COLUMBIA LAW REVIEW

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THE OTHER TAXATION: TRIBES, TERRITORIES, AND FISCAL AUTONOMY — *Alex Zhang*

ESSAY

THE CAPACITY TO MARRY — *Sarah Lorr*

BOOK REVIEW

IMMIGRATION LAW'S FOOT SOLDIERS — *Stephen Lee*

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ABSTRACTS

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THE PSEUDOSCIENCE OF GUN HUNTING *Amanda Savage* 335

Police departments nationwide train their officers to assume that a member of the community is armed using the "characteristics of an armed person" (CAP) framework. This framework, composed of multiple characteristics that ostensibly allow police to determine whether a person is carrying a handgun, has become a pseudoscientific justification for stop-and-frisk.

The CAP framework is a form of proactive policing: patrolling to find potential crime and preempt or stop it rather than responding to crime after it is reported. Such tactics lead to a myriad of legal and social problems, including racialized harassment, widespread distrust of police, and pervasive Fourth Amendment violations.

This Article examines the CAP framework, using the Baltimore Police Department's (BPD) implementation of this framework as a case study. The BPD's CAP training is so superficial and broad that nearly everyone exhibits the targeted characteristics. Everything from turning one's body or touching one's waistband to wearing an untucked shirt can give an officer cause to conclude a person might be armed. In effect, the CAP framework gives officers unbridled discretion to frisk whomever they choose and functions as a tool for racialized harassment.

*This Article argues that the CAP framework cannot provide legal justification for stops and frisks, especially post-*New York State Rifle & Pistol Ass'n v. Bruen*. This Article likewise argues that use of the CAP framework as a proactive policing tactic violates the Fourth Amendment.*

THE OTHER TAXATION: TRIBES, TERRITORIES, AND FISCAL AUTONOMY *Alex Zhang* 397

Native Americans pay taxes. Territories, by contrast, tax in place of the federal government. Both live with the legacy of American imperialism. Both seek the elusive fiscal self-governance and autonomy promised by Congress. The Supreme Court—through preemption, the plenary power doctrine, and interpretive principles—has hollowed out the Native tax base, forcing tribes to compete fiercely with Congress, states, and localities for revenue. By contrast, territorial residents pay no federal or state taxes on territorially sourced income by edicts of Congress and geography. But such tax exemption enabled the creation

of incentive regimes that have only invited more criticism as entrenching subordination. This Article argues that the conceptual underpinnings of the divergent tax treatment of tribes and territories are unsound. Under a more robust vision of fiscal autonomy, judicial limits on Native tax sovereignty are misguided. The territories' wide latitude in designing revenue streams merits increased scrutiny. While imperfect, a uniform, nonrefundable federal income-tax credit for tribal and territorial taxes paid is a promising path forward. This Article thus provides the first systematic study of subfederal taxation beyond states and localities—the "other" American taxation often overlooked in scholarship.

ESSAY

THE CAPACITY TO MARRY *Sarah Lorr* 485

This Essay identifies mechanisms by which the law regulates access to marriage for adults with intellectual disabilities, exploring how statutes and court decisions give meaning to the concept of "capacity to marry." The Essay identifies two previously unstudied and contradictory understandings of the relationship between marriage and capacity. One notion of "capacity to marry" operates to exclude adults with intellectual disabilities from marriage based on lack of capacity. Cases grounded in this view reveal that capacity determinations can be a vessel for subjective opinions about disability and the status of marriage, considering factors such as prior romantic and sexual history, financial decision-making, and ability to care for oneself independently. These cases show how capacity requirements can prohibit or limit nonconforming individuals—especially those who rely on external sources of support—from marrying. In contrast, a second notion of capacity conceives of marriage as capacity enhancing. Under this view, a court may decline to impose a guardianship in part because of an existing marriage. This view of capacity focuses more on the power and strength of human relationships. Building on the second notion—that marital relationships can be capacity enhancing—the Essay conceives of supported decision-making as a means of rendering marriage more accessible to people with intellectual disabilities while also recasting the institution of marriage from one focused on two self-sufficient individuals to one that celebrates human interdependence and connection.

BOOK REVIEW

IMMIGRATION LAW'S FOOT SOLDIERS *Stephen Lee* 549

Historically, we have known little about the law enforcement actors who oversee a punitive deportation machine. Slowly, this is changing. Using the insights from Professor Irene Vega's ground-breaking book on immigration enforcement agents and officers, this Book Review makes three points. First, these agents and officers utilize a range of strategies to justify morally ambiguous job duties, and at least a part

of the moral ambiguity comes from a misalignment between the agents' training (which focuses on the threat and use of force against dangerous transnational criminals) and the day-to-day reali-ties of the job (which involve a mostly compliant and non-threatening population of migrants). Second, the agents' strategies serve to legitimate punitive enforcement policies by denigrating migrants while simultaneously undermining other immigration-related programs that do not advance inherently punitive goals. Vega's book highlights an enduring dilemma within the immigration bureaucracy—finding ways to coordinate and reconcile the agency missions of foot soldiers and bureaucrats given their distinct skill sets and public reputations—while also providing new insights on areas for further study. Third and finally, the book offers especially poignant insights on the Trump Administration's decision to treat every immigration challenge as an enforcement problem to be addressed by the bureaucracy's foot soldiers.

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ARTICLES

THE PSEUDOSCIENCE OF GUN HUNTING

*Amanda Savage**

Police departments nationwide train their officers to assume that a member of the community is armed using the "characteristics of an armed person" (CAP) framework. This framework, composed of multiple characteristics that ostensibly allow police to determine whether a person is carrying a handgun, has become a pseudoscientific justification for stop-and-frisk.

The CAP framework is a form of proactive policing: patrolling to find potential crime and preempt or stop it rather than responding to crime after it is reported. Such tactics lead to a myriad of legal and social problems, including racialized harassment, widespread distrust of police, and pervasive Fourth Amendment violations.

This Article examines the CAP framework, using the Baltimore Police Department's (BPD) implementation of this framework as a case study. The BPD's CAP training is so superficial and broad that nearly everyone exhibits the targeted characteristics. Everything from turning one's body or touching one's waistband to wearing an untucked shirt can give an officer cause to conclude a person might be armed. In effect, the CAP framework gives officers unbridled discretion to frisk whomever they choose and functions as a tool for racialized harassment.

*This Article argues that the CAP framework cannot provide legal justification for stops and frisks, especially post-*New York State Rifle & Pistol Ass'n v. Bruen. *This Article likewise argues that use of the CAP framework as a proactive policing tactic violates the Fourth Amendment.*

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INTRODUCTION

On May 11, 2023, a Baltimore Police Department (BPD) detective shot seventeen-year-old Mekhi Franklin in the back.[1] The encounter began when the detective approached Franklin and his friend.[2] Franklin and his

1. CBS Balt. Staff, Baltimore Police Release Body-Camera Video of Officer Shooting 17-Year-Old in Shipley Hill Neighborhood, CBS News, https://www.cbsnews.com/baltimore/news/baltimore-police-body-camera-shipley-hill-17-year-old-boy-shooting-officer/ [https://perma.cc/QSK8-RPLC] (last updated May 16, 2023); Lea Skene, Teen Shot by Baltimore Police Officer During Foot Chase, Hospitalized in Critical Condition, AP News (May 11, 2023), https://apnews.com/article/baltimore-police-shooting-teen-critical-condition-39e57753d6efc0e62aef1d69d0b81213 [https://perma.cc/2TRW-DDYA] [hereinafter Skene, Teen Shot by Baltimore Police Officer].

2. Cadence Quaranta, Assault Charges Filed Against 17-Year-Old Shot by Police Officer in Shipley Hill, Balt. Banner (May 30, 2023), https://www.thebaltimorebanner.com/community/criminal-justice/charges-17-year-old-police-officer-shipley-hill-PW5ODHB2KVHH3MHOJIIE2QS3HQ/ (on file with the *Columbia Law Review*).

friend tried walking away.[3] When the detective said, "Come here," Franklin ran.[4] The detective chased Franklin, later claiming to have seen Franklin pull something out of his waistband as Franklin ran, and then fired four shots at Franklin.[5] A bullet struck Franklin in the back as he continued to run away.[6]

The detective who shot Franklin was a member of one of the BPD's District Action Team (DAT) squads,[7] units dedicated to proactively policing neighborhoods that the BPD considers "high crime," looking to identify and preempt criminal activity.[8] The detective was not there investigating any offense, nor did he have any specific reason to suspect Franklin or his friend of doing anything unlawful.[9] After the shooting, the detective said that he engaged with and tried to stop Franklin because he believed Franklin exhibited "characteristics of an armed person."[10]

Patrolling the community and looking for civilians exhibiting characteristics of someone who is armed is a form of proactive policing—a practice that this Article defines as police-initiated action aimed at reducing or preventing crime before it occurs.[11] While proactive policing is marketed as anticrime and pro-public safety, it in fact damages communities, hurts public safety,[12] and encourages discriminatory

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3. Id.

4. Id. (internal quotation marks omitted) (quoting Cedric Elleby, Detective, Balt. Police Dep't).

5. CBS Balt. Staff, supra note 1.

6. Id.

7. Id.

8. Brandon Soderberg, After the Gun Trace Task Force Scandal, BPD Established New Plainclothes Units. Are They More of the Same?, Balt. Mag. (May 2, 2023), https://www.baltimoremagazine.com/section/community/baltimore-police-department-plainclothes-district-action-team-units-gun-trace-task-force/ [https://perma.cc/7L6H-CXSS] [hereinafter Soderberg, After the Gun Trace Task Force Scandal] (internal quotation marks omitted).

9. Alex Mann, Cassidy Jensen & Darcy Costello, After Baltimore Police Shooting, Some Question: What Does 'Displaying Characteristics of an Armed Person' Really Mean?, Balt. Sun (May 12, 2023), https://www.baltimoresun.com/2023/05/12/after-baltimore-police-shooting-some-question-what-does-displaying-characteristics-of-an-armed-person-really-mean/ (on file with the *Columbia Law Review*) [hereinafter Mann et al., After Baltimore Police Shooting].

10. Id. (internal quotation marks omitted) (quoting Rich Worley, then-Deputy Commissioner, Balt. Police Dep't).

11. Definitions of proactive policing differ. See, e.g., Nat'l Acads. of Scis., Eng'g, & Med., Proactive Policing: Effects on Crime and Communities 30 (David Weisburd & Malay K. Majmundar eds., 2018) (defining proactive policing as "all policing strategies that have as one of their goals the prevention or reduction of crime and disorder and that are not reactive in terms of focusing primarily on uncovering ongoing crime or on investigating or responding to crimes once they have occurred").

12. See Lupe Victoria Aguirre & Simon McCormack, The Rise of Stop-and-Frisk Is a Dangerous Gift to the Trump Agenda, NYCLU (June 27, 2024), https://www.nyclu.org/commentary/the-rise-of-stop-and-frisk-is-a-dangerous-gift-to-the-trump-agenda [https://perma.cc/54HK-LMYT] ("The heavy reliance on stop-and-frisk has never been an effective

policing and stop-and-frisks without sufficient cause.[13] People in proactively policed neighborhoods experience poorer health outcomes, including chronic stress and worse mental health.[14] And, as it did after the BPD detective engaged Franklin, proactive policing can lead to police violence.[15]

The BPD's use of the "characteristics of an armed person" (CAP) framework is a form of proactive policing. Using standardized, written materials, the BPD trains its officers and detectives on the CAP framework. The BPD's training materials include a slideshow and a pocket-sized thirty-nine-page booklet, the cover of which is shown below[16]:

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public safety tool. Though it's been pitched as a way to prevent violent offenses, few guns are ever recovered and the vast majority of people who are stopped are completely innocent.").

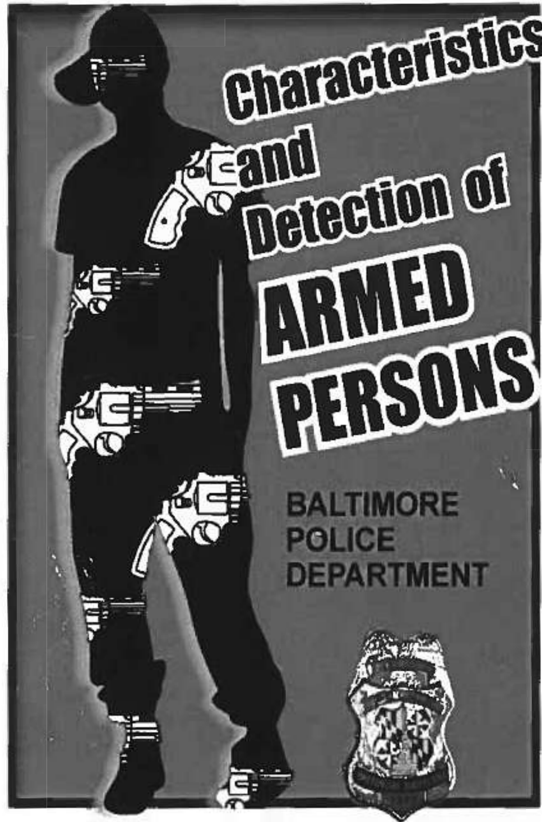
13. See Rachel A. Harmon & Andrew Manns, Proactive Policing and the Legacy of *Terry*, 15 Ohio St. J. Crim. L. 49, 49 (2017) ("Proactive policing may make constitutional violations more likely because—when poorly implemented—it can encourage officers to engage in stops and frisks even when adequate suspicion is lacking or in a manner that discriminates.").

14. See Juan Del Toro et al., The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys, 116 Proc. Nat'l Acad. Scis. 8261, 8266–67 (2019) (finding that young people stopped by police more frequently engaged in more delinquent behaviors six, twelve, and eighteen months later, even when controlling for factors like past delinquency); Amanda Geller, Jeffrey Fagan, Tom Tyler & Bruce G. Link, Aggressive Policing and the Mental Health of Young Urban Men, 104 Am. J. Pub. Health 2321, 2324–25 (2014) (finding that police contact was a statistically significant predictor of PTSD in young men); Alyasah Ali Sewell, Kevin A. Jefferson & Hedwig Lee, Living Under Surveillance: Gender, Psychological Distress, and Stop-Question-and-Frisk Policing in New York City, 159 Soc. Sci. & Med. 1, 9–10 (2016) (identifying an association between escalated police encounters and psychological distress).

15. While Franklin survived being shot in the back by a BPD detective, others whom police have pursued based on the "characteristics of an armed person" (CAP) framework have lost their lives. The link between the CAP framework and police violence is discussed in depth in section II.D.

16. Both the twenty-eight-slide slideshow, entitled *Characteristics of Armed Persons*, and the booklet, entitled *Characteristics and Detection of Armed Persons*, were already in this author's possession. During this project, this author requested these training materials directly from the BPD pursuant to the Maryland Public Information Act but received only the *Characteristics of Armed Persons* slideshow (provided November 25, 2024) and not the booklet. See Balt. Police Dep't, Characteristics of an Armed Person (Mar. 18, 2019) (unpublished slideshow) (on file with the *Columbia Law Review*) [hereinafter BPD Slideshow]; Balt. Police Dep't, Characteristics of an Armed Person (n.d.) (unpublished booklet) (on file with the *Columbia Law Review*) [hereinafter BPD Booklet]. This training is discussed in more detail in section II.B.

FIGURE 1. BPD BOOKLET COVER



As the booklet cover attempts to illustrate, the CAP framework is all about finding concealed guns. The framework consists of a list of traits that purportedly indicate that a person may be armed. This includes someone who wears seasonally inappropriate clothing, a tailored shirt untucked, an outfit with something that does not match (like suit pants with a windbreaker), only one glove, or a fanny pack or an unzipped shoulder bag. It also includes someone who turns their body, touches their waistband, or wears or uses a shoulder bag but keeps their wallet in their pocket.[17] The list goes on, and, by its end, the CAP framework provides reason for police to stop practically *anyone*.[18]

This police-created framework gives police justification for conflict *they initiate* by engaging with civilians who are not visibly doing anything unlawful. On the ground, use of the CAP framework entails police walking

17. See infra notes 162–166 and accompanying text.

18. The unreliability of the CAP training will be discussed in section II.B. See infra notes 162–166 and accompanying text.

through communities they have deemed priorities for proactive policing (usually communities of color[19]) and engaging with civilians who exhibit these characteristics—stopping them, speaking with them, patting them down for weapons.[20] Indeed, according to witnesses, the detective who shot Franklin would often come through the neighborhood, "antagonize residents," and "make derogatory jokes."[21] One witness said officers routinely came through the area, said "[y]ou look like you might have a gun on you," and then grabbed and searched him.[22] This anecdote is a concrete example of the way that the CAP framework encourages thinly disguised racial profiling and police harassment.

The CAP framework originated with a New York Police Department (NYPD) detective in the early 1990s who some described as a "gun-hunter."[23] The detective is said to have had an "uncanny ability to spot people carrying guns on the street" and "ma[de] a science out of his sixth sense" by listing out factors and training other officers.[24] The framework developed and spread from there. Today, across the nation, police

19. A 2023 study using police officers' GPS location data as a measure of where they were policing found that officers "spend more time in places with larger Black, Hispanic, or Asian populations both between and within cities" and that the disparity remained between time spent in Black and Hispanic neighborhoods versus white neighborhoods when controlling for socioeconomic status, social disorganization, and violent crime. M. Keith Chen, Katherine L. Christensen, Elicia John, Emily Owens & Yilin Zhuo, Smartphone Data Reveal Neighborhood-Level Racial Disparities in Police Presence, 107 Rev. Econ. & Stats., 1734, 1734–35 (2025).

20. E.g., David Collins, I-Team: Family of 17-Year-Old Shot Say Police Were Harassing Him for Some Time, WBALTV (May 12, 2023), https://www.wbaltv.com/article/mekhi-franklin-17-year-old-shot-police-family-accused-harassment/43878691 [https://perma.cc/T64N-SXLD].

21. Lea Skene, Witness: Teen Wounded by Baltimore Police Was Shot in the Back While Running Away, AP News (May 12, 2023), https://apnews.com/article/baltimore-police-shooting-fleeing-teen-7728192f419d8e353171b0811bdaafc1 [https://perma.cc/2RDN-UBYH] [hereinafter Skene, Witness].

22. Mann et al., After Baltimore Police Shooting, supra note 9 (internal quotation marks omitted) (quoting Daquan Young, Witness); see also Alex Mann, Cassidy Jensen & Darcy Costello, Body Camera Footage Shows Baltimore Police Officer Shoot 17-Year-Old From Behind, Balt. Sun (May 16, 2023), https://www.baltimoresun.com/2023/05/16/body-camera-footage-shows-baltimore-police-officer-shoot-17-year-old-from-behind/ (on file with the *Columbia Law Review*) [hereinafter Mann et al., Body Camera Footage Shows].

23. Erik Eckholm, Who's Got a Gun? Clues Are in the Body Language, N.Y. Times (May 26, 1992), https://www.nytimes.com/1992/05/26/nyregion/who-s-got-a-gun-clues-are-in-the-body-language.html (on file with the *Columbia Law Review*). The history of the CAP framework is discussed further in section I.B.

24. Id.

departments and police academies have in-house training on similar CAP frameworks[25] or rely on equivalent trainings by federal policing agencies.[26]

Terry v. Ohio is the seminal case used to justify proactive policing tactics.[27] The Supreme Court held in *Terry* that even in the absence of probable cause, an officer may stop a civilian if the officer reasonably believes the civilian may be in the process of committing a crime.[28] Moreover, the officer may pat down the civilian's outer clothing for weapons if the officer believes the civilian is armed and presently dangerous.[29] Officers employing the CAP framework routinely use *Terry* to justify warrantless stops and pat-downs for weapons, usually at the suppression stage of a criminal case: The prosecution argues that the CAP framework provided the officer with reasonable suspicion that the defendant possessed a gun, therefore justifying a stop and, in turn, a pat-down for weapons.[30]

This use of *Terry* to defend the CAP framework ignores the rapidly changing legal landscape in the United States around gun possession. In 2022, in *New York State Rifle and Pistol Ass'n v. Bruen*, the Supreme Court expanded the right of citizens to carry handguns outside their homes for self-protection.[31] In a post-*Bruen* world, questions about what if anything police are allowed to do when, absent other suspicions, they believe someone is armed require more nuanced consideration. Carrying a gun is not necessarily illegal, and someone who carries a gun is not necessarily dangerous.[32] Even someone carrying a gun illegally may not be dangerous.

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25. For example, the Wilmington Police Academy in Wilmington, Delaware, offers its own characteristics of armed gunmen training. See State v. Murray, 213 A.3d 571, 575 (Del. 2019) (noting that an officer who testified in a gun case had received training on the CAP framework at the Wilmington Police Academy).

26. For example, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) offers a four-hour "Characteristics of Armed Gunmen" course "[s]pecifically designed for uniform patrol officers." Project Safe Neighborhoods Enforcement Training, ATF, https://www.atf.gov/firearms/project-safe-neighborhoods-enforcement-training-psn-3-day-program [https://perma.cc/66XV-8RAH] (last updated Feb. 28, 2019). The United States Secret Service also offers a CAP training. Kevin Porter, U.S. Secret Serv., Characteristics of the Armed Individual (2010), https://info.publicintelligence.net/USSS-ArmedIndividuals.pdf [https://perma.cc/B4UL-4GUZ] (last visited Oct. 14, 2025).

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

28. Id. at 22–24.

29. Id. at 30.

30. The author of this Article was an Assistant Public Defender in the Baltimore Felony Division of the Maryland Office of the Public Defender from January 2022 through July 2024. In her practice there, this author saw the State argue this in nearly every case involving an arrest based on the CAP framework.

31. See N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022) (holding that the Second Amendment protects an individual's "right to carry a handgun for self-defense outside the home").

32. See Brandon del Pozo & Barry Friedman, Policing in the Age of the Gun, 98 N.Y.U. L. Rev. 1831, 1851 (2023) ("In short: If possession of guns is lawful in a state, then stops are

Suspecting that someone has possession of a handgun, then, should not automatically give rise to reasonable articulable suspicion of criminal activity, nor should it automatically give rise to a reasonable belief that the person is presently dangerous. But evident throughout judicial handling of the CAP framework is a conflation of *stops* with *weapons pat-downs.* When an officer offers suspicion that a person was armed as the reason for the officer's stop-and-frisk, questions of legality of the suspected gun possession (did the person have a permit?) and questions about dangerousness (does suspicion of being armed necessarily mean the person is presently dangerous?) are often ignored.[33] Instead, suspicion that a person was armed is accepted as justification for both the stop and the pat-down for weapons without differentiation between the two. The result is a perversion of the stop-and-frisk framework, in which the initial justification for the frisk *also* becomes a post hoc justification for the stop.

In legal scholarship, discussion of proactive policing has largely focused on stop-and-frisk, mostly in the context of the NYPD. Professor Tracey Meares called out the mismatch between what *Terry* allows and the way the NYPD misused it in its stop-and-frisk framework.[34] In *Terry*, the police officer "saw a crime in progress and tried to stop it."[35] But in modern policing, superficial characteristics rather than any legitimate individualized suspicion all but predetermine who will be stopped.[36] Further exposing the inequality of the NYPD's stop-and-frisk program, Professor Jeffrey Fagan analyzed the NYPD's stop-and-frisk citizen stop data and revealed racial disparities throughout.[37] Despite these important contributions to the more narrow issue of the NYPD's stop-and-frisk policy, no legal scholar has yet examined the broader CAP framework.

This Article provides the first analysis of the CAP framework while contextualizing it within proactive policing more generally. In discussing how state courts handle the CAP framework, this Article shows a split between states (and inconsistencies within courts in a single state over time) as to whether and how to accept and defer to the framework during suppression hearings. While some trial and appellate courts have rejected

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not."). This Article discusses the justification of firearm possession for a police stop further in section III.B.

33. See infra section III.B.

34. Tracey L. Meares, Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident, 82 U. Chi. L. Rev. 159, 174–78 (2015).

35. Id. at 178.

36. See id. at 174–76 ("[I]n a significant percentage of cases, police do not comply with the Constitution, and when they do not, the burden falls disproportionately on racial minorities.").

37. See Jeffrey Fagan, No Runs, Few Hits, and Many Errors: Street Stops, Bias, and Proactive Policing, 68 UCLA L. Rev. 1584, 1587–91 (2022) ("We find consistent evidence of bias toward Blacks, Latinx, and Black Latinx persons and significant differences by race and ethnicity in the use of the reasonable suspicion rationales that motivate stops.").

the CAP framework because of questions about its reliability,[38] more have permitted police actions based on the framework, deferring to officers' training and experience without further inquiry.[39] No court has parsed out the interplay between the CAP framework and the post-*Bruen* right to possess a firearm outside of the home for self-protection.

The BPD—whose officer shot Franklin in the narrative that began this Article—is a useful case study for this Article's analysis of the CAP framework for two reasons. First, the BPD frequently engages in stops based on the CAP framework.[40] Second, and perhaps more importantly, Baltimore's history with the CAP framework represents a profound paradox: Despite the BPD's extensive record of corruption and misconduct,[41] Baltimore judges routinely accept and defer to the BPD's use of the framework.[42] The Civil Rights Division of the DOJ concluded in 2016 that the BPD "us[es] enforcement strategies that produce severe and unjustified disparities in the rates of stops, searches and arrests of African Americans."[43] Specifically referencing the CAP framework, the DOJ found that "BPD officers . . . appear to be relying too heavily on only a single characteristic of an armed person, rather than a set of characteristics that,

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38. See, e.g., State v. Murray, No. 1710007866, 2018 WL 1611268, at *2–3 (Del. Super. Ct. Apr. 2, 2018) (rejecting the use of the framework for reliability concerns in Delaware), rev'd and remanded by, 213 A.3d 571, 578–80 (2019); State v. Pugh, 826 N.W.2d 418, 423–24 (Wis. Ct. App. 2012) (rejecting the use of the framework in Wisconsin). For a discussion on these cases, along with other state courts' reactions to the CAP framework, see infra section III.C.

39. See, e.g., Flowers v. State, 195 A.3d 18, 27–28 (Del. 2018) (finding reasonable articulable suspicion for a stop in part because of the corporal's training "in the police academy and from courses on street crime as to how to recognize the characteristics of an armed person").

40. While there has been no measure of the frequency with which the CAP framework is cited to justify stops and frisks in Baltimore, media accounts highlight its prevalence. See, e.g., Balt. Courtwatch, Displaying Characteristics of a Carceral State, Balt. Beat (Nov. 28, 2023) https://baltimorebeat.com/displaying-characteristics-of-a-carceral-state/ [https://perma.cc/95Y8-UPB6] (recounting how Baltimore Courtwatch observers frequently hear CAP explanations for stops in pretrial hearings); Mann et al., After Baltimore Police Shooting, supra note 9 (describing how the CAP explanation was used to justify the BPD's shooting of a seventeen-year-old).

41. See, e.g., Jessica Lussenhop, Who Were the Corrupt Baltimore Police Officers?, BBC (Feb. 13, 2018), https://www.bbc.com/news/world-us-canada-43035628 [https://perma.cc/M4Q5-53JY] (discussing the federal prosecution and conviction of members of the Gun Trace Task Force); Skene, Teen Shot by Baltimore Police Officer, supra note 1 (describing reforms that the Baltimore Police Department instituted after the DOJ discovered longstanding misconduct).

42. See infra section III.C.1.

43. C.R. Div., DOJ, Investigation of the Baltimore City Police Department 163 (2016), https://www.justice.gov/d9/bpd_findings_8-10-16.pdf [https://perma.cc/C6DZ-8RA7] [hereinafter DOJ C.R. Div. Investigation]. This investigation was followed by a 2017 consent decree. Consent Decree, United States v. Police Dep't. of Balt. City, No. 1:17-cv-00099-JKB (D. Md. Jan. 12, 2017) https://www.justice.gov/opa/file/925056/dl?inline [https://perma.cc/67XY-87SE] [hereinafter Consent Decree].

when combined, together indicate that a person is armed."[44] The BPD's Gun Trace Task Force (GTTF)—a street-level enforcement unit engaged in proactive policing[45]—was disbanded, and thirteen of its members were federally prosecuted, because of criminal activity within it, including planting guns and fabricating claims that people exhibited characteristics of an armed person.[46] Pop culture has focused on problems plaguing policing in Baltimore: *The Wire* brought police corruption and violence in Baltimore to people's living rooms in the early 2000s, and *We Own This City* depicted the corruption within (and the ultimate demise of) the GTTF in 2022.[47] Baltimore, however, has not received as much attention as New York City in the legal literature, and its police department continues to receive judicial deference on its use of proactive policing despite its documented history of reckless and unconstitutional behavior.

This Article proceeds as follows. Part I provides background. It describes the CAP framework and discusses the legal scholarship on other methods of proactive policing.

Part II is a case study of the BPD's use of the CAP framework. Part II includes a history of proactive policing in Baltimore within the context of its rise nationwide. Part II also engages in an in-depth discussion of the training BPD officers receive on the framework, its ineffectiveness at identifying people who have handguns, and the ways in which the framework damages the community and facilitates police violence. Part II concludes by comparing the BPD's use of the CAP framework to other

44. DOJ C.R. Div. Investigation, supra note 43, at 95 n.105.

45. See generally Michael R. Bromwich, Jason M. Weinstein, Rachel B. Peck, Katherine M. Dubyak, William G. Fletcher, James M. Purce & Troy D. Shephard, Steptoe, Anatomy of the Gun Trace Task Force Scandal: Its Origins, Causes, and Consequences (2022) [hereinafter GTTF Report] (providing a comprehensive explanation of the formation of the GTTF and the scandals in which it was involved).

46. See, e.g., id. at ii (explaining how thirteen former BPD officers were charged for crimes they committed both before and after they joined the GTTF); id. at 177–78 (documenting different instances of GTTF members fabricating claims that individuals were armed); Tim Swift, Police Sergeant Sentenced to 21 Months for Planting Evidence in Gun Trace Task Force Case, Fox 45 (July 13, 2022), https://foxbaltimore.com/news/local/police-sergeant-sentenced-to-21-months-for-planting-evidence-in-gun-trace-task-force-case [https://perma.cc/UY24-WYE4] (reporting that one GTTF member was convicted of planting evidence). Since 2020, Baltimore has paid $22,935,073.27 in settlements related to the Gun Trace Task Force's illegal conduct. Gun Trace Task Force (GTTF) Settlement Tracker, Balt. City Comptroller, https://comptroller.baltimorecity.gov/boegttf [https://perma.cc/XQ24-VUHK] (last visited Oct. 19, 2025); see also GTTF Report, supra note 45, at 115 (noting how the city paid out $8 million to compensate for the wrongful convictions of two individuals).

47. The Wire (HBO television broadcast, aired June 2, 2002); We Own This City (HBO television broadcast, aired Apr. 25, 2022); see also Eric Deggans, HBO's 'We Own This City' is the Closest Fans Will Get to a Sequel of 'The Wire', NPR (May 3, 2022), https://www.npr.org/2022/04/25/1094590786/hbo-we-own-this-city-the-wire-baltimore-police [https://perma.cc/VH5R-RAXS] (describing how these TV shows depicted real-life policing issues in Baltimore).

police departments nationwide, illustrating that they use the framework in similarly problematic and harmful ways.

Part III analyzes the constitutionality of the CAP framework, focusing on the Fourth Amendment and the conflation between the legal cause for the stop and the legal cause for the weapons pat-down. Part III also considers post-*Bruen* changes in the legal significance of being armed and the interplay between being armed and being presently dangerous. Part III compares state courts' treatment of the CAP framework and notes a split in whether the framework's reliability is considered.

Part IV argues that the CAP framework's reliability should be considered before trial courts accept testimony and conclusions based on it. Using existing discovery and evidentiary rules to obtain information about the framework and officers' relevant training, defense attorneys can expose the framework's failures: The framework cannot reliably identify people who are armed, let alone people who are *unlawfully* armed, and provides no information relevant to an assessment of dangerousness. Part IV argues that trial courts should play a gatekeeping function, as they do for expert testimony, to screen out unreliable policing practices like the CAP framework as justification for stops and weapons pat-downs. Finally, the Article concludes that requiring criminal courts to assess the proactive policing policies themselves is an effective way to expose the constitutional violations in individual criminal cases that otherwise go unchecked.

I. THE CAP PROACTIVE POLICING FRAMEWORK

The CAP framework, as its full name suggests, allows police to assume that a person is carrying a weapon if that person exhibits certain characteristics.[48] The framework is fundamentally a list of factors that *might* mean someone has a gun.[49]

Police present the CAP framework in reports and to judges as though it is scientific or evidence-based.[50] But assessments of the CAP framework's reliability in identifying people who are armed suggest that it fails.[51] Each of the listed characteristics is more consistent with innocence than illegality, and the list of factors is so long and broad that the framework describes almost everyone.[52] Accordingly, the CAP framework provides

48. See Balt. Courtwatch, supra note 40 (listing the characteristics often cited as evidence that someone is armed and noting that they often include "a wide variety of clearly harmless and innocent behaviors"); Mann et al., After Baltimore Police Shooting, supra note 9 (reporting that the framework was used to justify the shooting of a teenager by a BPD officer).

49. See Balt. Courtwatch, supra note 40 (explaining that the characteristics are meant to act as evidence that an officer possessed the reasonable suspicion necessary to make a stop); see also infra section II.B.

50. See infra notes 174–179 and accompanying text.

51. See infra section II.C.

52. See Balt. Courtwatch, supra note 40 ("These characteristics' broad and vague nature allows police to justify any stop."); see also infra section II.B.

unchecked discretion to police to stop-and-frisk members of the community.[53] Yet, it has flown under the radar of scholars and critics of the criminal legal system.[54]

This Part provides a description and overview of the CAP framework and traces its historical development.[55] It then discusses legal scholars' analyses of other proactive policing tactics, including the NYPD's stop-and-frisk and use of individual characteristics to justify police stops and pat-downs for weapons, highlighting the absence of any discussion of the CAP framework.[56]

A. *History*

The origins of the CAP framework trace back to NYPD detective Robert Gallagher. In 1992, the *New York Times* published an article, *Who's Got a Gun? Clues Are in the Body Language*, describing Detective Gallagher and his "gun-hunting."[57] Gallagher was touted for "disarm[ing] more than 1,200 gun-toting thugs" in his eighteen years with the NYPD.[58] In what the *New York Times* called "a science," Gallagher outlined the characteristics he observed—a bulge, "discordant clothes," an uneven stride and shorter arm swing, a "security feel" (touching the area where a weapon might be)—and claimed that "[r]ainy weather is great gun-hunting weather" because people hold a hand over their gun as they run for cover.[59] After making those observations, Gallagher would stop the person, "box the [person] in," then "reach over and clamp his hand over the gun" if the person turned away from him.[60] Gallagher had visual diagrams of the characteristics:[61]

53. See Mann et al., After Baltimore Police Shooting, supra note 9 (discussing a defense attorney's perspective that the CAP framework allows police to "justify stopping people on a 'hunch'").

54. See infra section I.C.

55. See infra section I.A–.B.

56. See infra section I.C.

57. See Eckholm, supra note 23 (reporting on Gallagher's "uncanny ability to spot people carrying guns on the street").

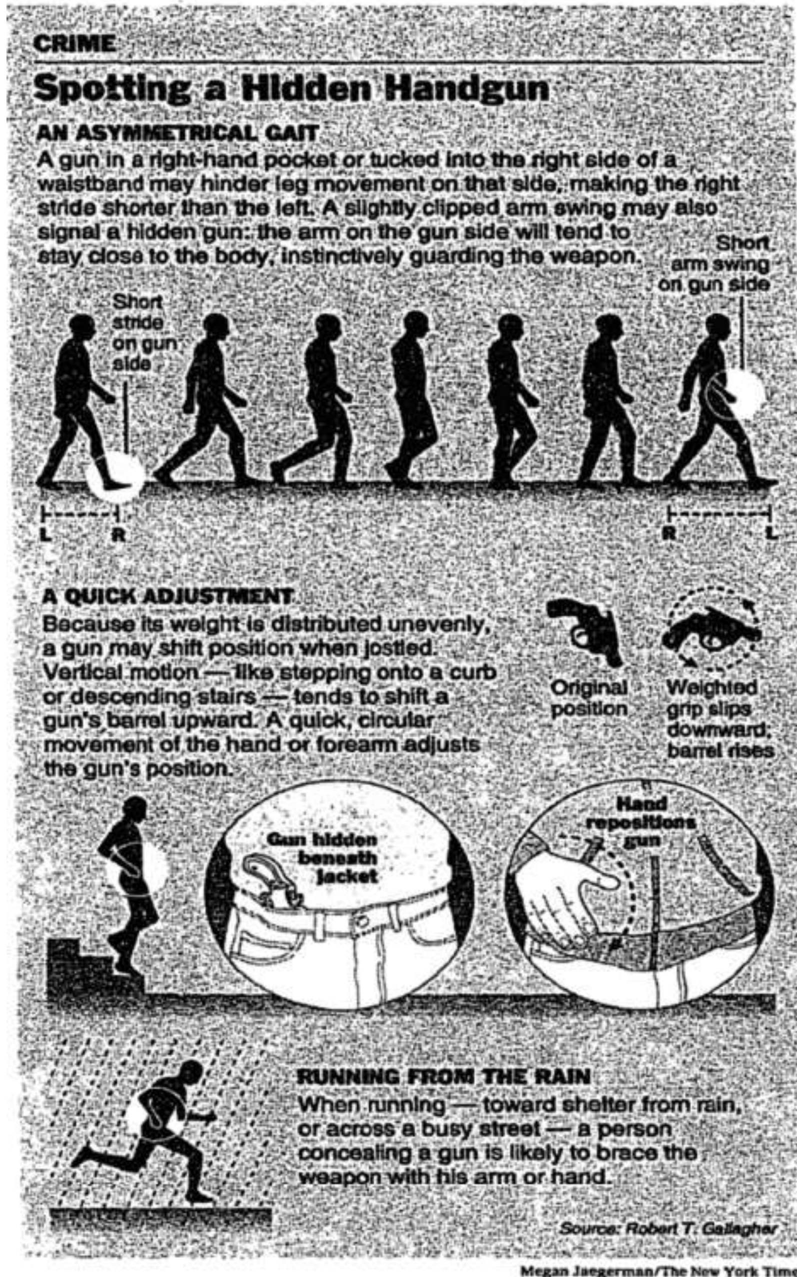
58. Id.

59. Id. (internal quotation marks omitted) (quoting Robert T. Gallagher, Detective, NYPD).

60. Id.

61. Id.

FIGURE 2. CAP FRAMEWORK VISUAL DIAGRAM



Gallagher's attempt to make his observations scientific came in the early 1990s, during the nationwide rise in proactive policing in response

to the perceived failures of police to reduce crime.[62] While not called the characteristics of an armed person framework, Gallagher's descriptors to determine whether someone was in possession of a gun became the foundations of the modern CAP framework.

B. *The CAP Framework*

Presently, the CAP framework is composed of a list of characteristics said to indicate that a person is armed.[63] Some of its characteristics are appearance based: wearing seasonally inappropriate clothing, wearing clothing that appears weighed down on one side, wearing an item of clothing that does not match the rest, and so on.[64] And some of the characteristics are movement based: "blading" (turning) one's body, walking or running with a stiff arm, touching one's waistband or pocket, and more.[65]

Officers across the country are trained in the CAP framework.[66] In effect, CAP training encourages police engagement with civilians not otherwise being investigated for anything, to determine whether those civilians possess guns. The training is distinct from merely teaching officers to recognize when someone has a weapon during an arrest or a conflict.[67] The CAP framework's primary focus is not officer safety—it is supposed to give officers the ability to recognize when a civilian they may not otherwise be interacting with (like someone just standing on the corner as the officer

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62. See Nat'l Acads. of Scis., Eng'g, & Med., supra note 11, at 35–40 (discussing the history and evolution of proactive policing). The Committee on Proactive Policing noted that proactive policing emerged from "a period of intellectual ferment as police chiefs, outside experts, and academics searched for new principles for police operations." Id. at 30. The article outlining Gallagher's successes was juxtaposed in the *New York Times* next to one entitled "Gunshot Kills Boy, Age 9, in Brooklyn," clearly illustrating the focus on crime and crime control. Ian Fisher, Gunshot Kills Boy, Age 9, in Brooklyn, N.Y. Times, May 26, 1992, at B3 (on file with the *Columbia Law Review*).

63. Examples of specific police departments' or agencies' training materials are discussed in sections II.B and II.E. What follows here is a general description. See BPD Booklet, supra note 16, at 2 ("This booklet was created to assist members of law enforcement in . . . identification of armed persons.").

64. See Porter, supra note 26; BPD Booklet, supra note 16, at 17–19; BPD Slideshow, supra note 16.

65. See Porter, supra note 26; BPD Booklet, supra note 16, at 14–17, 33–37; BPD Slideshow, supra note 16.

66. For example, the CAP framework is used by police in Pennsylvania, see Commonwealth v. Brown, 64 A.3d 1101, 1108–09 (Pa. Super. Ct. 2013); in Massachusetts, see Commonwealth v. Harrison, No. 15-P-1609, 2017 WL 838230, at *1–2 (Mass. App. Ct. Mar. 3, 2017); Commonwealth v. Jean, No. 14-P-1088, 2015 WL 9306684, at *1–2 (Mass. App. Ct. Dec. 21, 2015); and in Delaware, see Bryant v. State, No. 236, 2016, 2017 WL 568345, at *1–2 (Del. 2017).

67. Porter, supra note 26 (framing training as what to look for "[w]hen placing a subject under observation for the purpose of trying to determine whether or not that person is possibly armed").

is walking by) is armed, empowering officers to stop and investigate that civilian for weapon possession.[68]

Some police departments have their own training on the CAP framework,[69] while others rely on training offered by other agencies like the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).[70] Either way, the CAP framework training tends to be dual focused. First, the training presents identifying signs that someone is armed.[71] The training then shifts to helping officers write reports about these stops and searches that will survive Fourth Amendment challenges.[72] This is often explicit in the training. For example, the description of the ATF training notes: "The course includes detailed instruction on identifying characteristics of persons who carry concealed firearms; legal issues concerning stop and frisk; and articulating probable cause for searches."[73] Likewise, the BPD training has a section called "Writing the Incident Report,"[74] and the corresponding booklet identifies its purpose as assisting police in writing probable cause statements.[75]

Fundamental to the CAP framework are two assumptions. First, that reasonable belief that a person is armed justifies a stop. And second, that reasonable belief that a person is armed justifies a pat-down for weapons. As is discussed more fully in section III.B, both of these assumptions are flawed. The right to bear arms is constitutionally protected, and police cannot tell, merely by looking at someone, whether a weapon they may possess is or is not permitted.[76] Moreover, possession of a handgun does not automatically mean that someone is dangerous in a legal sense, especially given the Supreme Court's expanding interpretation of the

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68. Id.

69. For example, the BPD has its own "Characteristics of an Armed Person" training and "Characteristics and Detection of Armed Persons" booklet which, according to the booklet itself, was "the collectives' [sic] efforts of several members of the Baltimore Police Department, Baltimore Assistant States [sic] Attorney's Office and Detective Robert Gallagher of the New York City Police Department." BPD Booklet, supra note 16, at 2; see also BPD Slideshow, supra note 16.

70. See Project Safe Neighborhoods Enforcement Training, supra note 26. For example, the police officer whose conduct was being reviewed in *Commonwealth v. Brown* attended the ATF's version of the CAP training. See 64 A.3d at 1108–09 (affirming a lower court finding of reasonable suspicion in part based on the corporal attending "an ATF seminar on 'Characteristics of an Armed Gunman'" (quoting Suppression Court Opinion, Sep. 20, 2011, at 7–8)).

71. See BPD Booklet, supra note 16, at 14–21; BPD Slideshow, supra note 16; Project Safe Neighborhoods Enforcement Training, supra note 26.

72. See BPD Booklet, supra note 16, at 5–10, 25–32; BPD Slideshow, supra note 16; Project Safe Neighborhoods Enforcement Training, supra note 26.

73. Project Safe Neighborhoods Enforcement Training, supra note 26 (emphasis omitted).

74. BPD Slideshow, supra note 16.

75. Id.; see also BPD Booklet, supra note 16, at 2.

76. See infra section III.B.

Second Amendment.[77] But the CAP framework is premised on the idea that suspicion of a gun is suspicion of a crime, and possession of a gun is synonymous with being dangerous.

Like stop-and-frisk, infamously used by the NYPD, the CAP framework emphasizes quantity, not quality, in terms of stops.[78] The idea is that the more police stop people who present certain characteristics, the more weapons police will get off the street. What distinguishes the CAP framework from general stop-and-frisk, though, is that the CAP framework holds itself out to be a more scientific, evidence-based form of policing. While stop-and-frisk notoriously allowed unchecked discretion, the CAP framework centers around a list of characteristics to guide officers' decisionmaking. Officers using the CAP framework are often admitted in court as *experts* in it.[79]

But there is nothing evidence-based or scientific about the CAP framework. The characteristics that the framework comprises, discussed more fully in section II.B, do nothing to reliably distinguish armed people from those who are unarmed. A person turning his body away from the police, wearing seasonally inappropriate clothing such as a coat when the police do not think the weather warrants it, or carrying a bag that looks weighed down unevenly *could* be carrying a gun—or could be unarmed.[80] The CAP framework does not differentiate between the two and therefore does nothing to meaningfully guide officer decision-making. The framework merely empowers police to stop a civilian and check.

The checklist style of the CAP framework is not unique. Other checklist-based proactive policing frameworks have led to the same overbreadth that defeats their purpose. Street Cop, a popular police training organization,[81] trains officers from across the nation on the "Reasonable Suspicion Factors (RAS) Checklist" for identifying criminal

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77. See infra section III.B.

78. See Meares, supra note 34, at 164 (discussing the purposeful frequency of stop-and-frisks when implemented by the NYPD pre-*Floyd*).

79. Officers are routinely admitted as experts in the CAP framework in Baltimore. See, e.g., Ford v. State, No. 1447, 2022 WL 4546674, at *1 (Md. Ct. Spec. App. Sep. 29, 2022) (discussing the admission of a police officer as an expert in the characteristics of an armed person framework); Davis v. State, No. 2585, 2021 WL 3630036, at *1–2 (Md. Ct. Spec. App. Aug. 17, 2021) (same); Mallette v. State, No. 1624, 2018 WL 4521013, at *1–2 (Md. Ct. Spec. App. Sep. 20, 2018) (same); Bailey v. State, No. 522, 2017 WL 2482339, at *2–3 (Md. Ct. Spec. App. June 8, 2017) (same).

80. See BPD Booklet, supra note 16 at 14–19; BPD Slideshow, supra note 16.

81. Government entities from every state except Hawaii have provided public funds to Street Cop. N.J. Off. of the State Comptroller, Supplemental Report on the High Price of Unregulated Private Police Training 5 (2025), https://www.nj.gov/comptroller/library/reports/StreetCopFollowUp/2025-01-09_Street_Cop_Supplemental_Report.pdf [https://perma.cc/Z7TP-7MGQ] ("The only state not represented in the records . . . was Hawaii.").

behavior in motorists.[82] The RAS checklist, like the CAP framework, is a long and broad list of characteristics that supposedly indicate that a motorist might be engaged in unlawful behavior.[83] There is overlap between the two lists of characteristics, including a person's blading of their body.[84] The RAS Checklist was analyzed and then condemned by the New Jersey Comptroller's Office, which concluded that "none of [the RAS Checklist's] factors are more consistent with guilt than innocence," so "a stop based on a combination of those factors alone—without some additional factor that suggests criminality—would be unconstitutional."[85] Of particular concern to the New Jersey Comptroller was the utter lack of justification or assurance of the reliability of the factors on the checklist.[86] The Comptroller suggested *retraining* the officers who went to RAS Checklist trainings.[87]

The common thread throughout different proactive policing frameworks, even outside those that employ lists or checklists, is that they give the freedom to police to choose *whom to police*. And when police have full discretion over whom to police, history and experience show that inequality, rather than increased public safety, follows.[88]

C. *Legal Scholarship*

The relevant legal scholarship on proactive policing has mostly focused on the NYPD's stop-and-frisk policy and has never included a discussion of the CAP framework.[89] Legal scholarship understandably focused on stop-and-frisk in New York City after the takedown of the

82. N.J. Off. of the State Comptroller, The High Price of Unregulated Private Police Training to New Jersey 11 (2023), https://www.nj.gov/comptroller/library/reports/PoliceTraining/police_training_report.pdf [https://perma.cc/NN5Q-S268] [hereinafter Comptroller Report] (internal quotation marks omitted).

83. Id. The factors include "look[ing] away from the police car . . . or at the police car . . . for 'an extended period of time,'" "tilt[ing] their head," "remov[ing] their hat," "wear[ing] their hat so low that it covers their face," "mak[ing] some other 'slight head movement,'" "turning up their music and singing along," putting a turn signal on too early or at the last minute, "yawning," "smoking during a motor vehicle stop," "stretching," "vehicle occupants starting to whisper to one another when they pass the police car," "drivers and passengers 'clearly conversing' but looking forward instead of at each other," a passenger texting after their vehicle has been pulled over, a car containing more than one cell phone or a backpack in it, and more. Id. at 11–12 (quoting the RAS Checklist).

84. Id.

85. Id. at 13. The New Jersey Comptroller's Office investigated the legitimacy of Street Cop trainings after information surfaced about program presenters using demeaning racist and sexist language and examples. Eric Kiefer, Racist, Sexist Police Training Cost NJ Taxpayers $1M, New Report Says, Patch (Jan. 10, 2025), https://patch.com/new-jersey/newarknj/racist-sexist-police-training-cost-nj-taxpayers-1m-new-report-says [https://perma.cc/EG9K-F6M6].

86. Comptroller Report, supra note 82, at 13.

87. Id. at 37.

88. See supra note 37 and accompanying text.

89. See, e.g., Fagan, supra note 37; Meares, supra note 34.

NYPD's stop-and-frisk policy in 2013 by the Southern District of New York in *Floyd v. City of New York*.[90] The *Floyd* Court concluded that the NYPD violated the Fourth and Fourteenth Amendments and the Equal Protection Clause by having its officers "engage[] in 'indirect profiling' coded in terms of stop rationale."[91]

Professor Meares criticized the NYPD's use of stop-and-frisk as a policing "program" because of its nature as an "organizationally determined practice of stopping certain 'sorts' of people for the stated purpose of preventing or deterring crime."[92] Meanwhile, Professor Rachel Harmon and Andrew Manns touted the role of civil rights lawyers in generating data about proactive policing,[93] noting the impact that the data generated in the *Floyd* litigation has had while expressing doubt that changes to the relevant Fourth or Fourteenth Amendment doctrines are imminent.[94]

When the proactive policing conversation in legal academia has shifted from stop-and-frisk, it has looked at individual justifications offered to establish reasonable suspicion like presence in a "high-crime area," "furtive movements," or more recently, "blading."[95]

In the context of blading, which is one of the characteristics listed in the CAP framework, Professor Aliza Hochman Bloom discussed the "false veil of expertise that effectively minimizes *Terry*'s requirement for individualized suspicion" when it is offered to the court as a justification for a stop.[96] Hochman Bloom pointed out the "problematic adaptability of police testimony to judicial scrutiny through the use of new terms and tropes to support reasonable suspicion justifying a stop, search, or frisk."[97] Hochman Bloom argues there is a predictability to this process under the Fourth Amendment. First, police increasingly cite a particular term (there, "blading") as justification for their actions after noticing courts' acceptance of it as cause for reasonable suspicion.[98] Then, as scholars and judges "recognize the factor's problematic features," police cite the term less frequently, replacing it with a different reason for stops.[99] Rinse and

90. Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013).

91. Fagan, supra note 37, at 1606 (citing *Floyd*, 959 F. Supp. 2d at 562).

92. Meares, supra note 34, at 162.

93. Harmon & Manns, supra note 13, at 68–70.

94. Id. at 63. Professor Harmon and Manns argue that "the Court has been increasingly permissive about what constitutes reasonable suspicion in recent years, and it is almost unimaginable that it will become substantially more scrutinizing about Equal Protection violations anytime soon." Id. Ultimately, they argue for change through local statutes and ordinances. Id.

95. Aliza Hochman Bloom, Whack-A-Mole Reasonable Suspicion, 112 Calif. L. Rev. 1129, 1140–41, 1148, 1153 (2024) (internal quotation marks omitted).

96. Id. at 1134.

97. Id. at 1136.

98. Id. at 1134–35.

99. Id.

repeat. "Furtive movements" is an example—once judicially accepted as a basis for reasonable suspicion, frequently cited by police to justify their actions, then attacked by scholars and judges, ultimately falling out of favor.[100]

The CAP framework is the amalgamation of stop-and-frisk and the sort of individual characteristics offered to courts as justification for stops. As a result, the CAP framework can potentially disrupt the cycle that Hochman Bloom describes.

The framework complements stop-and-frisk by purporting to provide a more refined way to determine who is armed, replacing stop-and-frisk's disfavored blanket approach to stops. The CAP framework eliminates the need for singular terms of art like "furtive movements" or "blading," avoiding the eventual judicial disapproval once the term's vagueness is realized. The CAP framework masquerades as evidence based. But while having a list of characteristics seems objective, when those characteristics are so broad that they become meaningless, police are again able to profile, harass, and discriminate.

Accordingly, the CAP framework allows a similar "hunt for suspects using racialized proxies of suspicion"[101] as stop-and-frisk and results in a similar "fear of being stopped whenever [a person] leaves [their] home to go about the activities of daily life" condemned by the *Floyd* Court.[102] The CAP framework also provides the same (or perhaps even more of a) "false veil of expertise that . . . minimizes *Terry*'s requirement for individualized suspicion."[103] If ignored, use of the framework will likely expand, become normalized, and continue to go unchecked.

II. Case Study: The Baltimore Police Department

Baltimore, Maryland, is consistently portrayed as one of the most dangerous cities in the United States because of its persistent high crime rates.[104] Despite the strength and resilience of Baltimore's majority Black

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100. Id. at 1143–44.

101. Fagan, supra note 37, at 1670.

102. Floyd v. City of New York, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013).

103. Bloom, supra note 95, at 1134 (citing Commonwealth v. Nestor N., 852 N.E.2d 1132, 1137 (Mass. App. Ct. 2006) (Brown, J., concurring)).

104. See, e.g., James Cutmore, Top 11 Most Dangerous Cities in the US, BBC Sci. Focus (Nov. 4, 2024), https://www.sciencefocus.com/planet-earth/most-dangerous-cities-in-the-us [https://perma.cc/D7EP-KXEX] (identifying Baltimore as the city with the third highest rate of violent crime in the United States); Most Violent Cities in America, World Population Rev., https://worldpopulationreview.com/us-city-rankings/most-violent-cities-in-america [https://perma.cc/R67Q-WNCT] (last visited Dec. 13, 2024) (same). However, over the last three years, homicide and shooting rates in Baltimore have been decreasing, and in 2025 the number of homicides in Baltimore was at its lowest in almost fifty years. See Press Release, City of Balt., Baltimore Sees Lowest Number of Homicides Ever Recorded; Homicides and Shootings Down by Nearly 60% Since 2021 (Jan. 5, 2026), https://www.

population in the face of a long history of racialized discrimination[105] and harassment,[106] public corruption,[107] and environmental neglect,[108] pop culture knows Baltimore for its history of police corruption and stubbornly high crime rates.

In 2016, the United States DOJ condemned the BPD for its "us[e of] enforcement strategies that produce severe and unjustified disparities in the rates of stops, searches and arrests of African Americans,"[109] leading to

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baltimorecity.gov/mayor/news-media/press-releases/2026-01-05-mayor-brandon-m-scott-highlights-historic-reductions-in-violent-crime-in-2025 [https://perma.cc/D7J7-VTY9].

105. Baltimore is the birthplace of redlining, a housing policy which purposely creates racial divisions and racial segregation. See Mayor Scott's Approach to Addressing Baltimore's Vacant Properties at Scale, City of Balt., https://www.baltimorecity.gov/vacants [https://perma.cc/FN99-PLUA] (last visited Oct. 19, 2025) ("Redlining is at the root of Baltimore's hyper-segregated neighborhoods, and has impacted the health, education and life expectancy outcomes of Baltimoreans for generations.").

106. See ACLU Md., Chasing Justice: Addressing Police Violence and Corruption in Maryland 27 (2021), https://www.aclu-md.org/sites/default/files/field_documents/aclu-md_chasingjusticereport_aug2021.pdf [https://perma.cc/BAU7-2D39] [hereinafter ACLU Report] ("Whether it is due to a lack of reliable data, taking too many risks on dangerous officers, the white supremacist culture of policing, or simply indifference, law enforcement leaders have proven themselves unable or unwilling to make necessary changes.").

107. For example, the former State's Attorney of Baltimore City, Marilyn Mosby, was federally prosecuted and convicted of perjury and separately of making a false mortgage application, crimes committed while she was in office. Press Release, U.S. Att'y's Off. Dist. of Md., Former Baltimore City State's Attorney Marilyn J. Mosby Sentenced to Twelve Months of Home Confinement, With Electronic Monitoring and Ordered to Forfeit 90% of Property Value (May 23, 2024), https://www.justice.gov/usao-md/pr/former-baltimore-city-states-attorney-marilyn-j-mosby-sentenced-twelve-months-home [https://perma.cc/5Y42-WZ93]. About a decade before that, the former mayor, Sheila Dixon, resigned as part of a plea agreement after being found guilty of corruption. Convicted of Embezzlement, Former Baltimore Mayor Sheila Dixon Is Running Again, AP News (Sep. 7, 2023), https://apnews.com/article/baltimore-mayor-sheila-dixon-running-again-f946fe3f473b3e9ca8ef16c43e18eb1f [https://perma.cc/CV6Y-AY3L]. The history of law enforcement corruption in Baltimore is also vast. As State's Attorney, Mosby kept a list of officers with "integrity issues," which was more than three hundred entries long. ACLU Report, supra note 106, at 23. In 1965, the future police commissioner Donald Pomerleau "issued a report that 'declared the Baltimore force to be among the nation's most antiquated and corrupt, and characterized its use of force as excessive and its relations with the city's black community as nonexistent.'" Id. at 8 (quoting David Simon, Homicide: A Year on the Killing Streets 15 (1991)).

108. For example, lead poisoning has been and remains pervasive in many of Baltimore's majority Black neighborhoods. Lawrence Brown, Baltimore's Ongoing Lead Poisoning Crisis & the Link to Violent Crime, Medium (Sep. 11, 2018), https://bmoredoc.medium.com/baltimores-ongoing-lead-poisoning-crisis-b53870c4a142 (on file with the *Columbia Law Review*).

109. DOJ C.R. Div. Investigation, supra note 43, at 163.

a consent decree.[110] The DOJ investigation came after the BPD killed Freddie Gray in 2015.[111]

The BPD's actions over the years have been the subject of multiple award-winning dramas. *The Wire*, an early 2000s television series, brought police corruption and violence in Baltimore into the public eye.[112] In the 2021 series *We Own This City*, viewers returned to BPD corruption to learn about the rise and fall of the BPD's GTTF.[113]

Despite the unprecedented public attention the BPD has received and the corruption infecting its ranks, policing in Baltimore has been largely ignored by legal scholarship. This Part uses the BPD as a case study for the problems associated with the CAP framework, beginning with the historical context of proactive policing in Baltimore. It proceeds to examine the BPD's training on the framework, then discuss the problems with the BPD's use of the CAP framework—including the framework's unreliability, the flawed assumptions the framework relies on about the legality of gun possession and dangerousness, and the way the framework's overbreadth leads to unbridled discretion. This Part discusses the close connection between the BPD's use of the CAP framework and recent instances of extreme police violence. It concludes by contextualizing the BPD's use of the framework within the broader practices of other police departments across the country.

A. *Baltimore's History of Proactive Policing*

Proactive policing has been used in Baltimore for more than two decades.[114] Around the turn of the twenty-first century, Baltimore's mayor—future Maryland governor and presidential candidate Martin O'Malley—hired Ed Norris, a former executive in the NYPD, to help the

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110. Consent Decree, supra note 43.

111. Alan Blinder & Richard Pérez-Peña, 6 Baltimore Police Officers Charged in Freddie Gray Death, N.Y. Times (May 1, 2015), https://www.nytimes.com/2015/05/02/us/freddie-gray-autopsy-report-given-to-baltimore-prosecutors.html (on file with the *Columbia Law Review*). Freddie Gray's murder was the result of a "rough ride," a routine practice of the BPD in which people are locked in the back of police vans without seatbelts and transported in an intentionally rough manner. See Baynard Woods, 'Rough Ride': Practice Linked to Freddie Gray's Death at the Center of Latest Trial, The Guardian (June 9, 2016), https://www.theguardian.com/us-news/2016/jun/09/freddie-gray-death-trial-rough-ride-baltimore-police [https://perma.cc/3KP2-JVE3]. The BPD has a documented history of "rough rides," serving as another example of violent corruption within the police department. Id.

112. See Deggans, supra note 47 (describing *The Wire* as a "critically-acclaimed, groundbreaking police drama" in its exploration of institutional failure and police corruption in Baltimore).

113. Id.

114. See DOJ C.R. Div. Investigation, supra note 43, at 5 ("Starting in at least the late 1990s, . . . City and BPD leadership responded to the City's challenges by encouraging 'zero tolerance' street enforcement that prioritized officers making large numbers of stops, searches, and arrests . . . .").

BPD implement the NYPD's zero tolerance policing strategies.[115] Norris became the BPD's police commissioner.[116] Under Norris, the BPD encouraged its patrol officers to engage in the same "zero tolerance" enforcement that the NYPD pioneered: increasing stops, searches, and arrests for all offenses, including the most minor.[117] Corruption was "already an embedded part of BPD's culture."[118] At the time, Baltimore was dealing with a number of challenges, including corruption within the police department and high crime rates, and there was vast pressure to make arrests and get guns off the street.[119] The DOJ later concluded that Baltimore's Black residents and "predominantly African-American neighborhoods" suffered the most from this new proactive policing regime.[120]

The rise of proactive policing in Baltimore coincided with its rise in popularity across the United States. Proactive policing emerged nationwide in the 1980s and 1990s in response to concerns about the inability of police to meaningfully reduce crime.[121] As the proactive policing methods emerged, they could be categorized into four groups: (1) place based (policing geographic areas with higher concentrations of crime, such as "hot spots policing"); (2) person focused (targeting groups of individuals believed to engage in crime more frequently); (3) problem oriented (reducing crime by addressing the underlying issues that lead to it); and (4) community based (using community partnerships and relationships to address problems that lead to crime).[122] Broken windows policing, units dedicated to watching closed-circuit television (CCTV)

115. DOJ C.R. Div. Investigation, supra note 43, at 40; GTTF Report, supra note 45, at vii.

116. GTTF Report, supra note 45, at vii.

117. DOJ C.R. Div. Investigation, supra note 43, at 5; GTTF Report at vii.

118. GTTF Report, supra note 45, at vii. The Report notes that "[a] common form of corruption, which was not universally perceived by officers as inherently wrong, was making misrepresentations of fact to support law enforcement actions such as stops, arrests, and searches," then "perpetuat[ing] [the falsehood] through false testimony, if necessary." Id.

119. GTTF Report, supra note 45, at viii–ix.

120. DOJ C.R. Div. Investigation, supra note 43, at 47. The DOJ found that between January 2010 and June 2015, Black residents made up 84% of the BPD's stops, while making up 63% of the city's population. Id. at 48.

121. Nat'l Acads. of Scis., Eng'g, & Med., supra note 11, at 29–30; see also Rory Kramer & Brianna Remster, Stop, Frisk, and Assault?: Racial Disparities in Police Use of Force During Investigatory Stops, 52 Law & Soc'y Rev. 960, 969 (2018) (explaining that the NYPD began employing proactive strategies in the late 1990s as a response to an unprecedented crime rate). There is some suggestion that there was an even earlier era of proactive policing, which was then replaced by a "professionalized model of policing" in the 1960s and 1970s, which was replaced again by proactive policing in the 1980s. Bernard E. Harcourt & Tracey L. Meares, Randomization and the Fourth Amendment, 78 U. Chi. L. Rev. 809, 821 (2011).

122. Paul A. Haskins, Research Will Shape the Future of Proactive Policing, Nat'l Inst. Just. J., Oct. 24, 2019, at 1, 4; see also Harmon & Manns, supra note 13, at 56–57 (using different labels but describing similar categories of proactive policing).

cameras or monitoring social media accounts, road-side sobriety checkpoints, patrolling high crime areas, stop-and-frisk, and the CAP framework are all examples of proactive policing.[123]

Though proactive policing methods differ in their details, "very often proactive policing has in practice meant aggressively stopping and frisking individuals on the street in order to deter (rather than uncover or directly stymie) criminal activity."[124] In that sense, its intent is crime prevention. But proactive policing has also been aptly described as a "hunt for suspects using racialized proxies of suspicion"[125] because, in practice, proactive policing has strayed from its stated goal of crime prevention and instead has been used to target and harass certain members of the community.

The years that followed the implementation of proactive policing tactics in Baltimore were fraught with controversy about these methods.[126] BPD officers were encouraged to stop anyone they could and arrest them for anything they could.[127] Through zero tolerance policies, the BPD "prioritized attempts to suppress crime by regularly stopping and searching pedestrians and arresting them on any available charges, including discretionary misdemeanor offenses."[128] The BPD even joked about the philosophy of stopping violent crimes by policing minor ones: A BPD sergeant posted on Facebook that the "solution to the murder rate is easy. Flex cuffs and a line at [Central Booking]," citing the code for loitering arrests.[129] A flyer was circulated by the BPD's Violent Crime Impact Division (VCID) saying: "VCID: Striking fear into loiters . . . City-wide."[130] The BPD Officers were pressured to make arrests and get guns

123. Harmon & Manns, supra note 13, at 56–58; Matt Lethin, Proactive Policing at a Crossroads: Why Technology, Not Discretion, Should Drive Enforcement, Police1 (Feb. 4, 2025), https://www.police1.com/vision/proactive-policing-at-a-crossroads-why-technology-not-discretion-should-drive-enforcement (on file with the *Columbia Law Review*).

124. Harmon & Manns, supra note 13, at 57.

125. Fagan, supra note 37, at 1670.

126. See, e.g., Brandon Soderberg, Baltimore Police Unit Under Fire for Deadly Shootings, Questionable Stops, Garrison Project (Nov. 15, 2023), https://thegarrisonproject.org/baltimore-police-unit-dat/ [https://perma.cc/JFR3-7USJ] [hereinafter Soderberg, Baltimore Police Under Fire] ("Anytime that you have a unit described as 'proactive policing'—they're not responding to calls or issues that are arising in the area but deciding to take it upon themselves—it lends itself to the potential abuse of power[.]" (internal quotation marks omitted) (quoting Natalie Finegar, Md. Off. of the Pub. Def.)).

127. See DOJ C.R. Div. Investigation, supra note 43, at 42 ("Many officers believe that the path to promotions and favorable treatment, as well as the best way to avoid discipline, is to increase their number of stops and make arrests for [gun and drug] offenses.").

128. Id. at 24.

129. DOJ C.R. Div. Investigation, supra note 43, at 24 (alteration in original) (internal quotation marks omitted). Central Booking is the nickname for the local jail. See Baltimore Central Booking & Intake Center, Md. Dep't of Pub. Safety & Corr. Servs., https://www.dpscs.state.md.us/locations/bcbic.shtml [https://perma.cc/6BUN-VD6Z] (last visited Oct. 18, 2025).

130. Id. (internal quotation marks omitted). Anthony Barksdale, the former deputy police commissioner, told the media that the posters were meant to *insult* the VCID. Edward

off of the streets, leading to "[c]orrosive incentive structures."[131] The combination of this "pressure to achieve high arrest and gun seizure numbers" and the "inadequate training on the law of arrest and search and seizure" led to "unjustified stops and frisks, unlawful arrests, and gun seizures that did not result in successful prosecutions."[132] While the BPD had no official quotas for arrests or gun seizures, "the demand to produce numbers led some officers to cross the line and engage in enforcement actions that were unjustified—and, in many instances, illegal—and created incentives to shade or misrepresent facts in probable cause statements and search warrant affidavits."[133]

According to the DOJ, this "prioritiz[ation of] short-term [crime] suppression, including aggressive use of stops, frisks, and misdemeanor arrests" persists among "many BPD supervisors who were trained under the prior enforcement paradigm."[134]

Predictably, these pressures and incentives led to unlawful stops, frisks, searches, and seizures, increasing distrust between the community and the BPD.[135] While the BPD's failure to comply with its own policy of recording all stops makes it impossible to know how many stops they make per year, the DOJ estimated that "BPD officers likely make several hundred thousand pedestrian stops per year" at a time when the population was 620,000.[136] To put this number of police stops in perspective, the GTTF Report noted 130,000 stops and frisks during the first nine months of 2005.[137] Thus, in the first nine months of 2005, BPD made one stop for every five Baltimoreans, which is likely an undercount.[138]

The BPD was in the national spotlight for its proactive policing in 2015 when Freddie Gray was killed after being put in the back of a BPD

Ericson Jr., BPD Violates the Constitution and Federal Law, DOJ Finds, Balt. Sun (Aug. 17, 2016), https://www.baltimoresun.com/2016/08/17/bpd-violates-the-constitution-and-federal-law-doj-finds/ (on file with the *Columbia Law Review*) (last updated June 28, 2019).

131. GTTF Report, supra note 45, at ix–x.

132. Id.

133. Id. at x.

134. DOJ C.R. Div. Investigation, supra note 43, at 24.

135. See GTTF Report, supra note 45, at ix–x, 92 ("This incentive structure that emphasized arrest and gun seizure numbers, and the misconduct by some officers in response, profoundly damaged relationships between BPD and the community, especially Baltimore's Black community.").

136. DOJ C.R. Div. Investigation, supra note 43, at 25.

137. GTTF Report, supra note 45, at 92. This figure is likely an undercount because it is based on recorded information and did not account for the likely vast number of unrecorded stops and frisks. Id.

138. When the racial makeup of those stopped is considered, the situation becomes even worse. According to the DOJ, the BPD's data "show that these stops are concentrated on a small segment of the City's population." DOJ C.R. Div. Investigation, supra note 43, at 26 (reporting that "roughly 44 percent of the total stops" were recorded by officers in two districts, including the "central business district and several poor, urban neighborhoods with mostly African-American residents").

police wagon, handcuffed and shackled, but not strapped into his seat.[139] The officers who arrested Freddie Gray had been on proactive patrol and pursued him simply because he fled when the officers stopped their car.[140] The officers arrested Freddie Gray because he possessed a small knife, an arrest that the then-State's Attorney for Baltimore City called illegal because the knife was not unlawful to possess.[141]

Following Freddie Gray's killing by the BPD, the DOJ Civil Rights Division investigated the BPD, ultimately concluding in 2016 that "there is reasonable cause to believe that BPD engages in a pattern or practice of conduct that violates the Constitution or federal law," including (among other things) "making unconstitutional stops, searches, and arrests" and "using enforcement strategies that produce severe and unjustified disparities in the rates of stops, searches and arrests of African Americans."[142] The DOJ specifically noted that "BPD officers regularly stop and search individuals who are lawfully present on Baltimore's streets, despite lacking the constitutionally-required indicia that criminal activity is afoot."[143]

In a sample of the data the DOJ analyzed, the DOJ found that only 3.7% of pedestrian stops led to criminal citation or arrest,[144] meaning, 96.3% of the time, the stop uncovered nothing unlawful. The DOJ condemned the BPD's proactive policing tactics[145] citing "deficient policies, training, oversight, and accountability" and discriminatory "policing strategies" as causes for its pattern of unconstitutional action.[146] The DOJ's criticism extended to the CAP framework, too, with the DOJ

139. Freddie Gray's Death in Police Custody—What We Know, BBC (May 23, 2016), https://www.bbc.com/news/world-us-canada-32400497 [https://perma.cc/BD3V-RX24].

140. Id.

141. Blinder & Pérez-Peña, supra note 111. The then-State's Attorney, Marilyn Mosby, filed criminal charges against the involved officers, leading to a strained relationship between law enforcement and the State's Attorney's Office. See id. (reporting that "[t]he Baltimore chapter of the Fraternal Order of Police called the speed of the prosecutor politically motivated"). Ultimately, none of the involved officers were criminally convicted. See Jonathan Franklin, Officer Involved in Freddie Gray's Death Will Oversee Baltimore Police Integrity Unit, NPR (Feb. 14, 2024), https://www.npr.org/2024/02/14/1231225553/alicia-white-baltimore-police-promotion-freddie-gray-death [https://perma.cc/NJF7-9KTR] ("A year after Gray's death, prosecutors in Baltimore dropped the remaining charges against all six officers after three of them were acquitted at trial by a judge.").

142. DOJ C.R. Div. Investigation, supra note 43, at 163. This investigation was followed by a 2017 consent decree. Consent Decree, supra note 43.

143. DOJ C.R. Div. Investigation, supra note 43, at 27.

144. Id. at 28.

145. The DOJ noted, "Proactive policing does not have to lead to these consequences. On the contrary, constitutional, community-oriented policing is proactive policing, but it is fundamentally different from the tactics employed in Baltimore for many years." Id. at 5.

146. Id. at 163.

noting a problematic overreliance among officers on single characteristics.[147]

After the DOJ's report and the disbandment of the GTTF, the BPD introduced District Action Teams (DATs) across the city.[148] DATs, like the GTTF, disproportionately and aggressively police Black and brown neighborhoods, and members of the DATs, like the GTTF, have a documented history of misconduct.[149]

Despite this history—internal corruption scandalous enough to inspire multiple HBO series, a police killing that triggered an uprising across the city and sustained nationwide attention, a DOJ investigation followed by damning findings, and continued corruption within the new and theoretically improved units—proactive policing remains the status quo in Baltimore. As in other locales, the CAP framework is the now popular method used by the proactive policing units to justify their stops and frisks of people otherwise not under suspicion for anything unlawful.[150]

B. *CAP Training*

Members of the BPD, including members of the DATs and other proactive policing units, undergo in-service training on the CAP framework.[151] Part of this training occurs at the police academy, and a second part occurs thereafter.[152] The training purports to give BPD officers the tools necessary to identify people presently carrying weapons.[153] The CAP framework training is used by officers not just to assess their own safety when confronting suspects or investigating reported crimes but also to identify civilians—while on proactive patrol—whom police believe *may* be armed but who are otherwise doing nothing outwardly unlawful.[154]

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147. Id. at 95 n.105. The DOJ's criticism of the BPD's use of the CAP framework is discussed more fully in section II.C. See infra notes 191–196 and accompanying text.

148. GTTF Report, supra note 45, at 267–68; see also Robinson v. State, No. 0269, 2025 WL 1982852, at *1 n.2 (Md. App. Ct. July 17, 2025) (noting that the BPD created the DAT after the GTTF's disbandment).

149. Soderberg, After the Gun Trace Task Force Scandal, supra note 8. Members or former members of the DAT have been caught stashing drugs in a police locker, taking part in a warrantless search decried by a federal judge, engaging in police violence leading to four- and five-figure settlements and jury verdicts, and engaging in police violence resulting in civilian deaths. Id.

150. See Balt. Courtwatch, supra note 40.

151. DOJ C.R. Div. Investigation, supra note 43, at 79.

152. See Bailey v. State, No. 522, 2017 WL 2482339 at *4 (Md. App. Ct. June 8, 2017) (discussing a BPD officer's testimony in court that he received eight hours of training on the characteristics of an armed person while in the police academy, and eight more hours of training on it the following year).

153. BPD Booklet, supra note 16, at 7; BPD Slideshow, supra note 16.

154. See DOJ C.R. Div. Investigation, supra note 43, at 96 (describing examples of situations where police may utilize the CAP framework while on proactive patrol).

The BPD's CAP framework training consists of a twenty-eight-slide presentation, entitled "Characteristics of Armed Persons."[155] The slides give definitions and instructions for stops, weapons pat-downs, searches of a person, and reasonable suspicion.[156] The slides provide the "Legal Test for Stopping": "A well founded suspicion based on specific, objective, articulable facts, taken together with the member's training and experience, that a subject has committed, is committing, or is about to commit a crime."[157] They also list the "Legal Tests for Conducting a Weapons Pat-Down (Frisk)": "Reasonable articulable suspicion (RAS) for the stop . . . RAS that the person is armed[,] . . . [and] RAS that the person is dangerous."[158] The slides also describe and illustrate "[p]laces a person may try to hide a weapon," and list out characteristics that are "[i]ndicators that a person may be armed."[159]

In addition, the BPD has a pocket-sized booklet entitled *Characteristics and Detection of Armed Persons*, which outlines a longer list of characteristics; case law; an example probable cause statement; definitions of stop, frisk, search, and reasonable suspicion; guidelines for implementing the CAP framework; and some free pages at the end for notes.[160] This booklet was written collectively by members of the BPD, the Baltimore Assistant State's Attorney's Office, and former NYPD gun-hunter Detective Gallagher.[161]

The slides portion of the BPD CAP training teaches officers that people may hide weapons in or on their waistbands, holsters, ankles, pockets, sleeves of a jacket or shirt, jackets, bags or purses, or vehicles.[162] The training then teaches officers that each of the following characteristics are indicative that a person may be carrying a gun:

- security checks (when a person touches their waistband or pocket as if to make sure a weapon is still there);
- bladed stances (standing at an angle rather than directly facing the officer, as if to keep the weapon out of sight);
- the length of a person's stride;
- clothing that is weighted to one side;
- seasonally inappropriate clothing; and
- someone who is clutching at clothing or at something in their clothing while moving.[163]

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155. BPD Slideshow, supra note 16.

156. Id.

157. Id.

158. Id.

159. Id.

160. BPD Booklet, supra note 16.

161. Id. at 2. Detective Robert Gallagher was discussed in section I.A. See supra notes 57–62 and accompanying text.

162. BPD Slideshow, supra note 16.

163. Id. These factors are in addition to those discussed in section I.B, also noted in the BPD training materials.

The booklet reiterates many of the same and provides an additional, far longer, discussion of characteristics which suggest that someone may be armed:

- someone who wears a heavy coat when it is seasonably appropriate but keeps it partially unbuttoned or unzipped;
- someone whose belt is not properly threaded through belt loops;
- someone with the ties on their hood tightened;
- someone carrying a shoulder bag when it is warm out;
- someone who uses a shoulder bag but keeps their wallet in their pocket;
- someone whose shoulder bag is unzipped;
- someone who wears a fanny pack;
- someone whose bag looks like it is "hang[ing] heavily downward";
- someone wearing an athletic cup; and
- a woman carrying a purse.[164]

BPD officers are trained that these factors may support reasonable articulable suspicion of criminal activity.[165] The example given on one of the CAP framework training slides is that someone blading his body and keeping a stiff arm presumably to conceal a bulge displays "BOTH characteristics of an armed person AND characteristics of someone engaged in criminal activity (trying to hide the weapon from police)," thereby establishing reasonable articulable suspicion of criminal activity.[166]

Once trained on the CAP framework, officers use it to identify people to stop in the community whom the officer believes could be armed. The BPD's website captures a typical use of the framework:

> Northern District DAT officers were conducting proactive patrol . . . . During their patrol, they observed an unidentified male displaying characteristics of an armed person. When the officers attempted to stop the male, he fled on foot and was observed throwing a bag that was across his shoulder. The officers apprehended a 22-year-old male, placed him under arrest and recovered the bag along with a loaded Polymer handgun.[167]

Armed with training in the CAP framework, an officer can utter the seven magic words—"suspect exhibited characteristics of an armed

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164. BPD Booklet, supra note 16, at 14–24. These are just some of the factors listed in the BPD Booklet.

165. BPD Slideshow, supra note 16.

166. Id.

167. BPD Arrests and Enforcement—April 9, Balt. Police Dep't (Apr. 10, 2024), https://www.baltimorepolice.org/news/bpd-arrests-and-enforcement-april-9 [https://perma.cc/9CTE-56DH].

person"—and establish the cause needed to stop someone and then pat them down for weapons.[168]

C. *Analysis of the CAP Training*

Apart from listing the factors and providing some perfunctory legal definitions, the BPD's CAP training does not provide officers with the guidance they need to use the framework in a constitutional manner. The problems associated with the CAP framework discussed in this section cast doubt on the suggestion that an officer could *reasonably believe* someone was armed based on the CAP framework's use.

A foundational problem with the BPD's CAP training is that the training does not provide guidance to officers on how to distinguish between someone who may be armed *lawfully* versus someone who may be armed *unlawfully*.[169] The training materials likewise do not provide guidance on how to assess dangerousness.[170] In Maryland, "wear and carry" handgun permits existed, even before the Supreme Court expanded the right to bear arms outside of the home in *Bruen*,[171] so possessing a weapon is not necessarily a crime in Baltimore. And if possessing a weapon is not necessarily a crime, then the CAP framework cannot be relied on to form the basis of the reasonable articulable suspicion of criminal activity needed to stop someone.[172]

Even setting aside questions about the legality of gun possession, examination of the CAP training materials leads to questions about their legitimacy. The materials offer no explanation of how they were determined and lack any data about how frequently the characteristics coincide with someone being armed versus how often an unarmed person exhibits them. Likewise, there is no indication of how officers' competency with the framework is assessed—does being shown a presentation with a list of characteristics qualify an officer to use the framework? Is there an assessment of whether the officer can use it effectively? What does effective use of the framework even mean when its reliability is unknown?

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168. See infra section III.C (discussing courts' analyses of the CAP framework and general deference to the training and experience of police).

169. See BPD Booklet, supra note 16, at 2, 12–24, 33–37; BPD Slideshow, supra note 16.

170. See BPD Booklet, supra note 16, at 12; BPD Slideshow, supra note 16.

171. See N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022) ("We too agree, and now hold . . . that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home."). In Maryland, a person may "carr[y], wear[], or transport[]" a handgun if they have obtained a handgun qualification license, Md. Code Ann. Pub. Safety § 5-303 (West 2023), submitted and had approved a firearm application and waited one week, see id. at §§ 5-118(a)(1); 5-122(b)(1); 5-123, and applied for and received a permit to wear, carry, or transport the handgun, see id. at § 5-301(c); see also In re McCloy, 321 A.3d 748, 753 (Md. 2024) (describing the permitting process in Maryland).

172. The interplay between the CAP framework and the right to bear arms is discussed in section III.B.

Perhaps most troubling is the wide applicability of the CAP framework's listed factors. The characteristics outlined in these training materials describe virtually *everyone*. According to the training, BPD could conclude that any of the following could be armed:[173] A person who touches their pocket to make sure their wallet or phone or keys are there (especially if they are getting in or out of a vehicle); a person whose clothing looks weighted to one side because they have a wallet or keys or something else in their pocket; a person who, out of habit, walks with their hand on their phone in their pocket; a person who partially unzips their winter coat because they are too warm; a person who only wears one glove because they want to keep a hand free to operate their touchscreen phone; a person who wears a backpack in the summer or keeps heavy items like books or groceries in their bag; a person who tosses a windbreaker on over their suit or walks around with an untucked dress shirt. The innocent explanations far outnumber the "suspicious" ones, even when multiple factors are combined.

On the streets of Baltimore, the CAP framework is used by BPD officers as a justification for proactively approaching members of the community—usually Black, usually male, usually young—and stopping and then searching them for weapons.[174] The fact that the characteristics are so broad means that an officer policing with the CAP framework has nearly limitless discretion to stop anyone on the streets of Baltimore behind a guise of expertise, essentially transforming racially biased stops into an area of police expertise.

Whether the CAP framework is intended to be viewed as a science or an art is unclear. In Baltimore courtrooms, the BPD has indeed turned Detective Gallagher's "sixth sense" into a "science," as BPD officers are often qualified as experts in the CAP framework.[175] When challenges to the officer's expertise in the CAP framework are mounted, the state and the police defend it by emphasizing the amount of training officers undergo.[176] But when pressed during voir dire or cross examination on what the characteristics actually mean, the explanation becomes: "I know it when I see it."[177]

In a podcast discussion between two former police officers, one from the BPD and the other from a different county in Maryland, one of the former officers said, "There was a whole block of instruction on characteristics of an armed person."[178] He went on to list some of the same

173. See supra notes 162–164 and accompanying text.

174. See DOJ C.R. Div. Investigation, supra note 43, at 47 (finding "reasonable cause to believe that BPD engages in a pattern or practice of discriminatory policing against African Americans.").

175. See supra note 59 and accompanying text.

176. See infra section III.C.

177. See infra notes 279–280 and accompanying text.

178. Black and White and Thin Blue Lines: Characteristics of an Armed Person, at 08:08 (Spotify, May 20, 2023).

characteristics—security checks, unnatural gait, and so on[179]—but also noted that "unfortunately, they could also be carrying a bundle of keys"[180] and that "the tail end of a phone can also mimic the print of a gun,"[181] concluding that "[i]t's a skill, it's almost like an artform, and it's something that has to be honed."[182] Disclaiming that this is an "*artform*," a skill "*to be honed*"[183] suggests that at least at first, officers will not be able to properly use these characteristics to make accurate decisions on who to stop and search.[184]

The risk of hindsight and outcome biases[185] is unavoidably present in judicial evaluation of the CAP framework and other methods of proactive policing.[186] The stops and searches being evaluated by judges are typically the cases in which police were right in their belief that the person was armed.[187] Judges usually do not hear about the experiences of people stopped by police simply because they walked off with a stiff arm or because they chose to wear a heavier coat than the officer thought seasonally necessary. These unarmed people who are stopped, searched, and released are not considered in the calculus of whether this framework works or whether it is merely a pretext for an overly broad gun dragnet. The Supreme Court has been clear that judicial review of police reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"[188]—that is, the fact that the police were right that a particular defendant

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179. Id. at 11:28–11:40.

180. Id. at 11:48–11:51.

181. Id. at 12:44–12:52

182. Id. at 09:37–09:46.

183. Id. (emphasis added).

184. In its 2016 report, the DOJ noted that "BPD policies and training materials either misstate the law or are too vague to provide meaningful guidance to officers about operative constitutional standards." DOJ C.R. Div. Investigation, supra note 43, at 43.

185. "Hindsight bias" is "the tendency to view an event as more likely or predictable after it happened than it actually was before it occurred." Maggie Wittlin, Hindsight Evidence, 116 Colum. L. Rev. 1323, 1327 (2016) (citing Dustin P. Calvillo & Abraham M. Rutchick, Domain Knowledge and Hindsight Bias Among Poker Players, 27 J. Behav. Decision Making 259, 259 (2014)). "[O]utcome bias" is "the tendency to judge decisionmaking in light of outcome, independent of how likely or predictable the outcome was." Id. (citing Jonathan Baron & John C. Hershey, Outcome Bias in Decision Evaluation, 54 J. Personality & Soc. Psych. 569, 570 (1988)).

186. See Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, Probable Cause, Probability, and Hindsight, 8 J. Empirical Legal Stud. 72, 73 (2011) ("Decades of research on judgment in hindsight suggest that such judgments will be biased, as people cannot suppress the influence of known outcomes on their judgments . . . .").

187. Certainly, there are cases in which police stopped and searched someone based on the CAP framework and recovered contraband other than a weapon (e.g., drugs). The author saw such cases as an assistant public defender in Baltimore. But most of the time, the cases that judges see involving use of the CAP framework were the ones in which the person indeed turned out to be armed.

188. Graham v. Connor, 490 U.S. 386, 396 (1989).

indeed did possess a gun should not be part of the judge's consideration of whether the officer had legal justification for the stop-and-frisk.

But the risk remains. Judges may feel pressure to rule in favor of the police, believing that suppressing evidence is akin to allowing a defendant to get away with their crime.[189] Even in the absence of such pressures, "[p]eople who know how events unfolded come to believe that the course of events was unavoidable, and even predictable."[190]

In its 2016 investigation of the BPD, the DOJ criticized the over-applicability of the CAP framework.[191] The DOJ noted that "BPD training instructors warn students that there may be false positives, and informed us that they instruct students that *eighty percent* of individuals who show characteristics of an armed person—such as wearing loose or baggy clothing, or grabbing their waistbands while running—will *not* be armed."[192] But the DOJ noted that the true number is likely *much higher*: "It is highly unlikely that only eighty percent of individuals who are wearing loose or baggy clothing are unarmed."[193] The DOJ expressed further concern that "this issue of false positives does not appear to be taught in an effective manner" because "[n]o scenarios involving false positives are employed in the training that would allow officers to internalize and retain this lesson."[194]

The DOJ also criticized the BPD's implementation of the framework. The DOJ found that "BPD officers . . . appear to be relying too heavily on only a single characteristic of an armed person, rather than a set of characteristics that, when combined, together indicate that a person is armed."[195] When officers are given a list of factors, it is probably inevitable that they will zero in and over-rely on single factors. But even focusing on multiple CAP factors likely does not reliably predict when someone is armed and certainly does not reliably predict whether they are *unlawfully* armed.[196]

The inability of police to correctly identify whether someone has a weapon has been illustrated by social science research. Psychological researchers found no significant difference between police officers' and

189. Rachlinski et al., supra note 186, at 73.

190. Id. at 74. In three studies on the effect of hindsight bias on judges' decisionmaking, the authors observed mixed results: Hindsight bias had insignificant effects on judges' rulings but did affect their assessments of probability. Id. at 93–98.

191. See DOJ C.R. Div. Investigation, supra note 43, at 95 (describing the overbreadth of the CAP criteria).

192. Id.

193. Id. at 95 n.105.

194. Id. at 101.

195. Id. at 95 n.105. The DOJ also discussed BPD stops generally, noting that "BPD officers regularly stop and search individuals who are lawfully present on Baltimore's streets, despite lacking the constitutionally-required indicia that criminal activity is afoot." Id. at 27.

196. See id. at 95 n.105 ("[E]ven a person who is displaying some of the characteristics of an armed person is most likely to be unarmed.").

civilians' ability to determine whether someone is armed and found that more experienced members of policing agencies were *worse* at it than less experienced ones.[197]

Together, concerns about the framework's disregard of legal gun possession, its overbreadth, and its resulting unreliability bring into question whether an officer's opinion that someone was armed, based on use of the framework, is reasonable. Without any assurance that the framework accurately distinguishes between people who are armed versus people who are not armed, people who are armed *legally* versus people who are armed *illegally*, and people who are presently dangerous versus people who are not, a belief that a suspect is armed based on the listed characteristics cannot be a reasonable one. And if the belief is not reasonable, it cannot be the basis for a stop or a frisk.

D. *CAP and Police Violence*

The CAP framework does not just lead to violations of civilians' constitutional rights but to pervasive harassment, violence, and even death. The CAP framework empowers police to initiate interactions with community members that can turn violent or deadly.

On May 11, 2023, a detective from the BPD's DAT shot seventeen-year-old Mekhi Franklin in the back, leaving him in critical condition.[198] As was discussed in the Introduction, before police shot him, Franklin was approached by a member of the DAT, a unit tasked with proactive policing of areas the department considers to be high violence.[199] While police claimed to have seen Franklin remove a handgun from his waist while Franklin was running away from them, there is no allegation that Franklin

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197. See Dawn M. Sweet, Christian A. Meissner & Dominick J. Atkinson, Assessing Law Enforcement Performance in Behavior-Based Threat Detection Tasks Involving a Concealed Weapon or Device, 41 Law & Hum. Behav. 411, 418 (2017) (concluding that the results of three studies demonstrated a lack of difference between civilians' and police officers' abilities to detect a concealed item). Researchers for private police training company Second Sight Training Systems LLC interviewed "veteran law enforcement" agents to put together a list of factors used in police practice to visually identify handguns. Nathan Meehan, Christopher Strange & Alexander Garinther, It's the Walk, Not the Talk: Behavioral Indicators of Concealed and Upholstered Firearms Carrying, 94 Police J. 462, 462–63, 469–74 (2021). The list the researchers put together largely overlaps with CAP trainings. See id. at 469–74 (discussing common physical and behavioral indicators of gun possession, including "crease[s]" or bulging in clothing, changes in stride, and "[s]canning" for police or law enforcement). But the researchers admit the lack of validation of the factors and the possibility of and dearth of information about false positives and negatives. See id. at 475–76 ("[F]ield-based validation would be necessary to determine . . . how frequently these specific cues occur in comparison to when a firearm is not carried, and the . . . extent to which it is possible for trained law enforcement to identify them."). Additionally, they emphasize the complexity of using behavioral indicators to predict behaviors. Id.

198. Mann et al., After Baltimore Police Shooting, supra note 9; Mann et al., Body Camera Footage Shows, supra note 22.

199. Skene, Teen Shot by Baltimore Police Officer, supra note 1.

pointed or fired the gun, and eyewitnesses reported to the media that they had not seen him holding a gun while running at all.[200] The pursuit lasted less than a minute.[201]

The BPD officers *created the conflict* with Franklin. The detective was not responding to a tip about Franklin or investigating a particular crime. The detective was engaged in proactive policing. The detective confirmed that the CAP framework led him to engage with Franklin[202]—the detective believed Franklin exhibited characteristics of an armed person.

Six months after Franklin was shot, on November 7, 2023, members of the BPD DAT shot and killed twenty-seven-year-old Hunter Jessup.[203] Once again, the BPD officers were "proactively patrolling" and claim to have believed Jessup was armed with a gun because Jessup exhibited a characteristic of an armed person: Police saw a "non-anatomical bulge" in Jessup's waistband area.[204] Based on the bulge, BPD officers approached Jessup in a police vehicle, and later claimed to have seen a gun when Jessup raised his shirt.[205] Soon after, Jessup ran, and BPD officers chased him. After a BPD officer attempted to tackle Jessup, Jessup pulled out a gun and shot it, so officers fired at Jessup, shooting and killing him.[206] Jessup had twenty gunshot wounds, resulting from three dozen shots fired at him.[207] The BPD commissioner called this fatal interaction, initiated by police for no reason other than suspicion that Jessup had a gun because of a bulge, "another example of our officers doing a great job of apprehending an individual who was armed."[208]

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200. See Mann et al., After Baltimore Police Shooting, supra note 9 (explaining that the BPD did not allege that Franklin pointed a gun at the officers); Mann et al., Body Camera Footage Shows, supra note 22 (describing that the bodycam footage shows that Franklin was shot in the back).

201. Quaranta, supra note 2.

202. Skene, Witness, supra note 21.

203. Balt. Courtwatch, supra note 40; Lea Skene, Baltimore Police Shooting Prompts Criticism of Specialized Gun Squads, AP News (Nov. 9, 2023), https://apnews.com/article/baltimore-police-shooting-district-action-teams-eb9dc3b35d96c47384e9ef060ba75b12 [https://perma.cc/5VFN-ZVV7] [hereinafter Skene, Baltimore Police Shooting].

204. Indep. Investigations Div., Md. Off. of the Att'y Gen., Report Concerning the Police-Involved Fatal Incident in Baltimore City on November 7, 2023, at 3 (2024) https://oag.maryland.gov/resources-info/Documents/pdfs/IID/011924_IID_Report.pdf [https://perma.cc/9YNN-PM37] [hereinafter Md. Att'y Gen. Report] (internal quotation marks omitted) (quoting Antonio Johnson, Detective, Balt. Police Dep't).

205. Id. at 4–7.

206. Id. at 4–5.

207. Darcy Costello, No Criminal Charges for Baltimore Police Officers Who Fatally Shot Hunter Jessup, AG's Office Says, Balt. Sun (Jan. 19, 2024), https://www.baltimoresun.com/2024/01/19/hunter-jessup-shooting-baltimore-police/ (on file with the *Columbia Law Review*).

208. Skene, Baltimore Police Shooting, supra note 203 (internal quotation marks omitted) (quoting Richard Worley, Comm'r, Balt. Police Dep't).

Nine months after Jessup was shot and killed, on August 5, 2024, members of the BPD Group Violence Reduction Unit[209] shot and killed William Gardner, a seventeen-year-old.[210] According to the BPD officers, they were on patrol in the area because of gunshots an hour earlier but were not looking for Gardner in particular.[211] Gardner was standing with a group of people, and police claim to have seen him exhibit a characteristic of an armed person: Gardner grabbed at his waistband.[212] Gardner walked off when police approached him, so police pursued him, one on foot and three others by car.[213] Body camera footage begins during the chase, and officers can be heard yelling "get on the ground," "you're gonna get shot," and "I will shoot you."[214] What appears to be a gun becomes visible in Gardner's hand, then officers shoot Gardner a dozen times, killing him.[215]

In each of these cases, examples from just over a single year in Baltimore, the confrontation began because the BPD officer reportedly believed that the child or young man they were looking at displayed characteristics of an armed person.[216] The BPD officers were not investigating any of them for particular crimes. They had no tips that any of the three were dangerous or likely to commit any offenses. In each tragic situation, the BPD officers proactively approached someone who was doing nothing visibly wrong, pursued him, and shot him because of a belief that he was armed.[217]

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209. The BPD's Group Violence Reduction Strategy is a proactive policing partnership between the BPD and the Office of the State's Attorney for Baltimore City that focuses on individuals most likely to become victims of gun violence. Group Violence Reduction Strategy (GVRS), Balt. Mayor's Off. of Neighborhood Safety & Engagement, https://monse.baltimorecity.gov/gvrs-new [https://perma.cc/2PWW-F2JU] (last visited Oct. 19, 2025).

210. Lea Skene, Bodycam Video Shows Baltimore Officers Opening Fire on Fleeing Teen Moments After Seeing His Gun, AP News (Aug. 9, 2024), https://apnews.com/article/baltimore-police-shooting-william-gardner-bodycam-22dd3efccbc372d635aaaee21c79b77d [https://perma.cc/GQN7-VPRG] [hereinafter Skene, Bodycam Video Shows].

211. Id.

212. Clara Longo de Freitas, No Charges for Baltimore Police Officers Who Fatally Shot Teen, AG Says, Balt. Banner (June 12, 2025), https://www.thebanner.com/community/criminal-justice/baltimore-police-teen-shot-no-charges-JGY77L5OIRF2RLR4VNKPPUCMTI/ (on file with the *Columbia Law Review*); Skene, Bodycam Video Shows, supra note 210.

213. Skene, Bodycam Video Shows, supra note 210.

214. Id. (internal quotation marks omitted) (quoting two officers arresting Gardner).

215. Id.

216. This does not represent the full scope of the police violence that the DAT has engaged in during this time period. Members of the DAT have been involved with numerous other incidents of police violence, including fatal shootings in 2018 and 2020 and a fatal car crash in 2022. Soderberg, After the Gun Trace Task Force Scandal, supra note 8. Likewise, this does not represent the full scope of the police violence connected to the CAP framework. See DOJ C.R. Div. Investigation, supra note 43, at 94–96 (discussing patterns of police violence in which BPD officers justified their actions by reference to CAP factors).

217. The link between the CAP framework and extreme police violence is not unique to Baltimore. For example, members of the Chicago Police Department shot thirty-seven-

In these instances of police violence, it does not matter whether the person shot by police was actually armed. In each case, police engaged in profiling to pursue someone who was not engaged in violent or threatening behavior, then shot and injured or killed them because of a belief that they may be carrying a gun. Especially considering the expanding right to bear arms outside the home, to pursue and then shoot someone for possibly possessing a weapon is illegal, illogical, and immoral.[218]

Of course, the fact of a person being armed or suspected to be armed does not in itself give police legal justification to shoot them. The Supreme Court made clear in *Tennessee v. Garner* that the mere fact of being armed does not mean police can use deadly force: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."[219] That certainly remains the case as the right to possess a gun has been expanded by the Supreme Court.[220]

In each of these examples, BPD officers were trained using the CAP framework to engage with the shooting victim, and each time, the engagement led to the officer shooting him.[221] So, did the police get guns off the street? Yes. But at what cost? Police killed two people and seriously injured another, two of them children, all because of an officer's belief that each was armed.[222]

Even in examples in which the police do not shoot people, proactive policing has a damaging and persistent impact on communities and disproportionately impacts people of color. The American Civil Liberties

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year-old Harith Augustus, who attempted to flee after police tried to stop him for exhibiting characteristics of an armed person. Hannah Leone, Jeremy Gorner, Nuccio Dinuzzo & Rosemary Sobol, Violent Clash Between Officers and Crowd After Fatal Police Shooting in South Shore, Chi. Trib. (Aug. 22, 2019), https://www.chicagotribune.com/2018/07/15/violent-clash-between-officers-and-crowd-after-fatal-police-shooting-in-south-shore/ [https://perma.cc/68EQ-YGUR].

218. See infra section III.B.

219. Tennessee v. Garner, 471 U.S. 1, 11 (1985).

220. See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022) (holding gun licensing regimes that require applicants to show a "special need" unconstitutional).

221. Caitlyn Freeman & Cassidy Jensen, Baltimore Police Fatally Shoot Man Who They Say Pointed Gun at Officers Tuesday Afternoon in Millhill, Balt. Sun (Nov. 8, 2023), https://www.baltimoresun.com/2023/11/07/baltimore-city-police-officer-involved-in-fatal-shooting-of-22-year-old-department-says/ (on file with the *Columbia Law Review*); Longo de Freitas, supra note 212; Mann et al., After Baltimore Police Shooting, supra note 9; Mann et al., Body Camera Footage Shows, supra note 22.

222. It is certainly also possible that in any of these examples law enforcement initiated the contact and escalated the situation for other reasons and merely used the CAP framework as a justification for their actions after the fact. There are no doubt examples of police violence involving the CAP framework where the civilian ultimately did not have a weapon. But it is far less likely that in those scenarios the officer would cite the CAP framework as the reason for their pursuit.

Union of New York has noted that "the stress and humiliation of these types of police interactions can cause people serious psychological harm, which can extend more broadly to their families, neighborhoods, and communities."[223] The distrust that results between community members and police creates barriers to cooperation when it is needed.[224] Public health researchers have supported these conclusions, consistently finding that people in proactively policed communities experience poorer health outcomes, including "compromised mental health" and "higher levels of anxiety and trauma."[225] Over time, frequent stops by police are correlated with an *increase* in future delinquency.[226]

These trends align with eyewitness reports. According to witnesses from Franklin's neighborhood, the same detective would often come through the neighborhood, grabbing and searching people and making antagonistic comments—for example, telling one witness he "needed to lose weight."[227] As for police targeting Franklin in particular, Franklin's aunt said in a media interview that "this had been going on for about four or five days. They kind of just, like, come through jumping out on the kids, sitting with them and different stuff like that."[228] With the stated purpose of looking for guns and the CAP framework to back them up, proactive policing units in Baltimore are thereby stopping whomever they choose—young Black men in public doing nothing visibly unlawful.

E. *CAP Framework Across the Nation*

The BPD's training on the CAP framework and the breadth of its list of characteristics are not unique. Other CAP trainings have even broader lists of characteristics. The United States Secret Service "Characteristics of the Armed Individual" training highlights similar characteristics and adds additional, perhaps even more vague ones: "[m]acho feeling," "running," wearing a belt with pants that do not have belt loops, wearing ponchos or

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223. Aguirre & McCormack, supra note 12; see also Sewell et al., supra note 14, at 9–10 ("Living in a neighborhood with a higher density of frisking is associated with experiencing more severe psychological distress for all residents, while living in a neighborhood with a higher density of use of force is associated with experiencing fewer feelings of sadness and effort.").

224. See Tom R. Tyler, Jonathan Jackson & Avital Mentovich, The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact, 12 J. Empirical Legal Stud. 602, 605 (2015) (linking the experience of being made to "feel[] like a suspect" by police to decreased police legitimacy and willingness to cooperate with police).

225. Geller et al., supra note 14, at 2324–25. Public health researchers have called overpolicing "a health risk factor," finding that aggressive policing "is of detriment to the health of male residents in the neighborhood," resulting in psychological distress at the individual level. Sewell et al., supra note 14, at 10.

226. See Del Toro et al., supra note 14, at 8266–67.

227. Mann et al., Body Camera Footage Shows, supra note 22; see also Skene, Teen Shot by Baltimore Police Officer, supra note 1.

228. Soderberg, Baltimore Police Under Fire, supra note 126 (internal quotation marks omitted) (quoting Mary Scott).

other clothing with "wide arms," "[c]hains, straps, hats, etc.," "[s]ocks (use elastic as ankle holster)," and pockets.[229]

An article in the FBI Law Enforcement Bulletin highlights clothing-based characteristics, including things like a jacket that is not fastened when it is cold, a "man wearing a shirt and tie, suit trousers, and dress shoes" with "his shirttail hanging out," bags that "appear out of place," and someone who has a handwarmer on their coat whose hands are not in it despite cold weather.[230]

The Federal Law Enforcement Training Center also has a training that highlights many of the same characteristics,[231] as does the ATF.[232] Additionally, some individual police departments have their own versions of the training.[233]

Common among all the iterations of CAP framework trainings is the centralization of what is essentially a list of characteristics. The trainings do not focus on the nuanced considerations an officer should make regarding the legality of suspected weapons possession or how to determine when an armed person is dangerous given the possibility of carrying a weapon for self-protection. Instead, they list characteristics—an ever-growing list of characteristics—with blanket assertions that the people who exhibit them could be armed.

In January 2025, the City of Minneapolis, Minnesota, entered a consent decree in which it agreed that the Minneapolis Police Department would be prohibited from using only "conclusory statements, boilerplate, or canned language" including "characteristics of an armed person," in documenting uses of force.[234] The Louisville and Jefferson County Metro Government in Kentucky likewise entered a consent decree which included the same prohibition for the Louisville Metro Police Department

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229. Porter, supra note 26.

230. Anthony J. Pinizzotto, Edward F. Davis & Charles E. Miller III, "Dead Right": Recognizing Traits of Armed Individuals, 75 FBI L. Enf't Bull., Mar. 2006, at 1, 2–5. The article also cites behavioral traits, like adjusting or touching an area of clothing. Id. at 5.

231. See Fed. L. Enf't Training Ctrs., *Terry* Frisks, at 02:34–03:00, (Jan. 15, 2009), https://www.fletc.gov/video/terry-frisks (on file with the *Columbia Law Review*) (last visited Jan. 14, 2026) (discussing the different characteristics that lead police to conduct a stop).

232. See Project Safe Neighborhoods Enforcement Training, supra note 26 (detailing a course for ATF officials that includes a four-hour "Characteristics of Armed Gunman" seminar).

233. See, e.g., State v. Murray, 213 A.3d 571, 575 (Del. 2019) (referencing the Wilmington Police Academy's training).

234. Consent Decree at 25, United States v. City of Minneapolis, No. 0:25-cv-00048-ADM-DLM (D. Minn. Jan. 6, 2025), https://www.justice.gov/crt/media/1383116/dl [https://perma.cc/9ZEB-V8HB] (internal quotation marks omitted). The Trump Administration later withdrew its support for the consent decree, and the decree was dismissed in May 2025. Press Release, Off. of Pub. Affs., DOJ, The U.S. Department of Justice's Civil Rights Division Dismisses Biden-Era Police Investigations and Proposed Police Consent Decrees in Louisville and Minneapolis, (May 21, 2025), https://www.justice.gov/opa/pr/us-department-justices-civil-rights-division-dismisses-biden-era-police-investigations-and [https://perma.cc/X328-8C8G].

in December 2024.[235] The characterization of the CAP framework as an example of "conclusory statements, boilerplate, or canned language" shows recognition, at least in these instances, of the overbreadth and illegitimacy of the framework and its troubling connections to police violence.

Allowing the simple phrase "they exhibited characteristics of an armed person" to justify police violence is akin to excusing an officer from giving any explanation at all. Given the expansiveness of the CAP factors and their tendency to apply to nearly anyone, citation to the CAP framework does nothing to explain why an officer was suspicious of a particular individual. This failure of the CAP framework to expound an officer's reasons for engaging with someone spans beyond the context of police violence—as is discussed in Part III, the framework likewise fails to provide justification for stops and frisks for weapons.

III. ADDRESSING THE CAP FRAMEWORK THROUGH PROPER APPLICATION OF THE FOURTH AMENDMENT

Terry v. Ohio paved the way for the whittling away of the Fourth Amendment's protections for civilians.[236] *Terry* was never meant to provide blanket permission for stops of the masses or to be an investigatory tool in an officer's toolbelt.[237] Intentionally or not, in *Terry* the Supreme Court got rid of the probable cause requirement for vast numbers of police encounters, allowing officers to instead stop and search people not under investigation for any particular crime so long as the officer can give an excuse for why the individual was suspicious.[238]

Terry is cited in more than fifty thousand court opinions,[239] analyzed in many law review articles,[240] and invoked in nearly every trial level-brief

235. See Consent Decree at 31, United States v. Louisville Metro/Jefferson Cnty. Gov't, No. 3:24-cv-00722-BJB (W.D. Ky. Dec. 12, 2024), https://www.justice.gov/crt/media/1379951/dl [https://perma.cc/YW9J-BACZ] ("LMPD policy will prohibit officers from using conclusory statements, boilerplate, or canned language . . . ."). The DOJ under the Trump Administration has also withdrawn support for this consent decree, and the court appears poised to dismiss it as well. See DOJ, Off. of Pub. Affs., supra note 234.

236. See Brando Simeo Starkey, A Failure of the Fourth Amendment & Equal Protection's Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies, 18 Mich. J. Race & L. 131, 134 (2012) ("[I]n 1968, the Warren Court, despite its liberal reputation, lowered the standard police officers had to meet to conduct a certain type of search: the so-called '"stop" and "frisk."'" (quoting Terry v. Ohio, 392 U.S. 1, 16 (1968))).

237. See infra section III.A.

238. *Terry*, 392 U.S. at 30–31 (1968).

239. According to Westlaw, there are 51,003 decisions that cite *Terry* as of March 15, 2026. Westlaw, "*Terry v. Ohio*", 51,003 results (Mar. 15, 2026) (on file with the *Columbia Law Review*) (filtered by "Citing References," "Cases").

240. See generally, Lewis R. Katz, *Terry v. Ohio* at Thirty-Five: A Revisionist View, 74 Miss. L.J. 423 (2004) (explaining the impacts of *Terry* on individual freedoms); Stephen A. Saltzburg, *Terry v. Ohio*: A Practically Perfect Doctrine, 72 St. John's L. Rev. 911 (1998)

arguing for or against suppression of physical evidence stemming from a stop-and-frisk.[241] Yet the factual scenario in *Terry* often receives short shrift, and it warrants reminder here.

This Part examines the divorce between *Terry*'s original intent and the way *Terry* is applied to justify the CAP and similar frameworks. Delving into the conflation between cause for stops and cause for frisks, and the flawed assumptions inherent within the framework about dangerousness and the legality of gun possession, this Part discusses the ways that the Supreme Court's broad reading of the Second Amendment further illegitimizes the CAP framework. This Part then discusses state courts' reactions to the CAP framework, in Maryland and elsewhere, noting a split depending on the depth of the court's examination of the framework's legitimacy.

A. Terry *and the CAP Framework*

While the Fourth Amendment[242] protects against searches and seizures in the absence of probable cause, it is well recognized that police are allowed, in certain circumstances, to stop and search the outer clothing of civilians even in the absence of probable cause. In 1968, in *Terry v. Ohio*, the Supreme Court held:

> [W]here a police officer observes unusual conduct which leads him *reasonably* to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and *presently dangerous*, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[243]

In so holding, the Court empowered police to conduct what are colloquially known as *Terry* stops and *Terry* frisks.

The facts of *Terry* demonstrate that the holding was intended to be far narrower than it has become. The officer in *Terry* was on patrol and

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(assessing the *Terry* decision as a controlling doctrine); Gregory Howard Williams, The Supreme Court and Broken Promises: The Gradual but Continual Erosion of *Terry v. Ohio*, 34 How. L.J. 567 (1991) (providing an in-depth analysis of the findings and conclusions of *Terry*).

241. Public defender offices often disseminate manuals to help guide attorneys in their arguments for the suppression of physical evidence, and such manuals encourage challenging *Terry* stops and frisks as unreasonable. See, e.g., Ky. Dep't of Pub. Advoc., The Suppression Manual: Search, Seizure, & Miranda in Kentucky 7 (1st ed. May 2024), https://dpa.ky.gov/wp-content/uploads/2024/06/Suppression-Manual-May-2024.pdf [https://perma.cc/95LH-9MCF].

242. U.S. Const. amend. IV.

243. 392 U.S. 1, 30 (1968) (emphasis added).

observed two men standing at a corner.[244] The officer "took up a post of observation" because they "didn't look right to [the officer] at the time."[245] The officer watched one of them walk to a store, look in the window, then walk back and forth several times.[246] The two "conferred briefly."[247] The second man then repeated the first man's path.[248] The two did this "between five and six times apiece—in all, roughly a dozen trips."[249] Amid this, a third man approached, they all briefly spoke, the third man walked off, and the first two continued walking up to and peering in the store window.[250] After ten-to-twelve minutes, the two men walked in the direction the third man had gone.[251] The officer followed the two men and saw them stop and talk to the third man. Based on what he had seen, the officer "suspected the two men of 'casing a job, a stick-up,'" and was afraid "they may have a gun."[252] The officer approached them, asked for their names, grabbed Terry, and patted each of them down for weapons.[253]

It was in this context that the Supreme Court held that an officer who has reasonable suspicion but not probable cause to believe criminal activity is afoot may stop a suspect to investigate further.[254] After that initial encounter, and if that officer has a reasonable belief that the suspect is armed and presently dangerous, the officer may pat the suspect down for weapons.[255]

When the *Terry* Court imposed the reasonable articulable suspicion standard, they specifically contrasted this with an "inchoate and unparticularized suspicion or 'hunch,'" which the Court said does *not*

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244. Id. at 5.

245. Id. (internal quotation marks omitted) (quoting Martin McFadden, Officer, Cleveland Police Dep't).

246. Id. at 5–6.

247. Id. at 6.

248. Id.

249. Id.

250. Id.

251. Id.

252. Id. (internal quotation marks omitted) (quoting Martin McFadden, Officer, Cleveland Police Dep't).

253. Id. at 6–7.

254. See id. at 6–7, 30–31 ("[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.").

255. See id. at 32 (holding that "[t]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime").

provide legal justification for a stop and pat-down for weapons.[256] The *Terry* Court further emphasized the indignity suffered by a person who is publicly frisked by police.[257] In what Professor Sam Kamin and Zachary Shiffler called "an unusually self-conscious move," the *Terry* Court explicitly acknowledged "that it was handing law enforcement a powerful tool" that "would be easy for them to misuse" and made efforts to limit it.[258] In *Terry* and the cases that followed, Professor Kamin and Shiffler argue, the Court held that *Terry* stops must be "carefully circumscribed" and imposed limitations on things like the scope and duration of stops and frisks.[259] *Terry* nonetheless opened the floodgates for the very indignities it decried. After *Terry*, police across the country started stopping and frisking civilians, most of them not doing or in possession of anything illegal, while claiming to have reasonable articulable suspicion.[260] *Terry* is routinely cited by the government to defend proactive policing when challenged under the Fourth Amendment.

Defining reasonable articulable suspicion and making broad rules for when stops and frisks are permissible and when they are not has proven nearly impossible. Legal scholars have pointed out that "reasonable suspicion has never received a solid definition."[261] Decades after *Terry*, courts are still unable to articulate reasonable articulable suspicion in any clear fashion.[262] Indeed, legal scholars argue that courts are ill-equipped to truly analyze police claims about their levels of suspicion.[263]

It is well-established, at least, that random searches that lack individualized suspicion for the purpose of crime control violate the Fourth Amendment.[264] While the Supreme Court has held that sobriety

256. Id. at 27. "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21.

257. See id. at 16–17 ("[I]t is simply fantastic to urge that [frisking] . . . performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.'").

258. Sam Kamin & Zachary Shiffler, Obvious but Not Clear: The Right to Refuse to Cooperate With the Police During a *Terry* Stop, 69 Am. U. L. Rev. 915, 922 (2020) (citing *Terry*, 392 U.S. at 15).

259. Id. (citing *Terry*, 392 U.S. at 19–20).

260. Id. at 16–17.

261. William J. Stuntz, *Terry's* Impossibility, 72 St. John's L. Rev. 1213, 1215 (1998) (arguing that "reasonable suspicion has never received a solid definition").

262. Id.; see also Jeffery Fagan & Amanda Geller, Following the Script: Narratives of Suspicion in *Terry* Stops in Street Policing, 82 U. Chi. L. Rev. 51, 58 (2015) (arguing that "there is no constitutional consensus as to *how much* suspicion is needed to give rise to reasonable suspicion") (citing Camara v. Mun. Ct. of S.F., 387 U.S. 523, 536–37 (1967)).

263. Fagan & Geller, supra note 262, at 55 ("Today, neither courts nor social scientists know very much about how officers really form suspicion under the expanded *Terry* doctrine, how they crystallize specific behaviors to reach a threshold of actionable suspicion, or for which groups of persons that suspicion most often arises.").

264. See City of Indianapolis v. Edmond, 531 U.S. 32, 45–48 (2000) (invalidating a checkpoint program with the primary purpose of crime control and noting that "[w]hen

checkpoints do not violate the Fourth or Fourteenth Amendment,[265] nor do "reasonably located checkpoints" for immigration enforcement,[266] they have been clear that there is a line at which individualized suspicion is required and searches for general crime control crosses it. Despite public safety benefits, the Supreme Court rejected narcotics-interdiction checkpoints for that reason: "We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends."[267]

Use of the CAP framework falls somewhere in between. The circumstances of *Terry* are notably different from the typical application of the CAP framework. The officer in *Terry* noticed what he believed to be a crime in progress. Had the officer not intervened, the crime presumably would have occurred. Officer safety became an unavoidable issue, because in intervening to stop the suspected break-in, the officer had to interact with the suspects and reasonably believed they were armed. Use of the CAP framework is entirely different. Going into a neighborhood and watching people until they exhibit characteristics that an officer believes justify a stop is nothing like the factual scenario in *Terry*, even setting aside whether the officer could reasonably conclude that the suspected gun possession was unlawful.[268]

Professor Meares argues the inability of proactive policing to fit into the framework created by the *Terry* Court.[269] Stop-and-frisk, for example, is a "program to police [groups]" wherein police investigate "people that they suspect *could* be offenders" rather than those they suspect committed

law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here . . . stops can only be justified by some quantum of individualized suspicion").

265. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

266. United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976).

267. *Edmond*, 531 U.S. at 42–43.

268. See Fagan & Geller, supra note 262, at 53 n.7 ("Proactive policing instantiates the notions of criminal archetypes by encouraging police interdiction with persons whom the police decide *could* be committing a crime, albeit without explicit markers or indicia of suspicion. It anticipates the one-off intervention into a crime in progress in the *Terry* case.").

269. Meares, supra note 34, at 163.

specific crimes.[270] The stop-and-frisk policing program and the CAP framework alike are far afield of the sort of policing going on in *Terry*.[271]

The urgency that existed in *Terry* to justify acting before probable cause was established is not present in most uses of the CAP framework—unless the officer has reason to think the person the officer suspects of having a gun is about to use it, then there is no compelling need to act before probable cause has been established. And unless the officer has a reason to believe that there is present danger, then a frisk for weapons is unjustified under *Terry*.

B. *Legality and Dangerousness*

When police assume a person has a gun based on the CAP framework and then pat the person down for a weapon, they ignore *Terry*'s pre-stop requirement of reasonable articulable suspicion of *criminal activity* and *Terry*'s pre-frisk requirement of a reasonable belief the person is *presently dangerous*.[272]

The *Terry* Court clearly separated the cause needed for a stop (reasonable articulable suspicion that criminal activity is afoot) and the cause needed for a frisk (reasonable suspicion that the suspect is armed and presently dangerous).[273] But the use of the CAP framework on someone not otherwise suspected of committing any offense conflates *Terry*'s requirements: The cause for the stop is suspicion of gun possession, and the cause for the pat-down is suspicion of gun possession. The question of whether a belief someone is armed can justify a stop *and* a frisk does not have a clear answer in case law. As Professor Royce de R. Barondes explained, "[E]xtant Supreme Court authority does not unequivocally indicate whether reasonable suspicion a *Terry* subject is armed authorizes

270. Id. at 164–65 (citing Jeffrey Fagan, Greg Conyers & Ian Ayres, No Runs, Few Hits and Many Errors: Street Stops, Bias and Proactive Policing (2014) (unpublished manuscript) (now published as Jeffrey Fagan, No Runs, Few Hits and Many Errors: Street Stops, Bias and Proactive Policing, 68 UCLA L. Rev. 1584 (2022))). When the Maryland Court of Appeals rejected a bulge as the basis for a stop in *Ransome v. State*, they included a discussion of this very issue: "Unlike the defendant[] . . . in *Terry*, petitioner had done nothing to attract police attention other than being on the street with a bulge in his pocket at the same time [the officer] drove by." 816 A.2d 901, 907 (Md. 2003).

In 2022, Maryland renamed its highest court from the Court of Appeals of Maryland to the Supreme Court of Maryland, and its intermediate appellate court from Maryland Court of Special Appeals to the Appellate Court of Maryland. See Press Release, Md. Cts., Voter-Approved Constitutional Change Renames High Courts to Supreme and Appellate Court of Maryland (Dec. 14, 2022), https://www.courts.state.md.us/media/news/2022/pr20221214 [https://perma.cc/7CNF-JYJD]. When discussing a decision, this Article refers to the relevant court by its name at the time of decision.

271. Meares, supra note 34, at 163.

272. Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

273. Id.

a frisk."[274] While there is some lower court case law to suggest that a singular suspicion can be cause for both,[275] there is a split among courts that leaves this question open.[276]

Suspicion that a person is armed cannot justify a stop unless there is a reasonable belief that the suspected gun possession is *unlawful*. A lawfully possessed gun looks the same in someone's coat pocket as an unlawfully possessed gun. Suspicion that someone is armed, then, is not the same as suspicion that the person is committing a crime. And this is especially true post-*Bruen*.[277]

In *Bruen*, the Supreme Court held that individuals have the *right*, pursuant to the Second and Fourteenth Amendments, to "carry a gun outside the home for self-defense."[278] While states are still allowed to impose permitting and licensure requirements, states' ability to forbid civilians from carrying guns outside their homes has vanished, thereby vastly expanding the right to bear arms in public. *Bruen* is a part of the current Supreme Court's continued expansion of the right to bear arms.[279] In a post-*Bruen* world in which it is lawful in all states to possess a handgun (at least for some people), it cannot be legal for a stop to be based purely on suspicion that a civilian is armed with one.[280] As Professors Brandon del Pozo and Barry Friedman point out (in the context of traffic stops), "[T]here is no longer a reason to believe that a person carrying a gun . . . is anything but a law-abiding citizen."[281] Yet, an assumption that possession of a gun is illegal is the foundation on which the CAP framework was built, insofar as it is used as the basis for *Terry* stops.

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274. Royce de R. Barondes, Automatic Authorization of Frisks in *Terry* Stops for Suspicion of Firearms Possession, 43 S. Ill. U. L.J. 1, 20 (2018).

275. See del Pozo & Friedman, supra note 32, at 1848 ("[I]n countless subsequent [to *Terry*] cases, the only crime of which the target was suspected was carrying a gun."); see also United States v. Horne, 386 F. App'x 313, 315 n.1 (3d Cir. 2010) ("[W]hen police . . . reasonably suspect that a person is carrying a firearm, they also have reasonable suspicion that he is committing a crime unless the circumstances affirmatively suggest he has a permit.").

276. Barondes, supra note 274, at 20–21.

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

278. Id. at 2159. This came after the Supreme Court's decisions in District of Columbia v. Heller, 554 U.S. 570 (2008), and McDonald v. City of Chicago, 561 U.S. 742 (2010), in which the Supreme Court "recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun *in the home* for self-defense." *Bruen*, 142 S. Ct. at 2122 (emphasis added).

279. See, e.g., *McDonald*, 561 U.S. at 791; *Heller*, 554 U.S. at 635–36.

280. See del Pozo & Friedman, supra note 32, at 1851 ("In short: If possession of guns is lawful in a state, then stops are not. A growing body of cases recognizes this new reality. This alone will necessitate a sea change in policing."); cf. Jeffrey Bellin, The Right to Remain Armed, 93 Wash. U. L. Rev. 1, 5 (2015) ("[B]allooning numbers [of concealed carry licenses] will eventually force judges (and police officers) to acknowledge that gun possession alone is a constitutionally dubious justification for a search or seizure.").

281. Del Pozo & Friedman, supra note 32, at 1858.

Accordingly, a stop based on the CAP framework cannot satisfy *Terry*'s requirements without incorporating consideration of the legality of the suspected gun possession.[282] The reasonable suspicion inquiry hinges on "the *ex ante* probability that the suspect is breaking the law."[283] In their discussion of policing tactics after *Bruen*, del Pozo and Friedman call this question "[t]he [l]icensure [c]onundrum" and point out a split in courts' treatment of this inquiry.[284] In jurisdictions that explicitly bar police from stopping civilians to inquire about the licensure status of a weapon, a *Terry* stop based solely on suspicion of possession of a weapon is unlawful.[285] The Fifth Circuit Court of Appeals, for example, held that suspicion of gun possession alone is insufficient to justify a *Terry* stop.[286] But elsewhere, the question is more complex—some states, like New Jersey, have a presumption that a weapon is unlicensed, so police may stop the possessor to inquire,[287] while others, like Pennsylvania, do not.[288] The result is a split among jurisdictions, and widespread uncertainty among police about "what the structure of any particular state's law means for *Terry* stops."[289]

Though enlarged by *Bruen*, the enigma of how police must differentiate between lawful handguns and unlawful ones is not new. Even pre-*Bruen*, in states that did not forbid or severely limit civilians from carrying handguns in public, a person possessing a gun was not necessarily committing a crime. As the Supreme Court of Pennsylvania put it in 2019 in *Commonwealth v. Hicks*, "there can be no doubt that a properly licensed

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282. See Bellin, supra note 280, at 30 ("With respect to the Fourth Amendment, police officers' authority to stop an armed person depends on the constitutional standard — whether there is 'reasonable suspicion' to suspect that the person is committing an offense (e.g., unlicensed firearm possession)." (footnote omitted)).

283. Bellin, supra note 280, at 30.

284. Del Pozo & Friedman, supra note 32, at 1851.

285. See id. ("'A person carrying a weapon shall not be subject to detention for the sole purpose of investigating whether such person has a weapons carry license,' says § 16-11-137 of the Georgia Code. And so, presumably, they will not be." (footnote omitted) (quoting Ga. Code Ann. § 16-11-137 (2015))).

286. United States v. Wilson, 143 F.4th 647, 655–59 (5th Cir. 2025). The Fifth Circuit Court of Appeals rejected a presumption of illegality of gun possession in Louisiana and found "[t]here is no 'firearm exception'" to *Terry*. Id. at 657 (citing Florida v. J.L., 529 U.S. 266, 272 (2000)). The court nonetheless found reasonable suspicion to justify the *Terry* stop based on other circumstances. Id. at 659.

287. See del Pozo & Friedman, supra note 32, at 1852 ("New Jersey law provides that . . . 'it shall be presumed that [the gun possessor] does not possess such a license or permit . . . until he establishes the contrary.'" (quoting N.J. Stat. Ann. § 2C:39-2(b) (West 2014))).

288. See id. (explaining that the Pennsylvania Supreme Court reversed its rule allowing officers to "stop an individual to ensure a person concealing a weapon was licensed to do so" for being inconsistent with *Terry*).

289. Id. at 1853. As one journalist put it, "You mix guns with racism, and stir in some law and order, and it gets very confusing." Robert C. Koehler, Mixing Guns and Racism, Common Dreams (July 19, 2018), https://www.commondreams.org/views/2018/07/19/mixing-guns-and-racism [https://perma.cc/W45L-7ULB].

individual who carries a concealed firearm in public engages in lawful conduct."[290]

A similar conundrum exists regarding questions about dangerousness. With the Supreme Court expanding the right to bear arms for self-protection on the one hand and concerns about gun violence and officer safety on the other, clear guidance on how to assess dangerousness is needed. Even without clear guidance, it is evident that just because someone has a gun, that does not mean that he or she is dangerous.[291] In a dissent in *Adams v. Williams*, fifty years before *Bruen*, Justice William O. Douglas pointed out the hypocrisy in allowing a weapons frisk in a state that permits its citizens to carry guns.[292] In the same decision, Justice Thurgood Marshall also dissented, stating bluntly, "[T]here was no reason for the officer to infer from [the fact the respondent was armed] that the respondent was dangerous," because carrying a permitted weapon is legal.[293] While street-level gun violence is more likely to be committed by someone carrying a gun illegally than someone carrying one legally,[294] as Professor Jeffrey Bellin put it, "The challenge is crafting a lawful mechanism for police officers to distinguish licensed from unlicensed gun carriers."[295]

Even carrying a gun illegally does not necessarily mean a person is dangerous. There is a split among lower courts in handling the question of dangerousness.[296] Professors del Pozo and Friedman point out that "[g]iven the dangerousness that some see in the gun, courts have been

290. Commonwealth v. Hicks, 208 A.3d 916, 926 (Pa. 2019). The *Hicks* Court held that suspicion that someone possesses a firearm does not justify a stop without "articulable facts supporting reasonable suspicion that a firearm is being used or intended to be used in a criminal manner." Id. at 937.

291. There is evidence to suggest that legally possessed guns are not often used in violent crimes on the streets. Bellin, supra note 280, at 32 n.157.

292. See Adams v. Williams, 407 U.S. 143, 149–50 (1972) (Douglas, J., dissenting) (noting the hypocrisy that in Connecticut citizens are allowed to carry guns, yet they can be arrested for carrying one).

293. Id. at 160 (Marshall, J., dissenting). While an entire article (like Professors del Pozo's and Friedman's article, "Policing in the Age of the Gun," supra note 32), or perhaps even an entire book, could be dedicated to a discussion of *Bruen* and *Terry* and what suspicion of weapons possession means for policing going forward, that goes beyond this Article's confines.

294. See Bellin, supra note 280, at 32–34 ("Empirical evidence supports the intuition that those disqualified from possessing a firearm are among the most likely to use guns unlawfully.").

295. Id. at 34.

296. See del Pozo & Friedman, supra note 32, at 1855. When courts equate possession of a firearm with dangerousness, they do so based on the "inherently dangerous nature of firearms." Id. Professors del Pozo and Friedman note judicial support from the Supreme Court in cases such as *Pennsylvania v. Mimms*, which uses language suggesting the inherent dangerousness of guns. Id.

remarkably blasé about where this leaves police,"[297] noting, "[I]t is now impossible to love guns and cops equally, and so courts are choosing."[298]

The CAP framework does not provide any guidance to officers on how to assess present dangerousness. Instead, the framework seems to rely on the incorrect assumption that being armed and being dangerous are synonymous. These questions about conflation between cause for stops and frisks, disregard of the possibility of legal gun ownership, and lack of true evaluation of dangerousness, call into question the foundation of the CAP framework.

C. *The CAP Framework in the Courts*

Fourth Amendment-based challenges to stops and frisks based on the CAP framework have been met with mixed results. As Professor Katie Kronick noted in her analysis of judges' decisionmaking in the context of expert testimony, judges have a tendency to "admit the evidence . . . without critical analysis, even though they should have reason to believe the evidence is unreliable or, at best, has not been shown to be reliable."[299] While testimony from police regarding the CAP framework is sometimes considered expert testimony and sometimes considered lay testimony,[300] it nonetheless falls victim to this same problem of judicial conformity. Thus, the more times officers are allowed to testify to knowing someone is armed based on their training and experience in the CAP framework, the less pushback judges will provide the next time similar testimony is offered.[301] This section compares the treatment of the CAP framework by Maryland state courts with other courts across the country.

1. *Maryland.* — In the context of the BPD's use of the CAP framework to justify stops and searches, Maryland courts have been inconsistent in their analysis of the tactic as establishing reasonable suspicion. In 2003, the Maryland Court of Appeals in *Ransome v. State* examined a case in which the basis for a stop-and-frisk was a bulge in the defendant's pocket and the defendant's apparent nervousness and held that those characteristics did *not* suffice to establish reasonable articulable suspicion.[302] According to the *Ransome* Court:

> [C]onduct that would seem innocent to an average layperson may properly be regarded as suspicious by a trained or experienced officer, but if the officer seeks to justify a Fourth Amendment intrusion based on that conduct, the officer ordinarily must offer some explanation of why he or she regarded

297. Id. at 1858.

298. Id. at 1859.

299. Katie Kronick, Forensic Science and the Judicial Conformity Problem, 51 Seton Hall L. Rev. 589, 617 (2021).

300. See infra note 326 and accompanying text.

301. See infra note 326 and accompanying text.

302. Ransome v. State, 816 A.2d 901, 908 (Md. 2003).

> the conduct as suspicious; otherwise, there is no ability to review the officer's action.[303]

The *Ransome* Court acknowledged that to allow a stop based only on a bulge "would allow the police to stop-and-frisk virtually every man they encounter."[304]

Likewise, in 2011, the Maryland Court of Special Appeals in *In re Jeremy P.* rejected adjustment of the defendant's waistband as a characteristic of an armed person justifying a stop-and-frisk.[305] The court there indicated:

> Mere conclusory statements by the officer that what he saw made him believe the defendant had a weapon are not enough to satisfy the State's burden of articulating reasonable suspicion that the suspect was involved in criminal activity. For that reason, the officer's account of the stop must include specific *facts* from which the court can make a meaningful evaluation of whether the officer's suspicion was objectively reasonable under the totality of the circumstances.[306]

While siding with the defendants, the courts in these cases provided a roadmap for officers to follow in future cases to avoid suppression: explain *why* you thought the characteristic was suspicious, not merely that you did.

Then, in *Womack v. State*, the Appellate Court of Maryland discussed police training in a very different way while finding that a detective *did* have reasonable articulable suspicion to stop the defendant:

> The determination as to the existence of reasonable articulable suspicion must be made "through the prism of an experienced law enforcement officer," and deference must be given "to the training and experience of the . . . officer who engaged the stop at issue." . . . Though an average layperson may interpret such movements as neutral and unremarkable, those nuanced movements may be, and were in the instant case, significant to a trained officer.[307]

Notably, *Womack* was the first in this series of cases in which the detective explicitly spoke about the training he underwent in the CAP framework. The detective was a member of the BPD's DAT and had been

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303. Id.

304. Id. at 906.

305. In re Jeremy P., 11 A.3d 830, 838–39 (Md. Ct. Spec. App. 2011).

306. Id. at 839 (citation omitted) (citing *Ransome*, 816 A.2d at 907–08).

307. Womack v. State, No. 320, 2023 WL 1857241, at *7 (Md. App. Ct. Feb. 9, 2023) (quoting Holt v. State, 78 A.3d 415, 425 (Md. 2013)); see also Thornton v. State, 214 A.3d 34, 48 (Md. 2019) (discussing the officers' training in recognizing characteristics of an armed person but nonetheless finding their explanation of their suspicion insufficient because it was not sufficiently particularized); *In re Jeremy P.*, 11 A.3d at 842 (finding no reasonable articulable suspicion but commenting that the detective "did not testify about his own experience in recovering a gun based on observations of similar waistband adjustments").

monitoring a CCTV feed focused on a "high crime area."[308] The *Womack* detective went on to testify that the defendant's "[left jacket pocket] looked weighted down" and that the defendant had conducted "several security checks."[309] These observations were made via CCTV and were, in the court's eyes, sufficient to establish reasonable, articulable suspicion that Womack had a gun, because of the deference that must be given to the detective's "training and experience."[310]

In *Williams v. State*, decided less than a year after *Womack*, the appellate court again noted its "deference to the training and experience of the law enforcement officer."[311] There, the BPD officer only noted that the defendant was in a "high crime area" and conducted what the officer believed to be a security check.[312] Despite deference to the officer's training and experience, the court found that the security check alone did not justify a stop.[313] Likewise in *Robinson v. State*, the appellate court found a single CAP factor—a large and heavy object in a backpack that caused a bulge with a straight line—insufficient to justify a stop or a frisk, emphasizing the "reasonable possibility" that the heavy object was "any number of ordinary, innocuous items."[314]

While *Williams* and *Robinson* provide a glimmer of hope for judicial scrutiny of the CAP framework, the CAP training is generally credited so faithfully by judges that in Baltimore officers and detectives are routinely admitted as experts in this field.[315] As is discussed in Part IV, however,

308. *Womack*, 2023 WL 1857241, at *1.

309. Id. (quoting testimony of Victor Villafane, Detective, Balt. Police Dep't).

310. Id. at *6–7.

311. Williams v. State, No. 2198, 2024 WL 3579314, at *4 (Md. App. Ct. July 30, 2024) (quoting Sellman v. State, 144 A.3d 771, 781 (Md. 2016)).

312. Id. at *1 n.1 (internal quotation marks omitted) (quoting testimony of Aaron Jackson, Officer, Balt. Police Dep't).

313. Id. at *7. Notably, *Williams* also discussed *Bruen* at great length, but only in the context of the defendant's motion to dismiss the firearms charges as unconstitutional. There was no discussion of the interplay between the reasonable articulable suspicion standard and *Bruen*. See id. at *8.

314. Robinson v. State, No. 0269, 2025 WL 1982852, at *6 (Md. App. Ct. July 17, 2025).

315. Indeed, the detective in *Robinson* was admitted as an expert in the framework. Id. at *4–6. While the higher courts in Maryland have not addressed the issue of expertise in the CAP framework in a published case, a series of unpublished decisions on the topic, each stemming from cases in Baltimore, show that courts are recognizing this as an area of expertise. In 2017, the Appellate Court of Maryland found that an officer who had only been out of the police academy for one month at the time of the defendant's arrest was properly qualified as an expert in the CAP framework because of his eight hours of training in the academy and eight hours of training after the academy on the framework. See Bailey v. State, No. 522, 2017 WL 2482339, at *4–5 (Md. Ct. Spec. App. June 8, 2017). In 2018, the Maryland Court of Special Appeals again found in an unreported decision that an officer was appropriately qualified as an expert in the characteristics of an armed person, citing that he "had received formal training while at the Police Academy in the characteristics of an armed person." Mallette v. State, No. 1624, 2018 WL 4521013, at *4 (Md. Ct. Spec. App. Sep. 20, 2018); see also Ford v. State, No. 1447, 2022 WL 4546674, at *1 (Md. Ct. Spec. App. Sep. 29, 2022) (noting that a detective had been admitted as an expert in identifying

recognition of CAP as a field that police can be experts in should open the framework up to reliability challenges.

The discussion in Maryland courts about the adequacy of officers' claims about citizens exhibiting characteristics of armed persons has been completely devoid of discussion about the *substance* of the training itself. Maryland courts have not considered whether the CAP framework training is adequate or reliable or whether it merely allows police to stop-and-frisk anyone they choose. Rather, these courts focus on whether the officer testifying in each case followed the roadmap and checked the right boxes—did the officer have experience? Did the officer say that they could tell this otherwise innocent characteristic was not innocent in this circumstance? The CAP framework is a policing program and should be analyzed as such.[316]

Further, while Maryland courts consistently recognize the distinction between the cause needed for a *stop* and the cause needed for a *frisk*, these cases lack any discussion of what to do with this distinction when the cause for the stop and the cause for the frisk is *one and the same*. The Maryland Court of Special Appeals (now titled the Appellate Court of Maryland) emphasized the distinction in the cause needed for a stop and the cause needed for a frisk in *Ames v. State*, saying "the two do not conflate" and explaining:

> The *Terry* stop and the *Terry* frisk, of course, serve quite distinct purposes. The stop is crime-related, its purpose being to prevent or detect crime. The reasonable articulable suspicion for a stop must be framed in terms of that purpose. *The frisk, by diametric contrast, is not intended to be an investigative tool at all.* Its express purpose and animating concern is the safeguarding of the life and limb of the stopping officer.[317]

Similarly, that court explained in *Graham v. State*:

> The respective interests served by stops and by frisks are distinct. The stop is crime-related. What is, therefore, required is reasonable suspicion that a crime has occurred, is then occurring, or is about to occur. The frisk, by contrast, is concerned only with officer safety. What is, therefore, required is reasonable suspicion that the person stopped is armed and dangerous.[318]

The *Williams* court came close to discussing the meaning of this distinction in the context of the CAP framework, noting that the purpose

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characteristics of an armed person); Davis v. State, No. 2585, 2021 WL 3630036, at *4 (Md. Ct. Spec. App. Aug. 17, 2021) (same). In *Williams*, the Appellate Court noted that neither involved member of law enforcement was qualified as an expert because of a discovery violation, suggesting that otherwise, they would have been. See 2024 WL 3579314, at *2 n.2.

316. See Meares, supra note 34, at 162–63 ("When policing agencies engage in an organizationally determined practice of stopping certain 'sorts' of people . . . [t]he stops that flow from these programs are not individual incidents . . . .").

317. Ames v. State, 153 A.3d 899, 904 (Md. Ct. Spec. App. 2017) (third emphasis added).

318. Graham v. State, 807 A.2d 75, 92–93 (Md. Ct. Spec. App. 2002).

of the frisk of the defendant there (who was standing on a corner, spotted by police via CCTV, and stopped then searched because police observed him do a security check) was to look for evidence: "In this case, the purpose of the frisk appears to have been to uncover evidence of a crime, not to protect an officer from danger."[319] The *Williams* court noted, "Until the officers arrived at the scene, there was *no plausible threat to officer safety*."[320] Yet the court did not discuss the broader question of whether a pat-down for weapons can ever be lawful when the entire interaction was triggered solely by the CAP framework.[321]

2. *Nationwide*. — Higher courts across the country have approved police actions based on CAP frameworks. Courts generally give broad deference to officers trained in the CAP framework, without critical (or any) discussion of what the training entails, whether it is reliable, or the cited factors themselves. Indeed, in one instance, a state high court gave deference to the reliability of officers' use of the framework even when faced directly with the trial court's skepticism of the same.[322]

Perhaps the starkest example of a state supreme court refusing to engage with the reliability or substance of the framework is Delaware. In *State v. Murray*, a Delaware trial court granted the defendant's motion to suppress based on its refusal to defer to the officer's training and experience in the CAP framework (referred to there as "'armed gunman' profiling").[323] The trial court seemed disturbed by the lack of information it was provided about the training during the officer's testimony at a suppression hearing, noting that it "assume[s] [the training and experience] is real" but was not provided with any record about it; rather, the court was "essentially told to 'trust me.'"[324] The trial court made its concerns about deferring to the training without more information explicit:

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319. *Williams*, 2024 WL 3579314, at *8.

320. Id. (emphasis added).

321. See id. The Appellate Court of Maryland likewise stated in *Robinson* that the frisk was used as an investigatory tool, not for officer safety, noting "a *Terry* stop and a *Terry* frisk are two distinct investigative tools, each requiring a different justification." Robinson v. State, No. 0269, 2025 WL 1982852, at *5 (Md. App. Ct. July 17, 2025). The court in *Robinson* nonetheless avoided addressing whether suspicion of gun possession can trigger both a stop and a frisk. Id. But less than a month earlier in *Taylor v. State*, the Appellate Court of Maryland affirmed the denial of a motion to suppress in a bulge case in which the justification for the stop and the frisk was one and the same. No. 838, 2025 WL 1856497, at *3–5 (Md. App. Ct. July 3, 2025).

322. See State v. Murray, 213 A.3d 571, 579 (Del. 2019) (holding that an officer's testimony that the defendant was moving unusually was enough to justify the stop).

323. State v. Murray, 2018 WL 1611268, at *3 (Del. Super. Ct. Apr. 2, 2018). In *State v. Murray*, the officer cited "swinging of one arm" and "blading" as the factors he relied on, in conjunction with the defendant being in a "high crime neighborhood," taking a "stutter step," and "looking around" as the officer got out of his police vehicle. Id. at *1–2. The officer was trained in "'armed gunman' profiling" and trains other members of law enforcement in the same. Id. at *2.

324. Id. at *2.

> What we are not told, however, is the basis for this belief. The record is bereft of any scientific support for the proposition. What percentage of armed gunmen walk swinging one arm but not the other? What percentage of citizens who walk swinging one arm but not the other are armed gunmen? How, if at all, do these percentages change based upon the time of day or the fact that it is a high crime neighborhood? . . . [W]hat percentage of the citizens turn their bodies away from the policeman? And of those that do, what percentage are hiding something? And of those that are hiding something, what percentage of them are hiding firearms?[325]

The trial court noted that the officer's testimony about his training and experience and the conclusions he drew from it "is certainly not a 'lay opinion'" because "it is professed to be based on 'scientific, technical, or other specialized knowledge.'"[326] Yet the foundation needed for such an expert opinion was lacking—the trial court refused to recognize the state's CAP equivalent as a "science" (using scare quotes),[327] and noted that it could not even characterize it as a legitimate or "junk" science with the dearth of information about the training and its reliability.[328]

The Delaware Supreme Court reversed the trial court's decision, discarding the trial judge's concern about the substance of the training altogether: "A fair reading of the officer's testimony creates an inference that the occurrence of unusual canting and blading movements has risen to such a level that these movements are discussed in officer training as being indicators that a person is carrying a concealed weapon."[329] The Delaware Supreme Court admonished the trial court for not "giv[ing] due deference to the training and experience of the police officer"[330] and said that "[w]hen an officer testifies about something he has learned through his police training or through his police experience, . . . a court cannot expect the testimony to be supported by a statistical analysis or a scientific study where there is no evidence that such an analysis or study exists."[331]

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325. Id. at *3.

326. Id. (quoting Del. R. Evid. 701(c)).

327. Id. at *2–3 (internal quotation marks omitted).

328. Id. at *3.

329. State v. Murray, 213 A.3d 571, 579 (Del. 2019).

330. Id.

331. Id. at 580. The Delaware Supreme Court likewise deferred to training in the CAP framework in *Flowers v. State*, 195 A.3d 18, 27–28 (Del. 2018) (finding reasonable articulable suspicion in part because of the corporal's training "in the police academy and from courses on street crime as to how to recognize the characteristics of an armed person"), and *Bryant v. State*, 156 A.3d 696 (Del. 2017) (unpublished table decision) (finding that the police officer had "reasonable and articulable suspicion" to approach the defendant because the defendant was in a group near a vacant property, grabbed his waistband, and then fled). The Delaware Supreme Court did not engage in a discussion of the substance of the training in either opinion but merely noted it in passing as a reason for crediting the officer's opinion.

In a scathing dissent, Justice Gary Traynor argued that the trial judge did not have to "defer absolutely to [the officer's] testimony merely because he purported to ground it upon his 'training and experience'" and characterized the officer's testimony as "vague and fail[ing] to inspire confidence."[332] Justice Traynor's dissent recited the information the officer provided when asked about what he learned during his training:

> There's several characteristics involving people's behavior and the geographical locations that they are in. I mean, a lot of it is observations, and there are elements that–certain things that people display when they are attempting to conceal firearms from the police and from the public. They're just things that we're aware of and that we can use as a tool.[333]

The dissent engaged with the characteristics cited and pointed out that there was nothing to indicate that they were linked with anything unlawful.[334]

The Appeals Court of Massachusetts also gave its stamp of approval to the "characteristics of an armed gunman" framework by justifying a finding of reasonable suspicion for a stop-and-frisk because the officer testified to attending the ATF's training on it.[335] The appeals court, in a footnote, recited some specifics from the ATF training[336] but assumed the reliability of the training without discussion.[337]

The Superior Court of Pennsylvania affirmed a finding of reasonable suspicion when a detective who attended the ATF training saw the defendant in a high crime area grab his waistband then run when the detective approached him.[338] They did not discuss the training in any

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332. *Murray*, 213 A.3d at 581 (Traynor, J., dissenting).

333. Id. (quoting testimony of Matthew Rosaio, Officer, Wilmington Police Dep't).

334. See id. at 581–82.

335. Commonwealth v. Harrison, No. 15-P-1609, 2017 WL 838230, at *1 (Mass. App. Ct. Mar. 3, 2017); see also Commonwealth v. Jean, No. 14-P-1088, 2015 WL 9306684, at *2 (Mass. App. Ct. Dec. 21, 2015) (upholding a trial court's admission of an officer's testimony regarding the "characteristics of an armed gunman" and declining to decide whether it was a lay or expert opinion, noting instead that it is "'more akin to a description of the modus operandi of' persons who carry illegal firearms" (quoting Commonwealth v. Dennis, 604 N.E.2d 48, 50 (Mass. App. Ct. 1992))).

336. The court described the training as:

> The ATF curriculum provided that a person carrying an unlicensed firearm often carried it loose, in a pocket or waistband to make it accessible. Borges also learned the physical measures or 'security checks' that a person would perform on the unholstered weapon to prevent it from moving or falling from his person. Such 'security checks' involve 'touching or adjusting the waist numerous times.' Borges had implemented that training in at least fifty gun investigations.

Harrison, 2015 WL 9838230, at *1 n.4.

337. Id. at *1–2.

338. Commonwealth v. Mitchell, No. 1209 WDA 2014, 2015 WL 7076982, at *4 n.3 (Pa. Super. Ct. June 16, 2015); see also Commonwealth v. Brown, 64 A.3d 1101, 1108–09 (Pa. Super. Ct. 2013) (affirming a lower court finding of reasonable suspicion in part based on

detail—it was just mentioned in passing in a footnote along with the officer's thirteen years of experience as reasons for "giving due weight to the reasonable inferences" he drew.[339]

The Court of Appeals in Wisconsin took a different approach. In *State v. Pugh*, the court found no reasonable suspicion despite an officer's claim that the defendant was blading his body, which he was trained on in his "extensive training regarding the characteristics of armed individuals."[340] The *Pugh* court discarded the officer's claim of blading as providing reasonable suspicion, saying:

> That leaves Pugh not keeping the front surface of his body parallel to a line extending from one officer to the other—that is, turning his body, or, to use [the officer]'s word, "blading"—as he backed away from them. But how does a person walk away from another . . . without turning his or her body to some degree? Calling a movement that would accompany *any* walking away "blading" adds nothing to the calculus except a false patina of objectivity.[341]

Pugh is the sole example of a state court's discussion turning to what the characteristic of an armed person *actually means*. When the Court of Appeals of Wisconsin delved into what blading means in this context—turning one's body—the opinion became almost sarcastic in its discard of it as a claimed justification for reasonable suspicion.[342]

While the general trend in these cases is to defer to officers' training within the CAP framework, the Court of Appeals in Wisconsin's opinion in *Pugh* demonstrates how courts can interrogate precisely what is meant by the characteristics—what it shows and what it does not show—and articulate how meaningless the framework or characteristic is. Blading is just turning the body. A bulge is just a bulge. A security check could be a check for a phone or wallet. Clothing weighted to one side could be a heavy keychain or a pocket full of change.

In his concurrence in *Terry*, Justice John Marshall Harlan made clear that to have the right to disarm someone, an officer "must first have a right . . . to be in his presence."[343] When there is no crime being investigated except the perceived possibility of weapons possession, without knowledge of its legality, that should not suffice for a stop. The

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the corporal attending "an ATF seminar on 'Characteristics of an Armed Gunman'" (quoting Suppression Court Opinion, Sep. 20, 2011, at 7–8)).

339. *Mitchell*, 2015 WL 7076982, at *4, n.3.

340. State v. Pugh, 826 N.W.2d 418, 420–24 (Wis. Ct. App. 2012) (quoting testimony of Timothy Keller, Officer, Milwaukee Police Dep't).

341. Id. at 423–24 (footnote omitted) (quoting Timothy Keller, Officer, Milwaukee Police Dep't).

342. Id.

343. Terry v. Ohio, 392 U.S. 1, 32 (1968) (Harlan, J., concurring) ("In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop.").

inquiry should end there. But even if suspicion of gun possession suffices for a stop, it should not automatically suffice for a frisk, too, given the complete lack of engagement with the question of present dangerousness. The officer's creation of a perceived safety risk by stopping someone because the officer thinks that person may have a gun should not give cause for a frisk. State court decisions about use of the CAP framework do not engage with this circular problem, nor do they engage with the critical questions of legality of gun possession or present dangerousness.

IV. CHALLENGING THE CAP FRAMEWORK THROUGH FOCUS ON (UN)RELIABILITY

Lawyers and legal scholars largely rely on constitutional law to counteract perceived overreach by police, especially in the context of proactive policing tactics. Scholars have suggested a revamp of the Fourth and Fourteenth Amendments,[344] or change through legislation,[345] or systemic civil rights litigation.[346] All are appropriate and potentially effective options.

Yet, more short-term strategies are needed to supplement these systemic and mostly long-term solutions. Constantly, people are stopped and harassed and arrested based on the CAP framework.[347] Some are even killed.[348] The unbridled discretion of police officers inherent within the CAP framework is an urgent problem.

Setting aside the social and societal issues inherent in the use of the CAP framework, the framework's key problem is that its characteristics do not reliably predict who is armed and do nothing to determine whether suspected gun possession is legal or illegal. The characteristics are so broad that instead of effectively directing officers to those who might be armed, the CAP framework encourages officers to stop nearly anyone. This Part proposes a focus on the reliability (or unreliability) of the CAP framework.

The Supreme Court in *Florida v. Harris* found that deference to "bona fide" police training programs is legally appropriate.[349] But the *Harris*

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344. See Harmon & Manns, supra note 13, at 63 ("Scholars have argued that if the Fourth Amendment and Fourteenth Amendment doctrines do not prevent the proactive use of stops and frisks, the doctrines should change to accommodate these concerns.").

345. See id. at 65–70 (highlighting various effective state-level policies that have regulated the coercive aspects of policing and aligned accountability mechanisms).

346. See id. (explaining how civil rights litigation in New York City led to the creation of the Office of the Inspector General for the NYPD to assess the practices of the department).

347. See Skene, Witness, supra note 21 (describing how neighborhood residents near the Baltimore shooting of a teenager "said the shooting was just the latest example of Baltimore police treating Black communities poorly").

348. See supra section II.D.

349. See Florida v. Harris, 568 U.S. 237, 246–47 (2013) (holding that, if there is evidence of a police dog's satisfactory performance in a training program, "a court can presume . . . that the dog's alert provides probable cause to search").

Court made clear that the deference is not absolute and left an opening for reliability challenges.[350] Existing discovery and evidentiary rules provide the tools to obtain the information about the CAP framework necessary to challenge its use. Section IV.A advocates for offensive uses of existing discovery and evidentiary rules to obtain information about the CAP framework and officers' training in it. Section IV.B discusses framing of reliability arguments to capitalize on the opportunity given in *Harris* and argues for analogizing to the court's gatekeeping function when considering expert testimony. This twofold approach can be used to challenge the CAP framework and other checklist-style methods of proactive policing.

A. *Obtaining Necessary Information*

The first step to stopping unconstitutional police behavior based on the CAP framework is understanding the framework. Attorneys and scholars should not merely accept the framework at face value, as so often happens in the trial courtroom.[351] Instead, they must gather the information themselves to evaluate the reliability of the framework that is being utilized.

A judge cannot actually determine whether training and experience in a particular framework suffice to establish reasonable articulable suspicion without knowing what that training and experience are. Professor William Stuntz argued that "[c]ourts cannot know the things they need to know in order to do a good job of defining liability rules."[352] Stuntz therein suggested that courts do not have the knowledge or tools they need to evaluate police behavior to see whether it complies with *Terry*.[353] Relatedly, Professor Ric Simmons argued that the *Terry* standard has remained "ambiguous" because neither police nor courts have the tools they need to meaningfully assess the accuracy of officers' claims of reasonable articulable suspicion.[354] Instead, the *Terry* standard has become "a legal term of art," dictated not by probability measures or an analysis of whether there is a connection between the cited behavior and suspected crime but rather by "years of precedents in which certain fact patterns have been approved by courts based solely on the experience and expertise of police officers."[355]

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350. See id. at 247 (describing how a defendant must have the opportunity to challenge evidence of a dog's reliability).

351. See supra section III.C.

352. Stuntz, supra note 261, at 1227.

353. Id.

354. See Ric Simmons, Quantifying Criminal Procedure: How to Unlock the Potential of Big Data in Our Criminal Justice System, 2016 Mich. St. L. Rev. 947, 949–50 (explaining that the *Terry* standard has remained ambiguous because police and courts have "lacked the necessary tools to evaluate the accuracy of their predictions with any precision").

355. Id. at 961.

As Stuntz and Simmons argue, judges accepting at face value an officer's training and experience or expertise in the CAP framework may not have the knowledge or tools they need to truly evaluate it. Litigants can change that,[356] and they should, because certain courts are more likely to realize the problems inherent in the CAP framework.[357] The Wisconsin Court of Appeals' notable sarcasm when discussing blading in *State v. Pugh* is a prime example.[358] When the *Pugh* Court looked at what blading actually means rather than deferring to the officer's training, it rejected it as a basis for a privacy intrusion.[359] Likewise, the New Jersey Comptroller rejected the RAS Checklist as unconstitutional upon examining the content (or lack thereof) of its corresponding training.[360]

Discovery rules can be an effective vehicle for obtaining information about the CAP framework or similar proactive policing tactics. While specific discovery rules vary by jurisdiction,[361] they all provide the teeth needed for an argument in favor of disclosing training materials when police cite their training in the CAP framework or other proactive policing tactics. For example, discovery rules relating to expert testimony can be cited in discovery demands to obtain information about the CAP framework when officers are offered as experts in the framework.[362] Even

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356. In the context of challenging blading as a justification for a stop or search, Professor Hochman Bloom suggested that "advocates and trial court judges . . . seek evidence that factors were predictive of criminality before permitting their use to justify the Fourth Amendment intervention." Bloom, supra note 95, at 1181. It would certainly be ideal to have information about whether the factors are predictive of criminality, but it is unrealistic to think courts will require or that police departments will have this information. Nonetheless, the suggestions made in this Part are to push trial courts towards similar considerations, which is possible even without data—does the framework really mean anything, do the characteristics truly predict whether someone is armed, or is the framework just a disguise for blanket stop and frisk authorization?

357. See Bloom, supra note 95, at 1168–69 ("Massachusetts courts have been at the forefront of acknowledging an important paradox: nervous or evasive behavior during police interactions is disproportionately attributed to young people of color, but this behavior is itself the result of racialized policing.").

358. See supra section III.C.2.

359. See State v. Pugh, 826 N.W.2d 418, 420–24 (Wis. Ct. App. 2012) (holding that "the officers had no objective reasonable suspicion to justify a *Terry* seizure").

360. Comptroller Report, supra note 82, at 11–13. The New Jersey Comptroller did a thorough investigation of Street Cop, the private police training company that created the RAS Checklist, to determine whether state money should continue to be used to fund New Jersey police officers' participation in it. Id. at 1–2. The Comptroller's investigation included an analysis of the RAS Checklist and accompanying training and concluded that it was unconstitutional. Id. at 9–16.

361. See Daniel S. McConkie, The Local Rules Revolution in Criminal Discovery, 39 Cardozo L. Rev. 59, 82–86 (2017) (discussing differences between local discovery rules).

362. For example, Federal Rule of Criminal Procedure 16 requires disclosure of the "bases and reasons" for an expert's opinion, along with other information about the expert. Fed. R. Crim. P. 16(a)(1)(G). State discovery rules tend to have comparable requirements. See, e.g., Md. R. 4-263(D)(8)(A) (requiring disclosure of, among other things, "the substance of the expert's findings and opinions, and a summary of the grounds for each opinion").

when officers are not offered as experts, discovery demands can be based on the fact that training materials are in the government's (police department's) possession and necessary to prepare a defense.[363]

When prosecutors are not willing to comply with discovery requests for training materials and courts are unwilling to compel them, public records requests can lead to the same result. In many cases, Freedom of Information Act requests or states' versions of public information requests are relatively straightforward and are often already a familiar tool to scholars and litigants.[364]

The Federal Rules of Evidence and most states' rules of evidence provide for pretrial hearings—even outside of the context of proposed expert testimony—when "justice so requires" to determine the qualification of a witness to give proffered testimony or the admissibility of certain evidence.[365] At any such hearing, even if discovery was not provided pretrial regarding an officer's training and the substance of the CAP framework, questions can be posed to gain information and arguments can be made about the framework's unreliability.

B. *Reliability and Analogy to Expert Testimony*

Whether explicitly when officers are offered as experts in the CAP or a similar framework[366] or through analogy when they are not, rules and law surrounding the introduction of expert testimony are useful frames for gathering information and provide a lens for the court to use when evaluating a proactive policing tactic. The goal of analogizing to expert testimony is to engage the court in questions about the framework's reliability, like how often it works, how often it fails, and in the case of the CAP framework, how many characteristics are needed before making a stop.

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363. The Federal Rules of Criminal Procedure Rule 16 requires the government to "permit the defendant to inspect and to copy . . . papers, documents, data . . . or copies or portions of any of these items" when they are in the government's "possession, custody, or control" and are "material to preparing the defense." Fed. R. Crim. P. 16(E).

364. This author was able to obtain a copy of the BPD's CAP training materials just thirteen days after the BPD's Legal Affairs Division received a Maryland Public Information Act request.

365. Fed. R. Evid. 104. States' evidentiary rules often mirror this or provide more of a right to a pretrial hearing. See, e.g., N.J. R. Evid. 104(a) (noting that "[t]he court shall decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible" and "may hear and determine such matters out of the presence or hearing of the jury"); see also Colo. R. Evid. 104(a), (c) (providing pretrial rulings on the same preliminary questions and allowing for hearings "when the interests of justice require").

366. Officers are often admitted as experts in the CAP framework. See supra note 315 and accompanying text.

The Supreme Court has made its deference to "bona fide" police training programs clear.[367] In evaluating whether a drug-detection dog's alert sufficed to establish probable cause to search a car, the Court in *Florida v. Harris* noted that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert," even when two of the three alerts in the particular case appeared to be false positives.[368] The *Harris* Court went a step further, noting, "even in the absence of formal certification," successful completion of a training program that "evaluated his proficiency" would suffice, stating, "law enforcement units have their own strong incentives to use effective training and certification programs."[369] But the *Harris* Court went on to say where the defendant challenges the reliability, "the court should weigh the competing evidence," leaving open the possibility of the defense challenging the program's adequacy.[370] Reliability considerations are especially appropriate because the CAP framework is presented as scientific and evidence-based.

When police are offered as experts in the CAP framework, there is typically an entitlement to a pretrial hearing on the framework's reliability.[371] When a trial court is faced with proposed expert testimony, whether scientific in nature or not, the judge must act as a gatekeeper to "ensure that any and all [expert] testimony . . . is not only relevant, but reliable."[372] While an expert's qualifications "may bear on the reliability of his proffered testimony, they are by no means a guarantor of reliability."[373] Certainly in situations in which an officer is proffered as an expert in the CAP (or similar) framework, the requirements of Rule 702 and *Daubert* apply.

In advance of such a hearing, the bases for an officer's opinion—the parameters of the CAP framework, including the characteristics and any training or proof to support them—should be provided, per applicable discovery rules.[374] When this information is not provided, the hearing itself

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367. See Florida v. Harris, 568 U.S. 237, 246–47 (2013) (finding a drug detection dog's reliability was established based on its certification from a bona fide law enforcement training program).

368. Id. at 246.

369. Id. at 247.

370. Id. at 248.

371. For example, a *Daubert* hearing in jurisdictions that have adopted it. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993) (requiring evidentiary hearings in which the trial judge must ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand").

372. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999) (internal quotation marks omitted) (quoting *Daubert*, 509 U.S. at 589). This is required both by Fed. R. Evid. 702 and by *Daubert* and its progeny.

373. Quiet Tech. DC–8, Inc. v. Hurel–Dubois UK Ltd., 326 F.3d 1333, 1341 (11th Cir. 2003).

374. See supra note 362 and accompanying text.

can be used as a tool for discovery through questioning about the contours of the CAP framework and its scientific justification.

Even when officers provide lay testimony about the CAP framework, arguments about its adequacy fit squarely within the opening given by the *Harris* Court. The CAP framework is not reliable, and according to *Harris*, the defense is allowed to challenge its adequacy.[375] The DOJ's estimates that more than 80% of people exhibiting characteristics of an armed person are *not armed*,[376] or that 96.3% of the BPD's stops uncovered nothing unlawful,[377] are useful facts to cite to set the stage for the stark unreliability and inadequacy of the framework.[378]

Superimposing the CAP framework on the expert witness analysis pushes questions about the method's reliability to the forefront. This information includes inquiries about the error rates and false positives (how often police suspect someone unarmed to be armed), and about how many characteristics are needed before reasonable suspicion someone is armed. This information is critical for courts to begin to understand the exceedingly high error rates associated with this sort of proactive policing, and its overall unreliability.

CONCLUSION

The CAP framework provides cover for officers who are "gun-hunting." Almost no matter the circumstances, the CAP framework gives officers something to point to as justification for stopping a civilian, despite the framework's unreliability in accurately identifying whether the civilian has a weapon, whether that weapon is legally possessed, and whether the civilian is presently dangerous. The CAP framework leaves absolute discretion in officers' hands. This discretion has been, and continues to be, abused.

Creating a long, broad list of characteristics that might, or might not, mean a person is armed is not "making a science out of [an officer's] sixth sense."[379] The CAP framework is just pseudoscience shielded by "a false patina of objectivity,"[380] but when that patina is removed, all that is left is an overbroad excuse for police to stop whomever they choose.

The CAP framework is but one of many proactive policing frameworks vulnerable to abuse. Past failure of the Fourth Amendment to protect

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375. Florida v. Harris, 568 U.S. 237, 246–47 (2013).

376. DOJ C.R. Div. Investigation, supra note 43, at 95. While courts may consider a less than 20% accuracy rate to be good enough for reasonable articulable suspicion, shifting the conversation to screening of expert testimony can shift courts' opinions regarding the adequacy of the CAP framework.

377. DOJ C.R. Div. Investigation, supra note 43, at 28.

378. See, e.g., EEOC v. Ethan Allen, Inc., 259 F. Supp. 2d 625, 636 (2003) (barring expert testimony with a one-in-three error rate).

379. Eckholm, supra note 23.

380. State v. Pugh, 826 N.W.2d 418, 424 (Wis. Ct. App. 2012).

against ever-expanding *Terry* stops and frisks as part of proactive policing programs should not discourage advocates from challenging them. Creative policing tactics must be met with creative challenges if we are to slow the wave of unconstitutional police action.

THE OTHER TAXATION: TRIBES, TERRITORIES, AND FISCAL AUTONOMY

*Alex Zhang**

Native Americans pay taxes. Territories, by contrast, tax in place of the federal government. Both live with the legacy of American imperialism. Both seek the elusive fiscal self-governance and autonomy promised by Congress. The Supreme Court—through preemption, the plenary power doctrine, and interpretive principles—has hollowed out the Native tax base, forcing tribes to compete fiercely with Congress, states, and localities for revenue. By contrast, territorial residents pay no federal or state taxes on territorially sourced income by edicts of Congress and geography. But such tax exemption enabled the creation of incentive regimes that have only invited more criticism as entrenching subordination. This Article argues that the conceptual underpinnings of the divergent tax treatment of tribes and territories are unsound. Under a more robust vision of fiscal autonomy, judicial limits on Native tax sovereignty are misguided. The territories' wide latitude in designing revenue streams merits increased scrutiny. While imperfect, a uniform, nonrefundable federal income-tax credit for tribal and territorial taxes paid is a promising path forward. This Article thus provides the first systematic study of subfederal taxation beyond states and localities—the "other" American taxation often overlooked in scholarship.

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INTRODUCTION

Fiscal autonomy forms the foundation of self-governance. The power to tax enables robust provision of public goods.[1] Allocation of tax burdens effects the regime's vision of distributive justice and is the primary tool of income redistribution in the United States.[2] A key motivation of the 1787

1. See, e.g., Owen M. Fiss, Why the State?, 100 Harv. L. Rev. 781, 789 (1987) ("Examples of this form of state intervention include aid to public libraries, public schools, private and state universities, public broadcasting, and presidential candidates."); Liam Murphy & Thomas Nagel, Taxes, Redistribution, and Public Provision, 30 Phil. & Pub. Affs. 53, 54 (2001) (explaining how taxation "plays a central role in determining how the social product is shared out among different individuals, both in the form of private property and in the form of publicly provided benefits").

2. See Kirk J. Stark, Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution?, 51 UCLA L. Rev. 1389, 1390 (2004) ("[F]ederal law (especially federal tax law) has served as the primary vehicle through which income and wealth were redistributed in the United States."); see also Joseph Bankman & Thomas Griffith, Social Welfare and the Rate Structure: A New Look at Progressive Taxation, 75 Calif. L. Rev. 1905, 1910–18 (1987) (describing that "a theory of distributive justice" is needed "[t]o determine the desirability of a tax structure"); Ariel Jurow Kleiman, Impoverishment by Taxation, 170 U. Pa. L. Rev. 1451, 1453 (2022) ("The tax and transfer system improves on market outcomes by redistributing resources from rich to poor.").

Constitution was Congress's taxing power.[3] The Articles of Confederation set up a federal government with no independent means of raising revenue, relying instead on the states' generosity to implement federal policy.[4] A generation of social mobilization fought for the possibility of a progressive income tax.[5] Even today, lawmakers and scholars clash with the Supreme Court over Congress's power to tax the ultrarich on their unrealized gains and wealth—a power critical to federal fiscal autonomy in an age of tax cuts, increased spending, and astonishing budget shortfalls.[6]

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3. See The Federalist No. 30, at 188 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing for "a general power of taxation" to "be interwoven in the frame of the government").

4. See Articles of Confederation of 1781, art. IX (relying on revenue by requisition from the states); Pekka Pohjankoski, Federal Coercion and National Constitutional Identity in the United States 1776–1861, 56 Am. J. Legal Hist. 326, 328–33 (2016) (noting that even though "requisitions were 'binding' according to the Articles, in reality there was widespread noncompliance by the states" (quoting Articles of Confederation of 1781, art. IX)); see also Saikrishna Bangalore Prakash, Field Office Federalism, 79 Va. L. Rev. 1957, 1964–65 (1993) (describing how the Articles of Confederation "enfeebled" Congress by denying it "a robust, reliable stream of funds").

5. See generally Ajay K. Mehrotra, Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877–1929 (2013) [hereinafter Mehrotra, Making the Modern American Fiscal State] (examining the transformation of American public finance from a system of indirect, regressive taxation to a direct, progressive income tax).

6. See Moore v. United States, 144 S. Ct. 1680, 1685 (2024) (considering whether Congress has the power to enact the mandatory repatriation tax under Article I and the Sixteenth Amendment); Brief of Amici Curiae Professors Bruce Ackerman, Joseph Fishkin & William E. Forbath, in Support of Respondent at 1, *Moore*, 144 S. Ct. 1680 (No. 22-800) ("Amici's interest . . . is in exploring the original understanding of the Sixteenth Amendment . . . and why it should continue to define the scope of Congress's power of taxation as the nation confronts the challenges of the twenty-first century."); Brief of Amici Curiae Reuven Avi-Yonah, Clinton G. Wallace & Bret Wells, in Support of Respondent at 2, *Moore*, 144 S. Ct. 1680 (No. 22-800) (arguing that Nonrealization Rules "are essential to the broader scheme of income taxation envisioned by the Sixteenth Amendment—to ensure comprehensive and consistent taxation of all income across varied sources . . . ."); John R. Brooks & David Gamage, The Original Meaning of the Sixteenth Amendment, 102 Wash. U. L. Rev. 1, 5–6 (2024) (arguing that the Sixteenth Amendment was designed to overrule *Pollock v. Farmers' Loan & Trust Co.* and to restore Congress's broad power over income taxation); Alex Zhang, Rethinking *Eisner v. Macomber*, and the Future of Structural Tax Reform, 92 Geo. Wash. L. Rev. 179, 181–83 (2024) (examining the legal movement to constitutionalize the realization requirement and to shift federal power over distributive policy from Congress to the Supreme Court); see also Ari Glogower, A Constitutional Wealth Tax, 118 Mich. L. Rev. 717, 721–22 (2020) (describing income-tax workarounds to implement a federal wealth tax); Dawn Johnsen & Walter Dellinger, The Constitutionality of a National Wealth Tax, 93 Ind. L.J. 111, 113–14 (2018) (challenging the view that enactment of a federal wealth tax requires constitutional amendment). For tax cuts and deficits, see Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017); Michael J. Graetz, Foreword—The 2017 Tax Cuts: How Polarized Politics Produced Precarious Policy, 128 Yale L.J. Forum 315, 316 (2018), https://www.yalelawjournal.org/pdf/Graetz_z4nc57qx.pdf [https://perma.cc/25UV-VBMP] (noting that the 2017 tax act "created significant new differences in income tax" and "massive and unsustainable increases in deficits and the national debt"). For a

Scholars have intensely debated the reach of the federal taxing power.[7] They have also assessed state and local autonomy, often in the shadow of the Commerce Clause and the fiscal hegemony of Congress.[8] But within the United States, two other subnational governments have distinctive powers to tax. First, Native tribes can tax as an inherent attribute

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description of the modern anti-tax movement, see generally Michael J. Graetz, The Power to Destroy: How the Antitax Movement Hijacked America (2024).

7. See supra note 6 (collecting scholarly arguments); see also Bruce Ackerman, Taxation and the Constitution, 99 Colum. L. Rev. 1, 4–6 (1999) (arguing for broad congressional discretion in tax policy); John R. Brooks & David Gamage, Taxation and the Constitution, Reconsidered, 76 Tax L. Rev. 75, 82 (2022) (discussing past judicial deference to tax legislation through the "Excise Tax Canon"); Daniel Hemel, Taxing Wealth in an Uncertain World, 72 Nat'l Tax J. 755, 756–57 (2019) (discussing the "constitutional uncertainty" of structural tax reform); Erik M. Jensen, Did the Sixteenth Amendment Ever Matter? Does It Matter Today?, 108 Nw. U. L. Rev. 799, 802 (2014) (arguing for constitutional constraints on innovation in federal tax structure); Alex Zhang, The Forgotten Income-Attribution Power, 135 Yale L.J. 923, 995–1007 (2026) (assessing the federal power to tax corporate income to shareholders after *Moore v. United States*). Constraints on national taxing powers also arise from international tax competition and the rise of tax havens. See Reuven S. Avi-Yonah, Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State, 113 Harv. L. Rev. 1573, 1576–78 (2000) [hereinafter Avi-Yonah, Globalization, Tax Competition] (explaining that globalization "limits governments' ability to collect . . . revenues").

8. See, e.g., Peter D. Enrich, Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 Harv. L. Rev. 377, 405 (1996) ("The states find themselves caught, by competitive pressures compounded by political imperatives, in a contest that none of them can win."); Brian Galle, Kill *Quill*, Keep the Dormant Commerce Clause: History's Lessons on Congressional Control of State Taxation, 70 Stan. L. Rev. Online 158, 159 (2018), https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/03/70-Stan.-L.-Rev.-Online-158-Galle.pdf [https://perma.cc/RWW4-J64L] ("*Quill* established a kind of penalty default, denying states an important aspect of fiscal autonomy in the hopes that they would then use their political sway with Congress to craft a more pragmatic solution."); David Gamage & Darien Shanske, Tax Cannibalization and Fiscal Federalism in the United States, 111 Nw. U. L. Rev. 295, 297–98 (2017) [hereinafter Gamage & Shanske, Tax Cannibalization] (explaining that state-level taxes on corporate income, capital gains, and possibly ordinary income impose large, wasteful costs through "tax cannibalization"); Ariel Jurow Kleiman, Tax Limits and the Future of Local Democracy, 133 Harv. L. Rev. 1884, 1885 (2020) [hereinafter Kleinman, Tax Limits] ("[T]ax limits may reflect genuine concerns about government profligacy and nonresponsiveness."); Michelle D. Layser, Removing Barriers to State Tax Incentive Reform, 171 U. Pa. L. Rev. 1235, 1237–38 (2023) ("[S]tate-level place-based tax incentive reforms face significant constitutional barriers that are absent at the federal level."); Darien Shanske, Local Fiscal Autonomy Requires Constraints: The Case for Fiscal Menus, 25 Stan. L. & Pol'y Rev. 9, 12 (2014) (asserting that new state-level rules can be implemented to "enhance the operations of local democracy"); Daniel Shaviro, An Economic and Political Look at Federalism in Taxation, 90 Mich. L. Rev. 895, 897 (1992) (urging Congress to use its Commerce Clause powers to restrain states' taxing authority to the determination of their tax rates as opposed to the determination of the applicable tax bases); see also Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 Colum. L. Rev. 346, 453 (1990) (problematizing local autonomy); Daniel J. Hemel, Federalism as a Safeguard of Progressive Taxation, 93 N.Y.U. L. Rev. 1, 5 (2018) (contending that the Supreme Court's federalism doctrine has shifted fiscal and revenue-generation pressure to the much more progressive federal income tax system).

of sovereignty.[9] This authority extends at least as far as nonmembers' economic activities on trust lands.[10] As the Supreme Court has explained, tribal taxing power fosters "self-government" by "defray[ing] the cost of providing governmental services."[11] Despite the rhetoric of autonomy, federal courts have shrunk this power and simultaneously expanded the states' power to tax on Native land.[12] As a result, commentators and Native communities have decried tax policy as modern instruments of wealth extraction that limit essential services on reservations.[13] Their demand is simple but powerful: "You Can't Tax Stolen Lands," and Congress should put tribes on an equal fiscal footing as states.[14]

Second, U.S. territories—American Samoa, Guam, Northern Mariana Islands (CNMI), Puerto Rico, and the Virgin Islands—can tax pursuant to

9. Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 152 (1980) ("The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty . . . . The widely held understanding within the Federal Government has . . . been that federal law to date has not worked a divestiture of Indian taxing power.").

10. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982) (holding that the tribe had not surrendered its tribal taxing power); see also The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866) (holding that the state did not have the power to tax trust lands).

11. *Merrion*, 455 U.S. at 137; see also Exec. Order No. 14,112, 88 Fed. Reg. 86022 (Dec. 11, 2023) (calling for "administ[ration of federal] funding in a manner that provides Tribal Nations with the greatest possible autonomy to address the specific needs of their people").

12. See Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001) ("The Navajo Nation's imposition of a tax upon nonmembers on non-Indian fee land within the reservation is . . . presumptively invalid."); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 512–13 (1991) ("Although the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes."); infra sections I.B–.C.

13. See, e.g., Nat'l Cong. of Am. Indians, Res. No. SD-15-036, Support for Tribal Tax Reform and Setting Tax Policy Priorities (2015), https://home.treasury.gov/system/files/226/For%20the%20Record%209182019%20NCAI%20Tax%20Priorities%20Resolution%20SD-15-036.pdf [https://perma.cc/7QKL-THPH]; Maya Srikrishnan, Shannon Shaw Duty & Joaqlin Estus, Tribes Need Tax Revenue. States Keep Taking It., Ctr. Pub. Integrity (Dec. 20, 2022), https://publicintegrity.org/podcasts/integrity-out-loud/tribes-need-tax-revenue-states-keep-taking-it [https://perma.cc/5C9F-AVRH].

14. Misha Hill, You Can't Tax Stolen Land, Inst. Tax'n & Econ. Pol'y (Apr. 12, 2019), https://itep.org/you-cant-tax-stolen-land [https://perma.cc/TY35-MN3H]; see also Hearing on Examining the Impact of the Tax Code on Native American Tribes Before the Subcomm. on Selected Revenue Measures of the H. Comm. on Ways & Means, 116th Cong. 3 (2020), https://democrats-waysandmeans.house.gov/sites/evo-subsites/democrats-waysandmeans.house.gov/files/documents/Rodney%20Butler%20Testimony.pdf [https://perma.cc/Q376-XY5D] (statement of Rodney Butler, Chairman, Mashantucket Pequot Tribal Nation); Matthew L.M. Fletcher, In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue, 80 N.D. L. Rev. 759, 767 (2004) [hereinafter Fletcher, In Pursuit of Tribal Economic Development] (outlining how the practical response to issues in tribal taxation is to treat tribes as governments).

authorization by Congress.[15] As in the context of federal Indian law, territorial taxing power has been grounded in fiscal autonomy and self-government.[16] Unlike tribes, however, territories face little tax competition. They have no overlapping jurisdiction with states and fall outside of the Internal Revenue Code's (the "Code") definition of the "United States."[17] Bona fide residents of the territories—including U.S. citizens—are therefore exempt from federal taxation of territorially sourced income.[18] Instead, they pay a local tax on such income to fulfill their fiscal obligations to both the territorial and the federal government.[19] Congress has even empowered Puerto Rico and American Samoa to deviate from federal-income-tax rules: As a matter of formal statutory authorization, they can craft their own tax regimes to incentivize investment and effect territorial policy.[20] By contrast, Guam, CNMI, and the Virgin Islands are "mirror-Code" jurisdictions and must use the federal income tax as the local, territorial tax regime.[21] Puerto Rico has exercised this power and enacted

15. See Alex Zhang, The Origins of U.S. Territorial Taxation and the *Insular Cases*, 134 Yale L.J. Forum 556, 585–86 (2025), https://www.yalelawjournal.org/pdf/ZhangYLJForumEssay_id98771d.pdf [https://perma.cc/U58S-HNGU] [hereinafter Zhang, The Origins of U.S. Territorial Taxation] ("The evolution of interterritorial variation in income-tax powers again reflects Congress's focus on safeguarding federal tax receipts.").

16. The rhetoric of autonomy has permeated congressional discussions of territorial tax design since the turn of the twentieth century. See id. at 560.

17. I.R.C. § 7701(a)(9) (2018) (defining the "United States" to include "only the States and the District of Columbia").

18. See id. §§ 931, 933; 48 U.S.C. § 734 (2018); United States v. Vaello Madero, 142 S. Ct. 1539, 1543 (2022) (describing Puerto Rico residents' exemption from most forms of federal income, gift, and estate taxation). This general tax exemption is subject to several exceptions (e.g., income sourced to mainland United States or to foreign—that is, nonmainland and nonterritorial—jurisdictions like the United Kingdom, as well as income of federal government employees). See I.R.C. §§ 861(a), 931(d), 933(1), 937(b)(1); infra note 287 and accompanying text.

19. See, e.g., I.R.C. § 933(1) (exempting from taxation, "[i]n the case of an individual who is a bona fide resident of Puerto Rico during the entire taxable year, income derived from sources within Puerto Rico (except amounts received for services performed as an employee of the United States or any agency thereof)"); *Vaello Madero*, 142 S. Ct. at 1542.

20. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 1271, 100 Stat. 2085, 2591–93; P.R. Laws Ann. tit. 13, § 30061 (LexisNexis, LEXIS through 2025 Legis. Sess.) (taxing income at 7%–33%, rates which are lower than federal income tax rates). The Tax Reform Act of 1986 conditioned the power of Guam, American Samoa, and the Northern Mariana Islands to deviate from the federal income tax on an implementation agreement. See Tax Reform Act of 1986, § 1277(b). Such an agreement is in effect only for American Samoa, which has, in any event, adopted a system mirroring federal income taxation. See Am. Sam. Code Ann. §§ 11.0401, 11.0403 (2021); Tax Implementation Agreement Between the United States of America and American Samoa, Dec. 10, 1987–Jan. 7, 1988, IRS, https://www.irs.gov/pub/irs-lbi/tax_implementation_agreement_between_the_us_and_american_samoa.pdf [https://perma.cc/DCL2-JTH8]. Of course, many practical considerations (such as poverty and Congress's distaste for direct investment) prevent the territories from enacting cohesive and completely self-sustaining tax regimes. See infra Part II.

21. 48 U.S.C. §§ 1397, 1421i(a); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No.

a host of tax incentives to attract the wealthy to relocate from the mainland.[22] This has increased economic inequality and led to an influx of cryptocurrency tycoons and hedge fund managers.[23] Locals have criticized these tax regimes as fueling a predatory "tsunami of gentrification."[24]

Both Native and territorial taxing powers are thus grounded in fiscal autonomy. But this concept cannot rest on taxing power alone. For Native tribes, diminished power to tax has impoverished their members.[25] On the other hand, the robust taxing powers of territorial governments—even to replace the federal income tax—have brought neither prosperity nor self-governance.[26] Missing from the scholarship is an account of what exactly fiscal autonomy entails in subfederal taxation.[27] This involves a robust understanding of how federal tax law treats Native tribes and the territories and how fiscal self-governance works for communities living with the legacy of American imperialism.

This Article fills the gap. It analyzes the federal tax regime as applied to tribal and territorial communities, showing their diametrically opposite treatment under federal law.[28] Based on this analysis, it argues that fiscal autonomy is a twofold concept.[29] First-order structural autonomy concerns

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94-241, Art. VI, § 601(a), 90 Stat. 263, 269 (1976) (codified as amended in the notes of 48 U.S.C. § 1801); Organic Act of Guam, Pub. L. No. 81-630, § 31, 64 Stat. 384, 392 (1950).

22. See, e.g., P.R. Laws Ann. tit. 13, §§ 10831-10844 (LexisNexis, LEXIS through 2025 Legis. Sess.) (codifying Act 20 to Promote the Export of Services); id. §§ 10851-10855 (codifying Act 22 to Promote the Relocation of Individual Investors to Puerto Rico).

23. See Mariah Espada, Influencers, Developers, Crypto Currency Tycoons: How Puerto Ricans Are Fighting Back Against the Outsiders Using the Island as a Tax Haven, Time (Apr. 19, 2021), https://time.com/5955629/puerto-rico-tax-haven-opposition (on file with the *Columbia Law Review*) (discussing the tax exemptions available for wealthy individuals who move to Puerto Rico but are unavailable to Puerto Rican residents).

24. Id. (internal quotation marks omitted) (quoting Myrna Veda Pagan Gómez).

25. See, e.g., Nat'l Cong. of Am. Indians, Res. No. MOH-17-011, Equitable Treatment for Tribal Nations in Congressional Tax Reform, at 1 (2017), https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=627&index=0&total=1&view=view SearchItem (on file with the *Columbia Law Review*) (noting that the differential treatment of state and tribal governments in taxing power "significantly handicaps tribal authority to provide much needed government revenue for tribal programs and prevents economic growth on tribal lands"); infra sections I.B–C.

26. See infra notes 363–373 and accompanying text (criticizing Puerto Rico's tax-incentive regimes). This point is salient as Native communities have gestured toward the territories as examples of fiscal autonomy. See Nat'l Cong. of Am. Indians, Res. No. SD-15-036, supra note 13, at 3 (calling for tribal "autonomy from the Internal Revenue Service like the Commonwealth of Puerto Rico").

27. See infra section III.A (surveying scholarship).

28. See infra Part I. This analysis unsettles the traditional rhetoric of "preferential" treatment for Native Americans. See Carole Goldberg, American Indians and "Preferential" Treatment, 49 UCLA L. Rev. 943, 944–45 (2001) (describing equality-based challenges to the "[s]eparate rights, preferences, governmental recognition, and benefits for Indian nations" in American law).

29. This fiscal, institutional concept of autonomy contrasts with the liberal tradition of individual autonomy. See infra notes 433–436 and accompanying text; see also Angela R. Riley, (Tribal) Sovereignty and Illiberalism, 95 Calif. L. Rev. 799, 802 (2007) (contrasting

taxing power as to the substance and receipt of funds.[30] Subnational governments can tax to the exclusion of others with no formal tax competition or share funds acquired from the same tax base with other jurisdictions. This question goes to *how much* revenue is available to them within the confines of their tax base. Further, subnational governments can have substantial authority to design their own tax regimes or must tax in ways derivative of or shaped by the distributive preferences of the national community. This question goes to *how* they may raise revenue, which implicates key questions of fairness.

By contrast, second-order governance autonomy concerns democratic decisionmaking.[31] Given the degree of structural, first-order autonomy enjoyed by subnational governments, to what extent can they tax in accordance with their citizens' sense of distributive equity? Constraints on democratic and responsive fiscal governance can be internal to the subnational community—for example, because the wealthy dominate internal distributive politics.[32] They can also be external to the subnational community—for example, because its members lack representation in the national government.[33] Further, these constraints can be formal, like institutional or process defects that fail to channel preferences into lawmaking, or functional, like outsized influence of wealth on preference formation itself.

The interaction between first- and second-order autonomy is dynamic: The degree to which subnational governments deserve the former rests on its capacity for the latter. That is, robust taxing powers demand adherence to the citizens' vision of distributive justice in fashioning tax policy.[34] Any claims to autonomy thus entail an assessment of not only tribal and territorial authorities to tax but also their potential for fiscal self-governance—both of which have inevitably been influenced by extractive and paternalist federal policies, past and present.[35] Thus framed, the concept of fiscal autonomy captures the element of sovereignty that relates to self-governance in taxation but is not co-extensive with the traditional or

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tribal sovereignty and federal Indian law principles with the standard demands of Western liberalism).

30. See infra section III.B.1.

31. Second-order fiscal autonomy tracks, but does not perfectly replicate, contemporary philosophical discussions of autonomy. See infra notes 423–432, 481–485 and accompanying text (surveying contemporary discussions of individual autonomy, including the use of hierarchical theories and second-order value formation to define autonomy in contrast to unconstrained freedom). See generally Harry G. Frankfurt, Freedom of the Will and the Concept of a Person, 68 J. Phil. 5 (1971) (contrasting first-order desires with second-order volitions in the context of individual autonomy).

32. See infra notes 487–500, 517–533 and accompanying text.

33. See infra notes 501–516 and accompanying text.

34. See infra section III.B.2.

35. See infra Figure 1 (illustrating the fiscal capacity and tax-design powers of tribes and territories); infra Table 2 (summarizing the infrastructure of tribes and territories for democratic and responsive fiscal governance).

doctrinal concept of sovereignty.[36] Overall, this Article's normative framework suggests that judicial limits on tribal taxing power are misguided. By contrast, the territories' wide latitude in designing revenue streams merits further scrutiny.

This analysis is functionalist: It focuses on tribal and territorial governments' capacity in designing tax policy that is responsive to the will of the people they govern. Formal mechanisms of democracy (e.g., written constitutionalism, procedural safeguards in legislation, or numeric representation[37]) may provide strong but *non-exclusive* evidence for such capacity. This is an important point for Native governance because a significant number of tribes do not have written constitutions or might not be democracies in the strictest sense.[38] It is not the argument of this Article that these tribes must adopt canonical documents establishing the basic machinery of government—whether grounded in separation of powers or another articulated structure of popular sovereignty—to gain the privilege to tax. Instead, robust operations of implicit tribal norms or the reciprocal obligations to tribal members—both in collecting revenue and distributing the proceeds—may be enough. On the flipside, democratic fiscal governance in the territories (or its suboptimal presence) often results not from local resistance. Instead, *federal* control over and neglect of territorial constitutionalism, coupled with Congress's distaste for direct spending in the islands, have necessitated the development of tax incentive regimes that further increased inequality.[39] The continuation of such neglect and distaste makes certain forms of territorial taxing power incoherent with

36. In subfederal governance, this point is especially salient as to territorial and local governments, which do not enjoy, as a matter of doctrinal analysis, sovereignty independent from Congress or the states which created them. See Puerto Rico v. Sanchez Valle, 579 U.S. 59, 69–70, 75 (2016) (distinguishing the sovereignty of tribal and state governments from the authority of territorial governments).

37. See Matthew L.M. Fletcher, American Indian Tribal Law 138 (3d ed. 2024) [hereinafter Fletcher, Tribal Law] ("Tribal constitutions often borrow heavily from the United States Constitution—for example, some form of separation of powers.").

38. Id. at 123 ("Indian nations have a relatively new tradition of constitutionalism, and some tribes—most notably the Navajo Nation—still have no written constitution.").

39. U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."); see infra notes 497–500 and accompanying text (describing democracy deficits in and popular desires to amend territorial organic acts). One prominent, recent example of Congress's reluctance to make a direct fiscal investment in the territories is its failure to make the Supplemental Security Income program available to territorial residents. See United States v. Vaello Madero, 142 S. Ct. 1539, 1541 (2022) ("For various historical and policy reasons, including local autonomy, Congress has not required residents of Puerto Rico to pay most federal income, gift, estate, and excise taxes. Congress has likewise not extended certain federal benefits programs to residents of Puerto Rico."); Andrew Hammond, Territorial Exceptionalism and the American Welfare State, 119 Mich. L. Rev. 1639, 1641–43 (2021); Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 556–58.

second-order autonomy. It also puts the burden on Congress to remedy both the democratic deficit and the persistent impoverishment.[40]

The Article thus aims to integrate Native and territorial issues into the mainstream discourse about taxation.[41] It makes three main contributions. First, it evaluates the doctrinal and statutory regimes that govern the taxing powers of Native tribes and U.S. territories.[42] It is therefore the first Article to offer a systematic analysis of the law of subfederal taxation beyond states and localities.[43] Second, the Article deconstructs the concept of fiscal autonomy. It propels both scholarly and policy discussions beyond their current focus on a generalized concept of taxing power. Third, the conceptual framework yields insights for reform. A uniform federal income-tax credit for tribal and territorial taxes paid coheres more with Congress's promise of fiscal autonomy than the existing regime.

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40. Further, this Article's reference to the territories' power to tax in place of Congress and to deviate from federal income-tax rules does not imply that the territories make no contribution to the federal fisc. In a previous article, I have detailed how Congress designed territorial tax systems, including their exemption from internal-revenue regimes, "as part of its broader calculus in devising what it sees as the optimal revenue system for the mainland." That is, territories indirectly bear the costs of *federal* tax design. Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 560.

41. See infra section III.A (situating this Article's claims within existing scholarship); see also Elizabeth A. Reese, The Other American Law, 73 Stan. L. Rev. 555, 561 (2021) [hereinafter Reese, The Other American Law] (integrating tribal law into mainstream discourse); infra notes 338–371 and accompanying text (analyzing Puerto Rico tax law). This Article primarily discusses the federal law that has shaped tribal (and territorial) fiscal capacity, but its proposed income tax-credit regime enables tribes to develop their own tax laws and policies. Such tribal tax policy, when it emerges, also deserves serious study.

42. This account is much needed for not only scholarship but also teaching. The standard law school course in U.S. subnational taxation concerns state and local tax. See, e.g., Walter Hellerstein, Kirk J. Stark & Joan M. Youngman, State and Local Taxation at xi–xx (12th ed. 2025) (focusing on state and local taxation).

43. See infra notes 397–411 and accompanying text (scholarship on Native taxation); infra notes 412–417 and accompanying text (scholarship on territorial taxation). There has been no substantial scholarly treatment of taxation in the U.S. territories in general (rather than of Puerto Rico alone) in the last four decades. See, e.g., Diane Lourdes Dick, U.S. Tax Imperialism in Puerto Rico, 65 Am. U. L. Rev. 1, 16–83 (2015) (providing a historical account of U.S. economic domination of Puerto Rico only); Karla Hoff, U.S. Federal Tax Policy Towards the Territories: Past, Present and Future, 37 Tax L. Rev. 51, *passim* (1981) (exploring contemporary and historical treatment of territorial taxation, but predating major reforms in 1986). The literature on tribal taxation focuses on the Supreme Court's adjudication of state–tribal tax conflicts. See, e.g., Adam Crepelle, Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce, 122 W. Va. L. Rev. 999, 1000 (2020) [hereinafter Crepelle, Taxes, Theft, and Indian Tribes] ("Several factors contribute to Indian country's economic despair, but state taxation of Indian country commerce is the most severe impediment to tribal economies."); Fletcher, In Pursuit of Tribal Economic Development, supra note 14, at 768–74 (offering a comparative analysis of tribal revenue needs); Richard D. Pomp, The Unfulfilled Promise of the Indian Commerce Clause and State Taxation, 63 Tax Law. 897, 911–12 (2010) (analyzing primarily "seminal cases involving state taxation of Indians and those doing business with them and, to a lesser extent, those involving tribal taxation"). No one has examined—to the author's knowledge—both territories and Native tribes as species of subfederal taxation.

The remainder of this Article proceeds as follows. The Article first provides a comparative analysis of existing law. Part I addresses Native tribes, covering federal tax treatment, tribal taxing power, and interactions between tribal and state tax regimes. It shows (1) how divergent interpretive principles and collision of executive agencies, specialty tribunals, and general jurisdiction courts have led to narrowing federal tax exemption; (2) how the battle between dependent-sovereign and strict-autonomy theories has contracted tribal fiscal capacity; and (3) how the failure of preemption by delegation has forced tribes to engage in intense tax competition with the states. Part II examines territorial tax systems, including the territories' general federal tax exemption and Puerto Rico's tax-incentive regime. It shows how the territorial government's exercise of delegated tax discretion has invited criticism of tax shelter and imperialism.[44]

Part III builds a framework of fiscal autonomy. It assesses the scholarship about Native taxation, territorial tax policy, autonomy in other forms of subnational taxation, and the constitution of American imperialism. Part III then contends that fiscal autonomy is a twofold concept, incorporating first-order taxing power and second-order governance. It ends with policy and doctrinal reform proposals, including the design of a nonrefundable federal income-tax credit for tribal and territorial taxes paid.

I. NATIVE TAXING POWER

This Part examines tribal taxing powers. Section I.A examines the federal tax treatment of Native populations. Section I.B analyzes judicial limits on tribal tax sovereignty. Section I.C assesses the reach of state and local taxes in Native territory.

The doctrinal, primarily judge-made framework that governs Native taxation is complex and tripartite.[45] First, the federal government exer-

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44. By showing the distinctive echoes of imperialism in contemporary federal tax policy as to tribes and territories, this Article is in conversation with a burgeoning literature that includes: Maggie Blackhawk, The Supreme Court, 2022 Term—Foreword: The Constitution of American Colonialism, 137 Harv. L. Rev. 1, 151 (2023) [hereinafter Blackhawk, The Constitution of American Colonialism] (offering "a long overdue reckoning with American colonialism" and noting that "[t]he horizons of our constitutional law and theory have been limited in many ways by the American colonial project"); James T. Campbell, *Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement With the *Insular Cases* and "The Law of the Territories", 131 Yale L.J. 2542, 2651 (2022) (arguing that "[s]o long as American legal thought overlooks empire's path dependencies, judicial resolution of its foundational questions will imperil self-determination and invite promise breaking" and "call[ing] for better theories of judicial engagement with the law of the territories . . . and empire's role in American constitutional development"); see also infra notes 418–419 and accompanying text (collecting scholarship).

45. For a critical account of judicial supremacy and the formalist methodology courts used to achieve it in federal Indian law, see, e.g., Alex Tallchief Skibine, Formalism and Judicial Supremacy in Federal Indian Law, 32 Am. Indian L. Rev. 391, 416–36 (2008) (showing "how federal Indian common law has been recently reshaped by formalism").

cises plenary power over Indian affairs.[46] Congress has thus subjected tribal members to federal taxation but exempted tribes themselves and specific streams of income from trust land.[47] Second, tribes can tax as an inherent attribute of sovereignty and without congressional authorization.[48] But poverty and judicial carve-outs have diminished the tribal tax base.[49] Third, states' power to tax in Indian country has expanded.[50] As this analysis shows, the rhetoric of self-government and autonomy goes only so far. The Supreme Court's jurisprudence has removed sovereignty to the periphery of the inquiry. Instead of assuming jurisdiction, the Court has found a web of factual predicates that deprive tribes of taxing power—exceptions that threaten to swallow up the general rule.[51] Such doctrinal evolution has thus resulted in the diminution of tribal taxing power.

A. *Federal Taxation of Native Communities*

1. *Federal Taxation of Tribes and Tribal Entities.* — As a basic principle, Congress exercises plenary power over Indian affairs, including in taxation.[52] This differentiates tribes from states as to fiscal capacity. Congress

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46. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

47. Squire v. Capoeman, 351 U.S. 1, 6–7 (1956) (exempting income derived directly from trust land from taxation); Superintendent of Five Civilized Tribes v. Comm'r, 295 U.S. 418, 421 (1935) (holding that Native individuals are generally liable to the federal income tax); Rev. Rul. 94-16, 1994-1 C.B. 19, 20 (exemption of Native tribes from federal income taxation); see also infra section I.A.

48. See Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 152 (1980) ("The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain . . . .").

49. See, e.g., Atkinson Trading Co. v. Shirley, 532 U.S. 645, 649–59 (2001) (rejecting the Navajo Nation's ability to impose a hotel occupancy tax on nonmembers on non-Indian fee land within its reservation); infra section I.B.

50. See infra section I.C.

51. See, e.g., Montana v. United States, 450 U.S. 544, 565–66 (1981) (detailing circumstances in which a tribe may exercise civil authority on fee land owned by nonmembers, and finding that "[n]o such circumstances . . . are involved in this case"); infra notes 204–211, 252–268 and accompanying text.

52. See, e.g., United States v. Lara, 541 U.S. 193, 200 (2004); Negonsott v. Samuels, 507 U.S. 99, 103 (1993). The plenary power doctrine has its critics, though scholars have recently suggested using it to foster tribal self-governance. E.g., Philip P. Frickey, Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of *Lone Wolf*, 38 Tulsa L. Rev. 5, 19 (2002) ("Under either understanding of 'plenary,' however, as a matter of federal common law, tribes retained inherent sovereignty except with respect to land transfers and government relations."); Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, 132 U. Pa. L. Rev. 195, 233 (1984) ("[V]estiges of the judicial attitude of nonintervention developed and nurtured in the plenary power era remain, especially in the areas of tribal sovereignty and property rights where the Court continues to rely on an inherent Indian affairs power of almost unlimited scope."); see also Sarah H. Cleveland, Powers Inherent in Sovereignty:

can fully extend its taxing powers to the former but not the latter, as federalism shields states from direct federal taxation.[53] Under the intergovernmental tax-immunity doctrine, Congress cannot impose a tax on state governments that unduly interferes with state sovereignty.[54] The precise contours of immunity are blurry. The Supreme Court used to draw, but has since abrogated, a distinction between the state's governmental and proprietary capacity.[55] But at a minimum, it protects states from federal taxation of income "uniquely capable of being earned only by a State."[56] For example, Congress can tax state business activities like selling mineral water, but not a state's receipt of taxes paid by its residents.[57]

Due to plenary power, intergovernmental immunity does not protect Native tribes from federal taxation.[58] Constraints on Congress's taxation of

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Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs, 81 Tex. L. Rev. 1, 25–81 (2002) (analyzing the inherent power of the federal government over Native tribes); Matthew L.M. Fletcher, Resisting Federal Courts on Tribal Jurisdiction, 81 U. Colo. L. Rev. 973, 975 (2010) (describing the judicial assumption "that federal courts have plenary authority over tribal courts"); Zachary S. Price, Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction, 113 Colum. L. Rev. 657, 658 (2013) ("[T]he Supreme Court established that Congress has 'plenary' governmental authority, beyond its usual limited enumerated powers, with respect to Indian tribes and the territories."); Michalyn Steele, Plenary Power, Political Questions, and Sovereignty in Indian Affairs, 63 UCLA L. Rev. 666, 672 (2016) (recommending that courts use the political question and the plenary power doctrines to make Congress the ultimate arbiter over inherent tribal authority).

53. South Carolina v. Baker, 485 U.S. 505, 518 n.11 (1988) (explaining state tax immunity as a product of "constitutional structure and . . . state sovereignty").

54. States, of course, cannot tax federal instrumentalities. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 330 (1819). See generally Alex Zhang, U.S. National Report: Tax Immunity of Federal, State, and Tribal Governments, Am. J. Comp. L. (forthcoming 2026) [hereinafter Zhang, Tax Immunity] (providing an overview of the intergovernmental tax immunity doctrine).

55. *Baker*, 485 U.S. at 523 n.14.

56. New York v. United States, 326 U.S. 572, 582 (1946).

57. Compare id. at 582 ("[O]nly a State can get income by taxing."), with id. at 583–84 (upholding federal excise taxation of the bottling and sale of mineral water by New York). Today, much of state governments' and their instrumentalities' exemption from federal taxation comes from the IRS's expansive interpretation of § 115 of the Internal Revenue Code. See, e.g., Ellen P. Aprill, Revisiting Federal Tax Treatment of States, Political Subdivisions, and Their Affiliates, 23 Fla. Tax Rev. 73, 108 (2019) (explaining the implied statutory exemption from federal taxation for state governments and their instrumentalities); Zhang, Tax Immunity, supra note 54 (manuscript at 13) ("As to non-integral instrumentalities of state governments, the IRS has read § 115 of the Internal Revenue Code expansively to find exemptions which Congress may not have intended."); see also I.R.C. § 115.

58. See Reuven S. Avi-Yonah, The Dubious Constitutional Origins of Treaty Overrides: A Response to Rosenbloom and Shaheen, 26 Fla. Tax Rev. 287, 293 (2022) (citing The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870)) (situating the federal taxation of tobacco on Indian land in the context of plenary power). Intergovernmental immunity does protect Native tribes from state taxes whose legal incidence falls on tribes, but this protection is subject to federal abrogation. See Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (holding states without power to tax Native tribes absent "cession of jurisdiction" or

tribes thus arise from limits specified in the Constitution, like apportionment of direct taxes or uniformity of duties and excises.[59] Exemption stems from legislative grace rather than constitutional mandate.[60] And the famous "political safeguards of federalism"—the protection afforded the states from their role in the "composition and selection" of the national government—have only a generalized and feeble existence as to tribes.[61] Native influence on federal policy must come from individual participation in the democratic process or group lobbying.[62] Shifts in political winds—or judicial sympathies—can quickly change the federal–tribal taxing relationship.

Current law exempts a small subset of Native economic activities from taxation. It is distinctive in three respects: (1) statutory and administrative *exemption* of tribes themselves (and select tribal corporations) from the federal income tax; (2) general *coverage* of Native populations under income-tax regimes, with a specific exclusion for income derived directly from trust land; and (3) the outsized role played by the judiciary, including specialty tribunals, in crafting tax policy.[63]

First, the Treasury Department has long construed Congress to exempt Native tribes from the income tax.[64] The federal government taxes

federal statutory authorization); County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 270 (1992) (holding that a local government can tax the value of real property held by a tribe because Congress authorized state taxation in the General Allotment Act).

59. U.S. Const. art. I, § 2, cl. 3 (direct taxation); id. § 8, cl. 1 (uniform duty, impost, and excise).

60. See Uniband, Inc. v. Comm'r, 140 T.C. 230, 242 (2013) ("[I]f and when Congress acts to subject Indian tribes to Federal tax liability, they become liable—for example, for the Federal excise tax on wagering . . . .").

61. See Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 543 (1954) (describing the ways in which federalism protects and elevates the status of states within the broader Union).

62. Unlike other groups, Native Americans have succeeded less in representative politics (i.e., by electing themselves to Congress) and achieved more through interest-group politics. Kirsten Matoy Carlson, Beyond Descriptive Representation: American Indian Opposition to Federal Legislation, 7 J. Race, Ethnicity & Pol. 65, 65–67 (2022). See generally David E. Wilkins & Heidi Kiiwetinepinesiik Stark, American Indian Politics and the American Political System (4th ed. 2018) (offering a political science overview of Native tribes' relationship with the federal and state governments).

63. But see James W. Colliton, Standards, Rules and the Decline of the Courts in the Law of Taxation, 99 Dick. L. Rev. 265, 267 (1995) (arguing that the rise of complex statutes has reduced the judicial role in taxation generally).

64. E.g., Rev. Rul. 81-295, 1981-2 C.B. 15, 16; see also Staff of Joint Comm. on Tax'n, 112th Cong., Overview of Federal Tax Provisions and Analysis of Selected Issues Relating to Native American Tribes and Their Members 3 (2012) ("No specific Code provision governs the U.S. income tax liability of Indian tribes. However, the Internal Revenue Service . . . has long taken the position that Federally recognized Indian tribes and wholly owned tribal corporations . . . are not taxable entities for U.S. income tax purposes . . . ." (footnotes omitted)).

corporate income.[65] The regulations define "corporation[s]" to include "association[s]."[66] While tribes are plausibly taxable associations,[67] administrative rulings have consistently recognized tribal exemption from the corporate income tax.[68]

Further, under section 17 of the Indian Reorganization Act of 1933 (IRA), tribes can petition the Secretary of the Interior to create federally chartered corporations.[69] Section 17 corporations are owned by, but distinct from, the tribes and afford Indigenous nations modern vehicles of business organization.[70] Treasury has recognized section 17 corporations as nontaxable, like tribes themselves.[71] It relied on the Supreme Court's dictum that tribal tax immunity cannot "turn on the particular form in which the Tribe chooses to conduct its business."[72] But one should not read into this substance-over-form pronouncement: While section 17 corporations do not pay income taxes, wholly owned tribal corporations chartered

65. I.R.C. § 11 (2018).

66. Treas. Reg. §§ 301.7701-2(b)(1)–(2) (1996); see also Sloan G. Speck, The Social Boundaries of Corporate Taxation, 84 Fordham L. Rev. 2583, 2584–85 (2016) (analyzing concepts of the corporation for tax purposes).

67. See United States v. Mazurie, 419 U.S. 544, 557 (1975) (describing tribes as "unique aggregations possessing attributes of sovereignty"). Such arguments are unpersuasive. Treas. Reg. § 301.7701-2(b)(1) refers to business entities organized under tribal statutes. It thus characterizes Native tribes as entities that can create—rather than themselves constitute—corporations. Judicial deference to tax regulations is now an open question, however, after *Loper Bright Enterprises v. Raimondo*. 144 S. Ct. 2244, 2273 (2024).

68. See Rev. Rul. 94-16, 1994-1 C.B. 19, 20 ("[A]n Indian tribe is not a taxable entity . . . ."); Rev. Rul. 81-295, 1981-2 C.B. 15, 16 (finding that federally chartered Indian tribal corporations are not taxable on "income from activities carried on within the boundaries of the reservation"); Rev. Rul. 67-284, 1967-2 C.B. 55, 58 ("Income tax statutes do not tax Indian tribes."); Mark J. Cowan, Leaving Money on the Table(s): An Examination of Federal Income Tax Policy Towards Indian Tribes, 6 Fla. Tax Rev. 345, 352 (2004) ("While the tax-free status of Indian tribes is clear enough, the rationale and analysis behind it is far from obvious.").

69. 25 U.S.C. § 5124 (2018) (codifying as amended the IRA, Pub. L. No. 73-383, § 17, 48 Stat. 984, 988 (1934)). Some tribal casinos and cigarette businesses, for example, are § 17 corporations. See, e.g., PBP Entertainment Corporation and Casino, Prairie Band Potawatomi Nation, https://www.pbpindiantribe.com/pbp-entertainment-corporation [https://perma.cc/42YF-LMWZ] (last visited Feb. 18, 2026) (describing the creation of the Prairie Band Potawatomi Entertainment Corporation, a § 17 corporation, under Tribal Council Resolution No. 2006-208); see also Big Sandy Rancheria Enters. v. Bonta, 1 F.4th 710, 714 (9th Cir. 2021) (considering "whether California cigarette tax regulations apply to inter-tribal sales of cigarettes by a federally chartered tribal corporation wholly owned by a federally recognized Indian tribe").

70. See U.S. Dep't of the Interior, Choosing a Tribal Business Structure 3–4 (2019), https://www.bia.gov/sites/default/files/dup/assets/as-ia/ieed/pdf/Choosing%20a%20Tribal%20Business%20Structure%204.8.19.pdf [https://perma.cc/BS5U-5N78].

71. Rev. Rul. 81-295, 1981-2 C.B. 15, 15; see also Entities Wholly Owned by Indian Tribal Governments, 90 Fed. Reg. 58,151, 58,151 (Dec. 16, 2025) (to be codified at 26 C.F.R. pts. 1, 301) ("[E]ntities that are wholly owned by Tribes and organized or incorporated under the laws of one or more of the Tribes that own them generally are not recognized as separate [taxable] entities for Federal tax purposes.").

72. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 157 n.13 (1973).

under *state* law do.[73] The form of incorporation matters, and section 17 corporations' tax exemption reflects (1) their close relationship with the federal government itself and (2) their genesis in the IRA, an exercise of Congress's power to promote constitutional democracy in core tribal *governance* functions.[74]

2. *Federal Taxation of Native Individuals.* — Tribes and *federally* chartered tribal corporations are thus exempt from federal taxation. This contrasts with the treatment of Native individuals: Congress has taxed accretions to their wealth since the infancy of the modern fiscal state.

The first test came in *Choteau v. Burnet.*[75] The 1931 case asked whether Congress intended to tax Native individuals' income derived from their interests in the *tribes'* income.[76] There, the petitioner-taxpayer held shares in the royalties for oil-and-gas leases on tribal trust land.[77] The tribal council entered into the leases with the approval of the Secretary of the Interior.[78] Fees were paid to the U.S. Treasury and distributed quarterly among tribal members.[79]

In a unanimous decision, the Supreme Court rejected the petitioner's challenge to income taxation of distributed tribal income. The Court reasoned that petitioner's "status as an Indian" only sheltered his income and property subject to federal supervision.[80] Congress aimed "to emancipate [Native populations] from [their] former status as a ward."[81] Courts therefore presume tax exemption for property placed under the federal government's tutelage, but not for income over which Native taxpayers had "absolute" dominion and "untrammeled ownership," even if it originated from an exercise of tribal sovereignty approved by the U.S. Department of the Interior.[82] The Revenue Act of 1919, tracking the Sixteenth Amend-

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73. Rev. Rul. 94-16, 1994-1 C.B. 19, 21.

74. See Maggie Blackhawk, Federal Indian Law as Paradigm Within Public Law, 132 Harv. L. Rev. 1787, 1813 (2019) [hereinafter Blackhawk, Federal Indian Law as Paradigm] ("The [IRA] offered the Native Nations the opportunity to ratify a written constitution, which the United States would recognize as governing within each Nation's territory, and to form a separate corporate charter in order to foster economic development and manage natural resources."); Judith Resnik, Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. Chi. L. Rev. 671, 704 (1989) (describing how the IRA let Indian tribes adopt constitutional governance under the supervision of the Secretary of the Interior).

75. 283 U.S. 691 (1931); see also Robyn L. Robinson, A Discussion of the Application of FICA and FUTA to Indian Tribes' On-Reservation Activities, 25 Am. Indian L. Rev. 37, 51 (2000) (noting that "[i]n *Choteau v. Burnet*, the Supreme Court held that a member's per capita share of the tribe's mineral royalty income was subject to federal income tax").

76. *Choteau*, 283 U.S. at 693.

77. Id. at 692–93.

78. Id.

79. Id. at 693.

80. Id. at 694.

81. Id.

82. Id. at 696 (citing Work v. United States ex rel. Lynn, 266 U.S. 161 (1924); Work v. United States ex rel. Mosier, 261 U.S. 352 (1923)).

ment's language, broadly included as "income" any gains "derived from any source whatever."[83] The result of *Choteau* is that tribes' exemption from the corporate income tax comes at the cost of subjecting tribal members to the individual income tax.[84] Congress, as construed by the Court, has functionally subjected Native tribes to the partnership tax regime.[85] Tribal income flows through—taxable—to individual members instead of being taxed at the entity level.[86]

Four years later, in *Superintendent of Five Civilized Tribes v. Commissioner*, the Supreme Court held Native individuals generally taxable on *all* streams of income.[87] *Five Tribes* arose from the peculiar history of Native ownership (and loss) of land: The General Allotment Act of 1887 tried to assimilate Native populations by allotting land to individual tribal members.[88] The United States held the allotment at first for twenty-five years to prevent state taxation.[89] The allotment regime led to a precipitous decline in Native land ownership, and Congress abandoned it in 1934.[90] In *Five Tribes*, the petitioner-taxpayer received income from his restricted allotment beyond the needs of daily consumption.[91] The taxpayer's excess income was held in trust by the superintendent and invested under the direction of the Interior Secretary.[92]

Did Congress intend to tax the investment income pursuant to the Revenue Act of 1928?[93] The Court answered yes. It pointed to the income-tax statute's broad language as evidence of Congress's exercise of its full

83. Revenue Act of 1919, ch. 18, § 213, 40 Stat. 1057, 1065–66; see also U.S. Const. amend. XVI; *Choteau*, 283 U.S. at 693.

84. See supra notes 64–74 and accompanying text.

85. Today, per capita distributions to tribal members from trust funds held by Interior are not taxable. I.R.S. Notice 2015-67, 2015-41 I.R.B. 546; see also supra section I.A.1. Other distributions like income from gaming operations are expressly taxable. 25 U.S.C. § 2710(b)(3)(D) (2018).

86. I.R.C. §§ 701–771 (2018) (pass-through-taxation regime); Laura E. Cunningham & Noël B. Cunningham, The Logic of Subchapter K 1–17 (6th ed. 2020).

87. 295 U.S. 418, 421 (1935).

88. In general, each head of household received 160 acres. Dawes Severalty Act (General Allotment Act), ch. 119, § 5, 24 Stat. 387, 389–90 (1887).

89. Id. § 5, 24 Stat. at 389.

90. IRA, Pub. L. No. 73-383, § 1, 48 Stat. 984, 984 (1934); Kenneth H. Bobroff, Retelling Allotment: Indian Property Rights and the Myth of Common Ownership, 54 Vand. L. Rev. 1559, 1561 (2001) ("[T]he [allotment] policy had cost Indians almost 90 million acres, two-thirds of the land they owned."); Jessica A. Shoemaker, Complexity's Shadow: American Indian Property, Sovereignty, and the Future, 115 Mich. L. Rev. 487, 492–93 (2017) (describing and criticizing the allotment regime).

91. See *Five Tribes*, 295 U.S. at 418–19 ("Certain funds, said to have been derived from his restricted allotment, in excess of his needs were invested.").

92. Five Civilized Tribes v. Comm'r, 29 B.T.A. 635, 636 (1933).

93. *Five Tribes*, 295 U.S. at 419; see also Revenue Act of 1928, ch. 852, §§ 11–12, 45 Stat. 791, 795–97 (imposing normal and sur- taxes on individual income).

taxing powers under the Sixteenth Amendment.[94] Importantly, it appeared to dismiss Native taxpayers' control over the underlying income or property as key to taxability.[95] Gone was *Choteau*'s language of assimilative colonialism.[96] But so was the focus on fostering Native autonomy as a countervailing federal priority. The Court instead required an expression of "definite intent" before finding an exclusion from gross income.[97] Tax—and the revenue needs of Congress—thus prevailed over federal Indian law.

Choteau and *Five Tribes* established the general rule today: Congress taxes Native individuals on their income like everyone else. Courts, however, have found one stream of income exempt. Under the General Allotment Act, Congress conveys individually allotted Native land to the beneficial owner "free of all charge or incumbrance whatsoever" after the trust relationship terminates.[98] In a 1956 case, *Squire v. Capoeman*, the Supreme Court construed this language to imply an income-tax exemption for profits "derived directly" from trust land.[99] Proceeds from sale of timber on allotted trust land thus fell outside of capital-gains taxation.[100] In so holding, the Court noted two additional facts. First, the Interior Department sold timber on Native land in large quantities.[101] Purchasers were then required to make significant advanced payments.[102] This created challenges for access and infrastructure, so only the largest companies could bid.[103] Native timber was sold at steep discounts, thus reducing the income realized by the tribe and its citizens.[104] Second, the Court stated that the land was worth little after clearing the forest.[105] Taxing income

94. See *Five Tribes*, 295 U.S. at 420 ("The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income."). The Court had used similar reasoning in *Eisner v. Macomber*, stating that "Congress intended in that [income tax] act to exert its power to the extent permitted by the [Sixteenth] [A]mendment." 252 U.S. 189, 203 (1920).

95. See *Five Tribes*, 295 U.S. at 421 ("Non-taxability and restriction upon alienation are distinct things.").

96. See Elizabeth Hidalgo Reese, Tribal Representation and Assimilative Colonialism, 76 Stan. L. Rev. 771, 776 (2024) [hereinafter Reese, Tribal Representation] (defining assimilative colonialism with reference to "strategies to refashion Indigenous groups into the dominant culture's likeness, . . . notably includ[ing] the practice of offering American political power—whether citizenship, the right to vote, or the possibility of statehood—only on terms of racial, cultural, or political erasure").

97. *Five Tribes*, 295 U.S. at 421.

98. General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389–90 (1887).

99. 351 U.S. 1, 9 (1956).

100. Id. at 10.

101. Id. at 4 n.7.

102. Id.

103. Id.

104. Id.

105. Id. at 10.

from the sale of timber would deprive Native populations of the "chance of economic survival in competition with others."[106]

3. *Case Study:* Capoeman *Doctrine, Agency Conflicts, and Interpretive Collision.* — The evolution of the *Capoeman* doctrine presents a classic case study of federal Native tax law.[107] It dramatizes collisions between differing (1) statutory-construction methods and (2) institutional and judicial decisionmaking cultures. First, federal Indian law and tax law each employ distinctive interpretive principles. One interpretive canon in tax asks courts to construe deductions or exclusions from income narrowly, recognizing that Congress taxes accretions to wealth in exertion of its full powers under the Sixteenth Amendment.[108] But courts also read ambiguous terms in treaties and statutes in favor of Native tribes.[109] Second, taxation of Native communities engages actors with divergent institutional goals. The Bureau of Indian Affairs (BIA), a federal agency within the Interior Department, shapes Native policies, often to promote tribal autonomy.[110] By contrast, the Treasury Department raises revenue and aims to protect the federal fisc.[111]

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106. Id.

107. The *Capoeman* doctrine is not an idiosyncrasy of U.S. federal Indian law. Australia has a similar tax exemption known as Native title benefits. See Receiving Native Title Benefits, Australian Tax'n Off., https://www.ato.gov.au/aboriginal-and-torres-strait-islander-peoples/aboriginal-and-torres-strait-islander-peoples-and-individual-tax/receiving-native-title-benefits [https://perma.cc/94FT-K6NH] (last updated May 2, 2025).

108. See U.S. Const. amend. XVI; I.R.C. § 61 (2018) (defining gross income broadly to cover "all income from whatever source derived"); United States v. Burke, 504 U.S. 229, 244 (1992) (Scalia, J., concurring in the judgment) (citing United States v. Centennial Sav. Bank FSB, 499 U.S. 573, 582–83 (1991)) ("[T]he provision at issue here is a tax exemption, a category of text for which we have adopted a rule of narrow construction."); Old Colony Tr. Co. v. Comm'r, 279 U.S. 716, 729 (1929) (holding that an employer's payment of their employee's income taxes were taxable to the employee); Eisner v. Macomber, 252 U.S. 189, 203 (1920) ("Congress intended in [the income tax] act to exert its power to the extent permitted by the [Sixteenth] Amendment."); see also William N. Eskridge, Interpreting Law 444 (2016) (describing a "narrow interpretation" of federal tax exemptions and a "presumption" against tax deductions).

109. E.g., Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); Metlakatla Indian Cmty. v. Dunleavy, 58 F.4th 1034, 1042 (9th Cir. 2023) (collecting cases).

110. The BIA has sometimes failed in its fiduciary duties to tribes. See Stephen L. Pevar, The Rights of Indians and Tribes 64 (4th ed. 2012) (explaining that federal agencies, like the BIA, "have too often ignored their responsibilities and taken actions that have stifled rather than supported tribal self-government"); Valerie Lambert, The Big Black Box of Indian Country: The Bureau of Indian Affairs and the Federal-Indian Relationship, 40 Am. Indian Q. 333, 335–42 (2016) ("The BIA is for many Indians a powerful symbol of US government oppression and subjugation of Indians and ongoing federal paternalism toward Indians."). But in its external battle with the Treasury, the Interior Department has favored Native interests. See, e.g., infra notes 123–124 and accompanying text.

111. See Stanley S. Surrey, A Comment on the Proposal to Separate the Bureau of Internal Revenue From the Treasury Department, 8 Tax L. Rev. 155, 156–57 (1953)

The confluence of these forces showed from the beginning. The Treasury urged the Court to decide *Squire v. Capoeman* "as an ordinary tax case," pointing to the broad statutory definition of gross income and no express exemption for income from trust land.[112] The Court disagreed. It acknowledged the clear-statement rule for tax exemptions.[113] But citing academic works and administrative guidance, Chief Justice Earl Warren found Indian-law principles controlling.[114] Because courts read "[d]oubtful expressions" in favor of Native tribes, the Allotment Act's mandate to transfer trust property "free of all charge or incumbrance" included a guarantee of nontaxability.[115]

The battle between tax and federal Indian law thus favored tribes at first. But *Capoeman* raised more questions than it answered. The key conceptual issue is how to administer the direct-derivation standard. Most economic value ultimately derives from activities on and use of land. The inquiry therefore becomes a line-drawing exercise focused on the meaning of the word "directly." Formalists may ask how many intermediate steps separate land use and the activity taxed. Functionalists may ask how much economic value is attributable to the land (e.g., fair market rent). Add to the conceptual question two doctrinal nitty-gritties: Does income-tax exemption apply to (1) specific allotment acts which do not contain the General Allotment Act's "charge or incumbrance" language;[116] and (2) land purchased by tribal members from the original allottees?[117]

Courts answered the two doctrinal questions first. As in *Capoeman*, they applied federal-Indian-law principles to find implied tax exemptions. *Stevens v. Commissioner* featured a direct conflict between Treasury and Interior.[118] There, a Native taxpayer sought exemption for income derived from his ranch located on land purchased from other Native allottees in

(describing the U.S. practice of integrating tax administration and policymaking within one agency).

112. Squire v. Capoeman, 351 U.S. 1, 5, 9 (1956); see also Brief for the Petitioner at 7, 10–11, *Capoeman*, 351 U.S. 1 (No. 55-134) (arguing that tribal membership is no exception to the sweep of the "broad provisions of . . . the Internal Revenue Code").

113. See *Capoeman*, 351 U.S. at 6 ("[T]o be valid, exemptions to tax laws should be clearly expressed.").

114. Id. at 7–9 (citing Carpenter v. Shaw, 280 U.S. 363, 367 (1930); T.D. 3754, 1925-2 C.B. 37; T.D. 3570, 1924-1 C.B. 85; Income Tax—Five Civilized Tribes of Indians, 34 U.S. Op. Att'y Gen. 275, 281 (1924); Felix S. Cohen, Handbook of Federal Indian Law 265 (1940)).

115. *Capoeman*, 351 U.S. at 6–7 (first quoting *Carpenter*, 280 U.S. at 367; then quoting General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389 (1887)); see also Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) (asserting that ambiguous language, when used in treaties, should not be construed to prejudice Native tribes).

116. § 5, 24 Stat. at 389.

117. See Rev. Rul. 62-16, 1962-1 C.B. 7 (agency ruling that the *Capoeman* exemption does not apply to Native interests in land acquired "through an arm's length purchase rather than . . . through allotment, gifts, devise, or inheritance").

118. 452 F.2d 741, 743 (9th Cir. 1971).

Fort Belknap Reservation.[119] Unlike the General Allotment Act, the Fort Belknap Allotment Act does not mandate incumbrance-free transfer of property after the trust relationship terminates.[120] Treasury thus argued that the absence of an exemption provision in Fort Belknap Reservation's allotment act made the income taxable.[121]

The Ninth Circuit disagreed.[122] The court deferred to the Interior Department's position—appended, at Interior's request, to Treasury's appellate briefing[123]—that it exercised its statutory power to issue allotments in Fort Belknap with the same guarantees as the General Allotment Act.[124] It also relied on the "long-standing Congressional policy of treating Indians equally except where differences in tribal circumstances justify special legislation."[125] As to the exemption of income derived from *purchased* allotted land, the court again sided with Interior. The Ninth Circuit noted Native taxpayers' reliance interests: The BIA had facilitated exchanges of allotted land, with knowledge that Native communities presumed the nontaxability of purchased allotted land under *Capoeman*.[126] The court did not find persuasive tax principles like restrictive readings of exemption from gross income.[127] The *Capoeman* doctrine, the Ninth Circuit explained, was "not . . . technical or narrow," but grounded in Native autonomy, administrative practice, and the interpretive presumption in favor of tribes.[128]

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119. Id. at 742.

120. Compare Fort Belknap Allotment Act, ch. 135, § 1, 41 Stat. 1355, 1355–56 (1921) (providing for the allotment of land within the Fort Belknap Indian Reservation in Montana, but without the General Allotment Act's exemption language), with General Allotment Act, § 5 (providing that "at the expiration of said [trust] period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and *free of all charge or incumbrance whatsoever*" (emphasis added)).

121. *Stevens*, 452 F.2d at 744 ("The Commissioner argues that by reason of differences in the provisions of the General Allotment Act of 1887 and the Fort Belknap Allotment Act . . . under which the allotted lands were granted, Squire v. Capoeman is not applicable.").

122. Id. at 746, 749.

123. Id. at 748.

124. See id. at 746 ("As the agency charged with the administration of the Indian laws and responsible for drafting many of them, Interior's interpretation is entitled to 'great weight' and 'is not to be overturned unless clearly wrong.'" (quoting United States v. Jackson, 280 U.S. 183, 193 (1930))); id. at 745 n.10 (noting that the statement included at the Interior's request in the Commissioner's brief represents the position of the Interior Department); see also Brief for the Petitioner-Appellant at 42–43, *Stevens*, 452 F.2d 741 (Nos. 26193, 26281) ("The Secretary of the Interior has been given the responsibility to approve any transfers in trust and he is aware that abuses of the tax exemption could arise.").

125. *Stevens*, 452 F.2d at 745.

126. Id. at 748 (citing a letter from the Solicitor of the Department of the Interior to the Solicitor General).

127. Id. at 744 ("The Court recognized that 'to be valid, exemptions to tax laws should be clearly expressed' and that the 'Government's promise to transfer the fee "free of all charge or incumbrance whatsoever" is not expressly couched in terms of nontaxability . . . .'" (quoting Squire v. Capoeman, 351 U.S. 1, 6 (1956))).

128. See id. at 744–45.

The Interior Department thus triumphed in the immediate aftermath of *Capoeman*—at least in general jurisdiction courts that knew federal Indian law better than they liked tax. But Treasury prevailed on the conceptual—arguably more important—issue. It built on a string of victories in specialty tribunals like the Tax Court and the Court of Claims, whose expertise—if not sympathy—lies with the public fisc.[129] This process started with subregulatory guidance. In revenue rulings, Treasury negotiated the boundaries of the *Capoeman* exclusion: It first articulated a formula that apportioned income between land (exempt) and labor (nonexempt).[130] When administrability issues arose, it revoked apportionment in favor of complete exclusion, but limited the exclusion by (1) how taxpayers acquired the land; and (2) the funds dispensed in its acquisition.[131] When the Ninth Circuit decided *Stevens*, Treasury acquiesced, conceding these two points.[132]

Failure of agency action produced more vigorous contests in courts. The first major test came in 1979.[133] A Native taxpayer sought exemption for income from motel operations located within the reservation on trust land, in which she held certificates of possessory holding.[134] Relying on the allotment statute and *Capoeman*, she contended that her business generated value on land.[135] Treasury disagreed and argued that income-tax exemption applied only "where the *essential* and *primary* source of the revenue is the land itself."[136] The en banc Court of Claims (a now-defunct,

129. See Deborah A. Geier, The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory, 76 Corn. L. Rev. 985, 998 tbls. I & II (1991) (showing that the government won or partially won 70.5% of tax cases docketed at the district court, while winning or partially winning 90.4% of cases docketed at the Tax Court); David Laro, The Evolution of the Tax Court as an Independent Tribunal, 1995 U. Ill. L. Rev. 17, 24–25 (highlighting the expertise of Tax Court judges); Leandra Lederman, (Un)Appealing Deference to the Tax Court, 63 Duke L.J. 1835, 1880–85 (2014) (describing the specialization of Tax Courts and the concomitant potential for bias).

130. See, e.g., Rev. Rul. 60-377, 1960-2 C.B. 13 (allocating income from the sale of livestock raised by Native taxpayers on allotted land between the portion attributable to the land and the portion attributable to labor and the use of equipment and exempting up to the market grazing fees).

131. See, e.g., Rev. Rul. 56-342, 1956-2 C.B. 20 (scope of the *Capoeman* exemption); Rev. Rul. 58-64, 1958-1 C.B. 12 (taxing income from sale of cattle raised on allotted land); Rev. Rul. 62-16, 1962-1 C.B. 7 (taxing income derived from land acquired through arms-length transactions).

132. Rev. Rul. 74-13, 1974-1 C.B. 14 (acquiescing to *Stevens*, 452 F.2d at 741).

133. Critzer v. United States, 597 F.2d 708 (Ct. Cl. 1979) (en banc).

134. Id. at 709. Certificates of possessory holding, unlike allotments, cannot ripen into fee title. In *Critzer*, the original trial judge held both equivalent for tax exemption. Treasury declined to appeal this ruling. Id. at 711 n.7; Critzer v. United States, No. 134-75, 1977 WL 3788, at *7 (Ct. Cl. July 12, 1977).

135. *Critzer*, 597 F.2d at 712.

136. Id. (emphasis added).

specialty Article III court) sided with the government.[137] The court's reasoning was rooted in tax policy rather than doctrinal exegesis. It laid out a spectrum of taxable activities. On the one end are taxpayers selling stocks from on-reservation phonebooths.[138] Their businesses, while conducted on trust land, generate value from nonexempt labor.[139] On the other end are taxpayers with capital gains from sale of timber—income which the court "easily" saw was "directly derived" from land and thus exempt in *Capoeman*.[140] The court analogized the taxpayer's motel to the former, attributing her income to labor and improvements severable from land.[141] Exemption would embolden "businessmen" with "perpetual and total tax shelters . . . unavailable to all others."[142] The en banc court thus declined to apply federal-Indian-law principles to tax: Congress grants exemptions, "even those affecting Indians, . . . by a definite expression."[143]

The morass of agency guidance, judge-made law, and conflicting principles created what one court called "a crazy-quilt pattern."[144] In 1986, the doctrine crystallized through a creative rereading of *Capoeman* itself. In familiar fact patterns, Native taxpayers sought exemption for income derived from commercial activities like gift stores, gas stations, and smoke shops on trust land.[145] The Claims Court sided with Treasury. The court grounded its decision in *Capoeman*'s observation that the sale of timber significantly reduced the value of the allotted land, which was unsuitable for other uses.[146] Income-tax exemption therefore applies only "if the

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137. Id. at 709. The Court of Claims was an Article III tribunal with subject-matter jurisdiction over money claims against the government. Glidden Co. v. Zdanok, 370 U.S. 530, 571, 584 (1962). In 1982, Congress terminated its operation, transferring trial functions to the new United States Claims Court (now the Court of Federal Claims) and appellate functions to the new Court of Appeals for the Federal Circuit. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25; Philip R. Miller, The New United States Claims Court, 32 Clev. St. L. Rev. 7, 7–8 (1983).

138. *Critzer*, 597 F.2d at 713 ("If plaintiff were to sit in a telephone booth on her Indian land and sell stocks and bonds by phone from the booth, it would be ludicrous to attempt to argue that any income, so earned, was directly derived from the land.").

139. Id. at 713.

140. Id. at 713–14 (citing Squire v. Capoeman, 351 U.S. 1, 9 (1956)).

141. Id. at 714; see also id. at 713 (distinguishing Stevens v. Comm'r, 452 F.2d 741 (9th Cir. 1971); United States v. Daney, 370 F.2d 791 (10th Cir. 1966); and Big Eagle v. United States, 300 F.2d 765 (Ct. Cl. 1962)).

142. Id. at 714. The use of tax shelters by wealthy taxpayers caused serious issues until the Tax Reform Act of 1986. Tanina Rostain, Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry, 23 Yale J. on Reg. 77, 83 (2006); George K. Yin, Getting Serious About Corporate Tax Shelters: Taking a Lesson From History, 54 SMU L. Rev. 209, 210 (2001).

143. *Critzer*, 597 F.2d at 715 (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 156 (1973); *Capoeman*, 351 U.S. at 6; Okla. Tax Comm'n v. United States, 319 U.S. 598, 606–07 (1943)).

144. Saunooke v. United States, 9 Cl. Ct. 537, 545 (1986).

145. Dillon v. United States, 792 F.2d 849, 851–52 (9th Cir. 1986); *Saunooke*, 9 Cl. Ct. at 537–38.

146. *Saunooke*, 9 Cl. Ct. at 540–41 (quoting *Capoeman*, 351 U.S. at 10).

value of the land from which the income is generated is diminished or the land no longer serves the purpose for which [it was] allotted"[147]—that is, only if income results from exploitation of land that decreases its value. Under this standard, nonextractive uses of land—commerce, manufacturing, and even most forms of agriculture—receive no exemption. This reasoning soon spread from specialty tribunals to general jurisdiction courts.[148] Within a year, the Ninth Circuit adopted the diminution rationale. In a stunning reversal, the court called Native taxpayers' argument—even to apportion and exempt part of the income—"another attempt by taxpayers to broaden the rule in *Capoeman*."[149]

The diminution rule is a specious interpretation of *Capoeman*—better seen in the context of judicial attempts to curb tax shelters and protect the income-tax base in the 1980s.[150] *Capoeman* does not limit the exemption to exploitation of land. The Supreme Court mentioned diminution of land value only to illustrate the "wisdom" of tax exemption in "the facts of the instant case."[151] Those precise facts never marked the boundary of taxability. As the Ninth Circuit itself held, *Capoeman* was "not a technical or narrow decision."[152] Further, stated without qualification, the diminution rationale hardly explains case outcomes. In *Capoeman*, the sale of timber reduced the property's value. The same is true in later cases, in which the sale of commercial operations would have reduced property value.[153] The distinction must be one between natural growths (e.g., forest) and man-made capital improvements (e.g., buildings and equipment). But *Capoeman* articulated no such distinction. And this natural-growth/capital-improvement divide would exclude from the *Capoeman* doctrine activities long recognized as exempt.[154] Finally, as to policy, the diminution rule vio-

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147. Id. at 541.

148. Beyond general money claims, the Court of Claims handled claims by Native tribes against the federal government accruing after August 13, 1946, exercised jurisdiction over appeals from the Indian Claims Commission, and resolved disputes pending at the Indian Claims Commission when it dissolved in 1978. Indian Claims Commission Act, Pub. L. No. 79-726, §§ 20, 24, 60 Stat. 1049, 1054–55 (1946) (terminated by 25 U.S.C. § 70v (2018)); Indian Claims Commission Appropriations Act, Pub. L. No. 94-465, § 2, 90 Stat. 1990, 1990 (1976).

149. *Dillon*, 792 F.2d at 857.

150. See supra note 142; see also Marvin A. Chirelstein & Lawrence A. Zelenak, Tax Shelters and the Search for a Silver Bullet, 105 Colum. L. Rev. 1939, 1951 (2005) (describing the retail "tax shelter wars," which featured "the mass marketing of debt-financed tax shelters to upper-middle (and even middle-middle) income taxpayers in the 1970s and 1980s").

151. See *Capoeman*, 351 U.S. at 10.

152. Stevens v. Comm'r, 452 F.2d 741, 744 (9th Cir. 1971).

153. See supra notes 133–149 and accompanying text.

154. See Rev. Rul. 62-16, 1962-1 C.B. 7 (exempting "proceeds from the sale or exchange of cattle and other livestock raised by an Indian on his allotted and restricted lands"); Rev. Rul. 56-342, 1956-2 C.B. 20 (exempting "proceeds of sales of the natural resources of such land, and income from the sale of crops grown upon the land and from the use of the land for grazing purposes"); see also Cross v. Comm'r, 83 T.C. 561, 572 (1984)

lates horizontal equity (i.e., the principle that the tax system should treat similarly situated taxpayers similarly).[155] The result of *Saunooke v. United States* and *Dillon v. United States* is that Native taxpayers receive income-tax exemption *only* if they rent out commercial establishments for others to operate, but are deprived of the exemption if they run the business themselves.[156] This contradicts principles of tax fairness and operates as an obstacle to Native economic development.[157]

This case study of the *Capoeman* exemption yields three insights. First, agency conflicts and divergent decisional cultures have driven doctrinal evolution. Treasury proved more assertive in carrying out its statutory mandate (revenue-raising) than Interior was consistently faithful to Native interests. This is unsurprising. Broader political and social changes often shift the BIA's effectiveness and institutional loyalty.[158] By contrast, any gov-

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(Parker, J., dissenting in part) ("Farming and ranching, unless improperly conducted, do not damage or diminish the value of the trust land.").

155. Scholars have criticized horizontal equity as derivative because market, pre-tax income is not a fair baseline for redistribution. See Liam Murphy & Thomas Nagel, The Myth of Ownership 12–39 (2002) [hereinafter Murphy & Nagel, The Myth of Ownership] (arguing that horizontal equity may or may not be appropriate considering the goal that tax justice "be part of an overall theory of social justice and of the legitimate aims of government"); Lawrence Zelenak & Ajay K. Mehrotra, Introduction to A Half-Century With the Internal Revenue Code: The Memoirs of Stanley S. Surrey, at xxxv-xxxviii (Lawrence Zelenak & Ajay K. Mehrotra eds., 2022) (summarizing academic critiques of horizontal equity theories); Louis Kaplow, Horizontal Equity: Measures in Search of a Principle, 42 Nat'l Tax J. 139, 139 (1989) ("[Horizontal equity] is now frequently measured and applied even though there has been virtually no exploration of why one should care about the principle in the contexts and in the manner in which it is now being used."). Others have defended it as a matter of politics and compromise. Ira K. Lindsay, Tax Fairness by Convention: A Defense of Horizontal Equity, 19 Fla. Tax Rev. 79, 83 (2016) (offering a limited defense of horizontal equity "as a compromise principle for people who disagree about the justice of redistributive taxation"); James Repetti & Diane Ring, Horizontal Equity Revisited, 13 Fla. Tax Rev. 135, 138–39 (2012) (grounding the persistence of debate over horizontal equity in "a shared belief that government should communicate the rationale for treating people differently"). In conceptualizing horizontal equity within federal Indian law and *Capoeman*, Native autonomy becomes a critical factor.

156. Dillon v. United States, 792 F.2d 849, 856 (9th Cir. 1986) (denying tax exemption for income "not generated principally from the use of reservation land and resources" but rather "earned primarily through . . . taxpayers' labor, the sale of goods produced off the reservation and improvements constructed on the trust land"); Saunooke v. United States, 9 Cl. Ct. 537, 545 (1986) (describing the "anomaly" that "if an Indian rents his possessory holding to someone who operates a gift shop, his rental income is tax[-]exempt, but if the same Indian is industrious enough to run the business himself, the income allocable to rent is taxable").

157. See generally Fletcher, In Pursuit of Tribal Economic Development, supra note 14 (assessing tribal commercial development as a partial substitute for tax revenue); Richard J. Ansson, Jr. & Ladine Oravetz, Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They Continue to Strive for Economic Diversity?, 11 Kan. J.L. & Pub. Pol'y 441 (2001) (providing an overview of challenges in tribal attempts at economic diversification).

158. See generally Russel Lawrence Barsh, The BIA Reorganization Follies of 1978: A Lesson in Bureaucratic Self-Defense, 7 Am. Indian L. Rev. 1 (1979) (analyzing the BIA's

ernment's inherent fiscal needs will sustain a bureaucratic culture that fights for the fisc.[159] The structure of federal courts that adjudicate tax disputes adds to this dynamic. The Tax Court and the Court of Federal Claims make for litigation fora sympathetic to tax principles.[160] When agency actions fail, Treasury can ventilate its positions in venues that, because of their expertise in taxation, replicate administrative rather than judicial mores.[161] Interior has no second-chance forum. In contesting the reach of *Capoeman*, Treasury could compensate defeats by riding the momentum of victories in specialty tribunals.[162] Timing helped. General jurisdiction courts—less partial to the fisc—have lost interest in tax cases in the last few decades.[163] Scholars have commented on the strangeness of advocating

1978 reorganization as a bureaucratic self-preservation effort that undermined tribal sovereignty); Felix S. Cohen, The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy, 62 Yale L.J. 348 (1953) (demonstrating that federal administrative actions in the mid-twentieth century weakened tribal rights through bureaucratic decisionmaking rather than legislation).

159. See Kristin E. Hickman, Administering the Tax System We Have, 63 Duke L.J. 1717, 1724 (2014) (explaining that the IRS's bureaucratic culture and practices are oriented toward revenue raising, despite Congress's delegation of regulatory and welfare-policy tasks); Nat'l Taxpayer Advoc., 2012 Annual Report to Congress, at x (2012), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2012-Annual-Report-to-Congress-Executive-Summary.pdf [https://perma.cc/6QXZ-9AWE] (explaining that an underfunded IRS is a significant source of taxpayer issues).

160. See Nina J. Crimm, Tax Controversies: Choice of Forum, 9 B.U. J. Tax L. 1, 2 (1991) (analyzing the range of fora available in tax cases); Thomas D. Greenaway, Choice of Forum in Federal Civil Tax Litigation, 62 Tax Law. 311, 311–317 (2009) (same).

161. See Lawrence Baum, Probing the Effects of Judicial Specialization, 58 Duke L.J. 1667, 1677 (2009) (arguing that specialist judges with subject-matter expertise are "likely to be more assertive than generalists in their policymaking"); Laura G. Pedraza-Fariña, Understanding the Federal Circuit: An Expert Community Approach, 30 Berkeley Tech. L.J. 89, 94–96 (2015) (conceptualizing the Federal Circuit as an expert community).

162. Compare Saunooke v. United States, 9 Cl. Ct. 537 (1986) (judgment for Treasury), and Cross v. Comm'r, 83 T.C. 561 (1984) (en banc) (same), and Hoptowit v. Comm'r, 78 T.C. 137 (1982) (same), and Critzer v. United States, 597 F.2d 708 (Ct. Cl. 1979) (en banc) (same), with Stevens v. Comm'r, 452 F.2d 741 (9th Cir. 1971) (judgment for Native taxpayer); United States v. Daney, 370 F.2d 791 (10th Cir. 1966) (same).

163. In 1941, Stanley Surrey counted tax as the largest subject matter on the Supreme Court's docket. Stanley S. Surrey, The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions, 35 Ill. L. Rev. 779, 779 (1941). Today, the Court hears at most a few tax cases each term. See, e.g., Moore v. United States, 144 S. Ct. 1680, 1687 (2024) ("We must decide whether the 2017 Mandatory Repatriation Tax, or MRT, exceeds Congress's constitutional authority."); Connelly v. United States, 144 S. Ct. 1406, 1411 (2024) ("We granted certiorari . . . to address whether life-insurance proceeds that will be used to redeem a decedent's shares must be included when calculating the value of those shares for purposes of the federal estate tax." (citation omitted)). At the trial level, the Tax Court and the Court of Federal Claims have 28,500 cases in an average year, while the district courts docket 600 tax cases. Nat'l Taxpayer Advoc., Annual Report to Congress 188 & fig. 3.13 (2022) (on file with the *Columbia Law Review*) (noting that the Tax Court hears about 28,200 cases and the Court of Federal Claims hears about 300).

Native interests in "courts of the conqueror."[164] Tax-specialty tribunals amplified these dynamics.

Second, the collision of interpretive principles has framed but hardly predetermined case outcomes. Tax principles—at least as invoked by federal courts in adjudicating Native tax disputes—often place high bars on claims of exemption or deduction from gross income.[165] Federal Indian law suggests the opposite should be the case, establishing interpretive defaults against the federal government.[166] Immediately after *Capoeman*, courts favorably applied—as the Supreme Court did—Native canons of construction to find additional income-tax exemptions at the interstices.[167] That was at the expense of tax principles and motivated by (even if paternalist) concerns for Native autonomy. As one court remarked, Native Americans may no longer need tax exemption because of their status as "independent, qualified member[s] of the modern body politic," so "all the 'ordinary' tax principles should [apply]."[168] Mindful of separation-of-powers concerns, the court punted that task to Congress.[169] But as doctrine matured, another form of judicial restraint—hesitating to intrude into federal fiscal policy—prevailed. Expert adjudicators chose the doctrinal strictures of their craft (tax), and Native canons became an afterthought.[170] Favorable construction of treaties evolved into a strict requirement of "express exemptive language."[171] The invocation and battle between these principles thus mask normative choices made by agencies and the courts.

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164. Nell Jessup Newton, Indian Claims in the Courts of the Conqueror, 41 Am. U. L. Rev. 753, 753 (1992); see also Glen A. Wilkinson, Indian Tribal Claims Before the Court of Claims, 55 Geo. L.J. 511, 511 (1966) ("Perhaps the most fascinating aspect of the jurisdiction exercised by the Court of Claims is its jurisdiction over Indian tribal claims against the United States.").

165. See supra note 108 and accompanying text.

166. See supra note 109 and accompanying text.

167. See, e.g., *Stevens*, 452 F.2d at 749 (holding that income derived from certain lands purchased by the Secretary of the Interior on behalf of Native tribes is exempt from income tax by the General Allotment Act); *Daney*, 370 F.2d at 795 (interpreting the statute to extend a tax exemption to income derived from Native land).

168. *Daney*, 370 F.2d at 795.

169. Id.

170. See supra notes 133–157 and accompanying text; see also, e.g., Saunooke v. United States, 9 Cl. Ct. 537, 543 (1986) ("The conclusion flowing from this morass of authorities is that *Capoeman* borrowed from Cohen's treatise only the notion of the 'derived directly' test and developed a *narrow* meaning for it in broadly construing the General Allotment Act to exempt income generated by trust lands from federal taxation." (emphasis added)).

171. Hoptowit v. Comm'r, 78 T.C. 137, 142–43 (1982) (internal quotation marks omitted) (quoting United States v. Anderson, 625 F.2d 910, 913 (9th Cir. 1980)) "[A]mbiguous language in a treaty or statute is to be construed in favor of Indians. . . . This principle 'comes into play,' however, 'only if such statute or treaty contains language which can reasonably be construed to confer income [tax] exemptions.'" Id. at 142 (second alteration in original) (citations omitted) (quoting Holt v. Comm'r, 364 F.2d 38, 40 (8th Cir. 1966)).

This again tracks broader developments in judicial interpretive practices. Tax principles arise from two rules that ask courts to contextualize provisions within the statutory scheme and mandate narrow construal of exceptions/proviso clauses.[172] After all, Congress taxes "all income from whatever source derived."[173] Any exemption is therefore a carve-out from the Code. By contrast, federal-Indian-law canons are like the rule of lenity. They construe statutory language in favor of distinct, disadvantaged groups of people (e.g., Native populations and criminal defendants).[174] While the framework behind tax principles remains a foundation of statutory construction, the use of lenity has declined since the 1950s.[175]

Third, divergent agency priorities, institutional cultures, and conceptual approaches produced a doctrine that instantiated neither Native nor tax values. The key question raised by *Capoeman* prompts a line-drawing exercise. On the one end are Native citizens who practice law on their allotted trust land. On the other are Native landowners who receive compensation for damage to their allotted land through heavy industrial mining.[176] If *Capoeman* aims to promote Native autonomy, courts should draw the line close to the former. Income from commerce on allotted trust land, even if derived from labor, should be exempt. The en banc Court of Claims cast as "ludicrous" attempts to exclude such earned income.[177] But its concern with tax shelters was overblown. Not every lawyer or doctor can claim exemption under *Capoeman*. Instead, *Native* taxpayers must operate their business on allotted *trust land*.[178] The better tax-policy argument is that exemption disproportionately benefits higher-income Native taxpayers and reduces progressivity.[179] But this overlooks *federal* exemption's

172. E.g., King v. Burwell, 576 U.S. 473, 496–97 (2015) (whole-act rule); Comm'r v. Clark, 489 U.S. 726, 739 (1989) (narrow construal of exceptions); Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) ("To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process . . . ."); Eskridge, supra note 108, at 411 (defining the "Whole act rule").

173. See I.R.C. § 61 (2018).

174. See, e.g., Yates v. United States, 574 U.S. 528, 547–49 (2015) (plurality opinion) (applying the rule of lenity to narrow the purview of a criminal statute); Eskridge, supra note 108, at 430 (defining the "Rule of lenity").

175. Zachary Price, The Rule of Lenity as a Rule of Structure, 72 Fordham L. Rev. 885, 885–86 (2004) ("[T]he rule [of lenity] has lately fallen out of favor . . . ."); David S. Romantz, Reconstructing the Rule of Lenity, 40 Cardozo L. Rev. 523, 534–47 (2018) (describing the decline of the Court's application of lenity since the 1950s).

176. This is a more precise formulation of the taxable/nontaxable activities distinction articulated in *Critzer v. United States*. 597 F.2d 708, 713–14 (Ct. Cl. 1979) (noting that income is exempt from taxation when derived "just [from] the land," whereas income is taxable when derived from "utilization of the capital improvements constructed on the land").

177. Id.

178. The *Capoeman* exemption is grounded in the General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389–90 (1887), not tribal membership alone.

179. The federal income tax features progressive marginal rates: A $1 *Capoeman* exemption is worth 37 cents for taxpayers in the highest taxable bracket and 10 cents for those in the lowest bracket. I.R.C. § 1 (2018).

potential to spur *tribal* redistribution. That is, a more capacious *Capoeman* exemption leaves tribes with a larger fiscal capacity and enables them to impose income taxes in accordance with their members' sense of fairness.[180] And the tribal tax system may well have progressive distributive effects.

By contrast, faithfulness to income-tax principles should have resulted in apportionment.[181] Treasury can apportion mixed income from land, labor, and capital improvements among its sources under *Capoeman*.[182] Income attributable to the allotted land's value should be exempt—an approach that respects horizontal equity and substance over form.[183] Current doctrine does not. It incentivizes Native taxpayers to rent out their allotted land—as rental income receives the federal tax subsidy—instead of developing such land on their own accord.[184] This is inefficient: Why should Native allottees face higher post-tax costs for business operations than outside companies?[185] It is reminiscent of colonialism.[186] There are reasons for this outcome. But they sound in historical and institutional contingency rather than analytical rigor.

As this study of *Capoeman* and its doctrinal progeny shows, federal courts have narrowly construed one of the only tax exemptions for Native individuals grounded in their Indian status.[187] Although tribal members

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180. See infra sections I.B, III.B.

181. Apportionment is a familiar concept in taxation. See, e.g., Reuven S. Avi-Yonah, Kimberly A. Clausing & Michael C. Durst, Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split, 9 Fla. Tax Rev. 497, 498 (2009) (arguing for a system of formulary apportionment in multinational corporate income taxation). *Critzer* discussed the possibility of apportionment, but the plaintiffs failed to raise the argument. 597 F.2d at 714 ("[I]t might be appropriate in certain instances to allocate income based upon the relative value of the land vis-a-vis any improvements or services."). *Dillon* and *Saunooke* rejected apportionment. See Dillon v. United States, 792 F.2d 849, 857 (9th Cir. 1986) ("We reject taxpayers' attempt to exempt a portion of their income based on the fair rental value of the property."); Saunooke v. United States, 9 Cl. Ct. 537, 545 (1986) ("Plaintiffs' argument [for tax apportionment] must be rejected.").

182. Squire v. Capoeman, 351 U.S. 1, 10 (1956).

183. See Anne L. Alstott, Income Taxation in Six Concepts 7–8 (2018) (substance over form); supra note 155 (criticism and defenses of horizontal equity).

184. See supra note 156 and accompanying text.

185. That is, tax incentivizes some Native taxpayers with a competitive advantage in conducting business on their allotted land to rent the land to external companies, because rental income is exempt. See supra note 156 and accompanying text.

186. See Blackhawk, The Constitution of American Colonialism, supra note 44, at 9 n.31 (collecting scholarship); see also Joseph Bankman, Daniel N. Shaviro, Kirk J. Stark & Erin Adele Scharff, Federal Income Taxation 109–10 (19th ed. 2023) (discussing the relationship between taxation and the social contract, as well as the potential of using tax policy to remedy subordination, in the context of *Capoeman*).

187. Morton v. Mancari, 417 U.S. 535, 554 (1974) (describing the BIA's employment preference for Indians "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"); United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005) (explaining the

prevailed in the early contests, the Treasury Department soon succeeded in limiting the exemption to extractive uses of land that diminish its value. The diminution principle does not reflect the most natural reading of the original case law or robust applications of income-tax logic. Instead, it has resulted from divergent institutional decisionmaking cultures and interpretive preferences.

B. *Tribal Taxing Power: Benefits Theory, Dependent Sovereigns, and Strict Autonomy*

The previous section's analysis structures our understanding of tribal taxing power. The federal tax regime grants little preferential treatment to Native Americans.[188] Congress subjects tribal members to income taxation like all U.S. citizens, except for income derived from trust land under *Capoeman*, but federal courts have narrowly construed the exemption to encompass only those activities that decrease the value of the land itself.[189] Tribal governments are not taxed as corporations, but distributions to members are generally taxable as ordinary income.[190] As a result, Native tribes compete with Congress, in addition to states, for revenue.[191]

"judicially explicated" meaning of Indian status (internal quotations omitted) (quoting United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979))).

188. Section I.A focuses on income taxes, the largest federal receipt. As to payroll taxes: Tribes must pay employer-collected portions of payroll taxes, except on compensation paid for services as tribal councilors. In 2018, Congress enabled tribes, through voluntary agreement with the Social Security Commissioner, to cover tribal councilors under employment taxes and federal social-insurance programs funded by those taxes. Thirty-one tribes have entered into such agreements. See Tribal Social Security Fairness Act of 2018, Pub. L. No. 115-243, § 2, 132 Stat. 2894, 2894–96 (codified at 42 U.S.C. § 418a(a) (2018)) ("The Commissioner of Social Security shall, at the request of any Indian tribe, enter into an agreement . . . [to] extend[] the insurance system established by this title to services performed by individuals as members of such Indian tribe's tribal council."); Staff of Joint Comm. on Tax'n, 115th Cong., Description of H.R. 6124, The "Tribal Social Security Fairness Act of 2018," at 3–4 (2018) ("The proposal amends the Social Security Act to provide that, at the request of an Indian tribe, the Commissioner of Social Security will enter into an agreement with the Indian tribe to cover services performed by individuals as members of the Indian tribe's tribal council under the OASDI and Medicare programs."); Rev. Rul. 59-354, 1959-2 C.B. 24 (exempting tribal councilors' wages from federal employment taxes); SSA, Program Operations Manual System RS 01901.700, Services Performed by Members of Indian Tribal Councils (2025) (outlining procedures for voluntary agreements with tribes).

189. See supra section I.A.3.

190. See supra note 85 and accompanying text (noting the exception for per capita distribution to tribal members from trust funds). Payments by tribes to foster general welfare are excludable, under the general welfare doctrine (not specific to Native households). See I.R.C. § 139E (2018); Samuel D. Brunson & Christian A. Johnson, Good Intentions: Administrative Fiat and the General Welfare Exclusion, 100 Wash. U. L. Rev. 1411, 1440–41 (2023) ("[I]n 2014 Congress enacted the Tribal General Welfare Exclusion Act which codified the general welfare exclusion as it applied to Native American Tribes.").

191. See infra section I.C (discussing the states' power to tax Native communities).

Importantly, carving out the federal income-tax base to support the fiscal capacity of subfederal entities is not unprecedented.[192] This is precisely how Congress treats the U.S. territories today. As this Article shows, Congress has forgone collection of federal income, estate, and excise taxes in jurisdictions like Puerto Rico and Guam to enlarge its revenue streams.[193] Expansive delegation to territorial governments has not produced beacons of success.[194] But differentiation between tribes and territories—over both of which Congress holds plenary power and vows to foster autonomy—in federal tax treatment and delegated fiscal power raises difficult conceptual questions and demands justification.[195]

Federal taxation thus constrains tribal fiscal capacity. Add to these constraints judicial limits on tribal taxing jurisdiction. Few Native tribes tax their own members, due to poverty and the absence of federal subsidy.[196] Disputes therefore focus on tribes' taxation of *nonmembers* for their economic activities on reservations.[197] At first, the Supreme Court embraced an expansive conception of tribal tax authority. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, the Court allowed tribes to tax on-reservation sale of cigarettes at forty to fifty cents per carton.[198] According to the Court, the power to tax transactions "on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty."[199] Exercise of this sovereignty is presumptively valid unless divested by statute or by implication of tribes' dependent status. The Court found no such divestiture.[200] Likewise in *Merrion v. Jicarilla Apache Tribe*,

192. Congress has not attempted a modern wealth or sales tax. See generally Ajay K. Mehrotra, The Missing U.S. VAT: Economic Inequality, American Fiscal Exceptionalism, and the Historical U.S. Resistance to National Consumption Taxes, 117 Nw. U. L. Rev. 151 (2022) (examining American resistance to a value-added tax). This decision leaves room for state and local taxation of property and consumption.

193. See infra section II.A.

194. See infra notes 355–371 and accompanying text (describing congressional and territorial criticism of the Puerto Rico tax incentive regime).

195. See infra section II.A.

196. See, e.g., Adam Crepelle, Federal Policies Trap Tribes in Poverty, ABA (Jan. 6, 2023), https://www.americanbar.org/groups/crsj/resources/human-rights/archive/federal-policies-trap-tribes-poverty/ (on file with the *Columbia Law Review*) [hereinafter Crepelle, Federal Policies] (describing the weak economic state of Native tribes and the lack of federal support). Congress provides a limited federal subsidy through an income tax deduction for tribal taxes paid (on the same terms as state and local taxes). See I.R.C. § 164 (2018) (state- and local-tax deduction); I.R.C. § 7871(a) ("An Indian tribal government shall be treated as a State . . . for purposes of section 164.").

197. See, e.g., Atkinson Trading Co. v. Shirley, 532 U.S. 645, 649 (2001) (invalidating hotel occupancy taxes imposed by the Navajo Nation on nonmembers visiting the reservation).

198. 447 U.S. 134, 144, 154 (1980). Most purchasers were nonmembers, who bought cigarettes on reservation land because of their (contested) exemption from the higher excise taxes imposed by the state. Id.

199. Id. at 152.

200. Id. at 152–53 (citing Morris v. Hitchcock, 194 U.S. 384, 393 (1904); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956); Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905); Trespassers on Indian Lands, 23 U.S. Op. Att'y Gen. 214 (1900); Intruders on Lands

the Court upheld tribal severance taxes on oil-and-gas production on tribal lands.[201] *Merrion* and *Colville* emphasized the "taxing power of Indian tribes as an essential instrument of self-government"[202] and as manifestations of "autonomy that has roots deep in [Native] independence."[203]

This expansive conception of Native taxing power did not last. In Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001), the Supreme Court struck down the Navajo Nation's hotel-occupancy taxes on nonmembers staying on fee land within its reservation.[204] And *Atkinson Trading* is not a one-off. It reflects a paradigm shift that requires both territorial and ownership nexus for Native tribes to assume civil jurisdiction over nonmembers.[205] Under *Montana v. United States*, tribes have no inherent power over nonmember activities on non-Indian land in a reservation beyond what is necessary to control "internal relations."[206] The Court articulated two exceptions. Tribes can regulate such activities if nonmembers enter into consensual relationships with tribes or their members, or if nonmember conduct threatens tribal political integrity or economic security.[207] *Atkinson Trading* found *Montana* applicable to taxation and faulted the tribes for showing neither exception.[208] Importantly, consensual relationships can only arise from arrangements like contracts or commercial dealings.[209] And operation of a lodge on non-Indian fee land within the Navajo reservation, the Court said, did not imperil the tribe's political integrity or welfare.[210] *Atkinson Trading* thus significantly diminished tribal power to tax nonmember activities on reservations.[211]

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of the Choctaws and Chickasaws, 17 U.S. Op. Att'y Gen. 134 (1881); Jurisdiction of the Courts of the Choctaw Nation, 7 U.S. Op. Att'y Gen. 174 (1855)).

201. 455 U.S. 130, 137 (1982).

202. Id. at 139.

203. *Colville*, 447 U.S. at 167 (Brennan, J., concurring in part and dissenting in part).

204. 532 U.S. at 649.

205. See Montana v. United States, 450 U.S. 544, 559 (1981) (allowing tribal civil jurisdiction on non-Indian fee land only under narrow conditions); Matthew L.M. Fletcher, A Unifying Theory of Tribal Civil Jurisdiction, 46 Ariz. St. L.J. 779, 790 (2014) (describing how *Montana* limited tribes' civil jurisdiction over nonmembers to situations in which the nonmember has engaged in a consensual commercial relationship with the tribe or in which the tribe's welfare is significantly affected); Judith V. Royster, *Montana* at the Crossroads, 38 Conn. L. Rev. 631, 631 (2006) (describing *Montana*'s impact and how it may pave the way for further limitations to the scope of tribal civil jurisdiction). Scholars have noted that the doctrine's focus on land ownership is odd. See, e.g., Joseph William Singer, Sovereignty and Property, 86 Nw. U. L. Rev. 1, 31 (1991) (questioning the assumption that exclusive ownership of land inside a reservation is a prerequisite to tribal sovereignty).

206. *Montana*, 450 U.S. at 564.

207. Id. at 565–66.

208. *Atkinson Trading*, 532 U.S. at 654.

209. Id. at 655 (quoting *Montana*, 450 U.S. at 565).

210. Id. at 659.

211. *Atkinson Trading* was the culmination of a line of cases that used *Montana* to erode tribal taxing power over nonmembers. See Strate v. A-1 Contractors, 520 U.S. 438, 454–56 (1997) (analogizing federally granted rights-of-way to non-Indian fee land to hold that tribal

Three notions of Native tax power have animated the doctrinal shifts: benefits theory, dependent-sovereign status, and strict autonomy. First, both litigants and the Court seem to ground tribes' taxing jurisdiction in their provision of government services. This idea tracks the popular but much-criticized benefits principle of taxation: Individuals should bear the costs of governance insofar as they benefit from public goods funded by taxes in a transactional, almost quid pro quo arrangement with the state.[212] But the benefits theory is a red herring. It often yields to legal categories and values prevailing in federal courts. In *Colville*, the Court noted that tribal civil jurisdiction is strongest when "the taxpayer is the recipient of tribal services."[213] In *Merrion*, it highlighted the "police protection," the "'substantial privilege of carrying on business' on the reservation," and "'the advantages of a civilized society' . . . assured by the existence of tribal government."[214] But *Atkinson Trading* found such services not enough to sustain tribal taxation: Nonmembers' "actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection" for the tribe to levy taxes under the first *Montana* exception.[215] The benefits theory thus operates in the background, rhetorically invoked but seldom dispositive.[216]

Second, the Court has framed Native tribes as dependent *fiscal* sovereigns. This view starts with a default that tribes can tax nonmembers for their on-reservation conduct.[217] It takes a functional approach to autonomy:

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courts cannot adjudicate negligence claims involving nonmembers occurring on federal rights-of-way); Big Horn Cnty. Elec. Coop. v. Adams, 219 F.3d 944, 953 (9th Cir. 2000) (relying on *Strate* to strike down tribal property taxes where the jurisdictional nexus consisted in a right-of-way granted by the federal government to the utilities company).

212. See Murphy & Nagel, The Myth of Ownership, supra note 155, at 17–19 (noting that the modern economy and the system of property rights that make earning wages, owning homes, and holding bank accounts possible would be impossible without a framework of government support funded by taxes); Joseph M. Dodge, Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles, 58 Tax L. Rev. 399, 399–400 (2005) (describing common critiques of the benefits principle on the grounds of its impracticality and incompatibility with the welfare state); Matthew Weinzierl, Revisiting the Classical View of Benefit-Based Taxation, 128 Econ. J. 37, 38–39 (2018) (describing classical arguments for the benefits principle and the move away from it).

213. Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 157 (1980).

214. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137–38 (1982) (first quoting Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 437 (1980) and Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444–45 (1940); then quoting Exxon Corp. v. Wisc. Dep't of Revenue, 447 U.S. 207, 228 (1980)).

215. *Atkinson Trading*, 532 U.S. at 655.

216. The quid pro quo feature of the benefits theory, of course, contrasts with the modern, progressive federal income tax and its underlying rationale of ability to pay. See Mehrotra, Making the Modern American Fiscal State, supra note 5, at 9 (explaining the concept of "ability to pay" that animated calls for progressive income taxation).

217. See Seth Davis, Eric Biber & Elena Kempf, Persisting Sovereignties, 170 U. Pa. L. Rev. 549, 558 (2022) (exploring the concept of "dependent sovereigns"); Resnik, supra note 74, at 675–80 ("The capacity of the United States government to try to obliterate smaller

Self-government requires revenue, so taxing power is inherent to Native sovereignty.[218] If the minimum nexus of territoriality or membership is met, the only question is whether Congress, a superior sovereign, has deprived the tribe of its authority to tax.[219] This is the majority opinion in *Merrion*, which upheld a tribal oil-and-gas severance tax despite the tribe's earlier contractual agreement with the producer not to raise the royalty rates.[220] Reviewing executive pronouncements, legislative history, and case law, Justice Thurgood Marshall found all three branches in agreement that the "taxing power of Indian tribes [is] an essential instrument of self-government and territorial management."[221]

Third, Justice John Paul Stevens marshaled a conception of *strict* fiscal autonomy in his vigorous *Merrion* dissent. As noted, the dependent-sovereign theory endorses robust, first-order taxing powers to solidify the fiscal foundations of tribal government.[222] By contrast, the strict-autonomy view emphasizes second-order governance autonomy. It relies on the absence of democratic participation to set up a default that tribes have no inherent jurisdiction to tax nonmember activities, at least on fee land within a reservation.[223] For Justice Stevens, limits on tribal taxing power are "appropriate[] . . . because nonmembers are foreclosed from participation in tribal government."[224] Strict autonomy thus sharply divides members, who exert influence over tribal decisionmaking and can be taxed, from nonmembers, who have no say in the design or the imposition of the taxes they bear. As to members, tribal taxing power stems from sovereignty, which federal courts have consistently protected.[225] As to nonmembers, tribal taxing power stems from the tribe's right to *exclude* from its reservation, which a fortiori includes the power to grant entry into the reservation

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'sovereigns' illuminates reasons to respect and maintain semi-sovereigns and demonstrates the complexity of the interaction and interdependence of 'sovereigns' in the United States."); supra section I.A.1 (discussing the plenary power doctrine).

218. E.g., *Merrion*, 455 U.S. at 137 (arguing that the power to tax "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction"); see also id. at 141 ("[S]overeign taxing power is a tool for raising revenue necessary to cover the costs of government.").

219. Id. at 139–44; see also Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 154 (1980) ("[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government . . . .").

220. *Merrion*, 455 U.S. at 133–36. *Colville* also applied this approach. See supra notes 198–200 and accompanying text.

221. *Merrion*, 455 U.S. at 139.

222. See supra notes 217–218 and accompanying text.

223. E.g., *Merrion*, 455 U.S. at 183 (Stevens, J., dissenting).

224. Id.

225. Id. at 170 (citing United States v. Wheeler, 435 U.S. 313 (1978); Fisher v. Dist. Ct., 424 U.S. 382 (1976); Jones v. Meehan, 175 U.S. 1, 29 (1899); Roff v. Burney, 168 U.S. 218 (1897)) (affirming, as exercises of tribal sovereignty, powers to prosecute members for criminal law violations, to define tribal citizenship, to establish rules of inheritance that supersede state law, and to determine child custody).

on conditions like taxation.[226] Parties can bargain around the right to exclude (but not sovereignty) through contracts. Justice Stevens reasoned that the Jicarilla Apache Tribe had done just that in *Merrion*.[227] The Tribe could not later condition on the payment of additional fees its previous permission to let oil-and-gas producers enter the reservation.[228] Underlying his dissent is the intuition that taxation as a *sovereign* activity (rather than a right against trespass) requires the consent of the governed.[229]

Ultimately, strict autonomy prevailed. As *Atkinson Trading* adopted the *Montana* framework, Justice Stevens's member/nonmember dichotomy is critical to judicial inquiry into the bounds of Native taxation.[230] But as this Article argues, Justices Marshall and Stevens are both right.[231] A robust taxing power is integral to autonomy. So is the regime's prospect for self-governance through the exercise of that power. The question is how to operationalize second-order autonomy in today's subnational fiscal landscape.[232]

C. *Interactions Between State and Native Tax Regimes: The Failure of Preemption by Delegation*

States also compete with Native communities for revenue. Again, strict autonomy structures the doctrine, differentiating between state power to tax *members* and *nonmembers* on their economic activities.[233] Along with

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226. See id. at 171–72 (citing Montana v. United States, 450 U.S. 544, 564 (1981); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)) (holding that Native tribes lack the inherent power to assert jurisdiction over nonmembers' criminal conduct).

227. See id. at 186–88 ("The power to exclude petitioners would have supported the imposition of a discriminatory tribal tax on petitioners when they sought to enter the Jicarilla Apache Reservation to explore for minerals . . . . [T]he Tribe did not impose any tax prior to petitioners' entry or as a condition attached to the privileges granted by the leases in 1953.").

228. Id. at 189. As to policy, Justice Stevens called for "additional sources of revenue to better the economic conditions of many Indian tribes." Id. at 190.

229. See id. at 173 ("Since nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited."). Justice Marshall disagreed. Id. at 147 (opinion of the Court) (affording consent "little if any role in measuring the validity of an exercise of legitimate sovereign authority").

230. See Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647, 650 (2001) (acknowledging "[t]he delineation of members and nonmembers, tribal land and non-Indian fee land, [that] stemmed from the dependent nature of tribal sovereignty").

231. Infra notes 578–581 and accompanying text.

232. See infra section III.B.2.

233. Infra notes 234–243, 247–262 and accompanying text (describing case law governing states' power to tax the economic activities of tribal members, on the one hand, and nonmembers, on the other hand); Reese, Tribal Representation, supra note 96, at 775, 823–24 (noting that "Indians are now citizens of states," and that "tribal citizens can vote in state elections"). More precisely, it differentiates between Native interests in immunity from state taxation when the legal incidence of the tax is on tribal members and such interests when the incidence is on nonmembers. After all, Native individuals are citizens of the state where they reside and vote in state elections. But hostilities to Native political participation in state politics remain. See Jeanette Wolfley, You Gotta Fight for the Right to Vote: Enfranchising

territoriality, this creates four categories of analysis. First, courts have barred state taxation of tribal members' on-reservation activities. They include income from on-reservation employment, property held in trust, and transactions in Indian country (e.g., taxes on cigarette and gas sales).[234] The case law rests on the "semi-autonomous status of Indians" as "distinct political communities" with exclusive power over tribal members on Indian lands.[235] It scrutinizes legislative intent—whether Congress has authorized states to extract revenue from Native communities.[236] Its approach mirrors the dependent-sovereign theory, which looks to congressional *abrogation* to shift the default of tribal taxing power.[237] Given the federal objective of Native autonomy, courts rarely find statutory authorization for states to tax tribes.[238]

This categorical bar on state taxation of tribal members' activities on Indian land has produced peculiar methodologies.[239] Despite invocations of *Native* autonomy, courts apply principles of *federal* preemption. The Supreme Court has repeatedly cautioned against "platonic notions of Indian sovereignty," instead relying on "treaties and statutes to define the limits of state power."[240] This reflects a broader, positivist rejection of the

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Native American Voters, 18 U. Pa. J. Const. L. 265, 269–70 (2015) ("State election officials are reluctant to provide access to the franchise for Indian voters, and Indian voters cautiously participate in state and local elections.").

234. E.g., Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123, 128 (1993) (holding that states cannot impose motor-vehicle tax and registration fees on tribal members in "Indian country"); Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 141–42 (1980) (upholding a state excise scheme that taxes nonmembers but not members for on-reservation cigarette sales); Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv., 425 U.S. 463, 480–81 (1976) (invalidating a state "tax on [tribal members'] personal property located within the reservation"); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172–73 (1973) (precluding, through preemption, state taxation of tribal members' income derived from reservation sources); The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866) (precluding state taxation of Native trust land).

235. *McClanahan*, 411 U.S. at 164–65, 168 (internal quotation marks omitted) (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)).

236. See, e.g., *Sac & Fox Nation*, 508 U.S. at 126 (exploring whether Congress authorized states to tax Native communities).

237. See supra notes 217–221 and accompanying text.

238. County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 258 (1992) ("[O]ur cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.'" (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985))). Authorization usually includes taxing royalties from oil and gas production on leased reservation land, and taxing fee land on reservations. See 25 U.S.C. § 349 (2018) (Indian fee land); 25 U.S.C. § 398 (mineral leases); *County of Yakima*, 502 U.S. at 270 (upholding a state property value tax on fee land under the General Allotment Act but disallowing a state excise tax on the sale of such land).

239. *Sac & Fox Nation*, 508 U.S. at 127; *County of Yakima*, 502 U.S. at 258.

240. *McClanahan*, 411 U.S. at 172; see also *County of Yakima*, 502 U.S. at 257 ("The 'platonic notions of Indian sovereignty' that guided Chief Justice Marshall have, over time, lost their independent sway." (quoting *McClanahan*, 411 U.S. at 172 & n.8)).

law as "brooding omnipresence in the sky."[241] But it has the effect of delineating and seeing tribal autonomy through the lens of federal enactments rather than Native practice. The Court itself has acknowledged tribal sovereignty only as a "backdrop" against which to read the language of Congress.[242] The costs of this approach will become apparent in the fourth doctrinal bucket.[243]

The second and third doctrinal categories are straightforward. States have broad powers to tax nonmembers' off-reservation activities pursuant to state constitutions and their own sovereignty.[244] Further, states can impose nondiscriminatory taxes on tribal members' (and tribes') off-reservation activities.[245] And when tribal members live off reservation, the Supreme Court has relied on principles of international and interjurisdictional taxation to enable the states of residence to tax their entire income.[246]

The fourth doctrinal category has generated sharp disagreement. It concerns state power to tax nonmembers for on-reservation activities, especially when tribes tax the same conduct. The doctrine centers on the *legal* incidence of taxation.[247] For example, the Court has invalidated state motor-carrier license and fuel taxes on non-Indian taxpayers contracted to cut timber on a Native reservation, due to pervasive federal regulation of tribal timber-harvesting and the federal policy of tribal self-government.[248] By contrast, the Court has upheld state taxes on *off-reservation* receipt of fuel by non-Native distributors who later delivered to tribal gas stations.[249] The formalist approach thus distinguishes taxable off-reservation events from nontaxable on-reservation events. It serves predictability at the expense of gamesmanship: States can easily avoid judicial limits on their taxing power by redrafting the statute to tax upstream commercial

241. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); see also Stephen E. Sachs, Finding Law, 107 Calif. L. Rev. 527, 529–30 (2019).

242. *McClanahan*, 411 U.S. at 172.

243. See infra text accompanying note 269.

244. States still face constraints in taxation, but such constraints do not arise from federal Indian law. See Cal. Const. art. XIII A (limiting California's taxing power); Richard Briffault, Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law, 34 Rutgers L.J. 907, 909 (2003) (explaining that states have authority to tax their citizens); David Gamage & Darien Shanske, The Federal Government's Power to Restrict State Taxation, 81 St. Tax Notes 547, 551–53 (2016) ("The federal government almost certainly can impose significant restrictions on state taxing power, though within limits."); Tracey A. Kaye, Show Me the Money: Congressional Limitations on State Tax Sovereignty, 35 Harv. J. on Legis. 149, 183–88 (1998) (describing states' taxation powers).

245. E.g., Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 113 (2005); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 158 (1973).

246. See Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995) ("[A] jurisdiction, such as Oklahoma, may tax all the income of its residents, even income earned outside the taxing jurisdiction.").

247. *Wagnon*, 546 U.S. at 101.

248. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 153 (1980); see also Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 686 (1965).

249. *Wagnon*, 546 U.S. at 99.

activities before their eventual performance on tribal lands.[250] In one case, Justice Ruth Bader Ginsburg vigorously dissented from this formalism: The key question is who *functionally* bears the costs, not who collects the tax while passing the costs to downstream actors.[251]

The core conflict between state and tribal tax regimes concerns not the formalism/functionalism divide but defects embedded in the preemption framework. *Colville* is a prime example.[252] There, Washington imposed excise ($1.6 per carton) and sales (5%) taxes on cigarettes sold to nonmembers by tobacco outlets authorized by tribes to operate on reservations.[253] The tribes imposed, and the Supreme Court upheld, a lower (forty-to-fifty cents per carton) cigarette tax.[254] Interior approved the tribal tax ordinances, so *Colville* asked whether tribes—by Native sovereignty or federal preemption—could oust state taxation of the same transactions.[255] Writing for a splintered Court, Justice Byron White said no.[256] He conceded the "congressional concern with fostering tribal self-government and economic development."[257] But no statute guaranteed an "artificial" tax advantage to businesses on tribal lands.[258] Further, the majority refused to give preemptive effect to the Secretary's approval of tribal tax ordinances and rejected the inference that Congress gave Native tribes the "far-reaching authority to pre-empt valid state sales and cigarette taxes."[259]

Justice William Brennan penned a forceful dissent. He noted the twin federal policy of "tribal self-government" *and* "Indian economic and commercial development."[260] Washington's consumption taxes brought these two goals in conflict, because imposing tribal taxes on the same transactions taxed by the state would drive business away from reservations.[261] Tribes must choose either to tax (and forgo economic development) or to promote business activities (and forgo taxation). For Justice Brennan, this impossible choice violates the presumption of Native "autonomy that has roots deep in [Native] independence."[262]

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250. Id. at 121 (Ginsburg, J., dissenting) (describing Kansas's amendment of its fuel-tax statute to shift the tax's legal incidence away from on-reservation activities).

251. Id. at 116–17, 123.

252. See Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 154–56 (1980) (describing why preemption arguments are defective).

253. Id. at 141; see also Wash. Rev. Code §§ 82.08.020, 82.24.020 (1976).

254. The Yakima Tribe imposed a 22.5-cent tax on the wholesale price. *Colville*, 447 U.S. at 145.

255. The Secretary also approved each tribe's governance by a tribal council. Id. at 144.

256. Id. at 159. Four Justices joined Justice White's opinion on the non-preemption of state taxes.

257. Id. at 155.

258. Id.

259. Id. at 156.

260. Id. at 168 (Brennan, J., dissenting).

261. Id. at 170.

262. Id. at 167.

The *Colville* line of case law thus denies tribes the power to immunize on-reservation commerce from state taxation. It rests on the doctrine of implied agency conflict preemption. The Supremacy Clause affords three opportunities to displace state law: express, field, and conflict.[263] It allows three actors to preempt: Congress through statute, agencies through regulations pursuant to delegated power, and private entities through devolution.[264] No federal statute expressly preempts state taxes in the Native context. But state taxation renders tribal taxes functionally inoperative. Taxpayers would conduct the same transactions elsewhere to avoid the additional tribal tax.[265] It thus frustrates tribal taxation's revenue-raising purpose—which exemplifies conflict preemption.[266] Further, Congress could clearly delegate to other entities its preemptive power.[267] But *Colville* rejected this logic. Despite the Interior Department's approval of both tribal governance structures (including the tribal council that imposed the tax) and the tax ordinances themselves, the majority declined to find any preemptive force.[268] (Of course, this framing of preemption and delegation is not to say that tribal power, including tribal authority to tax, *is* (delegated) federal power. Instead, the point is that exercises of tribal tax sovereignty are part of executing federal policies of tribal self-governance and could carry the same preemptive weight.)

The failure of delegated conflict preemption produces real costs for Native tribes. The *Colville* tribes alone lost several hundred thousand dollars—as valued in 1975—of annual revenue needed to provide basic services and infrastructure on reservations.[269] Factors inherent to preemption contributed to this outcome. First, the *agency* model ill fits Native-state tax conflicts. While tribes are governance bodies that replicate structural protections of the federal Constitution, they are not part of the federal government itself.[270] The usual underpinnings of administrative legitimacy are absent—for example, accountability through the president to a con-

263. E.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992); Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 226–31 (2000); see also Richard Briffault, The Challenge of the New Preemption, 70 Stan. L. Rev. 1995, 1998, 2018 (2018) (analyzing preemption as a threat to local autonomy).

264. See Craig Konnoth, Privatization's Preemptive Effects, 134 Harv. L. Rev. 1937, 1956–57 (2021) (preemption by private entities); Catherine M. Sharkey, Inside Agency Preemption, 110 Mich. L. Rev. 521, 526 (2012) (preemption by administrative rulemaking).

265. See supra section I.B (noting the general requirement of a geographic nexus for tribal taxing power).

266. E.g., *Colville*, 447 U.S. at 154.

267. Sharkey, supra note 264, *passim*.

268. *Colville*, 447 U.S. at 156.

269. Id. at 144–45.

270. See 25 U.S.C. § 1302 (2018) (prescribing the rights and responsibilities of tribal governments as separate from those of the federal government); Angela R. Riley, Good (Native) Governance, 107 Colum. L. Rev. 1049, 1050–51 (2007) (describing how tribes are viewed as separate sovereigns from federal and state governments); Tribal Executive Branches, 129 Harv. L. Rev. 1662, 1664–66 (2016) (describing the history and structure of tribal governments under the Indian Reorganization Act).

stituency including the states whose laws are preempted.[271] Their absence makes it harder to convince federal courts to accord preemptive force to *tribes* through *federal* power.

Second, recent development has made the preemption doctrine even less hospitable to tribal taxing power. Since *Colville*, the Supreme Court has undergone a federalism transformation.[272] Its protection of traditional state powers and requirement of a "clear and manifest purpose" raise the bar for tribal plaintiffs.[273] The specter of the nondelegation doctrine and the major-question inquiry make the chain of delegation of preemptive force—from Congress to tribes through the Interior Department—even more attenuated.[274]

II. TERRITORIAL TAXING POWERS

This Part discusses territorial taxing powers. The United States acquired the territories—American Samoa, Guam, CNMI, Puerto Rico, and the Virgin Islands—through conquest or treaty.[275] Located outside of the continental United States, territories have no overlapping jurisdiction and face little tax competition with the states.[276] Congress, not federal courts, is the key policymaker.[277] Statutory rules have created a territorial fiscal landscape that diverges from the Native context but with its own unique challenges.

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271. See Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law 209 (2012) ("Administrators operate within three overlapping systems of accountability[, including] political accountability to elected executives and legislatures . . . ."); Alex Zhang, Separation of Structures, 110 Va. L. Rev. 599, 669–88 (2024) (describing values of accountability in deciding structural separation-of-powers disputes).

272. See Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. Chi. L. Rev. 429, 429 (2002) (referring to the well-accepted view that "the Supreme Court has an agenda of promoting constitutional federalism"); Ernest A. Young, The Rehnquist Court's Two Federalisms, 83 Tex L. Rev. 1, 2 (2004) (disentangling the Rehnquist Court's "Federalist Revival").

273. Wyeth v. Levine, 555 U.S. 555, 565 (2009).

274. See West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2607–10 (2022) (describing the major questions doctrine); Nina A. Mendelson, A Presumption Against Agency Preemption, 102 Nw. U. L. Rev. 695, 699 (2008) (arguing for a clear statement rule for congressional delegation of preemptive authority to agencies).

275. See generally Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019) (providing a historical account of American territorial imperialism); Sam Erman, Truer U.S. History: Race, Borders, and Status Manipulation, 130 Yale L.J. 1188, 1193, 1232 (2021) (reviewing and extending Immerwahr's account through the lens of status manipulation, with specific reference to the territories).

276. The competition for revenue between states and territories is not, strictly speaking, tax competition. Instead, it arises from economic development, which incentivizes territorial residents to migrate to the mainland in search of jobs or commercial opportunities. Indeed, because territories tax in place of Congress, they enjoy a tax advantage over states. See infra note 445–446.

277. See, e.g., I.R.C. §§ 931–933 (2018).

Unlike Native tribes, the U.S. territories have no inherent sovereignty, at least in a strict doctrinal sense.[278] That is, tribal taxing authority does not derive from Congress's constitutional powers over Indian affairs or the federal taxing power granted by Article I and the Sixteenth Amendment.[279] Instead, it derives from the tribe's inherent powers as a governance entity whose existence predated the 1789 Constitution.[280] After all, revenue collection and fiscal expenditures are essential to the operation of any government. Congress, of course, has conditioned certain exercises of tribal taxing authority on approval by the Interior Department. But that additional procedural hurdle does not change the substantive source of tribes' authority to tax (i.e., their own sovereignty), even if it might imbue tribal tax ordinances with federal force for purposes of the preemption analysis.[281] By contrast, territorial governments were at first created by Congress.[282] Their taxing authority derives ultimately from federal sovereignty and statutes enacted under Congress's power to rule and regulate the territories.[283] Territorial governments thus tax where authorized by Congress. This differentiation between tribes and territories appears a priori to favor the former. In practice, however, Congress has delegated broad discretion to the territories, while federal courts have shrunk tribal tax capacity.[284]

This Part proceeds as follows. Section II.A examines bona fide residents' exemption from federal taxation, in particular as to income sourced to the territories where they live. Section II.B scrutinizes Congress's delegation of substantive tax-design powers, highlighting its application to Puerto Rico.

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278. See Puerto Rico v. Sanchez Valle, 579 U.S. 59, 69–70, 75 (2016) (holding that, unlike Native tribes, the dual-sovereignty doctrine does not apply to Puerto Rico).

279. U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ."); id. cl. 3 (authorizing Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); id. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

280. See Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 152 (1980) ("The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.").

281. See supra section I.C.

282. E.g., Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950); Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, 68 Stat. 497 (1954).

283. U.S. Const. art. IV, § 3, cl. 2.

284. See supra Part I; infra sections II.A, II.B.

A. *Exemption From Federal Taxation*

First, the Code defines the "United States" to exclude the U.S. territories.[285] And Congress exempts their bona fide residents from the federal income tax.[286] The main exceptions are income derived from federal-government employment and income sourced to the United States (e.g., disposition of real property located on the mainland) or foreign jurisdictions (e.g., disposition of real property located in the United Kingdom).[287] As a result, any income "derived from" and "effectively connected to" territorial sources are untaxed by the federal government.[288] This includes labor income and capital gains from personal property accrued during territorial residency.[289] Taxpayers with only territorially sourced income therefore pay a local income tax to their *territorial* governments in satisfaction of their fiscal obligations to *both* the territorial and the federal government. This generous tax treatment contrasts with the fierce tax competition faced by Native tribes. While the Supreme Court extended the federal income tax to Native taxpayers under *Choteau* and *Five Tribes* with a limited *Capoeman* exemption for trust land, Congress has broadly relieved the territories from federal taxation with limited inclusion of income not sourced to the territories where they reside.[290]

Two filing systems have emerged to administer this distinctive tax treatment. In Puerto Rico and American Samoa, residents file two income-tax returns: one to the territory including their worldwide income and a second to the federal government reporting any United States–sourced

285. I.R.C. § 7701(a)(9) (2018) ("The term 'United States' when used in a geographical sense includes only the States and the District of Columbia.").

286. Id. §§ 931, 933, 935. Bona fide residence requires physical presence for at least 183 days during the taxable year, absence of a "tax home" outside of the territories, and maintenance of no closer relationship to anywhere other than the territories. Id. § 937; Treas. Reg. § 1.937-1 (2006). Section 935 continues to govern Guam and CNMI. The Tax Reform Act of 1986's repeal of section 935 is effective only upon an implementing agreement going into effect between the territory and the United States. This condition has not been met. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1277, 100 Stat. 2085, 2600–02.

287. I.R.C. §§ 861(a), 931(d), 933(1), 937(b)(1) (exempting from federal taxation bona fide territorial residents' income derived from territorial sources and effectively connected with a trade or business in the territories—that is, not income sourced to the mainland or foreign jurisdictions). See generally Mitchell A. Kane, A Defense of Source Rules in International Taxation, 32 Yale J. on Reg. 311 (2015) (arguing that "source rules can be a robust part of the international tax system and that such rules are not deeply flawed in the manner that has come to be commonly accepted").

288. I.R.C. §§ 931, 933.

289. Id. § 865. Special source rules govern assets acquired before taxpayers' move to the territories: Gains upon sale of those assets are sourced to the United States for ten years after bona fide residency. But taxpayers may elect to source gains accrued during bona fide residency to the territory instead. See Treas. Reg. § 1.937-2(f), (k) (2008) (allowing former mainland residents to "elect to treat as gain from sources within the relevant possession the portion of the gain attributable to the individual's possession holding period").

290. See supra sections I.A.2–3.

income.[291] The Code exempts their territorial income, and they can claim a tax credit for any federal taxes paid against their territorial income-tax liability.[292] By contrast, in Guam, CNMI, and the Virgin Islands, residents file a single tax return to their territorial government reporting their worldwide income, including from U.S. sources.[293] The territorial governments apportion such income between those that are United States-sourced and territory-sourced, and cover over taxes on United States-sourced income to the federal treasury.[294] The distinction between single and dual filing systems tracks the substantive design of territorial fiscal systems.[295]

Second, Congress has exempted most territorial residents from estate and gift taxes.[296] U.S. citizens are subject to taxation on worldwide property upon wealth transfer at death and on gifts during lifetime.[297] Estate and gift taxes affect only the wealthiest Americans and are meant to embody—even if they do not precisely track—principles like equal opportunity at birth.[298] But Americans who acquired their U.S. citizenship solely through territorial citizenship or birth face no such tax except for United States-situated property.[299] Mainland Americans, that is, cannot move to the territories to avoid estate-and-gift-tax liability, unlike with income tax.[300] The estate-and-gift-tax base in the territories is admittedly small, but not insignificant.[301] The exemption could apply, for example, to Orlando

291. IRS, Publication 570: Tax Guide for Individuals With Income From U.S. Territories 16, 19 (2024), https://www.irs.gov/pub/irs-pdf/p570.pdf [https://perma.cc/54HP-KEUP] [hereinafter IRS, Publication 570].

292. I.R.C. §§ 931, 933; P.R. Laws Ann. tit. 13, § 30201(a)(1) (LexisNexis, LEXIS through 2025 Legis. Sess.); IRS, Publication 570, supra note 291, at 18.

293. IRS, Publication 570, supra note 291, at 22, 24, 27.

294. Staff of Joint Comm. on Tax'n, 112th Cong., Federal Tax Law and Issues Related to the United States Territories 10, 20 (2012) [hereinafter Joint Comm. on Tax'n, Territories].

295. Single-filing jurisdictions are "mirror-Code" and impose the same income tax as the federal government. Infra section II.B.

296. See I.R.C. §§ 2208, 2501(b).

297. I.R.C. § 2001 (estate tax); id. § 2031 (defining gross estate to include "the value at the time of [the taxpayer's] death of all property"); id. § 2501 (gift tax).

298. See Michael J. Graetz & Ian Shapiro, Death by a Thousand Cuts: The Fight Over Taxing Inherited Wealth 3 (2005) (explaining that estate taxes are based on principles of equal opportunity); Anne L. Alstott, Equal Opportunity and Inheritance Taxation, 121 Harv. L. Rev. 469, 470 (2007) ("Equality of opportunity is widely understood as one of the bedrock principles supporting the taxation of inheritance.").

299. I.R.C. §§ 2208, 2501(b).

300. See supra note 286 and accompanying text.

301. This is because the federal estate tax exempts wealth transfer below $15 million—that is, all but the largest estates. See IRS, Estate Tax (Dec. 22, 2025), https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax [https://perma.cc/T5VL-KZC3].

Bravo, a multi-billionaire born in Puerto Rico, if he maintained territorial residency.[302]

Third, most federal excises (on commodities like alcohol) do not apply to the territories.[303] This patent violation of the constitutional uniformity requirement is tolerated because of the *Insular Cases*.[304] Excise exemptions do not cover merchandise shipped from Puerto Rico and the Virgin Islands for sale in the mainland.[305] This equalizes tax burdens to prevent any artificial tax advantage to territorial manufacturers.[306] But even there, the United States covers the collected excise to territorial treasuries.[307] Such revenue is significant. In 2007, Puerto Rico received $458 million in excise-tax transfers from the federal government.[308] In the 1980s, this fiscal allure prompted Puerto Rico and the Virgin Islands to sue the Treasury Department in hopes of obtaining additional excise-tax allocations from custom and gasoline duties.[309]

Finally, territorial residents pay federal employment taxes. Payroll taxes burden solely labor income, up to a salary cap that makes them the most regressive form of taxes levied by Congress.[310] The most significant payroll tax, imposed by the Federal Insurance Contributions Act (FICA), covers all five territories through FICA itself or the territory's organic act.[311] Only Puerto Rico and the Virgin Islands are subject to the Federal Unemployment Tax Act (FUTA).[312] Coverage of the territories under

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302. See Orlando Bravo, Forbes, https://www.forbes.com/profile/orlando-bravo [https://perma.cc/7WVG-67EF] (last updated Sep. 9, 2025) (estimating a $12.8 billion net worth).

303. Joint Comm. on Tax'n, Territories, supra note 294, at 14.

304. See U.S. Const. art. I, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . . ."); Downes v. Bidwell, 182 U.S. 244, 250–51 (1901) (holding the Uniformity Clause inapplicable to Puerto Rico). The Court has relaxed the application of the Uniformity Clause more broadly in United States v. Ptasynski, 462 U.S. 74, 84 (1983) ("We do not think that the language of the Clause or this Court's decisions prohibit all geographically defined classifications.").

305. I.R.C. § 7652 (2018).

306. E.g., Dick, supra note 43, at 33 n.179.

307. I.R.C. § 7652(a)(3), (e)(1).

308. Steven Maguire, Cong. Rsch. Serv., R41028, The Rum Excise Tax Cover-Over: Legislative History and Current Issues 4–5 tbl.I (2012).

309. Virgin Islands v. Blumenthal, 642 F.2d 641, 642 (D.C. Cir. 1980); Puerto Rico v. Blumenthal, 642 F.2d 622, 623 (D.C. Cir. 1980).

310. Linda Sugin, Payroll Taxes, Mythology, and Fairness, 51 Harv. J. on Legis. 113, 116, 120 chart 1 (2014).

311. I.R.C. § 3121(e)(1); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 606, 90 Stat. 263, 270–71 (1976); Fang Ling Ai v. United States, 809 F.3d 503, 508 (9th Cir. 2015); see also IRS, Publication 80 (Circular SS), Federal Tax Guide for Employers in the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands 28 (2023), https://www.irs.gov/pub/irs-prior/p80–2023.pdf [https://perma.cc/66PY-U2TT].

312. I.R.C. § 3306(j).

payroll taxation contrasts with their exemption from income, estate, and excise taxes. But this is not necessarily a burden: Payroll taxes fund social-insurance programs like Social Security and Medicare.[313] The benefits on the spending side can at least partially offset the extraction on the tax side. Guam's exemption from the FUTA comes at the cost of not having unemployment insurance for its residents.[314] Only in 2022 did the Island receive federal funding to even study the feasibility of such programs for Guamanians.[315]

Congress has thus carved out—more or less entirely—its tax base for income, estates, gifts, and excises so that territories tax *in place of* the federal government.[316] Territorial tax exemption dates to the very beginnings of American imperialism.[317] The Foraker Act, for example, removed Puerto Rico from the reach of internal revenue in 1900, shortly after Spanish cession.[318] Congress has repeatedly grounded fiscal segregation in territorial autonomy—rhetoric that bears an uncanny similarity to appeals to dependency and self-governance in the Native context. At the time of acquisition, Representative Charles Addison Russell of Connecticut, sitting on the Ways and Means Committee, characterized the committee's tax proposals for Puerto Rico as designed to "protect and sustain a possession . . . until she be able to stand alone to assume her full stature of equality and responsibility and burdens among the rest of her sisters in one great Republic."[319] In 1986, the Senate Finance Committee singled out "promot[ion of] fiscal autonomy of the possessions" as the key goal of territorial-tax coordination rules which exempt territorially sourced income from federal taxation.[320] Today, the Treasury Department considers U.S.

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313. See 42 U.S.C. § 401 (2018) (providing the sources of taxpayer funding for the Federal Old-Age and Survivors Insurance Trust Fund); SSA, Publication No. 05-10297 (2023).

314. U.S. Dep't of Labor, Exploring Unemployment Insurance (UI) Program Options for Guam: Options Brief 1 (2023), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/Exploring-Unemployment-Insurance-Program-Options-for-Guam.pdf (on file with the *Columbia Law Review*) ("Guam does not have an existing federal-state UI program . . . .").

315. Press Release, U.S. Dep't of the Interior, OIA Announces Additional $1.3 Million in Final TAP Awards, Closes Out FY2022 Year (Sep. 12, 2022), https://www.doi.gov/oia/press/OIA-Announces-Additional-%241.3-Million-in-Final-TAP-Awards-Closes-Out-FY2022-Year [https://perma.cc/9D55-46S7].

316. See supra notes 285–309 and accompanying text.

317. See Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 593 (illustrating the ways in which territorial tax exemption resulted from American imperialism at the turn of the twentieth century as well as the fiscal needs of Congress).

318. An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes (Foraker Act), ch. 191, § 14, 31 Stat. 77, 79 (1900) ("[T]he statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws . . . .").

319. 33 Cong. Rec. 2142 (1900) (statement of Rep. Charles A. Russell).

320. S. Rep. No. 99-313, at 478 (1986).

territories as jurisdictions with fiscal autonomy, at least for information-reporting purposes.[321]

B. *Design Discretion, Tax Shelters, and Imperialism*

The search for autonomy has even led Congress to delegate substantive discretion. The territories fall into two categories of varying authority to design local tax law. Puerto Rico and American Samoa are non-mirror-Code jurisdictions. Since at least the Jones Act of 1917 (now known for its grant of U.S. citizenship to Puerto Ricans), Congress has authorized Puerto Rico to deviate from federal-income-tax rules and create its own revenue system.[322] Puerto Rico has exercised this power and today taxes income at slightly lower rates than the federal government.[323] Like Puerto Rico, American Samoa can also design its own revenue system but has chosen the federal rules as its local income tax.[324] The Tax Reform Act of 1986 affirmed American Samoa's power to "enact [income-]tax laws . . . in lieu of" the federal regime.[325] Congress conditioned this authority on a tax implementation agreement intended to eliminate double taxation and evasion of the U.S. income tax, while facilitating information exchange.[326] American Samoa and the federal government executed such an agreement shortly after the passage of the 1986 Act.[327]

By contrast, current law requires Guam, CNMI, and the Virgin Islands to impose the federal income tax as the territorial income tax.[328] They are

321. Treas. Reg. § 1.6038-4(b)(7) (2016); see also Staff of Joint Comm. on Tax'n, 117th Cong., U.S. International Tax Policy: Overview and Analysis 65 n.239 (2021) (noting that jurisdictions, such as Puerto Rico, that have fiscal autonomy must provide certain information for the purposes of country-by-country jurisdiction).

322. Jones Act of 1917, ch. 145, § 3, 39 Stat. 951, 953 (codified as amended at 48 U.S.C. § 741a (2018)) (authorizing the Puerto Rico Legislature to provide for internal insular revenue); id. § 9, 39 Stat. at 954 (codified as amended at 48 U.S.C. § 734 (2018)) (excluding application of U.S. internal revenue laws in Puerto Rico); Act of March 4, 1927, ch. 503, § 1, 44 Stat. 1418, 1418 (amending the Jones Act's tax exemption to include specifically income taxes).

323. Compare P.R. Laws Ann. tit. 13, § 30061 (LexisNexis, LEXIS through 2025 Legis. Sess.) (income tax at 7%–33%), with I.R.C. § 1 (2018) (10%–37%). For Puerto Rico's tax incentives, see infra notes 338–353 and accompanying text.

324. Am. Sam. Code Ann. §§ 11.0401, 11.0403 (2021).

325. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1271(a), 100 Stat. 2085, 2591.

326. Id. § 1271(b), 100 Stat. at 2592.

327. Tax Implementation Agreement Between the United States of America and American Samoa, supra note 20.

328. 48 U.S.C. § 1397 (2018) (U.S. Virgin Islands); 48 U.S.C. § 1421i (Guam); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America, Pub. L. No. 94-241, Art. VI, § 601(a), 90 Stat. 263, 269 (1976) (codified as amended in the notes of 48 U.S.C. § 1801); Organic Act of Guam, Pub. L. No. 81-630, § 31, 64 Stat. 384, 392 (1950); Naval Appropriations Act of 1921, ch. 44, 42 Stat. 122, 123 (U.S. Virgin Islands). The split between mirror-Code and non-mirror-Code jurisdictions emerged in a somewhat haphazard fashion, but Congress seems to have been motivated by the desire to lessen territorial dependence on federal fiscal support and

mirror-Code jurisdictions because their organic acts (or in the case of the Virgin Islands, the Naval Appropriations Act of 1921) mandate the "mirroring" of federal tax law.[329] These territories still tax in place of Congress and enjoy federal exemptions.[330] But they have little authority to decide *what* and *how* to tax (e.g., rates, exclusions, deductions, and credits).[331] Unlike Puerto Rico, they derive revenue from taxing income in exactly the same way as Congress.[332] Unlike American Samoa, they cannot change these rules through territorial legislation.[333] Congress has attempted to delegate substantive design discretion to mirror-Code jurisdictions: The 1986 Act empowered Guam and CNMI to tax territorially sourced income differently from Congress.[334] It again conditioned this power on tax implementation agreements.[335] Guam and the United States executed such an agreement in 1989, but they indefinitely postponed the agreement's effective date due to disputes about the dual-filing agreement.[336]

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congressional appropriations. Before the Organic Act, for example, Guamanian citizens paid no federal or territorial income tax. Congress imposed the mirror-Code requirement on Guam in 1950 to close the "loophole" and to prop up federal receipts. Likewise, Congress extended the federal structure of income taxation to the Virgin Islands because it had been forced to fund the operations of territorial government while exempting its citizens from the federal revenue laws. See 96 Cong. Rec. 7577 (1950) (statement of Rep. Arthur L. Miller) (indicating that the mirror-Code requirement was adopted in order to close loopholes and protect the federal tax base); 61 Cong. Rec. 3173 (1918) (statement of Rep. Horace M. Towner) ("[W]e are required very largely to furnish money to run the government of the Virgin Islands. We hope that condition will not very long exist, but it does exist to-day, as you will see by the appropriation . . . ."); Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 585–86 (noting that the U.S. Virgin Islands are "exempt from federal income taxation, but . . . are required to institute the federal income-tax regime as the territorial income tax").

329. Guam can levy an additional tax at less than 10% of the taxpayer's annual income tax liability. 48 U.S.C. § 1421i(a). But even if exercised, this power only amplifies the distributive effects of the federal regime.

330. See supra notes 285–309 and accompanying text.

331. Territorial organic acts typically bake future Congress's tax policy into the mirror Code. E.g., 48 U.S.C. § 1421i(a) ("The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam . . . .").

332. See supra notes 322–323 and accompanying text.

333. See supra notes 325–327 and accompanying text.

334. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1271, 100 Stat. 2085, 2591–93; see also Guam Commonwealth Act, S. 692, 102nd Cong., tit. VI (1991); H.R. 98, 101st Cong., tit. VI (1989); infra notes 497–498 and accompanying text (explaining territorial efforts—and congressional reluctance—to reform outdated organic acts and to enhance territorial self-determination).

335. H.R. 98 tit. VI; see also § 1271(b), 100 Stat. at 2592.

336. See Tax Implementation Agreement Between the United States and Guam, 1989-1 C.B. 342; Amendment to the Tax Implementation Agreement Between the United States and Guam (Dec. 27, 1990) (explaining the postponement of the agreement's effective date); Stephen A. Cohen, Guam Tax Department Carries on in Wake of Big Shakeup, Tax Notes, Oct. 7, 1993, at 972, 973 (explaining that the agreement's effective date stalled because of disagreement about the dual return filing requirement).

Likewise, no tax implementation agreement is in effect between the United States and CNMI to enable the latter's tax-design powers.[337]

Puerto Rico's territorial tax regime is controversial. Enabled by Congress's delegation of substantive powers, the Puerto Rican legislature has enacted, since 2012, programs that encourage the wealthy to migrate from the mainland.[338] These programs reduce the total (federal/territorial, entity-level/individual) tax burden on eligible business income to 4% and exempt from taxation all capital gains accrued during one's bona fide residence in Puerto Rico.[339] The mechanics are as follows[340]: Act 20 authorizes the Puerto Rico Secretary of Economic Development and Commerce to approve "decrees" to "eligible" businesses.[341] To be eligible, a business must export services (including professional, legal, and financial) to nonresidents of Puerto Rico (e.g., mainland U.S. clients).[342] Act 20 then entitles the holder of approved decrees to a fixed income-tax rate of 4%.[343] The Act defines such decrees as contracts between Puerto Rico and the taxpayer to prevent abrogation of the tax benefits by future legislation, as the Puerto Rican Constitution bars the impairment of contracts.[344] If the eligible business is a corporation, all dividends paid to shareholders are exempt from territorial taxation after the 4% entity-level tax.[345] Further, Act 22 exempts from territorial taxation capital gains accrued after the taxpayer has established bona fide residence in Puerto Rico.[346] On capital gains *accrued* before bona fide residence, taxpayers receive preferential 5%

337. Joint Comm. on Tax'n, Territories, supra note 294, at 8 ("The changes [pursuant to the Tax Reform Act of 1986] are not yet in effect for Guam or the Northern Mariana Islands, because the effective date is contingent upon the existence of an implementation agreement, and the contingency has not been met.").

338. P.R. Laws Ann. tit. 13, §§ 10831–10844 (LexisNexis, LEXIS through 2025 Legis. Sess.) (codifying Act 20 to Promote the Export of Services); id. §§ 10851–10855 (codifying Act 22 to Promote the Relocation of Individual Investors to Puerto Rico).

339. See supra note 338.

340. Acts 20 and 22 were folded into Act 60 in 2019. IRS, Introduction to Puerto Rico for Acts 20/22, at 16 (2021), https://www.irs.gov/pub/irs-pgld/introduction-to-puerto-rico-acts-20-and-22.pdf [https://perma.cc/HY4R-LWSQ]. For clarity, this Article cites to both Acts 20 and 22 and parallel provisions in Act 60.

341. See P.R. Laws Ann. tit. 13, §§ 10831(b), 10838 (defining decree); id. § 45151 (outlining eligibility requirements).

342. See id. § 10831(k) (defining eligible services); id. § 10831(m) (explaining what constitutes an export of such services to outside of Puerto Rico); id. § 45231 (further defining export of services).

343. Id. §§ 10832(a), 45032(a)(1).

344. Id. § 10838(a) ("Decrees granted under this chapter shall be deemed as contracts between the eligible business, its shareholders, partners, or owners and the Government of Puerto Rico . . . ."); id. § 45004(b); see also P.R. Const. art. II, § 7 (LexisNexis, LEXIS through 2011) ("No laws impairing the obligation of contracts shall be enacted.").

345. Tit. 13, § 10834(a) ("Shareholders, partners, or members of an eligible business that holds a decree granted under this chapter shall not be subject to income tax on distributions of dividends . . . ."); id. § 45032(b)(1).

346. See id. § 10851(a) (defining resident individual investors entitled to such capital-gain exclusion); id. § 10853(b) (capital-gain exclusion); id. § 45142(b).

territorial tax rates if they *realize* the gains after the tenth year of residence.[347] At that time, special federal rules also exempt from taxation gains accrued before territorial residence.[348] As to the remaining Act 20 income and Act 22 gains, section 933 provides a general exemption from *federal* taxation.[349]

In sum, mainland emigrants who become bona fide residents of Puerto Rico enjoy a 4% tax rate on labor income and full forgiveness on capital gains, until at least 2036.[350] And according to the Puerto Rico Department of Economic Development, an estimated six thousand exemption decrees were approved under the territorial tax incentive programs between their creation in 2020 and 2023.[351] These tax incentives make the island perhaps the only place on earth where U.S. citizens can avoid the federal income tax, dodge the local income tax, and maintain U.S. citizenship.[352] Their allure led to the migration of, according to one account, "[t]housands of ultrarich individuals" to Puerto Rico.[353] The territorial government has accomplished what Congress and the Supreme Court have admonished that Native tribes cannot do: marketing tax exemptions to attract commercial activities.[354]

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347. Id. §§ 10853(a), 45142(a).

348. In general, federal law does not recognize gains from dispositions of investment property (1) acquired before territorial residence and (2) realized within ten years of becoming a territorial resident as being territorially sourced. See Treas. Reg. § 1.937-2(f) (2008).

349. I.R.C. § 933 (2018).

350. P.R. Laws Ann. tit. 13, §§ 10853, 45142.

351. Nicole Acevedo, Do Puerto Rico Tax Breaks Displace Locals to Benefit the Wealthy? Here Are 5 Things to Know., NBC News (Sep. 13, 2023), https://www.nbcnews.com/news/latino/tax-breaks-puerto-rico-wealthy-displacement-five-things-to-know-rcna104683 [https://perma.cc/UCH6-9HJ9] (stating that "the Puerto Rico Department of Economic Development has approved at least 3,198 tax exemption decrees" under Act 20, and that "[a]n estimated 6,000 tax exemption decrees have been approved under Act 22 since it was enacted").

352. Congress taxes U.S. citizens on worldwide income. See, e.g., Ruth Mason, Citizenship Taxation, 89 S. Cal. L. Rev. 169, 172 (2016).

353. Alberto C. Medina, Opinion, Tax Cheats Are Taking Advantage of Puerto Rico—the US Government Can Stop Them, The Hill (Nov. 21, 2023), https://thehill.com/opinion/finance/4319700-tax-cheats-are-taking-advantage-of-puerto-rico-the-us-government-can-stop-them (on file with the *Columbia Law Review*).

354. See Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 155 (1980) ("[P]rinciples of federal Indian law [do not] authorize Indian tribes . . . to market an exemption from state taxation . . . ."); Oversight Hearing to Provide for Indian Legal Reform: Hearing Before the Comm. on Indian Affs., 105th Cong. 7 (1998) (statement of Rep. Ernest J. Istook, Jr.) (arguing that exempting tribal sale of goods from state taxes "drives legitimate taxpaying competition out of business" and "destroys the tax base . . . that creates the network of roads on which we . . . drive[,] which creates the network of schools, which creates the network of public safety, of health care systems"); Fletcher, In Pursuit of Tribal Economic Development, supra note 14, at 767–68 (noting that tribes are generally prohibited from marketing the exemption, even though "state and local governments market their exemptions without objection").

But this exercise of fiscal autonomy has provoked backlash—from both Congress and the island itself. Policymakers have criticized the incentives as creating tax shelters: In 2023, members of Congress asked the Comptroller General to assess the Puerto Rico tax incentives.[355] They blamed Acts 20 and 22 for enabling "fraud," "significant tax avoidance by wealthy individuals," and "tax benefits that Americans could not obtain anywhere else in the world."[356] In 2024, the Senate Finance Committee urged the Internal Revenue Service (IRS) to crack down on Puerto Rico tax shelters, suspecting that "people were potentially evading billions of dollars in taxes."[357] An IRS investigation identified about one hundred high-income individuals who claimed tax incentives while flouting bona fide residence and sourcing rules.[358] But due to underfunding, the agency apparently has not recovered any evaded taxes since its "high-profile campaign announced more than three years ago to unearth possible abuse."[359] This has harmed the fisc. An IRS report to Congress stated that a group of around six hundred Act 22 decree-holders had paid $557 million in federal income taxes in the five years before their relocation to Puerto Rico.[360] The true cost to Congress is likely far higher, both because the IRS report only covers a subset of mainland emigrants to Puerto Rico and because more have established territorial residency for tax benefits after the pandemic.[361] Using the 2023 estimate of six thousand exemption decrees as a (conservative) baseline, the federal tax-expenditure cost well exceeds $1 billion.[362]

Further, Puerto Ricans themselves have criticized tax incentives as instruments reminiscent of imperialism. First, because Acts 20 and 22 aimed to incentivize *migration* from the mainland,[363] the statutes denied *long-term residents* of *Puerto Rico* the tax benefits. For the capital-gain exclusion, taxpayers may not have lived in Puerto Rico during the ten years

355. See Letter from Raúl M. Grijalva, Nydia M. Velázquez, Alexandria Ocasio-Cortez & Ritchie Torres, Members of Cong., to Gene Dodaro, Comptroller Gen. of the U.S. 1 (July 20, 2023), https://democrats-naturalresources.house.gov/imo/media/doc/gao_request_letter_for_act_60_puerto_rico_tax_review.pdf [https://perma.cc/S8B7-KW9J].

356. Id. at 1–2.

357. Jesse Drucker, I.R.S. Failed to Police Puerto Rico Tax Break, Whistle-Blower Says, N.Y. Times (May 28, 2024), https://www.nytimes.com/2024/05/28/business/irs-puerto-rico-tax.html (on file with the *Columbia Law Review*) (last updated May 29, 2024).

358. Press Release, IRS, Building on Filing Season 2023 Success, IRS Continues to Improve Service, Pursue High-Income Individuals Evading Taxes, Modernize Technology (July 14, 2023), https://www.irs.gov/newsroom/building-on-filing-season-2023-success-irs-continues-to-improve-service-pursue-high-income-individuals-evading-taxes-modernize-technology [https://perma.cc/Y2KE-4CA8].

359. Drucker, supra note 357.

360. IRS, Report to Congress Pursuant to Pub. L. 116-93 Regarding Interaction of Certain Puerto Rico and U.S. Tax Laws 5 (2020) [hereinafter IRS, Report to Congress].

361. Id. at 4–5.

362. See supra note 351 and accompanying text.

363. See supra note 338 and accompanying text.

before the effective date of the most recent enactment in 2019.[364] After all, no government can survive without revenue. And abuse of the incentives meant that taxpayers spent little time in Puerto Rico, contributing less to its economic development than anticipated (or compared to the tax benefits they reaped).[365] Thus, while mainland hedge fund and cryptocurrency managers received generous tax breaks, the locals—impoverished by decades of underinvestment and neglect—bore the costs of governance.[366]

Second, tax incentives have exacerbated structural problems. Puerto Rico already experiences the highest level of economic inequality among subnational jurisdictions.[367] Entrance of the wealthy—immune from taxation, a key redistributive tool—has further divided the rich and the poor.[368] The march away from egalitarianism intensifies the political-economy dynamics that make it even harder to vindicate the public's, rather than wealthy migrants', sense of tax fairness.[369] Gentrification has

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364. P.R. Laws Ann. tit. 13, § 45013(a)(4) (LexisNexis, LEXIS through 2025 Legis. Sess.) (excluding from Act 22 "resident individual of Puerto Rico for the last ten . . . taxable years prior to the effective date of this Code").

365. See Press Release, IRS, supra note 358 ("We recently identified about 100 high-income individuals claiming benefits in Puerto Rico without meeting the residence and source rules involving U.S. possessions. These wealthy individuals are attempting to avoid U.S. taxation on U.S. source income, and we expect many of these cases to proceed to criminal investigation."); Luis Valentín, Joel Cintrón Arbasetti & Dalila M. Olmo López, Puerto Rico Act 22 Tax Incentive Fails, Centro de Periodismo Investigativo (June 25, 2021), https://periodismoinvestigativo.com/2021/06/puerto-rico-act-22-fails (on file with the *Columbia Law Review*) (reporting that Puerto Rico's Act 22, which exempts new resident individual investors from capital gains taxes, has fallen short of its promises, creating fewer jobs than desired while attracting tax opportunists who invest little to nothing).

366. See Fernando Goyco Covas, Puerto Rico: A Tax Haven for Hedge Fund Managers, 152 Tax Notes 1131, 1131 (2016) ("[A]bout 500 individuals, including securities traders, investment advisers, and managers, have since moved to Puerto Rico for the tax benefits."); Nitasha Tiku, 'Crypto Colonizers' in Puerto Rico Try to Sell Locals on the Dream, Wash. Post (Jan. 13, 2022), https://www.washingtonpost.com/technology/2022/01/13/crypto-puerto-rico (on file with the *Columbia Law Review*).

367. In 2023, the Gini coefficient (a standard measure of income inequality) for Puerto Rico reached 0.5483. D.C. had the second-highest Gini index, at 0.5163. Most states' Gini coefficients are below 0.5. U.S. Census Bureau, Gini Index of Income Inequality, B19083 (2024), https://data.census.gov/chart/ACSDT1Y2024.B19083?q=gini+index [https://perma.cc/B5EX-HW2N] [hereinafter Census Bureau, B19083].

368. See Lily Batchelder & David Kamin, Policy Options for Taxing the Rich, *in* Maintaining the Strength of American Capitalism 200, 202 (Melissa S. Kearney & Amy Ganz eds., 2019) (identifying the existing "vast disparities of income and opportunity"); Jim Wyss & Michelle Kaske, Hedge Fund Paradise Hides Puerto Rico's Crisis in the Making, Bloomberg (Aug. 18, 2023), https://www.bloomberg.com/news/features/2023-08-18/puerto-rico-s-power-problem-spotlights-poverty-affordability-crisis (on file with the *Columbia Law Review*) ("40% of the population lives in poverty and an affordability crisis has deepened, thanks in part because of the influx of wealthy residents.").

369. See Frederick Solt, Economic Inequality and Democratic Political Engagement, 52 Am. J. Pol. Sci. 48, 48 (2008) ("[E]conomic inequality powerfully depresses political interest, discussion of politics, and participation in elections among all but the most affluent . . . .").

inflated real estate prices, displacing local residents who can no longer afford housing.[370] All this has fueled opposition to Acts 20 and 22. In a recent protest, demonstrators gathered before a former children's museum in San Juan that Brock Pierce—child actor turned Bitcoin-billionaire—had remodeled into a "crypto clubhouse;" they graffitied the building, labeling Pierce a "colonizer."[371] Such actions reflect broader discontent with the tax-incentive regime. Although polling on this precise topic is spotty, a recent survey showed that 41% of Puerto Rico voters "[s]trongly oppose[d]" and an additional 16% "[s]omewhat oppose[d]" the tax incentives.[372] By contrast, only 12% of Puerto Rico voters "[s]trongly support[ed]" and an additional 20% "[s]omewhat support[ed]" the tax incentives.[373]

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Parts I and II of the Article have analyzed Native and territorial tax authority. The same rhetoric of autonomy has produced divergent regimes. Native tribes have little fiscal power: Their populations are generally subject to federal taxation. A battle among Treasury, Interior, general jurisdiction courts, and specialty tribunals have narrowed the small exemption for income derived from land. The Supreme Court has limited Native taxing jurisdiction over non-tribal members and declined to have tribes preempt state taxation. The result is fierce tax competition with Congress and the states, diminishing the tribal tax base that is already hollowed out by impoverishment. By contrast, U.S. territories are generally exempt from federal taxation, possess robust powers to tax all residents, and face no formal tax competition with the states. Some territories can even derogate from federal rules and design their own tax regimes.

The following table illustrates the two contrasting fiscal regimes:

370. Coral Murphy Marcos & Patricia Mazzei, The Rush for a Slice of Paradise in Puerto Rico, N.Y. Times (Jan. 31, 2022), https://www.nytimes.com/2022/01/31/us/puerto-rico-gentrification.html (on file with the *Columbia Law Review*) (last updated June 22, 2023).

371. Id. (internal quotation marks omitted).

372. Gustavo Sánchez, Survey of Voters in Puerto Rico & U.S. Diaspora, 2024, IZQ Strategies (2024), https://labregayfuerza.org/wp-content/uploads/2024/05/IZQ-ByF-Survey-Report-C3-202405.pdf [https://perma.cc/84J4-VBQF].

373. Id.

TABLE 1. NATIVE AND TERRITORIAL TAX REGIMES

	Native Tribes	**U.S. Territories**
Overarching value	**Native and territorial autonomy**	
Primary institutional actors	*Supreme Court* (applying doctrines of federal Indian law, preemption, and delegation). *Lower federal courts* (collision between tax and Native-interpretive principles). *Treasury and Interior* (administrative rulemaking, litigation).	*Congress* (through statutory exemption, sourcing, and coordination rules). *Treasury* (implementation of statutory regime).
Federal tax treatment	*No general exemption* from the federal income tax (*Choteau* and *Five Tribes*). Exception for income derived from trust land; scope of exemption narrowed in lower courts (*Capoeman* and doctrinal progeny).	*General exemption* from the federal income tax (I.R.C. §§ 931–935). Narrow exceptions, including income sourced to non-territorial jurisdictions and salary of federal-government employees (e.g., I.R.C. § 931(1)).
Local taxing power	*Limited power* to tax on-reservation activities by non-tribal members (*Colville* and *Merrion*, constrained by *Atkinson Trading*); battle between strict-autonomy and dependent-sovereign theories. More robust power to tax tribal members; not exercised due to poverty and the absence of federal exemption.	*Robust power* to tax territorial residents and economic activities. *Power to derogate* from federal tax rules for Puerto Rico (exercised), American Samoa (not exercised), and potentially Guam and Northern Mariana Islands (pending implementation agreement under the Tax Reform Act of 1986).
Interactions with other subnational tax regimes	*Intense competition* with states for revenue due to nonpreemption of state taxes (*Warren Trading*, *Bracker*, *Colville*, and *Wagnon*).	*No overlapping tax jurisdiction* with states due to geography.

Distinct tax law produced similar echoes of imperialism. Federal courts have come to see Native interests not through Indigenous perspectives but *federal* laws and *federal* preemption.[374] The doctrine exempts activities of nonmembers from tribal taxation, though nonmembers nonetheless benefit from tribal services.[375] It does not allow tribes—even when they exercise taxing power with federal approval—to preempt state taxation of the same stream of commerce.[376] And courts have narrowly interpreted the *Capoeman* exemption for income derived from trust land.[377] By contrast, Congress has permitted territorial governments to tax locally sourced income to the exclusion of the federal government.[378] It has also given Puerto Rico plenty of tax-design power. The exercise of such power has incentivized hedge fund managers, crypto-tycoons, and influencers to move from the mainland.[379] Tax incentives have thus created a class of wealthy migrants constitutionally shielded from the burdens of taxation, which Puerto Ricans must bear.[380]

A synthesis is due before moving onto Part III. How did tribes and territories end up in such divergent positions as to taxing authority and fiscal capacity? Many have rightly attributed the current state of federal Indian law and the law of the territories to the legacy of U.S. imperialist acquisition and colonialism.[381] Under the historical and doctrinal account provided thus far in this Article, several additional factors are important, especially in generating the tribal/territorial divide: timing, institutions, and the distinctive mechanisms of doctrinal propagation compared to the political process.

First is timing. The structure of territorial tax policy—most prominently, territories' general exemption from the internal-revenue regime—was decided prior to the ratification of the Sixteenth Amendment and the income tax. Puerto Rico, for example, was acquired at the turn of the twentieth century and quickly exempted from compliance with *internal* revenue laws.[382] At that time, *external* revenue (e.g., tariffs) constituted the

374. See supra notes 263–271 and accompanying text.

375. See supra section I.B.

376. See supra notes 253–275.

377. See supra notes 134–158.

378. See supra section II.A.

379. Medina, supra note 353; Tiku, supra note 366.

380. See P.R. Laws Ann. tit. 13, § 45013 (LexisNexis, LEXIS through 2025 Legis. Sess.) (defining categories of individuals for preferential taxation programs predicated on their economic contributions); supra notes 350–366 and accompanying text.

381. Blackhawk, The Constitution of American Colonialism, supra note 44, at 6–8 (observing that "a body of law within the United States comprises the constitutional law of American colonialism," including "federal Indian law [and] the law of the territories" (footnotes omitted)).

382. Foraker Act, ch. 191, § 14, 31 Stat. 77, 79–80 (1900) (exempting Puerto Rico from "internal-revenue laws"); Treaty of Peace Between the United States of America and the Kingdom of Spain art. II, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754 (ceding Puerto Rico and Guam).

bulk of federal receipts, so it was less costly to grant territories exemption from internal revenue.[383] By contrast, tribes' existence predates that of the federal government, and any serious thinking about exempting tribal members from federal taxation did not emerge until almost the mid-twentieth century, as for example in *Capoeman*.[384] By that time, income taxes and internal revenue had already replaced tariffs to become the largest component, by far, of the federal fisc.[385] All that made tax exemption for tribes more costly compared to the territories. And beyond the timing, the *discrete moment* for deliberation mattered. When the United States acquired the territories, Congress had to make a deliberate decision about territorial tax policy. Those decisive moments made Congress think hard (even if it reached imperfect results) about how to fund local governance.[386] Internal-revenue exemption was the result Congress reached after substantial debate.[387] On the other hand, Congress has never devoted such serious attention to a rational, systematic tax solution for tribes at a discrete, deliberate moment.

Further, different institutions have been responsible for the policy decisions. Congress made all the rules for the territories and set up the general tax structure more than a century ago.[388] But its reluctance to do so for tribes (in part because the absence of a deliberate, decisive moment further enabled legislative inertia) made the courts and Treasury play key roles.[389] After the 1950s, however, courts and Treasury had little appetite to carve out general exemptions from income taxes. The reason is obvious for the Treasury, whose statutory mandate, after all, is to collect revenue.[390] As to the courts, a few developments mattered. In part due to the influence of the Legal Process School, there was general agreement (perhaps even a consensus) that the representative branches, in particular Congress,

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383. Mehrotra, Making the Modern American Fiscal State, supra note 5, at 7 (showing that customs duties constituted 56%, 57%, 41%, and 49% of all federal receipts in 1880, 1890, 1900, and 1910, respectively).

384. Squire v. Capoeman, 351 U.S. 1, 10 (1956) (discussing reasons to exempt a tribal member from federal taxation); see also Sarah Krakoff, They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum, 69 Stan. L. Rev. 491, 498–99 (2017) ("In short, the Constitution's unique treatment of tribes assumes that they are successors to the peoples who occupied the continent before the arrival of European explorers and American settlers.").

385. Mehrotra, Making the Modern American Fiscal State, supra note 5, at 7 (showing that income taxes constituted 59% of federal receipts in 1930).

386. See Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 570–87 (analyzing extensive legislative debate over the design of territorial tax systems, variously motivated by the desire "to create a self-sustaining territorial fiscal system," the view "that Puerto Rico could not bear a direct property tax," the perception of congressional "generosity," and "the serious threat of territorial free trade").

387. Foraker Act § 14.

388. See supra section II.A.

389. See supra Part I.

390. See supra note 111 and accompanying text (describing the Treasury Department's statutory mandate).

should craft tax policy.[391] Judicial interest diminished: Tax declined from the largest subject matter on the Supreme Court's docket to one of the smallest.[392] At the same time, the income tax regime gained in complexity. As the statutory rules became more and more detailed, courts became even less willing to read general exemptions without specific legislative directive.[393] One of the main areas in tax in which the judiciary did important work was curbing the use of tax shelters by high-income groups in the 1970s and 1980s.[394] The tribal tax cases were of course not about tax shelters. But that mode of reasoning and the judicial instinct to protect the federal fisc led to less sympathetic treatment of tribal tax issues.[395] And the judicial principle of guarding against the erosion of the income-tax base built a set of precedents and analytical approaches that have not responded adequately to the now more pressing concern of tribal tax sovereignty.[396]

III. TOWARD A CONCEPTUAL FRAMEWORK OF FISCAL AUTONOMY

Why would the same normative goal produce divergent law for tribes and territories? Part of the answer is the lack of a coherent framework of fiscal autonomy for communities living with the legacy of American imperialism. This Part of the Article provides this account. It proposes policies that will pave the path for more consistent federal tax treatment, while fostering fiscal capacity to realize the promise of self-governance.

This Part proceeds as follows. Section III.A evaluates existing scholarship. Section III.B argues that fiscal autonomy is a twofold concept. It

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391. See, e.g., Daniel J. Hemel, The President's Power to Tax, 102 Corn. L. Rev. 633, 639 (2017) (describing how the President and the Treasury Department have often asked Congress to change tax law, "even when existing statutes gave them ample (or at least arguable) authority to enact a desired change, and even when legislative gridlock made it exceedingly unlikely that Congress would act").

392. See supra note 163 and accompanying text (describing the decline in judicial interest in deciding tax disputes, in particular in an Article III forum and at the Supreme Court).

393. See Stanley S. Surrey, Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail, 34 Law & Contemp. Probs. 673, 674, 699–700 (1969) (examining "the characteristics and attributes" that have increased the complexity of the federal income tax regime).

394. See, e.g., Est. of Franklin v. Comm'r, 544 F.2d 1045, 1046 (9th Cir. 1976) (attempting to curb the use of retail, overvaluation shelters by high-income taxpayers to generate depreciation and interest deductions).

395. See supra section I.A.3 (describing the evolution of the *Capoeman* exemption in the lower courts, which often declined to extend the exemption to different factual predicates out of a desire to protect the income-tax base).

396. See generally Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers, 109 Yale L.J. 1 (1999) (analyzing the judiciary's common-law reasoning in disputes about federal Indian law); David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Calif. L. Rev. 1573 (1996) (noting throughout the central role of the Supreme Court in matters of federal Indian law).

centers on the dynamic relationship between a first-order structural component (taxing power) and a second-order governance component (democratic decisionmaking). Under this view, Native tribes hold promise for fiscal self-governance but little taxing power. By contrast, Congress's delegation of tax-design power to the territories merits additional scrutiny. Section III.C articulates policy proposals, including a uniform, nonrefundable income-tax credit for tribal and territorial taxes paid.

A. *Literature Review*

Existing scholarship fits into four general categories: (1) analysis of Native tribes' power to tax, especially its interaction with state taxation and as a strand of federal Indian law; (2) a small literature about taxation in Puerto Rico, especially in relation to welfare policy; (3) a broader discussion about American imperialism as to territories and tribes; and (4) the fiscal capacity of subnational governments, almost exclusively about state and local governments. As this survey shows, no scholar has conducted a systematic study of subnational taxation beyond states and their subdivisions or shown the divergent federal treatment of territorial and Native authorities to tax.

First, scholars have assessed the case law governing taxation on Indian lands.[397] This literature centers on the Supreme Court's adjudication of state–Native tax conflicts and faults it—in the spirit of Justice Brennan's *Colville* dissent[398]—for permitting double taxation of business activities which hinders Native economic development.[399] Most have focused on commodity taxes, but some have criticized state's income taxation on reservation lands as an invasion of tribal sovereignty.[400] Existing law's failure

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397. E.g., Dominic A. Azzopardi, Dual Taxation in Indian Country: The Struggle to Correct *Cotton Petroleum*, 67 Wayne L. Rev. 311, 313–31 (2022); Mark J. Cowan, Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues, 2 Pitt. Tax Rev. 93, 105–07 (2005) [hereinafter Cowan, Double Taxation]; Crepelle, Taxes, Theft, and Indian Tribes, supra note 43, at 1001–09; Angelique A. EagleWoman, The Philosophy of Colonization Underlying Taxation Imposed Upon Tribal Nations Within the United States, 43 Tulsa L. Rev. 43, 50–70 (2007); Fletcher, In Pursuit of Tribal Economic Development, supra note 14, at 759–74; David D. Haddock, To Tax Tribes or Not to Tax Tribes? *That* Is the Question, 12 Lewis & Clark L. Rev. 971, 975–88 (2008); Erik M. Jensen, Taxation and Doing Business in Indian Country, 60 Me. L. Rev. 1, 16–93 (2008); Pomp, supra note 43, at 946–1214; Scott A. Taylor, The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians, 91 Marq. L. Rev. 917, 954–75 (2008).

398. See supra notes 260–262 and accompanying text.

399. E.g., Azzopardi, supra note 397, at 325–34; Cowan, Double Taxation, supra note 397, at 94; Crepelle, Taxes, Theft, and Indian Tribes, supra note 43, at 1001; Haddock, supra note 397, at 973; Dale T. White, Five Restatements: Charting the History of the Law on State Taxation of Non-Tribal Members in Indian Country, 2022 Wis. L. Rev. 329, 351–68.

400. See Taylor, supra note 397, at 918–19 ("Tribes, their members, and all others within Indian Country continue to be subject to state attempts to impose their taxes whenever they can, even though *Worcester v. Georgia* seems to say that state power stops at the reservation boundary." (citing 31 U.S. (6 Pet.) 515 (1832))); see also Jennifer Nutt Carleton,

to strike a fair balance between state and tribal interests—in particular the legal-incidence test—has led scholars to call for reform.[401] Proposals include: (1) using the Indian Commerce Clause to invalidate state taxes on tribal lands,[402] (2) crafting state–tribal compacts to avoid double taxation while reducing the judiciary's role,[403] and (3) reimagining the preemption framework, including interventions by the Interior Department and Congress.[404] One prominent scholar has faulted the unsatisfying doctrine for forcing tribes to resort to raising revenue through economic development.[405]

The focus on *state*–tribal taxation, often in piecemeal response to cases, is unsurprising.[406] Conflicts at the Supreme Court attract scholarly

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State Income Taxation of Nonmember Indians in Indian Country, 27 Am. Indian L. Rev. 253, 256 (2002).

401. See, e.g., Haddock, supra note 397, at 989 (criticizing the legal-incidence test); David Y. Kwok, Taxation Without Compensation as a Challenge for Tribal Sovereignty, 84 Miss. L.J. 91, 103–08 (2014); Pomp, supra note 43, at 1198; Anna-Marie Tabor, Sovereignty in the Balance: Taxation by Tribal Governments, 15 U. Fla. J.L. & Pub. Pol'y 349, 372–89 (2004).

402. E.g., Crepelle, Taxes, Theft, and Indian Tribes, supra note 43, at 1023; Pomp, supra note 43, *passim*.

403. Richard J. Ansson, Jr., State Taxation of Non-Indians Whom Do Business With Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter Into Taxation Compacts With Their Respective State, 78 Or. L. Rev. 501, 504 (1999) ("Tribes must compact with states in an effort to pre-set the levels of taxation which the Tribe and the state may impose on nonmembers doing business in Indian country."); Matthew L.M. Fletcher, The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements, 82 U. Det. Mercy L. Rev. 1, 4, 44–45 (2004) (favoring voluntary tax agreement between tribes and states due to coordination, predictability, and economic cooperation); White, supra note 399, at 370; see also Larry EchoHawk, Balancing State and Tribal Power to Tax in Indian Country, 40 Idaho L. Rev. 623, 653–55 (2004) (advocating for discussion between states and tribes, with the advice of independent bodies like universities or commissions). But see Pippa Browde, Sacrificing Sovereignty: How Tribal-State Tax Compacts Impact Economic Development in Indian Country, 74 Hastings L.J. 1, 6 (2022) ("[C]ompacts do not live up to their promise of resolving juridical taxation in a way that promotes the economic development activities and opportunities that tribes need.").

404. See Robert William Alexander, The Collision of Tribal Natural Resource Development and State Taxation: An Economic Analysis, 27 N.M. L. Rev. 387, 391 (1997) (concluding "that Congress easily could remedy the current uncertainty created in the case law by explicitly preempting such state taxation"); Cowan, Double Taxation, supra note 397, at 143–49 (discussing express federal preemption of state taxation); Crepelle, Taxes, Theft, and Indian Tribes, supra note 43, at 1024, 1028–31 (putting forth a proposal to allow tribes to tax off-reservation activities as retaliatory, subnational tariffs); White, supra note 399, at 371 ("An effective fix would be for Congress to amend the Indian Trader Statutes." (citing 25 U.S.C. §§ 261–264 (2018))).

405. Fletcher, In Pursuit of Tribal Economic Development, supra note 14, *passim*.

406. See generally Stacy Leeds & Lonnie Beard, A Wealth of Sovereign Choices: Tax Implications of *McGirt v. Oklahoma* and the Promise of Tribal Economic Development, 56 Tulsa L. Rev. 417 (2021) (exploring "the sovereign power of taxation" among "federal, tribal, state, and local taxing authority" in the wake of McGirt v. Oklahoma, 140 S. Ct. 2452 (2020)).

attention, produce outcomes dependent on judicial personnel, and make it easy to view them as species of federal Indian law rather than taxation.[407] One recent study declared: "[S]tate taxation of Indian country commerce is the most severe impediment to tribal economies."[408] Thus, even when scholars have proposed federal fiscal support, they have done so to lessen dual *state*–tribal tax burdens on the same economic activities on reservations.[409] While precisely tailored for double taxation, this approach misses the forest for the trees. As Part I has shown, one key constraint on tribal fiscal capacity is Congress's failure to carve out the *federal* tax base for Native populations.[410] Congress has done exactly that in the territories for the same goal of autonomy and exercising a similar plenary power.[411]

Second, a few scholars have written about territorial taxation, and they have focused almost exclusively on Puerto Rico.[412] This scholarly strand arose from *United States v. Vaello Madero*, in which the Supreme Court sustained Congress's denial of Supplemental Security Income to Puerto Rico residents based on their exemption from income, estate, and gift taxes.[413] Other accounts provide tax-planning advice.[414] The last com-

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407. See William C. Canby, Jr., The Status of Indian Tribes in American Law Today, 62 Wash. L. Rev. 1, 6, 11–15 (1987) (reviewing the application of Supreme Court doctrines to the balance between state and tribal power); Daniel L. Rotenberg, American States and Indian Tribes: Power Conflicts in the Supreme Court, 92 Dick. L. Rev. 81, 82 (1987) ("[S]o long as Congress withholds legislation and its awesome power over the tribes, the disputes remain. Their resolution falls into the hands of the Supreme Court.").

408. Crepelle, Taxes, Theft, and Indian Tribes, supra note 43, at 1000.

409. See Cowan, Double Taxation, supra note 397, at 140–42 (evaluating federal tax credits as a solution to the dual state and tribal tax issue); Pomp, supra note 43, at 1099–120 (discussing tribal-tax credits in Native–state tax conflicts).

410. See supra notes 188–195 and accompanying text.

411. See supra section II.A.

412. A recent historical study traces federal tax policy in Puerto Rico from 1898. It contends that the United States used tax as an instrument of economic subordination to promote mainland corporate interests, leaving the island fiscally crippled. Dick, supra note 43, *passim*. Others have analyzed the welfare-policy consequences of tax exemption, advocating the extension of federal economic-security programs into the territories based on social citizenship, doctrinal coherence, and history. See Hammond, supra note 39, at 1677–94 (advocating "commitment to social citizenship" and economic security for territorial residents); Francine J. Lipman, Not Taxing Puerto Rico: Whitewashing Impoverishment in *United States v. Vaello Madero*, 77 Tax Law. 357, 364 (2024) (challenging *Vaello Madero*'s holding that "Congress can rationally deny . . . federal benefits to Puerto Ricans" based on income tax exemption); Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 559 (contending that Congress segregated territorial tax regimes for its own foreign-policy goals).

413. 142 S. Ct. 1539, 1542–43 (2022).

414. See generally Robert S. Griggs, Operating in Puerto Rico in the Section 936 Era, 32 Tax L. Rev. 239 (1977) ("In exercising its taxing power, Puerto Rico has provided, since 1919, tax exemption, of varying scope and duration, to qualifying businesses." (footnote omitted)); Juan Mendez-Torres, The Internal Revenue Code's Role in Puerto Rico's Economic Development, 15 J. Int'l Tax'n 22, 29 (2004) (assessing congressional tax incentives and reform options); Zoltan M. Mihaly, Tax Advantages of Doing Business in Puerto Rico, 16 Stan. L. Rev. 75, 75 (1963) ("Of prime importance as to Puerto Rican taxes is the

prehensive scholarly treatment of territorial taxation is more than four decades old.[415] It predates Puerto Rico's current tax incentives and the Tax Reform Act of 1986 (e.g., delegation of substantive design powers to American Samoa, Guam, and CNMI pending tax implementation agreements).[416] No scholar has systematically compared territorial and Native tax regimes, in part because the Code's exclusion of the territories from the United States invites treating them under international tax law.[417]

Third, scholars have written on the imperialist roots of American public law. Both federal Indian law and the law of the territories—in particular the framework animated by the *Insular Cases*—have proved fertile ground for exposing how empire and conquest have shaped the development of our constitutional polity.[418] A small but burgeoning subset of this literature, primarily historical and sociological inquiries, has theorized taxation as a fiscal tool of imperialism.[419] This Article adds to the discourse

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Industrial Incentive Act, which makes it possible for a qualified business to derive income free of tax in the first ten, twelve, or seventeen years of operations in Puerto Rico . . . ." (footnote omitted)); Jason Sampas, Puerto Rico: America's Tax Haven or Vacation Paradise, 21 Law & Bus. Rev. Ams. 49, 50 (2015) (explaining how "Puerto Rican incentives . . . could affect" groups such as retired couples, wealthy couples, and entrepreneurs); Covas, supra note 366 (explaining the tax advantages that hedge fund managers can receive by becoming "bona fide resident[s] of Puerto Rico").

415. See generally Hoff, supra note 43 (explaining federal income and excise-tax treatment of Puerto Rico, the Virgin Islands, and Guam, in response to excise-allocation litigation in the early 1980s).

416. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1271, 100 Stat. 2085, 2591–93; see also supra section II.B.

417. I.R.C. § 7701(a)(9) (2018) (defining the United States to "include[] only the States and the District of Columbia").

418. Full discussion of this literature is beyond this Article's scope. But some representative works include Blackhawk, The Constitution of American Colonialism, supra note 44; Blackhawk, Federal Indian Law as Paradigm, supra note 74; Seth Davis, American Colonialism and Constitutional Redemption, 105 Calif. L. Rev. 1751 (2017); Erman, supra note 275; Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381 (1993); K-Sue Park, The History Wars and Property Law: Conquest and Slavery as Foundational to the Field, 131 Yale L.J. 1062 (2022); Christina Duffy Ponsa-Kraus, The *Insular Cases* Run Amok: Against Constitutional Exceptionalism in the Territories, 131 Yale L.J. 2449 (2022); Angela R. Riley & Kristen A. Carpenter, Owning *Red*: A Theory of Indian (Cultural) Appropriation, 94 Tex. L. Rev. 859 (2016); Juan R. Torruella, Why Puerto Rico Does Not Need Further Experimentation With Its Future: A Reply to the Notion of "Territorial Federalism", 131 Harv. L. Rev. Forum 65 (2018), https://harvardlawreview.org/forum/vol-131/a-reply-to-the-notion-of-territorial-federalism [https://perma.cc/4W4J-7YHP]; José A. Cabranes, Puerto Rico: Colonialism as Constitutional Doctrine, 100 Harv. L. Rev. 450 (1986) (book review).

419. See generally Dick, supra note 43 (describing federal tax policy as economic subordination of Puerto Rico); Kyle Willmott, Taxes, Taxpayers, and Settler Colonialism: Toward a Critical Fiscal Sociology of Tax as White Property, 56 Law & Soc'y Rev. 6 (2022) (exploring the relationship between taxation and racial fiscal entitlements); Maximilien Zahnd, Not "Civilized" Enough to Be Taxed: Indigeneity, Citizenship, and the 1919 Alaska School Tax, 48 Law & Soc. Inq. 937 (2023) (scrutinizing how school taxes allowed Alaska to construct indigeneity and civilization); Maximilien Zahnd, Praise the Gardeners, Dun the Hunters: Alaska Natives, Taxation, and Settler Colonialism, 65 Comp. Stud. Soc'y & Hist.

an original comparative analysis of Native and territorial taxation. It shows how divergent federal tax treatment, under the same rhetoric of autonomy, has impoverished both tribes and territories.

Finally, scholars have assessed state and local governments' fiscal capacity. They have advocated constraining states' power to determine the tax base, criticized property-tax limits as diminishing voter power through excessive focus on tax reduction, and invited Congress to override the Dormant Commerce Clause to make state tax incentives more effective.[420] This literature focuses on states and their subdivisions.[421] But as Part I shows, tribes and territories—also subnational governments—have distinctive powers to tax. Congress's promise to foster their fiscal autonomy merits scholarly attention. The lacuna is especially pressing because extractive federal policies have harmed tribes and territories, which, unlike states, have no special representation in the federal government.[422]

B. *Conceptualizing Autonomy in Subnational Taxation*

This section builds a conceptual framework of fiscal autonomy. The term "autonomy" conjoins two ancient Greek words, *autos* ("oneself") and *nomos* ("custom," and as customs evolve to acquire institutional form, "law").[423] It first appeared as an adjective, used by Sophocles to describe

932 (2023) (detailing how Alaska used a fur tax to "civilize" Native hunters); Zhang, The Origins of U.S. Territorial Taxation, supra note 15 (describing territorial tax exemptions as tools to protect the federal tax base); see also Jeremy Bearer-Friend, Race-Based Tax Weapons, 14 U.C. Irvine L. Rev. 1067, 1069 (2024) (illustrating the use of "universalist," or race-neutral, tax statutes to target vulnerable taxpayers).

420. See Kleiman, Tax Limits, supra note 8, at 1890–91 (arguing that "tax limits" can "undermine public control by reducing local voter power"); Layser, supra note 8, at 1238–39 (contending that the Dormant Commerce Clause constrains the efficiency of state place-based incentives); Shaviro, supra note 8, at 897 (favoring "confining states' taxing authority to the determination of their tax rates").

421. Commentators have provided comparative analyses of the fiscal autonomy of state and local governments. See generally, e.g., Hansjörg Blöchliger & David King, Less Than You Thought: The Fiscal Autonomy of Sub-Central Governments, 43 OECD Econ. Stud. 155 (2006) (finding that "[t]he taxing power of sub-central governments is limited" and that "[t]axing power is lower for state than for local governments"); Sandra Gomes, Fiscal Powers to Subnational Governments: Reassessing the Concept of Fiscal Autonomy, 22 Reg'l & Fed. Stud. 387 (2012) ("[I]t is not valid to infer autonomy to spend from the way governments get their revenue.").

422. See U.S. Const. art. I, § 3, cl. 1 (state composition of Senate); Wechsler, supra note 61, at 543–46 (emphasizing the importance of states as separate sources of authority and their role in composing the central government).

423. See A Greek–English Lexicon 41, 185, 282–83 (H.G. Liddell & R. Scott eds., 9th ed. 1996); see also Lawrence Haworth, Autonomy 11 (1986); James T. Kloppenberg, Toward Democracy 7–8 (2016). The evolution of nomos from social-group customs to law animated the development of an influential piece of scholarship. Robert M. Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 28 (1983).

the tragic heroine Antigone.[424] In the eponymous play, Antigone defies her city's decrees, instead relying on unwritten laws in a daring act of civil disobedience.[425] The chorus thus calls her *autonomos*, "of her own laws."[426] Autonomy emerged as a prominent concept in modern philosophy through social-contract theories. Autonomous agents, capable of rational thought and value formation, helped formulate what powers and restrictions one would consent to in government.[427]

Autonomy thus centers on *self-governance*. It describes the condition, primarily of individuals, combining (1) capacity for rational deliberation; (2) independence from external coercion or distortion, including from legal rules, in the deliberative process to establish authentic values for oneself; and (3) capacity to realize those values within a political community.[428] Contemporary accounts of autonomy—though not all—have taken a proceduralist approach. They focus on perfecting the process of deliberation rather than arriving at specific substantive values.[429] In part because of its social-contract origins, autonomy bears a close relationship with state legitimacy: Public discourse and deliberation by individuals with autonomy legitimate the collective decisions of the community.[430] Autonomy thus differs from (a) *unconstrained freedom*: autonomy by definition features

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424. See Sophocles, Antigone *passim* (H.D.F. Kitto trans., Oxford Univ. Press 1994); David N. McNeill, Antigone's Autonomy, 54 Inquiry 411, 412 (2011) (describing "the first recorded instance of the word *autonomos*").

425. Sophocles, supra note 424, at 16–17; Teresa Godwin Phelps, Narratives of Disobedience: Breaking/Changing the Law, 40 J. Legal Educ. 133, 136–39 (1990); Robert P. Lawry, Ethics in the Shadow of the Law: The Political Obligation of a Citizen, 52 Case W. Res. L. Rev. 655, 690 (2002).

426. Sophocles, Sophoclis Fabulae 216 (H. Lloyd-Jones & N.G. Wilson eds., Oxford Univ. Press 1990) (translated by author) [("αὐτόνομος")].

427. See, e.g., John Rawls, A Theory of Justice 390 (1971) (using the social-contract tradition to construct the original position, a method of reasoning focusing on how equal citizens would agree to cooperate in political society); see also Gerald Dworkin, The Theory and Practice of Autonomy 9 (1988) [hereinafter, Dworkin, Theory and Practice] ("Rawls uses the idea of autonomous persons as part of a contractual argument for certain principles of distributive justice.").

428. See Bernard Berofsky, Liberation From Self 3 (1995) (describing subjective sources of distortion like prejudices and cognitive biases); Kloppenberg, supra note 423, at 8 ("[T]he concepts of popular sovereignty, autonomy, and equality are mutually constitutive."); James E. Fleming, Securing Deliberative Autonomy, 48 Stan. L. Rev. 1, 30–36 (1995) (analyzing the relationship between autonomy and deliberation); Frankfurt, supra note 31, at 6–7, 14–17 (describing, as a condition of autonomy, authenticity or the coherence between basic desires and second-order evaluation of those desires); see also Stefaan E. Cuypers, Harry Frankfurt on the Will, Autonomy and Necessity, 5 Ethical Persps. 44, 44–45 (1998) (putting Frankfurt's views in explicit terms of autonomy and authenticity).

429. Berofsky, supra note 428, at 122–29 (defending "procedural independence" as necessary to autonomy); Dworkin, Theory and Practice, supra note 427, at 18 (describing independence in reflective procedures as part of autonomy); see also Fabian Freyenhagen, Autonomy's Substance, 34 J. Applied Phil. 114, 115–17 (2017) (contrasting procedural and substantive conceptions of autonomy).

430. See, e.g., Jürgen Habermas, Between Facts and Norms 103–04 (William Rehg trans., 1996).

being governed and therefore constrained (i) by the rules prescribed to instantiate one's own normative commitments and (ii) by the legitimate demands of others in the same polity;[431] and (b) *paternalism*: autonomy refers to the capacity of realizing one's own authentic values, not those imposed by others, even if the values imposed are designed to further one's own good.[432]

Translation of this concept into our discussion presents two puzzles. First, in origins and contemporary discourse, autonomy primarily concerns individuals.[433] Attributing autonomy to subnational jurisdictions therefore entails refashioning it for an institutional context. This Article interprets the principle of fiscal autonomy to incorporate a democratic element.[434] The values that democratic governments should have the capacity to realize are those shared by their constituencies. This requires the regime to integrate accountability mechanisms that translate the public's distributive values into policy.[435] Second, this Article concerns not any type of decisional autonomy but *fiscal* autonomy. This requires analysis of subnational jurisdictions' *taxing* power, structured by formal constitutional and statutory provisions, and its tax base, shaped by the relative wealth (or poverty) of its citizens and tax competition.[436] It underscores the effects of *economic* rather than political inequality in distorting policy outcomes.

This section fleshes out this framework of fiscal autonomy, parts of which are implicit in Part I's discussion. Section III.B.1 addresses taxing power. Section III.B.2 addresses democratic fiscal governance.

1. *Autonomy as the Power to Tax.* — First-order fiscal autonomy centers on taxing power. Federalism overlaps governance structures: The revenue needs of central and subnational governments limit each other's power to tax.[437] These restrictions affect both receipt of funds and substantive tax

431. Isaiah Berlin, Two Concepts of Liberty, *in* Four Essays on Liberty 118, 121–31 (describing negative freedom); Berofsky, supra note 428, at 182 (describing how "autonomous agent[s] may enter relationships which entail (self-imposed) limitations"); John Christman, Autonomy and Personal History, 21 Canadian J. Phil. 1, 2–3 (1991) (distinguishing autonomy from freedom).

432. See Sarah Conly, Against Autonomy: Justifying Coercive Paternalism 16–18 (2013) (defending versions of paternalism against autonomy); Gerald Dworkin, Paternalism, 56 Monist 64, 83 (1972) (suggesting that people are "most likely to consent to paternalism in . . . instances in which it preserves and enhances for the individual his ability to rationally consider and carry out his own decisions"); David Enoch, What's Wrong With Paternalism: Autonomy, Belief, and Action, 116 Proc. Aristotelian Soc'y 21, 45–47 (2016) (explaining why paternalism is objectionable with reference to "the value of autonomy and its related constraints").

433. See supra notes 423–432 and accompanying text.

434. See Avishai Margalit & Joseph Raz, National Self-Determination, 87 J. Phil. 439, 440 (1990) (describing the concept of "self-government" for territories and jurisdictions).

435. See infra section III.B.2.

436. See infra section III.B.1.

437. See Blöchliger & King, supra note 421, at 156–59 (discussing how financial transfers, federal regulatory policies, and other structural features of federalism affect central and sub-central taxing power).

design. They arise from distinct sources of law (federal and subfederal constitutional norms, statutes, and case law) and decisions made by distinct actors (Congress, courts, the executive, and subfederal governments).[438] They raise questions of substantive fairness (is the divergent tax treatment of tribes and territories justified?) and of the Legal Process School (which institution has the competence and expertise to decide?).[439] This section provides an analytical taxonomy of first-order fiscal autonomy, and uses it to categorize the taxing powers of Native tribes and U.S. territories.

First, both formal and functional competition can constrain subnational taxing power as to receipt of funds. By *formal* tax competition, this Article refers to how law and overlapping governance structures can crowd jurisdictions into extracting revenue from the same tax base or leave them to tax to the exclusion of others. By *functional* tax competition, this Article refers to how each subnational jurisdiction can reduce tax rates and burdens to incentivize investment.[440] As Part I shows, territories are on one extreme. Statutes exempt territorial residents from federal taxation on territorially sourced income, including from labor, personal property, and real property located in the relevant territories.[441] Due process and geography mean that territories do not share their tax base with state and local governments.[442] They thus face little formal tax competition.

Further, because territories tax *in place of* Congress, they often enjoy an insurmountable advantage in functional tax competition. Guam, CNMI, and the Virgin Islands are required by statute to impose the federal

438. See generally Peter D. Enrich, supra note 8 (describing state taxing power); Erin Adele Scharff, Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them, 91 N.Y.U. L. Rev. 292 (2016) (discussing the taxing power of cities); supra Part I (describing constitutional, doctrinal, and executive constraints on Native and territorial taxing powers).

439. See Guido Calabresi, An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts, 55 Stan. L. Rev. 2113, 2123 (2003) ("The answer that the Legal Process approach advocated lay in comparative institutional analysis."); William N. Eskridge, Jr. & Philip P. Frickey, The Making of the Legal Process, 107 Harv. L. Rev. 2031, 2032–33 (1994) (describing "'institutional competence'" as a "legal process concept" (quoting Felix Frankfurter)).

440. See Avi-Yonah, Globalization, Tax Competition, supra note 7, at 1575–76 (describing international tax competition as situations in which "sovereign countries aim to attract both portfolio and direct investment by lowering their tax rates on income earned by foreigners"); Diane Ring, Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation, 9 Fla. Tax Rev. 555, 561–62 (2009) (describing tax competition as "a country's use of any feature of its tax system to 'enhance' its competitive advantage in the marketplace for capital, investment, and/or nominal business presence").

441. I.R.C. §§ 861, 931, 933, 935, 937 (2018).

442. See Shaffer v. Carter, 252 U.S. 37, 57 (1920) ("As to nonresidents, [state-tax] jurisdiction extends only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources."). While the Court has abolished a physical-presence requirement, states must still show a "substantial nexus" with the commercial activity they wish to tax. South Dakota v. Wayfair, Inc., 585 U.S. 162, 188 (2018).

income tax as the territorial income tax.[443] American Samoa has chosen to do so.[444] No states can subject their residents—who at a minimum must pay the federal income tax—to lower tax burdens than mirror-Code territories.[445] Only by completely forgoing state and local income taxes can states maintain parity with mirror-Code territories.[446]

Puerto Rico holds an even stronger tax advantage. Because it can deviate from federal tax rules, the island has enacted preferential regimes that reduce the tax burden on labor income to 4% and capital gains to 0%.[447] No state has such power: They can forgo state income taxes but cannot eliminate *federal* tax burdens for their residents. Even the normal income-tax rates in Puerto Rico are lower than on the mainland.[448] This makes it almost impossible for states to attract investment from Puerto Rico by lowering taxes. To be sure, many residents have emigrated from the island.[449] But this is due to *economic* opportunities on the mainland, not the states' power to engage in functional tax competition with the territory.[450]

By contrast, Native tribes face fierce tax competition. Formally, they share the same tax base with not only states and their subdivisions but also Congress.[451] As to members residing on reservations, tribes can tax their incomes to the exclusion of states but not Congress.[452] Due to the

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443. 48 U.S.C. §§ 1397, 1421i (2018); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, Art. VI, § 601(a), 90 Stat. 263, 269 (1976) (codified as amended in the notes of 48 U.S.C. § 1801).

444. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1271(a), 100 Stat. 2085, 2591.

445. I.R.C. § 1.

446. Seven states impose no income tax. Andrey Yushkov, State Individual Income Tax Rates and Brackets, 2024, Tax Found. (Feb. 20, 2024), https://taxfoundation.org/data/all/state/state-income-tax-rates-2024 [https://perma.cc/KDJ7-SHMY] (explaining each state's tax regime). States can, through welfare programs, effect a negative income tax and reduce their residents' tax burdens below those in mirror-Code territories. See Robert A. Moffitt, The Negative Income Tax and the Evolution of U.S. Welfare Policy, 17 J. Econ. Persps. 119, 119 (2003) (explaining the connection between welfare programs and a negative income tax). But absent significant transfers from Congress or revenue streams beyond taxation, this is impossible for a broad swath of taxpayers (because states must fund such welfare programs).

447. See supra notes 340–350 and accompanying text.

448. P.R. Laws Ann. tit. 13, § 30061 (LexisNexis, LEXIS through 2025 Legis. Sess.).

449. See Press Release, Jason Schachter & Angelica Menchaca, U.S. Census Bureau, Net Outmigration From Puerto Rico Slows During Pandemic (Dec. 21, 2021), https://www.census.gov/library/stories/2021/12/net-outmigration-from-puerto-rico-slows-during-pandemic.html [https://perma.cc/CFP6-CRKG].

450. See Alexis R. Santos-Lozada, Matt Kaneshiro, Collin McCarter & Mario Marazzi-Santiago, Puerto Rico Exodus: Long-Term Economic Headwinds Prove Stronger Than Hurricane Maria, 42 Population & Env't 43, 53 (2020) (concluding that economic factors were the driving force behind emigration from Puerto Rico).

451. See supra sections I.A–C.

452. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1973) (concluding that states cannot tax tribal members on income derived from reservation sources); Choteau

narrowing *Capoeman* doctrine, Native communities are exempt only on income derived directly from land which diminishes the land's value.[453] As to nonmembers residing on reservations, tribes share the same tax base as Congress *and* states.[454] Commodity taxes follow the same pattern.[455] Regarding functional tax competition, Native tribes often occupy a position of insurmountable disadvantage. Because reservations are located *within* other subnational jurisdictions like states, tribes cannot reduce tax rates below the level outside of reservations. That is, tribes can only impose additional taxes on top of federal and state tax burdens for nonmembers.[456] Any exercise of their taxing power works to drive nonmembers out of tribal jurisdiction rather than attract them in.[457] Both formal and functional tax competition thus constrain Native fiscal capacity.

Poverty limits the tax base of tribes and territories—some of lowest-income jurisdictions within the United States.[458] This becomes especially pressing for tribes because multiple taxing jurisdictions share the same impoverished tax base.[459] Territories' exemption from federal taxation leaves far more of their tax base for local taxation. Such exemption is not unjustified. The key question is how to translate a coherent notion of fiscal autonomy into federal tax policy—which this Article will address.[460]

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v. Burnet, 283 U.S. 691, 695–96 (1931) (subjecting Native populations to federal income taxation).

453. See supra notes 144–157 and accompanying text.

454. *McClanahan* only precludes state taxation of tribal members' income derived from reservation sources. 411 U.S. at 175–76. Later case law permits states to tax nonmembers (even if members of other Native tribes) residing in a reservation on their income derived from that reservation, and on their income derived from the reservation of the tribe of which the taxpayer is a member. See Mike v. Franchise Tax Bd., 106 Cal. Rptr. 3d 139, 147 (Ct. App. 2010) (permitting California to tax enrolled members of the Twenty-Nine Palms Band of Mission Indians, residing on a different tribe's reservation, on income derived from sources on the Twenty-Nine Palms Band Reservation); LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 908 (Wis. 2001) (permitting Wisconsin to tax "an enrolled member of the Menominee Tribe," "living and working on the Oneida Reservation," on income generated on the Oneida Reservation).

455. See supra section I.C.

456. Tribes can lower resident members' tax burdens by taxing less than the state, because *McClanahan* exempts those members from state taxation. 411 U.S. at 173. But this hardly enables tribes to engage in tax competition. The off-reservation investments and taxpayers tribes need to attract are unlikely to be members of the tribe already.

457. For example, assume the tribe and the state each imposes a 5% tax on cigarettes. Buying cigarettes off reservation would be subject to a 5% state tax only. Buying cigarettes on reservation would be subject to a 10% tax (5% state and 5% tribal). Buyers would then try to purchase cigarettes off reservation only to avoid the additional 5% tax.

458. Craig Benson & Alemayehu Bishaw, Persistent Poverty in Puerto Rico and the U.S. Island Areas, U.S. Census Bureau (2024), https://www2.census.gov/library/publications/2024/demo/acs-57.pdf [https://perma.cc/N4N5-AJAG]; American Indian and Alaska Native Health, U.S. Dep't Health & Hum. Servs., https://minorityhealth.hhs.gov/american-indian-and-alaska-native-health [https://perma.cc/59VE-WUKS] (last visited Mar. 19, 2026).

459. See supra section I.C.

460. See infra section III.C.

Second, subnational governments possess varying degrees of substantive power. Some wield full control over the design of their tax regimes; others must tax in ways derivative of or shaped by the national community's distributive preferences.[461] Again, Puerto Rico lies on one end. It uniquely combines federal tax exemption with the power to derogate from federal rules.[462] Puerto Rico's exercise of this authority has produced for its longtime residents a local tax structure slightly less progressive than the federal income tax.[463] It has also devised generous incentives for mainland transplants who tend to be very wealthy.[464] Such policy thus enables Puerto Rico to realize a vision of distributive justice divergent from Congress or other subnational jurisdictions. By contrast, mirror-Code territories like Guam have minimal tax-design powers.[465] They levy the federal income tax as their primary source of revenue.[466] Their tax regimes therefore embody the distributive judgment of Congress and its national constituency. Native tribes are in the same boat, though for different reasons. Courts and Congress have hollowed out their tax base.[467] Tribal governments having little fiscal capacity, the key rules that structure inequality and distribution in Native communities are those of federal and state taxation.

Figure 1 illustrates the first-order fiscal autonomy of U.S. subnational governments.

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461. See supra notes 321–336 and accompanying text (distinguishing between mirror-Code jurisdictions, which must impose federal income-tax rules, and non-mirror-Code jurisdictions, which can design their own tax regimes).

462. See supra notes 303–309, 323 and accompanying text.

463. Compare I.R.C. § 1 (2018) (taxing income at 10%-37%) with P.R. Laws Ann. tit. 13, § 30061 (LexisNexis, LEXIS through 2025 Legis. Sess.) (taxing income at 7%-33%).

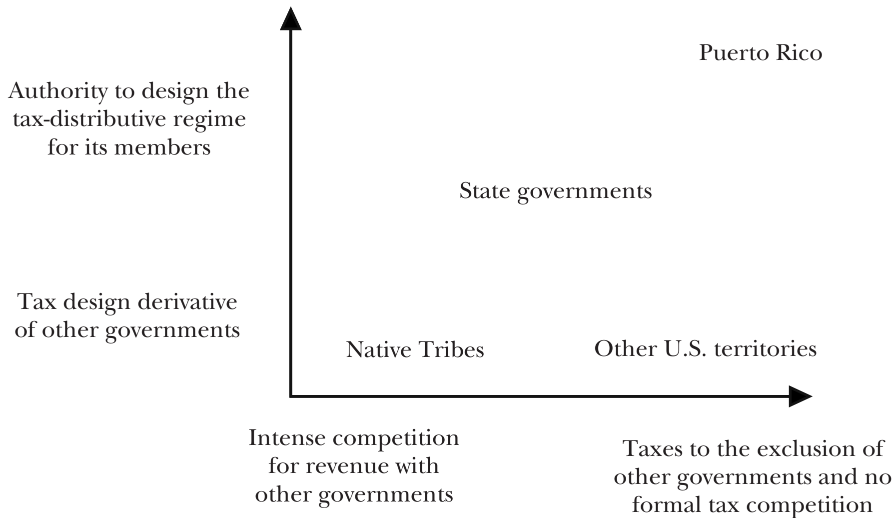
464. P.R. Laws Ann. tit. 13, §§ 10831–10844, 10851–10855 (providing a low fixed tax rate for certain businesses and for certain new residents of Puerto Rico).

465. See supra notes 328–336 and accompanying text.

466. See supra notes 328–336 and accompanying text.

467. See supra section I.A.

FIGURE 1. FIRST-ORDER FISCAL AUTONOMY OF SUBNATIONAL JURISDICTIONS



As Figure 1 shows, Puerto Rico has no overlapping jurisdiction as to territorially sourced income, faces little tax competition, *and* has robust tax-design powers.[468] Other territories—Guam, CNMI, the Virgin Islands, and American Samoa—tax to the exclusion of other governments, but in ways beholden to Congress's distributive judgment.[469] Native tribes face intense tax competition *and* have little tax-design power.[470] In the middle are the states. They share the same tax base as Congress (and occasionally tribes) and compete with each other for revenue.[471] Constrained by the floor set by the federal income tax, they also have limited freedom to design a tax regime that instantiates their own, rather than the national, preferences in distribution.

One caveat: As illustrated by Figure 1, this section's discussion focuses on the statutory and doctrinal coordination of subfederal governments' taxing authority. It does not provide a general assessment of congressional generosity in using tax policy to stimulate tribal or territorial economy. Nor does it place substantial weight on subfederal governments' limited spending or budgetary power after they have collected the tax revenue. For example, the arguments that Puerto Rico can tax to the exclusion of others, faces little tax competition, and has significant tax-design discretion do not imply that Congress has always supported the island in designing federal tax policy, or that Puerto Rico has significant discretion in

468. See supra notes 285–289, 321–322, 337–353 and accompanying text.

469. See supra notes 285–289, 327–336 and accompanying text.

470. See supra Part I.

471. See supra section I.C.

spending its tax receipts. Indeed, the Financial Oversight and Management Board exerts both substantive power and informal pressure over Puerto Rico's fiscal discipline.[472] Such external control over the island's budget and obligations certainly impairs its fiscal autonomy in a broader sense.[473] Further, Congress has been more generous to Puerto Rico in designing federal tax policy in the past, especially as to the corporate income tax. For the twenty years after the Tax Reform Act of 1976, for example, section 936 of the Code allowed U.S. corporations a credit for the full amount of federal corporate tax liability on income sourced to the U.S. possessions.[474] In practice, the vast majority of this tax benefit accrued to U.S. companies operating in Puerto Rico, spurring industrialization and commercial development.[475] The repeal of section 936 in 1996 depressed the territorial economy.[476] It contributed to the fiscal crisis that eventually led to the Puerto Rico Oversight, Management, and Economic Stability Act of 2016 (PROMESA).[477] But the end of this federal tax subsidy does not diminish the island's first-order autonomy over its own residents. Puerto Rico corporations remain generally immune from the federal corporate income tax.[478]

2. *Autonomy as Democratic or Responsive Fiscal Governance.* — By "fiscal autonomy," policymakers have generally referred to taxing power. They

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472. Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, What Is Puerto Rico?, 94 Ind. L.J. 1, 30 (2019) ("Under PROMESA, any fiscal plan or budget developed by the Commonwealth's central government needs to be approved by an Oversight Board before implementation.").

473. Brief Amici Curiae of the Service Employees International Union et al. at 6, United States v. Vaello Madero, 142 S. Ct. 1539 (2022) (No. 20-303) (contending that the Financial Management and Oversight Board's authority deprives Puerto Rico of fiscal autonomy).

474. I.R.C. § 936 (1976).

475. U.S. Gen. Acct. Off., GAO-93-109, Puerto Rico and the Section 936 Tax Credit 2 (1993) ("Since 1983, over 99 percent of the benefits of [section 936 of the 1976 act] have gone to companies operating in Puerto Rico. The Joint Committee on Taxation estimates that federal revenues forgone due to the section 936 tax credit will total $3.9 billion in fiscal year 1994.").

476. Scott Greenberg & Gavin Ekins, Tax Policy Helped Create Puerto Rico's Fiscal Crisis, Tax Found. (June 30, 2015), https://taxfoundation.org/blog/tax-policy-helped-create-puerto-rico-fiscal-crisis [https://perma.cc/T6WV-PD6K] ("When section 936 was repealed in 2006, foreign investment began to flee. Without a strong domestic corporate presence to fill the void, the economy began to contract, along with tax revenues.").

477. Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 130 Stat. 549 (2016).

478. Staff of Joint Comm. on Tax'n, 114th Cong., Federal Tax Law and Issues Related to the Commonwealth of Puerto Rico 16 ("In general, a corporation organized under the laws of Puerto Rico is a foreign corporation for U.S. tax purposes. The United States taxes foreign corporations only on income that has a sufficient nexus to the United States."); see also I.R.C. § 7701(a)(4) ("The term 'domestic' when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State unless, in the case of a partnership, the Secretary provides otherwise by regulations.").

have emphasized the tribe's or territory's exclusive control over its tax base and revenue streams.[479] This corresponds to the part of first-order autonomy that concerns the government's receipt of funds.[480]

But autonomy involves more than fiscal capacity. Indeed, existing doctrinal and policy moves resemble impoverished notions of unconstrained freedom that theories of autonomy are designed to replace.[481] After all, autonomy does not entail license to do whatever one likes.[482] In a famous argument, the late philosopher Harry Frankfurt described as "wanton" those purely motivated by first-order desires.[483] Instead, "second-order volitions" assess first-order desires under values formed through rational deliberation.[484] The coherence between the two—exercises of brute capacity and authentic normative commitments—thus defines both personhood and autonomy.[485] In subnational taxation, the critical process of value formation is democracy: Governments have no values of their own. Rather,

479. See, e.g., Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (noting that the power to tax "derives from the tribe's general authority, as sovereign, to . . . requir[e] contributions from persons or enterprises engaged in economic activities within that jurisdiction"); Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 167 (1980) (Brennan, J., concurring in part) (noting that Indigenous authority over the receipt of tax funds flows from "a presumption of sovereignty or autonomy that has roots deep in aboriginal independence"); see also I.R.C. §§ 931, 933, 935 (allowing the territories exclusive tax jurisdiction over territorially sourced income).

480. See supra notes 440–460 and accompanying text.

481. E.g., Berofsky, supra note 428, at 182 (describing a framework of autonomy that incorporates rationality, individual values, and other factors in addition to freedom); Christman, supra note 431, at 2–4 (distinguishing autonomy from the rudimentary notion of freedom as "the absence of various types of restraints (internal or external, positive or negative) that might stand between an agent's desires and the performance of her actions" (footnote omitted)); John Christman, Autonomy in Moral and Political Philosophy, Stanford Encyclopedia of Philosophy (2020), https://plato.stanford.edu/archives/fall2020/entries/autonomy-moral/ [https://perma.cc/J5KE-RWPD] (generally distinguishing autonomy from freedom).

482. See supra notes 423–432 and accompanying text; see also Richard H. Fallon, Jr., Two Senses of Autonomy, 46 Stan. L. Rev. 875, 877 (1994) ("To be autonomous, one must be able to form a conception of the good, deliberate rationally, and act consistently with one's goals.").

483. Frankfurt, supra note 31, at 11.

484. Id. at 10.

485. See John J. Davenport, Narrative Identity, Autonomy, and Mortality: From Frankfurt and MacIntyre to Kierkegaard 1 (2012) (describing the influence of hierarchical theories and "higher-order volitions" in contemporary understanding of autonomy); Cuypers, supra note 428 (describing Frankfurt's three conceptions of the will); Laura Waddell Ekstrom, A Coherence Theory of Autonomy, 53 Phil. & Phenomenological Rsch. 599, 600–03 (1993) ("By taking into account our higher-order mental states, contemporary hierarchical conceptions of freedom such as Frankfurt's make progress over classical compatibilist conceptions."); Frankfurt, supra note 31, at 15 ("It is in securing the conformity of his will to his second-order volitions, then, that a person exercises freedom of the will."); Marilyn A. Friedman, Autonomy and the Split-Level Self, 24 S.J. Phil. 19, 19 (1986) (noting that philosophers employ hierarchies when conceptualizing the self); Dennis Loughrey, Second-Order Desire Accounts of Autonomy, 6 Int'l J. Phil. Stud. 211, 211 (1998) (stating that the hierarchical model is the prevailing approach to understanding personal autonomy).

they have varying capacity to translate their citizens' normative vision into tax policy.

Second-order autonomy thus implicates democratic governance. Given first-order fiscal autonomy, how much will subnational governments tax in accordance with their citizens' sense of distributive justice? As relevant here, constraints on democracy can be internal/external, and formal/functional. *Internal–formal* constraints arise when the subnational jurisdiction's internal process fails to channel public preferences into lawmaking. *External–formal* constraints arise when the democratic processes of other governments with jurisdiction over that subnational community (e.g., federal vis-à-vis state) overlook the subnational community's preferences in formulating policy. By contrast, functional failures do not rest on process or institutional-design defects. *Internal–functional* constraints thus arise when economic inequality distorts the subnational government's tax policymaking. Likewise, *external–functional* constraints arise when interjurisdictional economic inequality distorts the federal or state government's tax and fiscal policy to (dis)favor the subnational community.[486]

Under this view, Native tribes have at least as much capacity for democratic and responsive fiscal governance as the territories. First, as to internal process, about half of Native tribes today have adopted written constitutions.[487] They add to the longstanding Native tradition of responsive and constitutional governance.[488] In general, written tribal constitutions divide government functions into executive, legislative, and judicial departments and provide for popular election (and occasionally legislative appointment) of tribal officers.[489] They provide the process by which tribes

486. See Jacob M. Grumbach, Laboratories of Democratic Backsliding, 117 Am. Pol. Sci. Rev. 967, 967 (2022) (noting the decline in state-level democracy).

487. Robert Miller, Tribal Constitutions and Native Sovereignty, *in* Oxford Handbook Topics in Politics (Oxford Univ. Press 2015), https://academic.oup.com/edited-volume/41327/chapter/496999456 (on file with the *Columbia Law Review*) (estimating that 230 tribes have written constitutions). Many tribes adopted their constitutions pursuant to the IRA, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101–5129 (2018)). Early views characterized IRA constitutions as boilerplate documents drafted by the BIA with little regard for tribal differentiation. Recent scholarship has challenged the received wisdom, contending that "Native communities had a fair amount of self-determination to decide what kinds of provisions they wanted to have in their organic charters." David E. Wilkins & Sheryl Lightfoot, Oaths of Office in Tribal Constitutions, 32 Am. Indian Q. 389, 391 (2008); see also Elmer Rusco, The Indian Reorganization Act and Indian Self-Government, *in* American Indian Constitutional Reform and the Rebuilding of Native Nations 49, 49 (Eric D. Lemont ed., 2006) (describing as "seriously flawed" the view that the IRA forced cookie-cutter, non-Native governments on most tribes).

488. See Seth Davis, The Constitution of Our Tribal Republic, 65 UCLA L. Rev. 1460, 1467–71 (2018) (arguing that agreements among tribes and colonial governments constitute part of American constitutional law).

489. See, e.g., Const. of the Cherokee Nation arts. VI–VIII; Const. of the Chickasaw Nation. arts. V–XIII; Const. of the Choctaw Nation of Okla. arts. V–XIV; see also William C. Canby, Jr., American Indian Law in a Nutshell 74–77 (7th ed. 2020) (explaining that most tribes have adopted a tripartite system of government).

levy taxes and spend the proceeds.[490] They therefore resemble the organic acts and constitutions that structure territorial governments.[491] Importantly, this is not to say that tribes must adopt written constitutions to exercise sovereignty in taxation, but only to show that many tribal governments share the formal features of responsive governance in the territories. Indeed, an emphasis on having a written constitution as a necessary marker of legitimate governance carries a history of colonial baggage for tribes.[492] And as one scholar has documented, tribes have developed institutional and functional checks when formal democratic mechanisms fail.[493] Further, many tribal taxes require federal approval. The tribal taxes at dispute in *Colville*, for example, were approved by Interior, prompting the issue of preemption by delegation.[494] As a result, Native tax policy benefits from additional scrutiny by the federal administrative apparatus, itself subject to mechanisms of democratic accountability.[495] These strictures of lawmaking and internal-process tools help tribes exercise their taxing power in accordance with Native communities' vision of distributive equity—at least as much as the territories.

Indeed, aspects of Native governance enable more robust local democracy than federal law allows the territories. What may have started as "boilerplate" constitutions have evolved through amendment and reform to structure tribes more in accordance with their cultures and norms.[496] By contrast, federal neglect of territorial governance means that some territories still live under organic acts enacted by Congress more than seventy years ago to replace military rule.[497] Guam has pursued greater self-determination in its territorial constitution, and presented to

490. E.g., Const. of the Cherokee Nation art. X (fiscal matters); Const. of the Chickasaw Nation art. VII, § 9, art. XI, § 4 (budget process); Const. of the Choctaw Nation of Okla. art. VII, § 5 (same); id. art. IX, § 8 (same).

491. E.g., P.R. Const. arts. III–V; Organic Act of Guam, Pub. L. No. 81-630, §§ 6–23, 64 Stat. 384, 386–90 (1950) (codified as amended at 48 U.S.C. §§ 1421–1424b (2018)); Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, §§ 5–27, 68 Stat. 497, 498–507 (1954) (codified as amended at 48 U.S.C. §§ 1541–1645).

492. See supra note 487 and accompanying text (describing scholarly debate on early IRA and boilerplate tribal constitutions).

493. See Reese, The Other American Law, supra note 41, at 584–621 (detailing the adaptability of tribal law).

494. Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 143–44 (1980); see also supra notes 252–271 and accompanying text.

495. See Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2331–39 (2001) (outlining mechanisms of democratic accountability in the administrative state).

496. Jason P. Hipp, Note, Rethinking Rewriting: Tribal Constitutional Amendment and Reform, 4 Colum. J. Race & L. 73, 74, 76 (2013) (describing "a substantial wave of [Native] constitutional amendment and reform"); Beth Redbird & Erin F. Delaney, Tribal Constitutions Project, 1 J. for Digit. Legal Hist. 2023, at 2 fig.1 (documenting the rise of Native constitutional amendments since 1960); see also Fletcher, Tribal Law, supra note 37, at 123–89 (providing an overview of tribal constitutions).

497. Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950); Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, ch. 558, 68 Stat. 497 (1954).

Congress draft Commonwealth Acts in the late 1980s after plebiscites, but without success.[498] Further, Congress has subjected Puerto Rico's fiscal policies to bureaucratic scrutiny, in appearance like BIA's review of tribal tax ordinances.[499] But the Financial Oversight and Management Board—colloquially known as "la junta"—has invited criticism of democratic *deficit* rather than accountability.[500]

Second, as to external democratic process, both territories and tribes suffer from inadequate representation that accentuates the need for first-order autonomy. Territories send only nonvoting representatives to Congress and have no Electoral College vote in presidential elections.[501] Puerto Rico alone has a federal district court staffed by Article III judges.[502] Article IV courts sit in Guam, CNMI, and the Virgin Islands, while federal-question cases arising from American Samoa often proceed in the district courts for the District of Columbia or Hawaii.[503] Unlike territories, Native communities receive *formal* representation in the federal government (and government of the state where they live). They vote in state and federal elections, but their size and dispersion diminish their voice.[504] And it

498. Guam Commonwealth Act, H.R. 98, 101st Cong. (1989); Guam Commonwealth Act S. 692, 102nd Cong. (1991); Paul Lansing & Peter Hipolito, Guam's Quest for Commonwealth Status, 5 UCLA Asian Pac. Am. L.J. 1, 2 (1998) ("By 1982, the people of Guam had confirmed their desire for commonwealth status."); Lizabeth A. McKibben, The Political Relationship Between the United States and Pacific Islands Entities: The Path to Self-Government in the Northern Mariana Islands, Palau, and Guam, 31 Harv. Int'l. L.J. 257, 287–91 (1990) ("Guamanians have in recent years made a concerted effort to achieve additional autonomy.").

499. PROMESA, Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C. 2101 (2018)).

500. Issacharoff et al., supra note 472, at 31–32 (discussing "the troubling antidemocratic character of PROMESA" and the Oversight Board).

501. U.S. Const. art. I, §§ 2–3; id. art. II, § 1; 48 U.S.C. §§ 891, 1711, 1751–1752 (2018); see also Luis Fuentes-Rohwer, Bringing Democracy to Puerto Rico: A Rejoinder, 11 Harv. Latino L. Rev. 157, 158 (2008) (describing the "mass disenfranchisement of all American citizens within [Puerto Rico's] borders"); Tom C.W. Lin, Americans, Beyond States and Territories, 107 Minn. L. Rev. 1183, 1204 (2023) ("The Territories do not have a vote in either chamber of Congress or an electoral vote for the President . . . .").

502. 28 U.S.C. § 119 (2018); see also James T. Campbell, Note, Island Judges, 129 Yale L.J. 1888, 1895 (2020) [hereinafter Campbell, Island Judges] ("The legislation that gave Puerto Rico's federal judges Article III protections carefully excluded the other territorial district judges in Guam, the U.S. Virgin Islands, and the Panama Canal Zone.").

503. 48 U.S.C. §§ 1424, 1424b, 1611, 1614, 1821; United States v. Lee, 472 F.3d 638, 639 (9th Cir. 2006) (upholding jurisdiction and venue in the district of Hawaii for federal criminal offenses committed in American Samoa); United States v. Gurr, 471 F.3d 144, 154–55 (D.C. Cir. 2006) (finding the same in the D.C. federal district court); Campbell, Island Judges, supra note 502, at 1901–02 (describing the Article IV judgeships in CNMI, the U.S. Virgin Islands, and Guam); Uilisone Falemanu Tua, Note, A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa, 11 Asian-Pac. L. & Pol'y J. 246, 251 (2009).

504. Congress has historically enacted some of the most detrimental policies for tribes. See General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389–90 (1887); supra notes 88–90 and accompanying text (describing the loss of Native land following the General Allotment Act).

is important not to assume this formal permission to vote—in particular in state elections—will translate into adequate political power or is conceptually coherent with our multilayered structure of governance. Elizabeth Reese has rightly observed that states and tribes are frequent "rivals for resources, territory, and power," and has argued that tribes' exclusion from the structure of the United States's representative democracy is a symptom of "assimilative colonialism."[505] Pointing to tribal "distrust" of and "tension" with state government, she has challenged the practice of apportioning tribal citizens into states for purposes of federal representation as a deviation from "the United States's fundamental commitment to representative democracy for all."[506] Indeed, territories and tribes do not *compose* the federal government in the same way states do. Herbert Wechsler famously wrote about the political safeguards of federalism, contending that the federal political process adequately protects the states through, for example, equal representation in the Senate.[507] Other subnational governments have no such privilege.

Such constraints mean that federal and state governments will not adequately account for Native and territorial distributive preferences in formulating fiscal policy. History bears out this observation. One scholar, for example, has shown how federal tax policy in Puerto Rico has evolved to facilitate U.S. corporate expansion rather than territorial interests.[508] Congress first experimented with tax incentives to transform the island into a low-cost manufacturing base.[509] It then tried to defend its corporate tax base by regaining control over American capital accumulation on the island, producing shifts in tax policy that debilitated the territorial economy.[510] Tribes have suffered similar economic extraction at the hands of the federal government.[511] And *Wagnon v. Prairie Board Potawatomi Nation*, a key case about states' power to tax Native commercial activities, illustrates

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But recently, advocates have turned to Congress to protect Native interests, with better but still mixed results. See Kirsten Matoy Carlson, Congress and Indians, 86 U. Colo. L. Rev. 77, 85–88 (2015) ("Recent assertions that Indians may fare better in Congress than in the courts contradict popular narratives about the political success of minority groups.").

505. Reese, Tribal Representation, supra note 96, at 776, 820.

506. Id. at 775–79, 826.

507. Wechsler, supra note 61, at 543–46; cf. Larry D. Kramer, Putting the Politics Back Into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 224 (2000) (characterizing Wechsler's conclusion that the Senate protects state interests as "baffling").

508. Dick, supra note 43, *passim*.

509. Id. at 53–68.

510. Id. at 68–78.

511. Most prominent is the loss of Native land. See McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (discussing the loss of land resulting from the Trail of Tears); Theda Perdue & Michael D. Green, The Cherokee Nation and the Trail of Tears, at xiii–xiv (2007) ("In the early nineteenth century, the United States forced the Cherokee Nation to surrender its homeland and relocate west of the Mississippi."); Ethan Davis, An Administrative Trail of Tears: Indian Removal, 50 Am. J. Legal Hist. 49, 49 (2008) ("[T]he federal government uprooted the so-called five 'Civilized Tribes' of the South and sent them westward to modern day Oklahoma."); supra notes 88–90 and accompanying text.

the failure of state democratic process.[512] *Wagnon* concerned a Kansas tax on the receipt of motor fuel by non-Indian distributors.[513] The majority upheld the tax, even though the distributor sold fuel to on-reservation gas stations.[514] Justice Ginsburg decried the state's discriminatory treatment of Native communities in distributing the benefits of tax revenue. Kansas failed to maintain even *state* roads on the reservation of the tribe that functionally bore the costs of the fuel tax.[515] She noted that Kansas allocated a large portion of its fuel tax revenue for counties and localities but "expend[ed] *none* of its fuel tax revenue on the upkeep or improvement of tribally owned reservation roads."[516] All these exemplify failures of external process to channel the subnational community's distributive preferences into broader policy. They counsel in favor of robust local taxing powers (i.e., first-order autonomy).

Third, functional constraints hinder democratic fiscal governance in territories more than in Native communities. Economic inequality distorts tax legislation.[517] Wealthy taxpayers gain concrete benefits through the reduction of rates and progressivity in the overall tax system.[518] They exert extraordinary political influence through campaign contributions,[519] amplified speech in media,[520] and direct participation in the political process.[521] All these can produce tax and fiscal policies that deviate from a subnational community's collective judgment on distributive equity, even

512. 546 U.S. 95, 130 (2005) (Ginsburg, J., dissenting).

513. Id. at 99 (majority opinion).

514. Id.

515. Id. at 129 (Ginsburg, J., dissenting).

516. Id. at 129–30 (Ginsburg, J., dissenting) (citing Prairie Band Potawatomi Nation v. Richards, 379 F.3d 979, 986–87 (10th Cir. 2004)); see also Kan. Stat. Ann. §§ 79–34,142 (2025); 1999 Kan. Sess. Laws 1124.

517. By "distortion," this Article refers to fiscal policies' deviation from the public's vision of distributive equity, rather than taxation's tendency to produce inefficient economic behavior. See James R. Repetti, Democracy and Opportunity: A New Paradigm in Tax Equity, 61 Vand. L. Rev. 1129, 1154 (2008) ("[H]igh-income individuals can distort the political process.").

518. See Thomas Piketty & Emmanuel Saez, How Progressive Is the U.S. Federal Tax System? A Historical and International Perspective, 21 J. Econ. Persps. 3, 3 (2007) (describing "a dramatic decline in top marginal individual income tax rates"); see also David Hope & Julian Limberg, The Economic Consequences of Major Tax Cuts for the Rich, 20 Socio-Econ. Rev. 539, 539 (2022) (referring to "the dramatic fall in taxes on the rich across the Organisation for Economic Co-operation and Development (OECD) countries").

519. See Kristin A. Goss, Policy Plutocrats: How America's Wealthy Seek to Influence Governance, 49 Pol. Sci. & Pol. 442, 442 (2016) ("These [millionaire and billionaire] donors are directing not only their money but also their time, ideas, and political leverage toward influencing public policy.").

520. Erin L. Miller, Amplified Speech, 43 Cardozo L. Rev. 1, 10 (2021) (describing how wealthy citizens can "amplify their speech to the largest audiences—often with great difficulty and cost—in the contemporary media environment").

521. James R. Repetti, Democracy, Taxes, and Wealth, 76 N.Y.U. L. Rev. 825, 849 (2001) ("[C]oncentrations of wealth enable wealthy individuals to influence disproportionately the elective and legislative process . . . .").

given robust operation of *formal* tools of democratic accountability. In short, money talks, and its chatter shifts how society allocates economic resources and spreads the costs of governance.[522] This point is especially salient in the age of *Citizens United v. Federal Election Commission*, which allows wealth unimpeded influence over politics.[523]

Native communities experience much lower *internal* economic inequality than territories. A recent study has shown that income distribution is more egalitarian among Indigenous populations in the United States than white, Asian, and miscellaneous non-classified ethnicities.[524] As a result, economic inequality less likely distorts tax policymaking in tribes than, for example, in Congress and certain states, for the wealthy cannot exert disproportionate influence over the tribal political process. To be sure, much of the lower inequality is attributable to poverty. Wealthy Indigenous taxpayers have less to gain from tribal tax policy because few exist.[525] But this accentuates the tribes' need for first-order autonomy. Poverty and lower inequality mean that tribes will struggle to have federal policy reflect their members' distributive preferences but face fewer functional constraints on the democratically responsive exercise of their own taxing power.[526]

By contrast, income distribution is much less egalitarian in the territories. Indeed, Puerto Rico has the highest level of income inequality among all subnational jurisdictions in the United States.[527] The wealthy thus attain outsized influence in territorial tax and fiscal policymaking.

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522. See Benjamin I. Page, Larry M. Bartels & Jason Seawright, Democracy and the Policy Preferences of Wealthy Americans, 11 Persps. on Pol. 51, 52–53 (2013) (noting that "[w]ealthy Americans tend to be highly active in politics, far more so than the typical citizen" and "much more conservative than the non-affluent on issues of taxes, economic regulation, and social welfare").

523. 558 U.S. 310 (2010); see also Benjamin I. Sachs, Unions, Corporations, and Political Opt-Out Rights After *Citizens United*, 112 Colum. L. Rev. 800, 803 (2012) (illustrating the asymmetry between capital and labor in their constitutional capacity for political speech).

524. Randall Akee, Maggie R. Jones & Sonya R. Porter, Race Matters: Income Shares, Income Inequality, and Income Mobility for All U.S. Races, 56 Demography 999, 1012, app. 34 fig. A6 (2019).

525. Id. app. 41 fig. A1; U.S. Dep't Health & Hum. Servs., supra note 458.

526. See also Matthew L.M. Fletcher, The Three Lives of Mamengwaa: Toward an Indigenous Canon of Construction, 134 Yale L.J. 696, 703 (2025) ("[T]ribal governments care about matters such as income inequality . . . .").

527. Census Bureau, B19083, supra note 367 (showing a Gini coefficient—a standard measurement of income inequality—of 0.5486 for Puerto Rico, compared to 0.4823 for the United States). The Virgin Islands also experiences higher income inequality than the mainland. U.S. Census Bureau, Gini Index of Income Inequality, PCT59 (2024) (showing a Gini coefficient of 0.5049). Income inequality in Guam tends to be lower (but not significantly) than the national average. Census Bureau, B19083, supra note 366 (showing a Gini coefficient of 0.4408); see also Maria Claret M. Ruane & Ning Li, Guam's Income Distribution, 1981–2005, 8 J. Int'l Bus. Rsch. 101, 106–07 (2009) ("Another observation is that, since 1989, Guam's Gini index estimates have been lower than those for the U.S., thus suggesting a more equal distribution of household incomes on Guam than in the U.S.").

The enactment of tax incentives (Acts 20 and 22) provides a dramatic illustration. According to a recent study of campaign filings, beneficiaries of those incentives have become major political donors in Puerto Rico.[528] They have contributed more than $1 million to candidates for territorial offices, circumventing campaign-contribution rules by bundling donations from family members.[529] Persistence of tax incentives creates a vicious cycle. As more wealthy taxpayers migrate from the mainland to avoid federal income taxation, pre-tax income inequality on the island keeps growing.[530] Because wealthy migrants pay little in taxes to Puerto Rico—after all, the point of Acts 20 and 22 is to reduce overall federal *and* territorial tax burdens—the territorial government collects little revenue to redistribute through spending.[531] This fuels the rise of a group with vested, concentrated, constitutional fiscal interest in preserving existing incentives and makes it even harder to design a tax regime that reflects the broader public's normative vision.[532] Such political-economy dynamics help explain the continued existence of Puerto Rico's tax incentives despite their unpopularity among the locals.[533]

The following table summarizes second-order fiscal autonomy of subnational jurisdictions.

528. Popular Democracy in Action, Pain & Profit: The Act 22 Donors Influencing Puerto Rico's Elections 3 (2024), https://populardemocracyinaction.org/wp-content/uploads/2025/06/pain-and-profit-the-act-22-donors-influencing-puerto-ricos-elections-c4-1.pdf [https://perma.cc/PYQ8-X4AZ].

529. Id. at 7, 9.

530. By 2023, more than five thousand people had moved to Puerto Rico for tax incentives, with numbers dramatically increasing in recent years. IRS, Report to Congress, supra note 360, at 3–4; Letter from Congress to Comptroller General, supra note 355.

531. Assuming good tax planning, the most significant tax that an Act 60 decree-holder will pay to Puerto Rico is a 4% income tax on the export of services. See supra notes 340–349 and accompanying text.

532. See Susannah Camic Tahk, Public Choice Theory and Earmarked Taxes, 68 Tax L. Rev. 755, 762 (2015) ("[Laws with] diffuse costs and concentrated benefits . . . [are] relatively easy to maintain and to extend.").

533. E.g., Popular Democracy in Action, supra note 528; Pedro Cabán, Gringo Go Home! Puerto Rico Is Not for Sale!, Am. Prospect (Aug. 21, 2023), https://prospect.org/power/2023-08-21-gringo-go-home-puerto-rico-not-for-sale [https://perma.cc/3BHG-ZXPL]; Matt Stieb, Puerto Rico to Finance Bros: 'Go Home', N.Y. Mag. (Sep. 22, 2022), https://nymag.com/intelligencer/2022/09/puerto-rico-to-finance-bros-gringo-go-home.html [https://perma.cc/X25A-726D].

TABLE 2. SECOND-ORDER FISCAL AUTONOMY OF SUBNATIONAL JURISDICTIONS

	Native Tribes	**U.S. Territories**
Internal process constraints	Written constitutions (half of federally recognized Tribes) in addition to informal tribal norms. Voting in tribal elections and other mechanisms of responsive governance. Requirement of federal approval for tribal taxes.	Written constitutions and organic acts. Voting in territorial elections.
External process constraints	Formal representation in federal and state governments through election. Diminished legislative influence due to small, dispersed voting blocs and competition with states.	No overlapping jurisdiction with states. No voting representation in the federal government.
Functional constraints	Fewer functional constraints due to lower economic inequality than U.S. average and robust operation of unwritten tribal norms.	More functional constraints due to higher economic inequality (e.g., support for Puerto Rico's tax incentives by the very wealthy).

As Table 2 shows, tribes have as much capacity for democratic fiscal governance as territories. Both jurisdictions have similar internal-process mechanisms of democracy. External-process constraints and inadequate representation in federal (and for tribes, state) governments favor more robust first-order autonomy. As to functional constraints, economic inequality besets fiscal governance of territories far more than that of tribes.

Importantly, second-order autonomy centers the functional value of democratic and responsive fiscal governance. Formal mechanisms of accountability (e.g., separation of powers and electoral control) provide strong indications of subfederal governments' responsiveness to the popular will. But they are not the sine qua non of taxing power. As a result, this Article's analysis does not require all Native tribes to adopt written constitutions to gain the privilege to tax. Instead, robust operation of informal tribal norms may offer equally compelling evidence of democracy.

* * *

Recall that autonomy differs from unconstrained freedom.[534] Autonomy rests on the coherence between first-order taxing power and second-order democratic fiscal governance.[535] Fiscal capacity and authority to design the substance of taxation thus demand adherence to the public's vision of distributive justice. As this section shows, tribes face intense tax competition and possess little tax-design authority, but they hold promise for democratic and responsive fiscal governance. By contrast, territories face little tax competition. Puerto Rico possesses significant tax-design authority but has exercised it in ways that deviate from its citizens' distributive preferences. These discrepancies counsel in favor of (1) increasing tribes' first-order taxing power and (2) constraining Puerto Rico's first-order taxing power to mitigate concerns of tax shelters and imperialism.[536]

This is not to say that territories must share their tax base or be powerless to design their revenue streams. Nor is it to fault territories for developing deficient tax regimes. Our system of territorial taxation arose from decades of federal extraction and Congress's distaste for direct investment in overseas possessions (rather than, for example, tax expenditures like federal tax exemption).[537] The key question is thus how to translate the promise of fiscal autonomy into coherent federal policy for both tribes and territories. Indeed, this Article's account highlights the central role that the federal government has played in diminishing the territories' democratic infrastructure. Such neglect—and plenary power—put the onus on Congress to remedy the deficit in second-order autonomy.

C. *Paths Forward*

This section proposes policy solutions. It advocates a uniform, nonrefundable federal income-tax credit for tribal and territorial income taxes paid. The design of this credit need not be complex. It can mirror existing provisions of the Code like the foreign tax credit.[538] A straightforward section will do:

In the case of an individual, there shall be allowed against the tax imposed by this chapter for the taxable year an amount equal to income taxes paid by the taxpayer to American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, and Indian tribal

534. See supra notes 428–432 and accompanying text.

535. See supra notes 481–485 and accompanying text.

536. Vertical externalities accentuate this point. Scholars have analyzed situations in which "some of the costs or benefits of a [subnational] tax policy decision affect the federal government rather than the [subnational jurisdiction] making the tax policy decision." Gamage & Shanske, Tax Cannibalization, supra note 8, at 297. Congress and the federal fisc bear the costs of Puerto Rico's tax-incentive regime.

537. Dick, supra note 43, at 85; Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 593.

538. I.R.C. § 901 (2018). In fact, non-bona fide residents of the territories already receive a foreign tax credit to the extent they pay territorial taxes (e.g., on territorially sourced income like employment).

governments as defined in § 7871(c)(3)(E)(ii), except in the case of amounts attributable to deductions taken under § 164.[539]

The nonrefundable nature of the credit means that Congress will not subsidize tribes and territories more than the federal income-tax base itself, preventing potential abuse.[540] Unlike a blanket exemption, the credit regime disables tax-incentive programs that harm the federal fisc without yielding revenue for tribes or territories.[541] Such tax shelters are normatively undesirable—and politically infeasible given Congress's scrutiny over wealthy migrants to Puerto Rico.[542] The goal is to foster tribal and territorial autonomy, not to enable the wealthy to dodge the federal income tax while distorting the Native or territorial communities' distributive politics. Further, the credit mechanism is better than a tax deduction. Deductions create upside-down subsidies by offering more economic value for higher-income taxpayers.[543] They are substantially less generous than the territories' current tax exemption[544] and will not provide enough subsidy to foster Native tribes' taxing power.

With the credit regime, Congress should enact the following coordination rules. As to tribes, Congress can repeal or maintain the current deduction of up to $10,000 for tribal taxes paid.[545] Taxpayers will elect the more generous tribal-tax credit even if the deduction remains an option.

As to the territories, Congress should repeal their existing exemption from the federal income tax and continue to allow them to tax local-

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539. The proviso clause prevents taxpayers from double dipping—that is, taking advantage of both the proposed nonrefundable tax credit and the existing deduction allowed under § 164 and § 7871. Congress should draft careful coordination provisions to ensure that the operation of the nonrefundable tax credit for tribal taxes paid does not hinder claims for refundable tax credits like the earned income-tax credit.

540. Under a refundable-credit regime, subnational governments can tax their citizens' income at far higher than federal rates. Those citizens can recoup the excess above federal tax burdens from the fisc, enriching subnational treasuries. Such blatant abuse is unlikely given mechanisms of democratic control at the national level (and plenary power). But the effect of a refundable-credit regime is to enlarge the substantive tax-design discretion of subnational jurisdictions, which section III.B.2 has problematized.

541. See supra section II.B.

542. See supra notes 355–360 and accompanying text.

543. See Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, Efficiency and Tax Incentives: The Case for Refundable Tax Credits, 59 Stan. L. Rev. 23, 24 (2006) ("Currently the vast majority of tax incentives operate through deductions or exclusions, which link the size of the tax preference to a household's marginal tax bracket. Higher-income taxpayers, who are in higher marginal tax brackets, thus receive larger incentives than lower-income taxpayers.").

544. Current law exempts income derived from territorial sources from federal income taxation for bona fide residents of such territories. I.R.C. §§ 931, 933. Current law also provides a deduction for tribal taxes paid by construing tribes as states for purposes of § 164. Id. § 7871(a)(3). But this deduction has not produced significant increases in tribal tax revenue, because it only removes a slight tribal disadvantage in tax competition with states. Id. § 164 (providing a deduction for state and local taxes).

545. See id. § 164(b)(6)(B) (capping the deduction at $10,000 until 2025); supra note 544 (discussing the deduction for tribal taxes).

sourced income. The effect of this repeal will differ among the territories. As a reminder, three territories (Guam, CNMI, and the Virgin Islands) are statutorily required to impose the federal income tax as the territorial income tax, and one territory (American Samoa) has chosen to do so.[546] For most taxpayers in mirror-Code jurisdictions, a federal income-tax credit will produce the same outcome as the existing tax-exemption regime. Bona fide residents with only territorially sourced income will incur the same tax liability under the territorial income tax and the federal income tax (since the two regimes are the same).[547] Those taxpayers will pay income taxes to the territory. They will receive the whole amount as a credit against their federal tax liability.

By contrast, recall that Puerto Rico taxes income at slightly lower rates than Congress.[548] Under a tax-credit-with-no-exemption regime, Puerto Rico taxpayers will likely incur a small tax liability to Congress. Bona fide residents with only Puerto Rico-sourced income will incur a slightly smaller liability under the territorial income tax than under the federal income tax. Those taxpayers will pay income taxes to Puerto Rico, and receive the whole amount as a credit against, but not fully offsetting, their federal tax liability. This cost is worth bearing. In 2022, the Supreme Court upheld Congress's denial of Supplemental Security Income (SSI) benefits to Puerto Ricans based on territorial tax exemption.[549] Subjecting Puerto Rico to a minimal level of federal taxation would thus deprive Congress of this rational basis for differential treatment of territories in welfare policy and force it to extend the SSI program to an impoverished jurisdiction.[550]

The largest impact will be on decree-holders under Puerto Rico's tax-incentive regime. Recall that with the right tax planning, they can reduce their capital-gains tax rate to zero and their ordinary income-tax rate to 4% by moving to Puerto Rico.[551] Under a tax-credit-with-no-exemption regime, their liability under the territorial income tax will be miniscule

546. See supra notes 324–336 and accompanying text.

547. Mirror-Code jurisdictions may not replicate all aspects of the federal tax regime. Guam's mirroring provision, for example, specifies that income tax laws "manifestly inapplicable or incompatible with the intent" of the mirroring provision will not apply in the territory. 48 U.S.C. § 1421i(d)(1) (2018). But those exceptions operate in the margins, not the core, of the income tax.

548. See supra notes 322–323 and accompanying text.

549. See United States v. Vaello Madero, 142 S. Ct. 1539, 1543 (2022); see also 42 U.S.C. § 1382c(a)(1)(B)(i), (e) (excluding Puerto Rico from the definition of the United States for the SSI program); Hammond, supra note 412, at 1641 (describing the First Circuit's opinion that was eventually overturned by the Supreme Court in *Vaello Madero*).

550. The credit regime subjects Puerto Ricans to a slightly higher federal tax burden. But the cost is made up by the extension of federal welfare programs to the island. See U.S. Gov't Accountability Off., GAO-14-31, Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources 82 (2014) (estimating that the federal government would need to spend $1.5–1.8 billion to bring the SSI program to Puerto Rico in 2011).

551. See supra notes 338–349 and accompanying text.

compared to their liability under the federal income tax. They will pay a small tax to Puerto Rico, claim it as a credit against the federal income tax, and owe additional taxes to the federal government. This reform will not violate Puerto Rico's guarantee to the taxpayers. The island has defined the Act 60 decrees as "contracts" to bring them under the protection of the Puerto Rican Constitution.[552] Under the tax-credit regime, Puerto Rico continues to honor its contractual obligations by granting the decree-holders preferential territorial tax treatment. Decree-holders simply owe more to the federal treasury. Puerto Rico, of course, does not promise to—and cannot—bind the hands of Congress.[553]

The effects of this uniform tribal- and territorial-tax credit are thus threefold. First, it builds tribes' fiscal capacity by affording them the same federal tax treatment as territories.[554] As this Article has argued, tribes' capacity for responsive fiscal governance entitles them to more robust first-order taxing power. The credit regime does precisely that, carving out the federal income-tax base to foster Native autonomy as Congress and the Supreme Court have so often promised. Second, it preserves the same tax outcome for most residents in mirror-Code territories. Extractive and paternalist federal policies in the past, Congress's unwillingness to invest directly in these impoverished jurisdictions, and Native communities' lack of representation in the federal political process still ground their need for first-order autonomy. Third, the credit regime limits the design authority of Puerto Rico by subjecting all U.S. citizens to the same minimum burden of the federal income tax. It preserves a level of first-order autonomy commensurate with the jurisdiction's capacity for democratic fiscal governance. It prevents subnational tax incentives from imposing undue vertical externalities and costs on the federal fisc.[555]

An additional implication concerns the administration of the Tax Reform Act of 1986. Recall that the 1986 Act affirmed American Samoa's—and granted to Guam and CNMI—power to deviate from federal rules and to enact their own territorial tax regimes, all predicated on a tax implementation treaty.[556] There is no effective treaty between the federal gov-

552. P.R. Const. art. II, § 7; P.R. Laws Ann. tit. 13, §§ 10838(a), 45004(b) (LexisNexis, LEXIS through 2025 Legis. Sess.).

553. See U.S. Const. art. IV, § 3, cl. 2; Cleveland, supra note 52, at 239–40 ("Puerto Ricans were allowed to adopt a constitution, form their own government, and were given commonwealth status between 1950 and 1952, although their constitution remained subject to amendment by Congress.").

554. A uniform federal income tax credit for tribal taxes paid only is also desirable. That is, should political momentum fail on territorial-tax reform, Congress should nonetheless pursue an improvement in Native fiscal capacity. That will still bring federal tax policy closer to the conceptual ideal of autonomy.

555. See supra note 536.

556. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 1271, 100 Stat. 2085, 2591–93 (authorizing Guam, American Samoa, and CNMI to "enact[] tax laws (which shall apply in lieu of the mirror system) with respect to income" sourced to the territories or received by territorial residents "only if . . . an implementing agreement is in effect between the United

ernment and either Guam or CNMI, and Treasury should give serious thought before signing one.[557] As this Article has shown, delegation of substantive discretion in tax design to the territories—while depriving them of democratic infrastructure—has created tax shelters that damage the fisc and distort federal redistribution.[558] If Congress desires to create more non-mirror-Code jurisdictions, it must grapple with the variation in subnational governments' capacity for democratic and responsive fiscal governance—not the least because federal policies have created, and continue to shape, that variation. In the interim, the nonrefundable credit provision will incentivize those jurisdictions to adopt federal rules as the local tax regime. That will entitle them to the maximum amount of federal subsidy.

Legislative intervention is not easy. But recent criticism of territorial tax shelters, calls for Native sovereignty, and opposition to the legacy of imperialism have built enough momentum to be hopeful. Further, the cost of a nonrefundable income-tax credit is relatively insignificant to the federal fisc. A rough estimate of the cost as applied to tribal taxes *only*, based on the median income of Native households and current federal income-tax rates, is $1.5–2 billion.[559] This is dwarfed by other items in the federal tax-expenditure budget, some of which cost more than $200 billion per year.[560] Complete enactment of the credit provision would further decrease the cost. If Congress abolishes the existing territorial tax exemption and enacts the coordination rules described in this section, taxpayers would not be able to escape federal income taxation by moving to Puerto Rico.[561] This recapture of revenue lost under Puerto Rico's Act 60 would return at least several hundred million dollars to the Treasury each year.[562]

States and such possession"); see supra notes 324–336 and accompanying text (discussing this authorization by the 1986 Act).

557. See Amendment to the Tax Implementation Agreement Between the United States and Guam, supra note 336 (delaying indefinitely the effective date of the agreement); see supra notes 335–336 and accompanying text.

558. See supra section II.B.

559. I.R.C. § 1 (2018) (current income tax rates); Press Release, U.S. Census Bureau, Census Bureau Releases New American Community Survey Selected Population Tables and American Indian and Alaska Native Tables (June 15, 2023), https://www.census.gov/newsroom/press-releases/2023/acs-selected-population-aian-tables.html [https://perma.cc/GV74-DBMF] (median income of Native households). This rough estimate results from applying the average effective tax rates to the median incomes of Native households, without taking into account the effects, if any, on other tax credits claimed by the households.

560. Tax exemptions for contributions to retirement plans and employer-provided health insurance cost the federal government more than $200 billion per year. U.S. Dep't of the Treasury, Tax Expenditures Fiscal Year 2026 tbl. 1 (2024), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2026.pdf [https://perma.cc/4T4Z-S3HR]. Even HSAs (Health Savings Accounts)—a relatively small tax expenditure—cost Congress about $14 billion per year, seven times the cost of the proposed credit regime. Id.

561. See supra notes 545–553 and accompanying text (describing the operation of the coordination rules, especially in the territories).

562. In 2020, the IRS estimated that a group of around six hundred Act 22 decree-holders had paid $557 million—that is, $111.4 million on average each year—in federal

The reasonable cost of the credit regime raises a concern in the Native context. The tax-expenditure cost—roughly estimated at $2 billion each year[563]—to the federal government equals the subsidy that tribes will receive. If so, the credit regime's direct fiscal impact is limited, especially compared to other sources of tribal revenue and federal spending. For example, in 2024, tribal gaming revenue reached a record $43.9 billion.[564] At a profit margin of 26%, casinos generated $11 billion for tribes to distribute to their members and to invest in their general welfare.[565] Further, in the Infrastructure and Jobs Act of 2021 and other statutes, Congress appropriated $3 billion for a multiyear grant program to expand access to broadband internet on tribal lands.[566] These figures make the subsidy in the form of the refundable tax credit look less significant. They pose two key questions: How much would this Article's proposed policy reform benefit the tribes, given other sources of tribal revenue? Further, what difference does it make for *tribes* to tax, if Congress—with a powerful and perhaps more efficient administrative apparatus—can simply reroute substantial federal revenue to expenditure programs on tribal lands?

Under this Article's framework, the credit regime is still valuable for tribes, for two main reasons. First, the reduced impact of the tax credit sounds in first-order autonomy—that is, how much the proposed regime will build the fiscal capacity of tribal government. Here, intertribal variation is a critical factor. The $2 billion figure may seem insignificant compared to the $11 billion annual profit from casino operations.[567] But gaming revenue is not evenly distributed among the tribes. In 2022, about 250 out of the 574 federally recognized tribes operated casinos.[568] More

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income taxes in the five years before moving to Puerto Rico. IRS, Report to Congress, supra note 360, at 5. The actual annual figure is significantly higher because the IRS Report did not cover all decree-holders under Act 22, and because more taxpayers have moved to the island during the pandemic and the era of remote work. Id.

563. See supra note 559 and accompanying text.

564. Press Release, Nat'l Indian Gaming Comm'n, NIGC Announces Record $43.9 Billion in FY 2024 Gross Gaming Revenues (July 31, 2025), https://www.nigc.gov/nigc-announces-record-43-9-billion-in-fy-2024-gross-gaming-revenues/ [https://perma.cc/QQ7K-3PZ3].

565. See Wipfli Releases 2024 Annual Indian Gaming Cost of Doing Business Report, Indian Gaming (Aug. 28, 2024), https://www.indiangaming.com/wipfli-releases-2024-annual-indian-gaming-cost-of-doing-business-report [https://perma.cc/4V2L-YZ5V] (noting a 26% average net profit percentage in 2023).

566. See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, div. J, tit. II, 135 Stat. 429, 1353 (2021) (appropriating an additional $2 billion for the Tribal Broadband Connectivity Program (TBCP)); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, §§ 905(b)–(c), 134 Stat. 1182, 2138 (appropriating $1 billion for the TBCP).

567. See supra notes 559, 564 and accompanying text.

568. See Nat'l Indian Gaming Comm'n, U.S. Dep't of the Interior, Budget Justifications and Performance Information Fiscal Year 2026, at 2 (2025), https://www.doi.gov/sites/default/files/documents/2025-07/nigc-fy26-greenbook508.pdf [https://perma.cc/F9Q3-5LTH] (stating that under the Indian Gaming Regulatory Act, the National Indian Gaming Commission oversees "more than 520 gaming establishments licensed by approximately 250 federally recognized tribes located within 29 states"); About Us, Bureau of Indian Affs.,

than half of the tribes therefore had no gaming revenue. Among the tribes that did, cash flows are concentrated in a handful of especially successful operations.[569] The credit regime will thus bring non-negligible fiscal benefits to the many tribal governments without large commercial operations. To be sure, tribes with wealthier members might receive a larger subsidy through the credit regime because they have more to tax. But this is a feature rather than a bug of the proposal. The federal government has vowed to foster the sovereignty and the fiscal autonomy of all tribes, regardless of their entrepreneurship.

Second, taxation holds promises distinct from direct federal spending. This implicates three elements of sovereignty: symbolic, discursive, and dignity-based. As this Article has discussed, and scholars have widely recognized, robust powers to tax lie at the center of governance.[570] As to symbolic or expressivist values, this means that fiscal sovereigns like tribal governments cannot simply be conduits or statutory categories through which to channel federal spending. For example, one of the largest sources—or *the* largest source, depending on the mode of categorization—of revenue for state governments in the United States is intergovernmental transfers from Congress.[571] But we would all agree that states lose an aspect of sovereignty and federalism when direct federal spending replaces state tax receipts. Likewise, framing tribes as holding only a contractual right to exclude rather than the authority to tax communicates a social or doctrinal norm that devalues their capacity for governance.[572] More concretely, it may reduce their civil jurisdiction in other areas of the law, as courts rely on limiting tax precedents to articulate generally applicable principles.[573]

Dep't of the Interior, https://www.bia.gov/about-us [https://perma.cc/3AK4-EWTM] (last visited Jan. 16, 2026) ("There are 574 federally recognized American Indian tribes and Alaska Native Villages in the United States.").

569. See, e.g., Mohegan Tribal Gaming Auth., Annual Report for the Fiscal Year Ended September 30, 2024, at 8 (Dec. 31, 2024), https://mohegangaming.com/wp-content/uploads/Mohegan-Fiscal-2024-Annual-Report.pdf [https://perma.cc/H2CT-MKJ3] (recording gaming revenue totaling $1.242 billion for the Mohegan Tribal Gaming Authority).

570. See supra notes 1–14 and accompanying text.

571. What Are the Sources of Revenue for State and Local Governments?, Tax Pol'y Ctr., https://taxpolicycenter.org/briefing-book/what-are-sources-revenue-state-and-local-governments (on file with the *Columbia Law Review*) (last updated Jan. 2024) (listing intergovernmental transfers as constituting 37% of all state-government receipts, a larger share than individual income taxes (19%), sales taxes (14%), or corporate income taxes (3%)).

572. See, e.g., Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 171–73 (1982) (Stevens, J., dissenting) (grounding tribal taxation of nonmembers in the right to exclude rather than as an act of sovereignty); see supra notes 225–229 and accompanying text.

573. This risk is also salient in the territorial context. The Supreme Court first held that the Constitution did not *ex proprio vigore* apply to unincorporated territories like Puerto Rico in tax cases. See De Lima v. Bidwell, 182 U.S. 1, 23 (1901) (concluding that Puerto Rico ceased to be a foreign country for purposes of the U.S. tariff regime); see also Downes v. Bidwell, 182 U.S. 244, 287 (1901) (concluding, despite the Court's holding in *De Lima*, that the constitutional requirement of uniform imposts did not apply to Puerto Rico). But it

Further, enabling taxation brings discursive benefits that bolster tribes' second-order autonomy. This applies both to impoverished tribes that need tax revenue and wealthier ones that can do without. That is, encouraging members to think through tribal tax policy (e.g., whether to adopt federal income-tax rules as tribal tax rules or to deviate from the former in ways that cohere with the specific tribal contexts) generates meaningful distributive speech. It will provide both epistemic opportunity and legislative occasion for members to learn about and reflect on tax-policy choices and tradeoffs, as well as their roles in shaping inequality and the provision of public goods. This builds democratic infrastructure. By contrast, if tribes must resort to commercial development to raise revenue, business talk will prevail over distributive discourse.[574] And as tribes develop their capacity for democratic or responsive fiscal governance through deliberation and tax legislation, they become entitled to greater fiscal capacity and first-order autonomy. Participation in the federal political process to vie for congressional appropriations does not produce the same discursive effect. Larger tribes and the elite representatives are bound to wield more influence, and ordinary tribal members less likely to participate.

In addition, recovering a lost aspect of sovereignty furthers the values of dignity. Both the federal government and the states have deprived tribes of the economic and legal tools of self-governance. The allotment regime has led to dramatic decreases in wealth and Native land ownership.[575] As this Article and other scholars have observed, the Supreme Court has often declined to protect tribes or eroded their power with inconsistent and unsympathetic doctrine.[576] These historical practices underscore the role of corrective justice: According tribes taxing power equal to their capacity for democratic and responsive governance also respects their dignity.

In the absence of action by Congress, doctrinal reform can help. Recall that the Supreme Court's jurisprudence in adjudicating Native tax disputes centers on a collision between dependent-sovereign and strict-

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quickly relied on the original *Insular Cases* to hold other constitutional rights inapplicable to territorial residents. See, e.g., Balzac v. Porto Rico, 258 U.S. 298, 305–07 (1922) (concluding that the Sixth Amendment right to a jury trial did not apply to unincorporated territories).

574. After all, a core principle of business enterprise is to maximize profits to various stakeholders (in contrast to, for example, ensuring a fair distribution of profits among the stakeholders). See, e.g., Robert J. Rhee, A Legal Theory of Shareholder Primacy, 102 Minn. L. Rev. 1951, 1951–52 (2018) (describing the shareholder primacy principle and the norm of maximizing shareholder wealth).

575. See supra note 90 and accompanying text.

576. See Elizabeth Reese, Welcome to the Maze: Race, Justice, and Jurisdiction in *McGirt v. Oklahoma*, U. Chi. L. Rev. Online (2020), https://lawreview.uchicago.edu/online-archive/welcome-maze-race-justice-and-jurisdiction-mcgirt-v-oklahoma [https://perma.cc/JWU8-PEMQ] ("Previous Supreme Court opinions have made clear that tribal sovereignty has been eroded and tribal governments have been denied the consistent protection of American law partially because they were judged as 'the other' or otherwise unworthy to survive as robust contemporary governments in the United States."); supra Part I.

autonomy theories.[577] Justice Marshall, writing for the majority in *Merrion*, saw tribes as fiscal sovereigns with inherent power to tax nonmembers on commercial activities within reservations.[578] Only Congress, a superior sovereign, can change the default.[579] By contrast, Justice Stevens, in a vigorous dissent which guided later case law, drew a sharp division between members and nonmembers. Tribes should, by default, have no authority to tax nonmembers because nonmembers cannot vote in tribal elections and have no voice in formulating tribal tax legislation.[580]

Justice Marshall's and Justice Stevens's views thus track the distinction between first-order and second-order autonomy. Seeing tribes as dependent fiscal sovereigns emphasizes their first-order fiscal capacity and substantive power. Requiring accountability for the authority to tax speaks to second-order constraints on democratic governance. But both are critical to fiscal autonomy in the subnational context. It is unrealistic to leave scrutiny of Native taxation to Congress. It defies the logic of interjurisdictional taxation to demand electoral accountability by all actors burdened by a government's levies.[581] Instead, courts should find the equilibrium where the tribe's democratic infrastructure or informal norms ground its power to tax. As this Article has shown, current judicial limits constrain tribal fiscal policy more than is due under the federal promise of autonomy.[582] Courts should thus embrace a stronger vision of tribal sovereignty to tax in adjudicating conflicts between tribes and states.[583]

But case law is ultimately less effective than legislation. Court action invites arbitrary outcomes. In *McGirt v. Oklahoma*, the Supreme Court held that much of eastern Oklahoma remained Native American territory.[584] A doctrine of tax sovereignty more favorable to tribes would either disable Oklahoma from taxing certain economic activities in Native territory or allow tribes taxing jurisdiction over half of the state. That, perhaps, is not a bad outcome for the tribes. But why should Oklahoma bear the entire cost when Georgia and Alabama drove the Creek Nation away from its

577. See supra section I.B.

578. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (describing the power to tax as arising from tribes' sovereignty).

579. See id. at 139–44 (noting the power of Congress to limit tribes' taxing power).

580. See id. at 183 (Stevens, J., dissenting) ("Tribal powers over nonmembers are appropriately limited because nonmembers are foreclosed from participation in tribal government.").

581. States and other countries impose various consumption and income taxes on noncitizens who cannot vote and have no opportunity for democratic participation in the respective government. See, e.g., Mason, supra note 352, at 171–72.

582. See supra section I.B.

583. Another option is to expand the *Capoeman* doctrine, which the lower courts narrowed. See Squire v. Capoeman, 351 U.S. 1, 9 (1956) (stating the rule that income derived from trust land is exempt from federal taxation); see supra section I.A.3.

584. See 140 S. Ct. 2452, 2459 (2020) (holding that much of Eastern Oklahoma remained Native American territory).

ancestral lands?[585] Even if doctrine improves tribal economic conditions, it will lead to more of the same litigation which generated only bitter, zero-sum contests between tribes and states in the past few decades.[586] A federal credit regime better—and more rationally—spreads the cost.

CONCLUSION

This Article studies the distinctive taxing powers of Native tribes and the U.S. territories. It shows that the same vow of autonomy and federal plenary power has produced complex, divergent tax treatment. The Article provides the missing account of fiscal autonomy for these subnational jurisdictions. It proposes policy reforms that bring the federal government closer to fulfilling its promise of self-governance for jurisdictions long afflicted by the legacy of American imperialism.

Indeed, such calls for fiscal autonomy echo the constitutional values that underpin the federal government's own authority to tax. In 1787, Alexander Hamilton argued passionately for Congress's taxing power:

> Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue: either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and, in a short course of time, perish.[587]

Hamilton's vision resonates with this Article's discussion of fiscal autonomy. Effective government requires revenue—"the vital principle of the body politic"[588]—and the power to tax. Democratic governance—what constitutes the state and "propriety"[589]—constrains its exercise. Despite a century of promise of fiscal self-governance, tribes and territories have long been overlooked. It is time to integrate them into the scholarly discourse and public debate about taxation.

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585. Id.

586. See supra section I.C.

587. The Federalist No. 30, at 188 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

588. Id.

589. Id.

ESSAY

THE CAPACITY TO MARRY

*Sarah Lorr**

This Essay identifies mechanisms by which the law regulates access to marriage for adults with intellectual disabilities, exploring how statutes and court decisions give meaning to the concept of "capacity to marry." The Essay identifies two previously unstudied and contradictory understandings of the relationship between marriage and capacity. One notion of "capacity to marry" operates to exclude adults with intellectual disabilities from marriage based on lack of capacity. Cases grounded in this view reveal that capacity determinations can be a vessel for subjective opinions about disability and the status of marriage, considering factors such as prior romantic and sexual history, financial decision-making, and ability to care for oneself independently. These cases show how capacity requirements can prohibit or limit nonconforming individuals—especially those who rely on external sources of support—from marrying. In contrast, a second notion of capacity conceives of marriage as capacity enhancing. Under this view, a court may decline to impose a guardianship in part because of an existing marriage. This view of capacity focuses more on the power and strength of human relationships. Building on the second notion—that marital relationships can be capacity enhancing—the Essay conceives of supported decision-making as a means of rendering marriage more accessible to people with intellectual disabilities while also recasting the institution of marriage

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from one focused on two self-sufficient individuals to one that celebrates human interdependence and connection.

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INTRODUCTION

Tom and Lucinda Barnes—both adults with intellectual and developmental disabilities (IDD)[1]—had been married for several years when the state sought to annul their marriage.[2] They had been living with

1. This Essay uses both "person-first" ("people with disabilities") and "identity-first" ("disabled person") language because the disability community has diverse views on which is preferred. In general, the person with a disability should determine whether to use person-first or identify-first language. See generally Lydia Brown, Identity-First Language, Autistic Self Advoc. Network, https://autisticadvocacy.org/about-asan/identity-first-language/ [https://perma.cc/YPE9-JF8Y] (last visited Oct. 16, 2025) (discussing arguments for and against identity-first language within the autism community and beyond).

2. This introduction recounts the story of a former client and their spouse. To preserve confidentiality, all names and some other details have been changed. See Letter from Sarah Lorr to Columbia Law Review (Jan. 28, 2026) (on file with the *Columbia Law Review*). Scholars make a strong case that client stories, as all human stories, belong to clients

Lucinda's parents and raising their two children in a shared family home, when an allegation about Lucinda's treatment of one of the children led the state to investigate the family. During a subsequent lawsuit about where and with whom the children should live, a different branch of the state acted on an anonymous tip and removed Lucinda from her home and family. Among other allegations, the state claimed that Tom and Lucinda's marriage should be legally annulled because Lucinda's diagnosed IDD meant she lacked capacity to consent to the marriage. After nearly a year of fighting in court, Lucinda was allowed to return home, and her marriage was left intact. Still, the intrusion into Tom and Lucinda's intimate life caused great damage to their family.

In addition to overt state intervention in an ongoing marriage, there are other ways the state, legally appointed guardians,[3] and others can deprive adults with IDD of marriage. For example, a putative or actual guardian can decide not to approve a marriage,[4] and a court clerk can choose not to grant a license based on a person's appearance.[5] Tom and Lucinda's experience is but one version of how the right to marry can be abridged or cut off for adults with disabilities.[6]

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themselves and that the best practice would be for the impacted person themself to tell their story. See e.g., Rachel López, Participatory Legal Scholarship, 123 Colum. L. Rev. 1795, 1800–02 (2023) (discussing the importance of "shift[ing] power to people who are not lawyers, establishing them as experts in their own legal realities"); Binny Miller, Telling Stories About Cases and Clients: The Ethics of Narrative, 14 Geo. J. Legal Ethics 1, 4 (2000) (arguing that "clients should have a say in decisions about how their stories are told"). This Essay shares the Barneses' story because there are so few reported cases about marriage and IDD, with the vast majority of these cases litigated, if at all, outside of public view. See infra note 12 and accompanying text.

3. "Guardianship is a process by which a court appoints a third party (called a 'guardian' or 'conservator') to make decisions on behalf of an individual the court has found unable to make those decisions for him or herself." Nina A. Kohn, Legislating Supported Decision-Making, 58 Harv. J. on Legis. 313, 321 (2021).

4. In Alabama, for example, guardians automatically have the power to consent to a marriage or divorce on behalf of an adult under guardianship, and to prevent guardians from having this authority, a court must specifically limit the guardians' social decision-making. Sup. Ct. of Ala.'s Comm'n on Adult Guardianships & Conservatorships, Alabama Guide for Guardians and Conservators 19 (n.d.), https://alabamawings.alacourt.gov/media/1063/alabama-guide-for-guardians-and-conservators.pdf [https://perma.cc/9QBB-6XB2] (last visited Oct. 17, 2025). The same is true in Connecticut. See Conn. Gen. Stat. Ann. § 46b-20a (West 2025) (excluding people under conservatorship from the general right to marry); id. § 46b-29 (requiring conservator signature to obtain marriage license). This Essay, though primarily concerned with marriage statutes, will necessarily also address statutes that give the guardians control of marital decisions.

5. See Kristin Booth Glen, Not Just Guardianship: Uncovering the Invisible Taxonomy of Laws, Regulations and Decisions that Limit or Deny the Right of Legal Capacity for Persons With Intellectual and Developmental Disabilities, 13 Alb. Gov't L. Rev. 25, 55 (2020) [hereinafter Glen, Not Just Guardianship] (envisioning "a clerk denying a marriage license where one or both of the parties have [IDD] that is clearly visible, such as Down Syndrome, or cerebral palsy with significant speech impairment").

6. Another central means of marriage deprivation is the so-called marriage penalty. Though not a focus of this Essay, it is explored in notes 177–181 and their accompanying

For people with disabilities, the right to marry—like the right to have or raise children—is one that for generations was so unimaginable that the United States Supreme Court has almost never referenced it.[7] This absence is in stark contrast to marriage in other contexts, in which the Supreme Court has opined that marriage is "fundamental to the very existence and survival of the race."[8] The law's failure to consider people with disabilities within the framework of the American family is consistent with the historical treatment of people with disabilities, many of whom were institutionalized and left without meaningful family relationships of

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text and has been addressed by other scholars. See, e.g., Gabriella Garbero, Comment, Rights Not Fundamental: Disability and the Right to Marry, 14 St. Louis U. J. Health L. & Pol'y 587, 592–95 (2021) (describing and critiquing how marriage impacts social security benefits); Rabia Belt, Disability: The Last Marriage Equality Frontier 1–3 (Stan. Pub. L. Working Paper No. 2653117, 2022), https://ssrn.com/sol3/abstract_id=2653117 (on file with the *Columbia Law Review*) (describing and critiquing how the marriage penalty functions to discourage marital unions for certain people with disabilities).

7. See Sarah H. Lorr, Disabling Families, 76 Stan. L. Rev. 1255, 1271–72 (2024) [hereinafter Lorr, Disabling Families] (describing Buck v. Bell, 274 U.S. 200 (1927), as indirectly opining on the rights of disabled adults to have and raise families).

8. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); see also Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (invalidating bans on same-sex marriage); Turner v. Safley, 482 U.S. 78, 81 (1987) (finding the right to marry impermissibly burdened by regulations limiting marriage for people in prison); Zablocki v. Redhail, 434 U.S. 374, 382 (1978) (finding the right to marry impermissibly burdened by a law prohibiting fathers who owed child support from marriage); Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down bans on interracial marriage).

While it is true that most other categorical bans on marriage have been rejected by the Supreme Court, some of the concerns raised in the disability context run parallel to other prior bans on, or barriers to, marriage. For example, the asserted basis for the prohibition on marriage for prison inmates at issue in *Turner v. Safley*—which dealt with a Missouri law preventing prison inmates from marrying unless a warden found a "compelling reason to allow the marriage"—suggests an infantilization of female inmates and their need for protection that is similar to the attitude toward people with disabilities who seek to marry. See *Turner*, 482 U.S. at 97–98 (including among the safety concerns that support a ban on marriage without the warden's consent, "that female prisoners often were subject to abuse at home or were overly dependent on male figures, and that this dependence or abuse was connected to the crimes they had committed"); see also infra notes 164–166. Likewise, long before *Loving* overturned bans on interracial marriage, some of the arguments against marriages involving enslaved people were baldly based in what we would now identify as eugenic logic. See, e.g., Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955) ("We are unable to read . . . the Fourteenth Amendment . . . [to] prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or . . . [to] deny the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens."). Others were based on lack of capacity. See Scott v. Raub, 14 S.E. 178, 179 (Va. 1891) ("A slave cannot marry, because he cannot make a valid contract, because the duties of a slave are inconsistent with the duties of a husband or a wife, and because a slave is property. So the marriage of a slave is a mere nullity . . . ."); see also Cumby v. Garland, 25 S.W. 673, 677 (Tex. Civ. App. 1894) (describing a marriage between two enslaved people, when achieved with consent of their enslaver, as "natural and moral, was so recognized and sanctioned, and lacked only the legal capacity of the parties to make it lawful wedlock").

any kind.[9] Indeed, the denial of the right to marry is yet another denial in a line of relational deprivations that disabled adults face, including deprivations to sexual intimacy[10] and the parent–child relationship.[11]

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9. See, e.g., Chris Chapman, Five Centuries' Material Reforms and Ethical Reformulations of Social Elimination, *in* Disability Incarcerated 25, 33 (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014) (describing "the proliferation of schools for intellectually disabled or blind pupils, asylums, and Indian Residential Schools" in the nineteenth century as part of "white ruling-class political rationality"); id. at 37 ("At the height of eugenics, some intellectually disabled people were more likely to be subjected to rehabilitative institutionalization, others to purely custodial institutionalization, and others to public torture and murder—in part due to interlocking oppressions."). For a particularly wrenching story of one family separation, see Jennifer Senior, The Ones We Sent Away, The Atlantic (Aug. 7, 2023), https://www.theatlantic.com/magazine/archive/2023/09/disabled-children-institutionalization-history/674763/ (on file with the *Columbia Law Review*).

10. See, e.g., Alexander A. Boni-Saenz, Sexuality and Incapacity, 76 Ohio St. L.J. 1201, 1213–15 (2015) [hereinafter Boni-Saenz, Sexuality and Incapacity] (describing "explicit legal and regulatory effects" as well as "expressive effects" of law that "invalidate[] the apparent consent choices of those who are deemed to lack legal capacity"); Natalie M. Chin, Group Homes as Sex Police and the Role of the *Olmstead* Integration Mandate, 42 N.Y.U. Rev. L. & Soc. Change 379, 413 (2018) [hereinafter Chin, Group Homes as Sex Police] (discussing how "the structural systems that are tasked with identifying and administering services to intellectually disabled individuals . . . often perpetuate the desexualization" of such adults); Natalie M. Chin, The Structural Desexualization of Disability, 124 Colum. L. Rev. 1595, 1618–20 (2024) [hereinafter Chin, Structural Desexualization] (canvassing modern laws that contribute to the "desexualization" of people with IDD); Deborah W. Denno, Sexuality, Rape, and Mental Retardation, 1997 U. Ill. L. Rev. 315, 324 (noting that a "high consent standard" in institutions "can totally prohibit sexual relations among residents"); Elizabeth F. Emens, Intimate Discrimination: The State's Role in the Accidents of Sex and Love, 122 Harv. L. Rev. 1307, 1311 (2009) [hereinafter Emens, Intimate Discrimination] ("[T]he law has required intimate discrimination with regard to sex and disability."); Jasmine E. Harris, The Role of Support in Sexual Decision-Making for People With Intellectual and Developmental Disabilities, 77 Ohio St. L.J. Furthermore 83, 86 (2016), https://kb.osu.edu/server/api/core/bitstreams/22dd8720-12b5-5773-8387-b98a63c51926/content [https://perma.cc/GAD4-PGFT] [hereinafter Harris, The Role of Support] (describing people with "more severe intellectual and developmental disabilities" as "currently precluded from exercising sexual agency" despite potentially having "the mental capability to do so"); Jasmine E. Harris, Sexual Consent and Disability, 93 N.Y.U. L. Rev. 480, 495 (2018) (noting that for people with disabilities "sexual regulation is often a reflexive part of legitimate state regulation of some other area of their lives").

11. This is well documented in the context of child welfare, also called family regulation. See, e.g., Joshua B. Kay, The Americans With Disabilities Act: Legal and Practical Applications in Child Protection Proceedings, 46 Cap. U. L. Rev. 783, 814–18 (2018) (advocating for the use of the ADA in defense of parental rights in family regulation cases); Sarah H. Lorr, Unaccommodated: How the ADA Fails Parents, 110 Calif. L. Rev. 1315, 1326–27 (2022) [hereinafter Lorr, Unaccommodated] (describing discrimination against parents with IDD in the family regulation system); Robyn M. Powell, Safeguarding the Rights of Parents With Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law, 20 CUNY L. Rev. 127, 141 (2016) (describing the assumptions that undergird discrimination against parents with IDD); Charisa Smith, Making Good on an Historic Federal Precedent: Americans With Disabilities Act (ADA) Claims and the Termination of Parental Rights of Parents With Mental Disabilities, 18 Quinnipiac Health L.J. 191, 200 (2015) ("[P]arents with mental disabilities, as a disadvantaged population, are

It is impossible to estimate how many people like Tom and Lucinda experience this kind of intrusion into their marital lives. Cases like theirs occur in different courts depending on the state, and many are litigated outside of the public eye, if at all.[12] The paucity of publicly available decisions obscures the question of marriage access for people with IDD from broader scrutiny and renders it nearly impossible to know with certainty the scope of state intervention and judicial resolutions. There is evidence, however, that marriage deprivation is not uncommon.[13]

This Essay provides critical insight into the understudied question of how the law conceives of marital capacity in the context of adults with IDD.[14] In every state, statutes or case law provide that the ability to marry

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often typecast as perpetrators of child maltreatment and not offered the opportunity to find the root of the alleged maltreatment and reunify their family systems."). It is also documented in private custody disputes. See Ella Callow, Kelly Buckland & Shannon Jones, Parents With Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community, 17 Tex. J. on C.L. & C.R. 9, 27–28 (2011) (discussing how various court actors exhibit "a biased response to a parent's disability" in private family law disputes involving child custody). As Professor Robyn Powell has demonstrated, these rights deprivations extend to reproductive decisions. See Robyn M. Powell, Forced to Bear, Denied to Rear: The Cruelty of *Dobbs* for Disabled People, 112 Geo. L.J. 1095, 1102–14 (2024) (examining reasons for high rates of unintended pregnancies among disabled people).

12. Decisions about marital capacity—if they ever come to court—are often made in the context of guardianship proceedings, see infra section II.B., which are frequently closed from public access. See Jasmine E. Harris, Processing Disability, 64 Am. U. L. Rev. 457, 504 (2015) [hereinafter Harris, Processing Disability] ("[W]ith few exceptions, privacy considerations have de jure or de facto subsumed the public's interests in accessing [guardianship and civil commitment] proceedings and the respondents' interests in visibility and autonomy."); id. at 504–14 (providing a detailed analysis of the procedural process in guardianship capacity cases). There is no source or data repository for information about the number of people with disabilities facing challenges to their capacity to marry. Indeed, it is difficult to identify even the number of people under guardianship. See Nat'l Council on Disability, Turning Rights Into Reality: How Guardianship and Alternatives Impact the Autonomy of People With Intellectual and Developmental Disabilities 41 (2019), https://www.govinfo.gov/content/pkg/GOVPUB-Y3_D63_3-PURL-gpo121724/pdf/GOVPUB-Y3_D63_3-PURL-gpo121724.pdf [https://perma.cc/FFT3-4VSW] ("Even identifying the number of active cases or their status is not possible in many states.").

13. See infra note 174 (listing state statutes that specifically preclude marriage for people with IDD); infra notes 248–265 and accompanying text (collecting and discussing cases).

14. In this regard, this Essay focuses primarily on statutes controlling marriage—who is allowed to marry and under what circumstances, as well as those marriage-related laws that speak to who may have standing to challenge the legitimacy of a marriage through a legal process of annulment. See infra section II.A. This is, of course, not the only assessment of the statutes and laws related to disability and marriage. See generally Alexander A. Boni-Saenz, Personal Delegations, 78 Brook. L. Rev. 1231 (2013) (studying the role of "personal delegation" in various statutes affecting people with intellectual disabilities); Lois Guller Jacobs, Note, The Right of the Mentally Disabled to Marry: A Statutory Evaluation, 15 J. Fam. L. 463 (1976) (examining various "legal deficiencies" in marriage statutes related to individuals with disabilities). But it is unique in its critical view and study of judicial findings

hinges upon capacity, and many states also have statutes that provide lack of capacity as a ground to render a marriage void or voidable.[15] Both sets of laws leave open a pathway for a judicial determination of incapacity, rendering marriages in which one partner is a person with IDD unstable in ways that are inconsistent with the very purpose of the institution.[16] In undertaking this analysis, this Essay bridges two bodies of scholarship: first, scholarship interrogating the function and purpose of marriage, and the government's role in who can claim legitimacy within the American family;[17] and second, scholarship illuminating the marginal-ization of people with disabilities in intimate and family life.[18]

This Essay focuses specifically on adults with IDD, as distinguished from other disabilities, because within the diverse and varied community of people with disabilities, people with IDD are among the most likely to face legal capacity challenges.[19] Additionally, people with IDD are a diverse and complex group who present unique issues in the context of marriage-capacity decisions, distinct certainly from people with physical disabilities[20] but also from those with psychiatric- or age-related cognitive disabilities.[21]

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on capacity to marry. This Essay joins a more extensive scholarship on sexuality and intimacy. See supra note 10 (collecting articles).

15. See infra sections II.A, II.C.1. "[V]oid marriages are void from their inception, while voidable marriages are valid unless and until one of the spouses seeks annulment." Douglas E. Abrams, Naomi R. Cahn, Linda C. McClain, Catherine J. Ross, Kaiponanea T. Matsumura & Jessica Dixon Weaver, Contemporary Family Law 202 (6th ed. 2023).

16. See infra sections II.A, III.A.

17. See infra note 109 (collecting just some of this vast scholarship).

18. See supra notes 10–11 (collecting scholarship).

19. See Cathy E. Costanzo, Kristin Booth Glen & Anna M. Krieger, Supported Decision-Making: Lessons From Pilot Projects, 72 Syracuse L. Rev. 99, 111 (2022) (explaining how supported decision-making has primarily been used for people with IDD, given that their legal capacity is often challenged); Matthew S. Smith & Michael Ashley Stein, Legal Capacity and Persons With Disabilities' Struggle to Reclaim Control Over Their Lives, Petrie-Flom Ctr. (Sep. 29, 2021), https://blog.petrieflom.law.harvard.edu/2021/09/29/legal-capacity-disabilities/ [https://perma.cc/T645-SCF7] ("Capacity assess-ments are sometimes weaponized to restrict persons with intellectual disabilities' right to sexual expression. Similar capacity assessments are also deployed systematically to deprive persons with intellectual disabilities[] of their parental rights.").

20. Despite the clear distinction, the capacity to marry was still questioned in cases involving certain "physical condition[s]." See, e.g., Snyder v. Snyder, 43 Pa. D. & C. 115, 115–16 (Ct. C.P. Del. Cnty. 1941) (characterizing epilepsy as a "physical condition" and allowing annulment based on its concealment). Impotence was also a historical ground for annulment. See, e.g., Kaufman v. Kaufman, 164 F.2d 519, 520 (D.C. Cir. 1947) ("[D]irect evidence of the defendant's impotence . . . was amply sufficient to require a judgment of annulment.").

21. Age-related disabilities and age-related cognitive decline can be distinguished from other cognitive disabilities in various ways, not least because of the way age-related disabilities can be said to cause decisions "that the 'real person' would never have made; the dementia is speaking, not my father." James Toomey, Narrative Capacity, 100 N.C. L. Rev. 1073, 1077–78 (2022); see also Morgan K. Whitlatch & Rebekah Diller, Supported Decision-Making: Potential and Challenges for Older Persons, 72 Syracuse L. Rev. 165, 184–202 (2022) (discussing, at length, the capacity issues unique to age-related disabilities).

In reviewing a selection of judicial decisions related to marital capacity for adults with IDD from the last sixty years,[22] this Essay identifies two different and contradictory understandings of the relationship between marriage and capacity. In the first conception, courts understand capacity as a necessary prerequisite to marriage; they block people with IDD from marrying based on factors such as prior romantic and sexual history, financial decision-making, and ability to care for one's self independently.[23] Courts issuing these decisions not only exclude certain individuals from normative conceptions of the family, delegitimizing and preventing intimate relationships, but also construct notions of the modern American family as an institution reserved for those who uphold certain moral standards of romantic and sexual behavior and are capable of financial and practical independence.[24]

The second conception of capacity takes an almost opposite view. In the context of guardianship proceedings,[25] a small number of courts have found that an existing marriage is a protective and supportive relationship that can strengthen and even increase the decision-making capacity of an

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Psychiatric disabilities, due to their often-episodic nature, also present unique issues. See Kathryn E. Ringland, Jennifer Nicholas, Rachel Kornfield, Emily G. Lattie, David C. Mohr & Madhu Reddy, Understanding Mental Ill-Health as Psychosocial Disability: Implications for Assistive Technology, 2019 ASSETS 156, 161 (discussing how participants of a study described their mental health issues and the "recurrent, episodic nature"). Despite the focus on IDD, the Essay draws upon and cites related case law involving people with brain injuries, age-related cognitive decline, or psychiatric disabilities where it is instructive.

22. By going back to 1965, the research intends to capture the cultural and legal understandings of capacity that exist and have taken shape from the apex of the disability rights movement to the present. See Paul K. Longmore & Lauri Umansky, Introduction: Disability History: From the Margins to the Mainstream, *in* The New Disability History: American Perspectives 1, 10 (Paul K. Longmore & Lauri Umansky eds., 2001) (describing the passage of the Americans with Disabilities Act in 1990 as "capp[ing] a generation of innovative lawmaking regarding Americans with disabilities" and "activists' campaign[ing]" going back to the 1960s).

23. See infra section II.C.1.

24. See infra sections II.C.1, III.A.

25. See infra section II.B. Guardianship, also called conservatorship in certain states, can be plenary or limited, and it has come under significant scholarly and governmental critique. See, e.g., Jasmine E. Harris, The Political Economy of Conservatorship, 71 UCLA L. Rev. 1364, 1368 (2024) [hereinafter Harris, Political Economy of Conservatorship] ("Sometimes used interchangeably with 'guardianship,' conservatorship is a legal device for substitute decisionmaking for a limited number of individuals deemed incapable of managing decisions about their finances or self-care."); id. at 1390 (arguing that conservatorship has been a form of public governance to control and subjugate through the "manipulability of the legal category of disability"); Robyn M. Powell, Disability Reproductive Justice, 170 U. Pa. L. Rev. 1851, 1853–55 (2022) (critiquing the role of guardianship in the context of Britney Spears and reproductive justice); Pamela B. Teaster, Erica Wood, Sally B. Hurme & E. Carlisle Shealy, Environmental Scan of Guardianship Abuse and Fraud, Full Report (2023), https://www.ojp.gov/pdffiles1/nij/grants/307525.pdf [https://perma.cc/9LA6-MCH5] (discussing the literature on the scope and nature of abuse and fraud by guardians).

adult.[26] Significantly, this vision rests on the notion that capacity can be expanded by people and supports beyond the individual in question.[27] This Essay demonstrates that these two sets of cases, taken together, reveal both the extent to which capacity can bar certain nonconforming individuals from marriage and the ways marriage itself can expand notions of capacity.

Building on the idea that the marital relationship can be capacity expanding, this Essay argues that supported decision-making (SDM)—an increasingly well-recognized means of ensuring the autonomy and decision-making capacity of people with IDD—can offer a significant intervention to this field.[28] SDM offers a means both of expanding access to marriage for people with IDD and of recasting the institution of marriage as one that accepts and celebrates human interdependence as inherent and welcome, rather than understanding it as a problem or failure.[29] In this reformed notion of marriage, the benefits of the marital relationship could be accessible to not only those who meet society's expectations of independence and self-sufficiency but also those who most need the support and care of the community around them. While this Essay critiques limits on the right to marry, it neither promotes nor criticizes the institution itself.[30] Instead, it responds to the very real desire of certain members in the disability community to have the state sanction and recognize their choices to enter loving and supportive relationships.[31]

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26. See infra section II.C.2.

27. See infra section II.C.2.

28. Supported decision-making is "a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life." Robert D. Dinerstein, Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons With Disabilities: The Difficult Road From Guardianship to Supported Decision-Making, Hum. Rts. Brief, Winter 2012, at 8, 10; see also infra notes 78–91 and accompanying text.

29. See infra sections III.C–.D.

30. After all, there is strong evidence that marriage itself—and even access to marriage—is not an unalloyed good. See Katherine Franke, Wedlocked: The Perils of Marriage Equality 198 (2015) [hereinafter Franke, Wedlocked] ("[T]he gay community has been able to leverage its social capital in whiteness to their advantage in the marriage equality movement, yet African Americans have received little benefit in any endowment they might enjoy from the stereotype that all or most black people are heterosexual."); R.A. Lenhardt, Marriage as Black Citizenship?, 66 Hastings L.J. 1317, 1319 (2015) (arguing "that the stock narrative that attends black marriage in this country is one that legal scholars and others concerned about African American citizenship and families should interrogate more deeply, if not resist").

31. Lori Long, a disabled woman who has publicly advocated for the right to marry her long-term, abled partner but who is now unable to marry her partner due to the steep financial penalty that would inhere, has described her desire to marry in these terms: "We are husband and wife. And it means something. It just does, that added title." Erika Mahoney, A Love Story Worth Fighting For, Salinas Couple Battles Bureaucracy to Get Married, KAZU (Feb. 12, 2021), https://www.kazu.org/local/2021-02-12/a-love-story-worth-fighting-for-salinas-couple-battles-bureaucracy-to-get-married [https://perma.cc/TQ

Part I of this Essay defines the terms IDD and "capacity," explaining the distinction between capacity as a mental status and capacity to marry. Next, it discusses the legal foundation and cultural meaning of marriage, focusing on the notion of a married couple as a self-sufficient unit. It also describes how disability status has interacted with the right to marry and reviews present-day barriers people with disabilities face when they seek to wed. Part II examines both the statutes and case law relating to marital capacity. It explores a selection of cases, identifying two very different ways of understanding marital capacity. Part III critiques how some judicial decisions both idealize the status of marriage and hold people with disabilities to unrealistic and unattainable standards before allowing them to marry. It proposes avenues for courts, advocates, and individuals with IDD to counter ableism in marital capacity cases. Ultimately, Part III urges courts and advocates to embrace SDM in the marital capacity context, both as a vehicle to increase access to marriage for people with IDD and to counter the normative, idealized vision of marriage as a self-sufficient unit that should not require external support.

I. CAPACITY, MARRIAGE, AND DISABILITY

This Part defines intellectual and developmental disability and offers the basic legal and psychological underpinnings of capacity doctrine. It then discusses the institution of marriage as a central organizing mechanism in American law and culture. Finally, it explores the historical and contemporary relationship between the institution of marriage and people with disabilities, particularly IDD, including some of the present-day barriers to marriage faced by people with disabilities.

A. *Defining Intellectual Disability and Capacity*

This section defines IDD, as used in this Essay, and the concept of capacity. Understanding the relationship between capacity and the right to marry requires engagement with language on one hand and with the philosophical understanding of personhood on the other. To do so, we must both identify the terms of our discussion and grapple with how the law understands and limits the power of human decision-making.

1. *Intellectual and Developmental Disability.* — Disability studies and legal scholars have devoted much thought to the challenges of defining disability writ large.[32] It is a term and concept that differs depending upon

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4L-MGVP] (internal quotation marks omitted) (quoting Lori Long). Indeed, marriage has also been described as the "ultimate merit badge." Ralph Richard Banks, Is Marriage for White People?: How the African American Marriage Decline Affects Everyone 21 (2011) (internal quotation marks omitted) (quoting Andew Cherlin, sociologist).

32. See, e.g., Samuel R. Bagenstos, Subordination, Stigma, and "Disability", 86 Va. L. Rev. 397, 406 (2000) (noting that "[t]he ADA provides its own definition of 'disability,' but the statute has not avoided the difficulties that have marked all attempts to demarcate the boundaries of the 'disability' category"); Sharon N. Barnartt, Disability as a Fluid State:

context—from law,[33] to medicine,[34] to social-psychological settings[35] and others. It can be understood as medical in nature, defined by a physical difference or specific diagnosis,[36] or as a social construction.[37]

This Essay is about adults with IDD, one group among the diverse set of people living with disability. When considering adults with IDD, it is especially fraught to rely merely on a medical model of disability "in that the broad diversity of who is included by the medical definition is not well expressed by rigid listings from a medical manual."[38] After all, medical diagnoses do little to delineate how, among the vast community of adults with IDD, a particular individual manifests or experiences their disability.

Introduction, *in* Disability as a Fluid State 1, 2 (Sharon N. Barnartt ed., 2010) (arguing that, in contradiction to most major models of disability, "there is a lot of evidence that disability is a fluid state and not a dichotomous one"); Doron Dorfman, Disability as Metaphor in American Law, 170 U. Pa. L. Rev. 1757, 1795 (2022) (describing how the concept of disability has evolved into a "far more complex and nuanced concept" over time).

33. Compare Americans With Disabilities Act of 1990, 42 U.S.C. § 12102(1) (2018) (defining an individual with a disability as someone who (1) experiences a physical or mental impairment that significantly restricts one or more major life activities, (2) has a documented history of such an impairment, or (3) is regarded by others as having such an impairment), with How Do We Define Disability?, SSA, https://www.ssa.gov/redbook/eng/definedisability.htm [https://perma.cc/F97S-GMYP] (last visited Oct. 18, 2025) (defining an individual with a disability as someone who is not "able to engage in any substantial gainful activity" due to a "medically determinable physical or mental disability[]" that is either expected to lead to death or has lasted/is expected to last continuously for at least a year).

34. See, e.g., Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 37–46 (5th ed., text rev. 2022) [hereinafter DSM-5-TR] (defining and describing "intellectual disability" to include deficits in intellectual and adaptive functioning, the onset of which occurs "during the developmental period").

35. See Dana S. Dunn, Only Connect: The Social Psychology of Disability, *in* Handbook of Rehabilitation Psychology 143, 143–46 (Lisa A. Brenner, Stephanie A. Reid-Arndt, Timothy R. Elliott, Robert G. Frank & Bruce Caplan eds., 3d ed. 2019) (discussing the "social psychology of disability," including the ways in which individuals with disabilities interact with nondisabled individuals and how such individuals perceive each other).

36. See Harris, Political Economy of Conservatorship, supra note 25, at 1369 ("Today, disability as a word, concept, or category, often serves as a proxy for medical diagnosis. Even for those who recognize its social construction, the medicalization of disability continues to predominate in legislation, courts, and the public imagination.").

37. See Samuel R. Bagenstos, Disability and Reproductive Justice, 14 Harv. L. & Pol'y Rev. 273, 278 (2020) (describing the social model as "the notion that disability is not a condition . . . inherent to the disabled person, but is instead one that results from the interaction between a person's physical or mental attributes and the contingent social decisions that make particular opportunities or environments incompatible with those attributes"); Doron Dorfman, Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process, 42 Law & Soc. Inquiry 195, 197 (2017) ("The social model views disability as a social rather than a purely medical or tragic phenomenon."); see also Jamelia N. Morgan, Rethinking Disorderly Conduct, 109 Calif. L. Rev. 1637, 1670 (2021) ("Ableist norms create and reinforce standards of behavior or social expectations that privilege able bodies and neurotypical minds while subordinating disabled bodies and neurodivergent minds.").

38. Lorr, Unaccommodated, supra note 11, at 1325.

In fact, even knowing the specific constellation of a given individual's "symptoms" or the details of their diagnosis may reveal little about what their disability means to them or their life.[39] Within the community of adults who have IDD, the variation of life experience, education, personality, adaptive behaviors,[40] and how the disability presents and is experienced makes generalization nearly impossible.[41] Add to that the range of other human identities—race, class, gender, sexual orientation—and the true breadth of the community on which this Essay focuses starts to become clear.[42]

Nonetheless, a grounding definition offers a place to begin. According to the American Association of Intellectual and Developmental Disabilities (AAIDD), a diagnosis of intellectual disability involves "[s]ignificant limitations in intellectual functioning" and "[s]ignificant limitations in adaptive behavior" that begin before the age of twenty-two.[43] Developmental disabilities are a "broader category," that can include both

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39. See id. (noting that adults with IDD are a "heterogenous" group "with members having very different strengths and needs for supports" and discussing the racialized history of the diagnosis).

40. Adaptive behavior encompasses three areas of "skills": "[c]onceptual skills," which include "language[,] reading and writing[,] . . . and number concepts"; "[s]ocial skills," which encompass areas like "interpersonal skills, social responsibility, . . . and social problem solving"; and "[p]ractical skills," which include "daily living" tasks, vocational skills, and scheduling. Am. Ass'n on Intell. & Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports 44 (2010) [hereinafter AAIDD Manual] (emphasis omitted).

41. See Comm. to Evaluate the Supplemental Sec. Income Disability Program for Child. With Mental Disorders, Mental Disorders and Disabilities Among Low-Income Children 176 (Thomas F. Boat & Joel T. Wu eds., 2015) [hereinafter Mental Disorders and Disabilities] ("As a diagnostic category, IDs include individuals with a wide range of intellectual functional impairments and difficulties with daily life skills. The levels of severity of intellectual impairment and the need for support can vary from profound to mild.").

42. See Subini Ancy Annamma, David J. Connor & Beth A. Ferri, Touchstone Text: Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability, *in* DisCrit: Disability Studies and Critical Race Theory in Education 9, 19 (David J. Connor, Beth A. Ferri & Subini A. Annamma eds., 2016) ("DisCrit values multidimensional identities and troubles singular notions of identity such as race *or* dis/ability *or* class *or* gender *or* sexuality, and so on."); see also Jamelia N. Morgan, Policing Under Disability Law, 73 Stan. L. Rev. 1401, 1407 (2021) (describing the "relational, contingent, fluid, and subjective nature" of disability (citing Rabia Belt & Doron Dorfman, Response, Reweighing Medical Civil Rights, 72 Stan. L. Rev. Online 176, 186–87 (2020), https://www.stanfordlawreview.org/online/reweighing-medical-civil-rights/ [https://perma.cc/Y9A4-63NW]).

43. FAQs on Intellectual Disability, Am. Ass'n on Intell. & Developmental Disabilities, https://www.aaidd.org/intellectual-disability/faqs-on-intellectual-disability [https://perma.cc/7WRP-KJ33] (last visited Oct. 17, 2025). Prior definitions of intellectual disability classified the end of the developmental period as eighteen. AAIDD Manual, supra note 40, at 3–12, 44.

intellectual and physical disabilities.[44] These can include conditions impacting the nervous system, like cerebral palsy, Down syndrome, and autism spectrum disorders.[45] Developmental disabilities can also impact the "[s]ensory system" (the five senses) and metabolism.[46] Other definitions exist, including in the *Diagnostic and Statistical Manual of Mental Disorders*[47] and in various state and federal laws.[48] While none are conclusive, they offer a sense of the how the diverse set of adults who might be identified as having IDD are understood by medical, legal, and psychiatric communities.

The broad community of people diagnosed with IDD is a "heterogeneous group" with "different strengths and needs."[49] Rather than being an "unchanging condition," "abilities and needs can vary based on several factors, including life stressors and the availability of accommodations and supports that maximize independence."[50] Indeed, in 2023, the Law School Admissions Council found that twenty-eight percent of students reported having a developmental or intellectual disability.[51] While one person with IDD may have difficulty reading maps and be more comfortable relying on verbal directions, another might be comfortable with reading and navigating maps but struggle with math.

This Essay focuses on adults with IDD because it is a diagnosis often used to question or undermine a person's capacity.[52] Though psych-

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44. About Intellectual and Developmental Disabilities (IDDs), Eunice Kennedy Shriver Nat'l Inst. Child Health & Hum. Dev., https://www.nichd.nih.gov/health/topics/idds/conditioninfo [https://perma.cc/F8AA-HNCC] (last updated Nov. 9, 2021).

45. Id.

46. Id.

47. DSM-5-TR, supra note 34, at 37 (defining "[i]ntellectual developmental disorder (intellectual disability)"). The *DSM-5-TR* notes that "attention-deficit/hyperactivity disorder; depressive and bipolar disorders; anxiety disorders; autism spectrum disorder; stereotypic movement disorder (with or without self-injurious behavior); impulse-control disorders; and major neurocognitive disorder" are "common co-occurring neurodevelopmental" and mental disorders for people with IDD. Id. at 45.

48. See, e.g., N.Y. Surr. Ct. Proc. Act Law § 1750 (McKinney 2025) (defining a person who is intellectually disabled as "a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with [IDD]"); Gina A. Livermore, Maura Bardos & Karen Katz, Supplemental Security Income and Social Security Disability Insurance Beneficiaries With Intellectual Disability, 77 Soc. Sec. Bull., no. 1, 2017, at 17, 18–19 (discussing the criteria that individuals with IDD must meet under certain federal benefits programs).

49. Maurice Feldman & Marjorie Aunos, Comprehensive, Competence-Based Parenting Assessment for Parents With Learning Difficulties and Their Children 7 (2011).

50. Id.

51. Debra Langer & Anna Russian, First-Year Law School Class: A Focus on Students With Disabilities, 2023 Update 2 (2025), https://www.lsac.org/sites/default/files/research/Disability-Brief-2023-Final.pdf [https://perma.cc/7U5X-2Y5X]. The Law School Admission Council includes attention deficit or hyperactivity disorder, autism spectrum disorder, and other developmental or intellectual disabilities in this category. Id. at 20.

52. See supra note 19 and accompanying text.

iatric-, age-, or accident-related disabilities, such as Alzheimer's and Traumatic Brain Injury (TBI), are also implicated in this discussion, these disabilities present challenges in the marriage-capacity context distinct from IDD. In the context of age-related disabilities, for example, these disabilities develop later in life such that courts and family members alike compare decisions made under disability with prior decisions, often with the goal of identifying whether the person is acting as one would expect or if the "decision is one that the 'real person' would never have made."[53] Psychiatric disabilities are often episodic, coming and going entirely depending on context and treatment.[54]

While age- and psychiatric-related cognitive disabilities can involve drastic change over the course of the lifetime, IDD is typically understood as involving a more stable set of characteristics.[55] Indeed, older stereotypes about IDD and incapacity rest on the notion that people with IDD cannot learn and are effectively perpetual children.[56]

IDD also presents different questions from physical disability, especially in the marriage or decision-making context. For example, an adult who uses a wheelchair to transport themselves because they are paralyzed from the neck down does not raise concerns about their ability to make decisions or form intimate relationships, even though some people who are paralyzed may not be able to have intercourse.

2. *Conceptualizing Capacity.* — Capacity is a polysemous term, speaking to philosophical ideas about agency and personhood, an

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53. See Toomey, supra note 21, at 1077–78.

54. Courts have acknowledged these challenges in the context of marriage-capacity decisions. See, e.g., DeMedio v. DeMedio, 257 A.2d 290, 297 (Pa. Super. Ct. 1969) ("The problem confronting us arises from the nature of schizophrenia itself, which admits of certain relatively lucid periods between acute attacks." (internal quotation marks omitted) (quoting the July 5, 1968 annulment decree entered by the Court of Common Pleas of Montgomery County)).

55. See Mental Disorders and Disabilities, supra note 41, at 176 ("The functional impairments associated with [IDD] are generally lifelong. However, there are functional supports that may enable an individual with [IDD] to function well and participate in society."). That IDD is comparatively more stable across the lifespan does not mean, as stereotypes and bias often suggest, that people with IDD are incapable of learning or growing during the scope of their lives. Indeed, research and lived experience both suggest that this stereotype is wrongheaded and false. See, e.g., Lorr, Unaccommodated, supra note 11, at 1330 & nn.69–70 (collecting sources on how parents with IDD best learn). For a haunting discussion of the ways understanding certain disabilities as static can lead to "a temporal framing of disability dovetailing with a developmental model of childhood," see Alison Kafer, Feminist, Queer, Crip 53–54 (2013).

56. Hannah A. Pelleboer-Gunnink, Jaap van Weeghel & Petri J.C.M. Embregts, Public Stigmatisation of People With Intellectual Disabilities: A Mixed-Method Population Survey Into Stereotypes and Their Relationship With Familiarity and Discrimination, 43 Disability & Rehab. 489, 494 (2021) (studying four primary stereotype-factors about people with IDD: "friendly," "in need of help," "unintelligent," and "nuisance" (internal quotation marks omitted)).

individual's abilities, and legal status.[57] Capacity is often understood through its inverse state, incapacity. As one court defines it:

> Incapacity is the legal status that occurs when a person's autonomy becomes either partially or totally impaired. A person lacks the ability to be autonomous . . . when he or she lacks the ability to absorb information, to understand its implications, to correctly perceive the environment, or to understand the relationship between his or her desires and actions.[58]

Capacity, then, is the ability to understand the nature and consequences of a decision, not evidence that one actually understands the nature and consequences of a particular decision.[59] There are numerous articulations of this test,[60] and it is far from a bright-line, unambiguous rule.[61]

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57. There are numerous ways to consider the concept of capacity. See, e.g., Boni-Saenz, Sexuality and Incapacity, supra note 10, at 1210 (defining legal capacity as a condition of having the "requisite legal authority to engage in autonomous decision-making"); Glen, Not Just Guardianship, supra note 5, at 30 (describing legal capacity as bearing a "critical relationship" to one's personhood because people are, "in many ways, the sum total of all the decisions (both good and bad) [they] are able to make in [their] lives"); Toomey, supra note 21, at 1076 ("If you have the cognitive abilities demanded by the law, you may make any decision you want; if you do not, your decisions will not be acknowledged by the legal system.").

58. In re Conservatorship of Groves, 109 S.W.3d 317, 328–29 (Tenn. Ct. App. 2003) (footnote omitted) (citing Leslie Pickering Francis, Decisionmaking at the End of Life: Patients With Alzheimer's or Other Dementias, 35 Ga. L. Rev. 539, 542 (2001)). Notice that even in this definition of capacity, the court appears to be assuming that a person starts as capacitated and then "becomes" incapacitated.

59. For example, in the marriage context, Kentucky courts apply a general test as to whether the disabled person understood the nature of the marriage and the duties such a relationship imposes. See, e.g., Gellert v. Busman's Adm'r, 39 S.W.2d 511, 512 (Ky. Ct. App. 1931) ("A woman who takes in roomers . . . [and] performs her duties as a wife . . . without exhibiting further evidence of unsoundness of mind than a few occasional tears, is certainly capable of understanding the nature of the marriage contract and the duties and responsibilities which it creates."). A similar articulation appears in Illinois law. See Larson v. Larson, 192 N.E.2d 594, 597 (Ill. App. Ct. 1963) ("[I]f the party possesses sufficient mental capacity to understand the nature, effect, duties, and obligations of the marriage contract into which he or she is entering, the marriage contract is binding . . . ."). In the medical context, "[d]ecisional capacity is typically defined as 'communicating a choice, understanding relevant information, appreciating the current situation and its consequences, and manipulating information rationally.'" Megan S. Wright, Resuscitating Capacity, 63 B.C. L. Rev. 887, 897 n.51 (2022) [hereinafter Wright, Resuscitating Capacity] (quoting Paul S. Appelbaum & Thomas Grisso, Assessing Patients' Capacities to Consent to Treatment, 319 NEJM 1635, 1635 (1988)).

60. See supra note 59.

61. As a Tennessee court stated in 1857:

> It is difficult to describe any exact, palpable line between legal capacity and incapacity. Perhaps this is impracticable, as an abstract thing, in reference to the ability to make a valid contract, as insanity subsists in various degrees, and the line of separation between it and mere imbecility is often faint and imperceptible. The general test is the fitness of the person to be trusted with the management of himself and his own

Capacity can also be compared to the related but distinct concepts of competency[62] and consent.[63] "[C]ompetency refers to the mental ability and cognitive capabilities required to execute a legally recognized act rationally."[64] Whereas capacity is often a medical or psychological decision, competency is a judicial decision and traditionally understood as an on/off switch.[65] Capacity, as it relates to consent, is a threshold issue: capacity must be established before a person can be determined to have consented to a given act. Indeed, in areas of sexuality, medicine, and criminal law, for one to give valid consent, one must first be determined to have capacity to consent.[66]

The modern approach to determining an individual's capacity is a "functional" one.[67] Generally, when making findings of capacity, courts concern themselves both with the specific diagnosis that an individual has—if any—and areas of their life that may require additional support.

> concerns. Such a person has a disposing, contracting mind, although it may be in a degree impaired.

Cole v. Cole, 37 Tenn. (5 Sneed) 57, 61 (1857).

62. For a concise and clear discussion of the relationship between competency and decision-making capacity in the medical context, see Megan S. Wright, More Choosers, Fewer Choices? Supported and Medical Decision-Making Law Post-*Dobbs*, 45 Pace L. Rev. 139, 142–43 (2024) [hereinafter Wright, More Choosers].

63. The primary meaning of consent is "to give assent or approval." Consent, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/consent [https://perma.cc/MH2S-8REC] (last visited Oct. 16, 2025).

64. Raphael J. Leo, Competency and the Capacity to Make Treatment Decisions: A Primer for Primary Care Physicians, 1 Prim. Care Companion J. Clinical Psych. 131, 131 (1999) https://www.psychiatrist.com/pcc/competency-capacity-treatment-decisions-primer-primary/ [https://perma.cc/9AB7-RKXH].

65. See Craig Barstow, Brian Shahan & Melissa Roberts, Evaluating Medical Decision-Making Capacity in Practice, 98 Am. Fam. Physician 40, 40 (2018) ("According to their strict definitions, lack of competence refers to global decision-making impairment (e.g., finances, property, wills), whereas lack of capacity refers to the inability to make decisions about proposed medical treatments and other aspects of care.").

66. See Elaine Craig, Capacity to Consent to Sexual Risk, 17 New Crim. L. Rev. 103, 104 (2014) (outlining factors that various jurisdictions' criminal laws consider when determining the "capacity to consent"); Martin Lyden, Assessment of Sexual Consent Capacity, 25 Sex. & Dis. 3, 5 (2007) ("An adult person has sexual consent capacity if the requisite rationality, knowledge, and voluntariness are present.").

67. Kristin Booth Glen, Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond, 44 Colum. Hum. Rts. L. Rev. 93, 94 (2012) [hereinafter Glen, Changing Paradigms] ("Under a functional approach, capacity is also seen as varying over time and with regard to specific decisions to be made."); id. at 98 (describing the functional approach as "lead[ing] to 'tailored' or limited guardianships, which represent the least restrictive means of protection, the promotion of greater autonomy for the incapacitated person, and robust procedural protections in the determination of incapacity and appointment of a guardian"). Note that, historically, capacity has been used as a form of social control for disfavored groups. For a strong analysis and argument about how this has been done, see generally Harris, Political Economy of Conservatorship, supra note 25.

Cognitive testing, such as IQ testing,[68] as well as psychological assessments play a role in a court's reasoning.[69] Courts also rely on the testimony of family members and others—often those involved in the lawsuit—to form their impressions of a given individual's maturity, relationships, and decision-making history.[70] Under the law, an adult's capacity should always be presumed.[71]

This fluid concept of capacity—understood to vary depending on context, adaptive skills, and situation—evolved in contrast to a more binary concept of capacity.[72] The distinction between the more binary, rigid rule of capacity and the more functional, fluid concept of capacity brings to mind the long-standing debate about the relative virtues of rules compared to standards.[73] Regardless of whether one considers capacity

68. Despite this reliance on IQ, a notion of capacity that is overly focused on measures of cognitive functioning may overvalue what we can learn from such measures. The American Association of Intellectual and Developmental Disability has clarified that while IQ "might be appropriate for a research study in which measured intelligence is a relevant variable," it is not meaningful when assessing how and where a person will best live and learn. AAIDD Manual, supra note 40, at 22. IQ—like other theoretically "objective" measures of intelligence or function—has been critiqued as unreliable and subjective. See, e.g., Harold W. Goldstein, Kenneth P. Yusko, Charles A. Scherbaum & Elliott C. Larson, Reducing Black–White Racial Differences on Intelligence Tests Used in Hiring for Public Safety Jobs, J. Intel., Apr. 2023, at 1, 2 ("While such tests are lauded in terms of predictive validity, they have also been disparaged for differential performance outcomes for racial/ethnic groups.").

69. See Smith & Stein, supra note 19 (noting ways that capacity assessments are used in court to disenfranchise people with IDD).

70. See infra notes 256, 268 and accompanying text. Families, of course, may not offer objective or full perspectives on some aspects of an individual's capacity. See Kevin Mintz, Ableism, Ambiguity, and the Anna Stubblefield Case, 32 Disability & Soc'y 1666, 1666–70 (2017) ("[I]t would not be unusual for the family of a man with a severe disability to have difficulty seeing him as a sexual being."). For a treatment of how similar evidence offered in the context of capacity to contract is often ableist, see Sean Scott, Contractual Incapacity and the Americans With Disabilities Act, 124 Dick. L. Rev. 253, 277–78 (2020).

71. See, e.g., Cal. Prob. Code § 810(a) (2025) ("For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions."); Haddad v. Haddad, 163 N.E.3d 406, 407 (Mass. App. Ct. 2021) (reciting the rule that, in the context of testamentary capacity, the testator is presumed to have capacity at time of will signing); In re Conservatorship of Groves, 109 S.W.3d 317, 329–30 (Tenn. Ct. App. 2003) ("Because of the importance of autonomy, it is well-settled that the law presumes that adult persons are sane, rather than insane, and capable, rather than incapable, to direct their personal affairs until satisfactory evidence to the contrary is presented." (footnotes omitted)); Glen, Not Just Guardianship, supra note 5, at 25 n.2 ("All adult persons are presumed to possess legal capacity unless and until a guardian is appointed for them.").

72. See Glen, Changing Paradigms, supra note 67, at 94 (describing earlier models of capacity as based on status, understanding "incapacity as a defect that deprived an individual of the ability—and consequently the legal right—to make choices").

73. See Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379, 400 (1985) ("[W]hen a legal dispute pits a rule against a standard, we can expect the proponent of the rule to trot out arguments about the importance of such legal virtues as certainty and stability . . . . [T]he champion of the rule will add that these virtues are best served by

assessments as standards or rules, however, it is not likely possible to escape the context of these decisions: the broader culture, including paternalist and ableist views of disability.[74] Comporting with the more modern and flexible idea of capacity, the most recent Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) marks a move away even from the word "capacity." Indeed, the UGCOPAA purposefully excludes the word "capacity" from its language.[75] As noted in explanatory comments, pursuant to the UGCOPAA, "the court is called upon to make particularized findings about the adult's individual needs in light of what the adult can and cannot do" rather than assign a binary status of capacity and incapacity.[76]

There is also an increasingly prevalent view that capacity to make decisions can be shored up—or even expanded—by external supports.[77]

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rules."); see also Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 61 (1992) ("These distinctions between rules and standards, categorization and balancing, mark a continuum, not a divide.").

74. See Schlag, supra note 73, at 407 ("There is no reason to believe that a rule or a standard supplies the context in which it is applied free from the influence of concerns external to that context."); Cass R. Sunstein, Problems With Rules, 83 Calif. L. Rev. 953, 959–60 (1995) ("Everything depends on the understandings and practices of the people who interpret the provision. Interpretive practices can convert an apparently rule-like provision into something very unrule-like.").

75. See Unif. Guardianship, Conservatorship, & Other Protective Arrangements Act § 301 cmt. (Unif. L. Comm'n 2017) ("Unlike Section 311(a) and (b) of the 1997 act, this section does not speak of capacity and incapacity.").

76. Id.; see also Third National Guardianship Summit Standards & Recommendations, 2012 Utah L. Rev. 1191, 1199 (recommending against the use of the term "incapacitated person").

77. See Megan S. Wright, Reconsidering Capacity Assessments, 52 Am. J.L. Med. (forthcoming 2026) (on file with the *Columbia Law Review*) (arguing that capacity assessments should not only include consideration of external supports but also a role for SDM). While this view is relatively new and continues to grow within the United States, it extends from the Convention of the Rights of Persons with Disabilities. See G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities (CRPD), art. 12 (Dec. 13, 2006) (stating that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" and that parties to the convention must "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity").

SDM has a much longer history and practice internationally and "is law in many countries around the globe." Leslie Francis, Intimate Relationships and Supported Decision Making, 77 Okla. L. Rev. 31, 31 (2024) [hereinafter Francis, Intimate Relationships]; see also Chester A. Finn, Matthew S. Smith & Michael Ashley Stein, How Persons With Intellectual Disabilities Are Fighting for Decision-Making Rights, 121 Current Hist. 30, 32 (2022) (listing countries that have adopted laws that enable individuals with disabilities to "get decision-making help while avoiding legal capacity restrictions"). Even internationally, however, how and when to use SDM is still being studied and debated. For example, CRPD compliance requires "abolition" of substituted decision-making whereas Australia's law continues to allow substituted decisions "only where such arrangements are necessary, as a last resort and subject to safeguards." Ron McCallum, Royal Comm'n Into Violence, Abuse, Neglect & Exploitation of People With Disability, The United Nations Convention on the

SDM is a practice, increasingly enshrined in statutory law,[78] through which individuals with intellectual, cognitive, and psychosocial disabilities can—ideally—make their own, contemporaneous decisions[79] about their lives.[80] "With supported decision making, an individual with a disability selects someone they trust to help with making decisions about healthcare, living arrangements, and other matters of consequence."[81] Scholars often describe it as "a nearly universal human experience: individuals looking to others for help when making decisions."[82]

There are some basic contours that will help to understand the process in this context. Within an SDM relationship, the person with the disability remains the "decision-maker" and others involved are

Rights of Persons With Disabilities: An Assessment of Australia's Level of Compliance 52 (2020), https://apo.org.au/node/308792 (on file with the *Columbia Law Review*) (quoting Convention on the Rights of Persons With Disabilities: Declarations and Reservations (Austl.), Mar. 30, 2007, 2515 U.N.T.S. 3).

78. Nearly half of the fifty states have now adopted legislation that legally recognizes decisions made pursuant to SDM agreements. See U.S. Supported Decision-Making Laws, Ctr. for Pub. Representation, https://supporteddecisions.org/resources-on-sdm/state-supported-decision-making-laws-and-court-decisions/ [https://perma.cc/6U4T-WDRG] (last updated Apr. 2025). For a discussion about the promise and perils of these laws, see generally Kohn, supra note 3. Some examples include La. Stat. Ann. §§ 13:4261.101–13:4261.302 (2025); N.Y. Mental Hyg. Law § 82.11 (McKinney 2025); Tex. Est. Code Ann. §§ 1357.001–1357.102 (West 2025); Wash. Rev. Code §§ 11.130.700–11.130.755 (2025).

79. Additional legal tools—including advance directive, power of attorney, medical proxy, and others—can often also assist with the autonomous decision-making, though such tools almost always involve advance planning. See Wright, Resuscitating Capacity, supra note 59, at 898. These tools can sometimes involve substituted decision-making. Id. at 919 (describing how a finding of incapacity in the healthcare setting "allows the physician to turn to a surrogate decision maker or a healthcare power of attorney to authorize a particular treatment").

80. Dinerstein, supra note 28, at 10 ("Supported decision-making can be defined as a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life."); Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, Supported Decision-Making: A Viable Alternative to Guardianship?, 117 Penn. St. L. Rev. 1111, 1120 (2013) ("As a general matter, supported decision-making occurs when an individual with cognitive challenges is the ultimate decision-maker but is provided support from one or more persons . . . .").

81. Wright, More Choosers, supra note 62, at 144. The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act defines SDM as "assistance from one or more persons of an individual's choosing in understanding the nature and consequences of potential personal and financial decisions, which enables the individual to make the decisions, and in communicating a decision once made if consistent with the individual's wishes." Unif. Guardianship, Conservatorship, & Other Protective Arrangements Act § 102(31) (Unif. L. Comm'n 2017).

82. Kohn, supra note 3, at 319; see also Finn et al., supra note 77, at 33 ("The idea is that just about everyone at some point in their lives needs or wants help when making some kinds of decisions, and therefore it follows that society should not discriminate against people because their support needs or preferences are different from those of others.").

"supporters."[83] As the decision-maker, the person with the disability retains agency and is the ultimate arbiter of the decision.[84] Indeed, one of the primary goals of SDM is preserving the autonomy of the decision-maker.[85] SDM can be accomplished through both formal and informal means,[86] and there is wide variation and diversity in the state laws recognizing SDM in one form or another.[87] Formal SDM involves written agreements between the person with a disability and their supporters, which outline the process for making decisions under the agreement and the scope—or type—of decisions that can be made under the agreement.[88] Some states have also provided for facilitated agreements, which involve training for both the decision-maker and supporters.[89] Areas of assistance include communication, information gathering, financial decisions, health care, housing, and more.[90] SDM has been lauded as morally preferable to guardianship in that it allows greater autonomy and agency for individuals, and it "can be appealing to legislatures for multiple

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83. Kristin Booth Glen, Supported Decision-Making From Theory to Practice: Further Reflections on an Intentional Pilot Project, 13 Alb. Gov't L. Rev. 94, 96 (2020) [hereinafter Glen, Supported Decision-Making] (describing why the New York pilot program in particular uses the term "Decision-Makers" for the individuals making decisions pursuant to an SDM agreement); id. at 97 (referring to those who support Decision-Makers as "supporters"); see also Francis, Intimate Relationships, supra note 77, at 31 ("Supporters support; they do not supplant the principal as decision-maker.").

84. See Francis, Intimate Relationships, supra note 77, at 35 ("Fundamental to supported decision-making statutes is ensuring that the principal remains the decision-maker . . . ."); Wright, More Choosers, supra note 62, at 144 ("Importantly, the person with the disability exercises agency and is the legal decision maker.").

85. Francis, Intimate Relationships, supra note 77, at 35.

86. See Unif. Guardianship, Conservatorship, & Other Protective Arrangements Act § 102 cmt. ("The act uses the term to apply to a variety of arrangements in which an individual is assisted by one or more persons of the individual's choosing in making and communicating decisions. These arrangements may be purely informal, or may be formalized by an agreement . . . ."); Rose Mary Bailly, Alb. L. Sch. Gov't L. Ctr., Supported Decision-Making and Supported Decision-Making Agreements 1 (2022), https://www.albanylaw.edu/sites/default/files/documents/Supported%20Decision%20Making%20Explainer%20Updated%20August%203%202022.pdf [https://perma.cc/JV8S-S679] ("Anyone who has have ever sought advice from a friend or family member before buying a car, a pair of running shoes, or even a jar of pasta sauce, has engaged in supported decision-making."); see also Kohn, supra note 3, at 317 (noting that SDM can be "entirely informal" or "formalized by an explicit agreement").

87. See Kohn, supra note 3, at 316 ("Supported decision-making can take a variety of forms. It can involve a single supporter or multiple supporters. Where multiple supporters are involved, they may work with the individual collaboratively as a group (sometimes referred to as a 'circle of support').").

88. Wright, More Choosers, supra note 62, at 145.

89. See, e.g., Kristin Booth Glen, Piloting Personhood: Reflections From the First Year of a Supported Decision-Making Project, 39 Cardozo L. Rev. 495, 496 (2017) [hereinafter Glen, Piloting Personhood] (describing a pilot program in New York state which subsequently became the basis of the New York SDM legislation).

90. Francis, Intimate Relationships, supra note 77, at 35–40.

reasons, including reducing the costs of guardianship or protecting the civil rights of persons with disabilities."[91]

Despite these benefits, the use of SDM is not without challenges. For example, one common form of support can be communicating on behalf of the decision-maker,[92] and "[a] persistent problem with support as communication is ensuring that the supporter accurately communicates what the principal wants to say."[93] In many cases in which communication support is needed, but especially in the context of cognitive disabilities, the question of whether the supporter is communicating the decision-maker's meaning may be difficult to verify.[94] The problem is more pronounced if there is the potential for a conflict of interest between the supporter and the decision-maker.[95] In the case of gathering information to assist with making a particular decision or solving a particular problem, the supporter may have biases or predispositions that lead them to focus on some information streams over others.[96] After all, "supporters are people, too, with their own desires, goals, and agency, potentially also realized in interdependence with others."[97] A related question is whether supporters should be focused on only the "means" of reaching a decision or whether, to some extent, their involvement in decisions about what "ends" is inevitable.[98] If involvement in the ends is at least sometimes unavoidable, to what degree is SDM upholding the autonomy of the decision-maker? These challenges may only be more complex in the context of intimate and sexual relationships.[99]

B. *Marriage and Disability*

This section first assesses the legal foundations of marriage and the cultural norms surrounding the institution. It next explores the historical and contemporary relationship between marriage and people with

91. Wright, More Choosers, supra note 62, at 146.

92. Francis, Intimate Relationships, supra note 77, at 36.

93. Id.

94. See id. (describing verification as "elusive").

95. Id.

96. See id. at 36–38 (discussing the complications that can arise when decisions also intimately affect supporters, as can be the case in healthcare, financial, and housing decisions).

97. Id. at 32.

98. Professor Leslie Francis argues convincingly that the "means" and "ends" of decisions cannot easily be disaggregated and that this presents especially challenging problems in the context of SDM. Francis, Intimate Relationships, supra note 77, at 40–42 ("A potential deficiency in a simple means/end model is the likelihood that ends may conflict and need to be reconciled or weighed against one another before reasoning about means can occur.").

99. Cf. Boni-Saenz, Sexuality and Incapacity, supra note 10, at 1239–40 (arguing for a rebuttable presumption against intimate partners providing support for principals in social or sexual relationships); Francis, Intimate Relationships, supra note 77, at 32 (arguing that unless they are spouses, sexual partners are inappropriate supporters in SDM relationships).

disabilities, particularly IDD, and surveys some of the present-day barriers to marriage faced by people with disabilities. Considering the role of marriage in organizing and branding the American family helps to better contextualize the meaning and impact of the statutes and judicial decisions focused on capacity and marriage explored in Part II. It also sheds light on the extent to which judicial findings of capacity may reflect idealized norms.

1. *Marriage as a Fundamental Right and Its Limits.* — Marriage is both a contract between two parties[100] and a hallowed fundamental right belonging to all citizens.[101] The Supreme Court has repeatedly discussed the import of marriage, most recently describing its "transcendent importance" and its promise of "nobility and dignity to all persons, without regard to their station in life."[102] In articulating that the right to

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100. See In re Marriage of Greenway, 158 Cal. Rptr. 3d 364, 374 (Ct. App. 2013) ("Marriage arises out of a civil contract, but courts recognize this is a special kind of contract that does not require the same level of mental capacity of the parties as other kinds of contracts.").

While it is true that marriage is a matter of contractual decision-making that allows "individuals to structure their own legal relationships," scholar Jill Elaine Hasday has critiqued the notion that family law "has shifted from status to contract." Jill Elaine Hasday, Family Law Reimagined 120–21 (2014). Hasday notes that the "normative premise of the story is that the move from status to contract is an improvement" where in fact there still exist many status rules in family law. Id. at 121, 124–28. For an early and formative view that family law provides a framework for adult bargains, see generally Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 951 (1979) ("Our primary purpose is to develop a framework within which to consider how the rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs between divorcing couples *outside* the courtroom.").

101. See Obergefell v. Hodges, 576 U.S. 644, 675 (2015). As explored more in section I.B.II, marriage can also be understood as a means of seeking "the blessing that the state can confer on relationships that meet its requirements for legitimacy." Katherine Franke, The Curious Relationship of Marriage and Freedom, *in* Marriage at the Crossroads: Law, Policy, and the Brave New World of Twenty-First-Century Families 88 (Marsha Garrison & Elizabeth S. Scott eds., 2012) (suggesting that the gay and lesbian community should have been more skeptical before seeking the state's recognition of legitimacy).

102. *Obergefell*, 576 U.S. at 656. Even before *Obergefell*, the Supreme Court had forcefully and repeatedly pronounced the rights to marriage, reproductive freedom, and family. See, e.g., Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (holding that a Virginia law that prohibited interracial marriage violated the Fourteenth Amendment); Griswold v. Connecticut, 381 U.S. 479, 485–86, (1965) (finding that a Connecticut law forbidding the use of contraceptives by married couples violated the couple's right to marital privacy); Skinner v. Oklahoma, 316 U.S. 535, 536, 541 (1942) (holding that an Oklahoma statute providing for sterilization of "habitual criminal[s]" involved rights "fundamental to the very existence" of humanity and violated the Fourteenth Amendment). More recently, in Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022), the Court rolled back the previously recognized right to abortion. Justice Clarence Thomas wrote separately in *Dobbs* to suggest that the Court should "reconsider all of [its] substantive due process precedents, including *Griswold* . . . and *Obergefell*." Id. at 2301 (Thomas, J., concurring).

Feminist scholar Janet Halley, among other scholars, has raised significant critiques of marriage as a status. See generally Janet Halley, Behind the Law of Marriage (I): From Status/Contract to the Marriage System, Unbound, 2010, at 1 (arguing that marriage as a

marry applies with equal force to same-sex couples, the Court based its finding, in part, on the concept that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[103] Indeed, the Court went so far as to suggest that the freedom to marry is actually a gateway to "other freedoms, such as expression, intimacy, and spirituality."[104]

The Court's framing of marriage as an exemplar of personal choice and autonomy has had many legal and cultural impacts.[105] From a doctrinal perspective, such framing is central to how the *Obergefell* majority determined that same-sex marriage is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.[106] From a normative perspective, it highlights how marriage—the choice of whether and whom to marry—is directly connected to an individual's autonomy and personhood.[107] By framing marriage as a "foundation of the family and of society,"[108] the decision also "reified" marriage as the center of

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status is problematically grounded in conservative, formalist logic that seeks to preserve tradition and the primacy of heterosexuality). Halley, who urges instead a vision of marriage as a set of effects, argues that the notion that marriage produces a status is an "ideological phantom." Id. at 58. Halley tells us that the insistence that marriage is a status "is not ideologically innocent," but "carries the idea that the market is free, while the family is entrenched in moral or natural command; it carries the idea that the market is the site of progress, while the family is or should be slow to change." Janet Halley, What Is Family Law?: A Genealogy Part I, 23 Yale J.L. & Humans. 1, 95 (2011).

103. *Obergefell*, 576 U.S. at 665–66 ("Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.").

104. Id. at 666.

105. The dissent, in contrast, would have found that while substantive due process might protect the right to marry, that right "does not include a right to make a State change its definition of marriage." Id. at 686 (Roberts, C.J., dissenting). For Chief Justice John Roberts, that marriage is a fundamental right does not mean that "anyone who wants to get married has a constitutional right to do so." Id. at 699. Instead, it means that states must "justify barriers to marriage *as that institution has always been understood*." Id. (emphasis added).

106. See id. at 663 (majority opinion) ("[T]hese liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."). But cf. Katherine Franke, Franke, J., Concurring in the Judgment., *in* What *Obergefell v. Hodges* Should Have Said: The Nation's Top Legal Experts Rewrite America's Same-Sex Marriage Decision 189, 189, 210 (Jack M. Balkin ed., 2020) (arguing that the Equal Protection Clause is the proper basis to uphold same-sex marriage equality); Clare Huntington, *Obergefell*'s Conservatism: Reifying Familial Fronts, 84 Fordham L. Rev. 23, 26–27 (2015) [hereinafter Huntington, *Obergefell*'s Conservatism] (characterizing the dissent's criticism of the majority "as a criticism of the Court choosing one social front over another" and arguing that *Obergefell* would have been better decided under the Equal Protection Clause).

107. See Glen, Piloting Personhood, supra note 89, at 496 ("[A]t its simplest, our personhood is the consequence of all the decisions we have made over our lives.").

108. *Obergefell*, 576 U.S. at 669 (internal quotation marks omitted) (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)). The Court also focused on the unique importance of the two-person relationship at the heart of marriage, id. at 666, and the extent to which marriage "safeguards children and families," id. at 667.

family law, further entrenching marriage as a necessary, normative element to a strong family.[109]

Before marriage was understood as a personal right, marriage laws were once an open mechanism for controlling sex,[110] cohabitation,[111] the raising of children,[112] the propagation of religious ideals,[113] and other aspects of family life.[114] Indeed, Chief Justice John Roberts has described

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109. See Huntington, *Obergefell*'s Conservatism, supra note 106, at 28–29 ("Every statement that Justice Kennedy makes for the Court can be read as an implicit criticism: a nonmarital family is *not* the keystone of the social order; it does *not* embody the ideal of family; and it is *not* essential to profound hopes and aspirations."); Melissa Murray, *Obergefell v. Hodges* and Nonmarriage Inequality, 104 Calif. L. Rev. 1207, 1240 (2016) ("In *Obergefell*, the Court promotes marriage—and only marriage—as the normative ideal for intimate life."). Note that the *Obergefell* Court's vision of the centrality of marriage, and preference for the marital family, is not new. See Courtney Megan Cahill, Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life, 54 Ariz. L. Rev. 43, 49–52 (2012) (discussing the interaction between "central kinship," meaning the "traditional 'nuclear' family," and "marginal kinship," which encompasses all "non-traditional family" structures); Serena Mayeri, Marital Supremacy and the Constitution of the Nonmarital Family, 103 Calif. L. Rev. 1277, 1279–83 (2015), https://www.californialawreview.org/online/marriage-inequality-and-the-historical-legacies-of-feminism [https://perma.cc/B3TM-Z9L5] [hereinafter Mayeri, Marital Supremacy] (discussing the ways in which "marital supremacy" interacted with cases involving illegitimacy classifications); Serena Mayeri, Marriage (In)equality and the Historical Legacies of Feminism, 6 Calif. L. Rev. Cir. 126, 134 (2015) [hereinafter Mayeri, Marriage (In)Equality] (noting how many feared *Obergefell* "reinforce[d] and entrenche[d] the legal privileging of marriage at the expense of individuals and families who cannot, or do not wish to, marry"); Alice Ristroph & Melissa Murray, Disestablishing the Family, 119 Yale L.J. 1236, 1252–64 (2010) (reviewing U.S. Supreme Court cases that reveal the centrality of the "marital model" to the Court's vision of family law).

110. See Mary Anne Case, Marriage Licenses, 89 Minn. L. Rev. 1758, 1769 (2005) ("[U]ntil quite recently, a valid marriage was the prerequisite to engaging lawfully in most any form of sexual activity: . . . criminal laws prohibited fornication and adultery[,] . . . homosexual and heterosexual oral and anal sex, bestiality, [and] even access to masturbatory aids and pornographic materials."); Melissa Murray, Marriage as Punishment, 112 Colum. L. Rev. 1, 5 (2012) (explaining the historical use of marriage as a "defense" and "punishment" for those charged with seduction of an unmarried woman).

111. See Elizabeth S. Scott, Marriage, Cohabitation and Collective Responsibility for Dependency, 2004 U. Chi. Legal F. 225, 234 (noting that "powerful moral and religious norms historically dictated that marriage was the only acceptable venue for intimacy and reproduction").

112. See Clare Huntington, Failure to Flourish: How Law Undermines Family Relationships 61 (2014) [hereinafter Huntington, Failure to Flourish] (describing the historical preference for children born within marriages and the "penaliz[ation] [of] 'illegitimate' children born to either extramarital or nonmarital partners").

113. See Case, supra note 110, at 1767 (describing the role of the established church in early English marriage laws).

114. "Without the state, there is no family, legally speaking . . . . [T]he state determines who can and cannot get married." Huntington, Failure to Flourish, supra note 112, at 59; see also Abrams et al., supra note 15, at 67 ("By limiting who may marry, lawmakers have sought to define and reinforce foundational social values relating to citizenship (including who is included and excluded from the status), morality, childrearing, race, gender, and sexuality.").

the historical right to marry as arising "to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship."[115]

In many regards, the state's use of marriage to dictate personal decision-making has changed.[116] As Professor Mary Anne Case writes,

> [A] married couple is by and large free to have or not have sex, vaginal or not, procreative, contracepted, or otherwise; to be faithful or not, to divorce and remarry, to commingle their finances or keep them separate, to live together or separately, to differentiate roles or share all tasks, to publicize their relationship or be discreet about it, while still having their commitment to one another recognized by third parties including the state.[117]

Adults are also now understood to have free choice about who to marry, though the full picture is a bit more complex. The state still has many status-based rules about who can marry,[118] such as rules prohibiting marriages between more than two people, between relatives, and involving people below certain ages.[119] Indeed, "[s]tatus rules regulating the rights of mentally disabled or mentally ill people to marry" are an example of persistent status-based rules in family law and have received "even less scrutiny" than other status-based rules.[120] The inclusion of disability on this list of status-based prohibitions on marriage itself aligns with the understanding of people with disabilities as requiring protection or, alternatively, as likely to produce biologically suspect children.[121] Such status-based regulation of those with disabilities contributes to "the mutually reinforcing nature of state-sanctioned marriage and the social understanding of marriage."[122]

2. *Marital Norms and the Self-Sufficient Family.* — Alongside legal strictures on who can marry and what constitutes a legally valid marriage, there exist strong norms around what constitutes an ideal marriage.[123]

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115. Obergefell v. Hodges, 576 U.S. 644, 689 (2015) (Roberts, C.J., dissenting).

116. See Case, supra note 110, at 1765.

117. Id.

118. Hasday, supra note 100, at 124–28.

119. Id. at 124.

120. Id. at 125.

121. See infra notes 139–153 and accompanying text (describing the historical basis for prohibitions on marriage for people with IDD and the connection to the eugenics movement); infra notes 154–159 (describing protection-based concerns surrounding the marriage of people with IDD).

122. Huntington, Failure to Flourish, supra note 112, at 61.

123. See id. (describing the "norms of loyalty, sexual faithfulness, emotional and financial sharing, and commitment" as "deeply entrenched with our understanding of marriage" (citing Elizabeth S. Scott, A World Without Marriage, 41 Fam. L.Q. 537, 547–50 (2007))). These norms have long been recognized by family law scholars. For early, formative work identifying the "dual system of family law," one for privileged, married families, and one for others, see generally Jacobus tenBroek, California's Dual System of

These norms are part of what makes marriage a "potent site of 'social statecraft.'"[124] Indeed, while the nature, purpose, and consequence of marriage are dependent on cultural,[125] religious,[126] and political[127] beliefs, normative views of the ideal marital family persist.[128] "The marital, nuclear family is one that encourages monogamy, procreation, industriousness, insularity, and—seemingly paradoxically—a certain kind of visibility."[129] Insularity, as used here, refers to the idea that "the established family is understood as a closed unit" that is financially self-sufficient and independent from the government.[130] Dependency that reaches outside of

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Family Law: Its Origin, Development, and Present Status (pts. 1–3), 16 Stan. L. Rev. 257, 900 (1964), 17 Stan. L. Rev. 614 (1965).

124. Sarah L. Swan, Constitutional Backfires Everywhere, 25 J. Const. L. 311, 313 (2023) (quoting Alyosha Goldstein, The Threat of Poverty Without Misery, Feminist Formations, Spring 2021, at 117, 121). Halley has also understood marriage and the family as an often-hidden site of economic distribution. See Janet Halley, What Is Family Law?: A Genealogy Part II, Yale J.L. & Humans. 189, 288 (2011) ("One of the costs of [family law exceptionalism] for the field of family law is its implication that the state and the market are agencies for distribution and *the family is not.* [Family law exceptionalism] carries an antidistributive bias for analysis of the family and its law.").

125. Nancy D. Polikoff, Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law 11–12 (2008) (noting that "social and cultural changes" can alter the concept of marriage).

126. Hasday, supra note 100, at 116 (describing religion as among the reasons a woman might be disinclined to divorce); Polikoff, supra note 125, at 3 (listing, as possible reasons to marry, "the spiritual, cultural, or religious meaning of marriage in their lives"); id. at 80 (describing the Christian Right marriage movement, including its goal of making divorce harder to obtain).

127. See, e.g., June Carbone & Naomi Cahn, Red v. Blue Marriage, *in* Marriage at the Crossroads 9, 9 (Marsha Garrison & Elizabeth S. Scott eds., 2012) ("[I]n the United States today, marriage is increasingly a symbol of what divides us: regionally, economically, racially, politically, and ideologically."); see also Steven L. Nock, Marriage as a Public Issue, Future Child., Fall 2005, at 13, 14, 28 (discussing current "marriage-promotion efforts" and their relation to debates about marriage throughout time); Julie Kohler, JD Vance Puts an Extremist Marriage Agenda on the Ballot, Ms. Mag. (Aug. 15, 2024), https://msmagazine.com/2024/08/15/jd-vance-extremist-marriage-agenda-childless-women/ [https://perma.cc/6YA9-723T] (discussing the "marriage promotion agenda" that exists in current Republican politics).

128. Clare Huntington, *Obergefell*'s Conservatism, supra note 106, at 24 (describing the "performative" nature of family law); see also Clare Huntington, Staging the Family, 88 N.Y.U. L. Rev. 589, 590–95 (2013) ("[P]erformative family law too often leads legal actors to accept rather than interrogate the public meaning of familial categories.").

129. Ristroph & Murray, supra note 109, at 1256–57. Visibility here refers to the idea that "the state has encouraged the view that public recognition as a family is something to be prized." Id. at 1257.

130. Id.; see also Serena Mayeri, Marital Privilege: Marriage, Inequality, and the Transformation of American Law 189 (2025) (describing how, historically, "[t]he success of challenges to marital primacy often tracked their fiscal impact: the state safely could ignore marital status when doing so helped to privatize dependence in the family"). The notion that dependency on the state is a "[m]arker of [d]eviance" exists outside of the marriage context as well, especially for those marked with "[m]ental disability, broadly defined." See Harris, Political Economy of Conservatorship, supra note 25, at 1381–82 (describing the

the family is understood as deviance.[131] The marital family is also "a site of domestication" that "discourages nonconformity and rebelliousness by encouraging discipline through dependency among family members."[132]

The idealized self-sufficient marital unit reinforces "the ideology of family responsibility for care provision."[133] Under the ideology of family responsibility, "[c]aring for family members is understood as a natural or inherent moral obligation, superior to any other form of care, such as paid home health care or institutional care."[134] Two "corollaries in public policy"[135] follow from the idea that family is the proper locus for all family provision, both of which have significant implications for households headed by adults with support needs. The first is that the government should provide care "only in cases where there is no family" or families cannot afford it.[136] The second is that "only the minimal amount of support should be provided in order to reinforce—and avoid weakening—family-based care."[137] The idea that government support for families should be minimal runs parallel to the view that adults should not marry and reproduce unless they are self-sufficient, a theme that has appeared in statutes and case law.[138] Marriages involving adults with support needs, including those with IDD, thus directly confront notions of the idealized, self-sufficient family.

3. *Intellectual Disability, Intimacy, and the Right to Marry.* — American law reflects a long-standing view that IDD is incompatible with sexual, romantic, and familial relationships.[139] While early U.S. laws held those

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history and growth of legal doctrine connecting legal incapacity, disability, and dependence on the state).

131. See Martha L.A. Fineman, Masking Dependency: The Political Role of Family Rhetoric, 81 Va. L. Rev. 2181, 2182 (1995) [hereinafter Fineman, Masking Dependency] (observing that "members of society who openly manifest the reality of dependency—either as dependents or caretakers in need of economic subsidy—are rendered deviants").

132. Ristroph & Murray, supra note 109, at 1258–59.

133. Sandra R. Levitsky, Caring for Our Own: Why There Is No Political Demand for New American Social Welfare Rights 4 (2014). "The ideology of family responsibility . . . refers to a particular set of norms and beliefs about who should be responsible for the care of society's dependent members." Id. at 4–5.

134. Id. at 5.

135. Id.

136. Id.

137. Id.; see also June Carbone & Naomi Cahn, Marriage Markets: How Inequality Is Remaking the American Family 30–32 (2014) (describing the work of political scientist Charles Murray who urged that the state cease offering economic support to single mothers as a means of restoring the consequences of marriage); Maxine Eichner, The Free-Market Family: How the Market Crushed the American Dream (and How It Can Be Restored) 178–92 (2020) (describing the history of policies and regulations that enact this ideology).

138. See infra Part II.

139. See, e.g., Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding a law forcibly sterilizing people with IDD); Chin, Group Homes as Sex Police, supra note 10, at 381 (describing how structural discrimination cuts off group home residents with IDD from sex and intimacy); see also Leslie Joan Harris, June Carbone & Rachel Rebouché, Family Law 137 (7th ed.

with and without IDD to the same standard in the context of marriage,[140] the eugenics movement led to the significant curtailment of marriage and sexual rights for people with disabilities, especially IDD. Eugenics laws were passed based on the conviction that political leaders needed to prevent the reproduction of people with IDD—then called feebleminded, imbecilic, lunatic, or insane—who were considered "defective and delinquent."[141] The leaders of the eugenics movement, though far from a majority inside the United States, were convinced "that they had a deep responsibility to protect and promote the future of civilization" from the reproduction of people with IDD, among other disabilities.[142] In passing the Virgina Sterilization Act of 1924, for example, drafters and advocates of the law "asserted that sterilization was truly humane for the individual concerned" and advocated that "the country would be enhanced if specific classes of individuals did not bear children."[143] While these classes of people were not limited to people with disabilities—indeed they included the poor, alcoholics, and other subsets—they did explicitly include people with disabilities.[144]

This cultural understanding is enshrined in Supreme Court precedent in the case of *Buck v. Bell*.[145] Despite decades of precedent upholding and clarifying parents' fundamental right to raise their children,[146] *Buck* is the sole Supreme Court case relating to the rights of

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2023) ("State restrictions on marriage by the developmentally disabled and the mentally ill may reflect a eugenic concern that found strong support during the late nineteenth and early twentieth centuries.").

140. Marissa DeBellis, Comment, A Group Home Exclusively for Married Couples With Developmental Disabilities: A Natural Next-Step, 28 Touro L. Rev. 451, 455 (2012).

141. Paul A. Lombardo, Three Generations, No Imbeciles: Eugenics, the Supreme Court, and *Buck v. Bell* 31, 36, 47 (2008) (quoting Extends Work in Eugenics, N.Y. Times, Mar. 30, 1913, at 10); see also Harris, Political Economy of Conservatorship, supra note 25, at 1382 (describing that "[m]ost states preserved, in name at least, the distinction between idiocy, lunacy, and insanity until the early twentieth century," but that most courts used the terms "interchangeably and grouped them under one proceeding" (citing Comment, Appointment of Guardians for the Mentally Incompetent, 1964 Duke L.J. 341, 342–43)).

142. Michelle Oberman, Thirteen Ways of Looking at *Buck v. Bell*: Thoughts Occasioned by Paul Lombardo's *Three Generations, No Imbeciles*, 59 J. Legal Educ. 352, 359 (2010).

143. Id. at 361.

144. See id. at 359–61 (noting how the Act enabled the sterilization of multiple groups, including those with IDD).

145. See 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

146. See, e.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."); Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (recognizing parents' rights to raise their children in their religion); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (reaffirming parents' right to "direct the upbringing and education of children"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing parents' right to "establish a home and bring up children").

adults with disabilities to have and parent children.[147] The Court found that the involuntary sterilization of a "feeble minded white woman," who had been committed in the same institution as her mother and daughter, was constitutional.[148] The Virginia state law under which Carrie Buck was sterilized allowed sterilization when a doctor determined it was in "the best interest of the patients and of society that an inmate under [their] care should be sexually sterilized."[149] Under such circumstances, the doctor "may have the operation performed upon any patient afflicted with hereditary forms of insanity[] [or] imbecility."[150] In this way, *Buck* embodies long-standing eugenic anxieties about people with IDD reproducing and "tainting the human race."[151]

By 1930, forty-one states limited marriage "based on mental disability."[152] Laws prohibiting people with IDD from getting married were based on a similar logic as those supporting involuntary sterilization.[153] Advocates for these marriage prohibitions feared that marriages involving people with IDD would result in more disabled children and, relatedly, that refusing to legally sanction such marriages would "protect[]" society from their offspring.[154] And so began an era in which—in many states—adults with psychiatric disabilities and IDD were not allowed to marry.

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147. Lorr, Disabling Families, supra note 7, at 1271. This author has previously pointed out that one other case, Lehman v. Lycoming Cnty. Child.'s Servs. Agency, 458 U.S. 502, 503 (1982), decided on jurisdictional grounds, presented a missed opportunity to "raise[] the question of what a social services agency must prove when it seeks to terminate a parent's rights based on disability." Lorr, Disabling Families, supra note 7, at 1271 n.67.

148. *Buck*, 274 U.S. at 205. Carrie Buck herself was enmeshed in an earlier iteration of the family regulation system. See Emma, Carrie, Vivian: How a Family Became a Test Case for Forced Sterilizations, Hidden Brain, NPR (Apr. 23, 2018), https://www.npr.org/transcripts/604926914 [https://perma.cc/8LMU-KEH8]. Later in her life, Buck consistently maintained that she was raped by her foster mother's nephew. See id. ("Carrie said, [my foster mother's nephew] took advantage of me. He promised me he would marry me. He forced himself on me, and then he left."). It appears likely that the rape and subsequent pregnancy—not her IQ or cognitive ability—were the reason that her foster mother sent her to the institution. Id.

149. *Buck*, 274 U.S. at 206.

150. Id.

151. Emens, Intimate Discrimination, supra note 10, at 1325.

152. Allison C. Carey, On the Margins of Citizenship: Intellectual Disability and Civil Rights in Twentieth-Century America 52 (2009). At this same time, thirty states had passed sterilization laws, and those classified as "imbeciles" or "feeble-minded" could be deported under federal immigration law. Id. (internal quotation marks omitted) (quoting Immigration Act of 1907, Pub. L. No. 59-96, ch. 1134, § 2, 34 Stat. 898, 898–99 (repealed 1917)).

153. See DeBellis, supra note 140, at 455 (describing the eugenic ideals which inspired restrictions on the right of developmentally disabled persons to marry as well as forced sterilization laws).

154. Id. at 456; see also Jonathan Matloff, Comment, Idiocy, Lunacy, and Matrimony: Exploring Constitutional Challenges to State Restrictions on Marriages of Persons With Mental Disabilities, 17 Am. U. J. Gender Soc. Pol'y & L. 497, 501–02 (2009) (noting that

4. *Other Barriers to Marriage.* — While this Essay focuses on capacity-based barriers to marriage, explored more fully in Part II, there are other barriers that also merit mention. This section considers some of those barriers—social, legal, and practical.

Some of the societal barriers to marriage for people with IDD stem, in part, from how disabled persons are represented in culture. Frequently, culture represents disabled people—especially those with IDD—as either nonsexual or hypersexual,[155] and there is widespread concern about the need to protect individuals with IDD from sexual, financial, and other forms of abuse.[156] Rates of sexual abuse and exploitation within the community of people with IDD are indeed disproportionate to members of the broader community.[157] This reality, and related concerns that a person with IDD might be more easily coerced into a marriage or more likely to be subject to abuse in a romantic relationship, may motivate governments and family members to approach marriages involving adults with IDD with unique care.[158] Likewise, there are concerns that people with IDD may make "bad decisions" that cause "self-harm."[159]

restrictions at this time reflected the belief that mental disabilities "could spread to children through procreation . . . and consequently diminish societal productivity").

155. See Chin, Structural Desexualization, supra note 10, at 1595 (describing the binary view of discourse on sexuality regarding people with intellectual and developmental disabilities); Emens, Intimate Discrimination, supra note 10, at 1325 (identifying the ways in which culture desexualizes disabled people, although noting that some representations depict disabled people as hypersexual); Garbero, supra note 6, at 601 (noting that the perceptions and opinions of the eugenics movement "find their roots in representations of disabled people as either non-sexual or hypersexual").

156. Prianka Nair, Surveilling Disability, Harming Integration, 124 Colum. L. Rev. 191, 229 & nn.210–211 (2024).

157. See Emily Ledingham, Graham W. Wright & Monika Mitra, Sexual Violence Against Women With Disabilities: Experiences With Force and Lifetime Risk, 62 Am. J. Prev. Med. 895, 897–99 (2022) ("After controlling for confounders, women with any disability type included in this study were significantly more likely to have experienced forced sex during their lifetime than nondisabled women . . . ."); Raluca Tomsa, Smaranda Gutu, Daniel Cojocaru, Belén Gutiérrez-Bermejo, Noelia Flores & Cristina Jenaro, Prevalence of Sexual Abuse in Adults With Intellectual Disability: Systematic Review and Meta-Analysis, 18 Int'l J. Env't Rsch. & Pub. Health 1980, 1989–91 (2021) (discussing the rates of sexual abuse among people with intellectual disability across different demographic groups).

158. See, e.g., Smith v. Smith, 224 So. 3d 740, 748 (Fla. 2017) (explaining that court approval is required for marriages involving those found to lack capacity to prevent abuse and exploitation). Likewise, as Professor Alexander Boni-Saenz points out, for people "whose decision-making will lead to significant harm on a consistent basis" there may be a justification to limit the right to make choices. Alexander A. Boni-Saenz, The Right to Fail, 77 Okla. L. Rev. 11, 18 (2024) [hereinafter Boni-Saenz, The Right to Fail].

159. See Boni-Saenz, The Right to Fail, supra note 158, at 17 (describing, in the broader context of those with cognitive disabilities, that a "nervousness" to allow autonomous decisions "usually stems from a concern that providing too much choice to members of this group will inevitably lead to bad decisions and self-harm"); cf. Samuel R. Bagenstos, Law and the Contradictions of the Disability Rights Movement 90–91 (2009) ("[A]ll participants in the disability rights movement have united in their opposition to paternalism—to

Research suggests, however, that concerns about protecting people with IDD have resulted in undereducation that dampens sexual expression and may actually place individuals at greater risk of abuse.[160] Research also suggests that sexual education and greater education overall may help this population to protect itself.[161] Moreover, perceived vulnerability can, by itself, contribute to devaluing the decisions of people with IDD.[162] While those who argue for higher scrutiny of marital decisions of people with IDD do so based on articulated concerns for their wellbeing, there are questions as to whether such concerns might be more precisely and usefully addressed, at least in some cases, with greater sexual education and empowerment.[163]

Another potential concern is fear that people with IDD will create babies that they themselves cannot care for.[164] Research shows that parents

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nondisabled people acting to deny opportunities to people with disabilities 'for their own good.'").

160. See Chin, Structural Desexualization, supra note 10, at 1602–04 (describing problems related to assuming vulnerability and adopting a "victim–perpetrator binary" in the context of people with disabilities).

161. See, e.g., Willi Horner-Johnson, Angela Senders, César Higgins Tejera & Marjorie G. McGee, Sexual Health Experiences Among High School Students With Disabilities, 69 J. Adolesc. Health 255, 261 (2021) ("A growing body of evidence suggests comprehensive sexuality education programs can reduce or delay sexual activity, decrease the number of sexual partners, reduce STIs, and increase the use of condoms and contraception."); Tamar Taub & Shirli Werner, Perspectives of Adolescents With Disabilities and Their Parents Regarding Autonomous Decision-Making and Self-Determination, Rsch. Dev. Dis., May 2023, at 1, 8–10 (finding, in the context of adolescents with developmental disabilities, that opportunities for autonomous decision-making are positively associated with a child's perceived competence and greater capacity for self-determination); see also Nat'l P'ship for Women & Fams. & Autistic Self Advoc. Network, Access, Autonomy, and Dignity: Comprehensive Sexuality Education for People With Disabilities 6 (2021), https://nationalpartnership.org/wp-content/uploads/2023/02/repro-disability-sexed.pdf [https://perma.cc/47WV-2SYX] ("People with disabilities need and deserve access to comprehensive, culturally competent sex ed to exercise full autonomy over their own bodies and lives on their own terms.").

162. See Nair, supra note 156, at 232 ("Given the negative associations with vulnerability—immaturity, weakness, passivity, and exploitability—'the more vulnerable a disabled person is believed to be, the less likely it is that others will treat the choices [they] make[] or opinions [they] hold[] as worthy of respect.'" (alterations in original) (quoting Jackie Leach Scully, Disability and Vulnerability: On Bodies, Dependence, and Power, *in* Vulnerability: New Essays in Ethics and Feminist Philosophy 204, 209–210 (Catriona Mackenzie, Wendy Rogers & Susan Dodds eds., 2014))).

163. For a similar argument in the context of disability-selective abortion bans, see Khiara M. Bridges, The Dysgenic State: Environmental Injustice and Disability-Selective Abortion Bans, 110 Calif. L. Rev. 297, 338–43 (2022) (describing the view, held by critics of disability-selective abortion bans, that if people are "genuinely concerned about people with disabilities, they would support measures that are known to improve the quality of the lives of people with disabilities").

164. See M. Aunos & M.A. Feldman, Attitudes Towards Sexuality, Sterilization and Parenting Rights of Persons With Intellectual Disabilities, 15 J. Appl. Rsch. Intell. Disabil. 285, 289 (2002) ("Generally, about 75% of parents surveyed were against their children

of people with IDD, in particular, may harbor this concern.[165] Likewise, in one study assessing service workers' attitudes toward the marriage of people with IDD, "[s]ome workers felt that persons with intellectual disabilities should only be allowed to marry if they agree to be sterilized."[166] But studies show that a majority of adults with IDD seek to parent,[167] and that many can and do parent,[168] especially with appropriate support.[169]

Some states take a more direct approach and, instead of focusing on capacity, outright prohibit marriage for people with mental illness and IDD. In 1955, a Pennsylvania court opined that one of three preliminary requirements for a marriage license to issue in a case involving someone with a mental affliction was that "the court must be reasonably assured that if children are born of the marriage, such children will be normal, healthy children, free from the taint of mental illness or deficiency."[170] Until 2001, Michigan law prohibited any person "adjudged insane, feeble-minded or an imbecile by a court of competent jurisdiction" from marrying.[171] From 1900 to the 1930s, feeble-mindedness, a term roughly comparable to IDD today,[172] "was linked to notions of immorality, criminality, and/or sexual promiscuity and, in turn, used as justification for institutionalizing women."[173] Marriage restrictions based on feeble-mindedness thus connect directly to racist miscegenation laws and eugenic views about disability and sexuality. Some states continue to directly prohibit marriages

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marrying and raising children; the parents felt that their children would lack the capacity to parent on their own.").

165. Id. Personal and family dynamics can play a tremendous role in the growth and development of people with IDD, including whether a person marries. See supra note 70 and accompanying text. While future work will consider the role of family members more directly, this project focuses primarily on how courts assess capacity, including reliance on family member testimony. See infra notes 256, 268 and accompanying text.

166. Aunos & Feldman, supra note 164, at 291.

167. See id. at 286–92 (collecting and reviewing studies).

168. See Lorr, Unaccommodated, supra note 11, at 1329 & n.61 (collecting sources).

169. Id. at 1330 & nn.69–70 (collecting sources). One study reported that adults with IDD who seek to become parents "preferred having a small number of children because of the costs and effort needed in raising them." Aunos & Feldman, supra note 164, at 291 (citing Henry P. David, John D. Smith & Erwin Friedman, Family Planning Services for Persons Handicapped by Mental Retardation, 66 Am. J. Pub. Health 1053, 1053–57 (1976)).

170. In re F.A. for Marriage License, 4 Pa. D. & C.2d 1, 7, 9 (Orphans' Ct. 1955).

171. Mich. Comp. Laws § 551.6 (repealed 2001). In its original formation, from 1846, the law read: "No white person shall intermarry with a negro, and no insane person or idiot shall be capable of contracting marriage." Martha A. Churchill, Marriage Laws Discriminate Against the Disabled, Mich. Bar J., Mar. 2001, at 12, 12.

172. See Carey, supra note 152, at 231 n.1 ("While 'feebleminded' roughly corresponds with intellectual disability, it contains very different assumptions, including a broader defectiveness that frequently led to delinquency and sexual deviance.").

173. Jamelia Morgan, On the Relationship Between Race and Disability, 58 Harv. C.R.-C.L. L. Rev. 663, 706 (2023) (citing Michele Goodwin, Gender, Race, and Mental Illness: The Case of Wanda Jean Allen, *in* Critical Race Feminism 228 (Adrien Katherine Wing ed., 2d ed. 2003)).

for people with mental illness and IDD[174] while others prohibit people under guardianship from marriage.[175]

Other financial barriers are baked into current law. Many of these practical barriers are often collectively described as the disability marriage penalty.[176] The disability marriage penalty refers to the set of financial penalties built into benefits programs that can connect marital status to a loss of benefits.[177] For example, people who receive Social Security Income (SSI) and Social Security Disability Insurance (SSDI)—both of which include asset limits—are penalized by marriage because, if married, their spouse's assets will be counted as their own, and they may lose access to needed benefits.[178] A similar penalty extends to people classified as

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174. As of 2014, "at least ten states impose[d] statutory prohibitions or restrictions on marriages involving a mentally disabled or mentally ill person that go beyond a basic requirement that the person be capable of consent and want to marry." Hasday, supra note 100, at 125; see also Matloff, supra note 154, at 498–99, 508 (noting that Pennsylvania, Tennessee, Vermont, West Virginia, and Guam had, as of Matloff's writing, statutes prohibiting the marriage rights of certain individuals with disabilities and arguing that marriage restrictions could serve to deter people with disabilities from attempting to apply for a license). While the laws in two of these states—Vermont and West Virginia—have been amended, others (at least Kentucky, Pennsylvania, and Tennessee) continue to directly prohibit marriages involving people with certain disabilities. See Ky. Rev. Stat. Ann. § 402.020 (West 2025) (pronouncing "prohibited and void" marriages involving "a person who has been adjudged mentally disabled by a court of competent jurisdiction"); 23 Pa. Stat. and Cons. Stat. Ann. § 1304 (2025) ("No marriage license may be issued if either of the applicants for a license is weak minded, insane, of unsound mind or is under guardianship . . . ."); Tenn. Code Ann. § 36-3-109 (2025) ("No license shall be issued when it appears that the applicants or either of them is at the time drunk, insane or an imbecile.").

175. See infra section II.B.

176. Sara Luterman, Marriage Could Mean Losing Life-Saving Benefits for People With Disabilities. So They're Protesting., The 19th (Sep. 13, 2023), https://19thnews.org/2023/09/disability-advocates-marriage-equality-commitment-ceremony/ [https://perma.cc/FK25-6W8M].

177. Id.; see also Belt, supra note 6, at 1 (describing marriage for people with disabilities as "the last marriage equality frontier"). Supplemental Security Income (SSI) is the primary program with a marriage penalty. Luterman, supra note 176. Couples can have no more than $3,000 collectively in their bank accounts to continue receiving SSI. Id. This means if one person on SSI marries someone who is financially stable and has more than $3,000 to their name, the individual with SSI will lose the benefit. Id. If two people on SSI marry, they will experience a significant restriction on their assets. Id. While a married couple can have no more than $3,000, individuals can have up to $2,000. Id. In that way, marriage requires a 25% decrease in assets. Id. Note that there was a bill before the Senate Finance Committee to increase the limits to $10,000 for an individual and $20,000 for a married couple. See SSI Savings Penalty Elimination Act, S. 2767, 118th Cong. (2023).

Note that this problem persists outside of disability law as well, with marriage penalties in existing assistance programs. See Huntington, Failure to Flourish, supra note 112, at 105 (describing the "so-called marriage penalty" built into the Earned Income Tax Credit and the Supplemental Nutrition Assistance Program). These penalties are most significant for low-income families. Id.

178. Robert E. Rains, Disability and Family Relationships: Marriage Penalties and Support Anomalies, 22 Ga. St. U. L. Rev. 561, 567 (2006) (describing how SSI recipients

Disabled Adult Children (DAC), who lose their benefits if they marry someone who does not receive SSI.[179] The same is true of people dependent on Medicaid, who may also lose their benefits after marriage.[180] These penalties discourage not only marriage but also saving money, pushing disabled people toward poverty.[181]

II. The Relationship Between Marriage and Capacity

The classic test for mental capacity to marry is similar to tests for legal capacity in other circumstances: "whether the person has the ability to understand the rights and duties of marriage."[182] But "concerns, including protecting vulnerable people from exploitation, doubts about the ability of disabled people to raise children, and eugenics are also sometimes in play in the cases."[183] And, what constitutes the "rights and duties" of marriage is deeply contested and depend upon an individual's views, goals, culture, and many other factors that are difficult to generalize.[184] Implicit in nearly every decision about whether one has capacity to marry, then, is a question of whether the persons seeking to marry share with broader society, and perhaps even the specific judge assigned to their case, the same understandings and beliefs about what constitutes "the rights and duties of marriage."[185] This opens the door to classist, racist, religious, and ableist visions of marriage each time the question of marriage capacity is raised.

Evaluating capacity in the clinical context involves a different but related set of tasks.[186] At least one set of doctors has outlined a possible means of evaluating capacity to enter a marriage contract.[187] Noting that

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who marry will face a one-third reduction in benefits; this does not apply to cohabiting couples).

179. Id. at 563–64.

180. See Garbero, supra note 6, at 603 ("Medicaid . . . eligibility is partially determined by marital status.").

181. See Joseph Shapiro, Supplemental Security Income Rules Can Limit the People the Program Is Meant to Help, NPR (June 5, 2024), https://www.npr.org/2024/06/05/nx-s1-4665841/supplemental-security-income-rules-can-limit-the-people-the-program-is-meant-to-help [https://perma.cc/PD6W-4TG2] ("One of the biggest traps is Supplemental Security Income's limit on how much you can own—$2,000. That's it. If you have a dollar more than that in savings or possessions—other than one car or your own home—you get kicked off the program.").

182. Harris et al., supra note 139, at 133.

183. Id.

184. See supra notes 126–128 and accompanying text.

185. See Harris et al., supra note 139, at 133.

186. Clinical evaluations of capacity—marital and otherwise—are useful to understand because they are frequently relied on by courts seeking to determine capacity. See, e.g., Hooten v. Jensen, 227 S.W.3d 431, 433 (Ark. Ct. App. 2006) (relying on two different medical experts to determine and define capacity to marry).

187. Anna Glezer & Jeffrey J. Devido, Evaluation of the Capacity to Marry, 45 J. Am. Acad. Psych. & L. 292, 295–96 (2017).

"there are no explicitly stated guidelines that describe an individual's decisional capacity to choose to get married," Doctors Anna Glezer and Jeffrey Devido put forward one such model to assess capacity, analogizing to the process used to evaluate capacity to make medical decisions.[188] Glezer and Devido suggest medical clinicians use "four basic elements to assessing capacity": (1) ability "to express a clear and consistent choice"; (2) ability "to understand the risks and benefits of the decision, as well as the alternatives"; (3) ability to "apply those risks, benefits, and information regarding the decision" to the specific marriage being contemplated; and (4) ability to "manipulate the relevant information rationally," meaning that there is no "cognitive or information-processing barrier preventing the patient from grasping the gravity of the decision at hand."[189] Under this proposed framework, a person "must meet all four criteria" if they are to have capacity to marry.[190] In Glezer and Devido's view, the more financial or familial implications to a given marriage, the higher the "capacity threshold" should be.[191]

There are some significant limitations to this framework's adoption in or related to court proceedings. First, Glezer and Devido are clear that their assessment is clinical, not legal.[192] Second, unlike medical procedures in which doctors are experts in the risks and benefits, knowing the panoply of risks and benefits of marriage is nearly impossible. Indeed, Glezer and Devido acknowledge such, at least as it relates to the spiritual and religious contexts.[193] Likewise, financial and familial implications may not form a fair or reasonable basis to require a higher capacity threshold. After all, when a fundamental right is concerned, is it appropriate to hinge the ability to engage the right—even in part—to one's financial background or the extent to which it may implicate other family members? Such considerations are not taken into account when assessing the ability of the vast majority of individuals seeking to marry.[194] Moreover, Glezer and

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188. Id. at 292 (citing Marlynn Wei, The Low Legal Threshold to Say "I Do", Psych. Today (Feb. 4, 2015), https://www.psychologytoday.com/us/blog/urban-survival/201502/the-low-legal-threshold-say-i-do (on file with the *Columbia Law Review*)). The criteria typically assessed for capacity to make medical treatment decisions include communication, understanding, appreciation, and reasoning. Paul S. Appelbaum & Thomas Grisso, Assessing Patients' Capacities to Consent to Treatment, 319 NEJM 1635, 1635 (1988).

189. Glezer & Devido, supra note 187, at 295–96.

190. Id. at 296.

191. Id.

192. See id. at 297 (noting the need for skilled clinicians in the assessment but recognizing that a multidisciplinary approach may work).

193. Id.

194. See, e.g., Joanna L. Grossman & Lawrence M. Friedman, Inside the Castle: Law and the Family in 20th Century America 42 (2011) (describing how in New York State "all it takes to get married is a $40 marriage license and a twenty-four-hour wait after the license is issued" and noting that "[i]n many states there is no waiting period; a couple can rush out and get married immediately").

Devido do not make mention of how SDM might change what is required for a "capacity threshold" or otherwise influence a capacity assessment.

At a more doctrinal level, the relationship between capacity and marriage is determined by statute and, when challenged, made meaningful by judicial decision. Given our federalist system, the vast majority of these decisions are governed by state statutes and made by state courts.[195] This Part first provides a broad overview of the varied—but substantially similar—state statutes governing the role of capacity in marriage.[196] It then discusses how guardianship can impact the right to marry. Next, it turns to an analysis of select judicial decisions applying those statutes. These cases provide a more meaningful sense of what marital capacity means in the situations where it has been challenged and show trends in the judicial understanding of the relationship between marriage and capacity.

A. *Statutory Rules of Marriage Capacity*

Though all fifty states link capacity and marriage, at least fifteen states understand capacity as an affirmative requirement for an entry into marriage.[197] For example, in New Jersey, "[n]o marriage license shall be issued when, at the time of making an application therefor, either applicant is a person currently adjudicated incapacitated."[198] Minnesota states the requirement in opposite terms: "A person who has attained the full age of 18 years is capable in law of contracting into a civil marriage, if otherwise competent."[199]

Statutes in the majority of states—approximately thirty-five—and Washington, D.C., consider incapacity to render a marriage void[200] or

195. Professor Courtney Joslin has argued that despite the myth of "family law localism," the federal government can and does, as a doctrinal matter, weigh in on family status. Courtney G. Joslin, Federalism and Family Status, 90 Ind. L.J. 787, 789 (2015). While this Essay acknowledges the profound role of federal legislation in shaping modern family law, id. at 805–11, it is bound by the reality that the majority of decisions related to marital capacity are issued by state courts.

196. This section is based on a review of marriage statutes in all fifty states and Washington, D.C.

197. See Ala. Code § 30-1-9.1(b)(2)(c) (2025); Ga. Code Ann. § 19-3-2(a)(1) (2025); Ind. Code Ann. § 31-11-4-11(1) (West 2025); Iowa Code § 595.3(5) (2025); Ky. Rev. Stat. Ann. § 402.020(1)(a) (West 2025); La. Civ. Code Ann. arts. 87, 93 (2025); Minn. Stat. § 517.02 (2025); Mo. Ann. Stat. § 451.020 (2025); Nev. Rev. Stat. § 122.010(1) (2025); N.J. Stat. Ann. § 37:1-9 (West 2025); N.M. Stat. Ann. § 40-1-1 (2025); Okla. Stat. tit. 43, § 1 (2025); 23 Pa. Stat. and Cons. Stat. Ann. § 1304(c) (2025); 15 R.I. Gen. Laws § 15-1-5(2) (2025); Tenn. Code Ann. § 36-3-109 (2025).

198. N.J. Stat. Ann. § 37:1-9.

199. Minn. Stat. § 517.02.

200. The following statutes consider a marriage void if a party was mentally incompetent at the time of contracting the marriage: Ga. Code Ann. § 19-3-5(a); Ind. Code Ann. § 31-11-8-4(4); Ky. Rev. Stat. Ann. § 402.020(1)(a); Mich. Comp. Laws § 552.1 (2025); Neb. Rev. Stat. § 42-103 (2025); N.C. Gen. Stat. § 51-3 (2025); 15 R.I. Gen. Laws § 15-1-5(2); Wyo. Stat.

voidable[201] or a basis to pursue a divorce or annulment.[202] For example, Illinois law states that when "a party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity," that can be a ground for a declaration of invalidity.[203] This is also true in Minnesota, though courts there have been clear that regardless of any alleged cause of incapacity or disability, "as long as the understanding and reason remain so far unaffected and unclouded that the afflicted person is cognizant of the nature and obligations of a contract entered into by him or her with another, the case is not one authorizing a decree avoiding the [marriage] contract."[204] The specific categorization of a marriage as void or voidable may not be mutually exclusive,[205] and some states that describe a marriage as void for want of capacity also specifically note it as a basis for annulment.[206] While

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Ann. § 20-2-101(a)(ii) (2025); see also Mo. Ann. Stat. § 451.020 (presumptively prohibited unless permission from court received).

201. The following statutes declare that a marriage is voidable if a party was mentally incompetent at the time of contracting the marriage: Alaska Stat. § 25.24.030(2) (2025); Ark. Code Ann. § 9-12-201 (2025); Cal. Fam. Code § 2210(c) (2025); D.C. Code § 46-403(1) (2025); Haw. Rev. Stat. Ann. § 580-21(4) (West 2025); Ind. Code Ann. § 31-11-9-2; Ky. Rev. Stat. Ann. § 403.120(1)(a); Minn. Stat. § 518.02(a); Mont. Code Ann. § 40-1-402(1)(a)(2025); N.Y. Dom. Rel. Law § 7(2) (McKinney 2025); Okla. Stat. tit. 43, § 128; Or. Rev. Stat. § 106.030 (2025); Vt. Stat. Ann. tit. 15, § 512 (2025); Va. Code § 20-45.1(B) (2025); Wash. Rev. Code § 26.04.130 (2025); W. Va. Code § 48-3-103(3)(A) (2025); see also Colo. Rev. Stat. § 14-10-111(1)(a) (2025) (allowing a declaration of "invalidity"); 750 Ill. Comp. Stat. Ann. 5/301(1) (West 2025) (same).

202. Ala. Code § 30-2-1(a)(1) (divorce); Alaska Stat. § 25.24.050(8) (divorce); Cal. Fam. Code § 2310(b) (dissolution or separation); Del. Code tit. 13, § 1506(a)(1) (2025) (annulment); D.C. Code § 16-904(d)(4) (annulment); Ga. Code Ann. § 19-5-3(2) (divorce); Idaho Code Ann. § 32-501(3) (2025) (annulment); 750 Ill. Comp. Stat. Ann. 5/301(1) (declaration of invalidity); Iowa Code § 598.29(4) (annulment); Kan. Stat. Ann. § 23-2701(a)(3) (West 2025) (divorce); Mich. Comp. Laws §§ 552.1, 552.3 (annulment); Miss. Code Ann. §§ 93-5-1, 93-7-3(b) (2025) (divorce or annulment); Nev. Rev. Stat. § 125.330(1) (annulment); N.J. Stat. Ann. § 2A:34-1(1)(d) (annulment); N.D. Cent. Code § 14-04-01(3) (2025) (annulment); Ohio Rev. Code Ann. § 3105.31(C) (2025) (annulment); 23 Pa. Stat. and Cons. Stat. Ann. §§ 3304(a)(3), 3308 (annulment or divorce); S.D. Codified Laws § 25-3-2 (2025) (annulment); Tex. Fam. Code Ann. §§ 6.108(a)(1), 6.108(b)(1) (West 2025) (annulment); Vt. Stat. Ann. tit. 15, §§ 512, 631 (annulment and divorce); Va. Code § 20-45.1(B) (divorce or annulment); Wis. Stat. & Ann. § 767.313(1)(a) (2025) (annulment); Wyo. Stat. Ann. §§ 20-2-101(a)(ii), 20-2-101(c) (annulment). Divorce and annulment have different impacts; an annulment may make a marriage void from its inception whereas a divorce does not. For a technical explanation of the difference between a divorce and annulment, see Abrams et al., supra note 15, at 201.

203. 750 Ill. Comp. Stat. Ann. 5/301(1).

204. Lewis v. Lewis, 46 N.W. 323, 323 (Minn. 1890) (denying a husband's request to annul his marriage based on his wife's alleged insanity due to kleptomania and finding no proof that she was otherwise insane or that her condition rendered her incapable of understanding or assenting to the marriage contract).

205. For example, Indiana lists marriages involving "mental incompetency" to be voidable, Ind. Code Ann. § 31-11-9-2, and those involving a "mentally incompetent" party as void, Ind. Code Ann. § 31-11-8-4.

206. See, e.g., Mich. Comp. Laws §§ 552.1, 552.3.

this review of capacity statutes focuses on incapacity related to disability, there are other bases for incapacity.[207]

Eighteen state statutes and the Washington, D.C., Code allow a third party—that is, someone outside of the marriage contract—to seek a declaration that an individual marriage is invalid.[208] Some other states make clear that only a party to the marriage, and not a third party, can seek to annul a marriage for want of capacity.[209] Regardless of the particular method, a review of statutes reveals that there are two primary threats based on incapacity to the stability of a marriage: An allegation of incapacity can be used to prevent a marriage in the first instance or as grounds to pursue some form of dissolution. These two paths to ending a marriage, embedded in marital capacity statutes, offer a unique means of disrupting a marriage permanently.

Definitions of marriage that render a marriage void or voidable based on a lack of capacity can be understood as vehicles for "[p]otential [i]mmediate and/or [d]eferred [d]eprivations" of capacity rights.[210] As scholar and former Judge Kristen Booth Glen has described:

> Laws may require a certain defined "capacity" to permit an individual to enter particular legal transactions, that is, to contract. These laws may result in an immediate deprivation of

207. For example, capacity can be age related in that minors of differing ages lack capacity to marry. Interestingly, when incapacity is age related, marriage can end incapacity in certain states. See Fla. Stat. Ann. § 743.01 (West 2025) ("The disability of nonage of a minor who is married or has been married or subsequently becomes married, including one whose marriage is dissolved, or who is widowed, or widowered, is removed."); Tex. Fam. Code Ann. § 1.104 ("Except as expressly provided by statute or by the constitution, a person, regardless of age, who has been married in accordance with the law of this state has the capacity and power of an adult, including the capacity to contract.").

208. Colo. Rev. Stat. § 14-10-111(2)(a) (2025); Del. Code tit. 13, § 1506(b)(1) (2025); D.C. Code § 46-404 (2025); Ga. Code Ann. § 19-4-3 (2025); Haw. Rev. Stat. Ann. § 580-26(West 2025); Kan. Stat. Ann. § 23-2701(b) (West 2025); Mich. Comp. Laws § 552.35; Minn. Stat. § 518.05(a) (2025); Miss. Code Ann. § 93-7-3(b) (2025); Neb. Rev. Stat. § 42-375 (2025); N.Y. Dom. Rel. Law § 140(c) (McKinney 2025); N.C. Gen. Stat. § 50-22 (2025); Ohio Rev. Code Ann. § 3105.32(C) (2025); Okla. Stat. tit. 43, § 128 (2025); S.D. Codified Laws § 25-3-2 (2025); Tex. Fam. Code Ann. § 6.108(a)(1); Vt. Stat. Ann. tit. 15, § 514(b) (2025); Wis. Stat. & Ann. § 767.313(1)(a) (2025); see also Minn. Stat. § 517.03 subdiv. 2 (requiring people under guardianship to obtain "written consent of the commissioner" to marry); Wyo. Stat. Ann. § 20-2-101(e) (2025) (providing that a guardian or "next friend" may bring an action to annul a marriage on the grounds of mental incompetency on behalf of the person deemed to lack mental capacity). Tennessee, though not by statute, also allows guardians and even next friends to intervene for the purpose of seeking an annulment. See Hunt v. Hunt, 412 S.W.2d 7, 12 (Tenn. Ct. App. 1965) (allowing a sister, as a self-appointed "next friend," to seek annulment where a guardian declined to do); see also Brown v. Watson, No. E2004-01229-COA-R3-CV, 2005 WL 1566541, at *1 (Tenn. Ct. App. July 5, 2005) (affirming annulment of marriage based on request from conservator).

209. See, e.g., Estate of Wild v. Wild, No. 12–1525, 2013 WL 2371190, at *3 (Iowa Ct. App. May 30, 2013) (unpublished table decision) (finding estate cannot sue to annul marriage because it was not a party to the marriage).

210. Glen, Not Just Guardianship, supra note 5, at 41–44 (internal quotation marks omitted).

> legal capacity by a person with [IDD], because the other party to the transaction may not be willing to deal with [them]. They may also place the long-term validity of the transaction in question, because it could subsequently be voided by a finding that the person lacked the relevant capacity at the time the transaction occurred.[211]

One benefit of marriage is lifelong commitment and stability. The very fact of voidability based on capacity denies people the right to benefit from that aspect of the institution even if they are successfully able to marry. As an example of this threatened instability in the marriage context, Glen describes how, under New York law, definitions of marriage may infringe on the rights of people with disabilities to exercise autonomy and obtain the right to marry.[212] New York law makes marriages voidable if one party is "mentally incapable of understanding the nature, effect and consequences of the marriage."[213] It also requires capacity for a marriage license to issue.[214] Thus, one party to the marriage may seek a declaration that the marriage is invalid based on an alleged prior inability to understand the marriage, or a licensing official may refuse to issue a license if the official suspects incapacity.[215] Together, these rules not only render capacity and the right to marry heavily intertwined but also destabilize the marriages of people with IDD who do marry.

B. *The Role of Guardianship*

Guardianship—itself a proceeding aimed at challenging capacity—presents special and complex circumstances for marriage.[216] Guardianship is a "legal process where a court removes some or many of the legal and decision-making rights from an individual and transfers all or some of them to another person, called a guardian or conservator."[217] Guardianship has been described as "the single and overarching legal vehicle by which a person's legal capacity may entirely—and potentially

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211. Id. at 42.

212. See id. at 54–56 (describing how New York's Domestic Relations Law can function as a deprivation of the right to marry).

213. Id. (internal quotation marks omitted) (quoting Weinberg v. Weinberg, 8 N.Y.S.2d 341, 345 (App. Div. 1938)).

214. Id.

215. See id.

216. See May v. Leneair, 297 N.W.2d 882, 885 (Mich. Ct. App. 1980) (finding that marriage of a person under guardianship or a person who has been deemed incompetent is void).

217. Nat'l Council on Disability, supra note 12, at 23; see also What Is Guardianship?, Nat'l Guardianship Ass'n, https://www.guardianship.org/what-is-guardianship/ [https://perma.cc/4CGK-PTGS] (last visited Oct. 17, 2025) ("Guardianship . . . is a legal process, utilized when a person can no longer make or communicate safe or sound decisions about his/her person and/or property or has become susceptible to fraud or undue influence.").

forever—[be] denied."[218] It can also be understood as a form of public governance, specifically "[r]isk [m]anagement."[219]

Many states require additional levels of review for individuals under guardianship to marry. For example, in Minnesota, "[d]evelopmentally disabled persons committed to the guardianship of the commissioner of human services[,] . . . in which the terms of the conservatorship limit the right to marry, may marry on receipt of written consent of the commissioner."[220] While the statute requires the commissioner to "grant consent unless it appears from the commissioner's investigation that the civil marriage is not in the best interest of the ward or conservatee and the public," it still creates an additional hurdle for those under guardianship.[221] This rule can also be understood as a safety valve for a person under guardianship whose guardian objects to a marriage for inappropriate reasons such as control or simple dislike of the intended spouses. Maine, like Minnesota, has special rules for people under guardianship to marry; there the individual under guardianship must have permission from their guardian to marry.[222] In Florida, a person under guardianship who lacks the capacity to contract must obtain court approval to marry.[223] Other states have laws that require judges who intend to take away the right to marry from an individual under guardianship to affirmatively grant the guardian power over marital decisions in a court order.[224]

Some states, such as California, have case law reflecting that a person under guardianship is not in the position of a minor and retains the right

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218. Glen, Not Just Guardianship, supra note 5, at 35 (footnote omitted).

219. Harris, Political Economy of Conservatorship, supra note 25, at 1461 (describing guardianship, referred to as conservatorship, "as a legitimate state tool within their police powers to manage difficult populations that threaten public safety").

220. Minn. Stat. § 517.03 subdiv. 2 (2025); see also In re Guardianship of Mikulanec, 356 N.W.2d 683, 688 (Minn. 1984) (noting that an individual "who has been adjudged an incompetent may contract a valid marriage if he has in fact sufficient mental capacity for that purpose" (internal quotation marks omitted) (quoting Johnson v. Johnson, 8 N.W.2d 620, 622 (Minn. 1943))).

221. Minn. Stat. § 517.03 subdiv. 2.

222. See Knight v. Radomski, 414 A.2d 1211, 1214–16 (Me. 1980) ("Because the marriage of a ward can have great impact on matters for which the guardian of his person is responsible under our statutes, it would be inconsistent . . . to permit an incompetent ward to enter effectively a contract of marriage that is not approved by the[ir] duly appointed guardian . . . .").

223. Fla. Stat. Ann. § 744.3215(2)(a) (West 2025); see also Smith v. Smith, 224 So. 3d 740, 751 (Fla. 2017) (holding that a marriage of an incapacitated person entered into without court approval is neither void nor voidable but is invalid and consent obtained retroactively will validate the marriage).

224. See, e.g., D.C. Code § 21-2047.01(6) (2025) ("A guardian shall not have the power . . . [t]o prohibit the marriage or divorce, or consent to the termination of parental rights, unless the power is expressly set forth in the order of appointment or after subsequent hearing and order of the court . . . .").

to enter into a marriage or a domestic partnership.[225] Similarly, Ohio courts recognize that "[t]he mere fact that [one] was under a guardianship would not render the marriage contract void"[226] but still find the fact that someone is under guardianship to be prima facie evidence of incapacity.[227] In Ohio, the marriage of an individual under guardianship will terminate that guardianship as to the person.[228] Likewise, in Illinois, guardianship is not an automatic bar to marriage,[229] but at least one court has required that a guardian give their consent for a ward to marry and, even if consent is given, the court will still hold a hearing to determine that the marriage is in the ward's best interest.[230] This could have the effect of leading courts to refuse marriages that seem otherwise built on genuine love and commitment based on a concern that the individual would then be without the protective care of a guardian. On the other hand, it suggests that marriage may be understood as a viable form of support for someone who might otherwise lack capacity. Still other jurisdictions find that once a court finds a person legally incapacitated and in need of guardianship, marriage is among the legal contracts that can no longer lawfully be entered.[231]

225. Cal. Prob. Code § 1900 (2025) ("The appointment of a conservator of the person or estate or both does not affect the capacity of the conservatee to marry or to enter into a registered domestic partnership."); see also Conservatorship of Navarrete, 273 Cal. Rptr. 3d 86, 95 (Ct. App. 2020) (stating that determining whether a "conservatee has capacity to marry is determined by the [same] law that would be applicable had no conservatorship been established" (internal quotation marks omitted) (quoting In re Marriage of Greenway, 158 Cal. Rptr. 3d 364, 374 (Ct. App. 2013))).

226. Dozer v. Dozer, 8 Ohio Law Abs. 507, 507 (Ct. App. 1930); see also Seabold v. Seabold, 84 N.E.2d 521, 523 (Ohio Ct. App. 1948) (noting that a guardianship alone does not make a marriage void).

227. *Dozer*, 8 Ohio Law Abs. at 507. Arkansas also follows this rule. Lovett v. Lovett, 493 S.W.2d 435, 437 (Ark. 1973). In South Carolina, an adjudication of incompetency has a similar effect; it is prima facie evidence of incapacity to marry, but the court must look at the facts at the time of the marriage to determine whether there was actual incapacity to marry. Church v. Trotter, 299 S.E.2d 332, 333 (S.C. 1983).

228. Ohio Rev. Code Ann. § 2111.45 (2025) ("The marriage of a ward shall terminate the guardianship as to the person, but not as to the estate, of the ward.").

229. Pape v. Byrd, 582 N.E.2d 164, 168 (Ill. 1991).

230. In re Estate of McDonald, 201 N.E.3d 1125, 1139 (Ill. 2022). Similarly, in Kentucky, guardians are allowed a role in divorce proceedings but must seek permission in a formal hearing to do so. Brooks by Elderserve, Inc. v. Hagerty, 614 S.W.3d 903, 914 (Ky. 2021).

231. See, e.g., Martin v. Martin, 240 A.2d 363, 365 (D.C. 1968) ("Clearly a marriage contracted by a person who has been adjudged mentally incompetent is illegal under the provisions of [the D.C. Code] . . . ."); May v. Leneair, 297 N.W.2d 882, 885 (Mich. Ct. App. 1980) (finding that the marriage of a person under guardianship or who has been deemed incompetent is void). But note the tension between the older D.C. case law and D.C.'s more recent statutory law. See D.C. Code § 21-2047.01(6) (2025) ("A guardian shall not have the power . . . [t]o prohibit the marriage or divorce . . . unless the power is expressly set forth in the order of appointment or after subsequent hearing and order of the court . . . .").

C. *Judicial Decisions on Marriage Capacity*

Relying on a limited set of publicly available cases from the last sixty years,[232] this section identifies two distinct ways that courts have approached the relationship between marriage and capacity. The cases primarily involve people with IDD rather than adults with age-related cognitive decline or psychiatric disability.[233] In the first judicial approach, described in section II.C.1, courts rely on paternalistic views of disabled adults and their decision-making—specifically in considering their prior romantic and sexual relationships, financial decision-making, and independent acts of daily living—to find a lack of capacity to marry. These cases reflect certain normative assumptions about the purpose and goals of marriage presented in Part I of this Essay, particularly the view that marital families should be self-sufficient and embody a standardized, monogamous romantic and sexual relationship between two individuals.[234] In these cases, when the couple does not live up to such norms, courts refuse to validate the existing relationship as legitimate.[235]

In contrast, in a small number of other cases, described in section II.C.2, courts have determined that because of a preexisting marriage, an adult does not require a guardianship. That is, because of support offered through a marriage, a person need not be subject to a substituted decision-making regime and can maintain their capacity as an individual. Here, too, we see courts understanding marriage as a legitimizing institution but this time as one that can actually enhance the capacity of an individual person. Comparing these two judicial approaches reveals the complex relationship between capacity and marriage, suggesting that while some courts understand the need for support as a marital disqualification, an alternative approach understands marriage as a form of support that will actually protect a person from vulnerability and expand their individual capacity.

The cases presented here come from a broad search for cases assessing whether an individual with IDD who is under guardianship has capacity to marry, as well as cases challenging one's capacity to marry. Despite the breadth of the search, research uncovered only a small number of cases. The limited number of uncovered cases is likely related to several factors. Primarily, it is nearly impossible to obtain a comprehensive view of how courts apply the marriage-capacity standards described above because so many decisions regarding the rights of people with IDD are made outside of public view. Courts frequently make capacity

232. See supra note 22 for an explanation about the selection of this time period.

233. See supra notes 19–21 and accompanying text (explaining the decision to focus primarily on people with IDD). The decision to focus on cases involving IDD further limited the set of cases available for assessment.

234. See supra notes 123–137 and accompanying text.

235. Cf. Franke, Wedlocked, supra note 30, at 143 ("Surely, exclusion from the institution of marriage inflicts a subordinating harm on those excluded.").

decisions in closed proceedings, often in the name of privacy or the "best interests" of the person alleged to lack capacity.[236] For example, one study of guardianship statutes found that twenty percent of states have presumptively closed proceedings.[237] Even when statutes may allow for open proceedings, such decisions are often not published or occur without notice to even the subjects of the proceeding.[238] While concerns about privacy protection may appear appropriate, inaccessible proceedings and case law lack transparency and accountability.[239] Second, numerous marriage and capacity decisions are likely decided informally among family members and guardians without ever reaching court. After all, it requires both the motivation and relative sophistication of at least one party to reach court and people with disabilities often face additional hurdles.[240]

Notwithstanding the extreme difficulty of uncovering what courts are doing in these situations[241] and the paucity of information about judicial

236. See Harris, Processing Disability, supra note 12, at 504–07 (providing a detailed analysis of how, in states where guardianship proceedings are not entirely closed, claims of privacy, protection, and "best interests" work to maintain closed court rooms in these proceedings).

237. In 2014, scholar Jasmine Harris found that "[a] majority of states appear to presumptively close minor guardianship proceedings" and that, as to "authority over the adult as opposed to conservatorship or minor guardianship proceedings," there is "[a] clear presumption of closure" in approximately twenty percent of states. Id. at 504 n.195; see also Harris, Political Economy of Conservatorship, supra note 25, at 1448 ("One major barrier to better understanding the nature of guardianship today is the absence of data and publicity . . . .").

238. See Harris, Processing Disability, supra note 12, at 504–07 ("In fact, most guardianship hearings proceed uncontested, with the majority of guardians appointed without the respondent present."). In addition, multiple practitioners in different states confirmed their experience with closed courts and unpublished decisions. See, e.g., Telephone Interview With Will Hack, Staff Att'y, Mo. Prot. & Advoc. Servs. (Aug. 7, 2024) (on file with the *Columbia Law Review*) (discussing that there are very few published guardianship cases); Telephone Interview With Sharon Krevor-Weisbaum, Managing Partner, Brown Goldstein & Levy (Aug. 6, 2024) (on file with the *Columbia Law Review*) (noting that many guardianship cases are closed and most decisions are unpublished); Telephone Interview With Morgan Whitlatch, Dir. Supported Decision-Making Initiatives, Ctr. for Pub. Representation (Aug. 9, 2024) (on file with the *Columbia Law Review*) (noting the lack of reported cases).

239. See Harris, Processing Disability, supra note 12, at 504 & n.195 (comparing the "significant presumption of openness" in most state court proceedings with the reality of guardianship); id. at 511 (describing "significant opportunities for an antistigma agency" in open guardianship proceedings).

240. See Qudsiya Naqui, Advancing Equal Access to Justice for Americans With Disabilities: Moving Towards Closing the Justice Gap on the 33rd Anniversary of the ADA, Off. for Access to Just., DOJ (July 26, 2023), https://www.justice.gov/archives/atj/blog/advancing-equal-access-justice-americans-disabilities-moving-towards-closing-justice-gap [https://perma.cc/UBU9-GCCL] (last updated Jan. 20, 2025) (describing various barriers faced by people with disabilities in accessing the courts).

241. The secrecy surrounding these decisions contrasts with the surveillance many of these same individuals with disabilities are likely to experience. See generally Nair, supra

approaches to these questions, the small number of publicly available cases that do exist reveal two strains of decisions that shed light on how courts and litigants understand the relationship between capacity and marriage. Understanding what courts consider when making a capacity determination helps to elucidate why the law requires "capacity to marry" and what, in the institution of marriage, the law seeks to protect by requiring entrants have a capacity to marry. The cases discussed here reveal how judicial decisions arising from the marriage context both idealize the value of marriage and hold people with certain disabilities to unrealistic and unattainable standards before allowing them to marry.

1. *Lack of Capacity as Barrier to Marriage.* — In some cases, courts rely on prior behavior or evidence about decision-making skills that appear disconnected from the question of whether the person alleged to lack capacity understood the nature and consequences of a decision to marry. These decisions rely on stereotypes and dwell on concerns that would never be raised in marriages in which capacity has not been challenged. They reveal courts in a protective posture in which their goal appears to be to *protect people from* the institution of marriage or, alternatively, to *protect the institution of marriage from these participants.* The decisions are notable especially in contrast to the view of capacity identified in section II.C.2, which appears to understand the institution of marriage as a *means of protection* for the people involved.

One strain of cases involves findings or allegations that hold people with IDD to ideal marriage norms—standards never applied to most couples seeking to marry. For example, in *In re Guardianship of Kindell*, a 2022 case, the Ohio Court of Appeals used a person's history of romantic infidelity and poor money management to preclude her from marrying.[242] The court found that the petitioner lacked the understanding of what it means to enter into a marriage and therefore was precluded from entering into a marital contract.[243] In reaching this conclusion, the court noted that "Kindell testified that she understood what marriage means. She explained that she could not cheat on her husband, they would combine their money, and they would support each other when one of them was sick."[244] Additionally, "[b]oth she and Tackett noted that they wanted to be consistent with the Bible's teachings."[245] Nonetheless, because Kindell had also testified to previously cheating on her proposed spouse, Tackett, not managing money well, and having trouble maintaining a clean home (to the point of eviction) when previously living with Tackett, the appellate court agreed with the trial court's finding that Kindell "failed to establish

note 156 (critiquing the surveillance and scrutiny to which people with disabilities are often subject).

242. 197 N.E.3d 1004, 1013 (Ohio Ct. App. 2022).

243. Id.

244. Id.

245. Id.

that she has the capacity and understanding to enter into a marriage contract."[246]

In *Juhl v. Jacobsen*, the Iowa Court of Appeals also relied on marital norms, along with prior sexual and romantic decisions. Though Juhl did not have a lifelong diagnosis of IDD, he was diagnosed with "frontal lobe syndrome and organic brain syndrome" after experiencing hypoxia during an open-heart surgery.[247] In *Juhl*, the court affirmed a specific finding that Milford Juhl lacked the capacity to marry.[248] In reaching this conclusion, the court did not offer a statement about the appropriate legal standard to be used in determining capacity to marry. Instead, the court considered that "Milford [Juhl] appears to enjoy reasonably good cognitive ability" but that he has "frequently exercised very poor and sometimes inappropriate judgment [in] decisions concerning personal relationships with others, and the spending of money."[249] In its fact-intensive decision, the court focused on Juhl's low executive functioning, inability to learn from mistakes, and inability to dispense and manage his own medication.[250] Regarding romantic relationships, the court noted, "Juhl has also pursued relationships with various women, asking three different women to cohabitate with him over the past three or four months. Apparently, Juhl's loneliness and impairment of his good judgment result in him making quick decisions to cohabitate with women acquaintances."[251]

The *Juhl* case is also an example of how courts rely on concerns related to financial and medical decision-making.[252] In finding that Juhl lacked capacity to marry, the court considered both prior financial decisions and Juhl's inability to dispense his own medication.[253] This is notable especially when one considers that spouses can frequently play a moderating

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246. Id. (internal quotation marks omitted) (quoting In re Guardianship of Krista Kindell, No. 80434, at *2 (Ohio Com. Pl. Feb. 28, 2022)).

247. Juhl v. Jacobsen, Nos. 0-644, 00-0195, 2001 WL 22919, at *1 (Iowa Ct. App. Jan. 10, 2001). The case is included here because the court's capacity decision came after Mr. Juhl "was given several different tests to examine different types of intellectual functioning" and because, as in cases involving IDD, the court was concerned primarily with "problem solving and judgment" rather than comparing Mr. Juhl's present decision-making to his past self. See id. at *1–2.

248. Id.

249. Id.

250. Id.

251. Id.

252. Id.; see also Conservatorship of Johnson, No. C0-94-2227, 1995 WL 321365, at *1 (Minn. Ct. App. May 30, 1995) (appointing guardian and finding lack of capacity to marry based on financial reasons in a case not involving IDD). There are also much older cases showing a history of considering financial decision-making as a reason to disallow marriage. See Johnson v. Kincade, 37 N.C. (2 Ired. Eq.) 470, 472 (1843) (highlighting Johnson's ignorance of the dollar as one consideration in determining competency); cf. Crump v. Morgan, 38 N.C. (3 Ired. Eq.) 91, 95 (1843) (highlighting a woman's inability to conduct household affairs as a reason for her incompetency).

253. *Juhl*, 2001 WL 22919, at *2.

influence in spending decisions and can very likely assist with medication management as well. If a spouse could not assist with medication management, other supports—including, for example, Medicaid Home and Community-Based Services waiver programs—could help to play these roles.[254] A representative payee can monitor finances for Supplemental Security Income recipients.[255]

Arguments appearing in other cases reflect similar logic. In *In re Guardianship of O'Brien*, appellant Michael O'Brien, a twenty-seven-year-old man, sought to marry against the wishes of his guardians, who were also his parents.[256] O'Brien, who had been diagnosed with "Fetal Alcohol Syndrome (FAS), ADHD, Bipolar Disorder, Mild Mental Retardation," and an unspecified cognitive disorder, moved for a judgment that he had the right to marry his girlfriend.[257] O'Brien's IQ was seventy-one, and it was reported that he "functions day-to-day at a level that is below his IQ . . . because of his other cognitive deficits, difficulties with judgment, poor learning from experience, etc."[258]

A psychiatrist reported that O'Brien had "very low adaptive capacity" and was "largely unable to function independently."[259] The report further noted that O'Brien had "an increased likelihood of engaging in dangerous behavior" and "placed himself in compromising situations during which he [became] sexually aggressive towards women."[260] His parents testified that they believed their son didn't comprehend what marriage was, that

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254. See 42 U.S.C. § 1396n(c) (2018). The HCBS waiver program allows states to provide home and community-based services so that people can live within the community rather than in an institution. Home & Community-Based Services 1915(c), Medicaid.gov, https://www.medicaid.gov/medicaid/home-community-based-services/home-community-based-services-authorities/home-community-based-services-1915c/ [https://perma.cc/9Z72-DPWN] (last visited Oct. 18, 2025).

255. Understanding Supplemental Security Income Representative Payee Program: 2025 Edition, SSA, https://www.ssa.gov/ssi/text-repayee-ussi.htm [https://perma.cc/DE9Q-V3Q2] (last visited Oct. 18, 2025).

256. 847 N.W.2d 710, 712 (Minn. Ct. App. 2014). For a similar case in which a court rejected allegations of lack of capacity to marry based, in part, on the individual's diagnoses, his tendency to "dress[] with carelessness," his "clothing . . . often [being] covered with particles of undigested food and spilled drink," his physical disability, and other detailed allegations, see Hunt v. Hunt, 412 S.W.2d 7, 12–14 (Tenn. Ct. App. 1965). The court in *Hunt* reasoned that "[e]ven though the complainant below, Charles E. Hunt, Jr. was handicapped both physically and mentally, we are convinced that he did understand the nature of the marital contract, the benefits, obligations and respon-sibilities ensuing therefrom; that he entered into the contract knowingly and willingly." Id. at 17.

257. *In re O'Brien*, 847 N.W.2d at 711–12 (internal quotation marks omitted).

258. Id. (alteration in original) (internal quotation marks omitted) (quoting an undated psychiatrist's letter).

259. Id. at 713 (internal quotation marks omitted) (quoting 2011 Psychiatric Evaluation of Michael O'Brien).

260. Id. (internal quotation marks omitted) (quoting 2011 Psychiatric Evaluation of Michael O'Brien).

he lacked the maturity to make conscious decisions to that effect, and that his medication might have interfered with his capacity to get married.[261]

This case is remarkable because, though the court considered these arguments against capacity, and O'Brien's parents based their arguments on his diagnosis and prior romantic behavior, the court found that there were not sufficient findings to demonstrate that O'Brien lacked capacity to marry.[262] In reversing and remanding to the trial court, the court noted that "Minnesota law explicitly protects the right of wards to marry, unless barred by specific provisions of their guardianship."[263] The appellate court found error in the lower court's focus on O'Brien's behavioral history, as opposed to his "mental capacity to comprehend the meaning, rights, or obligations of marriage."[264] In this way, O'Brien's case offers an example of a court pushing back against some of the apparently unrelated behaviors that the courts in *Juhl* and *Kindell* relied on to find a lack of marital capacity.[265]

Together, though, the cases show the way diagnosis and sexual history can be used in tandem to argue against marital capacity in ways that would surely never arise in the context of typical marriages. Indeed, in the majority of cases in which permission to marry is obtained by application for a license to marry,[266] there would be no opportunity to raise questions of prior sexual or romantic history.

2. *Marriage as Capacity Enhancing*. — Some courts take a different approach to questions about marriage and capacity. These courts have declined to implement and even terminated guardianships because an individual's alleged lack of decision-making capacity was mitigated by the fact that they were married. The consistent presence of their spouse in their daily life meant that their daily affairs could be managed without the need for a guardian.

The New York case of *In re Guardianship of Dameris L.* exemplifies how a court can use the support a person with IDD can obtain through marriage to avoid imposing a guardianship.[267] Dameris's mother, Cruz

261. Id. at 712–13.

262. See id. at 716.

263. Id. at 714. The court went on to say that "[a]ny limitation on a ward's right to marry must therefore be supported by findings focused specifically on whether 'a person clearly is incapacitated *with respect to choosing a spouse*.'" Id. at 715 (quoting In re Guardianship of Mikulanec, 356 N.W.2d 683, 688 (Minn. 2014)).

264. Id. at 715–16.

265. An older Missouri court, in *Sheffield v. Andrews*, relied on similar logic to that of *O'Brien*. The *Sheffield* court articulated that "[i]t is possible for an individual to be able to understand that he is being married and to be knowledgeable as to the effects and consequences of such a relationship, and still not be able to wisely manage his property and business affairs." Sheffield v. Andrews, 440 S.W.2d. 175, 179 (Mo. Ct. App. 1969).

266. See supra note 194 and accompanying text.

267. 956 N.Y.S.2d 848, 853, 855–56 (Sur. Ct. N.Y. Cnty. 2012). Dameris L.'s case has been cited widely in legal scholarship, more frequently as an example of how international and "human rights norms" can shape courts' decisions. See, e.g., Eilionóir Flynn & Anna

Maria S., filed a petition for guardianship in March 2009.[268] At the time, Dameris was twenty-nine years old, had a diagnosis of "mild to moderate mental retardation," and was described as having "poor receptive and expressive skills" and being "highly dependent" on others for medical and financial decision-making.[269] Twenty days later, and before the court could make a determination on the guardianship case, Dameris married Alberto R.[270] Cruz did not approve of Alberto—he had "a history of drug and substance abuse, mental illness and criminal charges."[271]

About two months later, Cruz returned to court seeking expedited resolution of her case because Dameris was pregnant. After a day-long mediation that the court characterized as a "struggle over control of Dameris," the parties agreed that Alberto and Cruz would be appointed co-guardians.[272]

Dameris had a baby girl, and, for a time, she and Alberto lived in transitional housing where they received support from a homemaker service.[273] Soon, however, the family faced eviction and relocated—with the authorization of the court but without the consent of Cruz—to Pennsylvania.[274] At this time, the court temporarily suspended Cruz's role as guardian.[275] After the move, Alberto and Dameris developed relationships with Alberto's cousin and his wife and connected with social

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Arstein-Kerslake, The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?, 32 Berkeley J. Int'l L. 124, 138–39 (2014) (explaining the court's decision in *Dameris* as a method of upholding and promoting international human rights norms); Kristen Booth Glen, Introducing a "New" Human Right: Learning From Others, Bringing Legal Capacity Home, Colum. Hum. Rts. L. Rev., Spring 2018, at 1, 10–11 & n.36 (2018) (mentioning *Dameris* as an early adoption of supported decision-making in United States case law); Michael L. Perlin & Naomi M. Weinstein, "There's Voices in the Night Trying to Be Heard": The Potential Impact of the Convention on the Rights of Persons With Disabilities on Domestic Mental Disability Law, 84 Brook. L. Rev. 873, 891 & n.114–115 (2019) (using *Dameris* as evidence that the Convention on the Rights of Persons with Disabilities has been given persuasive weight in New York state courts).

268. *Dameris L.*, 956 N.Y.S.2d at 849.

269. Id. at 849–50 (internal quotation marks omitted).

270. Id. at 850.

271. Id.

272. Id.

273. Id. at 850–51. Homemaking is defined as "a short-term specialized service provided to families in their homes to support their efforts to maintain household operations during periods of stress or crisis. A homemaker can teach child care and household management techniques . . . to strengthen the family and prevent the need for foster care placement or re-placement." Admin. for Child.'s Servs., City of N.Y., Homemaking Services Authorization Procedure 4 (2016), https://www.nyc.gov/assets/acs/policies/init/2016/G.pdf [https://perma.cc/NW6B-V9R5].

274. *Dameris L.*, 956 N.Y.S.2d at 851.

275. Id.

services agencies in their new community.[276] They lived with their baby and another child of Alberto's and even became pregnant again.[277]

Nearly three years later, the parties again appeared before the New York Surrogate's Court. Based on the network of support surrounding the family, particularly Alberto and his sister-in-law, the court terminated Alberto's guardianship over Dameris.[278] The court described: "[T]here is now a system of supported decision making in place that constitutes a less restrictive alternate to the Draconian loss of liberty entailed by a plenary . . . guardianship."[279]

In reaching this decision, the court discussed Dameris's connections to her broader community, including family, neighbors, and a social worker. Significantly, it also invoked Dameris's relationship to her husband: "Alberto had shown remarkable resiliency and perseverance settling his family . . . . His relationship to Dameris, while always loving, had clearly evolved, and they now presented as far more of a partnership than as a guardian and his ward."[280] Doctrinally, the decision was based both on substantive due process principles[281] and Article 12 of the United Nations Convention on the Rights of Persons with Disabilities.[282]

An Iowa case, *In re F.W.*, offers another example.[283] There, in a case involving age-related decline, the court terminated a guardianship partly because the court recognized that the allegedly impaired decision-making capacity of F.W. was mitigated by the fact that he was married and able to rely on additional supports.[284] The presence of his spouse in his daily life meant that his daily affairs could be managed without the need for a guardian.[285] Though the *F.W.* court did not rely on international law, Iowa law does require courts to "consider credible evidence as to whether there are other less restrictive alternatives, including third-party assistance, that would meet the needs" of the person alleged to require a guardian.[286]

276. Id.

277. Id. at 851–52.

278. Id. at 853.

279. Id. A detailed discussion of New York's guardianship regime under S.C.P.A. Article 17-A is beyond the scope of this Essay, but it has been the subject of substantial and sustained critique. See generally Mental Health L. Comm. & Disability L. Comm. of the N.Y.C. Bar Ass'n, Revisiting S.C.P.A. 17-A: Guardianship for People With Intellectual and Developmental Disabilities, 18 CUNY L. Rev. 287 (2015) (critiquing the Article 17-A guardianship framework and proposing reforms informed by disability rights principles).

280. *Dameris L.*, 956 N.Y.S.2d at 852.

281. Id. at 853–54.

282. Id. at 855–56; see also supra note 28.

283. No. 11-1574, 2012 WL 5355801, at *1 (Iowa Ct. App. Oct. 31, 2012) (unpublished table decision).

284. Id. at *6–7.

285. See id. at *6 ("B.W. has failed to prove that F.W. is not able to care for his personal safety or provide his necessities for life, particularly with the assistance available to him from his wife and employees.").

286. Iowa Code § 633.551(4) (2025).

Relatedly, other courts have considered the overall supports in a person's life, along with a future desire to marry, as a reason to deny guardianship.[287]

Cases like *Dameris L.* and *F.W.* view the relationship of marriage and capacity from a nearly opposite perspective as those in which a lack of capacity lead a court to block a marriage. Rather than focusing on the ways an individual requires support or deviates from normative expectations about participants in marriage, *Dameris L.* and *F.W.* show courts looking at the supportive potential of marriage and the extent to which the marital relationship itself can expand an individual's personhood and autonomy.

III. Toward a More Expansive Notion of Capacity

This Part begins by analyzing and critiquing the judicial decisions that connect capacity to marry with prior behavior related to sexuality, relationships, or financial or medical decision-making. These decisions, described in section II.C.1, tend to rely—often implicitly—on normative views of marriage and IDD rather than on one's actual ability to understand the nature and consequences of the decision to marry. Next, this Part offers pathways for litigators and courts to limit the role of ableism and the imposition of normative views of marriage in capacity decisions. Finally, this Part discusses the importance of moving towards an understanding of marriage as a potential means of expanding capacity. In this regard, it offers SDM as a potential tool to expand notions of marital capacity. Courts, litigators, and those who work with and support adults with IDD must offer sexual and romantic education to people with IDD and connect them to circles of support such that safe, meaningful, and capacity-expanding marriages can be available to those adults who want them.

A. *Critiquing Normative Conceptions of Capacity*

This section explores the impact of a marital capacity doctrine that considers sexual and romantic relationships, or medical and financial decision-making, as indicia of one's "ability to understand the rights and duties of marriage."[288] It argues that when courts consider factors beyond an individual's ability to understand the nature and consequences of a marriage, courts render capacity a vehicle for biased and subjective views

287. See, e.g., In re Eli T., 89 N.Y.S.3d 844, 847 (Sur. Ct. King's Cnty. 2018) (considering the alleged incapacitated person's desire to marry as a factor in rejecting a guardianship application); In re D.D., 19 N.Y.S.3d 867, 875 (Sur. Ct. King's Cnty. 2015) ("The loving and supportive environment in which D.D. is enveloped has enabled him to thrive despite his limitations."). *In re D.D.* is notable because the potential guardian of D.D. objected to the marriage on the concerning grounds that any child born to D.D. and his girlfriend would have Down Syndrome and because she did not believe that they would be capable of caring for the child. Id. at 873.

288. See Harris et al., supra note 139, at 133.

about people with IDD. This view of marital capacity is especially problematic given that courts are only called upon to apply it when third parties or guardians avail themselves of state statutes to challenge an existing or desired marriage of someone alleged to lack marital capacity.[289] Indeed, there is no parallel test for the vast majority of people entering marriage.[290]

Kindell is an example of a court holding a person with IDD to the normative ideal of monogamy in marriage and disqualifying her from marriage based on a prior history of nonmonogamy,[291] despite her ability to evince an understanding of marriage consistent with even the most traditional terms.[292] Similarly, in determining that Juhl lacked capacity to marry, the court focused not on Juhl's "cognitive ability," which the court described as "reasonably good," but rather on prior romantic and financial decisions.[293] The court's focus on how many women he had previously pursued,[294] and the speed of these decisions,[295] appears to be based on an understanding of the marital family as monogamous and conforming to romantic social norms.[296] And the notion that Juhl's prior financial decisions should be a factor in assessing capacity, connects to the notion that a family should have "financial independence" and function "relatively autonomously of the state."[297]

In *O'Brien*, the court appropriately focused on O'Brien's understanding of marriage, even though his family—those seeking a finding that he lacked capacity—focused on his diagnosis and, again, on prior sexual decisions. The focus on diagnosis and IQ suggests reliance on older tropes that IDD is inconsistent with marriage and intimacy.[298] His parents also focused on his numerous support needs, relying again on the notion that marriage requires self-sufficiency and suggesting that a marriage should not be allowed if one member will require significant external support.[299]

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289. See supra note 194 (describing a New York marriage licensure process).

290. See supra note 194 and accompanying text.

291. In re Guardianship of Kindell, 197 N.E.3d 1004, 1008 (Ohio Ct. App. 2022).

292. "She explained that she could not cheat on her husband, they would combine their money, and they would support each other when one of them was sick. Both she and Tackett noted that they wanted to be consistent with the Bible's teachings." Id. at 1013.

293. Juhl v. Jacobsen, Nos. 0-644, 00-0195, 2001 WL 22919, at *1–2 (Iowa Ct. App. Jan. 10, 2001).

294. Id. at *2.

295. Id.

296. See Ristroph & Murray, supra note 109, at 1256–57 ("The marital model that emerges in the case law reflects several specific—and contestable—normative preferences.").

297. Id. at 1257.

298. See supra section I.B.3.

299. An examining psychiatrist reported that O'Brien had "very low adaptive capacity" and was "largely unable to function independently." *In re Guardianship of O'Brien*, 847 N.W.2d 710, 713 (Minn. Ct. App. 2014).

In addition to upholding norms of marital self-sufficiency and monogamy, these decisions have the effect of excluding people with disabilities from the institution of marriage. These cases also have the unfortunate impact of screening out potentially supportive and meaningful partnerships based on practical concerns that would not be raised or considered but for the disability status of the individual(s) involved.[300] Indeed, "both individuals with and without cognitive impairments make irrational choices that bring harm to themselves, making the line between people with and without cognitive impairments blurry."[301] And while there are domains in which adults with IDD are more likely to need support than other adults,[302] courts that prevent people with certain disabilities from marrying are paradoxically denying them a primary form of support. While marriage itself is not a necessary part of a supportive relationship, nor does it per se offer unique capacity enhancing qualities, it is prized as a particularly stable and protected form of intimate relationship.

While there may indeed be reasons for caution when certain persons with IDD seek to marry or begin an intimate relationship,[303] the broad range of experiences for people with IDD cautions against considering this group uniformly. This vision of capacity appears to be protecting the institution of marriage as much as, if not more than, the individuals alleged to lack capacity. Moreover, there is a large gap between a person who cannot express volition or communicate a desire to partner and marry, that is, someone who might truly lack the capacity to marry, and a person who has behaved in a way that a court or family member understands to be contrary to marital ideals, but who is able to describe why and whom they would like to marry.

B. *Limiting Ableism in Capacity Decisions*

This section offers a modest proposal to limit the most harmful effects of the current application of the capacity doctrine. Rather than focusing on prior behavior or medical diagnosis, courts should ask only the narrowest question when it comes to capacity—does this person understand the nature and consequences of the decision to marry? This

300. See Boni-Saenz, The Right to Fail, supra note 158, at 17–18 (discussing how common "bad choices" are treated differently and hold greater consequences when made by someone with a cognitive disability).

301. Id. at 18.

302. RahKyung Kim & Stacy K. Dymond, What Skills Are Critical for Living in Supported Apartments and Small Group Homes?, 32 J. Dev. & Phys. Dis. 665, 665–66 (2020) ("While many individuals [with IDD] live independently with support from family and friends, some require additional support from paid service providers. It is estimated that approximately 17% of individuals with IDD in the United States receive long-term services and supports from state IDD agencies.").

303. See supra notes 155–159 and accompanying text (describing motivations to approach marital and romantic choice for people with IDD with caution).

inquiry should use the same approach as the *O'Brien* court and look at an individual's understanding, rather than an assessment of an individual's disability or prior behavior.[304]

Courts, family members of people with IDD, and advocates must not reflexively conclude that an individual's prior nonmonogamous behavior means they lack understanding of the meaning or import of marriage.[305] This will doubtless require nuanced, time-intensive consideration by courts and careful advocacy by lawyers for individuals with disabilities, but it is exactly the sort of analysis courts are well positioned to make. It is also the kind of fact-sensitive inquiry that courts are already engaged in, albeit with a narrower focus.[306] When an individual alleges that another person lacks marital capacity based on prior nonmonogamous behavior, courts need to be rigorous in focusing only on what someone can communicate regarding their own comprehension. Whether someone has previously been unfaithful—or indeed may be unfaithful again in the future—has little bearing on whether they understand the fidelity demanded in a traditional, idealized marriage, or whether they share that conception of marriage in the first place. Moreover, in a country where an estimated twenty to forty percent of married individuals engage in extramarital relationships of one kind or another,[307] to insist that individuals with IDD must be faithful, and must always have been faithful, is to hold these adults to a standard not imposed on other adults.[308]

The consideration of financial decision-making and comprehension presents a harder question. After all, it is difficult to disentangle the role of marriage in protecting and enshrining property rights,[309] and failing to consider the many financial impacts of marriage would be an oversight.[310] Denying marriage to those who are not financially literate or who have

304. See 847 N.W.2d at 715 ("[W]e hold that the standard for a ward's competency to marry is that he understands the meaning, rights, and obligations of marriage.").

305. Cf. Elizabeth F. Emens, Monogamy's Law: Compulsory Monogamy and Polyamorous Existence, 29 N.Y.U. Rev. L. & Soc. Change 277, 281 (2004) (engaging with, among other questions, "the larger puzzle of why mainstream culture seems to accept the numerosity requirement of marriage without question, even while so many people practice alternatives to lifelong monogamy either secretly (adultery) or serially (divorce and remarriage)").

306. See supra section II.C.

307. Rebeca A. Marín, Andrew Christensen & David C. Atkins, Infidelity and Behavioral Couple Therapy: Relationship Outcomes Over 5 Years Following Therapy, 3 Couple & Fam. Psych. 1, 1 (2014). For more analysis, see generally Edward Stein, Adultery, Infidelity, and Consensual Non-Monogamy, 55 Wake Forest L. Rev. 147 (2020) (discussing the frequency of infidelity and the problems inherent to maintaining clear data). For example, the accuracy of the many different studies regarding infidelity can be affected by factors such as age and societal attitudes towards infidelity more broadly. Id. at 165–66.

308. See supra note 300 and accompanying text.

309. See Emily J. Stolzenberg, The New Family Freedom, 59 B.C. L. Rev. 1983, 2018 (2018) (comparing "marital property distribution" to cohabitant property distribution).

310. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 669–70 (2015) (listing the benefits and obligations of marriage, including those connected to property and finance).

made financially dubious decisions in the past, however, is obviously overbroad. Instead, when a fundamental right such as marriage is at issue, we must make only those incursions that are narrowly tailored to protect a state's compelling interest.[311] Thus, rather than making blanket determinations as to the capacity or incapacity to marry, courts should be considering the least restrictive alternative to the actual right to marry. In this vein, courts should consider the use of prenuptial agreements, powers of attorney, and other vehicles that would allow an individual to plan for additional support in the context of their marital union. Powers of attorney and other advance planning documents are often used as part of or in addition to SDM agreements or as less restrictive alternatives to guardianship.[312] The use of prenuptial agreements would be more novel and would allow for advance, supported planning for people with IDD while mitigating some—if not all—of the financial risks inherent to marriage.[313] Such alternatives must be used with great care and only sparingly, as marriage is a fundamental right and should be allowed to occur without impositions of any kind in the great majority of cases, especially in the absence of a compelling state interest to the alternative.

Another option for courts who face genuine concern about an individual's cognitive understanding of the decision to marry, as well as

311. See O'Connor v. Donaldson, 422 U.S. 563, 575–76 (1975) (recognizing the state's interest in "providing care and assistance to the unfortunate" but holding that the state must do so in light of an individual's "constitutional right to freedom"); see also Mental Health L. Comm. & Disability L. Comm. of the N.Y.C. Bar Ass'n, supra note 279, at 302 ("Central to the substantive, as opposed to procedural due process required for the deprivation of liberty caused by the imposition of guardianship, and resonating throughout the discussion of [S.P.C.A. Article] 17-A which follows, is the concept of least restrictive means.").

312. See Megan S. Wright, Planning for Cognitive Decline: Combining Formal Supported Decision-Making Agreements and Healthcare Power of Attorney, 35 Health Matrix 225, 236–38 (2025) ("[T]hose planning for incapacity may also want to appoint someone to decide on their behalf . . . . [A] new legal document could be created that combines a formal supported decision-making agreement and appointment of a healthcare power of attorney."); Guardianship: Less Restrictive Options, DOJ, https://www.justice.gov/elderjustice/guardianship-less-restrictive-options [https://perma.cc/7DX4-X7G4] (last visited Oct. 18, 2025) (listing SDM, health care advance directives, and power of attorney as less restrictive alternatives to guardianship); see also Whitlatch & Diller, supra note 21, at 201 (describing use of power of attorney forms in the context of SDM); Megan S. Wright, Dementia, Autonomy, and Supported Healthcare Decision Making, 79 Md. L. Rev. 257, 270–71 (2020) (discussing the use of advance directives to avoid substituted decision-making in the context of dementia).

313. There is much evidence as to the efficacy of prenuptial agreements in protecting the financial statuses of spouses in a failing marriage, though such agreements are not without critics. See Allison A. Marston, Note, Planning for Love: The Politics of Prenuptial Agreements, 49 Stan. L. Rev. 887, 893–97 (1997) (discussing common critiques of prenuptial agreements and noting many reasons they are nonetheless valuable planning tools); see also Elizabeth R. Carter, Are Premarital Agreements Really Unfair?: An Empirical Study, 48 Hofstra L. Rev. 387, 429 (2019) ("[Critics'] key premise—the assumption that premarital agreements are unfair—was never supported by reliable empirical data because no such data existed.").

the consequences of that decision, might be to explore SDM as an alternative to a finding of incapacity. Indeed, as in the guardianship context,[314] SDM can be a less restrictive alternative to a finding of marital incapacity. It can also be a means of maintaining and fostering space for autonomous choice while providing support to ensure that the decisions will be as safe and "successful" as possible.[315] The following section will look at models of SDM, research on sexual intimacy and capacity, and forms of family creation to support the notion that SDM can be a means of finding or creating marital capacity.

C. *The Radical Potential of Supported Decision-Making*

The increasing recognition of SDM as a means of protecting the civil rights and autonomy of people with disabilities suggests vast potential in terms of accessing marriage. "[SDM] is a legally recognized method that augments the capacities of people with fluctuating, diminishing, or limited capacity to continue to act as their own decision-makers."[316] In practice, SDM can involve assisting with decisions across all areas of life,[317] including parts of the decision-making process such as gathering information, negotiating, discussing pros and cons, and communicating a decision-maker's position or view.[318] With SDM, there is the possibility that someone who otherwise lacks the legal capacity to enter into contracts can gain "the legal competence to do so with support."[319] Unlike guardianship, or other more limited forms of substituted judgment, SDM "recognizes the interdependence of people as reasoners."[320]

SDM's potential to enhance access to marriage is particularly clear when one considers that at least some courts have already understood marital and other intimate relationships to be capacity enhancing and mitigate the need for guardianship.[321] Moreover, "[p]eople with disabilities are likely to want to select intimate partners as supporters and partners may well want to play these roles."[322] When applied to the context

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314. See, e.g., In re Guardian for Michelle M., 2016 WL 3981204, at *4 (N.Y. Sur. Ct. King's Cnty. 2016) (unpublished table decision) (recognizing SDM as a less restrictive alternative to guardianship); Ross v. Hatch, No. CWF120000426P-03, slip op. at 5 (Va. Cir. Ct. Aug. 2, 2013) (noting that the ultimate goal was to transition from a limited guardianship to an SDM model).

315. Boni-Saenz, The Right to Fail, supra note 158, at 18 (describing "the proper long-term solution—and the one that respects the human dignity of people with cognitive impairments" as "creating individualized conditions that promote the capabilities for choice and that allow for a meaningful chance of success in decision-making, if possible").

316. Francis, Intimate Relationships, supra note 77, at 31.

317. See supra note 81 and accompanying text.

318. Francis, Intimate Relationships, supra note 77, at 35.

319. Id. at 32.

320. Id.

321. See supra note 314 and accompanying text (describing cases).

322. Francis, Intimate Relationships, supra note 77, at 52.

of these cases, SDM appears a natural and appropriate means of expanding marriage access for people who might otherwise be found to lack capacity to marry.

There are several ways that SDM could support access to marriage. An individual with an active SDM agreement or informal SDM network could rely on supporters to assist with considering the pros and cons of a specific and general marital relationship and even to continue to help make decisions within a marriage.[323]

Courts called to assess the validity of such decisions in this arena can also be guided by the "network consent" test,[324] pioneered by Professor Alexander Boni-Saenz in the context of sexual decision-making.[325] In addition to modifying aspects of the traditional assessments of sexual consent,[326] Boni-Saenz, who developed the model with both age-related and IDD cognitive capacity challenges in mind, suggests not limiting assessments of capacity for sexual decision-making solely to evidence of an individual's cognitive abilities but including what they can understand with the help of an SDM network.[327] This model also offers promise in the realm of marriage because it would allow courts to focus not only on an individual person's cognitive abilities but also on what they are capable of doing and understanding with appropriate support.[328] Key to the test is that it includes an assessment as to whether the decision-making support system, if there is one, is adequate.[329] Boni-Saenz recognizes that "[m]embers of the decision-making support system will often be spouses or other loved ones, who may be primary targets of sexual interest by the person with cognitive impairments."[330] Because of the potential for conflicts, however, he suggests that such partners "should be subjected to a rebuttable presumption of network inadequacy, which can be overcome

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323. Wright, More Choosers, supra note 62, at 146–48 (discussing the use of SDM in medical decision-making). A similar intervention has been suggested in the context of parenting with disabilities. See Leslie Francis, Maintaining the Legal Status of People With Intellectual Disabilities as Parents: The ADA and the CRPD, 57 Fam. Ct. Rev. 21, 23–26, 30–33 (2019) (describing the concept of "supported parenting" as a potential solution to the disparate impact of termination of parental rights in the family regulation system).

324. Alexander A. Boni-Saenz, Advance Consent and Network Consent, *in* The Routledge Handbook of Disability and Sexuality 222, 228–31 (Russell Shuttleworth & Linda R. Mona eds., 2021). This was previously called the "cognition-plus test." Id. at 231 n.2.

325. Boni-Saenz, Sexuality and Incapacity, supra note 10, at 1234.

326. Specifically, Boni-Saenz proposes requiring a "threshold" showing of volition, id. at 1234, and a simplified version of the "nature and consequences" test that asks whether the person has the cognitive capacity to reason about a specific sexual decision but would not require a demonstration that the individual understood the morals or consequences of their decision. Id. at 1216–22.

327. Id. at 1230.

328. Id.

329. Id. at 1237. "This is essentially an inquiry into the health of the decision-making apparatus as a whole, similar to the inquiry into the individual's mental capacities." Id. at 1238.

330. Id. at 1239.

if sufficient evidence of loyalty and care is supplied to the court."[331] Boni-Saenz has thus envisioned a model of sexual decision-making "in which a judicial inquiry would include both an analysis of the volitional capacity of the person with cognitive impairments and an evaluation of the adequacy of a support network."[332] Extending this kind of logic to the sphere of marital relationships is a small but significant step.

As in the context of assessing the sexual consent capacity of adults with IDD, utilization of the "cognition-plus" test in the context of capacity to marry will likely require some adaptation.[333] In particular, in cases involving communication impairments, lawyers for people with IDD will likely need to engage in creative advocacy to establish volition—that is, interest in marriage.[334] Likewise, advocates, family members, and people with IDD will need to continue to advocate for appropriate sexual and psychosocial education so that they can compellingly demonstrate an understanding of the moral and practical consequences of the decision to marry.[335]

In the context of sexual decision-making, SDM "involves communicating with the individual with cognitive impairments to discern what her sexual desires are and helping her make the connections between those interests and potential choices."[336] Supporting a person who is nonverbal "may involve observing the individual in context and paying attention to subtle cues of desire or displeasure."[337] In the marriage context, one can imagine a similar role for supporters to help identify and consider desires related to romance or partnership and think through the ramifications of the decision to partner or marry a specific person. Discussion of the legal ramifications of marriage—as opposed to a mere expression of volition to marry or desire to be married—will likely be a major source of discussion and counsel between a decision-maker seeking to marry and their supporter(s). When the supporter in question seeks to become a spouse, additional supporters should be involved in the decision to marry whenever possible. Additionally, the decision-maker and supporter should—before marriage—"delineate as clearly as possible [the supporter's] roles in the support agreement" going forward.[338] One can also imagine a similar role for courts, should they need to become

331. Id. at 1239–40.

332. Boni-Saenz, The Right to Fail, supra note 158, at 28–29.

333. See Harris, The Role of Support, supra note 10, at 95 (suggesting that application of "cognition-plus" to people with IDD might require adaptations to the "design or application" of the test).

334. Id. at 96–98.

335. Id. at 100 (noting that, especially in institutional or group homes, "there is an absence of formal and informal opportunities to amass knowledge about sex and its biological consequences or to exercise sexual decision-making" for people with IDD).

336. Boni-Saenz, Sexuality and Incapacity, supra note 10, at 1230.

337. Id.

338. Francis, Intimate Relationships, supra note 77, at 51.

involved. Courts would assess both the volition and volitional capacity of the person with IDD and evaluate the adequacy of their support network. If a putative spouse is part of the support network, courts and advocates must be wary of the potential for conflicts of interest; courts should hold such supporters to a higher standard when assessing the adequacy of their support. Boni-Saenz has suggested the courts hold spousal intimates to a rebuttable presumption that they are not adequate supporters and that can only be overcome with "sufficient evidence of loyalty and care."[339]

There is already at least one example in which both partners in a marriage benefited from SDM, though there is little information about their relationship or the role that SDM played within it. Earnest and Essie Walker were both disability rights advocates who lived together in a group home in Brooklyn, New York.[340] Earnest met Essie after he successfully fought to leave an institution, and the two married in 1989.[341] Both Essie and Ernest received support as decision-makers through SDM-NY.[342]

SDM is not, however, a panacea.[343] For example, many people with IDD lack adequate or meaningful support networks.[344] Moreover, in many of the cases involving challenges to marital capacity, it is a member of a former support network that is challenging the desired marriage.[345] Even

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339. Boni-Saenz, Sexuality and Incapacity, supra note 10, at 1239–41.

340. For a video of Essie and Earnest talking briefly about their marriage, see SDMNY, Supported Decision-Making Is for Everyone (Vimeo, Nov. 10, 2020), https://vimeo.com/477658828?fl=pl&fe=ti (on file with the *Columbia Law Review*). Since this video was made, Essie, unfortunately, passed away. For an earlier example of the couple's advocacy efforts and for information about their community living experience, see Denise Romano, Parents "Mad as Hell" Over Proposed Cuts to the Developmentally Disabled, Brooklyn Reporter (Mar. 6, 2013), https://brooklynreporter.com/2013/03/parents-mad-as-hell-over-proposed-cuts-to-the-developmentally-disabled/ [https://perma.cc/WHL4-KSQC].

341. SDMNY, supra note 340, at 5:15–6:21.

342. Id.

343. See Francis, Intimate Relationships, supra note 77, at 32 ("Respecting boundaries between supporting and supplanting the principal as the decision-maker is not easy, and it may prove especially difficult when principals and supporters have been or continue to be involved in an intimate relationship. Intimate partners—from new lovers to long-term spouses—likely have intertwining desires and goals."); Wright, More Choosers, supra note 62, at 147–48 (describing open questions regarding the use of SDM in medical decision-making).

344. Boni-Saenz, The Right to Fail, supra note 158, at 23–25 (describing problems with actualizing SDM, including lack of adequate support networks, though noting that those with adequate means can often purchase support through the market); see also Harris, The Role of Support, supra note 10, at 101–04 (describing anticipated challenges with utilizing SDM in the sexual consent capacity context).

345. See supra notes 248–287 (citing cases involving parents, siblings, and other potential supports challenging a person with IDD's capacity to marry). Boni-Saenz also points out that members of a given support network are not themselves immune from the consequences of decisions made in the network. See Boni-Saenz, The Right to Fail, supra note 158, at 22 ("We exercise choice not in a vacuum, but in a social world in which we are connected to countless others. Thus, it may be the case that we have a moral responsibility to address the radiating consequences of our decisions.").

in a situation with adequate and willing support, one might wonder how adding a supporter into the mix of a two-person relationship would impact the traditional marital dynamics.[346] For example, does this open the path for undue influence or pressure from a third party? Or might the non-supported partner, such as there may be, feel that there are too many people involved in the marriage if supporter(s) played a significant role in the decision-making process? Nor does SDM answer many of the trenchant and challenging questions that can arise in cases of people of starkly disparate abilities forming intimate relationships.[347] This issue is complicated by what scholar Kevin Mintz has characterized as "society's discomfort with the notion that people with disabilities are sexual beings who might be appealing romantic partners to those without disabilities."[348] If a marital partner were to become a supporter (or vice versa), the question of whether and when the supporter should be focused on the "ends" versus the "means" of reaching a decision may become especially complex.[349] This is just one example of issues that might arise related to potential conflicts of interests between spouse-supporters.[350] Likewise, there are unresolved questions about how, exactly, an SDM agreement "grants legal capacity" to the decision-maker.[351] There is also the economic reality that provision of high-quality, individualized SDM support, in and

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346. See Boni-Saenz, The Right to Fail, supra note 158, at 22 ("[A] general turn to life decision by committee seems to be in tension with the individualized decision-making that is core to the right to fail.").

347. For a sense of the most extreme questions that can arise in this context, consider the case of Anna Stubblefield and the many articles spawned in reaction. See, e.g., Mintz, supra note 70, at 1667 (arguing that the case—and coverage—was inflected heavily with ableism); Daniel Engber, The Strange Case of Anna Stubblefield, N.Y. Times Mag. (Oct. 20, 2015), https://www.nytimes.com/2015/10/25/magazine/the-strange-case-of-anna-stubblefield.html (on file with the *Columbia Law Review*) (describing the trial and surrounding investigation into the case). Stubblefield was a philosophy professor at Rutgers University who developed a relationship with D.J., a younger, Black man with cerebral palsy. Id. While the nature of the relationship is contested, it is clear Stubblefield and D.J. engaged in sexual intercourse at least once. Id. She was initially convicted of sexual assault, but the conviction was overturned on appeal. Id.

348. Mintz, supra note 70, at 1668; see also id. ("The prosecution highlighted the fact that D.J. wears diapers. This in itself is not a sign of intellectual impairment, but even if it were, he should not have been infantilized, especially in light of how briefly he was paraded to the jury.").

349. See supra note 98 and accompanying text.

350. See supra text accompanying note 331. Cases about the relationships between guardianship and marriage do exist and give us some sense of the many complex problems to be solved. See, e.g., Payton v. Payne, 414 N.E.2d 33, 36–37 (Ill. App. Ct. 1980) (finding it a conflict of interest to be guardian and wife); Ex parte Chace, 58 A. 978, 981–82 (R.I. 1904) (reasoning that once a ward enters a marriage, their guardianship should terminate or, if the guardianship still exists, its interest would be subordinate to the marital partner).

351. Wright, More Choosers, supra note 62, at 148–49 ("Is it the provision of decisional support that can . . . help [the supported person] demonstrate that they are competent? Or is it the declaration . . . that the supported person can act independently of the agreement and that the supported person is the legal decision maker and not their supporters?" (footnote omitted)).

out of the marital context, requires the expenditure of government resources.[352]

Notwithstanding these unresolved questions, the two capacity-expanding decisions explored in this Essay offer legal precedent for the idea that SDM can expand marital capacity for people with certain disabilities. Supporters could play a role in the decision of whether to pursue a serious, committed, and legal marital relationship at the outset, and their role would likely be known to the other member of the relationship. Supporters might also be able to facilitate safe, healthy dating opportunities. Indeed, in a world in which family is an increasingly elastic concept, the inclusion of a network of supporters to assist with decision-making may not be terribly radical.[353]

D. *Supported Decision-Making as Marriage Reform?*

By embracing SDM in this context, courts and advocates may do more than expand access to individual marital relationships; indeed, they may actually begin the herculean task of recasting marriage not as an institution separate and apart from the community, in which couples are expected to support themselves and their children in isolation, but as one that is interconnected with and reliant upon the broader world around them.

Feminist scholars—particularly Martha Albertson Fineman—have argued that true autonomy is a "myth" that "[t]he ideal of family is essential to maintaining."[354] Disability studies scholars have also critiqued

352. See Boni-Saenz, The Right to Fail, supra note 158, at 18–19 ("[C]reating individualized conditions that promote the capabilities for choice and that allow for a meaningful chance of success in decision-making . . . undoubtedly requires the expenditure of societal resources."); Costanzo et. al, supra note 19, at 134 (acknowledging the need for state governments to invest significant money to ensure access to highly individualized SDM services). For a sense of the cost of SDM pilots, see Radoslava Lalcheva & Miryana Malamin, De Pasarel Bulgaria, Cost Benefit Analysis of Supported Decision-Making 27–28, 30–34 (2014), https://sdmny.org/wp-content/uploads/2020/09/WebPage.pdf%20 [https://perma.cc/M8LV-32G6]; Elizabeth Pell & Virginia Mulkern, Hum. Servs. Rsch. Inst., Supported Decision Making Pilot: Pilot Program Evaluation Year 2 Report 40 tbls. 4 & 5 (2016), https://supporteddecisions.org/wp-content/uploads/2019/05/CPR-SDM-HSRI-Evaluation-Year-2-Report-2016.pdf%20 [https://perma.cc/WE7D-C4SX].

353. See Alexander Chen & Christina Mulligan, Parafamily, 105 B.U. L. Rev. 385, 402 (2025) (explaining how reliance on varied networks of support can be found even "in the most traditional nuclear family arrangements"); Alexander Chen & Christina Mulligan, Opinion, Polyamorous Relationships Are a Good Thing, Bos. Globe (Sep. 27, 2024), https://www.bostonglobe.com/2024/09/27/opinion/polyamory-relationships-legal-discrimination/ (on file with the *Columbia Law Review*) ("Extended family, platonic friends, and nonmarital romantic partners all can be critical components of a rich and fulfilling life . . . .").

354. Fineman, Masking Dependency, supra note 131, at 2182; see also Martha Albertson Fineman, The Autonomy Myth: A Theory of Dependency 37 (2004) ("Each individual family is ideally responsible for its own members' dependency, and resort to collective resources is considered a failure, deserving of condemnation and stigma."); Eva Feder

the overvaluation of independence in society on the grounds that it "tends to diminish the esteem of people who cannot live without a great deal of help from others, and to ignore or undervalue relationships of dependency or interdependence."[355] Indeed, some scholars see demands for independence and self-sufficiency as inherently dehumanizing to those with disabilities who rely on support systems.[356]

Normative views of the marital family justify the privatization of dependency, further marginalizing people with support needs by suggesting that, in ideal families, there should be no need for governmental or external support.[357] Accepting SDM's potential to enhance capacity for marriage is a move towards embracing dependency as "inevitable and universal."[358] Whereas normative conceptions of the family insist that neither "the market [n]or the state will directly contribute to or assist in the necessary caretaking" because "that is done in the privacy of the family,"[359] marriages supported by SDM acknowledge precisely the opposite—that a two-person unit necessarily will require the support of others. Judicial recognition of marriages supported by SDM would thus strengthen an alternative vision of "collective responsibility and an appreciation of the generalized interdependence among all members of society."[360]

Applying SDM to the question of marital capacity would also open the family form to a significant subsection of those traditionally excluded from family, opening more narrow conceptions of family to a broader set of people and recasting the marital relationship in a more communal,

Kittay, Love's Labor: Essays on Women, Equality and Dependency 34 (2d ed. 2020) ("Dependency is inescapable in the life history of each individual."). Significantly, marriage itself has also been a site of domination, not only of women but also children and other family members who have, historically and all too often contemporarily, lacked power outside of the home. See Mayeri, Marital Supremacy, supra note 109, at 1340 (describing the benefits and limitations to changes set in motion when the Supreme Court "str[uck] down most distinctions between 'legitimate' and 'illegitimate' children"); Mayeri, Marriage (In)Equality, supra note 109, at 127 ("Historically, as a matter of formal law if not always social reality, marriage prescribed gender-differentiated and unequal roles for husbands and wives and the subordination of wives' legal identity through coverture."). Recasting marriage as a place for interdependence has the potential to recast what remains of these dynamics as well, though awareness of such dynamics also suggests caution when exploring marriage as a site of true interdependence.

355. Susan Wendell, The Rejected Body: Feminist Philosophical Reflections on Disability 145 (1996).

356. See Akemi Nishida, Just Care: Messy Entanglements of Disability, Dependency, and Desire 128, 131–34 (2022) ("[Independence] has been deployed as the measurement to categorize and hierarchize people along the human and dehumanization spectrum that undergirds social oppressions enacted in the United States.").

357. See supra section I.B.2 (exploring marital norms of self-sufficiency and independence from government support).

358. Fineman, Masking Dependency, supra note 131, at 2181.

359. Id. at 2187.

360. Id. at 2194.

pluralistic form. This can happen on two levels. First, practically speaking, if more judges, legislators, and families accept SDM to be capacity enhancing, certain marital families will be expanded through the actual engagement of supporters, including third parties and expanded social safety nets. Second, if SDM allows a greater number of people with IDD to marry, then the institution of marriage itself will be rendered more accessible to people with IDD and potentially others with support needs. Together, these changes might push scholars, legislators, and judges to "engage in realistic explorations of how family functions might be successfully performed by nontraditional family units if they were adequately assisted by public subsidies and support now reserved for the nuclear family."[361] While this vision of marriage as a unit supported by and within the broader community doesn't necessarily lead to the total rejection of privatized dependency, it does potentially invite a broader public into the marital home, perhaps offering a path towards many and more varied forms of support.

While a key contribution of this Essay is to acknowledge and highlight the potentially capacity-expanding role of marriage for people with IDD, it is crucial to acknowledge that SDM as a form of support remains in its early stages. Indeed, though SDM is practiced internationally, the U.S. statutes are comparatively new,[362] the case law is relatively sparse, and the empirical evidence about SDM in practice is just beginning to be collected.[363] At this stage, SDM offers potential for the future rather than a certain path. Likewise, this Essay should not be understood as an argument promoting marriage. "[T]he expressive value of access to marriage is tremendous and fundamental to equality, yet constitutional recognition of marriage rights has proven insufficient to independently bring about that equality."[364] In fact, access to marriage for many historically marginalized groups has led to an "anemic version of dignity . . . in which dignity is not inherent, but must be earned by marrying."[365] Therefore, while this Essay seeks to critique the limits of the right to marry currently placed on people with IDD, it does not suggest that all or even more people with IDD should seek to marry. It suggests instead that marriage should be an institution that is as accessible to people with IDD as to others and that by expanding access to this diverse and varied group of adults, marriage itself can be recast as one among

361. Id. at 2192.

362. See supra note 78 and accompanying text (describing and collecting statutes).

363. See Glen, Supported Decision-Making, supra note 83, at 104 (describing the nascent study of New York's SDM legislation and comparing it to the far greater extent of SDM research that has been done in Australia).

364. Swan, supra note 124, at 317 (citing Franke, Wedlocked, supra note 30, at 10–11).

365. Id. at 318; see also Kaiponanea T. Matsumura, A Right Not to Marry, 84 Fordham L. Rev. 1509, 1510 (2016) (explaining that legalizing gay marriage emboldened states to restrict access to civil unions and domestic partnerships).

many forms of support for American adults and families, with and without disability.

CONCLUSION

Marriage—as an institution and system of normative ideals—is central to how American law and society organize and govern themselves. Historically, marriage has been a means both of shaping the moral foundation of the American citizenry and of providing for privatized dependency of its citizens. Access to marriage has also been a means by which marginalized groups have gained greater equality. For people with IDD, it is one more area in which courts, law, and society have regarded them as marginal and inferior, unfit for participation in the general rights and institutions of personhood. Modern statutes and case law reveal two different ways to conceive of the relationship between marriage and capacity: one in which those with IDD are more likely be excluded from the exalted status of marriage because of a judicial finding of incapacity and one in which marriage itself can become a means of expanding capacity and increasing the social and relational connectedness of a person with IDD to the broader world. When marriage itself is understood as a form of social support, and comes to include individuals who require support outside of the rigid, two-person relationship, there appears a path to recognizing more and greater forms of external support for the marital family. In turn, marriage itself can be recast as one among many forms of appropriate social supports, from government to care webs and kin networks, potentially transforming marital norms in the process.

BOOK REVIEW

IMMIGRATION LAW'S FOOT SOLDIERS

Bordering on Indifference: Immigration Agents Negotiating Race and Morality
By Irene I. Vega. Princeton, NJ: Princeton University Press, 2025.
Pp. 216. $29.95.

*Stephen Lee**

Historically, we have known little about the law enforcement actors who oversee a punitive deportation machine. Slowly, this is changing. Using the insights from Professor Irene Vega's groundbreaking book on immigration enforcement agents and officers, this Book Review makes three points. First, these agents and officers utilize a range of strategies to justify morally ambiguous job duties, and at least a part of the moral ambiguity comes from a misalignment between the agents' training (which focuses on the threat and use of force against dangerous transnational criminals) and the day-to-day realities of the job (which involve a mostly compliant and non-threatening population of migrants). Second, the agents' strategies serve to legitimate punitive enforcement policies by denigrating migrants while simultaneously undermining other immigration-related programs that do not advance inherently punitive goals. Vega's book highlights an enduring dilemma within the immigration bureaucracy—finding ways to coordinate and reconcile the agency missions of foot soldiers and bureaucrats given their distinct skill sets and public reputations—while also providing new insights on areas for further study. Third and finally, the book offers especially poignant insights on the Trump Administration's decision to treat every immigration challenge as an enforcement problem to be addressed by the bureaucracy's foot soldiers.

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* Associate Dean for Faculty Research and Development and Professor of Law, University of California, Irvine. For helpful comments, I am grateful to Sameer Ashar, Swethaa Ballakrishnen, Annie Lai, and Ari Ezra Waldman. I am also grateful to Irene Vega for writing a book from which I have learned so much. Please send comments and questions to slee@law.uci.edu.

INTRODUCTION

In 2026, during the second year of the second Trump presidency, many popular accounts have understandably focused on "purges" unfolding within major agencies responsible for protecting the environment, the rights of workers, and the health and openness of financial markets.[1] This Book Review tells another, complementary story, one that highlights the agencies that are thriving—namely, those tasked with enforcing our nation's immigration laws. When voters went to the polls in 2024, Congress had already devoted more resources to enforcing immigration laws than all other federal law enforcement programs combined.[2] As soon as President Donald Trump returned to office, he redirected even more resources towards the Department of Homeland Security (DHS), the cabinet-level agency that oversees the actions of the U.S. Border Patrol and

1. See Madeleine Ngo & Brad Plumer, Layoffs Expand at Federal Agencies, Part of Trump Purge, N.Y. Times (Feb. 14, 2025), https://www.nytimes.com/2025/02/14/us/politics/energy-department-layoffs.html (on file with the *Columbia Law Review*) (describing a purge of federal employees at agencies such as the Environmental Protection Agency); see also Katanga Johnson & Weihua Li, Trump Cuts Thousands of Wall Street Cops While Markets Swing, Bloomberg (May 7, 2025), https://www.bloomberg.com/news/articles/2025-05-07/trump-s-layoffs-cut-more-than-2-300-from-us-bank-and-markets-regulators?sref=zNmRQ0gk (on file with the *Columbia Law Review*) (describing layoffs at financial regulatory agencies such as the Securities and Exchange Commission and the Federal Deposit Insurance Corporation); Michael Sainato, Panic as US Federal Workers Scramble to Find Out if They've Been Fired: 'I Don't Have Email Access', The Guardian (Oct. 15, 2025), https://www.theguardian.com/us-news/2025/oct/15/trump-federal-workers-layoffs [https://perma.cc/HWB5-9C9B] (describing layoffs at the Departments of Education and Labor).

2. See Doris Meissner & Julia Gelatt, Migration Pol'y Inst., Eight Key U.S. Immigration Policy Issues: State of Play and Unanswered Questions 3 (2019), https://www.migrationpolicy.org/sites/default/files/publications/ImmigrationIssues2019_Final_WEB.pdf [https://perma.cc/F9BF-CKVE] (describing 2018 congressional appropriations for immigration enforcement agencies). The resources allocated to Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP)—the agency in which the Border Patrol is housed—far outweigh those given to U.S. Citizenship and Immigration Services (USCIS) and other agencies with mission orientations that are ministerial or at least not inherently punitive. Lawmakers and regulators often use the enforcement–benefits distinction to differentiate between the missions of these agencies even though the line separating the two can be blurry in practice. See Stephen Lee, Administrative Violence in Immigration Law, 66 Ariz. L. Rev. 739, 749–54 (2024) [hereinafter Lee, Administrative Violence]. While ICE's annual budget hovers around $8 billion, USCIS's annual budget peaked at $855 million. Compare DHS, U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2023 Congressional Justification 7 (2022), https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement_Remediated.pdf [https://perma.cc/N2TF-9L3B], with DHS, U.S. Citizenship and Immigration Services Budget Overview: Fiscal Year 2024 Congressional Justification 4 (2023), https://www.dhs.gov/sites/default/files/2023-03/U.S.%20CITIZENSHIP%20AND%20IMMIGRATION%20SERVICES_Remediated.pdf [https://perma.cc/67NP-7AN5] [hereinafter DHS 2024 Budget Overview].

of Immigration and Customs Enforcement (ICE).[3] Congress then amplified this effort by passing an appropriations bill—the One Big Beautiful Bill Act (OBBBA)—that included a massive influx of funding for these agencies.[4] Understandably, this influx of resources has put many migrant communities and advocates on edge and has generated fear that this funding will exacerbate the most harmful and violent elements of current immigration enforcement policies.[5]

Agents and officials tasked with enforcing immigration laws are sometimes derisively called "foot soldiers," evoking the use and threat of force under law associated with the military or the police.[6] Many legal and sociolegal scholars have noted the quasi-militarism and culture of violence that animates immigration enforcement. Mostly, though, existing scholarship has developed these insights at a distance, providing limited insights on the trajectory and experience of those who join the ranks of immigration enforcement agencies.[7] Enter Professor Irene I. Vega and her groundbreaking book, *Bordering on Indifference: Immigration Agents Negotiating Race and Morality*,[8] which provides an in-depth examination of

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3. See Proclamation No. 10886, 90 Fed. Reg. 8327 (Jan. 29, 2025) (providing the text of the executive order titled "Declaring a National Emergency at the Southern Border of the United States," issued on January 20, 2025).

4. See One Big Beautiful Bill Act, Pub. L. No. 119-21, §§ 90001–90007, 100001–100018, 100051–100057, 139 Stat. 72, 357–61, 364–85, 385–94 (2025) (codified in scattered titles of the U.S.C.).

5. See Rosa Barrientos-Ferrer, Ben Greenho & Silva Mathema, Congressional Republicans' One Big Beautiful Bill Act Creates an Unaccountable Slush Fund for the Trump Administration's Deportation Force, Ctr. for Am. Progress (Sep. 19, 2025), https://www.americanprogress.org/article/congressional-republicans-one-big-beautiful-bill-act-creates-an-unaccountable-slush-fund-for-the-trump-administrations-deportation-force/ (on file with the *Columbia Law Review*) (arguing that the One Big Beautiful Bill Act's massive expansion of the federal government's deportation capacity will "further escalate the Trump [A]dministration's unprecedented and indiscriminate deportation agenda"); see also Thomas S. Dee & Mark Murphy, How Strict Immigration Enforcement Harms Schoolchildren, Policy Brief, Stanford Inst. for Econ. Pol'y Rsch. (2018), https://drive.google.com/file/d/1ncLo-2j0yQ0xneBSpRgJ4cttPZtErAcN/view (on file with the *Columbia Law Review*) (describing the negative effects of ICE partnerships with local law enforcement on children, such as drops in school enrollment rates).

6. See, e.g., Samantha Michaels, Trump's Deportation Machine Has Diverted Some 42,000 Crime Fighters From Other Tasks, Mother Jones (Oct. 2, 2025), https://www.motherjones.com/politics/2025/10/trump-ice-deportation-local-state-federal-police-assisting-287g/ [https://perma.cc/U2NW-FTG7] ("President Donald Trump's deportation army is growing by the day, and a shocking number of its foot soldiers don't even work for US Immigration and Customs Enforcement (ICE).").

7. Vega is, of course, not the first scholar to have relied on interview data provided by political appointees and other government officials who come and go as administrations (and political priorities) turn over. See Jennifer M. Chacón, Susan Bibler Coutin & Stephen Lee, Legal Phantoms: Executive Action and the Haunting Failures of Immigration Law 4 (2024); Stephen Lee & Sameer M. Ashar, DACA, Government Lawyers, and the Public Interest, 87 Fordham L. Rev. 1879, 1880–81 (2019).

8. Irene I. Vega, Bordering on Indifference: Immigration Agents Negotiating Race and Morality (2025) [hereinafter Vega, Bordering on Indifference].

why a diverse cross section of Americans become immigration foot soldiers and how they make sense of their job and responsibilities. Agencies engaging in politically divisive work like the Border Patrol and ICE have little to gain by opening their doors to scholars and journalists.[9] As a result, scholars often have to pivot and redesign studies on the fly when best laid plans fail to yield access to bureaucratic institutions. And yet, Professor Vega recounts how she showed up to the Border Patrol sector headquarters near the U.S.–Mexico border in Arizona in July 2014, approached a woman sitting behind a "large, thick glass partition," and offered this casual introduction: "I'm a graduate student, and I want to talk to Border Patrol agents about their job. Is there someone who can help me?"[10] From this modest exchange, Vega gained access to some of the most cloistered agencies in the federal government, interviewing ninety agents engaged in enforcement work within both the Border Patrol and ICE. It is hard to overstate the novelty of this dataset.[11]

The descriptive clarity provided by *Bordering on Indifference* makes the book necessary reading for all students and scholars of immigration law, especially in an era when enforcement agencies shape so much of immigration policy. The book provides many important insights on the agencies most directly responsible for enforcing immigration policies—about the heavily Latino presence among the agency workforce and the false promise of racial representation as a cure for harmful policies;[12] about how many agents end up in immigration agencies as a "plan B" in life;[13] and about how many border communities resent but also rely on the carceral-like economy.[14] Tellingly, many of Vega's interviewees remarked on how

9. See Memorandum from Donald J. Trump, President to the Sec'y of Def., Att'y Gen., and Sec'y of Homeland Sec. (June 7, 2025), https://www.whitehouse.gov/presidential-actions/2025/06/department-of-defense-security-for-the-protection-of-department-of-homeland-security-functions/ [https://perma.cc/GPH2-F8VH] (calling the National Guard to protect ICE personnel in response to protests). In deflecting criticisms that agencies like ICE engaged in rogue activity during the Obama Administration, some high-level officials described such agencies as "quasi-paramilitary organizations." See Chacón et al., supra note 7, at 72. This is a problem that many social scientists face in reaching "organizational elites." See Kevin J. Delaney, Methodological Dilemmas and Opportunities in Interviewing Organizational Elites, 1 Socio. Compass 208, 210 (2007).

10. Vega, Bordering on Indifference, supra note 8, at 155–56.

11. More commonly, scholars who focus on immigration officials report difficulties in convincing officials to sit for formal interviews. See Dylan Farrell-Bryan, Agency Entrenchment: Sociological Legitimacy in a Politically Contested Occupation, 49 Law & Soc. Inquiry 2523, 2529 (2024) (noting the need to broaden the pool of interviewees to include former ICE attorneys once agency management cut off access to current ICE attorneys); see also Asad L. Asad, Engage and Evade: How Latino Immigrant Families Manage Surveillance in Everyday Life 195–222 (2023) (describing a methodology that relied on informal engagement with immigration judges because of their refusal to sit for formal interviews).

12. See Vega, Bordering on Indifference, supra note 8, at 140 ("[Latina/o agents] are not dissenting or reforming the immigration system; they are sustaining it and even lending the system the legitimacy that comes from having a 'racially representative' workforce.").

13. Id. at 29–35.

14. Id. at 144–45.

they don't often encounter the dangerous "criminal aliens" nested within transnational organizations that they were trained to target and combat.[15] Instead, they note that much of the job involves encounters with mere "economic" migrants or asylum seekers, an almost universally compliant and nonthreatening population.[16] These qualitative insights largely track, and provide much needed texture to, the quantitative trends that emerged during the same time period.[17]

Beyond its nuanced account of immigration agencies as viable employment options for racially marginalized and minoritized communities, *Bordering on Indifference* also provides important insights on the relationship between bureaucracies and violence, and more specifically, on how bureaucratic norms and practices obfuscate agency violence. Like many public officials empowered to use force and engaged in "dirty work"—work that is both "denounced and respected"—immigration enforcement agents and officers find ways to "construct a positive professional identity."[18] In Vega's account, these foot soldiers employ a range of strategies to reduce the stigma of working for these agencies, including assuming the worst about otherwise seemingly nonthreatening migrants, taking steps to be "caring" in apprehending and detaining migrants, and embracing an attitude of "disinterested professionalism" which prioritizes systemic norms of neutrality over the equities of any individual case.[19] All of these strategies aim to reduce stigma, legitimate broadly punitive immigration policies, and denigrate the targets of these regulatory efforts.

As a study of bureaucratic governance, *Bordering on Indifference* frequently compares federal immigration enforcement actors to the police, who are the most obvious government actors at the local level empowered to use and threaten force. In advancing her argument that ICE and the Border Patrol ought to be understood in bureaucratic terms, Vega interrogates the nominal commitments of administrative law—for example, making decisions based on technical expertise, an ostensible commitment to rationality, and a concern with legitimacy in the public's eye—and shows

15. Id. at 65–67.

16. Id. at 53, 56–65.

17. Vega conducted her interviews towards the end of the Obama Administration. Then, from the years 2016 to 2018, the percentage of immigrants in detention with serious criminal convictions declined while the percentage of those with no convictions increased. See ICE Focus Shifts Away From Detaining Serious Criminals, TRAC Immigration (June 25, 2019), https://tracreports.org/immigration/reports/564/ [https://perma.cc/89S5-T6LL]. This is a trend that continued during the first and second Trump Administrations. See ICE Detains Fewer Immigrants With Serious Criminal Convictions Under Trump Administration, TRAC Immigration (Dec. 6, 2019), https://tracreports.org/immigration/reports/585/ [https://perma.cc/VX6V-Z954]; see also Muzaffar Chishti & Valerie Lacarte, U.S. Immigrant Detention Grows to Record Heights Under Trump Administration, Migration Pol'y Inst. (Oct. 29, 2025), https://www.migrationpolicy.org/article/trump-immigrant-detention (on file with the *Columbia Law Review*).

18. See Vega, Bordering on Indifference, supra note 8, at 116–17, 182.

19. Id. at 76.

how these sturdy values quietly reinscribe racial identity and racialized harms. For this reason, framing the Border Patrol and ICE as federal agencies plagued by the same sorts of bureaucratic pathologies associated with the local police makes complete sense. It makes all the more sense when considering the degree to which federal immigration law relies on local criminal law officials.[20] In this way, *Bordering on Indifference* illustrates how bureaucratic rules and practices make it hard to identify and remedy racialized harms caused by law enforcement actors from the federal government all the way down. But this undersells what the book can teach us about bureaucratic governance. ICE and Border Patrol officers work within a broader federal ecosystem of agencies all charged with different immigration-related duties, many of which have nothing to do with the use or threat of force (such as visa adjudications or labor certifications). For this reason, this Book Review focuses less on what Vega's book can teach us about what ICE officers and Border Patrol agents have in common with police officers but rather what we can learn about how immigration law's foot soldiers relate to and affect other parts of the federal immigration bureaucracy.

While some agencies, like the Border Patrol and ICE, use or threaten force in administering immigration laws, other agency actors like U.S. Citizenship and Immigration Services (USCIS) officers, immigration judges, and consular officers engage in bureaucratic work such as reviewing paperwork, conducting interviews, granting visas, and adjudicating waiver applications far from the field or the streets.[21] Roughly speaking, these two ends of the spectrum of agency power—which I have elsewhere described in terms of direct and administrative forms of violence[22]—operate along pathways either committed to enforcing immigration laws or allocating immigration benefits. On the enforcement side, agencies like ICE and the Border Patrol are tasked with arresting, detaining, and removing migrants. On the benefits side, USCIS and other agencies, consulate offices, and, to a certain extent, immigration judges adjudicate applications for relief. The efforts by ICE officers and Border Patrol agents to achieve legitimacy through their unrelenting enforcement of immigration laws destabilizes the other agencies focused on allocating benefits. The threat of deportation exerts a gravitational force on other immigration agencies, putting them in the position of withdrawing and pulling away as lines demarcating authority get blurred or disappear. Managing migration challenges

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20. See Emily Ryo, Jennifer M. Chacón & Cecilia Menjívar, Criminalization of Immigration, Russell Sage Found. J. Soc. Scis., Oct. 2025, at 282, 283 ("Under this system, state and local law enforcement actors and institutions have come to play a central and ever-expanding role in policing and incarcerating immigrants in service of federal detention and deportation policies.").

21. See Lee, Administrative Violence, supra note 2, at 741–42 (describing the work of administrative bureaucratic actors, such as USCIS, as largely adjudicatory and benefits-related).

22. Id. at 743–54.

through enforcement policies not only leads to punitive and often demeaning regulatory outcomes, it also undermines other parts of the administrative state charged with addressing migration in different ways.

This dynamic has only worsened during President Trump's second Administration. Since 9/11, foot soldiers and bureaucrats have operated within their respective spheres in carrying out their immigration duties, but this commitment to separation of functions has mostly disappeared. Agents who work on the benefits side of the enforcement–benefits distinction are increasingly tasked with enforcement-oriented duties. DHS, for example, has empowered USCIS to issue Notice-to-Appear documents (NTAs), which are the immigration enforcement equivalent to a charging document or indictment issued by prosecutors in the criminal context.[23] Indeed, this Administration's approach seems to be aimed at removing any hurdles to reassignment and redirecting other agency actors to support enforcement efforts, including (for example) tasking military lawyers to serve as immigration judges at the border.[24] Within the broader immigration bureaucracy, foot soldiers are the paradigmatic immigration actor exerting outsized influence over immigration policy.

Part I summarizes the core, sociological contribution of Vega's book, which is its focus on how immigration enforcement officers exercise far-reaching legal and punitive authority against a vulnerable population that does not appear to be dangerous or deserving of such punishment. Because existing laws fail to satisfactorily address agent and officer concerns about the legitimacy of their actions, Vega describes the moral economies in which these actors grapple with and attempt to justify their power. Part II focuses on a set of insights that are less expressly developed but nevertheless animate much of the book, namely the mismatch or misalignment that immigration officers see between their training and the day-to-day realities of their jobs. While these agency actors were recruited, trained, and acculturated to focus on dangerous, transnational criminals, the reality has been that many of the migrants they encounter in the field often resemble economic migrants who pose no obvious danger. This misalignment motif, which appears throughout the book, clarifies how the broader immigration system makes it hard—if not impossible—to mean-

23. Ordinarily, such documents must originate within ICE, but this is not the case under the Trump Administration. See USCIS, DHS, PM-602-0187, Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens (2025), https://www.uscis.gov/sites/default/files/document/policy-alerts/NTA_Policy_FINAL_2.28.25_FINAL.pdf [https://perma.cc/T9LX-6J35].

24. Detailing Attorneys to the Department of Justice to Serve as Immigration Judges and Special Assistant United States Attorneys, 49 Op. O.L.C., slip op. at 1 (Oct. 23, 2025) ("[W]e advised that the Secretary may send, and the Attorney General may receive, personnel, including military personnel, to serve on detail as temporary immigration judges . . . ."); see also Ximena Bustillo, Military Lawyers Called Up to Relieve a Shortfall in Immigration Judges, NPR (Sep. 2, 2025), https://www.npr.org/2025/09/02/g-s1-86691/military-lawyers-immigration-judges-jag [ttps://perma.cc/RGT3-QT7D].

ingfully use enforcement policies to achieve just or humane enforcement outcomes.

Part III then considers how Vega's account broadens understandings about the meaning and reach of bureaucratic governance strategies that rely on the threat and use of force. Concerned by the absence of legal constraints on agency violence, critics of immigration enforcement often argue that such actions are lawful but illegitimate acts. The various strategies utilized by the interviewees in Vega's book ultimately legitimate punitive enforcement policies by denigrating migrants. At the same time, these enforcement policies and the violence for which they are responsible exert a gravitational force over the rest of the immigration bureaucracy, distorting and arguably corrupting other agency missions. Finally, Part IV considers how the agency dynamics highlighted in *Bordering on Indifference* can yield insights on immigration enforcement under the second Trump Administration.

I. MORAL ECONOMIES

Bordering on Indifference is a book about some of the most powerful and controversial agencies within the federal government: ICE and the Border Patrol. It highlights and interrogates the voices and experiences of the people who work in them—what they gain by working at the agencies and what the agencies gain in return by hiring them.[25] As Vega highlights, working for a government agency opens up stable employment opportunities for Latinx residents in rural border towns without many prospects for upward mobility.[26] In turn, hiring such residents bolsters the ability of government agencies to claim legitimacy because they are employing a diverse workforce that roughly resembles the populations they target and manage.[27] Ostensibly, this is a mutually beneficial relationship, but as the book shows, the benefits do not run neatly in both directions. The path to upward mobility goes through a workplace embedded within a carceral economy that poses some difficult moral questions to officers and agents.

The book opens with Vega's first meeting with a Border Patrol officer, Marcos Payan, a Latinx officer whose own family members "had entered the United States without documentation," similar to members of the border community he is charged with policing.[28] Vega describes Payan as

25. Vega, Bordering on Indifference, supra note 8, at 4–5.

26. Id. at 30–32. Structural racism and persistent disparities in employment rates constrain labor market opportunities for these Latinx residents. Rose Khattar, Jessica Vela & Lorena Roque, Latino Workers Continue to Experience a Shortage of Good Jobs, Ctr. for Am. Progress (July 18, 2022), https://www.americanprogress.org/article/latino-workers-continue-to-experience-a-shortage-of-good-jobs/ (on file with the *Columbia Law Review*).

27. See id. at 10 ("As representatives of the immigration state, all agents are engaged in this incessant project of legitimation, but the pull toward justification is especially pronounced for Latina/o agents, who deal with layered legitimacy deficits.").

28. Id. at 1–4.

a reluctant interview subject and as someone whose ambivalence remains suspended between two contradictory impulses: pride born of a family history including prior generations of undocumented migration and significant economic security and social standing provided by a job that aims to stop undocumented migration.[29] Noting that a significant percentage of immigration enforcement agents identify as Latinx, Professor Vega observes that many agents engage in work that is "marked by in-betweenness—they are state agents by profession, but also embodiments of the United States' main target as Latinas/os."[30] Many of Vega's interviewees found that navigating this in-betweenness meant having to explain away this stigma and "moral taint" to their friends, to their families, and even to themselves.[31]

While the dishonorable legacies and present-day activities of the Border Patrol and ICE certainly justify such hostility and suspicion,[32] the pre-government lives of agents—especially Latinx agents—demonstrate the complexities of rendering moral judgment on their career paths. Noting that many of these agents grew up in "border towns where poverty and unemployment rates are high and education rates are low," Vega describes this recruitment process as a kind of "browning of the immigration enforcement bureaucracy."[33] She astutely observes that "the federal government's fixation with *controlling the southern border* generates paradoxical combinations of threat and opportunity in border towns through the Southwest, and it has created an 'enclave' of Hispanic employment in the coercive arm of the immigration state."[34] Government jobs are good jobs that offer career stability and long-term benefits,[35] and a job with the Border Patrol is one of the few that does not require a degree from a four-year college.[36]

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29. Id. at 2.

30. Id. at 7.

31. See id. at 117–18.

32. See Kelly Lytle Hernandez, Migra!: A History of the U.S. Border Patrol 9–10 (2010) (discussing how the operations of the U.S. Border Patrol evolved and came to be defined by racial inequity, disenfranchisement, and the deprivation of rights and protections based on immigration status).

33. Vega, Bordering on Indifference, supra note 8, at 29.

34. Id. (quoting Edward Flores, Jillian Medeiros & Harry P. Pachon, Tomás Rivera Pol'y Inst., Equal Employment Opportunity or Enclave Employment?: A Critique of the GAO Report on Hispanic Employment in Federal Agencies (2007), https://web.archive.org/web/20151014010249/http://trpi.org/wp-content/uploads/archives/gao.pdf (on file with the *Columbia Law Review*)).

35. See Jon D. Michaels, An Enduring, Evolving Separation of Powers, 115 Colum. L. Rev. 515, 540–47 (2015).

36. See Vega, Bordering on Indifference, supra note 8, at 32 ("Immigration enforcement jobs are some of the highest paying in the region and are accessible to those without a college education."). This is an especially important consideration in light of the discrimination that Latinx workers face in U.S. labor markets. See Lisa Catanzarite & Lindsey Trimble, Latinos in the United States Labor Market, *in* Latinas/os in the United States: Changing the Face of América 149, 154–62 (Havidán Rodríguez, Rogelio Sáenz & Cecilia Menjívar eds.,

Professor Vega's account highlights the structural (and also racializing) challenges in border town labor markets that make a job in immigration agencies an attractive option in the first place.[37]

Bordering on Indifference illustrates how agents themselves struggle with questions about the legitimacy of immigration enforcement. Professor Vega explains that these agents deploy a range of strategies to manage the tension that arises within the "moral economy" of immigration enforcement.[38] Broadly speaking, she notes that agents tended to do one of three things. First, her interviewees sometimes deployed a strategy of "*manufactured ambiguity*," which helps agents cope with the guilt of enforcing harsh and unforgiving laws against seemingly harmless migrants.[39] By creating in their minds the possibility of nefarious motives and back stories, agents can rationalize their enforcement duties as a necessary evil to protect broader society against invisible threats which they are uniquely equipped to thwart. Second, Vega refers to agents internalizing a narrative of "*caring control*," in which Latinx agents and officers tap into their cultural competencies—Spanish fluency, immigrant family backgrounds—to connect with their enforcement targets[40] as "humane and culturally competent agents who improve the qualitative character of migrants' custodial experience."[41] Third and finally, agents engage in "*disinterested professionalism*," which turns the attention away from agent autonomy and discretion and instead focuses on systemic norms and consequences.[42] Even though enforcing laws against migrants can sometimes create moral angst, agents push these feelings to one side in the name of ensuring "neutrality and consistency across cases."[43]

These descriptive frames usefully explain how Latinx agents navigate the "moral economy of immigration control."[44] As Vega tells it, indifference is a strategy that agents use to manage the day-to-day challenges of this work, which allows the agents to ignore or reject their "common humanity."[45] At the same time, approaching the work of immigration enforcement with indifference allows these agents to maintain an acceptable "moral

2008) (highlighting several factors contributing to anti-Latinx discrimination in the American workforce, including skill mismatch and segregation).

37. Vega, Bordering on Indifference, supra note 8, at 144–45 (noting how "carceral institutions" like the U.S. immigration enforcement system address "the immediate material needs of the people who are experiencing state violence"); see also Mitchell Ferman & Manny Fernandez, In the Rio Grande Valley, the Border Patrol Is the 'Go-To Job', N.Y. Times (Apr. 14, 2019), https://www.nytimes.com/2019/04/14/us/border-patrol-recruit-texas.html (on file with the *Columbia Law Review*).

38. Vega, Bordering on Indifference, supra note 8, at 5.

39. Id. at 25.

40. Id. at 25, 92–93.

41. Id. at 25.

42. Id. at 92–93.

43. Id. at 25.

44. Id. at 5.

45. Id.

sense of self"[46] as members of the same or similar communities as those they are charged with policing. As Vega puts it more directly: "To be a federal immigration enforcement agent is to be a compulsory participant in what is a highly racialized, politically contentious, and moral debate about how the United States manages undocumented migration."[47]

Bordering on Indifference also explores how agencies as bureaucratic organizations benefit from the work of Latinx immigration agents. As Vega observes, "Agents are ambassadors for the state's legitimation efforts, but they are also a critical audience, as they too must believe in their own moral authority as enforcers of the borders and boundaries that divide the globe."[48] She argues that hiring Latinx agents is a part of an effort to legitimate the politically divisive and morally fraught goals of immigration enforcement policies: "As representatives of the immigration state, all agents are engaged in this incessant project of legitimation, but the pull toward justification is especially pronounced for Latina/o agents, who deal with layered legitimacy deficits."[49] This dynamic can create professional tensions, cutting against the rosy public-facing depiction of DHS, which "is touted as a diversity leader in the federal government because of its prolific hiring of Hispanics into agencies like the [Border Patrol] and ICE."[50] This oversimplified version of DHS's diversity "success story" obfuscates the pathways—which Vega terms "drifting, military-to-policing, and serving"—that agents of different racial groups followed into the immigration bureaucracy. Vega explains: "Agents who drifted into the profession are mostly Mexican Americans who grew up on the border, the aspiring and military pathways are the most diverse, and only White agents said they came into immigration work to serve their country."[51] She describes these Latinx agents as struggling against a "legitimacy deficit," but this nuanced and disaggregated insight on the pre-DHS lives of agents reveals other deficits shaping their career prospects as well: those measured in racial, economic, and political terms.[52]

In critiquing the legitimation-through-diversification narrative, Vega draws primarily from a broader literature that focuses not on other parts

46. Id.

47. Id. at 9.

48. Id. at 132 (citing Irene I. Vega, Empathy, Morality, and Criminality: The Legitimation Narratives of U.S. Border Patrol Agents, 44 J. Ethnic & Migration Stud. 2544 (2018)).

49. Id. at 10.

50. Id. at 8.

51. Id. at 25.

52. Vega gathered her interview data during the second Obama and first Trump Administrations. Today, under the second Trump Administration, DHS is unlikely to tout the diversity of the agency. Instead, it is actively engaging in a social media campaign centered around white nationalist imagery. See Jasmine Garsd, DHS Calls for Defending American Culture. That Leaves Some Latinos Rattled, NPR (Oct. 29, 2025), https://www.npr.org/2025/10/29/nx-s1-5564025/defend-american-culture-dhs-pledge-leaves-some-latinos-rattled [https://perma.cc/WRN4-6WSA] (exploring DHS's rhetoric regarding defending "American culture" and its reception among Latinx groups).

of the federal administrative state, but rather on a distinctly local set of bureaucracies, namely the police. She expressly (and rightly) rejects the idea that a racially and ethnically diverse ICE and Border Patrol can make those agencies more effective and less controversial by virtue of employing a workforce that resembles the communities being policed.[53] Vega flatly rejects this argument, noting that "Latina/o agents' presence in the US Border Patrol and ICE does not disrupt these organizations' status quo; it legitimizes it."[54] Importantly, she goes on to emphasize that the Latinx agents she interviewed "are not dissenting or reforming the immigration system; they are sustaining it and even lending the system the legitimacy that comes from having a 'racially representative' workforce."[55] In crude terms, the agent–agency relationship is a mutually beneficial one: The agents gain a path to upwards mobility while the agency can soften its image as the institutional embodiment of racialized violence.

II. MISALIGNMENT

Throughout *Bordering on Indifference*, Vega highlights the mismatch between the training that agents and officers receive and the day-to-day realities of their jobs.[56] Noting the "gap between their professional mission and their bureaucratic function," Vega observes that "agents want to punish criminality when what they are doing is processing illegality in a punishing way."[57] Many of the officers whose stories Vega recounts expressed confusion and frustration over the limited numbers of truly dangerous people they encountered while carrying out their duties.[58] For many of the officers, dangerous migrants just didn't exist—at least not in significant numbers. Vega observes: "[T]he gap between the fact and fiction of the work was most obvious when, after hours of patrolling the border in highly militaristic ways, [Border Patrol officers] encountered not the treacherous 'bad guys' but mostly compliant migrants."[59]

53. For a thoughtful assessment of this position, see generally David Alan Sklansky, Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement, 96 J. Crim. L. & Criminology 1209 (2006) [hereinafter Sklansky, Not Your Father's Police].

54. Vega, Bordering on Indifference, supra note 8, at 139.

55. Id. at 140.

56. See id. at 72 (noting the "mismatch between [the agents'] training and the character of their day-to-day routines").

57. Id.

58. See id. at 66.

59. Id. at 63. This comports with my own findings based on interviews of high-level political officials during that same period. See, e.g., Lee & Ashar, supra note 7, at 1892 (describing how top officials and immigration advocates expressed concerns that individuals with no or minor criminal history were being pursued for removal). Additionally, DHS specifically targeted individuals for immigration-related crimes such as reentry after deportation. See, e.g., id. (quoting a senior official explaining that the targeting of immigrants who reentered the United States illegally was problematic).

Vega situates her data within a broader legal and political system that treats immigration as a crime and security issue. In particular, she details the different ways that lawmakers prioritized the threat of drug traffickers and then terrorists in the 1980s and 1990s. 1996 proved to be a critical junction when Congress vastly expanded the criminal grounds of removal, and then 2001 emerged as another flashpoint after the 9/11 attacks, which prompted a massive reorganization through the Homeland Security Act of 2002.[60] This reorganization caused the immigration bureaucracy to split functions so that "enforcement" and "benefits" functions would no longer be carried out by the same agency. As Vega notes, her data speaks directly to the branches of the immigration state focused on enforcement: ICE and the Border Patrol.[61]

In shifting toward a focus on neutralizing criminals and would-be terrorists, immigration laws and policies narrowed the framework through which the public understood, and regulated parties experienced, the administration of these laws. For one thing, agencies began rolling out policies that facilitated information gathering and sharing.[62] No longer relegated to administrative silos, federal officials freely communicated with officials in state and local agencies, making available biometric information of noncitizens detained and screened in the criminal system.[63] These changes both pulled police into the enterprise of immigration enforcement (whether they wanted it or not) and created the basic infrastructure for normalizing surveillance tactics (at least when noncitizen activities were involved). In this paradigm of immigration enforcement, every noncitizen that immigration officials encounter presents the potential threat of being a terrorist or dangerous criminal. Indeed, in the post-9/11 era, information-sharing has been the norm among different federal agencies especially as it relates to immigration-related adjudication,[64] though these stakeholders and some agencies have objected to or resisted this norm.[65] As a result, ICE and Border Patrol officials operate within a

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60. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered titles of the U.S.C.).

61. See Vega, Bordering on Indifference, supra note 8, at 18–19.

62. See Jennifer M. Chacón, The Criminalization of Immigration, Oxford Rsch. Encycs.: Criminology & Crim. Just. (Jan. 22, 2021), https://oxfordre.com/criminology/display/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-333 (on file with the *Columbia Law Review*) (describing the information sharing between federal, state, and local government officials).

63. See id. (detailing how federal programs mandated information sharing from state and local governments to ICE regarding noncitizens in detention).

64. See Bijal Shah, Uncovering Coordinated Interagency Adjudication, 128 Harv. L. Rev. 805, 820–21 (2015) (explaining that agencies engaging in factfinding for other agencies is not limited to the context of immigration regulation).

65. Agencies with labor and employment enforcement mandates have been especially active, at least during Democratic administrations, in shielding information in their possession that might lead to adverse immigration consequences for their beneficiaries. See

political ecosystem that encourages them to draw from multiple information streams to make sense of the enforcement targets they pursue and detain.[66]

This structural reality provides important context for Vega's data. Many of her interviewees struggled to make sense of the relative absence of noncitizens with a truly dangerous criminal profile, and some even tried to soften the most punitive elements of their duties.[67] But the integrated nature of the immigration and criminal law bureaucracies encourages agents and officers to trust records and files, not their eyes and ears. Again, in a post-1996 world, regulatory approaches treated criminal records as a category of "super" data with dispositive explanatory power in the immigration process. The Homeland Security Act's structural commitment to information sharing combined with the 1996 expansion of criminal grounds for removal ensured that immigration officers would have at their disposal an abundance of information from which they could ascertain whether a noncitizen posed a threat. In the face of doubt and uncertainty about a migrant's moral character or history of violating the law, agents and officers could always find *something* in the migrant's past to justify and rationalize a swift detention and removal outcome.

The information overload presented by these changes in law helps explain some of the moral justifications offered by the officers in Vega's book. Officers who "manufacture ambiguity" in mentally processing the stories migrants share embody this dynamic precisely.[68] ICE was created in 2003[69] amid broad changes to information sharing.[70] In 2008, ICE translated this impulse into data-driven programs like Secure Communities, which instructed officers to cross-check migrants with criminal databases

Cazorla v. Koch Foods of Miss., LLC, 838 F.3d 540, 546 (5th Cir. 2016) (reviewing an Obama-era agency's noncompliance with discovery requests pertaining to records that would have revealed the "immigration status of any claimants who applied for U visas, as well as that of their families"). During the Trump Administration, agencies in possession of similar information have implemented policies that more freely share it. See Centro de Trabajadores Unidos v. Bessent, No. 25-CV-0677 (DLF), 2025 WL 1380420, at *1 (D.D.C. May 12, 2025) (describing a complaint that alleged the IRS had been contemplating the unlawful sharing of information with DHS to facilitate the location of "illegal immigrants").

66. See Dara Kay Cohen, Mariano-Florentino Cuéllar, and Barry R. Weingast, Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates, 59 Stan. L. Rev. 673, 731–732 (2006).

67. Vega, Bordering on Indifference, supra note 8, at 98–113 (describing how immigration officials try to deny or minimize the suffering their actions cause).

68. Id. at 53 (emphasis omitted).

69. History of ICE, ICE, https://www.ice.gov/history [https://perma.cc/RSE6-JURN] (last updated Dec. 19, 2025) (noting that ICE was created pursuant to the Homeland Security Act, which was passed in 2002).

70. See Anne Joseph O'Connell, The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World, 94 Calif. L. Rev. 1655, 1656–57 (2006) (discussing the post-9/11 shift within agencies to centralized intelligence).

to use prior convictions in assessing a migrant's danger to society.[71] Building out an infrastructure designed to target "criminal aliens" comports with the messaging that agents and officers received in their recruitment and training. As Vega explains, critical parts of the academies used for training Border Patrol and ICE officers emphasize the "physical, tactical, and firearms training" agents undergo to prepare them to face potentially dangerous scenarios including "active shooters and riot control."[72] This throughline running from the Homeland Security Act down to training academies fosters a work culture in which officers embraced the attitude "that migrants are inscrutable until their fingerprints are run through their databases."[73] The gap between the agents' training and the day-to-day realities of the job created a tension that could be described as one of mission mismatch or misalignment. In this way, these insights about the degree to which officers embrace data collection and harbor suspicions about even seemingly nonthreatening migrants make Vega's study a unique contribution.

The idea of mission mismatch or misalignment appears throughout the book, but it mostly forms the background of Vega's interview data. Instead, she foregrounds the reactions and rationales her interviewees produced when faced with the tension between their training and their day-to-day reality. This kind of dissonance prompted some officers to deny their own roles in the broader process of separating families and to minimize the discretionary authority they enjoy.[74] The strategy of minimizing discretion might be a response to negative public attention[75] and a way to create distance between themselves and the criticism, a dynamic that also can appear in other parts of the immigration system devoted to non-coercive duties like allocating benefits.[76] Vega devotes an entire chapter to

71. See David K. Hausman, The Unexamined Law of Deportation, 110 Geo. L.J. 973, 990 (2022) ("[T]he Secure Communities program . . . integrates Federal Bureau of Investigation (FBI) and ICE databases: whenever a county jail takes fingerprints, those fingerprints are transmitted to the FBI, and the FBI automatically shares the information with ICE, which in turn performs database checks to determine whether the person is potentially deportable."); Inés Valdez, Mat Coleman & Amna Akbar, Missing in Action: Practice, Paralegality, and the Nature of Immigration Enforcement, 21 Citizenship Stud. 547, 548 (2017) (describing the impacts of these policies, including that "nearly 3 million U.S. residents have been identified as deportable and/or inadmissible as a result of contact with local and state law enforcement agencies").

72. Vega, Bordering on Indifference, supra note 8, at 55 (internal quotation marks omitted).

73. Id. at 67.

74. See id. at 99–100 ("It is common for street-level bureaucrats to limit their responsibility for unfavorable outcomes by denying discretion and imposing certain restrictions on their own power.").

75. See id. at 109 (describing an immigration agent's negative feelings towards the media's depiction of ICE).

76. See Lucas Guttentag, Reflections on Bureaucratic Barriers to Immigration Reform, Regul. Rev. (Dec. 24, 2019), https://www.theregreview.org/2019/12/24/guttentag-

the practice of officers denying responsibility for their role in thwarting the efforts of migrants to enter or remain in the United States.[77] Using interview excerpts in which officers complain about supervisors, blame the parents of unaccompanied minors, or minimize the suffering that follows from their enforcement actions, Vega highlights what is unique about immigration officers as bureaucratic actors.[78] While noting that the "obstinate bureaucrat" who "use[s] rules and regulations to distance themselves from work actions" is a common trope and figure, she explains that immigration officers are different because of the "particularly coercive and morally ambiguous" nature of their jobs.[79]

The training and messaging that agents and officers receive send them into the field equipped with only a particular set of tools—associated with immigration enforcement—which they must then use to address a broad array of ill-matched issues. Even when officers approach migrants with an eye towards humanitarian relief, the tools at their disposal are unsuited to the realization of this goal. Enforcement-oriented skills can generally be manipulated only in terms of intensity. They can be dialed up or down, but they do only one thing: threaten or bring down the use of force through apprehension, detention, and removal. The "caring control" approach to immigration enforcement most clearly illustrates the limitations of this skillset.[80] The officers described in *Bordering on Indifference* often drew distinctions between dangerous criminals and "noncriminal, economic migrants who deserved humanitarianism" for whom agents reserved a "light touch" in processing them through the deportation machine.[81] As Vega shows, the idea of a "light touch" in a carceral setting—such as when officers and agents joke with detainees as a way of forging a personal connection—is a contradictory, if not indefensible, characterization of enforcement work.[82] One officer proudly recounted how he makes detainees laugh to maintain "a good rapport" with the migrants—a notion that Vega acknowledges is almost "farcical."[83]

These examples illustrate how actions by individual agents function to inwardly legitimize the immigration system as presently constructed without outwardly actualizing a meaningfully compassionate approach to managing migration. Vega herself expresses deep skepticism that existing immigration structures can accommodate or implement humanitarian

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reflections-bureaucratic-barriers-immigration/ [https://perma.cc/2JUT-VAL6] (explaining how public servants resist discretion as a means to minimize blame).

77. See Vega, Bordering on Indifference, supra note 8, at 95–113.

78. See id. at 98.

79. Id. at 100.

80. See id. at 76.

81. Id. at 83.

82. See id. at 144–45 ("The enduring danger of any type of reform, but particularly reformist reforms, is that the very solutions that purport to improve the system leave its core untouched.").

83. See id. at 82 (quoting David Bustos, Agent, U.S. Border Patrol).

goals.[84] Human-centric enforcement frames like "caring control" simply cannot disrupt the broader system. The notion of "a humane immigration system is oxymoronic."[85] Structure and context determine the extent and existence of what state actors deem to be acts of kindness. In this way, Vega's observations mirror similar insights about the presence of law enforcement in other settings associated with humanitarian goals such as emergency rooms and hospitals more generally. In the absence of clear guidelines, state actors like police can manipulate ambiguities in the allocation of authority in care settings where enforcement targets are most vulnerable—physically, emotionally, and psychologically.[86] The same goes for information about students gathered by teachers and other school officials, which can be gathered and manipulated for punitive purposes by the police.[87]

Vega expresses similar degrees of skepticism towards arguments that the roughly representative racial demographics of core immigration enforcement agencies provide legitimacy to agency policy objectives and actions. The impulse to diversify the agent workforce operates as a kind of crude attempt to head off criticisms of a different type of mismatch, one measured in terms of demographic representation. By recruiting and training a workforce that superficially resembles the population it manages, ICE and the Border Patrol can insulate itself against criticisms that it is furthering a White Christian Nationalist vision.[88] The ostensible increase in legitimacy stems not just from cosmetic changes to the workforce but, as noted earlier, to the social and economic mobility that government jobs provide.[89] Vega rightly expresses skepticism of any potentially transformative impact of these changes, emphasizing that agent actions in further-

84. See id. at 141–44 (expressing concern that immigration systems provide structural obstacles to humanitarian goals).

85. Id. at 144.

86. See Ji Seon Song, Cops in Scrubs, 48 Florida St. L. Rev. 861, 887–88 (2021) (describing how the legal framework "tacitly allow[s]" medical professionals and law enforcement to coordinate, without regard to the impact on patient privacy); Ji Seon Song, Policing the Emergency Room, 134 Harv. L. Rev. 2646, 2664 (2021) (describing how police "engage in intrusive searches, seizures, and interrogations" in emergency rooms and arguing that this "takes advantage of the medical vulnerability of emergency room patients").

87. See Fanna Gamal, The Private Life of Education, 75 Stan. L. Rev. 1315, 1332–33 (2023) ("[S]tudents experience privacy violations . . . [and] the outcome of these privacy violations is often increased vulnerability for students along the lines of gender, race, class, and disability.").

88. Public views of ICE are also shaped by religion and race. One study found that distrust of ICE was lowest among white Christian groups. See Diana Orcés, Most Americans Distrust U.S. Immigration and Customs Enforcement (ICE) and Believe Federal Funding Increases Have Gone Too Far, Pub. Religion Rsch. Inst. (Feb. 3, 2026), https://prri.org/spotlight/most-americans-distrust-u-s-immigration-and-customs-enforcement-ice-and-believe-federal-funding-increases-have-gone-too-far/ [https://perma.cc/JBD6-J4XV].

89. See supra text accompanying notes 26–27. Professor David Sklansky has noted that similar types of arguments have been made to justify and defend the diversification of the police force. See Sklansky, Not Your Father's Police, supra note 53, at 1228.

ance of "caring control" take place "within a context of systemic violence and discrimination. Therefore, far from evidence of change in the U.S. immigration bureaucracy, caring control is a window into the bureaucratic and cultural processes that sustain indifference in racialized organizations, regardless of what their workforces look like."[90] One of her core arguments is that enforcement agencies stand apart from other agencies in terms of the coercive nature of their functions, making it hard to take seriously agents' explanations that they are "simply following directions" when confronted with difficult moral questions.[91] Even when officials want to soften the blow of carrying out their duties—a dynamic that emerged for many of Vega's interview subjects—the narrowness and the inherently punitive nature of their enforcement-focused mission and skillset prevent them from meaningfully doing so.

III. Foot Soldiers Amid Bureaucrats

Vega is not the first scholar to study agency bureaucrats in the immigration system, but the field is sparsely populated. Most obviously, she builds on a cluster of articles produced by anthropologist Josiah Heyman during the 1990s and early 2000s. Heyman uses a concept of "thoughtwork" to "reveal organizational power" in the context of the Immigration and Naturalization Service (INS), the predecessor to DHS.[92] Heyman notes that studying agencies like INS is important because it reveals the "[t]echniques of power" such bureaucrats use in "their relationships with the persons they attempt to control."[93] Like Vega, Heyman explored the tensions gripping Mexican American immigration officers who were charged with enforcing laws against migrants who belong or might be mistaken as belonging to the same racial group.[94] Professor Kitty Calavita's book, *Inside the State*—another notable contribution to the study of immigration bureaucracies—also focuses on the INS but trains its attention on

90. Vega, Bordering on Indifference, supra note 8, at 94 (citing Victor Ray, A Theory of Racialized Organizations, 48 Am. Socio. Rev. 26 (2019)).

91. Id. at 95–105.

92. Josiah McC. Heyman, Putting Power in the Anthropology of Bureaucracy: The Immigration and Naturalization Service at the Mexico–United States Border, 36 Current Anthropology 261, 261 (1995).

93. See id. at 262 ("Power makes context stick, and bureaucracies are the preeminent technology of power in the contemporary world."). Heyman approaches these institutions as an anthropologist, drawing from sociological traditions and "law and society" methodologies. For example, Heyman engages heavily with Michael Lipsky's concept of street-level bureaucracy, a classic in the law and society tradition. Id. at 264 (citing Michael Lipsky, Street-Level Bureaucracy: Dilemmas of the Individual in Public Services (1980)).

94. See Josiah McC. Heyman, U.S. Immigration Officers of Mexican Ancestry as Mexican Americans, Citizens, and Immigration Police, 43 Current Anthropology 479, 479 (2002) (explaining that "Mexican Americans historically have been treated as a separate 'race' in [the border] region, blurring the line between [officers of Mexican ancestry] and people in Mexico" as the former enforce U.S. immigration law against the latter).

agency policies and practices during the middle of the twentieth century.[95] Specifically, Calavita studied the ascent and demise of the notorious Bracero Program, which created a temporary labor migration system to serve farms in the United States.[96]

Both Heyman's and Calavita's scholarship provide helpful insights into agency culture and practices and how front-line bureaucrats can normalize the vulnerability of migrants navigating the immigration system, but *Bordering on Indifference* stands apart in at least one important respect: It compiles a dataset from a post-1996 period.[97] The book offers special insights into how the enforcement branches within the immigration bureaucracy make sense of the broadly punitive laws that serve to empower them to use and threaten force. Not surprisingly, then, throughout her analysis, Vega frequently references policing: as involving analogous institutions facing similar questions of legitimacy, as a description of what ICE officers and Border Patrol agents do, and as an example of the kinds of career aspirations her interviewees had before turning to immigration enforcement.[98] For her, the police are a noun, a verb, and a data point.

Exploring the connections between immigration law's foot soldiers and the police makes sense given that concerns with race and racial inequality motivate many of the book's broader ambitions. For this reason, Vega is skeptical of bureaucracy as a mode of governance, frequently referencing how an agency's ostensible commitment to rationality and expertise can obfuscate deeper, racializing harms. Tellingly, she describes her book as "less a case study of representative bureaucracy and more a cautionary tale for those who uncritically conflate institutional diversity with organizational change, especially in policing."[99] It is precisely the bureaucratic trappings of agencies like ICE and Border Patrol—and more broadly the police and other law enforcement agencies—that normalize and reinforce the vulnerability of migrants. Vega questions the value of these agencies' "technical rationality," which she argues "can mollify moral instincts and thwart social group commitments."[100] She further notes how "social distance created by bureaucratic culture is especially pronounced in law enforcement organizations, like the USBP and ICE, where the archetypal

95. See generally Kitty Calavita, Inside the State: The Bracero Program, Immigration, and the I.N.S. (1992) (explaining how the INS controlled the largest foreign worker program in U.S. history in the 1940s).

96. See id. at 1–4.

97. For a more recent dataset, see Farrell-Bryan, supra note 11, at 2529–33 (describing and analyzing a dataset compiled from interviews with ICE attorneys at the Office of the Principal Legal Advisor in 2020 and 2021). This class of agents tends to follow a different life trajectory than those at the heart of Vega's study.

98. See Vega, Bordering on Indifference, supra note 8, at 138 (summarizing research on diversification efforts among police); id. at 27 (describing the topic of Latinx officers "policing" their own); id. at 37 (quoting an ICE officer who "always wanted to be a police officer" (quoting Carter Grayson, Officer, ICE)).

99. Id. at 9.

100. Id. at 12.

client is constructed as an undeserving, immoral 'bad guy.'"[101] Indeed, one reading of *Bordering on Indifference* is as a case study of foot soldiers acting as bureaucrats.

At the same time, ICE agents and Border Patrol officers are not the only government actors involved in the administration of immigration laws. This book proves important not just for what it illustrates about the relationship between immigration foot soldiers and other law enforcement actors but also for the insights it offers about how ICE and Border Patrol might interact with other federal agencies charged with a less punitive mandate. Other agencies in the same immigration ecosystem adjudicate applications for visas, employment-authorization documents, and other immigration-related benefits. Using *Bordering on Indifference* to think through how foot soldiers work *amid* bureaucracies highlights a constellation of agencies charged with immigration duties divided between two different types of work: *enforcement* duties, which involve arresting, detaining, and deporting migrants, and *benefits* duties, which refers to the adjudication of visas, waivers, and travel documents. These duties evoke starkly different images of agency officials. Those enforcing immigration laws are the foot soldiers of the system. They move through the streets or drive unmarked cars in search of surreptitious entrants. Those adjudicating benefits are the bureaucrats of the system. They work in offices, review records, and interact with migrant applicants on a less frequent basis. This difference in terminology—between foot soldiers on the one hand and bureaucrats on the other—roughly tracks the distinction between enforcement and benefits functions, which governs the allocation of power in core immigration agencies.[102]

Legal scholars might find some of the vocabulary of *Bordering on Indifference* jarring, in particular, Vega's use of the term "street-level bureaucrat" to describe immigration enforcement actors.[103] Some of this has to do with the difference between sociology and law. Referring to ICE and border patrol officials as "bureaucrats" is consistent with common sociological practice to treat all government officials as a part of a bureaucracy charged with carrying out discretionary and negotiable mandates

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101. Id. (quoting Steve Herbert, Morality in Law Enforcement: Chasing "Bad Guys" With the Los Angeles Police Department, 30 Law & Soc. Rev. 799, 802 (1996)).

102. It does not track the distinction perfectly. USCIS, for example, adjudicates applications for immigration benefits that are allocated within the United States. See Providing Immigration Benefits & Information, DHS, https://www.dhs.gov/providing-immigration-benefits-information [https://perma.cc/3CXU-SMNC] (last updated Oct. 14, 2022) ("The Department of Homeland Security, through [USCIS], provides immigration benefits to people who are entitled to stay in the U.S. on a temporary or permanent basis."). USCIS refers to its employees as "officers" even though their functions reflect bureaucratic responsibilities. See, e.g., Exploring Asylum Officer Careers, USCIS, https://www.uscis.gov/exploring-asylum-officer-careers [https://perma.cc/U9XX-336S] (last updated Feb. 6, 2025) ("Asylum Officers interview [noncitizens] to determine if they meet the U.S. legal definition of a 'refugee' and are eligible for asylum status.").

103. Vega, Bordering on Indifference, supra note 8, at 12.

stemming from law.[104] In the realm of legal scholarship, the term bureaucrat is not usually associated with government officials who are authorized to threaten or use force and engage in state-sanctioned violence. For many legal scholars, the difference between the power to detain and deport, on the one hand, and the power to adjudicate applications and "push papers" on the other, is analytically significant.[105] In the policing context, officers and departments sometimes understand police violence in terms of a "use-of-force continuum," a concept that provides limited guidance for officers interested in determining when the use of force crosses over from necessary and legitimate to violent and inexcusable.[106] In the immigration context, a similar idea animates the relationship between enforcement and benefits policies, in which immigration officials employ a "deservingness" continuum to determine whether migrants should be granted benefits or subjected to deportation.[107]

Vega makes clear that while some of her interviewees expressed misgivings about the nature of their work, such ambivalence did not prevent them from embracing their law enforcement duties. If anything, she describes many interviewees digging into their missions in response to public misgivings about immigration enforcement. She argues that her interviewees "are invested in being seen as legitimate, as having the moral authority to arrest, detain, and deport immigrants who fall outside the law."[108] She goes on to explain that this commitment reveals "an unspoken assumption: agents believe there is an inverse relationship between their and migrants' morality. If migrants are the good guys, then agents must be the bad guys, and that would be untenable as a matter of professional philosophy."[109]

This organizational investment in morally degrading migrants not only fosters an us-against-the-world agency culture, it also can disrupt the mission-effectiveness of other parts of the immigration bureaucracy

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104. See Farrell-Bryan, supra note 11, at 2528 ("While we have a growing knowledge about how field enforcement agents think about the work they do, less is known about the self-legitimacy strategies of prosecutorial bureaucrats who wield coercive force as a function of their occupations."); Lipsky, supra note 93, at 3 ("Public service workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work are called *street-level bureaucrats* . . . .").

105. Identities like "officer" or "agent" connote the power to engage in justified violence. Instead, scholars usually, perhaps unreflectively, refer to this class of government officials as merely agents (such as Border Patrol agents) or as officers (such as Customs and Border Protection officers). See also Angélica Cházaro, The End of Deportation, 68 UCLA L. Rev. 1040, 1073 (2021) (describing immigration judges, as well as officials in CBP and ICE, as "violence workers").

106. See David Alan Sklansky, A Pattern of Violence: How the Law Classifies Crimes and What It Means for Justice 106–107 (2021).

107. See Sébastien Chauvin & Blanca Garcés-Mascareñas, Becoming Less Illegal: Deservingness Frames and Undocumented Migrant Incorporation, 8 Soc. Compass 422, 426–28 (2014) (describing the concept of "deservingness").

108. Vega, Bordering on Indifference, supra note 8, at 131.

109. Id.

through its unique (and uniquely destabilizing) power to use and threaten force. Administrative law doctrine and commentary routinely cite expertise as a reason to empower or defer to agencies, but Vega's book highlights the limits of that kind of rationale in the context of immigration law. Rather than displaying expertise, enforcement policies and practices reassert power, a kind of performance of sovereignty in which power "is always a tentative and unstable project whose efficacy and legitimacy depend on repeated performances of violence and a 'will to rule.'"[110] Scholars in critical theory have identified this dynamic within the police.[111] Vega attempts to draw similar sorts of lessons in the immigration context from a sociological vantage point. Legal scholars are not far behind in this inquiry. Indeed, in recent years, legal scholars have questioned whether and how much courts ought to defer to agencies carrying out immigration duties on this basis.[112]

It is worth reemphasizing the extent to which the ability to use and threaten force against migrants undermines other agencies within the immigration bureaucracy. ICE's and the Border Patrol's enforcement duties draw from a broadly punitive set of laws, which operate as a kind of administrative singularity—an invisible but infinitely dense source of law that threatens to suck in everything around it. The power to deport ordinary migrants exerts such a destabilizing gravitational force that during the Biden Administration—which embraced many of the same policies as the Obama Administration—some agents within Homeland Security Investigations (HSI) pushed to formally separate the agency component from Enforcement and Removal Operations (ERO), which oversees apprehension, detention, and deportation.[113] The officials featured in

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110. See Thomas Blom Hansen & Finn Stepputat, Introduction to Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World 1, 3 (Thomas Blom Hansen & Finn Stepputat eds., 2005). They further explain:

> These performances can be spectacular and public, secret and menacing, and also can appear as scientific/technical rationalities of management and punishment of bodies. Although the meanings and forms of such performances of sovereignty always are historically specific, they are, however, always constructing their public authority through a capacity for visiting violence on human bodies.

Id.

111. See, e.g., Micol Seigel, Violence Work: State Power and the Limits of Police 9 (2018) (noting that "the violence of the police is often latent or withheld, but it is functional precisely because it is suspended").

112. Legal scholars Shoba Wadhia and Christopher Walker, for example, argued against the application of *Chevron* deference to legal interpretations in the immigration context. Shoba Sivaprasad Wadhia & Christopher J. Walker, The Case Against *Chevron* Deference in Immigration Adjudication, 70 Duke L.J. 1197, 1201–03 (2021); see also Emily R. Chertoff & Jessica Bulman-Pozen, The Administrative State's Second Face, 100 NYU L. Rev. 727, 729–30 (2025).

113. See Maria Sacchetti & Nick Miroff, Agents With Homeland Security Investigations Push to Break Away From ICE, Saying Negative Reputation Hurts Their Work, Wash. Post

Bordering on Indifference worked within ERO,[114] and they noted that the stigma of being associated with deportation goals makes it harder for them to conduct investigations in immigrant-friendly jurisdictions.[115] HSI agents raised a similar concern during the first Trump Administration.[116] In a letter to then-Homeland Security Secretary Kirstjen Nielsen, the HSI agents argued that ICE's two branches have distinct, and at times incompatible, missions: "The disparate functions performed by ERO and HSI often cause confusion among the public, the press, other law enforcement agencies and lawmakers because the two missions are not well understood and are erroneously combined."[117] While ERO routinely apprehends and removes a population of people who violate basic immigration laws but pose no real public safety threat,[118] HSI argued that it undertakes truly dangerous missions against "transnational criminal

(Dec. 29, 2021), https://www.washingtonpost.com/national-security/hsi-ice-split/2021/12/28/85dc6c66-61ad-11ec-8ce3-9454d0b46d42_story.html (on file with the *Columbia Law Review*). ERO's webpage provides: "As part of its critical mission, ERO manages all aspects of the immigration enforcement process, including the identification, arrest, detention and removal of aliens who are subject to removal or are unlawfully present in the U.S." Enforcement and Removal Operations, ICE, https://www.ice.gov/about-ice/ero# [https://perma.cc/J8G5-AKVP] (last visited Oct. 14, 2025). By contrast, HSI's webpage unambiguously mentions its criminal law enforcement focus: "At HSI, we protect what matters most–our country, our people and our future. What makes us unique is the global nature of the crimes we investigate and the broad legal authorities available to us to combat them." Who We Are, ICE, https://www.ice.gov/about-ice/hsi# [https://perma.cc/WUZ6-DFFL] (last visited Oct. 14, 2025) [hereinafter HSI, Who We Are].

114. See Vega, Bordering on Indifference, supra note 8, at 24.

115. See id. at 118.

116. See Nick Miroff, Seeking a Split From ICE, Some Agents Say Trump's Immigration Crackdown Hurts Investigations and Morale, Wash. Post (June 28, 2018), https://www.washingtonpost.com/world/national-security/seeking-split-from-ice-agents-say-trumps-immigration-crackdown-hurts-investigations-morale/2018/06/28/7bb6995e-7ada-11e8-8df3-007495a78738_story.html (on file with the *Columbia Law Review*) (describing how the reputation of ICE's transnational criminal investigations branch is marred by the agency's more divisive immigration arrests and deportations branch); Sacchetti & Miroff, supra note 113 ("[HSI agents] say their affiliation with ICE's immigration enforcement role is endangering their personal safety, stifling their partnerships with other agencies and scaring away crime victims . . . ."); see also Nick Miroff, Trump Loves ICE. Its Workforce Has Never Been So Miserable., The Atlantic (July 10, 2025), https://www.theatlantic.com/politics/archive/2025/07/trump-ice-morale-immigration/683477/ (on file with the *Columbia Law Review*) [hereinafter Miroff, Trump Loves ICE] (describing how ICE agents in the Trump Administration have faced longer hours and have received pressure from supervisors to shift their focus from criminal investigations to civil immigration enforcement).

117. See Letter from David Shaw et al., Special Agents in Charge, Homeland Sec. Investigations, ICE, to Kirstjen Nielsen, Sec'y, DHS 4 (c. June 2018), https://www.documentcloud.org/documents/4562896-FILE-3286/ (on file with the *Columbia Law Review*) [hereinafter HSI, Nielsen Letter].

118. This observation underlies approaches to immigration *enforcement* grounded in principles of priority setting amid resource scarcity. See Chacón et al., supra note 7, at 62–66.

organizations that facilitate cross border crimes impacting our communities and national security."[119]

Part of the reason HSI wants to separate from ICE is because of the public disapproval and divisiveness of aggressive enforcement policies.[120] Student protests of immigration enforcement actions drove HSI agents from college campuses, making it hard to recruit and train future agents.[121] And the nature of HSI's mission makes it harder to show the public what it does and the purpose it serves. HSI holds itself out as a legacy of the U.S. Customs Service, which was established in 1789, primarily to manage and regulate the imposition of tariffs on imported goods.[122] But it also regulates borders as it concerns the transportation or smuggling of people like trafficking victims.[123] In a way, the agency struggles to explain its mission to the public. Unlike ERO—which can point to easily quantifiable metrics for evaluating success such as the number of noncitizens detained and removed—HSI must work with a more challenging set of metrics.[124] From time to time, HSI can demonstrate its competence

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119. HSI, Nielsen Letter, supra note 117, at 4; see also Jason Buch, ICE Criminal Investigators Ask to Be Distanced From Detentions, Deportations in Letter to Kirstjen Nielsen, Tex. Observer (June 27, 2018), https://www.texasobserver.org/ice-hsi-letter-kirstjen-nielsen-criminal-civil-deportation-zero-tolerance/ [https://perma.cc/SU3W-9AD3] (describing the letter from HSI agents and their desire to be distanced from the work of ERO).

120. See Kari Hong, 10 Reasons Why Congress Should Defund ICE's Deportation Force, 43 N.Y.U. Rev. L. & Soc. Change: Harbinger 40, 47–49 (2019), https://socialchangenyu.com/wp-content/uploads/2019/03/Kari-Hong_-RLSC-The-Harbinger_43.pdf [https://perma.cc/TC98-LMH2] (arguing that the ERO's aggressive enforcement practices interfere with HSI's ability to prosecute criminal enterprises).

121. See Sacchetti & Miroff, supra note 113 (describing an HSI report complaining that the agency's affiliation with ICE damages its relationship with universities).

122. The agency both generates revenue for the federal government and serves a law enforcement function of screening for drugs, weapons, and other prohibited items. See HSI, Who We Are, supra note 113 ("The story of Homeland Security Investigations (HSI) begins in 1789, when Congress established the U.S. Customs Service."); see also Act of July 31, 1789, ch. 5, § 1, 1 Stat. 29 (repealed 1790) (requiring the creation of the U.S. Customs Services to collect tariffs).

123. See Annie Smith, The Underprosecution of Labor Trafficking, 72 S.C. L. Rev. 477, 494–95 (2020) (naming HSI as one of several agencies responsible for combatting human trafficking); Paul Ingram, Top ICE Agents Seek to Split Agency, Separate Investigations From Deportations, Tucson Sentinel (June 29, 2018), https://www.tucsonsentinel.com/local/report/062918_ice_letter/top-ice-agents-seek-split-agency-separate-investigations-from-deportations/ (on file with the *Columbia Law Review*) (referencing HSI's role in combatting human trafficking).

124. For example, in evaluating whether HSI has effectively accomplished its "drug control" goals, the agency relies on, among other things, the percentage of time agents devote to these tasks. See Off. of the Inspector Gen., DHS, OIG-19-30, Review of U.S. Immigration and Customs Enforcement's Fiscal Year 2018 Drug Control Performance Summary Report 1–2 (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-03/OIG-19-30-Mar19.pdf [https://perma.cc/BV4F-CQX6]. While such metrics might be helpful for internal tracking purposes, they are much less useful as a basis for showing the public that the agency is succeeding in its effort to combat drug trafficking.

through splashy and large-scale arrests, but such victories are resource intensive and take time.[125]

The HSI–ERO rift fits into a longer history of lawmakers and regulators searching for a suitable home for immigration enforcement power. Historically, that power has wandered between different cabinet-level departments—including the Departments of Commerce, Labor, and Justice—each of which housed a broad array of immigration-related powers.[126] When Congress created DHS and reorganized the immigration system into a bifurcated model—that is, separating the enforcement and benefits functions—the thought was that no single agency would be saddled with the burden of balancing exclusionary and inclusionary mandates thereby minimizing risks of conflicts of interest.[127] Splitting agency duties in this way—so the argument went—would help overcome problems of immigration enforcement policies that exert a gravitational force over other programs.[128] For obvious reasons, migrants and their families are harder to find during moments of intensified immigration enforcement.[129] For administrative programs that required the cooperation of migrant communities—for example, those addressing labor exploitation—cordoning off immigration enforcement could help other agencies present clean hands when reaching out with their regulations.[130] Indiscriminate and aggressive immigration enforcement tactics can undermine the successful operation of other regulatory goals related to labor and employment rights, education, commercial and consumer activities, as well as most of the machinery of governance, judicial decision-making, and access to courthouses. For this reason, different organs of government, society, and the

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125. For example, HSI investigated and arrested the rapper and mogul Sean "Diddy" Combs for alleged sex trafficking, which led to a long, drawn-out process including trial. See N.Y. Times, The Sean Combs Trial: Timeline of the Testimony (July 2, 2025), https://www.nytimes.com/article/sean-diddy-combs-trial-timeline-testimony.html (on file with the *Columbia Law Review*) (describing the seven-week trial of Sean Combs); see also Julia Jacobs, Why Is Sean Combs the Subject of a Homeland Security Investigation?, N.Y. Times (Mar. 30, 2024), https://www.nytimes.com/2024/03/30/arts/music/sean-combs-diddy-dhs-sex-trafficking.html (on file with the *Columbia Law Review*) (last updated Apr. 2, 2024).

126. See Stephen Lee, Monitoring Immigration Enforcement, 53 Ariz. L. Rev. 1089, 1110–13 (2011) (describing immigration as a paradigmatic example of how agencies with "difficulties reconciling multiple enforcement responsibilities" are often split and reorganized).

127. See id. at 1111.

128. Id. at 1110–12.

129. See Leticia M. Saucedo, Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace, 38 Fordham Urb. L.J. 303, 308 (2010) (describing how increased immigration enforcement causes immigrant employees to avoid reporting violations of employment and labor laws).

130. See, e.g., Jayesh M. Rathod, Immigrant Labor and the Occupational Safety and Health Regime, 33 N.Y.U. Rev. L. & Soc. Change 479, 496–98 (2009) (explaining, for example, how workplace injury reporting requires participatory reporting from the public).

economy have tried to extract themselves from the machinery of immigration enforcement.[131]

The tension between ERO and HSI also highlights how *Bordering on Indifference* might inspire further empirical examination of the immigration bureaucracy. For one thing, employees within each subcomponent of ICE enjoy different workplace protections. ERO is unionized, while HSI is not.[132] Public employee unions feature only in passing in Vega's book, leaving open many questions about political organizing, wrangling, and strategizing on the part of the rank-and-file immigration officers. A recent contribution by Professor Nicholas Handler shows that some of the most prominent examples of bureaucratic resistance within immigration agencies during the Obama era were generated and deployed by leaders within federal employee unions.[133] Federal employee union leaders like Chris Crane, who was President of the National Immigration and Customs Enforcement Council (NICC), and Brandon Judd, then the head of the Border Patrol Council, used a mix of lobbying, labor advocacy, and litigation to draw attention to their causes and gain access to the White House.[134] Vega singles out these unions as advocating for "extreme" views on immigration enforcement in ways that obfuscate the variation in attitudes among the rank-and-file agents.[135] The omnipresent tone-setting role of police unions in the local law enforcement context prompts the question of whether federal employee unions serve a similar function in the immigration agency context. In the policing context, unions can often frustrate the process of holding officers accountable for unlawful behavior

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131. The emergence of sanctuary cities exemplifies this dynamic. See Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, Anti-Sanctuary and Immigration Localism, 119 Colum. L. Rev. 837, 841 (2019) (describing how sanctuary cities implement policies to limit cooperation with immigration enforcement).

132. See HSI, Nielsen Letter, supra note 117, at 3.

133. See Nicholas Handler, Separation of Powers by Contract: How Collective Bargaining Reshapes Presidential Power, 99 N.Y.U. L. Rev. 45, 97–98 (2024) (explaining how, as ICE and U.S. Customs and Border Control (CBP) became more politically active, they began to more aggressively push their own policy objectives within DHS, most notably through prominent opposition to President Obama's Deferred Action for Childhood Arrival (DACA) program).

134. See, e.g., Paul Ingram, BP Union Head, Babeu Accuse Feds of 'Lack of Enforcement' at Border, Tucson Sentinel (Mar. 8, 2016), https://www.tucsonsentinel.com/local/report/030816_bp_babeu/bp-union-head-babeu-accuse-feds-lack-enforcement-border/ (on file with the *Columbia Law Review*) (reporting on National Border Patrol Council President Brandon Judd using a public press event with local officials to pressure federal policymakers); see also Handler, supra note 133, at 97–100 (describing how the National ICE Council, led by President Chris Crane, turned to "lobbying, advocacy, and impact litigation" to advance policy objectives). Both Crane and Judd have since emerged as influential figures within the Trump Administration. For example, President Trump nominated Judd to serve as U.S. Ambassador to Chile. See Judd, Brandon – Republic of Chile, March 17, 2025 – Certificate of Competency, Report for the S. Comm. on Foreign Rels., U.S. Dep't of State (Mar. 17, 2025), https://www.state.gov/judd-brandon-republic-of-chile-march-2025 [https://perma.cc/3QDY-FVFH].

135. See Vega, Bordering on Indifference, supra note 8, at 148.

because of union leaders' strong self-identification with being advocates for police officers.[136] Vega's account invites questions about whether union representatives understood their duties as elected advocates in similar terms vis-à-vis Border Patrol agents and ICE officers. Vega's framing of agents engaging in disinterested professionalism paints a picture of a body that sees itself as "simply" following instructions from supervisors, but the important question remains whether and how unions negotiate or cultivate some of this culture of compliance. Relatedly, HSI presents an interesting agency case study precisely because it is not represented by a union.[137]

The rift between ERO and HSI also invites further examination of the kinds of paradigms or ideas guiding reform discussions. Splitting ICE into further subcomponents implicitly concedes the legitimacy of both ERO and HSI missions. This is typical of the "liberal" approaches championed by the Obama and Biden Administrations, which facilitated carceralism even while temporarily protecting politically favorable groups of migrants through programs like DACA—a policy that did not ultimately lead to a meaningful path towards a more compassionate immigration system. Further, the version of HSI presented by its agents in their letter to Secretary Nielson—that HSI is operating at a healthy distance from core immigration enforcement actions—seems overstated if not just flat out wrong. For example, HSI has provided ERO with access to some of its databases in pursuing immigration enforcement goals.[138] And the two sub-units within ICE obviously share a budget and oversight from the ICE director and senior leadership.[139] Again, one of the core insights offered by *Bordering on Indifference* is the ways that agents found justifications for separating themselves from the morally ambiguous and coercive nature of

136. See Catherine L. Fisk & L. Song Richardson, Police Unions, 85 Geo. Wash. L. Rev. 712, 746 (2017) (noting that "police unions see their mission as protecting the interests of police officers, including protecting officers from discipline"); Stephen Rushin, Police Union Contracts, 66 Duke L.J. 1191, 1239 (2017) ("[P]olice union contracts sometimes establish problematic internal disciplinary procedures that serve as barriers to accountability.").

137. Although HSI employees are not represented by unions, they can seek support from the HSI Association, a nonprofit organization that serves current and former HSI employees. See About Us, HSI Ass'n, https://hsiassoc.org/about-us/ [https://perma.cc/5E9Y-ZZ3S] (last visited Feb. 22, 2026).

138. Mary Pat Dwyer & Rachel Levinson-Waldman, Brennan Ctr. for Just., A Realignment for Homeland Security Investigations 5 (2023), https://www.brennancenter.org/media/11356/download/2023_05_Homeland_Security_Investigations.pdf?inline=1 [https://perma.cc/K8XM-HLSC].

139. See DHS, FY 2025 Budget in Brief 33–38 (2024), https://www.dhs.gov/sites/default/files/2024-04/2024_0311_fy_2025_budget_in_brief.pdf [https://perma.cc/94CP-2R9W] (showing that ICE requests its yearly budget without distinguishing between ERO and HSI operations); DHS, 2024 Budget Overview, supra note 2, at 3–6 (showing a combined budget justification for ICE as a whole).

their work.[140] Vega's insights on misalignment can continue to push this conversation in the right direction. Those thinking about abolition and the role it has in advancing the goals of democracy focus on issues of budgets and resource allocation as means for moving away from policing and punishment.[141] Further examining the internal structures and divisions of immigration enforcement agencies can shed light on how basic administrative choices made at different levels of leadership shape internal understandings of the ideas raised in Vega's book. It would be helpful to disaggregate officials to better understand whether and how assessments of agency legitimacy vary with levels of seniority.

IV. AN ARMY OF FOOT SOLDIERS

Bordering on Indifference analyzes data gathered primarily during the Obama Administration—from the summer of 2014 to the winter of 2016.[142] Some of the interviews took place during the first few months of the Trump Administration, but on balance, the book has the most to say about moral economies of immigration enforcement during a period in which political leaders attempted to incorporate human consequences into their policies—at least as a matter of lip service if not in practice. At the time of this Book Review's publication, President Trump has unleashed a historically punitive range of immigration policies during his second term. The number of immigrants subject to detention has grown rapidly,[143] and aggressive enforcement tactics including roving patrols, some of which resulted in immigration officers killing both enforcement targets and protesters, have set many communities on edge.[144] One of the broader takeaways of *Bordering on Indifference* is that immigration enforcement officers use a range of strategies to legitimate their work by denigrating the migrants they detain and deport. This final Part considers how this

140. See Vega, Bordering on Indifference, supra note 8, at 100 ("It is common for street-level bureaucrats to limit their responsibility for un-favorable outcomes by denying discretion and imposing certain restrictions on their own power. . . . In this way, immigration agents . . . use rules and regulations to distance themselves from work actions when those actions bring them criticism from the public.").

141. See Allegra M. McLeod, Envisioning Abolition Democracy, 132 Harv. L. Rev. 1613, 1634–35 (2019).

142. See Vega, Bordering on Indifference, supra note 8, at 21.

143. See, e.g., Chishti & Lacarte, supra note 17 (reporting that ICE detainees increased from 39,000 in January 2025 to a record 61,000 by late August 2025); Camilo Montoya-Galvez, ICE's Detainee Population Reaches New Record High of 73,000, as Crackdown Widens, CBS News (Jan. 16, 2026), https://www.cbsnews.com/news/ices-detainee-population-record-high-of-73000/ [https://perma.cc/CXH3-WSG2] (reporting that, in January 2026, "[t]he number of detainees in U.S. Immigration and Customs Enforcement custody ha[d] reached a new record high, surpassing 70,000 for the first time in the deportation agency's 23-year history").

144. See Kurt Streeter, How Alex Pretti's Death Became a National Tipping Point, N.Y. Times (Feb. 1, 2026), https://www.nytimes.com/2026/02/01/us/alex-pretti-minneapolis.html (on file with the *Columbia Law Review*).

insight might shape our understandings of the administration of immigration laws now that the federal bureaucracy has been reoriented around an exacerbated anti-immigrant impulse.

Those who defend the legitimacy of immigration enforcement agencies routinely cite resource limitations.[145] If only there were more agents, detention centers, and immigration judges, the government could do more to get rid of dangerous and noncompliant migrants, or so the thinking goes. When Congress passed the OBBBA in 2025, it agreed to send $46.6 billion to border infrastructure.[146] To put that figure in context, in 2016, then-candidate Donald Trump campaigned on the promise that he would make Mexico pay to build a wall at the U.S.–Mexico border,[147] at one point proposing to compel Mexico to pay a one-time sum of $5–10 billion.[148] Once in office during his first Administration, President Trump pressed a divided Congress to allocate $5.7 billion for the border, settling for much less than that at $1.375 billion after tense negotiations and a government shutdown.[149] Congress just passed a law allocating more than thirty-three times the amount that was allocated in 2019.[150] This bill shows the effectiveness (and harm) of using the specter of the dangerous "criminal

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145. See, e.g., Removal of Aliens From the United States in Recent Years: Hearing Before the Subcomm. on Immigr. & the Nat'l Int. of the S. Comm. on the Judiciary, 114th Cong. 6 (2016) (statement of Thomas Homan, Exec. Assoc. Dir., Enf't & Removal Operations, ICE), https://www.judiciary.senate.gov/imo/media/doc/05-19-16%20Homan%20Testimony.pdf [https://perma.cc/4ENN-TJXP] ("In general, more time, personnel, and resources are required to complete the removal process for nationals from Central America and other noncontiguous countries when compared to Mexican nationals apprehended at the border.").

146. One Big Beautiful Bill Act, Pub. L. No. 119-21, § 90001, 139 Stat. 72, 357–58 (2025).

147. Donald Trump: Mexico Will Pay for Wall, "100%", BBC News (Sep. 1, 2016), https://www.bbc.com/news/election-us-2016-37241284 [https://perma.cc/BV9B-TUKM].

148. See Rebecca Shabad, Donald Trump Explains How He Would Force Mexico to Pay for Border Wall, CBS News (Apr. 5, 2016), https://www.cbsnews.com/news/donald-trump-explains-how-he-would-force-mexico-to-pay-for-border-wall/ [https://perma.cc/BDM8-C4XB] ("'It's an easy decision for Mexico: make a one-time payment of $5–10 billion to ensure that $24 billion continues to flow into their country year after year' . . . ." (quoting Press Release, Donald J. Trump Presidential Campaign, Compelling Mexico to Pay for the Wall (Apr. 5, 2016), https://www.presidency.ucsb.edu/documents/trump-campaign-press-release-donald-j-trump-compelling-mexico-pay-for-the-wall [https://perma.cc/CXP3-9AZC])).

149. See Peter Baker & Maggie Haberman, Trump Puts Best Face on Border Deal, as Aides Try to Assuage an Angry Right, N.Y. Times (Feb. 13, 2019), https://www.nytimes.com/2019/02/13/us/politics/deal-government-shutdown.html (on file with the *Columbia Law Review*) (highlighting a final agreement of $1.375 billion for fencing along the border); Shannon Van Sant, Border Security Funding Talks Stalled, Government Shutdown Looms, NPR (Feb. 10, 2019), https://www.npr.org/2019/02/10/693135144/border-security-funding-talks-stalled-government-shutdown-looms [https://perma.cc/V289-5N4S] (anticipating a potential government shutdown amid ongoing disagreement over funding for President Trump's border wall).

150. See Baker & Haberman, supra note 149.

alien" to drum up political support for funding, thereby propping up a large carceral economy.[151]

The OBBBA is going to create an army of foot soldiers for immigration enforcement. $8 billion has been earmarked for hiring, training, and retaining U.S. Border Patrol and U.S. Customs and Border Protection (CBP) personnel with the possibility of signing bonuses and other recruitment incentives.[152] The bill also allocates $3.3 billion for the Executive Office for Immigration Review (EOIR), which houses immigration judges,[153] and devotes $29.9 billion for hiring, training, and retaining ICE officers.[154] It further makes available $45 billion for addressing "detention capacity."[155]

The OBBBA will also further undermine programs historically grounded in inclusive principles. For example, the new law imposes fees on those applying for asylum and employment authorization documents[156] and does not permit fee waivers.[157] The bill similarly imposes fees to those seeking relief and an Employment Authorization Document (EAD) under Temporary Protected Status (TPS) and parole,[158] operating as a further deterrent to those seeking relief. This extends and distorts the model used

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151. See Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear 11 (2007) (arguing that American political institutions have been reorganized around the fear of violent crime, normalizing new forms of state power).

152. The bill devotes $4.1 billion to hiring and training new Border Patrol officers and an additional $2 billion to retention efforts like performance bonuses. One Big Beautiful Bill Act, Pub. L. No. 119-21, § 90002(a)(1)–(2), 139 Stat. 72, 358 (2025). The bill also makes available $5.9 billion for repairing and acquiring vehicles and improving facilities. See id. § 90002(a)(3)–(4). The bill separates and makes available $2 billion for hiring and training CBP personnel and funding related enforcement activities. See id. § 100051.

153. See id. § 100054 (allocating $3.3 billion for hiring EOIR judges and support staff, combating drug trafficking, prosecuting immigration matters, and other related purposes).

154. See id. § 100052 (appropriating $29.9 billion for hiring and training ICE officers and for other purposes that support "enforcement and removal operations," including transportation, information technology, facility upgrades, and fleet modernization).

155. Id. § 90003(a).

156. See id. §§ 100002(a)–(b), 100003(a). For example, the statute sets a $100 filing fee for asylum applicants, which can be increased by the Secretary of Homeland Security or Attorney General by rule. See id. § 100002(b)(1)-(2). Parolees must pay a $1000 filing fee, which can similarly be adjusted by the DHS Secretary. See id. § 100004(c)(1)–(2). The statute increased the filing fee for temporary protected status (TPS) from $50 to $500. See id. § 100006(2). Asylum seekers who apply for employment authorization documents (EAD) will have to pay $550, an amount that can be altered by the Secretary by rule. See id. § 100003(a)(2)(A)–(B). A similar fee structure governs EAD applications filed by other noncitizens with temporary statuses. See id. § 100003(b)(2)(A)–(B), (c)(2)(A)–(B) (defining similar fee structure for both parolees and recipients of temporary protected status seeking EAD).

157. Id. §§ 100002(e), 100003(a)(5), (b)(5), (c)(5). For those seeking parole, exceptions to the fee requirement may be available on a case-by-case basis for medical-related emergencies or equitable reasons related to the illness or death of family members. Id. § 100004(b).

158. Id. §§ 10003(b)(1)–(2), (c)(1)–(2), 100004(a), (c).

with Deferred Action for Childhood Arrivals (DACA),[159] a signature program of the Obama Administration. The bill increases fees for many programs offering relief or stability against removal as well as for other basic procedural rules related to appeals and motions to reopen.[160] These fees help fund agency components that adjudicate asylum applications.[161] But these increases also distort the program by extracting financial payments from vulnerable cross-sections of the population. Unlike Dreamers, who have employable skills, applicants within the other categories for temporary relief do not necessarily enjoy comparable leverage within labor markets. Some estimates suggest that the increased fee structure will raise more than one billion dollars over the next decade and up to nine billion dollars counting remittances, which are heavily driven by immigrant earnings.[162]

During the second Trump Administration, immigration agents have fanned out into society, showing up at worksites,[163] schools,[164] court-

159. Renew Your DACA as Early as Possible, DHS (May 13, 2024), https://www.dhs.gov/archive/news/2024/05/13/renew-your-daca-early-possible [https://perma.cc/LHG3-JRYH] (detailing filing fees for renewing DACA, including a $520 paper filing fee and a $470 online filing fee).

160. For example, the bill also increases fees for those seeking adjustment of status, cancellation of removal, suspension of deportation, or a waiver of inadmissibility, which many noncitizens secure before leaving the country for consular interviews. One Big Beautiful Bill Act §§ 100013(a), (b), (c), (h), (j). The bill also increases fees for those appealing initial adjudications and for those who are ordered removed and subsequently arrested by ICE. Id. §§ 100013, 100016(a), (b)(1).

161. Half of the fees that are collected will be devoted to the EOIR, which houses immigration judges, and DHS, which houses USCIS. Id. § 100002(d).

162. See Michelle Hackman & Jack Gillum, How Immigrants Will Help Fund Trump's Tax Cuts, Wall St. J. (July 4, 2025), https://www.wsj.com/politics/policy/trump-big-beautiful-bill-immigrants-a991470e?gaa (on file with the *Columbia Law Review*).

163. See Marianne LeVine, Lauren Kaori Gurley & Aaron Schaffer, ICE Is Arresting Migrants in Worksite Raids. Employers Are Largely Escaping Charges., Wash. Post (June 30, 2025), https://www.washingtonpost.com/immigration/2025/06/30/ice-raids-arrests-workers-companies/ (on file with the *Columbia Law Review*) ("The raids immigration officers are conducting have largely targeted small businesses such as car washes.").

164. See Howard Blume, Agents Detain Student at Gunpoint Near School; Safe Zones to Be Expanded Around LAUSD Campuses, L.A. Times (Aug. 11, 2025), https://www.latimes.com/california/story/2025-08-11/lausd-bass-pledge-back-to-school-protections-immigrant-families (on file with the *Columbia Law Review*) (describing immigration raids occurring outside of schools in Los Angeles).

houses,[165] and on the streets.[166] The agents sometimes wield guns and often, if not always, wear masks, making it difficult to identify them.[167] Workplace raids reflect a kind of crisis governance meant to capture the public's attention and seem to justify the funding that lawmakers insisted was necessary. Advocates of immigration enforcement often focus on the lack of resources. In justifying the reassignment of U.S. Marshalls and other DOJ officials who have traditionally worked outside of immigration enforcement to carry out workplace raids, then-acting Secretary of Homeland Security Benjamine Huffman noted, "For decades, efforts to find and apprehend illegal aliens have not been given proper resources. This is a major step in fixing that problem."[168] Although this influx of resources will give enforcement-oriented policymakers a chance to prove their point, it does not change the underlying empirical reality that the level of criminality and dangerous criminal behavior within immigrant communities remains very low.

This misalignment between the legal authority of agencies and the legal vulnerability of the target population shows that the OBBBA is unlikely to translate into better enforcement policies on the ground and will almost certainly make things worse. Rushing to spend down the funding, agencies like ICE and the Border Patrol have incentives to cut corners and streamline training, increasing the risk of mistaken arrests, deten-

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165. See Luis Ferré-Sadurní, Inside a Courthouse, Chaos and Tears as Trump Accelerates Deportations, N.Y. Times (June 12, 2025), https://www.nytimes.com/2025/06/12/nyregion/immigration-courthouse-arrests-trump-deportation.html (on file with the *Columbia Law Review*) (explaining that ICE agents have arrested immigrants leaving hearings in courthouses); see also Memorandum from Caleb Vitello, Acting Dir., ICE, to all ICE Employees, Interim Guidance: Civil Immigration Enforcement Actions in or Near Courthouses 1 (Jan. 21, 2025), https://www.ice.gov/doclib/foia/policy/11072.3_CivilImmEnfActionsCourthouses_01.21.2025.pdf [https://perma.cc/JG8X-KHFG] (rescinding Memorandum from Tae Johnson, Acting Dir., ICE & Troy Miller, Acting Comm'r, CBP to ICE & CBP, Civil Immigration Enforcement Actions in or Near Courthouses (Apr. 27, 2021)).

166. Currently, litigation is underway challenging the "roving patrols" conducted by immigration officers. See Vasquez Perdomo v. Noem, 148 F.4th 656, 664 (9th Cir. 2025) (discussing plaintiffs' allegations that immigration enforcement agents "detained individuals without reasonable suspicion, in violation of the Fourth Amendment[]" while on roving patrols).

167. Under federal regulations, ICE agents are required to identify themselves as immigration officers while executing an arrest. See 8 C.F.R. § 287.8(c)(2)(iii)(A) (2025). During the second Trump Administration, officers have begun wearing masks to conceal their identities. According to the ICE website, officers wear these masks to prevent doxing. See Immigration Enforcement Frequently Asked Questions, ICE, https://www.ice.gov/immigration-enforcement-frequently-asked-questions [https://perma.cc/9ZZD-PXMS] (last visited Oct. 15, 2025).

168. Ximena Bustillo & Chiara Eisner, As Trump Shrinks Other Parts of Government, Immigration Task Forces Grow, NPR (Mar. 4, 2025), https://www.npr.org/2025/03/04/nx-s1-5311686/trump-immigration-task-force [https://perma.cc/3DVD-LVBU] (internal quotation marks omitted) (quoting Benjamine Huffman, Acting Sec', Dep't of Homeland Sec.).

tions, and removals.[169] Recent examples from the second Trump Administration like the "Alligator Alcatraz" state-run detention centers have exhibited—in the words of the Trump Administration—"growing pains."[170] Similar government efforts to respond to manufactured crises like influxes of migrants reflect the willingness of agencies to take drastic measures like building "tent cit[ies]" to handle the overflow of migrants seeking asylum.[171] These programs are driving a need to hire new agents and officers on an impossible timeline.[172] During the first Trump Administration, a special report by the DHS Inspector General found that, from a human capital perspective, hiring 10,000 ICE officers would require a pool of 500,000 applicants, while hiring 5,000 border agents would require 750,000 applicants.[173] And the increase in hiring officers will not necessarily equate to a symmetrical increase in arrests of noncitizens with records of criminal activity or signs of dangerousness because ICE and the Border Patrol have shifted to arrest more immigrants regardless of their criminal activity.[174]

Journalistic accounts from the first year of the second Trump Administration have highlighted the degree to which morale has sunk among

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169. See Chacón et al., supra note 7, at 59–89 (discussing how ICE operationalized prosecutorial discretion through field office trainings and local implementation policies framed as increasing efficiency in the removal process, even as enforcement personnel continued to operate in a policelike, numbers-driven culture built around apprehensions and removals).

170. This is how the Trump Administration responded to allegations in a lawsuit by detainees detailing "unchecked spread of illness, flooding and a lack of food and of a place to bathe or clean their teeth." See Mariah Timms & Victoria Albert, 'Alligator Alcatraz' Detainees Allege Disease, Flooding at Florida Facility, Wall St. J. (Aug. 13, 2025), https://www.wsj.com/us-news/law/alligator-alcatraz-detainees-allege-disease-flooding-at-florida-facility-3080476b (on file with the *Columbia Law Review*).

171. See Julián Aguilar, The Government Is Putting Up More Tents to Hold Migrants, but Will It Be Enough?, Texas Trib. (May 2, 2019), https://www.texastribune.org/2019/05/02/new-border-holding-facilities-will-open-soon-migrant-surge-continues/ [https://perma.cc/ER6F-L2D4] (describing capacity issues in long-term detention centers and the construction of "two tent facilities" in Texas to process migrants and asylum seekers).

172. See Off. of Inspector Gen., DHS, OIG-17-98-SR, Special Report: Challenges Facing DHS in Its Attempt to Hire 15,000 Border Patrol Agents and Immigration Officers 13 & tbl.2 (2017), https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-98-SR-Jul17.pdf [https://perma.cc/F66Q-2JHY].

173. Id. Hiring issues have continued into the second Trump Administration. See John Pfaff, Opinion, Trump's Megabill Gives Billions to ICE—But Hiring 10,000 New Agents Won't Be Easy, MS Now (July 9, 2025), https://www.yahoo.com/news/opinion-trump-megabill-gives-billions-100000155.html [https://perma.cc/EG5Y-EA6G?type=image] (listing factors that will make it difficult for ICE to hire new agents, such as noncompetitive pay, decreased interest in law enforcement positions, and the weakened status of working as an ICE agent).

174. See David J. Bier, 65 Percent of People Taken by ICE Had No Convictions, 93 Percent No Violent Convictions, Cato Inst. (June 20, 2025), https://www.cato.org/blog/65-people-taken-ice-had-no-convictions-93-no-violent-convictions [https://perma.cc/V4FV-95GA?type=image] ("New nonpublic data from Immigration and Customs Enforcement (ICE) indicate that the government is primarily detaining individuals with no criminal convictions of any kind.").

immigration officers.[175] Notable accounts have reported that many immigration officers feel as if there is a mismatch between their training and the day-to-day demands of the job—all but confirming one of the core insights of *Bordering on Indifference*.[176] Some agents and officers have highlighted the "moral" consequences of "focusing on numbers over all else."[177] Given that the typical timeline for recruiting, hiring, and training ICE officers is eighteen months,[178] political pressure to put the money into the field creates a risk that the agency will cut corners.[179] John Sandweg, former acting director of ICE during the Obama Administration, has described the Trump Administration's approach to immigration enforcement as one that "has revved up the agency's raid strategy, leading to broad and indiscriminate sweeps to maximize arrests—regardless of people's criminal record."[180] The new bill will allow ICE to use military personnel and hire contractors to help "prepare target lists and other administrative tasks."[181]

CONCLUSION

More than two decades ago, Professor Gabriel "Jack" Chin drew attention to the role that immigration cases during the era of Chinese Exclusion played in the expansion of the administrative state and the development of administrative law doctrine.[182] As courts grappled with defining the outer boundaries of government power during the Progressive Era, they attempted to set limits on whether the government could admit and deport migrants during a racially exclusionary era.[183] Chin noted that administrative law, which is "often wrongly considered a technical and obscure discipline, was shaped in part by America's struggle with race."[184] A similar story could be told about the post-9/11 era and the fights over

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175. See, e.g., Ted Hesson, Tim Reid & Nicole Jeanine Johnson, Inside ICE, Trump's Migrant Crackdown Is Taking a Toll on Officers, Reuters (Aug. 27, 2025), https://www.reuters.com/legal/government/inside-ice-trumps-migrant-crackdown-is-taking-toll-officers-2025-08-27/ [https://perma.cc/75EW-MKED]; Miroff, Trump Loves ICE, supra note 116.

176. See Miroff, Trump Loves ICE, supra note 116 ("[M]any officers have spent their career doing work more akin to immigration case management: ensuring compliance with court orders, negotiating with attorneys, coordinating deportation logistics.").

177. Id. (internal quotation marks omitted) (quoting Adam Boyd).

178. Id.

179. Id.

180. Riya Misra, Why Is ICE So Aggressive Now? A Former ICE Chief Explains., Politico (Oct. 14, 2025), https://www.politico.com/news/magazine/2025/10/14/former-ice-director-q-a-00603916 (on file with the *Columbia Law Review*).

181. Miroff, Trump Loves ICE, supra note 116.

182. See Gabriel J. Chin, Regulating Race: Asian Exclusion and the Administrative State, 37 Harv. C.R.-C.L. L. Rev. 1, 2–4 (2002) (exploring the development of the Asian Exclusion Laws alongside the expansion of the administrative state).

183. Id. at 16.

184. Id. at 3.

executive power to enforce immigration law through its discretionary authority.

Vega's book obviously has political salience and offers a set of critiques that could be deployed against the Trump Administration and those pushing far-reaching immigration enforcement policies among the political Right. *Bordering on Indifference* illustrates the costs of empowering foot soldiers to manage a mostly non-threatening and compliant population of migrants with only a narrow skill set grounded in the use of force. But this book can also challenge the political Left to abandon uncritically broad definitions of agency expertise and to articulate a more precise justification for agency power. For decades, the political Left has relied on an uneasy coalition of interest groups that pushed arguments emphasizing deference to agency experts who can lead with facts, science, and fidelity to the laws tasking them with solving major social problems.[185] But this vision of technocratic leadership and problem solving cannot easily account for the agencies charged with administering immigration laws. Some of this vision has to do with limited understandings of how immigration enforcement agencies work on the inside, which is a part of what makes *Bordering on Indifference* such a critical contribution.[186] Until now, the public has caught only glimpses of life as an immigration enforcement agent, mostly through FOIA requests[187] or interviews with the political appointees who supervise immigration bureaucrats. For this reason, *Bordering on Indifference* sheds important light on the machinery of our immigration system.

The book also has much to say about the machinery of government more generally. As alluded to earlier, most debates about the administrative state focus on the experiences of bureaucrats working within agencies that regulate the environment or financial markets. *Bordering on Indifference* gives us a chance to evaluate administrative law from a different vantage point. Unlike the EPA, the SEC, and other agencies familiar to administrative law scholars, immigration agencies do not typically govern through rulemaking or other regulatory strategies that invite public participation. Instead, the Border Patrol and ICE lean on more invasive and aggressive tools like surveillance, apprehension, detention, and of course removal—all of which advance a morally ambiguous regulatory project. *Bordering on*

185. Those on the political left often supported the *Chevron* doctrine on the assumption that bureaucrats within certain agencies would be more likely to promote progressive policies than judges. But the same could be said about bureaucrats within agencies like ICE promoting more right-leaning restrictionist views during the Trump Administration. This tension made it hard for defenders of *Chevron* to embrace it across the regulatory state. See Ilya Somin, Gorsuch Is Right About Chevron Deference, Wash. Post (Mar. 25, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/25/gorsuch-is-right-about-chevron-deference/ (on file with the *Columbia Law Review*).

186. See supra note 112 and accompanying text.

187. See Susan Carroll, Report: Feds Downplayed ICE Case Dismissals, Houston Chron. (June 27, 2011), https://www.chron.com/news/houston-texas/article/report-feds-downplayed-ice-case-dismissals-2080532.php (on file with the *Columbia Law Review*).

Indifference helps us better understand how immigration agents make sense of these policies, which in turn helps us better assess the legitimacy of the agencies that enforce them. *Bordering on Indifference* highlights the relatively weak foundation upon which any arguments about legitimacy might be grounded. Vega notes the lack of specialized training required to carry out significant immigration duties. She also highlights the mismatch that agents experience between their training—which emphasizes a paramilitary-type boot camp focused on dangerous drug traffickers—and the day-to-day realities of enforcing immigration laws—which involves humanitarian duties like accounting for those seeking asylum amid dangerous conditions in the desert. Vega masterfully shows how these structural factors strain accounts of agency legitimacy, but, in addition, she details the ways that agents themselves attempt to graft a sense of legitimacy onto the job. In sum, the book highlights the relatively weak foundation upon which any arguments about the legitimacy of ICE and the Border Patrol might be established. Most surprising of all, *Bordering on Indifference* intimates that among those we might find questioning the legitimacy of the current immigration system are immigration law's foot soldiers themselves.

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