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Rethinking Judicial Review of High Volume Agency Adjudication

Jonah B. Gelbach & David Marcus*

Article III courts annually review thousands of decisions rendered by Social Security Administrative Law Judges, Immigration Judges, and other agency adjudicators who decide large numbers of cases in short periods of time. Federal judges can provide a claim for disability benefits or for immigration relief—the sort of consideration that an agency buckling under the strain of enormous caseloads cannot. Judicial review thus seems to help legitimize systems of high volume agency adjudication. Even so, influential studies rooted in the gritty realities of this decision-making have concluded that the costs of judicial review outweigh whatever benefits the process creates.

We argue that the scholarship of high volume agency adjudication has overlooked a critical function that judicial review plays. The large numbers of cases that disability benefits claimants, immigrants, and others file in Article III courts enable federal judges to engage in what we call "problem-oriented oversight." These judges do not just correct errors made in individual cases or forge legally binding precedent. They also can and do identify entrenched problems of policy administration that afflict agency adjudication. By pressuring agencies to address these problems, Article III courts can help agencies make across-the-board improvements in how they handle their dockets. Problem-oriented oversight significantly strengthens the case for Article III review of high volume agency adjudication.

This Article describes and defends problem-oriented oversight through judicial review. We also propose simple approaches to analyzing data from agency appeals that Article III courts can use to improve the oversight they offer. Our argument builds on a several-year study of social security disability benefits adjudication that we conducted on behalf of the Administrative Conference of the United States. The research for this study gave us rare insight into the day-to-day operations of an agency struggling to adjudicate huge numbers of cases quickly and a court system attempting to help this agency improve.

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Introduction

Federal administrative agencies adjudicate huge numbers of cases. Administrative law judges (ALJs) working for the Social Security Administration (SSA), "probably the largest adjudication agency in the western world,"[1] decided 629,337 claims for disability benefits in 2013.[2] That year, the country's immigration judges (IJs) completed 253,942 "matters,"[3]

1. Barnhart v. Thomas, 540 U.S. 20, 28–29 (2003).

2. SOC. SEC. ADMIN., JUSTIFICATIONS OF ESTIMATES FOR APPROPRIATIONS COMMITTEES FISCAL YEAR 2015, at 144 (2014).

3. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2013 STATISTICS YEARBOOK A2 (2014).

and veterans' law judges working for the Board of Veterans Appeals disposed of 41,910 veterans' benefits cases.[4] ALJs at the Office of Medicare Hearings and Appeals issued 79,377 decisions in cases involving Medicare payments and coverage, an effort quickly swamped by the 384,151 new filings the agency received in 2013.[5] Such immense caseloads require agency adjudicators to work with astonishing speed. The average SSA ALJ decided nearly 540 cases in 2013, or more than two per workday,[6] and the average IJ that year resolved matters for more than 1,000 immigrants.[7] The quality of adjudication often buckles under this furious pace, and criticism for slipshod, inconsistent decision-making has long dogged these agencies.[8]

With their power of judicial review, the federal courts sit atop this mountain of adjudication.[9] Time-strapped agency adjudicators have to rule under conditions hardly conducive to thoughtful deliberation. The fact that a federal judge offers a backstop against arbitrary decision-making thus offers something of a psychological salve.[10] Whatever happens within the agency, so the thinking goes, the unfairly denied disability claimant or the immigrant wrongly threatened with deportation can always get justice in an Article III court. For this reason and others, judicial review is thought to "secure an imprimatur of legitimacy for administrative action."[11]

But reality intrudes on this appealing view. The availability of judicial review for what we call "high volume agency adjudication"—adjudication by agencies whose caseloads and available personnel limit adjudicators to no more than a minimal amount of time per case—means that the federal courts feed on a sizable diet of administrative appeals. The 7,225 cases immigrants

4. 2013 BD. OF VETERANS' APPEALS ANN. REP. 24.

5. Statistics are available at Admin. Conference of the U.S. & Stanford Law Sch., *Adjudication Research: Caseload Statistics*, STAN. U., https://acus.law.stanford.edu/reports/caseload-statistics [https://perma.cc/943F-XSRS].

6. HAROLD J. KRENT & SCOTT MORRIS, STATISTICAL APPENDIX ON ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY ADJUDICATION: AN EMPIRICAL STUDY AND SUGGESTED REFORMS 6 (2013); OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., AUDIT REPORT: THE SOCIAL SECURITY ADMINISTRATION'S EFFORTS TO ELIMINATE THE HEARINGS BACKLOG 4 (2015).

7. FY 2013's 253,942 completed immigration matters were decided by 253 immigration judges on the bench that year. HUMAN RIGHTS FIRST, THE U.S. IMMIGRATION COURT: A BALLOONING BACKLOG THAT REQUIRES ACTION 1 (2016), https://www.humanrightsfirst.org/resource/us-immigration-court-ballooning-backlog-requires-action [https://perma.cc/Z83W-7LC8].

8. *E.g.*, KRENT & MORRIS, *supra* note 6, at 1–2; Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 302–03 (2007); James D. Ridgway, *A Benefits System for the Information Age*, 7 VETERANS L. REV. 36, 44 (2015).

9. The federal courts can review agency decisions subject to the limits Congress specifies. Five Flags Pipe Line Co. v. Dep't of Transp., 854 F.2d 1438, 1439 (D.C. Cir. 1988).

10. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965) (describing judicial review as a "necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate").

11. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 942 (1988).

filed in 2013, for instance, accounted for 12.8% of new federal appeals that year.[12] These appeals and others from agencies are indisputably significant to the judicial business of the federal courts.

But is federal court litigation likewise important to harried adjudicators drowning in claims or the agencies that struggle to manage them? The federal courts review only a tiny fraction of the cases agency adjudicators decide—only 3% of SSA ALJ decisions, for example,[13] and only about .03% of decisions by the Office of Medicare Hearings and Appeals.[14] Whatever legitimacy the Article III courts promise must seem like a distant mirage for the vast majority of immigrants, claimants, and others as they litigate in obscure hearing rooms, far away from the grandeur of the federal courts. Doubts that judicial review helps to improve high volume agency adjudication have thus surfaced in administrative law scholarship, perhaps none more importantly than in the seminal studies of social security disability adjudication that Jerry Mashaw wrote in the 1970s and 1980s.[15]

This Article defends the federal courts' involvement in high volume agency adjudication. It has its roots in our sense of what happens day-to-day in hearing offices, immigration courts, and federal judges' chambers around the country. We recently completed a two-year study of social security disability benefits litigation, conducted at the behest of the Administrative Conference of the United States.[16] This study required an extensive quantitative analysis of district court decision-making, as well as scores of interviews with agency officials, ALJs and their support staff, federal judges, and private lawyers. It thus gave us a rich perspective on almost every aspect of federal court involvement with the disability benefits adjudication process. A theoretical companion to the report we produced for the Administrative Conference, this Article uses the trove of information we assembled to inform our understanding of what exactly the federal courts can be—and in some instances are—up to when they review decisions issued by overworked, under-resourced agency adjudicators.

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12. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2013, at tbl.B-3 (2013), http://www.uscourts.gov/sites/default/files/statistics_import_dir/B03Sep13.pdf [https://perma.cc/XT29-DESF].

13. Nat'l Org. of Soc. Sec. Claimaints' Representatives, *Federal Court Filings Increase*, SOC. SEC. F., Aug. 2013, at 14, 14.

14. In FY 2014, claimants filed only twenty-five Medicare appeals in the federal courts. Email from Katherine E. Hosna, Ctrs. for Medicare and Medicaid Servs., to David Marcus, Professor of Law, Univ. of Ariz. Rogers Coll. of Law (May 22, 2017, 12:22 PM) (on file with authors).

15. *E.g.*, JERRY L. MASHAW, BUREAUCRATIC JUSTICE 189–90 (1983); JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM 146–47 (1978); Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1323 (2014); Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 778, 780 (2003).

16. *See* JONAH B. GELBACH & DAVID MARCUS, A STUDY OF SOCIAL SECURITY DISABILITY LITIGATION IN THE FEDERAL COURTS (2016).

Our main contribution is to identify a previously unappreciated function that courts perform when they review high volume agency adjudication. Judges correct adjudicators' errors, and they forge precedent to regulate agency decision-making. These jobs are well known, although this Article provides a badly needed reassessment of how well courts tackle them. The function not evident to critics of judicial review is a task we call "problem-oriented oversight." Courts identify and respond to entrenched problems of internal agency administration that can afflict adjudication. When bias discolors an IJ's decision-making and the agency does not respond, for example, courts can do so effectively. When the SSA issues a guidance document that distorts ALJ orders denying disability benefits claims, the federal courts can push the agency to correct course. Problem-oriented oversight involves more than the correction of adjudicator error or the issuance of precedent-setting opinions. The federal courts use various tools at their disposal to hold agencies accountable and insist that they improve. Added to the other functions federal courts discharge, problem-oriented oversight strengthens the case for Article III review of high volume agency adjudication.

Our argument toggles between the descriptive and the normative. Courts presently engage in problem-oriented oversight. We identify the function and describe how federal judges perform it. We also explain how courts can use a straightforward data gathering and analysis method to conduct oversight more rigorously. Finally, we defend the federal courts' oversight capacity. Institutional features of courts and agencies limit how well federal judges can correct adjudicators' errors and regulate agencies through precedent. These impediments pose less of a problem to courts' oversight function. By relying upon a process that requires aggrieved parties to bring problems to their attention, the federal courts can assemble information about poor agency performance efficiently. Their independence from agencies and Congress enables federal judges to address pathologies afflicting agency decision-making without politics or other agency priorities getting in the way. Finally, the federal courts' geographic dispersion and prestige make them effective overseers of a sprawling system of agency adjudication, and the sort of data gathering and analysis problem-oriented oversight requires fit within courts' competencies.

Understanding problem-oriented oversight is important for several reasons. First, appeals from overwhelmed agency adjudicators compose a large chunk of the federal courts' docket. In 2013, for instance, claimants appealed 18,779 SSA ALJ decisions to federal district courts,[17] nearly

17. *Appeals to Court as a Percentage of Appealable AC Dispositions*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/DataSets/AC04_NCC_Filed_Appealable.html [https://perma.cc/TS3M-73RE].

equaling federal habeas corpus filings.[18] A fully informed perspective on what Article III judges do on a daily basis requires an appreciation for problem-oriented oversight.

Second, legislators, judges, agency officials, and scholars frequently call for changes to various systems of high volume agency adjudication. Proposals have included the centralization of judicial review in a single Article III court,[19] retrenchment of Article III review,[20] and the end to Article III review altogether.[21] To our minds, problem-oriented oversight, when added to the other functions judges discharge when they oversee high volume agency adjudication, tips an otherwise equivocal normative balance in favor of the current system. But the costs and benefits of judicial review are difficult to measure with precision. Reasonable people may ultimately disagree with our assessment of other functions' efficacy and what problem-oriented oversight adds to the case they present for judicial review. At the least, however, any suggestion to replace Article III review is incomplete unless it grapples with how the change would affect the federal courts' capacity to discharge all of the functions they perform, including problem-oriented oversight.

Third, although courts do engage in problem-oriented oversight, some do so unevenly. In certain instances, federal judges have not yet addressed problems of internal agency administration that need a response. Our description and defense of problem-oriented oversight is an attempt to spur courts to execute this function more evenly and aggressively. Finally, problem-oriented oversight is not something exclusive to high volume agency adjudication. Courts have the capacity to perform this function in any domain where they review large numbers of decisions made by other institutions.[22] An appreciation for problem-oriented oversight and how it works can improve the contributions to good government that generalist judges make in a number of fields.[23]

Part I explains why we use immigration and disability benefits adjudication as the two exemplar systems we draw upon in this Article. It

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18. JUDICIAL BUSINESS 2013, *supra* note 12, at tbl.C-2A, http://www.uscourts.gov/sites/default/files/statistics_import_dir/C02ASep13.pdf [https://perma.cc/V4MN-4RRH].

19. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1685–86 (2010).

20. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 725–26 (2002).

21. *Id.* at 728.

22. *See, e.g.*, Milke v. Ryan, 711 F.3d 998, 1022–23 (9th Cir. 2013) (Kozinski, C.J., concurring) (blasting the "ridiculous" fact that a police detective with an extensive record of improper conduct was "sent to interrogate a suspect without a tape recorder, a video recorder, a witness or any other objective means of documenting the interrogation").

23. For an argument that criminal courts should engage in a version of the oversight we describe here, see Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2052 (2016).

also gives brief introductions to both, to provide basic background for the discussion that follows. Part II includes an extensive assessment of the previously identified functions that the federal courts play when they decide appeals from high volume agency adjudicators. Although our reasons differ, we ultimately agree with Mashaw's influential critique; courts cannot discharge these functions successfully enough to justify the case for Article III involvement in high volume agency adjudication. In Part III, we define problem-oriented oversight and explain how courts engage in it. We also offer a method for data gathering and analysis that courts can use to perform the function more rigorously. Part IV defends problem-oriented oversight through judicial review, stressing the federal courts' institutional advantages as reasons why the task suits them.

I. Disability Benefits and Immigration Adjudication

A. The Exemplar Agencies

Federal administrative adjudication comes in many varieties. Adjudication by the five ALJs working for the Securities and Exchange Commission represents one variant. They preside over proceedings that often last months and resemble civil litigation in Article III courts.[24] A world apart is a tribunal like the Veterans Administration's Board of Veterans' Appeals. Its sixty-one veterans' law judges decided 41,910 cases in 2013, or 687 per adjudicator.[25] This sort of high volume adjudication poses a distinctive set of challenges. How can large numbers of adjudicators administering the same complex regulatory regime decide cases consistently? How can they render high-quality decisions without allowing a huge backlog of claims to grow? What ensures that adjudicators, worn down by an unending river of cases, do not burn out or become jaded? Finally, can these adjudicators make decisions that will withstand federal judicial scrutiny? Should they be forced to do so?

To assess the contributions federal courts can make to these questions' answers, we draw on the illustrative experiences of the SSA and the Department of Justice's Executive Office for Immigration Review (EOIR). A number of federal agencies engage in high volume adjudication. Table 1 lists those agencies whose hearing-level adjudicators decide more than one case per workday.[26]

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24. Bandimere v. SEC, 844 F.3d 1168, 1170–71 (10th Cir. 2016); Breon S. Peace & Elizabeth Vicens, *Changes and Challenges in the SEC's ALJ Proceedings*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Nov. 12, 2016), https://corpgov.law.harvard.edu/2016/11/12/changes-and-challenges-in-the-secs-alj-proceedings/ [https://perma.cc/42X9-AML2].

25. All data in this Part on caseloads and numbers of agency adjudicators come from Admin. Conference of the U.S. & Stanford Law Sch., *Adjudication Research: Caseload Statistics*, STAN. U., https://acus.law.stanford.edu/reports/caseload-statistics [https://perma.cc/943F-XSRS].

26. By "hearing-level" we mean adjudicators who hold merits hearings to gather evidence, hear from witnesses, and so forth.

Table 1. High Volume Agency Adjudication

Agency Name	Number of Decisions, FY 2013	Number of Agency Adjudicators	Decisions per Adjudicator
Board of Veterans' Appeals	41,910	61	687
Department of Agriculture Administrative Review Branch	1,258	4	314.5
Office of Medicare Hearings and Appeals	79,377	65	1221.2
HHS Provider Reimbursement Board	1,833	5	366.6
EOIR	253,942	248	1024
SSA	793,580	1486	534

We use the EOIR and SSA for several reasons. First, for a long time these agencies have adjudicated more cases than any other.[27] A study of high volume agency adjudication that did not reflect the EOIR's and SSA's experiences with the federal courts would offer narrow instruction. Second, both of these agencies generate significant numbers of federal court appeals. Due to a recent spike, ALJs at the Office of Medicare Hearings and Appeals (OMHA) now decide hundreds of thousands of cases each year. Yet very few of the medical service providers contesting a reimbursement decision ultimately seek judicial review. The federal courts received only twenty-seven appeals from OMHA ALJs in 2016.[28] Likewise, veterans appealed only 109 cases to the Federal Circuit in FY 2015,[29] a year the Board of Veterans'

27. The Office of Medicare Hearings and Appeals now has a caseload roughly equal to EOIR's. This is a recent change, with filings growing 315% between 2010 and 2016. OFFICE OF MEDICARE HEARINGS AND APPEALS, FY 2018 CONGRESSIONAL JUSTIFICATION 7 (2017).

28. Hosna, *supra* note 14.

29. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2015, at tbl.B-8 (2013), http://www.uscourts.gov/sites/default/files/data_tables/B08Sep15.pdf [https://perma.cc/7HV8-HEZZ].

Appeals received 69,957 cases.[30] In contrast, social security and immigration appeals to the federal courts number in the thousands every year. For an agency like the OMHA, judicial review truly is a mirage. For the SSA and the EOIR, it is a more meaningful component in an overall system of adjudication.

Third, decisions go directly from the SSA and the EOIR to the Article III courts, without some other independent tribunal involved as an intermediary. Before veterans can appeal to the Federal Circuit, they first must litigate before the Court of Appeals for Veterans' Claims (CAVC), an Article I tribunal independent of the Veterans' Administration.[31] Adjudicators at the Internal Revenue Service's Office of Appeals decide more than 40,000 cases each year. Appeals from their orders go almost entirely to the U.S. Tax Court, also an Article I tribunal, before appeals can proceed to a federal appellate court.[32] No such court stands between the EOIR and the courts of appeals, or between the SSA and the district courts, to provide an intermediate level of oversight.

Notwithstanding the agencies' distinctive features, lessons from the EOIR's and SSA's interactions with the federal courts can readily inform critical evaluations of other systems of judicial review. Whether direct oversight by Article III courts succeeds should inform judgments of whether an Article I intermediary works better, for instance. Whether Congress should raise or reduce amount-in-controversy requirements for OMHA appeals, to use another example, should depend at least in part on the desirability of judicial review in Article III courts.[33] Also, much of what can be learned from the interactions between the EOIR and the federal courts, or from those between the SSA and the federal courts, does not depend on the precise configuration of judicial review that these systems' designs involve. The CAVC, for instance, could engage in the sort of data gathering we describe in Part III and use what it assembles to identify and respond to the kind of problems we identify.

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30. 2015 BD. OF VETERANS' APPEALS ANN. REP. 17; *see also* 2015 U.S. CT. OF APPEALS FOR VETERANS CLAIMS ANN. REP., https://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf [https://perma.cc/SDX8-XS2K].

31. Michael P. Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. CIN. L. REV. 501, 505 (2011).

32. Leandra Lederman, *Tax Appeal: A Proposal to Make the United States Tax Court More Judicial*, 85 WASH. U. L. REV. 1195, 1196–97 (2008).

33. One of the reasons why so few OMHA decisions get appealed to the federal courts is the amount-in-controversy requirement that federal court jurisdiction over these cases requires. *See* Medicare Appeals Amount in Controversy Threshold Amounts, 81 Fed. Reg. 65,651 (Sept. 23, 2016) (announcing 2017 amount-in-controversy threshold amounts as $160 for ALJ hearings and $1,560 for judicial review).

B. A Brief Primer on the SSA and the EOIR

The rest of this Article draws upon the EOIR's and the SSA's relationships with the federal courts to inform our claims about judicial review and the functions it plays in the context of high volume agency adjudication. Both systems have endless complexities, but a basic orientation to each should suffice for what follows.

As of June 2017, the EOIR, part of the U.S. Department of Justice (DOJ), employed about 325 IJs who work in dozens of immigration courts scattered around the country.[34] Cases can get before IJs in several ways. An immigrant who claims to be fleeing persecution can apply for asylum with the U.S. Citizenship and Immigration Services.[35] If USCIS rejects her application, it will forward her case to an IJ for an asylum hearing.[36] Alternatively, the government might initiate removal proceedings against an undocumented immigrant picked up at a work site, or against a noncitizen arrested for a crime. These cases go directly to IJs for adjudication. The IJ holds a hearing and issues a decision on the immigrant's asylum petition or request for cancellation of removal.[37] If the immigrant loses, she can ask the Board of Immigration Appeals (BIA), a sixteen-member appellate tribunal located at EOIR's headquarters in Falls Church, Virginia, to review the IJ's decision.[38] The immigrant can appeal from an adverse BIA decision to "the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."[39]

The SSA's Offices of Hearings Operations and of Analytics, Review, and Oversight encompass an enormous system of disability benefits adjudication. A person who believes that his impairments prevent him from working applies for disability benefits at one of the SSA's 1,300 field offices.[40] If initially denied, and if denied again upon reconsideration, the claimant can request a hearing before an ALJ.[41] (From this point on, "ALJ"

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34. Press Release, Exec. Office for Immigration Review, Executive Office for Immigration Review Swears in 11 Immigration Judges (June 16, 2017), https://www.justice.gov/eoir/pr/executive-office-immigration-review-swears-11-immigration-judges [https://perma.cc/Q4EP-JHB3]. As of the time of writing, the EOIR is expanding the IJ corps considerably. Statement of James McHenry, Acting Director, Exec. Office for Immigration Review, Before the Subcommittee on Immigration and Border Security, Committee of the Judiciary, U.S. House of Rep., Nov. 1, 2017, at 3.

35. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states [https://perma.cc/G544-VUJF].

36. *Id.*

37. 8 U.S.C. § 1229(a) (2012).

38. 8 C.F.R. § 1003.1 (2017); *Board of Immigration Appeals*, U.S. DEP'T JUSTICE, https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/8ZQQ-VG4V].

39. 8 U.S.C. § 1252(b)(2).

40. GELBACH & MARCUS, *supra* note 16, at 16–17.

41. *See id.* at 17–18.

refers to an SSA ALJ.) The ALJ works with about 1,400 judicial colleagues in one of 160 hearing offices around the country.[42] Aided by a "decision writer," the SSA's version of a law clerk, the ALJ issues a written decision after considering the claimant's medical records, his hearing testimony, and other evidence.[43] If the decision goes against the claimant, he can appeal to the SSA's Appeals Council, located in the same nondescript Falls Church office building. After a workup by an "analyst," who also functions as a law clerk, the case goes to one of dozens of appellate adjudicators for a decision.[44] If the claimant loses again, he can appeal to a federal district court, typically the one in the district where he resides.[45]

II. The Justifications for Judicial Review

Disability benefits adjudication belongs as an exemplar in a study of judicial review in part because it has attracted the most exhaustive attention. No treatment of SSA decision-making is more important than the landmark report Mashaw and his colleagues compiled in 1978. They identified several possible functions that judicial review performs, including the following:

- A "corrective function": courts can correct erroneous agency decisions.
- A "regulative function": courts can induce agency adjudicators to decide cases more accurately, either through fear of judicial reversal ("the in terrorem effect") or by forcing them to abide by court-fashioned rules ("the precedential effect").
- A "legitimizing function": review of an agency's decision by an independent judiciary can increase public confidence in the legitimacy of outcomes.
- A "critical function": courts offer agencies a "steady stream" of feedback that they can use to improve, and that is valuable for its own sake.
- A "public information function": court decisions "serve as a window on an agency whose operations would otherwise be largely invisible."[46]

Primarily assessing the corrective and regulative functions, the Mashaw group concluded that judicial review's benefits for the adjudication of social security disability claims did not justify its costs.[47] Decades later, this claim

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42. *Id.*
43. *Id.* at 20–23.
44. *Id.* at 27–28.
45. 42 U.S.C. § 405(g) (2016); *see also* GELBACH & MARCUS, *supra* note 16, at 30–35.
46. MASHAW ET AL., *supra* note 15, at 136–37.
47. *Id.* at 146–47.

continues to reverberate in discussions of whether the federal courts should review agency adjudication.[48]

The Mashaw group's discussion remains the most comprehensive and trenchant analysis of judicial review of high volume agency adjudication. It thus offers a good template for an inquiry into what functions judicial review can serve and how well it can perform them. Revisited four decades later, much of the Mashaw group's skepticism remains warranted, and not just for disability benefits adjudication. What follows updates and elaborates on the Mashaw group's analysis, with a focus on judicial review's error correction, regulative, and critical functions.[49] In any odd instance, the federal courts can discharge one or more of these functions well. But institutional features of courts and agencies prompt doubts that the former can do so reliably enough to place judicial review of high volume agency adjudication on stable normative footing.

A. The Corrective Function

Plenty of appeals filed in the federal courts involve mistakes made by agency adjudicators. To think otherwise requires unwarranted confidence in the internal agency appellate tribunals that stand between first-line adjudicators and the federal courts. Year after year, the SSA requests a voluntary remand in about 15% of cases appealed to the federal courts.[50] These "RVRs" happen only when an SSA lawyer and the Appeals Council conclude that the lawyer cannot defend the ALJ's decision as compliant with the agency's own view of social security law and policy.[51] Disability appeals go to the federal courts only after Appeals Council review, so RVRs amount to a concession that internal appellate review sometimes fails.

Errors surely remain for the federal courts to correct, and federal courts surely correct errors. But the Mashaw group doubted that courts can do so reliably. We disagree. Nonetheless, the opportunity cost of court-based error correction unsettles its contribution to the case for judicial review.

1. The Baseline Problem.—The Mashaw group questioned the capacity of courts to correct errors because of doubts that judges could evaluate

48. *E.g.*, Bagley, *supra* note 15, at 1330.

49. Following the Mashaw group's lead, we do not assess the legitimizing and public information functions at any length. Given the small numbers of claimants and immigrants who avail themselves of federal court review, we doubt that, for the average person caught up in high volume agency adjudication, the distant prospect of judicial review meaningfully legitimizes the exercise of agency adjudicator power. *See* MASHAW ET AL., *supra* note 15, at 147 (discounting the legitimizing function for a similar reason). Courts do broadcast information about agency adjudication that might not otherwise surface, but a judgment about the value of judicial review should account for the type of information publicized. When courts engage in problem-oriented oversight, they bring to light information germane to a critical evaluation of agency adjudication.

50. GELBACH & MARCUS, *supra* note 16, at 31.

51. *Id.* at 32.

disability claims as accurately as ALJs.[52] The problem involves a contrast between courts' and ALJs' baselines. ALJs handle a much larger caseload than federal judges, and ALJs get their cases earlier in the adjudication process. ALJs thus see a wider array of types of claims than federal judges do. Moreover, the government cannot appeal, so claimants pick all of the cases that go to federal court.[53] An ALJ may therefore have a different "cutpoint"[54]—roughly, the line the ALJ would draw along a given dimension between disability and no disability—than a federal court for a decision in favor of the claimant. Figures 1 and 2 illustrate.

Figure 1. ALJ Baseline

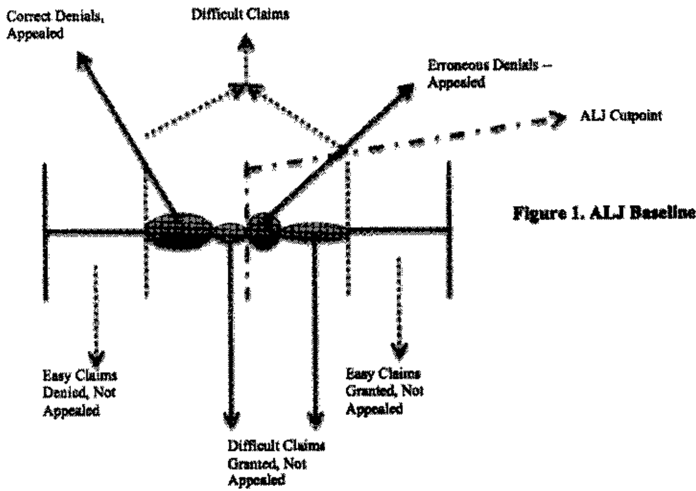
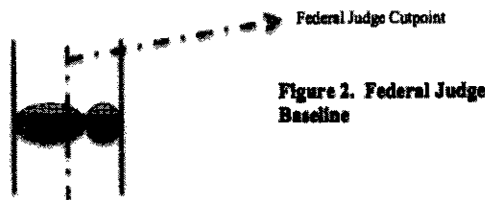


Figure 2. Federal Judge Baseline



Most appeals presumably come from the groups of correct and erroneous denials of what we call "difficult claims." Bereft of a more diverse baseline, a federal judge might view what to the ALJ was a relatively weak

52. MASHAW ET AL., *supra* note 15, at 138–39.

53. For analogous information about immigration appeals, see Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1649 n.64 (2010).

54. Jonathan Masur, *Patent Inflation*, 121 YALE L.J. 470, 483 (2011).

claim for benefits as an above-average one.[55] "If federal judges saw more of what ALJs grant," this ALJ told us, "they would appreciate why a case seems more borderline to an ALJ."[56]

The baseline problem can manifest itself in more granular ways. A federal judge might react differently than an agency adjudicator to particular evidence, for instance. With their immense caseloads, ALJs and decision writers can see letters from the same physicians that use the same phrases to describe patients with strikingly similar problems.[57] "We know which doctors are trustworthy and which ones aren't," one ALJ told us, "but we can't put this in a decision."[58] Likewise, another ALJ said, "claimants can testify in an obviously coached manner, taught to say just the right thing to buttress a claim for benefits."[59] IJs may experience the same phenomenon.[60] An ALJ or IJ might correctly discount such evidence, but a federal judge with a narrower evidentiary baseline might fault the ALJ for doing so.

Federal judges have countervailing institutional advantages, however, that may exceed whatever edge a richer baseline gives ALJs. Perhaps most importantly, courts can invest more time and resources in decision-making than agency adjudicators can. To keep backlogs at bay, the SSA asks its ALJs to decide between 500–700 cases per year,[61] with each involving hundreds of pages of medical records and a complex regulatory regime. This caseload is "preposterous," as one district judge described it.[62] ALJs spend about two-and-a-half hours total on all aspects of a case, and decision writers an additional eight hours when drafting a decision denying a claim.[63] A case gets about four hours of analyst time at the SSA's Appeals Council, and appellate adjudicators decide five to twelve cases per day.[64]

55. MASHAW ET AL., *supra* note 15, at 139.

56. GELBACH & MARCUS, *supra* note 16, at 77.

57. *Id.* at 77–78.

58. *Id.* at 78; *see also* Lester v. Chater, 81 F.3d 821, 832 (9th Cir. 1995) (disapproving of the ALJ's "unsupported and unwarranted speculation that the . . . doctors were misrepresenting the claimant's condition or were not qualified to evaluate it").

59. GELBACH & MARCUS, *supra* note 16, at 78.

60. *See* Jeff Chorney, *9th Cir. Slaps "Incomprehensible Ruling"*, NAT'L L.J. (Mar. 21, 2005) (quoting an immigration judge as insisting that arguments from asylum applicants "were all the same").

61. GELBACH & MARCUS, *supra* note 16, at 36.

62. *Id.* at 73 n.404; *see also* Alex M. Parker, *Recession Is Exacerbating Social Security Claims Backlog, Panelists Say*, GOV'T EXEC. (May 28, 2009), www.govexec.com/oversight/2009/05/recession-is-exacerbating-social-security-claims-backlog-panelists-say/29262/ [https://perma.cc/3493-TRB7] (quoting a federal magistrate judge describing ALJ workloads as "unconscionable").

63. GELBACH & MARCUS, *supra* note 16, at 14, 24.

64. *Id.* at 29.

With 1,000 cases to decide each year, IJs face an even more herculean task.[65] BIA review practices have changed considerably over the last fifteen years, but at their nadir, caseloads gave board members only 7–10 minutes for the average case.[66] Federal judges have more time to deliberate.[67] In FY 2014, when on average a single IJ had more than 1,400 matters on his docket,[68] the entire federal appellate bench received 54,988 filings.[69] Given the governing law's endless details and the often sizable case files assembled before agency adjudicators, the sheer amount of time a federal judge might spend compared to an ALJ or IJ can compensate for the narrower baseline.

Another institutional advantage adds to the courts' side of the ledger. The decision-writer-to-ALJ ratio is 1:1,[70] for instance, and the law-clerk-to-IJ ratio is 1:4.[71] District judges have at least two clerks, and court of appeals judges typically have four.

Agency adjudicators' baselines may give them a better sense of the overall disability landscape than what federal judges enjoy. But the time and resource shortfalls that afflict agency decision-making may make its adjudicators more error-prone, while federal judges' comparative surfeit of both improves their relative capacity to decide cases accurately. How these advantages and disadvantages balance out is not obvious in the abstract. Not long ago, however, the SSA's Chief ALJ conceded that it favors the federal courts, observing that "most of our decisions that are remanded or reversed by the federal judges are remanded or reversed simply because our decision did not comply with our own policy."[72] Although the SSA has embarked upon an extensive program of quality improvement since these comments, the composition of the pool of federal court appeals probably has not changed all that much since that time, as we argue at length in our report.[73] Federal judges can probably identify flawed decisions fairly accurately. The same is

65. HUMAN RIGHTS FIRST, REDUCING THE IMMIGRATION COURT BACKLOG AND DELAYS 5 (2016). *See generally* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., I-2013-001, MANAGEMENT OF IMMIGRATION CASES AND APPEALS BY THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2012) (documenting flaws in EOIR processes and recommending reforms).

66. Kadia v. Gonzales, 501 F.3d 817, 820 (7th Cir. 2007).

67. GELBACH & MARCUS, *supra* note 16, at 73.

68. *Empty Benches: Underfunding of Immigration Courts Undermines Justice*, AM. IMMIGR. COUNCIL (June 17, 2016), https://www.americanimmigrationcouncil.org /research/empty-benches-underfunding-immigration-courts-undermines-justice [https://perma.cc/Q2X6-AXVF].

69. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2014, at tbl.1, www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2014 [https://perma.cc/4D8N-T2ES]. During a several-year period in the mid-2000s, the Second and Ninth Circuits lost their time advantage over IJs and the BIA for immigration cases. But a return of immigration appeals to lower levels has restored it.

70. GELBACH & MARCUS, *supra* note 16, at 74.

71. HUMAN RIGHTS FIRST, *supra* note 65, at 5 n.41.

72. Letter from Frank A. Cristaudo, Chief Admin. Law Judge, Office of Disability Adjudication and Review, to Colleagues 3 (Dec. 19, 2007) (on file with authors).

73. GELBACH & MARCUS, *supra* note 16, at 54.

likely true of immigration appeals, at least for the cases that the federal courts remand to the agency.[74]

2. The Costs of Mistakes.—Whatever the frequency, surely federal judges err and incorrectly remand cases from time to time. The error-correction function cannot justify judicial review if judges make costly mistakes. Suppose a judge is right eight times out of ten when she remands a case to the agency. Judicial review would prove harmful on balance if the costs of the false positives (the two erroneous remands) exceed the benefits of the true positives (the eight correct ones).

The cost–benefit balance resists an easy assessment in part because the social value and harms of wrongfully made disability payments and of payments wrongfully withheld cannot really be measured.[75] One estimate holds that the wrongful allowance of benefits from 2005–2014 will ultimately cost the federal treasury $72 billion.[76] On the other side of the ledger is an actually disabled claimant whose impairments make a correct decision on her claim "a matter of life and death."[77] How does the social value of a true positive compare to the costs of false positives?

Any estimate of this balance must necessarily be crude. But one guess suggests that the benefits of true positives basically equal the costs of false positives in the aggregate, at least for social security adjudication, where the likelihood and costs of false positives relative to other categories of high volume agency adjudication are highest.[78] A claimant who successfully

74. The federal courts remand many fewer immigration cases, percentage-wise, than social security appeals. *See infra* notes 102–03 and accompanying text. Their prerogative to review IJ decisions is very narrow. Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 WASH. U. J.L. & POL'Y 71, 82–83 (2008). We thus presume that, when a federal court remands an immigration court decision, the likelihood that it is indeed flawed is very high.

75. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48 (1976).

76. Mark J. Warshawsky & Ross A. Marchand, *Reforming the System of Review by Administrative Law Judges in Disability Insurance* 15–16 (Mercatus Ctr., George Mason Univ., Working Paper, 2015), https://www.mercatus.org/system/files/Warshawsky-Reforming-DI-Review.pdf [https://perma.cc/M9J2-UXEC].

77. GELBACH & MARCUS, *supra* note 16, at 15 (quoting a claimant representative).

78. While we lack equivalent numbers, we are confident that this balance comes out in favor of judicial review for immigration adjudication as well. For one thing, the federal courts rule very infrequently in favor of immigrants. The circuits upheld agency decisions in 88.7% of cases in 2016. John Guendelsberger, *Circuit Court Decisions for December 2015 and Calendar Year 2015 Totals*, IMMIGR. L. ADVISOR, Jan. 2016, at 5, 5. Given these numbers, the 11.3% of cases immigrants win should involve fairly egregious agency errors. Moreover, the harms that result from a false positive—a decision reversing the BIA when the immigrant should be removed or denied asylum—should be fairly low. Immigrants who are ordered deported based on their criminal activity almost never prevail on appeal. Only an immigrant who has no criminal record, and thus presents no indication of a threat to public safety, is likely to prevail erroneously.

obtains benefits can expect to receive about $1,500 in cash per month.[79] In 2007, the Government Accountability Office determined that SSA ALJs eventually grant benefits to 66% of claimants who secure a court remand.[80] We used these numbers together with a range of assumptions about benefits wrongly provided, the costs associated with ALJ time spent on court remands,[81] the social value of dollars received by disability beneficiaries, and the social costs of raising the tax revenue needed to pay for benefits and the operation of the judicial review system, to conduct a back-of-the-envelope cost–benefit analysis. Our calculations yield two key conclusions. First, using what we regard as reasonable values of the key normative and positive parameters, we find that the net social value of judicial review of disability appeals is likely within $10–15 million of zero. Second, even with extreme assumptions in either direction, the net social value or cost of judicial review seems very unlikely to be more than a drop in the bucket when measured relative to the overall magnitude of disability (and federal court) expenditures—almost surely less than roughly a tenth of a penny for every dollar spent on these programs.[82]

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79. This figure refers to a claimant seeking SSDI benefits, not SSI benefits. *Social Security Administration Oversight: Examining the Integrity of the Disability Determination Appeals Process, Part II: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 50 (2014) (statement of Carolyn Colvin, Acting Comm'r, Social Security Administration). This figure does not include the value of Medicare coverage that a beneficiary would also receive.

80. U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-331, REPORT TO CONGRESSIONAL REQUESTERS, DISABILITY PROGRAMS: SSA HAS TAKEN STEPS TO ADDRESS CONFLICTING COURT DECISIONS, BUT NEEDS TO MANAGE DATA BETTER ON THE INCREASING NUMBER OF COURT REMANDS 16 (2007).

81. In FY 2015, federal courts remanded 8,646 cases to the SSA. *Court Remands as a Percentage of New Court Cases Filed*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/DataSets/AC05_Court_Remands_NCC_Filed.html [https://perma.cc/H876-F8BG]. We use this data and the following assumptions: (1) One-fourth of the 66% of court remands that result in the payment of benefits do so because ALJs want to get rid of troublesome cases, not because the claimant is actually disabled; (2) one-half of the 34% of court remands that do not result in the payment of benefits fail because the federal judge erred, with the other half of remands that do not result in benefit payment being true negatives, i.e., correct denials of benefits; and (3) court remands are more difficult than cases heard in the first instance, such that an average ALJ could decide a dozen new cases during the time required to decide court remands. *See* GELBACH & MARCUS, *supra* note 16, at 48 & n.291.

82. Here we define the benefits as benefits paid to claimants who should receive them. In FY 2015, courts remanded 8,646 cases to the agency. Assuming that ALJs paid benefits to 49.5% of these claimants correctly (three-fourths of the 66% of claimants who won benefits), judicial review creates an annual benefit of $77,035,860 in benefits rightly paid to people with disabilities. We let the social value of paying a dollar in benefits to an eligible claimant be α dollars. For example, if $\alpha = 2$, then the social value of providing a dollar to an eligible beneficiary is as good as providing two dollars to a randomly drawn member of the remainder of the population. Thus, the benefit side of having judicial review is $77,035,860 times α.

The costs of judicial review include ALJ resources that have to be spent on court remands as well as those federal judicial resources spent handling disability appeals. As far as ALJ resources go, each court remand displaces two cases an ALJ could decide in the first instance. Thus, the 8,646 remands from federal court in FY 2015 displaced 17,292 first-instance remands. In FY 2015, 1,519 ALJs, *Administrative Law Judge—Federal Salaries of 2015*, FEDERALPAY.ORG, https://www

.federalpay.org/employees/occupations/administrative-law-judge/2015 [https://perma.cc/B74T-GJL8], decided 507,883 cases, for an average of roughly 334 cases decided per ALJ. 2017 SOC. SEC. ADMIN. BUDGET JUSTIFICATION, LIMITATION ON ADMIN. EXPENSES 75 tbl.3.34 (2016), https://www.ssa.gov/budget/FY17Files/2017LAE.pdf [https://perma.cc/3YKV-YAQ7]. At that rate, it would take roughly 52 ALJs to decide 17,292 first-instance cases. In 2015, the average ALJ's salary was $159,196.65. *Administrative Law Judge—Federal Salaries of 2015*, FEDERALPAY.ORG, https://www.federalpay.org/employees/occupations/administrative-law-judge/2015 [https://perma.cc/B74T-GJL8]. That year, the SSA spent about 27% of ALJ salaries on fringe benefits. 2017 SOC. SEC. ADMIN. BUDGET JUSTIFICATION, *supra*, at 75 tbl.3.28, https://www.ssa.gov/budget/FY17Files/2017LAE.pdf [https://perma.cc/3YKV-YAQ7] (showing that ALJ benefit and salary expenses totaled $63,610,135 and $232,875,700, for a ratio of approximately 0.27). Thus the total cost to the SSA in 2015 of court remands, measured in terms of ALJ productivity, is 52 × 1.27 × $159,156.65, which amounts to $10,510,705.17. Assuming that the cost of decision writers and other support staff for the 52 ALJ-equivalents would amount to another 50% of this figure yields a total SSA staff cost of 1.5 × $10,510,705.17, or $15,766,058.

With respect to judicial resources, the 19,222 disability cases terminated in the twelve months ending June 30, 2015, amounted to 7% of civil terminations. *See* JUDICIAL BUSINESS 2015, *supra* note 29, at tbl.C-4, http://www.uscourts.gov/sites/default/files/c04jun15_0.pdf [https://perma.cc/3LXS-S2J3] (counting cases in the Disability Insurance and Supplemental Security Income rows). Assuming these cases would require 7% of the work time of 630 district court judges (663 permanent authorized and 10 temporary authorized, ADMIN. OFFICE OF THE U.S. COURTS, AUTHORIZED JUDGESHIPS, http://www.uscourts.gov/sites/default/files/allauth.pdf [https://perma.cc/HGL3-P8YQ], less 43 vacancies, *Vacancy Summary for June 2015*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015/06/summary [https://perma.cc/EW3W-5KRK]), which is high since these cases don't go to trial or involve intensive pretrial wrangling, these cases account for the work time of roughly 44 federal judges.

According to the Administrative Office of the U.S. Courts' *FY 2017 Congressional Budget Summary*, filling an Article III judgeship costs $233,333.33, *see* ADMIN. OFFICE OF THE U.S. COURTS, FY 2017 CONGRESSIONAL BUDGET SUMMARY 24 (2016), http://www.uscourts.gov/sites/default/files/fy_2017_federal_judiciary_congressional_budget_summary_0.pdf [https://perma.cc/9GCR-GWYU] (requesting $1.4 million to fill six judgeships), plus an additional $140,000 for each of five staff members, *see id.* at 25 (requesting $4.2 million for thirty associated staffers). The total including support staff is thus $933,333.33 per judge or $41,066,667 for the 44 additional federal judges. Adding that figure to the SSA staff cost of $15,766,058 calculated above yields a total government staff cost of $56,832,725. In addition, the SSA must pay some of claimants' litigation costs under the EAJA; in 2015 these costs amounted to $38,132,381, *Social Security Administration Data for Equal Access to Justice Act Payments*, SOC. SEC. ADMIN., https://www.ssa.gov/open/data/EAJA.xlsx [https://perma.cc/R4UM-GMV6], so the total government staff cost and fee-shifting expenses come to $94,965,106. Government staff must be paid out of tax revenues. Because taxes affect behavior, there are social costs of raising a dollar of tax revenue. *See* JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 566–75 (5th ed. 2016) (cataloguing a variety of tax policies and their varied effects on behavior). An implication is that in general, the overall social cost of having the government spend an additional dollar exceeds one dollar. (This implication might not hold true during severe recessions, a special case.) To account for this issue, we let β be the social cost of raising a dollar of tax revenue, so that under our assumptions the total social cost of government staff work related to judicial review of disability appeals is $94,965,106 × β. So far we have a total social value of $77,035,860 × α and a total social cost associated with government staffing equal to $94,965,106 × β. The difference will be marginally positive if $\alpha \geq 1.24 \times \beta$, i.e., if the social value of transferring a dollar to persons truly entitled to receive disability benefits is roughly 1.24 times the marginal cost of raising a dollar in taxes. We think this assumption is reasonable, though of course the value of α is fundamentally a normative question.

There is also the question of how to account for benefits erroneously paid to those not actually entitled to them under the law. Under our assumption above, benefits would have been wrongly

3. The Opportunity Cost.—Another way to look at error correction is to consider whether the resources it consumes could be spent in alternative ways. On this view, the limitations of the error correction function lie not only with the difficulties judges have identifying errors, nor only with the harms that false positives cause, but rather with judicial review's opportunity cost. If invested in agency adjudication, the resources that judicial review requires might lead to fewer errors made in the first instance.

Any adjudication system should prefer error avoidance to error correction, all else equal. An acquittal or dismissal obviously compares favorably to a conviction that later gets vacated on appeal. If the system's designer has $100 to spend, and if that sum can either avoid one error or correct one error, the designer should invest in error avoidance rather than error correction. Judicial review makes sense from this perspective only if the $100 can buy more error correction than error avoidance.

For social security claims, the return on investment probably comes out in favor of error avoidance rather than error correction. At a minimum, resources expended on judicial review include salaries for the SSA litigators who brief and argue cases, Equal Access to Justice Act (EAJA) fees paid to

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paid to 16.5% (one-quarter of 66%) of the 8,646 claimants who won remands in FY 2015, which amounts to $25,678,620 in benefits wrongly paid. One approach would be to regard these paid-out benefits as having a net social cost of $\$25{,}678{,}620 \times \beta$, since taxes must be raised to fund these benefits. But that approach fails to recognize that (i) these benefits have some value to those who receive them, and (ii) the well-being of such recipients has some social value. Presumably the social value of transferring a dollar in disability benefits to those not actually entitled under the law is less than the value of transferring a dollar to those who are eligible, in which case the appropriate value of a dollar of such transfer is $\alpha\lambda$, where $\lambda < 1$. Thus, the net social value impact of erroneous benefit payments is $\$25{,}678{,}620 \times (\alpha\lambda - \beta)$, which is positive if λ is close enough to 1, negative otherwise, and, finally, is never worse in social cost–benefit terms than $-\$25{,}678{,}620 \times \beta$. Our final cost–benefit formula is $\$77{,}035{,}860 \times \alpha - \$94{,}965{,}106 \times \beta + \$25{,}678{,}620 \times (\alpha\lambda - \beta)$, which, after some algebra, may be written as $\$120{,}643{,}726 \times (\alpha - \beta) - \$43{,}607{,}866 \times \alpha + \$25{,}678{,}620 \times \alpha\lambda$. If we assume that $\alpha = 2$, $\beta = 1.4$, and $\lambda = 0.5$ (so that a dollar of disability benefits paid to an ineligible person who is erroneously granted benefits on appeal has a social value of 50 cents), then the net social value is a gain of $11 million. Raising the value of λ to 1 would yield a net social value that is roughly $36 million. Reducing the value of λ to 0 instead yields a net social value that is a loss of roughly $15 million. If we totally ignored the social costs related to judicial review—i.e., set β to 0—and assumed $\lambda = 1$, we would obtain a social value that is a gain of about $205 million. If instead we kept the assumption of $\beta = 1.4$ but totally ignored the social benefits—i.e., set α to 0—we would obtain a social value that is a loss of about $169 million. This discussion shows that even with relatively extreme assumptions about the parameter values necessary to measure the social costs and benefits of judicial review, the magnitude of the net social gain or loss would be somewhere in the neighborhood of $100–$200 million. That might sound like a lot of money, but it is a drop in the bucket in the context of the disability programs; SSDI alone accounted for $147 billion in spending in 2015. SOC. SEC. ADMIN., 2016 OASDI TRUSTEES REPORT tbl.II.B1 (2016), https://www.ssa.gov/OACT/TR/2016/II_B_cyoper.html#96807 [https://perma.cc/U264-HYTH]. Thus, even our extreme assumptions yield net social gains or losses from judicial review of less than a tenth of a percent of the disability programs' overall spending. Our more reasonable assumptions yield estimates whose magnitudes are rounding error in the budgetary context.

claimants' lawyers when their clients prevail,[83] and the cost of federal judge time. In FY 2015, these resources funded a system of judicial review that corrected a maximum of about six-and-a-half errors per ALJ.[84] The SSA paid $38,132,381.48 in EAJA fees in FY 2015.[85] This amount equals the salaries of about 240 ALJs, or 18% of their total number.[86] If spent on ALJs instead, this money alone could increase the ALJ corps by 18% and thereby enable the SSA to lower per capita case completion goals without increasing the backlog of undecided cases. If a lightened load led to even a modest improvement in decisional accuracy, i.e., seven fewer errors per ALJ,[87] then the resources spent on judicial review would yield fewer errors if redirected to error avoidance.[88]

This case for error avoidance rests on the assumption that the federal courts currently correct only a modest number of errors. If the number rises, the argument for an investment in error correction strengthens. In theory, Congress can control this number by resetting jurisdictional requirements and the federal courts' standard of review. It thereby could adjust the flow of cases to the federal courts. An endogeneity problem seems to exist. Whether Congress should increase the flow of cases to the federal courts depends on the value of the courts' error correction function. But the value of error correction depends on where Congress sets the dial to control the flow of cases to the federal courts. Also, very importantly, claimants' behavior might be different earlier in the process if there were no judicial review. For example, some claimants might not pursue appeals at earlier stages if they

83. On EAJA fees, see GELBACH & MARCUS, *supra* note 16, at 55.

84. In FY 2013, the country's 1,356 ALJs rendered 458,869 appealable decisions. SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN tbl.2.F8 (2015), https://www.ssa.gov/policy/docs/statcomps/supplement/2014/supplement14.pdf [https://perma.cc/T7U5-JJE7]; *Appeals to the AC as a Percentage of Appealable Hearing Level Dispositions*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/DataSets/AC01_RR_Appealable_HO_Dispositions.html [https://perma.cc/23T9-3XER]. In FY 2015, the federal courts remanded 8,646 cases, or 6.4 remands per ALJ. *Court Remands as a Percentage of New Court Cases Filed*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/DataSets/AC05_Court_Remands_NCC_Filed.html [https://perma.cc/B9FD-EM46]. For the purposes of this calculation, we assume that an ALJ decision issued in 2013 will get reviewed, if at all, by a federal judge in 2015.

85. *Social Security Administration Data for Equal Access to Justice Act Payments*, SOC. SEC. ADMIN., https://www.ssa.gov/open/data/EAJA.xlsx [https://perma.cc/R4UM-GMV6].

86. *Administrative Law Judge—Federal Salaries of 2016*, FEDERALPAY.ORG, www.federalpay.org/employees/occupations/administrative-law-judge [https://perma.cc/WS9D-EE4L].

87. On the relationship between quality and quantity, see GELBACH & MARCUS, *supra* note 16, at 72–73.

88. The math comes out the same way for immigration adjudication. In 2015, the federal courts of appeals decided 250 cases in favor of immigrants—about one per IJ. Guendelsberger, *supra* note 70, at 6. For information on the number of IJs during 2015, see Joshua Breisblatt, *Despite Immigration Judge Hiring, Court Backlogs Continue to Grow*, AM. IMMIGR. COUNCIL (July 27, 2016), http://immigrationimpact.com/2016/07/27/despite-immigration-judge-hiring-court-backlogs-continue-grow/ [https://perma.cc/3HGP-GLWT].

knew there was no possible appeal to the federal courts, and they might have greater difficulty obtaining legal representation.

Other determinants of the bang for each buck invested in error correction, however, are exogenous. They depend on immutable institutional factors that constrain the federal courts' overall capacity to review agency decisions. Even under conditions that should prompt the most appeals, the federal courts receive few relative to the agency's caseload. In 2002, for example, the U.S. Attorney General announced changes to BIA processes to expedite agency review of IJ decisions.[89] Many believe that these "streamlining" changes degraded the BIA's review considerably by reducing the scrutiny it afforded IJ decisions.[90] BIA remands plummeted,[91] even as IJ decisional quality earned scathing criticism.[92] Cases flooded the courts of appeals,[93] rising from 1,760 in 2001 to 12,349 in 2005.[94] But even at the surge's peak, only about 5% of IJ decisions produced a federal court appeal.[95]

Attorney incentives are one such institutional factor that limits the federal courts' docket, regardless of where Congress sets the dial. Immigration and social security lawyers prefer to litigate before agency adjudicators rather than the federal courts. Disability and immigration cases generate only modest fees, so social security and immigration specialists often must have high volume practices.[96] For most lawyers, a federal court appeal takes much more time than an appearance before an IJ or ALJ.[97] Immigration lawyers typically represent clients for a flat fee,[98] an arrangement that should steer them toward less time intensive work (i.e., litigating in immigration court) than more (writing an appellate brief). Lawyers who represent social security claimants likewise have a strong

89. John D. Ashcroft & Kris W. Kobach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 DUKE L.J. 1991, 1994–96 (2009); *see also* 8 C.F.R. § 1003.1 (2017).

90. *E.g.*, Stacy Caplow, *After the Flood: The Legacy of the "Surge" of Federal Immigration Appeals*, 7 NW. J.L. & SOC. POL'Y 1, 4–6 (2012).

91. *See* Legomsky, *supra* note 53, at 1668–70 (explaining the decline in pro-immigrant decisions by BIA reviewers caused by the regulatory changes).

92. *E.g.*, Benslimane v. Gonzales, 430 F.3d 828, 829–30 (7th Cir. 2005).

93. Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1122–23 (2011).

94. Caplow, *supra* note 90, at 2–3.

95. In FY 2003, IJs decided 250,823 matters. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2006 STATISTICAL YEAR BOOK C4 (2007). In 2005, immigrants filed 12,349 appeals from BIA decisions. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2005, at 15.

96. Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 985 (2015).

97. GELBACH & MARCUS, *supra* note 16, at 55 & n.321; *see also* John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 88 (2005).

98. David Gialanella, *The Skinny on Flat Fees*, A.B.A. J., July 2008, at 26, 26.

economic incentive to prefer agency work.[99] True, poor quality agency adjudication in some hearing offices may deepen the pool of potentially good appeals and make court work more attractive to lawyers.[100] But as long as lawyers can earn more litigating before IJs or ALJs, the supply of lawyers available to litigate federal court appeals in the areas where agency decision-making suffers may be insufficiently elastic to pick up the slack.

Attrition is perhaps an even more powerful institutional barrier to federal court. The extended process of adjudication and review within the agency can cause even those with meritorious appeals to give up before they reach the federal courts. By the time she can file an appeal in federal court, a disability benefits claimant may well have already spent more than 1,000 days pursuing her claim.[101] Although the time can vary considerably, an immigrant's case can easily languish for more than 1,000 days before an IJ and the BIA complete their review.[102] Beyond the time involved, carrots or sticks available to the agency can incentivize claimants or immigrants to forego an appeal. Prolonged detention encourages immigrants to eschew appeals and accept removal, presumably to end the misery of incarceration.[103] The SSA allows a previously denied claimant to file a new disability claim based upon a worsening of her condition, but she must abandon any pending appeal to do so.[104]

Finally, the federal courts' limited capacity to decide appeals in a manner consistent with deliberative judicial practice may ultimately impose an upper limit on how many cases they attract. As filings increase, judicial processes may change to such an extent that they increasingly resemble the fast, truncated adjudication that ALJs and IJs provide.[105] The Second and

99. *See* GELBACH & MARCUS, *supra* note 16, at 55 n.321 (noting the greater time demands of federal court appeals).

100. *See* Palmer et al., *supra* note 97, at 87–88 (explaining immigration lawyers' loss of faith and sense of injustice in BIA proceedings has improved their view of federal court appeals).

101. In FY 2015, the average processing time for a claim's determination at the initial level was 114 days. Reconsideration took 113 days on average, and a claim languished for 480 days before an ALJ's decision. 2015–2017 SOC. SEC. ADMIN. ANN. PERFORMANCE REP. 26 (2017). Appeals Council review took on average 386 days. *Social Security Administration Appeals Council Requests for Review Average Processing Time*, SOC. SEC. ADMIN., www.ssa.gov/open/data/Appeals-Council-Avg-Proc-Time.html [https://perma.cc/WUH7-PRG2].

102. In 2015, the average case languished for 504 days before an IJ decided it. *Immigration Court Processing Time by Outcome*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/ [https://perma.cc/3JWK-GYUC]. We could not find 2015 data for the BIA. In 2012, the BIA took an average of 485 days to decide an appeal filed by a nondetained immigrant. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., I-2013-001, MANAGEMENT OF IMMIGRATION CASES AND APPEALS BY THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW 43 (2012).

103. *See* BANKS MILLER ET AL., IMMIGRATION JUDGES AND U.S. ASYLUM POLICY 131–32 (2015) (finding that detained immigrants "are much less likely to appeal").

104. SSR 11-1p, 76 Fed. Reg. 45,309, 45,310 (July 28, 2011).

105. *See* GELBACH & MARCUS, *supra* note 16, at 121–22 (describing the similarities in decision-making structures between magistrate judges with high caseloads and agency adjudicators); *see also* Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the*

Ninth Circuits bore the brunt of the surge in immigration appeals after the BIA streamlining changes.[106] Starting in 2002, the Ninth Circuit made aggressive use of a case screening process that ultimately routed sixty percent of immigration cases to staff attorneys for a quick workup, followed by a brief oral presentation of each case to a screening panel of judges.[107] These judges, who typically did not review any materials in advance, decided 100–150 cases based on these presentations over a 2–3 day period.[108] The rate at which immigrants prevailed appears to have fallen sharply between 2002 and 2006.[109] Perhaps this assembly-line character dissuaded some appeals, as lawyers came to identify less of a difference between agency and court adjudication and perceived that increasing caseloads prompt courts to defer more to the agency's decisions.[110]

B. The Regulatory and Critical Functions

The opportunity cost problem weakens the contribution that the error correction function can make to the case for judicial review. But if courts not only correct errors but also induce agency adjudicators to avoid more in the

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Immigrant Poor, 21 GEO. J. LEGAL ETHICS 3, 6 (2008) (describing the Second Circuit's "non-argument calendar" for asylum cases, designed to handle the swell of immigration appeals).

106. Huang, *supra* note 93, at 1123–24.

107. Anna O. Law, *The Ninth Circuit's Internal Adjudicative Procedures and Their Effect on Pro Se and Asylum Appeals*, 25 GEO. IMMIGR. L.J. 647, 673 (2011).

108. *Id.* at 675; *see also* Michael Kagan et al., *Buying Time? False Assumptions About Abusive Appeals*, 63 CATH. U. L. REV. 679, 702–05 (2014) (describing the Ninth Circuit screening system as efficient but expressing concern with its "heavy reliance on staff attorneys rather than judges.").

109. The Administrative Office of the U.S. Courts provides termination data on "administrative appeals" and does not isolate immigration cases more specifically. During the time period of the surge, however, almost all of the change in the number of administrative appeals came from changes to the number of immigration cases appealed. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2004 12–13. The following table includes the percentage of administrative appeals the Ninth Circuit either reversed or remanded out of the total number of administrative appeal terminations:

Year	Reversal/Remand Rate
2002	11%
2003	9.3%
2004	6.1%
2005	6.6%
2006	1.3%

Data come from Tables B-5 of the *Judicial Business of the United States Courts* for the years 2002–2006. *See Judicial Business of the United States Courts*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts [https://perma.cc/7GFM-CEPE].

110. *See* Huang, *supra* note 93, at 1111–12 (discussing the concern, as Judge John Gibbons put it, that federal appellate courts' "remarkable achievement in productivity has been attained at least in part by the adoption of a posture of increased deference to the rulings of the courts we're supposed to be supervising").

first place, then its claim to cost effectiveness strengthens. The Mashaw group suggested several ways by which court remands might play such a regulative or critical function. Judicial review might have an *in terrorem* effect on agency adjudication;[111] adjudicators might follow rules courts fashion, or an agency might use information gleaned from court remands to improve. As before, however, institutional determinants interfere with each of these possibilities.

1. The In Terrorem *Effect.*—An ALJ or an IJ focused on numbers alone has almost no reason to change her approach to decision-making just because a federal judge might reverse her. Only 2%–3% of ALJ decisions denying benefits produce a federal court remand.[112] The rate for IJs is even lower.[113] Another way to put it is to recall that federal courts remand roughly six cases per ALJ per year, whereas ALJs adjudicate about 540 claims per year.[114] Of course, agency adjudicators may vest outsized stock in the federal courts' opinions of their work. When ALJs sued to challenge the expectation that each decide 500–700 cases per year as a threat to their decisional independence, for example, their complaint alleged that the slipshod work this case completion goal required "injured" them because it "demeaned" them "in the eyes of the federal judiciary."[115] To be taken seriously by Article III judges as black-robed colleagues might matter more to agency adjudicators than the odd remand here and there. Thus the threat of federal court review might alter their decision-making.[116]

But federal judge criticism may just as plausibly encourage indifference or hostility among agency adjudicators. For our report, we interviewed ALJs who work in a hearing office that generates few remands and ALJs from a hearing office that generates a lot of remands. The former reported much more positive views of federal court decision-making and commented on the

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111. *See* Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 527 (1989) ("Judicial review serves as a powerful ex ante deterrent to lawless or irrational agency behavior.").

112. In FY 2013, ALJs issued 458,869 appealable decisions. SOC. SEC. ADMIN., *supra* note 84. In FY 2015, the federal courts remanded 8,646 cases. SOC. SEC. ADMIN., *supra* note 81.

113. In 2015, the federal courts of appeals reversed the BIA 250 times. *See supra* note 88. During FY 2013, immigration judges ordered removal in 95,838 removal proceedings. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2015 STATISTICS YEARBOOK C2 (2016). This figure does not account for the IJ decisions in asylum cases. So the chances of an immigrant losing before an IJ, but eventually winning at a federal court of appeals, is less than 0.2%.

114. KRENT & MORRIS, *supra* note 6, at 6.

115. Complaint at 27, Ass'n of Admin. Law Judges v. Colvin, 2014 WL 789074 (N.D. Ill. 2014) (No. 13–cv–2925).

116. *See* Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 71–72 (2008) (chronicling IJ complaints about threats to their esteem, including, for instance, the "[f]ear that every decision or proceeding may trigger a 'personalized' and scathing published criticism from the reviewing circuit court").

instructional value of court remands; indeed, these ALJs prepare and circulate semi-annual memoranda summarizing all decisions from the district court to which most of their cases go.[117] In contrast, ALJs in the high-remand district complained that district judges have little understanding of or regard for agency processes and expressed no appreciation for district court feedback.[118] The hearing offices there lack any sort of structured process that would internalize learning from district court opinions.[119]

2. *The Precedential Effect.*—Any *in terrorem* effect or lack thereof is less significant if a court can impose precedent on the agency that forces it to improve. This "precedential effect" has long attracted criticism on grounds that generalist courts lack the requisite expertise and perspective to forge useful legal changes to a complex regulatory regime.[120] We take as a given the proposition that judges can craft wise opinions for these areas of law, a proposition that is necessary but not sufficient for the precedential effect to function. Regardless of this proposition, however, institutional features and incentives can render the actual effect of precedent on agency decision-making questionable for high volume adjudication.

First, reviewing courts might not have a lot of precedent-setting authority. This is clearly true when appeals first go to the federal district courts, whose decisions agencies can ignore as nonprecedential. It can also be true when courts of appeals review agency decisions, because an agency can narrow the range of issues for which the court can issue binding precedent. If an internal appellate tribunal issues an opinion that resolves an unsettled interpretive issue, as the full BIA does routinely,[121] courts must extend the decision deference if it meets certain criteria of authoritativeness.[122] An agency can control the lawmaking terrain even more completely by issuing legislative rules.[123]

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117. GELBACH & MARCUS, *supra* note 16, at 119–20.

118. *Id.* at 120.

119. *Id.* at 121.

120. *See* Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework*, *in* REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 11, 19–20 (Daniel P. Kessler ed., 2011) (comparing courts to agencies and highlighting generalist courts' lack of expertise and institutional restraint as disadvantages).

121. For all BIA precedent decisions, see *Attorney General and BIA Precedent Decisions*, U.S. DEP'T JUST., www.justice.gov/eoir/ag-bia-decisions [https://perma.cc/4P6X-MNDB].

122. INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999); *see also* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). *But see* Mahn v. Attorney Gen., 767 F.3d 170, 173 (3d Cir. 2014) (holding that single-member BIA decisions do not warrant deference).

123. *See, e.g.*, Revisions to the Rule Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844 (Jan. 18, 2017) (replacing the treating-physician rule by regulation); ADMIN. CONFERENCE OF THE U.S., SSA DISABILITY BENEFITS PROGRAMS: ASSESSING THE EFFICACY OF THE TREATING PHYSICIAN RULE 7–10 (2013) (describing Courts of Appeals' creation of the treating-physician rules and later acknowledgment that the contours of the rule could be altered by the rulemaking process).

Second, agencies can resist control by judicial precedent when it does issue. Whether an agency can formally do so poses a complicated question, although the answer is probably no. To a greater or lesser degree, a number of agencies at one time or another have asserted a policy of "nonacquiescence," whereby they reserve the right to treat appellate case law as nonbinding.[124] "Intercircuit nonacquiescence," by which precedent binds adjudicators only within a circuit's boundaries, is routine.[125] This practice necessarily weakens the power of judicial review to regulate agency behavior,[126] but no more than how circuit boundaries limit the force of any precedent. The Fourth Circuit cannot compel ALJs in Pasadena to follow its interpretation of the Social Security Act, but neither can the Fourth Circuit demand that police officers in Pasadena honor its understanding of the Fourth Amendment. The Supreme Court has never ruled on "intracircuit nonacquiescence," the more problematic variant, whereby an agency denies that appellate precedent binds its decision-making even within that circuit's boundaries. The lower federal courts have uniformly condemned the practice,[127] and neither the EOIR nor the SSA currently practices intracircuit nonacquiescence, at least formally.[128]

But acquiescence in judicial precedent does not necessarily happen automatically within an agency. The agency typically has a process to digest case law that, whether intentionally or unintentionally, can blunt the precedent's force. When a court of appeals issues a published opinion that goes against the government in an immigration case, the EOIR's Office of General Counsel must coordinate the agency's response with the DOJ's Office of Immigration Litigation and its own Office of the Chief Immigration Judge.[129] This "difficult" process[130] presumably can delay the opinion's effect on IJ adjudication.

Something more than the unavoidable difficulty of bureaucratic coordination seems afoot in the SSA. Since 1985, the agency has required all ALJs within a circuit to follow that circuit's precedent.[131] But ALJs do not

124. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 692–718 (1989).

125. *See, e.g.*, Matter of Singh, 25 I & N Dec. 670, 672 (B.I.A. 2012) ("We apply the law of the circuit in cases arising in that jurisdiction, but we are not bound by a decision of a court of appeals in a different circuit.").

126. *See* ROBERT J. HUME, HOW COURTS IMPACT FEDERAL ADMINISTRATIVE BEHAVIOR 92–93 (2009) (explaining the impact of nonacquiescence on the force of precedent).

127. *E.g.*, Heartland Plymouth Court MI, LLC v. NLRB, 838 F.3d 16, 25 (D.C. Cir. 2016); Grant Med. Ctr. v. Burwell, 204 F. Supp. 3d 68, 78–79 (D.D.C. 2016).

128. SSR 96-1p, 1996 WL 374182 (July 2, 1996); *see* Peters v. Ashcroft, 383 F.3d 302, 305 n.2 (5th Cir. 2004) (explaining who is bound by what precedent in immigration adjudication).

129. HUME, *supra* note 126, at 25.

130. *Id.*

131. MARTHA DERTHICK, AGENCY UNDER STRESS: THE SOCIAL SECURITY ADMINISTRATION IN AMERICAN GOVERNMENT 148 (1990).

simply read opinions on their own and decide whether and how a court has tweaked agency policy. The SSA instructs ALJs to ignore circuit decisions until the agency has determined that the decision conflicts with agency policy. Only then does the SSA issue an "acquiescence ruling" that directs ALJs to comply.[132] This threshold can cloak a de facto policy of intracircuit nonacquiescence. The agency can soft-pedal differences between precedent and its own policy, insisting that no conflict exists, and thereby instruct ALJs to ignore court decisions. In 2013, for example, the Fourth Circuit held that ALJs must give "substantial weight" to the Veterans Administration's disability determination when a claimant with prior military service seeks social security benefits.[133] The social security ruling on the subject at the time was that the VA's determination "cannot be ignored and must be considered," an obligation that on its face seems weaker.[134] But the SSA never issued an acquiescence ruling for the Fourth Circuit's opinion.[135] In fact, the agency has issued just over eighty acquiescence rulings during the acquiescence policy's thirty-year history.[136] After an initial flurry of acquiescence rulings in the 1980s, when the policy began, the SSA's pace has slowed markedly. Since 1990, the SSA has issued only three acquiescence rulings for the Second Circuit, for example,[137] and only three for the Seventh Circuit—a court that generated at least ten published opinions adverse to the agency in 2015 alone.[138]

The tactics agencies can use to limit case law's significance matter less if agencies have no reason to resist regulation by precedent. But they do, for several reasons. First, agencies may believe that generalist courts inexpertly craft doctrine. Second, circuit-specific precedent can interfere with an agency's effort to administer a single national policy uniformly across the country.[139] An agency may believe that justice lies in the consistent treatment

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132. SSR 96-1p, 1996 WL 374182 (July 2, 1996).

133. Bird v. Comm'r of Soc. Sec., 669 F.3d 337, 343 (4th Cir. 2012).

134. SSR 06-3p, 71 Fed. Reg. 45,593-03 (Aug. 9, 2006), *rescinded,* Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844, 5845 (Jan. 18, 2017).

135. In 2017, the SSA removed consideration of VA determinations entirely when it updated its medical evidence rules. Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. at 5864, 5874 (codified at 20 C.F.R. §§ 404.1504, 416.904).

136. All acquiescence rulings are available here: *Acquiescence Rulings*, SOC. SEC. ADMIN., www.ssa.gov/OP_Home/rulings/ar-toc.html [https://perma.cc/2GA5-V4NS].

137. *See Acquiescence Rulings: Second Circuit Court*, SOC. SEC. ADMIN., www.ssa.gov/OP_Home/rulings/ar/02/AR02toc.html [https://perma.cc/G265-Z25Z].

138. *See id.* The Seventh Circuit published the following cases adverse to the SSA: Hill v. Colvin, 807 F.3d 862, 863 (7th Cir. 2015); Alaura v. Colvin, 797 F.3d 503, 508 (7th Cir. 2015); Stepp v. Colvin, 795 F.3d 711, 713 (7th Cir. 2015); Price v. Colvin, 794 F.3d 836, 841 (7th Cir. 2015); Varga v. Colvin, 794 F.3d 809, 810 (7th Cir. 2015); Engstrand v. Colvin, 788 F.3d 655, 656 (7th Cir. 2015); Voight v. Colvin, 781 F.3d 871, 879–80 (7th Cir. 2015); Adaire v. Colvin, 778 F.3d 685, 688 (7th Cir. 2015); Hall v. Colvin, 778 F.3d 688, 691 (7th Cir. 2015); Minnick v. Colvin, 775 F.3d 929, 939 (7th Cir. 2015).

139. Harold H. Bruff, *Coordinating Judicial Review in Administrative Law,* 39 UCLA L. REV. 1193, 1205–06 (1992).

of regulated entities or beneficiaries, regardless of what courts say in different parts of the country.[140] Also, the administration of a policy that splinters into dozens of geographically determined variants, to be applied by hundreds of different adjudicators, could prove impossibly difficult to administer. ALJs and IJs have earned harsh criticism for decisional inconsistencies.[141] While IJ disparities remain stubborn and notorious,[142] the SSA has undertaken significant efforts to identify reasons for ALJ idiosyncrasy and to counteract them.[143] If the SSA instructed ALJs to abide by circuit and district precedent, the agency would invite ALJs to draw their own judgment about governing policy and complicate its efforts to get more than 1,000 adjudicators on roughly the same policy-compliant page. For this reason,[144] the SSA has instructed ALJs and decision writers "not to consider any district court decisions."[145]

If an agency is recalcitrant, Congress can structure judicial review to maximize courts' power to create a precedential effect. As some have proposed for social security disability claims litigation, Congress can require that appeals go directly to circuit courts, not district courts, and it can steer all appeals to a single circuit.[146] Doing so would undermine a key argument for nonacquiescence: that different instructions from geographically dispersed courts would flummox an agency's effort to administer a single national policy. But this arrangement would require either significantly less litigation, a dramatic change to judicial standards for acceptable decision-making, or a huge increase in the size of the designated appellate court. When Congress contemplated legislation to send all immigration appeals to the Federal Circuit, the Federal Circuit's chief judge estimated that judicial time for decision-making would plummet to an hour-and-a-half per case as a result.[147] Were Congress to centralize all of the disability appeals currently pending before the regional circuits in the Federal Circuit, its caseload would spike by 25%, assuming no changes in claimant behavior; if all disability cases pending before the district courts went to the Federal Circuit, the latter

140. GELBACH & MARCUS, *supra* note 16, at 74–75.

141. *Id.* at 84–85 & n.444.

142. *E.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-72, ASYLUM: VARIATIONS EXIST IN OUTCOMES OF APPLICATIONS ACROSS IMMIGRATION COURTS AND JUDGES 2, 17 (2016).

143. Gerald K. Ray & Jeffrey S. Lubbers, *A Government Success Story: How Data Analysis by the Social Security Appeals Council (with a Push from the Administrative Conference of the United States) Is Transforming Social Security Disability Adjudication*, 83 GEO. WASH. L. REV. 1575, 1606 (2015).

144. Memorandum from Debra Bice, Chief Admin. Law Judge, to All Administrative Law Judges and All Senior Attorneys 2 (Jan. 11, 2013) (on file with authors); *see also* GELBACH & MARCUS, *supra* note 16, at 76 (quoting the Bice memorandum).

145. Bice, *supra* note 144, at 1–2.

146. *E.g.*, Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 BYU L. REV. 461, 512–17 (1990).

147. *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 4 (2006) (statement of Paul R. Michel, C.J.).

would have to grow by dozens of judges to keep its caseload at manageable levels.[148]

3. Feedback.—Whether binding or not, court decisions can serve as a valuable source of feedback and thereby discharge a critical function. An agency can always examine its wins and losses in court to look for ways to improve. But several institutional contrasts between courts and agencies may reduce agency incentives to do so.

One involves institutional goals. On a superficial level, agencies and courts share the same goal: the accurate and efficient implementation of the relevant regulatory regime. On another, however, these goals diverge. Agencies attempt to meet standards for decisional quality, but quantity—case completion goals, production quotas, and so forth—matter just as much, if not more, in measures of agency performance.[149] Quality conflicts with quantity, for obvious reasons.[150] ALJs surely could generate better decisions with half as many claims to adjudicate, but claimants would then wait twice as long for a hearing. The SSA is legitimately concerned with the injustice of

148. In FY 2014, the Court of Appeals for Veterans Claims decided about 175 petitions and appeals on the merits per "active judge." 2014 U.S. CT. APP. VETERAN CLAIMS ANN. REP. 5, www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf [https://perma.cc/Y6ZD-R8GP]. A court of appeals handling all 20,000 social security cases presently filed in the district courts would have to have 114 judges dedicated just to this litigation to have an equivalent caseload. The CAVC has attracted criticism for its backlog. *E.g.*, Jerry Markon, *Veterans Court Faces Backlog that Continues to Grow*, WASH. POST (Apr. 22, 2011), https://www.washingtonpost.com/politics/veterans-court-faces-backlog-that-continues-to-grow/2011/04/15/AFFaavRE_story.html?utm_term=.df2fbbcc9128 [https://perma.cc/99B5-44BS].

149. *See* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVT'L L. REV. 1, 12 (2009) (arguing that agencies "tend to overproduce on the goals that are complements and the goals that are easily measured"); STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., MISPLACED PRIORITIES: HOW THE SOCIAL SECURITY ADMINISTRATION SACRIFICED QUALITY FOR QUANTITY IN THE DISABILITY DETERMINATION PROCESS 49 (2014) (asserting that "many of [the agency's] failings are attributable to the agency's development of a factory-like production process that ignores the quality of ALJ decisions").

150. Ass'n of Admin. Law Judges v. Colvin, 777 F.3d 402, 404–05 (7th Cir. 2015); Stephen W. Gilliland & Ronald S. Landis, *Quality and Quantity Goals in a Complex Decision Task: Strategies and Outcomes*, 77 J. APPLIED PSYCHOL. 672, 680 (1992).

a claim's being unreasonably delayed.[151] It faces constant and enduring scrutiny for its claims backlog,[152] as does the EOIR.[153]

Agencies have the complex task of successfully managing the tradeoff between quantity and quality. Typically, the federal courts do not shoulder the same obligation to generate large numbers of decisions quickly.[154] Agencies constantly monitor adjudicator productivity and evaluate performance in terms of it.[155] The institutional culture of the federal judiciary would not permit the same sort of pressure on individual judges.[156] Moreover, the federal courts do not endure the same legislative and public scrutiny for their pace of decision-making that agencies routinely confront. Federal judges can therefore render particularized justice tailored to the circumstances of an individual case without significant regard for production quotas. Differences in resources available to decide cases exacerbate the significance of these contrasting goals. An ALJ deciding up to fifty cases per month has a fundamentally different job than a federal judge and her clerk, who can deliberate on a case for a week.[157]

An agency adjudicator might treat judicial feedback as unhelpful if it does not account for her need to produce decisions quickly under severe resource constraints. An example involves the enforcement of subpoenas ALJs issue to medical providers for relevant records.[158] To some federal

151. *See* Nash v. Bowen, 869 F.2d 675, 680 (2d Cir. 1989) (discussing "the Secretary's policy of setting a minimum number of dispositions an ALJ must decide in a month" and agreeing "with the district court that reasonable efforts to increase the production levels of ALJs are not an infringement of decisional independence").

152. *E.g.*, David A. Fahrenthold, *At Social Security Office with a Million-Person Backlog, There's a New Chief*, WASH. POST (July 23, 2015), https://www.washingtonpost.com/news/federal-eye/wp/2015/07/23/at-social-security-office-with-a-million-person-backlog-theres-a-new-chief/?utm_term=.bf7210f69698 [https://perma.cc/Y7QK-2LND].

153. *E.g.*, Julia Preston, *Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle*, N.Y. TIMES (Dec. 1, 2016), https://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html [https://perma.cc/RPC8-P3XW].

154. *See* RICHARD A. POSNER, HOW JUDGES THINK 140–41 (2008) (commenting on district judges' sensitivity to delays in deciding motions but noting that there is no sanction for delays). *But see* Diarmuid F. O'Scannlain, *Striking a Devil's Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473, 476 (2009) (observing that about one-third of Ninth Circuit cases get decided by a "screening panel" of judges that spend four to nine minutes on each after a workup by a staff attorney).

155. *E.g.*, GELBACH & MARCUS, *supra* note 16, at 41 (describing an online tracking program called "How MI Doing" that allows an ALJ to see the number of cases she has decided and her remand rate).

156. *See* Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. CHI. L. REV. 481, 516–17 (1990) (commenting on federal judges' aversion, based partly on their "self-image," to interference with their decision-making processes).

157. GELBACH & MARCUS, *supra* note 16, at 74.

158. *See* 20 C.F.R. §§ 404.950(d)(1), 416.1450(d)(1) (2017); SOC. SEC. ADMIN., HEARINGS, APPEALS, AND LITIGATION LAW MANUAL I-2-5-78 [hereinafter HALLEX], https://www.ssa.gov/OP_Home/hallex/I-02/I-2-5-78.html [https://perma.cc/XF4A-GJML].

courts, especially in pro se cases, the mere issuance of a subpoena does not discharge the ALJ's obligation to "develop" the record[159] when the person or entity being subpoenaed does not respond.[160] An ALJ who seeks a subpoena's enforcement, however, must trigger a cumbersome, time-intensive process.[161] The SSA may follow through on a particular court remand requiring a subpoena's enforcement. But the agency is not likely to act on this feedback more generally and institutionalize a subpoena enforcement policy, given the demands of its caseload.[162]

A second institutional difference might affect the filter through which adjudicators view court feedback, countering its potency. Agency adjudicators might feel obliged to honor aggregate-level, agency-wide policy goals that courts do not countenance.[163] A need to "protect the fund" and the overall health of the social security program might influence ALJ decision-making in individual cases.[164] Observers have long commented on the uncomfortable placement of IJs within the DOJ, suggesting that this institutional arrangement may skew decision-making in favor of strict enforcement.[165] Federal judges face no such aggregate-level pressure for the successful administration of a complex regulatory regime.

Two other institutional differences can also undermine guidance derived from judicial opinions. The first is the baseline problem described above. A

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159. 20 C.F.R. §§ 404.1512(d)–(e), 416.912(d)–(e).

160. *E.g.*, Brandow v. Comm'r of Soc. Sec., No. 1:05–CV–09171 NPMVEB, 2009 WL 2971543, at *5 n.6 (N.D.N.Y. Sept. 11, 2009); Suriel v. Comm'r of Soc. Sec., Civ. No. 05-1218, 2006 WL 2516429, at *6 (E.D.N.Y. Aug. 29, 2006); Sanchez v. Barnhart, 329 F. Supp. 2d 445, 450–51 (S.D.N.Y. 2004). *But see* Friedman v. Astrue, No. 07 Civ. 3651, 2008 WL 3861211, at *8–9 (S.D.N.Y. Aug. 19, 2008) (abiding by a Second Circuit holding that an "ALJ's decision to enforce a subpoena on an unresponsive party is discretionary"); Serrano v. Barnhart, No. 02 Civ. 6372, 2005 WL 3018256, at *3–4 (S.D.N.Y. Nov. 1, 2005) (finding that a mandate to enforce a subpoena would be a "tremendous and undue burden" on an ALJ).

161. HALLEX, *supra* note 158, at I-2-5-82, https://www.ssa.gov/OP_Home/hallex/I-02/I-2-5-82.html [https://perma.cc/4N4E-ZRW3]; *see also* Yancey v. Apfel, 145 F.3d 106, 113 (2d Cir. 1998) (expressing concerns over "the financial and administrative burdens of processing disability claims" that a rule requiring the SSA to subpoena treating physicians at the claimant's behest would entail).

162. *See* GELBACH & MARCUS, *supra* note 16, at 19–21 (juxtaposing the difficulties of the subpoena process with ALJs' institutional "just in time" approach towards case review).

163. Jerry L. Mashaw, *Organizing Adjudication: Reflections on the Prospect for Artisans in the Age of Robots*, 39 UCLA L. REV. 1055, 1056 (1992).

164. GELBACH & MARCUS, *supra* note 16, at 78–79; *see also* D. Randall Frye, *Statement of the Association of Administrative Law Judges, Committee on Ways and Means, Subcommittee on Social Security*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 35, 42–43 (2013) (June 27, 2012) (stating that "having the judge defend the Trust Fund as well as the claimant's interest . . . places the judge in an untenable situation").

165. *E.g.*, U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 178 (1997) (advocating that citizenship and immigration adjudications be moved from the DOJ to the State Department); AM. BAR ASS'N HOUSE OF DELEGATES, RESOLUTION 114F, at 4–5 (2010) (describing criticism of the placement of immigration adjudication under the purview of the DOJ and advocating for fundamental "restructuring").

nitpicky remand of a clearly meritless claim might lead the ALJ to discount the district court's order, and perhaps future ones, as uninformed. Second, the agency might explicitly discourage its adjudicators from considering court remands as a source of feedback, concerned that doing so might create discrepancies in adjudicators' understandings of policy-compliant decision-making.

Whatever the reason, the SSA presently does little as an agency[166] to mine district court remand decisions for instruction. An ALJ who gets remanded will see the decision, but the decision writer who drafted it will not.[167] Neither does the Appeals Council analyst nor the appellate adjudicator. The EOIR has no mechanism in place to ensure that staff attorneys involved in a decision that gets remanded see the court opinion and learn from it.[168]

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The foregoing dwells on the many institutional impediments that interfere with judicial review's corrective, regulative, and critical functions. The story may not be quite so bleak. In particular instances courts may discharge one or more of the functions more successfully. The body of immigration law that IJs administer, for instance, owes a good deal to federal circuit precedent. Also, the case for judicial review should not depend upon the justificatory force of any single function in isolation but rather the cumulative contributions that courts can make. Courts may not correct errors more efficiently than adjudicators can avoid them, but if they can rectify some mistakes and exert some regulative influence, however limited, then perhaps the case for judicial review of high volume agency adjudication strengthens.

Those who have studied high volume agency adjudication most closely remain unconvinced. The Mashaw group favored the replacement of Article III review of ALJ decision-making with a specialized social security court,[169] a recommendation seconded by distinguished commentators.[170] When Congress caved to judicial pressure and created judicial review for veterans benefits adjudication in 1988, it opted for a specialized Article I court.[171] A proposal to jettison review of IJ decisions by the regional courts

166. ALJs on their own in some instances have created organized methods of deriving feedback from district court decisions. GELBACH & MARCUS, *supra* note 16, at 119–20.

167. *Id.* at 174–75.

168. Lenni B. Benson, *You Can't Get There From Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405, 427 (2007).

169. MASHAW ET AL., *supra* note 15, at 146–50.

170. Verkuil & Lubbers, *supra* note 15, at 776, 781–82.

171. Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 NEB. L. REV. 388, 396 (2011).

of appeals gained traction in Congress in the mid-2000s.[172] Many clearly continue to believe that whatever benefits Article III review brings to high volume agency adjudication, they fall short of justifying it.

III. Problem-Oriented Oversight

Judgments about judicial review's wisdom are incomplete because existing accounts of its role supervising high volume agency adjudication have overlooked a key function courts can perform. This function has something important to do with an interesting dynamic apparent in the case law this litigation generates. Often boring and repetitive, appeals typically yield cookie-cutter opinions of little significance.[173] Not infrequently, however, judges break this tedium with extraordinary commentary on patterns or trends they have observed. Identifying a set of ALJ decisions he found troubling, for example, a magistrate judge recently described some social security proceedings as "border[ing] on madness."[174] In a separate opinion released the same day, he denounced ALJ decisions as "littered with recurring issues" and lampooned social security appeals as "Groundhog Day."[175] Perhaps such statements, which are legion in immigration opinions[176] and not uncommon in social security cases,[177] are little more than outbursts of judicial frustration. But Article III judges tend to keep their powder pretty dry, so we interpret this sort of commentary as purposeful.

From time to time, judges try to influence agency decision-making through means beyond the correction of discrete errors in individual cases or the issuance of binding precedent. A comparison provides some insight into what courts might be up to. Congress has a lot of tools at its disposal to influence agency behavior.[178] One important one is a form of oversight, by which legislators assemble information on an agency, then comment publicly

172. *E.g.*, *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 2 (2006) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary).

173. *E.g.*, MASHAW ET AL., *supra* note 15, at 140.

174. Wallace v. Colvin, 193 F. Supp. 3d 939, 941 (N.D. Ill. 2016).

175. Booth v. Colvin, No. 14 CV 50347, 2016 WL 3476700, at *1 (N.D. Ill. June 27, 2016).

176. *See* Legomsky, *supra* note 53, at 1645 (referring to "the unprecedented scathing criticisms that so many U.S. courts of appeals have leveled at EOIR").

177. *E.g.*, Hughes v. Astrue, 705 F.3d 276, 279 (7th Cir. 2013) (admonishing the SSA and DOJ to "do better than they did in this case"); Hardman v. Barnhart, 362 F.3d 676, 679 (10th Cir. 2004) (reiterating the demand for more than standard boilerplate language because it "fails to inform [the court] in a meaningful, reviewable way of the specific evidence the ALJ considered in determining that claimant's complaints were not credible"); Batista v. Colvin, Civ. No. 13-4185, 2014 U.S. Dist. LEXIS 80576, at *6 (E.D.N.Y. June 11, 2014) (demanding that "[j]ust once, [the court] would like to see an ALJ write" specific reasons for rejecting a plaintiff's credibility); Freismuth v. Astrue, 920 F. Supp. 2d 943, 954 (E.D. Wis. 2013) (describing the SSA Commissioner's brief that didn't include a citation to case law as "insulting" to the court because the "Commissioner's counsel can neither appropriately screen [ALJ decisions] nor adequately brief them").

178. Jack M. Beerman, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 69–70 (2006).

and critically on its performance.[179] Although in theory backed by the threat of a budget cut or some other legislative sanction, these congressional interventions can derive force simply from the informal pressure they generate.[180] We argue that courts attempt something similar, what we call "problem-oriented oversight," when they decide certain appeals.

Courts engage in problem-oriented oversight when they identify and respond to "problems," defined either as flawed administrations of policy by the agency, or as the agency's nonresponse to an entrenched decision-making pathology. This Part distinguishes problem-oriented oversight from existing models of agency oversight and explains how courts engage in the task. Part IV examines the institutional factors that determine whether this function can succeed.

A. *Models of Agency Oversight*

The notion that judicial review functions as a type of agency oversight is hardly novel.[181] What exactly this oversight is and how courts conduct it in the context of high volume agency adjudication, however, have attracted little examination.

We begin with what Mariano-Florentino Cuellar aptly calls an "incredibly durable framework for thinking about legislative oversight of the bureaucracy,"[182] a subject that has garnered more study than court-based oversight. This canonical framework describes oversight in terms of two models.[183] When Congress engages in "police patrol oversight," it surveys a large number of agency decisions or actions, selected at random, to determine if the agency is functioning properly.[184] Like a police officer cruising a neighborhood, this oversight happens when, "at its own initiative, Congress examines a sample of executive-agency activities, with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discouraging such violations."[185] Police patrol oversight is proactive and often regular and ongoing.[186] Examples include making an agency submit annual reports to Congress, obliging agency officials to appear at committee

179. *Id.* at 122–23, 125.

180. Douglas Kriner, *Can Enhanced Oversight Repair "the Broken Branch"?*, 89 B.U. L. REV. 765, 784–85 (2009).

181. *See, e.g.*, David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 747–78 (2009) (arguing courts make efficient and effective monitors of government conduct).

182. Mariano-Florentino Cuellar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 297 (2006).

183. Matthew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–66 (1984).

184. *Id.* at 166.

185. *Id.*

186. LINDA L. FOWLER, WATCHDOGS ON THE HILL: THE DECLINE OF CONGRESSIONAL OVERSIGHT OF U.S. FOREIGN RELATIONS 134–35, 139 (2015).

hearings in connection with an annual budget request, and submitting an agency to examination by the Government Accountability Office.[187]

"Fire alarm oversight," the second model, responds to institutional constraints, including high costs and inconstant legislator attention, that in theory limit the efficacy of police patrols.[188] Rather than itself gather and sift through large amounts of information about agency performance to find possible problems, "Congress establishes a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions . . . , to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself."[189] Such mechanisms are "fire alarms" that third parties can ring and thereby direct oversight attention to agency misconduct. Thus, this oversight is episodic and reactive.

A recent disability benefits scandal nicely illustrates fire alarm oversight. David Daugherty, an ALJ in Huntington, West Virginia, granted benefits in 1,280 of the 1,284 cases he decided in FY 2010.[190] This was the sixth year in a row in which Daugherty had decided more than 1,000 cases;[191] it came amidst a stunning growth in the nation's disability rolls, and in a year when ALJs granted benefits in more than 70% of cases they decided on the merits.[192] Protected by a statutory safe harbor,[193] a prototypical fire alarm,[194] a whistleblower contacted the *Wall Street Journal* to bring Daugherty's practice of rubber-stamping disability benefits claims to light.[195] The article

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187. Beerman, *supra* note 165, at 66–67.

188. McCubbins & Schwartz, *supra* note 183, at 168.

189. *Id.* at 166.

190. Damian Paletta, *Disability-Claim Judge Has Trouble Saying "No"*, WALL STREET J. (May 19, 2011), https://www.wsj.com/articles/SB10001424052748704681904576319163605918524 [https://perma.cc/D5XU-4KM2].

191. STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 113TH CONG., HOW SOME LEGAL, MEDICAL, AND JUDICIAL PROFESSIONALS ABUSED SOCIAL SECURITY DISABILITY PROGRAMS FOR THE COUNTRY'S MOST VULNERABLE: A CASE STUDY OF THE CONN LAW FIRM 34 (2013).

192. SOC. SEC. ADVISORY BD., ASPECTS OF DISABILITY DECISION MAKING: DATA AND MATERIALS 12 (2012); CTR. ON BUDGET & POLICY PRIORITIES, CHART BOOK: SOCIAL SECURITY DISABILITY INSURANCE 6–7 (2017), https://www.cbpp.org/sites/default/files/atoms/files/7-21-14socsec-chartbook.pdf [https://perma.cc/8C8B-T7SK].

193. 5 U.S.C. § 2302(b)(8) (2012).

194. David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1143 (2017).

195. Paletta, *supra* note 190; *see also* Press Release, Soc. Sec. Admin., Office of the Inspector Gen., Former SSA Chief Administrative Law Judge Pleads Guilty to Conspiracy to Retaliate Against Informant (June 13, 2016), https://oig.ssa.gov/audits-and-investigations/investigations/june13-andrus-guilty-plea [https://perma.cc/PAY6-VLVR] (describing the prosecution of the former chief ALJ in the Huntington office for conspiring to retaliate against an SSA employee who was an informant for federal investigators).

prompted several congressional hearings[196] and at least two committee reports.[197] What emerged was criticism that the SSA, focused on case-completion goals above all else, turned a blind eye to ALJs "paying down" a huge backlog of claims.[198] Daugherty eventually pleaded guilty to felony charges, admitting that he took kickbacks from a local social security lawyer who received fees when Daugherty granted his clients' claims.[199] Although the SSA denied the blind-eye charge, it made significant changes, at least partially in response to congressional scrutiny.[200] The ALJ claim allowance rate declined sharply, to 48%, by 2013.[201]

Although developed to describe versions of Congressional oversight, the police patrol and fire alarm models have come to serve as descriptions of how a range of overseers, including courts, can supervise agencies.[202] Judicial review has traditionally been treated as a component in a fire alarm system, with courts either as the oversight institution itself, or with courts serving as a forum where aggrieved third parties can ring a fire alarm and thereby trigger oversight.[203]

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196. *See, e.g.*, *Social Security Administration Oversight: Examining the Integrity of the Disability Determination Appeals Process: Hearing Before the H. Committee on Oversight and Government Reform*, 113th Cong. 29 (2014) (statement of Lamar Smith, Chairman, H. Comm. On the Judiciary) (indicating Congress first learned of the matter from the Wall Street Journal). *See generally Social Security Disability Benefits: Did a Group of Judges, Doctors, and Lawyers Abuse Programs for the Country's Most Vulnerable?: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 113th Cong. (2013) [hereinafter *Hearing on SSDI Abuse*] (repeatedly discussing the *Wall Street Journal* article).

197. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, *supra* note 149, at 6 & n.6; STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra* note 191, at 6.

198. *See* STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, *supra* note 149, at 5–7 (identifying the SSA's emphasis on quantity over quality in ALJ decisions); Stephen Olemacher, *Judges Tell Lawmakers They Are Urged to Approve Social Security Disability Claims*, WASH. POST (June 27, 2013), https://www.washingtonpost.com/politics/judges-tell-lawmakers-they-are-urged-to-approve-social-security-disability-claims/2013/06/27/ea990a7e-df66-11e2-b2d4-ea6d8f477a01_story.html?utm_term=.3bccda0a508a [https://perma.cc/7VUA-C7QG] (reporting ALJs describing a system where judges were urged to grant claims for the sake of reducing the case backlog).

199. Stephen Dinan, *Judge Pleads Guilty in Massive Social Security Fraud Case*, WASH. TIMES (May 14, 2017), http://www.washingtontimes.com/news/2017/may/14/david-b-daugherty-pleads-guilty-in-massive-social-/ [https://perma.cc/H8AR-77QH].

200. *Social Security Disability Benefits: Did a Group of Judges, Doctors, and Lawyers Abuse Programs for the Country's Most Vulnerable?: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 113th Cong. 127 (2013) (statement of Debra Bice, Chief ALJ, Social Security Administration).

201. 2017 SOC. SEC. ADMIN. BUDGET JUSTIFICATION, *supra* note 74, at 144.

202. Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1172 (2009).

203. *Id.*; Law, *supra* note 181, at 747–48.

B. *The Limits of the Fire Alarm Model*

When Richard Posner castigated the "Immigration Court" as "the least competent federal agency" in a 2016 opinion,[204] perhaps he meant his harsh words as an attempt at fire alarm oversight. A third party, the immigrant facing removal, brought an alleged agency problem to a court and got Judge Posner to respond vociferously. But for several reasons the fire alarm model imperfectly describes what courts do. First, courts review large numbers of cases, most of which were either acceptably decided or at worst marred by random error. Fire alarm oversight is premised on the notion that third parties screen agency decisions for the overseer, finding agency flaws for a court, or a legislature motivated by a court, to fix. If this is so, the mechanism would seem to fit high volume agency adjudication poorly. Indeed, judicial oversight has some of the markings of a police patrol. It is regular and ongoing, and it involves large numbers of unremarkable agency decisions.

The ordinariness of judicial review relates to a second reason why it does not really serve as a form of fire alarm oversight in the context of high volume agency adjudication. To the extent that fire alarm oversight depends upon attracting the attention of Congress or the public at large, the regularity of court involvement interferes with the objective. We are unaware of any congressional hearings held during the past decade that court decisions in social security cases prompted, even as federal judges have fulminated about poor quality SSA decision-making.[205] If fire alarms ring all the time, then they seem less like alarms and more like background noise.

Finally, especially for the sorts of problems that courts are uniquely well-positioned to identify and to try to correct, effective judicial oversight of high volume agency adjudication is often not reactive and incident-driven, but requires judicial proactivity and extended engagement over time. Sometimes an appeal from a random ALJ or IJ order sounds the alarm over a large-scale matter whose significance a court immediately appreciates. When the BIA determined that someone seeking asylum based on her experience with female genital mutilation did not establish a risk of future persecution because the mutilation happened in the past,[206] the Second Circuit swiftly rebuked the agency for a "significant error[] in the application of its own regulatory framework."[207] But an array of smaller bore but

204. Chavarria-Reyes v. Lynch, 845 F.3d 275, 280 (7th Cir. 2016) (Posner, J., dissenting).

205. We searched for congressional publications in the Proquest Congressional database using the search terms "federal /s (court or judge)," "social security," "disability /s benefits," and "Posner," limiting our search to 2007 to 2017. The search yielded nothing suggesting a hearing or other oversight activity prompted by federal court opinions. "Posner" refers to Richard Posner. Because of Judge Posner's stature and because of his high-profile criticism of disability benefits adjudication, his name should appear in oversight materials prompted by judicial criticism, had there been any.

206. *In re* A-T-, 24 I & N Dec. 296, 303–04 (B.I.A. 2007).

207. Bah v. Mukasey, 529 F.3d 99, 101 (2d Cir. 2008).

nonetheless important pathologies, such as problematic behavior by a single adjudicator or flaws in an agency's internal manual, can plague agency decision-making. Judicial awareness of these problems might sharpen only over time, and only as courts engage repeatedly with them.

C. Problem-Oriented Oversight Through Judicial Review

Judicial review of high volume agency adjudication does not fit the police patrol model either. The process relies upon third parties to identify and complain about flawed agency decision-making, which is a defining feature of fire alarm oversight. Courts do not proactively seek out adjudicator orders to review, as an auditor randomly sampling decisions to get an overall sense of the agency's performance might.[208] But an adjusted version of the police patrol metaphor works pretty well to describe the oversight role that courts can assume. "Problem-oriented policing"

> posits that police should focus more attention on *problems*, as opposed to *incidents* . . . . Problems are defined either as collections of incidents related in some way (if they occur at the same location, for example) or as underlying conditions that give rise to incidents, crimes, disorder, and other substantive community issues . . . .[209]

Whereas "incident-driven," reactive policing focuses on the resolution of discrete incidents,[210] problem-oriented policing treats each incident as a datum for the identification of underlying factors that create crime and for the best possible responses.[211] Identifying underlying causes, not clearing arrests, is the goal.[212]

Table 2 describes definitional characteristics of fire alarm, police patrol, and problem-oriented oversight.

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208. *See, e.g.*, Martinez v. Astrue, 630 F.3d 693, 695 (7th Cir. 2011) (explaining that the government's inability to appeal as well as caution by claimants' lawyers in appealing make it impossible for courts to assess the error rate of administrative adjudications).

209. Gary Cordner & Elizabeth Perkins Biebel, *Problem-Oriented Policing in Practice*, 4 CRIMINOLOGY & PUB. POL'Y 155, 156 (2005).

210. ANTHONY A. BRAGA, PROBLEM-ORIENTED POLICING AND CRIME PREVENTION 9 (2d ed. 2010).

211. *Id.* at 10, 15.

212. Cordner & Biebel, *supra* note 209, at 156, 158.

Table 2. Models of Oversight Compared

Definitional Characteristic	Fire Alarm Oversight	Police Patrol Oversight	Problem-Oriented Oversight
Initiator	Third Party	Oversight Institution	Third Party
Regularity of Oversight	Episodic	Regular/Ongoing	Regular/Ongoing
Goal of Oversight	Problem Identification and Response	Overall Assessment of Performance	Problem Identification and Response
Mode of Oversight	Discrete Response to Incident	Audit of Numerous Agency Decisions	Discrete Response to Incident or to Pattern Gleaned from Review of Numerous Agency Decisions

When courts engage in problem-oriented oversight, they treat appeals as indicators of potential problems. Of course, many appeals simply result from adjudicator "error," a word we use as a term of art. But "problems," defined as systematic underlying pathologies in internal agency administration that afflict adjudication, can lurk among these flaws. The claimant or immigrant bringing the problem to a court's attention may not know whether his case presents an error or a problem. Precisely the ordinariness of judicial review, or the continuing, routine engagement of courts with the agency's decision-making, enables courts to distinguish problems from errors and respond appropriately.

1. Errors.—Agency adjudicators can produce flawed decisions for several reasons. Sometimes they simply err. The agency has adopted an acceptable interpretation of governing law. An acceptably competent adjudicator understands and applies this interpretation. But in the odd case, the adjudicator, as a mere mortal, happens to make an error. Perhaps amidst the six hundred pages of medical records in the claimant's file, an ALJ overlooks the physician's note that confirms a claimant's alleged

symptoms.[213] Perhaps the IJ wrongly but not unreasonably treats a particular conviction as a "crime involving moral turpitude," which requires the immigrant's deportation.[214]

When an agency adjudicator errs, a reviewing court can correct the error but accomplish little more. By our definition of error, no underlying problem exists to address. Presumably, the ALJ would have decided the case better had she caught the physician's note, and the case proceeded to federal court only because her mistake slipped past personnel at the Appeals Council. As we have already argued, this error correction offers a marginal justification for judicial review of high volume agency adjudication. To return to the metaphor, the error-correction function is like arresting a random lawbreaker, not ferreting out what underlying factors foster criminal activity.

2. *Problems.*—Flawed decisions result from problems, not mere error, in one of two situations. First, the agency may have adopted a bad policy. Second, the agency cannot or will not fix an entrenched decision-making pathology.

a. *Bad Policy.*—Agencies can adopt bad policies. The BIA's erstwhile stance on female genital mutilation is an example. An instruction in a guidance document or manual that conflicts with governing precedent is another, albeit one more likely to fly under the radar and less likely to trigger a loud fire alarm.[215] However fine the mesh in its net, an internal appeals tribunal would never catch flawed adjudicator decisions when the shortcomings result from a bad policy because the tribunal has to abide by the policy as well. Thus, it would uphold an adjudicator's decision following the policy as correct.

b. *Entrenched Pathology.*—A second type of problem results when the agency is unwilling or unable to correct an entrenched pathology that afflicts adjudicator decision-making. The threat of deliberate indifference to certain strains of adjudicator dysfunction lurks in the institutional DNA of agencies tasked with large numbers of claims or decisions to make. The number of cases decided is an easily administrable performance metric, but one that can reward decision-making that fares poorly by the harder-to-use measure of decisional quality.[216] If an agency sets production targets or quotas, as the EOIR and SSA do, it may find the temptation to ignore warning signs of

213. *See Oversight of Rising Social Security Disability Claims and the Role of Administrative Law Judges: Hearing Before the Subcomm. on Energy Policy, Health Care and Entitlements of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 2 (2013) (statement of Sen. Tom Coburn) ("The average case has over 600 pages in it.").

214. *E.g.*, Omargharib v. Holder, 775 F.3d 192, 200 (4th Cir. 2014).

215. For examples of flawed guidance documents, see Harris v. Astrue, No. 3:09CV00260, 2010 WL 3909495, at *5 (S.D. Ohio May 21, 2010); Palaschak v. Astrue, No. 08-CV-1172, 2009 WL 6315324, at *11 (N.D.N.Y. Nov. 13, 2009).

216. *See supra* note 149 and accompanying text.

serious adjudicator dysfunction overwhelming.[217] Judge Daugherty, the Huntington ALJ, had a shockingly high allowance rate and decided astonishing numbers of cases. Together with the $600 million in lifetime benefits he awarded,[218] these dubious achievements should have raised red flags in SSA headquarters.[219] Instead, notwithstanding a well-documented morale and management problem in the Huntington hearing office, the SSA, under pressure to keep a growing backlog at bay,[220] transferred 1,186 aged cases there between 2006 and 2011.[221] During this time, the SSA based its evaluations of ALJ performance solely on number of cases decided, with no adjustment for decisional quality.[222]

The Huntington episode did not trigger judicial review because the SSA generally cannot appeal when an ALJ grants benefits. But an agency focused

217. *See* Lisa D. Ordóñez et al., *Goals Gone Wild: The Systematic Side Effects of Over-Prescribing Goal Setting* 7–8 (Harvard Bus. Sch., Working Paper No. 09-083, 2009), http://www.hbs.edu/faculty/Publication%20Files/09-083.pdf [https://perma.cc/9ACZ-3YAA] ("Goals that are easier to achieve and measure (such as quantity) may be given more attention than other goals (such as quality) in a multi-goal situation.").

218. Devlin Barrett & Damian Paletta, *Three Indicted for Alleged Social Security Fraud Scheme in Kentucky*, WALL STREET J. (Apr. 5, 2016), https://www.wsj.com/articles/three-indicted-for-alleged-social-security-fraud-scheme-in-kentucky-1459867962 [https://perma.cc/YGG6-AB4Z].

219. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, *supra* note 149, at 6.

220. For an indication of congressional interest in the disability claims backlog during the mid-2000s, see *Improve the Responsiveness and Oversight of the Hearings Process*, SOC. SEC. ADMIN., OFF. INSPECTOR GEN., https://web.archive.org/web/20160809001205/https://oig.ssa.gov/audits-and-investigations/top-ssa-management-issues/social-security-disability-hearings-backlog?page=6 [https://perma.cc/G6LJ-5E4K] (flagging the hearing backlog as a "Top SSA Management Issue" and listing dozens of reports on the topic, including nearly 40 from 2005 to 2010).

221. STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra* note 191, at 20–22.

222. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., SYSTEMIC WASTE AND ABUSE AT THE SOCIAL SECURITY ADMINISTRATION 32–34 (2014). Another episode involved an ALJ in Harrisburg, Pennsylvania, who granted benefits to 2,285 people in 2007 alone. Although others in the agency criticized this ALJ, the agency's chief ALJ praised him for "putting in incredible hours" and insisted that the ALJ "feels very committed to public service." Brent Walth & Bryan Denson, *Paying Out Billions, One Judge Attracts Criticism*, OREGONIAN (Dec. 30, 2008), http://www.oregonlive.com/special/index.ssf/2008/12/paying_out_billions_one_judge.html [https://perma.cc/2U9R-KWLW]. The ALJ continued in his role as Hearing Office Chief Administrative Law Judge for a year and a half after his decision pattern made news. *See Social Security Administration Oversight: Examining the Integrity of the Disability Determination Appeals Process: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 30 (2014) (statement of Charles Bridges, Administrative Law Judge, Social Security Administration) (stating that he continued in that role until June 2010, eighteen months after the *Oregonian* piece). He was removed from his leadership role in June 2010 because of how he administered the hearing office, but not explicitly because of his decision pattern. Appellees' Supplemental Appendix at SA00166, Bridges v. Comm'r of Soc. Sec., 607 F. App'x 168 (3d Cir. 2015) (No. 14-1580). Only in 2014 did the agency seem to take action to address the ALJ's decision patterns. *See* Bridges v. Comm'r of Soc. Sec., 607 F. App'x 168, 170 (3d Cir. 2015) (describing a determination made after FY 2013 that the ALJ's decisions "did not comply with SSA standards" and subsequent action taken by his supervisors).

on numbers might just as well turn a blind eye to poor-quality decision-making that harms claimants or immigrants if the adjudicator decides a lot of cases.[223] The Atlanta immigration court decides cases in immigrants' favor at astonishingly low rates.[224] Persistent criticism for perceived bias against immigrants hounds Atlanta IJs,[225] and at least one Atlanta IJ has attracted a disproportionate number of formal complaints.[226] But, as an observer speculates, the EOIR has not taken significant steps at reform, perhaps because the Atlanta immigration court decides large numbers of cases.[227]

Entrenched pathologies might persist for reasons other than deliberate indifference, but ones equally baked into the institutional structure of agency adjudication. Agency adjudicators often enjoy employment protections that amount to a minor league version of life tenure.[228] The SSA cannot take disciplinary action against an ALJ based solely on how the ALJ decides

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223. A Seattle-based IJ attracted scathing criticism from the Ninth Circuit and unfavorable public comment in 2002. Paramasamy v. Ashcroft, 295 F.3d 1047, 1048–49 (9th Cir. 2002); Chris McGann & Lise Olsen, *Controversial Immigration Judge Won't Be Transferred*, SEATTLE POST-INTELLIGENCER (Oct. 11, 2002), http://www.seattlepi.com/news/article/Controversial-immigration-judge-won-t-be-1098273.php [https://perma.cc/257W-LVHR]. She then moved to Los Angeles, where her decisions continued to garner unflattering attention. *See, e.g.*, Smolniakova v. Gonzales, 422 F.3d 1037, 1047 n.2 (9th Cir. 2005); Rivera v. Ashcroft, 387 F.3d 835, 841–42 (9th Cir. 2004); Pamela A. MacLean, *Immigration Judges Come Under Fire; Critics Say System Oversight Is Weak*, NAT'L L.J., Jan. 30, 2006. But she continued to decide cases, and she continued to garner severe criticism. *E.g.*, Cruz Rendon v. Holder, 603 F.3d 1104, 1111 n.3 (9th Cir. 2010). Asked why complaints against this IJ would prove futile, a prominent immigration attorney insisted that other IJs told him that the agency thought well of her work because "she clears a lot of cases." John Roemer, *Jurist's Asylum Seeker Rulings Earn Rebuke*, L.A. DAILY J., Jan. 31, 2006 (quoting Robert Jobe).

224. *E.g.*, Ramji-Nogales et al., *supra* note 8, at 331 (indicating an asylum grant rate of 12% in Atlanta, compared to 40% overall).

225. *E.g.*, Letter from Hallie Ludsin, Emory Law Sch., et al., to Juan P. Osuna, Dir., Exec. Office for Immigration Review 5–6 (Mar. 2, 2017) ("[O]bservers [of Atlanta IJs] noted specific examples of concern where IJs made statements that indicated potential prejudice against immigrant respondents, or lacked the necessary patience, dignity, and courtesy required of IJs in immigration proceedings.").

226. Between October 1, 2009, and March 31, 2010, at least five complaints were filed against IJ Pelletier. *See* Bryan Johnson, *Secret Identities of Immigration Judges Revealed*, AMJO LAW (Jan. 16, 2017), https://amjolaw.com/2017/01/16/secret-identifies-of-immigration-judges-revealed/ [https://perma.cc/HD4R-Z47C] (including a "modified key" that lists complaints against IJs by date filed). During this time period, eighty-seven complaints were filed against IJs nationwide. Executive Office for Immigration Review, Complaints Received Between Oct. 1, 2009, and Mar. 31, 2010 (on file with the authors). The EOIR employed 232 IJs in FY 2009. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FACT SHEET: EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION JUDGE HIRING INITIATIVE 3 (2010). The average IJ, in other words, received .38 complaints during the time period IJ Pelletier received five.

227. Jacqueline Stevens, *Lawless Courts*, NATION (Oct. 20, 2010), https://www.thenation.com/article/lawless-courts/ [https://perma.cc/PLC9-AY45].

228. *See Continuing Oversight of the Social Security Administration's Mismanagement of Federal Disability Programs: Hearing Before the Subcomm. on Energy Policy, Health Care and Entitlements of the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 27 (2013) (statement of Glenn E. Sklar, Deputy Commissioner, Social Security Administration) (explaining the SSA generally cannot issue strong discipline to ALJs such as furlough, suspension, or removal).

cases,[229] and its power to force ALJs to manage their cases in particular ways is tightly constrained.[230] An ALJ bears almost no risk of termination.[231] Indeed, the SSA believes that it cannot suspend an ALJ without pay, much less terminate him, until that ALJ has exhausted his appeals before the Merit Systems Protection Board (MSPB).[232] This extended process can create considerable delay.[233] After pleading guilty to a felony charge, for example, an ALJ who had sexually assaulted an employee in a hearing room during work hours while intoxicated received his salary for three more years until the MSPB had finally finished its review.[234]

Such protections, a (lesser) version of which IJs also enjoy,[235] give agency adjudicators a plausible claim to independence.[236] But they can lead to inertia or conflict avoidance within the agency and slow down or arrest efforts to respond to decision-making pathologies. Notwithstanding repeated federal judicial criticism of his performance,[237] for instance, one ALJ remained a hearing office chief administrative law judge until a class of 4,000 denied claimants filed a lawsuit against the SSA, alleging that due process violations systemically plagued his and several colleagues' case

229. *See* Nash v. Bowen, 869 F.2d 675, 681 (2d Cir. 1989) (stating that to "coerce ALJs into lowering reversal rates—that is, into deciding more cases against claimants—would, if shown, constitute in the district court's words 'a clear infringement of decisional independence'").

230. Soc. Sec. Admin. v. Butler, No. CB-7251-14-0014-T-1, slip op. at 24–25 (M.S.P.B. Sept. 16, 2015); Emilia Sicilia, *Combating Biased Adjudication in Claims for Social Security Disability Benefits*, CLEARINGHOUSE COMMUNITY (May 2014), http://povertylaw.org/clearinghouse/stories/sicilia [http://perma.cc/3AT4-GDSF].

231. *Role of Social Security Administrative Law Judges: Joint Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary and the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, 112th Cong. 46 n.10 (2011) (statement of Michael J. Astrue, Comm'r, Social Security Administration) (indicating that between 2008 and July 2011, the SSA tried to fire eight ALJs out of more than 1,000).

232. *Id.* at 46.

233. SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GEN., A-06-16-50026, AUDIT REPORT: ADMINISTRATIVE LEAVE USED FOR EXTENDED ABSENCES 3 (2017).

234. *Id.* at 3–4; Jillian Kay Melchior, *Social Security Disability Judge Got $600,000 in Pay and Three Raises After Drunkenly Groping Colleagues*, NAT'L REV. (Jan. 26, 2017), http://www.nationalreview.com/article/444272/sridhar-boini-social-security-judge-sexually-assaulted-collogues-given-raises [https://perma.cc/Y5DF-4AMF].

235. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 373–74 (2006).

236. *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1647 (2016) (describing ALJs as more independent than other administrative adjudicators who lack the same statutory protections).

237. *E.g.*, Lazo-Espinoza v. Astrue, No. 10–CV–2089, 2012 WL 1031417, at *14 (E.D.N.Y. Mar. 27, 2012); Bailey v. Astrue, 815 F. Supp. 2d 590, 599–601 (E.D.N.Y. 2011); Legare v. Comm'r of Soc. Sec., No. 08–CV–2180, 2010 WL 5390958, at *3 (E.D.N.Y. Dec. 22, 2010); Calderon v. Astrue, 683 F. Supp. 2d 273, 278 (E.D.N.Y. 2010); Gross v. Astrue, No. 08–CV–578, 2010 WL 301945, at *3 (E.D.N.Y. Jan. 15, 2010); Ginsberg v. Astrue, No. 05–CV–3696, 2008 WL 3876067, at *16 (E.D.N.Y. Aug. 18, 2008).

management.[238] Only upon the lawsuit's filing did the SSA relieve the ALJ of his management role.[239]

3. Distinguishing Errors from Problems.—To succeed as overseers, courts have to be able to distinguish problems from errors. Sometimes the former are obvious. A sharp uptick in court remands suggests something more systematic afoot than idiosyncratic adjudicator error. When the SSA terminated disability benefits for hundreds of thousands of claimants in the early 1980s,[240] appeals flooded the courts, and the court remand rate jumped from 19% in 1980 to nearly 60% in 1984.[241] The SSA's problematic policies with regard to mental impairments and continuing-disability review quickly became obvious.[242] Likewise, if sufficiently awry, even a single flawed decision can suggest an entrenched pathology. The Ninth Circuit described an IJ's decision denying asylum in a 2005 case as "a literally incomprehensible opinion," "indecipherable," and "extreme in its lack of a coherent explanation,"[243] flaws that loudly signaled a troubled adjudicator.[244]

In many instances, however, problems manifest themselves less clearly. These are ones where the bad policy or the entrenched pathology is subtler, and thus demonstrates its faults only over time. The SSA provides ALJs with a digital template that generates boilerplate for decisions. Before 2012, this text included a poorly written paragraph that presented an ALJ's findings in a manner that suggested that the ALJ had improperly assessed the claimant's credibility.[245] This flawed boilerplate is an example of a bad policy. But it is one whose demerits as such—that is, as a policy and not a random error—would likely become evident only as courts saw the same boilerplate over and over again.

Courts catch problems of this scale by reviewing large numbers of cases, identifying patterns of flaws, and determining that something more than random error creates them. What follows is a highly stylized description of

238. Amended Class Action Complaint at 2, Padro v. Astrue, No. 11–CV–1788, 2013 WL 5719076 (E.D.N.Y. Oct. 18, 2013), https://mhp.urbanjustice.org/sites/default/files/2011-05-04_Amended_Complaint.pdf [https://perma.cc/LD54-6LW9].

239. Mosi Secret, *Rejected Disability Claims in Queens May Be Reheard*, N.Y. TIMES (Jan. 11, 2013), http://www.nytimes.com/2013/01/12/nyregion/rejected-disability-claims-in-queens-may-be-reheard.html [https://perma.cc/7EXV-5A23].

240. DERTHICK, *supra* note 131, at 5.

241. *Id.* at 145.

242. Levy, *supra* note 146, at 487.

243. Recinos De Leon v. Gonzales, 400 F.3d 1185, 1187, 1193–94 (9th Cir. 2005).

244. When interviewed about the Ninth Circuit's decision, the IJ insisted that "the arguments" from asylum claimants "were all the same." Chorney, *supra* note 60.

245. Mascio v. Colvin, 780 F.3d 632, 639 (4th Cir. 2015); Bjornson v. Astrue, 671 F.3d 640, 644–45 (7th Cir. 2012); Freismuth v. Astrue, 920 F. Supp. 2d 943, 952 (E.D. Wis. 2013); Harvey v. Astrue, No. CIV–10–393–SPS, 2012 WL 984299, at *4 (E.D. Okla. Mar. 22, 2012); Krusemark v. Astrue, 725 F. Supp. 2d 829, 837 (S.D. Iowa 2010).

this process, one that no court of which we are aware actually uses. It owes a debt to a method the SSA has pioneered, using Appeals Council data to find problems in ALJ decision-making.[246] We believe it illuminates the mental steps courts proceed through as they identify problems. We present the method here to argue how courts should oversee high volume agency adjudication, and then defend their capacity to use it in Part IV.

The first step involves devising the proper classifications of potential problems. As with problem-oriented policing, broad classifications are "too heterogeneous" to yield much information about agency adjudication,[247] a claim we elaborate upon at length in our report.[248] Problem-oriented policing uses "highly nuanced and precise problem definitions."[249] To understand what factors generate burglaries in Tucson, Arizona, for example, the police should not just keep track of "burglaries." Instead they should also gather data on "burglaries in college dormitories," "burglaries in neighborhoods with alleyways," and so forth.

Problem-oriented oversight through judicial review should do the same. In the social security context, for example, courts should identify potential problems not as "remands," or even "remands to the Brooklyn Hearing Office." Rather, courts should develop categories that can identify flawed policies at the level of detail at which the agency crafts it, and they should use categories that can identify entrenched pathologies at the level at which they fester. The problems might be "treating source – opinion rejected without adequate articulation," or "inadequate rationale for credibility finding."[250] The entrenched pathology category might track decisions at the individual ALJ level, and certainly at the hearing office level.

To identify patterns and thus potential problems, courts could then use problem definitions to map data gathered from decisions. For any particular judicial review context the map would differ and depend on courts' sense of where problems likely will come from and how they might materialize. Table 3 tracks reasons for remands from judges in the hypothetical District of East Dakota over a three-year period. It offers a simple illustration of how a federal district might organize data capturing arguments made and reasons given in social security cases.

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246. Ray & Lubbers, *supra* note 143, at 1601–02; Letter from Michael J. Astrue, Comm'r, Soc. Sec. Admin., to Xavier Becerra, Ranking Member, Subcomm. on Soc. Sec., Comm. on Ways and Means, U.S. House of Representatives 6 (Dec. 5, 2012), https://waysandmeans.house.gov/UploadedFiles/QFR_responses_MichaelAstrue_SS_6_27_12_BECERRA.pdf [https://perma.cc/YRY5-V537].

247. Michael D. Reisig, *Community and Problem-Oriented Policing*, 39 CRIME & JUST. 1, 7 (2010).

248. GELBACH & MARCUS, *supra* note 16, at 52–56.

249. Reisig, *supra* note 247, at 7.

250. *Top 10 Remand Reasons Cited by the Court on Remands to SSA*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/DataSets/AC08_Top_10_CR.html#fy2015 [https://perma.cc/3RTQ-NZZW].

Table 3. D.E.D. Remands as a Percentage of Appeals, by Reason Given, FY2014–2016

		Treating source—inadequate articulation	Inadequate rationale for credibility finding	Inadequate rationale given for weight, given consultative examiner's opinion	Mental disorder not adequately considered
Hearing Office No. 1	ALJ 1	0.33	0.4	0.22	0.29
	ALJ 2	0.25	0.25	0.4	0.33
	ALJ 3	0.6	0.62	0.65	0.74
Hearing Office No. 2	ALJ 4	0.3	0.33	0.22	0.4
	ALJ 5	0.58	0.64	0.56	0.72
	ALJ 6	0.37	0.19	0.29	0.42

Table 3 breaks down reasons for remands into more precise categories that may correspond to detailed policy decisions the agency might make. The SSA, for instance, might urge its ALJs to assess credibility in a particular manner, or to use a particular approach to considering mental impairments. These policy determinations should show up in arguments claimants make for remands and reasons courts give for ruling in their favor. Table 3 also recognizes the possibility that a particular ALJ might be deciding cases in a pathological way, or that a particular hearing office suffers from pathological management.

The district would then organize data on its judges' decisions, to see if they suggest any particular problems. The number in each of Table 3's cells is a fraction, indicating how often a court concludes that a particular ALJ's decisions contain particular flaws. The numerator represents the number of cases in which the court agrees that the ALJ's decision contains the flaw, and the denominator is the number of cases in which the claimant argues that the ALJ's decision contains the flaw. Organized thusly, the data yield a heat map that highlights potential problems. Table 3, for instance, indicates that ALJs 3 and 5 produce unusually high numbers of remands, regardless of the alleged flaw, and have done so consistently. Their decisions' high rate of failure across the board may suggest adjudicator dysfunction, and its persistence

over multiple years may indicate an entrenched pathology that the agency cannot or will not correct.

Table 4 gives an example of a heat map that indicates an entrenched pathology at the hearing office level.

Table 4. Hearing Office Pathology

		Treating source—inadequate articulation	Inadequate rationale for credibility finding	Inadequate rationale given for weight given consultative examiner's opinion	Mental disorder not adequately considered
Hearing Office No. 1	ALJ 1	0.6	0.6	0.4	0.6
	ALJ 2	0.52	0.63	0.55	0.33
	ALJ 3	0.58	0.4	0.48	0.59
Hearing Office No. 2	ALJ 4	0.3	0.33	0.22	0.33
	ALJ 5	0.4	0.27	0.38	0.4
	ALJ 6	0.37	0.19	0.29	0.42

The consistency with which the District of East Dakota finds fault with ALJ decisions from Hearing Office 1 suggests that the problem lies not with a single idiosyncratic ALJ but with some office-wide phenomenon. But the office-wide phenomenon is likely office-specific, because the ALJs from Hearing Office 2 enjoy markedly better success across the board. A bad policy should produce a heat map along the lines of what Table 5 illustrates.

Table 5. Bad Policy

		Treating source—inadequate articulation	Inadequate rationale for credibility finding	Inadequate rationale given for weight given consultative examiner's opinion	Mental disorder not adequately considered
Hearing Office No. 1	ALJ 1	0.33	0.25	0.28	0.65
	ALJ 2	0.25	0.33	0.34	0.66
	ALJ 3	0.4	0.44	0.32	0.59
Hearing Office No. 2	ALJ 4	0.36	0.37	0.22	0.64
	ALJ 5	0.18	0.19	0.25	0.7
	ALJ 6	0.41	0.3	0.11	0.62

Again, as far as we know, no court actually uses this method or something like it to identify problems with agency adjudication. But some courts have engaged in an impressionistic version of the method for social security and immigration cases. In a 2005 opinion, for example, the Third Circuit marshaled a number of examples from cases to document "a disturbing pattern of IJ misconduct" involving "intemperate or humiliating remarks" directed at immigrants.[251] The Second Circuit listed six previous instances when it had commented on a particular IJ's inappropriate behavior in an opinion reversing the IJ for another episode of similar misconduct.[252] The Tenth Circuit identified repeated instances when it faulted the SSA for ALJ decisions that rely exclusively on boilerplate language for credibility discussions.[253] A district judge in Wisconsin came closer to what we recommend here when he buttressed a scathing critique of "a wholly dysfunctional administrative process within the Social Security Administration" with pages of statistics demonstrating the agency's poor record before his court.[254]

251. Wang v. Attorney Gen., 423 F.3d 260, 267–68 (3d Cir. 2005).

252. Islam v. Gonzales, 469 F.3d 53, 56–57 (2d Cir. 2006); *see also* Huang v. Gonzales, 453 F.3d 142, 150 (2d Cir. 2006) (also citing several previous cases rebuking IJ Chase's conduct).

253. Hardman v. Barnhart, 362 F.3d 676, 679 (10th Cir. 2005).

254. Freismuth v. Astrue, 920 F. Supp. 2d 943, 945, 955–67 (E.D. Wis. 2013).

4. Responding to Problems.—Problem-oriented policing counsels for a variety of responses beyond the mere arrest of perpetrators to address patterns of criminal activity. A police department, for example, might deploy social workers alongside police officers when criminal activity involves mentally ill people. Hospitalization and treatment might be the interventions instead of arrest.[255] Congress as an oversight institution likewise can choose from an extensive menu of tools when it addresses problems within an agency.[256] The federal courts in contrast appear to lack remedial options beyond issuing remands. They seem confined to error correction, a form of reactive, incident-driven policing.

But courts in fact have several oversight tools at their disposal.[257] First, they can criticize agency adjudicators in terms calculated to cause consternation or shame. In a 2005 opinion, for instance, the Third Circuit denounced "[t]he tone, the tenor, the disparagement, and the sarcasm of the IJ" as "more appropriate to a court television show than a federal court proceeding."[258] A district judge singled out an ALJ and insisted that his decision "shows a blatant disregard, not only of the legal standards, but of his obligations as a judicial officer and the basic rights and humanity of a vulnerable segment of our society, the disabled."[259] Naming an IJ, the Second Circuit included an extended and detailed summary of the many errors he committed, including extensive quotations from the hearing he conducted, in

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255. *E.g.*, Cindy Chang, *Across L.A. County, Law Enforcement Looks for Resources to Deal with the Mentally Ill*, L.A. TIMES (June 20, 2016), http://beta.latimes.com/local/california/la-me-ln-sheriff-mentally-ill-20160620-snap-story.html [https://perma.cc/2XDN-WEQC]; *see also* Amy C. Watson et al., *Improving Police Response to Persons with Mental Illness: A Multi-Level Conceptualization of CIT*, 31 INT'L J.L. & PSYCHIATRY 359, 361 (2008) (describing the Crisis Intervention Team model created by the Memphis Police Department to respond to calls involving a person suffering from a mental illness).

256. WALTER J. OLESZEK, CONG. RESEARCH SERV., 7-5700, CONGRESSIONAL OVERSIGHT: AN OVERVIEW 9–14 (2010).

257. Christopher Walker has rigorously documented ways that federal courts reviewing agency adjudication do more to extend their influence than simply remand cases for further adjudication. Christopher J. Walker, *Referral, Remand, and Dialogue in Administrative Law*, 101 IOWA L. REV. ONLINE 84, 88 (2016) [hereinafter Walker, *Referral*]; Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1590–99 (2014). Courts use various tools, Professor Walker maintains, in part to "communicate to the agency specific—and oftentimes even systemic—problems identified by the reviewing court." Walker, *Referral*, *supra*, at 90. We agree. The tools we describe here add to and build upon those Professor Walker has identified.

258. Wang v. Attorney Gen., 423 F.3d 260, 269 (3d Cir. 2005); *see also* Cham v. Attorney Gen., 445 F.3d 683, 686 (3d Cir. 2006):

> The case now before us exemplifies the "severe wound . . . inflicted" when not a modicum of courtesy, of respect, or of any pretense of fairness is extended to a petitioner and the case he so valiantly attempted to present. Yet once again, under the "bullying" nature of the immigration judge's questioning, a petitioner was ground to bits.

259. Lazo-Espinoza v. Astrue, No. 10–CV–2089, 2012 WL 1031417, at *8 n.4 (E.D.N.Y. Mar. 27, 2012).

a 2006 opinion.[260] The Ninth Circuit reproduced an "incoherent" order by an IJ in full as an appendix to a scathing opinion, letting the IJ's incompetence speak for itself.[261]

Courts can also exploit bureaucratic fault lines to force an agency to respond. Agencies that lack independent litigating authority, such as the SSA and the EOIR, control neither when they appeal to the federal circuits nor their advocacy before the federal circuits.[262] The DOJ takes a very conservative approach to what matters it wants to appear before the courts of appeals, wary of administrative law precedent that might affect the federal government's litigating position trans-substantively.[263] Rather than risk an adverse appellate decision, the DOJ might pressure the EOIR or SSA to correct a problem instead. Another fault line involves the personnel who defend ALJ and IJ decisions in federal court. They are not the same as those who supervise agency adjudicators.[264] A DOJ lawyer may tire of defending questionable decisions that prompt hostile court reactions and request that the EOIR take some corrective action.[265] A court might threaten the agency's lawyer with sanctions if the agency continues to insist on defending flawed decisions, or if the agency does not take steps to correct the problem.[266]

Courts can also adopt doctrines that raise the costs for agencies if they do not correct a problem. The Ninth Circuit applies something called the "credit-as-true" rule in social security cases. Until recently,[267] the most commonly identified flaw with ALJ decisions involved their failure to explain adequately why the opinion of the claimant's treating physician did not establish the claimant's disability.[268] In most circuits, courts will remand

260. Huang v. Gonzales, 453 F.3d 142, 149–50 (2d Cir. 2006).

261. Recinos De Leon v. Gonzales, 400 F.3d 1185, 1193–96 (9th Cir. 2005).

262. DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONFERENCE OF THE U.S.: SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 115–16, 116 n.296 (2012); GELBACH & MARCUS, *supra* note 16, at 144.

263. GELBACH & MARCUS, *supra* note 16, at 145–46; BERNARD ROSEN, HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE 127–28 (3d ed. 1998); Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 572–73 (2003).

264. The DOJ's Office of Immigration Litigation handles immigration appeals, and the SSA's Office of General Counsel, along with the U.S. Attorney, litigates social security cases in the district courts.

265. *See, e.g.*, HUME, *supra* note 126, at 24 (relaying interview comments that describe informally modifying procedures in response to a court decision).

266. A district judge in Wisconsin did just this in 2013. David Traver, *Warning of Sanctions for U.S. Attorney, up to and Including Disbarment*, TRAVER & TRAVER S.C., http://www.ssaconnect.com/260-sanctions [https://perma.cc/MWE3-SJGY].

267. The SSA replaced the treating-physician rule by regulation in January 2017. Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844, 5853 (Jan. 18, 2017) (to be codified at 20 C.F.R. pts. 404, 416).

268. *E.g.*, Garrison v. Colvin, 759 F.3d 995, 1012–13 (9th Cir. 2014) ("[A]n ALJ errs when he rejects a medical opinion or assigns it little weight while doing nothing more than ignoring it,

cases with such treating-physician flaws. The ALJ gets another chance to explain why the treating physician's opinion does not merit deference.[269] In the Ninth Circuit, however, courts must "credit as true" treating physician evidence that the ALJ does not adequately discount.[270] If that evidence, taken as true, establishes the claimant's disability, the court will remand for the payment of benefits only and refuse to give the ALJ another crack at the case.[271] Particularly irritating to the SSA,[272] the credit-as-true rule raises the cost of ALJs' failure to grapple adequately with treating-physician evidence.

An additional tool dovetails with fire alarm oversight. Courts can draw media attention to what are otherwise obscure and ignored parts of the federal courts' docket with scathing commentary or by otherwise publicizing what can easily pass under the media's radar. Judicial commentary on adjudicator performance can buttress other advocates' calls or efforts for reform.[273] The complaint in *Padro v. Astrue*,[274] a class action filed in New York against the SSA, quoted from dozens of judicial opinions remanding claims to support allegations that some Queens Hearing Office ALJs systemically deprived claimants of due process.[275]

Finally, Article III judges can use their considerable prestige to pursue reform while off the bench. Disheartened by the problems that have plagued immigration adjudication,[276] Robert Katzmann of the Second Circuit first spearheaded a prominent study of immigrants' access to counsel,[277] then created a public interest law organization that represents thousands of immigrants in cases before IJs.[278] Margaret McKeown of the Ninth Circuit

asserting without explanation that another medical opinion is more persuasive, or criticizing it with boilerplate language that fails to offer a substantive basis for his conclusion.").

269. *See* ADMIN. CONFERENCE OF THE U.S., *supra* note 123, at 20 (describing Ninth Circuit's doctrine that often denies the ALJ a second chance as an exception to the rule).

270. *Id.*

271. *Garrison*, 759 F.3d at 1020.

272. *See* Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. at 5859–60 ("In our view, the credit as true rule supplants the legitimate decisionmaking authority of our adjudicators, who make determinations or decisions based on authority delegated by the Commissioner. The credit as true rule is neither required by the Act nor by principles of due process.").

273. *E.g.*, AM. BAR ASS'N COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 2–19 (2010).

274. No. 11-CV-1788, 2013 WL 5719076 (E.D.N.Y. Oct. 18, 2013).

275. Amended Complaint, *supra* note 238, at 24–66.

276. Katzmann, *supra* note 96, at 6–7 (chronicling and lamenting serious issues in immigration adjudication).

277. STEERING COMM. OF THE N.Y. IMMIGRANT REPRESENTATION STUDY REPORT, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS 1–2 (2011).

278. The organization is the Immigrant Justice Corps. For information about its case load, see *Our Story: Our Impact*, IMMIGRANT JUST. CORPS, http://justicecorps.org/our-story/#impact [https://perma.cc/88JC-4UHV].

helped kickstart a similar effort in San Diego,[279] as has Michael Chagares of the Third Circuit in New Jersey.[280]

IV. Evaluating Problem-Oriented Oversight

Problem-oriented oversight adds to the list of functions judicial review can play in the context of high volume agency adjudication. In Part II, we described institutional determinants that limited the contribution that any of the other functions, on its own, could make to the case for judicial review of high volume agency adjudication. Problem-oriented oversight strengthens judicial review's normative foundation only if it fares better by an analogous institutional measure.

Problem-oriented oversight depends upon private litigants being able to bring problems to the federal courts, the federal courts' capacity to identify and respond to problems, and the efficacy of those responses in terms of their ameliorative effect on agency policy and behavior. In several regards, these criteria resemble those that inform the choice between private enforcement through civil litigation, on one hand, and public administration through agency action on the other, as means for the implementation of a regulatory regime.[281]

The literature on private enforcement addresses problems that differ from the supervision of agency adjudication. An illustrative example is whether lawmakers should pursue automobile safety through agency enforcement, such as recalls, or through private civil litigation, such as tort lawsuits. But this scholarship helpfully identifies a number of institutional advantages and disadvantages that privately initiated litigation in generalist courts has, at least as it compares with some form of direct agency action. These considerations, or closely analogous ones, provide a useful blueprint to assess courts' capacity to engage in problem-oriented oversight. They suggest that the federal courts can perform this function successfully. Judicial review relies upon private litigants, those most directly affected, to bring flaws with agency decision-making to courts' attention. The process thus produces information about pathologies or bad policy efficiently. The federal courts' independence from the agencies under review and Congress can insulate their oversight from agency slack or political pressure. Finally, Article III courts have sufficient influence with agencies to push for ameliorative changes, and oversight focused on rooting out the sorts of problems we describe does not overtax their expertise.

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279. Johanna S. Shiavoni, *ABA Immigration Justice Project Celebrates Its First Anniversary in San Diego*, NEWSL. (Fed. Bar Ass'n, San Diego Chapter, San Diego, Cal.), Spring 2009, at 6.

280. LORI A. NESSEL & FARRIN ANELLO, DEPORTATION WITHOUT REPRESENTATION: THE ACCESS-TO-JUSTICE CRISIS FACING NEW JERSEY'S IMMIGRANT FAMILIES i–ii (2016).

281. For a comprehensive list of the considerations implicated by this choice, see Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662–71 (2013).

A. *Efficiency*

The private enforcement of a regulatory regime through civil litigation enjoys several efficiency advantages over public administration. Private enforcement spares the expenditure of public resources on enforcement while leveraging the capacity of the private bar toward this end. It also relies upon those directly affected by the regulatory regime to trigger the enforcement process and thus likely produces information about the regime's implementation or lack thereof particularly readily.[282] The efficiency case for problem-oriented oversight through judicial review is less straightforward, but it probably favors it over other forms of agency oversight that do not rely upon private initiative.

1. Resources.—Private enforcement enjoys at least two types of resource advantages over public administration. First, the public bears only those direct costs that relate to the judiciary's involvement. Otherwise, the costs of enforcement are internalized by the plaintiff, the party seeking to benefit, and the defendant, the party that has allegedly violated the regime. Second, by delegating the law enforcement task to private lawyers, private enforcement multiplies the number of personnel involved in a regime's implementation without increasing the size of the federal bureaucracy.

Problem-oriented oversight through judicial review may not enjoy the first advantage as convincingly. Because the federal government is the defendant or appellee, it must foot its own defense costs and, at least for social security cases, pay EAJA fees when claimants obtain certain types of favorable outcomes.[283] The agency could invest these resources in, say, an expansive audit program if it did not have to litigate.

This sort of audit program, however, would require a politically dicey expansion of the federal bureaucracy. The SSA's program of pre-effectuation review offers a useful comparison. Each year, the agency's Division of Quality randomly selects a small percentage of ALJ decisions that are favorable to claimants, and thus cannot be appealed, for further review before notice of the favorable decision goes to the claimant. In FY 2015, for instance, the Division's 119 staff members reviewed about 4,500 decisions and identified concerns in approximately 900 of them.[284] The same year, the federal courts remanded 8,646 cases.[285] Keeping the rate at which Division staff members find flaws constant, assuming that each member's caseload remains fixed, and assuming that decisions denying and allowing claims

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282. *Id.* at 662–64; Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 108 (2005).

283. On EAJA obligations, see, for example, Shalala v. Schaefer, 509 U.S. 292, 302 (1993).

284. SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GEN., A-12-15-50015, AUDIT REPORT: PRE-EFFECTUATION REVIEWS OF FAVORABLE HEARING DECISIONS 1–2, 4 n.14 (2017).

285. SOC. SEC. ADMIN., *supra* note 85.

contain errors with the same frequency, the Division would have to expand by more than 1,000 staff members to catch the same number of mistakes as the federal courts do. By delegating much of the problem-identification task to private litigants and federal judges, judicial review spares the SSA this immense bureaucratic expansion.[286]

Problem-oriented oversight through judicial review is not necessarily as resource-friendly as private enforcement, although the politics of bureaucratic expansion may make its costs easier for Congress to swallow. But the case for judicial review requires more. In Part II, we questioned the value of court-based error correction on opportunity-cost grounds. The same concern warrants discussion here: if the resources invested in judicial review were spent instead on agency adjudication, would fewer problems arise in the first place?

On this score, the distinction between problems and errors makes the case for problem-oriented oversight stronger than that for error correction. Errors may result because an overworked ALJ does not have time to review a lengthy set of medical records thoroughly, or because an overextended IJ cannot probe an immigrant's story deeply enough. Logically, if the ALJ or IJ had more time, as a lower case load might permit, she would make fewer such errors. If the agency adopts a bad policy, however, an increase in adjudicator resources will do nothing to decrease the number of problematic adjudicator decisions. All decisions that comport with the policy, whether issued by a harried adjudicator or a relaxed one, will suffer.

The same outcome likely obtains when problems result from entrenched agency pathologies. If an SSA hearing office is mismanaged or suffers from bad morale, the addition of a new ALJ or two, or the hiring of three new decision writers, likely will not have a dramatic ameliorative effect. If an IJ harbors bias against immigrants, or if an ALJ thinks that most claimants are lazy ne'er-do-wells, a 10% caseload reduction is unlikely to change her mind. Excessive caseloads may deepen a pathology's entrenchment,[287] but a positive correlation does not necessarily or even often exist between caseloads and pathologies. The SSA's Miami Hearing Office, for instance,

286. Presumably, the SSA's Office of General Counsel (OGC) could shrink significantly if the agency did not have to defend its decisions in the federal courts. Presently, OGC has about 600 lawyers. *Regional Chief Counsel (Atlanta)*, USAJOBS (Sept. 5, 2017), https://www.usajobs.gov/GetJob/PrintPreview/478378400 [https://perma.cc/RS5F-ZCRF]. If one assumes that each OGC attorney spends five-sixths of his or her time on federal court appeals, an end to judicial review could enable the SSA to downsize OGC by 500 lawyers. An investment of these resources in Division of Quality staff would still require a net increase of 500 personnel.

287. *See* Marcia Coyle, *Burnout, Stress Plague Immigration Judges*, NAT'L L.J. (July 13, 2009), http://www.law.com/nationallawjournal/almID/1202432173266/?Slreturn=20170929151055 [https://perma.cc/C8ME-QRT9] ("[H]igh levels of burnout and stress may make it difficult for immigration judges to recognize trauma in the refugees who come before them.").

suffers from management and morale problems,[288] even though its productivity ranked it nearly last among the country's 163 offices in FY 2017.[289] In FY 2012, the year claimants filed *Padro v. Astrue*, the Queens Hearing Office decided fewer cases per day per ALJ than those from any other hearing office in the country.[290]

2. Information Production.—Another efficiency concern relates closely to the resources consideration. Private enforcement compares favorably to public administration because it relies on those with the best information, the injured parties, to identify misconduct and initiate a response. A version of this advantage is one of the chief arguments in favor of fire alarm oversight.[291] Rather than proactively audit an agency itself, Congress can more efficiently monitor agency performance if third parties bring misconduct to its attention.

Judicial review unquestionably brings problems with agency decision-making to the fore more cheaply than some sort of internal agency auditing process can. Depending upon how court access gets structured, barriers to judicial review can select for cases that are most likely to involve flawed decisions.[292] As discussed in Part II, hurdles for social security claimants can discourage a lot of potential appeals, and presumably those with strong claims are more likely to tough it out. Lawyers who represent social security claimants, to mention one barrier, get paid either by contingency or through EAJA fees, both of which require a claimant victory in federal court. Such hurdles should ensure that, of the appeals that get filed in federal court, many involve flawed ALJ decisions. Some of these decisions will involve errors and not problems, to be sure, and thus problem-oriented oversight succeeds only if courts can reliably distinguish between the two categories. But the subset is unlikely to involve a large number of correct decisions the way a

288. SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GEN., A-12-15-50041, WORKLOAD OVERSIGHT IN THE MIAMI HEARING OFFICE (2016).

289. *National Ranking Report by ALJ Dispositions per Day per ALJ FY 2017*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/DataSets/archive/04_FY2017/04_September_Disposition_Per_Day_Per_ALJ_Ranking_Report.html [https://perma.cc/5UAX-NGT2].

290. *National Ranking Report by ALJ Dispositions per Day per ALJ FY 2012*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/DataSets/archive/04_FY2012/04_September_Disposition_Per_Day_Per_ALJ_Ranking_Report.pdf [https://perma.cc/3XKK-HQJ5].

291. McCubbins & Schwartz, *supra* note 183, at 168.

292. The incentives that fuel appeals or barriers that limit them may be more complicated in other contexts. Some have argued, albeit with little empirical basis, that overly lax policies of granting stays of removal pending review have incentivized immigrants to file meritless appeals. Kagan et al., *supra* note 108, at 688, 692–94, 722–23. If so, then the pool of appeals before the circuits will include plenty of reasonable IJ decisions. In contrast, robust evidence suggests that detention discourages appeals. MILLER ET AL., *supra* note 103, at 131–32. Given that the immigrant can leave detention if she abandons her appeal and accepts removal, the fact that she remains incarcerated increases the likelihood that the IJ's decision includes an error or resulted from a problem.

random audit might, and thus the system operates efficiently to bring problems to courts' attention.

The SSA's Division of Quality example is again illustrative. From 2011 to 2015, the Division of Quality randomly selected 1.4% of ALJ decisions allowing benefits for pre-effectuation review.[293] In 80% of instances, the division "effectuated" the case with no further action taken, suggesting that it found grounds for concern in only one out of five cases it reviewed.[294] Over the same period, the federal courts remanded 43% of social security appeals.[295] Although the comparison between the two rates is not straightforward, it suggests, however crudely, that properly incentivized private litigants identify flawed decisions, and thus generate information for oversight, more efficiently than a random audit can.

B. Independence

The efficiency case for problem-oriented oversight through judicial review contrasts it with something like an audit, a method that relies on agency personnel proactively searching for flaws in adjudicator decision-making. But agencies can engage in their own version of problem-oriented oversight through an appeals system. Internal appellate review places the onus on the private litigant to come forward and thus should generate information about agency performance more efficiently than a randomized audit, if not as markedly so as Article III review.[296]

Problem-oriented oversight through internal appellate review only works if appellate personnel within the agency can catch problems and respond to them successfully. In recent years the Appeals Council and the BIA have attracted criticism for inconsistent and sometimes arbitrary decision-making.[297] This perceived problem surely results, at least in part, from institutional determinants, including a paucity of time and resources. If Appeals Council adjudicators have to decide up to twelve cases per day, then their capacity to detect and respond to problems likely suffers. But the institutional case for Article III review does not depend upon whether these

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293. SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GEN., *supra* note 284, at 1.

294. *Id.* at 2.

295. For data on the percentage of remands from 2011–2015, see SOC. SEC. ADMIN., *supra* note 57.

296. One reason why internal agency appellate review might not generate information as efficiently is that the barriers to appeal are lower. To appeal an ALJ's decision, for example, a claimant typically files little more than a three-page, often boilerplate letter identifying grounds for reversal. GELBACH & MARCUS, *supra* note 16, at 28. Moreover, someone who appeals to federal court has already appealed and lost within the agency, and thus has been pursuing her appeal for longer and more doggedly than those who have only appealed within the agency.

297. *E.g.*, David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1180–81 (2016); *see also* GELBACH & MARCUS, *supra* note 16, at 28 ("The last two digits of a claimant's social security number—not, say, the hearing office from which an appeal comes—determines the branch to which an appeal goes.").

critiques are accurate or not. Article III review promises several independence advantages that internal appellate review lacks.

The literature on private enforcement identifies independence as an important advantage privately initiated litigation enjoys over direct agency action. Public administration can suffer from "agency slack," or "the tendency of government regulators to underenforce certain statutory requirements because of political pressure, lobbying by regulated entities, or the laziness or self-interest of the regulators themselves."[298] A concern in times of divided government that the President might steer agencies away from Congress's regulatory objectives prompted the sharp increase from the 1960s onwards in the number of statutes delegating enforcement to private litigation.[299] Several analogous influences can interfere with an agency's self-oversight. Review in Article III courts insulates oversight from these pressures and enjoys an institutional advantage for this reason.

1. Agency Interests.—An agency may be tempted to oversee its adjudicators in a manner that casts their performances in the best possible light or that avoids internal conflict. In 2012, for example, the DOJ's Inspector General faulted the EOIR for measuring its own performance in a manner that "overstate[d] the actual accomplishments of" immigration courts.[300] The EOIR used a method for counting case completions that exaggerated IJ productivity, and it assessed efforts to meet timeliness goals in a way that did not capture how long immigrants actually had to wait to get their cases decided.[301] A quality-review system at the Board of Veterans' Appeals samples one out of every twenty decisions by veterans' law judges (VLJs) to look for flaws.[302] A decision is considered flawed only if no reasonable VLJ would have issued the decision under scrutiny, not if the reviewer thinks the case was actually decided incorrectly.[303] This threshold may avoid conflict with VLJs, who might resent second-guessing by personnel of less bureaucratic stature. But it does not come close to predicting how well VLJ opinions will fare on appeal.[304]

The self-interest problem can taint oversight through internal appellate review as well. The SSA uses the Appeals Council "agree" rate as an

298. Stephenson, *supra* note 282, at 110.

299. SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 216–17 (2010).

300. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., *supra* note 65, at i.

301. *Id.* at i–ii.

302. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-655T, VA DISABILITY BENEFITS: BOARD OF VETERANS' APPEALS HAS MADE IMPROVEMENTS IN QUALITY ASSURANCE, BUT CHALLENGES REMAIN FOR VA IN ASSURING CONSISTENCY 7 (2005).

303. *Id.* at 9–10.

304. *See id.* at 6 (reporting that the Court of Appeals for Veterans Claims reversed or remanded 88% of the VLJ decisions it reviewed).

indicator of ALJ performance, mining internal appeals for information in a manner similar to what we describe in Part III. A rising agree rate indicates improved ALJ performance, or so the logic goes.[305] But if the Appeals Council's review becomes more deferential, then a rising agree rate indicates nothing at all about improved ALJ performance. Under these conditions, not only does internal appellate review function less successfully as an oversight mechanism, it can also affect other agency oversight methods that rely upon information generated by the appellate tribunal.[306]

Finally, an agency may simply not want to oversee itself, even if it can glean information efficiently through internal appellate review. This tendency is all but guaranteed when it comes to problems of flawed policy. If the SSA instructs ALJs to use certain flawed text for discussions of credibility, the Appeals Council will not fault ALJs for doing so, and the problem will not show up in Appeals Council decision patterns. The SSA has mined Appeals Council data to identify and root out some entrenched decision-making pathologies, the second type of problem. But, as far as we know, the EOIR has not used BIA decisions for this purpose.[307] In fact, as far as we know, neither the EOIR nor the DOJ's Inspector General has assessed the quality of IJ decision-making using BIA data. Certainly neither has embarked upon an effort to identify and respond to problems commensurate with the campaign against pathologies in immigration cases the federal courts of appeals have waged.

2. Political Independence.—Related to agency self-interest is politics' looming influence. An agency might not prioritize problem-oriented oversight, even if internal appeals offer it an opportunity to do so efficiently, if such oversight is politically inexpedient. An agency might align its self-

305. *See* SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GEN., A-12-16-50106, AUDIT REPORT: OVERSIGHT OF ADMINISTRATIVE LAW JUDGE DECISIONAL QUALITY 1–2 (2017) (stating that "managers use agree rate results as well as other quality reviews to ensure ALJ decisionmaking is consistent and accurate"); Ray & Lubbers, *supra* note 143, at 1604–06 (associating a declining "rate at which the Council remands to the hearing level" with "quality improvement").

306. The SSA's Inspector General, like all inspectors general, enjoys protections that enable it to examine the SSA's decision-making without interference from the rest of the agency. *See* Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1176 & n.225 (2016) (noting some of the "various institutional design protections" that assist investigations by inspectors general); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1035–36 (2013) (discussing the "broad investigative powers" of inspectors general). But the SSA Inspector General does not generate raw data for assessment purposes on its own; it instead relies upon what the agency itself assembles. In a recent report on decisional quality, for example, it relied exclusively on the Appeals Council's agree rate as an ALJ performance measure. SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GEN., *supra* note 284, at 1.

307. AM. BAR ASS'N COMM'N ON IMMIGRATION, *supra* note 273, at 2-21–2-22. We submitted a Freedom of Information Act request to the EOIR asking for information about its quality assurance programs. We did not receive any information in response that indicated that the EOIR has used BIA information for this purpose.

policing with what it perceives as Congress's preferences. Congress can insist upon this alignment by enacting legislation requiring the agency to focus on particular problems.[308]

The agency may prioritize certain forms of oversight over others, even in the absence of legislation directing it to do so, to minimize conflict with Congress. Starting in 2011, roughly at the same time as the Huntington scandal, the SSA began to use Appeals Council data to identify problematic ALJs for "focused reviews."[309] Of the first fifty ALJs selected, thirty were identified because they had allowance rates that exceeded 75%.[310] By FY 2013, the number of high-allowance-rate ALJs had dropped precipitously,[311] a fact the agency's Chief Administrative Law Judge emphasized when she insisted at a Senate Committee hearing that "quality is improving."[312] But the number of low-allowance-rate ALJs, whose decisions are especially likely to generate court remands, ticked up slightly during the same period.[313] All of this happened as the SSA endured intense Congressional scrutiny for its perceived profligacy with benefits.[314]

In recent years, Congressional oversight of immigration policy has emphasized enforcement.[315] President Trump's first budget blueprint proposed that Congress authorize the EOIR to hire seventy-five new IJs, insisting that doing so would help to "combat[] illegal entry and unlawful presence in the United States."[316] In light of such pressures, the likelihood that the EOIR will prioritize oversight that looks for problems disadvantaging immigrants seems low.[317]

Congress's formal power to oversee the federal courts notwithstanding,[318] its attempts to exercise this power have been modest compared with its scrutiny of federal agencies.[319] Moreover, the federal

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308. Section 845(a) of the Bipartisan Budget Act of 2015, for example, requires the SSA to report on its efforts to combat fraud and prevent improper payment. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 845(a), 129 Stat. 584, 618.

309. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, *supra* note 149, at 6.

310. *Id.* at 13 & n.31.

311. *Hearing on SSDI Abuse*, *supra* note 196, at 131 fig.1.

312. *Id.* at 130.

313. *Id.* at 131 fig.1.

314. *See* STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, *supra* note 149, at 40–41 (reporting with detail on individual ALJ adjudicators and high allowance rates).

315. ANTJE ELLERMANN, STATES AGAINST MIGRANTS: DEPORTATION IN GERMANY AND THE UNITED STATES 106 (2009).

316. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN 30 (2017).

317. On the susceptibility of immigration adjudication to political pressure, see AM. BAR ASS'N COMM'N ON IMMIGRATION, *supra* note 273, at 2–24.

318. Todd David Peterson, *Congressional Investigations of Federal Judges*, 90 IOWA L. REV. 1, 33–39 (2004).

319. For instance, while Congress has created inspectors general for a number of agencies, including the DOJ and the SSA, efforts to do the same for the federal courts have failed repeatedly.

courts' diverse docket insulates them from some sort of politicized retaliation should their decisions in agency appeals tend to skew in one manner or another. Congress could always respond to a pattern of decisions it dislikes by altering the federal courts' jurisdiction or changing a standard of review. But short of such focused legislation, Congress is unlikely to use another sanction, like a budget cut, to pressure the federal courts because doing so will adversely affect other, more privileged, areas of their docket.

C. Capacity

Our critique of judicial review's regulative function questions the capacity of courts to force agencies to abide by precedent. Judicial efforts to engage in problem-oriented oversight warrant the same scrutiny, although what information presently exists indicates that courts may succeed in prodding agencies to respond to their diagnoses of certain problems. The literature on private enforcement suggests two other reasons to question judges' capacity to administer regulatory regimes: their inexpertness and the limited geographic reach of their decisions. Neither is a concern for court-based problem-oriented oversight.

1. Efficacy of Judicial Interventions.—The most obvious objection to judicial review's oversight function involves its efficacy. Neither the EOIR nor the SSA mines court remands for information that might help its adjudicators improve. One might expect agencies to act with similar indifference when courts respond more aggressively to perceived problems.

A federal court can all but ensure that an agency will respond if it uses extreme measures, such as Rule 11 sanctions, injunctive relief, or an approval of a class action settlement requiring changes.[320] Courts rarely do so, however.[321] Still, the difference between an ordinary court remand and the sort of opinion a court might issue when addressing a problem gives reason to think that the latter can influence agency operations.[322]

The agency can fully comply with an ordinary court decision if an adjudicator conducts the proceedings on remand in accordance with the court's instructions. If the court demands nothing more, it cannot fault the

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Casey C. Sullivan, *Is It Time for an Inspector General of the Federal Courts?*, FINDLAW (July 8, 2015), http://blogs.findlaw.com/federal_circuit/2015/07/is-it-time-for-an-inspector-general-of-the-federal-courts.html [https://perma.cc/8VFP-FFZQ].

320. The SSA recently settled a class action, for example, that requires it to give claimants who were evaluated by a particular consulting physician a chance to seek benefits again. Plaintiffs' Motion & Memorandum of Points & Authorities in Support of Motion for Final Approval of Class Action Settlement Agreement at 4, Hart v. Colvin, 310 F.R.D. 427 (N.D. Cal. 2015) (No. 15-cv-00623-JST).

321. *E.g.*, HUME, *supra* note 126, at 39 (describing courts' sparing use of sanctions and preference for lighter reprimands).

322. For similar optimism, see Walker, *Referral*, *supra* note 257, at 89–90.

agency for treating the remand as a one-off and not a source of constructive criticism. A decision concluding that "the ALJ failed to give specific and legitimate reasons for discounting [a treating physician's] opinion,"[323] for instance, obliges the SSA to do no more than ensure the ALJ does so on remand, regardless of whether the ALJ's hearing office is dysfunctional or if the ALJ routinely struggles with such evidence. A vast linguistic gulf separates this remand from a decision like *Freismuth v. Astrue*,[324] where the district judge denounced disability adjudication as a "wholly dysfunctional administrative process" and threatened the SSA with "very deep trouble" if it didn't take steps to fix observed problems.[325] In response to the decision, the U.S. Attorney for the Eastern District of Wisconsin insisted that his office had "been very much in conversation and communication – some of it quite productive – with" the SSA.[326]

Robert Hume concluded his empirical study of agency responsiveness to courts with the finding that "words" in opinions like *Freismuth* "seem to matter,"[327] for several reasons. First, "[w]hen opinion language leaves agencies little room to maneuver, administrators might change their policies to avoid sanctions and maintain favorable relationships with judges."[328] As repeat players, agencies know that they risk angering a judge who will surely decide appeals going forward if they ignore clear instructions to change course. While an angry judge could take out her anger on only a small number of cases relative to the agency's overall case load, agencies value their "reputational capital" and "credibility" with the federal courts and do not want to dissipate them.[329] Perhaps for this reason, the Department of Justice has long had a policy of initiating an investigation any time a federal court of appeals identifies an IJ by name in an opinion.[330]

Second, Hume suggests that a clear, strongly worded opinion can empower certain individuals within an agency who may prefer the sort of

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323. Penoza v. Berryhill, No. C15-1825-RAJ, 2017 WL 1532667, at *4 (W.D. Wash. Apr. 28, 2017).

324. 920 F. Supp. 2d 943 (E.D. Wis. 2013).

325. *Id.* at 945, 954.

326. Jane Pribek, *Federal Judges Fired Up Over Social Security Cases*, WIS. L.J. (Mar. 11, 2013), http://wislawjournal.com/2013/03/11/federal-judges-fired-up-over-social-security-cases/ [https://perma.cc/Y39T-2PX4].

327. HUME, *supra* note 126, at 126.

328. *Id.* at 78–79.

329. *Id.* at 116.

330. U.S. DEP'T OF JUSTICE, OFFICE OF PROF'L RESPONSIBILITY, POLICIES AND PROCEDURES 2 (2015) (on file with authors); Immigration Prof., *L.A. Immigration Judge Under Fire*, LAW PROFESSOR BLOGS NETWORK (Dec. 20, 2009), http://lawprofessors.typepad.com/immigration/2009/12/la-immigration-judge-under-fire.html [https://perma.cc/LJ8W-Q98V]. The SSA is more vague about how it responds to judicial criticism, but insists that it "carefully analyzes Federal court decisions" and "value[s] the courts' perspective . . . ." Marilyn Odendahl, *Disability Denials Draw Criticism*, INDIANALAWYER.COM (Apr. 6, 2016), https://www.theindianalawyer.com/articles/39934-disability-denials-draw-criticism [https://perma.cc/7XK2-36JS].

policy adjustment the court counsels relative to those who favor the status quo.[331] Others have documented this "destabilization effect" within federal agencies that judicial opinions can produce.[332] Perhaps agency officials have ignored a general counsel's recommendation that adjudicators use different language when discussing someone's credibility. The right sort of judicial opinion faulting the agency for its credibility boilerplate can give the general counsel significant leverage to insist upon a policy change.[333]

Third, as Hume reports, "[r]esearch on administrative behavior . . . emphasizes that administrators are professionals who take their work seriously and try to do what is right."[334] Agency officials may feel obliged out of a sense of professional obligation to respond when courts give unambiguous and strongly worded feedback.[335] This assumption, that agency personnel see themselves as professionals trying to discharge their mission as successfully as possible, underlies many of the SSA's efforts to improve ALJ performance.[336] It might also explain why congressional oversight is often effective.[337] Congress rarely passes legislation when a fire alarm rings. An agency may worry about its budget appropriation, but investigatory committees rarely have budgetary powers, and appropriations are a clumsy, blunt tool to use to insist upon specific change.[338] Maybe congressional oversight works because agencies want to do the right thing. If so, court pressure can have the same effect.

2. *Expertise.*—A standard critique of private enforcement compares courts unfavorably to agencies as generalists lacking in sufficient expertise to administer a regulatory regime optimally.[339] One version of this critique challenges judicial review's oversight function on grounds that courts cannot diagnose problems with adjudication as expertly as agencies can. The charge has force in two instances. First, a judicial attempt to force agencies into large-scale procedural changes of the sort that could dramatically upend settled agency practice should give pause. As Adrian Vermeule argues, "[t]he federal judicial system is not set up, not equipped, to engage in a sustained

331. HUME, *supra* note 126, at 75–76.

332. Hal G. Rainey, *What Motivates Bureaucrats?*, 12 J. PUB. ADMIN. RES. & THEORY 303, 305 (2002) (reviewing MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS (2001)); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1020 (2004).

333. HUME, *supra* note 126, at 76.

334. *Id.* at 8–9.

335. *Id.* at 113.

336. Ray & Lubbers, *supra* note 143, at 1598.

337. Beerman, *supra* note 178, at 121–22.

338. Kriner, *supra* note 180, at 784–85.

339. *See supra* note 120.

course of synoptic institutional engineering."[340] But, as Vermeule also argues, the federal courts, aware of their institutional limitations, have largely surrendered control over fundamental matters of procedural design to agencies.[341]

The expertise critique also has some bite when courts fail to appreciate that agency adjudicators have to optimize how they conduct their proceedings under significant constraints. Although some federal judges have a decent sense of the limits under which agency adjudicators labor,[342] others may be surprisingly unaware of adjudicator caseloads and their inadequate support.[343] Attempts to micromanage how adjudicators manage cases deserve criticism, as federal judges may not understand how resource inadequacies constrain the process agency adjudicators can afford.[344]

Most of the problems we have discussed in this Article, however, require neither a deep appreciation for immutable determinants that require adjudicators to act in certain ways nor an omniscient eye for large-scale procedural design. The fact that IJs decide 1,000 cases per year does not excuse IJ bias against categories of immigrants. The SSA has to ask ALJs to decide 500–700 cases per year; flaws in the credibility boilerplate the agency has ALJs insert into their decisions does not help them work through their dockets more quickly. Properly conducted, problem-oriented oversight should operate as a form of arbitrary and capricious review, a type of oversight that permits the agency to continue in a particular procedural vein if it has a plausible reason to do so.

A second version of the expertise critique is unique to judicial review of high volume agency adjudication. This data gathering and analysis we describe in Part III may seem far afield from core judicial competencies and may beg the question of whether courts deciding one case at a time can assemble information usefully from individual appeals that can accurately indicate problems.

To a certain extent, our method merely illustrates the sort of thinking that a judge should engage in to identify patterns and spot problems. A court does not have to assemble precisely the heat map we describe. Indeed, court competencies probably enable a district or circuit clerk's office to develop an even more sophisticated approach to problem identification. Some courts already assemble some of the sort of information that a problem-oriented

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340. ADRIAN VERMEULE, LAW'S ABNEGATION 115 (2016).

341. *Id.* at 123–24; *cf.* Paul Verkuil, *Meeting the Mashaw Test for Consistency in Administrative Decision-Making*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 239, 246 (Nicholas R. Parrillo ed., 2017).

342. *Cf.* Chavarria-Reyes v. Lynch, 845 F.3d 275, 280 (7th Cir. 2016) (Posner, J., dissenting) ("[The Immigration Court] may well owe its dismal status to severe underfunding by Congress . . . .").

343. GELBACH & MARCUS, *supra* note 16, at 5–6.

344. *See supra* notes 158–162 and accompanying text.

court would harvest from individual appeals. The Ninth Circuit does so for all cases, not just one category or another. There, a staff attorney reviews each appeal once it is fully briefed, judges its complexity, and prepares a "case inventory" that identifies the issues the appeal raises. The issues get entered into a searchable database to enable the Ninth Circuit to track it along with cases raising similar issues.[345]

The data analysis that problem-oriented judicial review requires should likewise pose little challenge. The patterns courts can identify in the data should prompt them to look at relevant appeals in a different light, but they should not react mechanistically to some statistical anomaly as conclusive proof of a problem. The SSA looks for outliers in ALJ decision data as guides to where it needs to investigate further.[346] A trend's emergence in court data should likewise further investigation, albeit of the sort that a court can undertake. Perhaps the fact that courts remand an IJ's claims involving immigrant credibility at an unusually high rate should signal to a judge that she take a hard look at a particular appeal for signs of IJ bias. Judges should not automatically remand a case involving mental impairments, much less pen some screed on bad SSA policy, simply because remand data indicate a sharp uptick across ALJs and hearing offices for cases involving mental impairments. But such indications would signal to judges to pay particular attention to how the agency describes applicable policy in such cases.

3. Geographical Dispersion.—The literature on private enforcement cites the judiciary's geographic dispersion as a comparative disadvantage.[347] A federal agency can administer a regulatory regime uniformly, subjecting the regulated entity to a consistent set of constraints nationwide. In contrast, regulation through private tort litigation, for example, subjects the defendant to different obligations in different places.

Geographic dispersion creates a somewhat different difficulty for problem-oriented oversight through judicial review. When the problem is one of a flawed policy, a court decision faulting the agency for its adoption suffers the same limitations as one attempting to regulate the agency through precedent. The agency, motivated by a felt obligation to administer a single policy nationally and concerned about adjudicator inconsistency, might resist making any changes in response to judicial chastisement.

When, however, a problem involves an entrenched decision-making pathology, the federal judiciary's geographic dispersion is often a feature, not a bug. Provided that venue rules require that decisions from a particular set

345. Harry Pregerson & Suzanne D. Painter-Thorne, *The Seven Virtues of Appellate Brief Writing: An Update from the Bench*, 38 SW. L. REV. 221, 223 (2008).

346. Ray & Lubbers, *supra* note 143, at 1594–95.

347. *See, e.g.*, Burbank et al., *supra* note 281, at 667–68 (blaming a "decentralized" judiciary as part of why private enforcement regimes lead to "fragmented and incoherent policy").

of adjudicators go consistently to a particular set of judges,[348] a geographically dispersed system of judicial review will better ensure that pathologies discoloring adjudication in a particular immigration court or a particular hearing office come to a federal judge's attention. Most appeals from disability-benefits decisions rendered by ALJs in the Tucson Hearing Office get filed in the District of Arizona.[349] A District of Arizona judge will see decisions by the same ALJ repeatedly and certainly will review decisions from the same hearing office. If, however, all social security appeals were to proceed in a single national social security court, the chances are slim that one of its judges would see multiple appeals from the same ALJ or that one of its judges would develop a feel for a problem arising at one of the SSA's 166 hearing offices. If cases are randomly assigned, then a lot of time could pass before one of the national court's judges saw the same ALJ's name on an appealed decision, or even the same originating hearing office. A judge on this national court would be more likely to mistake a problem for an error.

Conclusion

The standard justifications for judicial review of high volume agency adjudication are unsatisfying. Institutional clashes interfere with the corrective, regulative, and critical functions the federal courts attempt to serve, rightly prompting doubt that the benefits courts create when they discharge these functions exceed judicial review's costs. Problem-oriented oversight, suffering from fewer of these institutionally determined limitations, creates additional benefits. When added to the mix, the contributions courts make when they ferret out problems tip the balance in favor of judicial review.

We recognize that the costs and benefits of judicial review are difficult to quantify with precision.[350] Reasonable people may disagree with the empirical assertions we make about how courts can act and how agencies might respond. Even so, an understanding of problem-oriented oversight is important for at least two reasons. First, as future scholars and policy makers rethink judicial review of high volume agency adjudication, they should

348. On venue choices for social security cases, see 42 U.S.C. § 405(g) (2012). On venue for immigration cases, see 8 U.S.C. § 1252(b)(2) (2012).

349. A Tucson ALJ will most likely decide cases involving Tucson claimants. *See* HALLEX, *supra* note 158, at I-2-0-70 ("The [hearing office] will generally process all requests for hearing (RH) for claimants residing in that area."). Appeals from Tucson claimants to the federal courts most likely will go to the District of Arizona. *See* 42 U.S.C. § 405(g) ("Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides . . . .").

350. We thank Andy Coan for helping us to formulate this concluding thought.

measure courts' capacities to identify and help fix problems as they assess the value of all the contributions courts can make. Second, and perhaps more important, judicial review is here to stay, at least for the time being. As long as it remains so, courts can maximize the value they add to agency adjudication by engaging in problem-oriented oversight.

The Attack on American Cities

Richard C. Schragger*

American cities are under attack. The last few years have witnessed an explosion of preemptive legislation challenging and overriding municipal ordinances across a wide range of policy areas. State–city conflicts over the municipal minimum wage, LGBT antidiscrimination, and sanctuary city laws have garnered the most attention, but these conflicts are representative of a larger trend toward state aggrandizement. These legal challenges to municipal regulation have been accompanied by an increasingly shrill anti-city politics, emanating from both state and federal officials. This Article describes this politics by way of assessing the nature of—and reasons for—the hostility to city lawmaking. It argues that anti-urbanism is a long-standing and enduring feature of American federalism and seeks to understand how a constitutional system overtly dedicated to the principles of devolution can be so hostile to the exercise of municipal power. The Article also provides a current accounting of state preemptive legislation and assesses the cities' potential legal and political defenses. It concludes that, without a significant rethinking of state-based federalism, the American city is likely to remain vulnerable.

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Introduction

American cities are under attack. The last few years have witnessed an explosion of preemptive state legislation challenging and overriding municipal ordinances across a wide range of policy areas. These legal challenges to municipal regulation have been accompanied by an increasingly shrill anti-urban politics. Anti-city rhetoric suffused the 2016 presidential election, during which the Republican candidate for President, Donald Trump, painted a portrait of American cities as violent, decaying, depraved, and corrupt.[1] As President, Trump has repeatedly decried the actions of so-called "sanctuary cities"—those cities that have refused to comply with federal immigration mandates or have resisted cooperating with

1. Michelle Ye Hee Lee, *Fact-Checking Trump's Rhetoric on Crime and the 'American Carnage'*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/fact-checking-trumps-rhetoric-on-crime-and-the-american-carnage/?utm_term=.b256778bc38b [https://perma.cc/5Bp9-VD9X].

federal immigration authorities.[2] Trump's Executive Order on Immigration threatens cities that do not cooperate with the loss of federal funds.[3] The Order has been challenged by a number of cities, and both the Fourth and Ninth Circuit Courts of Appeals have granted preliminary injunctions against it.[4]

The federal threat to sanctuary cities, however, is a small piece of the overall legal assault on cities, which emanates mostly from the states and goes well beyond immigration policy. As a federal constitutional matter, states exercise plenary power over their political subdivisions. Even in states that provide for some measure of constitutional "home rule" protection, cities are usually not immune from contrary state commands.

Recent state legislative actions intended to "rein in" wayward cities are illustrative. In response to assertions by some local officials in Texas that they would not cooperate with federal authorities in enforcing federal immigration laws, the Texas Legislature adopted SB4, which bars cities and local officials from adopting any ordinance, rule, or practice that limits the enforcement of federal immigration laws on threat of criminal and civil penalties and removal from office.[5] The Arizona Legislature has adopted a law that requires the Attorney General to investigate local laws at the request of any state legislator and withhold state funds where a local law conflicts with state law.[6] Michigan adopted legislation that bars local governments from regulating paid sick days, wages, scheduling, and hours or benefits disputes.[7] In North Carolina, the state legislature adopted a "bathroom bill" that was designed to strike down local transgender civil rights ordinances.[8] Before it was repealed, the same law also preempted municipal minimum wage, contracting, employment discrimination, and public-accommodations ordinances.[9]

In all these cases, and many more, state legislatures have been motivated by hostility to local regulation—and in almost all cases to regulations adopted

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2. Press Release, The White House, Statement on Sanctuary Cities Ruling (Apr. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/04/25/statement-sanctuary-cities-ruling [https://perma.cc/G8GS-XB4H].

3. Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

4. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017), *vacated as moot*, 138 S. Ct. 353 (2017) (vacated and remanded due to expiration by its own terms); Washington v. Trump, 858 F.3d 1168 (9th Cir. 2017); *see also* City of Chicago v. Sessions, No. 17-C-5720, 2017 WL 4081821 (N.D. Ill. Sept. 15, 2017) (enjoining the Justice Department's imposition of conditions on sanctuary cities' receipt of federal funds).

5. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017). A federal district court enjoined portions of SB4. City of El Cenizo v. Texas, 264 F. Supp. 3d 744 (W.D. Tex. 2017).

6. ARIZ. REV. STAT. ANN. § 41-191.01 (2017). The Arizona Supreme Court upheld portions of the state's preemption law. State *ex rel.* Brnovich v. City of Tucson, 399 P.3d 663 (Ariz. 2017).

7. H.B. 4052, 98th Leg., Reg. Sess. (Mich. 2015).

8. H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C.).

9. H.B. 142, 2017 Gen. Assemb., Reg. Sess. (N.C.).

by specific cities. Cities such as Cleveland, New York, Detroit, Birmingham, El Paso, Austin, Miami, Charlotte, Greensboro, and others have been the main targets of their respective legislatures' preemptive legislation.[10] Openly disdainful of municipal regulation, the Texas Governor has stated that he favors a "broad-based law by the state of Texas that says across the board, the state is going to pre-empt local regulations."[11]

This hostility to city government is not new.[12] The American city's legal and political autonomy has long been precarious. In 1915, Robert Clarkson Brooks, a professor of economics and political science at Swarthmore College, observed that "[t]o a large degree the history of the relations of states to metropolitan cities in this country is 'a history of repeated injuries' . . . [and] 'repeated usurpations.'"[13] Recent state legislative challenges to city authority, however, arrive after a relatively quiescent period during the second half of the twentieth century, when state–local relations were somewhat stable even if city finances often were not. Strikingly, the attack on American cities is occurring at the very moment that cities are experiencing an economic and popular resurgence.[14] Those cities have also been pressing the existing limits of their regulatory authority in areas like labor and employment, antidiscrimination law, immigration, and environmental protection. As in the past, state legislators seem to be quick to intervene when cities exercise their economic and regulatory muscle in ways that threaten vested interests.

Even so, one might be surprised that the old rural–urban political dynamic that characterized early-twentieth-century hostility to cities has reasserted itself in the beginning of the twenty-first century. In 1910, 54.4% of the country still lived in rural areas; in 2010, 80.7% of the U.S. population was urban.[15] Moreover, the Supreme Court's one-person, one-vote decisions

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10. *See, e.g.*, City of Greensboro v. Guilford Cty. Bd. of Elections, 251 F. Supp. 3d 935 (M.D.N.C. 2017); City of Charlotte v. North Carolina, No. 13-CRS-12678, 2014 WL 5139410 (N.C. Super. Ct. Oct. 13, 2014); City of Bexley v. State, No. 17CV-2672, 2017 WL 5179520 (Ohio Ct. Com. Pl. June 2, 2017); Complaint at 1–3, El Paso Cty. v. State, No. 5:17-cv-00459 (W.D. Tex. May 22, 2017), 2017 WL 2240170.

11. Patrick Svitek, *Abbott Wants "Broad-Based Law" That Pre-empts Local Regulations*, TEX. TRIB. (Mar. 21, 2017), https://www.texastribune.org/2017/03/21/abbott-supports-broad-based-law-pre-empting-local-regulations/ [https://perma.cc/W64C-H88Q].

12. Gerald Frug and other local government theorists have been drawing attention to cities' relative political and legal weakness for a generation. *See generally* GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 231 (2008); GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 5 (1999). This Article's attention to constitutional anti-urbanism complements that work.

13. Robert C. Brooks, *Metropolitan Free Cities*, 30 POL. SCI. Q. 222, 222 (1915).

14. Parag Khanna, *How Much Economic Growth Comes from Our Cities?*, WORLD ECON. F. (Apr. 13, 2016), https://www.weforum.org/agenda/2016/04/how-much-economic-growth-comes-from-our-cities/ [https://perma.cc/29RK-N2MN].

15. *Urban Percentage of the Population for States, Historical*, IOWA ST. U., http://www.icip.iastate.edu/tables/population/urban-pct-states [https://perma.cc/W3KX-TAHA].

of the early 1960s were meant to remedy the malapportionment problems endemic to state legislatures, dominated as they were by rural interests.[16] Despite these demographic and legal shifts, cities continue to be embattled in ways that observers of the early twentieth century would recognize.

The recent spate of preemptive state legislation reveals the deep roots of constitutional anti-urbanism. Those roots are the subject of this Article, which argues that anti-urbanism is an enduring feature of American federalism. Cities *qua* cities are not represented in state or national legislatures. So too, the equal representation of states in the Senate privileges rural voters over urban ones. And the mere existence of states competing for power limits the possibilities for decentralizing power to cities.

This structural anti-urbanism reflects and reinforces the widening political gap between American cities and other parts of the country. That the United States is no longer a rural nation has not prevented large segments of the population from defining themselves in opposition to those city dwellers who do not appear to share small-town, suburban, or rural values. This stark cultural divide is reflected in politics. In the 2016 presidential election, Democrat Hillary Clinton won a total of 489 counties—88 out of the 100 most populous.[17] By contrast, Donald Trump, running from the political right as a populist, won a total of 2,623 counties.[18] Clinton won the popular vote on the votes of urban citizens; Trump won the presidency on the votes of everyone else. Additionally, Clinton's counties constituted 64% of America's economic activity as measured by the total 2015 output, while Trump's added up to only 36%.[19]

This Article describes the current preemption landscape in the states, offers an account of American constitutional anti-urbanism, and assesses potential city defenses. The Article's central descriptive goal is to understand how an institutional system overtly dedicated to the principles of devolution can be so hostile to the exercise of city power. The Article assumes (without explicit defense[20]) that local self-government is generally valuable. It also assumes that the appropriate powers of municipal government are contested

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16. *See* Reynolds v. Sims, 377 U.S. 533, 547–51 (1964) (acknowledging that disparities in district populations diluted the significance of urban votes).

17. Ronald Brownstein, *How the Election Revealed the Divide Between City and Country*, ATLANTIC (Nov. 17, 2016), https://www.theatlantic.com/politics/archive/2016/11/clinton-trump-city-country-divide/507902/ [https://perma.cc/8MY6-6MWC]; Sydney Schaedel, *Clinton Counties*, FACTCHECK.ORG (Dec. 9, 2016), http://www.factcheck.org/2016/12/clinton-counties/ [https://perma.cc/FP8H-PVJY].

18. *See* Schaedel, *supra* note 17.

19. Mark Muro & Sifan Liu, *Another Clinton-Trump Divide: High-Output America vs Low-Output America*, BROOKINGS (Nov. 29, 2016), https://www.brookings.edu/blog/the-avenue/2016/11/29/another-clinton-trump-divide-high-output-america-vs-low-output-america/ [https://perma.cc/R2AG-7CXK].

20. For such a defense, see RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 18–42 (2016).

and that the character of intergovernmental relations in any given historical period generally reflects substantive political commitments. It proceeds nonetheless on the assumption that an understanding of the American city's status in the U.S. constitutional order is valuable regardless of one's political commitments.

Part I describes the twenty-first century attack on American cities by canvassing preemptive state legislation across a number of policy areas. The purpose is to show both the recency and the breadth of state law preemption.

Part II turns to "Our Federalism's"[21] anti-urbanism. This Part describes how state-based federalism hinders municipal power generally, rehearses how the U.S. Constitution favors rural over urban voters specifically, and describes the deficiencies of state constitutional home rule provisions. I argue that the U.S. intergovernmental system is generally anti-city.[22]

Part III places this "anti-urban constitution" in the context of the historic skepticism of the exercise of city power. It describes a number of distinct forms of anti-urbanism, placing them in the context of the twentieth century's history of suburban growth. Even before the explosive rise of the postwar suburbs, policymakers had sought to fix society by fixing the city—often by trying to rid the city of its urban character or by seeking to liberate citizens from the congestion, dangers, and threats of urban life. Part III concludes with a discussion of resurgent populist anti-urbanism—visible in the rhetoric of the 2016 presidential election and reflected in a series of recent high profile state–city conflicts.

Part IV considers the legal and political options available to cities in responding to these conflicts, both in the context of specific preemptive legislation and more generally. The limits of litigation and legal reform are manifest when anti-urbanism seems to be such a pervasive feature of the U.S. constitutional structure and the wider political culture. Without a significant rethinking of state-based federalism, the American city is likely to remain vulnerable.

One need not share a concern with the city's vulnerability to recognize that federalism in an urban age is and will continue to be about the divide between cities and noncities. Cities and their wider metropolitan areas now contain the bulk of the American population and are the primary economic drivers of their states, their regions, and the nation. The focus on states in our federalism distracts from this important long-term demographic and economic shift. Old debates about state dignity, political safeguards, or anti-commandeering are less responsive in a new urban age in which the most important political and economic divisions do not track state lines. If

21. *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

22. Paul Diller has recently made a similar argument. Paul A. Diller, *Reorienting Home Rule: Part 1–The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 291 (2016). I recount some of his claims below and develop additional ones.

federalism is to have any force as an idea, it must wrestle with this current reality.

I. Conflictual Federalism: A Review of State Law Preemption

I start with an abbreviated review of the current preemption landscape in the states. The range of preemptive state laws is significant. Those laws constrain cities' revenue-raising and spending capacities; prevent cities from adopting environmental, labor, or wage laws; limit the ability for cities to respond to public-health threats; and prevent cities from protecting vulnerable minority groups.[23]

That being said, this review is both selective and a snapshot. It is selective in that it does not canvass the full panoply of state laws, nor does it address federal law preemption except incidentally. The growth of the states' regulatory and administrative apparatus over the course of the twentieth century parallels the rise of the federal regulatory state.[24] Any discussion of preemption thus has to assume that state law is ubiquitous and generally predominates. Indeed, doctrinally, the private law and criminal law exceptions to local home rule powers have held that the state's criminal, tort, contract, domestic-relations, and property law are not subject to local modification.[25]

I too assume a background in which local law is subordinate to state law across most arenas, even if that subordination has been somewhat ameliorated by broad state grants of municipal authority—either through state constitutions or state enabling statutes. The point of this mapping is to illustrate how those general grants are being narrowed and to highlight the reach of specifically targeted preemption laws gaining currency in the states. This is a snapshot insofar as the state preemption landscape remains volatile. New preemptive legislation is being proposed in every state legislative session, as are statutes that would repeal existing preemptive laws.

It should also be noted that cities are litigating at least some of these preemptive state efforts, invoking various principles, including their respective state constitutions' home rule grants.[26] The nature of these grants

23. *See generally* NAT'L LEAGUE OF CITIES, CTR. FOR CITY SOLUTIONS, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS (2017), http://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf [https://perma.cc/FBM3-SAF6] [hereinafter CITY RIGHTS]; Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS: J. FEDERALISM 403 (2017).

24. Marc T. Law & Sukkoo Kim, *The Rise of the American Regulatory State: A View from the Progressive Era*, *in* HANDBOOK ON THE POLITICS OF REGULATION 113, 114 (David Levi-Faur ed., 2011).

25. Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1118–19 (2012); *see* Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 677 (1973) (recognizing the existence of exceptions to the home rule grants).

26. Lewis v. Bentley, No. 2:16-CV-690-RDP, 2017 WL 432464, at *1 (N.D. Ala. Feb. 1, 2017) (regarding Birmingham's authority to establish minimum wage legislation); City of Bexley v. State,

varies widely across the states. At its simplest, state constitutions or enabling acts provide cities with the general authority to legislate for the health, safety, and welfare of the local populace, though almost always subject to override by state law.

These general grants were adopted in part to allow local governments to engage in the day-to-day regulatory activities of government without having to seek specific authorization from the state legislature. But these grants have been significantly undermined by the growth of preemptive state legislation, which removes particular issues from local control or limits city authority across an entire category of regulation. At some point, a "general" grant of authority ceases to be general when a state, through cumulative preemptive legislation, substantially narrows the practical contours of local authority.

A. Industry-Specific Preemption

A range of specific industries, from those selling firearms to those that deal in pesticides, have sought and successfully lobbied for state preemption of local regulations. In many cases, there appears to be a partnership between the private interests that seek to avoid local regulation and legislators at the state level, exemplified by organizations such as the American Legislative Exchange Council (ALEC).[27] ALEC is a pro-business lobbying organization. It seeks to facilitate relationships and efforts between state legislative branches and private industries by providing model legislation, networking opportunities, and lobbying services on behalf of its members.

The firearms industry has been particularly successful in large part because the National Rifle Association has acted aggressively at the state level. Firearm- and ammunition-specific preemption statutes have been enacted in forty-three states.[28] Of these states, eleven have adopted absolute preemption of municipal firearm regulations, barring any exceptions.[29] New

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No. 17CV-2672, 2017 WL 5179520, at *5 (Ohio Ct. Com. Pl. June 2, 2017) (regarding state versus municipal authority to regulate micro-wireless systems); Brief for Defendant-Appellee, Fla. Retail Fed'n, Inc. v. City of Coral Gables, No. 2016-018370-CA-01, 2017 WL 4884062, at *4 (Fla. Cir. Ct. Sept. 18, 2017) (regarding the constitutionality of overruling city's Styrofoam ban).

27. *See* AM. LEGIS. EXCHANGE COUNCIL, https://www.alec.org/about/ [https://perma.cc/5GY9-VANT].

28. *Preemption of Local Laws*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/ [https://perma.cc/CZF2-CJ9A].

29. These states are Arkansas, Indiana, Iowa, Kentucky, Michigan, New Mexico, Oregon, Rhode Island, South Dakota, Utah, and Vermont. N.M. CONST. art. II, § 6 (amended 1986); ARK. CODE ANN. § 14-54-1411 (2017) (effective July 30, 1993); IND. CODE § 35-47-11.1-2 (2017) (effective July 1, 2011); IOWA CODE ANN. § 724.28 (2017) (effective Apr. 5, 1990); KY. REV. STAT. ANN. § 65.870 (West 2017) (effective July 12, 2012); MICH. COMP. LAWS § 123.1102 (2017) (effective Mar. 28, 1991); OR. REV. STAT. § 166.170 (2017) (effective May 30, 1995); 11 R.I. GEN. LAWS § 11-47-58 (2017) (effective 1986); S.D. CODIFIED LAWS §§ 7-18A-36, 8-5-13, 9-19-20 (2017) (effective 1983); UTAH CODE ANN. § 76-10-500 (West 2017) (effective May 3, 1999); VT. STAT. ANN. tit. 24, § 2295 (2017) (effective May 9, 1988).

Mexico implemented this broad preemption rule by amending the state constitution.[30] As one state legislator has stated: "There are lots of areas where home rule certainly applies, . . . [b]ut this is not one of them. Not when it comes to an unalienable, natural, God-given right for people to protect themselves."[31]

A number of states have included penalty provisions in their firearm preemption statutes, in some cases authorizing private parties to bring civil actions against local officials for violations. Relying on a Florida statute with such a provision, two firearms-rights groups recently sued Tallahassee, its mayor, and three city commissioners in their individual capacities regarding two preempted ordinances—passed in 1957 and 1984, respectively—that prohibited the discharge of firearms in certain areas or city properties.[32] Although the city had not enforced either provision for years, the ordinances remained on the books.[33] The plaintiffs argued that by failing to repeal the ordinances, the city and its officials were liable. In a technical, narrow holding, an intermediate state appellate court held that in not repealing the old ordinances, the city had not actually "promulgated" preempted ordinances as required for penalties to apply under the statute.[34]

Over thirty states have some form of tobacco-related state preemption laws.[35] The Washington and Michigan laws preempt advertising, licensure, smoke-free indoor air, and youth access. The other states preempt some combination of these tobacco-related activities. Ten states specifically preempt licensure of vending machines containing tobacco products. At least seven states have preempted the local regulation of e-cigarettes, and others, such as Oklahoma, have acted by amending their tobacco preemption statutes to explicitly preempt the regulation of e-cigarettes and related vapor products.[36] Washington's legislature passed a comprehensive regulation of

30. N.M. CONST. art. II, § 6 (amended 1986).

31. Matt Valentine, *Disarmed: How Cities Are Losing the Power to Regulate Guns*, ATLANTIC (Mar. 6, 2014), https://www.theatlantic.com/politics/archive/2014/03/disarmed-how-cities-are-losing-the-power-to-regulate-guns/284220/ [https://perma.cc/BL5S-NK3P].

32. Fla. Carry, Inc. v. City of Tallahassee, 212 So. 3d 452, 455–56 (Fla. Dist. Ct. App. 2017).

33. *Id.* at 456.

34. *Id.* at 464–65 ("[S]ection 790.33, as it currently stands, does not prohibit the re-publication or re-printing of the void ordinances. . . . The fact that Appellees refused to remove the ordinances from the City's Code does not constitute prohibited conduct under the statute.").

35. *Map of Preemption on Advertising, Licensure, Smokefree Indoor Air, and Youth Access*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/statesystem/preemption.html [https://perma.cc/2GSJ-C6MZ].

36. ARK. CODE ANN. § 26-57-267 (2017) (effective July 22, 2015); IOWA CODE § 453A.56 (2017) (original version at 1991 Iowa Acts 495); NEV. REV. STAT. § 202.249 (2017) (codified as amended at 1991 Nev. Stat. 644); OKLA. STAT. tit. 37, § 600.10 (2017) (effective July 1, 1994) (to be recodified at OKLA. STAT. tit. 63, § 1-220.20); S.C. CODE ANN. § 16-17-504 (2017) (effective June 7, 2013); S.D. CODIFIED LAWS § 34-46-20 (2017) (effective Mar. 28, 2014), § 34-46-6 (2017) (effective Mar. 4, 1994); WASH. REV. CODE § 70.345.210 (2017) (effective June 28, 2016).

vapor products in 2016, which includes a section preempting local regulation of vapor products.[37]

Conflicts over the provision of municipal broadband, or high-speed internet services, have also arisen in the last decade. At least seventeen states have preempted local broadband provision.[38] State preemptive legislation either explicitly bars public entities from providing broadband services or creates barriers meant to disincentivize local governments from pursuing municipal broadband capacity.[39] Bans on local governments operating broadband services can be clear-cut and unambiguous[40] or based on certain categories.[41] A number of states have also erected procedural barriers to the municipal provision of broadband, requiring ballot initiatives (Colorado, Louisiana, and Minnesota),[42] feasibility studies (Virginia),[43] or proof that local incumbent providers cannot or will not provide broadband to the local community (California and Michigan).[44] A particularly contentious example occurred in North Carolina, where a 2015 FCC ruling blocking the state's preemptive statute was overruled by the Sixth Circuit, resulting in North Carolina cities losing municipal broadband capabilities.[45]

The sharing economy, another relatively new phenomenon with the advent of companies such as Uber and Airbnb, is another field in which industry is actively pursuing state preemptive legislation. Laws in thirty-seven states preempt local regulation of ride-sharing platforms, or "transportation network companies" (TNCs) such as Uber and Lyft.[46] Home-sharing platforms, such as Airbnb, have not been the focus of as much legislation, likely due to their novelty. However, states such as New York and Arizona have started to act on this topic, though with different objectives. Arizona, by statute, chose to absolutely prohibit counties from disallowing short-term rentals,[47] while New York criminalized short-term rentals of less

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37. WASH. REV. CODE § 70.345.210 (2017) (effective June 28, 2016).

38. CITY RIGHTS, *supra* note 23, at 3; *see also* Nixon v. Mo. Mun. League, 541 U.S. 125, 128 (2004) (holding that federal law does not preempt state laws that bar municipalities from providing telecommunications services or facilities).

39. James Baller, *State Restrictions on Community Broadband Services or Other Public Communications Initiatives (as of August 10, 2016)*, BALLER STOKES & LIDE (2016), http://www.baller.com/wp-content/uploads/BallerHerbstStateBarriers8-10-16.pdf [https://perma.cc/FEQ9-YMEP] [hereinafter Baller Report].

40. *See, e.g.*, TEX. UTIL. CODE ANN. §§ 54.201–06 (West 2017).

41. *See, e.g.*, NEV. REV. STAT. ANN. §§ 268.086, 710.147 (West 2017).

42. Baller Report, *supra* note 39, at 1–3.

43. *Id.* at 4–5.

44. *Id.* at 1–2.

45. Tennessee v. Fed. Commc'ns Comm'n, 832 F.3d 597, 614 (6th Cir. 2016).

46. CITY RIGHTS, *supra* note 23, at 12; *see, e.g.*, TENN. CODE ANN. § 65-15-302 (2017) (effective May 20, 2015).

47. ARIZ. REV. STATE. ANN. § 11-269.17 (2017) (enacted May 12, 2016).

than thirty days, as well as the advertisement of such practices.[48] This early divergence in state approaches to the issue signals the likelihood of future conflict between states and their localities.

Certain materials used regularly by businesses, such as plastic and Styrofoam, have invited statewide preemptive legislation. In particular, local plastic-bag bans have drawn attention from state legislatures.[49] Missouri and Idaho have explicitly preempted localities from banning plastic bags, as has New York recently.[50] Texas has pending legislation on the issue.[51] Florida has preempted the regulation of Styrofoam.[52]

As of 2013, explicit preemption language targeting local pesticide regulation had been adopted in twenty-nine states.[53] Most of these states' laws follow the language of ALEC's Model State Preemption Act. The Act states:

> No city, town, county, or other political subdivision of this state shall adopt or continue in effect any ordinance, rule, regulation or statute regarding pesticide sale or use, including without limitation: registration, notification of use, advertising and marketing, distribution, applicator training and certification, storage, transportation, disposal, disclosure of confidential information, or product composition.[54]

Other local environmental regulations have invited state opposition. Oil-rich states like Oklahoma and Texas have specifically preempted local regulation of hydraulic fracturing, or fracking. The Oklahoma preemptive statute states that political subdivisions "may not effectively prohibit or ban any oil and gas operations, including oil and gas exploration, drilling, fracture

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48. N.Y. MULT. DWELL. LAW § 121 (Consol. 2017) (effective Oct. 21, 2016). After Airbnb sued to challenge the New York law, the city and the state entered into settlement agreements permanently blocking enforcement against Airbnb. Todd E. Soloway & Bryan T. Mohler, *Settlement Agreements with Airbnb Violate Separation of Powers*, N.Y. L.J. (Aug. 15, 2017), https://www.law.com/newyorklawjournal/almID/1202795577718 [https://perma.cc/NH2F-ZBAU] (discussing settlement agreements between New York City and Airbnb that prohibit enforcement of the statute against Airbnb).

49. CITY RIGHTS, *supra* note 23, at 23; *State Plastic and Paper Bag Legislation*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx#pending [https://perma.cc/YS54-MG7V].

50. S.B. 7336, 2017 Leg., Reg. Sess. (N.Y. 2017); Henry Grabar, *Andrew Cuomo's Bizarre Logic for Killing New York City's Plastic Bag Fee*, SLATE (Feb. 15, 2017), http://www.slate.com/blogs/moneybox/2017/02/15/new_york_gov_andrew_cuomo_is_a_plastic_bag.html [https://perma.cc/9XBL-YXA2].

51. S.B. 1806, 84th Leg., Reg. Sess. (Tex. 2015).

52. FLA. STAT. § 500.90 (2017) (preempting local regulation of polystyrene products).

53. MATTHEW PORTER, STATE PREEMPTION LAW: THE BATTLE FOR LOCAL CONTROL OF DEMOCRACY, http://www.beyondpesticides.org/assets/media/documents/lawn/activist/documents/StatePreemption.pdf [https://perma.cc/WPG8-SGLT].

54. *State Pesticide Preemption Act*, AM. LEGIS. EXCHANGE COUNCIL (Jan. 28, 2013), https://www.alec.org/model-policy/state-pesticide-preemption-act/ [https://perma.cc/TM9Q-AUZB].

stimulation, completion, production, maintenance, plugging and abandonment, produced water disposal, secondary recovery operations, flow and gathering lines or pipeline infrastructure," with few exceptions.[55] Both the Oklahoma statute and the Texas statute, which use similar language, were passed in 2015. In 2016, the Colorado Supreme Court stepped in to overturn local regulations when two cities banned fracking and the storage of fracking waste within their respective cities' limits because they violated the state's Oil and Gas Conservation Act.[56] Ohio has also preempted local authority to regulate fracking,[57] leading one local official to complain that "[w]hat the drilling industry has bought and paid for in campaign contributions it shall receive."[58]

B. *Labor, Employment, and Antidiscrimination Preemption*

In addition to industry-specific regulation, states are actively preempting more general municipal labor, employment, and antidiscrimination laws. Again, in many of these cases, industry and business are pursuing a statewide preemption strategy.

The leading example is the preemption of local minimum- or living-wage laws. At least twenty-five states have passed statutes preempting local authorities from mandating differing minimum wages for private employers.[59] Many of these statutes were adopted in the last five years.

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55. OKLA. STAT. tit. 52, § 137.1 (2017) (effective Aug. 21, 2015).

56. City of Longmont v. Colo. Oil & Gas Ass'n, 369 P.3d 573, 585 (Colo. 2016).

57. State *ex rel.* Morrison v. Beck Energy Corp., 37 N.E.3d 128, 137–38 (Ohio 2015).

58. Billy Corriher, *Big-Money Courts Decide Fate of Local Fracking Rules*, CTR. AM. PROGRESS (Jan. 9, 2017), https://www.americanprogress.org/issues/courts/reports/2017/01/09/296113/big-money-courts-decide-fate-of-local-fracking-rules/ [https://perma.cc/44AE-GNAA].

59. For the statutes, see ALA. CODE § 25-7-41(9)(b) (2017); COLO. REV. STAT. § 8-6-101(3) (2017); FLA. STAT. § 218.077(2) (2017); GA. CODE ANN. § 34-4-3.1 (2017); IDAHO CODE § 44-1502 (2017); IND. CODE § 22-2-2-10.5 (2017); KAN. STAT. ANN. § 12-16,130 (2017); LA. STAT. ANN. § 23:642(A)(3) (2017); MICH. COMP. LAWS SERV. § 123.1385 (LexisNexis 2017); MISS. CODE ANN. § 17-1-51 (2017); MO. REV. STAT. § 285.055 (2015) (unless local ordinances were implemented by Aug. 28, 2015), *repealed by* H.B. 1193 & 1194, 99th Gen. Assemb., Reg. Sess. (Mo. 2017); N.C. GEN. STAT. § 95-25.1 (2017); OKLA. STAT. tit. 40, § 160 (2017); OR. REV. STAT. § 653.017 (2017); 43 PA. CONS. STAT. ANN. § 333.114a (2017); 28 R.I. GEN. LAWS § 28-12-25 (2017); S.C. CODE ANN. § 6-1-130 (2017); TENN. CODE ANN. § 50-2-112 (2017); TEX. LAB. CODE ANN. § 62.0515 (West 2017); UTAH CODE ANN. § 34-40-106 (West 2017); WIS. STAT. § 104.001 (2017); *see also* S.B. 331, 131st Gen. Assemb. (Ohio 2016); S.B. 704, 2015 Gen. Assemb., Reg. Sess. (Va. 2015) (failed and would have allowed localities to adopt minimum wage). The New Hampshire minimum wage law does not explicitly preempt local authority to set wages, but New Hampshire is a Dillon's Rule state and they have not been delegated such authority. Therefore, they may not set their own minimum wages. *See* N.H. REV. STAT. ANN. § 279:21 (2017); CITY RIGHTS, *supra* note 23, at 6 ("New Hampshire . . . [has] had long-standing preemption because authority to regulate wages was never granted to cities."). The Kentucky Supreme Court held that the state's minimum wage law preempts local authority to create minimum wage laws, Ky. Rest. Ass'n v. Louisville/Jefferson Co. Metro Gov't, 501 S.W.3d 425, 430 (Ky. 2016), but, as the dissent noted, the statute in question does not explicitly preempt such authority, *id.* at 431–34 (Wright, J., dissenting); it merely mandates a statewide minimum wage. *See generally* KY. REV. STAT. ANN.

Although a handful of cities have successfully defended their local minimum wage laws,[60] state preemptive laws have generally been upheld.[61] A state legislator recently urged a ban on local minimum wage laws in Washington State, arguing that "[t]his is a simple check on city councils run by special interests and ideologues out of touch with the needs of the whole community."[62]

Local regulations of employee benefits and paid and unpaid leave have also been preempted. At least twelve states have enacted laws that preempt local authority to regulate the benefits private employers provide their employees.[63] At least fifteen states have enacted laws that preempt local authority to regulate the amount of paid or unpaid leave that private employers provide their employees.[64] Nineteen states have preempted local

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§ 337.275 (West 2017); Ryland Barton, *Kentucky Supreme Court Strikes Down Louisville Minimum Wage Ordinance*, 89.3 WFPL (Oct. 20, 2016), http://wfpl.org/kentucky-supreme-court-strikes-down-louisville-minimum-wage-ordinance/ [https://perma.cc/2YHC-PMZS] (describing the effects of the majority opinion and the position of the dissenter).

60. Lynn Horsley, *Advocates of Local Control and Minimum Wage Score a Legal Victory in Missouri*, GOVERNING (Mar. 1, 2017), http://www.governing.com/topics/politics/tns-missouri-minimum-wage-ruling.html [https://perma.cc/V4P6-SD3V].

61. For more discussion of state preemption of local minimum wage regulation, see Riverstone-Newell, *supra* note 23, at 411–13.

62. Joseph O'Sullivan, *Lawmaker Proposes Striking Down Local Minimum Wage Laws*, SEATTLE TIMES (Jan. 26, 2016), http://www.seattletimes.com/seattle-news/politics/lawmaker-proposes-striking-down-local-minimum wage-laws/ [https://perma.cc/RQ64-8WLZ].

63. These states include: Alabama (2016), North Carolina (2016), Michigan (2015), Missouri (2015), Arizona (2013), Florida (2013), Indiana (2013), Kansas (2013), Mississippi (2013), Tennessee (2013), Georgia (2004), and Pennsylvania (1996). ALA. CODE § 25-7-41 (2017) (effective Feb. 25, 2016); FLA. STAT. § 218.077 (2017); GA. CODE ANN. § 34-4-3.1 (2017) (effective May 13, 2004); IND. CODE § 22-2-16-3 (2017) (effective July 1, 2013); KAN. STAT. ANN. § 12-16,130 (2017) (effective July 1, 2013); MICH. COMP. LAWS SERV. §§ 123.1386 (2017) (including wages or benefits in the prevailing community), .1391 (2017) (cannot require giving of specific fringe benefits or covering expenses), .1389 (2017) (effective June 30, 2015) (scheduling and hours); MISS. CODE ANN. § 17-1-51 (2017) (effective July 1, 2013); MO. REV. STAT. § 285.055 (2015), *repealed by* H.B. 1193 & 1194, 99th Gen. Assemb., Reg. Sess. (Mo. 2017); N.C. GEN. STAT. § 95-25.1 (2017) (effective Mar. 23, 2016); TENN. CODE ANN. § 7-51-1802 (2017) (effective Apr. 11, 2013) (addressing health insurance benefits only); *see also* ARIZ. REV. STAT. ANN. §§ 23-204 to -205 (2017) (scheduling but not benefits more generally). *But see* ARIZ. REV. STAT. ANN. § 23-364(I) (2017) (stating otherwise without indicating that § 23-204 is not current). For state law in Pennsylvania, see Bldg. Owners & Managers Ass'n of Pittsburgh v. City of Pittsburgh, 985 A.2d 711, 714 (Pa. 2009) (holding that Pennsylvania state law prohibits municipalities from regulating businesses by determining their "duties, responsibilities[,] or requirements"); Chris Potter, *Judge Rejects as 'Unenforceable' Two Pittsburgh Labor Ordinances*, PITTSBURGH POST-GAZETTE (Dec. 22, 2015), http://aww.post-gazette.org/local/city/2015/12/22/Allegheny-County-judge-strikes-down-city-sick-leave-ordinance/stories/201512220166 [https://perma.cc/99TM-UZLF].

64. These states include: Alabama (2016), North Carolina (2016), Oregon (2016), Wisconsin (2016), Michigan (2015), Missouri (2015), Oklahoma (2014), Arizona (2013), Florida (2013), Indiana (2013), Kansas (2013), Mississippi (2013), Tennessee (2013), Louisiana (2012), and Pennsylvania (1996). ALA. CODE §§ 25-7-41(b) (2017) (effective Feb. 25, 2016), 11-80-16 (2017) (effective Mar. 18, 2014); ARIZ. REV. STAT. ANN. § 23-204 (2017) (effective Apr. 30, 2013); FLA. STAT. § 218.077 (2017) (effective July 1, 2013); IND. CODE § 22-2-16-3 (2017) (effective July 1, 2013); KAN. STAT. ANN. § 12-16,130 (2017) (effective July 1, 2013); LA. STAT. ANN. § 23:642

governments from passing laws requiring companies in their jurisdictions to provide paid family leave.[65]

While not yet as active, the local regulation of wage theft has recently drawn some attention from state legislators. Currently, only Tennessee has passed a law directly preempting local authorities from regulating wage theft by private employers.[66] Other states, such as Pennsylvania and Arizona, may have statutes that control the topic, but only indirectly.[67] On collective bargaining, by contrast, at least twenty-eight states have "right-to-work" laws, which bar private employers from discriminating against employees on the basis of union membership. These laws preempt local regulations to the contrary.[68]

(2017) (effective Aug. 1, 2012); MICH. COMP. LAWS § 123.1388 (2017) (effective June 30, 2015); MISS. CODE ANN. § 17-1-51 (2017) (effective July 1, 2013); MO. REV. STAT. § 285.055 (2015), *repealed by* H.B. 1193 & 1194, 99th Gen. Assemb., Reg. Sess. (Mo. 2017); N.C. GEN. STAT. § 95-25.1 (2017) (effective Mar. 23, 2016); OKLA. STAT. tit. 40, § 160 (2017) (effective July 1, 2014); OR. REV. STAT. § 653.661 (2017) (effective Jan. 1, 2016) (only applies to sick leave); TENN. CODE ANN. § 7-51-1802 (2017) (effective Apr. 11, 2013); WIS. STAT. § 103.10 (2017) (effective July 1, 2016) (preempted in part by ERISA) (applying only to mandating leave for: medical reasons or family issues, including helping family members with medical conditions, helping family members relocate due to domestic assault, sexual assault, or stalking, or to seek services due to such issues, or to prepare to testify, testify, or participate in proceedings about such issues); *see* GA. CODE ANN. § 34-4-3.1 (2017) (effective May 13, 2004) (preempting "all . . . employment benefits" without referring to leave); *Bldg. Owners & Managers Ass'n of Pittsburgh*, 985 A.2d at 714; Chris Potter, *supra* note 63.

65. These states are Arizona, Georgia, Florida, Indiana, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Hampshire, North Carolina, Oklahoma, Oregon, Tennessee, Virginia, and Wisconsin. *See* CITY RIGHTS, *supra* note 23, at 8 ("Seventeen state[s] . . . preempt[ed] the ability of cities to pass laws mandating employers within their jurisdictions provide paid leave."); *Paid Sick Days Preemption Bills (Current Session)*, NAT'L PARTNERSHIP FOR WOMEN & FAM. (May 2017), http://www.nationalpartnership.org/issues/work-family/preemption-map.html?referrer=https://www.google.com/ [https://perma.cc/N3FK-NSXQ].

66. TENN. CODE ANN. § 50-2-113 (West 2017) (effective July 10, 2014).

67. *See* 53 PA. CONS. STAT. § 2962(f) (2017); *Bldg. Owners & Managers Ass'n of Pittsburgh*, 985 A.2d at 714 (holding that Pennsylvania state law prohibits municipalities from regulating businesses by determining their "duties, responsibilities[,] or requirements"). Philadelphia has passed such an ordinance, but it may be illegal. Arizona has a similar statute. ARIZ. REV. STAT. ANN. § 23-364 (2017) (effective Dec. 9, 2016).

68. These states include: Kentucky (2017), Missouri (2017), Alabama (1953—statute; 2016—constitutional amendment), West Virginia (2016), Wisconsin (2015) (no expressed mention of preemption, however), Indiana (2012), Michigan (2012), Oklahoma (2001), Idaho (1985), Louisiana (1976), Wyoming (1963), Kansas (1958), Utah (1955), Mississippi (1954), South Carolina (1954), Nevada (1951), Arkansas (1947), Georgia (1947), Iowa (1947), Texas (1947), Virginia (1947), North Dakota (1947), North Carolina (1947), Tennessee (1947), Arizona (1946), South Dakota (1946), Nebraska (1946), and Florida (1944). ALA. CONST. art. I, § 36.05 (amended 2016); ARIZ. CONST. art. XXV (1946); ARK. CONST. amend. XXXIV, § 1 (1944); KAN. CONST. art. XV, § 12 (1957); MISS. CONST. art. VII, § 198A (amended 1960); NEB. CONST. art. XV, §§ 13–15 (1946); FLA. CONST. art. I, § 6 (1944); OKLA. CONST. art. XXIII, § 1A (amended 2001); S.D. CONST. art. VI, § 2 (1945); ARK. CODE ANN. § 11-3-301 (2017) (effective 1947); GA. CODE ANN. § 34-6-6 (2017) (effective 1947); IDAHO CODE ANN. § 44-2001 (2017) (effective 1985); IND. CODE § 22-6-6-8 (2017) (effective Feb. 1, 2012); IOWA CODE §§ 731.1–.8 (2017) (enacted 1947, recodified 1977); KY. REV. STAT. ANN. § 65.015 (West 2017); LA. STAT. ANN. §§ 23:981–:987 (2017) (effective 1976); MICH. COMP. LAWS § 123.1392 (2017) (effective June 30, 2015); MO.

A number of states have adopted laws preventing local governments from passing ordinances prohibiting private employers from discriminating in employment practices.[69] Additional states may implicitly preempt local authorities from regulating discrimination, depending on how their statutes are interpreted by the courts.[70]

In addition to preempting the local regulation of the private employment relationship, states have also limited cities' authority to dictate municipal contract terms with private parties doing business with the city. North Carolina,[71] Ohio,[72] and Tennessee[73] have enacted laws that prohibit local governments from promulgating ordinances that require private contractors that acquire municipal contracts to hire some specified amount of local residents, or that give preference to contractors that employ local residents over their competitors in bidding for municipal contracts. Cleveland is currently defending its "local hire" ordinance against Ohio's preemptive statute.[74]

A number of states have also enacted laws that prohibit local governments from mandating the wages that private contractors fulfilling a municipal contract pay their employees.[75] North Carolina has enacted a law

REV. STAT. § 290.590 (2017); NEV. REV. STAT. ANN. §§ 613.250–.300 (2017) (effective 1953); N.D. CENT. CODE § 34-09-01 (2017) (effective 1947); N.C. GEN. STAT. § 95-78 (2017) (effective 1947); S.C. CODE ANN. § 41-7-10 (2017) (effective 1954); TENN. CODE ANN. §§ 50-1-201 to -206 (2017) (effective 1947); TEX. LAB. CODE §§ 101.001–.003 (West 2017) (effective 1993); UTAH CODE ANN. § 34-34-2 (2017) (effective 1955); VA. CODE ANN. §§ 40.1-58 to -69 (2017) (enacted 1947, amended 1970); W. VA. CODE ANN. §§ 21-1A-3 to -4 (2017) (effective May 5, 2016); WIS. STAT. ANN. § 111.04 (2017) (effective Mar. 11, 2015) (no expressed mention of preemption, however); WYO. STAT. ANN. §§ 27-7-108 to -115 (2017) (effective 1963).

69. *See, e.g.*, N.C. GEN. STAT. § 143-422.2 (2017) (emphasizing that it is the public policy of this "State" to protect and safeguard the equal protection right of employees); UTAH CODE § 34A-5-102.5 (West 2017); H.B. 600, 107th Gen. Assemb. (Tenn. 2017) (withdrawn); S.B. 202, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); *see also* Elizabeth Reiner Platt, *States Attempting to Preempt LGBT-Friendly Municipalities*, COLUM. L. SCH. (Feb. 11, 2016), http://blogs.law.columbia .edu/publicrightsprivateconscience/2016/02/11/states-attempting-to-preempt-LGBT-friendly-municipalities/ [https://perma.cc/H2FZ-G39V].

70. KAN. STAT. ANN. § 44-1001 (West 2017); N.H. REV. STAT. ANN. § 354-A:1 (2017); S.C. CODE ANN. § 1-13-20 (2017).

71. H.B. 2, 2016 Gen. Assemb., 2d Extra Sess., (N.C.) (discussing statewide consistency in laws related to employment contracting).

72. H.B. 180, 131st Gen. Assemb., Reg. Sess. (Ohio 2016); *see also Cleveland Sues Ohio over Prohibition on Local Hiring Laws*, NEWS-HERALD (Aug. 24, 2016), http://www.news-herald.com/article/HR/20160824/NEWS/160829729 [https://perma.cc/Z2MJ-9DJ2] (discussing Cleveland's challenge to the bill).

73. TENN. CODE ANN. § 62-6-111(i)(2)(C) (West 2017).

74. City of Bexley v. State, No. 17CV-2672, 2017 WL 5179520 (Ohio Ct. Com. Pl. June 2, 2017); Robert Higgs, *National Coalition Joins Cleveland Fight to Save Fannie Lewis Law*, CLEVELAND.COM (June 15, 2017), http://www.cleveland.com/cityhall/index.ssf/2017/06/national_coalition_joins_cleve.html [https://perma.cc/TS57-M4XK].

75. These at least include North Carolina (2016), Tennessee (2013), Arizona (2011), Georgia (2005), and Utah (2001). ARIZ. REV. STAT. ANN. § 34-321(B) (2017); GA. CODE ANN. § 34-4-3.1

that prohibits local governments from passing ordinances that alter private contractors' employee leave policies as a condition of accepting a municipal contract.[76] North Carolina,[77] Tennessee,[78] and Georgia[79] prohibit municipalities from altering the employee benefits policies of private contractors that acquire municipal contracts as a condition of bidding for or receiving a public contract. Seven states have enacted laws prohibiting local governments from setting certain requirements for private contractors in bidding for or receiving a public contract. Some of these barred conditional requirements include mandatory collective bargaining and labor agreements.[80]

LGBT discrimination in employment and public accommodations has also been an area of state–city conflict. North Carolina's "bathroom bill" was intended to override Charlotte's ordinance protecting the rights of transgender people to use bathrooms and changing facilities that corresponded to their gender identity.[81] Wyoming had considered a bill making the use of any restroom not corresponding to one's birth sex a crime of public indecency.[82] South Dakota and Virginia had bathroom bills introduced in their 2017 state legislatures, and nineteen states considered such measures in 2016.[83] Texas is currently considering such a law.[84]

(2017); N.C. GEN. STAT. §§ 153A-449(a), 160A-20.1(a) (West 2017); TENN. CODE ANN. § 50-2-112(a)(1) (2017); UTAH CODE ANN. § 34-40-106(2) (West 2017).

76. N.C. GEN. STAT. §§ 153A-449(a), 160A-20.1 (West 2017).

77. *Id.*

78. TENN. CODE ANN. § 7-51-1802 (2017) (prohibiting mandatory health insurance only).

79. GA. CODE ANN. § 34-4-3.1 (2017) (prohibiting local law that seeks to control or affects wages that would occur if collective bargaining were required without referring to union agreements).

80. These include Alabama (2016), North Carolina (2013), Arizona (2011), Missouri (2007), Tennessee (2011), Georgia (2005), and Nevada (1953). ALA. CODE § 25-7-42 (2017); ARIZ. REV. STAT. ANN. § 34-321(C) (2017); GA. CODE ANN. § 36-91-21 (2017); MO. REV. STAT. § 34.209 (2017); NEV. REV. STAT. § 613.250 (2017); N.C. GEN. STAT. § 143-133.5 (2017); TENN. CODE ANN. § 12-4-903 (2017).

81. N.C. GEN. STAT. § 143-422.11 (repealed 2017); *see also* CITY RIGHTS, *supra* note 23, at 11 (noting that HB2 was passed in direct response to a Charlotte ordinance that prohibited sex discrimination in public facilities).

82. Joellen Kralik, *"Bathroom Bill" Legislative Tracking*, NAT'L CONF. ST. LEGISLATURES (July 28, 2017), http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx [https://perma.cc/XES8-JK7R]; *see also* H.B. 0244, 64th Leg., Reg. Sess. (Wyo. 2017) (providing that a person is guilty of public indecency if the person "knowingly uses a public bathroom or changing facility . . . which does not correspond to the person's sex identified at birth by the person's anatomy").

83. *See* Kralik, *supra* note 82. Of the nineteen states that considered such legislation, one—North Carolina—enacted the legislation; the other eighteen states are Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, New York, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, Washington, and Wisconsin. *Id.*

84. *Id.*

C. *Local Authority Preemption*

In addition to preempting local laws that seek to regulate private businesses, states have also preempted local authority in areas that come closer to the traditional core of municipal authority: revenue raising and spending. States dramatically limit locals' tax and spending abilities through tax and expenditure limitations (TELs). Thirty-five states, as of 2015, imposed property-tax-rate limits on localities.[85] Thirty-five states impose limitations on tax levies, primarily through tax caps.[86] New York, for example, limits the amount raised by taxes on real estate in any fiscal year to the amount equal to the following percentages of the average full valuation of taxable real estate: 1.5%–2% for counties, 2% for cities and villages, and 2.5% for New York City and the counties therein.[87] Those caps can be overridden in certain circumstances, though a number of states do not provide any override procedure.[88]

Other states have imposed both tax and spending limitations. Colorado's Taxpayer Bill of Rights (TABOR), adopted in 1992, is an example.[89] The constitutional amendment requires that any tax increase or debt question be approved by the voters, and it imposes annual limits on both government revenue and spending.[90] The stringent limits on spending have led to recent bipartisan efforts to reform the law.[91]

Land use regulation and schools are other topics of traditional local concern that have seen recent preemption activity. Affordable housing requirements, or inclusionary zoning measures, have been preempted in at least eleven states.[92] Mississippi passed a law in 2013 explicitly exempting

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85. *Significant Features of the Property Tax: Tax Limits*, LINCOLN INST. LAND POL'Y, http://datatoolkits.lincolninst.edu/subcenters/significant-features-property-tax/Report_Tax_Limits.aspx [https://perma.cc/S8K2-7PM8] [hereinafter *Tax Limits*]. For foundational work in the field, see FRUG & BARRON, *supra* note 12, at 80–82; DANIEL R. MULLINS & KIMBERLEY A. COX, ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, TAX AND EXPENDITURE LIMITS ON LOCAL GOVERNMENTS (1995).

86. *See Tax Limits*, *supra* note 85.

87. N.Y. CONST. art. VIII, § 10 (2002).

88. *Tax Limits*, *supra* note 85 (searching under "levy limit").

89. CITY RIGHTS, *supra* note 23, at 22 (citing COLO. CONST. art. X, § 20 (1992)).

90. COLO. CONST. art. X, § 20(4), (7)–(8) (1992).

91. John Frank, *TABOR Faces Renewed, Republican-Led Effort for an Overhaul at 25-Year Mark*, DENVER POST (Feb. 28, 2017), http://www.denverpost.com/2017/02/26/tabor-colorado-bill-1187/ [https://perma.cc/3X84-PHEN].

92. *E.g.*, ARIZ. STAT. § 9-461.16 (2017); ARK. CODE ANN. § 14-54-1604 (2017); COLO. REV. STAT. § 38-12-301 (2017); MASS. GEN. LAWS ch. 40B, §§ 20–23 (2017); OR. REV. STAT. § 197.309 (2017); TEX. LOC. GOV'T CODE § 214.905 (2017). For Tennessee, see TENN. CODE ANN. § 66-35-102(b) (2017); see also Joey Garrison, *Legal Threat Hangs over Nashville Affordable Housing Proposal*, TENNESSEAN (Sept. 6, 2016), http://www.tennessean.com/story/news/local/davidson%20/2016/09/06/legal-threat-hangs-over-nashville-affordable-housing-proposal/89782528/ [https://perma.cc/D79J-BYP4]; Joey Garrison, *State Bill Would Prohibit Affordable Housing Mandates*, TENNESSEAN (Jan. 19, 2016), http://www.tennessean.com/story/news/2016/01/19/state-bill-would-prohibit-affordable-housing-mandates/79003712/ [https://perma.cc/Z64T-RBZP]. For New

charter schools from local rules, regulations, policies, and procedures.[93] ALEC's model legislation on charter schools was distributed in 2016, with language resembling that of the Mississippi statute.[94]

Local immigration issues have also elicited state legislative attention—as conflicts over sanctuary cities have become more widespread.[95] While there are constitutional limits on the federal government's ability to force local compliance with immigration laws, those limits do not necessarily apply to state laws—something I will say more about in Part IV.

Arizona, Georgia, Indiana, North Carolina, and Missouri all have bans against sanctuary cities that predate the 2016 election.[96] The Arizona law that contained the sanctuary city ban was partially struck down by the Supreme Court in *Arizona v. United States*[97] on the ground that it was preempted by federal law.[98] Some key provisions remain, however.[99] Since November 2016, at least fifteen additional states have proposed legislation to preempt sanctuary cities.[100] Of those states, four do not have any known sanctuary

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Hampshire, see N.H. REV. STAT. ANN. § 674:59 (2017); see also Cordell A. Johnston, *New Hampshire Town and City: New Laws Require Updates to Zoning Ordinances*, N.H. MUN. ASS'N (Dec. 2008), https://www.nhmunicipal.org/TownAndCity/Article/131 [https://perma.cc/UDM2-GBT8]. In New Jersey, the judiciary has rejected the municipality's inclusive zoning measure. S. Burlington Cty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 730–31 (N.J. 1975). For Rhode Island, see 45 R.I. GEN. LAWS § 45-24-46.1 (2017); see also CITY OF RALEIGH HOUS. & NEIGHBORHOODS DEP'T, AFFORDABLE HOUSING IMPROVEMENT PLAN: FY 2016-FY 2020 (noting that mandatory inclusionary zoning is illegal but some cities have them (Chapel Hill, Davidson, and Monteo) but other actions are allowed); R.I. DEP'T OF ADMIN.: DIV. OF PLANNING, HANDBOOK ON: DEVELOPING INCLUSIONARY ZONING (2006), http://www.planning.ri.gov/documents/comp/Handbook%20on%20Developing%20Inclusionary%20Zoning.pdf [https://perma.cc/8HQ3-2EZP]. *But see* MASS. GEN. LAWS ch. 40B, §§ 20–23 (2017); Tyler Mulligan, *A Primer on Inclusionary Zoning*, COATES' CANONS (Nov. 16, 2010), https://canons.sog.unc.edu/a-primer-on-inclusionary-zoning/ [https://perma.cc/54QE-BEYT] (arguing that the law is uncertain regarding this issue).

93. MISS. CODE ANN. § 37-28-45 (2017) (effective July 1, 2013).

94. *The Next Generation Charter Schools Act*, AM. LEGIS. EXCHANGE COUNCIL (Sept. 12, 2016), https://www.alec.org/model-policy/amendments-and-addendum-the-next-generation-charter-schools-act/ [https://perma.cc/56LS-BR4G].

95. *But cf.* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1281–82 (2009) (discussing local immigration "noncooperation" laws, which thwart federal attempts to force states to assist with immigration enforcement, as examples of uncooperative federalism).

96. ARIZ. REV. STAT. ANN. § 11-1051 (2017) (effective July 29, 2010); GA. CODE ANN. § 36-80-23(b) (2017) (effective May 5, 2009); IND. CODE ANN. § 5-2-18.2-4 (2017) (effective July 1, 2017); MO. ANN. STAT. § 67.307 (2017) (effective Jan. 1, 2009); N.C. GEN. STAT. § 153A-145.5 (2017) (effective Oct. 1, 2015).

97. 567 U.S. 387 (2012).

98. *Id.* at 46. The sanctuary city ban was not at issue in the case.

99. *Id.* at 389 (holding three provisions of the Arizona law to be preempted by federal law, but declining to rule similarly on one section in the absence of a definitive state court interpretation of that section).

100. *See, e.g.*, *City Enforcement of Immigration Laws Before Panel*, BILLINGS GAZETTE (Jan. 14, 2013), http://billingsgazette.com/news/state-and-regional/montana/city-enforcement-of-immigration-laws-before-panel/article_552b1c9f-f3e0-51bd-9064-1778ebfcf246.amp.html [https://perma.cc/9QCY-SAYS] (discussing a proposed state law that would require cities to "help

cities: Arkansas,[101] Idaho,[102] Oklahoma,[103] and Tennessee.[104] Notably, a proposed law in Ohio would hold local government officials criminally liable for the acts of undocumented immigrants.[105] SB4 (recently adopted in Texas) overrides all municipal policies and practices that may limit the enforcement of federal immigration laws, and imposes civil and criminal penalties on local officials who do not comply.[106]

D. *Punitive, Deregulatory, and Vindictive Preemption*

SB4 is an example of a punitive form of preemption, similar to the Florida firearms statute mentioned already. Traditionally, cities with preempted ordinances simply stopped enforcing those ordinances and might

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enforce anti-immigration laws"); Greg Hilburn, *Sanctuary Cities Bill Dies; Lafayette, NOLA Avoid Penalties*, NEWS STAR (May 24, 2016), http://www.thenewsstar.com/story/news/2016/05/24/sanctuary-cities-bill-dies-lafayette-nola-avoid-penalties/84769550/ [https://perma.cc/SGY3-PPUD] (noting that a bill that would have restricted state funding to sanctuary cities did not pass); *Kansas Among Several States Looking to Ban Sanctuary Cities*, KSN.COM (Feb. 2, 2016), http://ksn.com/2016/02/02/kansas-among-several-states-looking-to-ban-sanctuary-cities/ [https://perma.cc/R5V9-VMLA] (discussing multiple proposed laws to either ban sanctuary cities or restrict funding to "cities that don't cooperate with immigration officials"); Brandon Moseley, *Bentley Says Alabama Will Not Support Sanctuary Cities*, ALA. POL. REP. (Feb. 2, 2017), http://www.alreporter.com/2017/02/01/bentley-says-alabama-will-not-support-sanctuary-cities/ [https://perma.cc/GB5B-TF98] (discussing a proposed state law that would require cities to "help enforce anti-immigration laws"); Anjali Shastry, *Maryland Lawmaker Aims to Punish Sanctuary Cities*, WASH. TIMES (Jan. 19, 2016), http://www.washingtontimes.com/news/2016/jan/19/maryland-bill-aims-to-punish-sanctuary-cities/ [https://perma.cc/3E3Z-U4DM] (stating that Maryland would debate whether to enact a law punishing sanctuary cities).

101. Benjamin Hardy, *Bill Introduced to Strip State Funds from Hypothetical 'Sanctuary Cities' in Arkansas*, ARK. TIMES (Dec. 2, 2016), http://www.arktimes.com/ArkansasBlog/archives/2016/12/02/bill-introduced-to-strip-state-funds-from-hypothetical-sanctuary-cities-in-arkansas [https://perm.cc/FAT2-68C7].

102. Betsy Z. Russell, *Proposed Law in Idaho Would Discourage Sanctuary Cities and Direct Law Enforcement to Question People's Immigration Status*, SPOKESMAN-REV. (Jan. 30, 2017), http://www.spokesman.com/stories/2017/jan/30/idaho-house-panel-introduces-immigration-bill-targ/ [https://perma.cc/8LB2-LYYL].

103. Abby Broyles, *"You Incentivize a Lot of Bad Things," Oklahoma Senator Files Bill to Ban Sanctuary Cities in Oklahoma*, OKLA.'S NEWS 4 (Feb. 1, 2017), http://kfor.com/2017/02/01/you-incentivize-a-lot-of-bad-things-oklahoma-senator-files-bill-to-ban-sanctuary-cities-in-oklahoma/ [https://perma.cc/CE4N-8G88].

104. Ariana Maia Sawyer, *Lawmaker Introduces Tennessee 'Sanctuary City' Ban*, TENNESSEAN (Feb. 8, 2017), http://www.tennessean.com/story/news/politics/2017/02/08/lawmaker-introduces-tennessee-sanctuary-city-ban/97166104/ [https://perma.cc/XH3Y-RURK].

105. *See* H.B. 179, 132d Gen. Assemb., Reg. Sess. (Ohio 2017) (providing removal and prosecution of the local government officers). For further explanation of the bill, see Jessie Balmert, *Criminal Penalties for Cranley & Sanctuary City Advocates?*, CINCINNATI.COM (Feb. 6, 2017), http://www.cincinnati.com/story/news/politics/2017/02/06/criminal-penalties-john-cranley-cincinnati-sanctuary-city-pushers/97542278/ [https://perma.cc/H79G-PUX7].

106. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (enacted); *see* TEX. GOV'T CODE §§ 752.053, .056 (West 2017); TEX. PENAL CODE ANN. § 39.07 (West 2017); *see also* Priscilla Alvarez, *Will Texas's Crackdown on Sanctuary Cities Hurt Law Enforcement?*, ATLANTIC (June 6, 2017), https://www.theatlantic.com/politics/archive/2017/06/texas-sb4-immigration-enforcement/529194/ [https://perma.cc/S423-JUGX].

repeal them after express preemption. Punitive preemptive laws seek to deter cities from—and punish cities for—passing ordinances that are in conflict with state law.[107] These punitive laws fall into three broad categories: privately enforced civil penalties against local officials and governments, state-enforced fiscal sanctions for local governments, and criminal penalties (and possibly removal) for elected officials.[108] A number of state firearms preemption statutes are punitive in design, as noted above.

A broader form of punitive preemption was adopted by Arizona in 2016.[109] It requires the Arizona Attorney General to investigate local laws at the request of any state legislator.[110] If the Attorney General finds the ordinance in conflict with state law or the Arizona constitution, the local government must resolve the violation within thirty days or face a loss of shared state money.[111] Similar measures have been adopted in Texas and Florida and are under consideration by other states.[112]

More common are state laws that preempt for no obvious regulatory purpose. In the conventional case, state law expressly preempts local law or impliedly does so by occupying a field—that is, by replacing a local regulatory scheme with a statewide one. The purpose of the state legislation is not only to preempt but to advance a substantive policy goal or advance statewide interests in uniformity and consistency. But much of recent state law preemption is simply deregulatory. The state law does not replace a local scheme of regulation with a contrary state one, but rather simply bars the locality from regulating at all.

Professor Richard Briffault has called this "deregulatory preemption."[113] It operates by frustrating or blocking local regulations simpliciter. For example, the Florida legislature has adopted statutes preventing local governments from regulating smoking, fire sprinklers, nutrition and food policy, the sale or use of polystyrene products, hoisting equipment, beekeeping, fuel terminals, wireless alarm systems, paid sick leave and other employment benefits, moving companies, biomedical waste

107. *See Legal Strategies to Counter State Preemption and Protect Progressive Localism: A Summary of the Findings of the Legal Effort to Address Preemption (LEAP) Project*, BETTER BALANCE (Aug. 9, 2017), https://www.abetterbalance.org/resources/legal-strategies-to-counter-state-preemption-and-protect-progressive-localism-a-summary-of-the-findings-of-the-legal-effort-to-address-preemption-leap-project/ [https://perma.cc/Q7Z6-J6BG] [hereinafter *Legal Strategies*].

108. *See id.* (giving as examples several states that have adopted various punitive preemption measures since 2011).

109. It was introduced as SB 1487, codified at ARIZ. REV. STAT. § 41-194.01 (2017).

110. *Id.*

111. *Id.*

112. FLA. STAT. § 790.33 (2017) (providing up to $5,000 penalties for elected officials who violate preemption); TEX. GOV'T CODE § 752.056 (West 2017) (withholding state revenues from sanctuary jurisdictions); *see also* H.B. 76, 64th Leg., 1st Reg. Sess. (Idaho 2017) (withholding sales tax funds from government entities that prohibit or discourage the enforcement of immigration law).

113. Thanks to Richard Briffault for this insight.

in city landfills, plastic bags, and milk and frozen desserts.[114] In addition, Florida and other states are considering blanket preemption laws that bar localities from regulating any "business, profession, and occupation unless the regulation is expressly authorized by general law."[115] A more far-reaching proposal is to preempt the local regulation of matters relating to "commerce, trade, and labor."[116] These statutes function merely to deny localities certain regulatory powers, rather than to protect actual policies adopted at the state level.

Finally, there is a strand of what might be called vindictive or retaliatory preemption. Retaliatory preemption occurs when state law preempts more local authority than is necessary to achieve the state's specific policy goals, when the state threatens to withhold funds in response to the adoption of local legislation, or when the state threatens all cities with preemptive legislation in response to one city's adoption of a particular policy or ordinance. The bathroom bill adopted in North Carolina was a form of vindictive preemption. Not only did the legislature preempt Charlotte's local transgender access ordinance, it also preempted all other North Carolina cities' antidiscrimination, contracting, and minimum wage laws.[117]

State legislatures can threaten retaliation informally as well. An example is the targeting of sanctuary cities in Texas and other states with the threat of new broad-based preemption bills that limit municipal power across the board.[118] The withdrawal of local authority to regulate entire subject matters is a potent threat meant to chill cities' adoption of particularly disfavored policies.

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114. FLA. STAT. § 386.209 (2017) (smoking); § 633.206 (2017) (fire safety); § 500.90 (2017) (polystyrene products); § 489.113(11) (2017) (hoisting equipment); § 568.10 (2017) (confiscation of liquors); § 163.3206 (2017) (fuel terminals); § 553.793 (2017) (wireless alarm systems); § 218.077 (2017) (wage and employment benefits); § 507.13 (2017) (movers of household); § 381.0098(8) (2017) (landfills); § 403.7033 (2017) (plastic bags); § 502.232 (2017) (milk and frozen desserts).

115. H.B. 17, 25th Leg., Commerce Comm. (Fla. 2017) (bill rejected); *see also* Riverstone-Newell, *supra* note 23, at 417–18 (noting the trend in preemption laws being interpreted as encompassing all state laws, rather than discrete policy areas); Jeff Weiner, *Local Governments Decry Bill that Would Limit Regulations*, ORLANDO SENTINEL (Mar. 17, 2017), http://www.orlandosentinel.com/news/politics/os-legislature-ban-local-regulations-20170307-story.html [https://perma.cc/SN37-PYKE] (noting concern over the overbreadth of H.B. 17).

116. S.B. 1158, 25th Leg., Comm. on Commerce & Tourism (Fla. 2017) (bill rejected). For more information on the bill, see FLA. SENATE, https://www.flsenate.gov/Session/Bill/2017/01158 [https://perma.cc/UFK6-6EDC].

117. H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C.).

118. Madlin Mekelburg, *Local Officials Fear State Retaliation over 'Sanctuary Cities' Lawsuits*, EL PASO TIMES (July 6, 2017), http://www.elpasotimes.com/story/news/politics/texlege/2017/07/06/local-officials-fear-state-retaliation-over-sanctuary-cities-lawsuits/444215001/ [https://perma.cc/FD7N-3JRY] (describing Texas localities' concern that Governor Abbot would retaliate against them for filing suit over the new sanctuary city law).

II. Our Federalism's Anti-Urbanism

Why such hostility to city regulation? In many cases, state preemption represents the normal workings of a multitiered system of government. As is clear from the landscape of state preemptive laws, preemption is often a strategy of industry and trade groups seeking more favorable legislation at the state level. There is nothing particularly surprising about this shifting of scales; it occurs in any federal or quasi-federal system in which there is significant overlap of regulatory authority. The vertical fragmentation of authority in a three-tiered political system provides for multiple bites at the legislative apple.

The rise of state law preemption does not merely reflect a concerted string of strategic victories by deregulation-seeking interest groups, however. The recent spate of preemptive state legislation also reflects a structural bias against local government—in particular against city government. What these preemptive state laws illustrate is the continuing political and policy hostility to the exercise of municipal authority writ large.

As I argue below, an enduring feature of American federalism is its anti-urbanism. State-based federalism appears by design to produce weak cities. Cities are vulnerable to state intervention because regional governments have many reasons to ignore or override local decision makers. First, states and state officials are in competition with cities and city officials for political power and economic spoils. Second, the U.S. Constitution favors rural over city voters—favoritism that is exacerbated by a first-past-the-post electoral system that permits political gerrymandering. But even if gerrymandering were outlawed, cities would still be vulnerable to state intervention. The structure of state-based federalism itself impedes the decentralization of real authority to substate governments. And third, home rule protections—in states that have them—tend to limit city power instead of advancing it.

A. *The Problem of States*

As to the first point, the history and more recent prominence of state–city conflicts suggest that the exercise of municipal power is regularly contested. That local governments lack power in a federal system might at first be surprising, but as a number of commentators have pointed out, federal systems of government tend to be *less* decentralized than unitary ones.[119]

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119. *See* Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 35–36, 39–40 (2002) (arguing that the benefits of decentralization are derived primarily from independent local governments and that unitary, rather than federal, governments provide greater authority to local municipalities); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 911, 914 (1994) (contending that federalism and decentralization are distinct concepts and that the structure of federal governments, as opposed to unitary governments, discourages decentralization); *see also* Pradeep Chhibber & E. Somanathan, Are Federal Nations Decentralized? Provincial Governments and the Devolution of Authority to Local Government 2, 4, 8 (May 28, 2002) (unpublished manuscript) (on file with Stanford University)

Instead of fostering local power, the existence of regional governments appears to impede it.

What is it about U.S. states that impedes the devolution of power to U.S. cities? There are a number of possibilities. First, implementation and monitoring in a unitary government are costly, and so we might expect such a government to devolve significant powers and responsibilities to smaller-scaled entities, many of them smaller than U.S. states. The boundaries of regional governments—and this is certainly true of American states—are fairly arbitrary. Each state's jurisdictional reach is a function of geography and history, not a result of a considered evaluation of the needs of a particular geographically concentrated population. City boundaries, on the other hand, can roughly cohere with an identifiable constituency. In the absence of strong cultural or historical reasons militating in favor of a particular federal structure, municipal or metro-area boundaries seem more relevant to governing than do regional ones.

Second, and relatedly, in a federal system, regional or state governments take up the policy space that would otherwise be occupied by local governments. As Frank Cross and others have argued, the existence of a regional tier of government always impedes localism because it introduces a constraint on local officials, who otherwise would have unmediated relationships with their own constituents and with the central authority.[120]

No doubt, a central authority can be dictatorial, as in any hierarchical system. But often central officials need the assistance and cooperation of local officials to implement national directives—and so might be more responsive to the exercise of local discretion, something regional government officials might be less inclined to do. Moreover, because states share so much political and policymaking space with their local governments, state preferences will likely predominate. Elisabeth Gerber and Daniel Hopkins have found that municipal policy outcomes tend to diverge when there is less shared authority between cities, states, and the federal government in a given policy arena.[121]

Indeed, state lawmakers very much conceive of themselves as representing "local" constituencies—as in fact do many members of Congress. This points to a third reason for the dominance of states in a federal

(positing that federal government systems, in contrast with unitary systems, are less decentralized because they use a middle government tier—states—that reduce resources to and weaken local governments). *But see* Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 191–95, 210 (2005) (criticizing Cross, Rubin, and Feeley).

120. *See* Cross, *supra* note 119, at 27–28, 33–36 (arguing that local government power is significantly curtailed by state governments, which often limit decentralization at the local level).

121. Elisabeth R. Gerber & Daniel J. Hopkins, *When Mayors Matter: Estimating the Impact of Mayoral Partisanship on City Policy*, 55 AM. J. POL. SCI., 326, 327–29, 337 (2011) (suggesting that mayoral partisanship has a greater effect on local policy when state and federal governments exercise less authority).

system: vertical redundancy.[122] City leaders do not enjoy a monopoly on local representation, nor are cities *qua* cities represented in the state or national legislatures. Instead, numerous elected officials—in statehouses and in Congress—can validly assert that they represent locals, even as they do not represent the city as a whole. The political competition that results is invariably going to result in state legislative aggrandizement. There is no good political reason for state officials to act with restraint as long as they are being responsive to their particular slice of the electorate. Because state legislators are exercising "local" power, they do not perceive a significant tension between local control and state preemptive legislation.

This problem of vertical political competition drove the original movement for home rule at the turn of the century. State legislators, seeing political and economic opportunities in the burgeoning industrial city, began to govern the city directly from the state legislature.[123] State and local political machines were either entwined or state machines co-opted local ones. In an effort to clean up municipal government, Progressive Era reformers sought to insulate the city from state legislative interference. Home rule was not only an effort to free cities from control by rural interests, but was meant to free the city from the state's political machine, including the city's own state legislative delegation.[124] This was largely a "good government" strategy. Reformers sought first to insulate city government from a (corrupt and meddling) state government after which they could proceed to the business of electing pro-reform candidates within the city.

As the Progressive reformers understood, political competition in combination with state-level representation of "local" interests generate significant incentives for state officials to intervene. Unlike the rural county or the bedroom suburb, the city is the chief focus of this intervention, for a number of obvious reasons. First, the primary infrastructure and wealth of a state are often concentrated in its cities or in wider metropolitan areas. That was certainly the case at the turn of the century, when state legislators sought to apportion the city's spoils to favored interests.

To be sure, the demographic landscape is more complicated today, as suburbanization has led in many cases to the deconcentration of population from the central city. But that fact should not be overstated. The trend away from the central city has reversed in many places. And the city–suburb line is simply less relevant, in terms of density, relative amounts of retail and office space, and commuting patterns. Moreover, even declining

122. *See generally* SCHRAGGER, *supra* note 20, at 89–96.

123. DAVID R. BERMAN, LOCAL GOVERNMENT AND THE STATES: AUTONOMY, POLITICS, AND POLICY 57–61 (2003) ("State legislatures, in effect, became 'spasmodic city councils.'").

124. *Id.* at 62 ("By the late nineteenth century, urban reformers linked together through associations such as the National Municipal League set off in quest of local home rule and a form of local government insulated from state government that would enable cities to cope with the pressures of industrialization and urbanization.").

postindustrial American cities often continue to hold significant land-based, institutional, and infrastructural wealth. Leading civic institutions are also often found in the larger municipalities in their states, and particularly in capital cities.

Second, cities are often the most concentrated and populated jurisdictions in a state. Because they are often larger than other individual local-government units, the exercise of city power affects more constituencies and impacts more interest groups. Those constituencies and interest groups will naturally gravitate to the state legislature to seek relief.

Third, again because of size and diversity, cities may be more heterogeneous in terms of political preferences—both internally and in relation to noncity jurisdictions. Political heterogeneity will produce more—and at times, more controversial—governing.

And finally, fourth, cities simply need more government than do rural or suburban local jurisdictions. The range of city policies that can produce conflict is large. So too, the ideological distance between noncity legislators, who may resist on principled grounds the expansion of government, and city legislators, who may require "bigger" government to resolve urban issues, may be quite significant.[125]

These features of state-based federalism are independent of particular party affiliations. Whether Democrats or Republicans hold power locally or at the state level, the impulse to govern from the state is similar. Andrew Cuomo and Bill de Blasio are both Democrats, but the Governor of New York and the Mayor of New York City are regularly at odds when it comes to city policymaking. Cuomo, in conjunction with the New York state legislature, opposed or co-opted de Blasio's policies regarding charter schools,[126] congestion pricing,[127] a millionaire tax,[128] the living wage,[129] and universal

125. For evidence of increasing state–city conflict, see Katherine Levine Einstein & David M. Glick, *Cities in American Federalism: Evidence on State–Local Government Conflict from a Survey of Mayors*, 47 PUBLIUS: J. FEDERALISM 599 (2017).

126. Marc Santora, *Cuomo Vows to Defend Charter Schools, Setting Up Another Battle with de Blasio*, N.Y. TIMES (Mar. 4, 2014), https://www.nytimes.com/2014/03/05/nyregion/cuomo-vows-to-defend-charter-schools-setting-up-another-battle-with-de-blasio.html?_r=0 [https://perma.cc/H7LN-EN6T].

127. J. David Goodman, *Mayor de Blasio Says He 'Does Not Believe' in Congestion Pricing*, N.Y. TIMES (Aug. 21, 2017), https://www.nytimes.com/2017/08/21/nyregion/de-blasio-congestion-pricing.html [https://perma.cc/35TL-AN4J].

128. Jimmy Vielkind, *Shared Anxiety over Trump Helps Cool Cuomo-de Blasio Feud*, POLITICO (Jan. 30, 2017), https://www.politico.com/states/new-york/albany/story/2017/01/trump-thaws-cuomo-de-blasio-feud-109138 [https://perma.cc/FA7S-44ZU].

129. Thomas Kaplan, *Cuomo Rejects Another Plan by de Blasio: Minimum Wage*, N.Y. TIMES (Feb. 11, 2014), https://www.nytimes.com/2014/02/12/nyregion/cuomo-rejects-another-plan-by-de-blasio-minimum-wage.html [https://perma.cc/6UK6-Q9MM].

pre-K.[130] To be sure, New York is somewhat unique because of its size, scale, and importance. The city draws both attention and resistance from internal and external constituencies. But so do many other less well-known cities in every other state. The existence of regional governments that are governed by legislators elected by local constituencies guarantees that kind of scrutiny.

B. Malapportionment

American anti-urbanism is not simply a function of state-based federalism, however. Certain kinds of federal systems (for example, systems in which cities *qua* cities are represented) might be more amenable to local governing. The problem for American cities is exacerbated by a state-based system that favors rural over urban jurisdictions. As Professor Paul Diller has thoroughly documented, anti-urban bias is built into the basic structure of the U.S. Constitution and is a notable feature of state and congressional legislative districting.[131]

As to the former, the malapportionment of the Senate is a significant impediment to city power. As commentators have repeatedly observed, by giving each state equal suffrage in the U.S. Senate, the U.S. Constitution favors less populated, rural states over highly populated, urban ones.[132] The result is that states in the rural Midwest such as Wyoming, Montana, and the Dakotas are significantly overrepresented, while more urban states, like California and New York, are significantly underrepresented. As Diller concludes, "the U.S. Senate's egregious violation of one-person, one-vote works to the distinct detriment of voters in highly populous states with major metropolitan areas."[133]

To be sure, a state's total population may not be an accurate proxy for the state's urban population. A small state's population might be concentrated in one large city while a large state's population might be more evenly dispersed. If less populated states have a high percentage of urban dwellers, then the Senate's malapportionment could favor urban areas over rural ones—think Connecticut, Rhode Island, and Delaware, for instance.

That being said, the measures of population density in the states tend to reflect total population, at least roughly. Nine of the top fifteen states in population are also among the top fifteen in density, and higher population

130. Michael M. Grynbaum & Thomas Kaplan, *Pre-K Plan Puts Cuomo at Odds with de Blasio on Funding*, N.Y. TIMES (Jan. 21, 2014), https://www.nytimes.com/2014/01/22/nyregion/cuomo-prekindergarten-proposal.html [https://perma.cc/FC8F-AAAT].

131. Paul A. Diller, *Reorienting Home Rule: Part 1–The Urban Disadvantage and State Lawmaking*, 77 LA. L. REV. 287, 291 (2016).

132. *Id.*

133. *Id.* at 322.

states generally fall into the top half of states in density.[134] Moreover, metropolitan areas seem to be growing the fastest, both across the country and within states, as the top five fastest growing counties from 2015–2016 were all near various cities.[135] Population has moved steadily out of the agricultural Midwest and toward the urbanized coasts.[136] And while there have been declines in populations in upper-Midwestern cities, the growth in Sunbelt cities and metro areas has more than compensated.[137] Consider that the Atlanta metropolitan statistical area (MSA) contributes 56% of the population of Georgia and that the Denver MSA contributes 51% of Colorado's.[138]

The effect of shifting populations toward metropolitan areas is increasing gaps between high-population/higher density places and low-population/lower density places. The difference between the most populous state and the least has increased dramatically, and so has the gap between the most populated parts of particular states and the least.[139] Particularly as

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134. *Resident Population Data: Population Density*, U.S. CENSUS BUREAU, https://www.census.gov/2010census/data/apportionment-dens-text.php [https://perma.cc/5QRP-LBJC] (data collected in 2010 indicating that eight out of the fifteen are among the top in population density).

135. Reid Wilson, *Fastest-Growing Counties Show Growth in Florida, Western US*, HILL (Mar. 23, 2017), http://thehill.com/homenews/state-watch/325415-fastest-growing-counties-show-growth-in-florida-western-us [https://perma.cn/28E2-UXV9]. Harris County, Texas, is near Houston; Maricopa County, Arizona, is near Phoenix; Clark County, Nevada, is near Las Vegas; King County, Washington, is near Seattle; Tarrant County, Texas, is near Fort Worth.

136. *Shifting Geography of Population Change*, U.S. DEP'T AGRIC. (June 13, 2017), https://www.ers.usda.gov/topics/rural-economy-population/population-migration/shifting-geography-of-population-change/ [http://perma.cc/6CC2-3C9B] (noting population loss in Midwestern nonmetropolitan counties and population growth along the Pacific, Atlantic, and Gulf coasts).

137. Tanvi Misra, *The Rise of the Sun Belt*, CITYLAB (Dec. 30, 2016), https://www.citylab.com/equity/2016/12/us-population-growth-rate-sun-belt-states/511844/ [https://perma.cc/KY6S-2QUT].

138. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2016*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk [https://perma.cc/RX62-PTZK].

139. In 1950, the most populous state, New York, had a population of 14,830,192, while the least populous territory, Alaska, had 128,643, a difference of 14,701,549. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CENSUS OF POPULATION: 1950, at 32-6, 51-4 (1952). The gap has grown with each decennial census, with an estimated gap for 2010 between California (population: 37,253,956) and Wyoming (population: 563,626) of 36,690,330, an increase of almost 150%. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CALIFORNIA: 2010—SUMMARY POPULATION AND HOUSING CHARACTERISTICS 2 (2012); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, WYOMING: 2010—SUMMARY POPULATION AND HOUSING CHARACTERISTICS 2 (2012); *see* MICHAEL RATCLIFFE, A CENTURY OF DELINEATING A CHANGING LANDSCAPE: THE CENSUS BUREAU'S URBAN AND RURAL CLASSIFICATION, 1910 TO 2010, at 1–3 (2015), https://www2.census.gov/geo/pdfs/reference/ua/Century_of_Defining_Urban.pdf [https://perma.cc/LXX5-4UHN] ("In the 100 years of [urban–rural] classification, the urban population has increased from 45 percent of the nation's total in 1910 to nearly 81 percent in 2010."); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, UNITED STATES SUMMARY: 2010, at 13–15 tbl.7 (2012), https://www.census.gov/prod/cen2010/cph-2-1.pdf [https://perma.cc/S656-FNRJ] (providing data on urban and rural populations, which demonstrates an overall increase in urban populations over time). For further information, see *Census of Population and Housing*, U.S.

metropolitan-area populations take up ever larger proportions of their states as well as increasing percentages of the total population of the nation, the Senate's malapportionment will continue to result in significant underrepresentation of urban interests. The malapportionment of the Electoral College, which allocates votes on the basis of a state's total congressional representation, also results in bias against urban voters.

State and congressional legislative districting also leads to an anti-urban bias. State legislative and congressional districts have to abide by the one-person, one-vote rule explicitly stated in *Reynolds v. Sims*,[140] so as a matter of theory cities should do no better or worse than other parts of a state in Congress or in state legislatures.

Nevertheless, the effect of one-person, one-vote on cities was and is complicated. At the time of *Baker v. Carr*,[141] advocates believed that they were remedying the urban disadvantage in state legislatures by pursuing one-person, one-vote.[142] But there is some evidence that despite malapportionment, nonurban state legislators often deferred to urban representatives in policy areas that were highly salient to city constituencies.[143] Following the apportionment cases, however, suburban interests gained representation at a cost to both rural and urban constituencies. Those suburban interests were in some cases less willing to defer to cities than were the rural legislators.

Add to this partisan gerrymandering and geographical sorting and the legislative anti-urban bias is magnified.[144] The gerrymandering story is well known, with Democrats outpolling Republicans nationally and in many states, but still falling well short of legislative majorities in the House.[145] Diller observes that "[i]n states like Michigan, North Carolina, and Ohio, Republicans lost the statewide popular vote for House candidates yet comfortably won the majority of the state's House seats."[146] State legislative races are often similarly skewed by district lines that protect Republicans and

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CENSUS BUREAU, https://www.census.gov/prod/www/decennial.html [https://perma.cc/3V8V-4ZGA].

140. 377 U.S. 533, 547–51 (1964).

141. 369 U.S. 186 (1962).

142. Roy A. Schotland, *The Limits of Being "Present at the Creation"*, 80 N.C. L. REV. 1505, 1505 (2002) ("Doubtless some observers will persist in believing that the *Baker* Court intended to 'help the cities.'").

143. *Id.* at 1505 & n.2.

144. Diller, *supra* note 131, at 291.

145. *See* Nate Cohn, *Debate Is Over: Gerrymandering Is Crucial to G.O.P.'s Hold on House*, N.Y. TIMES (Aug. 2, 2017), https://www.nytimes.com/2017/08/02/upshot/its-time-to-end-the-old-debate-over-gerrymandering.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&_r=0 [https://perma.cc/3XSD-LVUV] (noting that gerrymandering likely cost the Democrats seven to twelve congressional seats in 2012).

146. Diller, *supra* note 131, at 326; *see also* Brief for Int'l Mun. Lawyers Ass'n as Amici Curiae in Support of Appellees, Gill v. Whitford, 137 S. Ct. 268 (2017) (No. 16-1161).

limit the number of Democratic seats, despite statewide majorities favoring Democrats.[147]

Of course, if Democrats and Republicans were evenly distributed throughout a state, such gerrymanders would be difficult to make. But they are not. Democrats are heavily represented in urban areas, and those areas are relatively easy to isolate, either by chopping them up and absorbing them into larger Republican-controlled districts, or by concentrating them into a few, safe Democratic districts.

The anti-urban bias is not direct; it is a function of a political bias that emerges because rural and suburban voters tend to vote Republican, while urban dwellers tend to vote Democratic, and increasingly so. Democrats are able to win the statewide vote because they amass huge majorities in uncompetitive, urban districts. Republicans more readily control statehouses and congressional seats because they amass smaller majorities in gerrymandered rural and suburban districts. Republicans "waste" fewer votes because their base is more evenly distributed across the state. Indeed, even in the absence of gerrymandering, as Jowei Chen and Jonathan Rodden have pointed out, Republicans would do better than Democrats because their voters are not so geographically concentrated.[148]

According to many recent studies, this geographical sorting by affiliation is increasing.[149] In twenty-five states, the state senate, house, and governorship are controlled by Republicans; in six states, Democrats similarly dominate.[150] In states in which Republicans dominate, cities are increasingly isolated, despite generating significant Democratic votes.

A consequence is that one of the two major American political parties can almost entirely ignore a state's urban constituents. At least when it comes to the House and to state legislatures, Republicans can govern comfortably without the cities, relying almost exclusively on noncity voters. Democrats are less able to do the same with rural and suburban voters, who are not as concentrated into particular districts. Statewide races require a more geographically neutral strategy, of course. But in many states and in Congress, when Republicans govern, cities are going to be marginalized, as their votes are not needed.

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147. David A. Lieb, *Analysis Indicates Partisan Gerrymandering Has Benefitted GOP*, U.S. NEWS (June 25, 2017), https://www.usnews.com/news/best-states/virginia/articles/2017-06-25/ap-analysis-shows-how-gerrymandering-benefited-gop-in-2016 [https://perma.cc/9PEN-9SWZ].

148. Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 241–43, 247 (2013).

149. *See, e.g.*, BILL BISHOP & ROBERT G. CUSHING, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 5–15 (2008); Paul Taylor, *The Demographic Trends Shaping American Politics in 2016 and Beyond*, PEW RES. CTR. (Jan. 27, 2016), http://www.pewresearch.org/fact-tank/2016/01/27/the-demographic-trends-shaping-american-politics-in-2016-and-beyond/ [https://perma.cc/XSS6-DBTM].

150. *State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government _trifectas [https:/perma.cc/2E8P-3G75].

C. *Home Rule Failure*

The persistent anti-urban bias of state and national legislators has long been a concern. The marginalization of cities occupied reformers well before the rise of computerized gerrymandering, and (as noted) the one-person, one-vote cases sought directly to address the problem of urban under-representation.[151]

Most significantly, the development of home rule in the states was an effort to protect cities—especially big cities—from a legislature that refused to let them govern.[152] The failure of home rule thus requires discussion, for it was intended to prevent the legislative targeting of cities, but it has become mostly toothless in that regard.[153]

Recall that the first state constitutional home rule provisions were urged by reformers responding in many cases to a series of attacks on the city. Those attacks included the famous "ripper bills": state statutes that transferred control of specific municipal responsibilities or entire municipal departments to state agencies or officers, or that simply removed local elected officials altogether.[154] Ripper bills were common. As Lyle Kossis notes, in New York alone, the state passed 212 laws in 1870 that controlled local functions in towns and villages throughout the state.[155] The well-known "Pittsburgh ripper" of 1901 removed the city's mayor from office.[156]

Home rule constitutional reforms, accompanied in many cases by bans on special legislation—which bar state legislatures from targeting specific cities—limited some of these more egregious practices. But the original

151. *E.g.*, Reynolds v. Sims, 377 U.S. 533, 556–57 (1964); Gray v. Sanders, 372 U.S. 368, 379 (1963).

152. BERMAN, *supra* note 123, at 62.

153. For an excellent account of the "failed promise of intrastate federalism," see Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 163–77 (2017) (discussing the principles of intrastate federalism, its practical limitations and failures, and potential solutions).

154. Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 805–06 (1992); Lyle Kossis, Note, *Examining the Conflict Between Municipal Receivership and Local Autonomy*, 98 VA. L. REV. 1109, 1125–26 (2012).

155. *See* Kossis, *supra* note 154, at 1126:

> For example, one ripper bill in Michigan was used to transfer the provision of local utilities to state boards, and another in New York was used to lodge control over local police forces in the state capitol. Perhaps most strikingly, Pennsylvania used a ripper bill to transfer control over the construction of City Hall in Philadelphia to the state. What is more, ripper bills were quite common. In New York alone, the state passed 212 laws in 1870 that controlled local functions in towns and villages throughout the state.

For the New York statistics, Kossis's note cites HOWARD LEE MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE 8 (1916).

156. FRANK C. HARPER, PITTSBURGH: FORGE OF THE UNIVERSE 149–54 (1957); LINCOLN STEFFENS, THE SHAME OF THE CITIES 138–42 (1957); *see also* C.D. Scully, Note, *Pittsburg: The Pittsburg Ripper*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 1902, at 135, 135–36.

version of home rule usually limited city power to matters of "local" concern, and local concern was almost always interpreted narrowly by state courts and against the background presumption that the state still held the general police power.[157] Many reformers—even at the time—were unimpressed. As Robert Brooks noted in his 1915 *Political Science Quarterly* article, "Metropolitan Free Cities," even the most liberal home rule schemes reserve "a goodly number of powers" to the state, "stop[ping] just short of the limits within which it would confer any real freedom upon our cities."[158]

Modifications to home rule in the 1950s and 1960s sometimes gave cities more flexibility, though still limited autonomy. Instead of limiting the exercise of city power to "local" matters, some states adopted blanket grants of the police power to local governments, subject to the denial of that power by a specific act of the state legislature.[159] This "legislative" home rule permits local governments wide discretion in initiating legislation, but no or very limited protection against state law preemption.[160] The upshot is that local governments are still vulnerable to a state's exercise of its police power. And home rule initiatives in the 1950s and 1960s did not include the power to modify the state's "private law"—tort, contract, property, and domestic relations.[161] The limited reach of home rule is strikingly apparent.

Even if state constitutional home rule provisions had more teeth, however, commentators have questioned the conceptual viability of grants of local authority detached from substantive policies. Judge David Barron, for example, has argued that "[l]ocal governments do not—indeed, cannot—possess anything like local legal autonomy," and that though cities "may operate within a legal structure that seems committed to securing their right to home rule, . . . that same structure subjects them to a variety of legal limitations."[162] As Barron argues, home rule is not an identifiable sphere of local autonomy, but rather a constellation of grants and limitations that "powerfully influences the substantive ways in which cities and suburbs act."[163]

Barron concludes that our current, late-twentieth-century version of home rule favors suburban power to protect property values over urban power to promote equality.[164] Courts conventionally hold that zoning and other land use matters fall within the core of home rule authority, thus

157. Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 18–19 (2006).

158. Robert C. Brooks, *Metropolitan Free Cities: A Thoroughgoing Municipal Home Rule Policy*, 30 POL. SCI. Q. 222, 229–30 (1915).

159. *See* Diller, *supra* note 131, at 1118.

160. *See id.* at 1119.

161. *Id.* at 1115.

162. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2263 (2003).

163. *Id.*

164. *Id.*

vindicating a power that often favors exclusionary suburbs.[165] At the same time, courts are skeptical of city efforts to annex territory, adopt rent control, or embrace other policies that might redistribute away from property owners or that might benefit cities to the detriment of suburbs.[166]

Similarly, Professor Kenneth Stahl has argued that the common conception of home rule as a boundary between local and nonlocal results in a skewed version of local power, one that is associated with the protection of home and family as opposed to the regulation of the market.[167] Courts tend to treat land use, education, and housing as quintessentially local, while the municipal regulation of commercial and other market actors is often rejected based on the imperative of "statewide uniformity."[168] Home rule is most robust insofar as it is associated with protection of a sphere of home life—those matters that are "private" and "associational."[169] By contrast, home rule has less traction when it comes to commercial or redistributional policies—those policies that seem somehow more "public" and "transactional."[170]

What both Barron and Stahl highlight is home rule's anti-urban bias. Localism is protected by home rule grants. But that localism is of a certain kind, more readily enjoyed by suburban jurisdictions and easily effaced when locals seek to regulate powerful commercial and financial actors.[171] Cities that seek to regulate global financial capital find their powers circumscribed, despite the significant local costs that deregulated transnational mobile capital often imposes.

Home rule cannot avoid this bias. To the extent that cross-border commercial interests are disproportionately located in cities, city power by definition threatens "nonlocal" interests. By design, home rule does not readily permit the regulation of cross-border markets. In other words, home

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165. *See, e.g.*, 2 W. MIKE BAGGETT & BRIAN THOMPSON MORRIS, TEXAS PRACTICE GUIDE: REAL ESTATE LITIGATION § 8:11 (2017) (explaining that both statute and case law grant broad zoning powers to Texas municipalities).

166. *See* Barron, *supra* note 162, at 2263 ("[T]he current rules of American local government law produce a form of home rule that assumes and reinforces a view of private property that disables local communities from promoting a different kind of development.").

167. Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 BYU L. REV. 177, 185–86 (2016).

168. *See* Am. Fin. Servs. Ass'n v. City of Oakland, 104 P.3d 813, 832 (Cal. 2005) (stressing the importance of uniform statewide regulations of commercial activities); *see also* Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30, 39–40 (Colo. 2000) (determining that a rent-control policy in an isolated mountain town implicated a state interest of uniform economic policy and was therefore void).

169. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1878 & n.108 (1994) (showing how courts give authority to local governments when the controversy is close to the "associational rights of individuals").

170. *See* Stahl, *supra* note 167, at 185–86.

171. *See id.* at 181–82 & nn.10–13 (acknowledging that courts regularly strike down local laws which regulate commercial and financial actors); *see also* Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 195 (2017) (suggesting that cities have been complicit in undermining the concept of home rule).

rule is "suburban." The combination of powers and limitations that constitutes the "local" has a substantive valence of suburban autonomy.

III. Forms of Anti-Urbanism

That home rule would favor forms of "suburban" power is unsurprising. The rise of the suburbs is a central trope of twentieth-century American political development. At midcentury, the deconcentration of central city populations began in earnest; Detroit's population was at its height from 1940 to 1950, when it topped out at 1.85 million residents as a result of WWII wartime growth.[172] The flight from the central city has been a driving force in state and national politics, aided and abetted by a range of government policies and reinforced by a rhetoric and ideology of suburban localism. Certainly, to understand the attack on the cities then, one must understand the suburban century.

The distinction between the dangerous city and the pastoral country was not invented in the twentieth century, however. The perception of the city as a problem to be fixed or a danger to be avoided existed long before the 1960s' riots. Thomas Jefferson thought that the city was unfit for a free, republican people, describing the "mobs of great cities" as a "degeneracy" and a "canker" on a country's constitution.[173] The Victorian city was identified with deviance, criminality, and corruption, at least when it came to the ethnic masses.

This Part identifies a number of strands of anti-urbanism that continue to shape attitudes toward the exercise of city power. The enduring anti-urban narrative suggests that the city is badly governed, bad for citizens' welfare, and bad for the nation. This narrative has encouraged past- and present-day efforts to beautify the city, to bring the civilizing benefits of nature to its inhabitants, or to disperse the urban population altogether. These efforts accelerated at the turn of the century, with the rise of the great industrial cities; they continued as those cities entered decline in the late twentieth century; and they persist despite the urban resurgence of the last few decades.

A. Antidemocratic Anti-Urbanism

The first strand of anti-urbanism consists of a skepticism of municipal government that takes root in the Progressive Era and that has never been entirely shaken. That skepticism begins with a conventional view—adopted then and still prevalent now—that American cities at the turn of the century were abysmally governed. As Jon Teaford notes in his study of late-1800s municipal government, observers of the newly industrializing American

172. *Detroit Population History 1900-2000*, SOMACON, http://www.somacon.com/p469.php [https://perma.cc/JEH8-UMYQ].

173. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 165 (William Peden ed., 1972).

cities generally agreed that the governing of those cities was a "conspicuous failure."[174] "[W]ithout the slightest exaggeration," wrote Andrew White in 1890 while president of Cornell, "the city governments of the United States are the worst in Christendom—the most expensive, the most inefficient, and the most corrupt."[175]

Teaford resists this historical narrative—his book is titled *The Unheralded Triumph* and he recites the great accomplishments of American cities in this period, despite their (mostly undeserved) reputation for poor governance.[176] So too have urban historians revised their accounts of the role of urban bosses and political machines in providing social services to the poor in an era of limited government.[177]

Yet the defining urban narrative cannot get far from the continual clash between bosses and reformers—"against a roughly sketched backdrop of municipal disarray."[178] Municipal politics is viewed as more corrupt than state or national politics, more prone to capture by special interests, more wasteful, and more incompetent.[179]

This narrative originally served to underwrite a reform agenda that often linked progressive good government reformers with business or corporate interests.[180] To be sure, Progressive Era reformers were often committed to using government—and in particular municipal government—to ameliorate social ills.[181] But they were also dedicated to technocratic solutions and were skeptical of machine politics. To accomplish their ends, Progressives often recommended replacing a "strong mayor" form of city government with a city manager model—giving over day-to-day control of city business to a nonelected professional.[182] This was of a piece with Progressive policy more generally—the impulse to shift power away from locally elected officials to state boards and commissions.[183]

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174. JON C. TEAFORD, THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870–1900, at 1 (1984).

175. *Id.* (quoting Andrew D. White, *City Affairs Are Not Political*, FORUM, Dec. 1890, at 357, 357).

176. *See id.* at 3–6 (giving various municipal accomplishments in the late nineteenth century and arguing that critics of American cities of that era "focused microscopic attention on [their] failures while overlooking [their] achievements").

177. *See, e.g.*, JOHN M. ALLSWANG, BOSSES, MACHINES, AND URBAN VOTERS 19–22 (1986) (noting that machine bosses were a major source of social services at the time).

178. TEAFORD, *supra* note 174, at 3.

179. *Id.*

180. *See* Barron, *supra* note 162, at 2292–93.

181. *See generally* Richard L. McCormick, *The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 AM. HIST. REV. 247 (1981).

182. SCHRAGGER, *supra* note 20, at 101 (citing Harold Wolman, *Local Government Institutions and Democratic Governance*, *in* THEORIES OF URBAN POLITICS, 135, 138–39 (David Judge et al. eds., 1995)).

183. Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2548 (2006) [hereinafter Schragger, *Strong*

Versions of this original reform agenda continue to emerge, often in mayoral contests. The idea of the "CEO mayor" who can bring discipline to municipal government and run it more efficiently is a common one.[184] Underlying these appeals to corporate competence is a general distrust of municipal power, a retreat to expertise, the valorization of business acumen as an antidote to municipal failure, and a suspicion of mass, unmediated urban democracy—a set of themes that municipal reformers have long asserted.

There have been dissenters to this original Progressive agenda. Frederic Howe, who served in the Ohio Senate and on the Cleveland City Council, is an example. Writing in 1905, he resisted the notion that the city should be treated as a business concern, to be run by businessmen.[185] He also resisted reformers' efforts to put the city's affairs in the hands of expert boards and commissions, arguing that urban reformers had "voted democracy a failure" and had convinced themselves that "mass government will not work in municipal affairs."[186]

In contrast, Howe argued for a robust urban democracy. He titled his 1905 book *The City: The Hope of Democracy*, and he advocated a popularly elected mayoralty with sufficient powers to act.[187] "The boss," he argued, "appears under any system, whether the government be lodged with the mayor, the council, with boards, or commissions."[188] But a centrally elected official can be held accountable in a way that numerous boards and commissions cannot. "Distrust of democracy has inspired much of the literature on the city," Howe wrote.[189] Taking power out of the hands of urban citizens was not the answer to municipal corruption. Urban citizens should instead be trusted to run their own affairs, as Howe believed that:

> [w] ith home rule secured, with popular control attained, with the city free to determine what activities it will undertake, and what shall be its sources of revenue, then the city will be consciously allied to definite ideals, and the new civilization, which is the hope as well as the problem of democracy, will be open to realization.[190]

Howe was in the minority, however. The current structure of state–local relations is generally the one inherited from Progressive Era constitution

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Mayors] ("The corporate model also dovetailed nicely with Progressive Era reformers' faith in expert administration."); *see also* SCHRAGGER, *supra* note 19, at 65–66; JON C. TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT 20–24 (2002).

184. Schragger, *Strong Mayors*, *supra* note 183, at 2576 ("Municipal policymakers came to believe that the professionalization of city management would do more to promote city efficiency than its politicization.").

185. FREDERIC C. HOWE, THE CITY: THE HOPE OF DEMOCRACY 1–2 (1905).

186. *Id.* at 1.

187. *Id.* at 180.

188. *Id.* at 185.

189. *Id.* at 1.

190. *Id.* at 313.

makers in the early part of the twentieth century, though modified in various ways to limit city government, not to extend its reach.[191] After a brief flirtation with a strong mayor system, reformist organizations generally backed the council-manager model of municipal government, and that model remains dominant.[192] So does the division of authority among boards and commissions. Skeptical of local democracy, this institutional structure leads to the diffusion of authority, the dividing-up of government functions, and deference to state legislatures. It is supported by a long-standing narrative of municipal corruption—a deeply held belief that locally elected officials cannot be trusted.

In the present day, *antidemocratic* anti-urbanism is best illustrated by state takeovers of fiscally distressed municipalities. Despite the enormous structural reasons for the industrial city's long-term decline during the second half of the twentieth century, a conventional view has been that a city in fiscal crisis is a city whose politics is deeply deficient. This is the conventional story of the fiscal crises of the early 1970s, when cities like New York struggled and when urban observers asserted that cities were "ungovernable."[193]

Like the Progressives, present-day reformers turn to institutional fixes to attempt to solve macroeconomic problems. Michigan has appointed emergency managers for numerous struggling cities, the most well known being Detroit.[194] In light of the assumed links between fiscal failure and political failure, the necessity of imposing some external control over that city seemed obvious, even unavoidable. Scholars and policymakers advocate "dictatorships for democracy"—disbanding the city council and mayoralty

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191. Starting in the 1970s, states added limits on the cities' taxing powers, an addition to the restrictions on debt adopted by Progressive Era reformers. *See* SCHRAGGER, *supra* note 20, at 220 ("[C]onstitutionalized fiscal policy is a product of a nineteenth-century reaction to state and municipal debt and a twentieth-century movement to restrict taxation . . . [resulting in] constraints designed to limit local fiscal flexibility.").

192. *See* Richard Schragger, *Strong Mayors*, *supra* note 183, at 2547–49 (comparing the short-lived nature of the "mayor's official ascendency" with the council-manager plan, which "was, and continues to be, attractive, as evinced by the steady increase in the number of cities that have adopted the [] plan").

193. *See, e.g.*, DOUGLAS YATES, THE UNGOVERNABLE CITY: THE POLITICS OF URBAN PROBLEMS AND POLICY MAKING 1–2, 5 (1977) (arguing that despite the drastic increase in spending levels during the 1970s, with New York City leading the way, cities did not provide solutions to growing urban problems, bolstering the conclusion that "the city is fundamentally ungovernable"); David Judge, *Pluralism* (pointing out that experiences in New York led commentators to assert that "policy making was fragmented to the point of chaos" and "such cities were deemed to be ungovernable" (internal quotations omitted)), *in* THEORIES OF URBAN POLITICS 13, 24–25 (David Judge et al. eds., 1995). For a recent revisionist account of the standard narrative, see KIM PHILLIPS-FEIN, FEAR CITY: NEW YORK'S FISCAL CRISIS AND THE RISE OF AUSTERITY POLITICS 4–7 (2017) (arguing that New York's fiscal crisis should not be understood as a parable of municipal fiscal irresponsibility).

194. An excellent treatment of these takeovers is Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014).

and bringing in an unelected receiver to put the city's finances back on track—ostensibly to return a healthy city to its constituents.[195] It should be noted that these receiverships are often for indefinite terms and a number of them have continued for years.

Takeovers of fiscally distressed cities seem not to elicit significant objection, except sometimes by the residents of those places. In the case of Michigan, most cities that have been placed into receivership or the equivalent are majority black and significantly poor.[196] That a city of more than half-a-million residents could be stripped of elected municipal government might be surprising if it were applied to a state or a suburban jurisdiction. But the trope of city mismanagement is a powerful one. Receiverships are defended on the grounds of endemic corruption and political failure.[197] Democratic accountability is the problem—not the solution—in these cases.

There are two weaknesses to this reasoning. The first is that there is no evidence that corruption or political failure is the *cause* of municipal fiscal distress—as opposed to a symptom. The crisis of the postindustrial city has been long in the making. Detroit has been declining for over fifty years. Deindustrialization, white flight, disinvestment, and concentrated poverty are not caused by mismanagement, though they can be exacerbated by it. Importantly, as Teaford observes, the "corrupt," machine-run cities of the industrial age were enormously successful if measured by economic and population growth, or in terms of public infrastructure.[198] And when that age ended, even those industrial cities with a history of relatively "clean" municipal government did not escape the structural forces undermining their local economies.[199]

Second, it is not at all evident that suspending municipal democracy can solve management failures. A powerful counterexample is Flint, Michigan, whose unelected manager shifted the city's water supply to save money and persisted in the plan despite significant popular opposition and evidence that

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195. *See* Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1433 (2014).

196. Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L.J. 577, 590–91 (2012).

197. *See* Gillette, *supra* note 195, at 1384, 1408, 1419 (listing numerous instances of city governments dominated by pervasive corruption that were replaced by receiverships and suggesting that receiverships may be appropriate in cases such as these where democratic procedures have been manipulated by local officials).

198. TEAFORD, *supra* note 174, at 3–6.

199. *See* Richard C. Schragger, *Decentralization and Development*, 96 VA. L. REV. 1837, 1880 (2010) (citing Rebecca Menes, *Limiting the Reach of the Grabbing Hand: Graft and Growth in American Cities, 1880–1930*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 69 (Edward L. Glaeser & Claudia Goldin eds., 2006)).

the water system was poisoning Flint residents.[200] Emergency managers' lack of political accountability should be a strike against their appointment, not an advantage.[201]

Whatever one's views of the causes or effects of municipal mismanagement, the idea that mismanagement cannot be corrected by the normal democratic process appears to be applied with special rigor to cities. Something about city politics elicits deep skepticism from elites and technocrats. As Frederic Howe argued, reformers tend to view municipal democracy as a failure and municipal government as properly run by professionals.[202] The usual response to local political pathology is not to expand public involvement but to contract it in the name of better governance.

B. *Anti-City Anti-Urbanism*

A second strand of anti-urbanism is more far-reaching, for it treats the city as a "problem" that cannot be solved through better governance. This *anti-city* strand of anti-urbanism is best captured by its most famous critic, the urbanist Jane Jacobs, who was inspired to write her seminal *The Death and Life of Great American Cities* in 1961 in response to a century of planning policy.[203] As Jacobs famously argued, everything about late-twentieth-century city planning seemed intended to "do the city in."[204] Widely accepted principles of planning seemed directed toward destroying urban life, instead of encouraging it. In reviewing the results of a generation of urban renewal, highway building, and public-housing developments in American cities, Jacobs concluded that "[t]his is not the rebuilding of cities. This is the sacking of cities."[205]

Jacobs placed the blame squarely on an anti-city "pseudoscience of city planning," full of superstitions and an obsession with bringing the benefits of healthy living to urban dwellers.[206] Her history of urban planning is sometimes tendentious, but it generally tracks the elites' preoccupation with urban disorder. It begins with the Englishman Ebenezer Howard, a self-trained urban reformer, who offered the Garden City as an antidote to the

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200. Richard Schragger, *Flint Wasn't Allowed Democracy*, SLATE (Feb. 8, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/a_big_reason_for_the_flint_water_crisis_no_democracy_there.html [https://perma.cc/BL3G-T2HU].

201. *See id.* ("Emergency managers answer to nobody but the one state official who can hire and fire them. State officials, in fact, don't *want* appointed managers to be responsive to local constituents. That is the whole point of appointing a manager—to prevent him or her from responding too readily to the costly demands of city constituents.").

202. HOWE, *supra* note 185, at 1–2.

203. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961).

204. *Id.* at 17.

205. *Id.* at 4.

206. *Id.* at 13.

crowded and congested London of the late-nineteenth century.[207] Howard founded the Garden Cities Association in 1899—now known as the Town and County Planning Association. The Garden City, based on the principles of Howard's only book, *Tomorrow: A Peaceful Path to Real Reform* (later retitled as *Garden Cities of Tomorrow*), was to be a planned community, limited in population, close to nature—"conceived as an alternative to the city, and as a solution to city problems."[208]

But the Garden City's real import was its approach to planning: a rigid separation of uses—commercial, industrial, and residential; an emphasis on "wholesome housing"; an obsession with the healthful qualities of nature; and a commitment to a suburban-style landscape.[209] These features were taken up by Progressive planners in the 1920s.

They were also given the imprimatur of the law, through the rapid adoption of zoning codes throughout the country. Famously, in *Village of Euclid v. Ambler Realty Co.*,[210] decided in 1926, the Court upheld single-family residential zoning, likening apartment buildings to obnoxious and dangerous land uses.[211] The lower court had actually struck down the zoning restriction, observing that its primary purpose was to "classify the population and segregate them according to their income or situation in life."[212]

The *Lochner* era Supreme Court had no trouble, however, upholding a regulation that significantly reduced property values so long as it protected the values of home and family.[213] Justice Sutherland, writing as if straight from a Garden City planning manual, observed that "the segregation of residential, business, and industrial buildings" will "increase the safety and security of home life [and] greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections."[214] It will also, he declared, "decrease noise and other conditions which produce or intensify nervous disorders [and] preserve a more favorable environment in which to rear children, etc."[215] Apartment houses, by contrast, "destroy[]" residential districts, acting as "mere parasite[s]" and "interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes."[216] Apartment houses further "depriv[e] children of the privilege of quiet and open spaces for play, enjoyed by those in more favored

207. *Id.* at 17.
208. *Id.* at 18.
209. *Id.* at 18–19.
210. 272 U.S. 365 (1926).
211. *Id.* at 394.
212. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924).
213. *Village of Euclid*, 272 U.S. at 384.
214. *Id.* at 394.
215. *Id.*
216. *Id.*

localities[]—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed."[217]

Almost fifty years later in 1974, Justice Douglas would channel this same idyllic vision of the single-family residential district in *Village of Belle Terre v. Boraas*.[218] In writing to uphold a zoning ordinance restricting single-family occupancy to related individuals, Douglas argued that "[t]he police power is not confined to elimination of filth, stench, and unhealthy places."[219] It is also, he wrote, permissible for cities to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[220]

The impact of zoning on urban design cannot be underestimated. It was part of a larger movement to disperse, decentralize, and deconcentrate the city. Jacobs places the blame on the "Decentrists."[221] As she puts it, this group of thinkers and planners were interested in "decentraliz[ing] great cities, thin[ning] them out, and dispers[ing] their enterprises and populations into smaller, separated cities or, better yet, towns."[222] The Garden City was soon followed by Le Corbusier's Radiant City. A Swiss–French architect, designer, and planner—and one of the pioneers of modern architecture—Le Corbusier was hugely influential into the 1960s. His Radiant City imagined a great metropolis consisting of towers in parks accompanied by expressways to accommodate automobiles. Planners took these ideas up at midcentury. The superblock, the public-housing complex, and the suburban office park are the inheritance of Le Corbusier.

Indeed, as Jacobs tells it (and only a little facetiously), it is the planners' obsession with grass that destroys the American city at midcentury.[223] Their belief that cities are noisy, congested, dangerous, and unhealthful led them to promote forms of planning that stripped city neighborhoods of their human scale, that demonized street life, that minimized the mixing of commercial and residential uses, and that treated grassy spaces as necessary for the full realization of the good life.[224]

These design elements had a moralizing valence—poor living conditions were associated with poverty as well as with deviance and criminality. Slum clearance and large-scale public housing were promoted as

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217. *Id.*

218. 416 U.S. 1 (1974).

219. *Id.* at 9.

220. *Id.*

221. JACOBS, *supra* note 1203, at 20.

222. *Id.*

223. *Id.* at 110–11.

224. *See id.* at 20, 22 (describing the belief held by many city planners that the street was a bad place and that houses should therefore be turned inward to face sheltered greens, providing the "illusion of isolation and suburbany privacy").

an uplift strategy—as long as the designs came "bedded with grass."[225] "[G]rass, grass, grass"[226]—as Jacobs writes, mimicking a half-century of urban planning zeal—"Isn't it wonderful! Now the poor have everything!"[227]

Urban renewal was the most consequential government-supported effort along these lines. Begun as a policy to replace deteriorating slum housing with improved housing, urban renewal often failed dramatically. In part that is because project planners could only see physical decline. They equated poor housing conditions with poor social outcomes and did not anticipate the dramatic effects of displacement on poor and often minority communities.[228] For African Americans in the inner city, urban renewal was tantamount to "Negro removal" and the wholesale displacement of long-standing African-American neighborhoods was tremendously damaging.[229] Many ethnic white neighborhoods were also displaced by renewal programs or in some cases highway building.[230]

Moreover, though urban renewal began as a housing program, it became a way to "renew" the city—to improve its tax base, attract new residents, and compete with the suburbs.[231] Downtown business interests sought urban renewal funds to "clean up" central business districts and make them more attractive. The new development was often based on a suburban model. Cities put shopping malls or festival marketplaces downtown, sought to make their streets amenable to automobiles, and then built highways to bring suburbanites to the city's core. City beautification efforts were directed toward suburbanites, not toward existing city residents—who had been displaced in many cases.

The injustices of urban renewal were evident by the 1960s, when Jacobs was writing. There are many reasons for the failure of American urban-development policy in this period. Suburbanization and deindustrialization were powerful forces arrayed against the industrial city, to be sure. But also, as one commentator has noted, "urban renewal failed because it was anti-

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225. *Id.* at 6–7.

226. *Id.* at 22.

227. *Id.* at 15.

228. Jacqueline Leavitt, *Urban Renewal Is Minority Renewal*, L.A. TIMES (Oct. 11, 1996), http://articles.latimes.com/1996-10-11/local/me-52672_1_urban-renewal [https://perma.cc/M4NG-VLDN].

229. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 47 (2003).

230. STEVEN CONN, AMERICANS AGAINST THE CITY: ANTI-URBANISM IN THE TWENTIETH CENTURY 168, 177 (2014).

231. *See* CONN, *supra* note 230, at 166–68 ("Urban renewal began its life as a housing program, though it was later expanded."); Pritchett, *supra* note 229, at 29–30 (examining the interplay between urban renewal and the expansion of public and private eminent-domain powers). For a discussion of urban renewal with specific reference to New Haven, Connecticut, see DOUGLAS W. RAE, CITY: URBANISM AND ITS END 312–60 (2003).

urban."[232] Significant government investments in central cities were animated by a suburban planning ethos and a concomitant lack of faith in existing urban neighborhoods, especially if they were poor and disheveled.[233] There was an assumption that poor urban neighborhoods were themselves a cause of poverty, not simply a result of it.

To be sure, the Victorian city and the industrial city that followed *were* often congested, dangerous, and sometimes violent places—for the poor and working class in particular. But the poverty (and the foreignness) of the urban resident was certainly not *caused* by cities. Jacobs argued that, in thinking that they could plan their way out of poverty, elite reformers adopted a "paternalistic, if not authoritarian" approach focused on beautification and uplift, instead of on the needs of actual city dwellers.[234] All this was accomplished through government policy, often at great expense. As Jacobs observed, "There is nothing economically or socially inevitable about either the decay of old cities or the fresh-minted decadence of the new unurban urbanization."[235] If the city is the problem—independent of discrimination, poverty, joblessness, or crime—then policy will be directed toward remedying urbanism. Twentieth-century urban policy has mostly been anti-urban even when it has been intended to help city dwellers.

Indeed, despite Jacobs's now-canonical status in schools of planning and architecture, *anti-city* anti-urbanism continues to exert a powerful subterranean force. Consider that remedying poverty is often confused with improving the neighborhood—when the two may have little to do with one another. Increased investment in a particular urban neighborhood does not signal a reduction in poverty. The gains to development rarely run to existing residents in any case, and the central theme of urban development in the twenty-first century has been gentrification—which from the perspective of existing residents looks like any other form of displacement.[236] When we say that a particular city "is doing better," we may mean that it has attracted wealthier residents, that its retail spaces are less vacant, that its housing is of a higher quality, or that its tax rolls are fatter. But it is not at all clear that the poor who live there now, or who lived there in the recent past, are any richer.

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232. CONN, *supra* note 2230, at 166.

233. RAE, *supra* note 231, at 312–15; *see also* CONN, *supra* note 230, at 166 ("[City planners held] a flawed set of assumptions about what should be destroyed and what should be built in its place, a misconception that the urban should be made more suburban . . . ."); JACOBS, *supra* note 203, at 20 ("[G]ood city planning must aim for at least an illusion of isolation and suburbany privacy.").

234. JACOBS, *supra* note 203, at 19.

235. *Id.* at 7.

236. *See, e.g.*, MATT HERN, WHAT A CITY IS FOR: REMAKING THE POLITICS OF DISPLACEMENT 7–8, 60 (2016) (describing the impact of gentrification on the residents of Albina, the one major Black neighborhood in Portland).

Moreover, poor, urban neighborhoods still receive outsized blame for their residents' poverty. The old anti-urban themes of dispersal and deconcentration haunt contemporary social welfare and urban policy. William Julius Wilson's famous 1987 book, *The Truly Disadvantaged*, asserted that extreme, territorially concentrated poverty is a chief barrier to black mobility and suggested a solution: move poor people out of concentrated-poverty neighborhoods and into neighborhoods with a more diverse socioeconomic makeup.[237] This idea continues to be a powerful one in social policy circles. It is at the heart of "moving to opportunity" pilot projects that take residents of predominantly poor urban neighborhoods and move them to wealthier suburban neighborhoods. It is also the impetus behind "mixed-income" public housing and the push to put such housing in the suburbs.[238]

No doubt, suburban racial and income exclusion limit opportunities for individual poor and minority families to access better services by moving there. Almost by definition, richer neighborhoods are better funded than poorer ones. Suburban residents often have better access to good public services. Mixed-income neighborhoods are by definition going to be less poor than the alternative.

But there is also an undercurrent of anti-urbanism in the notion that urbanites need to move to the suburbs to succeed. The evidence is actually uncertain regarding the social and economic outcomes for specific movers.[239] And in many cases, residential location itself does not seem to be doing the work. Maybe those urbanites just need better funded public services. Yet social welfare policy continues to be preoccupied with the deficiencies of city neighborhoods themselves, both in terms of those neighborhoods' physical attributes and their sociological makeup.[240]

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237. *See* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 55–62, 157–59 (1987) ("It seems . . . the most realistic approach to the problems of concentrated inner-city poverty is to provide ghetto underclass families and individuals with the resources that promote social mobility.").

238. Richard A. Webster, *New Orleans Public Housing Remade After Katrina. Is It Working?*, TIMES-PICAYUNE (Mar. 22, 2016), http://www.nola.com/katrina/index.ssf/2015/08/new_orleans_public_housing_dem.html [https://perma.cc/LMT6-5Y3D].

239. *See, e.g.*, Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 857–59 (2016) (studying the Department of Housing and Urban Development's Moving to Opportunity experiment's long-term impacts and finding positive effect on college attendance and income for people who moved before age thirteen, but finding slightly negative economic effects for people who moved as adolescents and minimal or no effect on adults' economic outcomes); Jens Ludwig et al., *Long-Term Neighborhood Effects on Low-Income Families: Evidence from Moving to Opportunity*, 103 AM. ECON. REV. 226, 227 (2013) (studying the HUD experiment's impacts and finding mental and physical health improvements, but a lack of impact on children's education and adults' earnings). For a critique of "moving to opportunity" and other dispersal strategies, see David Imbroscio, *Urban Policy as Meritocracy: A Critique*, 38 J. URB. AFFAIRS 79, 89–92 (2016).

240. *See* Imbroscio, *supra* note 239, at 89.

To be sure, the return to the city of the last few decades has witnessed an embrace of urbanism more generally. As I have noted, Jacobs's celebration of urban diversity, congestion, walkability, and public life has become canonical among planners.[241] It also seems to be attractive to residential consumers, as more Americans reject a suburbanized residential life. The most consequential planning movement of the last twenty-five years is called the "New Urbanism."[242]

Even with the renewed popularity of the central cities, however, it is notable that New Urbanist developments are predominantly located in greenfields.[243] They are planned communities, reproducing the look and feel of small towns and utilizing principles of planning developed in colonial times, not the planning principles of the industrial city.[244] Moreover, despite the urban resurgence, most development in the United States is still occurring outside the urban centers, in the suburban fringe. Some Americans are undoubtedly moving back into the central cities. But many more continue to prefer single-family homeownership (when they can afford it) in suburban neighborhoods, even as those neighborhoods may be designed to look and feel like small towns.[245]

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241. *See supra* text accompanying notes 195–97, 213–14. For an account of Jane Jacobs's broad acceptance, see Nathaniel Rich, *The Prophecies of Jane Jacobs*, ATLANTIC (Nov. 2016), https://www.theatlantic.com/magazine/archive/2016/11/the-prophecies-of-jane-jacobs/501104/ [https://perma.cc/85UP-JN9P].

242. *See* Andrés Duany & Emily Talen, *Looking Backward: Notes on a Cultural Episode* (describing New Urbanism principles and support for them in the design profession), *in* LANDSCAPE URBANISM AND ITS DISCONTENTS: DISSIMULATING THE SUSTAINABLE CITY 1, 1 (Andrés Duany & Emily Talen eds., 2013); Dan Trudeau, *New Urbanism as Sustainable Development?*, GEOGRAPHY COMPASS 435, 436–39 (June 25, 2013) (discussing the history of New Urbanism and distribution of New Urbanism projects).

243. Ivonne Audirac, *New Urbanism*, *in* 4 ENCYCLOPEDIA OF GEOGRAPHY 2024, 2027 (Barney Warf ed., 2010); AARON PASSELL, BUILDING THE NEW URBANISM: PLACES, PROFESSIONS, AND PROFITS IN THE AMERICAN METROPOLITAN LANDSCAPE 77 (2013).

244. ROBERT H. FREILICH ET AL., FROM SPRAWL TO SUSTAINABILITY: SMART GROWTH, NEW URBANISM, GREEN DEVELOPMENT, AND RENEWABLE ENERGY 171–73 (2010).

245. *Id.* at 4; *see also* ZILLOW GRP., CONSUMER HOUSING TRENDS REPORT 2016, at 14 (2016) ("A freestanding, single-family house is buyers' top choice, with 83 percent of all buyers seeking this home type."); Elena Holodny, *The Suburbs Are Making a Comeback*, BUS. INSIDER (Mar. 24, 2016), http://www.businessinsider.com/americans-moving-to-suburbs-rather-than-cities-2016-3 [https://perma.cc/RL42-VHWJ]; Kris Hudson, *Generation Y Prefers Suburban Home over City Condo*, WALL STREET J. (Jan. 21, 2015), https://www.wsj.com/articles/millennials-prefer-single-family-homes-in-the-suburbs-1421896797 [https://perma.cc/38WQ-DER2]; Chris Kirkham, *Suburbs Trying to Attract Millennials Diverge on Development Patterns*, WALL STREET J. (Aug. 26, 2016), https://www.wsj.com/articles/suburbs-trying-to-attract-millennials-diverge-on-development-patterns-1472251218 [https://perma.cc/SQ3Z-KKEF]; Mike Maciag, *Population Growth Shifts to Suburban America*, GOVERNING (June 2017), http://www.governing.com/topics/urban/gov-suburban-population-growth.html [https://perma.cc/W9JR-F46Y].

C. *Antigovernment Anti-Urbanism*

This brings me to a third strand of anti-urbanism. In his recent book, Steven Conn describes the linkage between American antigovernment sentiment and the rejection of big-city life.[246] In his description, the physical landscape of suburbanized America is coupled with a political landscape that is deeply suspicious of government.[247] This form of *antigovernment* anti-urbanism is, according to Conn, long-standing, but for the most part it is a twentieth-century phenomenon.[248] It constitutes a rejection of the city as a dense and diverse built environment as well as a rejection of the forms of municipal revenue-raising and regulation that would make such an environment possible.

Conn describes a century of thinkers, writers, planners, architects, and politicians who viewed the big-city as deeply threatening to the health of the republic.[249] Progressive urban reformers, regional planners, states'-righters, New Deal town-builders, back-to-the-landers, libertarians, Southern Agrarians, commune-dwellers, environmentalists, and small-is-beautiful decentralists did not all agree on the source of the problem or the role of government in providing solutions. But from whatever vantage point they had on the twentieth-century city, they all agreed that it was badly broken, and that the remedy was often dispersal, deconcentration, and decentralization.

Thus, we hear the famous architect Frank Lloyd Wright indicting the city as a "cancerous growth" and a "menace to the future of humanity"[250]; Lewis Mumford, regionalism's chief intellectual, arguing that "[t]he hope of the city lies outside itself . . . focus your attention on the cities . . . and the future is dismal"[251]; Thomas Hewes, former New Dealer, bemoaning the city as a place where big labor and big business collude, "abetted by big government"[252]; and Grant Wood, a central figure in a prominent school of Midwestern regionalist artists, writing against the "confusing cosmopolitanism, the noise, the too intimate gregariousness of the large city" in a diatribe entitled *The Revolt Against the City*.[253]

Not all these voices were explicitly antigovernment. Many, like Lewis Mumford, advocated significant government intervention to create a more congenial metropolitan landscape.[254] Nevertheless, the attack on big cities

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246. CONN, *supra* note 230, at 296.
247. *Id.*
248. *Id.* at 294.
249. *Id.* at 60.
250. *Id.* at 88.
251. *Id.* at 65.
252. *Id.* at 113.
253. *Id.* at 121.
254. *Id.* at 69.

was often coupled with a plea for a more pastoral, local, responsive, and community-oriented civic life—along with denunciations of big-city centralization and collectivism.[255] *Antigovernment* anti-urbanism draws a direct connection between bigness and the loss of liberty; centralization and the absence of self-government; and density and the threat to American values.[256]

Indeed, Americans are not generally opposed to localism. Resistance to central authority is a continuing and pervasive political and cultural trope. But cities have been less able than the suburbs to assert the values of local autonomy over the course of the twentieth century. Cities are viewed as centralizers; suburbs and small towns are where local self-government is perceived to flourish.

Thus, we see that when the Court embraced localism in the 1970s, it did so in defense of suburban prerogatives, not in favor of urban empowerment. The rejection of an equal protection challenge to the financing of public schools in *San Antonio Independent School District v. Rodriguez*[257] meant that richer suburban school districts could continue to spend substantially more than poorer urban ones.[258] Justice Powell, the author of the majority opinion, was worried about the centralizing effects of equalization, which he thought could lead to the "national control of education"—a feature of regimes like those ruled by "Hitler, Mussolini[,] and all communist dictators."[259]

Powell had been the chairman of the Richmond, Virginia school board in the 1950s when it operated segregated schools (even after the *Brown* decision). His experience as the head of a relatively well-funded (for whites at least), segregated urban school district had little to do with the metropolitan landscape of the 1970s. In 1970, the Richmond school district was already 64.2% African American; the surrounding suburban school districts were overwhelmingly white.[260] As of 2017, Richmond city schools are 75% African American, 12.8% Hispanic, and 9% white.[261] Cities had already been eclipsed by the time *Rodriguez* was decided. Suburban school districts were

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255. *Id.*

256. *Id.* at 62.

257. 411 U.S. 1 (1973).

258. *Id.* at 55.

259. Richard Schragger, San Antonio v. Rodriguez *and the Legal Geography of School Finance Reform*, *in* CIVIL RIGHTS STORIES 85, 99 (Myriam E. Gilles & Risa L. Goluboff eds., 2008).

260. Bradley v. Sch. Bd. of Richmond, 338 F. Supp. 67, 185 (1972); *see also* Eric Harrison, *Richmond to Stop Keeping White Students Together: Education: Virginia School District Used Racial 'Clustering' in Bid to Halt White Flight from Schools*, L.A. TIMES (Feb. 25, 1993), http://articles.latimes.com/1993-02-25/news/mn-751_1_school-district [https://perma.cc/QD4V-MN9C].

261. RICHMOND PUBLIC SCHOOLS, https://www.rvaschools.net/domain/6 [https://perma.cc/67Y8-UC8J].

the beneficiaries of a ruling affirming the legitimacy of decentralized and unequal school funding.

Milliken v. Bradley,[262] decided in 1974, put an exclamation mark on this durable city–suburb split. In *Milliken*, the district court adopted a metropolitan-wide desegregation plan for Detroit and the area's suburbs.[263] Detroit's schools were predominantly black; the suburban schools were overwhelmingly white.[264] Any desegregation remedy that did not include the suburbs would result in very little desegregation at all. Yet the Supreme Court held that the suburban districts could not be included in the plan.[265] Local government boundaries and the requirement that plaintiffs prove intentional discrimination placed an outside limit on judicial desegregation remedies.

De jure segregation could be remedied by a court, but the metropolitan-wide *de facto* segregation that divided city from suburb could not. "In *Milliken*," Myron Orfield has written, "the Supreme Court had in effect told whites that it was safe to flee and that it would protect them."[266] That flight had only accelerated in the aftermath of the riots of the 1960s. The two Americas of the 1968 Kerner Commission Report were the increasingly black city and the overwhelmingly white suburbs.[267] Localism and the pastoral ideal combined to enforce suburban prerogatives.[268] American cities were dangerous, overcrowded, and often burning. The suburbs were safe, light-filled, and protective of home and family.

More notable is that a "small government" ideology seemed to go hand in hand with the suburban ascendance.[269] Consider reapportionment. As I have already noted, *Baker v. Carr* and its progeny were supposed to have eliminated the urban disadvantage in state legislatures and the House of Representatives.[270] The results were and have been more complicated, however. One-person, one-vote did shift power away from lower populated rural districts. But it did not necessarily empower the cities, as reapportionment introduced a new factor in the state legislative political

262. 418 U.S. 717 (1974).

263. Bradley v. Milliken, 345 F. Supp. 914, 937 (E.D. Mich. 1972).

264. *Id.* at 932.

265. *Milliken*, 418 U.S. at 745, 750.

266. Myron Orfield, Milliken, Meredith, *and Metropolitan Segregation*, 62 UCLA L. REV. 363, 452 (2015).

267. OTTO KERNER ET AL., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 115–20 (1968).

268. *See* Schragger, *supra* note 199, at 1878.

269. See generally KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM (2005) for a description of the ideological connections between suburbanization and limited government. For the connections between suburbanization, limited government, and race, see DAVID M. P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 45–59 (2007).

270. *See supra* note 133 and accompanying text.

calculus. The suburbs—which had been underrepresented as well—now had more power.

For Jesse Unruh, the legendary Democratic politician and California state treasurer, that meant weaker cities instead of stronger ones. "You damn fools," Unruh berated Roy Schotland, as Schotland reports, in the aftermath of *Baker v. Carr*,

> [Y]ou think you're helping the cities. The cities were taking care of themselves; we can work things out with the agricultural areas—because they don't care what we do so long as it doesn't interfere with them. But you've shifted power to the suburbs—all they care about is keeping taxes down, and that means real trouble.[271]

Was Unruh right? In part, it seems so. A low-tax, low-services government is what many suburbanites wanted and have sought throughout the course of the second half of the twentieth century. At the beginning of the century, suburban areas sought annexation with the big city to receive better services and access to municipal wealth and power.[272] But that changed as municipalities were able to provide the services themselves and at a lower cost.[273] The annexation and incorporation battles of the midcentury reflected suburban resistance to city annexation efforts—animated in large part by fear of higher tax bills.[274] So too, the conventional story about twentieth-century tax revolts, starting with Proposition 13 in California, is that they had and have been mostly driven by suburban antitax sentiment. The tax and expenditure limitations adopted in almost every state have limited cities' revenue-raising ability significantly.[275] So too, suburbs' use of fiscal zoning to prevent high-cost newcomers from coming into the jurisdiction has raised the cost of metropolitan-area housing and has reduced the ability of lower income minorities to enter suburban neighborhoods.[276]

Of course, suburban development was never possible without significant government support. As already noted, the structure of education financing in the states, in which local schools are generally paid for with local dollars, induces local governments to limit development and generally favors suburban jurisdictions over urban ones. State law constraints on annexation prevent cities from expanding their borders and capturing suburban-tax-base

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271. Schotland, *supra* note 142, at 1505.

272. *See* GARY J. MILLER, CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION 34 (1981) (discussing cities looking to annexation as a means of expanding their population and resource base).

273. *See id.* at 58–60 ("I think it's a good place to live because the taxes are low and we furnish a lot of free services.").

274. *Id.* at 81–82 ("[T]he most basic and pervasive common denominator for incorporation was the avoidance of high property taxation.").

275. *See supra* notes 85–88 and accompanying text.

276. DOUGLAS S. MASSEY ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB 19–31 (2013).

growth. The ease of municipal incorporation and the ability to contract for local services allows small, suburban local governments to avoid the revenue demands of the big city while protecting their authority over land use and schools. One could also add the federal highway program, the mortgage interest deduction and other federal mortgage subsidies, development, and lending processes that favor the single-family, detached home.

The recitation of these suburban-shaping policies is familiar. But the ideology of antigovernment anti-urbanism is less appreciated.[277] That advocates of "small government" would reject big cities is almost definitional. Large cities require large municipal governments, the provision of expansive municipal services, and the raising of significant amounts of revenue. The provision of municipal services is expensive, and city government is often bureaucratic and wasteful. As Conn observes, city living also mandates tolerance of a certain collective, public life that appears to be antithetical to a tradition of rural or suburban individualism.[278] That individualism finds expression in a deep suspicion of government. If the "American way of life" includes private-property ownership, single-family homes, private-car ownership, and generally limited government, then city dwellers are not really American.[279] Against the backdrop of a limited government, pastoral, property-rights-based ideology, cities are inherently suspect.

D. Populist Anti-Urbanism

That suspicion appears to have found voice in a renewed populist anti-urbanism. The simmering alienation from the city has appeared in the form of a politics of urban resentment. Donald Trump's rhetoric during the campaign and thereafter, in particular, provided a dystopian view of the city—one that many commentators observed was out of touch with present realities. The President's anti-urban rhetoric did not create the backlash against the cities, but it has fanned the flames of a nascent populist anti-urbanism.

President Trump's view that cities are wasteful, violent, corrupt, and full of dangerous racial and ethnic minorities is not, as we have seen, unusual. His perception that cities are abysmally managed is also a long-standing trope. Speaking to a crowd in Dimondale, Michigan, on the 2016 campaign trail, then-presidential candidate Donald Trump summarized his prescription for American cities in a rhetorical statement: "You're living in poverty, your

277. Kruse's excellent book again provides a roadmap. *See generally* KRUSE, *supra* note 269.

278. *See* CONN, *supra* note 230, at 62.

279. *Id.* at 2; *cf.* Emily Badger & Quoctrung Bui, *Why Republicans Don't Even Try to Win Cities Anymore*, N.Y. TIMES (Nov. 2, 2016), https://www.nytimes.com/2016/11/03/upshot/why-republicans-dont-even-try-to-win-cities-anymore.html?mcubz=0 [https://perma.cc/7ASA-6KKF] (expounding the ways Republican candidates have characterized big cities as detached from "real America").

schools are no good, you have no jobs, 58% of your youth is unemployed—what the hell do you have to lose?"[280] As he echoed at multiple presidential debates against Hillary Clinton, President Trump asserted that American "inner cities are a disaster" filled with "the Latinos, Hispanics," and "the African Americans" living in a world where they "get shot walking to the store," "have no education," and "have no jobs."[281]

The racially inflected, violent city is not a new perception, but it is new to hear it so vocally articulated by a presidential candidate and then President who grew up in New York City and made his fortune in urban real estate. President Trump appears to subscribe to a reductive view of American cities: seeing them as distinguished from nonurban places by violence while wracked by policy mistakes and the failure of Democratic politicians to adequately meet their needs. In an exchange with Congressman John Lewis, President Trump tweeted that the Congressman should "spend more time on fixing and helping his district, which is in horrible shape" and "crime infested."[282] As President Trump put it, the Atlanta Congressman's "burning and crime infested inner-cit[y]" would best be served by his joining President Trump's policy agenda.[283]

Populist anti-urbanism usually leans to the political right. In the second half of the twentieth century, the Republican Party has generally been allied with anti-urban conservatives,[284] while the Democratic Party has been the party of big-city ethnic and minority groups and municipal unions. The New Deal coalition was an urban one; so too was the Democrats' civil-rights coalition of the 1950s and 1960s.

Even so, it is striking how complete the party split between cities and noncities has become in recent elections. Ted Cruz, the junior Texas Senator,

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280. Tom LoBianco & Ashley Killough, *Trump Pitches Black Voters: 'What the Hell Do You Have to Lose?'*, CNN (Aug. 19, 2016), http://www.cnn.com/2016/08/19/politics/donald-trump-african-american-voters/index.html [https://perma.cc/2394-TXLG].

281. Jenée Desmond-Harris, *Why Donald Trump Says "The" Before "African Americans" and "Latinos"*, VOX (Oct. 20, 2016), http://www.cnn.com/2016/08/19/politics/donald-trump-african-american-voters/index.html [https://perma.cc/2394-TXLG].

282. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 14, 2017, 4:22 PM), https://twitter.com/realDonaldTrump/status/820425770925338624 [https://perma.cc/HE5N-9EYM]; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 14, 2017, 6:50 AM), https://twitter.com/realDonaldTrump/status/820251730407473153 [https://perma.cc/Z6XM-QE3Y]. For more discussion, see Reena Flores, *Trump Blasts Civil Rights Icon John Lewis in Twitter Attack*, CBS NEWS (Jan. 14, 2017), http://www.cbsnews.com/news/trump-blasts-civil-rights-icon-john-lewis-in-twitter-attack/ [https://perma.cc/3QBL-2BKR].

283. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 14, 2017, 6:22 PM), https://twitter.com/realDonaldTrump/status/820425770925338624 [https://perma.cc/FX7J-JE7E].

284. KRUSE, *supra* note 269, at 254 (stating that President Nixon's support was based in the suburbs, not in urban areas); *see also* Kevin Baker, *How the G.O.P. Became the Anti-Urban Party*, N.Y. TIMES (Oct. 6, 2012), http://www.nytimes.com/2012/10/07/opinion/sunday/republicans-to-cities-drop-dead.html?mcubz=0 [https://perma.cc/8MAY-ALTZA] ("[T]he fact is that cities don't count anymore—at least not in national Republican politics.").

famously derided "New York values" in the 2016 Republican primary—a message to social and fiscal conservatives of where his own values lay.[285]

There is a reactionary history to this kind of populist anti-urbanism. At the turn of the twentieth century, the fear of ethnic masses animated anti-city sentiment. Professor Conn quotes the Reverend Josiah Strong's indictment of the city in his popular 1885 book *Our Country: Its Possible Future and Its Present Crisis*.[286] Strong's list of fears included immigration, Romanism, and socialism. "The City," however, is where "each of the dangers . . . [are] enhanced and all are focalized."[287]

In the 1920s and 1930s, anti-city sentiment had a regional flavor—southerners in particular attacked the large east-coast cities as part of a wider southern sectionalist agenda. As Edward Shapiro observes, "agrarians"—and others who called themselves "decentralists" or "distributists"—emphasized the pervasiveness of the conflict between rural and urban America, and argued that large-scale industrialization was leading to the concentration of property and political power into fewer hands, the dispossession of the propertied middle class of shopkeepers and small manufacturers, and the destruction of rural independence.[288] In their classic manifesto, *I'll Take My Stand*, published in 1930, the Southern Agrarians warned that the South was becoming an economic colony of the Northeast. Invoking a romanticized version of the South, they appealed to a Jeffersonian image of American yeoman greatness and urged a return to rural virtues. Radio personalities throughout the region joined the crusade against chain stores and northern bankers and industrialists, who they argued were putting the South "in chains."[289]

Trumpian anti-urbanism similarly shares a resentment of the big city, a fear of racial and ethnic difference, and a sense that urban policies and values are contrary to the values of the rest of America. It is not surprising that the most high profile state–city conflicts have involved immigration, guns, LGBT antidiscrimination, and environmental regulation. In Texas, Governor

285. Theodore Schleifer, *Ted Cruz Talks to New Yorkers About New York Values*, CNN (Mar. 24, 2016), http://www.cnn.com/2016/03/23/politics/ted-cruz-new-york-values/index.html [https://perma.cc/RR6H-5MBZ].

286. CONN, *supra* note 230, at 15 (citing REV. JOSIAH STRONG, OUR COUNTRY: ITS POSSIBLE FUTURE AND ITS PRESENT CRISIS 179–80 (1885)).

287. *Id.*

288. *See* Edward S. Shapiro, *Decentralist Intellectuals and the New Deal*, 58 J. AM. HIST. 938, 943 (1972).

289. *See* Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011, 1024–26, 1054 (2005). The continued salience of regionalism is amply illustrated by recent battles over the removal of Confederate monuments. A number of Southern states, including most recently Alabama, have adopted statutes barring local governments from removing Confederate statues and memorials. *See* Kasi E. Wahlers, Recent Developments, *North Carolina's Heritage Protection Act: Cementing Confederate Monuments in North Carolina's Landscape*, 94 N.C. L. REV. 2176, 2182 (2016).

Abbott said the state's new law banning sanctuary cities[290] was "doing away with those that seek to promote lawlessness in Texas."[291] Governor Abbott also called a special 2017 summer session of the legislature in part to consider legislation to restrict cities' powers.[292] "As your governor," Abbott has promised, "I will not allow Austin, Texas, to Californiaize the Lone Star State."[293] That city has engendered the Governor's particular antipathy. "As you leave Austin and start heading north, you start feeling different," Abbott has told appreciative audiences.[294] "Once you cross the Travis County line, it starts smelling different. And you know what that fragrance is? Freedom. It's the smell of freedom that does not exist in Austin, Texas."[295]

In North Carolina, the Governor at the time, Pat McCrory, called Charlotte's transgender antidiscrimination ordinance a "mandate on private businesses" that prompted the statewide debate about bathroom policy.[296] The North Carolina legislature's Republican leaders, Tim Moore and Phil Berger, said the city's policy was radical, had prompted the state to respond with its bathroom law in order to protect families, and ultimately had cost the city jobs.[297] A number of Texas pastors have supported a similar Texas ban, asserting that "[w]e are in the throes of a deliberate attempt to try to strip our nation from its Judeo-Christian heritage to the embracement of doctrines of

290. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (enacted).

291. Press Release, Greg Abbott, Governor, Office of the Tex. Governor, Texas Bans Sanctuary Cities (May 7, 2017), https://gov.texas.gov/news/post/Texas-Bans-Sanctuary-Cities [https://perma.cc/R5GD-X7UA]; *see also* Madlin Mekelburg, *Local Officials Fear State Retaliation over 'Sanctuary Cities' Lawsuits*, EL PASO TIMES (July 6, 2017), https://www.elpasotimes.com/story/news/politics/texlege/2017/07/06/local-officials-fear-state-retaliation-over-sanctuary-cities-lawsuits/444215001/ [https://perma.cc/E2J6-DQPZ].

292. Press Release, Greg Abbott, Governor, Office of the Tex. Governor, Governor Abbott Announces Special Session (June 6, 2017), https://gov.texas.gov/news/post/governor-abbott-announces-special-session [https://perma.cc/V7N4-XM6Y] (listing on the special session's agenda "[p]reventing cities from regulating what property owners do with trees on private land," "[p]reventing local governments from changing rules midway through construction projects," and "[s]peeding up local government permitting process[es]"); *see also* Sandhya Somashekhar, *Red States Try to Make Blue Cities Toe the Line*, WASH. POST, July 2, 2017, at A8 (including a Governor Abbott quote that "[i]t's the smell of freedom that does not exist in Austin, Texas").

293. *Id.*

294. *Id.*

295. Jonathan Tilove, *Gov. Abbott: Austin Stinks and So Does 'Sanctuary Sally'*, STATESMAN (June 6, 2017), http://www.statesman.com/news/state—regional-govt—politics/gov-abbott-austin-stinks-and-does-sanctuary-sally/goq6JEihda4PzADg2lOMgO/ [https://perma.cc/BK2J-LM9R].

296. Katie Zezima, *For Charlotte, an Unintended Fallout*, WASH. POST, May 11, 2016, at A3.

297. *Mayor Roberts' Radical Bathroom Sharing Ordinance Costs Charlotte PayPal*, PHIL BERGER (Apr. 5, 2016), http://www.philberger.org/mayor_roberts_radical_bathroom_sharing_ordinance_costs_charlotte_paypal [https://perma.cc/7UJ6-E7A9]; *see also* Jim Morrill, *NC's GOP Lawmakers Blame Charlotte Mayor Jennifer Roberts for Paypal Loss*, CHARLOTTE OBSERVER (Apr. 6, 2016), http://www.charlotteobserver.com/news/politics-government/article70074112.html [https://perma.cc/ERZ3-UZ8Z].

demons: socialism, communism, Marxism, Darwinism, secular humanism."[298]

An ongoing theme of populist anti-urbanism is the threat that wayward cities pose to the nation as a whole. As Trump's executive order claims, sanctuary jurisdictions and cities are causing "immeasurable harm to the American people and to the very fabric of our Republic" by failing to enforce federal immigration laws.[299] Remarking on violence in Chicago, President Trump tweeted that he would "send in the Feds" and give "federal help" unless the mayor ended the "horrible 'carnage.'"[300]

Social issues seem to evoke the strongest reactions. But economic issues may be more pertinent.[301] The Southern Agrarians were resisting the dislocations caused by the agricultural, industrial, and retail revolutions of the early twentieth century. Present-day anti-urban populism appears to be animated by a similar dissatisfaction with large-scale national and global economic processes.

The city is often associated—on both the political right and left—with these processes. The city is the location of corporate headquarters, large-scale global finance, and free-trade cosmopolitanism. Global trade benefits residents of certain large urban centers—global cities like New York, London, Tokyo, and Los Angeles. But open borders, immigration, and corporate finance are perceived as enemies of extractive economies in rural places and of declining midsized industrial cities. This seems to be a global phenomenon. Consistent with this political geography, the residents of London and its immediate environs voted overwhelmingly against leaving the European Union, while much of the rest of Britain voted to exit.

The economic gap between growing and diverse urban metropolises and declining and increasingly homogenous rural and smaller cities is reflected in a cultural and political gap.[302] Ironically then, the recent success of American cities has inaugurated heightened conflict between cities and states and between cities and the nation. The more wealthy and populous cities become, the more those conflicts will arise.

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298. Chuck Lindell, *Pastors Press for Transgender Bathroom Bill: 'Let the House vote'*, STATESMAN (Aug. 3, 2017), http://www.statesman.com/news/pastors-press-for-transgender-bathroom-bill-let-the-house-vote/tWvO8WgimYAsAGfDMMDo7I/ [https://perma.cn/9LF3-AHDG].

299. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

300. Nikita Vladimirov, *Trump: 'I Will Send in the Feds' if Chicago Doesn't Fix Violence*, HILL (Jan. 24, 2017), http://thehill.com/blogs/blog-briefing-room/news/315994-trump-i-will-send-in-the-feds-if-chicago-doesnt-fix-carnage [https://perma.cc/6KBK-KKNW].

301. *See* Nancy Isenberg & Andrew Burstein, *Cosmopolitanism vs. Provincialism: How the Politics of Place Hurts America*, HEDGEHOG REV., Summer 2017, at 58.

302. William H. Frey, *Census Shows Nonmetropolitan America Is Whiter, Getting Older, and Losing Population: Will It Retain Political Clout?*, BROOKINGS (June 27, 2017), https://www.brookings.edu/blog/the-avenue/2017/06/27/census-shows-nonmetropolitan-america-is-whiter-getting-older-and-losing-population/ [https://perma.cc/Z5VP-7EJD].

IV. City Defenses

The attack on American cities is driven by a combination of corporate deregulatory opportunism, culture-war hostility, and economic populism. The enduring nature of American anti-urbanism is notable. Despite the supposed "triumph" of the city in what some have called a "new golden age of the city,"[303] American cities are increasingly in a defensive posture, fending off broad-based attacks on their ability to govern.

What are potential city defenses? This Part begins by evaluating the legal arguments available to cities in resisting state centralization.[304] Litigating preemption cases using the frame of local home rule is often quite difficult in light of the limitations of those grants. Other city defenses involve deploying state or federal constitutional guarantees to protect local regulation. These efforts do not vindicate city power directly, and so risk winning the litigation battle but losing the conceptual war.

This Part then turns to the politics of city power. Federalism's anti-urban bias, the dominance of the suburbs, and the effects of political sorting cannot be undone with legal arguments. The cities' central defenses are political; cities need allies in the state legislature or in the governor's office. Whether this is possible may turn on large-scale demographic changes. Over the last few decades, central cities have seen their populations and economies stabilize and in some cases expand. At the same time, the United States has become a "metropolitan" country—its population and economic productivity increasingly located in large-scale, metro-area agglomerations. Both the "urban resurgence" and metropolitan growth have coincided with state–city conflict.

A. City Legal Defenses

Legal responses to the attack on city authority predictably begin with appeals to principles of federalism and home rule. The Supreme Court's federalism precedents provide some limit on federal overrides of municipal law, while state home rule provisions can sometimes serve as a resource against state legislative preemption. Both are fairly weak constraints on federal and state power, however.

1. Federalism.—Consider first federalism. Recall that the Court does not distinguish cities from states when considering federalism objections to federal lawmaking. The "state" officials in the *Printz* case, which held that

303. EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 2 (2011).

304. Some of this work has been done previously in law reviews and elsewhere, as the sources cited below indicate. The discussion that follows is informed by those sources as well as by conversations I have had with my local government law colleagues—especially those mentioned in the star footnote above. *See Legal Strategies*, *supra* note 107.

state officials cannot be "commandeered" by the federal government to administer federal law, were locally elected sheriffs.[305] Municipal law-making is no more or less immune from federal interference than state law generally—the Supreme Court does not draw a distinction between local and state for purposes of its commandeering and coercive spending doctrines.[306]

Donald Trump's threat to withhold funds from sanctuary cities thus is subject to constitutional restraints contained in the *Printz* line of cases as well as those enunciated most recently in *National Federation of Independent Business v. Sebelius*.[307] The federal government may not order local officials to directly enforce federal law or threaten states with the loss of funding in such a way that is coercive.[308] Courts have already ruled that Trump's sanctuary cities executive order violates both prohibitions.[309] The Tenth Amendment is a ready—if limited—tool for cities to use in resisting federal commands.

The cities' deployment of state sovereignty has serious pitfalls, however. For purposes of the Court's federalism doctrine, city officials are clothed with the sovereignty and dignitary interests of their states. But when state and municipal officials disagree, the Supreme Court's doctrine and rhetoric of state sovereignty reinforce state power. The constitutional principle of state sovereignty lends itself to the view that municipalities are "mere instrumentalities" of their states, without independent constitutional status, rights, or authority.[310] On this view, states can control, commandeer, or entirely eliminate their local governments. The rhetoric of state sovereignty stands as a barrier against the recognition of even a limited federal constitutional principle of local or municipal self-government.

There is no necessary reason why this should be so. Kathleen Morris has argued, for instance, that the federal constitutional doctrine of city status is untethered from state law.[311] States themselves treat their municipalities as more than mere instrumentalities under certain circumstances—the

305. Printz v. United States, 521 U.S. 898, 898 (1997).

306. Municipalities are treated differently from states for other purposes, however. Municipalities do not share the state's antitrust immunity. See Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 57 (1982). Also, a municipality is a "person" subject to suit under 42 U.S.C. § 1983. Monell v. Dep't of Soc. Servs. of the City of New York, 436 U.S. 658, 690–91 (1978).

307. 567 U.S. 519 (2012).

308. *Id.* at 585.

309. Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497, 508 (N.D. Cal. 2017); *see also* City of Chicago v. Sessions, No. 17-C-5720, 2017 WL 4081821, at *1 (N.D. Ill. Sept. 15, 2017) (granting Chicago's motion for preliminary injunction on conscription, but not coercion, grounds).

310. Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907); Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. CIV. RTS.-CIV. LIB. L. REV. 1, 3–5, 26 (2012) (describing the doctrine that resulted from the Supreme Court's holding in *Hunter v. City of Pittsburgh*, and challenging its soundness).

311. Morris, *supra* note 310, at 28.

recognition of home rule municipalities is an example.[312] Morris argues that the federal constitutional doctrine of city status should follow the states' lead—recognizing some forms of local autonomy where states already do so.[313]

A more far-reaching constitutional argument for a right of municipal self-government could be grounded in the Tenth Amendment's anti-commandeering principle. The Tenth Amendment reserves powers to the states and, separately, to the people, independent of the states.[314] Justices have observed on occasion that federalism guarantees serve as protections for popular sovereignty and not simply as guarantees of state sovereignty.[315] A right to local self-government has not been recognized by the Supreme Court. But the principles of the Tenth Amendment that reserve certain powers to the people could be interpreted to embody some form of constitutional home rule.

How would such an anti-commandeering principle apply? Consider SB4, the recently enacted Texas anti-sanctuary city provision that requires local officials to comply with federal immigration law on threat of civil and criminal liability.[316] Under existing Supreme Court precedent, federal immigration officials cannot order local police to spend money, allocate resources, or provide personnel to enforce federal law—this would be the unlawful commandeering of local officials under the Tenth Amendment.[317] So too under existing precedent, the state of Texas cannot spend money, allocate resources, or provide personnel to create its own parallel immigration-enforcement authority—that power is generally reserved to the federal government.[318]

SB4, however, compels local officials to enforce federal law despite these twin structural limitations on the location of immigration enforcement. If the protections of the Tenth Amendment run to the state of Texas, then one would assume that the state could waive this protection.[319] However, if the Tenth Amendment runs to the people, then Texas cannot force cities to do

312. *Id.* at 34.

313. *See id.* at 32–33, 43–44 (arguing that constitutional silence on local government status should lead to deference to state law).

314. U.S. CONST. amend. X.

315. New York v. United States, 505 U.S. 144, 181–82 (1992) (declaring Congress's "departure from the constitutional plan cannot be ratified by the 'consent' of state officials" because the constitutional division of power is for the benefit of the individual, not the State or state officials).

316. *See supra* note 102 and accompanying text.

317. *See* Printz v. United States, 521 U.S. 898, 935 (1997) ("Congress cannot compel the States to enact or enforce a federal regulatory program.").

318. Arizona v. United States, 567 U.S. 387, 394 (2012) (finding that the federal government has broad powers over immigration).

319. *But see New York*, 505 U.S. at 181–86 (rejecting the argument that consenting to infringement of state sovereignty may waive the protections of the Tenth Amendment); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

what the state or the federal governments cannot each do separately.[320] Local officials, in other words, could assert their own anti-commandeering objection in the relatively unique circumstance when the state and federal governments are separately disabled from acting. To allow them to overcome the anti-commandeering principle by acting in concert undermines an important check provided by the vertical separation of powers.

A municipal anti-commandeering principle would admittedly be novel—though the principle is sound if one assumes that the people act most immediately through their local governments. Courts have recognized that states do not exercise plenary power over their political subdivisions when federal law operates directly on those subdivisions, or when constitutional law requires some local freedom from state law commands. There is a limited "shadow doctrine" of local-government status that could be invoked to make out a larger anti-commandeering claim.[321]

That being said, a local anti-commandeering principle would require some judicial creativity. It is much more likely for cities to invoke federal law preemption to protect themselves against contrary state commands.[322] The leading argument against Texas's SB4 is that by deputizing local-government officials to enforce immigration laws, Texas has created an enforcement apparatus that is preempted by federal law. The federal primacy in immigration, the need for uniformity, and the problems of disparate local enforcement are standard arguments[323]—they are only unusual in the case of SB4 because the current administration will not bring them. The current administration *wants* Texas to commandeer local officials to enforce federal immigration laws. Many Texas cities, by contrast, do not want to become immigration enforcers for political as well as professional and public safety

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320. *Cf.* Bond v. United States, 564 U.S. 211, 222 (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

321. Richard C. Schragger, *Reclaiming the Canvassing Board:* Bush v. Gore *and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 395–96, 407–09 (2002). Local governments have been treated independently from their states in a number of contexts. *See* Lawrence Cty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 258 (1985) (holding that states cannot interfere with federal funds granted to localities); Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 53 (1982) (holding that local ordinances are not "state action" for purposes of the Sherman Act); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 & n.54 (1978) (holding that the Eleventh Amendment does not bar municipal liability); Milliken v. Bradley, 418 U.S. 717, 744–45 (1974) (holding that for federal constitutional purposes the relevant boundary lines for desegregation are local school districts and not states as a whole); Avery v. Midland Cty., 390 U.S. 474, 480 (1968) (holding that local governments must adhere to the "one person, one vote" principle); Louisiana *ex rel.* Folsom v. Mayor of New Orleans, 109 U.S. 285, 288 (1883) (ruling that a judgment against a locality cannot be collected from the state).

322. *See, e.g.*, City of El Cenizo v. Texas, 264 F. Supp. 3d 744, 758 (W.D. Tex. 2017).

323. *See id.* at 760–61, 769–70 (highlighting the cities' contentions that SB4 is preempted because it "generally upsets the careful balance . . . struck between encouraging local assistance and preserving local discretion," invades the federal government's "exclusive control of immigration," hinders the creation of uniform training and enforcement policies, and conflicts with federal law).

reasons.[324] These are good reasons, and courts should consider them when determining the legitimacy of SB4. But ultimately, the question turns on a conflict between state and federal law. Cities' invocation of federal law preemption is opportunistic.

2. Home Rule.—City recourse to federal preemption suggests how weak the concept of city self-government is as a conceptual matter. A more direct way to defend against state law preemption is via state constitutional home rule guarantees or via other state constitutional provisions that prevent the targeting of municipalities for special treatment. The difficulty, as I have noted already, is that most states have embraced a form of constitutional home rule that cannot resist explicit state law preemption.[325] Cities often have the power of initiative—they can adopt a wide range of legislation without prior authorization from the state. What cities do not often enjoy is the power of immunity—they cannot generally assert local law's supremacy over a duly and properly enacted state statute that conflicts.

It is for that reason that SB4 will be almost impossible to defeat on home rule grounds in Texas.[326] Other states can be slightly more amenable. Paul Diller has noted that approximately fifteen states provide for some degree of local legislative immunity, though most do so for structural or personnel matters alone.[327] Structural decisions are those that concern the form of local government—the number of city councilors and like issues. Personnel matters are decisions about the city's own employment practices, its hiring and firing policies. Most states do not provide for local regulatory or fiscal immunity—the kind of immunity most at issue in cases of state–city conflict.

In those few states that do, courts often have to determine whether a municipal ordinance is a matter of "local concern" immune from contrary state enactments.[328] In Colorado, for example, courts consider a number of factors, including the need for statewide uniformity and the impact of local policy on nonresidents.[329] Uniformity and extraterritoriality considerations often doom local legislation in anything but the narrowest sphere. As I already observed, local intervention to regulate cross-border markets is almost always going to have extraterritorial effects. By definition, such enactments will fail the standard tests for "local" legislation. In Colorado,

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324. For a discussion of the reasons that locals are better suited to enforce such laws, see Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 NYU L. REV. 698, 751–53 (2017).

325. *See supra* note 151 and accompanying text.

326. Texas home rule powers cannot be exercised on any matter that has been preempted by state law. *See* TEX. MUN. LEAGUE, HANDBOOK FOR MAYORS AND COUNCILMEMBERS 10 (2015) ("[H]ome rule cities look to the state constitution and state statutes to determine what they may not do." (emphasis omitted)).

327. Paul A. Diller, *Reorienting Home Rule: Part 2–Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1067 (2017).

328. *Id.* at 1068.

329. *Id.*

courts also look to "tradition" to determine the appropriate sphere of local authority.[330] This criteria too limits cities to those powers to which the state has already acceded.[331]

Generality requirements in state constitutions can have more teeth. In Ohio, for example, courts have struck down preemptive state legislation when it has not been part of a comprehensive, statewide enforcement scheme, did not operate uniformly across the state, or was essentially intended to override a local police-power regulation rather than replace it with the state's own conduct-regulating statute.[332] Ohio is an outlier, however. Most states' generality requirements are mere formalities; they merely prevent the legislature from specifically identifying a city for special regulation.[333]

Home rule provisions in state constitutions do not interpret themselves—there is often textual room to create more space for local authority. Courts, however, are generally wary of broad grants of local power. State court judges tend to be amenable to arguments for statewide uniformity. And because state judges tend to rise through state party political systems, their allegiance is unlikely to run to cities. State judges are by definition part of a statewide professional, political, and cultural apparatus. Many are elected and thus have to be responsive to a political party that is in turn responding to an increasingly polarized electorate.[334] If they are appointed, those judges are likely to reflect their appointer's political makeup.[335] To uphold the exercise of local authority where it matters, state judges have to resist the direct interests of the state legislature, and often their own policy proclivities.

That does not mean that state judges do not have some interest in the principle of home rule. In certain cases, that principle might override a judge's contrary policy preferences. But generally, judicial decisions distributing powers among different levels of government tend to reflect

330. *Id.*

331. *Id.* Also, tradition seems to be considered less important than other concerns of statewide impact. *See id.* ("Of the Colorado Supreme Court's factors, tradition perhaps is the most suspect.").

332. *See* City of Canton v. State, 766 N.E.2d 963, 964–65 (Ohio 2002) ("[G]eneral law[s under] . . . home rule analysis . . . must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.").

333. Diller, *supra* note 327, at 1073.

334. For a history of judicial elections, see JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 4 (2012).

335. *See, e.g.*, Michael Kiefer, *Brewer Fills Arizona Courts with Republican Judges*, ARIZ. REPUBLIC (Sept. 28, 2012), http://archive.azcentral.com/arizonarepublic/news/articles/2012/09/12/20120912brewer-fills-arizona-courts-republican-judges.html [https://perma.cc/8KUG-AEP7] (noting how Arizona has seen strong correlations between the political affiliation of its governors and appointed judges since 1991).

substantive policy commitments, as Laurie Reynolds has argued.[336] This is unsurprising: federalism decisions in the Supreme Court tend to break along partisan lines.[337] So too, one would expect policy preferences to infect the judicial determination of what is appropriately "local" and what is not.

3. Equal Protection.—In the absence of a clear and administrable procedural approach to the division of state and local authority, cities might instead assert substantive constitutional claims that generate a space for local authority. The preemption fight is generally stacked against the cities—their home rule authority is narrowly constrained by ostensibly "neutral" criteria. But local authority can be exercised in the form of constitutional litigation itself. Cities represent their constituents' constitutional interests directly or assert the city's own constitutional authority to protect.

Two kinds of litigation are relevant here. The first involves cases in which cities assert locals' constitutional rights. Starting about two decades ago, the San Francisco City Attorney's Office made a concerted effort to become an impact litigation arm of the municipal community.[338] Consistent with San Francisco's political agenda, the city attorney sought constitutional change through the courts, including and most prominently in pursuit of marriage equality in the years leading up to the same-sex marriage decision, *Obergefell v. Hodges*.[339]

City impact litigation is supported both as a legal and political matter in San Francisco, and the effectiveness and reach of that office have been difficult to reproduce elsewhere. California is particularly amenable to the bringing of municipal constitutional and statutory claims. Under California law, cities have standing to bring a wide range of actions on behalf of their residents.[340] The city attorney is elected, and has generally viewed his job as bringing constitutional claims on behalf of the city. City supported and funded litigation is a strategy for advancing local political aims. The

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336. Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. L. REV. 1271, 1292–93 (2009).

337. *See, e.g.*, Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 770 (2000) (concluding that the ideological aspect of federalism "predominates in the Supreme Court's federalism decisions").

338. *See* Kathleen S. Morris, *Cities Seeking Justice: Local Government Litigation in the Public Interest*, *in* HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE FACE OF POPULATION FLOWS, CLIMATE CHANGE AND ECONOMIC INEQUALITY 254, 254 (Ray Brescia & John Travis Marshall eds., 2016).

339. 135 S. Ct. 2584 (2015); *see also Dennis Herrera Re-elected by Voters as City Attorney*, CITY & COUNTY S.F. (Nov. 4, 2009), http://sfgov.org/tmp_home/newsarchive/sf_news/2009/11/dennis-herrera-reelected-by-voters-as-city-attorney.html [https://perma.cc/FUB3-B9ZL] (describing how the head of the San Francisco City Attorney's Office spearheaded the first government lawsuit challenging the constitutionality of laws banning same-sex marriage).

340. Morris, *supra* note 310, at 33 n.196.

constitutional injuries are not necessarily peculiar to San Francisco residents, but may have special resonance there.

A second type of litigation involves situations in which the absence or withdrawal of local authority is itself a structural component of the constitutional injury. Consider state takeovers of failing municipalities, as previously mentioned. City officials and local citizens have resisted such takeovers on the ground that they extinguish local electoral democracy—receivership laws generally suspend the authority of the mayor and city council and grant broad powers to a state-appointed official. In Michigan, as we have seen, state receivers have been appointed predominantly in majority-black cities, potentially giving rise to an equal protection claim.[341] Advocates have argued that these takeovers have a disparate impact on African-American residents of the state.

These kinds of claims are difficult to bring as they require the showing of animus under *Washington v. Davis*[342] and the standards articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[343] In *Lewis v. Bentley*, plaintiffs argued that the Alabama legislature acted with discriminatory intent when it preempted Birmingham's living wage law.[344] The plaintiffs claimed that preempting city wage minimums disproportionately affected African-American residents of the state and reinforced the existing racial wage gap that has persisted in Alabama since the Jim Crow era.[345] A federal district court rejected the equal protection claim—instead accepting that the legislature's stated justification of state wage uniformity was legitimate.[346]

School finance equalization litigation also involves a constitutional injury that turns on the capacity for local governments to adequately exercise local power. The original *Rodriguez* litigation asserted a violation of equal protection on the grounds that state systems like Texas's made it impossible

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341. Julie Bosman & Monica Davey, *Anger in Michigan over Appointing Emergency Managers*, N.Y. TIMES (Jan. 22, 2016), https://www.nytimes.com/2016/01/23/us/anger-in-michigan-over-appointing-emergency-managers.html [https://perma.cc/2GGP-GS2A] (describing local unhappiness in majority black cities over state appointments that they view as undemocratic and disenfranchising).

342. Washington v. Davis, 426 U.S. 229, 246–48 (1976) (stating that the need for discriminatory purpose for a validated equal protection claim); *see also* Lewis v. Bentley, No. 2:16-CV-690-RDP, 2017 WL 432464, at *1, *13 (N.D. Ala. Feb. 1, 2017) (rejecting an equal protection challenge to an Alabama statute overriding Birmingham's minimum wage ordinance).

343. 429 U.S. 252, 264–66 (1977) (requiring that racially discriminatory intent be shown to be "a motivating factor" in the state action and affirming that discriminatory impact alone is not dispositive proof of discriminatory intent).

344. *Bentley*, 2017 WL 432464, at *11.

345. For a discussion, see Brief for Partnership for Working Families and the Southern Poverty Law Center Supporting Applicants at 2–3, 5–6, 11–12, Lewis v. Alabama, No. 17-11009 (11th Cir. June 12, 2017), 2017 WL 2671579.

346. *Bentley*, 2017 WL 432464, at *11 (stating that plaintiffs did not allege facts showing intentional racial discrimination as required to support their equal protection claim).

for low-property-wealth school districts to raise the same funds as high-property-wealth districts for the same taxing effort.[347] After the *Rodriguez* Court rejected their federal claims, plaintiffs pursued similar claims under state constitutional education clauses, seeking additional funding for poorer school districts or the equalization of property-tax wealth across local jurisdictions.[348]

These kinds of cases empower local governments by way of vindicating equal protection guarantees. The most prominent case is *Romer v. Evans*.[349] In *Romer*, the Supreme Court held that Amendment 2, which barred Colorado local governments from adopting LGBT protective antidiscrimination laws, was unconstitutional—both because of its breadth and because it undermined the ability for local pro-gay majorities to gain protections in local jurisdictions with pro-gay majorities.[350] *Romer* relied in part on a line of Supreme Court cases from the civil rights era that struck down state or local electoral or procedural modifications that were designed to make it more difficult for African Americans to gain and exercise local political power.[351]

Before it was repealed, North Carolina's HB2[352]—the bathroom bill—had a similar structure to Amendment 2. In response to the city of Charlotte's adoption of a transgender bathroom ordinance that permitted individuals to use the public bathroom that corresponded with their gender identity, the legislature passed a law mandating that public bathrooms and changing facilities be restricted to individuals of their biological sex.[353] HB2 also barred the adoption of local antidiscrimination ordinances, but unlike Amendment 2 in Colorado, North Carolina's statute did not explicitly target pro-gay local ordinances for repeal. Instead, it merely preempted all local antidiscrimination laws with a statewide law that did not include LGBT persons as a protected class.[354]

Both Colorado's Amendment 2 and North Carolina's HB2 withdrew authority from local governments to adopt antidiscrimination legislation protecting vulnerable populations. Under conventional state-preemption analysis, these kinds of statutes are unremarkable. But *Romer* treats the

347. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 15–16 (1973).

348. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 391–93 (Tex. 1989).

349. 517 U.S. 620 (1996).

350. *Id.* at 633.

351. *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 487 (1982) (holding that states may not allocate government power nonneutrally by explicitly using a racial decision); Gordon v. Lance, 403 U.S. 1, 4 (1971) (distinguishing cases that struck down state laws for diluting a group's voting power); Hunter v. Erickson, 393 U.S. 385, 392–93 (1969) (determining that a municipal government may not enact policies that make it harder for a particular group to pass legislation benefitting it); Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (holding that states may not authorize private discrimination).

352. H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C.).

353. *Id.*

354. *Id.*

preemption of local authority as a component of the constitutional injury. At its broadest reading, *Romer* preserves a limited space for the exercise of local power free from state preemption.

In what circumstances a shift of decision-making authority from the local to the state would constitute an equal protection violation is uncertain. I have argued elsewhere that preemptive state legislation should be suspect when it overrides local laws that extend equal benefits to a normally unpopular group and when there are no good reasons for statewide regulation.[355] The combination of the absence of good reasons for centralized regulation, the unpopularity of the group, and the group's ability to obtain some measure of protection from local majorities will be indicative of statewide animus, an impermissible motive for government regulation.

HB2 seemed to share many of these characteristics. Charlotte's transgender bathroom ordinance applied only to public restrooms and changing facilities.[356] It did not have extraterritorial effects, did not upset the state's interest in uniformity, and did not regulate cross-border markets. The state legislation seemed driven by fear and misunderstanding of transgender persons and a sense of disgust associated with their use of restrooms and locker rooms. The exclusion of LGBT persons from state public-accommodation laws, when they had previously been included in some cities, also seemed gratuitous. As in *Romer*, the withdrawal of city-specific ordinances protecting LGBT persons seemed unwarranted by anything but hostility to an unpopular group that had gained some measure of equal treatment in sympathetic local jurisdictions.

To be sure, *Romer* is an enigma. The Supreme Court has not extended it beyond its currently narrow confines, and there are few cases applying it in a case of state–local conflict.[357] There is a fair amount of judicial work necessary to get from *Romer* to striking down statutes like HB2.

So too, a set of arguments would have to be developed to move from *Romer* to striking down a statute like Texas's SB4—which similarly preempts local authority to deal more equitably with a disfavored class. With SB4, the state could be accused of targeting Hispanic people or undocumented immigrants—again by overriding the policy gains they have made in particular cities where they have sympathetic majorities.

These arguments are latent in *Romer* itself, but too much can be made of the potential for equal protection challenges in defense of local autonomy.

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355. *See* Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 22 J.L. & POL. 147, 185 (2005). *But cf.* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1638 (2014) (plurality opinion) (rejecting a challenge to a Michigan constitutional amendment prohibiting state universities' use of race-based preferences).

356. CHARLOTTE, N.C., CITY CODE ch. 12, art. III, §§ 12-58 to -59 (2017).

357. An example of the Sixth Circuit adopting a localist reading of *Romer* can be found in Equal. Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289, 295 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998).

Equal protection precedents are available to cities that seek to defend against state overrides of local antidiscrimination statutes. But the current reach of these precedents is limited and does not offer a systematic path to real home rule.

B. City Political Defenses

HB2 is useful for analyzing the city's possible legal defenses to preemptive state legislation. But it is more relevant to examining the city's political defenses. Notably, HB2 was never tested in court—its repeal[358] short-circuited a full judicial hearing.[359] But that is representative—very little preemptive legislation is ultimately susceptible to legal challenge. Instead, city resistance normally takes place within the legislative arena, in fights over legislation and repeal.

These preemption fights illustrate some features of the current politics of state–city relations. First, local policy fights are never just "local"—they are often waged by national interest groups on both sides. The nationalization of state–local political fights makes them more difficult to resolve. Second, economic development interests exercise an outsized influence in state–city political battles, though that influence is selective. And third, while demographic changes are shifting wealth and power back toward the central city, metropolitan-area populations are often still overwhelmingly suburban.[360] City leaders will need to seek allies among those metropolitan populations in order to make headway in often hostile state legislatures.

1. Cities and National Interest Groups.—That the city has become a highly salient site for national battles over everything from fracking to LGBT rights to plastic bags is obvious from the long list of preemptive state legislation discussed in Part I. As I have argued, cities have always attracted the attention of state legislators. In the nineteenth and early part of the twentieth century, state legislative machines saw in cities both political and economic opportunities. Ideological and deregulatory political battles, by

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358. Corinne Segal, *What the North Carolina Legislation to Repeal the HB2 'Bathroom Bill' Actually Says*, PBS (Mar. 30, 2017), https://www.pbs.org/newshour/nation/watch-live-nc-legislature-debates-repeal-hb2-bathroom-bill [https://perma.cn/S8TM-U7HQ].

359. *Trial over North Carolina's Transgender Bathroom Law HB2 Delayed*, NBC NEWS (Sept. 3, 2016), https://www.nbcnews.com/feature/nbc-out/trial-over-north-carolina-s-transgender-bathroom-law-hb2-delayed-n642411 [https://perma.cn/BQ8A-8HNL]. Due to the trial being pushed back, the repeal in March of 2017 muted judicial review of HB2.

360. Jed Kolko, *How Suburban Are Big American Cities?*, FIVETHIRTYEIGHT (May 21, 2015), https://fivethirtyeight.com/features/how-suburban-are-big-american-cities/ [https://perma.cc/J22E-XEGZ] (explaining data showing that the recent growth of cities correlates not only with larger urban, but also suburban, populations).

contrast, generally have been fought at the national level, in the halls of the administrative state, and to a lesser extent in state houses.

Those fights continue. But in part because of state and federal inaction in particular regulatory arenas, and in part because political entrepreneurs have found opportunities at the local level, state–city conflicts have become increasingly salient.

A good example is the municipal living-wage movement and other pro-labor and anti-poverty efforts. These efforts have generally been spearheaded by national labor and anti-poverty groups working as part of a larger cross-city effort to regulate using the tools of municipal government.[361] At the same time, ALEC has made a concerted effort to promulgate model state legislation consistent with its industry-friendly, free-market positions.[362] As we have seen, ALEC has aggressively promoted a deregulatory agenda that seeks to override municipal business, licensing, or environmental regulation.[363]

That industry would seek to counter local regulation hostile to it is unsurprising. Regulated industries have long sought preemptive national or state legislation. As Lori Riverstone-Newell has observed, the tobacco and firearms industries successfully sought state protection from hostile local laws in the 1980s and 1990s.[364] As already noted, sharing economy firms, as well as telecommunications providers, have also sought blanket protective legislation at the state or federal level.[365] In these cases, the interests arrayed in favor of or against industry are national in scope—and the battle over a particular local regulation or a preemptive state law is part of a larger multistate political and policy fight.

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361. Steven Malanga, *How the "Living Wage" Sneaks Socialism into Cities*, CITY J. (Winter 2003), https://www.city-journal.org/html/how-%E2%80%9Cliving-wage%E2%80%9D-sneaks-socialism-cities-12397.html [https://perma.cc/4FGK-2UR3] (showing how the modern national living-wage movement arose out of a smaller movement in Baltimore in 1993, which is now a top-down countrywide force).

362. Molly Jackman, *ALEC's Influence over Lawmaking in State Legislatures*, BROOKINGS (Dec. 6, 2013), https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/ [https://perma.cc/H4JS-QM5U] (explaining how influential ALEC has been through its model legislation writing).

363. *Telecommunications Deregulation Policy Statement*, AM. LEGIS. EXCHANGE COUNCIL (Oct. 11, 2014), https://www.alec.org/model-policy/telecommunications-deregulation-policy-statement/ [https://perma.cc/Q5LR-LY7R].

364. Riverstone-Newell, *supra* note 23, at 405; *see also* Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won't Let Them*, N.Y. TIMES (July 6, 2017), https://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html [https://perma.cc/4YGN-68U4] (claiming current preemption laws have their genesis in the preemption laws that the tobacco industry and NRA lobbied for in the 1980s and 1990s).

365. Gerald B. Silverman, *Uber, Airbnb, Tech Companies Spend Big Bucks Lobbying in N.Y.*, BLOOMBERG (May 28, 2017), https://www.bna.com/uber-airbnb-tech-n73014451621/ [https://perma.cc/HJ7A-9AQP] (charting the rise in lobbying by tech firms in New York over the past three years).

The problem of legislative capture is apparent. State legislators often work part-time, are poorly paid, have limited staff, and have limited access to expertise. They depend heavily on interested parties to provide them with information. State legislative processes are notoriously opaque. At the same time, cities rarely have the resources to provide expertise, to marshal evidence, or to monitor state legislative activity or respond to proposed legislation. Only the largest cities have dedicated lobbyists in state capitols. And the organizations that represent cities within the state—Leagues of Municipalities or Leagues of Cities—tend to be fractured and weak.

The lack of a concerted municipal *qua* municipal voice in state–city preemption debates means that specific policy interest groups tend to drive intergovernmental relations. Charlotte's transgender access law thus becomes a statewide and nationwide flashpoint in the left–right culture wars over LGBT rights.[366] Similarly, municipal minimum wage fights and state anti-sanctuary city laws are ideological—reflecting the interests of national interest groups and national political conflicts.

The nationalization of local politics has been much remarked upon.[367] Local voters are increasingly voting their national political identity instead of identifiable local interests, and the paucity of pragmatic centrists in statehouses is increasingly apparent.[368] This may mean that the give-and-take of intrastate compromise politics is less likely to occur, and that what might have been viewed as a "city" or "rural" bill is now effectively an "issue" bill—deserving of no particular geographical deference. The rural or suburban legislator is less likely to give big city policymaking a pass under this regime. Those legislators are responding to voters who have stronger ideological than geographical commitments.

2. *Corporate Cosmopolitanism.*—HB2 in North Carolina is a good example of a local ideological fight that may have garnered less reaction in a less hyperpolarized and nationalized political environment. It is also an

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366. Mark Price, *Social Media Erupts as Charlotte Rescinds LGBT Rights Law in HB2 Trade Off*, CHARLOTTE OBSERVER (Dec. 19, 2016), http://www.charlotteobserver.com/news/local/article121747648.html [https://perma.cc/VJ3Z-3KKT] (describing the public reaction on Twitter over the HB2 controversy).

367. *See* Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 ELECTORAL STUD. 12, 15–16, 18 (2016) (arguing that the shift since the 1980s towards more and more negative partisanship has led to party loyalty and straight-ticket voting being dramatically more pronounced than before, which has in turn "nationalized" state and local elections). One implication of these voting patterns is that parties do not cater to the median voter at the state and local level. *See* David Schleicher, *Federalism and State Democracy*, 95 TEXAS L. REV. 763, 765–68 (2017).

368. Craig Fehrman, *All Politics Is National*, FIVETHIRTYEIGHT (Nov. 7, 2016), https://fivethirtyeight.com/features/all-politics-is-national/ [https://perma.cc/ML4F-MHPM] (charting the phenomenon of how local-level politics is starting to become increasingly polarized in a way that reflects the national political scene).

example of how economic development remains a central concern of state and local politicians and an important driver of policy.

In the case of HB2, the most significant political pressure groups were large-scale national corporations—specifically professional sports leagues. Charlotte is home to professional basketball and football teams and hosts professional golf tournaments. The National Basketball Association (NBA) and the National Collegiate Athletic Association (NCAA) in particular have been vocal about LGBT nondiscrimination, and both threatened to withdraw their tournaments and events from North Carolina locations.[369] Other companies threatened to suspend planned expansions in the state.[370]

Private, corporate boycotts as a means to induce policy change have been effective in a number of states. In addition to North Carolina, three states—Indiana, Arizona, and Georgia—have seen private businesses threatening to boycott in-state business over discriminatory state laws.[371] These efforts have generally been deployed in the context of LGBT antidiscrimination. In the case of HB2, back channel discussions between Charlotte and the legislature sought a compromise outcome to prevent the flight of high-visibility sports and entertainment events from the state and the city.[372] This pressure resulted in the repeal of HB2, accompanied by a moratorium on all municipal private-sector employment and public-accommodation ordinances until December 1, 2020.[373] As a result, Charlotte's antidiscrimination law was struck, but North Carolina's more far-reaching bathroom law was struck as well. Local power to adopt antidiscrimination ordinances was not vindicated, but it was not entirely preempted either.

Two observations are worth making. First, it is notable that the primary arguments against HB2 were economic and driven by the threat of corporate flight. Critics accused the legislature and governor of sacrificing the state's economic health to an ideological fight, and the threat of boycott and withdrawal was an effective inducement for the legislature to reconsider.

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369. *In Bitter Divide, Repeal of North Carolina LGBT Law Fails*, ESPN (Dec. 21, 2016), http://www.espn.com/college-sports/story/_/id/18329901/ncaa-nba-bans-north-carolina-remain-hb2-repeal-fails [https://perma.cc/MR26-PZHD].

370. Ryan Bort, *A Comprehensive Timeline of Public Figures Boycotting North Carolina over the HB2 'Bathroom Bill'*, NEWSWEEK (Sept. 14, 2016), http://www.newsweek.com/north-carolina-hb2-bathroom-bill-timeline-498052 [https://perma.cc/N58X-FRAA].

371. Sarah Parvini & Nigel Duara, *In Conservative Indiana, Bemusement Amid Boycott Threats over Religious Freedom Law*, L.A. TIMES (Mar. 28, 2015), http://www.latimes.com/nation/la-na-ff-indiana-religion-law-20150328-story.html [https://perma.cc/UW7K-KAJ3]; Maria Puente, *Hollywood Studios Threaten to Boycott Georgia If Controversial Law Signed*, USA TODAY (Mar. 24, 2016), https://www.usatoday.com/story/life/movies/2016/03/24/hollywood-studios-threaten-boycott-georgia-if-controversial-law-signed/82206760/ [https://perma.cc/KL97-DRTS].

372. Colin Campbell & Jim Morrill, *Lawmakers Vote Thursday on Deal to Repeal HB2*, CHARLOTTE OBSERVER (Mar. 29, 2017), http://www.charlotteobserver.com/news/politics-government/article141566264.html [https://perma.cc/59CB-4KN4].

373. H.B. 142, 2017 Gen. Assemb., Reg. Sess. (N.C.).

Cities like Charlotte are economic engines for their states, especially if those cities and their immediate surrounding metropolitan areas are homes to corporate headquarters and a high percentage of industry, corporate, and business leaders.

For cities, corporate "cosmopolitans" can be effective allies, though certainly not across the whole range of issues. Corporate officials' policy preferences on social issues may be more consonant with urban dwellers more generally. LGBT antidiscrimination, for example, may be both familiar to corporate decision makers and consistent with the corporate mission. Economic and regulatory issues, by contrast, may not be. Local regulatory and redistributive policies may find fewer corporate allies. If Charlotte was proposing a local minimum wage, it is likely the interests would line up differently.

Second, cities can more readily exercise power through alliances with statewide elected officials, who tend to be less ideologically polarized and more sympathetic to urban constituencies. As previously discussed, dense metropolitan areas are put to a disadvantage by state legislative gerrymandering. That disadvantage disappears in statewide races in which candidates have to appeal to voters from throughout the state. North Carolina is again an example. The Republican incumbent governor, Pat McCrory, who signed the bathroom bill, was defeated in a subsequent election in part because of his stance on the bill.[374] In many states with hostile state legislatures, city power is possible only through alliances with statewide elected officials, especially governors.

3. *Metro-Area Demographics.*—In the face of a hostile or somewhat hostile state legislature, the city's political influence will ultimately turn on the metropolitan-area population's identification with the city's interests. As commentators have observed, the large-scale agglomerations that make up the nation's MSAs drive state and national economies.[375] These census-defined regions are often centered on one or two large cities but are not coextensive with those cities. The city population is often dwarfed by the surrounding metropolitan-area population, which is located in suburban towns and smaller municipalities or in a large suburban county. Central cities

374. Colin Campbell, *McCrory Takes Parting Shots at HB2 Opponents, ACC as Cooper Becomes Governor*, NEWS & OBSERVER (Dec. 31, 2016), http://www.newsobserver.com/news/politics-government/state-politics/article123985324.html [https://perma.cc/7B98-Q38Z] ("He said HB2 likely played a major role in his election defeat, and he blamed the Charlotte City Council—which passed a nondiscrimination ordinance that prompted HB2—as well as the LGBT advocacy groups that backed economic boycotts of the state.").

375. *See* BRUCE KATZ & JENNIFER BRADLEY, THE METROPOLITAN REVOLUTION: HOW CITIES AND METROS ARE FIXING OUR BROKEN POLITICS AND FRAGILE ECONOMY 1–2 (2013).

have witnessed a revival over the last two decades. This urban resurgence has been more than matched by metropolitan-wide growth, however.

Metropolitan politics is complicated. In some places, city–suburb divisions still predominate. But as metro-area suburbs become increasingly dense and more ethnically diverse, the sociological, cultural, and economic lines between "city" and "suburb" are blurring. Whether this means that suburban voters will come to identify with city voters is another question. City leaders still have to convince metro-area residents that the city's health and welfare is in their interest.

Proponents of regional government have been making these kinds of arguments for some fifty years, urging suburban voters to ally with central cities to ensure that those cities are economically robust and that city neighborhoods are not in decline. Few suburbanites have been persuaded. Suburban voters have generally not been interested in consolidating school districts, sharing revenue with the central city, or creating regional planning or metro-wide governing bodies. The racial and economic divisions between city and suburb have generally been too deep to produce meaningful cooperation, let alone collective or regional government.

Two kinds of demographic shifts could auger a political change. The first is the rising wealth and economic primacy of the central city. As noted, the urban resurgence of the last few decades has led to population and economic gains in downtown business districts. The popularity of the city as a place for work, residence, and recreation gives the city some leverage, both in relation to the wider metro community and to the state as a whole. In Charlotte, for example, the city's site as a location for professional sports franchises provides it with some leverage in its negotiations with the legislature. Economically robust cities are more likely to be able to pursue social welfare legislation like the living wage, and also to be able to defend those policies against state objection. Simply having access to more stable municipal resources makes a significant difference in the political and fiscal life of the city. The less fiscally dependent the city is on the state, the more autonomy it can exercise.

The second demographic shift is the increasing economic diversity of the suburbs. As I have mentioned, the suburbs are becoming more ethnically diverse. They have also for some time been more economically diverse, often to their detriment. Struggling and poor suburban location are commonplace. Central cities are no longer the primary locations for the poorest metropolitan-area residents.[376] Alan Ehrenhalt has called this combination of

376. *See* Elizabeth Kneebone & Natalie Holmes, *U.S. Concentrated Poverty in the Wake of the Great Recession*, BROOKINGS (Mar. 31, 2016), https://www.brookings.edu/research/u-s-concentrated-poverty-in-the-wake-of-the-great-recession/ [https://perma.cc/5ZAQ-V8YQ] (observing that suburbs have the largest and fastest growing poor populations).

increased wealth in the central city and increased poverty in the suburbs "the great inversion."[377]

Does this "great inversion" imply city political strength? As I have already noted, the twenty-first-century reaction to urban resurgence seems in some cases to be resentment.[378] To the extent that non-metro or non-city populations are less connected to the expanding cosmopolitan economy, their interests will diverge from city dwellers.[379] Add to this a sense of cultural distance and one can immediately understand why state legislators might have the view that cities are lawless and have been "circumventing the process that's in place" or "overstep[ping] their bounds."[380]

To be sure, the state–city split reflects a Democratic/Republican split—and the fact that the ideological distance between the parties is significant and growing. For cities operating in such a political environment, the need for both corporate and metro-area allies is essential. The structural, cultural, and political anti-city biases are otherwise difficult to overcome.

Conclusion

The attack on the cities is not simply a function of present-day polarized American politics. Anti-urbanism is instead deeply embedded in the structure of American federalism, as I have been arguing. The relative weakness of the American city has often puzzled observers, who note that the U.S. constitutional system is otherwise highly decentralized. The puzzle is more explainable once one appreciates the political and cultural distinction between local autonomy and city power. The U.S. intergovernmental system supports local autonomy of a certain form; it does not support city power.

If one accepts this descriptive claim about the nature of American federalism, then one can proceed to ask why it matters. For some, the states' primacy in the constitutional system may be not only defensible but worthy of celebration. Others might find the Constitution's anti-urban bias to be troubling for reasons of equal treatment or because it generates disfavored policy outcomes.

In any case, the form that our current federalism takes requires justification. Home rule advocates at the turn of the twentieth century argued

377. ALAN EHRENHALT, THE GREAT INVERSION AND THE FUTURE OF THE AMERICAN CITY 1 (2012).

378. *See supra* subpart III(D); *see also* KATHERINE J. CRAMER, THE POLITICS OF RESENTMENT: RURAL CONSCIOUSNESS IN WISCONSIN AND THE RISE OF SCOTT WALKER (2016).

379. *See* William H. Frey, *Census Shows Nonmetropolitan America Is Whiter, Getting Older, and Losing Population: Will It Retain Political Clout?*, BROOKINGS (June 27, 2017), https://www.brookings.edu/blog/the-avenue/2017/06/27/census-shows-nonmetropolitan-america-is-whiter-getting-older-and-losing-population/ [https://perma.cc/VAD3-WRLP].

380. Reid Wilson, *GOP Aims to Rein in Liberal Cities*, HILL (Jan. 5, 2017), http://thehill.com/homenews/campaign/312766-gop-aims-to-rein-in-liberal-cities [https://perma.cc/5P34-G5JA].

that state dominance over the rising industrial cities was corrosive of accountable government, democratic transparency, good policy, and material advancement. Those arguments are familiar ones to both supporters of state-based federalism and those who would like to push federalism down to the city level.[381]

Another set of arguments in favor of federalism focuses on minority rights and the benefits of fragmented government. If the most consequential political and cultural divide of twenty-first-century America is the division between urbanites and non-urbanites, then state-based federalism will not be responsive. City power is necessary to vindicate the values of diversity, majority rule, and local self-government.

As American cities regain some of the economic vitality that they lost at midcentury, these kinds of arguments for home rule will exert more force. The emerging state–city conflicts are already evidence of a demographic and economic shift. Whether an urban-based home rule movement will be one result of this shift is an open question. Whether such a form of home rule will be so domesticated as to have little force is another.

381. *See* SCHRAGGER, *supra* note 120; *Panel Recap: Localism and Democracy*, CONSTITUTION IN 2020, http://www.constitution2020.org/taxonomy/term/19 [https://perma.cc/SUG9-7A2Z].

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A Baptism by Incentives: Curing Wildfire Law at the Font of Oil and Gas Regulation*

For over sixty years, wildland fires in the United States have been consuming American land to an ever-increasing extent:[1] from January 1 through March 31 of 2017 alone, over two million acres of U.S. earth were scorched by wildfires.[2] According to the U.S. Environmental Protection Agency, nine out of the ten years with the highest burned acreage counts on record in the United States have occurred within the past seventeen years.[3]

The cost of residential property destruction, both in terms of quantity and in terms of value, is one significant marker of just the human costs of wildfires. From 2002 to 2011, insured losses[4] related to wildfire totaled $7.9 billion, up 364.7% from the previous decade's total insured losses.[5] On at least one rendering, annual American property loss due to wildfire has been estimated to have increased by more than 22,000% between 1960 and the

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1. *See Total Wildland Fires and Acres (1960-2015)*, NAT'L INTERAGENCY FIRE CTR., https://www.nifc.gov/fireInfo/fireInfo_stats_totalFires.html [https://perma.cc/5WNK-9HAL] (reporting increasing rates of acreage burned by American wildfires); *see also Climate Change Indicators: Wildfires*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/climate-indicators/climate-change-indicators-wildfires [https://perma.cc/ZFS7-M8YS] ("The extent of area burned by wildfires each year appears to have increased since the 1980s.").

2. *Year-To-Date Statistics*, NAT'L INTERAGENCY FIRE CTR., https://www.nifc.gov/fireInfo/nfn.htm [https://perma.cc/85DM-75TR].

3. *Id.*

4. The term "insured losses" refers to the value of claim settlements between insurers and insureds. *See TRIA at Ten Years: The Future of the Terrorism Risk Insurance Program: Hearing Before the H. Subcomm. on Ins., Housing and Community Opportunity*, 112th Cong. 63 & n.2 (2012) (statement of Robert P. Hartwig, President & Economist, Insurance Info. Inst.) (discussing claim payouts by insurers to policyholders interchangeably with the term "insured losses").

5. LLOYD'S, WILDFIRE: A BURNING ISSUE FOR INSURERS? 20 (2013) (reporting $7.9 billion in insured losses during the period from 2002–2011 and $1.7 billion in insured losses during the preceding ten-year period).

early 2000s.[6] As global temperatures increase,[7] the costs of wildfires in terms of property damage are only likely to balloon in tandem.[8] Moreover, Americans continue to expand into the Wildland-Urban Interface (WUI),[9] an area defined as the "zone where natural areas and development meet."[10] At least with respect to certain "megafires"—enormous wildfires that consume over 100,000 acres[11]—property damage costs, stated in terms of insured

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6. *See* John W. Schoen, *Cost of Western Blazes Spreads Like Wildfire*, NBC NEWS (Aug. 22, 2013), http://www.nbcnews.com/business/cost-western-blazes-spreads-wildfire-6C10974725 [https://perma.cc/W7L5-26FY] (relating that annual insurance damage due to wildfires in the 1960s totaled around $3.5 million, whereas the same figure had jumped to $800 million by the 2000s). This estimate is ostensibly based on insured losses, although the author uses the term "insured damage." *Id.* The unadjusted median U.S. home value only increased roughly 1,000% from 1960 to 2000. *See Historical Census of Housing Tables: Home Values*, U.S. CENSUS BUREAU (June 6, 2012), https://www.census.gov/hhes/www/housing/census/historic/values.html [https://perma.cc/3UGU-DM2D] (reporting the unadjusted median U.S. home value as $11,900 in 1960 and $119,600 in 2000).

7. In the past fifty years, the global combined land and surface temperature has risen at double the rate at which it rose during the preceding 100 years; "all ten of the warmest years [on record] have occurred since 1997." INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 192–93 (Thomas F. Stocker et al. eds., 2013). Based on the best science available to date, the Earth's surface temperature is projected to rise continuously over the course of this century "under all assessed emission scenarios." INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT 10 (The Core Writing Team et al. eds., 2015).

8. Mark Fischetti, *How Much Do Wildfires Cost in Terms of Property Damage?*, SCI. AM. (May 27, 2011), https://www.scientificamerican.com/article/graphic-science-how-much-do-fires-cost-property-damage/ [https://perma.cc/P2GP-GD7C]. Three variables go into the calculus of future ballooning costs. The first variable is rising temperatures, as documented above, combined with less precipitation in drier areas that already suffer from increased wildfire risk. *See* Met Office & Duncan Clark, *How Will Climate Change Affect Rainfall?*, GUARDIAN (Dec. 15, 2011), https://www.theguardian.com/environment/2011/dec/15/climate-change-rainfall [https://perma.cc/Z8YN-FKFW] (estimating that "in a warmer climate heavy rainfall will increase and be produced by fewer more intense events" as a result of climate change, which "could lead to longer dry spells and a higher risk of floods"). A drier, hotter climate means drier wood, which will cause wildfires to burn hotter and longer. The second and third variables impacting ballooning fire-suppression costs are the lack of effective suppression strategies and the lack of effective cost-control measures relating to wildfire.

9. As of 2010, one in three homes in the lower forty-eight U.S. states was located in the WUI, and U.S. Forest Service statistics as of 2015 showed "continued expansion of housing development near forests." *As Wildfires Continue to Burn, New Maps Show* [sic] *Expansion of Wildland-Urban Interface*, U.S. DEP'T OF AGRIC. (Sept. 10, 2015), https://www.usda.gov/media/press-releases/2015/09/10/wildfires-continue-burn-new-maps-shows-expansion-wildland-urban [https://perma.cc/4FR5-F73P]. One serious issue that appears to be the source of a sizeable portion of the turmoil in the WUI is the general lack of land-use planning in the WUI by either county or municipal governments. *See* HEADWATERS ECON., SOLUTIONS TO THE RISING COSTS OF FIGHTING FIRES IN THE WILDLAND-URBAN INTERFACE 61 (2009) (listing a lack of land-use planning regarding fire at the county level as a factor which will lead to a wildfire problem of a much greater magnitude in the future, in conjunction with a warming climate and increasing pressure to develop land).

10. *Wildland Urban Interface*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/fire/living_with_fire/wildland_urban_interface.shtml [https://perma.cc/LNQ6-KL2B].

11. David A. Graham, *Just How Bad Is the 2015 Fire Season?*, ATLANTIC (Sept. 15, 2015), https://www.theatlantic.com/national/archive/2015/09/just-how-bad-is-the-2015-fire-season/405439/ [https://perma.cc/72FH-ZXT6].

losses,[12] are significantly greater than fire-suppression costs.[13] On top of property damage, wildfires destroy large swaths of habitat acreage and claim the lives of countless animals.[14]

Aside from the destruction of monumental amounts of land, property, and lives, wildland-fire-suppression efforts are exceedingly expensive. At the federal level, annual wildfire-suppression costs have topped $1 billion in thirteen out of the past sixteen years.[15] At the state level, in 2014—the most recent year for which comprehensive statistics on state fire-suppression efforts are available—state forestry agencies across the United States collectively spent $1.98 billion on wildland fire programs.[16] At the local level, municipal governments generally enact local ordinances based on the model codes adopted by their states; these ordinances are not typically written up as formal statutes.[17] To further fuel the wildfire problem, fire-suppression efforts appear to be at best tainted by inefficiency,[18] and at worst may be the product of distilled self-interest.[19]

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12. *See supra* note 4 and accompanying text.

13. *See* Bettina Boxall, *San Diego County's 2003 Wildfire Losses Top $2 Billion*, L.A. TIMES: GREENSPACE (July 13, 2009), http://latimesblogs.latimes.com/greenspace/2009/07/san-diego-countys-2003-wildfire-losses-top-2-billion.html [https://perma.cc/9WZP-G9KU] (stating that wildfire-suppression expenses related to the 2003 Southern California fires totaled under 2% of the $2.4 billion fire-related costs, and the "insurance industry paid an estimated $1.1 billion in property claims").

14. *See* Laura Zuckerman, *Massive Wildfires in U.S. Northwest Destroyed Habitats, Threaten Wildlife*, SCI. AM., https://www.scientificamerican.com/article/massive-wildfires-in-u-s-northwest-destroyed-habitats-threaten-wildlife/ [https://perma.cc/M3M9-4A8B] (reporting on multiple wildfires that collectively claimed hundreds of thousands of acres of forestland, killing dozens of wild horses and charring the habitats of rare birds, including the greater sage-grouse).

15. *Federal Firefighting Costs (Suppression Only)*, NAT'L INTERAGENCY FIRE CTR., https://www.nifc.gov/fireInfo/fireInfo_documents/SuppCosts.pdf [https://perma.cc/N6EV-UHTM].

16. *State Foresters by the Numbers*, NAT'L ASS'N ST. FORESTERS 10 (2015), http://stateforesters.org/sites/default/files/publication-documents/2014%20State%20Foresters%20by%20the%20Numbers%20FINAL.pdf [https://perma.cc/5AMP-CX76].

17. Terry K. Haines et al., *A Review of State and Local Regulation for Wildfire Mitigation*, *in* THE ECONOMICS OF FOREST DISTURBANCES: WILDFIRES, STORMS, AND INVASIVE SPECIES 273, 275–76, 280 (2008). As localities do not generally appear to enact robust fire regulations distinct from their respective states' regulations, this Note does not significantly address them.

18. *See* Karen M. Bradshaw, *Backfired! Distorted Incentives in Wildfire Suppression Techniques*, 31 UTAH ENVTL. L. REV. 155, 172 (2011) (discussing government action in a monopoly-power context, which is "especially susceptible to incentives that have little bearing on economic efficiency").

19. *See* Julie Cart & Bettina Boxall, *Air Tanker Drops in Wildfires Are Often Just for Show*, L.A. TIMES (July 29, 2008), http://www.latimes.com/local/la-me-wildfires29-2008jul29-story.html [https://perma.cc/S5ZQ-ETAQ] (arguing implicitly that the empirical reality of "[i]ncreased use of aircraft . . . driv[ing] up the cost of fighting wildfires" is due at least partially to political interests and the fact that "Americans have become conditioned to think officials aren't taking a fire seriously until they unleash a ferocious aerial attack").

On top of cost and human error, the fragmented ownership of firesheds gives rise to the deeper error of the collective-action problem.[20] Given the relatively small financial status of each homeowner in the WUI, homeowners gain little value from bargaining with either industrial landowners or other homeowners.[21] In short, the "heterogeneous preferences" present throughout the WUI lead to a world in which contracting for wildfire-risk reduction is limited.[22]

Published authors and academics in the realm of domestic wildfire policy mince no words. Some authors have decried widespread American fire-suppression tactics as ineffective at decreasing wildfire severity;[23] others have criticized the U.S. federal wildland firefighting complex as "rife with incentive problems."[24]

One primary flaw with modern wildfire law and policy in the United States is the fact that neither recognizes the nature of firesheds as commons.[25] Firesheds are defined as "areas of similar wildfire threat where a similar response strategy could influence the wildfire outcome," and are "conceptually analogous to watersheds"[26]—natural catchments that drain water to a common source.[27] At the time of this writing, state and federal lawmakers have done little to address wildfires in the United States as a

20. *See* Karen Bradshaw Schulz & Dean Lueck, *Contracting for Control of Landscape-Level Resources*, 100 IOWA L. REV. 2507, 2539 (2015) ("Wildfire urban interface areas are so fragmented that bargaining transaction costs and collective action problems outweigh benefits of landscape-level planning."). As a result of fragmentation, a feature of firesheds generated by homeowners' relatively weak financial positions, homeowners in the WUI rarely engage in contracting as a means of addressing the problem of wildfire and the task of protecting themselves and their property against it. *Id.*

21. *Id.*

22. *Id.*

23. *See, e.g.*, Kelsey Ray, *Is Aerial Firefighting Worth It?*, HIGH COUNTRY NEWS (Aug. 3, 2015), http://www.hcn.org/issues/47.13/after-a-record-setting-wildfire-a-washington-county-prepares-for-the-next-one/the-cost-benefit-analysis-of-aerial-firefighting [https://perma.cc/7HBJ-Z46Z] (addressing a 2011 study "that found [aerial] retardant use had no effect on wildfire size or initial attack success rates").

24. Dean Lueck & Jonathan Yoder, *The Economic Foundations of Firefighting Organizations and Institutions*, 113 J. FORESTRY 291, 292 (2015).

25. *See* Dean Lueck, *Common Property as an Egalitarian Share Contract*, 25 J. ECON. BEHAV. & ORG. 93, 93–94 (1994) (questioning the popular claim that natural resources are "common property which dissipate[] wealth" and arguing that common property can be justified based on contractual agreements); *see also* Schulz & Lueck, *supra* note 20, at 2511 & n.11 (positing that an area "of shared public–private control" can be conceptualized as a "semi-commons").

26. Bernhard Bahro et al., *Stewardship and Fireshed Assessment: A Process for Designing a Landscape Fuel Treatment Strategy*, *in* U.S. DEP'T OF AGRIC., PSW-GTR-203, RESTORING FIRE-ADAPTED ECOSYSTEMS: PROCEEDINGS OF THE 2005 NATIONAL SILVICULTURE WORKSHOP (Robert F. Powers ed., Jan. 2007).

27. *What Is a Watershed?*, U.S. GEOLOGICAL SURV., https://water.usgs.gov/edu/watershed.html [https://perma.cc/PW4P-V2X5].

general proposition,[28] much less put forth any serious effort to generate an effective policy in the fireshed: one that sophisticates current wildfire risk reduction efforts *ex ante* and evolves along with relevant science and knowledge on the subject of wildfires.

This Note argues in favor of state enactment of statutory schema that would allow private landowners to "pool"[29] and "unitize"[30] their interests in risk-reductive land management. With these statutes, states would be able to combat the predictably devastating and ubiquitous problem of wildfire, while curbing deleterious landowner impulses in the fireshed that—in terms of both current policy and practice—have imposed costs additional to the costs of suppression and property damage themselves. Under forced-pooling and compulsory-unitization statutes, landowners would be able to cut into a number of costs[31]—most notably, property-destruction and wildfire-suppression costs—by decreasing the likelihood that small fires ever gain the geophysical momentum necessary to become megafires.[32] In addition to aligning incentives for private landowners to reduce wildfire fuel sources on their property, which will be explored in Part IV of this Note, state regulations derived from forced-pooling and compulsory-unitization[33] regimes would shape the conception of wildfires as common-pool resources. States, rather than localities or the federal government, are best situated to regulate private land management with respect to wildfires, and thereby introduce the proper incentives to overcome the collective-action problem associated with fragmented ownership of firesheds.[34]

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28. *See* Karen M. Bradshaw, *A Modern Overview of Wildfire Law*, 21 FORDHAM ENVTL. L. REV. 445, 446 (2010) (stating "little legislative effort has been made to understand or stem the causes of wildfire spread and funding increases," although wildfire-cost reduction poses a challenge exceedingly amenable to a public-policy solution).

29. For the purposes of this Note, a "pool" is "[a]n association of individuals or entities who share resources and funds to promote their joint undertaking . . . ." *Pool*, BLACK'S LAW DICTIONARY (10th ed. 2014).

30. In the context of oil and gas, "unitization" refers to "[t]he collection of producing wells over a reservoir for joint operations such as enhanced-recovery techniques." *Unitization*, BLACK'S LAW DICTIONARY (10th ed. 2014).

31. Bradshaw, *supra* note 28, at 461 (describing homeowner losses additional to decreased home values, including forced evacuation, subjection to "smoke-affected air or water systems," and "economic downfall" in homeowner communities).

32. *See Hazardous Fuel Reduction*, NAT'L PARK SERV., https://www.nps.gov/fire/wildland-fire/learning-center/fire-in-depth/hazardous-fuel-reduction.cfm [https://perma.cc/SZ36-QPJL] (discussing wildfire fuel reduction, which can include "[t]hinning trees, removing underbrush, and limbing trees," as a proven means of "mitigating wildfire hazards" and decreasing the severity of wildfires generally).

33. Understandably, the terms *forced-pooling* and *compulsory unitization* may raise hairs on the back of the necks of certain state legislators, given the coercive ring they carry. However, the prevalence of these terms within the nomenclature of the statutory regimes crafted by the hydrocarbon-producing states that first developed these statutes warrants this Note's use of the statutes' common titles.

34. From a legislative standpoint, this is due to the Trump Administration's antiregulatory stance, embodied most cohesively in the policy of slashing two federal regulations for every new

To the end of arguing in favor of the enactment of land management statutory regimes descended from forced-pooling and compulsory-unitization regimes in oil and gas law—as well as a number of ancillary policy proposals aimed at smoothing out incentives in the fireshed—this Note will be divided into six Parts. First, it will canvass contemporary U.S. federal wildfire policy. Second, it will address legal scholarship on the topic of wildfire law and policy. Third, it will examine contemporary state legislative efforts to regulate private land management prior to the start of a wildfire. Fourth, this Note will demonstrate the ways in which state forced-pooling and compulsory-unitization regimes as they operate in the oil and gas industries would augment the efficiency—and thereby increase the effectiveness—of current efforts to reduce the incidence of, and costs associated with, large wildfires throughout the United States. Fifth, it will flesh out policy proposals that would work well in conjunction with oil and gas statutory derivatives to curb perverse incentives within the fireshed. Sixth, this Note will conclude by restating salient analytic points and offering closing remarks.

I. Overview of U.S. Federal Wildfire Policy

Elaborating further on the WUI, one author has described the region as inclusive of virtually all municipalities "bordering public lands."[35] Tracking the population boom in these areas, wildland fires have increased in temporal length, occurrence, and size, all in recent years.[36]

George W. Bush signed a bill into law in the early 2000s that ostensibly provided for wildfire risk reduction—the Healthy Forests Restoration Act (HFRA), based on his "Healthy Forests Initiative."[37] The Act requires at least half of funding allocated for "hazardous fuel reduction" to be spent on federal land management projects in the WUI.[38] The regulation represented a

federal regulation enacted. *See* Bourree Lam, *Trump's "Two-for-One" Regulation Executive Order*, ATLANTIC (Jan. 30, 2017), https://www.theatlantic.com/business/archive/2017/01/trumps-regulation-eo/515007/ [https://perma.cc/FDX5-6ZFV] (exploring the implications of President Trump's campaign promise of "requir[ing] federal agencies to cut two existing regulations for every new regulation they implement").

35. Jamison Colburn, *The Fire Next Time: Land Use Planning in the Wildland/Urban Interface*, 28 J. LAND RESOURCES & ENVTL. L. 223, 240 (2008). The federal government has defined the "Interface Community" as lands "directly abut[ting] wildland fuels," which usually contain "3 or more structures per acre" and offer "shared municipal services." Urban Wildland Interface Communities Within the Vicinity of Federal Lands that Are at High Risk from Wildfire, Notice, 66 Fed. Reg. 751, 753 (Jan. 4, 2001).

36. U.S. DEP'T OF AGRIC., *supra* note 9.

37. *See* WHITE HOUSE, HEALTHY FORESTS: AN INITIATIVE FOR WILDFIRE PREVENTION AND STRONGER COMMUNITIES, https://georgewbush-whitehouse.archives.gov/infocus/healthyforests/ [https://perma.cc/4K53-XXAT] (describing the purpose of the HFRA as "reduc[ing] the threat of destructive wildfires while upholding environmental standards and encouraging early public input during review and planning processes").

38. 16 U.S.C.A. § 6513(d)(1)(A) (2016).

significant step toward addressing the role of fuel sources in hiking up wildfire-suppression costs. With the HFRA, the federal government began aiming at the right target with respect to wildfire prevention.[39]

President Obama further fleshed out federal efforts to incentivize reasonable land management with the end goal of preventing more wildfire damage *ex ante*. The Four Forest Restoration Initiative (4FRI)—a 2011 project aimed at "restor[ing] wildlife to 2.5 million acres of ponderosa pine forests"—provided a model for an *ex ante* wildfire-prevention effort.[40] Perhaps the most significant aspect of the 4FRI from the perspective of *ex ante* wildfire prevention was its ability to forge public–private connections between disparate stakeholders in the WUI.[41]

While both President Bush and President Obama performed important work in terms of shifting the Forest Service's wildfire policy focus from *ex post* suppression to *ex ante* mitigation, the implementation phases of the HFRA and the 4FRI have ultimately amounted to failed efforts. With regard to the HFRA, the Forest Service under President Bush apparently disregarded the provision requiring half of the funding for fuel reduction to be spent on projects within the WUI.[42] Perhaps due to the unflattering results of the 2004 review of HFRA implementation, the Forest Service does not appear to have reprised this review in the ensuing thirteen years.[43] President Bush's efforts to reduce wildfire fuel in the United States appear to have been little more than legislative smoke and mirrors.

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39. That is, placing emphasis on *ex ante* wildfire prevention, rather than maintaining the time-honored emphasis on *ex post* wildfire suppression. *See* Charles Wilkinson & Daniel Cordalis, *Heeding the Clarion Call for Sustainable, Spiritual Western Landscapes: Will the People Be Granted a New Forest Service?*, 33 PUB. LAND & RESOURCES L. REV. 1, 11–12 (2012) (discussing the HFRA, which signaled a shift from "fighting fires to preventing them" and has "fit comfortably within . . . the new restoration emphasis of the Forest Service"). In 2009, Congress further crystallized the preventative approach by passing the Collaborative Forest Landscape Restoration Act, which offers funding for "landscape-level forest restoration projects" that pass muster according to an advisory committee. Martin Nie & Peter Metcalf, *National Forest Management: The Contested Use of Collaboration and Litigation*, 46 ENVTL. L. REP. 10,208, 10,210 (2016).

40. Schulz & Lueck, *supra* note 20, at 2538. The project proceeded at a "slow and controversial" pace. *Id.*

41. *See id.* at 2539 (discussing the option for "fragmented landowners" to negotiate agreements and thereby "reduce risk and invest in *ex ante* prevention").

42. Brett M. Paben, *The Collaborative Forest Landscape Restoration Program: A Panacea for Forest Service Gridlock or a New Name for Old Saws?*, 20 BUFF. ENVTL. L.J. 107, 125–26 (2013) (claiming critics' distrust of the HFRA was "not misplaced," and the HFRA is a bit of a handout to logging interests).

43. *See* U.S. DEP'T OF AGRIC. OFFICE OF INSPECTOR GEN. SOUTHEAST REGION, Report No. 08601-6-AT, AUDIT REPORT: IMPLEMENTATION OF THE HEALTHY FORESTS INITIATIVE 8 (Sept. 6, 2006), https://www.usda.gov/oig/webdocs/08601-6-AT.pdf [https://perma.cc/23WM-XHSV] (discussing a 2004 independent review of HFRA implementation, which described the acreage "treated adjacent to or within the WUI" as "limited" and found that "[p]riority was not given to the area where the risk to the community was greatest (the WUI)"). Incidentally, this audit effectively vindicated HFRA detractors' concerns that the Act was "an excuse to increase logging, weaken environmental protections and reduce public input." Paben, *supra* note 42, at 125–26.

There is no reason to believe federal efforts to reduce fuel sources within the WUI grew more robust during President Obama's two terms, despite the measured success of the 4FRI.[44] The federal government's actions to date have not effectively ameliorated the growing wildfire problem. Regardless of the animus behind the federal government's general lack of emphasis on *ex ante* fire prevention in terms of implementing facially robust statutes and programs,[45] the dearth of serious federal efforts to reduce wildfire risk is problematic. Given the perpetual penetration of American individuals and communities into the WUI, a trend that is only likely to increase in severity,[46] the wildfire problem will quite likely become exponentially worse in coming years.

II. Contemporary State Efforts to Regulate Private Land Management

In the style of their federal counterpart, state legislatures have done precious little to incentivize reasonable private land management in firesheds. While many states have enacted laws regulating private landowner behavior once a wildfire starts,[47] few states regulate private land management with respect to wildfire fuel reduction outside of the logging context and related landowner activities.[48] No states regulate private land management *ex ante* as the practice relates to "unmanaged natural vegetation growth."[49] Only two states, Oregon and Washington, have chosen to regulate private

44. *See* Nie & Metcalf, *supra* note 39, at 10,210 (discussing the HFRA's requirement of forming collaborative, community-based wildfire-prevention schemes and the continuation of "collaborative approaches to forest restoration" that marked the Obama years).

45. Professor Bradshaw of Arizona State University has posited that the relaxation of land management standards after the flames begin incentivizes the shift from *ex ante* to *ex post* handling of wildfires at the federal level. Bradshaw, *supra* note 28, at 454.

46. Based on statistical modeling grounded in growth trends over time, researchers estimated in 2000 that the WUI will increase from its size of 465,614 km^2 in 2000 to 513,670 km^2 by 2030. David M. Theobald & William H. Romme, *Expansion of the US Wildland–Urban Interface*, 83 LANDSCAPE & URB. PLAN. 340, 349–50 (2007).

47. Amanda Hemmerich, *From Fire Comes Life: Why Courts Assessing Forest Fire Damages Should Recognize Ecological Benefits*, 46 ENVTL. L. REP. 10,608, 10,612 (2016).

48. Massachusetts is one state that evidently does regulate land management with respect to all land uses that involve clearing and cutting brush and trees. *See* MASS. GEN. LAWS ANN. ch. 48, § 16A (West 2015) (requiring "[e]very owner, lessee, tenant or occupant of lands, . . . [to] dispose of the slash caused by [brush, wood, or timber] cutting"). By contrast, many states only require the disposal of slash that results exclusively from commercial operations. *See, e.g.*, N.H. REV. STAT. ANN. § 227-J:10 (West 2017) (setting out slash-disposal requirements for individuals who engage in timber operations on New Hampshire land); *see also* MONT. CODE ANN. § 76-13-407 (West 2017) (outlining slash-clearing requirements for anyone clearing rights-of-way for any "transmission or transportation utility").

49. Jonathan Yoder, *Liability, Regulation, and Endogenous Risk: The Incidence and Severity of Escaped Prescribed Fires in the United States*, 51 J.L. & ECON. 297, 307 n.15 (2008). Yoder describes existing statutory regimes for handling timber slash as illustrative of the proposition that "liability is more readily applied to cases in which discrete action rather than inaction is involved in an increase in risk." *Id.*

landowner behavior *ex post* by collecting "suppression costs" from negligent land managers once a fire begins.[50]

Out of all fifty U.S. states, only Oregon and Washington appear to have private land management statutes on the books with any real teeth. In Oregon, the Forestland-Urban Interface Fire Protection Act of 1997 provides for the ability of Oregon to "collect up to $100,000 in suppression costs from a WUI . . . landowner."[51] Three circumstances must be present before the state's ability to collect costs from a private landowner kicks in: (1) the wildfire started on the landowner's property; (2) "the fire spreads within the protection zone around a structure and driveway that does not meet the [fuel reduction] standards"; and (3) the Oregon forestry department "incurs extraordinary costs to suppress the fire."[52] Interestingly, the $100,000 limit can be exceeded if the investigation reveals the WUI landowner was negligent in starting the fire.[53] On its website, the State of Oregon describes the statute as intended to enlist "the aid of property owners to turn fire-vulnerable" areas "into less-volatile zones" in which firefighters will be able to "safely and effectively defend homes from wildfires."[54]

In Washington, section 76.04.495 of the Washington Code provides for uncapped cost recovery from persons, firms, or corporations that engage in three types of conduct: (1) negligently starting fires that spread on "forestland"; (2) creating or allowing a substantial fire hazard that perpetuates fire spread; or (3) allowing slash buildup to accumulate on their property.[55] The statute allows the state of Washington, municipalities, forest-protection associations, and all federal fire-protection agencies to recover reasonable fire-suppression expenses, investigation costs, and litigation costs—including a reasonable amount of attorneys' fees and court costs.[56] Moreover, the statute provides for a lien on all property of the entity or individual engaging in any of the three types of conduct described above, up to the amount of fire-suppression, investigation, and litigation expenses incurred in connection with the fire.[57] On two occasions, the Washington

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50. *See* Bradshaw, *supra* note 28, at 462 n.80 (exploring the Oregon Forestland-Urban Interface Fire Protection Act of 1997, which allows state governments to recover suppression costs from WUI landowners if certain criteria are met); *see also* WASH. REV. CODE ANN. § 76.04.495(1) (West 2017) (allowing recovery of costs from persons or entities that negligently start or contribute to the spread of large fires).

51. Bradshaw, *supra* note 28, at 462 n.80.

52. *Id.*

53. *Id.*

54. OR. OFF. ST. FIRE MARSHAL, *Annual Report 2016*, at 7 (2016) http://www.oregon.gov/osp/SFM/docs/Comm_Ed/AnnualReport/1173289_OSFM_2016%20Annual%20Report_2017-WEB.pdf [https://perma.cc/8SEM-R58V].

55. WASH. REV. CODE ANN. § 76.04.495(1) (West 2017).

56. *Id.*

57. *Id.* § 76.04.495(2).

State Department of Natural Resources successfully pursued significant suppression costs against entities under section 76.04.495.[58]

Unlike the fairly robust penalties in the Oregon statute, the existing state statutes regulating slash disposal provide for relatively toothless penalties.[59] Given the overt dearth of civil or criminal cases involving slash statutes,[60] states do not appear to be interested in enforcing slash laws. Luckily for states, enforcement costs with regard to forced-pooling and compulsory-unitization regimes in the area of land management ought not pose an onerous burden on state coffers. Enacting these statutes—with the end goal of increasing *ex ante* wildfire prevention—would likely end up costing states less in enforcement than states spend annually on wildfire suppression. Before turning to an exposition of these statutory regimes, this Note now examines the few coherent policy proposals gleaned from academic literature on point.

III. Existing Legal Scholarship on U.S. Wildfire Law and Policy

A number of authors have weighed in on the U.S. wildfire law and policy regimes as they currently stand. While a majority of this work is theoretical and foundational in nature,[61] three authors have crafted coherent

58. *See* Dep't of Nat. Res. of Wash. v. Littlejohn Logging, Inc., 806 P.2d 779, 780 n.1, 782 (Wash. Ct. App. 1991) (interpreting section 76.04.495 as allowing the recovery of reasonable expenses "made necessary by a person's negligence," in a case in which the Department of Natural Resources incurred $376,614.11 in firefighting expenses); *see also* State of Wash., Dep't of Nat. Res. v. Pub. Util. Dist. No. 1 of Klickitat Cty., 349 P.3d 916, 917, 924 (Wash. Ct. App. 2015) (holding the Department of Natural Resources could pursue a cost-recovery claim against a public utility district, as the latter constitutes a "person, firm or corporation" under section 76.04.495, for a fire in which the Department incurred over $1.6 million in suppression costs).

59. In Massachusetts, the failure to remove slash is punishable by a $250–$2,500 fine. MASS. GEN. LAWS ANN. ch. 48, § 20 (West 2015). In New Hampshire, the legislature has imposed a harsher penalty for failure to remove slash, in the form of one misdemeanor violation per "each 200 linear feet or fraction . . . of property boundaries, water frontage, public highway, and railroad frontage from which the slash and mill residue is not properly removed or disposed of." N.H. REV. STAT. ANN. § 227-J:10 (West 2017). In Montana, the penalty for failure to remove slash is an injunction from "further cutting, clearing and construction operations" on land until the landowner complies with the slash law. MONT. CODE ANN. § 76-13-410(1) (West 2015). A landowner's failure to comply with the slash law within thirty days "after being notified to do so by the department" may result in the department reducing the wildfire fuel sources at the landowner's expense. *Id.* § 76-13-410(3).

60. Under the Massachusetts, New Hampshire, and Montana statutes, only one case—a bankruptcy matter out of the District of Montana—has addressed a state slash-statute penalty. *See In re* Granite Lumber Co., 63 B.R. 466 (Bankr. D. Mont. 1986). The court in *Granite Lumber* briefly mentioned the Montana Department of State Lands's collection of a "slash fund" pursuant to section 76-13-410(3) of the Montana Code. *Id.* at 470. The statutory section the court referenced allows the Montana Department of Natural Resources and Conservation to "authorize . . . fire hazard reduction or management at the expense of the contractor or of the owner of the timber or other forest products cut or produced from the land" containing the fire hazard. MONT. CODE ANN. § 76-13-410(3).

61. *See* Bradshaw, *supra* note 28, at 474–78 (identifying primary wildfire-related issues that are ripe for legal analysis, including liability for fire-suppression costs and mixed incentives in firesheds).

policy proposals aimed at curbing perverse incentives in the fireshed. At the outset of this Note's exegesis of these authors' works, it is worth noting that the legal scholarship on the subject of wildfire law is scant.[62]

First, Professor Karen Bradshaw, the author who has generated the most prodigious catalog of academic literature on American wildfire law, offers a comprehensive policy proposal for compensating landowners whose property is damaged by backfire.[63] As a foundation for her argument, Professor Bradshaw submits the premise that governmental decisions to intervene or abstain from intervention in firefighting efforts by setting or failing to set backfire can influence the future necessity of setting backfire.[64] She next states that the fundamental characteristic of backfires as mechanisms employed in exigent circumstances prevents private parties from negotiating with the government or impacting backfire policy by political means.[65] She goes on to classify the chief benefit generated by backfire—namely, the protection of nearby landowners whose properties are undamaged by fire—as a windfall.[66] Not only is backfire damage prevention a windfall, according to Professor Bradshaw, but also this benefit is a windfall of the sort that is substantial enough, and occurs infrequently enough, to justify the transaction costs required for landowner compensation by the government.[67]

According to Professor Bradshaw, in the context of backfire setting, private parties are poorly situated to strike deals *ex ante*, both because different portions of property are worth differing amounts to the property owner and because governmental firefighters have absolutely no obligation to follow any private deals.[68] Bradshaw goes on to argue that backfire setting benefits a discrete group of property owners and creates an analogous situation to one in which one distinct group is harmed to benefit a separate group.[69]

Based on these arguments, Professor Bradshaw posits that the government must compensate harmed landowners for multiple quantifiable

62. *See id.* at 446–47 (describing the recent academic attention given to wildfire as of Professor Bradshaw's writing of the article in 2010 and defining the purpose of the article as overcoming the "reticence" of legal scholars to engage with wildfire).

63. *See* Bradshaw, *supra* note 18, at 164–65 (claiming that property owners are particularly deserving of compensation in cases of backfire for four reasons: (1) in setting backfires, the federal government effectively holds a monopoly on firefighting operations; (2) setting backfires generates windfalls that are not accounted for in any private market; (3) governmental transaction costs are lower than private transaction costs in the fireshed; and (4) the benefits of backfire are only realized by a small group of property owners who are subject to identification).

64. *Id.* at 167.

65. *Id.* at 168.

66. *Id.*

67. *Id.* at 169.

68. *Id.*

69. Bradshaw, *supra* note 18, at 172.

costs. The two most clear-cut costs she outlines are stumpage value—the value of the destroyed timber—and infrastructure damage—the value of roads, buildings, and equipment destroyed by backfire.[70] She proposes that the unsellable timber value be calculated based on board-feet measurements and valued under local timber sale values in nonvolatile markets.[71]

In addition to these two costs, Professor Bradshaw argues that the government must compensate harmed landowners for mitigation and regeneration costs, which include habitat remediation, future-value loss, insect and disease mitigation, value of saplings, value of seedlings, soil remediation, and invasive plant removal.[72] Professor Bradshaw posits that seedling value ought to be calculated based on market price (plus the cost of planting) and that sapling value ought to be calculated based on the net present value of the damaged vegetation.[73] Through the enactment of her detailed compensation proposal, Professor Bradshaw argues, distorted incentives regarding wildfire would be corrected, and backfire use would begin to reflect the costs it generates for the environment.[74]

Second, Benjamin Reilly offers a comprehensive policy proposal aimed at aligning incentives in the fireshed, distinct from the policy developed by Professor Bradshaw.[75] Reilly begins his argument by submitting the premise that guaranteed federal suppression efforts subsidize development in fire-prone areas.[76] He then argues that insurance providers may begin to move away from insuring property in the WUI and that Congress ought to fill the void by creating a national insurance program for wildfire loss.[77] Reilly crafts his proposal around the existing National Flood Insurance Program (NFIP), suggesting that the Federal Emergency Management Agency administer the program.[78]

In terms of the details of Reilly's proposed National Wildfire Insurance Program (NWIP), Reilly argues that the federal government should calculate premiums proportionate to fire-suppression costs in specific areas.[79] That is,

70. *Id.* at 174–75.

71. *Id.*

72. *Id.* at 178–79.

73. *Id.* at 179.

74. *Id.*

75. *See* Benjamin Reilly, *Free Riders on the Firestorm: How Shifting the Costs of Wildfire Management to Residents of the Wildland-Urban Interface Will Benefit Our Public Forests*, 42 B.C. ENVTL. AFF. L. REV. 541, 543 (2015) (arguing that one type of moral hazard in the fireshed, created by federal spending to protect private property in wildfires and the resultant deflated homeowners' insurance premiums, can best be addressed by creating a national insurance program covering wildfire damage—a program that would generate revenues that could be used to fund wildfire-suppression activities).

76. *Id.* at 555.

77. *Id.* at 559–60.

78. *Id.* at 561.

79. *Id.*

the federal government would charge premiums under the new insurance program that are tied to both coverage level and fire risk in regions of the WUI.[80]

In order to ensure that WUI residents obtain NWIP insurance, Reilly proposes that individuals in areas of high fire risk who fail to obtain NWIP coverage be forced to pay a shared-responsibility fine crafted in the same vein as the Affordable Care Act's individual mandate.[81] He proposes that Congress stagger premium increases, rather than increasing premiums in one fell swoop, and charge significantly higher premiums for insurance on second homes in the WUI.[82] Aiming directly at landowner activity, Reilly proposes that the government reduce premiums for policyholders who engage in risk-mitigating activity on their property, such as creating "defensible spaces" in the areas around their homes.[83]

Third, Headwaters Economics[84] formulates a detailed set of ten policy proposals designed to align the incentives of many disparate groups in the fireshed. The research group first proposes mapping of high-fire-risk areas, a tactic designed to identify regions in which development would place property and lives at risk and in which costs incurred in home-protection efforts would deal taxpayers the most significant blows.[85] Headwaters Economics next suggests that federal and state land management authorities educate local governments about the astronomical financial costs associated with fighting fires.[86] In addition to mapping and education, the organization posits that the federal government incentivize land-use planning in the WUI by tapping funding already allocated to wildfire programs to both assist with land-use planning and give funding preference to communities that have attempted to discourage folks from further developing the WUI.[87]

In addition to these three policy shifts, Headwaters Economics suggests that the federal government incentivize county governments in the West to sign existing master agreements—cost-sharing mechanisms for wildfire fighting that divide fiscal responsibility between federal and nonfederal wildfire-fighting entities.[88] Next, the group proposes the federal government either purchase wildfire-prone private lands that are at significant risk of private development or secure easements that prohibit development on these

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80. *Id.* at 562.

81. *Id.*

82. *Id.* at 563.

83. *Id.*

84. Headwaters Economics is a nonprofit research organization working to "improve community development and land management decisions in the West." *About Us*, HEADWATERS ECON., https://headwaterseconomics.org/about/ [https://perma.cc/9QBM-BMEV].

85. HEADWATERS ECON., *supra* note 9, at 20.

86. *Id.* at 23.

87. *Id.* at 25.

88. *Id.* at 31–33.

lands.[89] Headwaters Economics then sketches out a program conceptually identical to Reilly's proposed program: a national wildfire insurance program designed using the NFIP as a model.[90] Next, the organization submits the idea that insurers should adjust premiums to reflect wildfire risk in particular areas.[91]

As its eighth policy proposal, Headwaters Economics develops the idea of encouraging cities to enact zoning restrictions prohibiting homes from being built in the particularly fire-prone regions within the WUI.[92] The group further argues in favor of the abolition of federal home interest mortgage deduction with respect to new homes erected in areas of high fire risk within the WUI.[93] Finally, rounding out the policy proposals, Headwaters Economics submits a tenth maneuver: reduce federal budgets allocated to wildfire fighting in the WUI, a policy move that would be designed to force county and municipal governments to step in and make suppression decisions, ultimately driving down the permitting of new homes in the WUI.[94]

Aside from the three distinct sets of proposals offered by Professor Bradshaw, Benjamin Reilly, and Headwaters Economics, few authors have touched extensively on the maneuvers in which governments at any level may be able to engage by way of impacting private landowner incentives in the WUI. This is unusual, given the fact that many authors have identified the need to examine private landowner impacts on suppression costs.[95]

Each of the three architects of the policies explored in this section assuredly get certain things right in terms of fireshed-incentive alignment. Professor Bradshaw's proposal to effectively hold the federal government fiscally accountable for backfire-setting decisions would likely lead to a decrease in the federal government's prioritization of structures over timberlands in firefighting. This would, in turn, likely eliminate some of the subsidy from which WUI homeowners currently benefit, which would most probably lead to greater caution on the part of individuals considering development in the WUI. Benjamin Reilly's proposal of creating an NWIP modeled on the NFIP, with premiums calculated using wildfire-risk statistics, would quite likely impose the intended chilling effect on WUI home

89. *Id.* at 35.

90. *Id.* at 39. Like Reilly's proposal, the Headwaters Economics insurance proposal—published in an article that came out six years prior to Reilly's article—includes accurate pricing of policies in high fire-risk areas. *Id.* at ii, 43.

91. *Id.* at 45. This idea will be fleshed out in Part V, "Related Policy Proposals."

92. *Id.* at 50.

93. *Id.* at 55.

94. *Id.* at 58.

95. *See, e.g.*, Jingjing Liang et al., *Factors Influencing Large Wildland Fire Suppression Expenditures*, 17 INT'L J. WILDLAND FIRE 650, 651 (2008) (calling for a federal examination, in the "highly politicized environment" of private property rights, of the manners in which private owners in fire-prone areas impact suppression expenditures).

development. While the numerous policies proposed by Headwaters Economics would all likely lead to an alignment of incentives within the WUI, educating local governments on the costs of wildfire could have the greatest impact on risky development, by heralding a genesis of robust zoning laws in wildfire-prone regions of the nation.

While the policy proposals examined in this section do address key perverse incentives for various actors with starring roles in the wildfire tragedy that is currently unfolding on the American national stage, none of the policies crafted by academic authors thus far directly touch the core incentives for private landowners to disregard prudent land management considerations. Given the urgent and growing crisis of wildfires throughout the American West, the utility of a proposal aimed squarely at curbing these very incentives has never been greater. This Note now turns to an extensive overview of such a policy proposal, which comes in the form of regulatory regimes in the private land management realm, which echo forced-pooling and compulsory-unitization regimes in oil and gas law.

IV. Forced-Pooling and Compulsory-Unitization Statutory Derivatives in the Fireshed

In a majority of the primary hydrocarbon-producing states within the United States, statutes providing for both forced-pooling and compulsory-unitization shape the landscape of oil and gas law.[96] The most effective means of incentivizing reasonable land management decisions for private landowners in the WUI is for state legislatures to take a page from the oil and gas law playbook in the form of enacting forced-pooling and compulsory-unitization statutory analogues. Before providing a detailed description of the model statutory schema, it is useful to suggest what types of landowners will be impacted by the policy recommendation. Rather than including all nongovernmental owners of land in the term "private landowners," this Note proceeds on a definition of private landowners as individuals who own less than 5,000 contiguous acres in a given fireshed and who do not use their land for commercial purposes.[97]

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96. Bruce M. Kramer, *Compulsory Pooling and Unitization: State Options in Dealing with Uncooperative Owners*, 7 J. ENERGY L. & POL'Y 255, 255 n.2 (1986).

97. This definition explicitly leaves out institutional landowners, such as timber corporations; these landowners include "property owners with 5000 or more forested acres," and typically utilize their property for commercial purposes. Schulz & Lueck, *supra* note 20, at 2533. With regard to institutional landowners, the problem of distorted incentives appears to be nonexistent, or is at least much smaller in magnitude than the incentive problem in the context of small-scale, noncommercial private landowners. *See id.* (explaining that institutional landowners generally "have the resources to bear fire-related losses," claim to be self-insured, and "are well positioned to undertake *ex ante* fire prevention measures"). Given the relatively small distortion of incentives for institutional landowners, the fact that state slash law statutes typically cover activity by these landowners, and the fact that timber-laden states—such as Oregon and Washington—impose further deterrence of negligent land management by institutional landowners in the form of cost-recovery statutes,

This Part will be organized into three subparts: (1) Overview of Oil and Gas Statutory Derivatives for Fireshed-Land Management; (2) Detailed Features of Echoic Statutory Regimes; and (3) Recommended Modifications to Existing Statutory Regimes.

A. Overview of Oil and Gas Statutory Derivatives for Fireshed-Land Management

Based on a lame enforcement arm and limp statutory schema with respect to private land management, negligent private land managers in the WUI have little incentive to reduce wildfire risk by clearing slash on their property.[98] Moreover, individuals who own homes in the WUI can count on federal funding for firefighting once a wildfire commences its destructive journey. Whether or not WUI land becomes discounted by fire risk in the future—which could attract developers[99]—one can expect further development in this fire-prone terrain.[100] States are best positioned to step in and regulate private landowner behavior in order to prevent wildfires *ex ante*. This is so because federal regulation addressing wildfires may become even less robust than now, given President Trump's altered priorities.[101] In light of landowner and developer expansion into the WUI, as well as rising

wildfire law as it now stands appears to adequately address institutional landowners. This is the precise reason for the exclusion of institutional landowners from the policy prescriptions for which this Note advocates.

98. *See* Bradshaw, *supra* note 28, at 454–55 (explaining that a lack of accountability "for land manager fire suppression efforts" creates perverse incentives that are not offset in the current wildfire-fighting system).

99. The pattern of developers buying land saddled with risk at discount rates in order to ultimately profit off of its development is a form of moral hazard—a concept that boils down to the idea that insulating actors from the impacts of their deleterious actions generates a greater quantity of deleterious actions. Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEXAS L. REV. 237, 238 (1996).

100. *See* Ray Rasker, *Resolving the Increasing Risk from Wildfires in the American West*, 6 SOLUTIONS J. 55, 56 (2015) (discussing the fact that WUI homeowners have "little incentive to build on safer lands" because "a significant portion of the costs associated with building in hazardous areas are [sic] not borne by the local governments or homeowners").

101. *See* Nick Stockton, *Trump's Trying to Chainsaw Nearly Every Environmental Program*, WIRED (Mar. 16, 2017), https://www.wired.com/2017/03/trumps-trying-chainsaw-nearly-every-environmental-program/ [https://perma.cc/C6DU-H4EF] (examining President Trump's proposed federal budget); *see also* Lam, *supra* note 34 (quoting one of President Trump's most prominent campaign promises, encapsulated in his statement that "[i]f there's a new regulation, they have to knock out two").

temperatures due to climate change,[102] the prospect of continuing to allow unregulated management of land within firesheds is fraught.[103]

Enter the statutory regimes conjugate to forced-pooling and compulsory-unitization regimes from oil and gas law as means to cure the incentive structures that have led to landowners shirking wildfire risk reduction responsibilities throughout the WUI. Forced-pooling and compulsory-unitization statutes delegate state regulatory commissions the police power to compel nonconsenting mineral rights holders to allow drilling underneath their property.[104]

Compulsory unitization, unlike its regulatory cousin, forced pooling,[105] conceptually covers development of the entire reservoir itself, rather than the regulatory requirements necessary to legally exploit the hydrocarbons within portions of it by drilling specific wells.[106] Compulsory-unitization regimes deal exclusively with consolidating "all, or a sufficiently high percentage of the royalty and participating interests in a pool as will permit reservoir engineers to plan operation of the pool as the natural energy mechanism unit which it is."[107] In other words, the primary distinction between forced-pooling and compulsory-unitization regimes is that forced-pooling statutes handle the process of combining mineral interests to reach the threshold level for well-spacing and drilling units, whereas compulsory-unitization statutes address development of entire common-source hydrocarbon reservoirs. Compulsory-unitization statutes allow for fieldwide development, implicating all land and mineral interests related to an entire hydrocarbon reservoir.[108] Forced-pooling statutes merely permit interest consolidation in a single well-spacing unit, which covers a small portion of the entire field.[109]

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102. Rising temperatures increase the likelihood of hotter wildfires that burn for longer periods of time. *Is Global Warming Fueling Increased Wildfire Risks?*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/global_warming/science_and_impacts/impacts/global-warming-and-wildfire.html#.WOkgv1dKHVo [https://perma.cc/LBP3-EMD5].

103. *See id.* (arguing that the "devastating" costs of wildfires to the federal government and state governments will likely increase "unless we better address the risks of wildfires and reduce our activities that lead to further climate change").

104. Jared B. Fish, Note, *The Rise of Hydraulic Fracturing: A Behavioral Analysis of Landowner Decision-Making*, 19 BUFF. ENVTL. L.J. 219, 263 (2012).

105. *See* Kramer, *supra* note 96, at 255 n.1 (explaining that "[p]ooling and unitization are analogous but not identical concepts" and that pooling typically involves "the joining together of tracts in order to receive a drilling permit under the applicable well spacing rule for the area").

106. *See id.* (defining unitization as "the joining together of tracts in order to cooperatively develop all or part of a reservoir containing hydrocarbons").

107. ANDREW DERMAN & KYLE VOLLUS, UNITIZATION 5, https://www.tklaw.com/files/Publication/7450c785-022d-4a36-a9cb-da5897ca678b/Presentation/PublicationAttachment/562dbe71-7a60-4867-ab0b-98205656af8f/Unitization%20(Derman%2C%20A.).pdf [https://perma.cc/BQ5Z-AMXG].

108. John C. LaMaster, *Consent Requirements in Compulsory Fieldwide Unitization*, 46 LA. L. REV. 843, 843–44 (1986).

109. *See* Brad Secrist, *Not All "Units" Are Created Equal: How* Hebble v. Shell Western E & P, Inc. *Missed an Opportunity to Curb the Expansion of Fiduciary Obligations in Oklahoma*

1. On the Combination of Forced-Pooling and Compulsory-Unitization Statutes.—From a descriptive standpoint, adding both forced-pooling and compulsory-unitization statutes governing private land management to a state's regulatory regime would be quite simple. Rather than delegating authority to approve pooling agreements to the hydrocarbon regulatory commission of a given state, the forced-pooling statutory echoes would delegate authority to approve land management agreements to the state forest service or its equivalent. Relatedly, rather than allowing contiguous owners of land and/or the minerals thereunder to combine their interests in property to maximize efficiencies regarding an entire reservoir, the compulsory-unitization statutory echoes would allow contiguous landowners spanning an entire fireshed to combine their interests in risk reduction.

Boiled down to the essential elements of the regulatory regime, the statutory analogues for which this Note advocates will borrow two distinct features from oil and gas forced-pooling and compulsory-unitization statutes, and will be governed by one distinct feature unique to these echoic regimes. In terms of borrowed features, first, the agreements—when approved by the state agency responsible for their review—will be enforceable as against nonconsenting landowners in the fireshed, pursuant to a pooling or unitization order in which the agency has made findings of fairness and equity as to all landowners in the shed.[110] Second, landowners in the shed will be required to be presented with a fair opportunity to consent to the agreement before the state will be able to bind them to it. In terms of a feature distinct from the qualities of the oil and gas statutes from which the land management statutes are derived, the latter agreements will involve solely matters of cost—they will not address any sharing of benefits. The shared benefits that will likely fall out of the regulatory regimes are largely speculative; as crafted, the broader goal of the statutory echoes is to reduce the incidence of wildfires across the WUI.

Similar in function to the interest-holder agreements required by numerous forced-pooling and compulsory-unitization statutes in the oil and gas realm as precursors to pooling or unitization, both types of statutory echoes would require land management plans to be drawn up and submitted to the state forest service for approval. In addition to the requirement of voluntary consent of a certain percentage of landowners and interest holders as a precursor to the state regulatory commission's authority to compel unitization or pooling with regard to the remainder of interest holders in the

Oil and Gas Law, 65 OKLA. L. REV. 157, 161–62 (2012) (defining forced-pooling as a statutory provision for the combination of interests regarding development of a drilling and spacing unit and defining unitization as a process encompassing the entirety of a hydrocarbon reservoir).

110. Further details of the review process and the required findings will be outlined in the following subpart, "Institutional Design."

unit or pool,[111] oil and gas forced-pooling and compulsory-unitization statutes generally require findings of fairness and equity by the regulatory commission.[112] The recommended derivative regimes would similarly require voluntary consent of a specified percentage of fireshed landowners[113] as a prerequisite to the state forest service obtaining the authority to order the unitization or pooling of disparate property in the fireshed. Further details of the statutory analogues will be elucidated in subpart (4), "Detailed Features of Echoic Statutory Regimes."

From a prescriptive standpoint, the necessity for both a compulsory-unitization statute and a forced-pooling statute within each state's regulatory regime is evident based on two features of the WUI. As the principal point, firesheds cover exceedingly large areas of land.[114] Therefore, many private landowners are contained within a fireshed, and transaction costs between them can be extraordinarily high.[115] By allowing landowners to combine their interests in risk reduction, these statutes lessen transaction costs. As an ancillary—and related—point, one can conceive of a number of efficiencies flowing from statutes that incentivize private landowners to engage in both large- and small-scale joint land management efforts. With regard to the compulsory-unitization statutory analogue, owners of a specified percentage of land in a fireshed would be able to bind all other landowners in the same fireshed to high-level land management contracts and surveying procedures to ensure compliance with the provisions in the contracts. The forced-pooling statutory analogue, on the other hand, would allow for owners of smaller, adjacent tracts within particularized zones of the fireshed to enter into detailed, more specialized contracts to handle landscape features unique to the relatively small portions of the fireshed comprising their land.

Further, the resources covered by the statutes bear many similarities to one another. Like oil and gas reservoirs, which "typically underlie multiple

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111. *See, e.g.*, LaMaster, *supra* note 108, at 847–48 (detailing the contours of compulsory-unitization statutes, one of which is the requirement of either a unitization plan or contract, to which a specified percentage—typically 60%–80%—of working-interest owners and royalty-interest holders have agreed).

112. *Id.* at 848.

113. This Note leaves the calibration of the precise percentage of minimum consent to the states, although something in the neighborhood of 70%–80% likely best balances the interests of states in administrable regimes and the interests of a wide swath of private fireshed landowners in retaining the effective ability to have a say in the form and function of the agreements.

114. This feature of firesheds may be more pronounced in certain western states than in others; for example, "firesheds in California often encompass 50,000 to 100,000 ac[res] or more." Malcolm North et al., *Using Fire to Increase the Scale, Benefits, and Future Maintenance of Fuels Treatments*, 110 J. FORESTRY 392, 397 (2012).

115. *See* Bradshaw, *supra* note 18, at 170 (addressing contracting for private parties impacted by federal firefighting strategies, and claiming that "transaction costs for reaching a bargain are extraordinarily high," as a result of "the endless combination of scenarios that could arise").

parcels of land,"[116] firesheds are often owned in contiguity by numerous unaffiliated private landowners.[117] Additionally, both firesheds and hydrocarbon reservoirs are fleeting in nature,[118] which increases the difficulty of predicting *ex ante* the efforts required to mitigate risk[119] or maximize production.[120] The ephemeral natures of the resources also undoubtedly drive up the transaction costs associated with their management in both fireshed risk reduction and hydrocarbon exploration and development. The analogy runs deeper than the array of similarities between the two resources themselves, however. The requirement of a substantial front-end investment of funds prior to commencement of any actual land-altering actions is present in both fire risk management[121] as well as oil and gas drilling.[122]

2. *Institutional Design.*—Part of the beauty of the recommended state forced-pooling and compulsory-unitization regimes is that they allow for private contract to govern a vast array of primary matters taken up by the parties with regard to land management procedures, as long as the agreements

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116. D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1226 (2013).

117. *See* Tania Schoennagel et al., *Implementation of National Fire Plan Treatments Near the Wildland–Urban Interface in the Western United States*, 106 PROC. NAT'L ACAD. SCI. U.S. 10706, 10707 (2009) (stating that private land accounts for 71% of the WUI); *see also* Dean Lueck, *Economics and the Organization of Wildfire Suppression*, *in* WILDFIRE POLICY: LAW AND ECONOMICS PERSPECTIVES 71, 77 (Karen M. Bradshaw & Dean Lueck eds., 2012) (noting that the "first important consideration" regarding wildfires "is that the large scale of a wildfire, or fireshed, might be well beyond the acreage of a single landowner," and that the "Great 1910 Burn" covered millions of acres of private land—including "large tracts of forest land as well as small rural plots and town lots"); Schulz & Lueck, *supra* note 20, at 2529 ("As with most landscape-level resources, the wildfire resource exceeds the size of individually sized land parcels.").

118. With regard to fires, "[f]irescapes are ephemeral and uncertain in their nature." Schulz & Lueck, *supra* note 20, at 2529. In the context of oil and gas drilling, "hydrocarbons migrate," as "[o]il and natural gas deposits are under great pressure." Bryan Leonard & Gary D. Libecap, *Endogenous First-Possession Property Rights in Open-Access Resources*, 100 IOWA L. REV. 2457, 2468 (2015).

119. Schulz & Lueck, *supra* note 20, at 2529.

120. It is worth noting that gas trapped in shale formations does not exhibit the same "migratory" principles exhibited by hydrocarbons stored in traditional reservoirs. Lindsey Trachtenberg, Note, *Reconsidering the Use of Forced Pooling for Shale Gas Development*, 19 BUFF. ENVTL. L.J. 179, 212 (2012).

121. Granted, in the context of land management aimed at reducing wildfire risk *ex ante*, private insurers will likely bear a majority—if not all—of the costs associated with collaborative land management efforts. *See* Schulz & Lueck, *supra* note 20, at 2536–37 (positing the idea that third-party regulation by insurers is efficient in terms of reducing fire risks, since these insurers are able to engage in cost spreading in the form of increased premiums for homeowners' insurance in fire-prone regions). A further discussion of insurers in the WUI, their current perverse incentives to distort wildfire risk with regard to policy rates, and what can be done to ameliorate these deleterious incentives will be taken up in the following Part, "Related Policy Proposals."

122. *See* Chiawen C. Kiew, Comment, *Contracts, Combinations, Conspiracies, and Conservation: Antitrust in Oil Unitization and the Intertemporal Problem*, 99 NW. U. L. REV. 931, 962 (2005) ("Producing oil is an endeavor requiring high, upfront costs in exploration and capital equipment.").

are deemed fair and equitable[123] by the state forest service. As a more fine-grained point, the recommended forced-pooling and compulsory-unitization statutes in the land management area would contain language to the effect that the state forest service's role in reviewing and approving pooling and unitization agreements is to conserve natural resources and to promote fairness and equity.[124] This language would ensure that private landowners are able to challenge approval or nonapproval of specific macro- and micro-level land management plans on three separate grounds.[125]

Certain forced-pooling and compulsory-unitization statutes in the oil and gas realm indeed already require state regulatory commissions to find fairness and equity regarding a number of circumstances in orders unitizing or pooling interests. For instance, Wyoming's compulsory-unitization statute requires that the regulatory commission make five findings. First, after any "interested person" files an application for unitization with the regulatory commission, the commission must find a proposed operating plan adjusts front-end investment costs fairly and equitably among unit owners.[126] Second, the commission must find the plan provides for a "fair and equitable determination of the cost of unit operations."[127] Third, the commission must find the plan, if necessary, provides for fair, reasonable, and equitable terms and conditions regarding interest or financing for an individual "unable to promptly meet his financial obligations" attached to the unit.[128] Fourth, the commission must find the plan grants each owner "a vote in the supervision and conduct of unit operations," proportionate to the costs chargeable to the owner.[129] Fifth, the commission must find the plan provides for fair

123. This language is distinct from typical forced-pooling and compulsory-unitization statutes, which are premised on the protection of correlative rights. *See, e.g.*, OKLA. STAT. ANN. tit. 52, § 287.1–287.4 (West 2017) (reporting the legislative finding that the circumstances warrant authorization of and provision for "unitized management, operation and further development" of oil and gas properties, "to the end that a greater ultimate recovery of oil and gas may be had therefrom, waste prevented, and the correlative rights of the owners in a fuller and more beneficial enjoyment of the oil and gas rights, protected"). The doctrine of correlative rights in oil and gas law refers to the "reciprocal rights and duties that exist" between disparate owners of a common reservoir, given the "migratory nature of oil and gas reserves" and the consequential fact that "every extractive operation necessarily affects the economic welfare of adjacent or nearby owners of land overlying the common source of supply." Gregory F. Pilcher, Note, *Oil and Gas: H.B. 1221: Protection of Correlative Rights in the Absence of Waste*, 40 OKLA. L. REV. 127, 130–31 (1987).

124. By statute, the term "equitable" will be defined by its legal meaning: "[j]ust; consistent with principles of justice and right." *Equitable*, BLACK'S LAW DICTIONARY (10th ed. 2014).

125. Although administrative litigation against forest-service agencies is beyond the scope of this Note, plaintiffs in such litigation subpart V(d), "Standing Issues for Tort Victims in the WUI."

126. WYO. STAT. ANN. §§ 30-5-110(c), (e)(vi)(A) (West 2017).

127. *Id.* § 30-5-110(e)(vi)(B).

128. *Id.* § 30-5-110(e)(vi)(C).

129. *Id.* § 30-5-110(e)(vi)(D).

and equitable operator-removal and successor-appointment terms and conditions.[130]

The recommended forced-pooling and compulsory-unitization statutes will define the duties of the forest service similarly to the manner in which the Wyoming statute defines the duties of the regulatory commission. Specifically, the forest service will be required to review and approve any land management contracts that lack the consent of any landowners within a given fireshed, even if the agreements are supported by a landowner percentage equal to or exceeding the statutory minimum. Mandatory review of nonunanimous plans would likely require more administrative might than certain states' forest service agencies currently possess, but would be the best way to protect against the tyranny of the majority within the fireshed.[131]

When landowners in a particular shed apply for state forest-service approval of a land management plan—either a macro-level plan, drawn up under the unitization statute, or a micro-level plan akin to a Joint Operating Agreement (JOA),[132] drawn up under the pooling statute—the state agency will be statutorily required to make several additional findings. First, the forest service will be required to make a finding that the plan is fair, reasonable, and equitable with respect to all landowners in the shed.[133] All applying landowners will be statutorily required to provide documentation to the forest service showing that they offered a fair opportunity for each landowner in the shed to consent, prior to filing the administrative application. If certain landowners do not speak English,[134] the applying

130. *Id.* § 30-5-110(e)(vi)(E). Drawing on the Wyoming statute, in highly contested cases, state oversight agencies would have statutory authority—codified in both the compulsory-unitization and forced-pooling echoes—to conduct hearings regarding land management agreements. *See id.* § 30-5-105 (providing the regulatory commission the authority to appoint examiners to conduct hearings regarding any matter before the commission).

131. When any majority has access to a great deal of power, individuals within this group have the incentive to exploit individuals within the powerless minority, thereby—in the context of politics—abusing the legislative process at the "expense of a 'discrete and insular' minority." Eric A. Posner & E. Glen Weyl, *Voting Squared: Quadratic Voting in Democratic Politics*, 68 VAND. L. REV. 441, 444 (2015). In the context of land management, if a state merely enacts a compulsory-unitization statutory analogue—and thus presumably allows a majority of landowners in a fireshed to dictate the fireshed land management plan—the landowners in the majority will take advantage of small groups of landowners in particularized regions within the fireshed.

132. *See* Muhammad Waqas, *Joint Operating Agreements*, OIL & GAS FIN. J. (2014) http://www.ogfj.com/articles/print/volume-11/issue-10/features/joint-operating-agreements.html [https://perma.cc/R4SX-XNDK] (defining the JOA as a "contract where two or more parties agree to undertake a common task to explore and exploit an area for hydrocarbons" and providing a history and analysis of the agreements).

133. Tracking the requirements of the model Wyoming unitization statute, the statutory echoes will require the state oversight agency to make findings of fairness, reasonableness, and equity regarding cost determinations, front-end cost allocation, financing terms, vote allocation, and land-manager removal and successor terms.

134. This situation is likely to present itself, given the fact that over 350 languages are currently spoken in the United States. Press Release, U.S. Census Bureau, Census Bureau Reports at Least

landowners must provide documentation evidencing the fact that they translated the land management agreement into a language the landowner is able to understand and offered him or her a fair opportunity to consent to the agreement.

In addition to the requirement of submitting documentation evidencing the fair opportunity for all landowners to join in the agreement, the statutes will explicitly require the forest service or equivalent oversight agency to consider economic resources of nonconsenting landowners. That is, agency professionals will be required to examine the finances of all landowners in determining the equity of the proposed plan.[135] If the plan fails to account for the inevitable variance in landowner financing capabilities, the oversight agency will be explicitly disallowed from finding that the plan is equitable and will therefore be unable to order a unitization or pooling plan enforceable as against nonconsenting landowners.

When the reviewing agency approves an agreement, all landowners subject to the agreement will take on fiduciary duties to one another, specified in the statute. Codifying fiduciary duties into the statutory echoes will increase the likelihood that all landowners in the shed comply with the requirement to either chip in a specified sum—pegged to both owned acreage and economic ability to front costs—or personally engage in land management activities. Would-be noncomplying landowners will be more likely to comply, given the threat of litigation brought against them by their neighboring landowners in the fireshed.[136]

As part of the review process for proposed land management plans, individuals in charge of land management oversight at the state forest service or equivalent agency will necessarily be required to determine the reasonableness of matters of cost. One potentially effective means by which the forest service could determine the reasonableness of particular costs is to hire a land management expert familiar with the going rate for brush clearing and other relevant activities in the area in which the fireshed is situated, who would provide cost-review services. This individual would be statutorily prohibited from maintaining any affiliation with any of the landowners in the particular shed—bearing in mind issues of self-dealing and cost unfairness. Alternatively, the agency could obtain per-acre quotes from multiple land

350 Languages Spoken in U.S. Homes (Nov. 3, 2015), https://www.census.gov/newsroom/press-releases/2015/cb15-185.html [https://perma.cc/EB6M-B4AD].

135. Therefore, a fair amount of cost spreading will occur between economically powerful and economically weak landowners in the fireshed; this cost spreading is justified on the grounds that it will ultimately produce net gains for all landowners in the form of marked—and even—reductions in wildfire risk to private property across the fireshed.

136. This litigation would be premised on the idea that the noncomplying landowners breached their fiduciary duty to the complying landowners.

management companies that work in or near the fireshed.[137] The oversight agency could then average these quotes for each category of land management activity to create a table of reasonable per-acre costs, by category, that could be used to check against the costs listed in submitted land management agreements.

One major benefit of the former cost-review process is that it avoids the potential for price fixing. If the expert charged with approval of costs is familiar with the typical fees for brush hauling and the like, it would be difficult for companies in particular firesheds to collude with one another and submit artificially high cost figures. One major benefit of the latter cost-review process is that it builds in the potential to closely track the costs for particular land management services as the service providers adjust these costs. With the provision that a cost-approval process must be spelled out in the statutes, the particularities of the process are best left to the states, as laboratories,[138] to work out.

The costs likely to come up in land management agreements, that forest services or their equivalents ought to consider reasonable, include costs related to multiple activities in the process of fireshed land management. First, the costs of tree cutting, brush clearing, and disposal of brush should categorically be treated as reasonable if they match the going rate for brush-clearing services in the area—checked against the respective average table—or the land management expert deems them reasonable. Second, costs relating to transportation, both to and from the land, should also be treated as reasonable so long as they receive proper approval by way of either average-cost comparison or expert review. Transportation of the brush to a disposal site or mulching/compost facility should also be treated as reasonable, unless the ownership or location of the site or facility raises self-dealing concerns.[139] Third, monitoring costs relating to fireshed tracts will undoubtedly be featured among the greatest hits of submitted land management costs. These costs should likewise be considered reasonable, subject to approval by cost comparison or expert review.

137. The particular land management activities for which prudent oversight agencies would obtain quotes include tree cutting, brush clearing, brush hauling, and brush disposal, to name a few.

138. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

139. If the disposal site or mulching/composting facility is owned by one of the landowners in the subject shed, self-dealing concerns would be present. If the site or facility is not the nearest facility to the land that would be cleared pursuant to the agreement, more nuanced self-dealing concerns would be present. The latter situation would require prudent land management officials with the forest service to inquire as to the selection of the particular site or facility, probing for potential benefits to the operating landowner. This situation could of course be avoided if the landowners simply allow the company clearing the land to select the site or facility at which its workers will deposit the brush.

With regard to monitoring schema, states could utilize agency employees to review satellite data as a means of ensuring compliance with the agreements.[140] If a particular state's forest service budget is tight, the state could hire programmers to code an application that would monitor available satellite imagery and use some sort of algorithm to identify whether particular landowners are complying with the provisions of their governing land management agreements. An administrative monitoring process would generate the positive externality of leveraging economies of scale[141] to eliminate the need for landowners to fund monitoring efforts on an individualized basis.

As one potential maneuver to financially prop up state forest service entities and allow them to provide the sort of expert review vital to the proposed regulatory regimes, states could engage in aggressive *parens patriae* litigation against negligent land managers.[142] To ensure that states are able to maintain *parens patriae* suits based on public nuisance, states could include provisions in the conjugate statutes referencing public nuisance and expanding the tort's scope with regard to large wildfires.[143] As a matter of logic, the states would have incentive to sue only those negligent land managers who are flush with capital—the individuals representing the greatest potential for the states' investment in the litigation paying off. By way of financing *parens patriae* suits, states could solicit investment in litigation by private litigation-funding entities; no principled rationale exists to prohibit states from borrowing money from litigation funders in the same manner as they regularly borrow from other lending institutions.[144]

States could deposit any money recovered from the *parens patriae* actions into a fund that would be used as a boon for state forest-service agencies in their oversight of the land management plans generated pursuant

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140. Data generated by the Landsat satellite program is in fact commonly used to events bearing on land use such as crop yields. *See* Kenneth J. Markowitz, *Legal Challenges and Market Rewards to the Use and Acceptance of Remote Sensing and Digital Information as Evidence*, 12 DUKE ENVTL. L. & POL'Y F. 219, 225 (2002) (listing the land-monitoring applications of the Landsat 7 satellite, which include observing "forestry, crop monitoring, land cover, land use, and watersheds"). The Landsat program is currently producing data from Landsat 8, which was launched on February 11, 2013. *Landsat 8*, U.S. GEOLOGICAL SURV., https://landsat.usgs.gov/landsat-8 [https://perma.cc/XGS5-5GYK].

141. The reference to "economies of scale" is intended to reflect the increase in cost savings that results from an increase in efficiency when moving from small-scale to large-scale efforts, as a general proposition. *See Economy of Scale*, BLACK'S LAW DICTIONARY (10th ed. 2014) (providing, as one definition for the term, "savings resulting from the greater efficiency of large-scale processes").

142. *Parens patriae* actions are public lawsuits brought by the state in its quasi-sovereign capacity on behalf of its citizens, premised on the idea that the state possesses an interest distinct from the interests of its citizens. Anthony J. Sebok, *Private Dollars for Public Litigation: An Introduction*, 12 N.Y.U. J.L. & BUS. 813, 820 (2016).

143. These particular provisions are fleshed out in section (4) of this subpart, "Detailed Features of Echoic Statutory Regimes."

144. Sebok, *supra* note 142, at 827–28.

to the statutory derivatives. In addition to its utility in bankrolling oversight efforts, this fund could be exceedingly significant in the effort to raise landowner awareness of the dangers of negligent land management, by financing landowner information campaigns. The collective increase in awareness that would likely be effected through such campaigns would generate astronomical positive gains in terms of curbing deleterious landowner behavior that is partially to blame for spiraling suppression costs.[145]

In addition to *parens patriae* funding, states and the federal government would do well to develop other means of funding the stringent agency review that would be required to minimize self-dealing and the tyranny of the majority in fireshed land management contracting. State regulation of negligent land management falls squarely within the ambit of state police power, like legislative efforts aimed at addressing issues of health, safety, and welfare of a state's citizens.[146] Based on this proposition, funding of oversight efforts ought to fall on the states themselves, perhaps with the assistance of the federal government if necessary.[147]

3. Relevant Hypotheticals.—Hypotheticals demonstrating the effectiveness of compulsory-unitization and forced-pooling statutes working in tandem with regard to both macro- and micro-level land management in the fireshed abound. Suppose a small portion of a fireshed contains a grove of a certain type of highly flammable tree—mountain cedar, for instance[148]—which spans the tracts of multiple landowners. In order to address, with

145. State and federally funded information efforts would likely generate the landowner literacy, regarding wildfires and land management, necessary to solve the vexing problem posed by negligent private land managers, in conjunction with statutory echoes. States have every incentive to fund these campaigns. Given the vastness of the federal budget, the U.S. government is impacted by markedly less powerful incentives to fund landowner information campaigns. Therefore, the responsibility for informing WUI residents of the power they possess to tamp out the wildfire problem appears to fall on the states.

146. *See* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 745 (2007) (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991)) (quoting the Supreme Court's definition of the "traditional police power of the States" as "the authority to provide for the public health, safety, and morals").

147. At the state level, one simple means of increasing available funding for oversight and monitoring efforts would be a very slight increase in property taxes.

148. The tree referred to, both in this Note and conventionally, as "mountain cedar," is in fact a species of juniper—*Juniperus ashei*, to be precise. Patricia Sharpe, *Texas Primer: Cedar Fever*, TEX. MONTHLY (Mar. 1986), http://www.texasmonthly.com/the-culture/texas-primer-cedar-fever/ [https://perma.cc/V3YM-MZXX]. The resin within mountain cedar renders the trunks and branches exceedingly flammable in times of drought, creating a dangerous situation in "developed portions" of the Texas Hill Country "where sparks can ride high winds, igniting fires that race up steep slopes." Marty Toohey, *Why Can't We Just (Sniff) Wipe Out Austin's (Achoo!) Cedar Trees?*, AUSTIN AM.-STATESMAN (Jan. 12, 2017), http://www.mystatesman.com/weather/why-can-just-sniff-wipe-out-austin-achoo-cedar-trees/gqm7oTA22fMH9DFRgqfoYI/ [https://perma.cc/7ZVG-2YWR].

specificity, the land management procedures necessary to effectively reduce wildfire risk in the region of the fireshed in which the grove of cedar trees stubbornly lies, the landowners must—logically—contract for particularized services. These small-scale agreements should also be subject to the review of the state forest service, as they will in some cases be more important from an efficiency standpoint than the high-level contracts entered into pursuant to the compulsory-unitization statutes.

Suppose, further, that one of the unfortunate landowners in the blighted region within the fireshed containing the flammable trees happens to be highly skilled in the esoteric practices necessary to effectively clear out the pesky mountain cedar.[149] This additional wrinkle in the hypothetical is not a far-off prospect. Individuals who have had to engage in some level of private land management over the years in which they have owned property in the WUI likely have more expertise handling the particular features of their land than do individuals whose land does not contain those features. The skilled landowner would be the best choice for a land manager, in terms of the specific project of clearing the mountain cedar, but not in terms of all land management projects in the fireshed generally. A forced-pooling statutory analogue on top of the compulsory-unitization statutory analogue would allow for the attention to detail necessary for this landowner to get the contract for the micro-level job, as it were, pending approval of the oversight agency.[150]

In the possible event that more than one landowner possesses the ability to remove the cedar, and all of the able landowners are equally skilled, the state agency charged with review of the land management agreements must necessarily choose between these individuals. In light of the equity considerations enshrined in the recommended statutory derivatives, this hypothetical choice between equals is a simple one: the oversight agency must select the landowner with the greatest economic need as the land manager for the particular JOA related to the task of cedar removal. One positive externality associated with rewarding the economically disadvantaged landowner with the job is that he or she will be more equipped to front costs associated with further macro- or micro-level agreements, drawn up under the conjugate statutory regimes, in the future. Notably, this result would only occur in a narrow set of circumstances. First, the state

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149. *See* Joe Nick Patoski, *The War on Cedar*, TEX. MONTHLY (Dec. 1997), http://www.texasmonthly.com/articles/the-war-on-cedar/ [https://perma.cc/A94T-QCWJ] (quoting a rancher describing the elaborate process of cutting cedar: stacking "the dead wood in windrows on a slope to catch soil and runoff," keeping "dead branches around the trunk trimmed back," and cutting "any new growth").

150. As explored above, the reviewing agency would be statutorily permitted to approve the agreements only after a thorough review of their implications, including a detailed examination of the likely impacts of self-dealing on other landowners and a finding that any self-dealing would have no negative effects on other landowners in the shed.

oversight agency would have to find that multiple landowners are equally capable of a land management task. Second, the agency would have to find that the self-dealing effected by appointing any of these capable landowners to the position of land manager for the specific task outlined in the agreement would be fair and equitable to all other landowners.

4. Detailed Features of Echoic Statutory Regimes.—In reference to the earlier mention of explicit statutory encoding of nuisance law, states could include a number of relevant statutory provisions in this vein. Public and private nuisance are two disparate—but related—sorts of tort liability.[151] One primary distinction between the two classes of liability is the essential right on which plaintiffs base suits. Public nuisance claims are premised on violations of rights shared by all members of the public, whereas private nuisance claims are based on violations of an individual's right to the private use and enjoyment of her land.[152] Another significant distinction between public and private nuisance is the entity possessing the authority to sue. Illustrative of the typical public nuisance regime, in North Dakota, public nuisance actions may only be maintained by a private individual "if the public nuisance is 'specially injurious to himself or his property.'"[153] Similarly, in Texas, a county "or a person affected or to be affected" by public nuisance violations—including property owners, neighborhood residents, or an "organization of property owners or residents of a neighborhood"—may sue for abatement of public nuisances.[154] Remedies available to victims of public nuisance are civil actions or abatements.[155] A majority of states have enacted statutes that courts have interpreted to encompass common law public nuisance.[156]

With regard to private nuisance suits, plaintiffs' injuries must be specific to the plaintiffs as a result of a nuisance condition's proximity to the plaintiffs' homes.[157] Private nuisance actions typically involve "a single individual or a small group of individuals" harmed by a defendant's conduct.[158] Like public nuisance actions, private nuisance claims are premised on the idea that the defendant harmed the beneficial use and

151. David R. Bliss, *Tilting at Wind Turbines: Noise Nuisance in the Neighborhood After* Rassier v. Houim, 69 N.D. L. REV. 535, 538 (1993).

152. *Id.*

153. *Id.* at 539 (quoting N.D. CENT. CODE § 42-01-08 (1983)).

154. TEX. HEALTH & SAFETY CODE ANN. § 343.013(a)–(b) (West 2010).

155. Bliss, *supra* note 151, at 539.

156. *Id.* An exemplary statute in this vein is the North Dakota public nuisance statute, which defines "a public nuisance as one which affects an entire community, neighborhood, or any considerable number of persons." *Id.*

157. Bliss, *supra* note 151, at 540.

158. LaVonda N. Reed-Huff, *Dirty Dishes, Dirty Laundry, and Windy Mills: A Framework for Regulation of Clean Energy Devices*, 40 ENVTL. L. 859, 891–92 (2010).

enjoyment of the plaintiffs' private property.[159] In some states, plaintiffs may avail themselves of strict liability theories in nuisance claims if the defendants engaged in "abnormally dangerous" conduct or conduct that involves an abnormally "dangerous substance" creating a "'high degree of risk' of serious injury."[160]

In order to encourage public and private nuisance litigation, first, states would do well to include provisions defining private nuisance in the conjugate statutory regimes. Legislators could word these provisions so as to deliberately expand the common law understanding of the tort. More precisely, legislators could draft provisions in the statutory derivatives that explicitly include unreasonable caretaking of slash, failure to reasonably clear brush, and unreasonable management of live vegetation—all on private property—within the definition of private nuisance. The third category could include omissions such as failure to reasonably trim trees as a means of mitigating the potential for canopy fires.[161]

On top of expanding the definition of private nuisance by statute, legislators could draft the forced-pooling and compulsory-unitization analogues with explicit provisions extending the tort of public nuisance to situations involving specific landowner conduct. The recommended provisions would state that conduct committed with gross negligence or recklessness and involving the destruction of large acreage would give rise to public nuisance actions against the grossly negligent or reckless landowners. Primarily, the provisions would be designed to further curb negligent fireshed land management. Addressing one positive externality generated by the provisions, extending public nuisance to negligent and reckless private landowner conduct would increase the potential for *parens patriae* actions based on public nuisance claims. As explored in the preceding subpart, these actions could prove vital to states as part of a mechanism to bankroll the stringent agency-review processes required for the statutory derivatives to operate equitably as to private fireshed landowners both large and small.

With regard to the forced-pooling derivatives in particular, states lacking the resources for both macro- and micro-level land management monitoring could potentially leave small-scale monitoring to the parties to the agreements. Perhaps one or more private landowners entering into a JOA with respect to wildfire fuel reduction in a fireshed could engage in the land

159. *Id.* at 892.

160. *See* Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 609 (Tex. 2016) (discussing Turner v. Big Lake Oil Co., 96 S.W.2d 221, 222 (Tex. 1936)).

161. The National Park Service defines canopy fires as the fires that scorch the highest foliage layer on trees and are the most intense—and often most challenging to contain—of all types of wildfire. *Fire Spread*, NAT'L PARK SERV., https://www.nps.gov/fire/wildland-fire/learning-center/fire-in-depth/fire-spread.cfm [https://perma.cc/G8MF-R5VW].

management monitoring activities themselves by way of drone[162] or a thorough review of Landsat imagery by third-party land management experts. Although glaring economies of scale attend agency-level monitoring, small-scale efforts would be more amenable to private monitoring than large-scale efforts. This is due to the compressed time frame and small geographic scope of the JOAs, relative to the broad, long-term agreements contemplated by the unitization statutory echoes.

Conceivably, a JOA could even appoint an individual who owns part of the fireshed to serve as the satellite data reviewer, if the person has relevant experience sufficient to qualify her for the task of ensuring compliance with the various agreements between the landowners of contiguous private tracts. As crafted, the statutes would protect against damage to other landowners by this sort of self-dealing. Orders approving JOAs placing landowners in monitoring capacities—placements amounting to self-dealing on the part of the monitoring landowners—would have to contain reasonableness, fairness, and equity findings.

B. Recommended Modifications to Existing Statutory Regimes

Typical forced-pooling statutes in the area of oil and gas law merely allow pooling, rather than providing some independent incentive to pool.[163] The same proposition is true with regard to compulsory-unitization statutes across the board.[164] A vast majority of states require a minimum percentage of consenting working interest and royalty interest holders prior to ordering unitization.[165]

In terms of encouraging the use of the statutory echoes, the recommended fireshed land management statutes would be written to include

162. Indeed, modern drone technology is increasingly employed by land surveyors, as drones are now capable of collecting "geo-referenced digital aerial images, with resolutions as sharp as 1.5 cm (0.6 in) per pixel." *Drones for Surveying*, SENSEFLY, https://www.sensefly.com/applications/surveying.html [https://perma.cc/3L9R-2UM4].

163. *See, e.g.*, TEX. NAT. RES. CODE ANN. § 102.011 (2017) (providing that the Texas Railroad Commission, on a landowner's application "and for the purpose of avoiding the drilling of unnecessary wells, protecting correlative rights, or preventing waste, shall establish a unit and pool all of the interests in the unit" within an area of specified acreage).

164. *See* 52 OKLA. STAT. ANN. § 287.3 (2017) (setting out "the filing of a petition," as well as "notice and hearing," as prerequisites to the Corporation Commission ordering unitization of property interests).

165. *See* BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING AND UNITIZATION § 18.02(4)(b) (3d ed. 2016) (relating that all states with compulsory-unitization statutes on the books, other than Alaska, have codified a minimum-consent requirement). In the single case that addressed the constitutionality of minimum-consent requirements, the Supreme Court of Oklahoma held that these requirements are not mandatory under either the Oklahoma Constitution or the U.S. Constitution. *See* Palmer Oil Corp. v. Phillips Petroleum Co., 231 P.2d 997, 1004 (Okla. 1951) (holding that the legislature possesses the power to withhold the right to protest unitization from royalty interest holders, deriving from the legislature's "police power to enact the law without the consent of either lessees or royalty owners," and stating that statutorily allowing either group of interest holders to consent was optional).

positive incentives. One simple means of introducing a positive incentive would be to provide tax breaks to landowners who consent to agreements under the statutes. Again, as long as state legislatures include some form of powerful positive incentive in the statutory derivatives, the specific incentives—from the array of candidates—are best determined by the states in their capacities as laboratories of democracy.

Broadly, the primary benefit of hydrocarbon-development statutory derivatives is the deterrence of negligent land management, augmented by state and federally sponsored private landowner information campaigns. Additionally, these statutes would overcome the significant transaction costs involved in joining together disparate, contiguous private landowners in the fireshed for joint land management efforts.[166] With the detailed features of the forced-pooling and compulsory-unitization statutory echoes laid out, this Note now turns to an exploration of existing features of wildfire suppression and *ex ante* land management which would work more efficiently, in conjunction with the statutory derivatives, if modified from their current forms.

V. Related Policy Proposals

To be sure, the inefficiencies relating to ex ante wildfire risk reduction in the WUI cannot be solved exclusively by enacting forced-pooling and compulsory-unitization statutes to govern the actions of private landowners. This Part outlines other culpable actors generating inefficient results in firefighting and land management in firesheds across the United States, alongside policy proposals to better align relevant incentives.

A. Moral Hazard: A Reality in the Fireshed?

The age-old worry of moral hazard with regard to insurance[167] appears to be vindicated to some degree in the context of homeowner-insurance policies in fire-prone areas of the country. Homeowners in the WUI nearly all carry home-insurance policies that cover wildfire loss,[168] and the availability of federal disaster assistance disincentivizes insurers from

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166. *See* Schulz & Lueck, *supra* note 20, at 2536 (stating that individual landowners in the fireshed desire "to protect against wildfire risk and engage in *ex ante* management of the wildfire resource," despite the fact that these landowners are heterogeneous and the fact that "high transaction costs provid[e] a bar to bargaining").

167. That is, the worry that insurance at large has the effect of increasing careless behavior respecting insured property, which ultimately leads to higher insurance payouts. *See, e.g.*, Alston v. Pheonix Ins. Co., 27 S.E. 981, 982 (Ga. 1897) (characterizing the "delivering of a mortgage upon insured property" as a "moral hazard," since it "tends to lessen the interest of the mortgagor in the safety and preservation of the property").

168. *See* Schulz & Lueck, *supra* note 20, at 2536 (asserting that "[h]ome insurance among homeowners in wildland urban interface areas is ubiquitous" and "[s]tandard homeowner insurance provides private compensation for losses caused by fire").

adjusting premiums based on wildfire risk.[169] Thus, homeowners in the fireshed have the ability to obtain insurance at rates disproportionate to the risk they assume by living in wildfire-prone areas.[170]

To curb the moral hazard generated by current wildfire policies in the United States—a conundrum perpetuated by both governmental and private actors—insurers would do well to peg homeowner-insurance policies to actual fire risk in the WUI. By charging "actuarially sound premiums for wildfire insurance,"[171] home insurers in the WUI could do their part to reduce development in areas with exceedingly high rates of wildfire damage, which they could identify using fire-suppression cost figures. Since the home-protection component of wildfire-suppression costs likely makes up the bulk of fire-suppression costs across the board,[172] reducing development in the WUI is one of the most vital maneuvers in the effort to drive down annual wildfire-fighting costs.

B. *State Options in Addition to Oil and Gas Statutory Derivatives*

In terms of measures that would incentivize efficient land management with respect to wildfire risk, states and the federal government have a myriad of options at their disposal on top of statutes derived from oil and gas law.

1. Amending Slash Laws to Invite Tort Suits.—First, states would be wise to amend slash laws to cover all land management activities that impact the presence of wildfire fuel sources on private property. Massachusetts hits closer to this mark with its slash statute than any other state. However, the issue with Massachusetts's slash statute is that it regulates only landowner behavior as it relates to slash buildup caused by various wood-cutting activities.[173] The recommended slash statutes would not only cover both commercial and noncommercial activities but would also include regulation of landowner inactivity—that is, landowner failure to clear private property of slash. The target of the latter category of regulated behavior would be slash

169. Bradshaw, *supra* note 28, at 464 (quoting Richenda Connell et al., *Evaluating the Private Sector Perspective on the Financial Risks of Climate Change*, 15 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 133, 138–39 (2009)).

170. Bradshaw, *supra* note 28, at 462.

171. As detailed in Part III, at least one academic has proposed that the federal government create a national wildfire insurance program similar to the National Flood Insurance Program, with premiums based on "wildfire suppression costs" in particular areas within the WUI. Reilly, *supra* note 75, at 542, 544, 561.

172. HEADWATERS ECON., *supra* note 9, at 10 (reporting a finding by the U.S. Department of Agriculture's Office of Inspector General that land managers attributed 50% to 95% of wildfire-fighting costs "to the defense of private property").

173. *See* MASS. GEN. LAWS ch. 48, § 16A (2017) (requiring disposal of slash left over from brush, wood, and timber cutting).

that accumulates as a result of the natural process of decay, resulting in tree litter and brush that serves as wildfire fuel.

In addition to broadening the scope of slash laws, states could include tort-liability provisions within the penalty sections of slash laws. Legislators could include two features in these provisions that would likely increase deterrence of negligent private land management. First, drafters could include statutory damage provisions for civil tort suits alleging violations of the modified slash laws. Second, legislatures could statutorily lower the burden of proof for these tort suits to substantial evidence,[174] a burden the Supreme Court has defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[175] Although suits in tort are not commonly tried under this burden,[176] compelling reasons exist for legislators to codify this burden in modified slash statutes.

Substantial evidence is preferable to preponderance, since these cases would likely be difficult to prove, even with state-implemented land-monitoring programs that would produce some of the necessary evidence. Lowering the burden from preponderance would provide a toothier threat against negligent land managers, which would further incentivize them to manage their land to a reasonable degree.

2. *Enacting Cost-Recovery Statutes.*—In addition to amending slash statutes, states would do well to enact statutes explicitly providing the forest service the capacity to recover costs from landowners, using the Oregon Wildland-Urban Interface Fire Protection Act as a model.[177] These sorts of statutes would be particularly useful in dealing with groups of landowners in firesheds that come up with reasonable land management agreements, gain the necessary stamp of approval from the state forest service agencies, and then simply return to business as usual. One can conceive of a fireshed full of private landowners who resent the idea of the tyrannical state government

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174. Substantial evidence is a lower burden than the applicable burden in typical tort cases, preponderance of the evidence. Sarah T. Zaffina, *For Whom the Bell Tolls: The New Human Resources Management System at the Department of Homeland Security Sounds the Death Knell for a Uniform Civil Service*, 14 FED. CIR. B.J. 705, 728 n.143 (2005).

175. Consol. Edison Co. of N.Y. v. Nat'l Labor Relations Bd., 305 U.S. 197, 217 (1938).

176. However, in certain states, specific torts do indeed require proof by substantial evidence rather than preponderance of the evidence. As an example, in claims for tortious interference with contract in at least two states, plaintiffs must produce substantial evidence establishing a lack of justification or absence of privilege to show unlawful interference and means. 86 C.J.S. TORTS § 101 & nn.17–18 (2017); *see also* Nazeri v. Mo. Valley Coll., 860 S.W.2d 303, 316–17 (Mo. 1993) ("A plaintiff has the burden of producing substantial evidence to establish a lack of justification.").

177. This Act, plumbed in Part II, allows for cost recovery of suppression costs, up to $100,000, from WUI landowners when a fire started on their property; the fire spread "within the protection zone" surrounding a building and driveway which were not up to the fuel-reduction standards specified in the statute; and the costs expended to suppress the fire were "extraordinary." Bradshaw, *supra* note 28, at 462 n.80. The $100,000 cap is eliminated in cases of negligence. *Id.*

effectively compelling them to manage their land in particular ways, and who therefore sign off on what they see as red-tape paperwork without the intent to ever follow through. Cost-recovery statutes would allow states to address the vexing problem posed by this type of landowner.

As an incidental note, cost-recovery statutes would help offset the "implicit subsidy" that incentivizes private landowners to continue to plunge deeper into the WUI under the U.S. wildfire law and policy regimes as they now stand.[178] This is so because, as explored briefly above, the wildfire-related costs that WUI homeowners bear are disproportionate to the risk these homeowners incur by virtue of building in high-fire areas.[179] States could deposit the revenues collected pursuant to the cost-recovery provisions into the oversight and monitoring fund discussed in the previous Part.[180] As a positive-feedback loop, increased oversight would likely generate extensively greater revenues by way of increasing detection of negligent land managers after large fires, which would in turn allow for the development of more robust detection capabilities, which would in turn compound penalty revenues, and so forth.

C. *Role of Nuisance Litigation in Aligning Fireshed Incentives*

An examination of the role of public and private nuisance litigation in deterring negligent land management will prove an ideal bookend to this Note's primary analysis, prior to addressing ancillary standing issues in the following subpart. As explored in section IV(a)(ii), "Institutional Design," the recommended statutory echoes would contain provisions expanding the definition of private nuisance and extending public nuisance to encompass grossly negligent and reckless land management.

In order to further deter negligent land management in the WUI, municipalities, the private plaintiffs' bar, and states—in cases of large-acreage damage at the hands of grossly negligent or reckless landowners—ought to be vigorously pursuing public and private nuisance claims against negligent land managers. Such suits could be ideal tools in the fight to decrease fire-suppression costs by incentivizing efficient land management

178. LUECK, *supra* note 117, at 83.

179. This is largely due to the ubiquity of homeowners' insurance in the WUI, and the fact the premiums for same "do not reflect the actual risk of living in the WUI." Reilly, *supra* note 75, at 555.

180. Some states—like Texas—would likely use some of the money generated from land management tax revenues for other purposes when the states' budgets are tight. *See* Ross Ramsey, *Analysis: Lawmakers Can Turn to a Bag of Tricks to Balance State Budget*, TEX. TRIB. (Feb. 15, 2017), https://www.texastribune.org/2017/02/15/analysis-lawmakers-can-turn-bag-tricks-balance-state-budget/ [https://perma.cc/YXX6-BLJA] (describing the many means by which the Texas legislature regularly constructs the façade of a balanced budget, including "taking money set aside for other uses"). Certainly, this practice is reprehensible.

efforts *ex ante*. Standing may inhibit these uncommon suits.[181] Specifically, private plaintiffs and municipalities may face challenges proving that the injury of damaged land and property can be traced to the action of negligent land management. Standing issues with regard to all tort suits discussed in this Note are taken up in the following subpart.

D. *Standing Issues for Tort Victims in the WUI*

Standing under Article III of the U.S. Constitution is a prerequisite to a plaintiff's ability to maintain a federal lawsuit and requires plaintiffs to show three elements: (1) a particularized injury; (2) traceability of the injury to the challenged action; and (3) the ability for a favorable ruling to redress the injury.[182] The first element is known as "injury in fact," and requires that the plaintiff "personally suffered some harm."[183]

Although this three-pronged conception of standing requirements applies in suits brought in federal court, state standing doctrine typically tracks Article III standing doctrine, though the requirements may depart from the federal conception in certain respects and may derive from particular statutory regimes.[184] If they vary from federal requirements, state standing requirements are generally less onerous than Article III standing requirements.[185] Standing requirements in certain states' courts can be met by proof that the plaintiff "is within the class of persons intended to be protected by a statutory damages scheme," irrespective of any actual harm to the plaintiff.[186] Other states, however, more closely hew to the Article III standard with regard to standing requirements and therefore require plaintiffs to prove actual injury in order to maintain tort suits.[187]

The injury-in-fact prong will not be difficult to prove for plaintiffs whose homes are burned to crisps. The more onerous requirement will be proving traceability of the injury to the action of negligent land management—causation, by another name.[188] Courts have elaborated on the

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181. Indeed, nuisance claims for negligent land management are rare. *See* Yoder, *supra* note 49, at 306–07 n.15 ("Although nuisance claims for smoke from prescribed fires are commonplace, nuisance claims for the wildfire risk due to poor vegetation management in fire-prone areas is [sic] uncommon.").

182. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992); *see also* Edward Sherman, *"No Injury" Plaintiffs and Standing*, 82 GEO. WASH. L. REV. 834, 836 (2014).

183. Sherman, *supra* note 182, at 836.

184. *Id.* at 836–37.

185. Paul Karlsgodt, *Statutory Penalties and Class Actions: Social Justice or Legalized Extortion?*, 90 DENV. U. L. REV. ONLINE 43, 46 (2013).

186. *Id.*

187. *See* Brief of the Chamber of Commerce of the United States of America et al. as Amici Curiae Supporting Petitioner at 4–7, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (No. 13-1339) (providing a list of states requiring proof of injury in fact as a standing prerequisite).

188. *See* Rothstein v. UBS AG, 708 F.3d 82, 91 (2d Cir. 2013) ("The traceability requirement for Article III standing means that the plaintiff must 'demonstrate a causal nexus between the

traceability-of-injury requirement as a "lesser burden" than the requirement of showing proximate cause in a complaint.[189] Thus, in order to ensure that plaintiffs whose homes are burned in a given fireshed as a result of negligent management of adjacent tracts have standing to sue in all states, plaintiffs should endeavor to show proximate cause. In terms of widespread damages in a given fireshed, organizations of landowners may be able to maintain suits as entities in and of themselves, as long as they can show that their members have standing.[190] With respect to trial strategy, a fire-origin expert would likely be necessary to prove proximate cause, as is the case in the run-of-the-mill personal injury suit based on fire damage.[191]

Tort suits for slash law violations would only be viable with regard to certain types of wildfires, due to the difficulty of effective monitoring of large segments of private land. The most viable type of wildfire damage on which civil plaintiffs would be able to sue would be damage from fires resulting from negligent land management—slash buildup, for instance—around the edges of private tracts. The paradigmatic case of this type of tract-edge wildfire is the Bastrop Complex Fire of 2011.[192] Although plaintiffs would still be able to go after public entities, in some cases, for failures to maintain terrain explicitly under their charge,[193] statutory damage provisions for suits against private landowners would provide an incentive for land managers to remove the hazardous fuel sources on their property.

In the same vein as the state-implemented Landsat data review programs, it may be possible for states to fund the coding of programs that sift through Landsat data after a large fire and algorithmically determine the probable origin of the fire. These programs could then cross-reference that

defendant's conduct and the injury.'" (quoting Heldman v. Sobol, 962 F.2d 148, 156 (2d Cir. 1992))).

189. *Id.* at 92 (quoting Lerner v. Fleet Bank, N.A., 318 F.3d 113, 122 n.8 (2d Cir. 2003)).

190. *See* Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 360 (1996) (noting that associations have standing to bring suits on behalf of their members when the members "would otherwise have standing to sue in their own right," the interests the organizations seek to protect are "germane" to the purposes of the organizations, and "neither the claim asserted nor the relief requested" in any suit brought by an organization "requires the participation of individual members").

191. *See, e.g.*, Fireman's Fund Ins. Co. v. Canon U.S.A., Inc., 394 F.3d 1054, 1056–58, 1060 (8th Cir. 2005) (holding the district court properly excluded expert opinions on fire origin as unreliable in a strict products liability case).

192. *See Bastrop Victims Sue Utility, Claim Negligence*, AUSTIN-AM. STATESMAN, Sept. 27, 2011, at A8 (outlining Texas Forest Service findings that "trees that crashed into overhead power lines probably caused the Bastrop fire," as a result of heavy winds that "apparently knocked down trees that tumbled into the electrical lines at two locations, causing sparks that fell into the dry grass and tree litter below").

193. After the Bastrop Complex Fire of 2011, Bluebonnet Electric Cooperative, Inc. ended up settling with the plaintiffs in the Bastrop Complex Fire lawsuit in 2014; the fire was the most expensive wildfire in Texas history. Jess Krochtengel, *Texas Utility Settles Dozens of Suits over 2011 Fires*, LAW360 (Mar. 31, 2014), https://www.law360.com/articles/523690/texas-utility-settles-dozens-of-suits-over-2011-fires [https://perma.cc/D3UX-ZJPN].

data with more detailed, publicly available satellite images of the land on which the fire started. Creating a database of this cross-referenced information would likely drive down expert fees in litigation, as experts would have access to a majority of the data they would need to determine the origin of the fire. Consequently, more private plaintiffs would sue in tort, and land managers would be further deterred from negligently allowing slash and other wildfire fuel to accumulate on their property.

Conclusion

In sum, the most efficient means of aligning incentives with respect to land management as it relates to wildfire risk are delivered primarily in the form of state legislative action. In order to reduce the risk of wildfires by shaping wildfire law around the conception of the fireshed as a commons, state legislatures would do well to enact three measures. First, state legislatures would do well to enact forced-pooling and compulsory-unitization statutes in the area of private land management in firesheds. Second, state legislatures would do well to either enact slash laws or amend existing laws to provide for statutory damages in tort suits alleging violations of the slash laws' land management provisions. Third, state legislatures would do well to enact cost-recovery statutes.

In addition to states, insurers; private plaintiffs' attorneys; and municipalities have distinct roles to play in improving private land management efforts in the WUI. Insurers can disincentivize negligent land management in the WUI by pegging premiums to wildfire risk. Private plaintiffs' attorneys, municipalities, and states would be wise to aggressively engage in litigation based on nuisance law of both the public and private varieties following wildfires caused by negligent land management. States can foster this litigation by statutorily expanding public and private nuisance law in the forced-pooling and compulsory-unitization derivatives. Additionally, states would do well to ameliorate specific standing issues regarding these and other tort suits for negligent fireshed land management by coding programs to monitor Landsat data and other detailed satellite images of fireshed land following large wildfires.

Taken holistically, the benefits flowing from this bundle of reforms would, this author surmises, outweigh the elevated transaction costs associated with private landowner bargaining for *ex ante* fire risk reduction in the WUI. Moreover, these reforms would form the bedrock of a coherent wildfire law regime in the United States with the concept of wildfires as common-pool resources at its core. These policy measures would likely be

able to reduce the amount of money spent annually on fighting wildfires in the WUI, and would save countless human and nonhuman lives and homes from obliteration as humanity blazes its haphazard path into the future and global temperatures climb ever higher.

Michael Rothburn Darling

Good Transmission Makes Good Neighbors: The Case for Easing Permitting Processes to Encourage Cross-Border Power Infrastructure Between Mexico and the United States

Barriers to cross-border transmission on the United States–Mexico border, including labyrinthine permitting processes, have long impeded the development of valuable border-region power infrastructure. The historical origins of the electric power regulatory system offer some guidance for why the presidential permitting system exists in its present, tangled form. Recently, legislators have renewed efforts to amend cross-border infrastructure approval. Though these attempts have failed, a new set of legislative proposals has been making its way through the chambers and has a high chance of achieving success. This Note discusses these topics and closes by advocating for Congress to ease cross-border infrastructure permitting processes to benefit the economies and peoples on both sides of the United States–Mexico border.

Introduction

Nearly half-an-hour into the third presidential debate between Donald Trump and Hillary Clinton, Trump accused Clinton of wanting "open borders" with Mexico. When a moderator asked Clinton to clarify her position, Clinton, perhaps deflecting, insisted that what she referred to was not immigration, but energy: "We trade more energy with our neighbors than we trade with the rest of the world combined. And I do want us to have an electric grid, an energy system that crosses borders. I think that will be of great benefit to us."[1] Lately, this sentiment has gained traction—not just on the political stage, but in executive orders; proposed bills to Congress; and agreements between the United States, Canada, and Mexico. There is good reason for a change. Currently, cumbersome permitting processes stymie the growth of power infrastructure along the United States–Mexico border.

Easing the permitting process would lead to great benefits for both the United States and its southern neighbor. Indeed, the change would lead to the growth of power infrastructure, economic development in the border regions, electric grid security and stability, cheaper electricity prices, and economically efficient generation and capacity along the United States–

* Thank you to my peers on *The Texas Law Review*. I am grateful for your conversation, your editing, and above all, your friendship.

1. NBC News, *The Third Presidential Debate: Hillary Clinton and Donald Trump (Full Debate)*, YOUTUBE (Oct. 19, 2016), https://www.youtube.com/watch?v=smkyorC5qwc [https://perma.cc/VS4U-AJY9].

Mexico border.[2] As such, this Note advocates that Congress ease permitting processes in order to encourage economic flourishing and improved relations with Mexico.

On the northern border of the United States, a history of grid interconnections between Canada and the United States has already developed into a robust, fully integrated system that provides grid reliability, security, and cost-saving benefits. Though the United States is a net importer of Canadian-generated electricity, the power flows both ways—providing for stability in times of emergency but also efficiency in day-to-day operations—a policy that has benefited both countries and served as a model of cooperation worldwide.[3]

The border between Mexico and the United States stands in stark contrast to the border between Canada and the United States. Transmission between the border states of Mexico and the United States is nearly nonexistent, and the great majority of the connections that do exist operate via low-voltage ties.[4] This disparity continues despite the enormous opportunity for development.

In 2013, revolutionary changes to Mexico's constitution opened Mexico's wholesale electricity market to greater private and foreign investment.[5] In the same wave of legislation, the Mexican government set a goal of generating 35% of its power from clean energy sources by 2024, and 50% by 2050.[6] Meanwhile, across the border, Texas's "wind boom" increased clean, wind-generated energy capacity from just over 4,000 MW to more than 21,000 MW in 2017[7]—and Texas rivaled Spain for the title of sixth-largest wind-power generator in the world.[8] This technological progress

2. U.N. DEP'T ECON. & SOC. AFFAIRS, MULTI DIMENSIONAL ISSUES IN INTERNATIONAL ELECTRIC POWER GRID INTERCONNECTIONS 61 (2005), https://sustainabledevelopment.un.org/content/documents/interconnections.pdf [https://perma.cc/6FZN-7RYU] (indicating that increased competition between domestic and foreign firms in the market could lead to a "reduction in the price of electricity for end users," resulting in further economic benefits and more robust local economies).

3. *Canada Week: Integrated Electric Grid Improves Reliability for United States, Canada*, U.S. ENERGY INFO. ADMIN. (Nov. 27, 2012), https://www.eia.gov/todayinenergy/detail.php?id=8930 [https://perma.cc/C5GQ-LRWK].

4. *Mexico Week: U.S.–Mexico Electricity Trade Is Small, with Tight Regional Focus*, U.S. ENERGY INFO. ADMIN. (May 17, 2013), https://www.eia.gov/todayinenergy/detail.php?id=11311 [https://perma.cc/LV9W-2KXV].

5. Richard H. K. Vietor & Haviland Sheldahl-Thomason, *Mexico's Energy Reform*, 4, 10 (Harv. Bus. Sch., Working Paper No. 717-027, 2017), https://www.hks.harvard.edu/hcpg/Papers/2017/Mexican%20Energy%20Reform%20Draft%201.23.pdf [https://perma.cc/MA4X-6BFA].

6. *Id.* at 4.

7. *U.S. Installed and Potential Wind Power Capacity and Generation*, WINDEXCHANGE (2017), http://apps2.eere.energy.gov/wind/windexchange/wind_installed_capacity.asp [https://perma.cc/P6LQ-DZWJ].

8. Richard Martin, *The One and Only Texas Wind Boom*, MIT TECH. REV. (Oct. 3, 2016), https://www.technologyreview.com/s/602468/the-one-and-only-texas-wind-boom [https://perma.cc/W3XK-TULH].

was not perfect, however, as supply occasionally outpaced demand, which caused electricity prices to go negative.[9] The confluence of developments on the United States–Mexico border has allowed the opportunity for interconnection to ripen on the vine. Nevertheless, cumbersome permitting processes have stymied potential growth.

This Note advocates for easing permitting processes to encourage growth and investment in infrastructure, grid security and stability, and economically efficient generation and capacity along the United States–Mexico border. Part I will begin by presenting the history of U.S. cross-border electricity trade, the development of cross-border transmission and facility permitting—including its origins in hydroelectric power regulation—and the blurred boundaries between congressional and executive powers that have been a part of this permitting process since its inception. Part II will discuss the present state of the permitting process, developments in the electricity markets in Mexico and the United States that make border interconnection both more viable and more attractive, and existing proposals and efforts to ease permitting in the region. Finally, in Part III, this Note will apply the analysis of congressional and executive powers in Part I to propose how Congress can reform permitting processes to effectively encourage cross-border interconnection on the southern border.

I. The History of Cross-Border Electric Transmission Facility Regulation

Two matters are of interest when analyzing the subject of cross-border presidential permitting in the power sector: (1) the origins of this regulation in hydroelectric power statutes, and (2) the blurred lines between congressional and executive power for promulgating and enforcing presidential permits.

A. Origins of Electricity Regulation in Hydroelectric Power

The first electricity regulations originated in the growth of hydroelectric power: from the prohibition against using navigable waters of the United States for hydroelectric dams without a license, electric power became formally regulated by the federal government in 1920, when Congress passed the Federal Water Power Act (FWPA).[10] The FWPA—to be administered by the Secretaries of War, Agriculture, and the Interior—created the Federal

9. Daniel Gross, *The Night They Drove the Price of Electricity Down*, SLATE (Sept. 18, 2015), http://www.slate.com/articles/business/the_juice/2015/09/texas_electricity_goes_negative_wind_power_was_so_plentiful_one_night_that.html [https://perma.cc/LM39-WXUE]. This phenomenon also frequently occurs in California on the spot market thanks to a great increase in utility-scale photovoltaic capacity. Chris Namovicz, *Rising Solar Generation in California Coincides with Negative Wholesale Electricity Prices*, U.S. ENERGY INFO. ADMIN. (Apr. 7, 2017), https://www.eia.gov/todayinenergy/detail.php?id=30692 [https://perma.cc/TH5R-6FC6].

10. Federal Water Power Act, Pub. L. No. 66-280, 41 Stat. 1063 (1920) (recodified as amended at 16 U.S.C. §§ 791–828 (2000)).

Power Commission (FPC), and gave it authority to permit the generation of hydroelectric power.[11] The birth of the FPC did not presage a future of efficient permitting; with the new regulations, the FPC received more applications than it could address and left many of the permits undecided.[12] But what is of greatest interest in these origins is the emphasis on the power-generating source. Before the advent of modern travel—the shipment of goods and the transportation of people via cars, trucks, and planes—maintaining the navigability of waterways was a key component in a well-functioning society and economy. Regulatory bodies had to account for competing claims to maximize the efficient, shared use of waterways.

As such, it makes sense that the origins of the power-market regulation originated in dam permitting.[13] But it is arguable that this origin influenced the development of a blanket cross-border regulation that failed to consider the effects of a similar permitting process on the southern border.

The New Deal Era Congress passed sweeping legislation in 1935 under the Public Utilities Holding Company Act (PUHCA), which in part amended the FWPA.[14] One of the focuses of Part II of PUHCA, also known as the Federal Power Act (FPA), was to fill regulatory "gaps" associated with interstate wholesale electricity.[15] Perhaps influenced by the spirit of the times, legislators writing the FPA also chose to fill regulatory gaps that had *not* been disputed—and for the first time, the FPC was authorized to demand and enforce a cross-border transmission facility permitting process.[16]

These regulations were practical enough. They required that electric energy should not be transmitted to a foreign country without an order from the FPC. The regulations also stated that the FPC would grant such an order to an applicant as long as it did not find that "the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of

11. *Id.*

12. Philip L. Cantelon, *The Regulatory Dilemma of the Federal Power Commission, 1920–1977*, 4 FED. HIST. J. 61, 64 (2012).

13. Even in its time, the Federal Water Power Act received flak from critics for its potential to dampen the growth of hydroelectric power and for jurisdictional issues between federal and state governance. *See, e.g.*, Moses Hooper, *Some Views Respecting the Federal Water Power Act*, 8 MARQ. L. REV. 1, 7 (1923) (arguing that Congress overreached its authority by regulating water-powered facilities—even those on streams—when it was only empowered to pass regulation that directly affected the *navigability* of waters, resulting in a negative effect on development of hydroelectric power in the region).

14. Federal Power Act, ch. 687, § 33, 49 Stat. 838, 838 (1935) (amending § 201).

15. *Id.* § 213, 49 Stat. 838, 847–48 (amending § 201(b)). For an analysis of the history behind these gap-filling efforts, see Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEXAS L. REV. 399, 408–10 (2016) (analyzing the case that spurred gap-filling legislation, Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 84 (1927), which barred receiving or forwarding states from regulating the price of electricity sold between their states).

16. *See* Rossi, *supra* note 15, at 400–10.

facilities subject to the jurisdiction of the [Federal Power] Commission."[17] This legislation, part of an act that amended the FWPA, surely contemplated transmission on the Canada–United States border, and not the effects such a permitting system would have in the South. Notably, these restrictions, passed by a Congress not known for its regulatory laxity, were less stringent than today's—indeed, they were essentially permissive. Now, obtaining cross-border transmission facility permits can take several years and cost millions of dollars.[18]

B. Constitutional Issues Between Executive and Legislative Branch Authority

In 1953, acknowledging the FPA's grant of authority to the FPC to authorize transmission from the United States to a foreign country, President Eisenhower issued an executive order that delegated his own authority to grant permits for electric transmission facilities to the Secretary of Energy.[19] As such, Congress had delegated its authority to the President, who had in turn delegated that authority to an agency that Congress has created.

The executive order stated that the Secretary of Energy could issue a presidential permit upon finding that the permit was "consistent with the public interest" and had "obtain[ed] the favorable recommendations of the Secretary of State and the Secretary of Defense thereon . . . ."[20] If the Secretary of Energy, the Secretary of State, and the Secretary of Defense could not come to an agreement, the permit would then be submitted to the President for a decision.[21] This authority was later delegated to the Department of Energy (DOE) in 1977, but its requirements remained essentially the same.[22]

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17. Federal Power Act, ch. 687, § 213, 49 Stat. 803, 848–49 (amending § 202(e)).

18. *See, e.g.*, BI-NAT'L ELEC. TRANSMISSION TASK FORCE, ARIZ.–MEX. COMM'N ENERGY COMM., BI-NATIONAL ELECTRICITY TRANSMISSION OPPORTUNITIES FOR ARIZONA AND SONORA 4, 43 (2013) [hereinafter TRANSMISSION TASK FORCE] (describing how the permitting process for an interconnection project between Nogales, Arizona, and Nogales, Sonora took over five years and cost $9 million to complete, even though the project was never completed).

19. Exec. Order No. 10,485, 18 Fed. Reg. 5,397 (Sept. 3, 1953); *see* ADAM VANN & PAUL W. PARFOMAK, CONG. RESEARCH SERV., R43261, PRESIDENTIAL PERMITS FOR BORDER CROSSING ENERGY FACILITIES 3 (2013).

20. Exec. Order No. 10,485, 18 Fed. Reg. 5,397 (Sept. 3, 1953).

21. *Id.*

22. *See* 42 U.S.C. § 7172(f) (2012) (limiting FERC's permit-issuing abilities); VANN & PARFOMAK, *supra* note 19, at 3–4 (noting that when the FPC was eliminated, its permitting functions were transferred to the DOE).

II. The Permitting Process Today

A. Requirements of the Permitting Process

Today, applicants who wish to construct and operate cross-border electric transmission facilities must comply with a protracted and elaborate permitting process. First, applicants must apply to the Secretary of Energy for: (1) a presidential permit to construct, connect, operate, and maintain cross-border electric transmission,[23] as well as (2) an authorization to export electricity.[24] Additionally, an application for a permit to construct, connect, operate, and maintain electric transmission lines requires evidence supporting "two primary criteria" for proving that the project is "consistent with the public interest": (1) the impact the project would have on the operating reliability of the United States' electric power supply, and (2) the environmental consequences of proposed projects under the National Environmental Policy Act of 1969, as amended (NEPA), which requires an environmental assessment.[25] At this point, if the DOE determines that the proposal would be a "major Federal action significantly affecting the quality of the human environment," then, after an environmental assessment has been completed, an environmental impact statement is required.[26] The environmental impact statement in turn requires a minimum forty-five-day public comment period.[27] The DOE will then issue a "record of decision."[28] This extensive process often takes years.[29] If all of these steps proceed without a hitch, the DOE must then obtain concurrence from the Secretary of State and the Secretary of Defense before issuing the permit.[30] This first step of the process, at least according to the DOE's website, can take anywhere from six to eighteen months.[31] But there are still more requirements.

For an export authorization to export electric energy from the United States to foreign countries, applicants must send their materials to the Office of Electricity Delivery and Energy Reliability, an office of the DOE, and

23. Exec. Order No. 10,485, 18 Fed. Reg. 5,397 (Sept. 3, 1953), *as amended in* Exec. Order No. 12,038 (Feb. 3, 1978).

24. 16 U.S.C. § 824a(e) (2012); U.S. DEP'T OF ENERGY, *Presidential Permits and Export Authorizations - Frequently Asked Questions*, ENERGY.GOV, https://energy.gov/oe/services/electricity-policy-coordination-and-implementation/international-electricity-regulatio-6 [https://perma.cc/VPX4-RM3R].

25. U.S. DEP'T OF ENERGY, *supra* note 24.

26. NEPA Cooperating Agency, 40 C.F.R. § 1508.5 (2017); NEPA Environmental Assessment, 40 C.F.R. § 1508.9 (2017).

27. NEPA Timing of Agency Action Rule, 40 C.F.R. § 1506.10 (2017).

28. NEPA Record of Decision in Cases Requiring Environmental Impact Statements Rule, 40 C.F.R. § 1505.2 (2017).

29. *See* TRANSMISSION TASK FORCE, *supra* note 18.

30. U.S. DEP'T OF ENERGY, *supra* note 24; Exec. Order No. 10,485, 3 C.F.R. § 970 (1949–1953).

31. U.S. DEP'T OF ENERGY, *supra* note 24.

submit evidence that, first, the proposed export will not impair the sufficiency of the electric power supply within the United States and, second, that the proposed export will not cause operating parameters on regional transmission systems to fall outside of established industry criteria.[32] There must also be NEPA compliance for this export authorization, since approval of a presidential permit constitutes a "major Federal action."[33] This process, according to the DOE's website, takes "usually 3 to 6 months."[34] There are still further filing requirements for electricity exporters, including self-certifications and annual reports. The FPA also explicitly provides for state regulation of cross-border transmission so long as the state regulation does not conflict with the FPC's regulatory powers.[35]

Because the permitting process is cumbersome, many companies find it easier to simply take over older generation and transmission facilities that have already maneuvered the presidential permitting process. For example, Blackstone LP recently received a presidential permit to export all of its electricity across the border from its generation facility in Mission, Texas to Mexico.[36] Commentators noted that Blackstone likely received the permit because the preexisting Frontera facility that Blackstone bought had already received a presidential permit. But even in situations like these, a change in ownership necessitates a new presidential permit.[37] For voluntary transfers, the permittee and the entity who wishes to take over the permit and the facility must file a joint application to the Economic Regulatory Administration (ERA) that includes their reasons for requesting the transfer.[38] The law also prohibits that any "substantial change" be made to the permitted facility unless ERA has granted its approval.[39]

Even small modifications made to facilities require new or amended permits.[40] A good example of what amounts to insignificant, yet for all intents and purposes, "substantial changes" under these regulations is the case of Fraser Papers, Inc. The company owned a pulp facility in Madawasaka, Maine, and a paper-making facility in Canada. In 1945, the then-titled Fraser

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32. *Id.*

33. U.S. DEP'T OF ENERGY, *Presidential Permits–Procedures*, ENERGY.GOV, https://energy.gov/oe/services/electricity-policy-coordination-and-implementation/international-electricity-regulatio-9 [https://perma.cc/AX73-ZYDH].

34. U.S. DEP'T OF ENERGY, *supra* note 24.

35. 16 U.S.C. §§ 791–828c (2012).

36. Mark Chediak et al., *Blackstone to Export Texas Power to Newly Opened Mexican Market*, BLOOMBERG (Mar. 24, 2015), https://www.bloomberg.com/news/articles/2015-03-24/blackstone-to-export-texas-power-to-newly-opened-mexican-market [https://perma.cc/QLD4-4P98].

37. 10 C.F.R. § 205.323(b) (2017) (limiting the transferability and assignability of presidential permits under Executive Order 10,485 and their coordinate facilities).

38. *Id.*

39. *Id.*

40. Presidential Permit, Order No. PP-11-2, Fraser Papers Inc. (U.S. DEP'T OF ENERGY, Sept. 29, 1999).

Paper received a presidential permit to construct two transmission lines that would connect the pulp and paper-making facilities. These lines consisted of a 6.6-kilovolt (kV) transmission line and a 30.6-kV line.

In 1999, when Fraser Papers wished to increase the voltage of the 39.6-kV line to a 69-kV line "without making any physical changes to the transmission line itself," it was required to seek permission for a permit. Several years later, the company again requested permission to increase the voltage on the 69-kV transmission line to 138-kV. The Secretary of State and the Secretary of Defense then concurred in the amendment of each of these permit applications, noting that the "subject facility does not constitute a major transmission interconnection . . . . Therefore, the DOE has determined that amending Fraser's existing presidential permit . . . would not impair the reliability of the U.S. electric power supply system."[41]

The problem with these requirements is that aside from burdening operating businesses, they can also hamper investment in clean power development at a time when renewables are revolutionizing the industry. For example, the California company Sempra Energy built a wind farm on the high peaks of the Sierra Juárez mountain range of Mexico—what has been considered to be one of the last great undeveloped wind sites in the West—to transmit electricity across the international border to power the city of San Diego.[42] California had recently scaled up its renewable energy goals, and the site posed a solution to the increased demand for clean energy. Profits from the Mexican wind farm would also provide an economic boost to the small Mexican community that leased the land to wind developers. Indeed, because the wind farm was positioned on communally owned land, locals were set to receive $2,000 a month in profits—a substantial sum for residents whose primary income came from farming or other agrarian means.[43]

In 2007, the Energía Sierra Juárez wind farm applied for a presidential permit to construct an electric transmission line across the United States–Mexico border.[44] The line was short. Only 0.65 miles of the transmission line would be planted on U.S. soil before extending into Mexico, where the line would connect after one mile to an interconnection point.[45] The interconnection point would be connected via another mile of transmission line to the wind farm. In total, the transmission would extend 2.7 miles—only 0.65 miles on the U.S. side—but the NEPA review took five years to complete. Worse, there were three phases of the wind project. This was only

41. *Id.*

42. T.R. Goldman, *How Mexican Wind Lights San Diego Homes*, POLITICO (Feb. 16, 2017), http://www.politico.com/magazine/story/2017/02/mexico-wind-farms-renewable-energy-san-diego-border-214789 [https://perma.cc/VQ2F-7RWY].

43. *Id.*

44. Presidential Permit, Order No. PP-334, Energía Sierra Juárez U.S. Transmission, LLC (U.S. DEP'T OF ENERGY, Aug. 31, 2012).

45. *Id.*

Phase I.[46] Each phase required its own individual NEPA review and impact authorizations.[47]

The wind farm did not begin to produce and transmit power until 2015, and soon after, it faced litigation from environmental groups.[48] A federal district court ruled that the DOE violated NEPA by not considering in the Final Environmental Impact Statement the environmental effects that the transmission facilities would have on the *Mexican* side of the border,[49] despite the fact that the Mexican national environmental agency, Secretaría de Medio Ambiente y Recuroses Naturales (SEMARNAT), had already approved the project.[50] At this point, Energía Sierra Juárez had already made a twenty-year, $820-million power purchase agreement with distributor San Diego Gas & Electric.[51] Now, there is a fifty–fifty chance that the district judge will close the 1,200 MW project down until the environmental assessment has been conducted.[52]

Additionally, there are many authorizations and presidential permits for cross-border transmission facilities that are hanging in bureaucratic limbo: in April 2017, four applications were pending export authorizations (including one from 2004), and seven applications were pending presidential permit approvals (including one from 2010 and several from 2013).

Examining the DOE's list of Pending Presidential Permit Applications and list of Pending Export Authorization Applications also reveals that the time spans of six to eighteen months are more optimistic than a reflection of reality.

These regulations stifle the efficient functioning of business and deny facilities the flexibility to quickly adapt to an electric power market with rapidly changing technology that has in recent years moved towards incorporating clean energy.

Even the DOE, in its Quadrennial Report, acknowledged that the planning and permitting aspects of cross-border transmission are "uniquely challenging" and that these challenges stem, in part, from "permitting-related delays."[53] Because, of course, not only do facilities have to comply with

46. *Id.* at 1–2.

47. *Id.*

48. Backcountry Against Dumps v. Chu, 215 F. Supp. 3d 966, 972 (S.D. Cal. 2015); Protect Our Cmty's Found. v. Chu, No. 12cv3062 L(BGS), 2014 WL 1289444, at *1–2 (S.D. Cal. Mar. 27, 2014).

49. *Backcountry*, 215 F. Supp. 3d at 978.

50. Jean Guerrero, *First U.S.–Mexico Wind Energy Project Sees Legal Challenge*, KPBS (Oct. 13, 2015), http://www.kpbs.org/news/2015/oct/13/first-us-mexico-wind-farm-sees-legal-challenge [https://perma.cc/5YN5-X98G].

51. *Id.*

52. Goldman, *supra* note 42.

53. U.S. DEP'T OF ENERGY, TRANSFORMING THE NATION'S ELECTRICITY SYSTEM: ENHANCING ELECTRICITY INTEGRATION IN NORTH AMERICA, 2 QUADRENNIAL ENERGY REV. 6–8 (Jan. 2017), https://energy.gov/sites/prod/files/2017/02/f34/Quadrennial%20Energy%

byzantine federal regulations, they must also navigate the permitting processes of "provincial, local, and tribal governments."[54]

Speaking before the House Committee on Energy and Commerce, Jim Burpee, President and Chief Executive Officer of Canadian Electric Association, testified about the permitting delays associated with requesting permission for border-crossing transmission facilities on the Canada–United States border.

> We wait for presidential permit for an average of 2–1/2 or more years. We have a similar example of basically an ownership change . . . that took 2–1/2 years to get a new presidential permit for a 7–1/2 mile section of transmission line underwater that crosses U.S. territory waters going from south of Vancouver to Vancouver Island. And the Canadian equivalent was 7 months, 3 page[] application on the Canadian side, 62 pages on the American side.[55]

By laying down a blanket permitting process—and then, through later regulation, assuring that it was effectively labyrinthine—overly complicated permitting processes have raised significant barriers to entry where development has not yet justified the cost of transmission. As a result, the southern border area has entered into an endless cycle of stunted development due to a lack of grid reliability and transmission capacity; in turn, only a few companies are willing (or insensible enough) to take the risk of development.

III. Mexico: Past and Present

On the United States–Mexico border, there are only five electric transmission interconnections and eight interconnections used only for emergencies.[56] On the border between Canada and the United States, over thirty-five transmission connections cross international lines.[57]

There are several reasons why the power market did not develop on the United States–Mexico border as well as it did on the border between the United States and Canada. The first is a matter of population density and energy resources. In Canada, 75% of the population lives within 100 miles

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20Review—Second%20Installment%20%28Full%20Report%29.pdf [https://perma.cc/VR23-YQFD].

54. *Id.*

55. *The North American Energy Infrastructure Act: Hearing on H.R. 3301 Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce*, 113th Cong. 138–39 (2013) (statement of Jim Burpee, President & CEO, Canadian Electricity Association).

56. Sapna Gupta, *North American Electricity Primer*, NORTH AM. PROCESS 1 (2016), https://www.northamericanprocess.org/sites/default/files/primer_electricity_-_gupta.pdf [https://perma.cc/MGJ2-4JBE].

57. CAN. ELECTR. ASS'N, THE NORTH AMERICAN GRID: POWERING COOPERATION ON CLEAN ENERGY & THE ENVIRONMENT 6, 7 (2016), https://cea-ksiu6qbsd.netdna-ssl.com/wp-content/uploads/2016/01/CEA_16-086_The_North_American_E_WEB.pdf [https://perma.cc/5X2U-D5WX].

of the U.S. border,[58] and Canada has had access to vast hydropower resources.

By contrast, Mexico's population consolidated around Mexico City, and there was less need to develop the border region for many years. Additionally, though Mexico had access to coal and natural gas resources to generate power, energy sources in Mexico's northern border region such as solar power, an attractive option today, have only recently become economically viable.

Finally, there were governmental differences between Mexico and Canada that made the power market in Mexico less attractive for U.S. generators across the border. In Mexico, the power sector was born through private, and often foreign, investment.[59] In 1922, the government created the Comisión Nacional de Fuerza Motril (CNFM) to regulate the power industry, and in 1937 created the Comisión Federal de Electricidad (CFE) to ensure that rural areas unattractive to private investors would nonetheless have electricity.[60]

In 1960, after years of slowly consolidating the power market under the CFE, the government officially nationalized the entire industry.[61] This state of affairs remained the status quo until a half-century later, when in 2013 President Enrique Peña Nieto pushed an overhaul of the energy markets in Mexico, citing stunted development, high energy prices, unmet demand, and a potential for growth through privatization.[62]

For the electric power market, this development led to a number of changes. First, CFE, which owned 60% of generation capacity and has had a monopoly on transmission and distribution, vertically and horizontally unbundled.[63] System operation, which had for many years been the purview of CFE, was given to the Centro Nacional de Control de Energía (CENACE).[64] Independent Power Producers (IPPs), which operated even before the reform, no longer have to sell all of their power to CFE, and may now sell electricity via long-term contracts on an auction system.[65] The reform has also created short-term wholesale electricity markets to be calculated hourly for each node of the grid, and this locational marginal

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58. U.S. DEP'T OF ENERGY, *supra* note 53, at 6.

59. Alejandra Núñez-Luna, *Private Power Production in Mexico: A Country Study* 3 (The Program on Energy and Sustainable Dev. at Stanford U., Working Paper No. 47, 2005).

60. Lois Swanick, *Comisión Federal de Electricidad*, *in* MEXICO AND THE UNITED STATES 216, 216 (Lee Stacy ed., 2003).

61. *Id.*

62. Richard H. K. Vietor & Haviland Shedahl-Thompson, *Mexico's Energy Reform*, *in* HBS CASE COLLECTION 717-027 1, 3–4 (Jan. 23, 2017).

63. INT'L ENERGY AGENCY, MEXICO ENERGY OUTLOOK, WORLD ENERGY OUTLOOK SPECIAL REPORT 92–93 (2016), https://www.iea.org/publications/freepublications/publication/MexicoEnergyOutlook.pdf [https://perma.cc/L6S9-WZPT].

64. *Id.* at 93.

65. *Id.* at 94–95.

pricing will ideally mean that the lowest cost power is purchased for the grid.[66]

This means that if there is excess electricity generated in the United States' border states, they could get a good price for it on Mexico's market—particularly since peak demand times often differ on the two sides of the border. For example, a study found that peak demand times in Arizona and Sonora differed, in part because of distinct cultural traditions.[67] In Arizona, the peak demand occurs between 4 and 6 p.m., while Sonora has two peak demand times: 2–4 p.m. and 7–9 p.m.[68] Estimates of interconnection for one project predicted that, given these demands, Sonora would be transmitting power to Arizona 30% of the time, and Arizona would be transporting power to Sonora 70% of the time.[69]

Other studies have shown that, given these circumstances, there is great potential for cost-saving efficiencies if the two sides of the border are interconnected, in part because of the difference in peak demands. California already has multiple interconnections with Mexico. One study estimated that an 800 MW interconnection between Baja California and California could save $100 million yearly by reducing marginal costs through trading electricity.[70] Other states are also seeing the potential for energy exportation. Arizona has begun to develop solar projects in the sun-drenched stretches of the Sonoran Desert, right across from Sonora, Mexico, where there is already an insufficient supply for peak demand in the summers, and population and economic growth are expected to increase demand in the region.[71]

As such, there now exists an opportunity for growth that has not been available in nearly a century. Mexico currently has a higher priced market—which means that there is an opportunity for U.S. exporters to send electricity across the border, a development that would both benefit Mexico's economy while lowering costs for energy consumers across the border.[72] Indeed, Blackstone Group LP cited the price differential of consumer power in Mexico compared to Texas as its reason for applying to export electricity across the border.[73] In 2016, the wholesale price of electricity in Mexico was

66. *Id.* at 95.

67. TRANSMISSION TASK FORCE, *supra* note 18, at 3.

68. *Id.*

69. *Id.* at 45.

70. Ryan Triolo, *Integración Eléctrica en la Región Fronteriza: Beneficios y Barreras*, 79 ENERGÍA A DEBATE 26, 27 (2015).

71. TRANSMISSION TASK FORCE, *supra* note 18, at 2, 5.

72. U.N. DEP'T ECON. & SOC. AFFAIRS, *supra* note 2, at 61 (stating that increased competition between domestic and foreign firms in the market could lead to a "reduction in the price of electricity for end users").

73. Kristen Mosbrucker, *Mission Gas-Fired Plant Will Pump Electricity into Mexico*, MONITOR (Sept. 29, 2014), http://www.themonitor.com/news/local/mission-gas-fired-plant-will-pump-electricity-into-mexico/article_005badd4-476d-11e4-a986-0017a43b2370.html [https://perma.cc/X6AZ-JPYC].

between $48/MWh and $60/MWh, while in the Texas grid, managed by the Electric Reliability Council of Texas (ERCOT), the wholesale prices averaged $22/MWh.[74] Though ERCOT has been historically reluctant to interconnect with other systems since it seeks to avoid FERC regulation, ERCOT's interconnection with Mexico would not subject it to FERC regulation since cross-border electric trade is not interstate commerce falling under the jurisdiction of the FPA.

Additionally, there are a great number of benefits that both the United States and Mexico could receive by increasing cross-border electrical infrastructure, including greater reliability of the grid; reduced capital, operations, and generation capacity costs; and the opportunity to meet clean energy standards.

Not only have the benefits of cross-border interconnection been demonstrated on the Canada–United States border, but the trend is also catching on worldwide. Examples of other existing and planned international cross-border interconnection projects include the Bangladesh–India Electrical Grid Interconnection, the Sweden–Finland interconnection, and most recently, a France–Spain underground interconnection, which according to its developers, will "lead[] to greater security and stability in the two systems," which will work to "improve the quality of power supply . . . and allow the integration of a greater volume of renewable energy into the grid, especially wind energy."[75]

However, growth and development of cross-border transmission in the United States and Mexico are greatly impeded by the permitting process on the U.S. side of the border. Several case studies indicate the extent of these problems. The Bi-National Electricity Transmission Task Force published a white paper that included a case study indicating its frustration with the extensive permitting process. The paper stated that in 2000, Tucson Electric Power Company (TEP) wanted to make a 345-kV interconnection between Nogales, Arizona, and Nogales, Sonora.[76] Then the permitting process began.

First, TEP had to get a Certificate of Environmental Compatibility from the Arizona Corporation Commission to approve the transmission route. This took a year. Then, TEP had to file for an Environmental Impact Statement to receive a presidential permit from the DOE. This took four and a half years because the U.S. Forest Service, the U.S. Bureau of Land Management, and several other agencies had to change the route. At the end of the process, the Environmental Impact Study was a whopping 353 pages in length.[77] TEP

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74. U.S. DEP'T OF ENERGY, *supra* note 53, at 6–12.

75. *Spain–France Underground Interconnection*, RED ELÉCTRICA ESPAÑA, http://www.ree.es/en/activities/unique-projects/new-interconnection-with-france [https://perma.cc/58U9-79KR].

76. TRANSMISSION TASK FORCE, *supra* note 18, at 43.

77. U.S. DEP'T OF ENERGY, DOE/EIS–0336, TUCSON ELECTRIC POWER COMPANY SAHUARITA–NOGALES TRANSMISSION LINE FINAL ENVIRONMENTAL IMPACT STATEMENT 1.5, 2.2.104 (2005).

spent $9 million alone on the permitting process, and the project was never completed.[78]

Though U.S. procedures have made it burdensome to get permission to export electricity, Canada made a net revenue of $2.8 billion Canadian dollars in 2015 from exporting 68.4 terawatt-hours (TWh) of excess electricity to the United States.[79] The United States, in return, only exported 8.7 TWh to Canada.[80] Acknowledging these economic benefits then begs the question of what can be done to improve these processes.

IV. The Architecture of Abundance

A. *Jurisdictional Uncertainty*

Commentators who have examined the authority of the executive branch to regulate cross-border electric transmission have done so in part through statutory analysis comparing Executive Order 10,485, which governs electric power and natural gas facilities and takes its authority from both the FPA and the Natural Gas Act of 1977, to Executive Order 11,423 and Executive Order 13,337, which govern petroleum pipeline facilities, but do so without referencing any constitutional authority.[81] Between these orders, there is a disparity in the origins of power that enables the President to control the permitting process. Since presidential power is derived from the Constitution itself or is granted by Congress through legislation, it is worth noting the difference between these orders as it may provide insight into the reasoning—or lack thereof—behind this presidential authority, and the opportunity to change the permitting process.

Under the Constitution, Congress is granted the power "[t]o regulate Commerce with foreign Nations."[82] With this plenary power, Congress has three options: (1) to use this power; (2) to delegate this power; or (3) to abstain from the use of this power altogether.[83] Several courts, asked to determine the legitimacy of the President's authority to issue presidential permits in cross-border facilities, have decided in favor of the President's

78. TRANSMISSION TASK FORCE, *supra* note 18, at 43.

79. *2015 Electricity Exports and Imports Summary*, CAN. NAT'L ENERGY BOARD (June 2, 2017), https://www.neb-one.gc.ca/nrg/sttstc/lctrct/stt/lctrctysmmr/2015/smmry2015-eng.html [https://perma.cc/Q8Q4-7AV4].

80. *Id.*

81. VANN & PARFOMAK, *supra* note 19, at 1, 6–7.

82. U.S. CONST. art. I, § 8, cl. 3.

83. Rossi, *supra* note 15, at 404 n.24:

> Plenary power is absolute and comprehensive, but an entity with plenary power may or may not choose to treat that power as exclusive. It may choose to delegate power, as Congress often does in areas where it possesses plenary power (such as the Commerce Clause), or not to exercise it at all.

authority, based upon his constitutional authority over foreign affairs[84] or by Congress's failure to claim exclusive authority over the permitting process.[85]

What the opinions indicate, however, is that should Congress choose to take action, it will have the power to change how permission is granted for cross-border facilities,[86] particularly since such an action is more accurately described as "foreign commerce" than "foreign affairs." Such a solution would be helpful, in part because one problem with regulations derived executive orders is that the orders can easily be reversed or modified from one Presidency to the next. Legislation passed through Congress, however, means that it is more likely to be permanent—a situation which would lead to greater certainty for developers.

There are consequences to Congress not creating legislation that would fill this gap—that is, that executive orders have largely shaped the law. This has led to even more uncertainty. For example, in the *Energía Sierra Juárez* case previously mentioned, the Southern California District Court was tasked with determining whether or not, as the Plaintiffs asserted: (1) The DOE had violated the Administrative Procedure Act (APA) by not conducting a proper NEPA environmental review; and (2) whether the APA was at all applicable to the presidential permit process since, as the defendants asserted, "the Complaint . . . challenged presidential action undertaken by the agency pursuant to an express delegation of executive authority, which is not 'final agency action' subject to APA review."[87] Defendants had support for their contention, since other district courts had held "issuance of a permit by a federal agency pursuant to an executive order is presidential action, not agency action, and therefore not subject to judicial review under the APA."[88] Nonetheless, the Court was not convinced of the defendants' arguments, and denied the defendants' motion to dismiss.

In *Detroit International Bridge Co. v. Government of Canada*,[89] a subsequent case relating to cross-border bridges that have a similar presidential permitting process, the Washington D.C. District Court held that contrary to the rationale in *Protect Our Communities*, presidential authority delegated to an agency was still presidential—and thus not subject to review under the APA. Addressing the policy implication that agencies could avoid judicial review by hiding behind presidential authority, the court in *Detroit*

84. VANN & PARFOMAK, *supra* note 19, at 7 (citing Sisseton-Wahpeton Oyate v. U.S. Dep't of State, 659 F. Supp. 2d 1071, 1074–75, 1078, 1078 n.5 (D.S.D. 2009)).

85. *Id.* (citing Sierra Club v. Clinton, 689 F. Supp. 2d 1147, 1151–52, 1162–63 (D. Minn. 2010)).

86. *Id.* at 8.

87. Protect Our Cmtys. Found. v. Chu, No. 12cv3062-L-BGS, 2014 WL 1289444, at *4–5 (S.D. Cal. Mar. 27, 2014).

88. *Id.* at *6.

89. 189 F. Supp. 3d 85, 104–05 (D.D.C. 2016).

International Bridge replied, "Congress is fully capable of preventing such a result."[90]

This jurisdictional issue—and the power to grant presidential permits—was largely ignored. Recently, however, the presidential permitting process has been questioned in the above cases and also in congressional hearings. More attention has been brought to the issue because of developments in clean technology, such as wind and solar power, which have led to an increased interest in siting along the border of the United States and Mexico. But what drew the most attention to the issue was the Keystone XL Pipeline case—a controversy that dragged the topic of presidential permitting onto the national stage.[91]

B. *Congressional Attention*

The presidential permitting process was largely ignored until, in 2015, the Department of State, the agency that issues presidential permits for petroleum pipelines, and the equivalent of the DOE for electric transmission lines, denied a presidential permit for TransCanada's Keystone XL Pipeline after concluding that the project was not in the national interest.[92] Several bills passed through Congress attempting to amend the presidential permitting process, including Senate Bill 1, the Keystone XL Pipeline Approval Act, which passed through Congress but was vetoed by President Obama the same day it was sent to his office.[93] Another bill also passed through Congress, but this one had a broader aim—not just to ease the permitting process on one project, but to eliminate the presidential permitting process altogether.

During the 113th Congress, Representatives Fred Upton, Chairman of the Committee on Energy and Commerce, and Republican Gene Green of Texas presented a bill that the two had coauthored:[94] the North American Energy Infrastructure Act (NAEIA). The representatives presented the bill with a strikingly bipartisan group of cosponsors: twelve Republicans and eight Democrats. The majority of the cosponsors from border states hailed not from the Canada–United States border but from the Mexico–United States border, indicating that it is, indeed, the southern border that suffers the most from the permitting processes since, in part, they continue a cycle of growth stagnation (where there is no infrastructure, there is no development; where there is no development, there is no need for infrastructure).

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90. *Id.* at 105.

91. Aamer Madhani & Susan Davis, *Obama Rejects Keystone Pipeline from Canada to Texas*, USA TODAY (Jan. 18, 2012), https://usatoday30.usatoday.com/news/washington/story/2012-01-18/obama-rejects-keystone-pipeline/52655762/1 [https://perma.cc/WGE2-P6R8].

92. LINDA LUTHER & PAUL W. PARFOMAK, CONG. RESEARCH SERV., R44140, PRESIDENTIAL PERMIT REVIEW FOR CROSS-BORDER PIPELINES AND ELECTRIC TRANSMISSION 3 (2017).

93. *Id.* at 16.

94. *Hearing on H.R. 3301*, *supra* note 55, at 1 (opening statement of Rep. Ed Whitfield).

Upton, in his opening statement in the hearing before the Committee on Energy and Commerce, characterized the bill as an effort "to construct the architecture of abundance to realize [the] Nation's newfound energy potential."[95] The Bill was sent to the Committee on Energy and Commerce, who recommended that the Bill pass with an amendment.[96] The primary purpose of the Act was to "establish a more uniform, transparent, and modern process" for developing energy infrastructure—including the transport of oil and natural gas and the transmission of electricity—on the Canada and Mexico borders "in the pursuit of a more secure and efficient North American energy market."[97]

NAEIA proposed that presidential permits for border-crossing facilities be eliminated entirely and replaced with "crossing certificates." These crossing certificates would differ from the presidential permits in several ways. First, they would be issued by the Secretary of State for oil pipelines and the Secretary of Energy for electric transmission facilities, and would not require the complete concurrence of the Secretary of State, the Secretary of Energy, and the Secretary of Defense.[98]

The bill also removed any requirements for public notice or comment.[99] Significantly, the permitting process would have a time cap; agencies would be required to issue the certificates within 120 days of the findings of the NEPA review.[100] Moreover, granting a permit to a cross-border facility would no longer be considered a "major Federal action" that automatically triggered NEPA review.[101]

And in this bill too, there was a subtle linguistic shift relating to the emphasis on the "public interest": past legislation had required the applicant seeking a permit to prove that the project was either in the public interest or consistent with the public interest. In this new legislation, the default position was toward granting the certificate, rather than denying it, unless the facility "[wa]s *not* in the public interest."[102] This is a subtle, but significant change. Instead of laying a positive burden on the applicants, they were free to operate as they wished so long as the crossing did not hurt the public interest.[103]

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95. *Id.* at 5 (statement of Rep. Fred Upton).

96. H.R. REP. NO. 113-482, pt.1, at 1 (2014).

97. North American Energy Infrastructure Act, H.R. 3301, 113th Cong. (2013).

98. *Id.* § 3(b)(1)–(2).

99. *See id.* § 8(b)(1) (the only mention of notice of any rule changes in the Act is the requirement that the Act itself be published in the Federal Register within 180 days of its enactment).

100. *Id.* § 3(b)(1).

101. *See* LUTHER & PARFOMAK, *supra* note 92, at 4 (explaining that a "major Federal action" includes any project that requires federal agency approval via permit or otherwise); *see also id.* § 3(b)(1) (saying that NEPA or other necessary permit approval *shall* be granted unless it somehow runs contrary to public interest).

102. H.R. 3301 § 3(b)(1) (emphasis added).

103. This distinction drew dissent among some representatives advocating for the bill, including California Representative Jay McNerney, who stated that he "didn't understand why

The bill also nixed electric transmission facilities' requirement to get FERC authorization for the crossing.[104]

The bill drew the greatest opposition from those who feared, like Representative Henry A. Waxman from California, that the bill would be a "rubber stamp" to tar sands projects like the Keystone XL Pipeline and would increase the risk of projects that adversely affected climate change policies.[105]

The bill passed in the House on June 24, 2014.[106] It moved on to the Senate, where it was introduced by Senators Joe Donnelly, a Democrat from Indiana, Lisa Murkowski, a Republican from Alaska, and Joe Manchin, a Democrat from West Virginia.[107] The bill had already passed the House with bipartisan support and had even been recommended by the Committee on Energy and Commerce.[108] The bill was read twice in the Senate on September 16, 2014, and then referred to the Committee on Energy and Natural Resources.[109] It did not make it through the 113th session but had a second life in the 114th.

The bill was introduced in the 114th congressional session as Senate Bill 1228[110] and recommended for the Senate Committee on Energy and Natural Resources, to be heard five days later on May 14, 2015.[111] Unfortunately, this Committee had no Senate representation from any of the southern border states besides Arizona,[112] which has no existing electric transmission links to Mexico.[113] California and Texas, those states most keen on cross-border transmission facilities, had no representatives on the Committee at all. The Committee on Energy and Natural Resources hearing—which was set to address energy infrastructure as a whole—hardly touched on the issue. In a

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projects that are not in the public interest should be approved" and believed that, contrarily, energy projects should be in the "broad public interest." *Hearing on H.R. 3301*, *supra* note 54, at 3–4 (statement of Rep. Jay McNerney).

104. H.R. 3301 § 6.

105. *Hearing on H.R. 3301*, *supra* note 54, at 8–9 (statements of Rep. Jay McNerney and Rep. Henry A. Waxman).

106. North American Energy Infrastructure Act, H.R. 3301, 113th Cong., 160 CONG. REC. H5687–88 (2014) (enacted).

107. North American Energy Infrastructure Act, S. 2823, 113th Cong. (2014).

108. *#RecordOfSuccess*, HOUSE ENERGY AND COMMERCE COMM. (current through Jan. 23, 2018), https://energycommerce.house.gov/recordofsuccess/ [https://perma.cc/Z4UD-N8LC].

109. *S.2823 – North American Energy Infrastructure Act*, CONGRESS.GOV (Sept. 16, 2014), https://www.congress.gov/bill/113th-congress/senate-bill/2823/text [https://perma.cc/89VT-TA96].

110. North American Energy Infrastructure Act, S. 1228, 114th Cong. (2015).

111. *See Hearing on Energy Infrastructure Legislation Before the S. Comm. on Energy and Nat. Res.*, 114th Cong. (May 14, 2015).

112. *See id.*

113. *See* Michel Marizco, *Cross-Border Power Grid in the Works for Arizona, New Mexico*, ARIZ. PUB. MEDIA (Aug. 16, 2017), https://news.azpm.org/p/news-splash/2017/8/16/115386-arizona-mexico-cross-border-power-grid-in-the-works/ [https://perma.cc/RLU3-SJFY] (reporting that planning for the power grid between Arizona and Mexico was not finalized until 2017).

287-page document recording the proceedings, the word "border" was mentioned only four times, "Mexico" not once.

Parts of the original NAEIA resurfaced in other iterations, including the North American Infrastructure and Security Act of 2016—a monstrously large omnibus bill that passed in the Senate 85–12 on April 20, 2016, and in the House 241–178 on May 25, 2016.[114] Luckily, it died at the close of the session as the two versions of the bill were being reconciled.[115]

What began as beautiful legislation intended to ease permitting processes and minimize regulations lost its teeth and became incorporated into a bill that proposed far more red tape than it sought to cut through. The spirit of the original bill—eliminating presidential permits altogether, streamlining permitting processes, and fostering neighborliness that provided benefits on both sides of the border—was destroyed.

In the 115th Session, the bill lives again—and this time, it may prosper. Indeed, H.R. 2883, "Promoting Cross-Border Energy Infrastructure Act," an act identical to H.R. 3301, passed 254–175 in the House on July 19, 2017.[116]

There is also reason to believe that this time, when the newest version of the NAEIA passes in the House, it will be approved by the Senate. In 2013, when NAEIA first made its way through Congress, there was a split between the House, which was Republican, and the Senate, which was Democrat.[117] Since the bill was largely bipartisan, this should not have been of much significance, but the bill was associated with the Keystone XL pipeline and all of its political baggage. Now that the Trump Administration has approved the Keystone XL by issuing TransCanada a permit on March 23, 2017,[118] the bipartisan support that NAEIA had will likely be even stronger, since it is less likely to be lumped in with the Keystone controversy.

Additionally, now that Republicans control both the House and the Senate, it is likely that they will try to use their collective clout to push through NAEIA legislation. A Congress that is trying to please President Trump would do well to support NAEIA, particularly since President Trump has demonstrated his approval of such permit-expediting procedures, both through his approval of the Keystone XL pipeline and the recent Executive Order Expediting Environmental Reviews and Approvals For High Priority

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114. *All Information (Except Text) for S.2012—North American Energy Security and Infrastructure Act of 2016*, 114th Cong., https://www.congress.gov/bill/114th-congress/senate-bill/2012/all-info [https://perma.cc/DBL9-UY4L].

115. *S. 2012 (114th): North American Energy Security and Infrastructure Act of 2016*, GOVTRACK (2016), https://www.congress.gov/bill/114th-congress/senate-bill/2012 [https://perma.cc/R2BM-GBG9].

116. Promoting Cross-Border Energy Infrastructure Act, H.R. 2883, 115th Cong., 163 CONG. REC. H6010, H6023 (2017).

117. JENNIFER E. MANNING, CONG. RESEARCH SERV., R42964, MEMBERSHIP OF THE 113TH CONGRESS: A PROFILE 1 (2014).

118. Notice of Presidential Permit to TransCanada Keystone Pipeline, L.P., Public Notice 9941, 82 Fed. Reg. 16,467 (Apr. 4, 2017).

Infrastructure Projects.[119] What's more, these changes would perhaps work in tandem with President Trump's planned renegotiation of the North America Free Trade Agreement (NAFTA).[120]

Though the renegotiation of NAFTA is now politically loaded, in its current form, the NAFTA provisions relating to cross-border electricity trade are outdated, as they still require that any generating facilities selling to Mexico sell all of their output to CFE, a stipulation that would have become moot after Mexico's Energy Reform.[121] Given this set of circumstances, there is a significant chance that NAEIA reform is on the horizon.

Conclusion

Given the case examples presented above, a well-apprised power investor should not touch cross-border infrastructure with a ten-foot pole (nor a 2.7-mile transmission line). The costs are too great, the permitting process too protracted, and the rewards minimal or nonexistent if the project becomes stranded behind miles of red tape. As such, to encourage cross-border development, Congress should seek to ease permitting processes in order to encourage cross-border electric transmission development that will lead to greater grid reliability and cost efficiency as well as improved relations with Mexico. After all, as the great American poet Robert Frost once wrote, "[s]omething there is that doesn't love a wall."[122] Because it is not good fences, but good transmission, that makes good neighbors.

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119. Exec. Order No. 13,766, 3 C.F.R. § 8657 (2017).

120. Jill Colvin, *Trump: NAFTA Trade Deal a 'Disaster,' Says He'd 'Break' It*, ASSOCIATED PRESS (Sept. 26, 2015), https://apnews.com/982f8146e10942b2b7f6a07e2077576d/trump-nafta-trade-deal-disaster-says-hed-break-it [https://perma.cc/WV3J-HETW].

121. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 364–68.

122. ROBERT FROST, *Mending Wall*, *in* NORTH OF BOSTON 11, 11–13 (Henry Holt & Co. 1917) (1914).

The Personhood Movement's Effect on Assisted Reproductive Technology: Balancing Interests Under a Presumption of Embryonic Personhood

I. Introduction

In November 2017, congressional Republicans unveiled a plan to overhaul the tax code. While the proposal was primarily controversial for its fiscal policy, one section buried almost 100 pages into the bill sparked a different debate.[1] Section 1202 allows parents to open a 529 college savings account in the name of an "unborn child," defined as "a child in utero"—a human being "at any stage of development, who is carried in the womb."[2] This portion of the bill is effectively a personhood law—an attempt to classify the fetus as a person with legal rights. The drafters specified that an "unborn child" only includes embryos and fetuses inside a woman's body; however, most personhood laws sweep more broadly and include extracorporeal embryos as well. Those laws directly implicate assisted reproductive technology (ART), in which embryos are handled as part of treating infertility. How does redefining a legal "person" to include embryos affect an infertile woman's ability to use ART to conceive a child? The answer is unclear. But the prevalence of personhood laws alongside the increasing popularity of ART requires a serious conversation about how the former will affect the latter.

This Note aims to continue that conversation, exploring the consequences of personhood on ART by analyzing how a court might determine the constitutional boundaries of state personhood laws regulating embryo use. In Part I, I describe the significance of the personhood movement to ART. In Part II, I explain the legal backdrop, examining the embryo's legal and moral status; the relevance of *Roe v. Wade* and related cases; and the reproductive liberty framework. Finally, in Part III, I analyze hypothetical state regulations of embryo creation, storage, and discard under a presumption of embryonic personhood. This analysis ultimately asks, if a state passes a law labeling embryos "persons," can couples using ART to conceive raise a successful constitutional challenge?[3] Using a balancing test,

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1. *See* Caitlin Emma, *"Unborn Children" Qualify as College Savers in GOP Tax Plan*, POLITICO (Nov. 2, 2017), https://www.politico.com/story/2017/11/02/gop-tax-bill-abortion-rights-college-savings-244486 [https://perma.cc/HB7H-NSP8] ("Groups on both sides of the abortion debate squared off over the provision, opening a new front in the push to grant legal rights to a fetus.").

2. Tax Cuts and Jobs Act, H.R. 1, 115th Cong. § 1202(e) (2017).

3. ART can involve multiple parties. For example, a single woman who cannot produce viable eggs may use ART to conceive with several other people: an egg donor, a sperm donor, and perhaps

I demonstrate how a court might weigh the various competing liberty interests.

A. The Personhood Movement from Roe v. Wade *to Present*

The United States Supreme Court's decision in *Roe v. Wade*[4]—which recognizes constitutional protection for a woman's right to choose abortion[5]—set off a wave of pro-life backlash.[6] In 1974, just one year after *Roe* was decided, the Senate held its first set of hearings on what would later become known as a "personhood" amendment.[7] A portion of the proposed amendment read, "Neither the United States nor any State shall deprive any human being, from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception . . . equal protection of the laws."[8] The notion that life begins at conception is the core tenet of a larger personhood movement. Adherents believe unborn fetuses,

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a gestational surrogate. For simplicity purposes, I confine my discussion of the constitutionality of state laws regulating embryo use to those embryos created by a couple using both of their gametes.

4. 410 U.S. 113 (1973).

5. *Id.* at 154.

6. *See* ZIAD W. MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS 76 (2008) (explaining that the pro-life movement is primarily understood as a reaction to *Roe*); Clarke D. Forsythe & Keith Arago, Roe v. Wade *& the Legal Implications of State Constitutional "Personhood" Amendments*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y 273, 274 (2016) (observing that personhood amendments first surfaced in Congress immediately after *Roe* was handed down); Mary Ziegler, *Abortion and the Constitutional Right (Not) to Procreate*, 48 U. RICH. L. REV. 1263, 1268, 1273 (2014) (noting that personhood amendments originated in 1973, the same year *Roe* was decided). However, while *Roe* resulted in a large mobilization of pro-life efforts, the pro-life movement originated almost a decade before the Court's decision. *E.g.*, SHIRA TARRANT, GENDER, SEX, AND POLITICS: IN THE STREETS AND BETWEEN THE SHEETS IN THE 21ST CENTURY 58 (2008).

7. *Abortion—Part I: Hearings on S.J. Res. 119 and S.J. Res. 130 Before the Subcomm. on Constitutional Amendments of the S. Judiciary Comm.*, 93rd Cong. 2 (1974).

8. *Id.* at 1–2. Notably, not only did *Roe* deem a woman's right to terminate her pregnancy fundamental, but the Court explicitly rejected the idea of fetuses as "persons" under the Fourteenth Amendment. *Roe*, 410 U.S. at 162 ("In short, the unborn have never been recognized in the law as persons in the whole sense."); *see also infra* notes 82–84 and accompanying text.

and typically embryos,[9] deserve the same rights as living people.[10] The purpose of personhood legislation is thus to broaden the definition of a "person" under federal and state laws to include embryos and fetuses, ultimately guaranteeing them rights.[11]

The movement has been largely unsuccessful.[12] For example, in 2011 a proposed personhood amendment to the Mississippi Constitution surprisingly failed. Several pre-voting polls had suggested an overwhelming majority of the electorate supported the measure.[13] Following the initiative's unexpected failure, analysts sought to determine why 58% of people voted against it.[14] One of the most common reasons voters cited was concern about the law's effect on the availability of in vitro fertilization (IVF) technology, a form of ART.[15]

Several states have enacted general personhood laws.[16] However, Louisiana is the only state in which a personhood law specifically addresses

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9. Fetus and embryo are medically distinct but related terms. Human development between fertilization and birth is often divided into the embryonic and fetal periods. KEITH L. MOORE, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 1 (10th ed. 2016). While the embryo and the fetus technically represent distinct developmental phases—with the embryonic stage lasting until about the end of the eighth week of pregnancy—the law has not differentiated on this basis. Barbara Gregoratos, Note, *Tempest in the Laboratory: Regulation of Medical Research on Spare Embryos from* In Vitro *Fertilization*, 37 HASTINGS L.J. 977, 987 (1986); William A. Sieck, Comment, *In Vitro Fertilization and the Right to Procreate: The Right to No*, 147 U. PA. L. REV. 435, 439–40 (1998). Some scholars also differentiate between embryos and pre-embryos, suggesting the term pre-embryo be used to describe preimplantation embryos. *E.g.*, Jennifer P. Brown, Comment, *"Unwanted, Anonymous, Biological Descendants": Mandatory Donation Laws and Laws Prohibiting Preembryo Discard Violate the Constitutional Right to Privacy*, 28 U.S.F. L. REV. 183, 183 n.2 (1993). For the purposes of this Note, that distinction is not important, and I use the term embryo holistically.

10. 1 ANDREA O'REILLY, ENCYCLOPEDIA OF MOTHERHOOD 6 (2010); Jonathon F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J.L. & MED. 573, 575 (2013).

11. *See* Forsythe & Arago, *supra* note 6, at 275 (describing a typical state personhood amendment as "seek[ing] to amend the due process clause and the equal protection clause of its respective state constitution to include a developing human being or unborn child as a 'person'").

12. *See* Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, 74 OHIO ST. L.J. 75, 77 (2013) (characterizing personhood legislation as a "uniform failure"); *Legislative Tracker: Personhood*, REWIRE (last updated Jan. 17, 2018), https://rewire.news/legislative-tracker/law-topic/personhood [https://perma.cc/9GKT-NY9T] ("'Personhood' laws have been a favorite tactic of anti-choice activists for decades, but efforts to pass these laws have met with little success.").

13. *See* Frank James, *Mississippi Voters Reject Personhood Amendment by Wide Margin*, NPR (Nov. 8, 2011), http://www.npr.org/sections/itsallpolitics/2011/11/08/142159280/mississippi-voters-reject-personhood-amendment [https://perma.cc/VN6Z-MZNU] (describing the shock surrounding the measure's failure considering analysts thought support for the proposal was widespread).

14. Will, *supra* note 10, at 584.

15. *Id.* at 585.

16. *E.g.*, KAN. STAT. ANN. § 65-6732 (2015) ("The life of each human being begins at fertilization . . . [and] unborn children have interests in life, health and well-being that should be protected . . . ."); MO. ANN. STAT. § 1.205 (2017) ("The life of each human being begins at

embryos created using ART, and the law is narrowly constructed.[17] Chapter 3 of Louisiana's Civil Code is titled "Human Embryos."[18] The law provides that embryos created through IVF are "juridical persons" who have "certain rights granted by law."[19] These rights include the right to doctor–patient confidentiality[20] and rights against being sold, used for research, or destroyed.[21] The law's constitutionality has never been challenged in court.[22]

Personhood bills are not unique to state legislatures. In addition to the November 2017 tax proposal,[23] as recently as January 2017 Congress was considering a personhood law. United States Representative Jody Hice of Georgia and twenty-nine cosponsors introduced the federal Sanctity of Human Life Act, a bill declaring that human life starts with fertilization.[24] And advocates do not confine their efforts to legislative means. The Department of Health and Human Services released a draft strategic plan for 2018–2022 that describes the department's mission as "serving and protecting Americans at every stage of life, beginning at conception."[25] Pro-life groups have used judicial channels to advance these arguments as well. For example, in the embryo custody case *McQueen v. Gadberry*,[26] one pro-life litigation group argued that frozen embryos should be treated like

conception . . . [and] [u]nborn children have protectable interests in life, health, and well-being[] . . . ."); S.C. CODE ANN. REGS. 44-41-430 (2017) (defining an "unborn child" in the state's abortion statute as "an individual organism of the species homo sapiens from fertilization"); *see also* N.M. STAT. ANN. § 29-9A-1(D) (2017) (defining "clinical research" to exclude IVF treatments for infertility so long as measures are taken to ensure "each living fertilized ovum, zygote, or embryo is implanted in a human female recipient"). The New Mexico statute designates IVF as clinical research yet permits it to treat infertility so long as all embryos created are implanted into a woman's uterus. *Id.* However, it's doubtful this statute has any force because IVF is no longer considered clinical research and is a well established infertility treatment.

17. *See generally* LA. STAT. ANN. § 9:121–33 (2012).

18. *Id.*

19. *Id.* §§ 9:121, 124.

20. *Id.* § 9:124.

21. *Id.* §§ 9:122, 9:129.

22. The statute was the basis for a lawsuit brought against actress Sofia Vergara in 2016, but the case was dismissed on procedural grounds. Brooke Stanton, *Sofia Vergara and the Fraudulent Science of "Pre-embryos"*, NAT'L REV. (Sept. 5, 2017), http://www.nationalreview.com/article/451048/sofia-vergara-embryos-pre-embryos-fraudulent-science [https://perma.cc/4FQC-S279] (citing Emma & Louisiana Trust v. Vergara, ECF 2:17-cv-01498 (5th Cir. Aug. 25, 2017), PACER, https://www.pacermonitor.com/public/case/20667392/Emma_and_Isabella_Louisiana_Trust_No_1,_et_al_v_Vergara [https://perma.cc/6DUZ-WFU6]).

23. *See supra* Part I.

24. Sanctity of Human Life Act, H.R. 586, 115th Cong. (2017-2018). The bill was referred to the Subcommittee on the Constitution and Civil Justice in February 2017 and has been in legislative limbo since. *Id.*

25. Jessie Hellmann, *Trump's HHS Defines Life as Beginning at Conception*, HILL (Oct. 12, 2017), http://thehill.com/policy/healthcare/355104-health-department-defines-life-as-beginning-at-conception [https://perma.cc/7K93-XMTS].

26. 507 S.W.3d 127 (Mo. Ct. App. 2016).

children and suggested courts apply a best-interests analysis to determine the embryos' fates.[27]

Despite consistent failure, the movement has persisted in the last decade,[28] in part because the embryo's moral and legal status remains unsettled.[29] Capitalizing on this ongoing debate, legislators continue to introduce bills intended to expand the legal definition of a "person" to include the unborn. Since 2013, state legislators have proposed over 100 bills to this effect.[30] There was an influx of personhood bills across the country in 2017,[31] and 2018 looks to be no exception. For example, on February 20, South Carolina's Senate Judiciary Committee approved a bill titled "The Personhood Act of South Carolina."[32] The bill grants people the constitutional rights of due process and equal protection from the moment of fertilization.[33]

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27. *Id.* at 137; I. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, 46 HASTINGS CTR. REP., no. 4, Nov./Dec. 2016, at 13.

28. *See* Will, *supra* note 10, at 579 (outlining personhood proponents' recent legal efforts); *see also* Robin Abcarian, *A New Push to Define 'Person,' and to Outlaw Abortion in the Process*, L.A. TIMES (Sept. 8, 2009), http://articles.latimes.com/2009/sep/28/nation/na-embryos-personhood28 [https://perma.cc/8NVM-CDAP] ("Defeats of personhood measures around the country . . . have not daunted proponents . . . .").

29. *E.g.*, Kara L. Belew, *Stem Cell Division: Abortion Law and Its Influence on the Adoption of Radically Different Embryonic Stem Cell Legislation in the United States, the United Kingdom, and Germany*, 39 TEX. INT'L L.J. 479, 485 (2004) (explaining that perspectives on the acceptability of using embryos for research vary widely based on differing opinions about the embryo's moral status); John A. Robertson, *Embryo Culture and the "Culture of Life": Constitutional Issues in the Embryonic Stem Cell Debate*, 2006 U. CHI. LEGAL F. 1, 19 (2006) (describing the "profound disagreement" surrounding the moral status of the embryo) [hereinafter Robertson, *Constitutional Issues*]; Michelle F. Sublett, *Frozen Embryos: What Are They and How Should the Law Treat Them*, 38 CLEV. ST. L. REV. 585, 600–01 (1990) (noting that very few state statutes address embryos, and most that do are silent on what exactly an embryo is); Angela K. Upchurch, *A Postmodern Deconstruction of Frozen Embryo Disputes*, 39 CONN. L. REV. 2107, 2119–24 (2007) (discussing the different legal statuses courts attribute to embryos in embryo dispute and disposition cases); *see also infra* notes 55–59 and accompanying text.

30. *See Legislative Tracker: Personhood*, *supra* note 12 (cataloging state legislation introducing personhood measures).

31. *See* Olivia Becker, *At Least 46 Anti-Abortion Bills Are Already in Front of State Legislatures in 2017*, VICE NEWS (Jan. 12, 2017), https://news.vice.com/story/at-least-46-anti-abortion-bills-are-already-in-front-of-state-legislatures-in-2017 [https://perma.cc/9Y94-H4MF] (compiling a list of anti-abortion measures filed as of January 2017, many of which are personhood bills). At least five state personhood bills have been introduced since January 2018. *Legislative Tracker: Personhood*, *supra* note 12.

32. S. 217, 122nd Gen. Assemb. (S.C. 2018); Jamie Lovegrove, *Personhood Bill to End All Abortions in South Carolina Advances to Senate Floor*, POST & COURIER (Feb. 20, 2018), https://www.postandcourier.com/politics/personhood-bill-to-end-all-abortions-in-south-carolina-advances/article_f8aba1aa-1655-11e8-8b80-bbdd7c5d87ad.html [https://perma.cc/7B94-BHLV].

33. S.C. S. 217.

B. *The Tension Between Personhood Laws and ART*

Mississippi was not the first state to propose a personhood amendment to its constitution. Neither was it the first state where a personhood amendment failed a citizen vote.[34] However, it was the first state where a personhood proposal created a media frenzy. The widespread news coverage primarily focused on the measure's unexpected failure in a right-leaning, pro-life state.[35] The Mississippi amendment sparked extensive and pervasive debate over how personhood laws might affect access to ART. Voters wanted to know how reclassifying embryos as persons would affect couples' access to important reproductive treatments like IVF. The proposal highlighted the stark disagreement between pro-life, religious groups in favor of personhood laws and several prominent medical organizations that adamantly oppose them.[36] The American Society for Reproductive Medicine spoke out against the Mississippi proposal, criticizing it as "a dangerous intrusion of criminal law into the provision of medical care."[37]

Personhood legislation is largely fueled by anti-abortion sentiments.[38] Fixated on abortion—which involves fetuses and thus embryos *already implanted* in the womb—the movement's proponents often fail to consider the repercussions of personhood laws on embryos *outside* the womb.[39] Redefining "person" to encompass embryos is likely to have a profound effect on couples using ART to conceive children. And legislators will likely continue proposing personhood initiatives considering their popularity

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34. *See Legislative Tracker: Personhood*, *supra* note 12 (noting that Colorado was the first state to propose a personhood amendment, which failed, in 2008).

35. Aaron Blake, *Mississippi Anti-Abortion 'Personhood' Amendment Fails at Ballot Box*, WASH. POST (Nov. 9, 2011), https://www.washingtonpost.com/politics/mississippi-anti-abortion-personhood-amendment-fails-at-ballot-box/2011/11/09/gIQAzQl95M_story.html?utm_term=.508d6743d659 [https://perma.cc/QU4C-7CG7].

36. *See* Karen McVeigh, *Mississippi Voters Evenly Split over Controversial Abortion Ballot*, GUARDIAN (Nov. 7, 2011), https://www.theguardian.com/world/2011/nov/07/mississippi-abortion-ballot-voters-split [https://perma.cc/55KN-SBUP] (listing right-wing and Christian groups who supported the amendment and medical associations who opposed it).

37. Rob Mank, *Doctors Call Mississippi "Personhood" Initiative Dangerous*, CBS NEWS (Nov. 4, 2011), http://www.cbsnews.com/news/doctors-call-mississippi-personhood-initiative-dangerous [https://perma.cc/5UH3-NZQX].

38. Julie Rovner, *Abortion Foes Push to Redefine Personhood*, NPR (June 1, 2011), http://www.npr.org/2011/06/01/136850622/abortion-foes-push-to-redefine-personhood [https://perma.cc/F2RD-LYMS].

39. *See* Cynthia S. Marietta, *Personhood Amendment's Far-Reaching Implications Should Be Addressed and Reconciled*, U. HOUS. L. CTR. (Nov. 2, 2011), https://www.law.uh.edu/healthlaw/perspectives/2012/HLP_Marietta%20Personhood%20Referendum.pdf [https://perma.cc/J2AF-5CNL] ("But to date, Personhood USA has failed to explain how birth control and IVF would be spared . . . ."). Personhood USA is one of the leading organizations promoting personhood legislation. Manian, *supra* note 12, at 77, 79; *see also* Will, *supra* note 10, at 575 (noting that, while personhood advocates are adamantly anti-abortion, they are "less transparent" about their views on ART).

among conservative groups and the current pro-life administration.[40] The importance of defining the boundaries of personhood laws is thus more important now than ever.

II. ART and Procreative Liberty

To determine how a court might analyze a constitutional challenge to a personhood law, it is important to understand the current legal framework. ART is an increasingly common tool for couples who cannot conceive coitally. The rise in the use of ART correlates directly with a rise in the number of embryos being created and stored in medical facilities around the country. The growing number of extracorporeal embryos poses an issue because their legal status is unclear. This legal gray area, in addition to poorly defined fundamental reproductive freedoms, creates a constitutional landscape that is difficult to navigate.

A. *The Increasing Prevalence of ART*

Each year, infertility affects millions of people trying to conceive children.[41] In the United States, about 12% of women struggle to get pregnant or carry a pregnancy to term.[42] Now more than ever people are turning to health care professionals to help them start families.[43] Help often comes in the form of assisted reproductive technology (ART), which—according to the Centers for Disease Control and Prevention—includes all fertility treatments involving eggs or embryos.[44] The most commonly used and effective form of ART is IVF.

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40. President Trump has compared himself to Ronald Reagan, explaining that he is "pro-life with exceptions." Press Release, Donald J. Trump, Statement Regarding Abortion (Mar. 30, 2016), https://web.archive.org/web/20170428143840/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-regarding-abortion [https://perma.cc/DUD8-5YAZ] (archiving the press release).

41. *National Center for Health Statistics: Infertility*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 15, 2016), https://www.cdc.gov/nchs/fastats/infertility.htm [https://perma.cc/CQ8J-L9HP].

42. *Reproductive Health: Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 12, 2017), https://www.cdc.gov/reproductivehealth/infertility [https://perma.cc/U6UV-25GJ].

43. *See* Saswati Sunderam et al., *Assisted Reproductive Technology Surveillance—United States, 2013*, MORBIDITY & MORTALITY WKLY. REP., Dec. 4, 2015, at 1 https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6411a1.htm?s_cid=ss6411a1_w [https://perma.cc/G9XF-FSAA] ("Since the birth of the first U.S. infant conceived with assisted reproductive technology (ART) in 1981, the use of advanced technologies to overcome fertility has steadily increased . . . ."); Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 151 (2017).

44. *ART Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 1, 2017), https://www.cdc.gov/art/artdata/index.html [https://perma.cc/3TEU-CZNF].

IVF "offers . . . couple[s] a chance at biological parenthood that [they] may not otherwise" have.[45] To complete the IVF process, the woman undergoing treatment takes hormonal medication that stimulates her ovaries to produce an increased number of eggs.[46] The eggs are then retrieved from the woman's uterus and inseminated in a laboratory.[47] After successful fertilization, at least one resulting embryo is transferred into the woman's uterus.[48] Even for couples who only want one child, medical professionals generally recommend implanting more than one embryo to ensure that a pregnancy results.[49] However, the choice requires a balancing act: implanting more than one embryo increases the likelihood of pregnancy,[50] but implanting too many embryos can be dangerous because of the increased risk of complications associated with multiple gestation.[51] Cryopreservation alleviates some of this tension.[52] Couples can create multiple embryos in one IVF cycle, implant only a small number of those, and freeze the excess embryos in storage.[53] Cryopreservation provides for longer term use and decision-making and allows women to undergo multiple implantations without having to submit to a surgical procedure and redo the IVF cycle each time.[54]

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45. Mark Strasser, *The New Frontier? IVF's Challenges for State Courts and Legislatures*, 17 SMU SCI. & TECH. L. REV. 125, 125 (2014).

46. *In Vitro Fertilization (IVF)*, MAYO CLINIC (Aug. 10, 2017), https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [https://perma.cc/Z4HJ-PAQR].

47. *Id.*

48. *Id.*

49. *See generally* AM. SOC'Y FOR REPROD. MED. & THE SOC'Y FOR ASSISTED REPROD. TECH., *Criteria for Number of Embryos to Transfer: A Committee Opinion*, 99 FERTILITY & STERILITY 44, 44–45 (2013) (outlining guidelines recommending implantation of multiple embryos with the goal of "promot[ing] singleton gestations" and "reduc[ing] the incidence of high-order multiple gestations").

50. Sieck, *supra* note 9, at 440.

51. *Patient Fact Sheet: Complications and Problems Associated with Multiple Births*, AM. SOC'Y REPROD. MED. (2008), http://www.uicivf.org/uploads/ASRM_complications_multiplebirths.pdf [https://perma.cc/E5TH-HJ28].

52. Sieck, *supra* note 9, at 440. Embryo cryopreservation is a kind of fertility preservation in which embryos are frozen and saved for possible future use. *Embryo Cryopreservation*, NAT'L CANCER INST.: NCI DICTIONARY OF CANCER TERMS, https://www.cancer.gov/publications/dictionaries/cancer-terms?cdrid=739821 [https://perma.cc/WU6M-CACN].

53. Sieck, *supra* note 9, at 441.

54. Andrea Stevens, *The Legal Status and Disposition of Cryopreserved Embryos: A Legal and Moral Conundrum*, 13 J. SUFFOLK ACAD. L. 181, 183–84 (1999).

B. The Embryo's Legal and Moral Status

The legal status of embryos is contested.[55] There are three predominant views on the embryo's closely related moral status.[56] The traditionally pro-life view conceptualizes the embryo as a human being on par with living people.[57] On the other end of the spectrum is the view that the embryo is not entitled to any rights, regardless of its unique potential.[58] The third view is that the embryo's status lies somewhere between these two extremes—that it is not a person in the conventional sense of the word but nonetheless deserves "special respect" because of its potential to become one.[59]

Any resolution to the debate over the moral and legal significance of embryos would have important and far-reaching consequences. Fertility clinics in the United States alone are estimated to be part of a $4.5 billion industry,[60] and as many as one million embryos are currently frozen in storage.[61] The personhood debate aside, legal conflicts already abound. Courts struggle to resolve legal battles over the disposition of embryos when disputes arise. To illustrate, when a couple uses IVF to create embryos but later separates and disagrees about what to do with those embryos, what rules govern the disagreement?[62] No clear guidelines exist.

When prospective parents undergo IVF then later disagree about whether to implant the resulting embryos, there are typically two liberty interests at issue. An example demonstrates this intersection of rights. A married couple decides to have children using IVF. The woman undergoes the procedure and creates several embryos,, but the couple divorces before any have been implanted into the woman's body. Now the fate of the embryos

55. *See* John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 444–54 (1990) (analyzing various stances on the moral and legal statuses of the early embryo) [hereinafter Robertson, *In the Beginning*]; Kevin C. Walsh, *Addressing Three Problems in Commentary on Catholics at the Supreme Court by Reference to Three Decades of Catholic Bishops' Amicus Briefs*, 26 STAN. L. & POL'Y REV. 411, 421 (2015) (referring to the moral status of embryos as a legal issue); Stevens, *supra* note 54, at 185–91 (summarizing the three prevailing views).

56. *See* Robertson, *In the Beginning*, *supra* note 55, at 444–50 (summarizing the competing theories).

57. *Id.* at 444.

58. *Id.* at 445.

59. *Id.* at 446; Brown, *supra* note 9, at 197–99.

60. Indlieb Farazi, *The Price of Life: Treating Infertility*, AL JAZEERA (June 3, 2016), http://www.aljazeera.com/indepth/features/2016/05/price-life-treating-infertility-160524081956257.html [https://perma.cc/TY4X-9LW8].

61. *See* Andrea D. Gurmankin et al., *Embryo Disposal Practices in IVF Clinics in the United States*, 22 POL. & LIFE SCI. 4, 4 (2004) (estimating the number of stored frozen embryos to be 400,000 as of 2004); Tamar Lewin, *Industry's Growth Leads to Leftover Embryos, and Painful Choices*, N.Y. TIMES (June 17, 2015), https://www.nytimes.com/2015/06/18/us/embryos-egg-donors-difficult-issues.html?_r=0 [https://perma.cc/A5W2-YPDH] (reporting the number to be "hundreds of thousands . . . perhaps a million"); Cohen & Adashi, *supra* note 27, at 13 (reporting that, by some estimates, the number exceeds one million).

62. Cohen & Adashi, *supra* note 29, at 13.

is unclear because the man wants to discard them and the woman wants to use them. Multiple questions arise. Does prohibiting the woman from using the embryos interfere with her right to procreate? Does allowing her to use them infringe the man's right to avoid procreation and parenthood? And who makes these decisions—particularly if the couple did not sign a contract contemplating these issues beforehand?[63]

Granting embryos personhood status only complicates these questions by adding a third liberty interest to the debate—the embryo's.[64] Take our example: how do we balance the couple's procreative rights while also considering the constitutional rights of the embryo-person? What kind of analysis would suffice? And if the embryo's interests are always best served by allowing implantation (i.e., giving it the opportunity to develop into a child), is there ever a scenario in which implanting to protect its rights is trumped by, for example in our hypothetical situation, the man's desire to discard?[65] These complexities highlight the importance of addressing how personhood laws would affect couples using ART.

C. *The Constitutional Backdrop:* Roe v. Wade

It is nearly impossible to discuss reproductive rights without an examination of *Roe v. Wade*. While *Roe* was not the first Supreme Court decision to articulate a right to privacy or discuss reproductive freedom as part of that right,[66] it was the first to analyze reproductive freedom in a medical paradigm.[67] *Roe* is also important to the personhood movement because the decision served as the impetus for a major mobilization of pro-life efforts starting in the 1970s.

1. Roe *and its Evolution.*—Under *Roe v. Wade*, women have a right to terminate their pregnancies without governmental intrusion until the point of

63. Embryo disposition disputes have been thoroughly discussed and debated and are outside the scope of this Note. For an in-depth look at the legal controversies, see generally Sara D. Petersen, *Dealing with Cryopreserved Embryos Upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065 (2003); John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407 (1990); Cohen & Adashi, *supra* note 27; Upchurch, *supra* note 29.

64. *See* Will, *supra* note 10, at 575–76 (discussing the lack of legal clarity about a constitutional right to birth control and infertility treatments—an issue Will argues would be exacerbated under a personhood framework).

65. In our example, the woman wants to implant the embryos. What if, like the man, she wants to discard them? We would still want to know if implantation violates the man's desire to discard, but we would now also want to know if implantation violates the woman's right to refuse pregnancy.

66. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 744–45 (1989).

67. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 275 (1992) ("Because *Roe* relies so heavily upon medical science to define the state's interest in regulating abortion, medical analysis displaces social analysis . . . .").

fetal viability.[68] Although the case was decided in 1973, its central holding has since been reaffirmed, most recently in 2016.[69] *Roe* placed restrictions on state interference in abortion based on a trimester framework.[70] A state's interest in protecting the potentiality of human life was not considered compelling until the end of the first trimester.[71] However, once the second trimester began and the fetus was viable, the state was permitted to regulate abortion procedures to the extent the regulations "reasonably relate[d]" to protecting women's health.[72] Viability was the threshold: once the fetus was viable, a state could step in.[73] At that point, a state could even go so far as to prohibit abortion, so long as there was an exception for instances in which abortion was necessary to protect the life and health of the pregnant woman.[74]

Two decades later, in *Planned Parenthood v. Casey*,[75] the Court reconfigured *Roe*—affirming its central holding and the viability standard but rejecting the trimester framework.[76] Instead, the Court implemented an "undue burden" test.[77] As Justice O'Connor explained, state regulations that have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" will be considered an "undue burden" on the woman's right and, thus, unconstitutional.[78] Some critics argue that *Casey* effectively weakened *Roe*'s constitutional protection of abortion.[79] But the Court emphatically stressed the importance of constitutional protection for personal decisions about procreation and family relationships.[80] In doing so, the plurality conceptualized these matters as "choices central to personal dignity and autonomy," which are "central to the

68. Roe v. Wade, 410 U.S. 113, 163 (1973).

69. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).

70. *Roe*, 410 U.S. at 163–65.

71. *Id.* at 163. The rationale was that, at the time, medical research suggested mortality rates up to that point could be lower than mortality rates in normal childbirth. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 163–64.

75. 505 U.S. 833 (1992).

76. *Id.* at 846, 876–77.

77. *Id.* at 874.

78. *Id.* at 877.

79. *See, e.g.*, Caroline Burnett, Comment, *Dismantling* Roe *Brick by Brick—The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003*, 42 U.S.F. L. REV. 227, 236 (2007) (noting that, in part because of *Casey*'s alterations, *Roe* represents "the high-water mark for protection of abortion rights"); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 393 (2000) ("Whether abortion continues to remain a fundamental right . . . is no longer clear after the Supreme Court's decision in *Casey*."); Linda J. Wharton & Kathryn Kolbert, *Preserving* Roe v. Wade . . . *When You Win Only Half the Loaf*, 24 STAN. L. & POL'Y REV. 143, 144 (2013) (explaining that, after *Casey*, public relief that *Roe* was not overturned and public perception that *Casey* adequately protects abortion make it difficult for women's rights advocates to further secure abortion rights).

80. *Casey*, 505 U.S. at 851.

liberty protected by the Fourteenth Amendment."[81] Regardless of how *Casey* affects abortion rights, the case signifies the Court's continued belief in a constitutionally protected right to privacy, particularly with respect to reproductive decisions.[82]

Roe's holding is based on the premise that embryos and fetuses are not "persons" under the Fourteenth Amendment.[83] While the Court acknowledged the government's interest in protecting potential life, it refused to make a judgment about when that potentiality becomes realized: "When those trained in . . . medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[84] Since *Roe*, no Supreme Court justice has publicly taken the position that fetuses are persons under the Constitution.[85]

2. *The Relationship between* Roe *and the Personhood Movement.*—*Roe* motivated a surge in the personhood movement in the 1970s and continues to be its driving force.[86] The *Roe* Court refused to answer the question of when life begins; however, it highlighted the importance of a definitive answer by acknowledging that, if life *did* begin at conception and the fetus thus *was* a person, the plaintiff in *Roe*'s case would "collapse[]."[87] If pro-life

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81. *Id.*

82. *See* Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of* Planned Parenthood v. Casey, 45 AM. U. L. REV. 77, 81 (1995) (applauding the *Casey* Court for "recogniz[ing] that reproductive rights implicate all aspects of women's social and economic lives" and noting that state regulation of those aspects affects not just a woman's right to privacy but her right to liberty as well).

83. *Roe*, 410 U.S. at 158; *see also* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 57 (1994) [hereinafter CHILDREN OF CHOICE] (discussing the two basic premises behind *Roe*, one of which is that—because embryos and fetuses are not persons under the Fourteenth Amendment—they have no constitutional rights).

84. *Roe*, 410 U.S. at 159.

85. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 125 (2d ed. 1992).

86. While the personhood movement has been largely unsuccessful, a majority of states have passed fetal homicide laws. *See* Forsythe & Arago, *supra* note 6, at 283 ("As of 2015, there are thirty-eight states with fetal homicide laws."). These laws treat the killing of an unborn child (sometimes defined as a human being from the moment of conception) as murder. *Id.* They should be considered separate from the personhood laws discussed in this Note for two reasons. First, while they protect fetuses in the womb from third parties, they are silent on any fetal rights against the fetus's mother or genetic parents. *See* Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 734 (2006) ("About seventy percent of [fetal homicide] statutes explicitly contain an abortion exception, and more than half do not impose criminal liability on pregnant women for any harm they cause their fetuses."). Second, these laws deal with fetuses (i.e., *already implanted* embryos), whereas ART involves embryos outside a woman's body.

87. *Roe*, 410 U.S. at 156. The Court seemed to take the position that, if a fetus is a person with a right to life guaranteed by the Fourteenth Amendment, it follows that abortion is illegal. In one of the most influential papers published on abortion to date, Judith Jarvis Thompson showed that this conclusion is not necessarily true. *See generally* Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971). In her essay, Thompson uses colorful hypotheticals to illustrate that, even if a fetus is a person with rights, it does not automatically follow that the fetus's rights override

advocates see *Roe* as the only legal obstacle to criminalizing abortion, this concession is critical.[88] It provides those advocates with a weapon that can be used to attack *Roe*'s essential underpinnings.

Personhood amendments aim to change the *Roe* framework based on that perceived weakness. If fetuses are "persons," then the government has a constitutional obligation to protect their rights.[89] The legal argument sidesteps *Roe*'s nuances. Pro-life advocates believe that, under a personhood regime, abortion would become an encroachment on the rights of fetuses (who would be persons) and could be outlawed altogether.[90] This anti-abortion tactic exploded in popularity after *Roe*. Between 1973 and 2003, members of Congress proposed a Human Life Amendment—which would amend the federal Constitution to grant fetuses personhood status and require "respect" for fetal life—over 330 times.[91] (Only one of these proposals went to a vote, and it failed.[92])

D. The Reproductive Rights Framework

The Supreme Court has been shaping the depth and breadth of reproductive rights since the 1940s. Yet—despite decades of legal consideration—procreative freedom remains ill-defined. The lack of clarity is partially a product of an equally nebulous concept of the right to privacy.

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the pregnant woman's rights. *Id.* at 59. The fetus's interests (which would include the right to life) would still need to be balanced against the pregnant woman's interests (which would include her right to be free from the burdens of pregnancy), and Thompson argues there are circumstances in which the woman's rights should prevail. Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1020 (2003).

88. The Supreme Court has remained silent on the status of fetal personhood since *Roe*. Lisa Shaw Roy, Roe *and the New Frontier*, 27 HARV. J.L. & PUB. POL'Y 339, 344 (2003).

89. *See* Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1498 (1992) (discussing the "personhood presumption theory," in which a fetus would be presumed to be a constitutional person). Rivard argues—in the same vein as Judith Jarvis Thompson—that *Roe*'s determination that fetuses aren't persons doesn't necessarily conflict with the personhood presumption theory. *Id.*

90. Kay Steiger, *What Happens if the Mississippi Personhood Amendment Passes?*, ATLANTIC (Nov. 8, 2011), https://www.theatlantic.com/politics/archive/2011/11/what-happens-if-the-mississippi-personhood-amendment-passes/248095 [https://perma.cc/NFF4-4KEA]. In *Roe*, Justice Blackmun concluded that the word "person" as it is used in the Fourteenth Amendment "does not include the unborn." *Roe*, 410 U.S. at 158.

91. PAUL SAURETTE & KELLY GORDON, THE CHANGING VOICE OF THE ANTI-ABORTION MOVEMENT: THE RISE OF "PRO-WOMAN" RHETORIC IN CANADA AND THE UNITED STATES 296 (2015). As of January 2018, personhood amendments have failed at the federal level. There is a federal fetal homicide law, which recognizes in utero fetuses as legal victims of a substantial list of violent crimes. Unborn Victims of Violence Act of 2004, 18 § U.S.C. 1841 (2012). However, the law is distinct from the Human Life Amendment in the context of ART because it involves fetuses *already in* the womb. In addition, the law only applies to third parties; it cannot be used to prosecute "any woman with respect to her unborn child," including women who undergo abortion. *Id.* § 1841(c).

92. SAURETTE & GORDON, *supra* note 91, at 296.

But the confusion about what exactly reproductive rights include has also been exacerbated by rapid advancements in medical technology.

1. The Right to Procreate.—Procreative liberty, at least in its broadest form as the freedom to have or avoid having children, is relatively uncontroversial.[93] Choosing to have children implicates many important values, including self-determination, individual happiness, equality, and the creation of meaningful relationships.[94] Hence, while scholars disagree about the specifics, the right to reproduce is "widely accepted as a basic, human right."[95]

As early as 1942, the Supreme Court recognized the importance of a right to procreation because it is "fundamental to the very exercise and survival of the race."[96] *Skinner v. Oklahoma*[97] involved a constitutional challenge to an Oklahoma law permitting the mandatory sterilization of criminals.[98] Under the law, the state could sterilize a person if he or she had been convicted three or more times of crimes "amounting to felonies involving moral turpitude."[99] The plaintiff had been convicted once for stealing a chicken and twice for robbery with a firearm.[100] Because procreation is "fundamental" to survival, the Court subjected the law to strict scrutiny.[101] And in a unanimous decision, the Court struck down the law as unconstitutional.[102] The decision was based on an Equal Protection analysis. The law made an exception for white-collar crimes like embezzlement, and the Court found the justification for the distinction among crimes unconvincing and discriminatory.[103] But the analysis was also grounded in a common agreement among the justices that procreation is a fundamental right.[104] Under *Skinner*, any state action selectively depriving a person of his

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93. *See* Vanessa Volz, *A Matter of Choice: Women with Disabilities, Sterilization, and Reproductive Autonomy in the Twenty-First Century*, 27 WOMEN'S RTS. L. REP. 203, 211 (2006) ("The right to bear children has received little attention because it has seldom been challenged . . . ."); CHILDREN OF CHOICE, *supra* note 83, at 22 (describing procreative liberty in this broad sense as having "wide appeal").

94. *See* Carter Dillard, *Valuing Having Children*, 12 J.L. & FAM. STUD. 151, 171–83 (2010) (summarizing various theorists' arguments on the values grounding reproductive freedom).

95. CHILDREN OF CHOICE, *supra* note 83, at 29.

96. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

97. 316 U.S. 535 (1942).

98. *Id.* at 536–37.

99. *Id.* at 536.

100. *Id.* at 537.

101. *Id.* at 541. Justice Douglas emphasized this point: "We are dealing here with legislation which involves one of the basic civil rights of man." *Id.*

102. *Id.* at 538.

103. *Id.* at 541–42.

104. *Id.* at 541; *see also* Sieck, *supra* note 9, at 449 (summarizing *Skinner* as "protect[ing] the individual reproductive function against intrusion by the State, absent compelling circumstances").

or her right to procreate must be justified as the least restrictive means necessary to achieve a compelling state interest.[105]

Thus, well before *Roe* and the abortion cases, the Supreme Court protected a broad procreative right—the right "to bear and beget a child."[106] Building on the analysis from *Skinner*, Justice Douglas articulated an implied constitutional right to privacy in *Griswold v. Connecticut*.[107] The Court then held that a married couple's choice to use contraception was encompassed in that protected "zone of privacy."[108] Several years later, the right to contraception articulated in *Griswold* was extended to unmarried couples.[109] The Court stressed that the right to privacy is the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision" whether to have children.[110]

While courts have recognized the right to procreate for over a century,[111] formulations are unclear on what exactly the right protects.[112] At a minimum, procreative freedom encompasses reproduction with a genetic connection.[113] However, reproductive technologies—nonexistent at the time of *Skinner* and *Griswold*—raise novel questions about the scope of reproductive liberty.[114] Does a couple who is unable to reproduce coitally have the same right to procreate as a similarly situated couple who is? What kind of governmental interference in the use of ART is constitutionally permissible?

2. The Right to Avoid Procreation.—The right to avoid procreation is also generally well settled.[115] Its importance is better understood as the right to procreate's converse: because the right to procreate so heavily implicates

105. CHILDREN OF CHOICE, *supra* note 83, at 36–37.

106. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

107. 381 U.S. 479, 484 (1965).

108. *Id.* at 484–86. It was this concept of a right to privacy that later served as the foundation for Justice Blackmun's analysis in *Roe*. Roe v. Wade, 410 U.S. 113, 152–53 (1973).

109. *Eisenstadt*, 405 U.S. at 453.

110. *Id.*

111. A number of Supreme Court cases decided after *Skinner* reference the right to procreate. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015) (discussing Court precedent protecting a couple's right not to procreate); Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (referring to the appellee's right to procreate); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 n.3 (1976) (per curiam) (citing *Skinner* as recognizing a fundamental right to procreate); *see also* Devon A. Corneal, Comment, *Limiting the Right to Procreate:* State v. Oakley *and the Need for Strict Scrutiny of Probation Conditions*, 33 SETON HALL L. REV. 447, 449 (2003) ("The United States Supreme Court has recognized the fundamental right to procreate for nearly sixty years."). *But cf.* Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1119 (2016) (arguing that the boundaries to any procreative right are unsettled).

112. *See generally* Dillard, *supra* note 94 (surveying theoretical perspectives justifying procreative rights and the respective scope of the rights each perspective would protect).

113. *See, e.g.*, CHILDREN OF CHOICE, *supra* note 83, at 22–23, 27.

114. *Id.* at 27.

115. *See id.* at 28 ("Legally, the negative freedom to avoid reproduction is widely recognized . . . .").

privacy, intimacy, autonomy, and personal choice, the right not to procreate does as well.[116] Therefore, the right to avoid procreation is equally as sacrosanct. There are multiple stages at which a person could actively avoid reproduction, so the right is generally thought to include several different choices, including the choice to abstain from sex or use contraception to avoid getting pregnant and the choice to terminate an unwanted pregnancy.[117] The Supreme Court has explicitly acknowledged a right to avoid procreation at these stages.[118]

Like the right to procreate, the parameters of the right to avoid procreation are unclear.[119] The Court has not taken up the right in the context of ART and the use of frozen embryos.[120] However, the Court has emphasized that the choice to avoid procreation is, generally speaking, an essential component of the well established and heavily protected right to privacy.[121]

The indistinctness of the right to avoid procreation is significant to the legal issues surrounding ART.[122] Using our example from Part I, suppose a court hears the feuding couple's case and rules in the woman's favor, so she is permitted to use the embryos to ultimately have a child. Furthermore, the woman suggests that the man legally relinquish any parenting duties he would otherwise have with respect to that child. Does the man nonetheless have an objection to the court's ruling? In other words, does his right to avoid procreation include the right to avoid genetic parenthood, even when uncoupled from any other parental rights and duties?

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116. *See* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 640 (1980) (arguing that, "[b]ecause the decision to procreate implicates so intensely the values of intimate association," laws regulating the choice to avoid procreation should be heavily scrutinized).

117. CHILDREN OF CHOICE, *supra* note 83, at 26.

118. Griswold v. Connecticut, 381 U.S. 479, 484, 486 (1965) (reading an implicit right to privacy into the Constitution and finding marital decisions such as whether or not to have a child within the "zone of privacy"); Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the constitutional right to privacy "encompasses a woman's decision . . . to terminate her pregnancy"). The right to privacy enumerated in *Griswold* was extended to unmarried couples in *Eisenstadt v. Baird*. 405 U.S. 438, 453 (1972) ("If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible."). A number of lower courts have also extrapolated the right to avoid procreation from *Roe*. *E.g.*, J.B. v. M.B., 783 A.2d 707, 710 (N.J. 2001), *modified and aff'd*, 170 N.J. 9 (2001) (citing *Roe* among Supreme Court cases spelling out a right not to procreate); Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992) (citing *Roe* to support the proposition that the right to "procreational autonomy" is two-pronged: it includes the right to procreate and the right not to procreate).

119. I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1139 (2008).

120. *See Davis*, 842 S.W.2d at 601 ("The United States Supreme Court has never addressed the issue of procreation in the context of *in vitro* fertilization.").

121. Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.").

122. *See* Cohen, *supra* note 119, at 1136 (noting that "modern reproductive technologies have increasingly problematized" the issue of what constitutes a legal right to avoid procreation).

Arguably, because the Court's formulation of procreative freedom is so broad, the Constitution protects this right to avoid reproduction *tout court* (without childrearing obligations).[123] Becoming a genetic parent involves such intense psychological burdens that a person should be able to have the ultimate say over whether his or her gametes are used to create biological offspring.[124] Although courts have only recently taken up the issue, this argument has at least once been persuasive.[125] In *Davis v. Davis*,[126] the Supreme Court of Tennessee took an interests-balancing approach to an embryo disposition dispute and ultimately concluded that—in the absence of an agreement between the parties—"[o]rdinarily, the party wishing to avoid procreation should prevail."[127] But cases like *Davis* involve contract disputes, and one trend among courts has been to honor agreements between the parties.[128] These decisions may therefore speak less to courts' willingness to protect the right to avoid procreation and more to courts' unwillingness to void contracts involving such a weighty, personal choice when the parties previously agreed on the outcome in case of a disagreement.

Many scholars believe it is more likely the Supreme Court would decline to extend its formulation of procreative liberty to protect against reproduction *tout court*.[129] Professor Glenn Cohen argues there is likely no constitutionally protected "naked" right to avoid genetic parenthood separate from other parenthood obligations.[130] Not only are there no direct historical arguments considering ART's relative newness,[131] but Cohen contends that the abortion and contraception cases—which represent the core of privacy jurisprudence—provide no basis for which people could argue they have a

123. CHILDREN OF CHOICE, *supra* note 83, at 27. The phrase "reproduction *tout court*" refers to a situation in which a person's gamete is used to conceive a child but that person is completely removed from the parenting of that child. *Id.*

124. Robertson, *In the Beginning*, *supra* note 55, at 499.

125. *See* Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1027 (2004) ("The five state supreme courts that have ruled on frozen embryo disputes have signaled that the right to avoid procreation requires greater legal protection than does the right to procreate."); Strasser, *supra* note 45, at 125 (noting that, despite varying analysis approaches, state courts addressing the issue have all reached the same result—"delaying or precluding implantation, meaning that difficult issues . . . were not decided").

126. 842 S.W.2d 588 (Tenn. 1992).

127. *Id.* at 604.

128. Cohen & Adashi, *supra* note 27, at 14.

129. Robertson, *In the Beginning*, *supra* note 55, at 500.

130. Cohen, *supra* note 119, at 1148.

131. Arguably, the relative newness of ART should not automatically exclude it from constitutional protection. *See, e.g.*, Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1462 (2008) (arguing that the fact that ART is a recent development should not be conclusive on the issue of whether or not there is a fundamental right to use ART). The Supreme Court has extended constitutional protection to other modern technologies without controversy. *Id.* at 1462–63. For example, the First Amendment protects free speech communicated over the Internet, and the Fourth Amendment's prohibition on unreasonable searches extends to the use of infrared thermal sensors to scan private homes. *Id.*

right against genetic parenthood.[132] Professor John Robertson agrees.[133] *Griswold*, *Roe*, and related cases establish a right to avoid reproduction when attached to the burdens of gestation and childrearing.[134] Considering the importance of that attachment, Robertson doubts the Court would expand the right to include avoiding reproduction *tout court* solely in consideration of its possible psychological burdens.[135]

3. *Reproductive Rights and ART*.—Many commentators have argued that, under a broad umbrella right to procreate, noncoital reproduction should be protected just as fiercely as coital reproduction.[136] The foundations and importance of the right are the same in both situations. Reproduction is pivotal to "personal identity, meaning, and dignity,"[137] and an infertile couple is presumptively no less unfit to parent than a fertile couple.[138] State restrictions on noncoital reproduction—the use of ART to have children—should thus be subject to the same scrutiny applied to laws regulating coital reproduction.[139]

The argument that access to ART should be included in the right to procreate is consistent with the theory behind the right's existence. The right to procreate is grounded in autonomy and freedom of personal choice.[140] The logical conclusion is that this right extends beyond natural childbearing.[141] The sanctity of personal choice in this context depends on the ends (the

132. Cohen, *supra* note 119, at 1148.

133. Robertson, *In the Beginning*, *supra* note 55, at 500.

134. *Id.*

135. *Id.*

136. *See, e.g.*, Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 462 (1999) ("[I]f the law recognizes that parties to an in vivo conception are within the realm of reproductive liberties, it should follow that parties to an in vitro conception, who intend to procreate, also implicate the realm of reproductive liberties."); CHILDREN OF CHOICE, *supra* note 83, at 32 (noting that the moral right, and interest, in reproduction is present in both cases).

137. CHILDREN OF CHOICE, *supra* note 83, at 30.

138. John A. Robertson, *Decisional Authority over Embryos and Control of IVF Technology*, 28 JURIMETRICS J. 285, 290 (1988) [hereinafter Robertson, *Decisional Authority*].

139. *Id.*

140. *See, e.g.*, ROBERT DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 157–59 (1993) (arguing that a moral right to procreate is grounded in autonomy rights); CHILDREN OF CHOICE, *supra* note 83, at 24 ("Procreative liberty . . . is central to personal identity, to dignity, and to the meaning of one's life."); Michelle Elizabeth Holland, Comment, *Forbidding Gestational Surrogacy: Impeding the Fundamental Right to Procreate*, 117 U.C. DAVIS J. JUV. L. & POL'Y 1, 12–13 (2013) (explaining that the right to bear children is part of the right to privacy because it is an important, intimate matter).

141. Several courts agree. *E.g.*, Lifchez v. Hartigan, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990) ("It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."); J.R. v. Utah, 261 F. Supp. 2d 1268, 1275–78 (D. Utah 2002) (interpreting the right to procreate as encompassing a couple's choice to use gestational surrogacy).

choice being made), not the means (the mechanism by which the choice is executed); people should be able to determine for themselves whether they want children because having children is one of the most significant and deeply personal choices a person makes in his or her lifetime.[142] If a woman can choose to use medical assistance to avoid having children,[143] she can surely choose to use medical assistance to conceive them. And while the choice to use ART is not an express right, implied rights deserve no less protection just because they are not explicit in the Constitution.[144] Reproductive rights are encompassed in the more expansive right to privacy, which is now heavily ingrained in the constitutional jurisprudence.

While the specifics of procreative liberty are still debated, it remains clear that the Supreme Court recognizes the rights to procreate and avoid procreation. How a couple chooses to use embryos created using their gametes is intimately connected to that couple's ability to exercise those rights. But the issue is more complicated than whether a right to procreate includes a right to use ART. Even if we assume it does, some state regulation is permissible. Procreative liberty is typically understood to include negative rights—that is, rights against state interference in reproductive decision-making.[145] These rights provide the framework for an analysis of the question this Note seeks to answer. In a jurisdiction with personhood laws, what state regulations of ART-related embryo use are constitutionally acceptable? The narrower question becomes: which state interferences are so burdensome that they are unconstitutional? I discuss possible answers to these questions in Part III.

III. Constitutional Limits on State Regulation of a Couple's Embryo Use

My analysis in Part II concludes with an important premise: couples have a right to reproduce and—if they can't do so coitally—to choose to use ART free from burdensome state interference. It follows that infertile couples have a presumptive right to discretion over the use of embryos created with their gametes.[146] Few state statutes explicitly address the status of the embryo

142. *See* Dan W. Brock, *Procreative Liberty*, 74 TEXAS L. REV. 187, 193 (1995) (reviewing JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994)).

143. She can, via contraceptive medication. *See supra* notes 107–109 and accompanying text.

144. *See* Paula Z. Segal, *A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York*, 13 N.Y.C. L. REV. 313, 374 (2010) (discussing the Supreme Court's understanding of implied constitutional rights as no less fundamental than express rights).

145. John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439, 448 (2003). If procreative liberty were a positive right, a person could demand the state provide the means and resources necessary to procreate (or avoid procreation). *Id.*

146. Whether this same presumption should be granted to people seeking to use someone else's gametes is a question beyond the scope of this Note.

in the ART context.[147] But if *Roe* continues to withstand attack, anti-abortion activists and sympathetic state legislators will likely explore other avenues by which to pursue their goals. Tactics may include trying to push statutes like the Louisiana law through other state legislatures. A handful of pro-life groups have already made efforts to curtail the use of embryos beyond implantation.[148]

In Part III I use the legal framework described in Part II to analyze how a court might address the constitutionality of a personhood law as it applies to couples making choices about embryos created using their gametes. Part III does not address a couple's choice to donate their embryos to research because donation is not a procreative use. However, many pro-life groups adamantly oppose embryonic research.[149] Significant legislation and litigation target criminalizing stem cell research.[150] The Dickey–Wicker Amendment, passed by Congress in 1996, prohibits federal grant funding for embryo research.[151] The amendment's legislative history shows it was proposed "to uphold the sanctity and intrinsic value of life."[152] Additionally, a number of states have passed laws banning embryonic research, several of which have been struck down.[153] For example, in *Lifchez v. Hartigan*,[154] the

147. *See* LA. STAT. ANN. § 9:121 (West 2012) (describing an IVF-created embryo as having certain legal rights); N.M. STAT. ANN. § 24-9A-1(D) (West 2012).

148. *See, e.g.*, Cohen & Adashi, *supra* note 27, at 15 (noting that one right-to-life group's amicus brief in a recent embryo disposition dispute case argues that embryos must be treated like children under state law).

149. Jessica Reaves, *The Great Debate Over Stem Cell Research*, TIME (July 11, 2001), http://content.time.com/time/nation/article/0,8599,167245,00.html [https://perma.cc/3N5K-MYXN].

150. James C. Bobrow, *The Ethics and Politics of Stem Cell Research*, 103 TRANSACTIONS AM. OPHTHALMOLOGICAL SOC'Y 138, 140 (2005).

151. Balanced Budget Downpayment Act, I, Pub. L. No. 104–99, § 128, 110 Stat. 26, 34 (1996). In 2009, President Barack Obama issued an executive order removing the restriction on federal funding of embryonic stem cell research; however, the executive order did not abrogate the amendment entirely, and significant restrictions still exist. *See* Sheryl Gay Stolberg, *Obama Is Leaving Some Stem Cell Issues to Congress*, N.Y. TIMES (Mar. 8, 2009), http://www.nytimes.com/2009/03/09/us/politics/09stem.html?_r=2 [https://perma.cc/8XXR-5PVW] (noting that—while President Obama's executive order will broaden permitted stem cell research—it will not overturn the Dickey–Wicker ban).

152. June Mary Zekan Makdisi, *The Slide from Human Embryonic Stem Cell Research to Reproductive Cloning: Ethical Decision-Making and the Ban on Federal Funding*, 34 RUTGERS L.J. 463, 477 (2003) (citing 142 CONG. REC. H7327–03 (daily ed. July 11, 1996) (statements of Rep. Dickey and Sen. Hyde)).

153. *E.g.*, Forbes v. Napolitano, 236 F.3d 1009, 1013 (9th Cir. 2000) ("A criminal statute . . . that prohibits medical experimentation but provides no guidance . . . gives doctors no constructive notice, and gives police, prosecutors, juries, and judges no standards to focus the statute's reach. The dearth of notice and standards . . . thus renders the statute unconstitutionally vague.") (citing Kolender v. Lawson, 461 U.S. 352, 358 (1983) and Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)); Margaret S. v. Edwards, 794 F.2d 994, 1004 (5th Cir. 1986) ("Because [the law] unduly straitjackets an attending physicians' professional judgment . . . it presents an unconstitutional infringement on a woman's reproductive freedom.").

154. 735 F. Supp. 1361 (N.D. Ill. 1990).

court held a New Mexico statute prohibiting fetal research unconstitutional.[155] However, because donating embryos does not implicate a reproductive interest, further discussion of the issue falls outside the scope of this Note.

A. Roe*'s Application Is Limited*

Even with *Roe* intact, states may to some degree regulate embryo use. The *Roe* decision is important to understanding the personhood movement's history and purpose.[156] *Roe* and *Casey* also provide a helpful framework for understanding how the Supreme Court conceptualizes the rights to privacy and autonomy in the procreation context. But while *Roe* and the subsequent abortion cases carve out broad constitutional protection for reproductive decision-making, the *Roe* decision is grounded, in large part, on the "unique relationship between a pregnant woman and the fetus she is carrying."[157] Because *Roe* deals exclusively with a woman's right to embryos inside her body,[158] many scholars oppose using abortion jurisprudence to guide constitutional considerations of ART, which involves extracorporeal embryos.[159]

The significance of the inside–outside distinction is debated. Some scholars argue that, although IVF involves medical intrusion into a woman's body in a way that is different from abortion procedures and pregnancy, IVF nonetheless intrudes—and that intrusion implicates bodily integrity and *Roe* principles.[160] But this argument misunderstands the Supreme Court's concern with protecting a woman's bodily integrity. The phrase "bodily integrity" was first used regarding reproductive rights in *Casey*, which held that "compelled continuation of a pregnancy infringes upon a woman's right to

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155. *Id.* at 1377.

156. *See infra* subpart II(C).

157. Lawrence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1918 (2004).

158. Robertson, *In the Beginning*, *supra* note 56, at 499; *see also* Ziegler, *supra* note 6, at 1317 (explaining that abortion rights are grounded in a woman's experience with the burdens of unwanted pregnancy).

159. *See, e.g.*, CHILDREN OF CHOICE, *supra* note 83, at 108 ("The constitutionality of laws that prevent the discard or destruction of IVF embryos is independent of the right to abortion established in *Roe* . . . ."); Rao, *supra* note 131, at 1464 ("[I]t is clear that the Constitution does not guarantee reproductive autonomy . . . disentangled from concerns about bodily integrity and equality. The contraception and abortion cases provide only a limited right to prevent conception or to interrupt pregnancy."); Ziegler, *supra* note 6, at 1317 ("Understood in its historical context, abortion jurisprudence should not provide guidance for courts balancing rights to seek or avoid procreation in ART cases."). *But see* Daar, *supra* note 136, at 466–69 (extrapolating from abortion law to discuss reproductive liberty in the context of ART).

160. *E.g.*, Marina Merjan, Comment, *Rethinking the "Force" Behind "Forced Procreation": The Case for Giving Women Exclusive Decisional Authority over Their Cryopreserved Pre-Embryos*, 64 DEPAUL L. REV. 737, 762–64 (2015).

bodily integrity by imposing substantial physical intrusions and significant risks of physical harm."[161]

A woman has a right to abortion because she has a right to choose to avoid the physical and psychological effects of pregnancy (and thus not have them forced on her). Similarly, women have a right against abortion because forcing a woman to undergo an abortion involves bodily intrusion against her will. By contrast, a woman who undergoes IVF voluntarily chooses to have her body "intruded" to serve her own procreative interests. The majority view is that the physical disconnect between the embryo and a woman before implantation means that a woman's right to bodily integrity is not implicated; thus, *Roe* is not controlling,[162] and the constitutionality of laws regulating embryo use falls outside *Roe*'s scope.[163]

Louisiana's statute serves as one example of how *Roe* and personhood laws interact. While the statute defines embryos as juridical persons,[164] it avoids direct conflict with *Roe* by defining "personhood" as extending only to extracorporeal IVF embryos. Therefore, the statute does not abrogate or challenge current abortion law on its face. Instead, it establishes and protects embryo rights at the expense of gamete providers' reproductive choices.[165]

B. *Courts Would Likely Use a Balancing Test to Assess the Constitutionality of a Personhood Law Interfering with Embryo Use*

The potential legal ramifications of granting embryos personhood status are significant.[166] The remaining portion of Part III discusses how a court might weigh competing interests in an embryo use case if the court were to presume the validity of a state's determination that embryos are persons. Courts would likely undertake an analysis similar to that used in other

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161. Planned Parenthood v. Casey, 505 U.S. 833, 927 (1992).

162. *E.g.*, Brown, *supra* note 9, at 223; Robertson, *In the Beginning*, *supra* note 55, at 493.

163. *See* CHILDREN OF CHOICE, *supra* note 83, at 108 ("*Roe* and *Casey* protect a woman's interest in not having embryos placed in her body and in terminating implantation . . . . Under *Roe-Casey* the state would be free to treat external embryos as persons . . . as long as it did not trench on a woman's bodily integrity or other procreative rights.").

164. *See* LA. STAT. ANN. § 9:121 (West 2012) ("A 'human embryo' for the purposes of this Chapter is an in vitro fertilized human ovum, with certain rights granted by law, composed of one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child.").

165. *See* Sarah A. Weber, Comment, *Dismantling the Dictated Moral Code: Modifying Louisiana's In Vitro Fertilization Statutes to Protect Patients' Procreative Liberty*, 51 LOY. L. REV. 549, 550 (2005) ("Louisiana law places the protection of preembryos above progenitors' procreative liberty, granting preembryos the status of juridical persons while stripping progenitors of their decision-making authority over their preembryos.").

166. *See* Forsythe & Arago, *supra* note 6, at 306 (listing IVF among scientific and medical procedures affected by personhood legislation). For an analysis of these ramifications through an international lens, see generally Lauren B. Paulk, *Embryonic Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law*, 22 AM. U. J. GENDER SOC. POL'Y & L. 781 (2014).

procreative liberty cases.[167] Therefore, under a personhood regime, state laws regulating the use of embryos would be subject to a balancing test. The state will assert its interest in protecting the life of the embryo, which must be balanced against a couple's constitutional procreative liberties.

Courts may be reluctant to apply strict scrutiny despite the right to privacy's fundamental status. Unlike in abortion cases—where women risk being forced to undergo the physical burdens of pregnancy—bodily intrusion is not at issue in embryo use cases. (Even in abortion cases, *Casey* rejects strict scrutiny in its purest form: the infringement on a woman's right to choose abortion must be *substantial* to constitute an undue burden.) Additionally, the conflict between ART and embryonic personhood is new; it poses novel questions at a time when reproductive technology is quickly evolving. Courts may want to avoid applying strict scrutiny to protect a couple's presumptive right to use their gametes as they see fit until laws and social policy have caught up to medical technology.[168] More realistically, courts would conduct a balancing test via a fact-intensive, situation-specific inquiry.

This nuanced balancing test would require courts to weigh a host of considerations. The state's interest will almost always be the same. Under a personhood law, the state is seeking to protect the life and rights of the embryo-person. But a couple's situation in one case may vary greatly from a couple's situation in another case, and courts will have to consider a multitude of factors. These factors might include the couple's interest in achieving or avoiding parenthood, available alternatives that are less violative of the embryo's rights, economic and physical costs, and whether the state could achieve its goal by less restrictive means. In the following subsections, I analyze how courts might apply a balancing test to various hypothetical scenarios in which a state's personhood laws conflict with a couple's ability to procreate using ART.

The purpose of this Note is to discuss how a constitutional challenge to a personhood law might be assessed in court assuming the legitimacy of the state's interest in protecting embryos as persons. The purpose is *not* to assess whether the state is entitled to that assumption in the first place or whether personhood laws are constitutional. The constitutionality of laws regulating embryo use has been debated extensively,[169] as has the effect of personhood

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167. *See* Robertson, *In the Beginning*, *supra* note 55, at 487–88 (arguing that, even in a framework where *Roe* no longer exists, "many states no doubt would continue the previous balance between the woman and embryo").

168. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("[W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." (internal quotations omitted)).

169. *See generally* June Carbone & Naomi Cahn, *Embryo Fundamentalism*, 18 WM. & MARY BILL RTS. J. 1015 (2010) (discussing "embryo fundamentalism"—the belief that embryos are human beings from the moment of conception—and its potential constitutional impact); June

sentiments on ART.[170] This Note takes the next step. We know what issues personhood laws raise. Part III analyzes how a court might address those issues in a framework under which embryonic personhood is legally legitimized.

1. State Laws Regulating Embryo Creation.—To address concerns about the number of embryos frozen in storage and discarded each year, a state might pass a law limiting the number of embryos a couple can create when the woman undergoes one IVF cycle.[171] The law might be part of a broader personhood scheme. For example, if the state considers the embryo a person, the law limiting creation could work in conjunction with a law requiring that all embryos created in a laboratory setting be implanted.

Italian law is illustrative. In 2004, Italy passed a law extensively regulating ART.[172] The regulations (Law 40) impose many and significant restrictions on doctors and people seeking to use ART. These regulations include limiting the number of embryos that can be created at one time, requiring implantation of all embryos created, and prohibiting cryopreservation of spare embryos.[173] If right-to-life groups in the United States continue to propose legal protections for embryos via the personhood movement, they may succeed in persuading state legislatures to pass laws similar to Law 40.[174]

However, because these regulations could compromise the safety, effectiveness, and costs of IVF, they may interfere with a couple's ability to

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Coleman, *Playing God or Playing Scientist: A Constitutional Analysis of State Laws Banning Embryological Procedures*, 27 PAC. L.J. 1331 (1996) (examining the constitutionality of laws banning embryological research); Tamara L. Davis, Comment, *The Unique Status of and Special Protections Due the Cryopreserved Embryo*, 57 TENN. L. REV. 507 (1990) (discussing the legal status of embryos created using IVF); Kim Schaefer, In-vitro *Fertilization, Frozen Embryos, and the Right to Privacy—Are Mandatory Donation Laws Constitutional?*, 22 PAC. L.J. 87 (1990) (arguing that mandatory donation laws are unconstitutional); Brown, *supra* note 9 (analyzing the constitutionality of laws prohibiting the discard of embryos and requiring their implantation).

170. *See generally* Manian, *supra* note 12 (discussing personhood in a paradigm emphasizing women's health); Paulk, *supra* note 166 (analyzing the legality of personhood from an international perspective); Strasser, *supra* note 45 (discussing ways in which personhood laws could affect ART).

171. Because the industry is so deregulated, it is difficult to know how many embryos are destroyed each year. However, because of the enormous number of excess embryos created, the number is likely significant. One study of IVF clinics around the country found that 97% of them created more embryos than were transferred in a given IVF cycle. Gurmankin et al., *supra* note 62, at 6.

172. *See generally* Andrea Boggio, *Italy Enacts New Law on Medically Assisted Reproduction*, 20 HUM. REPROD. 1153 (2005).

173. G. Ragni et al., *The 2004 Italian Legislation Regulating Assisted Reproduction Technology: A Multicentre Survey on the Results of IVF Cycles*, 20 HUM. REPROD. 2224, 2224 (2005).

174. John A. Robertson, *Egg Freezing and Egg Banking: Empowerment and Alienation in Assisted Reproduction*, 1 J.L. & BIOSCIENCES 113, 117 (2014) [hereinafter Robertson, *Egg Freezing*].

have a family—and, thus, their right to procreate.[175] Robertson has argued that Italy's law likely violates reproductive rights.[176] By limiting the number of embryos that can be created during one cycle and requiring those embryos to be implanted, Law 40 forces women into a risky predicament. To avoid trying IVF multiple times, they are encouraged to create and implant several embryos at once—which increases the risk of complications.[177] But to avoid those complications and comply with the mandatory implantation rule, a woman must implant only one or two embryos, which reduces her chances of becoming pregnant.[178] Women not subject to a statutory scheme like Italy's don't face this dilemma because they can create, implant, store, and later discard as many embryos as they desire.

Robertson's concerns are not just theoretical. Originally, Italian courts applied Law 40 to require women to implant even grossly abnormal embryos, which resulted in some women terminating their pregnancies.[179] In 2009, the Constitutional Court of Italy reformed the law to better protect women's health. But the limits on creation remain and often require Italian women to undergo multiple IVF cycles, which can be expensive and physically demanding.[180]

A limitation on embryo creation thus appears to burden couples using IVF. The key question is whether the burden is substantial enough to invalidate the law as unconstitutional. Depending on how harsh the limit is, it may rob couples of their flexibility in assessing and hedging risk. A couple may want to create more embryos than the limit allows so they can implant multiple embryos or freeze extras for later use—or both.

The severity of the burdens imposed by the law would depend on any related regulations. For example, if a state's statutory scheme both limits the number of embryos a couple can create and prohibits embryo cryopreservation and discard, the limit's effects are exacerbated. Under those conditions, a couple may only be able to create two or three embryos per the law. But, because they cannot freeze or discard the extras, they must decide whether to implant all of them at once or implant one and risk having to undergo IVF again if the one implanted embryo does not result in a successful pregnancy. If they only implant one, the excess embryos will have to be donated. The couple may feel obligated to implant all of the embryos despite

175. *Id.* at 118.

176. Robertson, *Constitutional Issues*, *supra* note 30, at 36. For a discussion on why an American law modeled after Italy's Law 40 may pass constitutional muster, see Rao, *supra* note 132, at 1473–74.

177. John A. Robertson, *Protecting Embryos and Burdening Women: Assisted Reproduction in Italy*, 19 HUM. REPROD. 1693, 1693 (2004).

178. *Id.*

179. Bernard M. Dickens & Rebecca J. Cook, *The Legal Status of In Vitro Embryos*, 111 INT'L J. GYNECOLOGY & OBSTETRICS 91, 93 (2010).

180. *Id.*

the health risks, perhaps because the woman is older or the couple knows they will not be able to afford IVF again.[181] A scheme this punishing may require—and fail—strict scrutiny. Courts may be more receptive to a scheme that allows for consideration of patients' unique situations (compared to a limitation based solely on the moral status of the embryo with no regard for a couple's health-related circumstances).[182]

What if the state took a less aggressive yet still uniform, circumstance-neutral approach? For example, suppose that under this state law a couple is only allowed to create three embryos each time the woman undergoes IVF; however, she may freeze excess embryos.[183] A couple living in our hypothetical state has undergone IVF multiple times over the course of several years, creating three embryos and implanting all three each time—but with no success. She has been unable to carry any of the resulting pregnancies to term. Based on her unique situation, her doctor might recommend implanting more than three embryos were it not against the law. The woman may (acting on behalf of the couple) challenge the law as an unconstitutional encroachment on her right to procreate.

Using a balancing test to weigh the competing interests, the court would likely hold that, as applied, the law is constitutional. The woman's right to procreate is weighed against the state's interest in protecting embryos as persons.[184] In her favor is the fact that the law is directly interfering with her ability to have children. But it is possible for her to navigate around her predicament. Because the state has no mandatory implantation laws, she can undergo multiple IVF cycles, aggregate her embryos by cryopreserving those that result from the first rounds, then later implant multiple embryos at one time. However, undergoing several cycles—in addition to those she has already undergone—is expensive, time-consuming, and mentally and physically taxing.

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181. Women over forty years old are less likely to have success with ART than younger women. *IVF Success in Older Women*, USC FERTILITY (Feb. 16, 2009), http://uscfertility.org/ivf-success-older-women [https://perma.cc/6BK3-JGA6].

182. *See* Carbone & Cahn, *supra* note 171, at 1051 (noting that the abortion cases suggest courts are willing to give state legislatures a "high degree of deference" and theorizing that courts may extend that deference to legislative determinations of the embryo's legal status).

183. Because so few state personhood laws currently exist, it's difficult to know what kind of scheme a state legislative body might realistically create. It is plausible, however, that a state may choose to limit creation while still permitting cryopreservation—particularly if the law is preemptively designed to withstand a constitutional challenge or is based on the rationale that frozen eggs are more likely to be later implanted.

184. This case illustrates how a strict creation-limit law could conflict with the state's greater purpose in protecting embryonic personhood when applied rigidly. In this hypothetical situation, the law ironically prohibits a woman who wants to have children from using her embryos to do so successfully. While a more flexible law—for example, one that includes an exception to the limit for couples who commit to implanting all the embryos they create—seems more rational, the strict limit is not inconceivable, as illustrated by Italy's Law 40.

But the court would likely defer to the state's legislature because of the law's relative flexibility. In this case, the law limits the number of embryos that can be created in one IVF cycle but permits cryopreservation of any excess embryos.[185] It thus avoids creating the potential health risks posed by Italy's more rigid Law 40. And, again, this type of case does not involve the question of bodily intrusion implicated in the abortion cases. Both Supreme Court and state court decisions suggest a greater reluctance to protect procreational rights when a woman's bodily integrity is not directly involved.[186] While the court may begin its analysis with a thumb on the scale for the woman—who has a presumptive right to choose how to use her embryos—it would likely ultimately conclude that the law's narrow scope is proportionate to the state's goal of protecting embryonic persons.

The court might also be influenced by the gravity of creating precedent. If the court holds that embryo creation limitations are unconstitutional because a woman who has already undergone one round of IVF may have to undergo another, the decision would open a Pandora's box. IVF is expensive.[187] What about the many infertile couples who cannot afford to undergo the first cycle?[188] Would they then have a constitutional right to ART at a subsidized cost? No, because procreative liberty is interpreted as a negative right. However, courts may nonetheless be reluctant to facilitate the creation of this slippery slope, even at the expense of couples disadvantaged by embryo creation limitation laws. As one consideration in an interests-balancing approach, this factor weighs heavily in favor of the state.

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185. Carbone & Cahn, *supra* note 171, at 1051.

186. *See supra* section II(D)(2) (noting that, in embryo disposition dispute cases, courts are reluctant to decide in favor of the parties wanting to implant despite their right to procreate). I do not mean to suggest that the important decision to undergo IVF to have a child does not involve a woman's bodily integrity in a colloquial sense. To the contrary, it is a deeply personal choice that will greatly affect the woman physically. When I use the phrase "bodily integrity," I mean it as a legal concept. In *Casey*, the Court explained *Roe*'s rule of "bodily integrity, akin to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection." Planned Parenthood v. Casey, 505 U.S. 833, 835 (1992). In reproductive rights cases, bodily integrity is directly tied to a person's right to protection against any government-mandated physical intrusion. *See* Sonia M. Suter, *The "Repugnance" Lens of* Gonzales v. Carhart *and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1547 (2008) (discussing bodily integrity as part of a greater privacy right "against the state's interference with our ability to prevent unwanted bodily intrusions . . . ."); Robertson, *In the Beginning*, *supra* note 56, at 493 (explaining that laws prohibiting the creation or discard of extracorporeal embryos would not implicate bodily integrity under *Roe* because they do not interfere with a woman's right to avoid or terminate pregnancy).

187. *See* Ann Carns, *Meeting the Cost of Conceiving*, N.Y. TIMES (Jan. 28, 2014), https://www.nytimes.com/2014/01/29/your-money/meeting-the-cost-of-conceiving.html [https://perma.cc/R5AS-J4QM] ("The overall cost of a single cycle using a woman's own eggs often ranges from $14,000 to $16,000 . . . .").

188. Lower-income women have greater rates of infertility than their wealthier counterparts but are significantly less likely to be able to afford the high costs of IVF. CHILDREN OF CHOICE, *supra* note 83, at 226.

Finally, the state can point to egg freezing as a viable alternative for the couple.[189] In an egg freezing procedure, the woman undergoing treatment is given hormonal medications to stimulate egg production. The eggs are then retrieved from her uterus and stored for later fertilization.[190] For many years, egg freezing was possible but not a legitimate alternative to embryo freezing because a woman's chances of conceiving with IVF were significantly greater when newly created (rather than frozen) eggs were fertilized.[191]

In 2013 the American Society of Reproductive Medicine (ASRM) removed the procedure's "experimental" label, citing a dramatic improvement in success rates.[192] But the ASRM also explained that women should proceed with caution—particularly considering that a woman's age at the time of retrieval may impact the success of the freezing.[193] Just because egg freezing has proven effective in small-sample, short-term studies does not make it a perfect substitute. The ASRM has warned there is not yet sufficient data on the "safety, efficacy, ethics, emotional risks, and cost-effectiveness" of egg freezing to condone using it routinely as a substitute for embryo freezing.[194] Nonetheless, the existence of an alternative—one that does not interfere with the rights of an embryo-person—would likely help persuade the court that the law is constitutional as applied.

2. *State Laws Regulating Embryo Cryopreservation.*—Couples using IVF typically create more embryos than they implant.[195] The extra embryos are often frozen, which makes them available for later use.[196] Cryopreservation of excess embryos improves a woman's chances of achieving pregnancy and possibly eliminates the physical, emotional, and financial costs of additional IVF treatment cycles.[197] Pro-life groups object to cryopreservation on the grounds that it stymies embryos' potential; encourages their destruction; and may lead to embryo research,

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189. *See* Schaefer, *supra* note 171, at 91 (noting that commentators have suggested looking to egg freezing as one way to mitigate the social and ethical issues of IVF).

190. Alicia J. Paller, Note, *A Chilling Experience: An Analysis of the Legal and Ethical Issues Surrounding Egg Freezing, and a Contractual Solution*, 99 MINN. L. REV. 1571, 1577 (2015).

191. Robertson, *Egg Freezing*, *supra* note 171, at 114.

192. Practice Comms. of the Am. Soc'y for Reprod. Med. & the Soc'y for Assisted Reprod. Tech., *Mature Oocyte Cryopreservation: A Guideline*, 99 FERTILITY & STERILITY 37, 41 (2013). Law 40's creation limitation incentivized Italian researchers to develop new technology, which influenced the ASRM's decision. Robertson, *Egg Freezing*, *supra* note 176, at 115–16.

193. Practice Comms. of the Am. Soc'y for Reprod. Med. & Soc'y for Assisted Reprod. Tech., *supra* note 194, at 40.

194. *Id.* at 42.

195. Cohen & Adashi, *supra* note 27, at 13.

196. *Id.*

197. TEXTBOOK OF ASSISTED REPRODUCTIVE TECHNIQUES 304 (David K. Gardner et al. eds., 4th ed. 2012); Brown, *supra* note 9, at 188–89; Robertson, *Decisional Authority*, *supra* note 139, at 287.

experimentation, and other manipulation.[198] Robertson has argued that people who consider embryos persons should *oppose* limits on embryo storage.[199] Allowing couples to store frozen embryos increases the likelihood that those embryos will eventually be implanted and allowed to fully develop.[200] But pro-life groups and personhood advocates have not adopted this view.

There is virtually no regulation of IVF-created embryos in the United States.[201] Only Louisiana has laws defining the legal status of the cryopreserved embryo,[202] and only a few cases have directly addressed the issue. In *Davis v. Davis*,[203] the Supreme Court of Tennessee held that frozen embryos are neither persons nor property but rather "occupy an interim category that entitles them to special respect because of their potential for human life."[204] Grounded in personhood or "special respect," states may begin regulating cryopreservation as it becomes increasingly more common. Most IVF programs already set a limit on the length of time embryos may be kept in storage, requiring that—after that limit has passed—the embryos be either discarded or implanted.[205] But personhood advocates may not want to leave timing and parameters to the market.[206] Rather, a state may want to exercise greater control over these time limits by shortening them, conditioning them (for example, prohibiting embryo use for research upon expiration of the time limit), or monitoring compliance.

Whether these regulations are constitutional will depend on the extent to which they burden a couple's procreative liberties. A more restrictive law is demonstrative. Suppose a state passes a law prohibiting cryopreservation as part of a greater regulatory scheme in which embryos cannot be discarded.

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198. Robertson, *Decisional Authority*, *supra* note 139, at 294. *Donum Vitae*—an official Catholic document addressing the Church's position on the dignity of human life—characterizes cryopreservation as an "offence against the respect due to human beings." Congregation for the Doctrine of the Faith, *Instruction: Donum Vitae*, VATICAN (Feb. 22, 1987), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html [https://perma.cc/4Z9P-YZAW].

199. Robertson, *Decisional Authority*, *supra* note 138, at 495.

200. *Id.* June Coleman has argued that, because cryopreservation actually promotes procreation, it should be a constitutionally protected interest based on the abortion and contraception cases. Coleman, *supra* note 169, at 1364.

201. Paller, *supra* note 190, at 1585.

202. LA. STAT. ANN. § 9:129 (2012) ("An in vitro fertilized human ovum that fails to develop further over a thirty-six hour period except when the embryo is in a state of cryopreservation, is considered non-viable and is not considered a juridical person."). Essentially, an embryo created through IVF is a juridical person unless it fails to develop over a thirty-six-hour period. *Id.* But that exception does not apply to embryos frozen in storage. *Id.*; *see also* Davis, *supra* note 169, at 515 (noting that a frozen embryo is considered viable under Louisiana law).

203. 842 S.W.2d 588 (Tenn. 1992).

204. *Id.* at 597. The *Davis* court noted that if embryos were granted the legal status of a "person" vested with their own interests, this would effectively outlaw IVF programs in the state. *Id.* at 595.

205. Robertson, *In the Beginning*, *supra* note 55, at 494.

206. *Id.*

Compared to the embryo creation example, this law is more burdensome: a woman who undergoes IVF has to either implant every embryo she creates—which could jeopardize her health—or donate her embryos. A woman who creates multiple embryos is left with several potentially difficult choices. She first has to decide if she wants to risk her health by implanting all of the embryos—with the alternative being mandatory adoption. Then, if she implants all of the embryos and they each develop fully, she must decide whether to abort or carry the several fetuses to term.

For analysis purposes, imagine a theoretical case. A woman has undergone IVF, resulting in five embryos. She and her partner do not want to implant all five because of the health risks stemming from multiple gestation; however, under the law, they cannot discard or cryopreserve any of the embryos. They have only one alternative—donate any embryos they choose not to implant. The woman challenges the law's constitutionality, alleging a violation of her reproductive freedom.

After balancing the competing interests, the court would likely find the law unconstitutional, even considering the state's strong interest in protecting embryos as persons. By prohibiting couples from cryopreserving and discarding embryos, the state seeks to maximize an embryo's potential to develop into a human being. And the court may find the law banning cryopreservation, on its own, permissible. However, a ban on embryo storage alongside a ban on discard would be more difficult for the state to justify, especially considering research shows cryopreservation increases the effectiveness of IVF.[207] The woman could point to less burdensome alternatives by which the state could achieve its aim of protecting embryonic personhood. For example, the state could limit the length of time an embryo can be kept in storage, allowing a woman to choose not to implant all of the embryos created at one time and thereby avoid the health risks associated with multiple gestation.

Courts would likely permit some form of cryopreservation regulation. There are public concerns about the current deregulated system, including the risk of commercial exploitation of gamete and embryo donors,[208] ensuring safe use of the technology,[209] and consanguinity among individuals created using IVF.[210] But states could pass laws addressing these concerns without infringing the rights of couples using ART to have children. For example, a law mandating that fertility clinic employees have a certain level and quality

207. Deborah Netburn, *In IVF, Frozen Embryos May Lead to More Live Births Than Fresh Embryos*, L.A. TIMES (Aug. 10, 2016), http://www.latimes.com/science/sciencenow/la-sci-sn-ivf-frozen-embryos-20160809-snap-story.html [https://perma.cc/WBC9-B83X].

208. Davis, *supra* note 171, at 533.

209. Robertson, *Decisional Authority*, *supra* note 139, at 300.

210. Davis, *supra* note 169, at 534.

of medical training would surely survive a constitutional challenge—even if, for example, it would increase the cost of IVF to patients.

3. *State Laws Regulating Embryo Discard.*—There are several instances in which a couple may want to discard embryos—for example, if a woman undergoes IVF but the couple later decides they do not want children, one of them dies and the other chooses not to go forward with implantation, or they get divorced.[211] Thus far, only one state has passed legislation directly regulating embryo discard.[212] However, other states may follow suit.

If a state recognizes embryos as "persons," a prohibition on discard would best serve the personhood movement's goals if passed in conjunction with a law that also requires the use (or implantation) of embryos. Banning a couple from discarding an embryo does little to protect and better that embryo's "life" if it is stored indefinitely.[213] Mandatory donation laws would prevent the parents of an embryo from destroying it and require it to be implanted or donated.[214] Louisiana's regulatory scheme regarding ART includes a provision that can fairly be characterized as a mandatory donation law under certain circumstances.[215] The law explicitly prohibits discarding or destroying embryos.[216] And in cases where the IVF patients "fail to express their identity," the law requires that all spare embryos be made available to others for "adoptive implantation."[217] The permissibility of Louisiana's law banning embryo destruction has never been litigated, although some commentators have suggested it would not withstand a constitutional challenge.[218]

211. John Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 977 (1986).

212. LA. STAT. ANN. § 9:129 (2012) ("A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person.").

213. However, personhood advocates think indefinitely storing embryos is preferable to discarding them because storage doesn't affirmatively harm the embryos the way discarding (i.e., destroying) them does.

214. Schaefer, *supra* note 169, at 89 n.18. For a brief discussion of mandatory disposal laws, which are beyond the scope of this Note, see Heidi Forster, *The Legal and Ethical Debate Surrounding the Storage and Destruction of Frozen Human Embryos: A Reaction to the Mass Disposal in Britain and the Lack of Law in the United States*, 76 WASH. U. L.Q. 759, 761–62 (1998) (discussing Britain's law requiring embryos to be destroyed within five years of creation if there is no instruction otherwise from the donor parents).

215. *See* LA. STAT. ANN. § 9:121–33 (dictating circumstances in which unclaimed embryos must be made available for "adoptive implantation").

216. *Id.* § 9:129.

217. *Id.* § 9:126.

218. *See, e.g.*, Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 409 (1986) ("Because of its potential interference with couples' right to privacy to make procreative decisions, the Louisiana law is constitutionally infirm."); Jennifer Baker, Comment, *A War of Words: How Fundamentalist Rhetoric Threatens Reproductive Autonomy*, 43 U.S.F. L. REV. 671,

If a couple chose to challenge a law like Louisiana's, a court would likely rule in favor of the state. More specifically, if we presume the legitimacy of the state's assertion of embryonic personhood, the psychological burdens a couple might experience from knowing they will eventually have a biological child would likely be outweighed by the embryo's rights as a person.[219] As an example, a couple creates embryos using IVF but later decides not to implant them. They are having significant financial problems and don't feel they can take on the additional costs and psychological burdens of parenthood. While they would like to cryopreserve the embryos in hopes that their circumstances will change, they cannot afford to store the embryos and have therefore decided to discard them. They sue Louisiana to challenge the law prohibiting discard, alleging a violation of their reproductive rights.

There are two predominant interests the court must balance. On the couple's side, the law infringes their procreative freedom. They are no longer the sole decision makers with respect to their gametes. In fact, if they cannot implant or store the embryos, they risk the embryos being implanted in another woman—in which case the couple would become genetic parents. On the state's side, the law is meant to protect the embryos' legal rights. The court's decision may thus hinge upon whether or not an individual right against reproduction *tout court* exists.[220] If so, then the law would likely violate a couple's right to avoid procreation.

The consensus among scholars is that the right does not exist.[221] Hence, a claim of protection against reproduction *tout court* would, standing alone, likely not be sufficient to overcome a state's interest in protecting embryos.[222] Of course, a court would not need to affirmatively recognize a constitutional right to reproduction *tout court* (which it may be reluctant to do) to find the statute impermissible. And there are serious policy considerations that weigh in favor of striking down mandatory donation laws: the potential negative psychological effects on both the genetic parents and the resulting child; complicated litigation involving custody and parentage disputes; a lack of demand for embryos; and the possibility that embryo donation could commercialize humans and lead to "baby selling."[223] But considering only the parties' competing interests, the court would likely uphold the law as

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692 (2009) ("Because these statutes effectively deny the IVF couple the decision-making control over their 'property,' they are of questionable constitutionality . . . .").

219. *See* Robertson, *In the Beginning*, *supra* note 55, at 500 ("If the Court found that no fundamental right to avoid genetic offspring *tout court* existed, then the state's interest in protecting embryos by requiring donation of unwanted extras would easily meet the rational basis test by which such a statute would be judged.").

220. *See supra* section II(D)(2).

221. *Id.*

222. *Id.*

223. George J. Annas & Sherman Elias, In Vitro *Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family*, 17 FAM. L.Q. 199, 215–16 (1983).

constitutional. The couple's potential psychological burden would probably not be intrusive enough to overcome the embryos' much more physical liberty interest.

In addition to arguing the law violates their right to avoid procreation, the couple could also assert that the law violates their converse right to procreate.[224] If the couple cannot discard excess embryos, they may feel obligated to forego IVF altogether—possibly because they do not want to donate their embryos and may not be able to afford storing them indefinitely. The couple may choose not to use ART (and, thus, choose not to have children) at all, despite the fact that the woman would like to be treated for infertility. They might argue that, by prohibiting them from discarding embryos, Louisiana is requiring them to either implant all embryos they create (which can have dangerous health consequences), donate the embryos (which they may not want to do), or pay to store them indefinitely (which they may not be able to afford). They would then argue that Louisiana substantially burdens them by effectively disallowing them from using IVF to conceive, which prevents them from exercising their procreative right to choose to have children.

However, under a personhood regime, the court would likely not consider this burden substantial enough.[225] The law does not ban IVF outright. In the case of this couple, it just requires them to assess the costs and risks before making a difficult decision (whether or not to implant all the embryos they create) based on their personal circumstances. And if the state has a compelling interest in protecting the life of the embryo, the difficulty of the couple's choice probably does not create a substantial enough burden to overcome the interests served by the prohibition on discard.[226]

Banning the discard of embryos creates other legal issues. If couples are prohibited from discarding their excess embryos but do not want them donated to another couple, their only option under the law may be to keep the embryos frozen indefinitely. This raises the question of who is required to bear the costs of maintaining the embryos. If that responsibility falls on the couple, courts may need to weigh the law's financial burden against the couple's reproductive choices. Other dilemmas would likely arise. For

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224. CHILDREN OF CHOICE, *supra* note 83, at 109.

225. Lawrence Tribe is one of several scholars who has cautioned against assuming that the Supreme Court's recognition of a right to choose abortion necessitates recognition of a right to destroy a frozen embryo. Tribe, *supra* note 157, at 1930 ("To say that recognizing a right of reproductive freedom is tantamount to conferring an affirmative right to kill a fetus is to forget, among other things, that embryos can now be frozen; it would be quite a leap beyond *Roe* and *Casey* to posit that such an embryo's genetic mother has a right to ensure its destruction.").

226. This example illustrates how personhood laws may not effectively achieve their ultimate aim—to circumvent *Roe* in service of protecting life defined as beginning from the moment of conception. The prohibition on embryo discard does not vitiate *Roe*. As a result, the couple cannot destroy the embryos by discarding them. But they can still implant the embryos and abort any resulting pregnancy. Weber, *supra* note 165, at 590.

example, if a couple can no longer make payments to a storage facility, what are the facility's responsibilities with respect to the embryos—particularly if they are legal "persons"? The law's practical implications are especially onerous if the facility could then sue the couple for a breach of contract. As exemplified by these hypothetical scenarios, the constitutionality of laws regulating embryo use under a personhood regime would be determined on a sliding scale, and each law would need to be assessed individually and contextually.

IV. Conclusion

In 2008, Colorado residents voted on an amendment to define a "person" under Colorado's constitution as a human being from the moment of conception.[227] If approved, the amendment would have extended rights to every fertilized egg. Most importantly, in the eyes of its proponents, it would have tentatively laid the groundwork for criminalizing abortion.[228] The amendment failed, with an astonishing 73% of the electorate voting against it.[229] Polling revealed that many voters cast their votes against the amendment—not based on their views on abortion or the moral status of embryos—but because they worried about the law's impact on the availability and use of IVF.[230]

Despite public acknowledgment of the potential conflicts personhood laws create for nontraditional conception, bills that propose to protect embryos as people but fail to properly address the repercussions on ART continue to surface. Legislative clarity on the legal status of the embryo and judicial clarity on the scope of procreative freedom are both needed. In the meantime, it's important to continue discussing and debating the intersection of pro-life views and technological advancements in infertility treatments. Particularly if the judicial system accepts the premise that embryos are juridical persons, couples using ART to conceive children will need guidance on how their rights may be affected.

Greer Gaddie

227. Electa Draper, *Huckabee Endorses "Personhood" Amendment*, DENVER POST (Feb. 25, 2008), http://www.denverpost.com/2008/02/25/huckabee-endorses-personhood-amendment/ [https://perma.cc/8W84-MTQD].

228. *Id.*

229. I. GLENN COHEN ET AL., OXFORD HANDBOOK OF U.S. HEALTH LAW 349 (2017).

230. *Id.*

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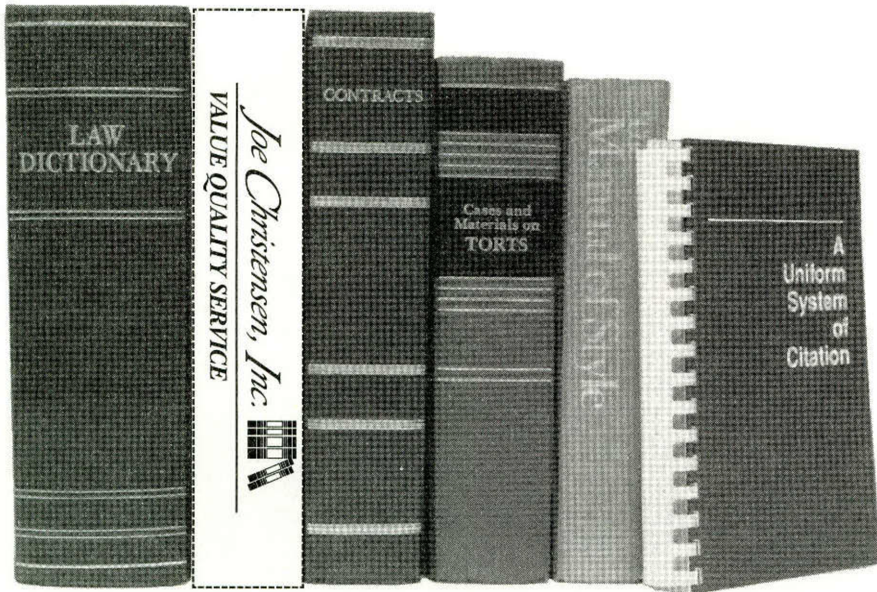

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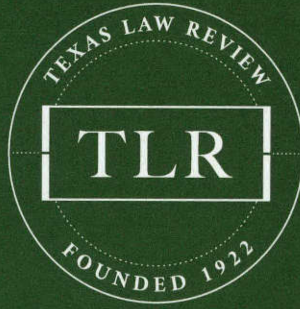
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