to sell their properties.[293] These arguments can be rebutted, though. Single-family housing and farmland are different in their nature and size.[294] Thus, there is less risk of residential lots becoming so large that they price out all individual purchasers. Likewise, while livestock are easily movable, such that shifting patterns of investment actually shift the number of animals in any one state,[295] housing is not. Corporate landlords may shift their home ownership from State A to State B, but that would not move homes out of State A.[296] While there may be downward pressure in the market from initial sales—reducing the cost of entry—economic analysis of ACF laws suggest long-term increases in property values,[297] which could likewise carry over to single-family housing and increase individual wealth. Finally, while ACL laws could prevent landlords from developing economies of scale, these laws—like the ACF laws on which they are modeled—clearly eschew economic factors in favor of greater community benefits.[298]

This is not a complete list of every possible challenge to ACL laws. Lawmakers will likely have to respond to other arguments if they seek to pursue these laws. But the preceding discussion demonstrates that ACL laws have a solid theoretical foundation, and that some possible criticisms can be rebutted with facility.

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291. See supra section I.D.2.

292. H.F. 685, 93d Leg. Sess. (Minn. 2023).

293. See Hahn, supra note 248. Hahn also argues that the law would be ineffective for only preventing conversion of single-family housing to rental property, and not preventing the ownership of single-family housing or already-converted single-family rentals. See id. Hahn's argument mirrors this Note's criticism in that regard. See supra section I.C.6.

294. The national average farm size in 2023 was 464 acres. Nat'l Agric. Stats. Serv., USDA, Farms and Land in Farms 2023 Summary 5 (2024), https://downloads.usda.library.cornell.edu/usda-esmis/files/5712m6524/b2775h03z/ns065w04d/fnlo0224.pdf [https://perma.cc/2ZZY-LJT9]. In contrast, the average lot size of new single-family houses sold in 2022 was only 15,009 square feet, or 0.345 acres. Characteristics of New Housing, U.S. Census Bureau (June 1, 2024), https://www.census.gov/construction/chars/current.html [https://perma.cc/EUV7-XGLD].

295. See supra notes 158–160 and accompanying text.

296. And, by extension, limiting the restrictions to Corporate Landlords does not affect the market for corporate real estate *developers* who build homes to sell to individuals.

297. See supra note 163 and accompanying text.

298. See supra section II.B.1; infra section III.B.1.

B. *Crafting an Anti-Corporate Landlord Law*

With normative arguments in hand, the next step is to craft a statute that is both effective and constitutionally valid. This section offers elements that an ACL law should contain—including proposed language—and evaluates considerations that bear on the validity and efficacy of the ACL law.[299]

1. *Statement of Purpose. —*

The legislature finds that it is in the interests of the state to encourage and protect home ownership and the single-family home as a basic housing option, to allow families increased access to housing through homeownership, for families to build equity and wealth through their housing, and to enhance and promote the stability and well-being of families and society . . . .[300]

Beginning with a statement of purpose clearly identifies the goals of the law. This can help publicize the intent of the legislature and enshrine normative goals. For example, Minnesota's proposed bill focused on "increased access to housing through homeownership" and "families [building] equity and wealth through their housing."[301] Lawmakers may adapt these policy goals as they deem necessary. In light of the housing crisis's impact on racial minorities,[302] lawmakers might wish to make "promoting racial equity in homeownership" a goal. Or, if they support a SFR market and want to promote better practices, they may include a goal of "promoting fair practices in single-family rentals."[303]

A clear statement of purpose can guide later interpretations of the statute as new situations arise.[304] Likewise, the statement of purpose will help the statute withstand constitutional scrutiny. Courts regularly look to statutory purpose when deciding constitutional challenges.[305] Given that the one of the main concerns with constitutionality will likely be the dormant Commerce Clause,[306] and newly enacted laws will not receive the benefit that a history of similar corporate regulations can provide,[307] including a clear nondiscriminatory purpose in the statute's text will be

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299. As a formatting note, proposed statutory language is presented in italics.

300. The structure of this proposed provision is based on H.F. 685, 93d Leg. Sess. (Minn. 2023).

301. Id.

302. See supra note 216 and accompanying text.

303. See supra section III.A.1.

304. For an argument that enacted legislative purpose is a useful interpretation tool, see Jarrod Shobe, Enacted Legislative Findings and Purposes, 86 U. Chi. L. Rev. 669, 674–77 (2019) ("Enacted findings and purposes are also prominently included at the beginning of the statutory text Congress votes on, so it is less susceptible to manipulation and is uniquely reliable and attributable to Congress as a whole.").

305. See id. at 694–95.

306. See supra section I.C.3.

307. See supra note 134 and accompanying text.

useful in ensuring the statute is not overturned on constitutional grounds.[308]

2. *Restricted Entities.* —

Unless otherwise provided, no Corporation, Limited Liability Company, or Limited Partnership (hereinafter "Restricted Entity") . . .

In identifying a list of restricted entities, legislators should thoroughly define the "corporate" entities that they wish to restrict. They should look to their own corporate laws and the forms they recognize, as well as other states where corporations commonly register, like Delaware. States should also look to Corporate Landlords' public filings to identify the forms they use to structure their rental operations.[309]

3. *Prohibited Activities.* —

No Restricted Entity shall, either directly or indirectly, own, acquire or otherwise obtain or lease any single-family rental homes in this state. This restriction shall apply to all interests, whether legal, beneficial, or otherwise.[310]

Here, too, lawmakers should write broad enough statutes to encapsulate the various ways Corporate Landlords control property. This may be done through reference to the state's property laws and should include any beneficial ownership forms that the state recognizes. Lawmakers should also consider restricting "management contracts" or other agreements that allow Corporate Landlords to control homes nominally owned by individuals.[311] These provisions will insulate the ACL laws from criticisms that they are not broad enough to *actually* restrict corporate influence in the SFR market.[312] Finally, lawmakers should also consider, as a policy matter, if there are other rental classes they want to restrict and reflect that in the statute's text.[313]

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308. Cf. S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 594 (8th Cir. 2003) (overturning a ACF law after finding discriminatory purpose). Lawmakers must be careful to consistently state their purpose in a nondiscriminatory manner, as courts may look to statements outside the final text of the law in evaluating the legislative purpose. See id. ("Notes from the Amendment E drafting meetings provide additional direct evidence of the drafters' intent to discriminate against out of state businesses.").

309. See Invitation Homes Inc., Annual Report (Form 10-K) Exh. 21.1 (Feb. 27, 2025) (providing a list of one Corporate Landlord's subsidiaries).

310. The structure of this proposed provision is based on Kan. Stat. Ann. § 17-5904(a) (West 2025); Mo. Ann. Stat. § 350.015 (2024).

311. These management contracts allow Corporate Landlords to engage in predatory activities without directly owning any homes. See, e.g., *Havenbrook Homes* Complaint, supra note 232, at 5 ("HavenBrook currently manages over 15,000 single-family rental homes . . . . [In] 2018, Front Yard Residential acquired HavenBrook . . . . [I]ts acquisition . . . would allow it to . . . internalize all property management functions . . . .").

312. See supra section II.D.1.

313. This Note has focused on SFRs. It does not address whether other types of rental housing are adversely impacted by corporate ownership. Housing development generally includes both single-family and multi-family housing, see St. Louis Fed.,

4. *Excepted Entities. —*

This section shall not apply to Family Rental Corporations or Authorized Rental Corporations, as defined in this statute.

Lawmakers should also consider exceptions for certain corporate entities. As this Note argues, one fundamental problem with Corporate Landlords is their lack of connection to the land that they rent.[314] Conversely, corporate forms may facilitate generational transfers of property and businesses within families.[315] For these reasons, lawmakers may wish to except certain closely held entities that maintain a connection between the property owners, managers, and the property itself. Drawing from ACF laws, these may limit owners to a relatively small group of natural persons, all members of the same family, with limits on transfers to outsiders.[316] A familial requirement might incentivize a sense of "place" that comes from generational memories or association with a single-family home.[317] In contrast, an exception similar to "authorized farming corporations" might be less effective, as those exceptions' usual requirement that a corporation make a minimum income—such as 65%[318]—from renting would not prevent corporations created to be landlords from continuing their problematic conduct.[319]

Lawmakers must also be wary of the constitutional significance of these provisions. Exceptions that require a geographic link to the state—such as living in the state—have been overturned for facial discrimination against interstate commerce.[320] Careful drafting might avoid any

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Trends in the Construction of Multifamily Housing, The Fred Blog (July 6, 2023), https://fredblog.stlouisfed.org/2023/07/trends-in-the-construction-of-multifamily-housing/ [https://perma.cc/5Z7W-UGTU] (showing that over 25% of the privately-owned housing units completed in 2022 were in buildings with five or more units), and lawmakers may not wish to disrupt the flow of capital to multi-family developments.

314. See supra section III.A.1.

315. See Lynn A. Stout, The Corporation as a Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form, 38 Seattle U. L. Rev. 685, 696–98 (2015) (describing how "[c]orporate perpetual life" allows for the preservation and transfer of resources to future generations); see also supra note 155 and accompanying text.

316. See supra section I.B.4.

317. See Shoemaker, supra note 178, at 858–61 (describing private ownership of land as fostering "local knowledge [that] can lead to better decision-making than more centralized regulation would").

318. See, e.g., Okla. Stat. tit. 18, § 951(A)(2) (2024).

319. Limiting ownership to a small number of shareholders might echo the family requirements but—lacking the family connection—may not be effective in promoting a sense of "place." See supra note 317 and accompanying text.

320. See supra text accompanying notes 123–127. But see supra text accompanying note 135.

constitutional challenges but so would leaving out the exception entirely.[321]

States may also consider exceptions for other corporations that pose a low risk of predatory activity. Religious, charitable, or educational organizations, which may incorporate for tax-exempt status,[322] might warrant an exception based on the specific state's policies regarding those institutions.[323]

5. *Exempted Activities.* —

Subject to the divestiture requirements of this statute, a Restricted Entity may acquire single-family rental property as security for indebtedness, by process of law for the collection of debts, or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise.[324]

Lawmakers should adopt substantially identical exemptions to the ACF exemptions. Restricted access to credit was a significant contributing factor to the financialization of housing[325] and contributed to some of the racial disparities in the financial crisis.[326] If lawmakers ensure that ACL laws do not disrupt mortgage law, they can limit any disruption to the home lending and credit industries. At the same time, by requiring divestiture of housing obtained through foreclosures or other debt settlements, they can ensure that corporate lenders do not subvert the law by retaining foreclosed property and converting it to rental property.

6. *Effective Date.* —

This statute shall be effective for all single-family rental property, regardless of when a Restricted Entity obtained its interest in the property. Any single-family rental property owned or acquired by a Restricted Entity after this statute's enactment shall be sold within three years.[327]

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321. See Schutz, supra note 127, at 123–34 (identifying risks to ACF laws under the dormant Commerce Clause and arguing that states should remove geographic exceptions to avoid further scrutiny).

322. See I.R.C. § 501(c)(3) (2018) (exempting "[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, . . . or educational purposes" from federal income tax).

323. But see Rosenkrantz, supra note 182 (implicating Harvard, an educational tax-exempt institution, in contributing to Boston's housing crisis as a Corporate Landlord).

324. The structure of this proposed provision is based on N.D. Cent. Code. § 10-06.1-24(4) (2024).

325. See Mari, supra note 171 ("When credit was tight after the financial crisis, [private equity firms] figured out a way to generate more of it by creating a new financial instrument . . . ."); cf. Lewis, supra note 215, at 12 ("Many subprime lenders employed a risk-based pricing system . . . to determine the interest rate [a borrower] would be charged . . . . This, along with relaxed underwriting guidelines, allowed many banks to expand access to credit to communities who would otherwise be excluded." (citation omitted)).

326. See supra note 216.

327. The structure of this proposed provision is based on N.D. Cent. Code § 10-06.1-24(5).

Lawmakers can decide whether their ACL law should have a retroactive effect. Because the financialization problem is ongoing, lawmakers might decide that retroactive effect is the better solution. They may also exempt Corporate Landlords from the strict sale requirement if the Corporate Landlords negotiate a plan to return the property to its original owner.[328] States may also opt for a phase-out period or one longer than three years. Either option would moderate any downward price pressure that would result from an influx of homes in the market and make the law more likely to afford the corporation "a fair opportunity to realize the value of the [property]."[329]

7. *Monitoring Systems.* —

Any Corporate Entity owning single-family rental property in the state shall file with the state a report including: its name and place of incorporation; the registered office of the corporation in the state; the address and parcel information of every single-family rental property owned by the corporation; and the names of the officers and directors of the corporation.[330] *No corporation shall commence leasing a single-family rental until it has filed the report required by this section.*[331]

Reporting requirements allow those charged with enforcing the ACL laws to have information on entities that claim exemptions under the law. Lawmakers may consider including these reports within their ordinary corporate filing requirements.[332] Alternatively, states might leverage local municipalities that license rental properties.[333] Because these municipalities already collect information for licensing, reporting them to the state would prevent duplication of effort.[334]

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328. See, e.g., id. at § 10-06.1-24(6)–(7) (providing an exception for corporations that enter into contracts for deed or leases with purchase option arrangements with the previous owners of the property).

329. See Asbury Hosp. v. Cass County, 326 U.S. 207, 212–13 (1945).

330. The structure of this proposed provision is based on Mo. Ann. Stat. § 350.020(1) (2024).

331. See id. § 350.020(3) (providing the structure for this proposal).

332. State laws generally require both domestic and foreign corporations to file information statements with the state. See Model Bus. Corp. Act § 16.21 (ABA 2024). As of 2023, thirty-four states have enacted the Model Business Corporations Act as their corporate law. See Model Business Corporation Act Resource Center, ABA, https://www.americanbar.org/groups/business_law/resources/model-business-corporation-act (on file with the *Columbia Law Review*) (last updated Jan. 1, 2023).

333. See, e.g., Inspections Services, Minneapolis, Application for a Rental Dwelling License, https://www2.minneapolismn.gov/media/content-assets/www2-documents/business/RLIC—Rental-License-Application.pdf [https://perma.cc/P648-4ANU] (last visited Oct. 16, 2024) (requiring applicants to register the corporation or LLC name, the principal shareholder's name and address, an "associated natural person['s]" name and address, and a listing of all the entity's shareholders or members).

334. But such a provision would not apply to any rentals outside of a recognized municipality or in municipalities that do not require licensing of rental properties.

8. *Enforcement Actions. —*

An action to enforce this statute may be brought in the district court of any county where single-family rental property is owned in violation of this statute[335] *by the Attorney General,*[336] *the District Attorney of said county,*[337] *or any tenant of a Corporate Landlord.*[338]

The Attorney General may bring an action to enjoin any prospective or threatened violation of this statute.[339]

If an action is brought by a private party under this section, the district court must award to the prevailing party the actual costs and disbursements and reasonable attorney's fees.[340]

If the court finds that the single-family rental property in question is being held in violation of this statute, it shall enter an order so declaring; the Attorney General shall file for record any such order with the County Recorder or the Registrar of Titles in the county where the property is located; thereafter, the Restricted Entity owning such property shall have a period of three years from the date of such order to divest itself of the property; this divestment period shall be deemed a covenant running with the title to the land against any Restricted Entity; Any property not divested within the time prescribed shall be sold at public sale.[341]

The final element of an ACL law is the enforcement mechanism. Legislators must decide who can enforce the law, where actions can be brought, and what remedies courts can order. Any remedies should be crafted to ensure that the goals of the statute are not subverted.

The proposed language provides for enforcement by several parties. The Attorney General—the officer generally empowered to enforce state

335. ACF laws generally provide for enforcement in the county where the land is located. See, e.g., N.D. Cent. Code § 10-06.1-24(1)(b) (2024).

336. See id. (authorizing enforcement of North Dakota's ACF law by the Attorney General).

337. The structure of this proposed provision is based on Wis. Stat. & Ann. § 182.001(4) (2025) (authorizing enforcement of Wisconsin's ACF law by any district attorney).

338. Some states that allow private enforcement of ACF laws require a connection to the land, while others allow anyone in the state to bring an action. Compare N.D. Cent. Code. § 10-06.1-25 (providing for enforcement by "any corporation . . . authorized to engage in the business of farming . . . or any resident of legal age of a county in which the farmland . . . owned . . . in violation of this chapter is located"), with Neb. Const. Art. XII, § 8 (repealed 2006) ("If the Secretary of State or Attorney General fails to perform his or her duties as directed by this amendment, Nebraska citizens and entities shall have standing in district court to seek enforcement.").

339. The structure of this proposed provision is based on Minn. Stat. § 500.24 subdiv. 5 (2024).

340. The structure of this proposed provision is based on N.D. Cent. Code § 10-06.1-25.

341. The structure of this proposed provision is based on Minn. Stat. § 500.24 subdiv. 5. The proposed language substitutes three years for Minnesota's five years for consistency with the earlier proposed language.

law[342]—is an obvious candidate to bring enforcement actions. But expanding to local district attorneys and tenants would distribute the administrative burdens of enforcement and limit political nonenforcement. Local enforcement might also be more responsive, as deeds are often recorded at the county level and thus more accessible to county officials.[343] At the same time, restricting individual actions to people with an interest in the property—such as tenants—can prevent nuisance actions by third parties. Fee shifting provisions can also enable tenants without financial means to find a lawyer willing to pursue enforcement against their landlords.[344]

With respect to remedies, the proposed language mirrors ACF laws' general requirement that the violator divest within a specified term. This term may be stated in the statute[345] or left to judicial discretion.[346] In any case, this is an area in which states should exercise caution, lest they violate the Corporate Landlord's due process right.[347] Lawmakers might also consider whether the risk of harm is so great as to warrant an injunction before the corporation can attempt to purchase housing.[348] By registering a judgment of the statutory violation as a covenant running with the land, states can prevent corporations from subverting the law by transferring SFRs between different entities every time the court finds a violation.

Finally, states can structure divestitures to correct injustices created by the housing crisis.[349] While ACF laws often provide for private sales or public auctions—under the same laws as foreclosure sales[350]—such open and unrestricted sales helped contribute to the very problem these laws are seeking to resolve.[351] In seeking to prevent a new cycle of racial disinvestment, state legislatures might consider prioritizing sales to previous owners of the properties or appointing an oversight official to make sure sales are done equitably. Because of the loss of individual wealth

342. See, e.g., N.D. Cent. Code § 54-12-03 (2024) ("The attorney general may make an investigation in any county in this state to the end that the laws of the state shall be enforced therein and all violators thereof be brought to trial . . . .").

343. See, e.g., Minn. Stat. § 386.05 (2024) (requiring the county recorder to keep records of all documents affecting ownership interests in that land).

344. See Fee-Shifting, ABA, https://www.americanbar.org/groups/delivery_legal_services/reinventing_the_practice_of_law/topics/fee_shifting/ (on file with the *Columbia Law Review*) (last visited Oct. 16, 2024) ("[Fee-shifting] provisions are designed to attract lawyers to public interest cases that otherwise would not seem worth the investment.").

345. See supra note 341 and accompanying text.

346. See Wis. Stat. & Ann. § 182.001(4) (2025) (requiring divestiture in a "reasonable" time).

347. Cf. Asbury Hosp. v. Cass County, 326 U.S. 207, 212–13 (1945) (upholding an ACF law because it provided a reasonable time for the corporation to divest its holdings).

348. See supra note 339 and accompanying text.

349. See supra section II.B.2.

350. See, e.g., Minn. Stat. § 500.24 subdiv. 5 (2024).

351. See supra notes 191–198 and accompanying text.

during the financial crisis,[352] individuals may not have access to traditional credit, so lawmakers should also consider implementing a system to expand access to credit. This could be through direct lending, mortgage guarantees, or even a system of lending cooperatives chartered to service this lending niche.[353]

CONCLUSION

Proposals for housing reform have focused on consequences without addressing the root cause of the problem—that Corporate Landlords inherently disrupt communities and deprive people of the benefits of affordable and dignified housing, all for the sake of profit. Previous proposed solutions have assumed that the market should include Corporate Landlords who can invest in SFRs if they choose. In that sense, these proposals seek to structure the marketplace to be more fair—through financial disincentives, rent control, eviction protections, and penalties for failures to "play fair" in the marketplace.

This Note suggests that lawmakers should take a different approach: Declare that the SFR market has *no* place for Corporate Landlords and restrict them from participating in the market entirely. And to the extent state lawmakers agree, ACF laws provide a tried and tested framework to achieve these goals. By using ACF laws as a guide, legislators can enact Corporate Landlord restrictions that are normatively valid, constitutionally sound, and effective at reaching their goals.

352. See supra note 218 and accompanying text.

353. In another analogy to farming, the federal government has a system of farm credit cooperatives that lend money to farmers and finance their loans through public debt issuances. See Our Structure, Farm Credit, https://farmcredit.com/our-structure [https://perma.cc/A9AZ-MG34] (last visited Oct. 16, 2024).

BOOK REVIEW

BIGLAW'S RACE PROBLEM

The Black Ceiling: How Race Still Matters in the Elite Workplace
By Kevin Woodson. Chicago: The University of Chicago Press, 2023.
Pp. 216. $26.00.

Angela Onwuachi-Willig & Anthony V. Alfieri***

Ever since the 1970s when BigLaw firms began to hire Black lawyers into their associate ranks, these firms have wrestled with problems in both recruiting and retaining Black associates. During the ensuing decades, BigLaw firms have minimally increased the low numbers of Black attorneys who have become partners, particularly equity partners, within their organizations. Numerous scholars have explored how racial bias and discrimination, both within BigLaw firms and greater society, have contributed to such failures in the recruitment, retention, and promotion of Black lawyers. In his new book The Black Ceiling: How Race Still Matters in the Elite Workplace*, Professor Kevin Woodson, a Black law professor and sociologist who once worked as an associate at a large, elite law firm, offers his own theory about how "racial discomfort," and specifically "social alienation" and "stigma anxiety" related to race, have functioned together to create and maintain racial disparities in BigLaw attrition and partnership. This Book Review examines Woodson's insights against the backdrop of recent high-profile employment discrimination litigation embroiling BigLaw firms across the*

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* Dean and Ryan Roth Gallo Professor of Law, Boston University School of Law. Thank you very much to Provost Gloria Waters for her research support. I also extend my sincere thanks to Mario Barnes, Mandie LeBeau, Jacob Willig-Onwuachi and Kevin Woodson for their helpful insights and comments. I also thank BU Law librarian Stefanie Weigmann for her excellent research assistance. Enormous thanks go to Shaunak M. Puri for his excellent edits and praiseworthy patience. Professor Alfieri and I are thankful for his commitment to making our work its best. We also express our sincere gratitude to the entire team at the *Columbia Law Review* for their excellent work on our piece. Finally, I give special thanks to my husband, Jacob, and our children Elijah, Bethany, and Solomon for their constant love and support. ORCID: https://orcid.org/0000-0002-5091-7365.

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country, focusing on one recent case, Cardwell v. Davis Polk & Wardwell LLP*, in which the plaintiff, a Black former associate, alleged he had been fired in retaliation for raising concerns about racial discrimination at his law firm. The Book Review extends Woodson's research by identifying and assessing innovative firm- and industry-wide policies that can mitigate the impact of racial discomfort on Black associates' prospects for thriving in and attaining partnership at BigLaw firms.*

"Elite firms are not raceless organizations."
— Professor Kevin Woodson.[1]

INTRODUCTION

In 2001, *The American Lawyer* published a devastating critique of large law firms[2] in an article entitled *Losing the Race*.[3] The article chronicled the longstanding failures of large law firms in retaining Black[4] associates and

1. Kevin Woodson, The Black Ceiling: How Race Still Matters in the Elite Workplace 17 (2023) [hereinafter Woodson, The Black Ceiling].

2. This Book Review uses the terms "large law firms" and "BigLaw firms" interchangeably. "Large law firms" refers to law firms with 100-plus attorneys. "The term 'Big Law' refers to the nation's very large firms, as defined by the number of lawyers, size of revenue and number of offices." Ashley Merryman, What Is 'Big Law?', U.S. News & World Rep. (Sept. 7, 2023), https://law.usnews.com/law-firms/advice/articles/what-is-big-law (on file with the *Columbia Law Review*).

3. Alan Jenkins, Losing the Race, Law.com (Oct. 3, 2001), https://www.law.com/almID/900005523745/ (on file with the *Columbia Law Review*).

4. Throughout this Book Review, the authors capitalize the word "Black" when they use the term in reference to a racialized group. As Professor Kimberlé Crenshaw has explained, using the uppercase "B" reflects the "view that Black[] [people], like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1332 n.2 (1988); see also W. E. Burghardt Du Bois, That Capital "N", 11 The Crisis 184, 184 (1916) (contending that the "N" in the word "Negro" was always capitalized until defenders of slavery began to use the lowercase "n" as a marker of Black people's status as property and as an insult to Black people); cf. Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 Signs 515, 516 (1982) (asserting that "Black" cannot be reduced to "merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically stigmatic and/or glorious and/or ordinary under specific social conditions"). Additionally, the authors find that "[i]t is more convenient to invoke the terminological differentiation between [B]lack and white than say, between *African-American* and *Northern European-American*, which would be necessary to maintain semantic symmetry between the two typologies." Alex M. Johnson, Jr., Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, 1992 U. Ill. L. Rev. 1043, 1044 n.4.

Here, as elsewhere, the authors use the words "Black people," rather than the words "African American people," to refer to the entire group of people who identify as being Black in the United States because it is more inclusive. In this Book Review, "African American" specifically refers to direct descendants of enslaved Africans who were forcibly brought to the United States during the slave trade, whereas "Black people" refers to a broader group, including many people and communities without a direct connection to chattel slavery in the United States. See Cydney Adams, Not All Black People Are African American. Here's the Difference., CBS News (June 18, 2020), https://www.cbsnews.com/news/not-all-black-people-are-african-american-what-is-the-difference/ [https://perma.cc/ENS9-MV6A] (describing "the adoption of the term African American as a 'very deliberate move on the part of [B]lack communities to signify our American-ness, but also signify this African heritage'" (quoting Professor Celeste Watkins-Hayes)). These distinctions are important because, at times, there are intersectional,

successfully mentoring them into and through the partnership ranks.[5] The article's author was Alan Jenkins, a Harvard-educated Black attorney who served as a law clerk for both U.S. District Court Judge Robert L. Carter and U.S. Supreme Court Justice Harry Blackmun.[6] Jenkins filtered his critique through an exploration of a cohort of Black associates at one of the nation's most prestigious law firms, Cleary Gottlieb Steen & Hamilton, from 1989 to 1996.[7] Jenkins focused on Cleary precisely because the firm had been a leader in taking the first important step toward addressing the "race problem" in large law firms: hiring a critical mass—meaning more than mere token numbers[8]

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intraracial differences in how these different groups experience racial subordination and discrimination. See Angela Onwuachi-Willig, The Admission of Legacy Blacks, 60 Vand. L. Rev. 1141, 1141–60, 1165–1204 (2007) (detailing some of those differences, with a specific focus on access and admission to elite universities and colleges). That said, the authors consider "Black" to be "a better default" term to use when generally discussing racism or anti-Black racism because use of the term "Black people" recognizes that not every Black person who lives in the United States is a citizen of the United States by birth or naturalization and thus cannot access the benefits of citizenship. See Adams, supra. Additionally, not every Black person in the United States identifies as a descendant from Africa. See id. ("African American technically isn't even what I am . . . . I'm a Jamaican-born [B]lack person but I have taken on this label of African American because of where I live." (internal quotation marks omitted) (quoting Darien LaBeach)).

Several parts of this Book Review discuss the historical presence of Black people prior to the first influx of Black immigrants in the 1960s and 1970s, so the authors will sometimes use the term "African American" when the broader term "Black" is not needed. See Anthony V. Alfieri & Angela Onwuachi-Willig, Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance, 122 Yale L.J. 1484, 1488 n.5 (2013) (book review) ("The year 1965 thus marked the beginning of a much more diverse, far less European immigrant stream into this country." (internal quotation marks omitted) (quoting Kevin R. Johnson, The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium, 49 UCLA L. Rev. 1481, 1484 (2002))). For an argument framing the experience of Black enslaved people—while clearly marked by the forced, vicious, and deadly trafficking from their native lands during the slave trade—as a type of "immigrant[] [experience] in the sense that they arrived from the foreign shores of Africa or the Caribbean, often without knowledge of the language and customs," see Lolita K. Buckner Inniss, Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness, 49 DePaul L. Rev. 85, 90–94 (1999).

5. See Jenkins, supra note 3 (showing that the percentage of Black associates and partners is lower than the percentage of Black law students and exploring potential causes for this discrepancy).

6. Alan Jenkins, Harv. L. Sch., https://hls.harvard.edu/faculty/alan-jenkins [https://perma.cc/PTF2-R3B4] (last visited Oct. 26, 2024).

7. Jenkins, supra note 3.

8. A critical mass is established when an underrepresented group is represented in high enough numbers that its members are less likely to feel isolated within an environment, are more likely to feel comfortable participating in the institution's culture, and do not feel like the sole representative of their race. See Grutter v. Bollinger, 539 U.S. 306, 318–19 (2003) (discussing critical mass in the context of higher education); see also Vinay Harpalani, Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions, 15 U. Pa. J. Const. L. 463, 468 (2012) (noting that "a 'critical mass' of minority students refers not only to numerical representation of racial groups, but also to the diversity

—of Black associates in its New York City office.[9] Cleary's New York office went from employing only one Black associate in 1989, to twenty-three Black associates in 1992, to its then-peak of thirty Black associates in 1996.[10] (Over the same time period, the firm also more than doubled its number of Latinx[11] attorneys from six to fourteen and more than tripled its

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of viewpoints and experiences within each group, which contribute to the educational benefits of diversity articulated in *Grutter*"). The term "token numbers" refers to the numerical representation of a group that is not only miniscule in size and scale but also merely symbolic. One author proclaimed that "tokenism" is "the practice of doing something (such as hiring a person who belongs to a minority group) only to prevent criticism and give the appearance that people are being treated fairly." See Kara Sherrer, What Is Tokenism, and Why Does It Matter in the Workplace?, Vand. Univ. Owen Graduate Sch. of Mgmt. (Feb. 26, 2018), https://business.vanderbilt.edu/news/2018/02/26/tokenism-in-the-workplace [https://perma.cc/FPQ2-ZGVB] (internal quotation marks omitted) (quoting Tokenism, The Brittanica Dictionary, https://www.britannica.com/dictionary/tokenism [https://perma.cc/3Z5E-2LTR] (last visited Jan. 28, 2025)) (misattributed quotation); see also Margaret M. Russell, Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice, 95 Mich. L. Rev. 766, 768–72 (1997) (discussing the costs of being a "token" for Black attorneys).

9. See Jenkins, supra note 3 (describing Cleary's aggressive recruitment strategy and growth, and quoting one of its Black associates during the 1989–1996 period as stating, "There were enough [B]lack associates at Cleary that . . . we didn't even get together that much" (second alteration in original) (internal quotation marks omitted) (quoting Professor Denise Morgan)).

10. Id. The Vault Law Firm Diversity Survey reported that there were twenty-seven Black associates (eight men, nineteen women, and zero nonbinary individuals) at Cleary's U.S. offices in 2023. 2023 Vault Law Diversity Survey, Cleary Gottlieb Stein & Hamilton 4, https://media2.vault.com/14349285/cleary-gottlieb-with-ad.pdf [https://perma.cc/8S6L-LS5X] (last visited Oct. 26, 2024).

11. This Book Review follows the more widespread practice today of using the term "Latinx" to refer to individuals with ancestral or direct heritage in Latin America. For examples of recent scholarship that also use the term Latinx, see, e.g., Kevin R. Johnson, Systemic Racism in the U.S. Immigration Laws, 97 Ind. L.J. 1455, 1470–72 (2022); Ediberto Román & Ernesto Sagás, Rhetoric and the Creation of Hysteria, 107 Cornell L. Rev. Online 188, 216–17 (2022), https://live-cornell-law-review.pantheonsite.io/wp-content/uploads/2022/12/Roman-Sagas-final.pdf [https://perma.cc/BH8K-ZYWR]; Jasmine B. Gonzales Rose, Color-Blind but Not Color-Deaf: Accent Discrimination in Jury Selection, 44 N.Y.U. Rev. L. & Soc. Change 309, 312 n.19 (2020). The authors use the term "Latinx" instead of "Hispanic" because the term "Hispanic" "refer[s] to people from or with a heritage rooted in Spanish-speaking Latin American countries or Spain." Latine vs. Latinx: How and Why They're Used, Dictionary.com (Sept. 26, 2022), https://www.dictionary.com/e/latine-vs-latinx [https://perma.cc/5B59-NWW4]; see also Bos. Univ. Ctr. for Antiracist Rsch., Comment Letter on Notice of Initial Proposals for Updating OMB's Race and Ethnicity Statistical Standards 4 n.15 (Apr. 25, 2023), https://www.bu.edu/antiracism-center/files/2023/04/2023.4.25-BU-CAR-Comment-on-Proposals-for-Updating-Race-and-Ethnicity-Statistical-Standards.pdf (on file with the *Columbia Law Review*) ("'Hispanic' has a colonial history. The term de-emphasizes Latino/a/e connection to the Americas and emphasizes Spanish heritage over Indigenous and African heritage. 'Hispanic' also excludes the population descended from Latin America who do not share Spanish as a heritage language, but who may have similar racialized experiences . . . ."). The authors also prefer to use the term "Latinx" because it is more "inclusive of [people from] countries where Spanish is not the most widely spoken language, such as Brazil." Latine vs. Latinx: How and

number of Asian attorneys from seven to twenty-four.)[12] But by 2001, the firm's number of Black associates had been cut in half to fifteen, with none of those fifteen Black associates having come from the 1989-to-1996 *Losing the Race* cohort.[13]

Not surprisingly, while highlighting Cleary's status as "a leader in diversity" among large law firms, a 2000 issue of the *Vault Guide to the Top 50 Law Firms* registered Black associate attrition and the small number of Black partners as two key problems for the firm.[14] This excerpt read: "[S]ome associates believe that ethnic minorities, particularly African-Americans, leave in disproportionately high numbers. 'I think the firm works very hard on this. I can see, though, why African-American associates find it dismaying that there are no African-American partners.'"[15]

But, nearly twenty years later in 2018, comments on Cleary's diversity efforts in that year's *Vault Guide* showed improvement. For instance, one comment read:

> [Cleary] does a fantastic job at recruiting women and minorities, however at the top level the needle has moved very little, with few women or minorities being promoted. I do believe that this is a genuine issue of concern to many in the partnership, but there is no clear sense of how to fix this issue.[16]

By 2024, Cleary remained steady in its commitment to and upward trajectory in advancing diversity and inclusion for attorneys of color on its teams. This time, comments in the *Vault Guide* stressed the strides that the firm had taken to advance diversity efforts and to communicate the

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Why They're Used, supra. Furthermore, the authors use the term "Latinx" instead of "Latino" and "Latina," which are the masculine and feminine forms of the word, to avoid gendered language when our intention is to be gender-inclusive. See id. Although the term "Latinx" has no Spanish pronunciation and another term growing in favor, "Latine," does, the authors use the term "Latinx" because it is currently the more commonly used term in legal scholarship; thus, it is more readily recognizable as an intentional use of a gender-neutral term. The authors use the term "Latinx" "here with the awareness that [it] may be imperfect." See Bos. Univ. Ctr. for Antiracist Rsch., supra, at 4 n.15.

12. Jenkins, supra note 3. In 1996, of its 513 attorneys, Cleary had 0 Black partners, 30 Black associates, 2 Latinx partners, 12 Latinx associates, 3 Asian partners, and 21 Asian associates. There were no Native American partners or associates. See Ann Davis, Big Jump in Minority Associates, But; Significant Attrition in Their Later Years Has Left Partnership Ranks Almost as White as Five Years Ago, Nat'l L.J. (Apr. 29, 1996) (on file with the *Columbia Law Review*).

13. Jenkins, supra note 3.

14. See Steve Gordon, Hussam Hamadeh, Mark Oldman, Douglas Cantor, Catherine Cugell, Michael Erman, Marcy Lerner & Chris Prior, Vault.com Guide to the Top 50 Law Firms 153 (3d ed. 2000).

15. Id. (quoting one contact at Cleary). Although the quote notes that there were no Black partners at Cleary, this assertion was incorrect. By 2000, there was at least one Black partner at Cleary: Carmen Amalia Corrales. See infra notes 80–84 and accompanying text.

16. Vault Guide to the Top 100 Law Firms: More Than 17,000 Associates Rank the Top Firms 166 (Matthew J. Moody ed., 2018) (internal quotation marks omitted).

importance of diversity to all of its constituents, both internally and externally. For example, one respondent stated:

> The firm offers billable credit for all participation in affinity groups and other firm citizenship committees and events. Participation is encouraged. The firm is open about diversity being a clear goal and is transparent about the processes that they are taking to achieve those goals, as well as how they are measured. While the law as a whole is not particularly diverse, it is clear that the firm cares a great deal about enhancing diversity and doing so intentionally and effectively.[17]

Indeed, one woman of color associate remarked the following in the *Vault Guide*: "I am a minority woman of color and require particular religious accommodation. Cleary is phenomenal at creating a space where I can work and thrive."[18] Critically, Cleary was named a top twenty firm in *The American Lawyer*'s 2024 Diversity Scorecard, with special recognition for being third in LGBTQ+ representation and eighteenth in minority representation.[19]

Still, even Cleary concedes that it must do more work to achieve equity and inclusion for underrepresented attorneys, including attorneys of color, in its practices.[20] The firm's storied battle with Black associate attrition and low Black partnership numbers is not unique among large law firms. A decades-long trail of newspaper headlines reveals the persistent challenges that Black associates and partners encounter in large law firms: "Big Jump in Minority Associates, But; Significant Attrition in Their Later Years Has Left Partnership Ranks Almost as White as Five Years

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17. Cleary Gottlieb Steen & Hamilton LLP Associate Reviews: Inclusion Efforts, Vault, https://vault.com/company-profiles/law/cleary-gottlieb-steen-hamilton-llp [https://perma.cc/SB3U-KT7Y] (last visited Oct. 27, 2024) (internal quotation marks omitted).

18. Id. (internal quotation marks omitted).

19. Cleary Named a Top 20 Firm in 2024 Am Law Diversity Scorecard, Cleary Gottlieb (June 25, 2024), https://www.clearygottlieb.com/news-and-insights/news-listing/cleary-named-a-top-20-firm-in-2024-am-law-diversity-scorecard [https://perma.cc/D7HW-HMN6]; see also The 2024 Diversity Scorecard: Minority Representation, Am. Law. (June 25, 2024), https://www.law.com/americanlawyer/2024/06/25/the-2024-diversity-scorecard/?kw=The%202024%20Diversity%20Scorecard%3A%20Minority%20Representation (on file with the *Columbia Law Review*).

20. See Comm. on Diversity Issues, Cleary Gottlieb, 2011 Annual Report 27, https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/cleary-gottlieb-committee-on-diversity-issues-annual-report.pdf [https://perma.cc/2UNH-EATD] (last visited Nov. 2, 2024) (describing the importance of diversity, offering the firm's mission statement on diversity, detailing its goals "to develop and implement new policies that further promote a diverse workplace," and declaring such work must be done on "a consistent basis throughout each year").

Ago" (1996);[21] "Black Lawyers: Lonely at the Bottom" (1999);[22] "Lawyers Debate Why Blacks Lag at Major Firms" (2006);[23] "Many Black Lawyers Navigate a Rocky, Lonely Road to Partner" (2015);[24] "Why They Left: Black Lawyers on Why Big Law Can't Keep Them Around" (2020);[25] and "Why the Blackout in Philly's Big Law" (2024).[26]

Ultimately, two persistent questions continue to plague large law firms when it comes to racial representation and the partnership successes of attorneys of color. First, what exactly is causing the disproportionate retention rates as well as the low rates of partnership attainment among attorneys of color, specifically Black attorneys, at large law firms? Second, what can be done to stem these critical problems?

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21. Davis, supra note 12 (detailing how the both the numbers and percentages of people of color in partnership ranks at law firms remain low despite growth in the number of people of color at the associate ranks).

22. Michael D. Goldhaber, Black Lawyers: Lonely at the Bottom, Nat'l L.J. (Apr. 12, 1999) (on file with the *Columbia Law Review*) (describing the high attrition rate of Black associates at law firms and the challenges that they face due to partners' disparate treatment of them and the small number of Black associates).

23. Adam Liptak, Lawyers Debate Why Blacks Lag at Major Firms, N.Y. Times (Nov. 29, 2006), http://www.nytimes.com/2006/11/29/us/29diverse.html (on file with the *Columbia Law Review*) (noting that Black associates "remain far less likely to stay at the firms or to make partner than their white counterparts" and detailing a debate over Professor Richard Sander's then-new research, which attributed the disproportionate attrition rate of Black associates to the fact that their law school grades were, on average, lower than those of white associates).

24. Elizabeth Olson, Many Black Lawyers Navigate a Rocky, Lonely Road to Partner, N.Y. Times: Dealbook (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/business/dealbook/many-black-lawyers-navigate-a-rocky-lonely-road-to-partner.html (on file with the *Columbia Law Review*) (detailing how the lack of prior exposure to the corporate world, the lack of mentorship from white partners, and the conscious and unconscious racial bias that Black associates face in law firms, plus other factors, contribute to the low numbers of Black partners in large law firms).

25. Dylan Jackson, Why They Left: Black Lawyers on Why Big Law Can't Keep Them Around, Am. Law. (Aug. 24, 2020), https://www.law.com/americanlawyer/2020/08/24/why-they-left-black-lawyers-on-why-big-law-cant-keep-them-around/ (on file with the *Columbia Law Review*) (highlighting lack of mentorship, cultural isolation, and difficulties in developing and maintaining a book of business as major reasons why Black associates leave their private law firms in droves).

26. Christina Kristofic, Tribune Special Report: Why the Blackout in Philly's Big Law, Phila. Trib. (June 17, 2024), https://www.phillytrib.com/news/local_news/tribune-special-report-why-the-blackout-in-phillys-big-law/article_c1f2f72f-38e1-5fd6-af4a-0688842656d6.html [https://perma.cc/6V85-TRBW] (detailing numerous reasons, including disparate treatment by white partners in assignments and mentorship, loneliness and isolation, lack of access to information, and the imposition of negative racial stereotypes on them, as accountable for the near-absence of Black partners (and associates) in Philadelphia's law firms).

In his important new book, *The Black Ceiling: How Race Still Matters in the Elite Workplace*,[27] Professor Kevin Woodson endeavors to answer these questions as they relate to the experiences of Black associates. To do so, he draws from 110 interviews that he conducted with "high-status" Black workers in "elite" professional service firms, including seventy-five law firm attorneys, to uncover the sources of "Black disadvantage at elite firms" that have contributed "to a nearly impermeable 'Black ceiling'"[28] and to offer an in-depth analysis of the interrelationship between race, racism, firm culture,[29] organizational leadership,[30] and institutional discrimination.[31]

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27. Woodson, The Black Ceiling, supra note 1. For earlier writings laying the groundwork for Woodson's study, see generally Kevin Woodson, Derivative Racial Discrimination, 12 Stan. J. C.R. & C.L. 335 (2016) (introducing the concept of "derivative racial discrimination," explaining its adverse consequences on Black employees at predominantly white firms, and detailing how it might be addressed by Title VII of the 1964 Civil Rights Act); Kevin Woodson, Human Capital Discrimination, Law Firm Inequality, and the Limits of Title VII, 38 Cardozo L. Rev. 183 (2016) (discussing how large, predominantly white law firms operate as sites of "human capital discrimination, [a] process through which unequal access to quality work assignments limits the careers of [B]lack associates and reinforces racial inequality"); Kevin Woodson, Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms, 83 Fordham L. Rev. 2557 (2015) (explaining how cultural homophily, or "the tendency of people to develop rapport and relationships with others on the basis of shared interests and experiences, profoundly and often determinatively disadvantages many [B]lack attorneys in America's largest law firms" (footnote omitted)).

28. Woodson, The Black Ceiling, supra note 1, at 4, 13–14.

29. See Debra Pickett, 5 Ways Traditional Law Firm Culture Burdens Lawyers of Color, Nat'l L. Rev. (Oct. 10, 2019), https://natlawreview.com/article/5-ways-traditional-law-firm-culture-burdens-lawyers-color [https://perma.cc/HG7U-EYKC] (noting, for example, how a law firm's reliance on organic or natural development of mentoring relationships between partners and associates can breed racial inequities between the experiences of Black and white associates).

30. See Amanda Robert, Law Firm Leaders Are Still Mostly White and Male, ABA Diversity Survey Says, ABA J. (May 16, 2022), https://www.abajournal.com/web/article/law-firm-leaders-are-still-mostly-white-and-male-aba-diversity-survey-says [https://perma.cc/33DF-SCK9] (detailing the low percentages of partners of color at large law firms); Noam Scheiber & John Eligon, Elite Law Firm's All-White Partner Class Stirs Debate on Diversity, N.Y. Times (Jan. 17, 2019), https://www.nytimes.com/2019/01/27/us/paul-weiss-partner-diversity-law-firm.html (on file with the *Columbia Law Review*) (stating that there is a "broader pattern across big law: the share of partners who are women and people of color is much smaller than the number reflected in the ranks of associates, or those starting law school, not to mention the general population").

31. See Woodson, The Black Ceiling, supra note 1, at 13–14; see also Leonard M. Baynes, Falling Through the Cracks: Race and Corporate Law Firms, 77 St. John's L. Rev. 785, 796–834 (2003) (examining the challenges to battling racial discrimination against law firm partners given the case-by-case determinations of whether a partner plaintiff is an employee or not under Title VII); Tiffani N. Darden, The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory & the Institutional Analyses of Bias in Corporate Law Firms, 30 Berkeley J. Emp. & Lab. L. 85, 89–90 (2009) (detailing why the associate evaluation process is "an appropriate intervention point for realizing workplace equity in law firms"); Veronica Root, Retaining Color, 47 U. Mich. J.L. Reform 575, 577 (2014) (arguing that the attrition problem among associates of color requires a "change [in] the behavior of white males so that they work to instill more loyalty" to the

In his book, Woodson explains that the obstacles affecting the pathway to partnership for his Black professional subjects all involved one social dynamic that he called *racial discomfort*: "the unease that Black professionals experience in White-dominated workplaces because of the isolation and institutional discrimination they encounter,"[32] which is all encompassed within the "racial conditions" and persistent racial stratification of broader U.S. society. According to Woodson, such racial discomfort, which has cumulative, harmful impacts on the careers of Black attorneys at law firms, can be broken down into two categories: *social alienation* and *stigma anxiety*.[33] The first category, social alienation, includes Black associates' experiences with isolation, marginalization, and reduced access to social capital within their firms due to white partners' unspoken—and even unconscious—preference to work with and mentor associates "who share similar cultural and social tastes, interests, and experiences": in other words, associates who are nearly always other white people.[34] The second category, stigma anxiety, "refers to the uneasiness and trepidation that many Black professionals develop in situations where they recognize that they may be at risk of unfair treatment on the basis of race," a disparate burden that frequently causes Black professionals to engage in what Woodson calls *racial risk management* by adopting "self-protective [but often backfiring] behaviors to insulate themselves from possible mistreatment."[35]

This Book Review explores Woodson's theories and insights against the backdrop of recent high-profile employment discrimination litigation embroiling large law firms.[36] In particular, this Book Review interrogates whether (and how) Woodson's theories regarding social alienation and stigma anxiety are evidenced in the legal documents and proceedings of

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firm among non-white associates and offering ideas on how firms can incentivize white partners to inspire such loyalty); Eli Wald, BigLaw Identity Capital: Pink and Blue, Black and White, 83 Fordham L. Rev. 2509, 2513–14 (2015) (offering a new model for understanding associates' relationships with law firms "as complex transactions in which BigLaw and its lawyers exchange labor and various forms of capital—social, cultural, and identity"); David B. Wilkins & G. Mitu Gulati, Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis, 84 Calif. L. Rev. 493, 501–02 (1996) (arguing that the "underrepresentation [of Black attorneys in large law firms] is due in part to the way in which the structural characteristics of corporate firms shape the strategic choices of [B]lack lawyers").

32. Woodson, The Black Ceiling, supra note 1, at 4.

33. Id. at 5.

34. Id.

35. Id. at 5–6.

36. See, e.g., Judgment, Cardwell v. Davis Polk & Wardwell LLP, No. 1:19-cv-10256-GHW, (S.D.N.Y. Jan. 30, 2024), ECF No. 417 (dismissing the complaint because the jury "returned a verdict in favor of Defendants"); *Cardwell*, No. 1:19-cv-10256-GHW, 2023 WL 2049800 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (granting in part and denying in part defendants' motion for summary judgment on aiding and abetting, discrimination, and retaliation claims).

lawsuits chronicling the narratives told by attorneys who have sued large law firms for race discrimination on behalf of Black firm lawyers and the responses by attorneys who have defended large law firms.[37] The starting point for this examination is the recognition that large law firms' general "race problem" goes beyond incidents of ill intent and individual bias. As Woodson makes clear, the problems of high attrition rates and low partnership rates of Black attorneys at large law firms are much more multifaceted and nuanced than overt acts of explicit bias and harmful actions resulting from implicit bias.[38] Such problems are intertwined with, and fortified by, an unspoken white workplace culture and a baseline that neglects the role that racial comfort plays in career advancement, stagnation, or foundering in white spaces.[39] To top it off, the problems are consistently reinforced by longstanding, persistent and embedded racial narratives[40] about factors like Black incompetence and Black disinterest in

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37. See Peter Brooks, Narrative Transactions—Does the Law Need a Narratology?, 18 Yale J.L. & Humans. 1, 11–13 (2006) (demonstrating how differing retellings of the facts among the opinions in a particular case are loaded with "point of view" on the "ways that things 'are supposed to happen'").

38. See Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 Duke L.J. 345, 360–62 (2007) ("[P]eople who display strong implicit biases are often not the same people who demonstrate strong explicit biases."); Nicole E. Negowetti, Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection, 15 Nev. L.J. 930, 936 (2015) ("Implicit biases are unconscious mental processes based on implicit attitudes or . . . stereotypes that are formed by one's life experiences and that lurk beneath the surface of the conscious. They are automatic; 'the characteristic in question . . . operates so quickly . . . that people have no time to deliberate.'" (footnote omitted) (quoting Christine Jolls & Cass R. Sunstein, The Law of Implicit Bias, 94 Calif. L. Rev. 969, 975 (2006))); see also Joan C. Williams, Marina Multhaup, Su Li & Rachel Korn, ABA & Minority Corp. Couns. Ass'n, You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession 7–10 (2018), https://biasinterrupters.org/wp-content/uploads/2024/05/You-Cant-Change-What-You-Cant-See-Executive-Summary.pdf [https://perma.cc/K2XJ-8BDU] (documenting "how implicit gender and racial bias . . . plays out in everyday interactions in legal workplaces and affects basic workplace processes such as hiring and compensation").

39. See Elijah Anderson, "The White Space", 1 Socio. Race & Ethnicity 10, 10 (2015) (describing "the white space" in part as "overwhelmingly white neighborhoods, restaurants, schools, universities, workplaces, churches and other associations, courthouses, and cemeteries . . . that reinforce[] a normative sensibility in settings in which [B]lack people are . . . not expected, or marginalized when present").

40. See Mario L. Barnes, Black Women's Stories and the Criminal Law: Restating the Power of Narrative, 39 U.C. Davis L. Rev. 941, 952 (2006) (asserting that understanding the production of narrative "helps us to understand in a world of competing facts and inferences, whose story is more likely to become officially adopted"); Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2413 (1989) ("Stories, parables, chronicles, and narratives are powerful means for destroying mindset[s]—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place."); Llezlie L. Green, Erasing Race, 73 SMU L. Rev. Forum 63, 67 (2020), https://scholar.smu.edu/cgi/viewcontent.cgi?article=1013&context=smulrforum (on file with the *Columbia Law Review*) (asserting that narratives are "also the source of mindsets" and noting how "[f]act-

corporate work, narratives common to both BigLaw workplaces and BigLaw employment discrimination proceedings.

Despite the "[g]rowing [w]ave"[41] of employment discrimination litigation against large law firms as well as the growing backlash against diversity, equity, and inclusion (DEI)[42] in large law firms, the academic and popular literature on the history, economics, and sociology of law firms has not kept pace. This literature has scarcely considered how the culture of large law firms has shaped the narrative and storytelling strategies used by hiring and promotion committees to rationalize claims of discrimination and anecdotal and empirical evidence of discrimination to internal constituencies (partners and associates) and external observers (courts, clients, law schools, legal services industry peers, and media outlets). Similarly, the academic and popular literature has seldom considered how the narratives used by plaintiff- and defense-side legal teams in pretrial, trial, and appellate practice work to construct identity for the individuals and the groups involved,[43] and how such pretrial, trial,

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finders . . . filter . . . stories through their own narrative understandings of how the world works"); Charles Lawrence III, Listening for Stories in All the Right Places: Narrative and Racial Formation Theory, 46 Law & Soc'y Rev. 247, 250–51 (2012) (highlighting how an individual's "performance [can become a] part of the narrative that constructs race" because that performance is "received against . . . stories and images" that already exist about the individual's racial group).

41. See Carmen D. Caruso, The Growing Wave of Gender Discrimination Lawsuits Against BigLaw, ABA Section of Litig., Diversity & Inclusion, Summer 2017, at 5, https://www.americanbar.org/content/dam/aba/publications/litigation_committees/diversity_inclusion/issues/summer2017.pdf (on file with the Columbia Law Review); Andrew Maloney, Amid Big Law Focus on Performance, Law Firms Hit by Wave of Employment Claims, Am. Law. (Aug. 6, 2024), https://www.law.com/americanlawyer/2024/08/06/amid-big-law-focus-on-performance-law-firms-hit-by-wave-of-employment-claims/ (on file with the *Columbia Law Review*) ("Big Law has been hit with a wave of lawsuits in recent months, with discrimination and compensation claims from both current and former employees front and center.").

42. See Emma Goldberg, Facing Backlash, Some Corporate Leaders Go 'Under the Radar' With D.E.I., N.Y. Times (Jan. 22, 2024), https://www.nytimes.com/2024/01/22/business/diversity-backlash-fortune-500-companies.html (on file with the *Columbia Law Review*) (highlighting that anti-DEI groups have filed suits to challenge a number of diversity programs and stating that, even without a legal decision on diversity programs in the workplace, companies and firms are reevaluating their DEI programs).

43. The ABA Model Rules of Professional Conduct permit the lawyer to construct client, party, and witness identity in court filings and oral communications. See, e.g., Model Rules of Pro. Conduct r. 3.1 (ABA 2023) (permitting a broad scope of lawyer advocacy, accounting for ambiguities and changing limits of procedural and substantive law); id. r. 3.3 cmt. (permitting a lawyer to use "persuasive force" in advocacy within adjudicative proceedings); see also Anthony V. Alfieri, The Ethics of Violence: Necessity, Excess, and Opposition, 94 Colum. L. Rev. 1721, 1725–26 (1994) (book review) (describing the pain experienced by parties when lawyers "act to erase their identities, to silence their narratives, and to suppress their histories during advocacy"). The Model Rules also permit the lawyer to construct client, party, and witness identity in nonadjudicative proceedings, such as arbitration and mediation, as well as in extrajudicial pretrial, trial, and post-trial statements to the public. See Model Rules of Pro. Conduct r. 3.9 cmt. (permitting lawyers to "present

and appellate filings work to reinforce and reinscribe the very social discomfort that results in "Black disadvantage" in large law firms.

To highlight and rectify these omissions, this Book Review analyzes one recent race discrimination case brought against a law firm by a former Black associate as a means of exploring and understanding the narratives that plaintiff-side legal teams representing former law firm employees and defense-side teams representing large law firms tend to tell and retell in arguing their cases. Specifically, this Book Review probes the language that legal teams have used to allege and rebut facts and, likewise, to assert and defend claims in their pleadings, memoranda of law, discovery materials, hearing and trial transcripts, and even press releases. This Book Review then illustrates how such legal language has helped to reinforce and sustain the troubling tropes of racial inferiority, deficiency, and incompetence and the troubling limitations placed on how Black people are expected to perform their racial identity in predominantly white workspaces, limitations that have enabled and nourished racial discomfort and its negative impacts in elite firms and in broader society.[44] The upshot for large law firms is a workplace environment in which whiteness constitutes the background racial norm and maleness constitutes the preferred gender norm for filtering experience, organizing legal representation, and defining professionalism and success.

This Book Review proceeds in four parts. Part I sets the stage for understanding the harms that racial discomfort causes for Black associates in large law firms. In so doing, Part I returns to the story of the 1989-to-1996 cohort from Cleary, New York, highlighting the reasons that many of

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facts, formulate issues and advance argument" in nonadjudicative proceedings before legislative bodies and administrative agencies acting in a rulemaking or policymaking capacity); see also id. r. 3.6 (permitting lawyers to make extrajudicial statements to the public even if there is a likelihood of materially prejudicing an adjudicative proceeding in the matter, provided the likelihood is not "substantial"). For further discussion of nonadjudicative proceedings, see Michael Z. Green, Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters, 70 SMU L. Rev. 639, 651–52 (2017) (indicating that "[B]lack persons, more likely than any other racial group, tend to find themselves pressured to 'cover' or conform to norms that deny their racial identity at work").

44. See Angela Onwuachi-Willig, Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases, 137 Harv. L. Rev. 192, 198 (2023) ("Stories and storytelling play a critical role in the law. . . . In summary, stories are vital to lawyering and the legal profession because 'the ways stories are told, and are judged to be told, make[] a difference in the law.'" (second alteration in original) (footnote omitted) (quoting Peter Brooks, Narrative Transactions—Does the Law Need a Narratology?, 18 Yale J.L. & Humans. 1, 3 (2006))); see also Angela Onwuachi-Willig & Anthony V. Alfieri, (Re)framing Race in Civil Rights Lawyering, 130 Yale L.J. 2052, 2068–108 (2021) (book review) (describing how troubling racial images, stereotypes, and narratives about Black people persist in today's legal cases); David B. Wilkins, On Being Good *and* Black, 112 Harv. L. Rev. 1924, 1954 (1999) (reviewing Paul M. Barrett, The Good Black: A True Story of Race in America (1999)) (noting the sociopsychological "dynamic" that leads some Black associates "to believe that in order to be seen as 'good' by whites" in BigLaw workplaces, they "must make every effort to minimize the extent to which these same people saw [them] as '[B]lack'").

those Black associates asserted for their own departures from the firm and revealing how Woodson's findings in *The Black Ceiling* mirror and contrast those reasons. Part I also provides data regarding the persistence of problems with Black associate recruitment and attrition at large law firms before partnership. Part II details Woodson's key insights about what builds and sustains—or complicates and thwarts—the ability of Black people to thrive in elite law firms.[45]

Part III extends Woodson's analysis about how the problem of racial disadvantage in elite law firms is tied to racial discomfort, specifically social alienation and stigma anxiety, to the contemporary field of employment discrimination. Part III specifically tracks the recent, high-profile case of *Cardwell v. Davis Polk & Wardwell LLP*, filed by Kaloma Cardwell, a former fourth-year Black associate, against the prominent, New York–based law firm, Davis Polk & Wardwell.[46] Informed by relevant pleadings, memoranda of law, discovery materials, hearing and trial transcripts, and press releases, Part III contrasts the racial discomfort stories, and related social alienation and stigma anxiety narratives, crafted by Cardwell's lawyers and other plaintiff-side litigation teams representing Black law firm employees with the competing narratives of character deficiency and professional incompetence presented by Davis Polk's lawyers and other defense-side litigation teams that represent large law firms in employment discrimination cases.

Part IV proposes remedial workplace strategies that law firms may employ to better address the harmful results stemming from racial discomfort. Part IV offers these suggestions against the backdrop of the evolving reconstitution and growing erasure of DEI recruitment, promotion, and retention programs across the country[47] since the

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45. See Woodson, The Black Ceiling, supra note 1, at 2–3.

46. Verified Complaint With Jury Demand at 1–2, Cardwell v. Davis Polk & Wardwell LLP, No. 1:19-cv-10256-GHW, 2019 WL 5860596 (S.D.N.Y. filed Nov. 4, 2019), ECF No. 1 [hereinafter Complaint] (alleging "racial discrimination and retaliation").

47. See Atinuke O. Adediran, Racial Targets, 118 Nw. U. L. Rev. 1455, 1461–68, 1491–94 (2024) (arguing that racial targets, as opposed to quotas, are legally defensible and describing the "conservative backlash" against racial targets, particularly "[o]pen-ended . . . goals and aspirations that do not include a stated year by which the goal would be met"); see also Brenda D. Gibson, Affirmative Reaction: The Blueprint for Diversity and Inclusion in the Legal Profession After *SFFA*, 104 B.U. L. Rev. 123, 171–80 (2024) (proposing how diversity efforts can be reconstituted in legal education and the Bar post-Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023)); Mariana Larson, Diversity on Trial: Navigating Employer Diversity Programs Amidst Shifting Legal Landscapes, 8 Bus. Entrepreneurship & Tax L. Rev. 239, 254 (2024) (making recommendations for promoting DEI after *SFFA* and arguing that "employers should think about focusing and shining a light on their inclusion efforts, rather than diversity"); Nancy B. Rapoport & Joseph R. Tiano, Jr., Walking the Data Walk: Using Time Entries to Advance DEI Initiatives, 79 Bus. Law. 1, 5 (2024) ("To retain associates, each one must get roughly the same types of experience to be able to advance up the law firm ladder. Time entries,

Supreme Court issued *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*).[48] Building on Woodson's research, this evaluation identifies and assesses innovative firm- and industry-wide policies that can mitigate the impact of racial discomfort on Black professionals and may enable Black professionals to avoid or overcome racial disadvantage in elite firms and thus thrive in their careers at large law firms.[49]

I. "LOSING THE RACE"

As many individuals have asserted over the years, associates of all races leave large law firms before partnership consideration at alarming rates.[50] For instance, one study from 2003 found that "an average of 8.4% of entry-level associates left their law firms within sixteen months of their start dates [and] [a]lmost 23% of entry-level hires departed within twenty-eight months, 35.1% departed within forty months, 44.9% left within fifty-two months, and 53.4% left within fifty-five months."[51] Additionally, in 2007, the National Association of Law Placement (NALP) found that approximately 80% of attorneys at large law firms did not work at that firm five years later.[52] Similarly, in 2020, NALP's *Keeping the Keepers IV* study of eight hundred law firms revealed that "[f]or every 20 associates hired by law firms, 15 left."[53] More recently, the NALP Foundation reported

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mined correctly, can make BigLaw a more welcoming place for people of diverse backgrounds.").

48. 143 S. Ct. 2141 (2023).

49. See Woodson, The Black Ceiling, supra note 1, at 125–45 (offering suggestions for addressing the low retention and promotion rates of Black professionals at BigLaw firms). For other recent proposals of what BigLaw firms can do to better recruit and retain attorneys of color, see generally Debo P. Adegbile, Lisa Davis, Damaris Hernández & Ted Wells, Raising the Bar: Diversifying Big Law (Anthony C. Thompson ed., 2019).

50. See, e.g., Joshua Johnson, Associate Attrition and the Tragedy of the Commons, 1 the crit 48, 57–58 (2008) (discussing data showing high rates of associate attrition from 1998 to 2003); Paul Fischer, The Legal Profession Is Not Doing Enough to Fix Its DEI Problem, Fast Co. (Oct. 21, 2022), https://www.fastcompany.com/90797820/the-legal-profession-is-not-doing-enough-to-fix-its-dei-problem (on file with the *Columbia Law Review*) (noting that "the overall attrition rate for law firm associates reached a record high of 26% in 2021").

51. Johnson, supra note 50, at 57–58 (footnotes omitted) (citing Paula A. Patton, NALP Found. for L. Career Rsch. & Educ., Keeping the Keepers II: Mobility & Management of Associates 24 (2003)).

52. Kate Neville, Why Associates Bail Out of Law Firm Life and Why It Matters, Nat'l L.J. (Nov. 15, 2007), https://www.law.com/nationallawjournal/almID/900005496007/ (on file with the *Columbia Law Review*).

53. Debra Cassens Weiss, Law Firms Lost 15 Associates for Every 20 They Hired, NALP Foundation Study Finds, ABA J. (Oct. 1, 2020), https://www.abajournal.com/news/article/law-firms-lost-15-associates-for-every-20-they-hired-study-finds [https://perma.cc/873Q-38J7].

20% and 18% overall average departure rates for associates in 2022 and 2023.[54]

Even compared to the high overall attrition rates for all large law firm associates, the attrition rate for associates of color, particularly Black associates, is even worse.[55] This Part provides greater context for understanding Woodson's insights about the role of racial discomfort—and, specifically, social alienation and stigma anxiety—in such departures by detailing diversity data and anecdotes about Black associates' experiences at large law firms, particularly data and stories related to their reasons for leaving their firms. Section I.A offers a general description of large law firms' racial retention problem over the past few decades, along with the reasons that associates and academics have proffered for this problem. Section I.B then focuses on Woodson's findings regarding Black professionals' experiences in elite firms, comparing and contrasting their explanations for departure or for success or failure in attaining partnership with those described by other Black attorneys in section I.A of this Book Review.

A. *Why and How Large Law Firms Are "Losing the Race"*

Nearly twenty-five years after Jenkins detailed how Cleary, New York, had "lost the race" due to the departure of all Black associates originally in its 1989-to-1996 cohort by 2001,[56] the problem of disproportionate rates of attrition for associates of color persists.[57] For instance, a 2016 Diversity Benchmarking Report regarding legal practice experiences in New York City revealed that "15.6% of minorities and 14.3% of women left signatory firms in 2016—150% and 135% above the 10.6% rate for white men respectively."[58] Similarly, a NALP report from 2021 reported an 8% difference (from 26% to 34%) between the overall attrition rate for

54. Debra Cassens Weiss, It's a Quick Goodbye for Many Departing Associates, New NALP Foundation Report Finds, ABA J. (Apr. 11, 2024), https://www.abajournal.com/web/article/its-a-quick-goodbye-for-many-departing-associates-new-nalp-foundation-report-finds [https://perma.cc/72U2-U83N].

55. See Update on Associate Attrition: Findings From a National Study of Law Firm Associate Hiring and Departures, NALP Found. (Apr. 26, 2022), https://www.nalpfoundation.org/news/nalp-foundation-releases-update-on-associate-attrition-for-calendar-year-2021 [https://perma.cc/D4EC-VAGX] [hereinafter Update on Associate Attrition] (noting that, in 2021, the overall associate attrition rate was 26% compared to 34% for associates of color); see also Fischer, supra note 50 (discussing the disproportionate attrition rates of associates of color from large law firms).

56. See Jenkins, supra note 3.

57. See Fischer, supra note 50 ("Black lawyers are 22 percentage points more likely to leave their firms than white lawyers . . . .").

58. N.Y.C. Bar, Diversity Benchmarking Report 2016, at 2, 14 (2017), https://documents.nycbar.org/files/BenchmarkingReport2016.pdf [https://perma.cc/JHQ5-XCY3].

associates and the attrition rate for associates of color in large law firms.[59] The 2016 Diversity Benchmarking Report even found that large disparities in the attrition rates between white and non-white attorneys existed at the partnership level, with "[v]oluntary attrition . . . rates of 9.8% for women and 9.3% for minorities compared to 3.7% for white men."[60]

Other reports have shown that Black associate attrition rates from large law firms are higher than those for white associates—in some cases by as much as 15% or more.[61] For instance, one study of Harvard Law School from 2000 to 2016 showed that Black alumni left the large law firms where they started their careers "at much higher rates than both white and [B]lack lawyers nationally."[62] Specifically, the study revealed "a whopping 63.0% decrease in the number of [B]lack HLS graduates in private practice compared to their first job post-HLS."[63] This 63% decrease is particularly startling when compared to the 28% decrease for white lawyers, and the 38% decrease for Black lawyers more generally, in the *After the JD* Study.[64]

The reasons offered to explain these disproportionate departure rates between white and Black associates at large law firms are numerous and complex. Over the decades, from the very first hire of a Black associate in BigLaw,[65] with William T. Coleman Jr.'s 1949 entry at Paul, Weiss, Rifkind,

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59. See Update on Associate Attrition, supra note 55.

60. N.Y.C. Bar, supra note 58, at 2; see also Abby Yeo, Fight or Flight: Explaining Minority Associate Attrition, Cornell J.L. & Pub. Pol'y Issue Spotter (Mar. 21, 2018), https://live-journal-of-law-and-public-policy.pantheonsite.io/fight-or-flight-explaining-minority-associate-attrition/ [https://perma.cc/GM24-73ZD] ("Minority partners are almost three times as likely to leave their positions compared to white men.").

61. See Johnson, supra note 50; Yeo, supra note 60.

62. David B. Wilkins & Bryon Fong, Harvard L. Sch. Ctr. on the Legal Profession, Report on the State of Black Alumni II, 2000–2016, at 48 (2017), https://clp.law.harvard.edu/wp-content/uploads/2022/10/HLS-Report-on-the-State-of-Black-Alumni-II-2000-2016-High-Res-1.pdf [https://perma.cc/5EWT-FCZ6]; see also Vivia Chen, Black Harvard Law Grads Are Doing Fine (Mostly), Am. Law. (Oct. 13, 2017), https://www.law.com/americanlawyer/almID/1202800445396/ [https://perma.cc/R8R5-SD5X] ("So I leave you with this: If [B]lack alums of Harvard are voicing doubt about the future of [B]lack lawyers in Big Law, where does that leave [B]lack lawyers in the bigger pool?").

63. Wilkins & Fong, supra note 62, at 48. The Harvard Law School study provided data regarding where Black Harvard alumni migrated to once they left their firms. The report indicated that the "largest movement was towards business (practicing law)—from 1.6% initially to 14.9% for current jobs. There was also significant migration into government (7.2% to 17.5%), education (2% to 12.1%), public interest (4.7% to 6.9%), and business (not practicing law) (6.9% to 10%). Legal services (2.4% to 2.2%) remained relatively stable." Id.

64. See id.

65. See supra note 2 (explaining the meanings of "large law firms" and "BigLaw").

Wharton & Garrison LLP;[66] to Conrad Harper's historic election as the first Black partner in a major New York City law firm, Simpson Thacher & Bartlett LLP, in 1974;[67] to today, the reasons for disproportionate Black associate attrition have ranged from explicit racism to a lack of mentorship.[68]

As with many workplaces in the past few decades, large law firms have veered further away from explicit racism and more toward subtle and structural forms of racism.[69] For example, in Jenkins's 2001 article, *Losing the Race*, the Cleary attorneys interviewed—partners of all races as well as Black associates from the 1989-to-1996 cohort—offered a plethora of reasons for why the BigLaw firm had lost "the [r]ace,"[70] meaning all thirty Black associates from the 1989-to-1996 cohort. Critically, almost none of these attorneys highlighted explicit racism as one of the reasons for the racial attrition rate disparities between white and Black associates.[71] Still, racial bias and presumptions undergirded many of the explanations they gave.

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66. Paul, Weiss, Rifkind, Wharton & Garrison LLP, Diversity (2013), https://www.paulweiss.com/media/2089201/diversitybrochure.pdf [https://perma.cc/SN5X-DBRL]. Coleman was also the first Black person to clerk for a United States Supreme Court Justice, Justice Felix Frankfurter. Christine Perkins, Counsel for the Situation: William T. Coleman Jr. '46 (1920–2017), Harv. L. Today (Apr. 4, 2017), https://hls.harvard.edu/today/william-t-coleman-obituary/ [https://perma.cc/W6BJ-MHZT]. Initially, and "[d]espite his clerkships and his academic achievement, he was repeatedly rejected by white-shoe firms in Philadelphia." Id.

67. Conrad Harper, Law.com, https://www.law.com/almID/900005555609/ [https://perma.cc/XF9Z-EF4Q] (last visited Oct. 27, 2024). In 1989, Harper also became the first Black person to serve as President of the Association of the Bar of the City of New York. Id. During his term, he led "the association's efforts to address racial inequality in the legal profession." Id. Prior to his tenure at Simpson Thacher, Harper served as an attorney at NAACP Legal Defense Fund. Simpson Thacher & Bartlett LLP, Conrad Harper 2L Diversity Fellowship, https://www.stblaw.com/docs/default-source/related-link-pdfs/2024-conrad-harper-2l-diversity-fellowship-flyer72c90e0f743d6a02aaf8ff0000765f2c.pdf [https://perma.cc/M8CU-LN93] (last visited Jan. 18, 2025).

68. See, e.g., Vitor M. Dias, Black Lawyers Matter: Enduring Racism in American Law Firms, 55 U. Mich. J.L. Reform 99, 111–20 (2021) (using data from the After the JD Study to detail the various different forms of racism faced by Black attorneys in law firms); Alex M. Johnson, Jr., The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective, 95 Mich. L. Rev. 1005, 1007–26 (1997) (detailing the forms of racism faced by Black attorneys in BigLaw firms).

69. See, e.g., Devon W. Carbado & Mitu Gulati, Acting White? Rethinking Race in Post-Racial America 136–48 (1st ed. 2013) (describing how complex forms of intraracial distinctions and discrimination work based on "identity performance" during the post-Civil Rights era).

70. Jenkins, supra note 3.

71. See id. ("When asked whether the Cleary experience was different for [B]lack associates than for others, very few Cleary alums point to incidents of blatant racism—although there are a few such stories."); see also infra notes 72–86 and accompanying text.

The most obvious explanation was that, between 1989 and 1996, Cleary had simply failed to account for or consider how race and subtle, structural forces of racism, apart from the lack of a "critical mass," would shape the experiences and opportunities of its Black associates.[72] As the late Ned Stiles, a Cleary partner who served as the firm's Managing Partner from 1988 to 1999 and as Chair of the Diversity Committee of the New York City Bar Association from 1997 to 1999, speculated about the disappearing 1989 to 1996 Black associate cohort: "We all went into this naively thinking that if we bring a lot of minorities into the firm, some of them will make partner. . . . Now we see that it's more complicated than that."[73]

Other articulated reasons for the firm's retention failures with Black associates ranged from the "prejudice of low expectations," which too frequently led to second-rate or lousy assignments for Black associates;[74] to wrongful assumptions that Black associates were "interested in pro bono, but not corporate transactions";[75] to the pain of watching white associate peers consistently receive better and more meaningful assignments than Black associates received;[76] to the (nearly all white) partners' unconscious preferences to work with attorneys "who looked like them";[77] to Cleary's then-informal practice group structure and its lack of a centralized system for doling out associate assignments;[78] to the denial of partnership to one senior Black associate who was widely perceived as a superstar and shoo-in for partner by other Black associates.[79] Ironically—or perhaps, not

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72. See Jenkins, supra note 3.

73. Id. (internal quotation marks omitted) (quoting Ned Stiles).

74. See id. (quoting one of the Black associates from the cohort as saying, "You get lousy assignments, then they say that everything you do is wrong[,]" and as recalling "that 'you can't write' was a remark frequently directed toward [B]lack attorneys by white partners and senior associates" (internal quotation marks omitted) (quoting Roslyn Powell)).

75. Id. (internal quotation marks omitted) (quoting an anonymous Black former associate) ("The bottom line is that there is this negative presumption. . . . There's this view that we're not really interested in corporate work." (internal quotation marks omitted) (quoting an anonymous Black former Cleary associate)).

76. See id. (indicating that one lawyer asserted, "White associates were drafting documents and getting meaningful skills" while the "associates of color were doing organizing stuff, way past the time [in their careers] that they should have been" (alteration in original) (internal quotation marks omitted) (quoting an anonymous Black former Cleary lawyer)).

77. Id. ("But a large majority of them say that during their time at Cleary they experienced a subtle, often subconscious tendency by a virtually all-white partnership to favor those who looked like them.").

78. Id. ("Many of the [B]lack lawyers who passed through Cleary feel that this structure, though initially seductive, made for an unpredictable environment in which personal relationships and subjective judgments played an inordinate role. And that was often bad news, they say, for African-American associates.").

79. See id. (noting that the decision to deny partnership to Lynn Dummett "was especially disturbing to several [B]lack lawyers at the firm because they believe that white

ironically—the one Black associate who did make partner from the 1989-to-1996 cohort at Cleary, Carmen Amalia Corrales, was not known to be Black by partners or even other Black associates at the time of her ascension; other Black associates believed that Corrales identified as only Latina—and more specifically, as Cuban.[80] As Jenkins explained, Corrales had never denied being Black during her associate years, but she "did not necessarily publicize her African heritage" before her election to partnership.[81] Corrales told Jenkins, "Inadvertently, I did 'pass,' because when I came up for partner there were people who knew I was [B]lack and others who assumed I identified as Latina as some vague category."[82] Corrales's announcement of her race, followed by the firm's identification of her as a new Black partner on the NALP form, only added to the reasons why Black associates at Cleary later decided to leave the firm.[83] Many Black associates at Cleary were turned off by what they viewed as the firm's opportunistic glorification of its unknowing promotion of a Black woman to partner. As Judge Raymond J. Lohier, Jr., a member of the cohort who now sits on the United States Court of Appeals for the Second Circuit, proclaimed to Jenkins: "Cleary was quick to take advantage of it. . . . They put it on the NALP [National Association for Law Placement] form. Putting it out there."[84] Another Black associate claimed they heard a partner make the following comment after Corrales's election to partner: "Thank God we made Carmen partner, because she fits into every category."[85]

In the end, as one former Cleary associate summed up about Cleary's race problem, "It[] [was] not any one big thing. It[] [was] a million little things that add[ed] up."[86]

Today, associate recruitment and attrition among Black attorneys persist as problems for large law firms.[87] According to the NALP's diversity

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associates with lesser skills had made partner at Cleary both before and since"); id. ("Most [B]lack lawyers at Cleary also felt that Dummett was recruited into the firm as a lateral hire specifically in order to be groomed for partnership, a perception that made her rejection particularly jarring.").

80. See id. (quoting one Black former associate as stating, "When she was coming up for partner she was 'passing'" and that "[n]one of the people who have pigment at Cleary knew that she was [B]lack" (internal quotation marks omitted) (quoting a Black former associate)).

81. Id.

82. Id. (internal quotation marks omitted) (quoting Carmen Amalia Corrales).

83. See id.

84. Id. (alteration in original) (internal quotation marks omitted) (quoting Judge Lohier).

85. Id. (internal quotation marks omitted) (quoting a Black former Cleary associate).

86. Id. (internal quotation marks omitted) (quoting a Black former Cleary attorney).

87. See infra notes 88–91 and accompanying text. This problem is not limited to BigLaw firms in the United States. See Varsha Patel, Rankings Show Which Law Firms Have the Most Black Lawyers, But Retention Is Still a Huge Failing, Law.com (June 29, 2022),

and demographics data for 2023, only 6% of associates at firms with one hundred or more attorneys are Black, which is less than half the percentage of the U.S. Black population, 13.7%,[88] and 1.7% percentage points less than the 7.7% of Black students matriculated at U.S. law schools in 2023.[89] Furthermore, 30.73% of these large law firms have no Black associates at all, and 43.87% of the firms have no Black women associates.[90] For Black partners, the NALP data are even worse. Black partners comprise only 2.47% of large law firm partners, with 50.99% of such firms having no Black partners at all and 69.83% having no Black women partners.[91]

But even now, almost twenty-five years after the publication of *Losing the Race*, Cleary remains a leader on diversity, and specifically Black representation, among large law firms. In 2022, *The American Lawyer* ranked Cleary number five on a list of firms with the best diversity scores.[92] Additionally, a review of the largest law firms in the United Kingdom showed that Cleary was a distinct leader among its peers in terms of Black partner representation, with Black partners comprising 7% of partners in Cleary's United Kingdom office.[93] This percentage was notable when compared against other firms in the United Kingdom's top twenty-five, where the average number of Black attorneys—both partners and associates combined—was 4.1%.[94] But Cleary's attorney diversity across all of its offices globally is not substantially above its competitor firms. For example, in Cleary's coveted New York office, the percentage of Black attorneys, while above average, is still at only 7% of all associates

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https://www.law.com/international-edition/2022/06/29/rankings-show-which-law-firms-have-the-most-black-lawyers-but-retention-is-still-a-huge-failing/ (on file with the *Columbia Law Review*) (surveying large U.K. law firms and noting that "Black lawyers leave more quickly than their white counterparts").

88. QuickFacts: Race and Hispanic Origin, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/US/RHI225223 (on file with the *Columbia Law Review*) (last visited Oct. 26, 2024).

89. James Leipold, Incoming Class of 2023 Is the Most Diverse Ever, But More Work Remains, L. Sch. Admissions Council (Dec. 15, 2023), https://www.lsac.org/blog/incoming-class-2023-most-diverse-ever-more-work-remains [https://perma.cc/3PLP-G4X7]. In 2021 and 2022, 7.9% and 7.8% of matriculated law students nationwide identified as Black. Id.

90. See Women and People of Color in U.S. Law Firms, NALP Bulletin+, tbl.4 (Mar. 2024), https://www.nalp.org/0324research (on file with the *Columbia Law Review*); see also Debra Cassens Weiss, BigLaw Makes Diversity Gains; Which Firms Did Best?, ABA J. (June 1, 2022), https://www.abajournal.com/news/article/biglaw-makes-diversity-gains-which-firms-did-best [https://perma.cc/2XPF-VS93] [hereinafter Weiss, BigLaw Diversity Gains] (noting that American Lawyer's 2022 Diversity Scorecard indicated that Black lawyers constituted 3.9% of *all lawyers*, meaning both Black partners and associates, in large law firms and 2.3% of Black partners in law firms).

91. See Women and People of Color in U.S. Law Firms, supra note 90.

92. See Weiss, BigLaw Diversity Gains, supra note 90.

93. See Patel, supra note 87.

94. See id.

(compared to the 6% national average) and 2.6% of all partners (compared to the 2.47% national average).[95]

These problems of Black associate recruitment, attrition, and promotion in large law firms are further compounded by the fact that the percentage of Black lawyers in the United States has remained virtually the same over the past ten years. While the overall percentage of Asian lawyers has more than doubled in just two years—from 2.5% in 2021 to 6% in 2023—and the percentage of Latinx attorneys has grown by more than one-and-a-half times in the last decade—from 3.7% in 2013 to 6% in 2023 (still less than a third of the Latinx population in the United States (19.5%[96]) and less than the 9.4% of Latinx students who matriculated at U.S. law schools in both 2022 and 2023[97])—the percentage of Black attorneys has been stagnant, increasing by only 0.2%, from 4.8% in 2013 to just 5% in 2023.[98]

That said, large law firms also have a race problem when it comes to the percentages of Asian partners and Latinx associates and partners. While Asian American associates are well represented at large law firms, comprising 12.84% of all associates (when compared to the percentage of Asians in the United States, 6.4%,[99] and the percentage of Asian students in law schools, which was 9.6% in 2023[100]), they are underrepresented at the partnership level, with only 4.87% of all large law firm partners being of Asian descent.[101] Still, 24.16% of these large law firms have no Asian associates.[102] Like Black attorneys, Latinx attorneys are also underrepresented at both the associate and partnership levels in large law firms. Latinx associates comprise only 7.05% of all large law firm associates, with 31.97% of the firms having no Latinx associates and 45.35% having no Latina associates.[103] At the partnership level, the numbers are starker, with large law firms having only 3.01% of their partners identify as Latinx,

95. Cleary Gottlieb Steen & Hamilton LLP, NALP Directory (2024), https://www.nalpdirectory.com/student_login?redirectURL=%2Femployer_profile%3FFormID%3D16598%26QuestionTabID%3D34%26SearchCondJSON%3D (on file with the *Columbia Law Review*).

96. QuickFacts: Race and Hispanic Origin, supra note 88.

97. See Leipold, supra note 89. Nationally, the percentage of enrolled Latinx law students in 2021 was 8.8%. Id.

98. Profile of the Legal Profession 2024: Demographics, ABA, https://www.abalegalprofile.com/demographics.html [https://perma.cc/ZJ8Z-LMDD] (last visited Oct. 26, 2024).

99. Quickfacts: Race and Hispanic Origin, supra note 87.

100. Leipold, supra note 89. Nationally, the percentages of enrolled Asian law students in 2021 and 2022 were 8.1% and 8.9%, respectively. Id.

101. Women and People of Color in U.S. Law Firms, supra note 90.

102. Id.

103. Id.

with 45.32% of firms having no Latinx partners, and with 71.18% of firms having no Latina partners.[104]

B. *Why and How "Racial Discomfort" Makes the Race to the Top Uneven*

Like most of the Black associates interviewed for Jenkins's 2001 *Losing the Race* article in the *American Lawyer*, Woodson's subjects do not point to explicit racism as the reason for the challenges that they and other Black associates encountered on the path to—or away—from partnership at their firms.[105] Instead, they highlight what Woodson refers to as "certain social and cultural dynamics."[106] Woodson explains, "Their reports of their career difficulties generally involve[d] feelings of alienation, frustration, and isolation, rather than outright discrimination. These problems can be difficult to describe because the current terminology used to discuss race does not fully account for them."[107]

Noting that the barriers and hurdles that his Black interviewees identified are varied and numerous, Woodson explicates that the identified obstacles all share one social dynamic in common: a phenomenon he calls racial discomfort, meaning "the unease that Black professionals experience in White-dominated workplaces because of the isolation and institutional discrimination they encounter,"[108] all encompassed within the "racial conditions" and persistent racial stratification of broader U.S. society.

Woodson uncovers that large law firms' attrition and low partnership problems with respect to Black attorneys are not the result of the type of blatant racism that employment discrimination doctrine is narrowly designed to address—meaning "smoking gun," blanket, stereotypical perceptions of all Black people or explicit acts of racial bias.[109] Rather, just as one former Cleary associate asserted in *Losing the Race*, Woodson's Black professional subjects generally attribute the barriers and obstacles to their

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104. Id.

105. See Woodson, The Black Ceiling, supra note 1, at 3 (noting that the Black professionals he interviewed "perceive that Black professionals working at elite firms face unfair hindrances and burdens, but they consider these disadvantages to be distinct from racial bias").

106. Id.

107. Id. at 3–4.

108. Id. at 4.

109. See Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 Mich. L. Rev. 953, 957 (1993) (defining "*transparency* phenomenon" as "the tendency of [white people] not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific" and detailing why proving discrimination, which requires proof of intent, is difficult in a world where the transparency phenomenon prevails).

advancement in elite firms to "a million little things,"[110] including "everyday interactions, decisions, and social activities"; the culture of colorblindness; and the presumed "neutrality" of the professional pathway to partnership that has enabled racial inequities to persist within their firms.[111] Woodson describes this cumulative, daily-recurring experience as racial discomfort. To capture the complexity of racial discomfort and gauge its harmful impact on the careers of Black attorneys in law firms, he puts forward the interrelated concepts of social alienation and stigma anxiety.[112]

Woodson's explanation of social alienation echoes many of the themes that Black associates at Cleary articulated in rationalizing their individual departures and the departures of their peers in *Losing the Race*. On his analysis, the concept of social alienation links Black associates' isolation and marginalization to the corresponding limited access of Black associates to social capital fostered by the unspoken—and often unconscious—social and cultural preferences of white partners. In the workplace, those preferences steer white partners toward working and mentoring relationships with associates of common background "cultural and social tastes, interests, and experiences," typically white associates.[113]

By extension, Woodson's explanation of stigma anxiety discloses the keenly felt "uneasiness and trepidation" that many Black professionals experience in workplace situations where they perceive a looming "risk [or threat] of unfair treatment on the basis of race" rather than performance.[114] On this account, stigma anxiety frequently spurs Black professionals to engage in the workplace-specific practice of racial risk management. Woodson construes the adoption of "self-protective," racial risk management behaviors as notionally insulating from unfair treatment but often harm-inducing to professional competition and standing in the internal markets of law firms.[115]

II. UNDERSTANDING STRUCTURAL RACIAL DISCOMFORT

As Woodson makes clear throughout *The Black Ceiling*, "there is no single 'Black experience' at elite firms,"[116] nor is there a singular outcome

110. See Jenkins, supra note 3 (internal quotation marks omitted) (quoting a former Cleary attorney).

111. See Woodson, The Black Ceiling, supra note 1, at 4–5 (noting that Black attorneys often face "a series of burdens, barriers, and obstacles" throughout their careers).

112. Id. at 5.

113. Id.

114. Id.

115. Id. at 5–6. For a discussion of internal markets and unregulated competition within BigLaw firms, see Mitt Regan & Lisa H. Rohrer, BigLaw: Money and Meaning in the Modern Law Firm 137–45 (2021).

116. Woodson, The Black Ceiling, supra note 1, at 7.

for Black associates at large law firms. Among Woodson's subjects are Black attorneys who thrived in their firms, becoming partners and leaders within their organizations, and Black attorneys who floundered.[117] Regardless of their experiences and outcomes, nearly all of the interviewees in the Woodson study spoke about the dynamics that worked to systemically disadvantage Black associates in large law firms, even if the associates believed that they did not personally experience such dynamics or if they somehow managed to overcome those disadvantages.[118]

This Part details Woodson's findings about the ways in which racial discomfort—specifically social isolation, stigma anxiety, and racial risk management—work together to hinder Black associate progress in law firms. In so doing, it explains the contradictions in narratives about merit, opportunity, and inclusion that facilitate racial discomfort's role as "a mechanism through which White organizational spaces reinforce and reproduce racial inequality."[119]

A. *The Practices of Elite Law Firm Hiring, Promotion, and Retention*

To elucidate how elite law firm practices and workplace conditions produce racial disparities sufficient to create a "Black ceiling"[120] for partners[121]

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117. Id. at 7–10, 13, 34, 104, 138.

118. For example, Sandra, a Black attorney who eventually made partner, qualified her unique experience by noting: "I certainly don't want to come off as saying I think everything in law firms is fine, and if you work hard and pull yourself up by your bootstraps, you're going to make it. That's not what I am saying at all." Id. at 8 (internal quotation marks omitted) (quoting Sandra). Instead, she recognized others had very different experiences, stating: "I really think you could talk to somebody [else], and they would tell you, 'It was terrible. It was racist. No, I didn't feel any type of mentorship at all.'" Id. (alteration in original) (internal quotation marks omitted) (quoting Sandra).

119. Id. at 12.

120. Id. at 4. The Black BigLaw Pipeline notes: "While major law firms have made modest strides in the hiring and promotion of women and certain minority groups, studies have consistently shown that the number of Black attorneys in large law firms has either remained stagnant or declined over the last several years." About Us, The Black BigLaw Pipeline, https://blackbiglawpipeline.com/about [https://perma.cc/B2HS-BS9B] (last visited Oct. 26, 2024).

121. See Debra Cassens Weiss, 16 BigLaw Firms Have No Black Partners, Including Firm Ranked No. 1 For Diversity, ABA J. (May 28, 2021), https://www.abajournal.com/news/article/sixteen-larger-law-firms-have-no-black-partners-including-firm-ranked-no.-1-for-diversity [https://perma.cc/4XNZ-GJBY] ("Many law firms that ranked relatively well on the American Lawyer's 2021 Diversity Scorecard have no Black partners . . . ."); Vivia Chen, The Momentum for Black Lawyers Might Already Be Fading, Bloomberg L. (Jan. 20, 2023), https://news.bloomberglaw.com/business-and-practice/the-momentum-for-black-lawyers-might-already-be-fading (on file with the *Columbia Law Review*) ("[W]hen it comes to partnership, Black lawyers are still in the dumps. Their rate increased by just 0.1% from last year, accounting for a scant 2.3% of all partners, equity and non-equity."); Jackson, supra note 25 ("Black attorneys are—and have always been—significantly underrepresented in

and associates,[122] Woodson scrutinizes "the role of discretionary, subjective, and informal personnel decisions regarding assignments and assessments."[123] Moreover, he evaluates "the impact of the relational dimensions of professional careers" in elite firms, highlighting "the importance of relationships with mentors, sponsors, and peers, in disadvantaging Black professionals" and advantaging their white peers.[124] Those decisions and their relational contours mold the practices of elite law firm hiring, promotion, and retention.

To Woodson, the common, industry-wide practices of elite law firms are "distinctively White in ways that shape the everyday experiences and career trajectories of White and non-White workers alike."[125] By shaping ordinary experiences and career trajectories, the personnel processes operating within these racialized organizations "consistently perpetuate racial inequality."[126] The key to understanding the organizational structures and personnel processes of elite firms, and their claimed commitment to a diverse, equitable, and inclusive workplace ethos,[127] is the notion of racialized space—racialized space that is widely and mistakenly perceived by many white members of the workplace community as colorblind.

According to Woodson, "[e]lite firms are not raceless organizations."[128] Rather, measured in terms of institutional structure and cultural character, they embody racially inequitable and exclusionary

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the legal profession, more so than Latino and Asian American lawyers. Despite comprising more than 13% of the U.S. population, less than 2% of Big Law partners are Black . . . .").

122. See Lauren E. Skerrett, On Being a Black American Biglaw Associate, Above the Law (June 4, 2020), https://abovethelaw.com/2020/06/on-being-a-black-american-biglaw-associate/ [https://perma.cc/VA66-BWBY] ("[B]eing a [B]lack Biglaw associate is uniquely difficult. . . . There's no safe and polite way for the [B]lack junior associate to express frustrations to white leadership.").

123. Woodson, The Black Ceiling, supra note 1, at 14–15.

124. Id. at 15.

125. Id.

126. Id. at 12.

127. See Amanda O'Brien, 'Resources Are a Huge Issue': Law Firms Struggle to Fully Back DEI Goals, Am. Law. (July 10, 2024), https://www.law.com/americanlawyer/2024/07/10/resources-are-a-huge-issue-law-firms-struggle-to-fully-back-dei-goals/ (on file with the *Columbia Law Review*) ("Given the political stressors on DEI efforts at the moment, as well as overall law firm financial priorities, however, pursuing diversity is often easier said than done, with DEI professionals and consultants noting disconnects between law firm resource allocation and the diversity goals firms espouse."). At Davis Polk, the firm's stated commitment to DEI includes the aspiration that its lawyers "reflect the diversity of our communities, our clients and the world" and its pledge to "ensur[e] equity of opportunity within the firm" and to "continually foster a culture of inclusivity." See Diversity, Equity, and Inclusion, Davis Polk, https://www.davispolk.com/dei [https://perma.cc/CN9N-ZZ6T] (last visited Oct. 26, 2024).

128. Woodson, The Black Ceiling, supra note 1, at 17.

"White spaces."[129] Both symbolically and demographically, their workforces are white, especially the senior ranks of equity partners.[130] As a result, the social and cultural character of elite law firm spaces across departments and practice groups "heavily reflect the cultural preferences of White men."[131] These preferences include "seemingly frivolous" social matters like "pop culture references" and "nightlife preferences" that can help to facilitate the type of bonding that can evolve into career-advancing mentor-mentee or sponsor-mentee relationships.[132] Significantly, they also include preferences with even more tangible consequences, such as partialities for cultural familiarity that frequently work to provide white associates "with preferential access to work opportunities."[133] Together, such preferences have cumulative effects that make it difficult for Black associates to ever gain or regain a foothold on the path to partnership. To illustrate such effects, Woodson conveys a story that reveals how disparate assignment opportunities during just the first few weeks of an associate's career can have long-lasting damaging effects. Woodson explains:

> Samantha, an attorney, described suffering from such practices firsthand. She explained that during her first month at her law firm partners gave a new White associate 180 hours of billable work, while only giving her 60. This gap grew over time, quickly creating a significant disparity in the two associates' skills . . . .
>
> Samantha's account reveals just how quickly career-altering discrepancies can emerge. A mere two months after joining the firm, Samantha already had fallen significantly behind her peer. Although the two held the same job title and took home the same pay, because the White associate had received far greater opportunities to develop human capital, Samantha had become

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129. Id. at 18.

130. The National Association for Law Placement reports that "both women and partners of color remain substantially underrepresented within the partnership ranks" of law firms. See Women and People of Color in U.S. Law Firms, supra note 90 ("About 37% of offices reported no Asian partners, 45% had no Latinx partners, and 51% had no Black partners in 2023. Further . . . Black women and Latina women were each found in the partnership ranks of only about three out of ten offices."); Representation of Women and Minority Equity Partners Among Partners Little Changed in Recent Years, NALP Bulletin (Apr. 2019), https://www.nalp.org/0419research (on file with the *Columbia Law Review*) ("Equity partners in multi-tier law firms continue to be disproportionately white men. New figures from NALP show that in 2018, just one in five equity partners were women (19.6%) and only 6.6% were racial/ethnic minorities.").

131. Woodson, The Black Ceiling, supra note 1, at 18.

132. Id. at 73.

133. Id. at 27; see also id. at 71 (describing how the provision of work assignments can be shaped by preferences for shared cultural characteristics, including race, by detailing "the well-known 'airport' or 'airplane' standard of rapport and compatibility": "If I'm stuck in an airport for eight hours, are you someone I want to hang out with?" (internal quotation marks omitted) (quoting Rebecca, a consultant at a BigLaw firm)).

> objectively less qualified than her peer for future assignments . . . . In this way, initial racial disparities can become self-reinforcing.[134]

Furthermore, although alert to gradations and variations in the cultural preferences of professional services firms, Woodson maintains that the "cultural milieus" of elite firms are neither shared by nor "particularly attuned to those of Black professionals."[135] In this respect, he argues, the cultural practices of elite firms "center and 'normalize' certain aspects of White male professionals' experiences,"[136] rendering such experiences conventional and unremarkable. To gain entry and thrive in firm culture, Woodson observes that Black professionals must necessarily "adapt" to white spaces and "everyday situations" that may in sociopsychological effect "impede, exclude, and isolate" them.[137] Citing the racial dimensions of white spaces and the social stress[138] experienced by Black professionals in "seemingly innocuous everyday situations," he explains that this adaptive strategy "heightens both the salience of racial stigma and the disadvantages of racial cultural differences."[139] These disadvantages, in turn, hinder the efforts of Black professionals to compete in intrafirm tournaments for partnership-training tracks and major institutional clients.[140]

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134. Id. at 27.

135. Id. at 18–19.

136. Id. at 19.

137. Id.

138. See, e.g., Joanna M. Hobson, Myles D. Moody, Robert E. Sorge & Burel R. Goodin, The Neurobiology of Social Stress Resulting From Racism: Implications for Pain Disparities Among Racialized Minorities, 12 Neurobiology Pain 100101, Aug. 20, 2022, at 1, 2 (addressing the neurobiological underpinnings linking racism to social threat and linking social threats and physical pain); see also Eric Kyere & Sadaaki Fukui, Structural Racism, Workforce Diversity, and Mental Health Disparities: A Critical Review, 10 J. Racial & Ethnic Health Disparities 1985, 1991 (2023) (discussing "identity verification and non-verification processes" research to point out that "a lack of contextual/setting cues affirming individuals' identities may generate distressing emotions and reduce contextual engagement").

139. Woodson, The Black Ceiling, supra note 1, at 19.

140. On intrafirm tournament competition, see Marc Galanter & Thomas Palay, Tournament of Lawyers: The Transformation of the Big Law Firm 3, 99–102 (1991) (describing the "promotion-to-partner tournament" as the phenomenon in which large U.S. law firms "structure[] attorney compensation and incentives around a promotion contest, which has proven to be a simple device for fostering the efficient sharing of human capital"); Marc Galanter & William Henderson, The Elastic Tournament: A Second Transformation of the Big Law Firm, 60 Stan. L. Rev. 1867, 1877–78 (2008) (describing a new "elastic tournament" model of large law firm growth that "does not end with the promotion to partnership, but instead becomes 'perpetual' or unending as partners work longer hours, accept differential rewards, and fear de-equitization or early, forced retirement," producing "more competition and tension within the firm").

Indeed, Woodson describes several ways in which the defense mechanisms that Black professionals employ in response to racial stress and bias in workplaces can hinder the progress of Black associates. For instance, as Woodson explains, many of the Black professionals he interviewed experienced significant anxiety around attending and participating in work-related or non-work-related social gatherings with white colleagues, events where they could have been, and should have been, developing and furthering the types of personal relationships that often lead to more assignments, better work projects, and more mentors and sponsors. As one example, Woodson highlights how racial stress and worries about racially offensive comments that white colleagues, particularly intoxicated ones, might make at social gatherings have prevented some Black professionals from even attending social work events or have resulted in awkward interactions that do little to increase the chances of social bonding.[141] One interviewee's comments perfectly exemplify these disadvantages. This interviewee explained:

> I've gotten there many times where you walk into a party and nobody looks at you, and your mind is already set on what time am I getting out of here, what excuse am I going to give if anyone asks where I'm going, how am I going to get through this night, what can I make up to talk about. So from the first twenty seconds of some of the events I went to, I was already in defense mode. And that's just debilitating and painful and it just takes you away from the situation.[142]

Overall, as Woodson explicates, the end results of racial stress and discomfort are Black professionals who feel burnt out and drained "cognitively, emotionally, and physically," along with "racially disparate rates of self-elimination, as Black professionals choose to quit these firms in search of fairer work environments."[143]

Woodson also locates racial disadvantages in the "rules and procedures that elite firms have implemented to systematize personnel decisions" in hiring and promotion committees as well as in the "discretionary acts and decisions" of supervisory partners who control "access to valuable career capital."[144] Access of this sort determines the quality of work opportunities, the content of performance assessments, and the extent of social capital (e.g., sponsorship, mentorship, and friendships opportunities) afforded to Black professionals.[145] By detailing recurrent discrepancies—"minor actions, decisions, and omissions"—in the oversight and supervision of Black professionals relative to their white

141. Woodson, The Black Ceiling, supra note 1, at 53–54.

142. Id. at 53 (quoting Pernell, a Black investment banker).

143. Id. at 52–53.

144. Id. at 44.

145. Id.

peers,[146] Woodson exposes the "substantial burdens and obstacles" that encumber Black professionals under entrenched, long-accepted firm management systems.[147] Data show that such unequal burdens and obstacles "limit the careers of Black professionals decisively," and thereby "systemically perpetuate racial inequality" independent of "any acts of racial bias."[148]

Worse, such unequal burdens and obstacles can begin to crush the confidence of the Black associates suffering under them. Consequently, they cause significant psychological harm. As Agnes, one of Woodson's interviewees, described, witnessing the disparity between what she and a white male associate received ultimately "diminished her professional self-confidence."[149] Explaining her thoughts, she asserted, "Psychologically it affected me . . . . You start feeling like I can't do it or whatever. They don't have faith in me. And it almost transferred into me going, 'Well, *can* I do this?'"[150] Generally speaking, once an associate begins to question their ability to do the work, the writing is on the wall. Similarly vexing, as Woodson explains, such doubts can lead to destructive self-protective tactics like what he calls *racial reticence*, "a phenomenon in which Black people choose not to speak up or out because they worry that colleagues will assess them according to anti-Black stereotypes."[151] Racial reticence, in turn, can get interpreted by partners as a lack of interest or engagement in assigned projects, a lack of initiative, or even a lack of ability, which only "render[s] [the associate] more susceptible to being saddled with additional low quality work."[152] Racial reticence can even intensify the discomfort that a white work colleague already has about working with a Black associate, further exacerbating gaps in personal connection, which is essential to forming a sponsor-mentee or mentor-mentee relationship.[153]

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146. Id.; see also Alex B. Long, Employment Discrimination in the Legal Profession: A Question of Ethics?, 2016 U. Ill. L. Rev. 445, 449–52 (2016) ("[M]uch of the discrimination that takes place in today's workplace tends to involve more subtle forms of cognitive or unconscious bias. As Professor Susan Sturm famously postulated, workplace biases now often result from 'patterns of interaction, informal norms, networking, . . . mentoring, and evaluation . . . .'" (second and third alterations in original) (footnote omitted) (quoting Susan Sturm, Second-Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 469 (2001))).

147. Woodson, The Black Ceiling, supra note 1, at 44.

148. Id.

149. Id. at 28.

150. Id. (internal quotation marks omitted) (quoting Agnes, a Black attorney).

151. Id. at 47.

152. Id. at 55–59.

153. See id. at 36–37 ("Without such advocacy, even highly capable professionals can fare poorly.").

B. *The Form and Content of Elite Law Firm Institutional Culture*

Studying the form and content of elite law firm institutional culture illustrates the social dynamic of racial discomfort and the experience of social alienation and stigma anxiety for Black professionals in the workplace. Even when that experience evolves in a subtle and nuanced fashion, its effects prove disadvantaging, and its outcomes evince unfairness. As noted before, elite law firm institutional culture gives rise to the dynamic of racial discomfort, a byproduct of Black disadvantage and workplace inequality.[154] Woodson attributes racial discomfort to "broad social structures and processes, including segregated neighborhoods and schools, and the continued prevalence of racial bias in America."[155] Because of its sociocultural breadth, racial discomfort "can work in conjunction with racial bias, but it can also have an impact separate and apart from it."[156] Discomfort of this kind "occurs when racially disparate access to resources (including social capital) generates disparate outcomes independent of any racist motives."[157] On this sociocultural logic, the workplace conditions that subject Black professionals to the stress of racial discomfort "can produce racial disparities even if their White colleagues do not actually mistreat them on the basis of race."[158]

Here again, Woodson identifies the two types of racial discomfort affecting Black professionals in predominantly white workplaces: social alienation and stigma anxiety.[159] Conceptually, both social alienation and stigma anxiety expose the "subtle social dynamics"[160] and "sources of disadvantage"[161] of work environments in hindering "access to beneficial workplace relationships, premium work assignments, and professional esteem and accolades."[162] Both also illuminate the "racial difficulties" and "nuanced challenges" bound up in the "structural and social conditions" of firms.[163] Woodson sifts numerous accounts from Black professionals of "intense racial discomfort" stemming from "being constantly forced to navigate unfamiliar White-dominated social settings and precarious work situations in which they perceived themselves to be at risk of discrimination."[164] These recurrent accounts of social alienation and

154. See id. at 4–5.
155. Id. at 12–13.
156. Id. at 13.
157. Id.
158. Id.
159. See supra text accompanying notes 33–35.
160. Woodson, The Black Ceiling, supra note 1, at 125.
161. Id. at 13.
162. Id. at 126.
163. Id. at 125.
164. Id.

stigma anxiety convey "the isolation and frustration that many Black professionals experience because their backgrounds and preferences differ from those of their White colleagues."[165] In addition to isolation and frustration, the accounts also express a pervasive sense of "uneasiness and trepidation" associated with the expectation of unfair treatment.[166]

For Woodson, the interplay of social alienation and stigma anxiety within elite law firms marginalizes Black professionals as "outsiders" by impairing their relationships and rapport with white senior colleagues who control discretionary work assignments and subjective performance assessments and, furthermore, by impeding their access to the career capital reservoir of white mentorship and sponsorship.[167] That alienation- and anxiety-inducing interplay, Woodson laments, generates higher rates of attrition among Black professionals relative to their white counterparts and "contributes to inequitable employment outcomes," even if, as he emphasizes, the Black professionals "personally never suffer any acts of racial bias."[168] To grasp the complex workplace dynamics generating these inequitable employment outcomes and to understand how both plaintiff- and defendant-side employment discrimination litigation teams render those dynamics through racial bias and racial discomfort narratives in pleadings and at trial, this Book Review turns next to a close reading of the filings in the recent, high-profile case of *Cardwell v. Davis Polk & Wardwell LLP* in the U.S. District for the Southern District of New York.

III. PATTERNS IN RACIAL BIAS AND RACIAL DISCOMFORT LITIGATION

This Part extends Woodson's analysis of the experience of racial bias and racial discomfort for Black professionals in elite law firms to the contemporary employment discrimination case of *Cardwell v. Davis Polk & Wardwell LLP* filed by Kaloma Cardwell, a Black former fourth-year associate at Davis Polk, in 2019.[169] The *Cardwell* lawsuit is useful as a case study both because it is representative of a noteworthy increase in employment discrimination litigation against U.S. law firms[170] and because it is well-documented both in its pretrial and trial record. Culled from relevant pleadings, discovery materials, hearing and trial transcripts, orders, and even press releases, this applied analysis contrasts the stories

165. Id. at 126.

166. Id.

167. See id. at 61, 126, 128.

168. Id. at 126–27.

169. Complaint, supra note 46.

170. A recent LexisNexis search for "BigLaw" and "discrimination" performed in the category "U.S. Publications" ("articles from magazines, newspapers, newsletters, transcripts, and wires located in the United States") yielded 176 articles from 2015 to 2019 and 171 articles from 2020 to 2024, compared with 72 articles for the years 2010 to 2014 and 114 articles between 2000 and 2009.

of racial bias and discomfort presented by Cardwell's legal team with the purportedly race-neutral stories of professional and cultural incompetence offered by Davis Polk's legal team, a defense team staffed by litigators from the BigLaw firm Paul, Weiss.[171]

A. *Racial Bias and Racial Discomfort Narratives in Pleadings*

Woodson defines racial bias in terms of "the positive and negative assessments and feelings people have regarding racial groups and their members."[172] At elite firms, he acknowledges, "direct evidence of bias and discrimination is relatively rare."[173] Instead, "[d]iscrimination at these firms tends to be subtle and covert rather than blatant."[174] Often, he recounts, "the evidence of potential unfair treatment is at best highly circumstantial" in part because "White professionals usually hold their biases surreptitiously" and in part because "many may not even be aware of their own" closely-held biases.[175] Despite this causal ambiguity, "other conditions" prevalent at elite firms "convey to Black professionals that they should not expect to be treated fairly there."[176] For Black professionals, the typical conditions from which to draw inferences of bias include statistical, evidence-based racial disparity; public reputation for a toxic culture of racism; and private rumor of discrimination.[177]

Woodson notes that racial bias can manifest itself in terms of both positive and negative orientations toward others, whether individuals or groups. Positive orientations, he explains, rest on commonly shared traits, "such as when White people presume other White people to be more competent and trustworthy than people from other racial groups."[178]

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171. Investigating Paul, Weiss's all-white, overwhelmingly male "new partner class" announced in December 2018, the *New York Times* reported: "Paul, Weiss makes a point of recruiting law students of color, who are often attracted by the chance to work alongside [B]lack partners like [Jeh] Johnson and [Theodore] Wells." Noam Schreiber & John Eligon, Elite Law Firm's All-White Partner Class Stirs Debate on Diversity, N.Y. Times (Jan. 27, 2019), https://www.nytimes.com/2019/01/27/us/paul-weiss-partner-diversity-law-firm.html (on file with the *Columbia Law Review*). Yet, reportedly "many of these young lawyers described a complicated reality, in which young minorities are welcomed at the firm and then frequently sidelined." Id. Indeed, "[s]ome complained that people in power held them to different standards than their white male peers, or punished them more severely for mistakes." Id. Wells himself commented: "I fear that African-American partners in big law are becoming an endangered species." Id. (internal quotation marks omitted) (quoting Wells).

172. Woodson, The Black Ceiling, supra note 1, at 2–3.

173. Id. at 48.

174. Id. at 51.

175. Id.

176. Id. at 42.

177. See id. at 51.

178. Id. at 82. Woodson explains: "In employment settings, cultural traits serve as bridges of inclusion for some employees while creating boundaries that exclude others.

Negative orientations, by comparison, hinge on the presence of nonconforming cultural traits.[179] Racial bias arising out of negative orientations, he emphasizes, "can be subtle and need not involve any malicious intent."[180] In this sense, the implicit bias inhering in positive and negative orientations may be "subconscious and almost automatic."[181]

1. *Plaintiffs' Pleading Narratives: Racial Bias and Discrimination.* — In *Cardwell v. Davis Polk*,[182] Kaloma Cardwell and his legal team told a story of "racial discrimination and retaliation"[183] that interwove narratives of both explicit and implicit racial bias. The story unfolded in 2014 when Cardwell joined Davis Polk as one of four Black associates out of 120 total associates at the law firm, notably the firm's only Black male associate in the group.[184] In his initial and amended complaints,[185] Cardwell alleged that Davis Polk and seven of its individually-named partners subjected him to discriminatory treatment over the four-year period (September 2014 through August 2018) during which he worked as a corporate associate in the firm's Credit, Capital Markets, and Mergers & Acquisitions (M&A) practice groups.[186] For purposes of racial discrimination, Cardwell alleged that Davis Polk and its partners ignored his internal complaints of "racially based disparate treatment," limited his "professional development and opportunities by assigning [him] to fewer deals and assignments," and

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Shared cultural traits can provide access to valuable workplace social capital in the form of office friendships and relationships with sponsors and mentors." Id. at 69.

179. See id. at 82 ("Racial bias can also disadvantage individuals from underrepresented racial groups who have nonconforming cultural traits, for example when it leads White employers to discriminate against Black workers who wear distinctively Black hairstyles (e.g., dreadlocks and Afros).").

180. Id.

181. Id. at 82–83; see also Anthony G. Greenwald & Lisa Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 Cal. L. Rev. 945, 951 (2006) ("Implicit biases are discriminatory biases based on implicit attitudes or implicit stereotypes." (emphasis omitted)); Joan C. Williams, Rachel M. Korn & Sky Mihaylo, Beyond Implicit Bias: Litigating Race and Gender Employment Discrimination Using Data From the Workplace Experiences Survey, 72 Hastings L.J. 337, 348 (2020) ("Another basic tenet of the implicit bias consensus is that most bias, or most bias that matters, is unconscious.").

182. Prior to filing his initial complaint, on August 3, 2017, Cardwell filed a Charge of Discrimination with the EEOC against Davis Polk. On August 6, 2019, the EEOC issued Cardwell a Right to Sue letter. Complaint, supra note 46, at 2.

183. Id. at 1.

184. *Cardwell*, No. 1:19-cv-10256-GHW, 2020 WL 6274826, at *2 (S.D.N.Y. Oct. 24, 2020), ECF No. 78 (granting in part and denying in part defendants' second motion to dismiss).

185. Cardwell's initial eighty-six-page complaint was later supplemented by three amended complaints. See, e.g., Third Amended Verified Complaint With Jury Demand, *Cardwell*, No. 1:19-cv-10256-GHW, 2021 WL 4737628 (S.D.N.Y. filed Oct. 4, 2021), ECF No. 200.

186. Complaint, supra note 46, at 2–3. The Davis Polk 2014 associate class numbered more than 120 but contained only 4 Black members; Cardwell was the lone Black male. Id. at 3.

"effectively ceas[ed]" communication with him and, in doing so, deprived him of "billable work" and "mentorship opportunities."[187] Cardwell also alleged that Davis Polk and the seven named partner-defendants retaliated against him when he complained of their discriminatory conduct.[188] Specifically, he alleged that they threatened his employment and career, falsified his performance reviews and other inter-office communications "to distort the quality of [his] job performance and justify his firing," and, finally, terminated his employment.[189] Based on these allegations, Cardwell asserted seven counts of racial discrimination, unlawful retaliation, and harassment[190] under Title VII of the Civil Rights Act of 1964,[191] section 296 of the New York State Human Rights Law,[192] and section 8-107 of the New York City Administrative Code.[193] For relief, he requested compensatory damages, including compensation for emotional harm, psychological harm, and related physical impairments,[194] punitive damages, fees, and costs.[195]

Cardwell's allegations of racial discrimination and retaliation combined narratives of both explicit and implicit racial bias. From the outset, he described "a problem with bias and unconscious bias" at Davis Polk, citing "situations where Davis Polk attorneys were not making eye contact with or speaking to summer associates and junior associates of color in meetings."[196] He also described what he viewed as multiple "discriminatory interactions" and occasions when he was excluded from "email communications and meeting invitations" pertaining to deal team transactions within his practice group.[197] Referencing this "staffing" exclusion in conversation with the Diversity Committee and the Black Attorney Group at Davis Polk, Cardwell clarified that "he wasn't just talking about the *feeling* of being excluded," but addressing the actual, racially disparate exclusion of Black associates.[198] Further, Cardwell described reporting the "interpersonal and institutional discrimination"

187. Id. at 2.

188. Id.

189. Id.

190. Id. at 80–84.

191. See Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 241, 253–58 (codified at 42 U.S.C. §§ 2000e–2000e-3 (2018)).

192. See N.Y. Exec. Law § 296(1)(a), (h) (McKinney 2025).

193. See N.Y.C., N.Y., Admin. Code § 8-107(1)(a) (2025).

194. In June 2017, Cardwell informed Davis Polk "that he had experienced some health complications as a result of the Firm's treatment" of him. Complaint, supra note 46, at 76.

195. Id. at 84–85.

196. Id. at 15, 17.

197. Id. at 18–19.

198. Id. at 20.

experienced by Black associates to the former Davis Polk managing partner Thomas Reid.[199]

Taken as a whole, Cardwell's complaint-based, factual allegations are replete with detailed examples of partner-attributed, disparate deal team staffing and communication shunning ("radio silence"[200]) that practically "isolated and ignored" him.[201] Cardwell described these cumulative actions as a "constant barrage of direct and indirect forms of harassment and humiliation."[202] Coinciding with his increasing isolation, Cardwell reported that his billable hours declined precipitously in 2016 and 2017, commenting that his "workload continued to be almost completely nonexistent."[203] When the firm's promised institutional efforts, as described by Cardwell, to rectify ("fix[]"[204]) his continuing workload and staffing issues failed to come to fruition in late 2017, he filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission (EEOC) against Davis Polk.[205] In his EEOC complaint, Cardwell asserted that Davis Polk had discriminated and retaliated against him because of his race and because he "actively raised awareness and concerns regarding issues of racial bias and disparate outcomes."[206] On February 8, 2018, two Davis Polk partners informed Cardwell of the firm's decision to terminate him, effective in August 2018.[207]

In November 2019, three months after the EEOC issued a Right to Sue letter, Cardwell filed an employment discrimination complaint against Davis Polk in the U.S. District Court for the Southern District of New York.[208] In an early joint letter to U.S. District Court Judge Gregory H.

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199. Id. at 4, 22.

200. See id. at 75.

201. See id. at 35–52, 55–56 (recounting a series of negative interactions with Davis Polk partners and their failure to staff Cardwell on deals or provide opportunities for billable hours).

202. Id. at 56.

203. Id. at 57.

204. Id. at 67 (internal quotation marks omitted) (quoting Reid).

205. See id. at 2.

206. Id. at 76 (internal quotation marks omitted) (quoting the EEOC filing).

207. Id. at 78–79.

208. Id. at 2. In a series of decisions reached over the course of four years, the district court granted Davis Polk's motions to dismiss and for summary judgment as to Cardwell's discrimination claims. See, e.g., *Cardwell*, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *41 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (granting in part and denying in part defendants' motion for summary judgment). Subsequently, in January 2024, the district court conducted a jury trial on the surviving retaliation claims. David Thomas, Law Firm Davis Polk Faces Trial in Ex-Lawyer's Retaliation Lawsuit, Reuters (Jan. 8, 2024), https://www.reuters.com/legal/litigation/law-firm-davis-polk-faces-trial-ex-lawyers-retaliation-lawsuit-2024-01-08/ [https://perma.cc/7KUB-BK9A]. After three weeks of trial, on January 29, 2024, the jury returned a verdict in favor of the defendants. See Verdict Sheet, *Cardwell*, 1:19-cv-10256-GHW (S.D.N.Y. filed Jan. 29, 2024), ECF No. 388;

Woods (submitted in advance of a pretrial conference in December 2019), Cardwell's legal team reiterated its allegations that Davis Polk discriminated against Cardwell "on the basis of his race and retaliated against him" for raising "concerns about racial bias and disparate treatment" in "a series of interactions" with firm partners and personnel.[209] In the joint letter, Cardwell's legal team alleged that when Cardwell's "complaints regarding bias escalated," Davis Polk and the seven partners named as defendants in the suit retaliated by:

> engag[ing] in a systematic process of isolating [Cardwell] by depriving him of substantive deal work; reducing his opportunities for advancement by, among other actions, effectively cutting his billable hours to zero for months on end; and assigning him to 'mentors' who (i) refused to communicate with [him] and (ii) were central to the unlawful treatment [he] had experienced and complained about.[210]

In addition, Cardwell's legal team alleged that individual Davis Polk partners "explicitly threatened to alter [Cardwell's] standing and employment if [he] didn't drop his complaints and requests for investigations."[211]

2. *Defendant Firms' Pleading Narratives: Professional and Cultural Incompetence.* — In the same joint letter, the legal team representing Davis Polk and the seven named partners denied "each and every claim" set forth in Cardwell's complaint.[212] The Davis Polk defense team couched this denial in a nondiscrimination story showcasing narratives of Cardwell's professional and cultural incompetence. The story opened with an expression of frustrated institutional altruism and unfulfilled professional aspiration. Davis Polk, the team claimed, hired Cardwell "in the hopes that he would succeed and make the transition from law student to skilled attorney."[213]

Debra Cassens Weiss, Jurors Rule for Davis Polk in Former Associate's Retaliation Suit; Defense Called His Claims a 'Conspiracy Theory', ABA J. (Jan. 29, 2024), https://www.abajournal.com/news/article/jurors-rule-for-davis-polk-in-former-associates-retaliation-suit-defense-called-his-claims-a-conspiracy-theory [https://perma.cc/22LC-2UDL]. On February 28, 2024, Cardwell filed a notice of appeal. Notice of Appeal, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. filed Feb. 28, 2024), ECF No. 419. On October 15, 2024, Cardwell withdrew his appeal. See Patrick Dorrian, Black Ex-Davis Polk Associate Withdraws Appeal in Job Bias Suit, Bloomberg L. (Oct. 16, 2024), https://news.bloomberglaw.com/litigation/black-ex-davis-polk-associate-withdraws-appeal-in-job-bias-suit (on file with the *Columbia Law Review*).

209. Joint Letter to Judge Woods at 2, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. filed Dec. 13, 2019), ECF No. 25.

210. Id.

211. Id.

212. Id. at 2–3.

213. Id. at 2.

Regrettably, the team bemoaned, "[t]hese hopes were disappointed."[214] Weaving a narrative of irreparable professional incompetence and well-intentioned, remedial frustration, the defense team cited "significant efforts by the Firm to assist in [Cardwell's] professional development"—efforts stymied by Cardwell's asserted inability "to perform at the level expected of a Firm associate."[215]

Despite the fact that Cardwell had been vetted during the law school on-campus and call-back interview process, participated in the Davis Polk 2013 summer associate program following his second year of law school, and received a post–law school employment offer to join the firm as a first-year associate,[216] the defense team declared that his "work was notably uneven" from the very "outset."[217] Throughout the litigation, the defense team pressed this point, maintaining that, "by the end of 2016," only Cardwell's "second year at the Firm, senior lawyers in three different practice groups had observed—and documented—troubling problems with [Cardwell]'s performance."[218] Cardwell, according to the defense

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214. Id.

215. Id.; see also Defendants' Memorandum of Law in Support of Their Partial Motion to Dismiss at 2, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. filed Feb. 10, 2020), ECF No. 34 [hereinafter Defendants' Memorandum of Law] ("By the end of 2017, despite repeated efforts by the Firm to help him, [Cardwell]'s performance problems had not been cured, and it was clear that [he]—by then a fourth-year associate in the M&A group—was not performing at the level expected of a mid-level Davis Polk associate.").

216. Jane Wester, Ex-Davis Polk Associate Files Notice of Appeal to Second Circuit in Retaliation Lawsuit, N.Y. L.J. (Feb. 29, 2024), https://www.law.com/newyorklawjournal/2024/02/29/ex-davis-polk-associate-files-notice-of-appeal-to-second-circuit-in-retaliation-lawsuit/ (on file with the Columbia Law Review).

217. Joint Letter to Judge Woods, supra note 209, at 2. Such a remark seems surprising. After all, Davis Polk had evaluated Cardwell's work for over eight weeks during his employment as a summer associate in 2013 and had decided to hire him back for a full-time job as an associate, only to turn around and criticize his work from day one. See supra text accompanying notes 216–217. In many ways, this declaration casts the Davis Polk entry-level associate recruitment program into sharp relief, calling into question both its cultural fit criteria and its skill-based performance benchmarks for hiring. See Careers, Davis Polk & Wardwell LLP, https://www.davispolk.com/careers/overview [https://perma.cc/6CT6-TM93] (last visited Mar. 28, 2025) (advertising Davis Polk's "warm, inclusive culture" and reputation for "exceptional advice and representation" to prospective job applicants); cf. Assessing Law Firms: Culture, Clients, Compensation and Beyond, Yale L. Sch., https://law.yale.edu/student-life/career-development/students/career-pathways/law-firms/assessing-law-firms-culture-clients-compensation-and-beyond [https://perma.cc/FN52-LQPF] (last visited Jan. 17, 2025) (enumerating several criteria law students should consider when applying to law firms, including "the firm's corporate culture and fit," "the types of legal issues you engage in and the types of clients you serve," as well as the firm's ranking and reputation).

218. Joint Letter to Judge Woods, supra note 209, at 2; see also Defendants' Memorandum of Law, supra note 215, at 1–2 ("[Cardwell] failed to complete the work required; he neglected the tasks assigned to him; he failed to meet deadlines; he failed to respond to his supervisors . . . he failed to identify fundamental legal issues and came to

team, "neglected the tasks that were assigned to him," "missed deadlines," and produced "frequently substandard" work "marred by errors."[219] Furthermore, the team claimed, Cardwell "was often unresponsive to inquiries and requests from colleagues" and "made mistakes unacceptable for an associate at even the most junior level."[220] Critically distilled, the team pronounced Cardwell's work "deficient in multiple, serious respects," and his potential wanting, given his allegedly demonstrated inability to improve his performance, even when "repeatedly told by supervising attorneys and in multiple formal reviews that he needed to" do so "substantially."[221]

Amplifying the narrative of professional incompetence, the Davis Polk defense team contended that Cardwell's "shortcomings in performing his work" and "difficulties in consistently meeting the Firm's expectations became increasingly apparent as the tasks he was assigned became more demanding."[222] Unsurprisingly, the team continued, Cardwell's "record of poor performance came to be known within his assigned practice group, and, as a result of those performance shortfalls" and "continuing deficiencies," "the lawyers within that group found it increasingly difficult to staff him on the more challenging matters," in spite of his "more senior" associate status.[223] Poor performance, the team ventured, "explain[ed] [Cardwell's] frustration in not obtaining choice assignments" at the firm.[224]

Crediting Davis Polk senior management leaders and practice group members, the defense team claimed that the firm "told" Cardwell "consistent[ly]" in 2017 and in "prior performance reviews" that "he needed to make significant improvements to his performance."[225] To that end, the team insisted, Davis Polk "devoted significant, senior-level resources to helping [Cardwell] improve his performance" and in fact "offered" him "a variety of resources to address his performance problems, including personal coaching by several partners."[226] To "an extraordinary degree," the team intoned, "senior leadership . . . took an interest in [Cardwell]'s success and expended considerable personal efforts throughout 2017 to improve his professional development."[227]

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incorrect legal conclusions, including . . . introducing changes that . . . [were] adverse to the client's interests.").

219. Joint Letter to Judge Woods, supra note 211, at 2.

220. Id.

221. Id. at 2–3.

222. Id. at 3.

223. Id.

224. Id.

225. Id.

226. Id.

227. Id.

Yet, the defense team complained, Cardwell's "performance deficiencies persisted,"[228] notwithstanding "sustained" firm-wide efforts to give him "another chance to improve his work to the level expected of an associate at his seniority level," repeated "opportunities" and "second chances," and "meaningful real-time feedback" and even "attempted performance coaching."[229] At bottom, the defense team explained, Cardwell's "deficient performance made him unsuitable for the work expected of an associate of his seniority."[230] In this Davis Polk-told counterstory of Cardwell's professional incompetence, "[n]o discrimination or retaliation happened here."[231]

B. *Racial Bias and Racial Discomfort Narratives at Trial*

Long-discerning of the subtle machinations of implicit bias, Woodson nevertheless concedes that many Black professionals working at elite firms like Davis Polk "perceive" the "unfair hindrances," "burdens," and "disadvantages" that they face "to be distinct from racial bias."[232] He reports that their accounts of "career difficulties generally involve feelings of alienation, frustration, and isolation, rather than outright discrimination."[233] He underlines that such "nuanced problems" stand out as "a major source of Black disadvantage at elite firms," an institutionally hardened disadvantage "leading to a nearly impermeable 'Black ceiling.'"[234]

Recall that Woodson ties Black disadvantage and workplace inequality to the social dynamic of racial discomfort.[235] He defines racial discomfort in terms of "the unease that Black professionals experience in White dominated workplaces because of the isolation and institutional discrimination they encounter"—an unease operating "independently of any acts of racial bias."[236] Again, in this analysis, two types of racial discomfort affect Black professionals in the predominantly white workplaces of elite law firms: social alienation and stigma anxiety.

Once again, to Woodson, social alienation describes "the isolation and marginalization that many Black professionals experience because

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228. Id.

229. Id.

230. Id.

231. Id.

232. Woodson, The Black Ceiling, supra note 1, at 3.

233. Id.

234. Id. at 4. Woodson also considers how "race-based cultural dynamics operate in conjunction with gender- and class-based variations to further alienate some Black women and Black professionals from lower socioeconomic backgrounds." Id. at 15.

235. See id. at 4–5 (explaining "social alienation and stigma anxiety . . . affect Black professionals in predominantly White workplaces").

236. Id.

their backgrounds and cultural repertoires differ from those of their White colleagues."[237] Indirectly connected to racial bias, social alienation signals limited access to, and scant accumulation of, cultural capital. At elite firms, disparities in "cultural capital shape workplace interactions in ways that advantage many White professionals while excluding and further marginalizing many Black professionals."[238]

Additionally, for Woodson, stigma anxiety captures "the uneasiness and trepidation that many Black professionals develop in situations where they recognize that they may be at risk of unfair treatment on the basis of race."[239] A chief source of stigma anxiety for Black professionals, according to Woodson, derives from the perception of racially skewed performance-assessment procedures and outcomes as well as racial disparities in the quality of work assignments.[240] This perception fuels anxiety among Black professionals that they stand at "heightened risk of unfair treatment"[241] simply on the basis of racial difference. Fear of "stigma-based disapproval and mistreatment,"[242] he observes, engenders strategic, "self-protective behaviors"[243]—for example reticence and self-concealment[244]—as an adaptive kind of "racial risk management."[245] He cautions, however, that defensive, risk-mitigation, or workplace coping strategies may prove "counterproductive and self-limiting" for Black professionals.[246] In effect, such strategies may disadvantage Black professionals by curbing "their access to vital social capital" and reinforcing "their feeling of not belonging."[247] Compounding workplace disadvantage, Woodson explains, is the fact that Black associates' engagement in self-protective defense mechanisms like racial reticence are frequently "misinterpreted" by white

237. Id. at 5.

238. Id. at 69.

239. Id. at 5.

240. See id. at 29–34 (noting that "[n]egative reviews can doom [Black professionals] to lower-quality assignments and more intense scrutiny and may even lead to their being terminated").

241. Id. at 129.

242. Id. at 46.

243. Id. at 6.

244. Id. at 47. For Black professionals at elite firms, Woodson identifies three particularly disadvantaging effects of stigma anxiety: racial stress, racial reticence, and self-concealment. See id. He defines racial stress as "the psychological burden of constant vigilance against mistreatment." Id. He denotes racial reticence as "a phenomenon in which Black people choose not to speak up or out because they worry that colleagues will assess them according to anti-Black stereotypes." Id. And he defines self-concealment as a tendency among Black professionals to "opt not to share personal details that they believe might increase the salience of their racial identity and discredit them in the eyes of their colleagues." Id.

245. Id. at 5–6 (emphasis omitted).

246. Id. at 45.

247. Id. at 5–7, 45.

partners, senior professionals, and peers as evidence of "personal failings or professional deficiencies of individual Black professionals rather than as reactions to legitimate situational concerns" about workplace bias and discrimination.[248]

Rooted in the seemingly raceless or race-neutral dynamics of white organizational spaces, the experiences of social alienation and stigma anxiety captured by Woodson remain stubbornly "salient for members of underrepresented and stigmatized groups even in the absence of any direct manifestations of discrimination or racial animus."[249] For Woodson, the pervasiveness of these experiences "suggest[s] that racial discomfort accounts for at least some of the difficulties and disparities" that social scientists observe, document, and "typically attribute to racial bias."[250] To better understand the experience of racial discomfort for Black professionals in elite law firm workplaces, and its shifting relationship to racial bias, consider the social alienation and stigma anxiety narratives in *Cardwell v. Davis Polk*.

In both his administrative EEOC filings and federal litigation papers, Cardwell echoed and enlarged the racial discomfort narratives of social alienation and stigma anxiety described by Woodson. Cardwell's pleadings employed these narratives to illustrate an overall experience of racially disparate access to law firm mentoring and sponsorship resources and their accompanying cultural and social capital, a common experience for Black professionals in white-dominated workplaces. He described painfully awkward circumstances where senior white associates who were "'extremely gregarious' when interacting with white associates, partners, and clients" or who "turned into Leonardo DiCaprio when dealing with partners," failed to even make eye contact with him or other Black associates or to say hello to him when they were in the same room for fifteen minutes or more.[251] Cardwell further alleged, for example, that he was not included on "a congratulatory email concerning a deal on which he had completed substantial work";[252] that he was abruptly removed from deal teams;[253] and, more broadly, that he was "excluded from staffing-related opportunities."[254]

Additionally, Cardwell alleged that firm partners declined to respond to his expressed concerns over racially disparate treatment or even to

248. Id. at 46.

249. Id. at 3–5.

250. Id. at 129.

251. Cardwell v. Davis Polk & Wardwell LLP, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *3, *8 (S.D.N.Y. Feb. 16, 2023) (granting in part and denying in part defendants' motion for summary judgment).

252. Id. at *7.

253. See Complaint, supra note 46, at 41–43.

254. Id. at 20.

verbally communicate with him for "four to six months."[255] Overall, Cardwell and his legal team articulated narratives of professional isolation and marginalization, as well as institutionally inflicted unease and stress, that finally culminated in "health complications" for him.[256] In sum, Cardwell and his legal team alleged that "virtually all of Davis Polk's M&A partners isolated and ignored" him, a "routine daily" practice that Cardwell's team described as "a form of harassment and humiliation."[257] At the same time, Cardwell and his team reached beyond racial discomfort narratives of social alienation and stigma anxiety in bluntly alleging that the staffing and mentoring decisions of the all-white Davis Polk partners were "motivated" by race and demonstrated proof of "discriminatory and retaliatory treatment."[258]

Because the social dynamic of racial discomfort is a byproduct of Black disadvantage and workplace inequality and, moreover, attributable to discriminatory social structures and processes, it can work in conjunction with or independent of racial bias. Isolation of this sort increases the real and perceived risk of unfair treatment on the basis of race. For Cardwell, however, the dynamics of social alienation and stigma anxiety he described at Davis Polk appear nowhere subtle. On the contrary, taken as true, those social dynamics seem starkly displayed and highly disadvantaging, as they inhibited his access to beneficial workplace relationships and premium work assignments. Indeed, the workplace dynamics confronting Cardwell appeared to be isolating and frustrating, rather than nuanced in their marginalizing impact.

Furthermore, although Cardwell tried to advocate for himself by requesting that the firm offer training to help address the dynamic of racial discomfort and the pattern of uneven assignments and insufficient mentoring described by his legal team,[259] and although he remained eager for work and receptive to constructive feedback,[260] the responses of white leaders at the firm, however well-intentioned, did not seem to fully grasp

255. Id. at 45, 49–51, 60.

256. See id. at 76–79.

257. Id. at 55, 56, 63.

258. See id. at 18, 60, 65, 72.

259. See *Cardwell*, 2023 WL 2049800, at *3 (S.D.N.Y. Feb. 16, 2023), ECF No. 305. "On May 8, 2015, [Cardwell] emailed the Firm's Executive Director of Personnel regarding . . . an 'inter-office dynamic,' and recommended that the issue be addressed through the Firm's training for third-year associates . . . to 'remind[] our attorneys of the importance of saying hello and introducing themselves to attorneys they do not know.'" Id. (fourth alteration in original).

260. Id. at *10, *11 (describing how Sophia Hudson, a partner, said that Cardwell was "'behind' his class" and "extremely willing to hear the feedback and took it with grace" (quoting Hudson)); id. at *12 (noting that Hudson "commend[ed] Kaloma for his positive attitude . . . even when [she] gave him direct feedback" and that he not only bought a book that she referred to when she corrected him on his grammar in an email but also "bought [her] an updated version" (quoting Hudson)).

the racial dynamics that Cardwell and his team believed to be at play. Gauged by the tenor of their responses to Cardwell, firm leaders did not seem at all eager to allay or disrupt what Woodson has described as the unrecognized and frequently underappreciated burden that Black professionals must endure in adapting "to the[ir] office's [white] cultural milieu" and in having to "'change who they are' in accordance with the preferences and values of White colleagues."[261] Rather, the cumulative import of individual and institutional responses at Davis Polk left Cardwell, the only Black male associate in his associate class of 120 lawyers, to grapple with the racial discomfort by himself. For Davis Polk, the burden of overcoming racial discomfort fell to Cardwell, not the firm or its leadership. Cardwell, the firm's Executive Director of Personnel insisted, should "show[] them," meaning the partners and senior attorneys who did not make eye contact with him and who did not say hello to him even when he worked on a team with them, "how to live in a polite society (!)."[262] Cardwell, the Executive Director declared, should "introduce[]" himself![263] Echoing this facile analysis, Thomas Reid, the former managing partner of Davis Polk and a white man whom Cardwell himself described as well-intentioned in his personal journal, did not seem to consider whether Cardwell's proposed training for lawyers would have been helpful and instead explained to Cardwell that his and another Black associate's experiences with disparate treatment "were likely due to supervising lawyers not having adequate social skills."[264]

1. *Plaintiffs' Trial Narratives: Racial Bias and Discrimination.* — To further illustrate the contested narratives of professional and cultural competence in BigLaw racial bias and racial discomfort litigation, this Book Review briefly considers the stories told by the legal teams in the three-week jury trial of Cardwell's termination-predicated retaliation claims against Davis Polk and three of its seven initially-named individual partners in January 2024.[265] At both pretrial and trial proceedings, for example, Cardwell's attorney, David Jeffries, a solo practitioner, [266]

261. Woodson, The Black Ceiling, supra note 1, at 80.

262. *Cardwell*, 2023 WL 2049800, at *4 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (granting in part and denying in part defendants' motion for summary judgment).

263. Id.

264. See id. at *8.

265. The three-week civil jury trial featured more than *thirty* witnesses, including current and former Davis Polk partners and executives. The ten-person jury reached a verdict after little more than three hours of deliberation. See Jane Wester, Manhattan Jury Finds Davis Polk Not Liable for Retaliation Against Ex-Associate, N.Y. L.J. (Jan. 30, 2024), https://www.law.com/newyorklawjournal/2024/01/29/verdict-jury-finds-davis-polk-not-liable-for-retaliation-against-ex-associate/ (on file with the *Columbia Law Review*) [hereinafter Wester, Jury Finds Davis Polk Not Liable].

266. A former prosecutor from the Queens County District Attorney's Office, Jeffries is a solo practitioner specializing in criminal law and personal injury law. See David Jeffries Attorney At Law, Jeffries Law, https://www.jeffrieslaw.nyc/our-firm/ [https://perma.cc/

presented a story of covert, racial-bias-motivated conspiracy and retaliation.[267] During the initial pretrial conference Jeffries described Cardwell's "firsthand" experiences of "racial discriminatory behavior" within the firm, his repeated attempts to "vocalize" complaints of such racially discriminatory treatment to firm "management," and the ensuing "retaliation" mounted "deliberately and directly" by the firm against him.[268] In addition, during his opening statement at trial, Jeffries stated, "You're going to hear that this firm, these people—they used their knowledge, they used their intelligence to put in place a scheme that is going to be difficult to detect, a scheme that is going to allow them to avoid liability."[269] Recounting a conversation in 2017 between Cardwell and Reid in which Cardwell expressed concerns about the racial bias and discriminatory treatment exhibited by firm partners toward him, Jeffries added: "You're going to learn that he was told that if he didn't drop it, that if he didn't stop asking questions, he's going to be off the field."[270]

Relatedly, in his trial testimony, Cardwell pointed to a 2015 meeting of Davis Polk's Black Affinity Group ("BAG") where he publicly remarked that BAG members "were not being staffed similar to people in our class, similar to white associates."[271] Cardwell testified: "This was not an environment where we were just freely communicating our racial concerns or racial views . . . [BAG] members, including myself, were being very careful about how we were talking about what we had experienced at the firm."[272] He described the firm's "response" offered by Davis Polk's former director of professional development to be:

B8WE-UJZ9] (last visited Oct. 28, 2024). Jeffries graduated from Syracuse University and the Maurice A. Deane School of Law at Hofstra University. See id.

267. See, e.g., infra notes 268–270 and accompanying text.

268. Transcript of Dec. 20, 2019 Pretrial Conference at 4–5, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. Jan. 21, 2020), ECF No. 29.

269. Jane Wester, 'Poor Performance,' Not Retaliation, Led to Davis Polk Associate's Firing, Jeh Johnson Tells Jury, N.Y. L.J. (Jan. 8, 2024), https://www.law.com/newyorklawjournal/2024/01/08/poor-performance-not-retaliation-led-to-davis-polk-associates-firing-jeh-johnson-tells-jury/ (on file with the *Columbia Law Review*) [hereinafter Wester, 'Poor Performance,' Not Retaliation] (internal quotation marks omitted) (quoting Jeffries); see also Trial Transcript for Jan. 8, 2024, at 66, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. Jan. 30, 2024), ECF No. 389.

270. Wester, 'Poor Performance,' Not Retaliation, supra note 269 (internal quotation marks omitted) (quoting Jeffries); Trial Transcript for Jan. 8, 2024, supra note 269, at 72.

271. Jane Wester, Davis Polk Ex-Associate Kaloma Cardwell Recounts His Experience in Retaliation Trial Testimony, N.Y. L.J. (Jan. 22, 2024), https://www.law.com/newyorklawjournal/2024/01/22/davis-polk-ex-associate-kaloma-cardwell-recounts-his-experience-in-retaliation-trial-testimony/ (on file with the *Columbia Law Review*) [hereinafter Wester, Cardwell Recounts His Experience] (internal quotation marks omitted) (quoting Cardwell).

272. Id. (alterations in original) (internal quotation marks omitted) (quoting Cardwell).

> something along the lines of "Well, we understand that people may feel like they are being excluded or are not receiving the same opportunities" and I waited for her to finish speaking and then I said "Just to be clear, I'm not talking about a feeling of being excluded, I'm talking about our career opportunities being hindered."[273]

Cardwell added: "[I]t was very clear that we were talking about our experiences as [B]lack associates at the firm. It was very clear that I was talking about my experiences as a [B]lack associate at the firm."[274]

Cardwell also testified that he had "experienced sitting in an M&A practice group [meeting] for an hour, being one of the only Black attorneys in the room, sitting at a table that had six or seven other attorneys at it and experiencing absolutely no [one] looking at me for the entire hour-long meeting."[275] At the time, he noted, "I thought that what I experienced did not happen to everyone and it was not happening to everyone . . . ."[276]

On cross-examination, Bruce Birenboim, a Paul, Weiss partner and a member of the Davis Polk defense team, asked Cardwell: "Is it your testimony that certain of these Davis Polk partners lied to this jury when they came in and swore these were their *honestly held views of your performance*?"[277] Cardwell replied: "Are you asking me,

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273. Id. (internal quotation marks omitted) (quoting Cardwell).

274. Trial Transcript for Jan. 22, 2024, at 1811, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. Jan. 30, 2024), ECF No. 404 (quoting Cardwell).

275. Wester, Cardwell Recounts His Experience, supra note 271 (alterations in original) (internal quotation marks omitted) (quoting Cardwell). In an email to Cardwell, Davis Polk's former executive director attributed the absence of collegiality (e.g., "eye contact" or a "hello") at firm meetings to "lawyers being more socially awkward than most." Jane Wester, 'Strange . . . '?: Jurors at Davis Polk Retaliation Trial Read Firm's Internal Emails, N.Y. L.J. (Jan. 12, 2024), https://www.law.com/newyorklawjournal/2024/01/12/strange-jurors-at-davis-polk-bias-trial-read-firms-internal-emails/ (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Sharon Crane). She added: "Unfortunately that happens to everyone but it can be most uncomfortable for those who are junior or new or feel different." Id. (internal quotation marks omitted) (quoting Crane).

276. Wester, Cardwell Recounts His Experience, supra note 271 (internal quotation marks omitted) (quoting Cardwell). In testimony, Reid recalled discussing feelings of not being noticed with Cardwell and another Black former Davis Polk associate at a dinner in January 2016. See Trial Transcript for Jan. 18, 2024, at 1532, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. filed Feb. 7, 2022), ECF No. 403. Reid also affirmed that the "purpose of the dinner was to discuss diversity issues." Id. at 1533 (quoting Bruce Birenboim, a member of the Davis Polk defense team).

277. Jane Wester, Were Davis Polk Performance Reviews 'Ginned Up'?: Cardwell Cross-Examined in Retaliation Trial, N.Y. L.J. (Jan. 24, 2024), https://www.law.com/newyorklawjournal/2024/01/24/were-davis-polk-performance-reviews-ginned-up-cardwell-cross-examined-in-retaliation-trial/ (on file with the *Columbia Law Review*) (emphasis added) (internal quotation marks omitted) (quoting Birenboim).

do I believe they were not telling the truth? Absolutely, some of them."[278]

In closing argument, Jeffries asserted that Davis Polk partners terminated Cardwell to avoid "embarrassing" the firm in fending off an accusation of "discrimination" by a Black associate.[279] The goal of the firm, according to Jeffries, was "to get Mr. Cardwell out."[280]

2. *Defendant Firms' Trial Narratives: Professional and Cultural Incompetence*. — By contrast, in his opening statement, Jeh Johnson,[281] a partner at Paul, Weiss and the leader of Davis Polk's legal defense team, invoked standard BigLaw "up or out" narratives of performance-based competence, hard-earned merit, and cultural respectability.[282] At the outset, Johnson stated: "As sinister and as complicated and as conspiratorial as Mr. Jeffries and Mr. Cardwell would like to make it, it's actually pretty simple. The reason Kaloma Cardwell was asked to leave Davis Polk was his *poor job performance*."[283] Specifically referencing Cardwell's performance reviews, he commented: "Over time [Cardwell] could not demonstrate, as he was becoming more senior, that he could be

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278. Id. (internal quotation marks omitted) (quoting Cardwell); see also Trial Transcript for Jan. 24, 2024, at 2138, *Cardwell*, No. 1:19-cv-10256-GHW (S.D.N.Y. Jan. 30, 2024), ECF No. 409.

279. Jane Wester, Jeh Johnson Urges Jury to Reject 'Conspiracy Theory' in Davis Polk Retaliation Case, N.Y. L.J. (Jan. 26, 2024), https://www.law.com/newyorklawjournal/2024/01/26/jeh-johnson-urges-jury-to-reject-conspiracy-theory-in-davis-polk-retaliation-case/ (on file with the *Columbia Law Review*) [hereinafter Wester, Jeh Johnson Urges Jury] (internal quotation marks omitted) (quoting Jeffries).

280. Id. (internal quotation marks omitted) (quoting Jeffries).

281. A partner at Paul, Weiss, Johnson is a former Secretary of the U.S. Department of Homeland Security, General Counsel of the U.S. Department of Defense, General Counsel of the U.S. Air Force, and Assistant United States Attorney for the Southern District of New York. Jeh Charles Johnson, Paul, Weiss, https://www.paulweiss.com/professionals/partners-and-counsel/jeh-charles-johnson [https://perma.cc/9E2N-8TX6] (last visited Oct. 27, 2024). Johnson graduated from Morehouse College and Columbia Law School. Id. For more on the role of Morehouse College in shaping Johnson's generation of Black men, see generally Saida Grundy, Respectable: Politics and Paradox in Making the Morehouse Man (2022) (describing the "rhetoric of leadership and exceptionalism" articulated at Morehouse College and its fervent institutional "belief that Black advancement relies on the exemplary deeds of the race's accomplished men"); Sara Weissman, 'Respectable: Politics and Paradox in Making the Morehouse Man,' Inside Higher Ed (Oct. 16, 2022), https://www.insidehighered.com/news/2022/10/17/author-discusses-recent-book-morehouse-man [https://perma.cc/8JU7-J848] (interviewing Saida Grundy about "her recently published book on how societal ideas about Black masculinity shaped the values instilled in graduates as Morehouse College").

282. See Trial Transcript for Jan. 8, 2024, supra note 271, at 83 (quoting Johnson); see also Wester, 'Poor Performance,' Not Retaliation, supra note 269 (internal quotation marks omitted) (quoting Johnson).

283. Wester, 'Poor Performance,' Not Retaliation, supra note 269 (emphasis added) (internal quotation marks omitted) (quoting Johnson); see also Trial Transcript for Jan. 8, 2024, supra note 271, at 79 (emphasis added) (quoting Johnson).

trusted to handle the more *complex work* of a mid-level and then senior-level associate at the law firm . . . ."[284] Johnson added: "We will not enjoy rolling out the track record of the *poor performance* of a former associate in this public proceeding . . . ."[285]

Similar narratives of professional and cultural incompetence emerged throughout the trial in the testimony of Davis Polk's fact witnesses. To rebut racial bias and retaliation testimony, current and former Davis Polk partners repeated narratives underscoring Cardwell's professional incompetence. Reid, for example, testified that he was "very concerned" by Cardwell's "first set of reviews . . . there were matters being commented on . . . that if not fixed immediately, could be fatal to his career. Lack of responsiveness, lack of attention to detail."[286] Reid observed, "His performance was going down very fast . . . . He wasn't responding to criticisms he'd received before."[287] In his testimony, Reid acknowledged that Cardwell had complained of "being racialized," which Reid apparently understood to mean that Cardwell "was not getting work and being discriminated against because he was Black."[288] Likewise, John Bick, the former leader of the firm's M&A practice, testified that he "was giving Kaloma a lot more attention than anyone else in [his] career advisor program in 2017" but found that staffing him on M&A cases was "increasingly difficult" because "he was 'still operating as a first- or second-year, as a practical matter.'"[289]

Along similar lines, current and former Davis Polk executives reiterated narratives emphasizing Cardwell's cultural incompetence—his naive expectations, his lack of cooperation and teamwork, his cavalier attitude, his inappropriate body language, and his unwillingness to work long hours. For example, Davis Polk's former director of professional

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284. Wester, 'Poor Performance,' Not Retaliation, supra note 267 (emphasis added) (internal quotation marks omitted) (quoting Johnson); see also Trial Transcript for Jan. 8, 2024, supra note 271, at 79 (emphasis added) (quoting Johnson).

285. Wester, 'Poor Performance,' Not Retaliation, supra note 267 (emphasis added) (internal quotation marks omitted) (quoting Johnson); see also Trial Transcript for Jan. 8, 2024, supra note 271, at 100 (emphasis added) (quoting Johnson).

286. Jane Wester, 'Going Down Very Fast': Ex-Davis Polk Managing Partner Recounts Cardwell's Career Path in Retaliation Trial, N.Y. L.J. (Jan. 18, 2024), https://www.law.com/newyorklawjournal/2024/01/18/going-down-very-fast-ex-davis-polk-managing-partner-recounts-cardwells-career-path-in-retaliation-trial/ (on file with the *Columbia Law Review*) (second alteration in original) (internal quotation marks omitted) (quoting Reid).

287. Id. (internal quotation marks omitted) (quoting Reid).

288. Id. (internal quotation marks omitted) (quoting Reid).

289. Jane Wester, 'Increasingly Difficult': In Davis Polk Retaliation Trial Ex-M&A Leader Talks About Guiding Plaintiff, N.Y. L.J. (Jan. 16, 2024), https://www.law.com/newyorklawjournal/2024/01/16/increasingly-difficult-in-davis-polk-retaliation-trial-ex-ma-leader-talks-about-guiding-plaintiff/ (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Bick).

development testified, "It really surprised me that a first-year associate would expect to be included in every call and meeting in a large corporate transaction . . . ."[290] Moreover, Davis Polk's former professional development manager testified that Cardwell declined to accept an "assignment" outside of his practice group because "[h]e felt it would take away from his M&A work."[291] When she pressed Cardwell to "accept" the assignment, the manager explained, "He still didn't want to take it, which is when he mentioned something about 'Was I aware African-American men were generally disadvantaged in the law field.'"[292] Throughout the conversation, the manager noted, "Cardwell appeared 'cavalier' . . . and displayed relaxed body language."[293] Reportedly leaning back in the witness chair and raising her arms to demonstrate Cardwell's referenced "body language," she added: "I have never experienced that before . . . . The associates work extremely long hours—70, 80, occasionally 90 hours and everyone's a team. You need your people to be a team . . . . [T]hat is not the traditional response, especially as an associate at a big, very very good law firm."[294]

Recapitulating narratives of professional and cultural incompetence, in his closing argument, Johnson asserted: "It was not, 'Let's manufacture a negative review and drive him out of the firm . . . .'"[295] Instead, he insisted: "It was, 'Keep plugging away with him.'"[296] Johnson characterized Cardwell's claims as "various shifting conspiracy theories," discounting his allegations as "the kind of thing that you hear when there is simply no evidence."[297] Urging the jury to "disregard" the alleged "grand scheme to retaliate," Johnson pointed to a conflicting factual "trail of 3.5 years of evidence, reviews and testimony."[298] He concluded: "[W]e take no

290. Jane Wester, Jurors in Davis Polk & Wardwell Retaliation Trial See Ex-Associate's Early Efforts To 'Flag' Inclusion Issues at Firm, N.Y. L.J. (Jan. 11, 2024), https://www.law.com/newyorklawjournal/2024/01/11/jurors-in-davis-polk-discrimination-trial-see-ex-associates-early-efforts-to-flag-inclusion-issues-at-firm/ (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Renee DeSantis).

291. Jane Wester, 'Not the Traditional Response': Ex-Davis Polk Manager Says Ex-Associate Showed Unusual 'Cavalier' Attitude, N.Y. L.J. (Jan. 9, 2024), https://www.law.com/newyorklawjournal/2024/01/09/not-the-traditional-response-ex-davis-polk-manager-says-ex-associate-showed-unusual-cavalier-attitude/ (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Rocio Clausen).

292. Id. (internal quotation marks omitted) (quoting Clausen).

293. Id. (quoting Clausen).

294. Id. (internal quotation marks omitted) (quoting Clausen).

295. Jane Wester, Jury Finds Davis Polk Not Liable, supra note 265 (internal quotation marks omitted) (quoting Johnson).

296. Id. (internal quotations omitted) (quoting Johnson).

297. Wester, Jeh Johnson Urges Jury, supra note 279 (internal quotation marks omitted) (quoting Johnson).

298. Id. (internal quotation marks omitted) (quoting Johnson).

pleasure in outlining the poor performance of Kaloma Cardwell publicly in this courtroom."[299]

Also, in press releases, Davis Polk put forward race-neutral narratives of professional incompetence and fact-based, substandard performance. In an early press release, the firm stated: "Mr. Cardwell's termination had nothing to do with his race . . . . He was terminated for legitimate, non-discriminatory reasons."[300] A subsequent firm press release stated, "Once again, as our filing makes clear, all of the claims in this lawsuit are meritless. . . . If this lawsuit proceeds beyond this point, we will show that the remaining claims . . . are flatly contradicted by the facts and that Davis Polk, its management and partners acted entirely properly."[301] Taken together, the race-neutral narratives of professional and cultural incompetence tailored by Davis Polk's legal team to describe Cardwell's purportedly substandard performance and offered in defense of the firm in pretrial and trial proceedings and in press releases to the legal services industry and the media pose difficult remedial challenges for Woodson and others seeking to advance race-conscious norms of inclusion, equity, and partnership in large law firms and legal education. The next part assesses these challenges and considers strategies to overcome them.

IV. CAN THE RACE BE WON? REMEDIAL STRATEGIES FOR GREATER INCLUSION, EQUITY, AND PARTNERSHIP

This Part evaluates potential remedial strategies for addressing the damaging effects of racial discomfort for Black professionals in large law firms. It does so against the backdrop of new and renewed challenges to law firm DEI programs[302] following the U.S. Supreme Court's 2023

299. Id. (internal quotation marks omitted) (quoting Johnson).

300. Jack Newsham, Ex-Davis Polk Associate Alleges Discrimination, Says He Was Repeatedly Sidelined, N.Y. L.J. (Nov. 5, 2019), https://www.law.com/newyorklawjournal/2019/11/05/ex-davis-polk-associate-alleges-discrimination-says-he-was-repeatedly-sidelined/ [https://perma.cc/NU69-EH3T] (internal quotation marks omitted) (quoting Davis Polk & Wardwell).

301. David Thomas, Davis Polk Doubles Down Against Ex-Associate in Race Bias Suit, Citing 'Deficient' Performance, N.Y. L.J (May 1, 2020), https://www.law.com/newyorklawjournal/2020/05/01/davis-polk-doubles-down-against-ex-associate-in-race-bias-suit-citing-deficient-performance/ [https://perma.cc/Q8TK-PCHH] (internal quotation marks omitted) (quoting Davis Polk & Wardwell).

302. See Julian Mark & Taylor Telford, Conservative Activist Sues 2 Major Law Firms Over Diversity Fellowships, Wash. Post (Aug. 22, 2023), https://www.washingtonpost.com/business/2023/08/22/diversity-fellowships-lawsuit-affirmative-action-employment/ (on file with the *Columbia Law Review*) ("Since late June, when the Supreme Court [issued *SFFA*], there's been a rush of legal activity aimed at translating the court's race-blind stance to the employment sphere."); Julian Mark & Taylor Telford, Conservatives Are Suing Law Firms Over Diversity Efforts. It's Working., Wash. Post (Dec. 9, 2023), https://www.washingtonpost.com/business/2023/12/09/conservatives-sue-law-firms-dei/ (on file with the *Columbia Law Review*) ("Since August, the conservative American Alliance for Equal

decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*.[303] This evaluation entails the identification and assessment of innovative firm-wide policies that could help to mitigate the impact of racial discomfort on Black professionals and enable Black professionals to avoid (or overcome) racial disadvantage and discomfort in elite white social and institutional spaces and excel in their careers at large law firms.[304]

Section IV.A first details the proposals that Woodson offered for redressing the problems aligned with racial discomfort in *The Black Ceiling: How Race Still Matters in the Elite Workplace*. Section IV.B analyzes the efficacy of Woodson's proposals for structural and cultural change in law firms to

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Rights has sued or sent threatening letters to at least seven law firms, demanding that they shutter diversity fellowship programs, and claiming that they exclude qualified White and Asian students based on race."); John Roemer, Now What? Law Firms Are Getting a Wake-Up Call as Division Over Diversity Roils America's Cultural Debate, ABA J. (Dec. 1, 2023), https://www.abajournal.com/magazine/article/law-firms-are-getting-a-wake-up-call-as-division-over-diversity-roils-americas-cultural-debate (on file with the *Columbia Law Review*) (describing how SFFA has helped conservatives target law firm DEI programs); Taylor Telford, The Growing Battle Over Corporate Diversity Practices, Explained, Wash. Post (Oct. 2, 2023), https://www.washingtonpost.com/business/2023/10/02/corporate-diversity-inclusion-affirmative-action-ruling/ (on file with the *Columbia Law Review*) ("In recent months, a flurry of litigation has aimed to translate the court's race-blind stance on education to corporate diversity and inclusion policies.").

303. 143 S. Ct. 2141, 2175 (2023) (holding that "the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause"). Shortly after the Supreme Court published its decision in *SFFA*, then-ABA President Mary Smith stated:

> In the wake of the Supreme Court decision in Students for Fair Admissions v. Harvard, the legal profession needs to review its programs and identify ways to comply with the law while promoting diversity, inclusion and equity in the legal profession. Now is the time for law firms, law schools and employers to rededicate themselves to creating a more diverse and inclusive environment.

Press Release, ABA, Statement of ABA President Mary Smith RE: Diversity Programs at Law Firms (Aug. 25, 2023), https://www.americanbar.org/news/abanews/aba-news-archives/2023/08/statement-of-aba-president-re-diversity-programs-law-firms/ [https://perma.cc/ER2Y-HDF5]; see also Report and Recommendations of the New York State Bar Association Task Force on Advancing Diversity 4 (2023), https://nysba.org/app/uploads/2023/09/NYSBA-Report-on-Advancing-Diversity-9.20.23-FINAL-with-cover.pdf [https://perma.cc/5TT9-7R6A] (analyzing what steps can lawfully be taken to support DEI after *SFFA*); A Call to Action for DEI Success: An ABA Toolkit for Advancing DEI in the Workplace, ABA, https://www.americanbar.org/groups/diversity/resources/toolkits/dei-success-toolkit/ [https://perma.cc/FW8H-VCYM] (last visited Oct. 27, 2024) ("This Toolkit focuses on the NYSBA Report's recommendations for private employers, which are crucial for fostering inclusive work environments and advancing diversity, equity, and inclusion within the legal profession.").

304. See Woodson, The Black Ceiling, supra note 1, at 125–45 ("Although firms cannot prevent racial discomfort altogether, they can limit its impact. They can do so through a combination of policies that both provide more equitable treatment to all junior professionals and channel career capital opportunities to Black professionals in need of them.").

produce greater racial equity among Black and white associates, detailing the obstacles to implementation. It also offers additional recommendations for large law firms to employ to ameliorate the problems of disproportionate attrition.

A. *Ideas for Lifting the Black Ceiling*

In specifying the solutions to inequities created by racial discomfort, Woodson begins with an important concession: that large law firms alone cannot eradicate racial discomfort and the resulting disadvantages that plague Black associates on the path to partnership.[305] He explains:

> So long as racial segregation and discrimination remain prevalent in America, Black people will likely continue to experience racial discomfort in elite firms and other White institutions. . . . Eradicating racial discomfort would require addressing its root structural causes in societal segregation and inequality, which would entail massive public investments and policy changes of a magnitude that far exceeds the current political will. As a practical matter then, racial discomfort is likely here to stay.[306]

Woodson then proceeds to detail various steps that law firms, white professionals, Black associates and partners, and even universities can take to help minimize the negative effects of racial discomfort on Black professionals' performance within private firms.[307]

Despite his belief in the entrenchment of whiteness in the culture of large law firms and the permanence of racial discomfort for Black associates, Woodson maintains that law firms hold the power to at least limit the detrimental impacts of racial discomfort on Black associates' progress within large law firms.[308] He identifies five means by which large law firms can work to reduce the harms of racial discomfort: "(1) career capital monitoring, (2) enhanced mentorship programs and assignment procedures, (3) racial discomfort training, (4) accountability measures and incentives, and (5) discomfort-conscious programming."[309]

For Woodson, career capital monitoring involves the important step of collecting data, both quantitative and qualitative.[310] He argues that the timely accumulation and detailed charting of real-time information that identifies "emerging deficits and racial disparities in premium assignments and mentorship" may enable firms to reallocate "resources and

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305. Id. at 130–31.

306. Id.

307. See id. at 130–43.

308. Id. at 131.

309. Id.

310. See id. at 131–32.

opportunities to individual Black professionals who are at risk of negative career outcomes."[311] Similar risk-assessment and resource-intervention mechanisms, he notes, may be usefully applied by firm committees to track the fairness and sufficiency of "individual senior professionals' assignment, mentorship, and sponsorship actions" directed toward Black junior associates or partners.[312]

Because career capital opportunities are foundational, Woodson encourages firms to strengthen their mentorship programs and augment their assignment procedures.[313] Referencing evidence of continuing racial deficits and disparities in social capital prevalent among elite firms, he recommends the formal, organizational implementation of "targeted mentorship and sponsorship programs that specifically pair Black professionals with particularly supportive and powerful senior colleagues."[314]

To promote and improve vital, interracial mentorship and sponsorship relationships, Woodson urges the introduction of racial discomfort training "to cover social alienation and stigma anxiety."[315] The open embrace and integration of racial discomfort training, he contends, would enhance the cultural competency of white professionals, who would then be better equipped to more accurately interpret, understand, and empathize with the discomfort-driven behavior of Black associates, and therefore better positioned to properly assess the performance of Black associates.[316]

To encourage the shared development and appropriate distribution of social capital among Black and white peers, Woodson also recommends the adoption of more elaborate accountability measures and incentives.[317] Targeting senior white professionals, he endorses tailored financial and nonfinancial incentives to promote the support of Black colleagues by white partners and senior associates.[318] He links these incentives to the expansion of discomfort-conscious programming in the planning of formal firm-related events and informal firm-sponsored outings.[319] He

311. Id. at 131.

312. Id.

313. See id. at 132–33.

314. Id. at 132.

315. Id. at 134.

316. Id.

317. Id. at 131, 135–36.

318. Id. at 135.

319. Id. at 131, 136–37. Law firms might usefully draw upon the multicultural lawyering, cross-cultural competency, and racial equity practices forged by law school clinics in devising discomfort-conscious programming. See Mable Martin-Scott & Kimberly E. O'Leary, Multicultural Lawyering: Navigating the Cultures of the Law, the Lawyer, and the Client 5–39 (2021) (exploring the importance of multiculturalism in the legal profession); Deborah

asserts that discomfort-conscious programming, coupled with joint white and Black attendance at internal and external affinity group functions, may avoid the "inadvertent exclusionary impact" of some firm events and "appeal to a broader cross-section of firm employees."[320]

Woodson argues that actions by white professionals to voluntarily mentor and sponsor their Black colleagues is indispensable to law firm culture change. He presses for a bundle of "inclusive interactional habits," such as "engaging in more open-ended discussions," "initiating more frequent interactions and in-depth conversations," and "soliciting" more input on substantive and strategic matters.[321]

B. *Can the Black Ceiling Be Broken?*

Numerous challenges, however, await Woodson's proposals for enabling greater racial equity between Black and white associates' experiences in law firms. One such challenge is the broader societal backlash against race-conscious efforts to achieve equitable outcomes.[322] The backlash has been brewing for decades, but it recently picked up steam during the summer of 2023, when the United States Supreme Court issued the *SFFA* decision.[323] Since its release and publication, the *SFFA* decision has been used as a sledgehammer to broadly challenge and attack programs designed to achieve greater diversity, inclusion, and equity in traditionally white spaces, even though *SFFA* applies only to college and university admissions, not recruitment, hiring, DEI programs, or other considerations.[324] For example, *SFFA* has been weaponized to eliminate

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N. Archer, Introduction to the Symposium, 30 Clinical L. Rev. 1, 6 (2023) (encouraging clinicians to "address the intersectional harms and the mingling of public and private discrimination"); Kim Diana Connolly & Elisa Lackey, The Buffalo Model: An Approach to ABA Standard 303(c)'s Exploration of Bias, Cross-Cultural Competency, and Antiracism in Clinical & Experiential Law, 70 Wash. U. J.L. & Pol'y 71, 82 (2023)(discussing training clinical student in "cross-cultural work" and "trauma-informed lawyering").

320. Woodson, The Black Ceiling, supra note 1, at 136–37.

321. Id. at 137–38.

322. See Nino C. Monea, Next on the Chopping Block: The Litigation Campaign Against Race-Conscious Policies Beyond Affirmative Action in University Admissions, 33 B.U. Pub. Int. L.J. 1, 4–6, 10 (documenting the wave of lawsuits that have followed *SFFA*, mostly filed by "conservative and libertarian legal groups," that "challenge nearly every possible manifestation of affirmative action" in public life).

323. See id. at 6 (summarizing landmark Supreme Court cases curtailing the consideration of race college admissions beginning in 1978 and culminating in *SFFA* in 2023).

324. See Shakira D. Pleasant, Data's Demise and the Rhetoric of *SFFA*, 77 SMU L. Rev. 161, 183–84 (2024) ("Since the *SFFA* decision, Blum [president of Students for Fair Admissions] has taken steps vis-à-vis each organization to expand the Supreme Court's holding in *SFFA* into the areas of finance, employment, voting rights, and more institutions of higher learning."); see also Jonathan Feingold, After *SFFA v. Harvard*, Universities Must Hold the Line, Oxford Hum. Rts. Hub (Aug. 10, 2023), https://ohrh.law.ox.ac.uk/after-

DEI offices or change the offices' focus at colleges and universities across the country;[325] to eliminate departments and courses concerning race, gender, sexuality, gender identity, and other individual identity characteristics despite anti-DEI activists' purported desire for increasing and promoting intellectual diversity;[326] and even to abolish a venture capital funding program, which provided no more than twenty thousand dollars to individual Black women entrepreneurs.[327]

In the legal profession, these attacks on DEI have manifested in a number of ways, most notably through assaults on large, private law firms.[328] For example, in August 2023, just one month following the *SFFA* decision, the American Alliance for Equal Rights filed lawsuits challenging

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sffa-v-harvard-universities-must-hold-the-line/ [https://perma.cc/8MRJ-UAS3] ("*SFFA* applies to admissions decisions only.").

325. See, e.g., Katherine Mangan, 'A Slap in the Face': How UT-Austin Axed a DEI Division, Chron. Higher Ed. (June 27, 2024), https://www.chronicle.com/article/a-slap-in-the-face-how-ut-austin-axed-a-dei-division [https://perma.cc/7ML5-KFB7] (noting that forty-nine staffers at UT-Austin were fired when a DEI division was eliminated); see also Alecia Taylor, 3 Ways That Anti-DEI Efforts Are Changing How Colleges Operate, Chron. Higher Ed. (Jan. 18, 2024), https://www.chronicle.com/article/3-ways-that-anti-dei-efforts-are-changing-how-colleges-operate?sra=true [https://perma.cc/7GZT-98U9] ("[R]estrictions on DEI efforts have taken effect in five states; several governors have also issued executive orders that direct colleges to review or reshape diversity efforts. Some institutions have acted without official state directives."). For example, the University of Houston closed its LGBTQ+ Resource Center on August 31, 2023. Id. Now, students seeking support as part of the LGBTQIA+ community are instead referred to places like the counseling center. Id.

326. See, e.g., Emma Pettit, New College of Florida's Board Starts to Dismantle Gender-Studies Program, Chron. Higher Ed. (Aug. 10, 2023), https://www.chronicle.com/article/new-college-of-floridas-board-starts-to-dismantle-gender-studies-program (on file with the *Columbia Law Review*) (noting how the New College of Florida has experienced an institutional overhaul, with Governor Ron DeSantis appointing five new like-minded Trustees to the Board and reporting that the Board voted to begin shutting down the college's gender studies program in August 2023).

327. Jonathan Franklin, A Venture Capital Grant Program for Black Women Officially Ends After Court Ruling, NPR (Sept. 11, 2024), https://www.npr.org/2024/09/11/nx-s1-5108729/fearless-fund-atlanta-grant-program-shut-down-lawsuit [https://perma.cc/XJ4Y-7EQQ]; see also Paula C. Johnson, Education Access & Opportunity: An Introduction, 74 Syracuse L. Rev. 885, 894 n.29 (2024) (stating that "the effect of the *SFFA* decision has far-ranging ramifications beyond the classroom such as the lawsuits against the Fearless Fund, a venture capital fund designated for Black women, who receive an infinitesimal amount of venture capital funding from traditional sources"); Shelby A.D. Moore, Moving Forward While Reaching Back: How Private Law Schools Can Help Public Law Schools Navigate Diversity, Equity, Inclusion, and Access in Challenging Times, 55 U. Tol. L. Rev. 241, 261 n.201 (2024) (discussing the litigation attack against the Fearless Fund).

328. See Tatyana Monnay, Law Firms Embrace Roadmap Against Diversity Program Attacks, Bloomberg L. (Oct. 2, 2023), https://news.bloomberglaw.com/business-and-practice/law-firms-embrace-roadmap-against-diversity-program-attacks (on file with the *Columbia Law Review*) (describing how "five Republican state attorneys general" and U.S. Senator Tom Cotton sent BigLaw firms letters about their DEI programs after *SFFA*).

the diversity hiring programs for Morrison Foerster and Perkins Coie,[329] despite the fact that 56.7% of the associates and 77.3% percent of the partners at Morrison Foerster are white[330] and 62.0% of the associates and 82.1% of partners at Perkins Coie are white.[331] These aggressive litigation tactics by the American Alliance for Equal Rights proved to be successful, as both firms, even after one initially vowed to fight back, ultimately decided to alter their programs.[332] Similarly, a group called Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) recently and anonymously filed a reverse discrimination lawsuit, viciously attacking current and future Black faculty at Northwestern University Pritzker School of Law with misrepresentations and racist stereotypes, as well as misleading statements about the workings of the faculty hiring process.[333] FASORP also followed up its lawsuit with threatening emails to law school deans and faculties, clearly hoping to deter any efforts by law schools to diversify their faculties.[334]

The main challenges to breaking the Black ceiling at law firms, however, relate to the economics of law firms, the lack of financial incentives for firms to insist upon change and for individual attorneys to

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329. Id.

330. See 2023 Vault Law Diversity Survey, Morrison & Foerster LLP 4–5, https://media2.vault.com/14349342/morrison-foerster-with-ad.pdf [https://perma.cc/3PQY-WCX2] (last visited Oct. 27, 2024).

331. See 2023 Vault Law Diversity Survey, Perkins Coie LLP 3–4, https://media2.vault.com/14349412/perkins-coie.pdf [https://perma.cc/82P6-RY43] (last visited Oct 27, 2024).

332. See Tatyana Monnay, Gibson Dunn Changes Diversity Award Criteria as Firms Face Suits, Bloomberg L. (Sept. 13, 2023), https://news.bloomberglaw.com/business-and-practice/gibson-dunn-changes-diversity-award-criteria-as-firms-face-suits (on file with the *Columbia Law Review*) (noting that Gibson, Dunn & Crutcher changed the criteria for its diversity and inclusion scholarship to focus on students "who have demonstrated resilience and excellence on their path toward a career in law," removing prior "programming language . . . mentioning historical underrepresentation" (internal quotation marks omitted) (quoting Gibson, Dunn & Crutcher)).

333. See Karen Sloan, Northwestern Law School Sued for Discrimination Against White Men in Faculty Hiring, Reuters (July 3, 2024), https://www.reuters.com/legal/legalindustry/northwestern-law-school-sued-discrimination-against-white-men-faculty-hiring-2024-07-02/ (on file with the *Columbia Law Review*) (alleging that the law school "refuses to even consider hiring white male faculty candidates with stellar credentials, while it eagerly hires candidates with mediocre and undistinguished records who check the proper diversity boxes" (internal quotation marks omitted) (quoting Complaint at 4, Fac., Alumni, & Students Opposed to Racial Preferences (FASORP) v. Nw. Univ., No. 1:24-cv-05558 (N.D. Ill. filed July 2, 2024)).

334. See, e.g., Email from FASORP to Angela Onwuachi-Willig, Dean & Ryan Roth Gallo Professor of L., Bos. Univ. Sch. of L. (July 2, 2024) (on file with the *Columbia Law Review*) (announcing that "FASORP will be suing other universities . . . that deploy these illegal discriminatory practices" and demanding that "every one of your university's faculty members, employees, and students . . . preserve and retain all [relevant] communications, documents, data, and electronically stored information").

alter their behavior, the lack of time for busy partners and senior associates in large corporate law firms to make any and all necessary changes to the firm's culture and practices, and the invisibility of racial advantage to white partners, many of whom, as activist and scholar Peggy McIntosh has taught us, are "'meant' to remain oblivious" to their racial privileges.[335] For example, while Woodson's recommendation that firms provide training on racial discomfort for white partners and senior associates—or frankly for all attorneys in the firm—is a required foundational step for addressing the problem, such training, unless it is regularly provided and comes with true action items and accountability each week, is unlikely to have cross-cultural impact within the firms. Systemic racial disadvantage persists in our society precisely because of the transparency phenomenon,[336] which makes it harder for white individuals, including those who are well-meaning, to understand and see the challenges facing Black associates without a commitment to engaging in serious and intentional reflection and action every single day. Systemic racial disadvantage also persists because of racial privilege, which gives white partners and white senior associates at large law firms the choice to ignore the ways in which racism operates invisibly and structurally against certain groups around them without any seeming harm to the white lawyers and their lives.[337]

Overall, it is not that Woodson's suggestions are unhelpful. They are both helpful and excellent. After all, firm-wide education and training about the racial discomfort (both social alienation and stigma anxiety) that Black associates generally experience in large law firms and about the self-protective defense mechanisms, like racial reticence and concealment, that Black associates frequently employ to guard against racism might have helped to ease the pains that Cardwell endured during his four years at Davis Polk. A review and analysis of the partner reviews used for Cardwell's annual performance evaluations illustrate as much. For instance, although the majority of the partner reviews following Cardwell's first rotation at the firm were neutral, one partner critiqued Cardwell for not being more

335. Peggy McIntosh, White Privilege: Unpacking the Invisible Knapsack, Peace & Freedom, July/Aug. 1989, at 1, 1, 3, https://psychology.umbc.edu/wp-content/uploads/sites/57/2016/10/White-Privilege_McIntosh-1989.pdf [https://perma.cc/4F2P-PERG] (discussing white people's "obliviousness about white advantage" and describing white privilege as "an invisible package of unearned assets which [they] can count on cashing in each day, but about which [they] [were] 'meant' to remain oblivious").

336. See supra note 109 and accompanying text.

337. See Angela Onwuachi-Willig, Moving Beyond Statements and Good Intentions in U.S. Law Schools, 75 Ala. L. Rev. 691, 704 (2024) (arguing "structural racism tends to be invisible to those who benefit from it the most, meaning Whites, and may even be invisible to those who are disadvantaged by it, for example, Blacks, because it is simply a feature of the social, economic, and political systems that we exist in").

proactive in asking questions before he began work on a project.[338] Although the critique appears fair and thoughtful, it also is true that education and training about stigma anxiety, meaning Black associates' apprehensiveness "about the discrimination that might await them,"[339] and "racial reticence, which occurs when Black professionals silence themselves to attempt to limit their exposure to discrimination,"[340] might have helped this specific reviewing partner understand the reasons why Cardwell (or any Black associate) might have made the counterproductive decision to hesitate in asking more questions. These reasons include the "[f]ear of [b]eing [j]udged [i]ncompetent" and, specifically, the fear of confirming stereotypes of Black incompetence, that is, if Cardwell had asked a question perceived to be too simple.[341] With such knowledge, the reviewing partner might have more proactively worked to build a deeper rapport and trust with Cardwell to make him less racially reticent and more comfortable in asking clarifying questions.

Similarly, training on the cumulative impacts of racial discomfort and racial stress might have assisted certain Davis Polk partners in understanding why Cardwell's confidence may not have been very high after a few years at the firm. Following Cardwell's third rotation, one partner offered a supportive review that nevertheless lamented Carwell's alleged lack of confidence. The review read in relevant part:

> Relatedly and I am sure this comes with time[], Kaloma would benefit from focusing on his confidence. There have been a few instances when we were on the phone with a client when I would ask him a question, and he equivocated in his answer, which made me feel like maybe he did not know the answer. In every instance, [h]is initial answer (although with equivocation) was correct. So he had a good handle on the matters that I had delegated to him, but sometimes he did not convey that because I think he lacks confidence at times. I believe that with time and the right training / mentorship, Kaloma can absolutely gain that confidence.[342]

Yet, as Woodson explained in his book, one of the most harmful effects of racial discomfort, assignment disparities, and racial stress at law

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338. See Cardwell v. Davis Polk & Wardwell LLP, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *3 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (noting that "[a]ll six" of Cardwell's initial performance reviews rated him as "performing 'with' his class").

339. Woodson, The Black Ceiling, supra note 1, at 48.

340. Id. at 55.

341. See id. at 49, 55.

342. *Cardwell*, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *13 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (alterations in original) (internal quotation marks omitted) (quoting one of Cardwell's reviews) (granting in part and denying in part defendants' motion for summary judgment).

firms is their impact on Black professionals' self-confidence and the self-doubt that may emerge and grow as a result of senior colleagues' and partners' treatment, particularly disparate treatment, of them. In the *Cardwell* case, after nearly three years of receiving disparate assignments from white peers, enduring awkward cross-racial interactions, and more, it is not surprising that the end result was Cardwell's diminished confidence even though his instincts and intuition were, as the partner noted, consistently right. With training on racial discomfort, however, rather than seeing such tentativeness as a personal deficiency of Cardwell's, the reviewing partner might have understood why his confidence was diminished and also might have understood that Cardwell's hesitancy was the predictable result of an alienating work environment. With such an understanding, this generally supportive partner might have instead chosen to engage with Cardwell in ways that could have counteracted these institutional effects by bolstering, rather than dampening, his confidence.

Still, Woodson's suggestions for racial discomfort training and greater accountability for mentoring and sponsoring Black associates are unlikely to be a formidable match against the broader forces of structural racism and a persistent culture of colorblindness that routinely results in the neglect and denial of the experiences of people of color. Furthermore, in an environment in which cultural practices and biases are driving inequity and in which attorneys are overworked and striving to bill as many six-minute increments as possible, white partners and senior associates are unlikely to put in the daily intentional effort that is required to overcome decades of lived obliviousness to racial discomfort. Indeed, the economic incentives for firms to even encourage actions to combat the effects of racial discomfort are low given the ease with which partners and whole departments, along with clients, can migrate laterally from one firm to another in today's market.[343] Also, incentives are low for partners to invest in time-intensive mentoring for any associates, but particularly for associates whose unique experiences are unfamiliar to them. In the end, as we have learned from Professor Derrick Bell's interest convergence theory,[344] real changes that benefit people of color in law firms are unlikely to occur unless the interests of people of color align with those of the white decisionmaking elite. In this instance, the interests of equity partners and Black associates must converge, which is an unlikely prospect.

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343. See, e.g., Jack Thorlin, Racial Diversity and Law Firm Economics, 76 Ark. L. Rev. 131, 135–39 (2023) (discussing how the "race to the bottom" inhibits increasing racial diversity (internal quotation marks omitted)).

344. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 523–34 (1980) (arguing the Supreme Court's decision in *Brown* resulted from a convergence of the interests of white people who were "able to see the economic and political advances at home and abroad that would follow abandonment of segregation" with people who morally opposed segregation).

Apart from Woodson's suggestions for achieving improved racial climates and better cross-racial partner-associate relationships in law firms, several other proposals are needed to improve Black associates' chances of winning the tournament for partnership. One major proposal includes forming a "Diversity Leadership Committee," as opposed to a Diversity Committee, to "set [a] strategy . . . [that] work[s] with all partners to strengthen and promote . . . excellent conditions for recruiting" and to lay out in the firm's plans precisely how it cannot thrive and succeed without engaging DEI appropriately.[345] BigLaw firm Latham & Watkins took this path several years ago, as a means of "signaling that everyone at the firm has a role to play in advancing diversity" and that diversity is central to the firm's overall strategy.[346] Today, Latham has one of the largest groups of Black partners worldwide.[347]

But the most important action that large law firms can take to address what Woodson identifies as racial discomfort for Black associates is to tackle, head on, the many forms of white racial discomfort[348] that continually work to the disadvantage of Black associates at law firms. One such form of white racial discomfort is the fear that many white partners and senior associates feel about giving constructive feedback to Black associates on their work. The comparatively inferior quality of feedback that Black associates receive from white partners occurs precisely because of white partners' own racial discomfort. Not only are Black associates disadvantaged by explicit and implicit biases in how partners assess their work—as shown by the famous Nextions study on partners' assessments of the same exact brief from a "white" and "African American" associate[349]—

345. See Katrina Dewey, Black Brilliance: How Latham & Watkins Built an Extraordinary Network of Top Black Lawyers, Lawdragon (May 31, 2024), https://www.lawdragon.com/news-features/2024-05-31-black-brilliance-how-lathamwatkins-built-an-extraordinary-network-of-top-black-lawyers [https://perma.cc/5S63-S8C6].

346. See id.

347. Id.

348. For more on the social science of *racist stereotype threat*, one type of white racial discomfort, see Kim Shayo Buchanan & Phillip Atiba Goff, Racist Stereotype Threat in Civil Rights Law, 67 UCLA L. Rev. 316, 325–38 (2020) (defining "racist stereotype threat" as a concern of white people in racially fraught situations that they may be stereotyped as racist, which in turn triggers them to behave in racially disparate ways).

349. See Arin N. Reeves, Nextions, Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills 2–5 (2014), https://nextions.com/wp-content/uploads/2022/06/2014-04-01-14-Written-in-Black-and-White-Yellow-Paper-Series-ANR-Differences-Based-on-Race-Implicit-Bias-Bias-Breakers-Effective-Recruiting-and-Hiring-.pdf [https://perma.cc/LT8T-78SQ]. In this study, researchers gave sixty different law firm partners a memorandum from a fictional third-year litigation associate with purposefully included errors. The memorandum had twenty-two deliberately inserted errors. Specifically, it had seven spelling or grammatical errors, six substantive technical writing errors, five errors in fact, and four errors in the analysis of the facts. All of the partners were asked to participate in a "writing analysis study" concerning the "writing competencies of young attorneys." Id. at 2–3 (internal quotation marks omitted).

but they are also disadvantaged by the fears of white partners and senior associates who fail to provide Black associates with the same level of constructive feedback that they regularly give to white associates precisely because white partners and senior associates fear being viewed as racist or find themselves outside of their comfort zones when interacting with people of color. As Thomas S. Williamson Jr., a former partner at Covington & Burling, once explained, "White partners are generally very uncomfortable critiquing [B]lack lawyers for fear that aggressive criticism will be interpreted as racial animus."[350] Yet, such apprehension and unwillingness to provide the very same level of constructive feedback that allows white associates to grow and advance to Black associates is clear disparate treatment based on race, even though it is not rooted in racial animus. As the experiences of Woodson's interviewees, the *Losing the Race* cohort, and Kaloma Cardwell reveal, firms not only need to make sure that

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The partners all received an identical memorandum. Id. at 2. The only difference was that half of the partners received a memorandum with a cover page that indicated that the author was African American, and the other half received the same memorandum with a cover page that indicated that the author was white. Id.

The email instructions asked each partner, each of whom was provided all the research materials that were used to prepare the memorandum, to "edit the memo for all factual, technical and substantive errors." Id. at 3. The instructions also asked the partner participants to rate the overall quality of the memorandum from one to five, with a score of one indicating an "extremely poorly written" memorandum and a score of five indicating a memorandum that was "extremely well written." Id. With seven weeks to evaluate the memorandum, fifty-three of the sixty partners (88.33%) completed the tasks for the study. Id. Of those fifty-three partners, twenty-four received the memorandum from the fictional African American associate, and twenty-nine received the memorandum from the fictional white associate. Id.

The researchers found unconscious racial confirmation bias from the partners, with the partners finding a greater number of errors in the same brief when the author was African American. Id. Specifically, the partners found an average of 2.9 of the 7 spelling/grammar errors in the white associate's memorandum compared to 5.8 of the 7 spelling/grammar errors in the African American associate's memorandum. Id. Additionally, the overall score on the memorandum was lower for the African American associate than the white associate—3.2 out of 5 compared to 4.1 out of 5. Id.

The researchers also found that the qualitative comments on the fictional white associate's memorandum were more positive. Id. For example, comments for the white associate included feedback like "generally good writer but needs to work on . . . ," "has potential," and "good analytical skills" while comments for the African American associate—the exact same memorandum—included feedback like "needs lots of work," "can't believe he went to NYU," and "average at best." Id. (alteration in original).

Differences even arose in the partners' evaluation of one aspect of the brief that the researchers did not request: formatting. Id. Specifically, forty-one of the fifty-three partners gratuitously offered feedback on formatting. Id. Of those forty-one, eleven partners left comments for the fictional white associate while twenty-nine left comments for the fictional African American associate. Id.

350. Derek Bok & Thomas S. Williamson, Jr., Transcript of the Boston Bar Association Diversity Committee Conference: Recruiting, Hiring and Retaining Lawyers of Color, Bos. Bar J., May/June 2000, at *18, *20 (quoting Williamson).

partners understand the real harms behind their racially-influenced failures to provide comparable feedback to Black associates, but they also must be held accountable when they engage in such a harmful form of disparate treatment discrimination. Specifically, firms need to implement explicit mechanisms for holding partners accountable when they fail to provide feedback to associates and, even more so, when they provide uneven feedback to Black and white associates because of white racial discomfort.[351]

Another form of white racial discomfort is the tendency to react defensively and lash out when Black individuals highlight racial disadvantage or discrimination in the workplace. As Robin DiAngelo has highlighted, for many white people, the worst thing they can imagine being called is a racist; as a result, they angrily lash out when people of color identify any one of their actions or statements as emerging from implicit or explicit racial biases.[352] One Black former BigLaw associate, Lauren E. Skerrett, wrote eloquently about this dynamic in large law firms, noting:

> I think [B]lack attorneys such as myself are in a uniquely challenging position. In addition to being forced to maintain the same semblance of composure and level of productivity as our non-[B]lack counterparts (a level which, for a whole host of reasons, is already difficult to replicate), the potential repercussions for vocalizing our frustrations (about society, about management, about anything, frankly) are often far more subtle than an immediate dismissal. Rather than being viewed as a valued team member offering earnest feedback with the goal of making contributions to enhance your work environment (thereby leading to happier and more productive employees, increased minority retention, and a healthier bottom line for the firm), the overly vocal [B]lack associate is likely viewed as a complainer—judgmental and difficult.[353]

One of the factors that harmed Cardwell the most at Davis Polk was precisely this form of white racial discomfort. Because his white colleagues did not understand either his racial discomfort or their own racial

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351. Cf. Cardwell v. Davis Polk & Wardwell LLP, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *8 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (noting that Cardwell told a partner, Tom Reid, that "many Black associates leave b/c of [the] Firm's cultures" and that they discussed "how attorneys give feedback and that it's often too late, not helpful or racialized" (alterations in original) (quoting Cardwell's Jan. 21, 2016, journal entry)).

352. Robin DiAngelo, White Fragility: Why It's So Hard for White People to Talk About Racism 2 (2018) (noting that white people "perceive any attempt to connect [them] to the system of racism as an unsettling and unfair moral offense" that "triggers a range of defensive responses," including "anger, fear, and guilt," and then conceptualizing this process as "white fragility").

353. Skerrett, supra note 122.

discomfort when he expressed the actions and words that made him feel uncomfortable, underappreciated, and undervalued at work, they chose to do one of two things to him: gaslight[354] him or ignore him, both of which only intensified his feelings of isolation, alienation, and devaluation, and both of which made it impossible for him either to recover from these tensions in their eyes or to overcome his sense of alienation within the firm.[355]

The final proposal is to provide education to partners on the harm they can do in tanking an associate's—any associate's, but particularly a Black associate's—career by denigrating their work and disparaging their professional promise when they make a common or an uncommon mistake.[356] Many white associates can recover from such negative chatter among partners because their work is not generally read and interpreted against existing negative stereotypes and tropes about white incompetence or lack of belonging. In essence, one mistake or even two mistakes do not tend to mark white associates as unworthy associates to work with; due to how racial privilege works, white associates are instead more likely to get the benefit of the doubt and to be given another chance.[357]

On the other hand, Black associates, who will occasionally make mistakes just like all other associates do, are, as some attorneys have attested, rarely given that second chance.[358] As Williamson once observed, "Black lawyers know that if they disappoint the white partner on the first assignment, that partner will anxiously avoid having that lawyer assigned to him again, often, partly for racial reasons."[359] Not only did attorneys from both the *Losing the Race* cohort and Woodson's subject group discuss this problem as emerging in their or other Black associates' experiences, but Cardwell also highlighted this phenomenon at work in his own experience at Davis Polk. Indeed, one can see the damaging effects of word-of-mouth reviews between partners in several of Cardwell's reviews. For instance, one review from a partner who openly asserted that he barely

354. See Angelique M. Davis & Rose Ernst, Racial Gaslighting, 7 Pol., Grps. & Identities 761, 763 (2019) (defining "racial gaslighting" as "the political, social, economic and cultural process that perpetuates and normalizes a white supremacist reality through pathologizing those who resist" (emphasis omitted)).

355. See *Cardwell*, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *8–9 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (describing firm leaders' denials of Cardwell's descriptions of what he was experiencing and failure to respond to his concerns).

356. See Woodson, The Black Ceiling, supra note 1, at 30 (asserting that "when the word spreads that a particular junior professional is unreliable, her senior colleagues may entrust her with fewer assignments, regardless of her formal evaluations").

357. See id. at 32–35 (discussing the subjectivity of partners' views and racialized assessment disparities, which are "unjust if White professionals receive greater leniency when they make comparable mistakes").

358. See Woodson, The Black Ceiling, supra note 1, at 49–51 (identifying and discussing "selective punitiveness" as applied to Black professionals).

359. Bok & Williamson, supra note 350, at *20 (quoting Williamson).

worked with Cardwell shared overall impressions that were received fully from third party accounts.[360] This partner wrote:

> I did not have much direct interaction with Kaloma on the . . . transaction. That said, we were very stretched on the transaction, and the impression I got from the team was that they did not have confidence that Kaloma could interact directly with the client (as much as, for instance, some of the other first years could). Also, my understanding was that he was not yet able to take the lead on the diligence report, while another first year could take the lead (and that his due diligence summaries needed quite a bit of work). For this reason, my impression is that Kaloma may be 'behind' in his class, although because my impression is based off of third party accounts, I do not feel totally confident with this determination.[361]

In the end, as Woodson makes clear in his book, "one reason [Black] racial discomfort is as damaging as it is for Black professionals is that it often either goes unrecognized or is misinterpreted as a personal deficiency."[362] For this reason, and because of the transparency phenomenon and the pervasiveness of a colorblind culture in our society, very few proposals for improvement are likely to work broadly across law firm cultures. It is hard for sparsely scheduled programs, trainings, and policies to overcome the invisible racialized norms, unspoken practices, and evaluation methods that presume both whiteness and fairness. To combat the norms that one has been taught not to see and recognize for decades requires intensive daily work if one wants to open up their eyes to acknowledge race and racism and racism's subordinating forces like racial discomfort, both externally and internally, with self-reflection. As Woodson proclaims, accomplishing such feats will be far from easy, but they "are worth pursuing nevertheless."[363]

CONCLUSION

> "*As a practical matter then, racial discomfort is likely here to stay.*"
> — Professor Kevin Woodson.[364]

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360. *Cardwell*, No. 1:19-cv-10256-GHW, 2023 WL 2049800, at *5 (S.D.N.Y. Feb. 16, 2023), ECF No. 305 (internal quotation marks omitted) (quoting Buergel Declaration Exhibit 9, at 10) (granting in part and denying in part defendants' motion for summary judgment).

361. Id. (internal quotation marks omitted) (quoting Buergel Declaration Exhibit 9, at 10).

362. Woodson, The Black Ceiling, supra note 1, at 133.

363. Id. at 145.

364. Id. at 131.

Professor Kevin Woodson's perceptive and well-researched new book, *The Black Ceiling: How Race Still Matters in the Elite Workplace*, marks an inflection point for legal education, employment discrimination scholarship, civil rights litigation, and the legal services industry, particularly BigLaw firms. For law schools and large law firms operating in an environment unsettled by the anti-DEI backlash fueled by the U.S. Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[365] Woodson's research provides new ways of understanding and remediating the racial discomfort and accompanying social alienation and stigma anxiety experienced by Black professionals in both law firm and academic workplaces. For employment discrimination scholars and civil rights practitioners, his research supplies novel approaches to integrating alternative racial discomfort narratives with conventional racial bias and discrimination narratives in both administrative agency and judicial proceedings. Correspondingly, when applied to litigation dockets and lawyer strategies, his research widens ethical sensitivity to race-based identity construction and subordination in the pretrial and trial conduct of both plaintiff- and defendant-side employment litigation teams and, consequently, reinvigorates the debate over the nature and scope of legitimate advocacy in civil rights cases.

In these ways, Woodson furnishes lawyers, judges, and interdisciplinary scholars with new approaches for thinking about the causes and consequences of racial inequality in contemporary U.S. culture and society, particularly in elite corporate workplaces. Indeed, by interweaving theories of discrimination from the fields of cultural sociology, organizational studies, and social psychology, he carves out new pathways to remedy racial inequality within both for-profit and nonprofit organizations. Equally important, he shows that the disadvantages of race and racial discomfort are not only complex and multifaceted but also highly individualized across a broad spectrum of Black professionals where some struggle and others thrive.[366]

For Woodson, segregation in education, housing, and geography remains a "key determinant" in shaping the experience of race and racial discomfort for Black professionals at BigLaw firms and elsewhere.[367] The structural persistence of racial segregation and discrimination, he suggests, likely condemns Black professionals to endure the experience of racial discomfort in BigLaw and other elite firms "no matter how many

365. 143 S. Ct. 2141 (2023).

366. See Woodson, The Black Ceiling, supra note 1, at 13 (asserting that some characteristics of racial inequality in the workplace "render some Black workers especially vulnerable to racial discomfort and others that enable some Black workers to thrive despite these potential challenges").

367. Id. at 130.

resources firm leaders devote to their DEI objectives."[368] In his view, these firms "may very well remain White spaces in perpetuity."[369]

The seemingly entrenched and ineradicable quality of white elite law firm spaces is striking when considered against the backdrop of longstanding critiques of BigLaw, namely, Paul Barrett's *The Good Black*[370] and Alan Jenkins's *Losing the Race*.[371] Reflecting on this critique a quarter century ago, Professor David Wilkins urged legal scholars to study "the complex intersection between race and the incentive structures of large law firms" in order to understand how "even in the absence of discriminatory intent, white lawyers will sometimes take actions that ultimately hurt the careers of their [B]lack colleagues."[372] Some may read the recent federal jury trial in *Cardwell v. Davis Polk* to suggest that Kaloma Cardwell's time at Davis Polk ultimately hurt his fledgling career not because of individual or institutional discriminatory intent but because he failed to satisfy the "basic criteria"[373] of professional and cultural competence.[374] To be sure, this reading is subject to contest. Contested readings notwithstanding, the outcome in *Cardwell v. Davis Polk* requires us to revisit a foundational question for law schools and law firms: *How should we train law students and lawyers not merely to endure but to thrive in the racialized workplaces of BigLaw firms?*

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368. Id. at 131.

369. Id.

370. Paul M. Barrett, The Good Black: A True Story of Race in America (1999) (detailing the story of a Black BigLaw associate who was unfairly treated at his firm and ultimately sued for racial discrimination).

371. Jenkins, supra note 3; see also supra notes 70–86 and accompanying text.

372. Wilkins, supra note 44, at 1928.

373. Id. at 1943. Wilkins further comments:

> [W]hat separates those who become partners from those who leave is not whether a given lawyer "works hard and plays by the rules." Most of the women and men hired by large law firms satisfy this basic criteria. Instead, those who make it must have two kinds of capital: "human capital," consisting of skills and dispositions built up by doing good work on difficult projects; and "relationship capital," consisting of strong bonds with powerful partners who will give the associate good work and, equally important, report the associate's good deeds to other partners. In the absence of either of these forms of capital, an associate has little chance of making partner no matter how hard she works and no matter how diligently she does what she is told.

Id. at 1943–44 (footnote omitted).

374. Wilkins contends that "despite all of the talk about identity politics, the dominant understandings of both professionalism and race taught in law school offer little guidance about how to integrate one's identity with one's professional role in a manner that honors the legitimate moral claims of each." Id. at 1928.

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