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Articles

Supremacies and the Southern Manifesto

Justin Driver*

In March 1956, the overwhelming majority of senators and congressmen from the former Confederate states joined forces to issue the Southern Manifesto. That document marshaled a series of constitutional arguments contending that the Supreme Court incorrectly decided Brown v. Board of Education. *Legal scholars initially lavished considerable attention on the Manifesto. Today, however, the Manifesto no longer occupies a central place in the American legal imagination. No law review article, or any other work written by a law professor, has appeared in more than fifty years that examines the Manifesto in a sustained fashion. This Article contends that the Manifesto should be restored to a prominent position in legal scholarship because the document serves to recast two prominent debates that have occupied constitutional law scholars for decades. First, analyzing the Manifesto reveals that many southern politicians were far more legally sophisticated, calculating, and shrewd in defending white supremacy than legal scholarship generally suggests. Second, examining the remarkable public debates generated by the Manifesto demonstrates that, contrary to popular constitutionalism's account, widespread support for judicial supremacy predated the Supreme Court's articulation of the concept in* Cooper v. Aaron. *Although it may be tempting to view the Manifesto as promoting ideas that have no connection to current conditions, the document continues to have resonance within the modern constitutional order.*

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* Professor, The University of Texas School of Law. I received particularly insightful feedback on this project from David Barron, Tomiko Brown-Nagin, Margaret Burnham, Josh Chafetz, Richard Fallon, Laura Ferry, James Forman, Jacob Gersen, Risa Goluboff, Ariela Gross, Lani Guinier, Daniel Ho, Aziz Huq, John Jeffries, Laura Kalman, Randall Kennedy, Michael Klarman, Alison LaCroix, Sanford Levinson, Kenneth Mack, John Manning, Jonathan Masur, Melissa Murray, Martha Nussbaum, James T. Patterson, Richard Pildes, Scot Powe, David Pozen, Saikrishna Prakash, Richard Primus, George Rutherglen, Benjamin Sachs, Jane Schacter, Frederick Schauer, Jordan Steiker, Matthew Stephenson, Geoffrey Stone, Lior Strahilevitz, David Strauss, Karen Tani, Gerald Torres, Mark Tushnet, Laura Weinrib, and Ted White. Jane O'Connell of The University of Texas School of Law Library went well above and beyond the call of duty in helping me to obtain the materials I needed to undertake this project. I also benefited from indispensable research assistance provided by Parth Gejji, Kyle Kreshover, Liam McElhiney, Javier Perez-Afanador, Jim Powers, and Julia Wilson. I am also grateful for the questions and comments I received from faculty workshop participants at the following law schools: Harvard, Northeastern, Stanford, the University of Chicago, the University of Michigan, the University of Texas, and the University of Virginia.

Introduction

On March 12, 1956, United States Senator Walter George read aloud a document on the Senate floor formally labeled the "Declaration of Constitutional Principles."[1] Despite that imposing official title, just about everyone—including the document's drafters—called it the "Southern Manifesto."[2] The room must not have contained much suspense about the content of George's statement, as that morning's edition of many newspapers had already printed the document's full text, alongside the names of the nineteen senators and seventy-seven congressmen who had endorsed it.[3] These politicians, all from the former Confederate states, had joined together to denounce the Supreme Court's two-year-old decision invalidating racially segregated public schools in *Brown v. Board of Education*.[4] George, with more than three decades of senate experience representing Georgia, had been tapped to deliver the address on account of his senior status among the southern delegation.[5] When George concluded, his most junior colleague—Strom Thurmond of South Carolina—stepped forward to grasp the glory he felt was rightfully his as the person who conceived of the joint statement.[6] But before Thurmond explained his aims for the Manifesto, he paused to honor the moment's significance. "I am constrained to make a few remarks at this time because I believe a historic event has taken place today in the Senate," Thurmond said.[7] Thurmond was far from alone in deeming the occasion momentous. Even several senators who applauded *Brown* acknowledged that the Manifesto's recitation was no ordinary event. Senator Patrick McNamara of Michigan—one of the many elected officials who would feel compelled to discuss the Manifesto in the coming weeks—allowed that the moment was "historic."[8] Nevertheless, he insisted "it was not the kind of history of which Americans can be proud."[9]

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1. 102 CONG. REC. 4459–61 (1956) (statement of Sen. Walter George); William S. White, *Manifesto Splits Democrats Again*, N.Y. TIMES, Mar. 13, 1956, at 1.

2. *See* 102 CONG. REC. 5445 (1956) (statement of Sen. Strom Thurmond) (discussing the "manifesto of the southern Senators"). For insightful biographical treatments of Thurmond, see JACK BASS & MARILYN W. THOMPSON, STROM: THE COMPLICATED PERSONAL AND POLITICAL LIFE OF STROM THURMOND (2005); NADINE COHODAS, STROM THURMOND AND THE POLITICS OF SOUTHERN CHANGE (1993); JOSEPH CRESPINO, STROM THURMOND'S AMERICA (2012).

3. *See, e.g.*, *Text of 96 Congressmen's Declaration on Integration*, N.Y. TIMES, Mar. 12, 1956, at 19 (indicating that the document had been issued one day earlier).

4. 347 U.S. 483 (1954).

5. *See* ALBERTA LACHICOTTE, REBEL SENATOR: STROM THURMOND OF SOUTH CAROLINA 128 (1966) (noting that George was the South's senior senator).

6. *See The Southern Manifesto*, TIME, Mar. 26, 1956, at 25 (acknowledging Thurmond conceived the Manifesto).

7. 102 CONG. REC. 4461 (1956) (statement of Sen. Strom Thurmond).

8. *Id.* at 4687 (statement of Sen. Patrick McNamara).

9. *Id.*

Constitutional law professors initially agreed that the Manifesto's denunciation of *Brown* marked an important development on the legal landscape. Many figures who were considered among the most distinguished legal scholars of their era—including Alexander Bickel, Charles Fairman, and Paul Freund—wrote articles in a range of publications responding to the Manifesto's core contentions.[10] As late as 1962, the Manifesto and its meaning still so preoccupied Bickel that he dedicated several passages in *The Least Dangerous Branch* to grappling with its significance.[11]

Today, it is safe to say that the Southern Manifesto no longer occupies a central place in the minds of legal scholars. Indeed, it risks only mild exaggeration to contend that the Manifesto no longer occupies any place there at all. Following the initial flurry of activity, no law review article has appeared in more than five decades that either primarily examines the Manifesto or even subjects the document to extended analysis. Instead, within the legal literature, the Southern Manifesto invariably appears in passing, on the way to some other destination. Surveying these fleeting invocations of the Manifesto, moreover, yields the nagging suspicion that the document has been cited a good deal more frequently than it has been read.

The Manifesto's marked diminution is lamentable because that document and the debate that it generated contain essential lessons for legal audiences. Examining the Manifesto does nothing less than recast dominant scholarly understandings of *Brown v. Board of Education* and *Cooper v. Aaron*,[12] two Supreme Court decisions that stand among the most closely scrutinized in the nation's history. Intriguingly, the Manifesto reveals how each decision involved a different type of supremacy: the attempt to maintain white supremacy after *Brown* and the articulation of judicial supremacy before *Cooper*. The Manifesto occupies an unusually strong position for exploring these two supremacies, not in isolation, but in concert—an approach that aims to provide a less fragmented assessment of the modern American constitutional order.

This Article makes two principal contributions to ongoing debates among legal scholars. First, bringing the Manifesto to center stage illuminates the sophistication of efforts taken by southern senators and congressmen to preserve white supremacy in the form of racially segregated schools during the immediate post-*Brown* era. Law professors have

10. *See, e.g.*, Alexander M. Bickel, *Ninety-Six Congressmen Versus the Nine Justices*, NEW REPUBLIC, Apr. 23, 1956, at 11; Charles Fairman, *The Supreme Court, 1955 Term—Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83 (1956); Paul A. Freund, Editorial, *Understanding the School Decision*, CHRISTIAN SCI. MONITOR, Mar. 26, 1956, at 18.

11. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 76, 78, 92, 263–67 (1962).

12. 358 U.S. 1 (1958).

lavished a tremendous amount of attention on examining—re-examining, and examining once more—*Brown* and its progeny from the perspective of lawyers and citizens who were, one way or another, dedicated to eradicating racial hierarchy.[13] That rich attention is doubtless merited, as it strengthens scholarly understanding of a defining legal moment during the nation's history.[14] What seems to be vastly less appreciated among law professors, however, is that examining white resistance to racial equality also strengthens understanding of that critical era. Law professors have, with a negligible number of exceptions,[15] approached the legal materials advocating white resistance to *Brown* as though they contained some sort of racial contagion and that the best way to avoid contracting racial prejudice is to keep materials exhibiting such prejudice at bay.[16] But, at the risk of

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13. For only a few of the many prominent works in this vein, see generally KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012); TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (1987); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

14. *See* Richard A. Posner, *The Spirit Killeth, But the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012, at 18, 19 (calling *Brown* "the most esteemed judicial opinion in American history").

15. *See* Ariela J. Gross, *From the Streets to the Courts: Doing Grassroots Legal History of the Civil Rights Era*, 90 TEXAS L. REV. 1233, 1249–51 (2012) (noting the paucity of legal scholars studying white resistance). Bucking the trend among law professors, Michael Klarman and Anders Walker have written important and illuminating works examining white resistance to *Brown*. Klarman argued that *Brown* eliminated the space for racially moderate politicians in the South and succeeded in producing an environment of racial extremism. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 389–408 (2004). Walker's identification and examination of three racially moderate southern governors during the post-*Brown* era can be understood as modifying Klarman's account. *See* ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS (2009) (examining the efforts of Mississippi Governor J.P. Coleman, North Carolina Governor Luther Hodges, and Florida Governor LeRoy Collins to limit *Brown*). Those three governors might also be construed, however, as merely the moderate exceptions that prove the extremist rule. Focusing on the Southern Manifesto—which Klarman mentions only in passing, and Walker omits altogether—shifts the focus from state capitals to the nation's capital, permitting insight into the perspectives of pro-segregation elected officials from the South, who served in the federal government from Washington, D.C. This shift in focus reveals that some southern politicians who would normally be deemed racial "extremists" in fact periodically drew upon the language of racial moderation. Rather than labeling all southern politicians either "moderates" or "extremists," it may be more helpful to view them as drawing upon a wide array of racial rhetoric and tactics, depending upon their shifting motivations and their shifting audiences.

16. In recent years, historians have done a considerably better job than law professors of attempting to puncture the myth of the ignorant southern racist. For a few of the exemplary efforts in this area that have deeply influenced my approach, see KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM (2005); MATTHEW D. LASSITER, THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH (2006); JASON SOKOL, THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975 (2006). Yet perhaps because of modern historians' commitment—critics might say

stating the obvious, examining racial prejudice is not the same thing as championing racial prejudice. It is an excellent indication of how thoroughly legal scholars have overlooked materials promoting white resistance to desegregation that the Manifesto—a document that, at bottom, offers an unusually articulate example of constitutional interpretation outside of the courts—continues to suffer from such intense scholarly neglect.[17] A close examination of the Manifesto adds some sorely needed complexity to the caricatured treatment that typifies legal scholarship's scant references to the document and its drafters. Recovering the complexity that the Manifesto's drafters displayed in resisting *Brown* belies the pervasive stereotype that reads southerners as enraged, unsophisticated bumpkins. To the contrary, in their efforts to preserve segregation, many senators and congressmen demonstrated the ability to be considerably more calculating, self-aware, and legally sophisticated than is commonly appreciated. While it may be tempting to view this inquiry as merely an academic exercise designed to examine history's losers, Manifesto supporters in fact presaged recent contours in the Supreme Court's Equal Protection Clause jurisprudence.

Second, focusing upon the Manifesto helps to reconceptualize the debate among legal scholars regarding judicial supremacy. Many prominent law professors have contended that broad acquiescence to judicial authority over matters of constitutional interpretation emerged only after the Supreme Court issued its expansive proclamation of judicial

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obsession—with writing history about "ordinary" citizens, some of these same historians have continued to propagate the myth as applied to political leaders. Somewhat oddly, then, leading historians have produced a considerably richer conception of resistance to school desegregation on the local level than resistance at the federal level, the latter of which sometimes verges on the cartoonish. Thus, Kevin Kruse, who has written perhaps the most widely celebrated of these recent histories, frames his study of post-*Brown* Atlanta as an effort to capture the ingenuity and sophistication of white resistance, qualities that Kruse contends were lacking among political elites. "If we shift our attention away from politicians and focus on the lives of ordinary segregationists, the flexibility and continuity of white resistance becomes clear," Kruse writes. KRUSE, *supra*, at 8. "While national politicians waged a reactionary struggle in the courts and Congress to preserve the old system of de jure segregation, those at the local level" were, according to Kruse, "incredibly innovative in the[ir] strategies and tactics." *Id.* at 7–8. But, as will become apparent, we need not shift our attention away from politicians in order to see flexibility and innovation among white southerners attempting to preserve the racial order during the post-*Brown* era. Consistent with historians' generally more inquisitive approach to white resistance, some historians have explored the Southern Manifesto in extended fashions. Brent Aucoin, Anthony Badger, and John Kyle Day have each written extraordinarily insightful historical treatments of the Manifesto that influence my analysis throughout this Article. *See, e.g.*, ANTHONY J. BADGER, NEW DEAL/NEW SOUTH 72–101 (2007); Brent J. Aucoin, *The Southern Manifesto and Southern Opposition to Desegregation*, 2 ARK. HIST. Q. 173 (1996); John Kyle Day, The Southern Manifesto: Making Opposition to the Civil Rights Movement (2006) (unpublished Ph.D. dissertation, University of Missouri-Columbia).

17. *See* Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2280 (1999) (contending that "[t]he constitutional understandings of political and social leaders have been given very short shrift").

supremacy in *Cooper v. Aaron* in 1958.[18] But that contention is false. The rollicking debate generated by the Manifesto demonstrated that widespread adherence to notions of judicial supremacy emerged at least as early as 1956, more than two years before the Court decided *Cooper*. In response to the Manifesto, a wide variety of locations—ranging from the halls of Congress, to the Oval Office, to law school faculty lounges, to newsrooms, to ordinary citizens' homes—witnessed testaments to judicial supremacy in nearly identical formulations to those that subsequently appeared in *Cooper*. Indeed, acceptance of judicial supremacy was already so widespread when the Manifesto appeared that even the document's signatories typically did not question the Supreme Court's authority to issue decisive constitutional interpretations. Understanding that widespread notions of judicial supremacy actually preceded *Cooper* complicates the account offered by popular constitutionalists who assert that broad acquiescence to judicial authority flowed from a Supreme Court power grab.[19] Concentrating on the Manifesto enables that overly tidy narrative to be replaced by a subtler account, one that highlights the importance of nonjudicial actors' attitudes toward judicial supremacy. This context not only transforms a dominant understanding of *Cooper*, one of the Court's most significant pronouncements regarding judicial authority, but also challenges the historical foundations of popular constitutionalism, one of the most significant developments in constitutional law to have emerged in recent decades.

Scholars have traditionally treated these two questions of supremacy as utterly distinct. Law professors who write primarily about judicial supremacy have tended to avoid scrutinizing white supremacy. Conversely, law professors who write primarily about racial equality have not evinced much interest in deeply exploring the phenomenon of judicial supremacy. Even law professors who have written about both racial equality and courts' authority to determine constitutional meaning have too often treated white supremacy as though it were unrelated to judicial supremacy.[20] This bifurcated approach, however, is misguided. It is difficult to understand modern American attitudes toward law without contemplating how these two supremacies intersect and interact. For many Americans, the refusal to acknowledge judicial supremacy is personified by advocates of white supremacy during the post-*Brown* era. The most exuberant of those advocates are now widely viewed as having fought on the wrong side of history, and many citizens are reluctant to reenact what they regard as the

18. *See infra* notes 263–73 and accompanying text.

19. *See infra* notes 276–79 and accompanying text.

20. Mark Tushnet has made numerous indelible contributions to the legal literatures involving racial equality and judicial supremacy. But it seems noteworthy that his book extolling constitutional interpretation outside of the courts does not mention the Manifesto. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

nation's anti-Court cautionary tale. Thus, these two core principles—an aversion to white supremacy and an adherence to judicial supremacy—have become inextricably connected in the American legal imagination. Treating these two supremacies jointly rather than separately should, accordingly, pave the way toward a more accurate and coherent understanding of the nation's constitutional order.

The balance of this Article unfolds as follows. Precisely because so much confusion surrounds what the Manifesto says—and, importantly, what it does not say—Part I begins with an analytical overview of the document's text. Contrary to the widespread assumption, the Manifesto did not predominantly consist of sharp invective. Instead, the document primarily advanced a series of measured legal arguments, contending that the Court incorrectly decided *Brown* as a matter of constitutional law. Drawing upon the fundamental modalities of constitutional interpretation, the Manifesto claimed that *Brown* could not be squared with the Constitution as a matter of originalism, text, precedent, structure, prudence, or tradition. After examining the Manifesto's text, it becomes possible to appreciate more fully the document's context. Although recent commentators have criticized the document for what they regard as its enraged tone, many contemporaneous observers applauded the document for voicing its judicial criticisms in a restrained manner. The Manifesto was designed to strike a temperate tone, Part I contends, because doing so would help to garner support from the largest possible bloc of the South's congressional delegation. The Manifesto backers sought broad southern support, in turn, because such support would increase the likelihood of reaching their primary audience. While many commentators have assumed that the Manifesto was targeted at white southerners, considerable evidence suggests that it was primarily geared toward white northerners.

Part II examines the tactically shrewd approach to maintaining white supremacy that the Manifesto and its supporters advanced during the immediate post-*Brown* era. Instead of deploying the crude racial rhetoric that was common even among the most sophisticated defenders of racial segregation during the 1950s, the Manifesto's drafters understood that the document would be more effective in dampening integrationist sentiment if it eschewed such unvarnished appeals. Beginning with the very earliest of Senator Thurmond's drafts of the Manifesto, the document's authors demonstrated remarkable self-awareness and self-control in declining to detail the many racially inflected ills that segregationists typically asserted would follow school desegregation. Relatedly, some Manifesto backers understood that, if segregationists resorted to either violence or outright defiance of judicial authority in resisting *Brown*, such actions would hinder the effort to preserve racially segregated public schools. Demonstrating impressive foresight, some southern politicians expressly warned their constituents to forgo racial violence and lawlessness because of the negative

reaction that northerners would have in response. In issuing such warnings, Manifesto backers managed to anticipate the sequence of events during the 1960s that legal academia would subsequently label the "counter-backlash" phenomenon.[21] Southern senators and congressmen during the mid-1950s, rather than consistently goading white southerners into defying the law, instead far more frequently sought to define the law. Capitalizing upon the legal uncertainty stemming from the Court's infamously nebulous implementation decree in *Brown II*,[22] Manifesto supporters advocated several innovative strategies that they hoped would forestall school desegregation. These alternative strategies reveal how Manifesto backers resisted desegregation not primarily with obstinacy and intransigence, but instead with creativity and flexibility.

Part III recovers the central debate that the Manifesto elicited about judicial supremacy. The most notable portions of that debate unfolded on the floors of both houses of Congress, where members of the Senate and the House of Representatives engaged in perhaps the most searching discussions of the judiciary's role in constitutional interpretation that occurred among elected officials during the entire twentieth century. These occasionally heated discussions demonstrate that, some two years before the Court decided *Cooper*, many politicians had already adopted even that opinion's most expansive conceptions of judicial authority. The debates also underscore how even some of the most ardent backers of the Manifesto nevertheless often espoused surprisingly robust notions of judicial supremacy. President Dwight Eisenhower echoed legislators' strong embrace of judicial supremacy in response to the Manifesto, as did leading law professors, journalists, and even ordinary citizens. This broad embrace of judicial supremacy before the Court's decision in *Cooper* unsettles a core claim within popular constitutionalism. Rather than unilaterally taking something away from "the people" in *Cooper*, it may be more accurate to understand that decision's embrace of judicial supremacy as articulating the notion of constitutional interpretation that many citizens desired.

Part IV steps back to examine three of the Manifesto's most prominent modern implications, demonstrating that the document's import is far from confined to the past. First, the strategies that Manifesto drafters developed for containing *Brown*'s meaning for school desegregation would eventually overlap with the Supreme Court's understanding of that foundational opinion. Second, the legal vision elevating individual liberty above federal government authority that was espoused in the Manifesto continues to hold

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21. *See* Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 116 (1994) ("*Brown* produced a southern political environment that encouraged public officials to use violent tactics to put down civil rights demonstrations, to the horror of northern television audiences, who in turn mobilized in support of national legislation to eradicate Jim Crow.").

22. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

sway in American constitutional law. Third, the Manifesto's linkage with the Little Rock desegregation crisis suggests that the document forms one part of a sort of national cautionary tale that exemplifies the dangers of extrajudicial constitutional interpretation.

The overarching aim here is to offer neither absolution nor an apology for the Manifesto's signatories. During a period when national figures began in earnest to march toward racial justice, Manifesto signatories rushed headlong in the opposite direction. Their attempt to sustain the nation's racial caste system was, I believe, an atrocity. But vehement disagreement with the underlying views of Manifesto backers should not prevent scholars from understanding what arguments they advanced, why they framed those arguments as they did, and how those arguments resonated within the context of their times. This work is vital not only for appreciating one of the nation's most significant legal transformations in all of its rich complexity, but also for appreciating the contemporary continuities that stem from that earlier era.

I. What Was the Southern Manifesto?

Today, the Southern Manifesto and the men who shaped it are enshrouded in the mist of mythology. The primary element in this mythology holds that, provoked by *Brown*, a group of southern politicians' segregationist fervor caused them to take leave of their senses and issue an enraged attack against *Brown*—a screed that sounded like nothing so much as a latter-day rebel yell.[23] When describing the Manifesto and its signatories, commentators have consistently invoked the language of fear, anger, and mental illness—just about any emotion or condition that drastically reduces or altogether eliminates the possibility for rational, coherent thought. Thus, the document's drafters are called "fanatic segregationists"[24] and a "band of fanatics"[25] who were motivated by "a deep spring of primitive, sub-rational fears."[26] And the Manifesto itself is purported to "seeth[e] with anger,"[27] and to "bristle[] with angry words,"[28]

23. *See* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 344 (1988) (describing a "rebel yell" as attacking Confederate soldiers' "strange, eerie scream" and "unearthly wail").

24. L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697, 709–10 (2003).

25. Garrett Epps, *The Littlest Rebel: James J. Kilpatrick and the Second Civil War*, 10 CONST. COMMENT. 19, 35 (1993).

26. Paul A. Freund, *Storm over the American Supreme Court*, 21 MOD. L. REV. 345, 354 (1958).

27. Joe R. Feagin, *Heeding Black Voices: The Court,* Brown*, and Challenges in Building a Multiracial Democracy*, 66 U. PITT. L. REV. 57, 71 (2004).

28. HAYNES JOHNSON & BERNARD M. GWERTZMAN, FULBRIGHT: THE DISSENTER 143 (1968).

"ugly vehemence,"[29] and "righteous indignation."[30] Richard Kluger's *Simple Justice*—a book some law professors view as the definitive narrative history of the legal fight against Jim Crow[31]—describes the Southern Manifesto as an "ejaculation of bile" and an "orgiastic declaration[] of defiance."[32]

A secondary, but nevertheless noteworthy, element in the mythology surrounding the Manifesto is a belief that its signatories generally lacked intellectual sophistication. This notion stems from the misperception that advocates of racial bigotry are almost invariably crude, inarticulate, and dull-witted. Although commentators sometimes come right out and label these southern politicians from the 1950s "simple,"[33] this notion may be viewed most readily in the context of Senator J. William Fulbright of Arkansas, the intelligent exception that theoretically proves the vulgar rule.[34] Viewed through the spectacles of urban and educated northerners, it was simply inconceivable that Fulbright—a Rhodes Scholar, University President, and founder of the eponymous scholarship for study abroad—actually held the racial attitudes they associated with a rube. Thus, upon Fulbright losing his Senate seat in 1974, the *New York Times* editorialized: "A sophisticate and a cosmopolite, he signed the segregationist 'Southern Manifesto' and in years past expressed a good deal more loyalty to old Southern attitudes than he surely felt."[35] Three years later, an article in the *New Yorker* identified Fulbright as someone "who, despite his signing of the Southern Manifesto against the Supreme Court decision, was always suspected of being too worldly to be an authentic bigot."[36] As to the remaining Manifesto signatories, few people entertained such suspicions.

A close examination of the Manifesto, however, undermines the perception that southern politicians were universally blinded by either rage

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29. Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 507–08 (1997).

30. ROBBINS L. GATES, THE MAKING OF MASSIVE RESISTANCE: VIRGINIA'S POLITICS OF PUBLIC SCHOOL DESEGREGATION, 1954-1956, at 118 (1964); *see also* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1133–34 (1995) (connecting the Manifesto to "the enraged tones" of resistance to *Brown*).

31. *See, e.g.*, Randall Kennedy, *Schoolings in Equality*, NEW REPUBLIC, July 5 & 12, 2004, at 29, 33, 36 (praising the book as "learned," "illuminating," and even "magisterial").

32. RICHARD KLUGER, SIMPLE JUSTICE 752 (1975).

33. *See, e.g.*, NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S, at 118 (1969) ("Like Harry F. Byrd, Eastland was a simple man who found the past more attractive than the future."); Robert G. Sherrill, *James Eastland: Child of Scorn*, NATION, Oct. 4, 1965, at 154, 155 (describing Senator James Eastland as "a rather simple man").

34. For a comprehensive biography of Fulbright, see RANDALL BENNETT WOODS, FULBRIGHT: A BIOGRAPHY (1995).

35. *Mr. Fulbright Loses*, N.Y. TIMES, May 30, 1974, at 36.

36. Calvin Trillin, *Remembrances of Moderates Past*, NEW YORKER, Mar. 21, 1977, at 85, 86–87.

or stupidity. To the contrary, the drafters of the Manifesto often advanced legal arguments opposing integration that contained considerably more nuance, subtlety, and sophistication than their detractors have allowed. Recovering those arguments in detail enables one to understand how the Manifesto is, in significant ways, the photographic negative of *Brown*.

A. Text

The harshest language that appears in the entire Manifesto arrives in its very first sentence: "The unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law."[37] When scholars bother to quote from the document at all, this opening passage supplies many of those quotations.[38] The fixation of legal scholars on the Manifesto's overture is regrettable for at least two reasons. First, as will become clear, many contemporaneous observers did not perceive that language as unusually condemnatory. Indeed, contrary to the impression of some prominent scholars, such language was by no means foreign even to that era's most sober, buttoned-down academic critics. Second, the fixation invites the misimpression that the Manifesto sounded themes that resonated primarily in politics rather than in law. In fact, though, the inverse is true: the Manifesto chiefly consisted of lawyerly arguments about constitutional meaning. The Manifesto contended that *Brown* was incorrectly decided under the Constitution as a matter of originalism, text, precedent, structure, prudence, and tradition.[39] Recovering the Manifesto's constitutional dimensions is vital not least because it provides legal scholarship with an all-too-rare concrete example of extrajudicial constitutional interpretation.

The Manifesto's central critique asserted that the decision violated the original understanding of the Fourteenth Amendment.[40] In doing so, the Manifesto placed in the foreground precisely the argument that the Court's opinion in *Brown* sought to force into the background.[41] "The debates preceding the submission of the [Fourteenth A]mendment clearly show that there was no intent that it should affect the system of education maintained

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37. 102 CONG. REC. 4460 (1956).

38. *See, e.g.*, WOODS, *supra* note 34, at 210 (quoting a portion of the Manifesto's first sentence); Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1789 n.163 (2007) (quoting the Manifesto's first sentence in its entirety); Feagin, *supra* note 27, at 70 (same).

39. On constitutional law's six modalities, see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991).

40. For an important argument contending that *Brown* can be understood as compatible with originalism, see McConnell, *supra* note 30. *But see* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (critiquing McConnell's position).

41. *See* Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted . . . .").

by the States," the Manifesto noted. "The very Congress which proposed the amendment subsequently provided for segregated schools in the District of Columbia."[42] The great majority of states that ratified the Fourteenth Amendment during the 1860s, the Manifesto observed, either already had public schools in operation that were segregated or started a segregated school system thereafter.[43] Why would the states have so acted, the Manifesto asked, if they believed that Jim Crow education could not peacefully coexist with the Equal Protection Clause?[44] Bolstering its original meaning argument with a textual claim, the document further noted that the word "education" appeared nowhere in the Constitution.[45]

The Manifesto further criticized *Brown* for reversing important, longstanding Supreme Court precedents upon which society was organized. In a decision dating back six decades, the Supreme Court had in *Plessy v. Ferguson*[46] authorized "separate but equal" facilities,[47] a constitutional doctrine that the Manifesto appeared to delight in noting "began in the North, not in the South."[48] Since that time, the document continued, *Plessy* "has been followed in many other cases," including *Gong Lum v. Rice*,[49] where the Court, "speaking through Chief Justice Taft . . . unanimously declared in 1927 . . . that the 'separate but equal' principle is 'within the discretion of the State in regulating its public schools and does not conflict with the [Fourteenth A]mendment.'"[50] Drawing upon principles of stare decisis, the Manifesto contended that *Plessy* articulated a fundamental rule around which citizens had ordered their affairs: "This interpretation, restated time and again, became a part of the life of the people of many of the States and confirmed their habits, customs, traditions, and way of life."[51]

The Court's decision in *Brown*, according to the Manifesto, also violated various structural components of the Constitution. Most prominently, the document repeatedly appealed to principles of federalism

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42. 102 CONG. REC. 4460 (1956).

43. *Id.*

44. *See id.*

45. *Id.* This wooden constitutional interpretation drew considerable fire from contemporary critics. *See, e.g.*, Bickel, *supra* note 10, at 13 ("Of course the Constitution does not mention education. Nor does it mention an Air Force, but the President's title to the commander-in-chief in the air as well as on land is not consequently the less."); Herbert Brownell, Jr., *The United States Supreme Court: Symbol of Orderly, Stable and Just Government*, 43 A.B.A. J. 595, 599 (1957) ("[T]he Constitution [also] does not refer to agriculture. Does that mean that the Congress may not provide price supports for cotton, soy beans or wheat? Obviously not.").

46. 163 U.S. 537 (1896).

47. *See id.* at 550–51.

48. 102 CONG. REC. 4460 (1956) (tracing the doctrine to *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849)).

49. 275 U.S. 78 (1927).

50. 102 CONG. REC. 4460 (1956) (quoting *Gong Lum*, 275 U.S. at 87).

51. *Id.*

by invoking the Tenth Amendment. Where northern states that eventually rejected racially segregated schools had validly "exercis[ed] their rights as States through the constitutional processes of local self-government," the southern politicians explained that, in opposing *Brown*, they aimed to eliminate "the Supreme Court's encroachments on rights reserved to the States and to the people, contrary to established law, and to the Constitution."[52] In one of its more emotive passages, the Manifesto elevated its defense of federalism into a defense of an ideal that had made the nation great.[53] "Even though we constitute a minority in the present Congress," the document allowed, "we have full faith that a majority of the American people believe in the dual system of government which has enabled us to achieve our greatness and will in time demand that the reserved rights of the States and of the people be made secure against judicial usurpation."[54] In another argument invoking constitutional structure, the Manifesto contended that, in order to prohibit states from segregating pupils by race, proponents of integration should have pursued a constitutional amendment through Article V rather than simply filing a lawsuit.[55] The document further appealed to separation of powers principles by contending: "The Founding Fathers gave us a Constitution of checks and balances because they realized the inescapable lesson of history that no man or group of men can be safely entrusted with unlimited power."[56]

In addition, the Manifesto advanced a few consequentialist arguments in contending *Brown* was incorrectly decided. Seeking to claim the mantle of stability, the Manifesto criticized the Court's decision for being "contrary to the Constitution, [and] creating chaos and confusion in the States principally affected."[57] Moreover, if "outside agitators" persisted in their "threat[s]" to seek "immediate and revolutionary changes in our public-school systems," the Manifesto alleged that they would be "certain to destroy the system of public education in some of the States."[58] The Manifesto maintained that the Justices had already succeeded in exacting a heavy toll on southern race relations: "[*Brown*] is destroying the amicable

52. *Id.*; *see also id.* (bemoaning "encroach[ment] upon the reserved rights of the States and the people").

53. For an examination of the nation's federalism principles at the time they were initially being forged, see ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010). For a recent comprehensive overview of federalism, see VICKI C. JACKSON & SUSAN LOW BLOCH, FEDERALISM: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2013).

54. 102 CONG. REC. 4460 (1956).

55. *See id.* ("They framed this Constitution with its provisions for change by amendment in order to secure the fundamentals of government against the dangers of temporary popular passion or the personal predilections of public officeholders.").

56. *Id.*

57. *Id.*

58. *Id.*

relations between the white and Negro races that have been created through 90 years of patient effort by the good people of both races. It has planted hatred and suspicion where there has been heretofore friendship and understanding."[59]

The Manifesto further contended that *Brown* represented a rupture with the nation's constitutional tradition of protecting parental rights.[60] *Plessy*'s separate-but-equal principle, the Manifesto argued, "is founded on elemental humanity and commonsense, for parents should not be deprived by Government of the right to direct the lives and education of their own children."[61] The Manifesto did not explicitly cite the Supreme Court's decision in *Pierce v. Society of Sisters*,[62] but it bears mentioning that its language here maps almost perfectly onto that canonical opinion. In 1925, the Court in *Pierce* invalidated an Oregon law requiring children to attend public school, rather than private or parochial school, because it held such laws violate "the liberty of parents and guardians to direct the upbringing and education of children under their control."[63] It is unclear whether the Manifesto's drafters intentionally echoed *Pierce*. But it would hardly be surprising if some Manifesto supporters knew of the case, given the national media attention it received and that the case was decided when many southern senators were either law students or newly minted lawyers.[64]

Finally, the Manifesto closed by attempting to enlist broad support from across the nation for the constitutional values it defended. "We appeal to the States and people who are not directly affected by these decisions to consider the constitutional principles involved against the time when they too, on issues vital to them, may be the victims of judicial encroachment," the Manifesto urged.[65] In its concluding passages, the Manifesto signatories repeatedly stated that their aim—to reverse *Brown*—should be sought only within legal bounds. "We reaffirm our reliance on the Constitution as the fundamental law of the land," they wrote, apparently alluding to the Supremacy Clause contained in Article VI.[66] The signatories further explained: "We pledge ourselves to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent

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59. *Id.*

60. *Id.* *See also* BOBBITT, *supra* note 39, at 20 (describing appeals to the "ethical" constitutional modality as arguments that frequently emphasize the notion of limited government).

61. 102 CONG. REC. 4460 (1956).

62. 268 U.S. 510 (1925).

63. *Id.* at 530, 534–35.

64. For national news coverage that analyzed *Pierce*'s oral argument, see *Supreme Court: Oregon and Oregonians*, TIME, Mar. 30, 1925, at 5.

65. 102 CONG. REC. 4460 (1956).

66. *Id.*; *see also* U.S. CONST. art. VI (noting that "[t]his Constitution . . . shall be the supreme Law of the Land").

the use of force in its implementation."[67] This same emphasis on legality also appeared when the Manifesto commended actions taken by states up to that point in resistance to *Brown*.[68] The last line of the Manifesto instructed southern citizens in responding to the Court's decision "to scrupulously refrain from disorder and lawless acts."[69]

B. Context

The most illuminating way to conceptualize the Southern Manifesto is to view it as the mirror image of the Supreme Court's opinion in *Brown v. Board of Education*. On a superficial level, of course, where *Brown* sought to dismantle Jim Crow, the Manifesto sought to reinforce it. Yet the links between the two documents extend much deeper, as the processes that led to the creation of *Brown* and the Manifesto contain at least three related, striking similarities. First, in drafting *Brown*, Chief Justice Warren aimed to achieve a tone that was "unemotional," "non-rhetorical," and "non-accusatory" in an effort to avoid alienating white southerners.[70] Although the Manifesto is now widely misunderstood on this score, its drafters also intentionally adopted a mild tone. Second, Warren kept his draft opinion in *Brown* "short" so that it would be "readable by the lay public" and could be reproduced in newspapers around the country.[71] The Manifesto's drafters shared these same goals, limiting the final version of the document to fewer than 1000 words, in an effort to plead their case directly to a nationwide audience. Third, and perhaps most famously, Warren worked diligently to achieve unanimity.[72] Similarly, while not every southern politician in Congress signed the document, Manifesto backers went to considerable lengths to make the southern delegation as solid as possible.[73]

1. Tone.—Although commentators in recent decades have frequently derided the Manifesto for brimming with anger, the immediate reaction to the document was quite distinct. Rather than construing its tone as irate, many contemporary observers instead praised the document for demonstrating moderation, restraint, and also for avoiding inflammatory and emotional rhetoric. Such words often recur in the initial descriptions of

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67. 102 CONG. REC. 4460 (1956).

68. *See id.* ("We commend the motives of those States which have declared the intention to resist forced integration by any lawful means.").

69. *Id.*

70. *See* KLUGER, *supra* note 32, at 696.

71. *See id.*; LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 29 (2000).

72. KLUGER, *supra* note 32, at 698. *See generally* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 34–44 (1979) (describing the process that led to the unanimous decision in *Brown*).

73. *See, e.g.*, ALBERT GORE, LET THE GLORY OUT: MY SOUTH AND ITS POLITICS 104 (1972) (detailing efforts to secure Gore's signature).

the Manifesto's tone and were used by the document's detractors and supporters alike.

Two senators who expressed deep opposition to the Manifesto from the Senate floor nevertheless applauded its mild tenor. Senator Alexander Smith of New Jersey developed this theme at length. "I commend the signers of the manifesto for the moderation of the language they used in questioning the validity of the Supreme Court decision and in urging a quiet, unemotional approach to the solving of the problem which troubles them," Smith said. "There is no evidence in this document of rebellion; there is no evidence of any intention to divide our country. The spirit of the manifesto is moderate and is respected by all of us, even those of us who completely disagree with its substance and purpose."[74] Senator Herbert Lehman of New York agreed that the document was "certainly not inflammatory in tone."[75]

Commentators outside of the Senate, including those from the worlds of academia and journalism, shared this assessment. Professor Alpheus Mason of Princeton, who expressed admiration for the document, contended that the Manifesto communicated its ideas in "a dignified and effective way."[76] A Manifesto critic writing in the *Kentucky Law Journal* nevertheless called its approach "relatively moderate."[77] The *Wall Street Journal*'s editorial page observed that the Manifesto "is not the voice of any gallused demagogue" and elaborated: "[T]he words were not inflammatory; there was a tone of restraint throughout and a cautious admonition to extremists on both sides of the segregation question."[78] Liberal magazines echoed these sentiments from the conservative newspaper, as the *New Republic* found the Manifesto "notable for its restraint,"[79] and even the *Nation* allowed that the document's text was "non-inflammatory."[80]

Despite these early tonal appraisals, Bruce Ackerman recently asserted that the Manifesto was unusually strident in its criticism of the Court's decision in *Brown*—even as assessed against the prevailing standards of the 1950s. Ackerman—in writing of Herbert Wechsler's Holmes Lectures that he delivered in 1959 at Harvard Law School[81]—noted in his own set of

74. 102 CONG. REC. 5625 (1956) (statement of Sen. H. Alexander Smith).

75. *Id.* at 4940 (statement of Sen. Herbert Lehman).

76. *Law Professor Backs Manifesto*, N.Y. TIMES, Mar. 18, 1956, at 87.

77. Paul Oberst, *The Supreme Court and States Rights*, 48 KY. L.J. 63, 73 (1959).

78. Editorial, *Statement from the South*, WALL ST. J., Mar. 14, 1956, at 12.

79. *Southern Democrats*, NEW REPUBLIC, Mar. 19, 1956, at 4, 5.

80. Carey McWilliams, *The Heart of the Matter*, NATION, Mar. 31, 1956, at 249. McWilliams did express the concern that, despite its placid tone, the document by its very existence may nevertheless lead to lawlessness and perhaps even violence. *See id.* For some critical analysis of these claims, see *infra* section II(B)(1).

81. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

Holmes Lectures: "Wechsler's [*Neutral Principles*] critique was mild, even tentative, compared to the extravagant constitutional claims made in the Southern Manifesto."[82] In a similar vein, Ackerman contended that Wechsler's lectures communicated the message that "continuing dissent to *Brown* was not the monopoly of segregationist bitter-enders, but was a serious option for mainstream professionals."[83] The only support from the Manifesto that Ackerman cited to accompany these assertions is its well-worn opening line, which in its sharpest terms called *Brown* "unwarranted" and a manifestation of "naked power."[84]

As it turns out, though, the gap separating Wechsler's criticisms from the Manifesto's criticisms may not be as vast as Ackerman posited. Indeed, the documents contain several notable similarities. The central claim in *Neutral Principles* suggested, after all, that *Brown* was not legally warranted—a claim that both documents made by affirming *Plessy*'s legitimacy.[85] In perhaps the most arresting rhetorical similarity, Wechsler used an even more provocative phrase than the Manifesto's usage of "naked power" when he contended that the Court must not act as "a naked power organ"—a phrase that appears twice in *Neutral Principles*.[86] In elite lawyer circles during the 1950s, it would seem that the term "naked power" was, if not quite ubiquitous, then exceedingly well-traveled.[87]

But the similarities extended beyond the Manifesto's first sentence. In a move reminiscent of the Manifesto's *Pierce*-inflected appeal, Wechsler prioritized the views of white parents who wished to avoid sending their children to schools with black students. "[I]f the freedom of association is denied by segregation," Wechsler wrote, "integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms . . . ."[88] Although it is

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82. Ackerman, *supra* note 38, at 1789.

83. *Id.* at 1790.

84. *Id.* at 1789 n.163 (quoting the Manifesto as arguing that "[t]he unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law" (internal quotation marks omitted)).

85. *See* Wechsler, *supra* note 81, at 33 ("[I]s there not a point in *Plessy* in the statement that if 'enforced separation stamps the colored race with a badge of inferiority' it is solely because its members choose 'to put that construction upon it'?").

86. *Id.* at 12, 19.

87. *See, e.g.*, George H. Dession & Harold D. Lasswell, *Public Order Under Law: The Role of the Advisor-Draftsman in the Formation of Code or Constitution*, 65 YALE L.J. 174, 184 n.12 (1955) ("Naked power is not law . . . ."); Philip B. Kurland, *The Supreme Court and Its Judicial Critics*, 6 UTAH L. REV. 457, 466 (1959) (criticizing judicial activism as "the exercise of such naked power"); Myres S. McDougal & William T. Burke, *Crisis in the Law of the Sea: Community Perspectives Versus National Egoism*, 67 YALE L.J. 539, 588–89 (1958) (twice using the phrase "naked power"); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 205 (1952) (using the phrase "naked power").

88. Wechsler, *supra* note 81, at 34.

commonly believed that Wechsler originated the argument that *Brown* contradicted the freedom of association, southern politicians had been articulating that argument for several years before Wechsler got around to doing so.[89] Only days after the Court decided *Brown*, Senator James Eastland of Mississippi stated: "All free men have the right to associate exclusively with members of their own race, free from governmental interference, if they so desire."[90] Shortly after the Manifesto's unveiling, Senator Sam Ervin of North Carolina similarly contended that opposition to *Brown* "results from the exercise of a fundamental American freedom—the freedom to select one's associates. Whenever Americans are at liberty to choose their own associates, they virtually always select within their own race."[91] Finally, Wechsler, like the Manifesto three years earlier, closed by urging lawfulness: "Having said what I have said, I certainly should add that I offer no comfort to anyone who claims legitimacy in defiance of the courts."[92]

There are, to be sure, significant differences between the two documents. Not the least of those differences is Wechsler's contention that segregation harms both blacks and whites,[93] a claim that one would search the Manifesto for in vain. Unlike Manifesto signatories, moreover, Wechsler professed a desire for school desegregation as a policy matter—even if he found it difficult to conclude that segregation was unconstitutional.[94] Nevertheless, the point remains that, as judged by the standards of the day's leading legal commentators, the Manifesto was not an exercise in constitutional extravagance. The document initially received so much attention perhaps less for what it said than for who was saying it—and to whom it was addressed.

2. Audience.—Leading authorities have consistently suggested that the Manifesto's primary audience was white southerners. Anthony Lewis, in what is perhaps the most oft-quoted line about the document, ventured in

89. Many years ago, Barry Friedman perceptively portrayed Wechsler's freedom-of-association critique of *Brown* as echoing an argument made by southern elected officials. *See* Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 508 n.34 (1997).

90. 100 CONG. REC. 7255 (1954). Eastland continued: "Free men have the right to send their children to schools of their own choosing, free from governmental interference, and to build up their own culture, free from governmental interference." *Id.*

91. Sam J. Ervin, Jr., *The Case for Segregation*, LOOK, Apr. 3, 1956, at 32, 32. For helpful biographical examinations of Ervin, see KARL E. CAMPBELL, SENATOR SAM ERVIN, LAST OF THE FOUNDING FATHERS (2007); PAUL R. CLANCY, JUST A COUNTRY LAWYER: A BIOGRAPHY OF SENATOR SAM ERVIN (1974); DICK DABNEY, A GOOD MAN: THE LIFE OF SAM J. ERVIN (1976).

92. Wechsler, *supra* note 81, at 35.

93. *See id.* at 34 ("I think, and I hope not without foundation, that the Southern white also pays heavily for segregation, not only in the sense of guilt that he must carry but also in the benefits he is denied.").

94. *See id.* at 31–34.

1964: "The true meaning of the Manifesto was to make defiance of the Supreme Court and the Constitution socially acceptable in the South—to give resistance to the law the approval of the Southern Establishment."[95] The passage of time has done little to soften this perception. Thus, Anthony Badger recently suggested the drafters of the Manifesto "aimed above all to persuade white southerners that school desegregation could be prevented, for they were concerned that white southerners were too fatalistic on the race issue."[96] Giving greater specificity to this general claim, Badger has also contended that "[w]hen Strom Thurmond drafted the Southern Manifesto, his aim was . . . to stir up popular segregationist feeling."[97] Lewis and Badger enjoy considerable support in contending that the Manifesto was essentially a regional document.[98]

Although this theory claims many adherents, it nevertheless misconstrues the Manifesto. That document was not primarily designed with a focus on whipping up segregationist sentiment among southerners but instead on tamping down integrationist sentiment among northerners. It is odd that such a profound misperception surrounds the Manifesto's main audience because so much evidence suggests that its drafters intended to send a clear signal to the North about southern opposition to integration. Whatever the cause of this audience misperception, though, it has distorted understanding of the document itself. The claim here should not be viewed, of course, as contending that northerners were the Manifesto's *only* audience; as with most documents written by politicians, the Manifesto surely spoke to multiple audiences simultaneously. This multiplicity of audiences does not mean, however, that it is impossible to ascertain a document's primary audience, or that it is fruitless to do so. It is awfully difficult to know whether a message is received, after all, if you do not know to whom it is centrally addressed.

The Manifesto's sponsors repeatedly explained that their statement was principally targeted at a nonsouthern audience. In Senator George's very brief introductory remarks on the Senate floor, he began by explaining that southerners aimed to communicate "the increasing gravity of the situation following [*Brown*], and the peculiar stress in sections of the country where this decision has created many difficulties, unknown and unappreciated, perhaps, by many people residing in other parts of the

95. ANTHONY LEWIS, PORTRAIT OF A DECADE 45 (1964).

96. BADGER, *supra* note 16, at 93.

97. Tony Badger, Brown *and Backlash*, *in* MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 39, 46–47 (Clive Webb ed., 2005).

98. *See, e.g.*, KLUGER, *supra* note 32 (contending that the Manifesto aided "the more rabid elements in the region"); JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 340 (2006) (contending that, from Warren's perspective, the Manifesto was "provocative—annoying, even—but unthreatening, as long as its complaints were regional").

country."[99] Following George, Thurmond echoed this theme, noting that they sought "to make clear there are facts that opposing propagandists have neglected in their zeal to persuade the world there is but one side to this matter."[100] Congressman Howard Smith, who introduced the Manifesto in the House of Representatives, likewise explained, "We're just hopeful it might have a sobering effect on the rest of the country and make them stop, look, and listen."[101]

The initial media accounts—in outlets ranging from small southern newspapers to elite magazines—likewise understood the Manifesto as being pitched to northerners. An editorial in the *Greenville News* of South Carolina contended: "First and foremost, the statement is an appeal to the thinking people all over the United States to understand the southern point of view on the issues involved."[102] A leading newspaper in South Carolina, the *State*, agreed with this assessment, and elaborated:

> The sooner the rest of the country takes a realistic view of the situation that exists, the better it will be for everybody. And such pronouncements as the congressional manifesto serve to notify the people of other sections of the firm intention of the white South to use every legal means to circumvent [*Brown*].[103]

At the opposite end of journalism's spectrum, an article in the *New Republic* concluded of the Manifesto's endorsers: "Their purpose undoubtedly was to check the extremists in the North by showing them the difficulty and danger attending the eradication of any long-established social pattern."[104]

Motivating this desire to reach a national audience directly was the strong sense among southerners that the national news media covered the issue of segregation in a biased manner. Writing in *Harper's* shortly before the Manifesto appeared, Thomas R. Waring, a prominent journalist from South Carolina, contended: "[T]he metropolitan press almost without exception has abandoned fair and objective reporting of the race story. For fact it frequently substitutes propaganda."[105] The absence of

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99. 102 CONG. REC. 4459 (1956) (statement of Sen. Walter George).

100. *Id.* at 4461 (statement of Sen. Strom Thurmond).

101. Guy Friddell, *3 Senators Criticize Manifesto*, RICHMOND NEWS LEADER, Mar. 12, 1956, at 1, 2.

102. *Statement Is an Appeal to Reason*, GREENVILLE NEWS, Mar. 13, 1956, at 4.

103. *Will Have Effect*, STATE (Columbia), Mar. 14, 1956, at 4A.

104. Gerald W. Johnson, *Southern Manifesto*, NEW REPUBLIC, Apr. 9, 1956, at 8. Professor Alpheus Mason of Princeton similarly told the *New York Times* that the Manifesto "is calculated to give the court and the country pause." *Law Professor Backs Manifesto*, *supra* note 76, at 87.

105. Thomas R. Waring, *The Southern Case Against Desegregation*, HARPER'S, Jan. 1956, at 39, 39; *see also id.* at 39–40 ("[W]ith the exception of a small coterie of Southern writers whom Northern editors regard as 'enlightened,' spokesmen for the southern view cannot gain access to Northern ears."). In an editorial note explaining the decision to run Waring's defense of segregation, *Harper's* suggested that the segregationist refrain alleging media bias was not wholly

straightforward coverage communicating the intensity of segregationist sentiment, Waring and others agreed, had misled northerners into believing that widespread public-school desegregation was just around the corner.[106] Apart from underreporting the aversion to integration, though, segregationists also contended that the media's coverage had prevented nonsoutherners from grasping even the most basic facts. In a letter to Senator Richard Russell praising the Manifesto, one writer living in Hollywood, California, noted: "The South really needs to get its case before the people untainted by the prejudice of the non-Southern Press. I find that the average person here believes that negroes are given NO SCHOOLS AT ALL."[107]

After surveying responses to the Manifesto, signatories contended that the document had successfully reached its intended audience. Senator Harry F. Byrd of Virginia said that the Manifesto had "made a profound impression on the country because of its sincerity of statement," and that the northern newspapers' generally fair treatment of the document revealed "a feeling of moderation on the part of those who have been attempting to bring about enforced integration."[108] Congressman Watkins Abbitt, a fellow Virginian, detected a similar trend: "It is heartening . . . to see that gradually there is an awakening on the part of a large part of the American people, particularly the editors, to the awareness of our problem in the South and the necessity for combating, overriding and changing the dreadful decision referred to heretofore."[109]

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without foundation. *See Personal and Otherwise: Man Here Wants to Be Heard*, HARPER'S, Jan. 1956, at 22, 22 (noting that southern segregationists "believe—with some reason—that they have been denied a hearing in the national press"). Notably, Thomas Waring was the nephew of J. Waties Waring, a federal district court judge in South Carolina who sought to end school segregation after *Brown*. *See generally* TINSLEY E. YARBROUGH, A PASSION FOR JUSTICE: J. WATIES WARING AND CIVIL RIGHTS (1987) (discussing, among other things, Judge Waring's role in school desegregation and his relationship with his nephew).

106. *See* James F. Byrnes, *The Supreme Court Must Be Curbed*, U.S. NEWS & WORLD REP., May 18, 1956, at 50, 50 ("The suppression of that viewpoint outside the South has caused much of the nation to suppose that such dissatisfaction as existed with the Supreme Court's decision was due to petty prejudice and would soon disappear."); Waring, *supra* note 105, at 39 ("Many white Northerners are unable to understand the depth of feeling in the Southern states . . . .").

107. Letter from John Jones to Senator Richard B. Russell (Mar. 12, 1956) (on file with the University of Georgia Libraries, Richard B. Russell, Jr. Collection [hereinafter Russell Collection]). For an extremely illuminating biography of Russell, see GILBERT C. FITE, RICHARD B. RUSSELL, JR., SENATOR FROM GEORGIA (1991).

108. *Senator Byrd Sees Trend to Moderation*, WASH. POST, Mar. 20, 1956, at 14. For biographical examinations of Byrd, see JAMES W. ELY, JR., THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE (1976); RONALD L. HEINEMANN, HARRY BYRD OF VIRGINIA (1996); J. HARVIE WILKINSON III, HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS 1945-1966 (1968).

109. 102 CONG. REC. 12232 (1956) (statement of Rep. Watkins Abbitt). Writing two months after the Manifesto appeared, Governor Byrnes of South Carolina similarly noticed that the media had recently started displaying a more receptive attitude toward southern views of desegregation: "Only now is an effort being made in the Northern press to give thoughtful, balanced and

Although it is tempting to dismiss such statements as mere idle legislator boasting, other accounts corroborate that the Manifesto succeeded in draining enthusiasm for school desegregation. Proponents of racial equality agreed with the Manifesto's backers that the document had proven effective in reaching its targeted audience. Four days after the Manifesto's publication, A. Philip Randolph, who headed the Brotherhood of Sleeping Car Porters, wrote a letter to NAACP Executive Secretary Roy Wilkins suggesting that the document had already made an impact. "In my opinion, the manifesto of the 100 Southern Congressmen is not to be taken lightly so far as its probable influence in weakening the liberal forces in the North in their support of the fight for desegregation," Randolph wrote. "Already, influential publications in the North are beginning to dilute and greatly water-down their expression of interest in the fight for desegregation and civil rights."[110] Two weeks later, Randolph remained sufficiently alarmed by the Manifesto that he sent a letter to the leaders of several labor and civil rights groups announcing a meeting to coordinate strategy. "The purpose of this manifesto is to break away from the cause of desegregation, its north allies and to mobilize public opinion against the Supreme Court, in order that [*Brown*] may be reversed," Randolph explained. Accordingly, he contended that the organizations must "develop and strengthen public opinion in support of" *Brown* and counteract "the force and effect to this manifesto."[111] In 1957, Carl Rowan identified the Manifesto as "part of a calculated effort to convince the nation that the Supreme Court decision cannot be enforced, should not be enforced, and had better not be enforced."[112] Worse, in Rowan's view, the effort seemed to be working: "How did the nation react to this [Manifesto]? It shuddered—just the way the southerners had hoped."[113]

Randolph and Rowan were not simply imagining that the appetite for desegregation diminished in liberal circles after the Manifesto's appearance. Rowan pointed to a perceptible shift in the *Christian Science Monitor*'s coverage, particularly in the column written by Editor-in-Chief Erwin Canham.[114] "This statement, it seems to me, is a climax in the battle against integration," Canham wrote. "The South will not be coerced, and it has

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reasonably impartial presentation of what might be called 'the Southern point of view.'" Byrnes, *supra* note 106.

110. Letter from A. Philip Randolph, Int'l President, Bhd. of Sleeping Car Porters, to Roy Wilkins, Exec. Sec'y, NAACP (Mar. 16, 1965), *microformed on* Black Studies Research Sources, Papers of the NAACP, Part 20: White Resistance and Reprisals, 1956–1965, Reel 7, Slide 00893 (Univ. Publ'ns of Am.) [hereinafter Papers of the NAACP, Part 20].

111. Letter from A. Philip Randolph, Int'l President, Bhd. of Sleeping Car Porters, to Roy Wilkins, Exec. Sec'y, NAACP (Mar. 30, 1965), *microformed on* Papers of the NAACP, Part 20, *supra* note 110, Reel 7, Slide 00901.

112. CARL T. ROWAN, GO SOUTH TO SORROW 213–14 (1957).

113. *Id.*

114. *Id.*

rallied into a phalanx of formidable proportions."[115] This "eminent and responsible group" of Manifesto backers had convinced Canham that pursuing desegregation was unrealistic: "I do not see how laws can be enforced against so substantial a minority, which, of course, is a majority as far as representation goes in about one-fourth of our states."[116] Similar evidence appeared elsewhere. In June 1955, the *Washington Post* editorial page initially read the Court's decision in *Brown II* as brooking no delays whatsoever based on southern whites' disdain for desegregation.[117] But three days after the Manifesto appeared, the newspaper adopted a far more equivocal tone: "It is of the utmost importance to recognize, we believe, that while the moral and constitutional issues involved in the extension of full civil rights and political equality to Negroes admit of no compromise, the tactics and timing of that extension need to be conditioned by wisdom and realism."[118]

The Manifesto's drafters also received a strikingly large amount of correspondence directly from citizens all across the nation who wrote indicating that the segregationist cause enjoyed ample support well beyond the confines of the old confederacy.[119] Ten days after the document appeared, a married couple from Kansas City, Missouri, drove this point home in a letter to Senator Russell: "Thought you would be interested in knowing that the manifesto prepared by you Southern gentlemen is indeed heartening to many people outside of the Solid South. Although our 'suppressed press' has given little indication of it, there is much opposition to this horrible crime of integration."[120] A resident of Goshen, Indiana, seconded this notion: "As a word of encouragement to all of you, I want to say that there are plenty of people who live north of the Mason-Dixon line who concur with your stand wholeheartedly. . . . Your host of friends in the

115. Erwin D. Canham, *'Southern Manifesto' Issued*, CHRISTIAN SCI. MONITOR, Mar. 12, 1956, Second Section, at 1.

116. *Id.*

117. *See Making Integration Work*, WASH. POST, June 3, 1955, at 20 (asserting that "understanding of local conditions does not mean the countenancing of evasions" and "local attitudes" cannot serve as "cause[] for delay").

118. *Oil on Troubled Waters*, WASH. POST, Mar. 15, 1956, at 18.

119. *See, e.g.*, Letter from Dale Duckworth to Senator John C. Stennis (Mar. 27, 1956) (on file with the Mississippi State University Libraries, John C. Stennis Collection [hereinafter Stennis Collection]) ("You may rest assured that there are many, many northerners who believe in segregation."); Letter from Thomas J. Larkin to Senator Richard Russell (Mar. 12, 1956) (on file with Russell Collection) ("People of the north should never forget this magnificent exhibition of friendship and loyalty of our good friends in the south."); Letter from Charles H. Schwab II to Senator Richard Russell (Mar. 13, 1956) (on file with Russell Collection) ("I am a native born Chicagoan . . . and am in full accord with the southern point of view regarding segregation! I am grateful to you and your colleagues! Please keep up your good work and save America for Americans!"); Letter from H.E. Winters to Senator Richard Russell (Mar. 14, 1956) (on file with Russell Collection) (writing in praise of the Southern Manifesto).

120. Letter from Mr. and Mrs. C.A. Schoor to Senator Richard Russell (Mar. 22, 1956) (on file with Russell Collection).

North admire your courage in standing for right principles."[121] A resident of Langley, Washington, similarly informed Senator John Stennis of Mississippi that the Manifesto "reflect[ed] the position of a great many thinking people in the North," even if they were "afraid or at least reticent about boldly stating their convictions out in public, during this time when every effort is being made to ram over 'integration.'"[122] Echoing Stennis's own thoughts on the question of interracial sex, the Washingtonian concluded the letter by playing the anti-*Brown* trump card: "We would ask these avidly pro-'integration' people; just how many daughters have you to contribute to the fullest interpretation of 'Integration'?"[123]

3. Seeking Unity.—Many commentators have incorrectly suggested that Strom Thurmond's initial drafts of the Manifesto breathed fire and that the document was dramatically modulated by more restrained senators in subsequent iterations.[124] This misperception dates all the way back to the Manifesto's release. Because Thurmond's rhetoric did so much "arm-waving," *Time* reported, Senate colleagues "pushed Thurmond aside" and "ordered the paper rewritten by more temperate Senators."[125] Only after the real work had been accomplished, *Time* contended, "Thurmond elbowed his way back onto the scene, posed for photographers dictating the final draft—with which he had nothing to do—to his wife seated at a typewriter."[126] This account, while vivid, is complicated by the archival records.[127] The final version of the Manifesto is strikingly similar to the earliest versions in terms of substance, tone, and even its underlying language. Beginning with his very first draft, it appears that Thurmond designed the document not to articulate his independent, intemperate views of school segregation, but instead to provide an anti-*Brown* statement that could elicit support from as many southern members of Congress as possible. Thurmond's drafting of the document so as to attract broad southern support underscores how even some of the most racially inflammatory politicians possessed sufficient self-awareness to make shrewd tactical determinations in order to advance the segregationist cause.

Thurmond's first two drafts of the Manifesto contained all of the essential arguments that ultimately appeared in the final version. Like the

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121. Letter from Albert Penn to Senator Richard Russell (May 3, 1956) (on file with Russell Collection).

122. Letter from John Metcalf to Senator John Stennis (Mar. 27, 1956) (on file with Stennis Collection).

123. *Id.*

124. *See, e.g.*, JOHNSON & GWERTZMAN, *supra* note 28, at 147 (contending that because of Fulbright's efforts "the Manifesto was rewritten" and toned down).

125. *The Southern Manifesto*, *supra* note 6.

126. *Id.*

127. Clemson University's Strom Thurmond Collection [hereinafter Thurmond Collection] contains all Manifesto drafts.

published Manifesto, Thurmond highlighted the claim that *Brown* violated the Fourteenth Amendment's original understanding[128] and also made appeals to textualism,[129] precedent,[130] structure,[131] prudence,[132] and even the *Pierce*-inflected appeal to constitutional tradition.[133] In making these arguments, moreover, Thurmond extolled the importance of using "lawful means" to resist *Brown*, affirmed reliance on the Constitution, and pitched the appeal to the entire nation.[134] With respect to tone, Thurmond's initial drafts may have been even more subdued than the published Manifesto. Consider Thurmond's draft opening in contrast to the final version: "On May 17, 1954, the Supreme Court of the United States handed down a decision of far-reaching implications as to the future of constitutional government. The people of this nation cannot afford to ignore the threat posed by this decision to the rights of the States and the Congress."[135] Those two sentences accurately reflect the tone that Thurmond's drafts struck throughout.

Senator George appointed a three-person committee—made up of Senator Sam Ervin of North Carolina, Senator Richard Russell of Georgia, and Senator John Stennis of Mississippi—to solicit ideas and to transform Thurmond's draft into a final document.[136] That trio undoubtedly produced some meaningful changes to the document. In addition to stylistic modifications, the Ervin–Russell–Stennis draft also added the suggestion that *Brown* had actually harmed the South's harmonious race relations and

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128. *See* Strom Thurmond, Statement Regarding the Supreme Court Decision of May 17, 1954, in the School Cases 1 (Feb. 6, 1956) [hereinafter Thurmond's First Draft] (unpublished manuscript) (on file with Thurmond Collection) (contending that "[o]nly by following the intent of the framers of the [Fourteenth A]mendment and the people who ratified it could the Court hope to arrive at a constitutional decision").

129. *See id.* at 2 ("The Constitution does not mention education.").

130. *See* Strom Thurmond, Statement on the Supreme Court Decision of May 17, 1954, in the School Cases 1 (n.d.) [hereinafter Thurmond's Second Draft] (unpublished manuscript) (on file with Thurmond Collection) (citing *Plessy* and *Gong Lum* and contending that "[t]he people accepted" the separate-but-equal "doctrine through the years").

131. *See* Thurmond's First Draft, *supra* note 128, at 2 (contending *Brown* ignored federalism principles).

132. *See id.* (suggesting *Brown* would lead to other unwarranted judicial decisions that should be left to elected officials).

133. *See id.* (contending that "under the decision of the Court, parents would be deprived of the right to guide and regulate the lives of their own children").

134. *See* Thurmond's Second Draft, *supra* note 130, at 2 ("We pledge the States our support in using every lawful means of resistance against the Court."); Thurmond's First Draft, *supra* note 128, at 3 ("We affirm our reliance on the Constitution as the fundamental law of the land."); *id.* at 2 ("If the Court can legislate by judicial decree in school cases, it follows that the Court could and likely would again exercise the same self-assumed power in other matters.").

135. Thurmond's First Draft, *supra* note 128.

136. *See* Strom Thurmond et al., Origin of "Declaration of Constitutional Principles," Commonly Known as the Southern Manifesto 1 (1956) [hereinafter Thurmond, Origin] (unpublished manuscript) (on file with Thurmond Collection).

deleted Thurmond's relatively demure discussions of interposition[137] and jurisdiction stripping.[138] But George's decision to have this committee assume responsibility for the document may well have been motivated by a desire to dissociate Thurmond as much as possible from the effort. After serving in the Senate for nearly five decades when he died in 2003 at the age of 100, Thurmond is now remembered by many people as the consummate Senate insider.[139] But in 1956, Thurmond's fellow senators regarded him as an upstart who either did not know his place, or knew his place and refused to occupy it.[140] For a period of several weeks before the Manifesto was issued, Thurmond sought to gain support for a joint statement opposing *Brown* and was met with extremely modest success.[141] When George removed Thurmond as the Manifesto's point person, the document's chances of attracting broad southern support increased dramatically.

Despite considerable efforts to draft the document in a way that would elicit the broadest feasible support from southern elected officials, Thurmond and his likeminded compatriots nevertheless needed to lobby some of their colleagues to get them to sign the document. Recalling the events surrounding the Manifesto more than three decades later, Senator Fulbright contended in 1989 that he and Senator Daniel objected to portions of the initial draft they received. "But in the southern caucus, through several meetings, our colleagues went to great lengths to get our agreement, stressing the importance of unanimity," Fulbright wrote.[142] "We hated very much to stand out against our colleagues from the South. There was a sense

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137. *See* Thurmond's First Draft, *supra* note 128, at 2. Thurmond wrote:

> Several of the States have now acted to interpose their objections to the decision of the Court in the school cases because of the clear violation of the Constitution by the Court. The Legislatures of these States have approved resolutions stating their intention to interpose the sovereignty of the States between the decision of the Court and the enforcement of its decree by the use of every lawful means at their disposal.

Id. These sentences from Thurmond's draft approximate the message of the interposition resolutions that some state legislatures adopted after *Brown*.

138. *See id.* at 3 ("We cite to the Court the provisions of the Constitution circumscribing the duties of the Court and remind the Court that the Congress is granted authority by the Constitution to limit the appellate jurisdiction of the Court.").

139. *See, e.g.*, Adam Clymer, *Strom Thurmond, Foe of Integration, Dies at 100*, N.Y. TIMES, June 27, 2003, at A1.

140. *See* John H. Averill, *Thurmond Joins Insiders at Last*, L.A. TIMES, Apr. 25, 1982, at A12 (noting that some of Thurmond's southern colleagues accused him of "grandstanding"). Albert Gore referred to Thurmond as "a busybody" and contrasted Thurmond unfavorably with "respectable senators" like Byrd and Russell. GORE, *supra* note 73, at 103.

141. *See* Thurmond, Origin, *supra* note 136 (detailing the difficulties of getting support for the Manifesto from southern senators). Senator Byrd's decision to support Thurmond's initiative proved critical in getting the issue on the southern lawmakers' agenda. *See The Southern Manifesto*, *supra* note 6 (noting Thurmond "enlisted the powerful aid of Virginia Senator Harry Byrd").

142. J. WILLIAM FULBRIGHT, THE PRICE OF EMPIRE 93 (1989).

that we were the poor part of the country, that we had historic reasons to band together against northerners who were again imposing on us."[143] Although Senators Fulbright and Daniel received some requested modifications in exchange for signing the Manifesto, nearly all of those changes were more superficial than foundational.[144] In the end, the bid for regional unity proved remarkably successful, as the overwhelming majority of the South's congressional delegation signed the Manifesto.

It is mistaken to view the politicians who opted not to sign the Manifesto as making that decision because they necessarily held more egalitarian racial ideals than those who did sign the document. It is surely no coincidence that the only three southern senators who did not sign—Albert Gore and Estes Kefauver of Tennessee, and Lyndon Johnson of Texas—all harbored presidential aspirations.[145] Signing the document would diminish their chances of joining a major party's national ticket.[146] At least some politicians who refused to sign the document, moreover, expressed disagreement not with the Manifesto's aims but with its tactics. Congressman W.R. Poage's homespun explanation of his decision not to sign the Manifesto exemplified this idea. "I'm for segregated schools, but the way to retain it is not by going around yelping like a band of coyotes on a midnight hill," Poage said. "If we sit tight and tend to our business we will be more help in maintaining the status quo than by inviting a lot of people to come into our area."[147] Laying low is, of course, not the same thing as standing up for racial equality.

II. White Supremacy

Drafters of the Manifesto aimed to preserve the prevailing racial order, which at bottom was animated by an ideology that the Supreme Court has accurately labeled "White Supremacy,"[148] the bedrock belief that whites are better than blacks. Their efforts to maintain white supremacy were often considerably more sophisticated, self-aware, and nuanced than the cartoonish depiction of southern stupidity and hostility would admit. Manifesto supporters displayed these attributes in their resistance toward racial integration in three particularly important fashions. First, they crafted

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143. *Id.* at 94.

144. *See infra* notes 313–325 and accompanying text.

145. *See* RICHARD C. BAIN & JUDITH H. PARRIS, CONVENTION DECISIONS AND VOTING RECORDS 296–97 (2d ed. 1973) (noting that all three politicians received consideration for the Democratic Party's national ticket in 1956).

146. ROBERT MANN, THE WALLS OF JERICHO: LYNDON JOHNSON, HUBERT HUMPHREY, RICHARD RUSSELL, AND THE STRUGGLE FOR CIVIL RIGHTS 165 (1996).

147. Elizabeth Carpenter, *Three from State Sign 'Manifesto' After 'Softening,'* ARK. GAZETTE, Mar. 18, 1956, at 5F.

148. Loving v. Virginia, 388 U.S. 1, 11 (1967); *see also* POWE, *supra* note 71, at 39 (calling segregated schools "the cornerstone of white supremacy").

the Manifesto to avoid the racial rhetoric of black inferiority and white supremacy that typically accompanied even the most restrained defenses of school segregation. Second, many Manifesto signatories overwhelmingly eschewed exhortations to violence and defiance of judicial authority because they understood that such rhetoric could hinder their efforts. Third, in lieu of violence and defiance, Manifesto signatories proposed numerous innovative—and sometimes influential—strategies that aimed to preserve racially segregated schools without running afoul of the law.

A. Avoiding Racial Rhetoric

The Southern Manifesto is often understood as a document brimming with racial invective. Thus, in addition to Kluger's contention that the Manifesto spewed "bile,"[149] other reputable authorities have derided it as a "thinly disguised racist attack"[150] and a "cheap appeal to racism."[151] Despite these claims, the Manifesto's most striking racial feature is the scarcity of anti-black animus that almost invariably accompanied arguments against school desegregation during the 1950s. By the time that the Manifesto was issued, establishment segregationists had developed a common vocabulary and a host of standard arguments that they regularly drew upon in opposing racially integrated public schools. Given this vast menu of items available to express white segregationist sentiment, the Southern Manifesto is a model of asceticism.

Placing the Manifesto within the wider context of racial attitudes among elite white segregationists is a vital task. An appreciation of the many arguments against integration that the Manifesto eschewed makes it possible to gauge the document's intended goals and its intended audience. In order to understand what the Southern Manifesto *was*, in other words, it is necessary to understand what the Southern Manifesto *was not*. In addition, dispelling the notion that the Manifesto fully articulated the views of the racial rearguard during the 1950s should help to underscore the real progress that has occurred on the racial front since that time. Detailing the often unpleasant racial rhetoric of yore, rhetoric that circulated even among the most respected segregationists, helps to challenge the all-too-common claim among legal scholars that racial dynamics in this nation are more notable for continuity than for change.[152]

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149. KLUGER, *supra* note 32.

150. A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1019 (1992).

151. GORE, *supra* note 73, at 104–05.

152. For a prominent example of such thought, see DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 211 (5th ed. 2004) (stating that "[t]he difference in the condition of slaves in one of the gradual emancipation states and black people today is more of degree than of kind").

None of the following should be taken as arguing that the Manifesto altogether avoided lapsing into objectionable racial notions. Even contemporaneously, a few commentators howled at the Manifesto's assertion that *Brown* had "destroy[ed] the amicable relations between the white and Negro races" and "planted hatred and suspicion where there has been heretofore friendship and understanding."[153] Sociologist St. Clair Drake wrote a letter to the *New York Times* criticizing the suggestion that blacks actually enjoyed Jim Crow. "This declaration reveals a dangerous ignorance of the current state of opinion and attitude among Southern Negroes," Drake wrote. "'Amicable relations' between whites and Negroes have been secured through an elaborate caste system."[154] A broad smile should not be mistaken for contentment with second-class status, Drake insisted: "They may seem 'amicable' on the outside, but even the meekest carry deep-seated resentments against their assigned 'place' deep down inside."[155] Senator McNamara also took issue with the Manifesto on this point from the Senate floor: "The Negro who is denied the right to vote; the Negro who is murdered by white men; the Negro who is barred from educational facilities because of the color of his skin—he understands the system . . . but he has no friendship. It is the system he seeks to destroy."[156]

It should hardly be surprising that the Manifesto gave voice to the notion that black citizens preferred racially segregated schools. Blinded by racial paternalism, many white segregationists deluded themselves into believing that "our Negroes" genuinely supported the racial status quo,[157] a notion that Judge J. Harvie Wilkinson has accurately called "a gross but not uncommon deception."[158] Indeed, among white southerners during the 1950s, it had reportedly become clichéd to contend: "The Negroes don't want integration—my cook told me."[159] The marvel of the Manifesto is not, however, that a racially troubling conceit did manage to find its way into the document but, rather, that so many others did not.

1. Purity, Nature, and Religion.—The most important argument for maintaining segregation that the Southern Manifesto excluded was the notion that integrated classrooms would inexorably lead to integrated bedrooms. During the mid-1950s, southern politicians frequently cited their

153. 102 CONG. REC. 4460 (1956).

154. St. Clair Drake, Letter to the Editor, N.Y. TIMES, Mar. 18, 1956, at 190.

155. *Id.*

156. 102 CONG. REC. 4687 (1956) (statement of Sen. Patrick McNamara).

157. *See* DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW 175–76 (2004) ("Most segregationists continued to embrace the illusion that 'their' Negroes were . . . too contented . . . to organize effectively.").

158. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 36 (1979).

159. Gladwin Hill, *Louisiana*, N.Y. TIMES, Mar. 13, 1956, at 19 (calling the statement "cliché").

desire to prevent interracial sex—and the negative consequences that they suggested would flow from such contact—as their principal justification for continuing racial segregation. Among senators, James Eastland advanced this argument in its most unvarnished form, making plain that he was concerned solely with preserving whites' racial heritage. "Generations of Southerners yet unborn will cherish our memory because they will realize that the fight we now wage will have preserved for them their untainted racial heritage, their culture, and the institutions of the Anglo-Saxon race," Eastland stated.[160] Eastland's Senate colleague from Mississippi, John Stennis, offered a softer version of this argument, contending that he sought to preserve the racial integrity of both blacks and whites alike. "[O]ne of the most compelling reasons is the deep realization that placing the children side by side over the years, in primary, grammar and high-school grades, is certain to eventually destroy each race," Stennis said. "I don't know how many generations that would take. And we all believe that the bloodstream—the racial integrity of each group—is worth saving. And this is one of the main, basic reasons why our people will oppose the mixed schools."[161]

Stennis's usage of the term "mixed schools" highlights how the Manifesto also omits this prominent anti-miscegenation euphemism, one that segregationists often invoked.[162] In a magazine article that he wrote shortly after the Manifesto appeared, Senator Ervin used the term twice, warning of people "who seek immediate mixing of races in public schools" and aim "to force the involuntary mixing of the races."[163] In his statement on the Senate floor accompanying the Manifesto, Strom Thurmond also invoked the term. Black students sought admission to white schools in Clarendon County, South Carolina, even though, according to Thurmond, that locale's black schools were actually better than the white schools.[164] The push for integration in the face of these facts, Thurmond said, demonstrated that the lawyers representing black South Carolinians "are

160. Dan Wakefield, *Respectable Racism*, NATION, Oct. 22, 1955, at 339, 339.

161. *The Race Issue: South's Plans, How Negroes Will Meet Them*, U.S. NEWS & WORLD REP., Nov. 18, 1955, at 86, 89 [hereinafter *The Race Issue*]. James Byrnes, the governor of South Carolina and a former United States Supreme Court Justice, endorsed this same idea:

> Southerners fear that the purpose of those who lead the fight for integration in schools is to break down social barriers in childhood and the period of adolescence, and ultimately bring about intermarriage of the races. . . . Because the white people of the South are unalterably opposed to such intermarriage, they are unalterably opposed to abolishing segregation in schools.

Byrnes, *supra* note 106, at 56.

162. *See* WALTER SPEARMAN & SYLVAN MEYER, RACIAL CRISIS AND THE PRESS 47 (1960) (noting that the term "mix" conjures "a picture of thousands of persons being stirred with sticks until completely amalgamated" and that "its implications make it a genuine scare word").

163. Ervin, *supra* note 91, at 32–33.

164. 102 CONG. REC. 4461 (1956) (statement of Sen. Strom Thurmond).

interested in something else. The 'something else' they are interested in is the mixing of the races."[165]

Relatedly, although southern politicians frequently defended segregation by appealing to laws of both the natural and the divine, the Manifesto conspicuously contains no such references. Speaking on the Senate floor ten days after the Court decided *Brown*, Senator Eastland explained: "[I]t is the law of nature, it is the law of God, that every race has both the right and the duty to perpetuate itself."[166] And those fundamental laws, Eastland contended, could not coexist with the law according to *Brown*.[167] Even Senator Ervin, a southern politician who was widely viewed as a racial "moderate,"[168] invoked these same terms in his defense of segregation. "It is not strange that" Americans typically associate with members of "their own race," Ervin explained, because doing so followed "a basic law of nature—the law that like seeks like."[169] In case people wondered what Jesus would do about segregation, Ervin supplied a ready answer: "Although He knew both Jews and Samaritans and the relations existing between them, Christ did not advocate that courts or legislative bodies should compel them to mix socially against their will."[170] Even though such religion-based arguments had been (and would continue to be) articulated by judges in defense of school segregation,[171] the Manifesto was limited to more traditional legal arguments.

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165. *Id.* As events after his death would reveal, Thurmond had not always been quite so pertinacious in honoring this opposition to racial mixing. When Thurmond was in his twenties, he fathered a child with a black young woman who worked in his parents' home—a fact that was concealed until after his death. In a fascinating turn of events, Thurmond's daughter from that relationship, Essie Mae Washington-Williams, accepted Thurmond's invitation to visit the Senator in his Washington office shortly after the Manifesto appeared. *See* ESSIE MAE WASHINGTON-WILLIAMS & WILLIAM STADIEM, DEAR SENATOR: A MEMOIR BY THE DAUGHTER OF STROM THURMOND 171 (2005) ("His whole staff at the Old Senate Office Building knew I was coming in, though I assume they thought I was an old family friend from Edgefield. They gave me a royal welcome . . . ."). Perhaps more fascinating still is the pride that Washington-Williams reported feeling toward Thurmond. *See id.* at 173 ("Whatever he stood for, however he segregated me from his real life, I couldn't help but like having a senator for a father.").

166. 100 CONG. REC. 7255 (1954) (statement of Sen. James Eastland); *see also id.* at 7251 (contending that interracial relationships violated "the laws of nature, and the law of God").

167. *See id.* at 7255 (declaring that "[a]ll free men have the right to associate exclusively with members of their own race, free from governmental interference").

168. Ervin, *supra* note 91, at 33.

169. *Id.* at 32. Ervin voiced similar ideas on other occasions. *See The Race Issue*, *supra* note 161, at 90, 95 (quoting Ervin as stating that "men segregate themselves in society according to race in obedience to a basic natural law, which decrees that like shall seek like").

170. Ervin, *supra* note 91.

171. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting the trial judge in 1959 in *Loving* as saying "almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents" and deducing "[t]he fact that he separated the races shows that he did not intend for the races to mix" (internal quotation marks omitted)); Hayes v. Crutcher, 108 F. Supp. 582, 585 (M.D. Tenn. 1952) ("Nature has produced white birds, black birds, blue birds, and red birds, and they do not roost on the same limb or use the same nest. Such

2. Sex, Crime, and Intelligence.—The Manifesto also omitted several additional arguments that enjoyed wide circulation among mainstream, respected opponents of school desegregation. Indeed, these arguments became so familiar that those who sought to preserve segregation sometimes seemed to be reading from a common playbook. At least one insightful opponent of Jim Crow comprehended the sophisticated segregationists' playbook at the time. Writing just one year after the Manifesto became public, Carl Rowan identified the main elements in this playbook as featuring references to the supposed black propensity toward: nonmarital children, venereal disease, crime, and ignorance.[172] Consider how Thomas Waring and James J. Kilpatrick—two prominent authors writing contemporaneously with the Manifesto—struck each of these themes.[173]

Both Waring and Kilpatrick cited statistics that demonstrated an allegedly casual approach among blacks toward children born outside of wedlock—a cultural weakness that they feared may be transmitted to whites in integrated schools.[174] "On the average one Southern Negro child in five is illegitimate," Waring wrote. "It is possible the figure may be even higher, since illegitimate births are more likely to go unrecorded. Even among Negroes who observe marriage conventions, illegitimacy has little if any stigma."[175] Kilpatrick similarly bemoaned the incidence of what he quaintly termed "Negro bastardy" and noted: "The rate of Negro illegitimacy . . . is not improving: It grows worse."[176]

Both authors also suggested that purportedly high rates of venereal disease among blacks made integrating public schools unwise. "That such promiscuity [among Negroes] must result in widespread venereal disease is as predictable as the case histories are demonstrable," Kilpatrick argued. "In areas where Negroes make up less than one-third of the population,

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recognition and preference for their own kind prevails among other animals. It prevails also among all people, among the yellow, black and red skinned races."). For analysis of how segregationists used religion to justify racial separation in the legal sphere and beyond, see Jane Dailey, *Sex, Segregation and the Sacred After* Brown, 91 J. AM. HIST. 119 (2004). For a claim that white organized religion did not meaningfully aid the forces opposing the civil rights movement, see CHAPPELL, *supra* note 157, at 107.

172. *See* ROWAN, *supra* note 112, at 105 (noting that the sophisticated segregationists "cite statistics on venereal disease, illegitimate births, the 'cultural lag' and crime among Negroes in the Deep South").

173. *See* JAMES JACKSON KILPATRICK, THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA 279–80 (1957); Waring, *supra* note 105, at 41–42.

174. For a historical examination of how the debate about race and illegitimacy unfolded in the context of the Moynihan Report, see JAMES T. PATTERSON, FREEDOM IS NOT ENOUGH (2010). For an examination of illegitimacy's racialized underpinnings, see Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 413–17 (2012).

175. Waring, *supra* note 105, at 41–42.

176. KILPATRICK, *supra* note 173, at 279.

colored patients account for 90 per cent of all reported syphilis and gonorrhea."[177] Waring cited high rates of venereal disease as part of a larger contention that black parents were generally less diligent than whites "in looking after the health and cleanliness of their children."[178] "Fastidious parents do not favor joint use of school washrooms when they would not permit it at home—and there's no use to tell them that it is unlikely that anyone will catch venereal disease from a toilet seat," Waring explained.[179]

Racially integrated southern schools, both authors warned, would also unwisely subject white pupils to blacks' alleged propensity for crime. "For many years, crime in the South has been more prevalent among Negroes than among white people," Waring contended. "Though the Northern press no longer identifies criminals by race, white Southerners have reason to believe that much of the outbreak of crime and juvenile delinquency in Northern cities is due to the influx of Negro population."[180] Given that "[m]aintaining order is a first concern of southerners," Waring contended that integrating schools was unthinkable.[181] Kilpatrick went so far as to suggest that blacks, driven by the same "undisciplined passion[]" that they demonstrated toward sex, lived by a distinct criminal code from whites.[182] Murders within the black community, Kilpatrick explained, "follow[ed] a constant and elemental pattern: The unfaithful woman, the triflin' man; a fancied wrong, a bloody vengeance. Yet as often as not, the evidence discloses no reason—no white man's reason—that conceivably might justify murder."[183]

Finally, both authors warned that southern blacks lacked the basic academic training, and perhaps the underlying aptitude, enabling them to keep pace with their white peers. Blacks were, according to Kilpatrick, "pathetically ill-equipped to compete with whites in public school education. As the experience of every Southern State has made vividly clear, Negro pupils *as a group* are woefully less educable than white pupils as a group."[184] While Waring was unconvinced that exposing black students to white students would remedy any existing racial gap in education, he was certain that the costs of such an experiment were too

177. *Id.*

178. Waring, *supra* note 105, at 41.

179. *Id.* As Martha Nussbaum has explained, such concerns were not limited to uneducated whites: "I was brought up by a father (from the deep South)—a highly educated man, a partner in a large Philadelphia law firm—who seriously believed that it was unclean and contaminating for a white person to drink from a glass that had previously been used by a black person, or to use a toilet that had been used by a black person." MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 204–05 (2010).

180. Waring, *supra* note 105, at 42.

181. *Id.*

182. KILPATRICK, *supra* note 173, at 279.

183. *Id.* at 279–80.

184. *Id.* at 280 (emphasis omitted).

great. "Some advocates of integration say the way to cure these differences is to let the children mingle so that the Negroes will learn from the whites," Waring wrote. "The trouble with this theory is that even if it works, a single generation of white children will bear the brunt of the load. While they are rubbing off white civilization onto the colored children, Negro culture will also rub off onto the whites."[185]

Neither Waring nor Kilpatrick were regarded as advancing particularly aggressive or outlandish arguments in defense of segregation. To the contrary, nonsoutherners thought of both authors as unusually thoughtful and articulate spokesmen for the segregationist cause. Waring's essay appeared in *Harper's* magazine, which took pains to make clear that Waring was decidedly not a part of "the lunatic fringe of White Supremacy fanatics," but was instead "a conservative, and a gentleman."[186] Kilpatrick was an intimate of Senator Byrd's, and the book in which he articulated these views received respectful, if critical, reviews in serious academic publications.[187] Some members of the segregationist camp thought that Kilpatrick was, if anything, too reserved and intellectual in the arguments that he advanced against integration.[188] Although reading their ideas within today's racial context may make it difficult to believe, the claims advanced by Waring and Kilpatrick were, in comparison to the most aggressive from the era, notably restrained.[189] The omissions of these arguments—arguments that northern audiences thought came not from the racial gutter, but from on high—demonstrate the lengths to which the Manifesto's drafters went in order to prevent racially inflammatory rhetoric from appearing in the document.

B. Avoiding Extremes

Commentators have repeatedly asserted that the Manifesto urged white southerners to preserve segregation through violence and defiance of judicial decisions. But Manifesto signatories typically avoided promoting

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185. Waring, *supra* note 105, at 42.

186. *Personal and Otherwise: Man Here Wants to Be Heard*, *supra* note 105.

187. *See* Robert J. Harris, Book Review, 20 J. POL. 229, 231 (1958); Walter F. Murphy, Book Review, 67 YALE L.J. 1505, 1505–07 (1958).

188. *See* CHAPPELL, *supra* note 157, at 170–71 (noting that segregationist Carlton Putnam thought that Kilpatrick's defense of Jim Crow was excessively intellectual and insufficiently emotional).

189. Tom P. Brady's *Black Monday* offered a particularly spirited defense of school segregation. *See* TOM P. BRADY, BLACK MONDAY 64 (1955) ("Very few negroes have true respect and reverence for their race. They sense their racial limitations. If there is a short cut they want it. . . . [T]hey desire a much shorter detour, via the political tunnel, to get on the inter-marriage turnpikes. These Northern negroes are determined to mongrelize America!"). Brady, a graduate of the Lawrenceville School and Yale University, was hailed as "the intellectual leader of the [segregationist] movement." JOHN BARTLOW MARTIN, THE DEEP SOUTH SAYS "NEVER" 16 (1957).

violence and defiance because they realized that such tactics would hinder, rather than help, the segregationist cause. The misperception that many southern senators and congressmen implored violent and defiant actions distracts scholars from focusing on the actual methods that those elected officials typically advocated. And those less sensational methods deserve greater attention than they generally receive because it was through the softer forms of resistance that segregationist senators and congressmen mounted their most effective defenses of white supremacy.

1. Violence?—Although the Manifesto expressly counseled against "disorder and lawless acts" to counteract *Brown*, many observers have criticized the document for fomenting violence. In 1964, Anthony Lewis contended that the Manifesto's claim that *Brown* contradicted the Constitution effectively meant that no "measure to fight [the Court's] decision"—including "violence"—could "be termed philosophically unlawful."[190] Writing one decade later in the *Notre Dame Lawyer*, Reverend Theodore Hesburgh agreed, reasoning that the "Southern officials encouraged the worst elements in Southern society to take any steps perceived necessary, including violence, to stop desegregation."[191] Several thoughtful commentators, including C. Vann Woodward, have even gone so far as to blame the Manifesto for resuscitating the Ku Klux Klan.[192]

Despite the steady stream of causal claims linking the Manifesto to violence, at least some evidence complicates that account. Critics and supporters of the Manifesto alike contemporaneously credited the antiviolence plea as sincere and applauded it for departing from common practice. Among critics, Alexander Bickel noted: "The Declaration enters, on the part of the South, a universe of discourse different from that in which the South's men of violence and demagoguery dwell, and into which they have been trying to draw us."[193] Princeton Professor Alpheus Mason, who expressed sympathy for the document, commended it for "specifically repudiat[ing] force. This approach represents a salutary shift from the violence that has recently characterized the integration effort."[194] One perceptive commentator even noted at the time that southern segregationist politicians had an extremely powerful incentive to hope that the anti-*Brown*

190. LEWIS, *supra* note 95, at 44–45; *cf.* JOHNSON & GWERTZMAN, *supra* note 28 ("Although they added the qualifying phrase 'by any lawful means,' their statement was taken as a call to arms.").

191. Theodore M. Hesburgh, *Preface: Fiftieth Anniversary Volume*, 50 N.D. LAW. 6, 9 (1974).

192. *See* DANIEL M. BERMAN, IT IS SO ORDERED: THE SUPREME COURT RULES ON SCHOOL SEGREGATION 125 (1966) (suggesting that the Manifesto prompted the Klan's revival); C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 240–41 (3d ed. 1993) (contending that the Manifesto was "interpreted in lower ranks as authorizing revivals of Ku Kluxery").

193. Bickel, *supra* note 10.

194. Alpheus Thomas Mason, Letter to the Editor, N.Y. TIMES, Mar. 27, 1956, at 34.

movement did not descend into violence: because it would damage the cause. As Gerald Johnson explained, "The honorable members who signed that manifesto certainly did not believe that they were putting their names to an incendiary document, for they have everything to lose by an explosion."[195]

Some politicians' contemporaneous statements also lend support to the notion that the document's signatories were not winking when they urged white southerners to forsake violence. Southern senators themselves perceived that violent resistance to school desegregation would bring adverse consequences, and they communicated that awareness when addressing their constituents. Speaking about the Manifesto on a radio show that aired in his native Louisiana, Senator Allen Ellender called the document "a sober warning," and contended:

> What the South must avoid at all costs is violence, lawlessness, hatred and bloodshed. The outside agitators who seek the subjugation of both the white and Negro races in the South are hovering like greedy vultures for the time when racial antagonisms lead to chaos, the breakdown of governmental authority, and general lawlessness.[196]

Failure to heed this advice, Ellender cautioned, would bring the "use of force" by the federal government and would result in "a repetition of the reconstruction regimes which brought the South only oppression and self-seeking exploitation."[197] Surprisingly, Senator Eastland at least periodically sang a similar tune, as the senator perhaps best known for his unvarnished racism sometimes voiced convincing arguments contending that violent resistance to desegregation would serve to catalyze pro-integration sentiment among northerners. "Violence hurts the cause of the South," Eastland said in a speech to the White Citizens Council. "Violence and lawlessness will hurt this organization. These acts are turned against us by our enemies. They are effectively used to mould public sentiment against us in the North. It is imperative that we be looked upon with favor and have the best wishes of the average American."[198]

These statements do not establish, of course, that the Manifesto definitively played no role in spurring whites to defend segregation by violent means. Even though the Manifesto itself contained antiviolence rhetoric and some signatories warned about the vices of violence, legal texts

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195. Johnson, *supra* note 104.

196. *Ellender Warns South Not to Use Violence in Resisting Integration*, N.Y. TIMES, Mar. 18, 1956, at 87.

197. *Id.*

198. Senator James O. Eastland, Address Before the Statewide Convention of the Association of Citizens' Councils of Mississippi: We've Reached Era of Judicial Tyranny 8–9 (Dec. 1, 1955). Some southern politicians, thus, seem to have anticipated the counter-backlash portion of Professor Klarman's backlash thesis.

frequently obtain meanings that their drafters either did not intend, or that they even affirmatively opposed.[199] Some white segregationists may have *received* a proviolence message from the Manifesto, even if that message was not one that the document's drafters meant to convey. But before agreeing too readily with the notion that the Manifesto was a principal spark for white violence during the post-*Brown* era, it merits pausing to recollect that white southerners had a long, if not exactly glorious, history of greeting perceived threats to the prevailing racial order with violence. That history, of course, stretched back well before the Manifesto ever appeared.[200]

The antiviolence warnings that southern politicians issued surrounding the Manifesto do, however, reveal that southern politicians did not all react to *Brown* by simply jumping up and down, and screaming, "Never!" Many southern politicians were, rather, sophisticated political actors capable of making complex assessments about what reaction would likely occur if a particular action unfolded. Anticipating several moves ahead to identify the negative public reaction that anti-integration violence would ultimately generate reveals that Manifesto signatories were often reflective, self-aware, and calculating—traits seldom on display in the caricatures that typify depictions of southern elected officials, who are rendered both red-faced and red-necked. Such antiviolence sentiments also raise the important possibility that white southerners who did use violence to resist segregation acted not at politicians' behest, but at their own.

2. Defiance?—If the Manifesto did not encourage violence, did it nevertheless seek to promote nonviolent defiance of judicial decisions? On this front, as well, commentators have consistently questioned the sincerity of the Manifesto's stated goal of urging southerners "to resist forced integration by any lawful means."[201] That line must have been disingenuous, the thinking goes, because all methods of resisting *Brown* were unlawful. In 1956, a prominent group of legal academics and practitioners issued a statement arguing that the Manifesto, on this score at least, advocated an oxymoron: "To appeal for 'resistance' to decisions of

199. *See* J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 780 (1987) (noting that "once the signifier leaves the author's creation and is let loose upon the world, it takes on a life of its own in the other contexts in which it can be repeated").

200. *See generally* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 203–05 (2003) (describing Emmett Till's murder in Mississippi one year before the Manifesto appeared); KLARMAN, *supra* note 15, at 258, 390 (describing riots in response to Autherine Lucy's attempt to integrate the University of Alabama in February 1956); CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008) (describing the Colfax Massacre). I do not mean to suggest, of course, that white violence in response to perceived black encroachments was a peculiarly southern phenomenon.

201. *See* 102 CONG. REC. 4460 (1956).

the Court 'by any lawful means' is to utter a self-contradiction, whose ambiguity can only be calculated to promote disrespect for our fundamental law."[202] The intervening decades have done little to erode this impression. Apart from Kluger calling the Manifesto an "orgiastic declaration[] of defiance,"[203] Anthony Lewis labeled it "the most influential single document of defiance."[204] No less an authority than Chief Justice Earl Warren contended in his memoir that the Manifesto "urged all [southern] states to defy the Supreme Court decision."[205] Many scholars have also wholeheartedly signed onto the notion that the Manifesto called for defiance.[206]

As with the claims about violence, though, the claims that the Manifesto urged defiance are complicated by the actual record. The document itself did not counsel defiance as a legitimate response to *Brown*, a point that commentary appearing in southern newspapers often emphasized. "Although some already have tried to make the statement out to be a declaration of defiance of the United States Supreme Court and the Constitution, and others will follow suit, it is nothing of the sort," noted a *Greenville News* editorial. "The signers . . . believe the antisegregationist decision of the Court to be wrong, legally and otherwise. They pledge themselves to try to get it changed, but they do not say they will defy or attempt to nullify it. There is a vast difference between the two courses of action."[207] An article in the *Nashville Tennessean* similarly noted: "Close study of the Manifesto has shown that it contains not even a veiled threat of defiance of the Supreme Court. It outlines no program of political action to nullify the court's decision."[208] Even President Eisenhower, speaking at a news conference shortly after the Manifesto's release, disagreed with a

202. *Recent Attacks upon the Supreme Court: A Statement by Members of the Bar*, 42 A.B.A. J. 1128, 1128 (1956).

203. KLUGER, *supra* note 32.

204. LEWIS, *supra* note 95, at 44.

205. EARL WARREN, THE MEMOIRS OF EARL WARREN 288 (1977).

206. *See* BADGER, *supra* note 16, at 72 (contending that the Manifesto aimed "to ensure that all white southerners united behind moves to defy the Supreme Court"); J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 41–42 (1961) (contending that the Manifesto enabled segregationists to make "a major breakthrough in their campaign to dignify defiance of the federal judiciary"); POWE, *supra* note 71, at 61 ("Not surprisingly, [the Manifesto] did not say how there could be 'lawful' means to oppose a Supreme Court decision."); William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 495 (2002) ("Of course, the signers of the Manifesto knew that there were no lawful means . . . ."); *see also* ROY REED, FAUBUS: THE LIFE AND TIMES OF AN AMERICAN PRODIGAL 348–49 (1997) (referring to the "defiant Southern Manifesto"); WOODS, *supra* note 34, at 210 ("The Southern Manifesto was angry and defiant.").

207. *Statement Is an Appeal to Reason*, *supra* note 102.

208. Peter Edson, *Manifesto Brushed Off in Capital*, NASHVILLE TENNESSEAN, Mar. 22, 1956, at 16.

reporter's suggestion that the Manifesto counseled defiance: "I don't believe they expressed their defiance. I believe they expressed their belief that [*Brown*] was in error, and they have talked about using legal means to circumvent or to get it, whatever the expression they have used."[209]

The belief that the Manifesto urged defiance stems in large part from a misperception that the South was represented in Congress by one hundred versions of Senator Eastland, a man who sometimes espoused defiant language. On the day that the Court decided *Brown*, Eastland was quick to contend: "The South will not abide by nor obey this legislative decision by a political court."[210] Eastland's defiant rhetoric only intensified during the coming months. "I know that Southern people, by and large, will neither recognize, abide by nor comply with [*Brown*]," Eastland said during his senate campaign in 1954. "We are expected to remain docile while the pure blood of the South is mongrelized by the barter of our heritage by Northern politicians in order to secure political favors from Red mongrels in the slums of the East and Middle West."[211] Three months after the Court decided *Brown II* in 1955, Eastland told his constituents in Senatobia, Mississippi: "On May 17, 1954, the Constitution of the United States was destroyed because the Supreme Court disregarded the law and decided that integration was right. . . . You are not required to obey any court which passes out such a ruling. In fact, you are obligated to defy it."[212]

But Eastland's stance of rhetorical defiance was not representative of the attitudes of most southern members of Congress during the mid-1950s. To the contrary, his defiant comments were aberrant, as contemporary press accounts repeatedly emphasized that Eastland's outright defiance of *Brown* was extremely unusual among southern politicians in Washington.[213] The response to *Brown* from Eastland's junior senate colleague from Mississippi, John Stennis, makes for an enlightening juxtaposition, and was more indicative of the general southern congressional response. Stennis urged "deliberation and caution," and suggested that this issue would play out over a long time, maybe even a period of years.[214] "Before we abolish our public school system in Mississippi, I hope that all of our leaders and thinking people will fully confer and study all phases of the problem and all possibilities of a solution," Stennis commented.[215] Thus, although some

209. *The Transcript of Eisenhower News Conference on Foreign and Domestic Issues*, N.Y. TIMES, Mar. 22, 1956, at 20.

210. William S. White, *Ruling to Figure in '54 Campaign*, N.Y. TIMES, May 18, 1954, at 1.

211. Sherrill, *supra* note 33, at 193.

212. *The South vs. the Supreme Court*, LOOK, Apr. 3, 1956, at 23–24.

213. *See* Robert C. Albright, *Southerners Assail High Court Ruling*, WASH. POST, May 18, 1954, at 1 (noting that Eastland's response was extreme compared to other southern senators); White, *supra* note 210 (noting that the openly defiant faction of southern senators was small).

214. Albright, *supra* note 213.

215. *Id.*

white supremacy groups attempted to anoint Eastland "the Voice of the South,"[216] many Manifesto signatories spoke in a decidedly different register.

Aaron Henry, a Mississippi civil rights activist, offered an unusually insightful comparison of how Eastland-style defiance and Stennis-style deliberation played out in practice:

> The difference between Eastland and Stennis is that Stennis is a segregationist, Northern-style. He uses subtlety. Eastland would say, point blank, "Get the hell out of here, I ain't going to serve you because you're black." Stennis would say, "You don't have a reservation." But either way, you still haven't eaten. One is shrewd and sophisticated in promulgating segregation, the other is blatant—and maybe more honest.[217]

Henry made those comments in 1969 for a *New York Times* profile of Senator Stennis. But the rhetorical divide among segregationists that Henry identified extends back at least to the mid-1950s. If nothing else, the Manifesto makes it apparent that by 1956—to borrow a term from Congressman Adam Clayton Powell—"Eastlandism"[218] was waning and Stennisism was waxing.

Claims that the Manifesto urged defiance of the judiciary are also predicated on the document's invocation of the interposition movement that swept southern states beginning in 1956. This movement, the brainchild of James J. Kilpatrick, saw legislatures throughout the South pass resolutions condemning the Court's decision in *Brown*.[219] Given that the Manifesto "commend[ed] the motives of those states which have declared the intention to resist forced integration by any lawful means,"[220] some commentators have suggested that the Manifesto encouraged states simply to dust off the old, discredited doctrine of nullification associated with John Calhoun.[221] Segregationists during the mid-1950s, however, went to sometimes elaborate lengths to assert the difference between nullification and interposition.[222] When one examines the text of the underlying interposition

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216. FRANCIS M. WILHOIT, THE POLITICS OF MASSIVE RESISTANCE 82 (1973) (internal quotation marks omitted).

217. James K. Batten, *Why the Pentagon Pays Homage to John Cornelius Stennis*, N.Y. TIMES MAG., Nov. 23, 1969, at 44, 175 (internal quotation marks omitted).

218. *See* ROBERT FREDERICK BURK, THE EISENHOWER ADMINISTRATION AND BLACK CIVIL RIGHTS 169 (1984).

219. *See* POWE, *supra* note 71, at 58–60 (identifying Kilpatrick as interposition's intellectual leader).

220. 102 CONG. REC. 4461 (1956).

221. *See* WARREN, *supra* note 205 (linking the Manifesto to Calhoun and nullification).

222. *See* GATES, *supra* note 30, at 108 (offering Kilpatrick's effort to contrast nullification with interposition). Strom Thurmond wrote a letter to the editor of *Time* complaining that the magazine inaccurately suggested that his initial Manifesto draft mentioned "nullification." *See* Strom Thurmond, Letter to the Editor, TIME, Apr. 23, 1956, at 12.

measures, moreover, it becomes apparent that different states' interposition measures expressed extremely different attitudes toward judicial authority.[223] Some states—including South Carolina and Virginia—framed their resolutions in manners that can be viewed as compatible with demonstrating respect for the Supreme Court's authority. These comparatively restrained measures can be understood as participating in the segregationist effort to win the battle for public opinion during the post-*Brown II* era. Other states, however, adopted hardline measures that can be understood only as embracing judicial defiance. Alabama and Georgia, for instance, proclaimed that the two *Brown* opinions were "null, void, and of no force or effect" within their jurisdictions.[224] It is far from certain whether the Manifesto's drafters were aware of the linguistic differences separating these various state measures and the disparate poses they struck toward the judiciary. What can be said with certainty, though, is the Manifesto's eschewal of language claiming that the *Brown* decisions were without effect bolsters the notion that the document did not expressly disavow judicial authority and implore defiance. But even if the Manifesto is viewed as implicitly condoning judicial defiance, that view still succeeds in complicating the dominant understanding of the document. Implicit encouragement of judicial defiance, after all, suggests a far more subtle approach than the nakedly reflexive, vehemently antijudicial attitude that the Manifesto is typically understood as articulating.

One important reason that many Manifesto signatories would have generally avoided preaching such overt defiance of judicial authority was that they devised several different schemes for forestalling school desegregation that stopped well short of that extreme method. Instead of defying the law, they typically set about defining the law.

C. *Strategizing Segregation*

Southern senators and congressmen openly entertained several different means of either delaying public school desegregation or minimizing what they regarded as its adverse effects. Recovering the wide range of tactics that various Manifesto signatories advocated underscores how southern anti-integration efforts during the post-*Brown* era were more often characterized by creativity and flexibility than by obstinacy and intransigence. Although some of these specific plans proved short-lived, others proved remarkably durable. Indeed, some of the plans contemplated

223. *See South Carolina*, 1 RACE REL. L. REP. 443, 445 (1956) (urging "legal steps" to prevent federal encroachment on states' authority); *Virginia*, 1 RACE REL. L. REP. 445, 447 (1956) (pledging "to take all appropriate measures honorably, legally, and constitutionally available to us," and contending that school desegregation proponents should seek an Article V amendment).

224. *See Alabama*, 1 RACE REL. L. REP. 437, 437 (1956) (asserting that the Court's *Brown* decisions were "null, void, and of no effect" in Alabama); *Georgia*, 1 RACE REL. L. REP. 438, 440 (1956) (same in Georgia).

by Manifesto supporters continue to play a role today in maintaining the paucity of meaningful racial integration in the nation's public schools.[225] But even more important than grasping the particulars of the plans is appreciating the lawyerly thoroughness and thoughtfulness that animated them. Without understanding intimately how southern elected officials demonstrated these qualities during the immediate post-*Brown* era, it is difficult to understand how pro-segregation forces were able to stave off utter defeat for so long.

In contemplating the various plans that southern politicians considered for preserving segregation when the Manifesto was introduced, it is essential to remember the legal backdrop that existed during that particular historical moment. In 1956, the Court's two-year-old decision in *Brown* had yet to acquire the sacrosanct status that it now occupies both in legal circles and in the broader world.[226] To the contrary, *Brown* remained an intensely divisive decision throughout the country.[227] The Court's most recent word on school desegregation in March 1956, moreover, was not *Brown* itself, but the implementation decree articulated in *Brown II*. That decision, as will soon become clear, appears to have buoyed the belief among southern politicians that school desegregation could effectively be resisted. Far from being delusional, ample evidence supported the notion that school desegregation could be evaded. Thus, before abruptly dismissing any of the proposals as harebrained and doomed to failure, it would be wise to recall the central lesson of historical contingency: Just because matters are a particular way today in no way means that they were predestined to turn out that way.[228]

1. Reversal.—A primary strategy that Manifesto supporters contemplated, as revealed in the document itself, was attempting to have *Brown* "revers[ed]."[229] They hoped to do so through two different routes. First, supporters suggested that the document could serve as one part of a larger effort to mobilize public opinion against school desegregation, a development that could inspire the Justices to backtrack. Second, some southern senators aspired to prevent Supreme Court nominees who approved of *Brown* from receiving confirmation.

Several Manifesto signatories suggested that the Justices could be indirectly motivated to reverse *Brown* if a sufficiently large segment of the public opposed the decision. A few weeks after the Manifesto appeared, a

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225. *See* James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132–33 (2007).

226. *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 439–47 (2000).

227. *See* Justin Driver, *The Consensus Constitution*, 89 TEXAS L. REV. 755, 804–19 (2011).

228. *See id.* at 819–21 (criticizing scholars for claims of historical inevitability).

229. 102 CONG. REC. 4460 (1956).

columnist writing in the *Los Angeles Times* underscored that southern politicians believed the Justices' attitudes toward *Brown* were malleable:

> You won't hear it shouted from the rooftops, but one of the main purposes of the Southern Manifesto is to reform and resuscitate the Supreme Court. "Those political justices over there," a southern Congressman told me with a jerk of his chin toward the Supreme Court Building, "are going to get the point of what we're doing."[230]

Senator Eastland also advocated this public-opinion angle. "We can only win this fight through favorable public opinion," Eastland said. "The greatest danger is not in the Court. They are politicians who can change their minds."[231] A public-opinion campaign could succeed, Eastland suggested, because northern support for *Brown* was a good deal softer than had widely been portrayed: "We must carry the message to every section of the United States. Our position is righteous. The great majority of the rank and file of the people of the North believe exactly as we do. . . . We must place our case at the bar of public opinion."[232]

Several senators expressed the hope that they could, in the alternative, have *Brown* reversed by blocking the confirmation of Justices who thought that the case was correctly decided. The *New York Times*'s initial coverage of the Manifesto noted that some signatories contemplated "a boycott of candidates favorable to the court's ruling."[233] On the day of the Manifesto's release, Senator Stennis intimated to reporters that the Senate's southern bloc aimed to prevent the confirmation of new Supreme Court Justices who thought that the Fourteenth Amendment prohibited segregation.[234] Senator Thurmond had been advocating an aggressive use of the Senate's confirmation role since August 1955. "I also propose to consider carefully every nomination made by the Chief Executive to the courts and to other positions of power," Thurmond stated. "If I find the appointee, by his actions and statements, to be disqualified for the trust he would assume, I shall vote against his confirmation."[235]

2. Amendment.—The second major anti-*Brown* strategy involved the constitutional amendment procedures detailed in Article V.[236] Two

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230. Holmes Alexander, *Southern View*, L.A. TIMES, Mar. 30, 1956, at A5.

231. Eastland, *supra* note 198, at 11–12.

232. *Id.* at 10.

233. *See* Alvin Shuster, *96 in Congress Open Drive to Upset Integration Ruling*, N.Y. TIMES, Mar. 12, 1956, at 1.

234. *Bloc Hints Trouble on Nominees*, DALL. MORNING NEWS, Mar. 13, 1956, at 1.

235. Senator Strom Thurmond, Speech Before the Virginia State Bar Association: The Constitution and the Supreme Court (Aug. 6, 1955), *reprinted in* VITAL SPEECHES OF THE DAY, Oct. 15, 1955, at 29, 32.

236. *See* Shuster, *supra* note 233 (noting that the Manifesto's signatories were contemplating "proposals for constitutional amendments").

different proposed constitutional amendments received support from Manifesto backers. One proposal sought to take advantage of the "Lost Amendment," a proposal that Congress had submitted to the states in the 1860s that pledged not "to abolish or interfere within any state with domestic institutions thereof, including that of persons held to labor or service by the laws of said state."[237] Although the measure was initially designed to protect slavery, some senators thought that the language promising noninterference with "domestic institutions" could be interpreted to include public schools.[238] Reviving the Lost Amendment held some appeal because three states—Illinois, Maryland, and Ohio—had already ratified it, and it could be argued that no time limitation applied for ratification.[239]

The other amendment proposal, formally introduced in 1956, would have permitted states to determine for themselves whether they preferred segregated schools or integrated schools.[240] Although such a proposal never appeared to be on the cusp of garnering the high threshold of support necessary to amend the Constitution, the notion was also not nearly as farfetched as it may seem from today's vantage point. When Gallup conducted a nationwide poll on the question in 1959, a majority of respondents supported amending the Constitution to allow states to resolve the school integration question on their own terms.[241] This polling data suggests that, even five years after the Court decided *Brown*, support for integrated education in the North was far less pervasive than legal scholars often suggest.

3. Doctrine.—Manifesto supporters also offered several different approaches that aimed to preserve racial segregation in public schools, but did so within the existing doctrinal framework.

a. Influence District Courts.—The Manifesto's drafters encouraged district court judges to exploit the broad latitude regarding implementation that the Court adopted in *Brown II*. Senator Stennis of Mississippi helped to forge the southern response to *Brown* that sought to preserve school

237. *"Lost Amendment" Now Provocative*, N.Y. TIMES, Mar. 11, 1956, at 122; *see also* Editorial, *South's Men of Conviction Stand Up to Be Counted*, NASHVILLE BANNER, Mar. 13, 1956, at 4. Senator Russell was particularly enamored of the idea. *See* David Daniel Potenziani, Look to the Past: Richard B. Russell and the Defense of Southern White Supremacy 130 (1981) (unpublished Ph.D. dissertation, University of Georgia) (on file with author).

238. *"Lost Amendment" Now Provocative*, *supra* note 237.

239. *Id.*

240. *See* 102 CONG. REC. 1215 (1956) (proposing to "eliminate limitations upon[] the power of the States to regulate health, morals, education, marriage, and good order therein").

241. 51 percent favored the amendment, 43 percent opposed, and 6 percent expressed no opinion. *The Gallup Poll #610*, GALLUP BRAIN, http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0610&p=2.

segregation while simultaneously acknowledging judicial authority. In November 1955, when an interviewer asked Stennis whether district court judges could realistically do anything to implement *Brown* if the South simply refused to integrate, Stennis's crafty answer began by conceding the authority of courts. But he then quickly pivoted and attempted to shape the implementation decrees that the district courts would offer by providing an extraordinarily close reading of *Brown II*:

> I'm not going to attempt to tell the trial judge what his rulings should be, but, in the words of the Supreme Court decision, the trial judge must give weight to local conditions, reconciling public and private needs.
>
> The Court also recognized that there are "a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision."
>
> The trial court, I quote again, "may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner." The Supreme Court did not attempt to say what the lower court could and would do.[242]

Stennis's response vividly encapsulates how closely some southern senators parsed judicial opinions in an effort to mold legal doctrine that remained quite malleable.

b. Nonracial Classifications.—In a similar vein, Manifesto supporters advocated substituting nonracial classifications to achieve the goals of race-based segregation. In August 1955, Thurmond delivered an address to the Virginia State Bar Association, where he suggested working within the law to maintain racially segregated schools by using nonracial classifications. Rather than counseling outright defiance, Thurmond instead noted that *Brown*, and the implementation decree embodied in *Brown II*, afforded segregationists substantial room to maneuver without violating the law. "[T]he States and school districts must construct laws and regulations with the principles stated by the Court," Thurmond instructed.[243] But complying with those principles, Thurmond continued, did not necessarily require racial integration: "Not even the edict of the Court prevents the adoption of systems of classifying pupils other than that of race."[244] In making this point, Thurmond cited a judicial opinion written by Judge John Parker only three weeks earlier that offered a narrow interpretation of the relief ordered by *Brown II*. "Let me emphasize Judge Parker's statements that 'the Constitution does not require integration,'" Thurmond said, "and that 'it merely forbids the use of governmental power to enforce segregation.' These words are extremely important to the officials of the States and the

242. *The Race Issue*, *supra* note 161, at 86.

schools, as we consider means of maintaining our way of life under the Constitution."[245]

c. Voluntary Segregation.—Another Manifesto framer suggested the document endorsed the establishment of voluntarily segregated schools. Immediately upon the Manifesto's release, Senator Sam Ervin argued that such a plan was perfectly consistent with *Brown*. "While the [S]upreme [C]ourt decision is deplorable from the standpoint of constitutional law and ought to be reversed for that reason, it is not as drastic as many people think," he explained.[246] Explicitly referencing Judge Parker's lower-court opinion, Ervin maintained that advocates of racial integration had badly misinterpreted *Brown*. "This decision does not require immediate integration of the public schools of the South," Ervin wrote. "It does not even require integration."[247] The Court continued to "permit[] the races to attend separate schools on a voluntary basis," which Ervin maintained was "the best course to follow at this time."[248] Just as people of different races could elect to attend separate churches without violating the Constitution, Ervin suggested, that same elective approach could be employed by school districts without violating the Constitution.[249]

d. Attendance Zones.—Some Manifesto signatories intimated during the mid-1950s that southern school districts could maintain racial segregation by establishing boundary lines in a way that yielded single-race schools. They often obliquely pressed this point by contending that such practices were not exactly unknown north of the Mason–Dixon Line. Senator Ervin chided that northerners who "think the South is cruel to its children when it segregates them on the basis of race in the public schools[] simply ignore the hundreds of thousands of Negro children who are actually segregated in schools in Northern cities by gerrymandered school districts embracing the ghettos where Negroes live."[250] Senator John Sparkman of Alabama similarly speculated after *Brown* that whatever mechanism achieved school segregation in Harlem schools would also work in the South.[251]

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243. Thurmond, *supra* note 235, at 31.

244. *Id.*

245. *Id.* (quoting Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955)).

246. Margaret Kernodle, *'Lawful Means' Pledged to Reverse Court Decision*, NEW ORLEANS TIMES-PICAYUNE, Mar. 12, 1956, at 22.

247. Ervin, *supra* note 91, at 33.

248. Kernodle, *supra* note 246.

249. Ervin, *supra* note 91, at 33 (quoting *Briggs*, 132 F. Supp. at 777).

250. *Id.* at 32.

251. *See* Albright, *supra* note 213 ("[Sparkman] predicted that in many areas of the United States 'segregation by choice' will continue. He said Harlem, N.Y. is an example of this kind of 'voluntary segregation.'").

e. Tracking.—Some segregationist politicians also worked within legal doctrine by contending that *Brown*'s theoretical goals would not be realized within the reality of desegregated schools. In the hypothetical event that schools enrolled both black and white children, educators could still separate students into different classrooms according to aptitude. Elected officials were confident that such sorting would result in black pupils overwhelmingly if not uniformly being assigned to remedial classes. That eventuality, segregationists suggested, may not be doctrinally permissible, because it would intensify the racial stigma that *Brown* was designed to eliminate.[252] South Carolina Governor James Byrnes, who was also a former United States Supreme Court Justice, expressed this notion in a magazine article shortly after the Manifesto's publication. "If the Negro students are not able to do the work of the white students, can the races be segregated in the classroom and assigned different class work?" Byrnes wrote. "Would not the scars inflicted upon the Negro child by such segregation be far deeper than the harm done him by associating with only Negro students in segregated schools?"[253] Byrnes's fellow South Carolinian Strom Thurmond had earlier advanced a version of this argument, contending: "Certainly differences of inferiority and superiority would be emphasized greatly by close proximity."[254]

f. Sex Segregation.—Finally, Manifesto signatories also devised contingency plans meant to salvage as much of the old regime as possible. Given that resistance to *Brown* was driven in large part by concerns about interracial sex, some Manifesto signatories broached the possibility of integrating public schools by race, but simultaneously separating them by gender.[255] Congressman Brooks Hays suggested, for instance, that the "establishment of schools segregated by sex" may be one way to accomplish racial integration "without loss of values deemed vital by the white majority."[256] Communities that separated schools by sex would be able to avoid the dreaded spectacle of seeing white girls come into contact with black boys, who were thought to be hypersexual.[257]

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252. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (contending segregation "generates a feeling of inferiority as to [blacks'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

253. Byrnes, *supra* note 106, at 56.

254. Thurmond, *supra* note 235, at 31.

255. For a thoughtful analysis of this strategy, see Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE L.J. & HUMAN. 187 (2006).

256. BROOKS HAYS, A SOUTHERN MODERATE SPEAKS 228 (1959).

257. *See, e.g.*, LOUIS E. DAILY, THE SIN OR EVILS OF INTEGRATION 38 (1962) ("White people of the South know that a large number of Negro teenage boys are nearly sex maniacs. . . . Only under the protection of a school heavily guarded by police officers would [parents] have any peace of mind for the safety of their daughters from the attacks of such Negro boys."); FULBRIGHT,

4. Abolition.—Manifesto signatories also discussed the possibility of evading *Brown* by simply abolishing public schools altogether, expanding upon an idea broached in the Manifesto itself.[258] "If this matter is pressed it will result in some states going out of the public school business," Senator George said to the press after introducing the Manifesto. "Unless there is a reasonable approach to this problem by men and women of good will that may be the result."[259] Senator Stennis had likewise suggested that, in the face of actual efforts to bring about integration, southerners "will regretfully and reluctantly abolish their public school systems if necessary to avoid enforced destruction of their own race."[260] A system of racially segregated private schools, their thinking ran, would fall beyond the reach of the Equal Protection Clause. Going further, Senator Eastland suggested that starting private schools may even be unnecessary, as states could delay integration by first abolishing their public school districts when they faced court-ordered integration and then establishing new districts. "The state, if necessary, can abolish school districts, create other ones and thus remove the corpus or basis of a suit," Eastland contended. "This would mean the whole case must start over, with years' delay."[261]

The wealth of strategies that Manifesto signatories identified as potentially forestalling school desegregation demonstrates that southern politicians diligently surveyed their available options. There was at least one theoretically available option, though, that Manifesto signatories typically avoided. In their effort to preserve white supremacy, southern senators and congressmen during the mid-1950s evinced broad agreement that mounting a frontal assault on judicial supremacy was a strategic stone best left unturned.[262]

III. Judicial Supremacy

Focusing upon the Southern Manifesto complicates the prominent view among constitutional law professors regarding the emergence of

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supra note 142, at 90 (recalling "what used to really bother [his constituents] was the prospect of their young daughter marrying a black man" and adding "[t]hey couldn't tolerate the thought of it"); PELTASON, *supra* note 206, at 38 (quoting an Alabama State Senator as saying shortly after *Brown* that if a black man is given "the opportunity to be near a white woman, . . . he goes berserk" (internal quotation marks omitted)).

258. *See* 102 CONG. REC. 4460 (1956) (entertaining the possibility of closing public schools); Shuster, *supra* note 233 (noting one Senator said that "lawful means" could include the establishment of private school systems).

259. Jack Bell, *Humphrey Suggests Countermove to Southern 'Manifesto,'* LOUISVILLE TIMES, Mar. 13, 1956, at 1 (internal quotation marks omitted).

260. *The Race Issue*, *supra* note 161.

261. *The Authentic Voice*, TIME, Mar. 26, 1956, at 26, 29.

262. *See infra* subsection (III)(A)(1)(b).

judicial supremacy.[263] On this conventional view, one most often associated in academic circles with Larry Kramer, judicial supremacy became a widely accepted notion on the American constitutional scene only after 1958.[264] Before that time, Kramer contends, popular constitutionalism flourished, as everyday citizens and elected officials alike routinely advanced their own constitutional visions—even (and sometimes especially) in the face of competing constitutional visions articulated by the judiciary.[265] From the nation's founding through at least the late 1950s, Kramer asserts, Americans did not widely understand the Supreme Court as enjoying a dominant role in determining constitutional meaning.[266]

What happened in 1958 that ushered in the modern era of judicial supremacy and marked the beginning of the end for popular constitutionalism? In Kramer's narrative of decline, the free fall is unmistakably inaugurated by the Supreme Court's decision in *Cooper v. Aaron*.[267] Thus, Kramer has repeatedly, and ruefully, identified acquiescence to the judiciary's constitutional authority as a development that broadly appeared only after the Court issued its well-known decision espousing judicial supremacy against the backdrop of the Little Rock desegregation crisis.[268] On Kramer's telling, the Court's decision in *Cooper* amounted to a power grab that the Justices simply foisted upon the American people and their unsuspecting elected officials. "The Justices in *Cooper* were not reporting a fact," Kramer writes, "so much as trying to manufacture one."[269] What seems considerably more disheartening, from Kramer's vantage point, is that this effort at judicial usurpation proved

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263. The term "judicial supremacy" is a protean one, carrying different connotations for different scholars. *See* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1030 (2004) (acknowledging contested notions of judicial supremacy). I use the term here in a relatively standard fashion, meaning that in order to subscribe to at least a minimal understanding of judicial supremacy, in instances of contested constitutional meaning, the judiciary's interpretation of the Constitution is accepted as decisive. *Cf.* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 6 (2001) (describing judicial supremacy as "the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone").

264. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 221 (2004).

265. *See id.* at 162–64.

266. *Id.* at 221.

267. 358 U.S. 1 (1958).

268. *See* KRAMER, *supra* note 264 (stating that judicial supremacy became prominent "after *Cooper v. Aaron*" and broadly accepted "sometime in the 1960s"); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 963 (2004) (contending judicial supremacy found "active and widespread public acceptance" only "[a]fter *Cooper*"); Kramer, *supra* note 263 (contending that "in the years since *Cooper v. Aaron*, the idea of judicial supremacy . . . has finally found widespread approbation"); *id.* at 13 (suggesting it was not "until some time after *Cooper*" that judicial supremacy "achieve[d] acceptance").

269. KRAMER, *supra* note 264.

successful: "[H]ere is the striking thing: after *Cooper v. Aaron*, the idea of judicial supremacy seemed gradually, at long last, to find wide public acceptance."[270]

Kramer's historical account of popular constitutionalism's demise and judicial supremacy's rise is in no way viewed as idiosyncratic. Prominent law professors from across the ideological spectrum have claimed that *Cooper* initiated the era of widespread adherence to judicial supremacy.[271] This sequencing contention about *Cooper* even arose during the most recent campaign for the Republican presidential nomination, as former presidential candidate Newt Gingrich emphasized his opposition to the constitutional world that *Cooper* supposedly initiated.[272] Gingrich's constitutional views generated extensive news coverage, some of which relied uncritically upon Kramer's account of *Cooper*.[273]

Yet for all of its adherents, the claim that *Cooper* preceded the broad embrace of judicial supremacy gets matters exactly backward. Rather than securing the notion that judges enjoyed a privileged role in interpreting the Constitution, the Court's decision in *Cooper* instead merely amplified what at least by 1958 had become a notion that enjoyed wide circulation. Indeed, the debate generated by the Manifesto's release provides a vivid snapshot of the ample support that judicial supremacy enjoyed in March 1956, more than two years before the Court decided *Cooper*. After the Manifesto's release, members of both houses of Congress, President Eisenhower, leading law professors, journalists, and, yes, even a few ordinary citizens all offered hearty endorsements of judicial supremacy.

Tellingly, individuals from these various walks of life often articulated their support for judicial supremacy in terms that were strikingly, almost eerily, similar to the terms that the Justices themselves would eventually use in *Cooper*. The Supreme Court's particular formulation of judicial supremacy in *Cooper* has, of course, been roundly characterized as resting on no fewer than four claims that are dubious as a matter of constitutional

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270. *Id.*

271. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 241 (2002) ("The seeds for this vision of [judicial supremacy] can be found in *Cooper v. Aaron* and its proclamation that the Court is 'supreme in the exposition of the law of the Constitution.'"); John C. Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 MICH. L. REV. 1436, 1458–59 (2000) (suggesting that *Cooper* inaugurated the era of judicial supremacy at a time when that view was heavily criticized).

272. Gingrich's campaign document articulating his views stated: "[F]ollowing *Cooper v. Aaron*, the executive and legislative branches have largely acted as if the Constitution empowered the Supreme Court with final decision making authority about the meaning of the Constitution." NEWT 2012, BRINGING THE COURTS BACK UNDER THE CONSTITUTION 4 (2011), *available at* http://www.newt.org/sites/newt.org/files/Courts.pdf.

273. *See, e.g.*, Adam Liptak, *Among Legal Ranks, Shrugs for Gingrich's Tough Talk*, N.Y. TIMES, Dec. 18, 2011, at A24 (quoting Kramer's contention that "[t]he justices in *Cooper* . . . were not reporting a fact so much as trying to manufacture one" (internal quotation marks omitted)).

history, a matter of constitutional theory, or both.[274] It is necessary to recount these oft-critiqued statements from *Cooper* in order to lay the groundwork for establishing that these statements were already in wide circulation by 1958. First, *Cooper* claimed that *Marbury v. Madison*[275] had declared that "the federal judiciary is supreme in the exposition of the law of the Constitution."[276] Second, *Cooper* claimed that "ever since" *Marbury* the federal judiciary's constitutional supremacy had "been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[277] Third, *Cooper* interprets Article VI's statement that the Constitution is "the supreme Law of the Land" to apply with equal force to Supreme Court interpretations of the Constitution.[278] Fourth, *Cooper* suggests that state officials are—by virtue of taking an oath "to support this Constitution" as required by Article VI—also bound to support the Court's interpretations of the Constitution.[279]

The goal here is not to demonstrate that the Justices in *Cooper* were somehow correct in advancing any of these four notions. Instead, the goal is simply to demonstrate that these statements, whatever their veracity, were broadly embraced before the Court memorialized them in *Cooper*. Even allowing that these statements were in fact misperceptions, they were nevertheless extremely common misperceptions in 1956—subscribed to by esteemed constitutional law professors and ordinary folk, opinion journalists, and elected officials. Contrary to the conventional understanding, then, *Cooper* did not inaugurate the era of widespread judicial supremacy; instead, that era was already well under way.

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274. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 276 (Sanford Levinson ed., 5th ed. 2010) (calling *Cooper* "quite preposterous in its depiction of American history"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 225 (1994) ("At least since . . . *Cooper* . . . the Court has repeatedly asserted that its opinions are 'the supreme law of the land' and that the other branches are bound by them. It is the burden of this article to show that this self-interested assertion is wrong as a matter of constitutional first principles.").

275. 5 U.S. (1 Cranch) 137 (1803).

276. Cooper v. Aaron, 358 U.S. 1, 18 (1958). *Marbury* might more readily be understood, however, to mean merely that the judiciary is not altogether excluded from constitutional interpretation. *See* KRAMER, *supra* note 264, at 126 ("What [*Marbury*] said was 'courts too, can say what the Constitution means.'").

277. 358 U.S. at 18. In fact, though, at some points in American history national figures seem to have denied the judiciary a special role in constitutional interpretation. *See* KRAMER, *supra* note 264, at 183 (describing President Andrew Jackson's vetoing of an act to recharter the Bank of the United States on constitutional grounds even though it had received the Court's constitutional validation).

278. U.S. CONST. art. VI, cl. 2; 358 U.S. at 18. Those two items need not be conceived as coextensive.

279. *See* 358 U.S. at 18–19. Again, those two items need not be conceived as coextensive.

Constitutional law professors have derided these various statements regarding judicial authority in *Cooper* as mere "bombast,"[280] the "boasting of the weak,"[281] and "just bluster and puff."[282] The animating idea behind these skeptical appraisals is that the Supreme Court ratcheted up its rhetoric, claiming an outsized constitutional role for itself, only after President Eisenhower dispatched federal troops to guarantee the desegregation of Little Rock Central High School. After the coast was clear, this critique runs, the Court decided to flex its judicial muscles, issuing its ostentatious and exaggerated assertions of constitutional authority. Admittedly, *Cooper* appears to have been the first time that the Supreme Court ever articulated these robust notions of judicial supremacy in these terms.[283] Simply because the Court said these things for the first time in *Cooper*, however, does not mean that *Cooper* introduced them to the constitutional mainstream. But in order to appreciate how widespread testaments to judicial authority were by 1958, professors need not scour more Supreme Court opinions. Instead, they should examine understandings about constitutional authority that were articulated outside of the courts during the period leading up to *Cooper*. Doing so makes it evident that the Justices in *Cooper* were engaged less in constitutional puffery than they were in expressing widely articulated constitutional understandings.[284]

It may initially seem both strange and strained to use an examination of the Manifesto as an occasion to argue that notions of judicial supremacy were commonplace in the pre-*Cooper* era. After all, the Manifesto offers a counter-interpretation of the Fourteenth Amendment's bearing on segregated schools that clashes with the Court's interpretation in *Brown*. At first blush, it may seem that the Manifesto exemplifies a pre-*Cooper* rejection of judicial supremacy, not a manifestation. But among the more remarkable aspects about the Southern Manifesto are the extent to which even many Manifesto signatories adhered to conceptions of judicial supremacy and how they voiced these convictions while crafting the document. There may well be no stronger indication of how prevalent notions of judicial supremacy were before *Cooper* than the fact that some of

280. ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 309–10 (1992); *see also id.* at 293 (calling *Cooper* an "atavistic rhetorical demand for absolute submission").

281. Powe, *supra* note 24, at 713; *see also id.* at 713–14 (calling *Cooper*'s language "bravado substituting for an inability to do anything").

282. KRAMER, *supra* note 264.

283. Some pre-*Cooper* statements of broad judicial authority to determine constitutional meaning do, of course, reside in the U.S. Reports. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

284. Kramer contends that *Cooper*'s "declaration of judicial interpretive supremacy evoked considerable skepticism at the time." KRAMER, *supra* note 264. But Kramer does not reveal either where such criticisms appeared or who articulated them.

the very people who would seem most likely to have vilified judicial supremacy in its entirety actually embraced the concept to a surprising degree. The claim here should not be mistaken for an assertion that Manifesto signatories invariably embraced judicial supremacy in its more robust formulations. Such a claim would be risible. Yet if one conceives of adherence to judicial supremacy not as something absolute but instead as running along a spectrum, then it becomes possible to understand that the Manifesto did not offer the no-holds-barred, frontal assault on judicial supremacy that it is sometimes viewed as presenting.

A. Electoral

1. Legislative.—After Senator Thurmond completed his statement claiming intellectual ownership of the Manifesto, Senator Wayne Morse of Oregon immediately rose and offered an impassioned response to the document. Although Morse briefly mentioned the underlying legal issue of racial segregation in public schools, he dedicated the lion's share of his remarks toward a defense of judicial supremacy—an ideal that he believed the Manifesto had undermined.[285] Intriguingly, Morse's defense of judicial supremacy was predicated on the same expansive reading of *Marbury*'s holding that *Cooper* would deploy two years later. "[I]n Marbury against Madison, decided in 1803, there was established the authority and the jurisdiction of the Supreme Court to determine for all Americans . . . rights under the Constitution," Morse contended. "The supremacy of the Supreme Court in passing on constitutional questions was determined by that decision."[286] In his extraordinary summation, Morse reiterated that interpretation of *Marbury* in the course of calling upon his colleagues to engage in an extended discussion about their conceptions of the judicial role:

> A historic debate must take place on the floor of the Senate in the not too distant future, because in the weeks immediately ahead the Congress will have to determine whether or not we and the people of the United States shall follow the Supreme Court decision, and recognize, as was laid down in Marbury against Madison, the supremacy of the Court in protecting the American people in their constitutional rights.[287]

That debate did, indeed, unfold. Morse was only the first among many elected officials, from both houses of Congress, who stepped forward in the shadow of the Manifesto to offer their constitutional understandings of judicial authority. Those debates received extensive news coverage at the

285. *See* 102 CONG. REC. 4462 (1956) (statement of Sen. Wayne Morse).
286. *Id.*
287. *Id.*

time.[288] Recovering these forgotten debates is vital, as they serve to illuminate congressional attitudes regarding judicial authority to interpret the Constitution.

a. Floor Debate.—Senator Paul Douglas of Illinois spoke on the Senate floor one day after Morse issued his call. Unlike Morse, Douglas did not detect in the Manifesto anything resembling an all-out assault on the Supreme Court. Indeed, Douglas repeatedly emphasized that the southern senators were well within the bounds of legality and propriety in criticizing *Brown*.[289] Nevertheless, Douglas, like Morse before him, also expressed a firm adherence to notions of judicial supremacy. "[U]nder our American system of government, the Supreme Court was established to settle disagreements over the interpretation of the basic law and the Constitution," Douglas said.[290] "[A]s long as the decisions of the Court represent the law of the land," Douglas insisted, those decisions must be obeyed.[291]

When the Manifesto was introduced, Senator Herbert Lehman of New York made a short statement on the floor expressing his disapproval and vowing that he would have more to say at a later date.[292] A few days later, on March 16, Lehman weighed in again and this time offered an enthusiastic endorsement of judicial supremacy. Given that "[t]he Supreme Court is, as every schoolboy knows, the keystone of the arch of the judiciary," Lehman contended, there "can be no supportable challenge to the supremacy or competency of the Supreme Court in deciding what is . . . constitutional, as strongly as some might disagree with the High Court's findings. It would be absurd, if it were not so deadly serious and so highly dangerous, to hold otherwise."[293] Lehman further offered a grim consequentialist assessment of the costs that would accompany any widespread rejection of judicial supremacy: "Shall each individual in our Nation have the right to say that he disagrees with the Supreme Court's

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288. *See, e.g.*, Robert E. Baker, *Anti-Court Manifesto Stirs Row: Senate Fireworks Follow Attack by Southerners on Desegregation*, WASH. POST, Mar. 13, 1956, at 1; Robert E. Baker, *Manifesto Hit by 3 Speakers in Congress: High Court Ruling Called 'Exemplary' by Rep. Keating*, WASH. POST, Mar. 16, 1956, at 1; Allen Drury, *Senate Liberals Score Manifesto: McNamara Calls Southern Stand 'Shameful'—Parley at White House Urged*, N.Y. TIMES, Mar. 15, 1956, at 18; Friddell, *supra* note 101; William S. White, *Moderation Urged by Case of Jersey in Reply to South*, N.Y. TIMES, Mar. 16, 1956, at 1.

289. 102 CONG. REC. 4550 (1956) (statement of Sen. Paul Douglas) ("Criticism of the Court and its decision is . . . both legal and proper."); *id.* ("No doubt it is the legal right of those who disapprove the law as thus interpreted to seek . . . to change it.").

290. *Id.* Douglas's usage of the term "settle," thus, offers an adumbration of the well-known argument that Larry Alexander and Fred Schauer have made defending *Cooper*. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997) (extolling the Court's "settlement function").

291. 102 CONG. REC. 4550 (1956) (statement of Sen. Paul Douglas).

292. *Id.* at 4461 (statement of Sen. Herbert Lehman).

293. *Id.* at 4940.

interpretation of the Constitution and, therefore, will not abide by the . . . Supreme Court? Obviously, that would be anarchy, and our Nation would collapse in chaos and disorder."[294]

It should come as no surprise that several members of the House of Representatives took to the floor to make similar statements supporting judicial supremacy in the wake of the Manifesto. On March 15, 1956, three days after Senator George recited the Manifesto, Congressman Morris Udall of Arizona stated: "Unless we adopt the argument that the Supreme Court is really not supreme under the Constitution, there is one honorable and patriotic course open to those aggrieved by a decision of our highest tribunal."[295] That sole available course, according to Udall, resided in Article V's procedures for constitutional amendment.[296] Later that day, Congressman Laurence Curtis of Massachusetts advanced that same notion: "Under the Constitution the Supreme Court is the final authority in interpreting the Constitution. When the Court has spoken, that ends it, unless the Constitution is amended."[297] Nor were these statements the only statements supporting judicial supremacy in the House.[298]

But perhaps the most fascinating exchange about judicial authority that occurred in either house of Congress took place on the Senate floor on March 23, 1956, eleven days after the Manifesto had been introduced.[299] That debate revealed widespread adherence to the foundational notion of judicial supremacy in the Senate, even as the senators evinced some disagreement in the particulars about what actions should be deemed an affront to that notion. Further, the debate demonstrated that at least some southern senators had a considerably richer appreciation for the wide range of ways that constitutional meaning is sometimes shaped than did their northern counterparts.

Senator Willis Robertson of Virginia initiated the remarkable discussion by suggesting that Senator Lehman's record on federalism smacked of inconsistency. The Manifesto's signers should be understood, Robertson insisted, as working in the tradition of the effort to repeal Prohibition—a cause that Lehman had championed when he served as New York's Governor.[300] "New York and other Northern States objected to national prohibition," Robertson said. "The Southern States now object to a

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294. *Id.*

295. *Id.* at 4846 (statement of Rep. Morris Udall).

296. *See id.*

297. *Id.* at 4865 (statement of Rep. Laurence Curtis).

298. *See, e.g.*, *id.* at 6384 (statement of Rep. Noah Mason) (contending that "under the Constitution, the United States Supreme Court is the final arbiter as to the meaning of the Constitution" and that "[a]ny and all decisions of the Court become the law of the land").

299. For only one of the many articles chronicling this particular day's senatorial debate, see *South's Fight Seen Akin to 'Dry' Battle*, N.Y. TIMES, Mar. 24, 1956, at 15.

300. 102 CONG. REC. 5443 (1956) (statement of Sen. Willis Robertson).

prohibition against separate but equal schools. The constitutional principle involved is the same."[301] While allowing that the Manifesto's cause currently seemed to face long odds, Robertson reminded his colleagues that the same had once been said of the anti-Prohibition cause. Here, Robertson offered a colorful quotation of ill-fated overconfidence from former Senator Morris Sheppard, one of the Eighteenth Amendment's drafters, who had said: "There is as much chance of repealing the [Eighteenth] [A]mendment as there is for a hummingbird to fly to the planet Mars with the Washington Monument tied to its tail."[302] Robertson noted that things had not turned out precisely as Sheppard anticipated.[303] Just as Prohibition's opponents had prevailed by successfully courting public opinion, Robertson said, "It is before the bar of public opinion that we of the South now hope to make our case."[304]

In response to Robertson's assertion of inconsistency, Senator Lehman contended that the underlying circumstances in the two situations were themselves inconsistent.[305] While anti-Prohibition forces channeled their energy into repealing the Eighteenth Amendment, Lehman noted that the Manifesto contained no analogous proposal to repeal the Fourteenth Amendment—an effort that Lehman thought would surely end in defeat. Given these different underlying facts, Lehman stated that he stood by every word he had uttered one week earlier. "I consider my speech on that occasion one of the most important statements of my long public career," Lehman explained, not "because the speech was eloquent," but because it contained what he "believe[d] to be an incontrovertible principle and a statement of truth which cannot be denied."[306] The undeniable principle that Lehman's prior speech defended was, of course, judicial supremacy—a principle that he defended once more. "[R]egardless of our personal sentiments . . . the ruling by the Supreme Court on a constitutional question constitutes the supreme law of the land," Lehman said, and "no one is justified in defying the Constitution of the United States as interpreted by the Supreme Court."[307]

Senator Thurmond seized on Lehman's last point to question whether the Senator from New York construed the Manifesto as advocating defiance of the Constitution. When Lehman allowed that he did, Thurmond replied: "I challenge the Senator from New York to cite the section of the manifesto that is in defiance of the Constitution."[308] After Lehman failed to cite any

301. *Id.*
302. *Id.* (internal quotation marks omitted).
303. *Id.*; *see also* U.S. CONST. amend. XXI (repealing Prohibition).
304. 102 CONG. REC. 5443 (1956) (statement of Sen. Willis Robertson).
305. *Id.* at 5444 (statement of Sen. Herbert Lehman).
306. *Id.*
307. *Id.*
308. *Id.* at 5445 (statement of Sen. Strom Thurmond).

specific Manifesto provision as urging defiance (despite having a copy of the document at hand), Thurmond pulled rank, forcing Lehman to admit that he lacked legal training. "I am sure that if the Senator from New York would read the manifesto carefully and would ask any good lawyer to construe it, he would not place any such construction upon it," Thurmond advised. "The manifesto uses the words 'all legal means.' Those words were cautiously used, and do not imply defiance, but mean within the law."[309]

Witnessing this scene unfold, Senator Morse entered the fray seeking to bolster Lehman's position. "[N]o matter what phraseology they use in their manifesto . . . they are aiding and abetting defiance of the law," Morse said.[310] In addition, Morse echoed Lehman's call for the southern politicians to introduce a constitutional amendment to repeal the Fourteenth Amendment if they truly sought to rid themselves of *Brown*.[311] Finally, and most importantly, Morse threw down the gauntlet of judicial supremacy:

> I say on the floor of the Senate today that I think every Member of the Senate ought to have an opportunity to stand up and be counted by giving him an opportunity to put his John Henry on a manifesto as to whether or not he believes in the supremacy of the Supreme Court, as was laid down by that great Virginian, John Marshall, in Marbury against Madison, as being the supreme tribunal for the determination of the constitutional rights of all Americans, irrespective of race, color, or creed.[312]

No record indicates that Morse, or anyone else for that matter, ever produced a document resembling a Judicial Supremacy Manifesto for senators to sign. Perhaps more significantly, though, neither Senator Robertson nor Senator Thurmond responded that they would withhold their John Henrys from such a document on grounds of principle. Nor did any other senator subsequently make a statement from the floor directly rejecting Senator Morse's articulation of judicial supremacy.

It would be mistaken, of course, to construe the silence that greeted Morse's averment as constituting universal assent. There are many reasons that senators may have declined to answer Morse's challenge. But one important reason for that silence appears to have been broad assent with at least some attenuated vision of Morse's depiction of judicial authority. Indeed, substantial evidence suggests that, even as many senators signed the Manifesto, they nevertheless simultaneously endorsed notions of judicial supremacy to a surprisingly large extent. It is, of course, quite possible that some southern politicians spoke in the language of judicial supremacy less

309. *Id.*
310. *Id.* at 5454 (statement of Sen. Wayne Morse).
311. *Id.*
312. *Id.*

out of deep-seated conviction than a determination that rejecting judicial supremacy entirely would damage the segregationist cause. But even such calculated articulations of judicial supremacy are noteworthy because they stem from assessments regarding the broad acceptance of judicial authority to settle constitutional meaning throughout the nation. It seems difficult, moreover, to dismiss southern senators' embrace of judicial supremacy as wholly insincere. Indeed, it does not go too far to say that actual concern for respecting judicial supremacy even shaped the Manifesto itself.

b. Attitudes of Manifesto Supporters.—Although an early draft of the Manifesto called the Court's decision in *Brown* both "unconstitutional" and "illegal," a small group of senators led by Price Daniel of Texas and J. William Fulbright of Arkansas predicated their signing the statement on having the terms removed.[313] They contended that these watchwords communicated insufficient respect for the Supreme Court's ultimate constitutional authority, an idea that both Daniel and Fulbright repeatedly sought to preserve in similar terms. Before he was elected to the Senate, Daniel had, as Attorney General of Texas, written a brief defending the separate but equal regime when the Court decided *Sweatt v. Painter*[314] in 1950.[315] When the Court decided *Brown* four years later, Daniel delivered a lengthy statement on the Senate floor, parsing obscure Supreme Court opinions in an effort to demonstrate that the recent school decision departed from precedent.[316] Despite expressing keen disappointment with the opinion, Daniel in no way questioned the Court's authority to issue it. "No matter how much some of us may disagree with the reasoning and result of the Court's decisions, we must look to the future with patience, wisdom, and sound judgment to live under the law as it has now been written . . . ," Daniel said.[317] Even two years later, Daniel could not abide joining a Manifesto that accused the Court of acting unconstitutionally or illegally in issuing *Brown*. "That just isn't true and I won't sign it," Daniel said. "You can't call any action of the Supreme Court unconstitutional or illegal."[318]

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313. *See* Carpenter, *supra* note 147 (noting that "[f]our senators refused to sign the document and Senator Long, who had already signed, chimed in supporting their objections"). That Senator Long supported the movement to eliminate the term "unconstitutional" is far from surprising. Immediately after *Brown*, Senator Long indicated that his constitutional oath required him to accept the decision: "Although I completely disagree with the decision, my oath of office requires me to accept it as law. Every citizen is likewise bound by his oath of allegiance to his country." Albright, *supra* note 213 (internal quotation marks omitted).

314. 339 U.S. 629 (1950).

315. Brief for Respondents, *Sweatt*, 339 U.S. 629 (No. 44).

316. *See* 100 CONG. REC. 6750 (1954) (statement of Sen. Price Daniel) (expressing "disappoint[ment]" in *Brown*'s treatment of *Gong Lum*).

317. *Id.* at 6742; *see also id.* at 6743 ("The opinions of yesterday are new law. They are the law for today and for the future. But they did not follow the law as former opinions had stated it in the past.").

318. Carpenter, *supra* note 147.

These same terms also stuck in Fulbright's constitutional craw. After the Manifesto had circulated among the southern delegation, Fulbright drafted a statement expressing his qualms. "I fear the statement holds out the false illusion to our own southern people that there is some means by which we can overturn the Supreme Court's decision," Fulbright wrote. "Our duty to our own people in their hour of travail is one of candor and realism. It is not realistic to say that a decision of the Supreme Court is 'illegal and unconstitutional,' and to imply, thereby, that it can be overturned by some higher tribunal."[319] Only five days before the Manifesto appeared, Fulbright wrote a letter to a constituent where he adopted an even stronger stance on judicial supremacy. While agreeing that *Brown* was "wrong" and "untimely," Fulbright emphasized the lack of constitutional recourse and echoed Daniel's post-*Brown* statement in urging a forward-looking outlook.[320] "The great problem facing all of us in the South is no longer how to prevent the decision, but what to do about it now that we have it," Fulbright explained. "[U]nder our system of government the Supreme Court is specifically given the authority to interpret the Constitution, and no matter how wrong we think they are, there is no appeal from their decision unless you rebel as the South tried to do in 1860."[321] In May 1958, more than two years after signing the Manifesto, Fulbright continued to stress that the document had not formally contested the Court's authority to issue definitive constitutional interpretations. In an anguished letter responding to his sister—who had written Fulbright to chastise him for inaction during the Little Rock desegregation crisis—the Senator drew a sharp distinction between the Manifesto's approach toward law and that of Arkansas Governor Orval Faubus.[322] "You will recall that I joined other Southerners in expressing our disapproval of the Supreme Court's decision shortly after it occurred, but also in the same document, tacitly

319. J. William Fulbright, Statement of Fulbright to Southern Senators 2 (n.d.) (unpublished manuscript) (on file with the University of Arkansas Libraries, J. William Fulbright Papers [hereinafter Fulbright Papers]). Fulbright appears not to have circulated this draft statement.

320. Letter from Senator J. William Fulbright to Les Gibbs (Mar. 7, 1956) (on file with Fulbright Papers).

321. *Id.* Fulbright did proceed to modulate this seemingly absolute statement somewhat in writing that "there is, of course, the appeal to the public opinion of the whole nation for them to try to understand the problem, to be patient with it, and to permit the individual school districts to work it out in their own time." *Id.*

322. *See* Letter from Senator J. William Fulbright to Anne Teasdale (May 27, 1958) (on file with Fulbright Papers). Fulbright wrote that he continued to think that *Brown* was "very wrong," and contended that Judge Learned Hand's *The Bill of Rights* went "pretty far in supporting this position." *Id.* Fulbright and Hand, it seems worth noting, were correspondents. *See* Letter from Senator J. William Fulbright to Judge Learned Hand, U.S. Court of Appeals for the Second Circuit (Mar. 14, 1958) (on file with Fulbright Papers) ("As a representative of Arkansas, perhaps I feel more deeply on the subject than most of our citizens, but I am convinced that the Court must bear a large share of the responsibility for the tragic conditions which now engender deep bitterness among our people.").

acknowledged that it was the law of the land," Fulbright wrote. "We certainly did not recommend the kind of actions taken by the Governor of Arkansas."[323]

Daniel and Fulbright were eventually vindicated in their concern that calling a Supreme Court decision "unconstitutional" would subject them to ridicule. There can be no question here because, while they succeeded in excising that term (along with "illegal") from the final document, the Manifesto nevertheless received some criticism on precisely that ground.[324] This charge doubtless arose because the Manifesto, while eschewing the term "unconstitutional," did call *Brown* "contrary to the Constitution."[325] Whatever the basis for that extraordinarily fine distinction, it was one that eluded commentators at the time. Nevertheless, that some senators evidently viewed it as impossible for the Court to issue an "unconstitutional" decision indicates desire to avoid launching what they perceived as a frontal assault upon judicial authority.

Daniel and Fulbright were far from the only Manifesto signatories who thought that signing the document did not amount to a wholesale repudiation of judicial supremacy. In a race for a congressional seat representing Arlington, Virginia, for instance, Congressman Joel Broyhill addressed challengers who criticized his recent decision to sign the Manifesto.[326] "In no way does the manifesto imply that any signer is not a loyal supporter of the Constitution as the supreme law of the land," Broyhill contended. "Nor does it repudiate the Supreme Court as the proper body to interpret it. It says only that we feel the nine members erred in this case. They are human and can err like other humans."[327] Congressman Brooks Hays of Arkansas would also suggest that, even though he signed the Manifesto, he "never strayed from [his] settled conviction that the national government was pre-eminent and that the Supreme Court was the final judge of what the Constitution meant."[328]

Some readers will surely dismiss these acknowledgements of judicial supremacy as camouflaging the views of the Manifesto's most committed signatories. These statements, after all, come largely from politicians who were contemporaneously understood as articulating generally "moderate"

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323. Letter from Senator J. William Fulbright to Anne Teasdale, *supra* note 322. Governor Faubus baldly asserted that *Brown* was "not the law of the land." BARTLEY, *supra* note 33, at 273.

324. *See supra* text accompanying notes 292–294.

325. 102 CONG. REC. 4460 (1956).

326. One challenger even claimed that signing the Manifesto would violate the oath to support and defend the Constitution. *See Three Friendly Enemies*, WASH. POST, June 8, 1956, at 43.

327. Richard L. Lyons, *Broyhill Tells Why He Signed Manifesto*, WASH. POST, June 10, 1956, at B4.

328. HAYS, *supra* note 256, at 94.

views on racial segregation. All of the southern politicians quoted above, moreover, represented states on the South's periphery. Some may believe that those areas enjoyed greater flexibility in racial dynamics that would have enabled politicians to absorb the blow inflicted by *Brown*, without calling into question their underlying acquiescence to judicial authority. Conversely, politicians more vehemently opposed to desegregation, especially those from the Deep South, may have been expected to eliminate all willingness to recognize judicial authority in the racial arena after the Court's decision in *Brown*. Even in the 1950s, in other words, Arlington, Virginia, was in no danger of being confused for Senatobia, Mississippi.[329]

But even the southern politicians who supported the Manifesto with the greatest fervor also seemed to indicate that the Supreme Court's interpretations of the Constitution ultimately determined constitutional meaning. Predictably, *Brown*'s most hardline opponents shouted from neither the rooftops nor the Senate floor about the joys of submitting to judicial authority. Sometimes, hardliners even engaged in tough talk deriding the Court, its authority, or the Justices. Despite occasionally using pointed language, however, the Manifesto's most ardent backers frequently emphasized that they sought to influence what they acknowledged were the judiciary's controlling constitutional interpretations. They did not, in other words, typically attempt to issue authoritative constitutional interpretations in their own right.

A careful reading of Senator Thurmond's remarks from the Senate floor following the Manifesto's introduction suggested that he voiced acceptance of the judiciary's constitutional interpretations as decisive. Thurmond's statement, to be sure, contained some sharply critical and charged rhetoric. "I do not and cannot have regard for the nine Justices who rendered [*Brown*]," Thurmond stated. He further contended that "bow[ing] meekly to the decree of the Supreme Court" would constitute "the submission of cowardice."[330] Despite the intermittent usage of such language, Thurmond's floor statement accompanying the Manifesto indicated that he viewed the Manifesto as an effort to motivate the Court to reverse the constitutional interpretation it offered in *Brown*. "I respect the Court as an institution and as an instrument of Government created by the Constitution," he allowed.[331] Thurmond expressly contended that the tactics he advocated for achieving judicial reversal did not differ appreciably from those deployed by the opponents of *Plessy v. Ferguson*. "For more than half a century the propagandists and the agitators applied

329. *Cf.* V.O. KEY JR., SOUTHERN POLITICS IN STATE AND NATION 229 (1949) ("Northerners, provincials that they are, regard the South as one large Mississippi. Southerners, with their eye for distinction, place Mississippi in a class by itself.").

330. 102 CONG. REC. 4461 (statement of Sen. Strom Thurmond).

331. *Id.*

every pressure of which they were capable to bring about a reversal of the separate-but-equal doctrine," Thurmond said. "They were successful, but they now contend that the very methods they used are unfair. They want the South to accept the dictation of the Court without seeking recourse. We shall not do so."[332] As in the Manifesto's text, moreover, Thurmond repeatedly noted that, in seeking "to have the decision reversed," he would use only "lawful" means.[333]

Thurmond's floor statement should not be dismissed as a single isolated incident. In August 1955, Thurmond delivered an important precursor of this senate speech in an address to the Virginia State Bar Association, which also suggested that Thurmond accepted the Supreme Court as the Constitution's authoritative interpreter.[334] One such indication arose in the context of a mild but revealing joke. "A friend has written me suggesting, facetiously, that I should introduce a bill making all legislation by the Supreme Court subject to review by the Congress," Thurmond said. "I agree this would be just as constitutional as what the Court itself has done."[335] That Thurmond thought that it would be patently unconstitutional, even laughable, to have Congress review Supreme Court decisions serves only to underscore how prevalent notions of judicial supremacy were during the mid-1950s. Apart from the ultimate aim of achieving *Brown*'s outright reversal, Thurmond's address also urged segregationists to work within the existing legal doctrine to negate the decision's impact.[336] Thurmond explicitly advocated only lawful approaches in attempting to have *Brown* reversed: "If propaganda and psychological evidence are effective for our opponents, they can be effective for us."[337]

Senator Stennis articulated even stronger respect for judicial supremacy than Thurmond. Throughout his interview with *U.S. News & World Report* in November 1955, Stennis made clear that, while he opposed desegregated schools, he did not oppose the judiciary's ultimate authority to determine constitutional meaning. "I don't think a State can nullify the Supreme Court decision merely by 'passing a law,' but a State can and should enact laws which will enable a community to provide the type of schools desired by the overwhelming majority of its people," Stennis explained. "These laws are subject to review, of course, by the courts, but

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332. *Id.*

333. Thurmond used the term "lawful" no fewer than three times in his statement. *See id.* at 4461–62.

334. *See* Thurmond, *supra* note 235, at 30 (arguing that the Court usurped Congress's legislative power).

335. *Id.* at 31.

336. *See id.* at 32 (advocating the use of "every legal weapon at their disposal").

337. *Id.*

they represent the politics of the people."[338] Along similar lines, Stennis stated: "I don't intend to demean the Supreme Court, although I think their decision unwise and completely unsound."[339] Stennis's avowed respect for judicial authority even filtered down to inferior courts. Recall that on the heels of *Brown II*, he began his assessment of the district court judge's role in the desegregation process with an acknowledgment of judicial authority. "I'm not going to attempt to tell the trial judge what his rulings should be . . . ," Stennis explained.[340] While the remainder of Stennis's answer certainly provided district court judges with strong indications of what he thought the best reading of *Brown II* required, he in no way suggested that he rejected judicial supremacy.

Senator Ervin, who served along with Stennis on the Manifesto's revision committee, adopted an anti-integration strategy in the Manifesto's wake that broadly resembled the model espoused by Mississippi's junior Senator. While Ervin certainly pushed back against the idea that his oath of office required him to support all Supreme Court decisions,[341] he did not reject the judiciary's authority to issue decisive constitutional interpretations. Ervin instead combined anti-*Brown* rhetoric with an insistence that the decision could be defanged while working within the law.[342] Thus, Ervin simultaneously maintained that *Brown* was deplorable but also, as a practical matter, virtually meaningless in light of the implementation readings available to lower court judges. Again, rather than directly threatening to flout judicial decisions, Ervin resolved to shape them.

None of the foregoing should be misconstrued as suggesting that the Manifesto's drafters and signatories invariably steered clear of language that impugned the Court's constitutional authority. That claim, of course, could not be supported. What is true today was also true during the mid-1950s: politicians spoke to their various constituencies in various registers. That southern politicians sometimes challenged judicial authority is not in the least surprising. But it is genuinely stunning that, even in the Southern Manifesto's wake, frontal assaults on judicial supremacy did not constitute the dominant approach taken by southern senators and congressmen. Instead, southern senators and congressmen during the mid-1950s generally voiced surprisingly robust—if grudging—conceptions of judicial supremacy.

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338. *The Race Issue*, *supra* note 161, at 86, 88–89.

339. *Id.* at 90.

340. *Id.* at 86.

341. *See* Ervin, *supra* note 91, at 33 (questioning why the politicians' "oaths to support the Constitution compel them to accept what Chief Justice Warren and his associates said about the Fourteenth Amendment," but that "the oaths of Chief Justice Warren and his associates to support the Constitution permit them to reject what their judicial predecessors said on the same subject").

342. *Id.*

2. Executive.—President Eisenhower's response to the Manifesto also demonstrates that, well before the Court decided *Cooper*, strong notions of judicial supremacy extended to the Executive Branch. Indeed, Eisenhower consistently equated the Supreme Court's constitutional interpretations with the Constitution itself. At a press conference shortly after the Manifesto's release, Eisenhower noted that the southern politicians indicated they would rely upon only legal means to resist *Brown* and warned that abandoning that strategy would lead "to a very bad spot for the simple reason I am sworn to defend and uphold the Constitution of the United States and, of course, I can never abandon or refuse to carry out my own duty."[343] Eisenhower—prefiguring one of *Cooper*'s controversial rationales—thus understood his oath to support the Constitution as also requiring him to support the Supreme Court's interpretations of the Constitution. "[W]e are simply going to uphold the Constitution of the United States," Eisenhower said, "see[ing] that the progress made as ordered by [the Supreme Court] is carried out."[344] At Eisenhower's press conference one week later, he again contended that Supreme Court opinions constitute the fundamental word on the Constitution.[345] Revisiting a suggestion from the press corps that the Manifesto had counseled defiance of *Brown*, Eisenhower gestured toward the Supremacy Clause in responding that any such stance was constitutionally untenable. "I do not believe that anyone . . . used the words 'defy the Supreme Court,' because when . . . we carry this to the ultimate, remember that the Constitution, as interpreted by the Supreme Court, is our basic law," Eisenhower explained.[346]

Over the next year, Eisenhower continued to articulate strong notions of judicial supremacy, including in explaining his decision to dispatch federal troops to integrate Little Rock Central High School in September 1957.[347] Intriguingly, Eisenhower thought that such a decision would never become necessary because he seemed to believe that American citizens had so deeply internalized notions of judicial authority. Speaking only two months before he dispatched military forces to Arkansas, Eisenhower explained: "I can't imagine any set of circumstances that would ever induce me to send federal troops . . . into any area to enforce the orders of a Federal court, because I believe that common sense of America will never require

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343. *Transcript of Eisenhower News Conference on Foreign and Domestic Issues*, N.Y. TIMES, Mar. 15, 1956, at 16.

344. *Id.*

345. *Transcript of Eisenhower News Conference on Foreign and Domestic Issues*, *supra* note 209.

346. *Id.*; *see also Text of President Eisenhower's News Conference on Foreign and Domestic Affairs*, N.Y. TIMES, Sept. 6, 1956, at 10 ("[T]he Constitution is as the Supreme Court interprets it; and I must conform to that and do my very best to see that it is carried out in this country.").

347. *See Eisenhower Address on Little Rock Crisis*, N.Y. TIMES, Sept. 25, 1957, at 14.

it."[348] However common such common sense actually was, subsequent events would unmistakably demonstrate that these values were not uniformly embraced. Evincing absolutely no enthusiasm for what would eventually be called popular constitutionalism, Eisenhower conceived the rejection of judicial supremacy as an invitation to anarchy. "There must be respect for the Constitution—which means the Supreme Court's interpretation of the Constitution—or we shall have chaos," Eisenhower wrote in a letter during 1957.[349] "We cannot possibly imagine a successful form of government in which every individual citizen would have the right to interpret the Constitution according to his own convictions, beliefs and prejudices. Chaos would develop. This I believe with all my heart—and shall always act accordingly."[350] After dispatching the troops to Little Rock, Eisenhower's national address explained his decision in ways that resonated with judicial supremacy. "As you know, the Supreme Court of the United States has decided that separate public educational facilities for the races are inherently unequal and therefore compulsory school segregation laws are unconstitutional," Eisenhower explained. "Our personal opinions about the decision have no bearing on the matter of enforcement; the responsibility and authority of the Supreme Court to interpret the Constitution are very clear."[351]

Eisenhower was not alone in believing that his presidential responsibilities constitutionally required him to support federal judicial decisions. Like Eisenhower, Senator Lehman's floor statement about the Manifesto contended that the president's alleged responsibility to support Supreme Court opinions stemmed from his having taken the oath of office. "I ask [Eisenhower] only to execute the obligations of his office and to defend the Constitution, as interpreted by the Supreme Court," Lehman stated.[352] Similarly, Attorney General Herbert Brownell—perhaps the individual most responsible for informing Eisenhower's constitutional vision—frequently linked the notions of judicial supremacy and executive constitutional duty surrounding the school desegregation cases.[353] When Brownell wrote about the Manifesto in his memoir, for instance, he

348. *Transcript of the President's News Conference on Foreign and Domestic Affairs*, N.Y. TIMES, July 18, 1957, at 12.

349. Letter from President Dwight Eisenhower to Captain Hazlett (July 22, 1957), *in* DWIGHT D. EISENHOWER, THE WHITE HOUSE YEARS: WAGING PEACE, 1956–1961, at 157 (1965).

350. *Id.*

351. *Eisenhower Address on Little Rock Crisis*, *supra* note 347.

352. 102 CONG. REC. 4941 (1956) (statement of Sen. Herbert Lehman). Lehman contended that Eisenhower's responsibility stemmed from his obligation to "see that the laws are faithfully executed." *Id.* at 4939.

353. *See* HERBERT BROWNELL WITH JOHN P. BURKE, ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL 190–91 (1993) (detailing how Brownell often linked these notions in discussing *Brown* with Eisenhower).

explained that "for Eisenhower, his duty, first and foremost, was to see that the Constitution, and by implication the Supreme Court's interpretation of it, was upheld."[354]

B. Non-Electoral

1. Academics.—In response to the Manifesto, many law professors rose to defend the principle of judicial supremacy. Paul Freund, among the most esteemed Harvard Law School professors of his time, played a particularly active role in beating back the challenge to judicial supremacy that he perceived in the Manifesto. Writing two weeks after the Manifesto appeared, Freund contended that the document posed "not only a crisis in race relations but—what could in the long run be even more shattering—a crisis in the role of the Supreme Court as *the* authoritative voice of our highest law."[355] Later that year, Freund drafted a statement on behalf of 103 prominent members of the bar and legal scholars—including Charles Black and Eugene Rostow, both of Yale Law School—that repudiated the Manifesto and also offered an even stronger affirmation of judicial supremacy.[356] While some members of the group did not believe that *Brown* was correctly decided, they were nevertheless united in understanding the judiciary to hold ultimate authority for determining constitutional meaning.[357] Indeed, the group's statement almost perfectly anticipated the series of moves that the Justices would make two years later in *Cooper*, where they concluded that their own constitutional interpretations stood on equal footing with the Constitution. As in *Cooper*, Freund started the crucial passage by gesturing toward the Supremacy Clause. "The Constitution is our supreme law," Freund began. "In cases of disagreement we have established the judiciary to interpret the Constitution for us. The Supreme Court is the embodiment of judicial power," he continued.[358] In Freund's estimation, all of this meant: "The privilege of criticizing a decision of the Supreme Court carries with it a corresponding obligation—a duty to recognize the decision as the supreme law of the land as long as it remains in force."[359]

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354. *Id.* at 200.

355. Freund, *supra* note 10 (emphasis added).

356. *See Recent Attacks Upon the Supreme Court: A Statement by Members of the Bar*, *supra* note 202, at 1128–29; Morrey Dunie, *Stern Renunciation of Dixie Manifesto*, WASH. POST, Nov. 18, 1956, at E3 (stating that Freund drafted the document).

357. *See* Dunie, *supra* note 356 (noting that some signatories opposed *Brown*).

358. *Recent Attacks upon the Supreme Court: A Statement by Members of the Bar*, *supra* note 202.

359. *Id.* The statement also concluded that the Manifesto "foment[ed] disrespect for our highest law" and ought "to be repudiated by the legal profession and by every thoughtful citizen." *Id.*

Similarly, Yale's Alexander Bickel wrote an article in the *New Republic* embracing the notion that no legally significant difference separated the Court's constitutional interpretation from the Constitution itself. "The signers reaffirm their 'reliance on the Constitution as the fundamental law of the land'—a statement which in context is pregnant with the suggestion, tenable only academically or by force but not in law, that there exists a Constitution distinct from the one the Supreme Court expounds," Bickel wrote.[360] It was *Cooper*'s avowal of roughly this same idea that academics now often deride as the most excessive of *Cooper*'s many excesses.[361]

Academic expressions of judicial supremacy were not confined to those inhaling New England's rarefied air. Virginia's George Spicer also contended that the Manifesto's suggestion that *Brown* was at odds with the Constitution was simply delusional: "[T]o characterize the decision of the Supreme Court as unconstitutional is fantastically absurd. . . . The decision may be characterized as wrong, improper, or unwise, but under the American theory of constitutional law it may not be characterized as unconstitutional."[362] George Stumberg of Texas likewise derided such contentions as "unlawyer-like" and further criticized the Manifesto by linking judicial supremacy to constitutional law's foundational case.[363] "Every lawyer knows, or should know, that as long ago as 1803, in the case of *Marbury v. Madison*, the Supreme Court declared an act of Congress to be unconstitutional," Stumberg explained. "Its power to determine the constitutionality of state and federal law has long since become so thoroughly imbedded in our system of government that for it now to become otherwise, a constitutional amendment or a revolution would be necessary, neither of which is likely to occur."[364]

2. Journalists & Citizens.—The Manifesto also elicited several claims of judicial supremacy from journalists and ordinary citizens alike. Writing in the *New Republic* shortly before Bickel's article ran there, Gerald Johnson criticized the Manifesto for seeming to suggest that it was somehow possible for a Supreme Court opinion to be unconstitutional. "In

360. Bickel, *supra* note 10.

361. *See, e.g.*, Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1223–24 (2006) (noting that the "conventional view" stops short of *Cooper*'s claim "that when the Court decides a constitutional question, the decision effectively becomes the Constitution itself"); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1298 (2008) (contending that equating "decisions of the Supreme Court with the Constitution itself" presents an instance of "stunning wrongness").

362. George W. Spicer, *The Supreme Court and Racial Discrimination*, 11 VAND. L. REV. 821, 847 (1958).

363. George W. Stumberg, *The School Segregation Cases: Supporting the Opinion of the Supreme Court*, 42 A.B.A. J. 318, 318 (1956).

364. *Id.* (citation omitted).

this respect [the Manifesto] bears some resemblance to the famous bill introduced by a legislator of the last generation which provided that in the state of Missouri the value of *pi* should be 3, instead of the conventional, but inconvenient, 3.1416," Johnson wrote.[365] Syndicated columnist Roscoe Drummond expressed disapproval of the Manifesto's effort to "undermine the authority of the court as the ultimate adjudicator of the Constitution."[366]

Even outlets that adopted a somewhat more sympathetic view of the Manifesto nevertheless often acknowledged that judicial supremacy formed a major obstacle to undoing *Brown*. In an editorial called *Responsible Southerners Take over the Problem*, the *Baltimore Sun* allowed that "any hope of ultimate success" was doubtful. "It is all very well to talk about 'Supreme Court encroachment,' 'abuse of judicial power,' etc., etc.," the editorial noted, "but the fact remains that our system supplies no recourse after the court has made a clear-cut decision on a basic constitutional question, save the remote and almost impossible one of amending the document itself."[367]

Citizens without any apparent specialized legal training also joined the ranks of those articulating notions of judicial supremacy well before the Court's decision in *Cooper*. In a letter to Senator Fulbright written shortly after the Manifesto appeared, Anne Ferrante admonished: "The Southern Manifesto is a direct blow to the very core of our government—the Constitution."[368] Ferrante further suggested, in a move *Cooper* would echo, that Fulbright violated his oath of office by signing the document: "As citizens, we are all obligated to uphold the Constitution. As a legislator, you have sworn to do so. How can you repudiate the Constitution you have taken an oath to uphold?"[369] Writing in a letter to the *Montgomery Advertiser*'s editor, Juliette Morgan expressed a similar idea: "I believe the Constitution and the Supreme Court of the United States constitute the supreme law of the land."[370]

Just as southern elected officials sometimes engaged in hostile rhetoric about the Supreme Court without actually going so far as to reject judicial supremacy, this same dynamic also emerged among southerners who did not hold elective office. B.L. McCord, school superintendent of Clarendon County, South Carolina, captured these dueling sentiments in responding to how his district might negotiate the Court's desegregation decisions. "No nine men in these United States are going to dictate who our children are

365. Johnson, *supra* note 104.

366. Roscoe Drummond, *Change by Amendment*, CHATTANOOGA TIMES, Mar. 19, 1956, at 6.

367. *Responsible Southerners Take over the Problem*, BALT. SUN, Mar. 13, 1956, at 18.

368. Letter from Anne Ferrante to Senator J. William Fulbright (Mar. 15, 1956) (on file with Fulbright Papers).

369. *Id.*

370. ROWAN, *supra* note 112, at 122–23.

going to associate with, even if it comes to the place where we don't have public schools," McCord explained.[371] Vehement as this response is, though, it may not best be viewed as casting doubt on the Supreme Court's constitutional authority. Although he marched through many of the stock reasons that rendered school integration unwise in particularly animated fashion, McCord nevertheless made clear his intention to locate an innovative solution within the parameters established by the Court's constitutional interpretations: "We're going to study and work out some plan. Court didn't say how long we had, but it didn't implement the decree either."[372]

C. *Upshot*

It may be tempting to think that discovering the notion of judicial supremacy had already attained widespread acceptance before the Court decided *Cooper* is a point of exceedingly modest significance. After all, what really hinges on whether broad acceptance of judicial supremacy already existed in 1956, or whether it was something that did not emerge until shortly after 1958? In the grand scheme of constitutional law, this point might be dismissed as, at best, pedantic—and perhaps even petty. But, as it turns out, understanding that the widespread acceptance of judicial supremacy actually preceded *Cooper* is a point that yields substantial insight into ongoing scholarly debate.

The widespread and enthusiastic articulations of judicial supremacy before *Cooper* upset the account depicting the Justices as power-hungry scoundrels who arrogated constitutional authority unto themselves while the nation was preoccupied. The judicial power grab narrative certainly adds drama, as every good story needs a villain. But as with most monocausal explanations for complex phenomena, the judicial power grab makes for a better story than for a satisfying account of our current constitutional order. It seems odd that legal scholars who have advocated popular constitutionalism have not dedicated greater intellectual energy to identifying with precision how nonjudicial actors conceived of judicial supremacy during the 1950s. For law professors who bemoan what they regard as an obsession with courts, the *Cooper*-driven explanation of judicial supremacy appears awfully judge-centric.

It seems deeply improbable that popular constitutionalists will be cheered to know that many Americans articulated robust notions of judicial supremacy even before the Court formally did so. On a superficial reading, popular constitutionalists may appear to draw solace from the fact that the Court did not act unilaterally and simply usurp judicial supremacy. This

371. Julian Scheer, *The White Folks Fight Back*, NEW REPUBLIC, Oct. 31, 1955, at 9, 10.
372. *Id.*

pre-*Cooper* history could at least theoretically be welcomed by popular constitutionalists because it would mean that the Court was not the behemoth that they sometimes seem to fear. But on another, perhaps more plausible, reading of popular constitutionalist sympathies, the discussions that the Manifesto elicited could be viewed as the unkindest cut of all. The broad embrace of judicial supremacy would mean that elected officials and at least some of their constituents agreed that the Supreme Court should have the final word in determining constitutional meaning—and that is, of course, precisely what popular constitutionalists oppose. If "the people" in some meaningful sense acceded to judicial supremacy before the Court articulated that notion, that assent may place popular constitutionalists in the uncomfortable position of saying the people simply do not know what they want.

IV. Implications

When observers have attempted to assess the Southern Manifesto's ongoing significance, they have generally concluded that the document has no substantial relevance to the modern world. The southern politicians who shaped and signed the Manifesto might, on this telling, be viewed roughly as reenacting the fate of their nineteenth-century forbearers. Like the southerners who fought to defend slavery during the 1860s, the battle to preserve racial segregation should be understood as the twentieth century's lost cause.[373] Eisenhower Attorney General Herbert Brownell has argued that signs of the Manifesto's demise appeared as early as 1957: "I can only conclude that Eisenhower's decisive action at Little Rock crushed the forces behind the Southern Manifesto. Eventual Federal enforcement of the *Brown* case was assured."[374] Scholars have shared this general assessment, even if they would date the Manifesto's death a few years later. In 1973, less than twenty years after the Manifesto appeared, Francis Wilhoit contended that the document had already been proven a massive failure:

> How well did the Manifesto realize the framers' goals? An honest answer would have to be not very well. Certainly it provided a boost to the morale of the South's segregationists, and on the surface it seemed to endow southern resistance with a new legitimacy and aura of respectability. Yet these gains were ephemeral, for in the long run the Manifesto simply did not achieve the decisive or dramatic impact its creators envisioned. Most important, it did not succeed in either

373. *See* KRUSE, *supra* note 16, at 6 (complicating the notion that the battle to maintain segregation presented another "lost cause").

374. Herbert Brownell, *Eisenhower's Civil Rights Program: A Personal Assessment*, 21 PRESIDENTIAL STUD. Q. 235, 242 (1991).

> repealing or discrediting [*Brown*], nor did it seriously retard the slow march of tokenism.[375]

Since Wilhoit wrote that assessment, the intervening four decades would seem only to reinforce its conclusions. As has often been remarked, after all, anyone who now claims to be even remotely within mainstream legal thought agrees that the Court correctly decided *Brown*.[376] On this view, an extended analysis of the Manifesto—which at its heart denounces an opinion that has become almost universally celebrated—may seem to hold some interest for antiquarians, but to merit attention from few others.

In an important sense, commentators are correct to contend that the nation the Manifesto aimed to preserve has changed in meaningful ways. The Manifesto's drafters did not succeed in their attempt to maintain state-sponsored Jim Crow, and it would be foolish to assert otherwise. This change, moreover, should not be dismissed as merely superficial, but instead should be understood as representing a profound racial transformation. Despite this transformation, it would be severely mistaken to believe that the Manifesto and its drafters' views are utterly disconnected from current conditions. Asserting that the forces behind the document were "crushed," and that any victories they achieved were "ephemeral," impedes appreciating how the views articulated by the Manifesto's drafters continue to have modern resonance.

A. Equal Protection

Although the drafters' foremost goal of absolutely preventing racial desegregation in public schools went unrealized, it may be more accurate to view their loss on that score in terms partial rather than total. The Manifesto's text certainly expressed strong opposition to *Brown*. But southern politicians quickly realized that the meaning of that decision—and the Court's implementation decree in *Brown II*—still provided ample room to maneuver in order to prevent the widespread integration of public schools. Even well after Congress gave *Brown* some sorely needed teeth by threatening to deny public school funding in 1964,[377] southern communities continued to implement various strategies proposed by Manifesto backers during the 1950s that yielded extremely modest amounts of racial integration in school classrooms. With methods ranging from tracking

375. WILHOIT, *supra* note 216, at 54.

376. *See, e.g.*, Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374 (1990) (noting that "[n]o constitutional theory that implies that *Brown* . . . was decided incorrectly will receive a fair hearing nowadays").

377. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 47 (2d ed. 2008).

students by perceived ability,[378] to segregating public schools by sex,[379] to creating white-only private schools widely called "segregation academies,"[380] southern localities repeatedly availed themselves of the anti-integration tactics prominently advanced by Manifesto supporters. If the Court's opinion in *Brown* was a lemon, desegregation opponents deftly refocused their attention on producing legal lemonade.

Perhaps more significant than any particular anti-integration tactic, though, was the way that Manifesto backers succeeded in their larger effort to control the meaning of *Brown*. While the Manifesto was rhetorically positioned as opposing the Court's decision, southern politicians in other contexts had already begun to argue in the alternative. Even though *Brown* was unwarranted, they contended, it should not be misconstrued as the dreaded decision that compelled racial integration.[381] This alternative argument may have debuted as an understudy, but over time it assumed a starring role. Manifesto supporters, as early as 1955, had laid the groundwork for adopting a curtailed conception of *Brown*, one that stopped well short of requiring government actors to facilitate racial integration. After it became clear that reversing *Brown* was highly implausible, southern segregationists shifted their emphasis from opposing the decision to defanging it.[382] Manifesto drafters eventually insisted that the proper understanding of *Brown* not only did not require localities to take affirmative steps to integrate schools, but actually forbade such efforts—if those underlying efforts involved racial classifications. Although southern politicians came to view this feeble conception of *Brown*'s reformatory power as clashing with Supreme Court doctrine, their view would ultimately prevail. Thus, far from comprising losers' history, the intellectual milieu that produced the Manifesto contained the origins of modern equal protection doctrine.

The trajectory of southern segregationists' attitudes toward *Brown* can be traced by examining the evolving approach of Senator Ervin, who sat on

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378. *See, e.g.*, Martha Minow, *Surprising Legacies of* Brown v. Board, 16 WASH. U. J.L. & POL'Y 11, 25 (2004) (noting that in *Hobson v. Hansen*, 269 F. Supp. 401 (D.C. Cir. 1967), the D.C. Circuit revealed "how any one school can use tracking to segregate internally by race").

379. *See, e.g.*, Moore v. Tangipahoa Parish Sch. Bd., 304 F. Supp. 244, 249 (E.D. La. 1969) ("Plaintiffs contend that this proposal is racially motivated, and point out that separate education on the basis of sex was not considered until the schools were ordered to desegregate."). *See generally* Comment, *The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. CHI. L. REV. 296 (1970).

380. *See* SOKOL, *supra* note 16, at 171 (discussing segregation academies).

381. *See supra* notes 246–248 and accompanying text.

382. *Cf.* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 946–54 (1989).

the Manifesto's revising committee.[383] After initially claiming that *Brown* was both "deplorable" and "not as drastic as many people think,"[384] Ervin eased away from the first part of that formulation, leaving only the second. In August 1963, Ervin made a concerted effort to limit *Brown*'s reach during hearings about the Kennedy administration's civil rights bill held by the Senate Commerce Committee. Rather than railing against *Brown* during his questioning of Attorney General Robert Kennedy, Ervin instead heaped scorn on "educators who want racially balanced schools," and posed the following loaded question:

> Do you not agree with me that denying a school child the right to attend his neighborhood school and transferring him by bus or otherwise to another community for the purpose of racially mixing the school in that other community is a violation of the Fourteenth Amendment as interpreted by the Supreme Court in Brown versus Board of Education?[385]

Kennedy responded that he did not quite understand the question and, according to one reporter in attendance, "twisted a bit in his chair" as Ervin repeated the precisely worded query.[386] "You could make an argument along those lines," Kennedy weakly and noncommittally responded.[387] "I don't see how you can disagree with me," Ervin replied with a grin.[388]

By the time that his autobiography *Preserving the Constitution* appeared in 1984, Ervin was prepared to acknowledge that he had changed his mind about *Brown*: He now agreed, exactly three decades after the Court issued the opinion, that it had been correctly decided in the first instance. After "[t]he high tide of opposition" embodied by the Manifesto had receded, Ervin explained, he "gave priority of study and thought to the Constitution in general, the three Civil War Amendments and their history in particular, and relevant Supreme Court decisions."[389] As a result of his constitutional immersion, Ervin "gradually became inseparably wedded to certain abiding convictions" and concluded: "The Constitution is . . . color-blind as the first Justice John Marshall Harlan maintained in his dissent in *Plessy v. Ferguson*, and requires the States to ignore the race of school children in assigning them to their public schools."[390]

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383. For an extremely insightful examination of Senator Ervin's evolution with respect to *Brown* that has shaped my assessment, see KARL E. CAMPBELL, SENATOR SAM ERVIN, LAST OF THE FOUNDING FATHERS 158–60 (2007).

384. Kernodle, *supra* note 246.

385. James E. Clayton, *Sam and Bob Show Enters Fourth Week*, WASH. POST, Aug. 9, 1963, at A4.

386. *Id.*

387. *Id.*

388. *Id.*

389. SAM J. ERVIN, JR., PRESERVING THE CONSTITUTION 145–46 (1984).

390. *Id.*

Ervin's account of events on the road to Damascus did not appear, however, to transform his bottom-line views of what *Brown* actually required of school districts. Where Ervin advocated "voluntary segregation" when the Manifesto appeared in 1956,[391] he advocated "freedom of choice" plans nearly three decades later: "There is, I submit, no more effective way for a state to ignore race in determining what schools their children attend than by establishing 'freedom of choice' plans which extend to all children of all races equal rights to attend the schools of their choice."[392] Ervin also continued to insist that pro-integration forces misconstrued *Brown*: "'Freedom of choice' plans are nevertheless anathema to compulsory integrationists and activist Supreme Court Justices because they know that free school children may not exercise their freedoms in ways pleasing to them."[393] Ervin complained that while he now embraced the true colorblind vision of *Brown*, the Court had illegitimately disowned that vision in decisions dating back to the 1960s. In Ervin's estimation, the Court had taken a wrong turn in several leading cases—*Green v. County School Board of New Kent*,[394] *Swann v. Charlotte-Mecklenburg Board of Education*,[395] and *Keyes v. School District No. 1*[396]—because those opinions "decreed that the Constitution is color conscious, and sanctions the use of race to bestow special privileges on members of racial minorities and to deprive other Americans of fundamental rights to make such special privileges effective."[397] Thus, according to Ervin, "[n]otwithstanding the lip service they pay" to *Brown*, the Justices "actually repudiate" that opinion.[398] Indeed, by "compel[ling] the States to make race the major consideration in assigning children to their schools and to mix children in their schools in racial proportions pleasing to them," Ervin contended that the Court had succeeded in "rob[bing] the States of the power to assign children to their schools on a non-racial basis as required by the equal protection clause."[399]

Although the Supreme Court long avoided this understanding of *Brown*, Ervin's vision found voice in the Court's decision seven years ago in *Parents Involved in Community Schools v. Seattle School District No. 1*.[400] In that case, the Court invalidated plans that local school districts had voluntarily enacted in order to achieve greater amounts of racial

391. Ervin, *supra* note 91.
392. ERVIN, *supra* note 389, at 148.
393. *Id.*
394. 391 U.S. 430 (1968).
395. 402 U.S. 1 (1971).
396. 413 U.S. 189 (1973).
397. ERVIN, *supra* note 389, at 146–47.
398. *Id.* at 179.
399. *Id.*
400. 551 U.S. 701 (2007).

integration because those plans realized their goal by using racial classifications. Like Ervin, the Court derided these voluntary plans as efforts to achieve mere racial balancing.[401] Writing for a plurality, moreover, Chief Justice Roberts sounded like Ervin when he asserted that invalidating these integration plans represented a vindication of *Brown*. "Before *Brown*, school children were told where they could and could not go to school based on the color of their skin," Roberts wrote.[402] And that old evil, Roberts concluded, found uncomfortable echoes in these new plans: "[W]hen it comes to using race to assign children to schools, history will be heard."[403] That line has already drawn substantial scholarly criticism.[404] Critics have contended that Roberts's opinion offered a severely decontextualized understanding of *Brown* and virtually ignored the caste system that the decision challenged. Viewed through that prism, this criticism surely hits the mark. In an important sense, though, Roberts was correct in contending that his opinion articulated the views of the *Brown* era. But rather than embracing the views of those who initially proposed *Brown*, Roberts's opinion may more closely resemble the views of those who initially opposed it.[405]

B. Federalism & Autonomy

The Southern Manifesto is almost invariably examined as a document involving only racial considerations. That focus, while understandable, has blinded scholars to the document's other significant implications for the modern legal world, as the Manifesto intervened in foundational debates that had long been smoldering and that even today remain intensely contentious. In order to appreciate the Manifesto's nonracial implications, it is necessary to analyze the legal vision that southern segregationists *advanced* rather than the legal vision that they *rejected*. Admittedly, segregationist politicians themselves sometimes appeared to prioritize the condition that they opposed (which was, at bottom, racial equality) above the ideals they aimed to defend—a characteristic evident in Senator Byrd's decision in 1956 to label the segregationist cause "massive *resistance*."[406] Nevertheless, segregationist politicians also articulated an affirmative view

401. *See id.* at 716, 722–23 (noting that "effort[s] to achieve racial balance" are impermissible).

402. *Id.* at 747 (plurality opinion).

403. *Id.* at 746.

404. *See, e.g.*, Pamela S. Karlan, Lecture, *What Can* Brown® *Do For You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1068–69 (2009) (criticizing Roberts's line as "wrench[ing] *Brown* free of its original context").

405. For insightful accounts of how the judiciary came to limit *Brown*'s reach, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004); Strauss, *supra* note 382.

406. PELTASON, *supra* note 206, at 208 (emphasis added) (internal quotation marks omitted).

of the world, and they sometimes even explicitly objected to being characterized only in terms of their negative views. Congressman Brooks Hays, a Manifesto signatory, made this very point before a congressional committee weighing the creation of a national commission to counter employment discrimination in 1950. "I know that emphasis is often given to things we oppose," Hays said.[407] "I would prefer that emphasis be given to things I favor. It is inevitable in any issue as controversial as this that the negative attitude will receive the high lights, but I would much prefer that the committee remember the things I favor rather than the things I object to."[408] In remembering those ideas that southern segregationists favored, it becomes possible to identify the Manifesto's modern resonances.

In this vein, the Southern Manifesto is framed, above all, as a defense of three related rights that it portrays *Brown* as violating. First, the Manifesto urged that *Brown* infringed upon the liberty of individuals to direct the education and upbringing of their children.[409] Second, it warned about the dangers of an all-powerful federal government that conceives of no sphere as beyond its reach.[410] Third, the document defended the state government and local government as the appropriate levels for making important determinations.[411]

Manifesto supporters repeatedly struck these three legal themes—individual liberty, wariness of the national government, and federalism—in the period surrounding the document's debut and well afterward. Regarding the liberty theme, when Senator Lister Hill of Alabama explained his decision to sign the Manifesto to a disapproving constituent, he claimed that he "acted to protect two fundamental rights: to choose one's associates and to determine the educational destinies of one's children."[412] Senator Ervin similarly complained after the Manifesto's release that, with racial desegregation, southerners "would be forced to associate by legal formula rather than by personal preference."[413] The aversion to federal authority and the embrace of subfederal government were, not surprisingly,

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407. HAYS, *supra* note 256, at 53; *see also* KRUSE, *supra* note 16, at 9 (contending that "like all people, [segregationists] did not think of themselves in terms of what they opposed but rather in terms of what they supported").

408. HAYS, *supra* note 256, at 53.

409. *See* 102 CONG. REC. 4460 (1956) (claiming "parents should not be deprived by Government of the right to direct the lives and education of their own children").

410. *See id.* (warning that "no man or group of men can be safely entrusted with unlimited power" and extolling "the dual system of government which has enabled us to achieve our greatness").

411. *See id.* (defending the ability of subfederal governments to "exercis[e] their rights as States through the constitutional processes of local self-government" and criticizing "encroach[ment] upon the reserved rights of the States").

412. VIRGINIA VAN DER VEER HAMILTON, LISTER HILL: STATESMAN FROM THE SOUTH 213, 214 & n.7 (1987) (citing Letter from Senator Lister Hill to Jo Richardson (Mar. 19, 1956)).

413. Ervin, *supra* note 91.

constant companions, as they formed opposite sides of the same coin. Thus, Senator Stennis criticized *Brown* in 1955 because the decision brought the federal government into a realm "that [was] entirely new."[414] And the consequences of the federal government's latest venture were, in Stennis's view, staggering; the Court's logic allowed it "to destroy the last vestige of the powers expressly reserved to the States by the Constitution. This includes the States' powers of local taxation, States' powers as to health and morals, the States' power to classify teachers and pupils, as well as the States' general police power."[415]

Drafters of the Manifesto continued to draw upon these three legal arguments well after the immediate post-*Brown* era had closed. In 1973, when bussing to achieve racial integration was a hot-button issue, Senator Ervin touched upon all three items in rapid succession:

> [W]e will not fool history as we fool ourselves when we steal freedom from one man to confer it on another. When freedom for one citizen is diminished it is in the end diminished for all. Nor can we preserve liberty by making one branch of Government its protector, for, though defense of liberty be the purpose, the perversion of it will be the effect. The whole fabric of our Constitution—the Federal system and the separation of powers doctrine—is designed to protect us against such centralization; but even the language and lessons of the Constitution cannot stop a people who are hell-bent on twisting the document to the will of a temporary majority.[416]

By the end of the 1970s, of course, such arguments could be heard across the nation, as opponents of court-ordered bussing denounced the practice in venues that extended beyond the southern states.[417]

Quite apart from the context of racial integration in public schools, these legal arguments continue to resonate powerfully with many Americans today. Indeed, two notable movements that have flourished during the Obama presidency were based in large part upon appealing to individual autonomy and a limited role for the federal government. The Tea Party has in a short period of time obtained a remarkable amount of success with its libertarian-inspired emphasis on reducing individuals' tax rates and reducing governmental expenditures.[418] Similarly, the nearly

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414. *The Race Issue*, *supra* note 161, at 90.

415. *Id.*

416. James M. Naughton, *Constitutional Ervin*, N.Y. TIMES, May 13, 1973, at 13 (internal quotation marks omitted).

417. *See, e.g.*, J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES 244 (1985) (chronicling examples of antibussing activities in Boston).

418. *See* Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons from the Tea Party*, 88 DENV. U. L. REV. 523, 531–33 (2011) (analyzing the Tea Party's rise).

successful opposition to the Affordable Care Act's individual mandate in *National Federation of Independent Business v. Sebelius*[419] centered upon the notion that permitting the legislation to stand would authorize the federal government to require its citizens to do anything that it wished.[420]

To be clear: The claim here is not that the Manifesto's drafters somehow invented the legal arguments that Tea Party members and opponents of the Affordable Care Act's individual mandate recently articulated. Each of these issues, of course, enjoys a life that extends back well before the Manifesto was ever conceived. Nor is the claim that recent articulations of these themes draw inspiration either consciously or subconsciously from the Manifesto. Very few people have even heard of the document. I do contend, however, that the continuing salience of these arguments in our contemporary legal culture heightens the need to understand how these arguments have been deployed throughout American history. And few eras can claim a greater need for legal scholars to explore these fields of legal argumentation than the post-*Brown* era.

C. *Adherence to Judicial Authority*

Perhaps the Manifesto's most significant modern implication is the indirect and unintended role that it has played in solidifying the belief that acquiescence to judicial authority forms a fundamental tenet of American civil religion.[421] Notions of judicial supremacy, as I demonstrated in Part III, were already flourishing when the Manifesto appeared. But in the wake of the Manifesto, as the nation witnessed several high-profile standoffs over the integration of educational institutions, these norms became even more deeply ingrained. Those standoffs provided up-close portraits of individuals who rejected the idea that courts played a decisive role in constitutional interpretation. Many Americans, in turn, found these portraits nothing less than repulsive.[422] And Americans who learned about these events in civics textbooks would find such images all the more

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419. 132 S. Ct. 2566 (2012).

420. *Id.* at 2643 (Scalia, J., dissenting). During oral argument in *National Federation of Independent Business v. Sebelius*, Justice Scalia asked the Solicitor General whether the government could force people to buy broccoli. Transcript of Oral Argument on March 27, 2012 at 13, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566 (No. 11-398), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf. Relatedly, Justice Alito wondered why healthy young people should be forced to subsidize unhealthy older people. *Id.* at 7–8.

421. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 9–12 (1988) (exploring the Constitution's role in American civil religion).

422. Michael Klarman has emphasized how media images of southern resistance played an important role in catalyzing northerners to support integration with greater fervor. *See* KLARMAN, *supra* note 15, at 385 ("It was the brutality of southern whites resisting desegregation that ultimately rallied national opinion behind the enforcement of *Brown* and the enactment of civil rights legislation."). I contend that these images shaped American attitudes not only toward race, but also toward the rule of law more generally.

repulsive in later years.[423] Thus, just as *Brown* obtained canonical status within the legal profession and beyond, the images of individuals who blocked the path of black students seeking to enter white schools have conversely become embedded within law's anticanon.[424]

These profiles in judicial defiance now form a synecdoche for the entire segregationist movement that resisted racial desegregation, even though segregationists approached law in a variety of different ways. Where the Manifesto counseled working within legal constraints to resist integration, some elected officials adopted tactics far less solicitous of judicial authority. Perhaps most famously, during the Little Rock Central High School desegregation controversy, Arkansas Governor Orval Faubus made the unadorned statement: "[T]he Supreme Court decision is not the law of the land."[425] But such distinctions among the varied approaches to maintaining segregation have become blurred. Indeed, the Manifesto is now widely viewed as having called for the formation of segregationist mobs.[426]

In 1990, Robert Bork, a former professor at Yale Law School, vividly demonstrated how the American legal imagination has effectively mashed together the Manifesto with Little Rock's unruly scenes into a single, largely undifferentiated mass of segregationist sentiment:

> Those of us of a certain age remember the intense, indeed hysterical, opposition that *Brown* aroused in parts of the South. Most Southern politicians felt obliged to denounce it, to insist that the South would continue segregation in defiance of any number of Supreme Court rulings. We remember the television pictures of adult whites screaming obscenities at properly dressed black children arriving to attend school. We remember that at one point President Eisenhower had to send in airborne troops to guarantee compliance with the Court's rulings.[427]

Similarly, in 1964, Anthony Lewis asserted a strong link between the Manifesto and mob violence: "The first phase of the South's response to the

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423. *See* DAVID HALBERSTAM, THE FIFTIES 667 (1993) (describing the "indelible images" of white southerners with "pure hatred contorting their faces, as they assaulted nine young black students who dared to integrate Little Rock Central High"); David A. Strauss, *Little Rock and the Legacy of* Brown, 52 ST. LOUIS U. L.J. 1065, 1082 (2008) ("The televised images of frenzied crowds of white adults abusing black schoolchildren were very dramatic.").

424. *See* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–19 (1998); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 386–87 (2011); Richard A. Primus, Essay, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998).

425. BARTLEY, *supra* note 33, at 273.

426. *See supra* notes 23–32 and accompanying text.

427. ROBERT H. BORK, THE TEMPTING OF AMERICA 76–77 (1990).

School decision ended in 1956 with statesmen sowing the wind of defiance. The next year, at Little Rock, they reaped the whirlwind."[428]

If *Brown* represents the Supreme Court's finest hour,[429] the rowdy mobs in Little Rock—and many other cities in subsequent years—represent something like the converse: the lowliest moments brought about by blatant disrespect for judicial authority. To the extent that citizens today are inclined to express vehement disagreement with judicial decisions after they are initially issued, it would not be surprising if they often muted their reactions in order to avoid resembling the widely reviled opponents of racial integration during the post-*Brown* era—not only in their own eyes, but also in the eyes of others. Thus, these two strongly held principles—an aversion to white supremacy and an adherence to judicial supremacy—have become fused in the minds of many Americans.

Popular constitutionalists may underestimate how these events influence American legal understandings, as they routinely criticize what they regard as citizens' overly acquiescent approach toward judicial supremacy. In the declinist narrative that popular constitutionalists identify as marring twentieth-century legal history, the nadir arrives with the Supreme Court's opinion in *Bush v. Gore*[430] in 2000. Popular constitutionalists have criticized that decision not so much for the outcome, but for the broader legal culture that enabled the electoral dispute to find its way into a courthouse in the first instance. It never would have dawned on Americans of an earlier era, Kramer has contended, to permit the judiciary to resolve a deadlocked presidential election—an event that occurred in the 1876 contest between Rutherford Hayes and Samuel Tilden. "[Nineteenth century Americans] surely would have done something: something other than submissively yield while explaining that to challenge the Court would look unpatriotic," Kramer wrote. "Which is why, of course, no one at the time of this earlier election—on or off the Court—ever dreamed of trying to resolve it in litigation."[431]

Kramer's reproach of "submissive[ness]" to judicial authority in the name of patriotism is, of course, a thinly disguised dig at Vice President Al Gore. After the Court issued the opinion effectively awarding the presidency to George W. Bush, Gore's concession speech repeatedly appealed to national pride in urging his supporters to accept the decision. "I know that many of my supporters are disappointed," Gore said. "I am too.

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428. LEWIS, *supra* note 95.

429. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 867 (2007) (Breyer, J., dissenting) (calling *Brown* the Supreme Court's "finest hour"). For an earlier articulation of this view, see JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL 330 (1994).

430. 531 U.S. 98 (2000).

431. KRAMER, *supra* note 264, at 231.

But our disappointment must be overcome by our love of country."[432] Gore elaborated: "Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court's decision, I accept it. . . . This is America. Just as we fight hard when the stakes are high, we close ranks and come together when the contest is done."[433]

Whatever one makes of those sentiments as matters of either legal theory or political oratory, their substance should not have been greeted as any great surprise. In December 1999, during his campaign for the Democratic presidential nomination, Al Gore told New Hampshire voters that his father "was a man of great courage" because he was "one of only two senators in the whole South who refused to sign the Southern Manifesto."[434] Gore can thus be viewed as having gestured toward the acquiescent approach to judicial authority that he would fully articulate one year later.[435] It is popular constitutionalism's penchant for overlooking or minimizing the Manifesto that allows Gore's "submissive" approach to judicial supremacy to be regarded as puzzling.

This lesson, though, extends well beyond Al Gore and even beyond the extraordinary decision that bears his name. For many Americans, the disorder in Little Rock during the 1950s encapsulates what the nation could look like if citizens rejected judicial supremacy. And it does not make for a pretty picture. If popular constitutionalists want their movement to gain steam, they need to acknowledge more forthrightly that many Americans identify the resistance to judicial supremacy primarily with segregationists during the post-*Brown* era. Pining for the good old days of "defiance" of judicial authority may be unlikely, in all events, to convince many liberals to adopt the popular constitutionalist cause.[436] That cause enjoys a lower likelihood of success still if it fails to provide some explanation for how defying judicial decisions would not render its adherents the rightful heirs of Orval Faubus's legacy. That is an awfully heavy and awkward burden to bear. Either ignoring this conspicuous issue or treating it with disregard, however, will not succeed in making it disappear.

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432. *In His Remarks, Gore Says He Will Help Bush 'Bring America Together,'* N.Y. TIMES, Dec. 14, 2000, at A26.

433. *Id.*

434. *At a Meeting with Voters, Gore Talks About His Plans, His Family and Himself*, N.Y. TIMES, Dec. 2, 1999, at A28.

435. My colleague Sandy Levinson ventured a guess on this front that may have proved accurate. *See* Sanford Levinson, Bush v. Gore *and the French Revolution: A Tentative List of Some Early Lessons*, LAW & CONTEMP. PROBS., Spring 2002, at 7, 26 n.86 ("It would surely not be surprising if the younger Gore had been strongly socialized during his childhood years to accept the supremacy of the Supreme Court with regard to constitutional meaning.").

436. *See* KRAMER, *supra* note 264 (lamenting that "sometime in the 1960s, these incidents of noncompliance [with judicial decisions] evolved into forms of protest rather than claims of [constitutional] interpretive superiority" and that "[o]utright defiance, in the guise of denying that Supreme Court decisions define constitutional law, seemed largely to disappear").

Conclusion

In 1956, when Ralph Ellison was in Rome on a writing fellowship, he received a letter from a childhood friend soliciting his reactions to the recently issued Southern Manifesto. "Are you keeping up with what's happening here at home?" the friend inquired. "Have you read about those cracker senators cussing out the Supreme Court and all that mess? Let me hear what a home-boy done gone intellectual thinks . . . . Tell a man how it is."[437] Ellison responded to the letter, and then attempted to set out his thoughts about the Manifesto in an essay for a general audience. That initial effort proved, in Ellison's own estimation, a failure.[438] As Ellison would eventually explain:

> [F]or me it was by no means a simple task to "tell it like it is"—even when the subject was desegregation and the Southern Congressmen's defiance of the Supreme Court. I was outraged and angered by the event, but the anger was not isolated or shallowly focused, rather it suffused my most non-political preoccupations. More unsettling, I discovered that there lay deeply within me a great deal of the horror generated by the Civil War and the tragic incident which marked the reversal of the North's "victory," and which foreshadowed the tenor of the ninety years to follow.[439]

Despite the powerful emotions that the Manifesto elicited and the feelings of failure that the essay generated, Ellison could not completely set the matter aside. In 1965, nearly a decade after Walter George's recitation on the Senate floor, Ellison again attempted to write an article that addressed the Manifesto. The passage of time and the attendant racial changes, Ellison intimated, had inspired him to take another crack. "Since I attempted the essay, some nine years ago now, the power of the Southern Congressmen has been broken and the reconstruction of the South is once more under way," Ellison wrote.[440] Whatever the veracity of that rosy assessment, though, Ellison found that the old agonies remained. "[T]he psychic forces with which I tried to deal . . . are still there," he explained.[441] Unlike Ellison's first attempt, his second effort resulted in publication, as the piece ran in the *Nation*'s centennial issue. But the published piece amounted to little more than recorded fragments of Ellison's dreams, and the author also adjudged his latest literary effort a failure. "So I confess defeat," he wrote, "it is too complex for me to 'tell it like it is.'"[442]

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437. Ralph Ellison, *"Tell It Like It Is, Baby,"* NATION, Sept. 20, 1965, at 129.
438. *See id.* (noting "the essay failed").
439. *Id.*
440. *Id.*
441. *Id.* at 129–30.
442. *Id.* at 136.

Ellison was quite correct to sense that the Manifesto raised profound questions about American society. In no domain are those questions of greater urgency, moreover, than in the legal domain. Regrettably, law professors today demonstrate none of Ellison's fascination with the document and its deeper meaning. Indeed, law professors have overwhelmingly turned a blind eye to the Manifesto. Worse still, when legal scholars have not altogether ignored it, they have severely distorted our understanding by recycling a mass of misconceptions about the document, its signatories, and their tactics. A sustained examination of the Manifesto is long overdue not only to correct these misperceptions, but also because focusing upon the Manifesto serves to recast two longstanding and high-profile scholarly discussions involving the legal quest for racial equality and the origins of judicial authority over constitutional interpretation. More importantly, the Manifesto highlights better than any other single document how these two scholarly discussions about white supremacy and judicial supremacy should no longer be permitted to unfold in utter isolation from each other. Rather than running along parallel tracks, the Manifesto reveals how the intersections of these two supremacies inform contemporary attitudes toward law.

The Southern Manifesto was produced by men who held views about racial equality that many people today regard as loathsome. That loathing, however, must no longer be allowed to prevent legal scholars from seriously analyzing this pivotal document, the historical moment that it represents, and its continuing relevance. The refusal of legal scholars to confront the Manifesto invites the perhaps comforting, but certainly mistaken, notion that the document comes from a distant world that has no connection to our own. The Southern Manifesto is quite simply too significant to be deemed beneath scholarly scrutiny. It is well past time for anger, in other words, to give way to analysis.

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The Lost World of Administrative Law

Daniel A. Farber* & Anne Joseph O'Connell**

The reality of the modern administrative state diverges considerably from the series of assumptions underlying the Administrative Procedure Act (APA) and classic judicial decisions that followed the APA reviewing agency actions. Those assumptions call for statutory directives to be implemented by one agency led by Senate-confirmed presidential appointees with decision-making authority. The implementation (in the form of a discrete action) is presumed to be through statutorily mandated procedures and criteria, with judicial review to determine whether the reasons given by the agency at the time of its action match the delegated directions. This is the lost world of administrative law, though it is what students largely still learn.

Today, there are often statutory and executive directives to be implemented by multiple agencies often missing confirmed leaders, where ultimate decision-making authority may rest outside of those agencies. The process of implementation is also through mandates in both statutes and executive orders, where the final result faces limited, if any, oversight by the courts. The mismatch has consequences for the legitimacy and efficacy of the federal bureaucracy: some positive, many negative. Because we do not think a return to the lost world is possible or perhaps even desirable, we propose some possible reforms in all three branches of the federal government to strengthen the match between current realities and administrative law and to further administrative law's objectives of transparency, rule of law, and reasoned implementation of statutory mandates. We also hope that the proposed reforms can help foster the public interest goals of modern regulation, such as environmental quality or financial stability.

We realize that many scholars and probably at least some judges are aware that formal administrative procedures, official records, and judicial review are only part of the dynamics of administrative governance. But administrative law, as developed by the courts and in governing statutes, has not meaningfully confronted the contemporary realities of the administrative state. It thus risks becoming irrelevant to the quality of governance.

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Introduction

Administrative law, derived from the Administrative Procedure Act (APA) and key judicial decisions, can seem like a minor presence in the modern regulatory process. Take just one example. When it comes to food safety, both the Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA), among other agencies, have regulatory authority.[1] After President Obama signed the FDA Food Safety Modernization Act on January 4, 2011, the FDA, with input from the USDA and the Department of Homeland Security, had one year to propose enforceable preventative controls as well as safety requirements for growing and harvesting farm produce, among other mandates.[2] As every student learns in administrative law class, the rulemaking process "on the books" is a streamlined, three-part procedure, in which the agency crafts and publishes a notice of proposed rulemaking (NPRM) based on its own expertise and general presidential administration policy, then receives public comments, and lastly promulgates the final rule.[3] The actual process, however, bore little resemblance to the textbook description.

The FDA got straight to work, but agency expertise was only one element in drafting the proposed rules. After holding hundreds of meetings with farmers, state and local officials, researchers, and consumer groups,[4] it produced drafts of two proposed rules (one on preventative controls and one on produce), among others, before the Act's deadline.[5] But rather than publishing the NPRMs in the *Federal Register* for formal public input, it submitted the drafts (as it was required to do under Executive Order 12,866) to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), along with elaborate cost–benefit analyses.[6]

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1. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-289, FEDERAL FOOD SAFETY OVERSIGHT: FOOD SAFETY WORKING GROUP IS A POSITIVE FIRST STEP BUT GOVERNMENTWIDE PLANNING IS NEEDED TO ADDRESS FRAGMENTATION 1 (2011) (noting the large number of agencies that administer food-related laws).

2. FDA Food Safety Modernization Act, Pub. L. No. 111-353, § 419, 124 Stat. 3885, 3899–900 (2011) (codified at 21 U.S.C. § 350h (2012)).

3. *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 476 (2011) (elaborating on the textbook description of the agency rulemaking process).

4. *See* Press Release, U.S. Food & Drug Admin., FDA Proposes New Food Safety Standards for Foodborne Illness Prevention and Produce Safety (Jan. 4, 2013), *available at* http://www.fda.gov/newsevents/newsroom/pressannouncements/ucm334156.htm.

5. *See* Helena Bottemiller, *NYT to White House: Move Forward on Food Safety Rules*, FOOD SAFETY NEWS (Aug. 13, 2012), http://www.foodsafetynews.com/2012/08/nyt-calls-on-omb-to-release-food-safety-rules/.

6. *See id.*

Under the Executive Order, OIRA was supposed to approve or reject the NPRMs within 120 days at most.[7] OIRA sat on them for a year, also meeting with industry and public interest groups.[8] OIRA finally allowed the agency to move forward after eliminating certain testing and monitoring mandates.[9] The FDA formally proposed the revised versions on January 4, 2013, exactly a year later than the statutory deadline.[10] The FDA missed other deadlines under the Act as well, prompting a district court judge in April 2013 to order the agency to propose new deadlines it would meet.[11]

Little of this process fit with the vision of the administrative state underlying current administrative law. The one step that was "visible" to administrative law—the FDA's ultimate publication of NPRMs—was less important in the overall process of policy making than the less public White House role, which took place outside of judicial oversight. Focusing on the formal notice and the ensuing process of formal public comment would

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7. *See* Exec. Order No. 12,866 § 6(b)(2), 3 C.F.R. 638, 646–47 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802, 805 (2012) (limiting OIRA's review period to ninety days with the possibility of a thirty-day extension).

8. *See* Nancy Watzman, *Key Elements of Food Safety Law Stuck at White House Regulatory Agency*, SUNLIGHT FOUND. (May 7, 2013, 11:20 AM), http://sunlightfoundation.com/blog/2013/05/07/food-safety-law/ (noting how OIRA held on to the two draft rules for a year and providing a spreadsheet that lists meetings at OIRA and their attendees).

9. *See* Helena Bottemiller, *Documents Show OMB Weakened FDA's Food Safety Rules*, FOOD SAFETY NEWS (Mar. 25, 2013), http://www.foodsafetynews.com/2013/03/documents-show-omb-weakened-fdas-food-safety-rules/ (using released documents to show how OMB "significantly weakened the U.S. Food and Drug Administration's draft food safety rules").

10. Press Release, U.S. Food & Drug Admin., *supra* note 4. In August, the FDA extended the comment period for a second time. Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food; Extension of Comment Periods, 78 Fed. Reg. 48,636, 48,636–37 (Aug. 9, 2013). Strikingly, for the first extension, in February, comments were to be sent to OMB, not the FDA. *See* Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food; Extension of Comment Period for Information Collection Provisions, 78 Fed. Reg. 11,661, 11,661 (Feb. 19, 2013) (requesting that interested persons submit electronic or written comments directly to OMB).

11. Ctr. for Food Safety v. Hamburg, C 12-4529 PJH, at 10 (N.D. Cal. Apr. 22, 2013). The Court approved new deadlines in June. Ctr. for Food Safety v. Hamburg, C 12-4529 PJH, at 3 (N.D. Cal. June 21, 2013) (ordering the FDA to publish all proposed regulations under the FSMA by November 30, 2013, and to publish all final regulations in the Federal Register no later than June 30, 2015); *see also* Michael Patoka, *Three Food Safety Rules Grow Moldy at OIRA as Import-Related Outbreaks Continue*, FOOD SAFETY NEWS (June 26, 2013), http://www.foodsafetynews.com/2013/06/three-food-safety-rules-grow-moldy-at-oira-as-import-related-outbreaks-continue/ (acknowledging the import of the court's order but noting that the dates the court set were deferential to the FDA's projected timeline). The FDA appealed the new deadlines to the Ninth Circuit. The FDA then sought an emergency stay due to the government shutdown. Greg Ryan, *Shutdown Affected Food Safety Deadline, FDA Tells 9th Circ.*, LAW360 (Oct. 21, 2013, 5:43 PM), http://www.law360.com/articles/481762. The parties then settled, agreeing to a staggered schedule, with dates far later than the original statutory deadlines. *See* Sindhu Sundar, *FDA Agrees to FSMA Rollout Deadlines in Settlement*, LAW360 (Feb. 20, 2014, 5:49 PM), http://www.law360.com/articles/511920/fda-agrees-to-fsma-rollout-deadlines-in-settlement (describing the settlement agreement that establishes staggered final rule deadlines, beginning in August 2015 and ending in May 2016, for finishing the implementation of the FSMA).

give an entirely misleading picture of how food safety policy was created. This example is, however, far from exceptional for important regulatory initiatives.

Our thesis is simple but powerful: the actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed.[12]

Of course, some divergence between the "law on the books" and the "law in action" is to be expected in any field, but here the gap seems especially large and growing. The "lost world" was not a golden age in which agencies were free from influence by other parts of the Executive Branch and perfect transparency reigned. In addition, the "law on the books" is not that old, dating roughly from the second half of the twentieth century. But we have seen in recent decades a diffusion of authority away from individual agencies and erosion of statutory and administrative rules designed to achieve transparency.[13] As a result, there is an increasing mismatch between the suppositions of modern administrative law and the realities of modern regulation. Or to put it another way, administrative law seems more and more to be based on legal fictions.

The mismatch (or legal fictions), in turn, has consequences for the legitimacy and efficacy of the federal bureaucracy. To be sure, there may also be benefits, and we discuss those later, but the costs must be taken seriously. We therefore need to rethink current approaches to bureaucratic operation and oversight if we still want to achieve administrative law's goals of transparency, rule of law, and reasoned implementation of statutory mandates.[14]

We are far from the first to point out aspects of this problem, but the scale of the problem and the need for pragmatic solutions are in need of further exploration.[15] This Article attempts to provide such an examination

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12. We should note that most, though not all, of our discussion focuses on executive agencies that are directly responsive to the President, such as the EPA, rather than independent regulatory commissions and boards that are more independent from the President, such as the SEC. This emphasis also reflects changes since the post-New Deal era of administrative law and the growing importance of Executive Branch agencies like the EPA and OSHA at the expense of independent agencies such as the SEC and NLRB.

13. We are not advancing here a causal narrative about how the "law in action" became so distanced from the "law on the books."

14. We make some key assumptions that we do not defend here. First, we believe the goals of transparency, rule of law, and reasoned implementation of statutory mandates are desirable ones, at least to some substantial degree. We do not pause here to elaborate the meaning of these goals or discuss potential conflicts. For a recent discussion of values underlying administrative legitimacy, see Emily Hammond and David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 320–30 (2013). Second, we adopt an institutionalist perspective—in other words, that outcomes are not solely a function of the constellation of political forces but also depend on institutions and process.

15. *Cf.* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 95 (2003) (arguing that the APA "fails to address the administrative

and potential reforms. In Part I, we describe the lost world—the world envisioned by the APA and key judicial rulings. We then turn in Part II to explain how the realities of the modern administrative state differ from the intended circumstances. The contrast is stark: someone whose knowledge of administration was based only on statutes and judicial rulings would be gravely misled about the real dynamics of modern governance. In Part III, we consider the benefits and costs of this shift, tentatively concluding that the costs trump the benefits. Because we doubt a return to the lost world is possible, we also propose some possible reforms in all three branches of the federal government to make the match between current realities and administrative law stronger.

Our extensive discussion of the role of OIRA may give the impression that this Article is yet another complaint about presidential directives authorizing OIRA review of agency cost–benefit analysis. At least for purposes of this Article, we have no quarrel with those administrative orders. Our concern regarding OIRA targets the drift of OIRA's role and procedures away from these presidential mandates as written in executive orders. We also see other important changes in the regulatory state, not involving OIRA, which may have undermined rule of law values. OIRA is an example of such modern practices, but it would be a mistake to see it as the root of the problem.

I. The Conceptual Framework of Administrative Law

The way we think or talk about a subject embodies certain background assumptions. For instance, when we say, "Jan owned Greenacre," we are assuming: (1) that ownership is a binary relationship between one or more persons and some physical object and (2) that Jan alone stands in this relationship to Greenacre.[16] Similarly, many observations about a baseball game can be structured as:

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character of the modern state" and that "a new, administratively oriented APA be drafted" that is "founded on the principle of instrumental rationality"); William H. Simon, *The Organizational Premises of Administrative Law*, LAW & CONTEMP. PROBS. (forthcoming 2014) (manuscript at 1), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332079 (claiming that "[a]dministrative law is out of touch with forms of public administration developed since the Progressive and New Deal eras" and calling for new doctrine that "is more attuned to performance-based organization"). While there is much to admire in the Rubin and Simon pieces, they are rooted in making the bureaucracy function better, largely as a matter of social welfare. We agree that this is an important goal, but we also give weight to the traditional administrative law values such as transparency and fidelity to law, even though these goals may sometimes involve tradeoffs with agency efficiency and ability to maximize social welfare. For instance, Congress may have had other goals than welfare maximization, or the sole goal of efficiency may involve excessive sacrifices of fairness to individuals.

16. The analogy here is to what cognitive scientists call framers or schemas. *See* HOWARD MARGOLIS, PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT 37 (1987) (identifying "frames" and "schemas" as terms psychologists use to emphasize how individual

> *A Player* [hit, threw, caught, missed, dropped] *the ball or* [ran, walked, slid, jumped] *to* [a location on the field].

Again, note the tacit assumptions: there are designated people who make rulings and other designated people who play; there is one and only one ball; there is a designated field of play; and the core of the game is what the players and the ball are doing.

In the same sense, as we will see, much of administrative law invokes something like the following description of administration:

> *Using the authority granted to it by* [one or more statutes], *the* [agency issued (or occasionally, declined to issue)] *an* [order/rule] *by applying* [the standard established by the statute(s)] *to the facts before it.*

This description of administrative law is so commonplace that it seems entirely innocuous. Yet, it is loaded with assumptions: that statutes delegate authority to particular agencies (rather than, for example, to the Executive Branch as a whole); that agency decisions through discrete actions are based on evidence rather than political perspectives and that we can identify the particular evidence before the agency (also known as "the record"); that certain kinds of reasons and only those reasons are allowed; that one agency, rather than many, makes the decision; and that the output of the administrative process consists of discrete, severable decisions.

Conceptual frameworks of this kind are not rigid blinders. We may center our understanding of a baseball game on the motions of the ball and the players, but this might not exclude the potential for recognizing the operation of other factors such as umpires' rulings, signals from coaches, or changes in the wind. Similarly, centering our understanding of administrative law on discrete acts by agencies does not preclude recognizing that the President may have some influence on events or that some important agency programs may not be easily reduced to discrete actions. To be sure, the existence of OIRA is duly noted in administrative law courses, but its centrality to the modern regulatory state has not penetrated, and issues continue to be framed in terms of "agency" decisions. That framing influences the way problems are perceived, events interpreted, and solutions posed.

In Part II, we will show that in practice the administrative state has evolved well away from these assumptions. This does not mean that statutes, agencies, reasoned explanation, and formal records have become irrelevant, but fixation on these features of the administrative state may impair the ability to recognize and respond to current problems. Moreover, current doctrine may have effects very different than anticipated given the

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parts are perceived "only in the context of some (often implicit or imputed rather than overtly present) whole").

changed landscape of administrative governance. Before discussing relatively recent changes, however, we will provide support for our view of the centrality of the "discrete agency action" way of thinking in administrative law, as it was first established by the APA and then elaborated (some might say beyond recognition) by the courts. Perhaps this vision of administrative law seems so obvious and familiar that it needs no documentation. It is important, however, to be clear on just how pervasive and firmly embedded it is in the way we all understand administrative law.

Historically, we suspect it may have been particularly easy for this view of administration to take root because adjudication played an outsized role in thinking about administrative law.[17] With adjudication as a preoccupation, it is not surprising that administrative action would be envisioned as the work of a designated judge as opposed to, for example, a network of members of the Executive Branch contributing to the decision. It is also unsurprising that adjudicators would be expected to apply preexisting standards to formally created bodies of evidence. One of the impetuses behind the APA was to separate adjudication from other agency functions in the interest of fairness, walling it off from "[p]ressures and influences properly enough directed toward officers responsible for formulating and administering policy."[18] In other words, the APA ensures that decision makers consider only the relevant legal factors and are not subject to pressure by political actors. Finally, the prevalence of adjudication fostered the rise of the "appellate review model" in administrative law, where courts review agency action on the agency's record even in nonadjudicatory cases.[19] Of course, adjudications can also involve major policy decisions, but because of the due process tradition of nonpolitical adjudication, the process fostered a distinctive mindset.

Adjudicatory procedures continued to loom large in administrative law in the two decades after passage of the APA, whereas informal rulemaking

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17. For discussion of adjudication-related concerns during the long and conflicted process that led to the APA, see Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452–54 (1986), and George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1575–77 (1996). As Shapiro observes, "the new health, welfare, safety, and environmental statutes of the sixties and seventies demanded more rulemaking." Shapiro, *supra*, at 456.

18. S. REP. NO. 79-752, at 3 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 1944-46, at 187, 189 (U.S. Gov't Printing Office 1946) [hereinafter APA LEGISLATIVE HISTORY] (quoting a report by the President's Committee on Administrative Management); *see also id.* at 7 (stating that the APA "provides quite different procedures for the 'legislative' and 'judicial' functions of administrative agencies"); H.R. REP. NO. 79-1980, at 8 (1946), *reprinted in* APA LEGISLATIVE HISTORY, *supra*, at 235, 242 (commenting that the committee's concern with this separation "reflects a widespread feeling, which has been greatly extended by the expansion of administrative controls during the subsequent war years" and is of "permanent importance").

19. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940 (2011).

received relatively little attention until the 1970s. For instance, as late as 1974, the Gellhorn and Byse casebook in the field devoted only twenty-two pages to rulemaking proceedings,[20] which mostly was a lengthy excerpt from a single case limiting the use of formal rulemaking. By contrast, it devoted two chapters (281 pages) to adjudication.[21] The 108 page section on the scope of judicial review contained only eight pages on review of informal actions, consisting of the then-recent *Overton Park*[22] decision.[23] Even more strikingly, the first edition of the Davis casebook in 1951 dedicated only three pages to notice-and-comment rulemaking, though it gave a whole chapter to formal rulemaking, which uses essentially adjudicatory techniques.[24] When courts started to pay more attention to informal rulemaking, they tended to respond by pushing it in the direction of adjudication through creation of a "paper hearing" requirement.[25] As recast in quasi-adjudicatory terms, rulemaking poses no challenge to the model of the discrete decision maker applying statutory authority to the facts in the record. Thus, it remained natural to think of the administrative state as a creature of congressional directives, with statutes providing the legal authority and standards of decision just as they do for courts. In addition, both these adjudications and rulemakings are seen to involve discrete decisions as opposed to more open-ended monitoring or other more continuous activities.

We will consider the features of this framework in turn, starting with the role of statutes as the sources of administrative authority and of governing standards; turning then to the role of "the agency" as the critical administrative actor and subject of administrative law; and ending with the connection among evidence considered, reasons provided, and decisions made by the agency.

A. Statutes as Sources of Administrative Authority

In challenges to an agency's action, a generally unspoken assumption is that the action must be authorized by a congressional enactment.[26] As

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20. WALTER GELLHORN & CLARK BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 731–52 (6th ed. 1974).

21. *Id.* at 860–1140.

22. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

23. GELLHORN & BYSE, *supra* note 20, at 478–85.

24. KENNETH CULP DAVIS, CASES ON ADMINISTRATIVE LAW 327–28, 570 (1951) (on notice-and-comment rulemaking); *id.* at 321–59 (on formal rulemaking).

25. *See* Shapiro, *supra* note 17, at 462–64 (describing how courts have changed agency rulemaking from quasi-legislative to quasi-judicial with a procedural "paper trial" that reduces the scope of agencies' discretion).

26. Although it is difficult to document that something is an unspoken assumption—the point, after all, is that the assumption often is not mentioned explicitly—courts do sometimes explicitly articulate the assumption. *See, e.g.*, Lyng v. Payne, 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress."); Ernst & Ernst v. Hochfelder, 425 U.S.

Professor Shapiro puts it, "[a]lthough the Constitution gives the President the general duty of enforcing all the laws, congressional statutes give particular agencies the particular duty of enforcing particular laws."[27] It is the rare case where the legality of the agency's action does not depend, at least in part, on a determination that it acted within the scope of the authority delegated by Congress—rare enough that such cases get excerpted in constitutional law casebooks. In the *Steel Seizure*[28] case, Justice Black's majority opinion adopted an approach that was too simplistic[29] but nonetheless correct in most cases:

> The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied.[30]

Finding no constitutional source of authority for the President's action, the Court found the action to be an illegitimate exercise in legislation, void because the Constitution "entrusted the lawmaking power to the Congress alone in both good and bad times."[31] While this language is not a definitive statement of the separation of powers among the three branches of the federal government, it is the rare case in which the agency claims any warrant for its decision other than a grant of power from Congress, at least in cases outside of the arenas of national security or international affairs.

In a very different legal context—application of the *Chevron*[32] doctrine of agency deference to jurisdictional matters—the Court recently emphasized the primacy of congressional authority over agencies:

> Both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less

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185, 213 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law."); FAG Italia S.p.A. v. United States, 291 F.3d 806, 816 (Fed. Cir. 2002) ("It is indeed well established that the absence of a statutory prohibition cannot be the source of agency authority." (citing So. Cal. Edison Co. v. FERC, 195 F.3d 17 (D.C. Cir. 1999))).

27. Shapiro, *supra* note 17, at 465. Of course, as Shapiro immediately points out, the next question is inevitably: "So to whom are the agencies answerable in implementing the laws—the President or Congress?" *Id.*

28. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

29. *Cf.* Shapiro, *supra* note 17, at 464 ("Under the most simplistic view of the Constitution, Congress makes laws and the executive branch carries them out.").

30. *Steel Seizure*, 343 U.S. at 585.

31. *Id.* at 589.

32. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842–43 (1984) (stating that courts must defer to an agency's reasonable interpretation of a statute in cases where Congress has not dictated a particular result and where Congress has delegated the authority to interpret the statute to the agency).

> than when they act beyond their jurisdiction, what they do is ultra vires. Because the question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as "jurisdictional."[33]

In important ways, then, the agency is conceptualized as the agent of Congress (strictly speaking, the enacting Congress rather than the current one), not the President. Indeed, a decade before the passage of the APA, the Supreme Court went so far as to say that independent regulatory commissions and boards did not exercise executive power at all but were purely creatures of Congress.[34]

Because the nondelegation doctrine is anemic, Congress may validly choose not to provide administrators much guidance or constraint, presumably leaving more room for other influences. Nonetheless, the requirement of congressional authority means that an administrator's ability to independently make policy requires at least some advance authorization from the legislature, and often Congress does provide considerably more guidance than the Constitution requires. The requirement of statutory authority also provides a basis for judicial review, which functions as another check on agency activity.

It may seem like a truism that administrators' "power to act and how they are to act is authoritatively prescribed by Congress." But as we will see in Part II, there are important situations where this idea breaks down. Today, some key administrators' authority to act stems as much from the President as from Congress, as do many of the procedural requirements governing "how they are to act."

B. Applicable Standards for Decision

Statutes are commonly thought to be not only the source of the agency's power but also the primary basis for how the agency exercises its discretion.[35] Thus, the vision of the agency as the maker of decisions is

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33. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1869 (2013).

34. As the Court explained:

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive.

Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).

35. The cases discussed in this subpart illustrate the operation of this principle. To be fair, the Court has struck down only two laws that were interpreted as giving the agency unrestrained discretion on how to address a particular subject matter. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935) (holding that a section of the National Industrial Recovery Act granted unfettered discretion to the President and was thus an unconstitutional

closely tied to an assumption that the agency will act as an agent of the enacting Congress. As Professor Shapiro points out, "[s]ingle-agency deliberation followed by discrete judicial review of discrete agency decisions is never likely to shake off the particular enthusiasm that engendered the main thrust of the statute in the first place."[36]

For instance, the principle that the agency cannot consider extrastatutory factors, even when acting within its statutory authority, was critical to the Court's decision in *Massachusetts v. EPA*.[37] The statute in question directed the agency to regulate any air pollutant from new motor vehicles or new motor vehicle engines that endangered human health or welfare.[38] The EPA denied petitions asking it to initiate a rulemaking to determine whether greenhouse gases met the endangerment standard, relying partly on what turned out to be an erroneous interpretation of its statutory authority, but also partly on prudential arguments against using this statute to address the problem of climate change.[39] The Court chastised the agency for considering these broader policy considerations:

> EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. . . . To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.[40]

An agency must follow relevant statutory factors and must not consider impermissible factors. The principle that the agency's decision must rest on the statutory standard arguably has constitutional roots. In *Whitman v. American Trucking Ass'ns*,[41] the Court explained the basic principles of the nondelegation doctrine:

> In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests "[a]ll legislative Powers herein granted . . .

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delegation of legislative power); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935) (same). Instead, Congress must provide an "intelligible principle" to guide agency discretion. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

36. Shapiro, *supra* note 17, at 468.

37. 549 U.S. 497 (2007).

38. Clean Air Act, 42 U.S.C. § 7521(a)(1) (2006).

39. 549 U.S. at 529–34.

40. *Id.* at 533. Prior to this decision, the Court had arguably been more open to agencies relying on factors on which Congress had been silent. *See* Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, 79 (citing to the dissent, which "noted that the majority opinion was inconsistent with precedent by inferring from congressional silence a congressional decision to make a long list of logically relevant reasons for a decision to defer a judgment impermissible").

41. 531 U.S. 457 (2001).

> in a Congress of the United States." This text permits no delegation of those powers, and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."[42]

American Trucking involved a provision of the Clean Air Act (CAA) directing the EPA to establish national ambient air quality standards (NAAQS), and the Court ruled that in doing so the agency could not consider costs.[43] It began by saying that, given explicit attention to costs elsewhere in the statute, "respondents must show a textual commitment of authority to the EPA to consider costs in setting NAAQS under § 109(b)(1)."[44] Having failed to find such a textual commitment, the Court also made it clear that it was not simply saying that the EPA had to be able to write up a justification for its decision without reference to cost. Rather, cost could play no role in the EPA's deliberations:

> Respondents' speculation that the EPA is secretly considering the costs of attainment without telling anyone is irrelevant to our interpretive inquiry. If such an allegation could be proved, it would be grounds for vacating the NAAQS, because the Administrator had not followed the law.[45]

To similar effect, the Court said in the *State Farm*[46] case that a decision would be arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider."[47]

The assumption that the agency's decision must actually be based on its interpretation of the statutory factors is deeply embedded in administrative law. In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[48] in which the Court established the parameters for judicial review under the arbitrary and capricious standard,[49] the Court also made clear that the statutory standards did not merely limit the scope of the agency's discretion but also remained relevant in exercising that discretion:

> Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706 (2) (A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or

42. *Id.* at 472 (alterations in original) (citations omitted).

43. *Id.* at 471.

44. *Id.* at 468.

45. *Id.* at 471 n.4.

46. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

47. *Id.* at 43.

48. 401 U.S. 402 (1971).

49. *Id.* at 420.

> otherwise not in accordance with law." To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.[50]

Moreover, the Court made clear, although the Secretary of Transportation's public explanation of his decision was entitled to a presumption of regularity, if a showing of bad faith were made, the Secretary could actually be required to testify in order to explain the reasons for his decisions.[51] It was not enough for the Secretary to file litigation affidavits in that case, which "were merely '*post hoc*' rationalizations,"[52] because those might not reflect the actual reasons for the decision.

The presumption of regularity widens the potential for a gap between the formal explanation and the true reasons for a decision by limiting judicial inquiry into the decisional process. But at least a contemporary explanation by the actual decision maker is more likely to resemble the actual explanation than an after-the-fact explanation by someone else. The assumption that even discretionary decisions will be made with reference to standards created by the legislature reinforces the nondelegation norm, providing a further possible check on independent action by administrators. It also provides advance warning about what sorts of evidence and arguments will be relevant to the decision and further structures judicial review. All of this begins to add up to a coherent picture of how the administrative state is supposed to operate. We doubt that courts naively

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50. *Id.* at 416 (citation omitted). In *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990), the Court ruled that it would be improper for an agency to consider factors outside of its statutory mandate, including those in related statutes that it was not tasked with implementing:

> First, and most important, we do not think that the requirement imposed by the Court of Appeals upon the PBGC [to consider factors under other related statutes] can be reconciled with the plain language of § 4047, under which the PBGC is operating in this case. This section gives the PBGC the power to restore terminated plans in any case in which the PBGC determines such action to be "appropriate and consistent with its duties *under this title* [*i.e.*, Title IV of ERISA]" (emphasis added). The statute does not direct the PBGC to make restoration decisions that further the "public interest" generally, but rather empowers the agency to restore when restoration would further the interests that Title IV of ERISA is designed to protect. Given this specific and unambiguous statutory mandate, we do not think that the PBGC did or could focus "inordinately" on ERISA in making its restoration decision. Even if Congress' directive to the PBGC had not been so clear, we are not entirely sure that the Court of Appeals' holding makes good sense as a general principle of administrative law. . . . If agency action may be disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy that was not explicitly considered, then a very large number of agency decisions might be open to judicial invalidation.

Id. at 645–46 (first alteration in original). Some have read this case to allow agencies to rely on factors on which Congress was silent, though that principle was rejected in *Massachusetts v. EPA*. *See supra* note 40 and accompanying text.

51. *Overton Park*, 401 U.S. at 420.

52. *Id.* at 419.

believe that the process invariably corresponds with this picture, but this picture establishes a norm against which actual conduct can be measured.

C. *The Centrality of "the Agency"*

The idea that administrative actions are taken by discrete "agencies" runs deep in administrative law; it may even seem too obvious to deserve mention. Yet, it is certainly not impossible to imagine a system of administration in which decisions are made by shifting groups of administrators, depending on circumstances. But because we assume that administrative powers are created by statute and that Congress reposes them in specific government organs, it seems natural also to think of these organs as the fixed cast of players in administrative law.

The assumption that actions are taken by distinct government bodies, rather than by the Executive Branch as a whole,[53] is built into the structure of the APA itself. Section 551 defines an agency as an "authority of the Government of the United States."[54] According to the Senate Judiciary Committee, "authority" meant "any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority."[55] Notice that this definition invokes yet another unspoken assumption of administrative law—that the topic is defined by discrete "final and binding action[s]."

Section 551 goes on to define a rule as "an *agency* statement of general or particular applicability and future effect"[56] and "rule making" as an "*agency* process for formulating, amending, or repealing a rule."[57] An "order" means a "final disposition . . . of an *agency*,"[58] and "adjudication" means "*agency* process for the formulation of an order."[59] Note that, according to the Senate Judiciary Committee, "there are only two basic types of administrative justice—rule making and adjudication,"[60] so these

53. Or the Executive Branch plus independent regulatory commissions and boards, if you prefer.

54. Administrative Procedure Act, 5 U.S.C. § 551(1) (2012).

55. STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., SENATE JUDICIARY COMMITTEE PRINT (Comm. Print 1945), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 18, at 11, 13.

56. 5 U.S.C. § 551(4) (emphasis added).

57. *Id.* § 551(5) (emphasis added).

58. *Id.* § 551(6) (emphasis added).

59. *Id.* § 551(7) (emphasis added).

60. STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., SENATE JUDICIARY COMMITTEE PRINT (Comm. Print 1945), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 18, at 14. Similarly, the Attorney General's letter regarding the legislation remarked that the "basic scheme underlying this legislation is to classify all administrative proceedings into these two categories" of adjudication and rulemaking. Letter from Tom C. Clark, U.S. Att'y Gen., to Pat McCarran, Chairman, Senate Judiciary Comm., app. (Oct. 19, 1945), *in* S. REP. NO. 79-752, at app. B. at 37, 39 (1945), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 18, at 223, 226.

definitions of agency activity cover the relevant universe of the administrative management. It would be tedious and redundant to list all of the times the word "agency" is repeated in the APA, but § 551 itself clearly sets up the agency as the key decision maker and the major subject of administrative law.

If there were any doubts about the discrete nature of agency authority, they would be dispelled by § 558(a), which provides that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."[61] According to the Senate Report on the APA, this provision was intended to ensure, among other things, that "no agency may undertake directly or indirectly to exercise the functions of some other agency."[62] Thus, the Senate Report continued, this "subsection confines each agency to the jurisdiction delegated to it by law."[63]

The concept of "the agency" as the critical actor continues to figure heavily in the case law. For instance, in *Chevron*, the Court spoke of the "legislative delegation to an *agency*" on the question at hand and said that the Court had "long recognized that considerable weight should be accorded to *an executive department's* construction of a statutory scheme it is entrusted to administer."[64] The Court acknowledged the relevance of broader administrative policies, but only as something the agency could use to "inform its judgments."[65] Similarly, in *Vermont Yankee*,[66] in the course of limiting judicial power to determine administrative procedures, the Court said that under the APA, "the formulation of procedures was basically to be left within the discretion of the *agencies* to which Congress had confided the responsibility for substantive judgments."[67]

The Court also assumes the leaders of these agencies make the delegated decisions. In *Chevron*, for example, the Court treated the "agency" interchangeably with the administrator of that agency: "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation

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61. 5 U.S.C. § 558(b).

62. S. REP. NO. 79-752, at 25 (1945), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 18, at 211.

63. *Id.* Note that this restriction seems to limit the ability of the President to reallocate authority to other agencies, to White House staff, or to the Vice President. Whether the President has directive authority when a statute delegates authority to the agency (as opposed to the President) is the subject of some debate by scholars. *See infra* note 270.

64. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 844 (1984) (emphasis added).

65. *See id.* at 865.

66. Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

67. *Id.* at 524 (emphasis added).

made by the administrator of an agency."[68] For present purposes, what is important is not the realism of the Court's assumption about delegation but rather the emphasis on congressional primacy and on the agency head (not the Executive Branch as a whole) as the key decision maker. These agency heads contribute to the political accountability rationale for agency deference through their assumed connection to the President and Congress—in that they are supposed to be selected by the President and confirmed by the Senate and removable (sometimes for any reason and other times only if there is cause) only by the President.[69]

Conceiving of the administrative state as a collection of agencies, each with its own designated statutory powers, provides a greater sense of intelligibility than thinking of federal activities as emerging en masse from a black box consisting of significant numbers of federal employees. This agency-based worldview also resonates strongly with the delegated-power concept (running from Congress to designated actors).

D. Evidence and Reasoned Decision Making

Given the idea that an agency's orders and rules must be based on some intelligible principle provided by the legislature, it is a short step to the view that the agency must have evidence before it acts and must provide (or at least be prepared to provide) an explanation for its actions that links the decision to the statutory standards. Without evidence, how would we know whether the agency was just inventing a state of affairs that would justify its action given the statutory standard?[70] In practice, complete power to post the relevant facts would be little different from complete power to specify the legal standard.

The idea of reasoned explanation at the time of agency action is deeply embedded in administrative law. "We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner," the Court said in *State Farm*, going on to reaffirm emphatically this principle.[71] Moreover, *State Farm* held, "courts may not accept appellate counsel's *post hoc* rationalizations for agency action."[72] Instead,

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68. *Chevron*, 467 U.S. at 844.

69. *See* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 242–43 (2002) (stressing that "[i]t is only the presence of high-level agency officials that makes plausible *Chevron*'s claimed connection between agencies and the public" and recognizing that this accountability flows through the President and the Senate); *cf. Chevron*, 467 U.S. at 865–66 (implying administrative authorities are accountable to the people by way of the Chief Executive).

70. *Cf.* Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 762–64 (2006) (suggesting that the provision of evidence and reasoned explanation is a costly signal by agencies to courts).

71. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48–49 (1983).

72. *Id.* at 50.

"an agency's action must be upheld, if at all, on the basis articulated by the agency itself."[73] Although the agency's view of the public interest may change, it must "supply a reasoned analysis" of its change in position.[74] This "hard look" review in *State Farm* of an agency's explanation had its roots in a much earlier decision, *SEC v. Chenery Corp.*[75] In that pre-APA decision, the Court stressed: "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."[76] (In all these decisions, the analysis also assumes that the agency is the relevant decision maker, not some broader group of administrators.)

Much of the APA is devoted to the process by which parties put information before agencies. Section 553 establishes the right to submit evidence in informal rulemakings,[77] while § 556 governs the right to submit evidence in formal adjudications and rulemakings.[78] In the latter class of proceedings, "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."[79] In informal rulemakings and other actions, *Overton Park* also made clear that the decision is reviewed on the basis of "the full administrative record that was before [the head of the agency] at the time he made his decision."[80] After all, the APA provides that in applying all of the standards for judicial review, "the court shall review the whole record or those parts of it cited by a party."[81]

State Farm is the paradigmatic application of the concept that action must be based on reasoned consideration of the record before an agency. It also shows how this concept is related to the existence of a statutory delegation to the agency, which furnishes the standards that provide the foundations of the reasoned explanation. And the reasoned explanation would be only a post hoc rationalization unless the body issuing the explanation (the agency) is also the decision maker. Thus, *State Farm* aptly

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73. *Id.*

74. *Id.* at 57 (quoting Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)).

75. 318 U.S. 80 (1943).

76. *Id.* at 95.

77. Administrative Procedure Act, 5 U.S.C. § 553(c) (2012).

78. *Id.* § 556.

79. *Id.* § 556(d).

80. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

81. 5 U.S.C. § 706. Subsequent legislation in the 1960s and 1970s—primarily the Freedom of Information Act and the Government in the Sunshine Act—complemented the APA's mandate of a record. These Acts were specifically designed to foster transparent decision making. *See, e.g.*, Government in the Sunshine Act, Pub. L. No. 94-409, § 2, 90 Stat. 1241, 1241 (codified at 5 U.S.C. § 522b note) (declaring it the "policy of the United States that the public is entitled to the fullest practicable information regarding [its] decisionmaking processes").

illustrates how the standard framing of administrative law combines all the elements we have discussed.[82]

To summarize, we have seen that modern administrative law is characterized by a series of assumptions. It conceives of the administrative process as operating as follows: (1) The implementation of statutory directives (2) by statutorily designated administrators ("the agency") (3) based on reasoned consideration of the statutory standard (4) as applied to formally designated evidence (5) using procedures imposed by Congress or determined by the agency, which (6) can then be reviewed by the courts. The primary emphasis throughout is on the subordinate relationship of the agency to congressional directives, with fidelity to statutory policies as the main test of validity. This approach tends to leave agencies considerable leeway but does provide some check on executive policymaking. At a deeper level, these assumptions portray administrative activity in discrete, isolated terms, much like the kind of activity that judges engage in: there is a single decision maker applying predetermined standards to a formally created body of evidence.

Whatever normative force this way of structuring administrative law may have, it provides a framework that seems almost instinctive in considering an agency action. In inquiring into an such a decision, it seems obvious that the first questions to ask are what agency made the decision, under what statutory authority and standards, and how the agency explained its decision based on the evidence before it. But these questions seem obvious only because that is the way we are used to thinking about the U.S. federal administrative state and because, to some degree, the administrative state has been shaped accordingly.

II. The Reality

The reality of the modern administrative state diverges considerably from the series of assumptions described in the previous Part, on which current administrative law rests. Those assumptions call for statutory directives to be implemented by an agency led by Senate-confirmed presidential appointees with decision-making authority. The implementation is presumed to be through statutorily mandated procedures and criteria, where the final result can then be reviewed by the courts to see if the reasons given by the agency at the time of action match the delegated directions. Yet, there are often statutory and executive directives to be

82. The *State Farm* framework does not rest only on expertise values of agency action. So long as the agency makes a decision on the statutory factors, political influence can shape what that decision is within the statutory framework. *See* Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 284 (1986) (stating that the "arbitrary and capricious" standard exists to prevent agency capture but recognizing that political influences can be accommodated without violating that standard).

implemented by multiple agencies, frequently missing confirmed leaders, where practical decision-making authority may rest outside of those agencies. The process of implementation also follows mandates in both statutes and executive orders, where the final result faces limited, if any, oversight by the courts. We consider these discrepancies in turn below.

A. Statutes and Presidential Orders as Sources of Administrative Authority to Multiple Agencies

Administrative law presumes that the source of authority of agency action is statutory. In addition, it generally presumes that the relevant statutory framework gives only one agency the power to act. In practice, however, both legislative enactments and presidential directives compel agency action. This authority also is often directed to more than one agency.

Almost all administrative agencies sit at least partly within the Executive Branch.[83] It is therefore not surprising that the White House would try at times to direct agency action that the current Congress does not support or has not ordered.[84] For example, in June 2013, President Obama, by memorandum and public speech, directed the EPA Administrator to issue a new proposal to regulate greenhouse gas emissions for new stationary sources by September 20, to finalize the rule "in a timely fashion" thereafter, and to issue proposed and final standards for "modified, reconstructed, and existing power plants" by June 1, 2014, and June 1, 2015, respectively.[85]

Five months earlier, in the aftermath of the Newtown school shooting tragedy, President Obama, by memoranda, ordered all federal agencies to require any relevant mental health and criminal history information be provided to the National Instant Criminal Background Check System[86] and told agencies that recover firearms to ensure that the firearms are traced through the Bureau of Alcohol, Tobacco, Firearms, and Explosives as soon as possible.[87] He also directed the Secretary of Health and Human Services, through the Centers for Disease Control and Prevention, to "conduct or

83. DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 1, 10–11 (2012).

84. To survive judicial review, of course, the action must be justifiable under a directive enacted by some past Congress, even if the current Congress takes a different view of the subject.

85. Memorandum on Power Sector Carbon Pollution Standards, 2013 DAILY COMP. PRES. DOC. 457 (June 25, 2013) [hereinafter Carbon Standards Memo]; *see also* Remarks at Georgetown University, 2013 DAILY COMP. PRES. DOC. 452 (June 25, 2013) (announcing climate change directives to the EPA).

86. Memorandum on Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System, 2013 DAILY COMP. PRES. DOC. 22 (Jan. 16, 2013) [hereinafter NICS Memo].

87. Memorandum on Tracing of Firearms in Connection with Criminal Investigations, 2013 DAILY COMP. PRES. DOC. 23 (Jan. 16, 2013) [hereinafter Tracing Memo].

sponsor research into the causes of gun violence and the ways to prevent it."[88]

These recent agency directives take on large and contentious policy issues, climate change and gun control. Some Republicans charged that the President lacked the authority to issue them.[89] The climate change order rests explicitly on the CAA authority to impose regulatory obligations on new and existing stationary sources.[90] The gun control orders impose duties only on federal agencies.[91] If the CAA permits those mandates and if the presidential gun control directives do not regulate the public, such orders are permitted.[92] Thus, the President has and uses considerable practical authority to direct agencies.[93]

When presidential orders are connected to an underlying statute, the statute may not be the primary driver of agency action. For instance, the CAA was not enacted to address climate change.[94] The President used the broad regulatory authority in the Act to compel climate change regulations under a White House timeline.[95] The primacy that administrative law places on congressional mandates, therefore, diverges from the realities of modern agency action, where presidential directives can have equal importance with statutes to agencies. Of course, the agencies may sometimes be happy enough to take actions in these areas, but the timing and framing of the policies are not under their control.

Even within the statutory lens, administrative law tells too simple a story of congressional delegation of particular regulatory authority over nonfederal entities to a single agency. To start, Congress often has delegated to multiple agencies that then often have to coordinate action.[96]

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88. Memorandum on Engaging in Public Health Research on the Causes and Prevention of Gun Violence, 2013 DAILY COMP. PRES. DOC. 21 (Jan. 16, 2013).

89. *See, e.g.*, Jonathan Easley, *Freshman Lawmaker Threatens Impeachment over Gun Rights*, BRIEFING ROOM, THE HILL (Jan. 14, 2013, 7:29 PM), http://thehill.com/blogs/blog-briefing-room/news/277021-gop-rep-threatens-obama-with-impeachment-over-gun-action.

90. *See* Carbon Standards Memo, *supra* note 85.

91. *See* NICS Memo, *supra* note 86 (directing agencies to submit a report regarding any relevant records after the DOJ issues guidance); Tracing Memo, *supra* note 87 ("Federal law enforcement *agencies* shall ensure that all firearms . . . are traced through ATF . . . ." (emphasis added)).

92. *See* Peter M. Shane, *The Hysteria over the Obama Executive Orders*, HUFFINGTON POST (Jan. 18, 2013, 3:25 PM), http://www.huffingtonpost.com/peter-m-shane/the-hysteria-over-obama_b_2497292.html (observing that executive orders may be issued in the President's executive capacity or pursuant to a statute, although such orders may not "impose obligations or restrictions on the public").

93. *See generally* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (2003).

94. *See* Massachusetts v. EPA, 549 U.S. 497, 507 (2007) ("When Congress enacted these provisions [of the CAA], the study of climate change was in its infancy.").

95. *See* Carbon Standards Memo, *supra* note 85.

96. *See, e.g.*, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) (analyzing the strengths and weaknesses of assigning overlapping

As discussed in the introduction, the FDA and the USDA both have jurisdiction over food safety. In addition, the delegation of one task is often linked to the delegation of some other task, which could be in tension with the first.[97] Interior Department agencies, for example, have both economic and environmental mandates.[98] Relatedly, other agencies are not infrequently the subjects of regulations. For instance, the Defense Department's activities must comply with EPA regulations except in the rare cases where the President issues a national security exemption.[99] Finally, even within the conventional paradigm of congressional delegation to a single agency, scholars have recently noted "the delegation to agencies of the power to waive requirements that Congress itself has passed."[100] The No Child Left Behind Act and the Patient Protection and Affordable Care Act are two such examples.[101] Such overlapping delegations inevitably mean that coordination is required so that the policy development is not tied to a single agency. This may be a healthy situation, but it necessarily strains the idea of policy delegation to a unique agency decision maker.

B. Administrators of Agencies and White House Staff

Just as administrative law rests on oversimplified assumptions about the impetus for agency action, it also makes some questionable presumptions about the target of that delegation. First, the agency, not the wider Executive Branch, is Congress's executor.[102] Second, Senate-confirmed presidential appointees (or in the rare case, recess appointees) lead that agency.[103] In short, any decisions are agency decisions, and the decision maker is the agency leader (or top board), who is chosen by the President and confirmed by the Senate.

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authority to agencies); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (2007) (examining *Gonzales v. Oregon*, 546 U.S. 243 (2006), to revisit the conventional wisdom regarding agency interpretations of statutes that share jurisdiction between more than one political institution); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006) (analyzing arguments for and against the unification of federal agencies in their responsibilities related to national security).

97. *See, e.g.*, Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009) (examining options for addressing the problem of agencies underperforming in certain areas when faced with competing goals).

98. *See id.* at 2–3.

99. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. § 1536 (2012); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6961 (2006); Clean Air Act, 42 U.S.C. § 7418 (2006); Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9620 (2006).

100. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 265 (2013).

101. *Id.* at 267–68.

102. *See supra* subpart I(C).

103. *See supra* notes 68–69 and accompanying text.

We will discuss the decision-making process at length in the subsequent two subparts. Here, we focus on the people involved. The time it takes for the President to choose an agency leader and then for the Senate to confirm her can be considerable. At the end of his first year in office, President Obama had filled only 64.4% of Senate-confirmed positions in executive agencies (excluding independent regulatory commissions and boards).[104] And because agency leaders often have relatively short tenures,[105] the delays are repeated within an administration. From 1977 to 2005, Senate-confirmed positions in these executive agencies were "empty," on average, between 15 and 25 percent of the time.[106]

In many cases, these top positions are not literally empty. An acting official is often at the desk. The Federal Vacancies Reform Act of 1998 allows temporary officials to wield full authority in most agencies[107] (but, critically, not in top jobs in independent regulatory commissions such as the National Labor Relations Board (NLRB)[108]). The law limits who can serve as acting officials and for how long.[109] These acting officials can be picked from three primary groups: political "first assistant[s]" to the vacant jobs, other political officials (if sufficiently senior), and high-level civil servants.[110] The first two groups share some similarities with the presumed Senate-confirmed leaders, in that the President has selected these officials, but the Senate has not confirmed them for the particular job, if at all.[111] The third group may be more faithful to congressional intent, as civil servants, but lacks the political stature of Senate-confirmed officials.[112] Commentators within and outside the government view the use of acting

104. ANNE JOSEPH O'CONNELL, CTR. FOR AM. PROGRESS, WAITING FOR LEADERSHIP: PRESIDENT OBAMA'S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE APPOINTMENTS PROCESS 2 (2010), *available at* http://www.americanprogress.org/issues/2010/04/pdf/dww_appointments.pdf.

105. *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 919 n.23 (2009) (compiling studies that measure the tenure lengths of agency leaders).

106. *Id.* at 965.

107. *See* Federal Vacancies Reform Act of 1998, 5 U.S.C. § 3345 (2012).

108. *See id.* § 3349c (listing exclusions).

109. *See id.* § 3345(a) (specifying who may be an acting officer in the event of a vacancy); *id.* § 3346(a)–(b) (providing time limits for the service of acting officers); *id.* § 3349a(a)–(b) (providing additional specifications for when the § 3346 time limits begin during periods of presidential inaugural transitions). Because the Act excludes independent regulatory commissions, it appears the President can fire acting officials at will. However, because a limited number of people can serve in an acting capacity for a vacant position, the President often has little incentive to replace an acting official. *See* O'Connell, *supra* note 105, at 944 (reasoning that an acting official is a placeholder until the President can find a permanent replacement).

110. *See* 5 U.S.C. § 3345(a)(1)–(3).

111. *See* O'Connell, *supra* note 105, at 944–45.

112. *See id.* at 942, 945 (describing how a career official does not have the authority of a permanent appointee in, for example, dealing with outside constituencies).

officials as less attractive than traditionally appointed leaders.[113] Lacking permanency and Senate imprimatur, acting officials are less able to advocate forcefully for the agency within the Executive Branch or fend off pressure from the White House or other agencies.[114] Unlike other components of the modern administrative state, the use of acting officials to fill empty administrative positions, by itself, would seemingly cut against a trend of increasing White House power (and decreasing congressional and judicial power). Yet, in combination with the increased role of White House staff, which we turn to next, the overall effect is more mixed.

The decision makers in administrative law are also assumed to be working in the agency.[115] In the modern Presidency, the size of White House staff has significantly expanded overall, though not always in a uniformly increasing manner.[116] Early on, President Obama chose some important policy advisors, including Carol Browner for energy and environmental topics, Larry Summers for economics and recovery areas, and Nancy-Ann DeParle for health care.[117] Republicans and Democrats in Congress, among others, have complained about these White House "czars."[118] Such high-level advisors operate out of the White House, not particular agencies, and thus do not face Senate confirmation or direct congressional oversight.[119] Officially, they do not exercise independent legal authority, but by many accounts they are key players in agency decisions.[120]

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113. *See, e.g.*, Michael D. Shear, *Politics and Vetting Leave Key U.S. Posts Long Unfilled*, N.Y. TIMES, May 2, 2013, http://www.nytimes.com/2013/05/03/us/politics/top-posts-remain-vacant-throughout-obama-administration.html (describing concern among various commentators regarding acting officials who have "little authority to make decisions" and weaken accountability in their agencies).

114. *See* Dan Eggen & Christopher Lee, *Late in the Term, an Exodus of Senior Officials*, WASH. POST, May 28, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/05/27/AR2008052702641.html.

115. *See supra* notes 68–69 and accompanying text.

116. *See* ANDREW RUDALEVIGE, MANAGING THE PRESIDENT'S PROGRAM: PRESIDENTIAL LEADERSHIP AND LEGISLATIVE POLICY FORMULATION 51, 52 & fig.3.3, 53–61 (2002).

117. *See* Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2577–78 (2011).

118. *See* Amy Harder, *Observers Worry White House 'Czars' Have Too Much Power*, GOV'T EXECUTIVE (Mar. 13, 2009), http://www.govexec.com/oversight/2009/03/observers-worry-white-house-czars-have-too-much-power/28755/ (reporting that both Senator Robert Byrd, a Democrat from West Virginia, and Yale law professor Bruce Ackerman had concerns that "czars" threatened the balance of powers).

119. *See* O'Connell, *supra* note 105, at 930–31 (noting the use of high-level advisors as an exception to the formal nomination and appointment process).

120. *See* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49–50 (2006) (stating that, in the context of EPA rulemaking, White House offices often have more influence on important issues than OIRA); Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal,"* 35 HARV. ENVTL. L. REV. 343, 343 n.* (2011) (stating that the author of the article served as Counselor for Energy and Climate Change in the White House and

The modern administrative state thus is often missing the presumed decision makers, Senate-confirmed agency leaders. Sometimes, acting officials take their place; other times, agencies, such as the NLRB, lack the necessary leaders to make decisions.[121] In addition, administrative law generally ignores the decision makers within the White House who have grown in number and power, who do not face congressional or judicial oversight, and who are now too numerous to be personally supervised by the President.[122] But their role is shielded from judicial scrutiny by decisions such as *Sierra Club v. Costle*.[123]

C. *Procedural Mandates*

The APA details what procedures agencies must follow to issue binding decisions.[124] Much of the APA focuses on formal rulemaking and adjudication, the use of which declined precipitously after the Court's decision in *Florida East Coast Railway*.[125] Nevertheless, judicial decisions have supplemented the Act's requirements for notice-and-comment rulemaking to create an alternative, robust "paper hearing" process.[126] The realities of modern rulemaking, however, often do not comport with this "paper hearing." First, agencies forgo prior notice and comment in a significant number of rulemakings. Second, agencies do follow detailed procedural mandates for important regulations, but those mandates are tied not to the APA but rather to executive orders of both Democratic and Republican presidents.

If agencies want their regulations to have the force of law, under the APA they must provide prior notice and comment unless they determine

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in that position contributed to the creation of the national auto policy discussed in the article); Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2582 (2011) (noting that "it seems clear that at least some of Obama's czars were tasked to bring about particular and significant policy change, and to do so from the White House").

121. *See* New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2638 (2010) (holding that the NLRB, which has a three-member quorum requirement, could not exercise its authority when the agency's board fell to two members).

122. *See* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1146–59 (2010) (presenting evidence that the White House significantly influences agency decisions without agencies or others disclosing the content of this influence).

123. 657 F.2d 298 (D.C. Cir. 1981). The D.C. Circuit held that the court was limited to determining whether an agency decision was supported by its explanation and the record and that it would not be proper to inquire into whether the decision was actually based on reasons from the White House. *Id.* at 408.

124. *See* Administrative Procedure Act, 5 U.S.C. §§ 553–557 (2012).

125. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224 (1973); *see also* J. Skelly Wright, Commentary, *Rulemaking and Judicial Review*, 30 ADMIN. L. REV. 461, 462–63 (1978) (noting the shift away from formal rulemaking precipitated by *Florida East Coast Railway*).

126. *See* Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 529, 553–54 (2006).

and explain that such process would be "impracticable, unnecessary, or contrary to the public interest."[127] The good-cause exception was intended to be narrow. In recent decades, however, agencies have increasingly relied on two broader forms of binding rulemaking that forgo prior notice and comment: direct final rulemaking and interim final rulemaking, neither of which is covered directly by the APA.[128] Direct final rules, which are supposed to speed up noncontroversial regulation, become effective a certain time after publication in the *Federal Register* unless "adverse" comments are submitted.[129] Interim final rules take effect immediately upon publication or soon thereafter and allow for commenting *ex post*.[130] Agencies can then issue final rules, but rarely do so, keeping the interim final rules on the books.[131] In an empirical study of rulemaking, one of us showed that the use of these new forms of rulemaking increased between 1983 and 2002.[132] The Government Accountability Office (GAO) determined that agencies did not publish an NPRM allowing the public to comment in about 44% of nonmajor rulemakings between 2003 and 2010.[133] Less than 10% of those rulemakings were interim final rules, which permit *ex post* commenting.[134]

Agencies are forgoing prior notice and comment in particularly important rulemakings as well. The GAO also found that agencies skipped this process in approximately 35% of major rulemakings (i.e., having an annual effect on the economy of at least $100 million or other significance) between 2003 and 2010; almost half of these major rules were, however, interim final rules with commenting after the fact.[135] To be fair, agencies typically claim that the good-cause exception in the APA or some other exemption allows them not to follow traditional procedures.[136] Yet,

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127. 5 U.S.C. § 553(b)(B).

128. *See* Adoption of Recommendations Notice, 60 Fed. Reg. 43,108, 43,110–13 (Aug. 18, 1995) (explaining these two types of rulemaking and how each has been partially justified using the good-cause exception); Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 401–02 (1999) (arguing that direct final rulemaking does not comply with the APA despite its recent use and the good-cause exception).

129. *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1 (1995).

130. *See* Recommendation 95-4, *supra* note 123, at 43,111; Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (1999).

131. *See* Asimow, *supra* note 130, at 736–37 (finding that many interim final rules remained unfinalized three years after their adoption).

132. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 929–36 (2008).

133. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 8 (2012).

134. *Id.* at 13.

135. *Id.* at 7–8, 13.

136. *See id.* at 2 (noting prior notice and public comment is not always required and giving examples of exceptions).

agencies do not respond to *ex post* comments in the most significant rulemakings one-third of the time.[137]

While agencies may be skipping well-established statutory procedural requirements, they have been subject to process mandates through presidential directives for the past three decades. Specifically, since 1981, executive orders have required agencies to submit certain proposed and final rulemakings, along with a cost–benefit analysis, to OIRA, which sits within OMB, for prior approval.[138] Currently, only executive agencies (and not independent regulatory commissions like the NLRB) pursuing economically significant rulemakings have to conduct a cost–benefit analysis and wait for approval, though all agencies must submit notice of all of their nontrivial regulatory plans to OIRA annually.[139] OIRA also signs off on executive agency rules that do not meet the $100 million annual threshold but are considered otherwise significant because of interagency and other concerns.[140] There is some dispute about whether nonbinding (in the formal sense) but still significant guidance must be submitted to OIRA. President George W. Bush explicitly included major guidance in his regulatory review directive in the latter part of his administration.[141] Although President Obama repealed that executive order, OIRA maintains that such guidance still is covered.[142]

Just as with the APA's mandates, agencies have attempted, with mixed success, to evade review by OIRA.[143] Some avoidance is through the

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137. *Id.* at 28.

138. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802–06 (2012); Exec. Order No. 12,291, §§ 7–9, 3 C.F.R. 127, 131–34 (1982), *revoked by* Exec. Order No. 12,866 § 11, 3 C.F.R. at 649.

139. Exec. Order No. 12,866 §§ 3(b), 4(c), 6, 3 C.F.R. at 641–48.

140. *Id.* § 3(f), 3 C.F.R. at 641–42. According to a recent estimate, fewer than 20% of rules reviewed by OIRA meet the $100 million annual threshold. Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1851 (2013).

141. *See* Exec. Order No. 13,422, 3 C.F.R. 191 (2008), *revoked by* Exec. Order No. 13,497 § 1, 3 C.F.R. 218, 218 (2010).

142. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to Heads and Acting Heads of Exec. Dep'ts & Agencies: Guidance for Regulatory Review (Mar. 4, 2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf; *see also* Sunstein, *supra* note 140, at 1853.

143. *See* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013) (analyzing different strategies for agency behavior in relation to executive review); Note, *OIRA Avoidance*, 124 HARV. L. REV. 994 (2011) (examining how and why agencies avoid OIRA review); *cf.* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 337, 360 (2014) (drawing on insider experience at the EPA to question the plausibility of agencies avoiding OIRA review).

choice of policymaking form.[144] Formal rulemaking and adjudication do not fall under OIRA's purview; yet, agencies rarely engage in formal proceedings.[145] Nonbinding policies generally are not reviewed by OIRA, though OIRA does examine, in some fashion, significant guidance, so there is some room to use guidance and other such mechanisms to avoid OIRA.[146] Nevertheless, avoidance of OIRA review through nonbinding action at the front end often comes with more scrutiny at the back end from the courts.[147] Perhaps, "regulation by deal" in the financial crisis has been the most effective mechanism of OIRA avoidance, though almost no one focuses on the OIRA angle.[148] Agencies also can try to break down regulations into smaller components or claim regulations are not significant to avoid White House review, for which they have had mixed success.[149]

These statutory and presidential procedures differ in their transparency. If agencies engage in traditional notice-and-comment rulemaking, the notice and comments are public.[150] Forgoing prior notice and comment, as is becoming more common, therefore makes the decision-making process considerably more opaque. Although presidents have increased the openness of the White House process over time, it remains much less transparent than the statutory process when both are followed.[151] During the review process, OIRA engages directly with the drafting

144. *See* Nou, *supra* note 143, at 1789 ("[A]gencies can choose between simple inaction, adjudication, guidance documents, or nonsignificant rules as instruments that are more likely as a class to bypass presidential review.").

145. *See* O'Connell, *supra* note 132, at 901 (noting that because so few statutes contain the phrase "on the record after opportunity for [a] . . . hearing," "agencies generally do not conduct formal rulemakings when promulgating legally binding regulations" (alterations in original)).

146. *See* Nou, *supra* note 143, at 1784–85.

147. *See* O'Connell, *supra* note 132, at 909, 917–18 (considering strategies for an agency's choice of rulemaking process and observing that "[m]ore formal procedures . . . produce greater deference from reviewing courts").

148. *Cf.* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 466 (2009) (demonstrating that in the financial crisis the government largely used "deals" with the private sector rather than more traditional regulatory tools). *But see* David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 189 (2010) (noting that the Treasury Department did not consult OMB regarding the terms of the financial bailout).

149. *See* Nou, *supra* note 143, at 1788–89 (commenting on the possibility of avoiding White House review through a nonsignificant rulemaking form); Note, *supra* note 143, at 1002, 1006, 1012 (listing these two possibilities for avoiding OIRA review, finding mixed experiences among two former OIRA officials regarding the likely success of regulatory avoidance, and providing evidence that cost underestimation is used when making politically contentious rules).

150. *See Administrative Procedure Act*, 5 U.S.C. § 553(b) (2012) (requiring the publication of notice and comments in the *Federal Register*); REGULATIONS.GOV, http://www.regulations.gov (providing public access to proposed regulations, final regulations, and other documents published by the U.S. federal government).

151. *See* Bressman & Vandenbergh, *supra* note 120, at 50–51; *id.* at 82 (reporting survey results).

agencies, sometimes intensively.[152] OIRA can also meet with interested parties within and outside government.[153] As former OIRA head Cass Sunstein explained, "[i]t accepts all comers."[154] OIRA now must invite the agency (or agencies) that drafted the regulation to each meeting and disclose all the participants in those meetings.[155] The directives also require OIRA to "make available to the public all *documents* exchanged between OIRA and the agency during the review by OIRA," including written materials given to OIRA by a private or public entity, but only after the final rule has been published in the *Federal Register* or the agency has publicly announced its decision not to issue the rule.[156] Oral communications and documents exchanged before the official review process, however, are not included.[157]

Even if the meeting and document-exchange disclosure mechanisms are followed, much of the interaction between OIRA and regulators remains shielded from public scrutiny.[158] In addition, the White House contends that these interactions are protected by executive privilege from congressional oversight and by the deliberative-process exemption from required disclosure under the Freedom of Information Act.[159] And if these or any other requirements in the presidential directives are not followed, there is no judicial review; the directives explicitly bar that oversight option.[160]

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152. *See* Heinzerling, *supra* note 143, at 356–57 (describing the direct engagement of OIRA with the EPA).

153. Sunstein, *supra* note 140, at 1860.

154. *Id.*

155. *See* Exec. Order No. 12,866 § 6(b)(4)(B)–(C), 3 C.F.R. 638, 647–48 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802, 805–06 (2012).

156. *Id.* § 6(b)(4)(D), 3 C.F.R. at 648 (emphasis added). In addition, the agency is supposed to disclose any technical information on which it bases its regulatory decisions, including from these meetings. *See* Sierra Club v. Costle, 657 F.2d 298, 397–98 (D.C. Cir. 1981).

157. *See* Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. at 648 (requiring disclosure only of *documents*, and those only during the official review process).

158. *See* Mendelson, *supra* note 122, at 1149 ("[P]ublic information about the content of executive supervision . . . is surprisingly rare.").

159. Assertion of Executive Privilege over Communications Regarding EPA's Ozone Air Quality Standards and California's Greenhouse Gas Waiver Request, 32 Op. Att'y Gen. (June 19, 2008), http://www.justice.gov/olc/opiniondocs/ozonecalwaiveragletter.pdf (advising the President that he may lawfully assert executive privilege over subpoenaed documents regarding EPA's proposed regulations).

160. Executive Order 12,866 states:

> Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Exec. Order No. 12,866 § 10, 3 C.F.R. at 649.

In addition to transparency, the statutory and presidential procedures differ in their timing. At least as written, presidential mandates on agency decision making do impose time limits, unlike the APA requirements. Some of these limits restrict OIRA; others apply to the drafting agencies. Under the most recent executive order, OIRA generally has ninety days for its review process, which it can extend only once, by thirty days.[161] The directive also supplements the APA's commenting process by instructing agencies that "a meaningful opportunity to comment on any proposed regulation" requires "in most cases . . . a comment period of not less than 60 days."[162]

Just as agencies do not always follow statutory mandates, OIRA does not consistently comply with presidential requirements. Recent investigations have drawn attention to two discrepancies, in both Democratic and Republican administrations. First, written communications between OIRA and the drafting agency, whether generated by OIRA or given to it by outside parties, are often not disclosed once the final rule is issued. Indeed, on OIRA's website, there is no direct link to written documents to agencies by OIRA.[163] Despite the explicit mandate for disclosure, according to the GAO, OIRA "would not do so regarding exchanges between the agencies and OIRA staff at the level where most such exchanges occur."[164] Although OIRA's website does include some written documents provided to it by outside parties, much appears to be missing.[165] Specifically, between October 2001 and January 2013, OIRA noted that it had 581 meetings on EPA rulemakings but disclosed only 26 written documents from outsiders.[166] If nothing else, it seems implausible that there were at least 555 meetings where no outsider brought even a scrap of paper to the meeting. Thus, much of the actual process that shapes

161. *Id.* § 6(b)(2)(B)–(C), 3 C.F.R. at 647. If OIRA has previously reviewed the rulemaking and "since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based," OIRA gets only forty-five days, not ninety. *Id.* § 6(b)(2)(B), 3 C.F.R. at 647.

162. *Id.* § 6(a)(1), 3 C.F.R. at 644.

163. *See Regulatory Matters*, OFFICE MGMT. & BUDGET, http://www.whitehouse.gov/omb/inforeg_regmatters. The website does link to regulations.gov, which does contain a few redlined documents. For an example of a proposed rule and OMB's redlined changes, see *OMB Review of Proposed Rule re Executive Order 12866, Foreign Supplier Verification Programs for Importers of Food for Humans and Animals, July 29, 2013 - Memorandum*, REGULATIONS.GOV, http://www.regulations.gov/#!documentDetail;D=FDA-2011-N-0143-0036.

164. U.S. GEN. ACCOUNTING OFFICE, GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 13 (2003).

165. Sam Abbott, *Disclosure at the Office of Information and Regulatory Affairs: Written Comments and Telephone Records Suspiciously Absent*, CENTER FOR EFFECTIVE GOV'T (Feb. 26, 2013), http://www.foreffectivegov.org/disclosure-at-oira-written-comments-and-telephone-records-suspiciously-absent.

166. *Id.*

regulation, along with the supporting reasoning, if any, remains shielded from public scrutiny or judicial oversight.

Second, OIRA has not followed the express time limits on its review process. The time limits were imposed after criticism that Republicans in the White House were delaying regulations.[167] But Democrats too have delayed, particularly in this administration.[168] The *New York Times* has referred to the "purgatory of OIRA."[169] Of 136 rules recently under review at OIRA, more than half had been there longer than the ninety-day limit; of those, nearly forty had been there over a year.[170] Another study of reviews completed in 2012 found that approximately 20% of the year's completed reviews took more than 120 days.[171] The *Washington Post* reported that OIRA delayed "a series of rules on the environment, worker safety and health care to prevent them from becoming points of contention before the 2012 election."[172] Most recently, a report prepared for the Administrative Conference of the United States found that in 2012 OIRA review took, on average, 79 days and that in the first half of 2013 the review took even longer, on average 140 days.[173] The report did note that "data indicate that OIRA has reduced its backlog of long-term reviews and has improved review times in recent months, although those review times have still not returned to historic norms."[174]

This noncompliance may also generate conflicts with explicit statutory deadlines for agency action. For example, the proposed food safety

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167. *See* Cary Coglianese, *The Rhetoric and Reality of Regulatory Reform*, 25 YALE J. ON REG. 85, 88 (2008) (summarizing criticisms made during the Reagan Administration regarding the "costly delays" caused by OMB review).

168. *See* Heinzerling, *supra* note 143, at 371 (noting that as the process currently works "OIRA calls an official at the agency and *asks the agency to ask for an extension*" and "the agency is not to decline to ask for such an extension" and, therefore, that "not only is there no deadline for OIRA review, but OIRA itself controls the agency's 'requests' for extensions," allowing rules to remain at OIRA "for years").

169. Editorial Bd., Editorial, *Stuck in Purgatory*, N.Y. TIMES, June 30, 2013, http://www.nytimes.com/2013/07/01/opinion/stuck-in-purgatory.html.

170. *Id.*

171. *Regulatory Delay in 2012*, CENTER FOR EFFECTIVE GOV'T (Dec. 18, 2012), http://dev.ombwatch.org/regulatory-delay-in-2012. The new OIRA Administrator has promised "to ensure that regulatory review at OIRA occurs in as timely a manner as possible." John M. Broder, *Regulatory Nominee Vows to Speed Up Energy Reviews*, N.Y. TIMES, June 12, 2013, http://www.nytimes.com/2013/06/13/us/politics/environmental-rules-delayed-as-white-house-slows-reviews.html.

172. Juliet Eilperin, *White House Delayed Enacting Rules Ahead of 2012 Election to Avoid Controversy*, WASH. POST, Dec. 14, 2013, http://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809_story.html.

173. CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 4 (2013), *available at* http://www.acus.gov/sites/default/files/documents/Revised%20OIRA%20Report%20Re-posted%202-21-14.pdf.

174. *Id.*

standards discussed in the introduction sat at OIRA for about a year, far beyond the maximum 120 days allowed under the executive order, and the agency consequently missed the congressional deadline for issuing the proposed rules.[175] These delays not only slow the process (in this case violating a statutory deadline) but also provide the opportunity for more extensive lobbying and more intrusive White House review.

In short, important procedural mandates of administrative law come from the White House rather than from the APA and related case law. In addition, the combination of agencies avoiding prior notice and comment and OIRA not following the limited, express accountability mandates from presidential directives has resulted in agency decision-making procedures that are largely shielded from Congress, the courts, and the public.

D. Criteria for Decisions and Reason Giving

The presumptions of administrative law and the practices of modern agencies differ not just on the decision-making process but also on the substantive decisions. Administrative law rests on the agency reaching a decision based on statutory criteria provided when Congress delegated authority. We discuss first the criteria and then the decision maker, though the two are often connected.

The White House regulatory review process, on its terms, as well as political considerations can shape agency decisions in ways not permitted or imagined by the explicit terms of the statute. To start, the regulatory review process is premised on social welfare criteria. Specifically, "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach."[176] Because executive agencies must provide a cost–benefit analysis to OIRA for economically significant rulemakings even when the statute provides a different basis for decision (for instance, by precluding consideration of cost),[177] critics of OIRA review argue that OIRA essentially forces agencies to violate the law in making decisions in particular circumstances.[178] Defenders contend, however, that the cost–benefit analysis serves only as a disclosure requirement in those situations and does not displace the statutory factors, as the directive explicitly notes

175. *See supra* notes 8–10 and accompanying text.

176. *See* Exec. Order No. 12,866 § 1(a), 3 C.F.R. 638, 639 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802, 802 (2012).

177. *Cf. id.* § 6(a)(3)(C), 3 C.F.R. at 645–46 (noting no exception to the mandate).

178. *See* Heinzerling, *supra* note 143, at 338 (criticizing OIRA as "rest[ing] on assertions of decision-making authority that are inconsistent with the statutes the agencies administer").

that its requirements do not trump existing law.[179] The opacity of the review process makes it difficult to evaluate these competing descriptions, but there is at least some reason to think that OIRA can sometimes demand consideration of cost–benefit analysis even under statutes where the decision must be based on other factors.

Political considerations also factor into agency decisions. The opposite conclusion may be one of the strongest fictions of administrative law. Agencies rarely acknowledge these political considerations explicitly, though few commentators and scholars dispute their importance.[180] For example, Obama's pending reelection in November 2012 and the corresponding political need to avoid public conflict with the agricultural industry presumably contributed to the delay in proposing the new food safety standards.[181] So long as agencies can articulate some reasoned defense based on statutory terms, even if some political factor drove the decision, courts can manage to ignore politics.[182] The charade disintegrates only when the agency has no facially plausible alternative story it can tell. For instance, in striking down the Obama Administration's refusal to allow girls under seventeen to obtain the "morning-after pill" without a prescription—a decision that had the Secretary of Health and Human Services overruling the Administrator of the FDA—the district court found that "the Secretary's action was politically motivated, scientifically unjustified, and contrary to agency precedent."[183]

The statutory criteria may therefore be the basis for the decision in name only. Similarly, the agency may be the decision maker only in the formalist sense. There is increasing evidence that OIRA is no longer just a reviewer of the costs and benefits of agency decisions but rather is a reviewer of noneconomic judgments as well as a maker of policy decisions

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179. *See* Sunstein, *supra* note 140, at 1865–66. As we have seen, because it would be unlawful for the agency to consider the cost–benefit analysis in making its decision in such situations, even if the ultimate outcome could be rationalized under the applicable statutory standard, OIRA must claim that the cost–benefit analysis is merely for informational purposes.

180. Given the fiction's strength, it is not surprising that scholars have already examined it. *See, e.g.*, CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990); Mendelson, *supra* note 122; Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 14–29 (2009).

181. *See* Sabrina Tavernise, *Groups Urge Action on Food Safety Law*, N.Y. TIMES, July 17, 2012, http://www.nytimes.com/2012/07/17/science/consumer-groups-criticize-delay-on-food-safety-law.html.

182. *See* Watts, *supra* note 180, at 7 (describing "the blanket rejection of politics" as the courts' status quo view of administrative decision making).

183. Tummino v. Hamburg, 936 F. Supp. 2d 162, 170, 192 (E.D.N.Y. 2013). According to reports, the Health and Human Services reversal came as "Mr. Obama was campaigning for reelection, and some Democrats said he was conscious of avoiding divisive issues that might alienate voters." Pam Belluck, *Judge Strikes Down Age Limits on Morning-After Pill*, N.Y. TIMES, Apr. 5, 2013, http://www.nytimes.com/2013/04/06/health/judge-orders-fda-to-make-morning-after-pill-available-over-the-counter-for-all-ages.html.

and a conveyer of input from White House staff and other agencies, no matter which party controls the White House.[184] Recent OIRA head Sunstein concedes that OIRA does more than review a particular cost–benefit analysis. He touts that the organization serves an even more important role as a clearinghouse for input into decisions by other parts of the Executive Branch—in other words, it pools information (or fosters interagency lobbying, depending on your perspective).[185] Critics, however, argue that OIRA second-guesses agencies' scientific and technological judgments as well as their economic analysis[186] and does not even achieve the claimed "regulatory effectiveness" and "intra-agency coherence."[187] A broader role for OIRA also provides a conduit for influence by regulated parties; the Agriculture Department, for instance, might represent the interests of farmers.

In a survey of EPA scientists during President George W. Bush's Administration (conducted by the nonprofit Union of Concerned Scientists), agency employees reported in free-form essays that OMB officials "insert[ed] themselves into decision-making at early stages in a way that shaped the outcome of their inquiries."[188] In addition, OIRA writes critical regulatory text rather than merely signing off on agency language. For instance, a red-lined version of a recently proposed EPA regulation on power plants' toxic discharges of pollutants showed it was "significantly altered during White House review to include additional regulatory options for industry."[189] White House staff members, separate from OIRA, also provide detailed drafting of regulations.[190] These practices show that instead of the agency making decisions on statutory criteria, the White House may call the shots, and the decision may result from criteria not found in the delegating statute. On the other hand, supporters of White

184. Michael Livermore argues that the agency role in developing the methodology for cost–benefit analysis undercuts arguments that OIRA's review of cost–benefit analysis undermines agency independence because the methodology can have important effects on regulatory outcomes. *See* Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, U. CHI. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=2327554. Although this effect makes the analysis of OIRA's role more complex, its relevance is limited to the extent that OIRA's role now extends far beyond review of cost–benefit analysis.

185. Sunstein, *supra* note 140, at 1840.

186. *See* Heinzerling, *supra* note 143, at 367–68 (criticizing OIRA for "play[ing] an active role in adjusting EPA's discussions of technical matters in its NAAQS decisions. . . . [without] the scientific expertise necessary to make judgments about where the NAAQS should be set").

187. Bressman & Vandenbergh, *supra* note 120, at 50.

188. Judy Pasternak, *Hundreds of EPA Scientists Report Political Interference*, L.A. TIMES, Apr. 24, 2008, http://articles.latimes.com/2008/apr/24/nation/na-epa24.

189. Anthony Adragna, *Document Shows Power Plant Guidelines Rule Significantly Altered in White House Review*, BLOOMBERG BNA (Aug. 9, 2013), http://www.bna.com/document-shows-power-n17179875765/.

190. *See* Bressman & Vandenbergh, *supra* note 120, at 66.

House involvement often lament what they perceive as agency fixation on their governing statutes at the expense of other policies.[191]

E. Judicial Oversight

Modern administrative law, particularly the APA, venerates the courts.[192] We teach students that judicial review can ensure that the agency justification for a decision matches the delegated directions from Congress. Specifically, under the APA, aggrieved parties can bring challenges to the courts, which can then set aside unlawful agency action.[193] The "background presumption" of judicial review is that of "congressional intent."[194]

A variety of judicial decisions have helped to limit the courts' oversight of the policymaking process by restricting the class of aggrieved parties and reviewable actions as well as by lightening the intensity of review even when such aggrieved parties and reviewable actions exist. Decisions have made it harder to show the requisite injury, causation, and redressability to have standing to sue.[195] To the extent that these barriers are particularly difficult for regulatory beneficiaries to overcome, they could reinforce the advantage that regulated parties may already have in lobbying OIRA. Other decisions have made it difficult to challenge agency policies until they have been applied in enforcement actions, in effect allowing adoption of broad policies that can only be challenged through expensive, piecemeal litigation.[196] Relatedly, decisions have made it nearly impossible to force agencies to undertake broad actions, even if required by statute.[197]

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191. *See* Sunstein, *supra* note 140, at 1871–72.

192. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 76–78 (2012) (comparing the limited role of judicial review of administrative actions in early U.S. history with its more robust conception after the APA). To be sure, judicial review of agency action since the APA has been uneven. The courts took a particularly active role in overseeing agencies in the 1960s and 1970s, for example. *See* Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1392 (2000).

193. Administrative Procedure Act, 5 U.S.C. §§ 702, 706 (2012).

194. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1868 (2013).

195. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (denying plaintiffs standing for failure to establish injury in fact); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 45 (1976) (denying plaintiffs standing because too many inferences were required to establish causation); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 105 (1998) (denying plaintiff standing for failure to pass the redressability test). *See generally* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1185–98 (2009).

196. *See, e.g.*, Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 812 (2003) (finding a challenge to an agency regulation on national park concessions not ripe for judicial review and requiring the challenger to wait to dispute a concrete contract).

197. *See* Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55, 62–63 (2004) (holding that the courts have the authority to compel only discrete, legally required actions that agencies have failed to perform).

Even if agency actions are reviewable, deference doctrines have developed that generally favor agency discretion and therefore foster White House influence. *Chevron* permits any reasonable interpretation of an ambiguous statute even if it is not a compelling one.[198] *Mead*[199] does restrict this deference to binding interpretations,[200] which encourages notice-and-comment rulemaking, or, often, good-cause rulemaking.[201] *Brand X*,[202] however, allows agencies to switch binding interpretations of such statutes even if a court has found another interpretation persuasive.[203] The latest major case, *City of Arlington*,[204] furthers *Chevron*'s view by incorporating jurisdictional questions into the agency deference framework.[205]

Judicial decisions targeting the process of agency decision making (including but not limited to the process of reaching substantive interpretations of statutes) under § 706(2)(A) of the APA may not be as deferential as the second step of the *Chevron* framework. But "hard look" review may be getting a bit lighter. *Fox Television*[206] permits agencies to reverse policies without a real defense of the need for change.[207] It is conventional to see these decisions as giving more discretion to agencies.[208] That may be true (if thinking against the background of the courts versus the agencies), but they also give more room to the White House to intervene

198. *See* Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843–44 (1984). *Chevron* has a cult-like status, standing now for far more than it did at the time, when it was perceived as summarizing existing law. *See* Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551, 553 (2012) (recognizing that "*Chevron* has come to stand for judicial deference to administrative interpretations of law" in spite of the fact that Justice Stevens "was not especially deferential to agency decisions" in his majority opinion).

199. United States v. Mead Corp., 533 U.S. 218 (2001).

200. *Id.* at 229–33.

201. *See* O'Connell, *supra* note 132, at 909, 917–18 (articulating that many believe that notice-and-comment rulemaking could make *Chevron* deference more likely); *see also Mead*, 533 U.S. at 245 (Scalia, J., dissenting) (positing that the Court's decision in *Mead* will encourage agencies to use notice-and-comment procedures to gain more deference in judicial challenges).

202. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

203. *See id.* at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

204. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863 (2013).

205. *See id.* at 1873.

206. FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

207. *Id.* at 514 (finding no basis in the APA to subject "all agency change . . . to more searching review").

208. *See, e.g.*, Randolph J. May, *Defining Deference Down, Again: Independent Agencies,* Chevron *Deference, and* Fox, 62 ADMIN. L. REV. 433 (2010) (discussing the discretion afforded by some of these decisions and characterizing this discretion as problematic).

in policymaking.[209] Indeed, portions of *Chevron*'s reasoning seem to provide affirmative support for White House intervention. *Chevron* maintains that statutory decisions about ambiguous statutes should be made by politically accountable actors; it does not primarily base deference on agency expertise,[210] as under *Skidmore*.[211]

The political accountability side of *Chevron* seems to license a shift toward the political venue of the White House since the agency has no comparative advantage in terms of political accountability. Yet, to the extent that *Chevron* is based on the idea of a delegation of interpretative power to the agency, displacement of the agency by OIRA or other governmental actors undercuts that rationale.[212] *Mead* can be seen as an attempt by the courts to bring agency action more in line with the lost world; though by imposing procedural requirements to get *Chevron* deference,[213] it might push more agency action into OIRA's ambit. It is written as a case about congressional intent, but it too increases presidential power.

Agencies also work to keep cases out of court entirely by relying heavily on settlement. For example, approximately 90% of the Securities and Exchange Commission (SEC)'s and 80% of the Equal Employment Opportunity Commission (EEOC)'s and Federal Trade Commission (FTC)'s enforcement actions are settled.[214] Such settlements permit agencies to evade the statutory process, often entirely. In some sense, settlements are like direct and interim final rules: they implement policy decisions, but they face no public scrutiny before they are reached.

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209. *Cf.* Sunstein, *supra* note 82, at 288–90 (noting that "the [*Chevron*] approach is unlikely to serve Congress' own goals and expectations" and suggesting that this is because excessive judicial deference allows the agency too much latitude to deviate from congressional intent).

210. *See* Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 865–66 (1984) ("[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is . . . .").

211. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

212. *See* Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097, 1113–17 (2006) (arguing against *Chevron* deference in the context of a Clean Water Act regulation because OIRA, rather than the EPA, was responsible for the decision on how to interpret the statute).

213. *See supra* notes 199–201 and accompanying text.

214. Brief of the Securities and Exchange Commission, Appellant/Petitioner at 23, U.S. SEC v. Citigroup Global Mkts. Inc., 673 F.3d 158 (2d Cir. 2012) (Nos. 11-5227, 11-5375, 11-5242); Hamilton Jordan Jr., Should Courts Take a "Hard Look" at Agency Enforcement Settlements? 3 (May 22, 2013) (unpublished manuscript) (citing SEC v. Clifton, 700 F.2d 744 (D.C. Cir. 1983)) (on file with authors); *see also* FTC, THE FTC IN 2010: FEDERAL TRADE COMMISSION ANNUAL REPORT 2 (2010) (listing the number of consents per total FTC antitrust enforcement actions from 2005 to 2010); P. DAVID LOPEZ, EEOC, OFFICE OF GENERAL COUNSEL FISCAL YEAR 2009 ANNUAL REPORT 62 (2009) (stating that 83.9% of EEOC suit resolutions in FY 2009 were settlements).

Interestingly, the General Counsel of OMB apparently signs off on many agency settlements, informally consulting with OIRA. At the back end, courts rarely question settlement agreements. The D.C. Circuit typically treats enforcement settlements as unreviewable under *Chaney*;[215] other courts often give only a quick glance.[216] District Court Judge Rakoff's refusal to sign off on the SEC settlement with Citigroup was top national news when it happened because it deviated from this norm,[217] and was quickly stayed by the Second Circuit and is likely to be struck down.[218] Free of any meaningful oversight, agency settlements may therefore function as implicit waivers of congressional delegation as well.

In short, the courts are not the dominant overseer of agencies that the APA anticipated, though they can still play a powerful role in particular circumstances. Rather, the White House—typically through OIRA—is now at least as important as an overseer of agency action, at least if that action is significant rulemaking or guidance, particularly because it holds almost unreviewable power to block regulation entirely. This is not to say that judicial review is unimportant, but it is not necessarily the most significant restraint on agencies. Moreover, OIRA's role may step beyond oversight into active participation in making policy.

III. Assessment of Disjunction and Potential Policy Responses

As a descriptive matter, the previous two Parts have hopefully demonstrated that the realities of modern agency practices do not fit well with the theoretical framework established by the APA and judicial decisions. Sometimes, we may actually find agencies led by Senate-confirmed presidential appointees with decision-making power implementing statutory directives through statutorily mandated procedures where courts can ensure that the agency's reasoning matches the delegated directions. Yet, at many other times, multiple agencies missing confirmed leaders and lacking independent decision-making authority are implementing statutory and executive directives through mandates in both

215. Heckler v. Chaney, 470 U.S. 821 (1985); *see also* Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1030 (D.C. Cir. 2007) (asserting that enforcement actions are excluded from judicial review under § 701(a)(2) of the APA); N.Y. State Dep't of Law v. FCC, 984 F.2d 1209, 1216 (D.C. Cir. 1993) ("Such agency enforcement decisions, which often turn on careful calculations about finite resource allocation, are ill-suited to judicial oversight."); Schering Corp. v. Heckler, 779 F.2d 683, 685–86 (D.C. Cir. 1985) (explaining the Supreme Court's conclusion in *Chaney* that an agency's exercise of its enforcement power is "beyond the reach of APA review"). *See generally* Jordan, *supra* note 214, at 15–18.

216. *See generally* Jordan, *supra* note 214, at 4–9.

217. *See, e.g.*, Edward Wyatt, *Judge Blocks Citigroup Settlement with S.E.C.*, N.Y. TIMES, Nov. 28, 2011, http://www.nytimes.com/2011/11/29/business/judge-rejects-sec-accord-with-citi.html.

218. U.S. SEC v. Citigroup Global Mkts. Inc., 673 F.3d 158, 161 (2d Cir. 2012).

statutes and executive orders where the final result faces limited, if any, review by the courts.

Legal fictions are, of course, commonplace. The question then becomes whether the real world improves on the lost world. If so, we would want to determine whether the legal rules should shift to better accommodate these practices. If they make things worse, however, we would want to assess whether the practices should change. Yet, in order to not create more fictions, any proposed changes also have to be feasible. We aim here to start a conversation about how to address the consequences of the mismatch between the concepts and realities of administrative law, aware of the constraints on any reform.

A. Assessing the Mismatch

There are some benefits to the current reality of the administrative state, or at least to some of its features.[219] Economists laud cost–benefit analysis as an important mechanism to weed out socially (in terms of aggregate welfare) undesirable regulations.[220] As former OIRA head Sunstein has suggested, OIRA permits the pooling of information and expertise and, along with cost–benefit analysis, helps foster more rational regulation.[221] In addition, as Justice Kagan argued before joining the Court, White House involvement produces not only greater coherence but also potential democracy benefits.[222] From this perspective, we have seen a desirable shift from the reign of unaccountable bureaucrats who could be captives of particular interest groups or overly attached to their own missions to increased economic rationality and democratic legitimacy through the White House.

There are, however, some very real costs, which extend beyond attacks on cost–benefit analysis as a regulatory methodology.[223] A quick list would

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219. We are not examining what the ideal administrative state might look like. For instance, we do not consider how many agency positions ideally should be vacant at any given time, or how many regulations ideally should go through no or abbreviated prior public process, based on a set of normative criteria.

220. *See, e.g.*, W. Kip Viscusi & Ted Gayer, *Safety at Any Price?*, REGULATION, Fall 2005, at 54 (recognizing that proper cost–benefit analysis can be socially optimal but critiquing the efficacy of the current approach).

221. *See* Sunstein, *supra* note 140, at 1840–41.

222. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2334–39 (2001). Agency employees believe presidential involvement in agency decisions provides democratic legitimacy, even if they disagree with the views of the White House. *See* Bressman & Vandenbergh, *supra* note 120, at 89–90 (noting that EPA employee comments convey that the President plays a "democratizing role" in balancing competing interests).

223. *See, e.g.*, SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 40, 46–72 (2003) (defending Congress's choice not to rely on cost–benefit analysis when shaping risk regulation); Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1556 (2002).

include: loss of transparency for the regulated parties and the public; greater difficulty of congressional oversight; more politicization of the rulemaking process (the flip side of the democracy benefit); decreasing influence of the agency's unique expertise and knowledge of the record; and blurring or undermining delegation as the agency's statutory mandate is diluted by other policy and political goals. For instance, OIRA meets far more often with industry representatives than with public interest groups; the content of these meetings is largely unknown; and there are plausible fears of special interest influence.[224] Even if the agency's role in the process is exhaustively documented and subject to judicial oversight, such transparency may be deceptive if the real decisions are being made elsewhere based on considerations that never see the light of day.

The old-style administrative process of the lost world—where Senate-approved agency heads are in charge of implementing their statutory mandates through APA procedures subject to judicial review—has tremendous appeal. We suspect, however, that a return to that world is not a realistic possibility. Even at the time the APA was enacted, it lacked uniform support.[225] The Act was a compromise of New Deal politics between those who wanted New Deal programs implemented quickly (claiming administrative efficiency) and those who did not (claiming protection of individual rights).[226] Today, the increased difficulty and delay in staffing top agency positions through the traditional process means that agencies will often be run by acting heads promoted from the staff or other

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224. *See* RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT 2–15 (2011) (examining data from 2001 to 2011 to conclude that industry special interests warped agency regulations through meetings with OIRA); William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence over Rulemaking*, 54 ADMIN. L. REV. 611, 612 (2002) (arguing that inappropriate OMB involvement in rulemaking may necessitate a judicial or legislative response); *see also* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 855–59 (2003) (analyzing OIRA meeting records by industry, agency, rule stage, and significance). An early article by Cass Sunstein, who later headed OIRA, recognized the risk of interest group influence:

> OMB supervision may of course generate risks of its own, principally in the form of increased power by private groups with disproportionate access to OMB officials. The creation of a second low-visibility decision may also increase rather than diminish the dangers of self-interested representation and factional tyranny.

Sunstein, *supra* note 82, at 294 (footnote omitted).

225. *See, e.g.*, Herbert Kaufman, *The Federal Administrative Procedure Act*, 26 B.U. L. REV. 479 (1946). An editorial note at the beginning of Kaufman's article acknowledged the conflict:

> It is recognized that many readers of this *Review* will disagree with Mr. Kaufman's speculations as to the probable effects of the [APA], and that even more will disagree with his personal opinions as to the desirability of such legislation (his conclusions being based on an apparent bias in favor of complete, non-reviewable administrative freedom of action) . . . .

Id. at 479.

226. *See* Shepherd, *supra* note 17, at 1560, 1679–81 (describing the APA as "the armistice of a fierce political battle over administrative reform").

political appointees in the agency, who will not be in a strong position to insist on agency prerogatives or to make tough decisions. Overlapping agency jurisdiction or other conflicts between agencies are not easily eliminated and will inevitably call for coordination efforts from above. Like it or not, cost–benefit analysis seems to be a well-entrenched feature of the administrative state. Congress has never blessed OIRA's role with explicit statutory authorization as a general matter, but it has made presidential selections to the top position of OIRA subject to Senate confirmation in recognition of the importance of its role, and it continues to fund OIRA's rulemaking oversight. In short, regulatory review by the White House seems here to stay.[227]

Most importantly, it seems unrealistic to expect the White House to leave regulatory agencies alone to do their business. Regulations by the EPA and other agencies have too much political salience to be ignored by the White House.[228] Even from the point of view of lost world (agency) advocates, it may be a mistake to overlook the need for political oversight. Many key statutes, such as the federal pollution laws, were products of vanished political coalitions.[229] Given the polarization of American politics, even relatively recent legislation may no longer enjoy broad political support, and broad regulatory statutes of the kind passed in the

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227. *See* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 37–42 (1994) ("Regulatory review is now a routine part of the executive process.").

228. Clearly, successive presidents have not thought that the power to appoint agency heads and key subordinates was a sufficient means of ensuring consistency between agency and White House preferences. *See* Joshua D. Clinton et al., *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341, 352 (2012) (finding that preferences of agency personnel are not aligned with the appointing President or Congress). There are several possible reasons for this presidential belief in a principal–agent problem. First, there is the possibility that constant interaction with agency staff will "corrupt" the views of political appointees. Second, White House preferences may change after an appointment is made, but replacing the appointee may be impractical. Third, the White House may be motivated by partisan political calculations that agency heads are not competent to make. And fourth, advice-and-consent appointees have to go through Senate committees (and the full Senate), whose policy views have to be accommodated when selecting appointees, so the appointee's policy views may be a compromise due to the needs of confirmation rather than purely reflecting the views of the White House. Although one might argue that this mismatch is a "feature rather than a bug" in systemic terms—perhaps the requirement of confirmation is actually intended to produce this effect—from the President's point of view it may lead to agency heads having policy preferences that contrast with those of the President.

229. *See* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT 26–27 (1981) (identifying how a coalition of disparate groups was able to take advantage of institutional shortcomings in Congress to shape environmental policy); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1159 (1995) (noting that broad, grassroots support for environmental measures in the early 1970s "contributed to a political climate extremely favorable to environmental legislation").

1960s and 1970s would have no chance of enactment.[230] Blindly implementing their provisions might result in a congressional backlash that would be at least as damaging to those original interests as White House interference.[231] In the meantime, cost–benefit analysis may help the agency in attracting political support, and OIRA oversight may help legitimate the agency's positions.[232]

Nevertheless, the current situation is somewhat dismaying for those who still believe in the "rule of law" values underlying the lost world of administrative law. The changing realities of administrative law have left behind the mechanisms that the APA and the courts have drafted to achieve these values. Finding new ways to ensure transparency, accountability, rationality, and fidelity to statutes will be a major undertaking.

We suspect that some readers will find our proposals disappointingly incremental and perhaps lacking in coherence. We ourselves would be happy to propose more elegant solutions. But we are consigned to a kind of muddling through because we see the current situation as a sign of deep and unresolved tensions in American political culture. Many regulatory statutes and a good portion of the public favor whole-hearted pursuit of goals such as environmental quality and public health, with cost as a secondary consideration.[233] But this view is not universal, either among the public or among key political actors. Another major segment of the public thinks regulation has become a Leviathan-like threat to liberty,[234] while elite opinion seems oriented toward economic rationality as the goal.[235] Even on issues of process, there is a deep, unresolved tension about the balance between agency expertise and political accountability.[236] We doubt that these tensions will be resolved in the near future—and for us to simply posit

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230. *See* Percival, *supra* note 229, at 1165.

231. *Cf.* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, U. PA. L. REV. (forthcoming) (manuscript at 1), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2393033 (noting that "[r]ather than 'going for broke,' [agencies] tend to choose policies that stop short of open conflict with Congress, yet reflect the agency's mission, the president's priorities, and the limits of their statutory authority").

232. *See* Sharon Jacobs, *The Administrative State's Passive Virtues*, 66 ADMIN. L. REV. (forthcoming 2014) (manuscript at 29–31), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2355988 (stressing the importance for agencies of cultivating and maintaining presidential goodwill).

233. *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 153–58 (2004); STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 185–86 (2008).

234. *See generally* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 35–45 (1990) (summarizing arguments).

235. *See, e.g.*, CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 51–52, 164–65 (2013) (describing the primacy of economic rationality espoused by some prominent scholars at the University of Chicago and stressed by some members of Congress).

236. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (2008).

our preferred solution would be to little avail. So our proposals are meant to accommodate rather than resolve the tensions, an effort that may not lend itself to simplicity or intellectual elegance.

B. What to Change

Before turning to specific ideas about how administrative law can deal more effectively with the realities of current administrative practice, there are some broader strategic issues to consider. Although we will argue on behalf of a more incremental, pragmatic approach, three more sweeping responses to the problem are worth discussing. The first is simply to ignore the recent changes, clinging to the traditional view of regulation as a useful legal fiction. This approach could be supported by appeals to legal stability as well as doubts about how well courts and other institutions can assess and respond effectively to changing administrative practices. Moreover, the need to produce viable post hoc rationalizations for decisions would continue to provide some constraint on decision making. This approach necessarily involves some sacrifice in terms of achieving the general goals of administrative law, but it does have the advantage of simplicity. The risk is that administrative law will serve a primarily ceremonial purpose, providing the appearance, but not the reality, of public participation and accountability in policymaking. In our view, the goals of transparency, participation, and accountability are worth continued effort to strengthen them beyond their modest traction today.

A second, equally simple strategy (as a theoretical matter) would be to try to undo the changes that have made the conventional view untenable. Such an approach would require eliminating, or at least neutering, OIRA, removing the emphasis on cost–benefit analysis as a generalized approach to regulation, and shielding agency decision processes from other parts of the Executive Branch.[237] Although this approach will be appealing to those who applaud implementation of the congressional vision of the 1960s and 1970s, the basic problem we see is implicit in that very description: the Congresses that enacted those statutes are no more, and the political equilibrium that led to their enactment is gone as well. Under our constitutional system, statutes remain in effect until repealed, and the Executive has a duty to execute those statutes—but these ideals have to be pursued with a degree of political realism.

The third strategy is the opposite of the second: embrace the current system, acknowledge that real policy is often made behind closed doors in the Executive Branch for extrastatutory reasons, and eliminate the various constraints that are now embodied in administrative law, such as *State*

237. For a recent proposal in this vein, see Rena Steinzor, *The End of Centralized White House Regulatory Review: Don't Tweak EO 12,866, Repeal It*, CPR BLOG (Oct. 4, 2013), http://cprblog.org/CPRBlog.cfm?idBlog=837F8E83-9DA1-F501-FC902B3836C8542D.

Farm/Overton Park review or step two of *Chevron*. Courts would then limit themselves to ensuring that the Executive Branch is not violating clear constraints imposed by Congress, leaving the exercise of administrative discretion within those constraints entirely to the Executive Branch's combination of expertise and political judgment.[238] This solution may have a certain brutal realism to recommend it. But leaving this degree of unchecked discretion to the Executive Branch may be disturbing to those who are already distrustful of either the "imperial presidency" or its mirror image, "the faceless bureaucracy." Even apart from these two points, an additional concern is that the administrative mechanisms that would substitute for judicial review were created under a regime of strong judicial review, and we cannot be sure that they would continue to function in the same way once courts are largely taken out of the picture. So even if we are resigned to (or enthusiastic about) the current status quo, overturning current administrative law might change Executive Branch review in unpredictable and possibly undesirable ways.

We do not regard these alternative strategies as wholly unreasonable, but we think they fail to take seriously enough the need for new ways of achieving the goals of administrative law in a changed world. We also have doubts about their political feasibility, even if they were considered desirable. Once these straightforward strategies are put aside, we are left with the messy strategy of pragmatic accommodation.[239] This strategy entails looking for relatively incremental changes that can help bring administrative law and the actual operation of the administrative state into greater alignment. Hopefully, that realignment would further core concerns such as transparency and public accountability, fairness to regulated parties and regulatory beneficiaries, and efficient decision making. Below, we discuss possible steps toward such realignment.

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238. In many ways, this third option might seem like a return to the world of New Deal governance. But if judicial review were limited to determining whether an agency action is clearly prohibited by statute, this would not be a complete return to the pre-APA world for two reasons. First, standing to challenge administrative action is much broader than it was then, and in particular, beneficiaries of regulation would have the power to enforce statutory limits on agencies in certain contexts. Second, prior to *Chevron*, courts had more power to review an agency's statutory interpretations. In short, in one way agencies would be less subject to judicial oversight than they were prior to the APA, while in another way they would be more constrained by the courts.

239. We are putting aside two other possible strategies. The first is to eliminate the administrative state in favor of a libertarian watchdog state or a socialist state in which government regulation of business is unnecessary because the government runs all businesses. We consider these equally improbable. The second is a radical transformation in methods of governance: for example, replacing agency rulemaking with the use of some combination of an open-source drafting platform and prediction markets, or delegating authority to some AI (artificial intelligence). We leave consideration of the second of these strategies to less earthbound thinkers than ourselves.

C. *Potential Reforms*

We propose some changes for consideration by each branch of government to help reduce the gap between theory and practice. We believe the changes are feasible ones, though they are not costless to the relevant institutions.

1. By Congress.—In the lost world of the APA, Congress is a major actor in administrative law. The same year Congress enacted the APA, it also passed a massive reorganization of itself, reducing the number of committees and strengthening oversight of agencies.[240] But changes in the administrative process have taken place in the modern era largely without any initiative by Congress.

Assuming that Congress has an institutional interest in achieving agency compliance with statutory requirements, it could do more to keep agencies and their administrative overseers within statutory bounds.[241] To begin with, Congress could make better use of existing tools to supervise agency implementation of statutory directives. It could mandate more regular GAO investigations of key agencies. Even without such congressional mandates, because the GAO treats a committee chair and ranking minority member identically, a requested GAO investigation in real time may be less of a hostage to party control of Congress than a traditional hearing.[242] Such investigations could accomplish a range of objectives, including making legitimate agency actions more transparent, flagging when agencies are being pushed away from statutory mandates by cost–benefit analysis, and helping to distinguish technical input originating from (or passing through) OIRA from more nakedly political interventions.[243]

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240. Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (codified as amended in scattered sections of 2, 3, 5, 10, 15, 28, 31, 33, 34, 40, 44, 46, 50 U.S.C.); JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE 111 (2012) (explaining that the Act "revamped the congressional committee structure" in part by consolidating numerous committees into new standing committees with more "functionally defined" oversight of administrative agencies). We suspect that changes in Congress have eroded that Branch's ability to rely on congressional committees to support the statutory missions of agencies against incursions by other parts of the Executive Branch.

241. We recognize that at present Congress seems too paralyzed by political polarization to undertake this role, at least on any consistent basis, but we are hopeful that this paralysis will prove temporary. If not, the problems confronting the American system of governance will far transcend the issues discussed in this Article. Even if Congress becomes more active in governance, it may or may not view compliance with law as a significant independent factor in oversight, as opposed to approval or disapproval of outcomes on policy or political grounds.

242. *See* Anne Joseph O'Connell, *Intelligent Oversight*, *in* THE IMPACT OF 9/11 AND THE NEW LEGAL LANDSCAPE: THE DAY THAT CHANGED EVERYTHING? 157, 168 (Matthew J. Morgan ed., 2009) (arguing that increased GAO evaluation of the intelligence community would be feasible in today's political climate because the GAO does not differentiate between chairman and ranking minority member requests for review).

243. *See* Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. (forthcoming 2014) (manuscript at 2, 24–26), *available at* http://papers.ssrn.com/sol3/

The Senate can also confirm top agency officials faster (by providing credible commitment devices, such as timelines on confirmation).[244] Confirmed officials may be more attentive to congressional oversight, having promised to respond to congressional requests (including appearing at hearings) during their confirmation process. Confirmed agency officials may also have more leverage in internal administration disputes about policy. Because of their institutional role as agency heads, they are more likely to represent the agency and its authorizing statute to a greater degree than other administration officials outside the agency. The recent elimination of the cloture requirement,[245] at least as applied to agency positions, is a positive step.

The changes we describe in the operation of the administrative state are also relevant to drafting substantive legislation. If Congress wants to ensure that agency heads rather than White House staff members make relevant decisions—or at least that they have a major role in key decisions—it may need to delegate more frequently to independent regulatory commissions and boards, which face less scrutiny from OIRA, as opposed to giving authority to executive agencies like the EPA. This could propel the White House to revise its regulatory review directives to include regulatory commissions and boards, though the legal authority to do so is disputed.[246] Congress can also specify procedures that have to be followed by agencies in taking action. Along these lines, Congress should also be clear in cases when it does not want cost–benefit analysis to be the basis of decisions.

Congress can also think more about agency design and coordination. Specifically, it can create structures outside of OIRA to coordinate agency

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papers.cfm?abstract_id=2320471) (noting how the GAO provided "crucial information" in an episode involving the Plan B pill).

244. *See* O'CONNELL, *supra* note 104, at 17–18 (advocating the imposition of deadlines on the confirmation process).

245. Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES, Nov. 21, 2013, http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html.

246. *See* VIVIAN S. CHU & DANIEL T. SHEDD, CONG. RESEARCH SERV., R42720, PRESIDENTIAL REVIEW OF INDEPENDENT REGULATORY COMMISSION RULEMAKING: LEGAL ISSUES 12 (2012) (noting "there may be lingering questions as to whether the President has the legal authority to extend requirements of the executive order to the [independent regulatory commissions] without . . . congressional action"). One of the authors of this Article (O'Connell) has written in support of proposed legislation that permits the President to extend regulatory review to independent regulatory commissions and boards. Letter from Admin. Law Professors to Senator Joe Lieberman, Chairman, Senate Comm. on Homeland Sec. & Governmental Affairs, and Senator Susan Collins, Ranking Member, Senate Comm. on Homeland Sec. & Governmental Affairs, on S. 3468, The Independent Agency Regulatory Analysis Act (Jan. 2, 2013), *available at* http://www.portman.senate.gov/public/index.cfm/files/serve?File_id=3f7b2523-c274-438e-9892-5d8dcbcc0345; *see also* S. 1173, 113th Cong. §§ 3–4 (2013) (affirming the President's authority to require independent regulatory commissions and boards to comply with regulatory directives but not creating a right of judicial review over those directives).

action. For instance, the Financial Stability Oversight Council in the Dodd-Frank legislation, which draws together leaders of multiple agencies engaged in financial regulation, functions in such a manner.[247] Finally, it can issue statutory deadlines, which can be a tool against White House foot-dragging (through OIRA delay and other mechanisms).[248] Even under *SUWA*, which restricts judicial review of agency inaction, deadlines for discrete agency action can permit judicial review. As noted earlier, before the parties settled, a district court recently ordered the FDA to issue regulations under the Food Safety and Modernization Act after the agency missed deadlines.[249]

Congress may also want to take steps to strengthen its oversight of OIRA. Given OIRA's importance as a "super-agency," it may not be enough that the head of OIRA is subject to Senate confirmation; perhaps this requirement should extend one level lower in the organization.[250] The GAO could also be tasked with more investigations of the regulatory review process.[251] Some members of Congress have even proposed creating a competitor to OIRA, a division within the Congressional Budget Office (CBO) to perform regulatory analysis.[252] Such an arrangement might parallel the functioning of OMB and the CBO for budgetary forecasts. Finally, the various committees with jurisdiction over the regulations that OIRA supervises may want to coordinate on oversight of OIRA rather than leaving OIRA matters to each chamber's general government operations committee, since that committee may have a weaker interest in the faithful implementation of the relevant regulatory statutes.

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247. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 111–112, 124 Stat. 1376, 1392–98 (2010) (codified at 12 U.S.C. §§ 5321–5322 (2012)). *See generally* Jacob E. Gersen, Recent Development, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689 (2013) (describing the organization and role of the Financial Stability Oversight Council).

248. Deadlines may generate costs, including encouraging agencies to forgo procedural mandates under the APA, *see* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 972 (2008) (noting that agencies may use deadlines as an excuse to "opt out" of certain procedures), and allocating agency resources inefficiently, *see* Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 186–200 (1987) (demonstrating the costs imposed by statutory deadlines in terms of wasted and misallocated resources).

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

250. The Deputy Administrator is currently a nonpolitical position. Sunstein, *supra* note 140, at 1845.

251. It does some of that work already. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-423T, FEDERAL RULEMAKING: REGULATORY REVIEW PROCESSES COULD BE ENHANCED (2014).

252. Strengthening Congressional Oversight of Regulatory Actions for Efficiency, S. 1472, 113th Cong. (2013).

At a more fundamental level, most of OIRA's operation is entirely a creature of administrative fiat.[253] It is anomalous that such an important feature of the regulatory state has no statutory basis. Congress might want to consider providing a statutory framework for OIRA's role, which could also address the process issues. This framework might address the substantive role of cost–benefit analysis in decision making,[254] either expanding or contracting the current practice.[255] Alternatively, the statute might be limited to process issues to ensure that the review process is transparent and fair, if only by codifying the procedures already embodied in executive orders so that they would have the force of law and be judiciously reviewable.

2. By the President.—In the real world of administrative law, the White House is the main player. Presidents will therefore presumably be loath to give up power, but they may, at least under pressure, be willing to make some changes. Other changes may be desirable simply to improve the effectiveness of the current process.

Along the latter lines, it might make sense to separate OIRA's technical role from its more general managerial role, which might better be performed by appointees with broad government or political experience, which is typical for the head of OMB but not for the head of OIRA. In terms of OIRA's mission of improving the economic rationality of regulation, the person in charge of cost–benefit review should have substantial economics training. The current head of OIRA, Howard Shelanski, is one of the few Ph.D. economists to hold the position.[256] It is also possible that we would be better off with a peer review process for cost–benefit analysis rather than a White House agency for the purpose. The EPA's Science Advisory Board could be a model for such a process, or

253. *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 23, 28 (2009) ("Congress has enacted legislation expanding OIRA's statutory responsibilities [for example, related to the Unfunded Mandates Reform Act of 1995], and has considered (but not enacted) legislation that would provide a statutory basis for OIRA's regulatory review function.").

254. Given *Chevron*, agencies may find it hard to resist OIRA pressure to employ cost–benefit analysis as a basis for decision. Congress could provide presumptions regarding the application of cost–benefit analysis, universalize its use, or forbid the use of cost–benefit analysis under certain statutes or provisions of statutes.

255. The two of us are not in complete agreement about the desirability or direction of change. For one example of an attempt to make agency decisions be justified by cost–benefit analysis, see Regulatory Responsibility for Our Economy Act of 2013, S. 191, 113th Cong. § 3 (2013).

256. *See Professor Howard Shelanski Confirmed as Administrator, Office of Information and Regulatory Affairs*, GEO. L. (June 28, 2013), http://www.law.georgetown.edu/news/press-releases/professor-howard-shelanski-confirmed-as-administrator-office-of-information-and-regulatory-affairs.cfm.

this role could be given to the Council of Economic Advisors (CEA).[257] With the technical quality of cost–benefit analysis dealt with separately, OIRA's role could then be focused on agencies' coordination with other agencies and with White House policy staff.

In terms of OIRA's executive coordination role, it is very clumsy to wait until the agency has actually formulated a NPRM to try to coordinate with the rest of the federal government.[258] Informal interactions undoubtedly begin earlier,[259] but there would be something to be said for formalizing the process and making it transparent.[260] Perhaps more could be done with the required annual regulatory plans (that announce future actions) and Memorandums of Understanding between multiple agencies. Such a change might well be desirable from the point of view of the White House.

Perhaps the most pressing issue is transparency. The natural inclination of the Executive Branch is probably to limit transparency. Although President Clinton made the OIRA process far more transparent in Executive Order 12,866 than it had been under Presidents Reagan and George H.W. Bush,[261] OIRA could do more: it could follow the deadlines in the current executive order; it could distribute written communications with agencies at the time of the final rule as the directive prescribes; it could provide that information earlier; and it could provide more information about oral communications (for instance, a summary of meetings) instead of just the list of participants that is now available.[262]

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257. Although we are unaware of any formal documentation to this effect, we have some reason to believe that CEA sometimes plays this role as an adjunct to OIRA.

258. *See* Freeman, *supra* note 120, at 362 (stating that the late-stage input from other agencies typical of OIRA-led regulatory review inhibits substantive changes in rulemaking).

259. *See* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1085–87 (1986) (discussing the extent of OMB's informal involvement in the rulemaking process).

260. The Administrative Conference of the United States (ACUS), a nonpartisan agency tasked with improving the operation of the administrative state, recently called for more "informal discussions" to predate OIRA review as one mechanism to decrease OIRA delays. Memorandum from the Admin. Conference of the U.S. to the Comm. on Admin. & Mgmt. and the Comm. on Regulation 6 (Nov. 12, 2013), *available at* http://www.acus.gov/sites/default/files/documents/Draft%20OIRA%20Statement%2011-12-13%20CIRCULATED.pdf. The Center for Effective Government, among others, has objected to this recommendation, at least without more transparency on these consultations. *See* Letter from the Ctr. for Effective Gov't to the Comm. on Admin. & Mgmt. and the Comm. on Regulation (Nov. 12, 2013), *available at* http://acus.gov/sites/default/files/documents/CEG%20Public%20Comment%20for%20OIRA%20Project.pdf.

261. In addition, OIRA Administrator John Graham, who served under President George W. Bush, also increased transparency by posting more information (including meeting logs) online, among other items. *See* John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 966–68 (2006).

262. ACUS recently "offer[ed] a discrete set of principles for improving the timeliness of review and the transparency concerning the causes for delay." ADMINISTRATIVE CONFERENCE STATEMENT #18: IMPROVING THE TIMELINESS OF OIRA REGULATORY REVIEW 5 (Admin.

All of these reforms could be implemented without undermining presidential prerogatives under Article II, although the price might be occasional political embarrassment. On the other hand, if it is true that the process is largely technical and apolitical, greater transparency might actually give the process more legitimacy without impairing its effectiveness.

3. By the Courts.—Taking a more realistic view of administrative practice could change judicial doctrine in at least two directions, which are not altogether consistent. One type of change is to redesign doctrine to pursue core administrative law values in a different way, which sometimes means pushing back against some of the recent evolution of the process. If courts were to become more realistic, they may have to admit that some existing doctrines that attempted to achieve these goals are no longer capable of doing so and that in some situations solutions, if any, will have to be political.

Here, we focus on changes along the first line, which do not attempt to undo recent changes but do seek to regularize procedures and reinforce to some extent the efforts of agencies to apply their expertise to the pursuit of statutory goals.[263] We do not attempt to cordon off agencies from White House influence, but at the least, we think they could usefully be given additional bargaining chips in their negotiations with the rest of the Executive Branch.

Like Congress, the courts can undertake actions to capture some of the lost world values within modern administrative practices. There have been suggestions that the courts should bring more of the realities of the administrative process into the open by allowing agencies to rely on "political" factors.[264] We do not have a position on this.[265] The hope would be that by bringing some of the perspectives of political actors into view, agencies would have fewer incentives to make disingenuous use of evidence to support outcomes that are really based on political priorities. The fear would be that doing so would only legitimize and strengthen interference with an agency's judgments and could provide a screen for less acceptable types of influence based on purely partisan considerations.

Conference of the U.S. 2013), *available at* http://acus.gov/sites/default/files/documents/OIRA%20Statement%20FINAL%20POSTED%2012-9-13.pdf.

263. This function of agencies has been justified by neorepublican theories that stress deliberation and achievement of broad public interests. *See* Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1445–48 (2013).

264. *See, e.g.*, Watts, *supra* note 180, at 8–9 (arguing that certain political influences should qualify as valid reasons to uphold agency decision making).

265. A more constrained position, which we discuss *infra*, would be to require agencies to disclose political input, subject to constitutional constraints, but not to allow agencies to rely on those factors in judicial review. *See* Mendelson, *supra* note 122, at 1163–75.

Courts might also want to move from *Chevron* to *Skidmore* deference, which gives the agency more leverage since it has the statutory expertise, although this might have the downside that *Skidmore* makes it harder for agencies to change policies.[266] The effect would be to increase the influence of line agencies in internal administration debates over statutory interpretation, while also increasing the role of the courts as compared with the Executive Branch. Of course, for *Chevron* enthusiasts, the shift toward judicial control of statutory interpretation would be an undesirable side effect of this change.

A more modest shift would involve increased review of regulatory inaction. Courts might show greater willingness to mandate action when delays are not internal to the agency itself, particularly when the agency has already invested substantial resources in a possible regulation. For instance, some proposed regulations have sat in OIRA for months or years. Similarly, courts might try to normalize OIRA review by treating it as part of the administrative process before them for review. While providing a statutory basis for OIRA review would make such judicial review easier, even without such a basis, the courts might require more disclosure of OIRA's role in shaping regulations and provide a harder look at changes made in response to OIRA pressure, on the theory that those changes do not reflect the agency's expertise under the statute delegating authority to the agency.[267] Similarly, courts might take a harder look at settlements and also at direct and interim rules where the agency has not provided prior notice and comment.

To the extent that effective decision-making power has moved away from the agency to the White House and may incorporate extrastatutory factors, we may need to reconceptualize parts of administrative law. For instance, some of the arguments for notice-and-comment decision making (such as improving agency rationality) assume that the public record and justification are the real basis for the decision.[268] This appears to be something of a fiction, or at least an oversimplification, and the natural response might be to require the agency to reveal and justify changes made in response to White House pressure.

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266. In a recent article, Daniel Walters highlights that litigation can provide agency staff with leverage against political directives. Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & POL. 129, 175–78 (2013). It has been suggested that agencies generally prefer *Chevron* deference. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1061–62 (2011). The effort to consider how administrative law affects the internal distribution of power within agencies is very much in the spirit of this Article, but we would suggest that such consideration should not overlook potential impacts on the distribution of power between the agency and other parts of the Executive Branch.

267. *See* Mendelson, *supra* note 122, at 1163–75 (summarizing the pros and cons of increased scrutiny of White House involvement in agency decision making).

268. *See supra* subpart I(D).

On the other hand, perhaps we should give up on the idea that the public explanation corresponds to the actual reasons for a regulation. Even if the public explanation were only an after-the-fact justification for a decision made on other grounds, judicial review based on the public explanation would not be completely pointless. There is separate value to the production of a public and rational explanation showing that the agency's decision is legitimately within the scope of the congressional delegation, even if the explanation has little to do with the reasons for the decision. In some cases, at least, it will be impossible to draft a satisfactory rationalization for actions based on partisan politics or on nonstatutory policies. In such cases, judicial review (even of factual issues) functions just as a way of policing the boundaries of the agency's authority, not of improving decisions or even fairness to the regulated parties.[269] We think it is premature, however, to give up on the idea that administrators should make a good faith effort to implement statutes in favor of viewing statutes as unfortunate constraints that sometimes interfere with their ability to implement their own policy preferences.

There are legitimate reasons to be wary of excessive intrusion into Executive Branch deliberations. But at least when challengers can show probable cause to believe that statutory policies have been swamped by other considerations or that control of a decision has passed to the White House rather than the agency designated by Congress, judicial intervention may be warranted.[270] In sum, we are not advocating that the courts should

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269. *But see* Heinzerling, *supra* note 243 (manuscript at 59) (calling such an approach a "lie").

270. For discussion of a striking example of just such a situation, see *id.* There is considerable dispute about whether the President has statutory or constitutional authority to make decisions unilaterally or to mandate particular decisions when a statute purports to vest authority in an executive agency rather than directly in the President. *Compare* Kagan, *supra* note 222, at 2327–28 (arguing that unless a statute forecloses it, presidents have directive authority), *and* Nina A. Mendelson, *Another Word on the President's Statutory Authority over Agency Action*, 79 FORDHAM L. REV. 2455 (2011) (arguing in favor of such presidential authority and advocating greater disclosure rather than efforts to limit this power), *with* Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2488 (2011) (arguing that "even if the President has unfettered removal authority over the heads of non-independent agencies, it matters that this removal power does not imply the power to control decision making entrusted by law to agency heads"), *and* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (arguing that presidents have directive authority only if the statute delegates to the President and not an agency head). We would observe, however, that even if the President has such power, it seems clear that he or she cannot freely delegate it to other administration officials. Otherwise, the President could reorganize the government at will simply by reallocating statutory powers among officials, a power not granted to the President by Congress. Therefore, this debate is directly relevant only in the case where the President personally intervenes in a decision and overrides a contrary determination by an agency head. It is difficult, we think, to account for the Constitution's requirement of Senate confirmation for principal officers if the President may freely delegate control of those officials to individuals confirmed for other posts or staff members who have not been subject to confirmation. In terms of personal presidential interventions, we are

generally apply increased scrutiny of political factors; rather, the courts should at least make those factors more transparent.

The proposals in this subpart are admittedly fragmentary and somewhat costly to implement. One could certainly imagine a new Administrative Procedure Act ("APA 2.0"?) based on a holistic vision of the modern administrative state. But at least in the near future, potential reforms are likely to be piecemeal and incremental, with correspondingly modest aspirations. It will be important to think about how these reforms might place our normative goals in conflict; for example, increased transparency (or process) may make socially desirable regulation take longer to achieve. Our goal is not to return to the lost and perhaps unrecoverable world of the APA. But we do suggest that it may be worth making some incremental changes from the current practices in order to ensure that other administrative forces do not swamp statutory directives and agency expertise. In any event, we would also note that the current system of Executive Branch review does not live up to its own expectations regarding efficiency and transparency.

Conclusion

The lost world of the APA and administrative law and the real world of modern administrative practice do share the same overall focus: the exercise of discretion. The cleavages, some rather deep, turn on the sources, the wielders, and the reviewers of that discretion.

Almost forty years ago, Richard Stewart posited that interest groups might become the basis of a "fully-articulated model" of administrative discretion.[271] In his view, if a wide range of interests could be captured in the administrative state, "policy choices would presumably reflect an appropriate consideration of all affected interests and the pluralist solution to the problem of agency discretion might prove both workable and convincing."[272] Today, pluralism or some wider form of democratic legitimacy is just one goal of not only administrative law but administrative practice as well.

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inclined to side with those who do not find a basis for such directives in Article II when Congress has reposed power elsewhere, in part because the requirement of confirmation for senior officials seems senseless unless they were intended to be more than presidential hand puppets. Moreover, when agency officials are removable by the President, we see a genuine practical difference between a rule that requires the President to fire an obdurate subordinate and one that allows the President to get his or her way, putting the onus on the official to resign afterwards in protest. In any event, personal intervention by the President is unlikely to be the norm except in the most sensitive rulemakings.

271. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1813 (1975).

272. *Id.* at 1715.

These goals include agency efficiency and effectiveness, democratic legitimacy, and the rule of law. With such complex ends, it should not be surprising that the sources, exercise, and review of discretion are not simple, either as a descriptive or as a normative matter. We not only need to acknowledge the increasingly fictional yet deeply engrained account of administrative law, but also need to think seriously about how that account can better reflect current practices while still retaining its tractability and original objectives. This Article has been an attempt to focus the attention of scholars, judges, and policymakers on this crucial task.

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Book Review Colloquy

The Architects of the *Gideon* Decision: Abe Fortas and Justice Hugo Black

Abe Krash*

Anthony Lewis's riveting account of *Gideon v. Wainwright*[1] is one of the best books ever written about a Supreme Court case.[2] It is certainly the most widely read.[3] For half a century, it has inspired countless young men and women to pursue careers in the legal profession and in public service.[4]

Apart from Clarence Earl Gideon, there are two principal figures in *Gideon's Trumpet*: Abe Fortas and Justice Hugo Black. These two men may justly be described as the architects of the *Gideon* decision. Fortas was the lawyer appointed by the Supreme Court to represent Gideon in his appeal; he wrote the brief and made the oral argument on Gideon's behalf.[5] Justice Black wrote the Court's opinion sustaining Gideon's claim that he was denied his constitutional rights by reason of the trial court's refusal to appoint counsel to represent him.[6] Lewis clearly had high regard for both Fortas and Black.

In this Essay, I will discuss the problems that confronted the advocate and the Justice in the *Gideon* case and the manner in which each of them resolved those issues.

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1. 372 U.S. 335 (1963).

2. ANTHONY LEWIS, GIDEON'S TRUMPET (1964). The only book about a Supreme Court case of comparable excellence that comes readily to mind is Richard Kluger's superb account of *Brown v. Board of Education*. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (Vintage Books 2004) (1975).

3. *See* Adam Liptak, *Anthony Lewis, Supreme Court Reporter Who Brought Law to Life, Dies at 85*, N.Y. TIMES, Mar. 25, 2013, http://www.nytimes.com/2013/03/26/us/anthony-lewis-pulitzer-prize-winning-columnist-dies-at-85.html ("[*Gideon's Trumpet*] has never been out of print since it was published in 1964.").

4. *See id.* (quoting Yale Kamisar as saying, "There must have been tens of thousands of college students who got it as a graduation gift before going off to law school").

5. LEWIS, *supra* note 2, at 48, 133–34, 169.

6. *Gideon*, 372 U.S. at 336, 345.

I. The Advocate

It is the practice of the Supreme Court when it agrees to review an *in forma pauperis* petition, as it did in Gideon's case,[7] to appoint a member of the Supreme Court bar to represent the petitioner.[8] The Court provides no explanation for its choice of counsel,[9] and accordingly, one is forced to speculate on why Fortas was chosen. Fortas was a close friend of Justice Douglas dating back to their time together at the Yale Law School in the early 1930s, and Fortas knew a number of other Justices.[10] I believe it is fair to say that the Court regarded the *Gideon* case as important, and it wanted an eminent advocate to present the argument on behalf of the petitioner. Fortas met that specification. Measured by any standard, he was one of the best lawyers of his generation.

In June 1962, when he was appointed by the Court as counsel in the *Gideon* case, Fortas was fifty-two years old and a senior partner in the Washington, D.C., law firm Arnold, Fortas & Porter.[11] Fortas graduated from the Yale Law School in 1933.[12] He was an outstanding student and the editor in chief of the *Yale Law Journal*.[13] Immediately after his graduation, he was offered an appointment to the Yale faculty,[14] a unique tribute. Fortas remained only briefly in New Haven and left Yale to join the Roosevelt Administration in Washington.[15] He worked together with William O. Douglas at the Securities and Exchange Commission, with Jerome Frank at the Agricultural Administration Department, and with Harold Ickes at the Department of the Interior.[16] At age thirty-two, he became Under Secretary of the Interior Department.[17] There were many exceptionally able lawyers in the New Deal Administration, and Fortas was one of the stars.

After World War II ended, Fortas left the government, and in 1946 he joined his former Yale Law School professor Thurman Arnold in private practice in Washington.[18] Fortas was the quintessential Washington lawyer.

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7. LEWIS, *supra* note 2, at 34.

8. *See* SUP. CT. R. 39; LEWIS, *supra* note 2, at 44.

9. LEWIS, *supra* note 2, at 47.

10. *Id.* at 50, 52.

11. *Id.* at 48–50. For a biography of Fortas, see generally LAURA KALMAN, ABE FORTAS (1990). Two years after the *Gideon* decision, in July 1965, Fortas was nominated by President Johnson to be an Associate Justice on the Supreme Court. *Id.* at 241, 244. He was promptly confirmed by the Senate. *See id.* at 248. He resigned his seat on the Court in May 1969. *Id.* at 373. He died in April 1982 at age 71. *Id.* at 400–01.

12. LEWIS, *supra* note 2, at 50.

13. *Id.*

14. KALMAN, *supra* note 11, at 25.

15. *Id.* at 26–27.

16. *See id.* at 45–47; LEWIS, *supra* note 2, at 50.

17. LEWIS, *supra* note 2, at 50.

18. KALMAN, *supra* note 11, at 125–26.

He specialized in securities and antitrust issues, but he represented parties before many different administrative agencies involving a variety of issues, and he advised clients with respect to legislative matters.[19] Fortas was not a trial lawyer, but he was an excellent appellate advocate. At the time of his appointment as Gideon's attorney, Fortas was among the best known lawyers in Washington.

One factor that may have influenced the Supreme Court's appointment of Fortas as Gideon's counsel was that Fortas was well-known as a public interest, or pro bono, lawyer. Fortas was extensively engaged in his firm's pro bono representation of government employees in the loyalty and security proceedings during the McCarthy era.[20] Government employees could be questioned and dismissed from their government jobs on the basis of organizations they had joined while in college, magazines they had read, or friendships they had formed as young persons.[21] Those proceedings involved significant issues of freedom of speech and freedom of association as well as questions of due process presented by the refusal of loyalty boards to permit government employees to confront adverse witnesses.[22] In the atmosphere that then prevailed, it took considerable moral courage to represent such persons; many lawyers declined to do so because of concerns that they would be shunned by their clients as communist sympathizers.[23]

There was another matter that enhanced Fortas's reputation as a pro bono lawyer. In 1953, Fortas was appointed by the U.S. Court of Appeals for the D.C. Circuit to represent an indigent petitioner in an appeal that raised the issue of the standard of responsibility that should be applied in criminal cases, that is, the manner in which the defense of insanity should be defined.[24] Fortas urged the court of appeals to abandon the test that had been formulated in England in the 1840s, the so-called M'Naghten Rule, which required the trial court in a proceeding where the accused pleaded insanity to determine whether the defendant knew the difference between right and wrong.[25] That test was then still followed by most U.S. courts,

19. *Id.* at 152–54.

20. *See id.* at 183 (noting that Fortas was passionate about loyalty cases and that this type of public-interest work was most important to Fortas). As examples of cases on which Fortas worked, see Bailey v. Richardson, 182 F.2d 46, 48 (D.C. Cir. 1950), and Peters v. Hobby, 349 U.S. 331, 332 (1955).

21. *See* KALMAN, *supra* note 11, at 130.

22. *See id.*

23. *Id.* at 129–30.

24. *Id.* at 178–80.

25. *Id.* at 178–79; *see also* Durham v. United States, 214 F.2d 862, 869 (D.C. Cir. 1954) ("It has been ably argued by counsel for Durham [, Fortas,] that the existing tests in the District of Columbia for determining criminal responsibility, *i. e.*, the so-called right-wrong test supplemented by the irresistible impulse test, are not satisfactory criteria for determining criminal responsibility."), *abrogated by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

including those in the District of Columbia.[26] Fortas urged the Court to substitute a test that was consistent with the insights of modern psychiatry and that would permit psychiatrists to tell the jury everything they had learned about the accused.[27] In the widely discussed *Durham v. United States*[28] case, the court of appeals established a new standard of criminal responsibility—whether the offense charged is a product of mental disease—and ignited a debate about the insanity defense that continues to this day.[29]

A day or so after he was appointed by the Supreme Court in late June 1962 to represent Gideon, Fortas summoned me to his office; he told me of his appointment, and he asked me to assist him in the research and the writing of the brief on Gideon's behalf.[30] I had been privileged to work with Fortas previously on many matters from the time I became an associate in the firm in 1953. We had the responsibility as Gideon's lawyers to assert every legitimate argument supported by the record that we could make in order to secure reversal of his conviction, but Fortas made clear from the outset that he wanted to convince the Supreme Court to establish the principle that an indigent person is entitled under the Constitution to the assistance of counsel in any felony prosecution.

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In order to appreciate the problems Fortas confronted in representing Gideon, it is essential to bear in mind the status under constitutional law in 1962 of the government's duty to furnish a lawyer to indigent defendants in federal and state criminal prosecutions.

There was a fundamental difference between the duty to do so in the federal courts and the duty to do so in the state courts. The Supreme Court had ruled in 1938, in *Johnson v. Zerbst*,[31] that the federal courts were

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26. *See* KALMAN, *supra* note 11, at 178.

27. *See Durham*, 214 F.2d at 872 (noting that the objection to the old test was that it relied on a particular symptom and adopting a new test that allows fact-finders to take all relevant scientific information into account); KALMAN, *supra* note 11, at 179 (discussing the same).

28. 214 F.2d 862 (D.C. Cir. 1954).

29. *Id.* at 874–75; *see also, e.g.*, Morris B. Hoffman & Stephen J. Morse, *The Insanity Defense Goes Back on Trial*, N.Y. TIMES, July 30, 2006, http://www.nytimes.com/2006/07/30/opinion/30hoffman.html (noting that the debate over the proper scientific inquiry into insanity continues).

30. Two other individuals were named in the brief filed on behalf of Gideon as assisting Fortas: Ralph Temple, an associate, and John Ely, a third-year law student at Yale and a summer law clerk in 1962. LEWIS, *supra* note 2, at 122, 129; *see also* Brief for the Petitioner at 47, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155). (The brief was filed under the case's initial name, *Gideon v. Cochran*.) In a footnote to the brief, Fortas "acknowledge[d] the valuable assistance rendered in connection with this brief" by Ely. *Id.* at 47 n.* Two other associates at Arnold, Fortas & Porter, James Fitzpatrick and Bruce Montgomery, contributed helpful memoranda. LEWIS, *supra* note 2, at 121, 129.

31. 304 U.S. 458 (1938).

required by the Sixth Amendment to provide a lawyer for an indigent defendant in all criminal prosecutions.[32] If they failed to do so, the judgment was void.[33] The state courts, however, were required to appoint counsel only in cases involving the death penalty.[34] That principle dated from the Court's decision in 1932 in the Scottsboro case, *Powell v. Alabama*.[35] In all other state felony cases—that is, in all noncapital cases—there was no such constitutional requirement imposed on the state courts. This doctrine was confirmed by the Supreme Court in 1942 in *Betts v. Brady*,[36] where the majority held that in a state criminal prosecution of an indigent defendant that did not involve the death sentence, the constitutional right to the assistance of a lawyer depended on whether there were special circumstances in the case such that, without counsel, the defendant's conviction would be regarded as fundamentally unfair.[37]

It developed in subsequent cases that "special circumstances" meant such things as whether the accused person was mentally incompetent,[38] or was a juvenile,[39] or illiterate,[40] or if the proceeding was unusually complex.[41] In such cases, a lawyer had to be furnished by state courts to indigent defendants. However, in all other state felony cases—the *Betts* case, for example, involved a prosecution for robbery[42]—there was no constitutional requirement that the state court supply counsel to a poor person,[43] and countless defendants were convicted and imprisoned after a trial where they didn't have a lawyer.[44] *Gideon* was just such a case.

In constructing the argument on Gideon's behalf, Fortas had to deal basically with two problems. The first issue was how to address an adverse precedent, *Betts v. Brady*. When the Supreme Court granted certiorari in the *Gideon* case, it asked the lawyers for both sides to discuss in their briefs and oral argument whether the court should reconsider *Betts v. Brady*.[45]

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32. *Id.* at 467–68.

33. *Id.*

34. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932).

35. 287 U.S. 45 (1932).

36. 316 U.S. 455 (1942).

37. *Id.* at 462, 473.

38. *E.g.*, McNeal v. Culver, 365 U.S. 109, 114 (1961); Massey v. Moore, 348 U.S. 105, 108 (1954); Palmer v. Ashe, 342 U.S. 134, 137 (1951).

39. *E.g.*, Uveges v. Pennsylvania, 335 U.S. 437, 441–42 (1948); De Meerleer v. Michigan, 329 U.S. 663, 665 (1947).

40. *E.g.*, Carnley v. Cochran, 369 U.S. 506, 511 (1962).

41. *E.g.*, Chewning v. Cunningham, 368 U.S. 443, 447 (1962); *Uveges*, 335 U.S. at 441.

42. *Betts*, 316 U.S. at 456.

43. *Id.* at 473.

44. *See* Anthony J. Lewis, *Supreme Court Extends Ruling on Free Counsel*, N.Y. TIMES, Mar. 18, 1963, http://query.nytimes.com/mem/archive/pdf?res=F50A1FF93B54157A93CBA81788D85F478685F9.

45. Gideon v. Cochran, 370 U.S. 908, 908 (1962). The name of the case was changed to *Gideon v. Wainwright* when H.G. Cochran, Jr., resigned as director of the Florida Division of

Fortas had to respond to that directive in his brief. If the Court adhered to *Betts*, Gideon's appeal would fail. In order for Gideon to prevail, Fortas had to distinguish *Betts* or convince the Court that *Betts* should be overruled.

The second basic issue that confronted Fortas involved federalism, or states' rights. A decision by the Supreme Court that counsel had to be appointed by the state courts for an indigent person in every felony prosecution would constitute an intervention by the Court in the state's administration of criminal justice. It would impose economic costs on the states by requiring them to pay for defense lawyers.

I shall discuss in turn how Fortas dealt with each of the foregoing problems. We carefully studied the trial record in Gideon's case. It was skimpy. It was clear to us that Gideon was disadvantaged at his trial by the lack of a lawyer, but there were no special circumstances in his case in terms of the Court's precedents. It was a run-of-the-mill, plain-vanilla case involving a charge of breaking and entering. Gideon was a fifty-year-old man who was neither illiterate, mentally incompetent, nor inexperienced in criminal prosecutions. There was no solid basis for distinguishing the *Betts* ruling.

As of 1962, it was obvious, for several reasons, that the decision in *Betts v. Brady* was on wobbly legs. In the first place, four of the Justices—Chief Justice Warren and Justices Black, Douglas, and Brennan—had expressly stated in cases decided during the preceding two terms of the Supreme Court that they felt the *Betts* case should be overruled.[46] The special circumstances test was subjective and ambiguous, and it provoked endless litigation to define its contours.[47] In the second place, the Supreme Court had selected Gideon's handwritten petition for review from hundreds of *in forma* petitions submitted to the Court;[48] it was like plucking a needle from a haystack. The Court was plainly on the look out for a case like that presented by Gideon's petition. The Court's order granting certiorari in Gideon's case was in itself a strong indication that at least four members of the Supreme Court believed that the failure of a state court to appoint a lawyer for an indigent defendant in an ordinary felony case raised a serious and substantial question.[49] Finally, and perhaps most significantly, the Court's request that counsel discuss whether the Court's holding in *Betts v.*

Corrections and was replaced by Louie L. Wainwright during the pendency of the case. LEWIS, *supra* note 2, at 185.

46. *See* Carnley v. Cochran, 369 U.S. 506, 517–20 (1962) (Black, J., concurring) (opinion joined by Chief Justice Warren); *id.* at 520 (Douglas, J., concurring); McNeal v. Culver, 365 U.S. 109, 117 (1961) (Douglas, J., concurring) (opinion joined by Justice Brennan).

47. *See Carnley*, 369 U.S. at 517–18 (Black, J., concurring).

48. *See* LEWIS, *supra* note 2, at 33 (observing that the Court received about fifteen hundred *in forma pauperis* petitions during the term the case was decided).

49. *See id.* at 41.

Brady should be reconsidered was an unmistakable signal that the *Betts* decision was in a terminal stage. Fortas recognized that it was his responsibility to furnish the Court with arguments and reasons that would support a decision overturning the ruling in *Betts v. Brady*.

In his brief, Fortas attacked the *Betts* decision head-on. He urged that it should be overruled.[50] He challenged the major premise of the *Betts* decision, namely that a defendant can have a fair trial without the assistance of counsel.[51] He stressed that in every criminal prosecution a fair trial requires the assistance of defense counsel.[52] A layman simply cannot effectively defend himself.[53] He cannot evaluate such matters as the validity of the indictment or the charge against him, whether a search and seizure was lawful, whether a confession is admissible, whether he was mentally competent at the time of the offense, and so on.[54] He is at a loss in dealing with questions of evidence, how to examine witnesses, or how to make a closing argument.[55] As Justice Douglas put it, a criminal jury trial confronts a layman with "a labyrinth he can never understand nor negotiate."[56]

Fortas next argued that there was no legitimate basis for the distinction that had been made by the Supreme Court between the need for counsel in capital and in noncapital cases in the state courts.[57] He pointed out that the necessity for a lawyer in noncapital cases might even be greater than in death sentence cases because of the complexity of the issues.[58] The distinction was irrational.

Fortas then turned to the issue that was central, namely federalism, or states' rights. In the early 1960s, the Justices of the Supreme Court were deeply divided about whether the various provisions of the Bill of Rights relating to criminal procedure—historically, limitations only on the powers of the national government—were also applicable to the states.[59] Doctrinally, the issue was whether various provisions in the Bill of Rights—such as the prohibitions against self-incrimination or double jeopardy, or in the *Gideon* case, the Sixth Amendment's guarantee of the right to the assistance of counsel—were incorporated into or absorbed by

50. Brief for the Petitioner, *supra* note 30, at 7, 11.

51. *Id.* at 7.

52. *Id.* at 7, 13–14.

53. *Id.*

54. *See id.* at 7.

55. *See id.* at 7–8.

56. Carnley v. Cochran, 369 U.S. 506, 524 (1962) (Douglas, J., concurring).

57. Brief for the Petitioner, *supra* note 30, at 22–25.

58. *Id.* at 22–23.

59. *See* MELVIN I. UROFSKY, THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY 158, 159 (2001) (describing how the debate about whether to incorporate all of the Bill of Rights or just some of them extended into the 1960s and was one of the great constitutional debates of the time).

the provision of the Fourteenth Amendment that no person shall be deprived by a state of liberty "without due process of law."[60] Justice Black wrote a famous dissenting opinion in 1947 in *Adamson v. California*[61] maintaining that the Fourteenth Amendment was designed to make all of the Bill of Rights applicable against the states.[62] But the majority of the Court did not agree with him.[63] As of 1962, the Court had selectively applied only a few of the provisions of the Bill of Rights to the states.[64] Viewed in one way, the question presented in Gideon's case was whether the Due Process Clause of the Fourteenth Amendment incorporated the Sixth Amendment's provision that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."[65] The Court had never decided that issue.

Fortas did not want to get caught up in a cross fire among the Justices as to whether the Sixth Amendment's guarantee of the right to counsel was incorporated or absorbed into the Fourteenth Amendment. He was concerned that some Justices would have agreed it was incorporated, whereas other Justices would have disagreed. Instead, he made the straightforward argument that the Due Process Clause of the Fourteenth Amendment, standing on its own bottom, so to speak, considered independently of the Sixth Amendment, required that counsel be appointed by state courts for an indigent defendant in every felony prosecution in order to guarantee a fair trial.[66]

In this connection, Fortas made two points:

First, he pointed out that the ruling he advocated would not be a significant intrusion on states' rights.[67] It would not entail a revolutionary change in state practices if the Supreme Court were to rule that a lawyer had to be supplied by the state courts to indigent defendants in all felony cases. As of 1962, forty-five states required that a lawyer be furnished to an

60. U.S. CONST. amend. XIV, § 1.

61. 332 U.S. 46 (1947).

62. *Id.* at 71–72 (Black, J., dissenting).

63. *Id.* at 54 (majority opinion) ("Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution.").

64. For cases where the Court had incorporated provisions of the Bill of Rights to the states, see, for example, *Robinson v. California*, 370 U.S. 660, 667 (1962) (Eighth Amendment, cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (Fourth Amendment, exclusion of evidence obtained by unreasonable search and seizure from a criminal trial); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (First Amendment, freedom of speech). For a case where the Court did not incorporate a Bill of Rights provision, see, for example, *Palko v. Connecticut*, 302 U.S. 319, 328 (1937) (Fifth Amendment, double jeopardy).

65. U.S. CONST. amend. VI.

66. Brief for the Petitioner, *supra* note 30, at 7, 13.

67. *Id.* at 28–32.

indigent defendant in all felony cases.[68] They did so either pursuant to state constitutional provisions, state supreme court decisions, or state court rules. Moreover, even in the five outlier states, such as Florida, which did not follow that practice, a lawyer was appointed for poor persons in all capital cases.[69] If Fortas's position were to be approved by the Court, the states would be required to appoint a lawyer for an indigent defendant in every felony prosecution, but the states would retain freedom in devising methods to assure compliance with that requirement. An amicus brief supporting Fortas's position joined by twenty-two state attorneys general[70] strengthened his argument on this point about states' rights.

Next, Fortas had the brilliant insight that the special circumstances rule impaired the values of federalism by creating friction between the state and federal courts.[71] Following many state criminal prosecutions where an indigent person was convicted without the assistance of a lawyer, a petition for habeas corpus would be filed by the prisoner in a federal district court alleging a denial of constitutional rights for that reason.[72] The district court judge would then review the state court proceedings under the special circumstances test; that is, the federal court would decide whether the defendant had been denied a fair trial in the state court because he was not furnished with counsel.[73] As Fortas observed, that practice involved federal court supervision of state courts in an ad hoc way—that is, case by case—and in an ex post facto manner—that is, review of each case in an historical, backward-looking fashion.[74] A rule requiring that counsel be appointed in every case would be much less intrusive on state rights.

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68. *Id.* at 30. Fortas cited Justice Douglas's appendix in *McNeal v. Culver*, 365 U.S. 109, app. at 120–22 (1961) (Douglas, J., concurring), for the proposition that thirty-seven states required the appointment of a lawyer for destitute defendants in all felony cases. Brief for the Petitioner, *supra* note 30, at 30. Of the remaining thirteen states, eight typically provided counsel when it was requested. *Id.*; *see also* Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962), *cited in* Brief for the Petitioner, *supra* note 30, at 30.

69. Brief for the Petitioner, *supra* note 30, at 30; *see also McNeal*, 365 U.S. app. at 121–22 (Douglas, J., concurring) (pointing out that Alabama, Florida, Mississippi, and South Carolina all required the appointment of attorneys for indigent defendants accused of capital felonies). With regard to the fifth state—North Carolina—the Douglas appendix points to *State v. Davis*, 103 S.E.2d 289 (N.C. 1958), which states that in North Carolina there is no requirement that defendants be afforded attorneys in cases not involving capital felonies. *McNeal*, 365 U.S. app. at 122; *Davis*, 103 S.E.2d at 291.

70. Brief for the State Government Amici Curiae at 1, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155).

71. Brief for the Petitioner, *supra* note 30, at 8–9, 33–34.

72. *Id.* at 33.

73. *See id.*

74. *Id.* at 9, 34.

Fortas's superb oral argument was recorded, and it is readily available.[75] In his autobiography, Justice Douglas, who sat on the Court for thirty-four years, stated: "In my time probably the best single legal argument was made by Abe Fortas in 1963 in *Gideon v. Wainwright* . . . ."[76] Making due allowance for the fact that Fortas and Douglas were good friends, that is high praise indeed.

II. The Justice

Following the oral argument on January 15, 1963,[77] and the Court's conference where the vote on the case was taken, Chief Justice Warren assigned the writing of the Court's opinion to Justice Black.[78] It was a most appropriate designation. Black had written the opinion of the Court in 1938 in *Johnson v. Zerbst*, when the Court ruled that the federal courts were obliged by the Sixth Amendment to provide counsel to indigent defendants in all cases.[79] He had written a dissent from the majority opinion in *Betts v. Brady* in 1942.[80] And he had made clear in cases decided in the spring of 1962 that he felt the *Betts* decision should be overruled.[81]

In considering how to draft his opinion for the Court, Black faced at the outset the same issue that confronted Fortas, namely, how to deal with the precedent of *Betts v. Brady*. The question was whether the *Betts* decision should be followed, distinguished, or overturned. Black's view, supported by a majority of the other Justices, was that *Betts* was erroneous and should be overruled.[82] He acknowledged that the "facts and circumstances of the two cases [*Betts* and *Gideon*] are so nearly indistinguishable [that] the *Betts v. Brady* holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel."[83] He thought that in *Betts* the Court had made an abrupt break with its own well-considered precedents. As he put it: "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for

75. Oral Argument, *Gideon*, 372 U.S. 335 (No. 155), *available at* http://www.oyez.org/cases/1960-1969/1962/1962_155.

76. WILLIAM O. DOUGLAS, THE COURT YEARS: 1939–1975, at 187 (1980).

77. *Gideon*, 372 U.S. at 335.

78. *See* LEWIS, *supra* note 2, at 182, 187 (noting that by tradition, the Chief Justice assigns the case to a particular Justice to be written, and that assignment fell to Justice Black).

79. 304 U.S. 458, 458, 462–63 (1938).

80. 316 U.S. 455, 474 (1942) (Black, J., dissenting).

81. *E.g.*, Carnley v. Cochran, 369 U.S. 506, 517–18 (1962) (Black, J., concurring).

82. *Gideon*, 372 U.S. at 339.

83. *Id.*

him. This seems to us to be an obvious truth."[84] He accordingly concluded that *Betts* should be overruled.[85]

Black also had to deal with the issue that Fortas had finessed; that is, Black was obliged to specify the constitutional law rationale for the decision. He had to confront the divergent views of different members of the Court with respect to the incorporation issue. Black made clear in his opinion that he was guided in interpreting the Due Process Clause of the Fourteenth Amendment, applicable to the states, by the provision with respect to the right to counsel in the Sixth Amendment that was applicable to the federal government.[86] As he put it, "the fundamental nature of the right to counsel" was confirmed by the Sixth Amendment, and fundamental rights protected against federal infringement are safeguarded against state action.[87] In short, Black incorporated the Sixth Amendment into the Fourteenth Amendment, and thus the right to counsel was made applicable to the states in the same manner as it was applicable to the federal government.

Black's opinion in *Gideon* is typical of many opinions that he wrote. It is brief, free of legal jargon, and intelligible to a layman as well as a lawyer.

There are two separate themes in Black's opinion in *Gideon*:

First, Black's opinion reflects the view that in our adversary system of justice an individual needs a lawyer to prepare and present his defense. Black knew from personal experience how important it is to have a lawyer at one's side in the courtroom. He had been a county prosecutor, a police court judge, and a trial lawyer in the early years of the century in Birmingham, Alabama.[88]

Second, his *Gideon* opinion reflects Black's profound empathy for those who are poor and disadvantaged. It was simply unacceptable to him that a man should be denied a fair trial because he was poor. For Hugo Black, defense "lawyers in criminal courts are necessities, not luxuries."[89]

In his biography of Justice Black, Roger Newman described the scene at the Supreme Court on the morning of March 18, 1963, when the opinion in the *Gideon* case was announced. Newman wrote:

> When [Chief Justice] Warren called on [Justice Black] on the bench, he leaned forward and spoke in an almost folksy way, reading sections of his [*Gideon*] opinion. Happiness, contentment, gratification filled his voice. "When *Betts v. Brady* was decided," he

84. *Id.* at 344.
85. *Id.* at 339.
86. *Id.* at 342–43.
87. *Id.*
88. Earl Warren, *A Tribute to Hugo L. Black*, 85 HARV. L. REV. 1, 1 (1971).
89. *Gideon*, 372 U.S. at 344.

> said a few weeks later, "I never thought I'd live to see it overruled." . . . It was indeed a moment of supreme satisfaction, one of the highlights of [Justice] Black's years on the Court.[90]

As a matter of constitutional law, the *Gideon* decision was significant for several reasons. In the first place, it closed a gap in the law with respect to the duty of state courts to furnish counsel to indigent defendants, previously limited to capital cases. After *Gideon*, it could be said that every person charged, either in a federal court or in a state court, with a criminal offense that could lead to imprisonment is entitled by the Constitution to have a lawyer's assistance.

The *Gideon* decision was also consequential because it was a key link in the effort by the Warren Court to reform the administration of criminal justice in the state courts and to establish the principle that the rules of law in criminal cases required by the Constitution should be the same in both the state and federal courts. One of the principal things the Warren Court sought to do was to make the nation's criminal justice system more protective of the rights of poor persons and black persons.[91] This was to be accomplished, in part, by extending to the state courts the procedural rights in criminal proceedings provided for by the Bill of Rights, which previously had applied only in the federal courts. In the *Gideon* case, the court held that the Sixth Amendment's guarantee of the assistance of counsel applied to the states pursuant to the Fourteenth Amendment. In a series of cases decided in the decade that followed the *Gideon* decision in 1963, one after another of the provisions of the Bill of Rights, such as the privilege against self-incrimination,[92] the right to confront adverse witnesses,[93] the right to an impartial jury trial,[94] and the prohibition against double jeopardy,[95] were made applicable to the state courts pursuant to the Due Process Clause. The *Gideon* case was a critical step in this process.

At various events in 2013 commemorating the fiftieth anniversary of the *Gideon* decision, some commentators invariably observed that the high expectations surrounding the *Gideon* decision have not been fulfilled.[96] Regrettably, that is true. The *Gideon* decision invigorated the movement for public defenders, and it improved the representation of indigent defendants to a considerable extent, but it is incontrovertible that a great many accused persons in the state courts are still not adequately or

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90. ROGER K. NEWMAN, HUGO BLACK 528 (1994).

91. *See* Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 10 (1993).

92. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

93. Pointer v. Texas, 380 U.S. 400, 406 (1965).

94. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

95. Benton v. Maryland, 395 U.S. 784, 787 (1969).

96. *See, e.g.*, Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES, Mar. 15, 2013, http://www.nytimes.com/2013/03/16/us/16gideon.html.

competently represented.[97] The same observation about hopes not fully realized could be made concerning the Supreme Court's great decision in the school desegregation case, *Brown v. Board of Education*.[98] That point does not diminish either the luster or the enduring importance of either the *Brown* or *Gideon* decisions. To the contrary, it should be taken as a wake-up call that there is unfinished business, and it should renew our commitment to fulfilling the aspirations for a just society reflected by these landmark decisions.

There are several reasons why defendants are still not adequately represented, especially in various state courts.

First, the *Gideon* decision contemplated that the legislature in each state would appropriate funds to cover the cost of furnishing lawyers to indigent defendants.[99] But neither the *Gideon* opinion, nor any subsequent opinion by the Supreme Court, provided any mechanism or procedure for enforcing this mandate.[100] Moreover, the Court did not specify a level of required expenditures or any standard of adequacy.[101] If a state legislature fails to appropriate the necessary funds, there is no established procedure for making it do so. Many public defender's offices throughout the country are underfunded and understaffed.[102] The budget crisis in many states has aggravated the problem.[103]

Second, there have been profound changes since 1963 in the criminal law system that have increased the burden of providing lawyers for indigent defendants. A great many activities, especially in the area relating to drugs, have been criminalized by statute with the result that many more persons are now prosecuted,[104] leading to even greater financial pressures and an increased need for legal assistance. The incarceration rate in our country

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97. *See id.*

98. 347 U.S. 483 (1954).

99. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (noting that the state legislatures spend vast sums of money trying defendants but never explicitly stating the mechanism by which sums of money would be allocated to defend the same defendants). Abe Fortas also made a point to mention the variety of ways in which a state could fund the new programs. Brief for the Petitioner, *supra* note 30, at 34–35.

100. *See* Erwin Chemerinsky, Remarks, *Lessons from* Gideon, 122 YALE L.J. 2676, 2685–86 (2013).

101. *See id.* at 2686 (noting that "states often will choose the most inexpensive way to meet [the] obligation" of providing a lawyer to all criminal defendants); *see also* Strickland v. Washington, 466 U.S. 668, 689 (1984) ("[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . .").

102. Eric Holder, U.S. Att'y Gen., Address at the ABA's National Summit on Indigent Defense (Feb. 4, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html ("Across the country, public defender offices and other indigent defense providers are underfunded and understaffed."); *see also* Chemerinsky, *supra* note 100, at 2683 (recognizing that underpaid public defenders lack proper incentives to provide the desired standard of representation).

103. Chemerinsky, *supra* note 100, at 2679, 2684.

104. *See id.* at 2686.

now exceeds the amount of incarceration in Russia.[105] The rate of imprisonment of black men has reached astronomical levels.[106] It is estimated that if present rates of imprisonment continue, half of all black men with no college education will spend some time in prison.[107] That level raises serious moral issues.

Third, at the time of the *Gideon* decision in 1963, roughly one-third of all persons charged were involved in trials.[108] But at present, nineteen out of every twenty felony convictions are the product of a plea bargain.[109] One of the major challenges that now confronts us is how courts can ensure defendants are competently represented in a process dominated by plea bargaining that occurs behind closed doors and without a record.

Fourth, another factor that has weakened the promise of *Gideon* is that the Supreme Court compromised the principle of adequate and effective representation in 1984 in the *Strickland v. Washington*[110] case. The Court established a presumption that defense counsel are competent, and it required a defendant who complains of ineffective assistance of counsel to show that the outcome of the trial would have been different if he were competently represented.[111] Applying this exacting standard, the courts have sustained inadequate representation.[112]

Finally, the strict procedural requirements that have developed as a precondition to obtaining habeas corpus have foreclosed, to a significant extent, federal court supervision of the quality of legal representation in the state courts.[113]

There is a basic underlying factor—there is a political reality—that accounts for the failure of many states to fully implement the *Gideon* decision. There is no effective political constituency for the right to counsel

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105. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 327 n.61 (2011).

106. *See* Adam Gopnik, *The Caging of America: Why Do We Lock up so Many People?*, NEW YORKER, Jan. 30, 2012, http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik?currentPage=all.

107. *See id.*

108. *See* STUNTZ, *supra* note 105, at 32.

109. *See id.*

110. 466 U.S. 668 (1984).

111. *Id.* at 689, 694.

112. *See, e.g.*, Muniz v. Smith, 647 F.3d 619, 624 (6th Cir. 2011) (denying appellant's claim of ineffective assistance of counsel, despite the fact that his lawyer was literally asleep for parts of the trial, because the defendant could not show a probability that the result would have been different if his lawyer was awake).

113. *See, e.g.*, Smith v. Murray, 477 U.S. 527, 529 (1986) (upholding the dismissal of a habeas corpus petition on the grounds that the petitioner waived his constitutional claim by not pressing it on direct appeal); Lefkowitz v. Fair, 816 F.2d 17, 24 (1st Cir. 1987) (dismissing a habeas corpus petition because the petitioner was not in custody at the time of the filing); Brown v. Cuyler, 669 F.2d 155, 161 (3d Cir. 1982) (denying habeas corpus review because of a failure to exhaust state remedies).

of indigent persons in criminal cases.[114] The persons most deeply prejudiced by the absence of an effective system of representation are, for the most part, poor people and are disproportionately people of color from low-income communities without resources and who lack political clout.[115]

If the *Gideon* decision is to be effectively implemented, various things need to be done by Congress, by the state legislatures, by the federal and state courts, and by lawyers and citizens.

First, Congress needs to pass legislation decriminalizing various activities that can be better addressed outside the criminal courts. The announcement by Attorney General Eric Holder that the Department of Justice will no longer prosecute low-level, nonviolent drug suspects for offenses that carry mandatory minimum sentences, and who instead will be given drug treatment and community service,[116] is a step in the right direction.

Second, an adequately staffed, adequately funded public defender office should be established in every state. The state legislatures need to be shown that it is considerably more economical to pay for defense lawyers than to incur the enormous costs associated with confining persons in prison who should not be there.[117] The supreme court in each state should be encouraged to be more aggressive in requiring adequate representation of indigent defendants.

Third, the U.S. Supreme Court should reexamine the standard it formulated in the *Strickland* case governing adequate representation and should apply a more realistic standard to claims of incompetent representation. That is especially true with respect to advice concerning the collateral consequences of a guilty plea, such as access to public housing or denial of the right to vote.[118] The Supreme Court's ruling in *Padilla v. Kentucky*[119]—that defendants who are immigrants must be advised of consequences of a guilty plea, especially the risk of deportation[120]—is a hopeful development.

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114. *See* Chemerinsky, *supra* note 100, at 2686.

115. *See id.* at 2691–92.

116. Eric Holder, U.S. Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html.

117. *See* STUNTZ, *supra* note 105, at 278–79 (noting that it is considerably more cost effective to police and prevent crime than it is to prosecute crime and keep people locked up, especially when considering that the "bulk of [the] cost takes the form of broken lives, jobs never held, and marriages and families never formed," which suggests that keeping people out of the prison system who do not belong—no matter what method used—is cost efficient).

118. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699–700 (2002).

119. 559 U.S. 356 (2010).

120. *Id.* at 374.

Fourth and finally, the effective implementation of *Gideon* will require the strong support of bar associations, law schools, and private law firms united with other groups who recognize the importance of counsel for the defense.

If those things are done, the high ideal of the *Gideon* decision that every person in our country who is charged with a criminal offense should be effectively represented by counsel will be more fully realized.

Gideon v. Wainwright a Half Century Later

CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE. By Karen Houppert. New York, New York: The New Press, 2013. 288 pages. $26.95.

Reviewed by Yale Kamisar*

On May 23, 2013, the Florida Supreme Court ruled that the public defender's office serving the state's largest judicial district (the Miami-Dade County public defender's office, sometimes called PD-11) could withdraw from assigned cases or decline to take new ones.[1] The reason was that a crushing caseload prevented the defender's office from adequately representing indigent criminal defendants.[2]

As a result, observed the Florida Supreme Court, public defenders routinely "juggle" cases in a crude "triage," focusing on the most serious cases to the detriment of other clients.[3] Various witnesses also testified that typically

> [t]he assistant public defender meets the defendant for the first time at arraignment during a few minutes in the courtroom or hallway and knows nothing about the case except for the arrest form provided by the state attorney, yet is expected to counsel the defendant about the State's plea offer. In this regard, the public defenders serve "as mere conduits for plea offers." . . . The witnesses also testified that the attorneys almost never visited the crime scenes, were unable to properly investigate or interview witnesses themselves, often had other attorneys conduct their depositions, and were often unprepared to proceed to trial when the case was called. Thus, the circumstances presented here involve some measure of nonrepresentation and therefore a denial of the actual assistance of counsel guaranteed by *Gideon* and the Sixth Amendment.[4]

More than a few people are likely to be surprised, even shocked, by the sorry condition of Florida's public defender's office. But not anyone who

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1. Pub. Defender, Eleventh Judicial Circuit v. State, 115 So. 3d 261, 282–83 (Fla. 2013). The state supreme court held that the public defender's office could do so if circumstances, since the case was originally brought, "still warrant[ed] granting the Public Defender's motion to decline appointments in future third-degree felony cases under the standards approved in this decision." *Id.* at 264–65.

2. *Id.* at 273–74.

3. *Id.* at 274.

4. *Id.* at 278.

has read Karen Houppert's new book: *Chasing Gideon: The Elusive Quest for Poor People's Justice*.[5]

As Ms. Houppert observes:

> Ironically, one of the areas hardest hit by . . . [the] failure of the indigent defense system to keep pace with the demand for representation . . . is in Gideon's home state of Florida. There, the crisis in the overburdened courts reached epic proportions in the last decade. The chief public defender in Miami, struggling with massive caseloads, fell on his sword a few years back, sacrificing his job and reputation by refusing to accept more cases.
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> . . . .
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> . . . Starting with Bennett Brummer, [Miami-Dade County's] chief public defender for thirty-two years until 2009, and now continuing with Carlos Martinez, chief public defender since then, PD-11 has fought to reduce its excessive caseloads, which since 2004 began steadily climbing and by 2008 crept as high as seven-hundred-plus [felony] cases a year for some assistant public defenders.
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> . . . .
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> . . . [Various] organizations advise a maximum of 150 noncapital felony cases per public defender, per year. Meanwhile, a Florida governor's commission on public defense set a maximum standard of 100 felony cases per lawyer per year while the Florida Public Defenders' Association recommends 200 cases.
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> No one says seven hundred cases per attorney is okay. And that, Brummer says, is the insane level at which public defenders in his office were expected to work.[6]

When he was nearing the end of his distinguished career, one of my former law professors observed that a dramatic story of a specific case "has the same advantages that a play or a novel has over a general discussion of ethics or political theory."[7] Ms. Houppert illustrates this point in her very first chapter.[8]

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5. KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE (2013). The book was published shortly *before* the Florida Supreme Court ruling, discussed *supra* notes 1–4 and accompanying text.

6. HOUPPERT, *supra* note 5, at 91–94.

7. ELLIOT EVANS CHEATHAM, A LAWYER WHEN NEEDED 22 (1963).

8. The primary heading of the chapter, "Due Process Theater," is based on comments made by public defender Carol Dee Huneke. HOUPPERT, *supra* note 5, at 3, 25. After highlighting the fact that she and other public defenders are under enormous pressure to persuade clients to plead guilty, and noting that "a lot of ills are hidden by bad plea bargains," Huneke adds: "It's like due process theater . . . . People are dressed up like lawyers and they're standing next to a client, but they are not really zealously advocating" because they have too many cases to handle, and they simply do not have the time. *Id.*

Houppert is a good storyteller. And she writes with power and style. In the first chapter she tells a story about two Washington state public defenders: Douglas Anderson, who represented a twelve-year-old boy charged with the sexual molestation of a neighboring five-year-old; and Carol Dee Huneke, who represented an eighteen-year-old charged with vehicular homicide.[9]

Anderson was an overworked, indeed, overwhelmed public defender, who just seemed to be going through the motions. Huneke was also overworked, but she was highly motivated and quite effective.

When A.N.J., as he is called in the book, was charged with sexually molesting a much younger boy, his public defender, Anderson (who had over 200 other child criminal cases that year, plus another 200 abuse or neglect cases) urged the boy and his parents to plead guilty, thereby getting a reduction to a lesser felony. When asked by the boy's parents whether their son would always be labeled a "sex offender," Anderson assured them that the label would, or could, be removed at some point, but he admitted that he did not really know when. He promised to get back to the parents on this matter—but never did. The boy pled guilty. The boy and his parents soon learned, however, that once there was a guilty plea the child molestation conviction would *never* come off the records.[10]

Anderson made no motions. He filed no pleadings. He interviewed no witnesses. He hired no investigators—perhaps because money to pay for one would come from the flat fee he was paid by the county for representing indigent clients. Even Anderson admitted that the arrangement he had with the county "creates a disincentive" for him to hire investigators. This may explain why, although he had more than 200 juvenile offense cases the year he represented A.N.J., Anderson did not hire an investigator for any of them.[11]

It was only after A.N.J. pled guilty that his parents learned, to their dismay, that their son's record as a sex offender would *never* be expunged. Moreover, a monitor was likely to put the boy under daily surveillance for many years.[12]

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9. *Id.* at 5–6, 16.

10. *Id.* at 16–19.

11. *Id.* at 18–19. When it comes to legal aid for indigent defendants, there are some hard questions that cannot be avoided. But the flat-fee arrangement, which may have led Anderson not to hire a single investigator for the entire year, is not one of them. It should be prohibited.

Moreover, Anderson did not consult a single expert or hire a single one to testify that year. Once again, the reason may have been that the money would have come from the public defender's "own pocket." *Id.* at 19.

Still another arrangement should be noted and prohibited. As Houppert observes, "[b]ecause many flat-fee attorneys also continue in private practice, where they charge paying clients hourly fees, flat-fee defenders are also incentivized to serve their paying clients at the expense of the indigent clients." *Id.* at 32.

12. *Id.* at 19–20.

A.N.J.'s parents turned to two local attorneys in an attempt to overturn their son's guilty plea.[13] They finally succeeded—six years later! At that time, the state's highest court ruled that the performance of A.N.J.'s court-appointed counsel had been so pitiful that his client would be allowed to withdraw his guilty plea.[14]

The other Washington state case Houppert discusses in the first chapter involves eighteen-year-old Sean Replogle, who was involved in a car accident. When the elderly driver of the other car (Lowell Stack) died in the hospital some days later, the state raised the charge against Replogle to vehicular homicide.[15]

Because of her excessive caseload, Replogle's public defender, Carol Dee Huneke, asked for a continuance. At first, the trial judge denied it. But Huneke battled on.[16]

She got co-workers to submit signed affidavits to the effect that she had been working in the office nearby every Saturday, Sunday, and holiday. She also pointed out that the public defenders were "extremely outnumbered" by prosecutors. As a result, the prosecutors had little incentive to plea bargain. On further reflection, the trial judge decided to grant Huneke a three-week extension.[17]

The extension gave Huneke time to hire an expert to investigate the accident in order to recreate it for the jury. Her investigator soon discovered that the state's expert "had doubled the length of the skid marks to do his speed-distance calculations."[18]

Once Huneke took the time and trouble to find out more about how the driver of the other car had died, the so-called homicide turned out to be nothing of the sort. The driver of the other car had not died from injuries suffered in the accident but from an infection that had occurred after surgery had been performed to fix a hernia. As the victim's family physician told Huneke when she interviewed him (and as he subsequently told the jury), the emergency room doctors had never notified him that they were planning to perform surgery on the driver of the other car. If they had done so, the family physician would have strongly objected.[19]

After all, the hernia had not been bothering the patient for a long time. Moreover, considering the patient's advanced age and fragile condition, a

13. *Id.* at 39.
14. *Id.* at 47.
15. *Id.* at 9.
16. *Id.* at 29.
17. *Id.* at 29–30, 36.
18. *Id.* at 38.
19. *Id.*

hernia operation was a poor option because it might kill the patient.[20] Of course, as it turned out, it did.

When Ms. Huneke put Lowell Stack's family doctor on the witness stand, the homicide case against Replogle "fell to pieces."[21]

Chapter Two has a good deal to say about *Gideon v. Wainwright*[22] the case and Gideon the person. But there are some problems.[23]

Houppert does note that although he wrote the majority opinion in *Gideon* overruling *Betts v. Brady*,[24] Justice Black "made no attempt to suggest that the overruling was necessary due to legal and social shifts in the two decades since *Betts*."[25] But she does not explain *why*.

It so happens that there is a well-known article, written by Professor Jerold Israel only a few months after *Gideon* was decided, that spells out at considerable length why Black wrote the *Gideon* opinion the way he did.[26] (Although Ms. Houppert quotes from a number of other law review articles throughout her book, she never refers to Professor Israel's article.)

Justice Black had written a strong dissent in *Betts*.[27] He believed *Betts* was wrongly decided *from the start*.[28] Therefore, when he wrote the opinion overruling *Betts*, Black insisted that "the Court in *Betts v. Brady* [had] made an abrupt break with its own well-considered precedents."[29] As Professor Israel observes, this is a way of "depreciating the original

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20. *Id.*

21. *Id.*

22. 372 U.S. 335 (1963).

23. A minor one, but one that should be noted, is that Ms. Houppert says twice that Justice Black dissented in *Powell v. Alabama*, 287 U.S. 45 (1932). HOUPPERT, *supra* note 5, at 72. Black did not become a Supreme Court Justice until five years after the famous case was decided. *See* ROGER K. NEWMAN, HUGO BLACK 267 (1994) (noting that Black's first day at the Supreme Court was October 4, 1937). However, he did dissent in *Betts v. Brady*, 316 U.S. 455, 474 (1942), the decision that *Gideon* overruled. *Gideon*, 372 U.S. at 339.

24. 316 U.S. 455 (1942); *see also Gideon*, 372 U.S. at 336 (Black, J., majority opinion).

25. HOUPPERT, *supra* note 5, at 86.

26. Jerold H. Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211. Israel's article has deservedly been called "a classic article on the art of overruling." Donald A. Dripps, *Up from* Gideon, 45 TEX. TECH L. REV. 113, 115 (2012). As Professor Israel points out, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court noted the change in the state of public schools since the ruling in the overruled case of *Plessy v. Ferguson*, 163 U.S. 537 (1896). Israel, *supra*, at 220; *see also Brown*, 347 U.S. at 492–95. As Israel also notes, in *Mapp v. Ohio*, 367 U.S. 643 (1961), which overruled *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court made it clear that it considered alternatives to the exclusionary rule, such as tort actions against the offending police officer, inadequate. *See* Israel, *supra*, at 222; *see also Mapp*, 367 U.S. at 679.

27. *See Betts*, 316 U.S. at 474 (Black, J., dissenting).

28. ANTHONY LEWIS, GIDEON'S TRUMPET 188 (1964).

29. *Gideon*, 372 U.S. at 344.

significance of the rejected case. . . . The Court is placed in a position to reject a precedent and at the same time claim adherence to *stare decisis*."[30]

Ms. Houppert maintains that Bruce Jacob's[31] chances of prevailing in the Supreme Court were significantly reduced when, only a few months before *Gideon* was to be decided, Justice Frankfurter retired from the Court.[32] Houppert calls Frankfurter "a proponent of *Betts*" as well as a "huge proponent of judicial restraint and the importance of precedent."[33]

Justice Frankfurter did join the majority in the 1942 *Betts* case and Justice Black did write a strong dissent in that case. But Anthony Lewis suggests that the difference between the two Justices may have "come down to a question of timing."[34] Frankfurter might have believed, for example, that in the early 1940s the legal profession was unprepared for the burden of providing counsel for indigents or that in those days some states would have strongly resisted a *Gideon*-like decision.[35]

By the 1960s, according to Lewis, Justice Frankfurter might very well have changed his mind.[36] Indeed, Justice Black thought so. Lewis tells us that Justice Black assured his fellow Justices that if Frankfurter had still been on the Court in 1963 he would have voted to reverse Gideon's conviction and overrule *Betts*.[37] Moreover, according to Lewis, when Frankfurter learned that Black had told the other Justices that he would have voted with them if he had still been on the Court, Frankfurter responded: "Of course I would."[38]

Although Ms. Houppert quotes from Lewis's book on many other occasions, she never mentions Lewis's views on how (or why) Frankfurter would have voted if he had still been on the Court when *Gideon* was decided.

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30. Israel, *supra* note 26, at 235. However, Israel makes it clear that he does not share Justice Black's view. He believes, rather, that a "close reading" of *Powell v. Alabama* is that it restricted the duty to provide counsel for indigent defendants to special circumstances, such as illiterate defendants. *Id.* at 236–37. In short, "*Powell v. Alabama* provided a steppingstone to either a *Betts* or a *Gideon*, depending upon how far and fast the Court utilized the opinion's potential for expansion." *Id.* at 238. I share Israel's view.

31. Bruce Jacob represented the State of Florida when the *Gideon* case was argued in the U.S. Supreme Court. LEWIS, *supra* note 28, at 139–40.

32. HOUPPERT, *supra* note 5, at 76.

33. *Id.*

34. LEWIS, *supra* note 28, at 221.

35. *Id.*

36. *Id.* at 221–22.

37. *Id.*

38. *Id.* (internal quotation marks omitted). My understanding is that Frankfurter and Lewis were fairly close. I assume that at some point Lewis heard what Justice Black had said about how Justice Frankfurter would have voted in *Gideon* if he had still been on the Court and Lewis then asked Frankfurter whether Black had been correct.

A big chunk of Houppert's second chapter consists of extracts from the oral arguments in the *Gideon* case.[39] It is not clear why. After all, in his 1964 book, Lewis sets forth virtually all of the same extracts from the oral arguments that Houppert does.[40] If anything, Lewis's coverage is more extensive than Houppert's.

For example, Lewis makes it clearer than Houppert does how Alabama Assistant Attorney General George Mentz irritated the Justices. (Mentz, who had written an amicus brief on behalf of Alabama and North Carolina, the only two states siding with Florida, had also been given some time to argue the case.[41]) Consider the following exchanges (both omitted from Houppert's book):

> Mentz: ". . . [P]rosecutors are more lenient with unrepresented defendants . . . ."
>
> Justice Stewart: "Isn't that a matter of trial strategy? It might backfire if the prosecutor were tough and the jury saw the defendant there helpless. . . . All you're saying is that the absence of counsel impedes the adversary system of justice."
>
> Mentz: "I didn't mean to go that far."
>
> Justice Stewart: "I'm sure you didn't."
>
> . . .
>
> Mentz: "In actuality, indigents without lawyers probably get off easier. The average Alabama lawyer is not equipped to deal with the career prosecutor. . . ."
>
> . . .
>
> Justice Douglas: "Maybe if laymen are as effective as you say, we should get the Sixth Amendment repealed."
>
> Mentz: "Mr. Justice, I didn't mean to go that far."[42]

Those people who remember the Henry Fonda movie, *Gideon's Trumpet* (based on Anthony Lewis's book of the same name), will be surprised to learn that, according to Ms. Houppert, Mr. Gideon did not write his petition for certiorari all by himself. Instead, Houppert tells us, Gideon needed and obtained the services of a former lawyer and municipal judge, Joseph A. Peel, Jr. After being convicted of murder, Peel was sentenced to life imprisonment, winding up in the same prison where Gideon resided.[43]

Bruce Jacob represented the State of Florida when the *Gideon* case was argued in the U.S. Supreme Court.[44] Fred Turner represented

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39. *See* HOUPPERT, *supra* note 5, at 77–86.
40. *See* LEWIS, *supra* note 28, at 169–81.
41. *Id.* at 152–53, 178.
42. *Id.* at 179–80.
43. HOUPPERT, *supra* note 5, at 99–101.
44. *See supra* note 31 and accompanying text.

Mr. Gideon after his burglary conviction was reversed by the Supreme Court, and he was tried for burglary a second time.[45] According to Houppert, Jacob and Turner became good friends.[46] At this point, let Houppert speak for herself:

> [Jacob] says he and Turner had many conversations about [Mr.] Gideon. "Fred Turner told me that Gideon told him [that a former lawyer and municipal judge, Joseph Peel, who wound up in the same prison as Gideon,] helped [Mr. Gideon] out," Jacob recalls. . . . Jacob went on to suggest that Peel not only helped prepare Gideon's writ, but masterminded the idea of not including any "special circumstances" in it, so that the Supreme Court would be more inclined to use the case as an excuse to reexamine *Betts*. [Jacob] also cynically suggests that Peel may have retained Gideon's misspellings and grammatical errors to impress the [C]ourt with this determined but unlettered man. In any case, there is little doubt that the colorful Joseph Peel was an unrecognized character in the drama of *Gideon*—in a way that both challenges and affirms the reasoning behind the Supreme Court's decision.[47]

I have no doubt that Bruce Jacob did accurately report what Mr. Turner told him about Peel's involvement in the *Gideon* case. I can't help wondering, however, whether Mr. Gideon did something that irritated Mr. Turner and led Turner to exaggerate Peel's role in *Gideon*.

Evidently, Mr. Gideon was a difficult person. For example, immediately after a long meeting with Mr. Gideon, shortly before the latter was retried for burglary, a civil liberties lawyer names Tobias Simon said of Mr. Gideon that his "maniacal distrust and suspicion lead him to the very borders of insanity."[48] Houppert herself tells us that, shortly after Turner agreed to represent Gideon on his retrial for burglary, Turner "sharply reprimanded Gideon for meddling in the case, telling him, 'I'll only represent you if you will stop trying to be the lawyer.'"[49]

From what we know about the former lawyer and judge who is said to have helped out Mr. Gideon in his legal work, Joseph Peel did very few good things in his colorful life. After being convicted of murder, Peel spent more than twenty years in prison.[50] Then he was paroled because he was dying of cancer.[51] (He died a few days after his release.[52])

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45. HOUPPERT, *supra* note 5, at 102.

46. *Id.*

47. *Id.*

48. LEWIS, *supra* note 28, at 224, 227–28.

49. HOUPPERT, *supra* note 5, at 89 (quoting Bruce R. Jacob, *Memories of and Reflections about* Gideon v. Wainwright, 33 STETSON L. REV. 181, 259 (2003)).

50. *Joseph A. Peel Jr.; Had Murder Role*, N.Y. TIMES, July 5, 1982, at 17, *available at* http://www.nytimes.com/1982/07/05/obituaries/joseph-a-peel-jr-had-murder-role.html.

51. *Id.*

When he was released, Peel agreed to be interviewed by a Florida reporter and more or less admitted his involvement in the murder which led to his life imprisonment.[53] Peel knew he was dying. He knew, too, that this was the reason he had been released from prison. It strikes me that this would have been a propitious time for Peel to note that he had done *a few good things* in his life, too—such as help the famous Mr. Gideon write his petition for certiorari. But Peel never did say anything about that.

We are told very little about Joseph Peel. We know that he was a divorce lawyer.[54] We don't even know whether he ever practiced criminal law before he became a municipal judge. Nor do we know whether he ever presided over criminal cases when he did become a municipal judge. Nor do we have any idea whether Peel had any interest in constitutional law, generally, or the right to counsel in particular.

Houppert points out that after *Gideon* was decided, thousands of Florida prisoners sought new trials, and that Mr. Peel became so busy assisting his fellow prisoners that "he was called the 'jailhouse attorney.'"[55]

Arguably, therefore, even though he had not been a criminal lawyer earlier in his career, one might say that Mr. Peel became a proficient lawyer while he was in prison. (At least he did before he wound up in a maximum security cell for practicing law in violation of prison rules.[56])

However, what Mr. Peel did after *Gideon* was handed down in March of 1963 has little or no bearing on whether he helped Mr. Gideon draft the writ that arrived at the U.S. Supreme Court some fourteen months *before* the *Gideon* case was decided.

According to Houppert, Mr. Peel wanted to impress the Supreme Court with how "unlettered" Gideon was.[57] If so, why did Peel write Gideon's petition in such a way (or allow Mr. Gideon to write it in such a way) as to lead an assistant clerk of the Supreme Court, one of the first to read the petition, to conclude that the person who wrote it "seemed likely" to have worked from a copy of the Supreme Court rules?[58] Was this the best way to let Gideon show the Court how "unlettered" he was?

I submit that there *is* an astonishing story to tell about the *Gideon* case, but one that does not involve Mr. Peel. It is a story first told by Lucas Powe, Jr.,[59] but one still not generally known.[60] Because Powe is a

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52. *Id.*

53. *See* Tim Pallesen, *Peel Dies of Cancer Nine Days After Parole*, MIAMI HERALD, at 1, July 4, 1982.

54. HOUPPERT, *supra* note 5, at 100.

55. *Id.* at 101.

56. *Id.* at 101.

57. *Id.* at 102.

58. *See* LEWIS, *supra* note 28, at 5.

59. According to journalist Jim Newton, "Powe was the first to discover the intertwined history" of *Douglas v. California*, 372 U.S. 353 (1963), and *Gideon v. Wainwright*. JIM NEWTON,

professor of government at the University of Texas, it seems fitting and proper that I tell the story in the pages of the *Texas Law Review*.

There was *another* right-to-counsel case in the U.S. Supreme Court at the time, one that the Court had focused on before it turned its attention to *Gideon*. That other case, *Douglas v. California*,[61] was eventually reargued and decided on the same day as *Gideon*. The *Douglas* case raised the question of whether an indigent person had the right to counsel on appeal, the first appeal as of right.[62]

To understand *Douglas*, it is helpful to start with the 1956 case of *Griffin v. Illinois*.[63] In this case, the Court held that under certain circumstances indigent appellants, those who could not afford to pay for a trial transcript on their first appeal as of right, had to be provided one at state expense.[64] There was no opinion of the Court. Speaking for four members of the Court, Black wrote a stirring opinion, observing: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[65]

Not surprisingly, the lawyers for Mr. Douglas relied heavily on Black's language in *Griffin*.[66] But these lawyers probably had no idea that they had prevailed before their case was ever reargued. As Professor Powe has revealed,[67] and as the personal papers of Justices Clark and Douglas disclose,[68] at a 1962 conference, a majority of the Justices agreed that an indigent defendant did indeed have a right to counsel on the first appeal.

That a majority of the Court reached agreement in 1962 about how *Douglas* should be decided affected *Gideon* as well. By deciding *Douglas*, the Court, in effect, also decided *Gideon*.[69] As Chief Justice Warren

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JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 568 n.73 (2006); *see also* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 379–86 (2000).

60. For example, there is no mention of this story in the leading treatise on criminal procedure, the seven-volume work coauthored by Professor Wayne R. LaFave and several others.

61. 372 U.S. 353 (1963).

62. *Id.* at 355.

63. 351 U.S. 12 (1956).

64. *Id.* at 19–20.

65. *Id.* at 19. Black's opinion was joined by Chief Justice Warren and Justices Douglas and Clark. *Id.* at 13.

66. *See* Brief for Petitioners at 13–21, Douglas v. California, 372 U.S. 353 (1963) (No. 34).

67. POWE, *supra* note 59, at 384.

68. *See id.* at 383 & 527 n.7, 384 & 528 nn.7–8 (indicating that Professor Powe cited and drew from the personal papers of Justices Clark and Douglas in presenting the revelation that *Douglas* was essentially decided before the case was reargued).

69. *Id.* at 384.

observed at the 1962 meeting: "[W]e can't say [an indigent person] must have a lawyer on appeal and [yet] be denied one at trial."[70]

As surprising as it may seem, when the Court met in conference for the last time in late June, a majority of the Justices (perhaps all of them) agreed that "Fortas [who had just been appointed to represent Mr. Gideon] should have the privilege of arguing the case that interred *Betts* rather than arguing a pro forma case after *Douglas*."[71]

Chapter 3 (called "A Perfect Storm: Looking for Justice in New Orleans") deals largely with the killing of fifteen-year-old Elliot Porter[72] and the wrongful conviction of two young men for this crime.[73] One witness insisted that she saw the two defendants walking with the deceased on the night of the shooting and then chasing him.[74] She also claimed she heard shots shortly thereafter.[75] The witness was Sheila Robertson.[76] The two young men prosecuted for, and convicted of, the murder were Gregory Bright and Earl Truvia.[77]

Thanks to the excellent work of a new lawyer on the case, Emily Bolton (the director of the newly established Innocence Project New Orleans), the case for the prosecution was eventually demolished and the two convicted men were finally released from prison. Unfortunately, it took a staggering twenty-seven years to bring this about.[78]

The key witness for the prosecution—indeed, the only witness—was Ms. Robertson. She claimed that at about 1 a.m. on the night of the shooting she was sitting at her window, waiting for her boyfriend, when she saw Elliot Porter break away from the two men accompanying him and crawl through a nearby fence. Then she heard shots. Ms. Robertson subsequently identified the two defendants as the two men she saw that night.[79]

Ms. Robertson told the police what she saw. Then she told the grand jury. Finally, she testified at the trial. But major aspects of her version of the events kept changing.

First, she claimed that on the night of the shooting the two defendants warned her not to tell the police what she had seen. Then she told the grand

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70. *Id.* at 383.

71. *Id.* at 384; *see also* NEWTON, *supra* note 59 (maintaining that having "secured Fortas to argue *Gideon* as the landmark case," the Justices "did not then want to steal his thunder by announcing *Douglas* first").

72. HOUPPERT, *supra* note 5, at 105.

73. *Id.* at 109–10.

74. *Id.* at 108.

75. *Id.*

76. *Id.* at 108–09.

77. *Id.* at 109.

78. *Id.* at 160–61, 174–75.

79. *Id.* at 108–09, 116–19.

jury that *a couple of nights after the shooting* the defendants warned her not to tell the police. At the trial, Ms. Robertson testified—and this was the first time a gun was ever mentioned—that one of the defendants held a pistol to her young child's head when he "reminded" Ms. Robertson not to contact the police.[80]

Unfortunately, the defense had no idea that this was the first time Ms. Robertson had ever mentioned a gun because the defense had never seen any previous statements by the witness.[81]

Public defender Robert Zibilich had been appointed to represent Gregory Bright. (Zibilich was a private attorney who represented his indigent clients as a public defender "while juggling his paying clients."[82] All the public defenders in New Orleans operated this way.[83])

Without calling a single witness, Zibilich concluded the murder trial in less than two hours. None of defendant Bright's eight subpoenaed witnesses, several of them alibi witnesses, were ever called to testify. According to Mr. Bright, his attorney told him he was not going to call any witnesses because he thought doing so would "aggravate the jury," who were already tired and upset that the trial was taking so long.[84] (Taking so long? The trial took less than two hours.)

Gregory Bright's first lawyer had never looked at the crime scene (which was only a quarter of a mile down the road from the courthouse). But that was the first thing Mr. Bright's new lawyer, Emily Bolton, did.[85] She soon realized that

> there was no way the state's primary witness could have seen what she described taking place on the sidewalk, no way she could have seen the hole in the fence, no way she could have seen [the victim of the shooting] where she said she did. Beneath Sheila Robertson's third-story bedroom window was a porch roof that completely obstructed her view of the sidewalk.[86]

And that is not all. Ms. Robertson had testified that she could see "pretty good" the night of the shooting because she had "the bathroom, kitchen, and hall lights on."[87] However, the kitchen and the bathroom were on the floor *below* the bedroom.[88]

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80. *Id.* at 117, 137.
81. *Id.* at 137.
82. *Id.* at 120.
83. *Id.*
84. *Id.* at 139.
85. *Id.* at 163.
86. *Id.*
87. *Id.*
88. *Id.*

Why would Sheila Robertson lie? Ms. Bolton discovered that the state witness's name was not Sheila Robertson, but Sheila Caston—and that Sheila Caston had been arrested for, *inter alia*, forgery, prostitution, drug possession, and distribution. After getting a court order for Caston's hospital records (and those under her alias, Robertson), Bolton learned that the only witness for the prosecution was a "paranoid schizophrenic" who had been "experiencing hallucinations at the time of the [Elliot Porter] murder."[89]

I have pointed to so many weaknesses in the prosecution's case against Gregory Bright and Earl Truvia that it is hard to believe there are any more. But there are. When Ms. Bolton spoke with the original forensic pathologist about the time of death, he insisted it had to be between 5 a.m. and 8 a.m. According to the pathologist, there was "no way [Elliot Porter] could have been killed at 1:30 a.m. as Sheila had testified."[90]

Once again, as we saw in the first chapter of Ms. Houppert's book, the third chapter illustrates the great distance between a first-class lawyer and an inadequate one. But is the enormous caseload public defenders must work with making it increasingly difficult for even first-class lawyers to make a difference? On this point, Ms. Houppert is understandably quite pessimistic:

> Greg Bright was finally released from prison on June 23, 2003, thanks to the herculean efforts of a team of lawyers who, working for a tiny nonprofit, randomly stumbled on his case and agreed to work his appeal. According to the parameters established by *Gideon*, he had been given a lawyer for his initial trial. But regardless of how ineffective his counsel was, he had no right to an attorney to represent him in most of the complicated legal processes that followed. The fact that there was no possible way for him to do the legwork necessary to investigate the case—visit the crime scene, interview witnesses, secure documents, obtain witness rap sheets, consult psychiatric experts—is considered inconsequential by the government. Making matters worse, Louisiana joins Michigan, Arkansas, and Washington in limiting felons' access to public records, including police reports and DA files.[91]

Chapter 4 is largely about Georgia's successful effort (a) to convict Rodney Young of the murder of his ex-girlfriend's twenty-eight-year-old son, Gary Jones, and (b) to sentence the murderer to death.[92] It is also the story of Joseph Romond (the lead defense lawyer), who is trying his first

89. *Id.* at 164–65.
90. *Id.* at 164.
91. *Id.* at 173.
92. *Id.* at 181–83, 229, 247.

death penalty case.[93] (Unfortunately, Romond is "also juggling eight other death penalty cases at the same time."[94])

Romond is well aware that Georgia is the only state in the nation that requires evidence "beyond a reasonable doubt" that the murderer is mentally retarded in order for a capital defendant convicted of murder to be spared the death penalty.[95] He is even more aware that there has never been a jury trial in the history of Georgia when a jury concluded that a defendant was guilty of a capital offense but found him mentally retarded.[96]

It does not help defense lawyer Romond that the murder was especially brutal. As Houppert describes the body of the murder victim—and this is just one of many examples of her robust writing—"[t]he button-down oxford that clothes the corpse is so drenched in deep red blood that it is impossible to detect what color it might have once been."[97] Nor does it help the defense that the jury is more likely to identify with the victim of the murder than it would in the ordinary case because the victim of *this* murder "was on his way home from church, still in his church clothes" when he was killed, something the prosecution repeatedly told the jury.[98]

There is a good deal of interesting material in this chapter. We are told that in many parts of the country, African-Americans are greatly underrepresented on juries.[99] (One probable reason is that African-Americans are struck from juries at three times the rate of whites.[100]) To put it another way, "racially biased peremptory strikes" have taken their toll.[101] Lawyers "can exclude a juror based on the vaguest of reasons—*not the brightest bulb in the pack, too strident, wears a cross necklace, wears a nose ring, wears pearls, wears patchouli oil*[, etc.] . . . ."[102]

Houppert has studied the speeches and writings of such well-respected commentators as Stephen Bright (founder and director of Atlanta's Southern Center for Human Rights) and Scott Sundby (a law professor who has interviewed hundreds of jurors after their deliberations in capital cases). She has also personally interviewed Professor Sundby.

Bright "explains the clamor for death as something elected officials—politicians, of course, but also elected judges—have generated themselves, fighting a fear of being perceived as 'soft on crime.'"[103] Sundby

93. *Id.* at 186.
94. *Id.* at 212–13.
95. *See id.* at 184.
96. *Id.* at 227.
97. *Id.* at 185.
98. *Id.* at 232 (internal quotation marks omitted).
99. *Id.* at 215.
100. *Id.* at 215–16.
101. *Id.* at 215.
102. *Id.*
103. *Id.* at 217.

emphasizes that the presence or absence of African-American males on juries really matters: "'If you have one African American male juror, the chances of the defendant getting a death sentence go down 40 percent,' says Scott Sundby.... ['I]f you have five white males on the jury, the chances of death go up 40 percent.'"[104] But Houppert continues:

> [Sometimes] the most powerful voices for death can [also] be African Americans, Sundby says.... "If the African American defendant's life really parallels that of an African American juror, growing up in this same neighborhood with gangs, and he is looking at this life of violence that led to killing, that juror could go, "'Hey, that was me and I didn't end up doing *that*!'"[105]

The reader of this chapter learns about the philosophy of group decision making generally and, more specifically, about such matters as the *Allen* charge[106] (sometimes called the "dynamite charge") when the jury appears to be deadlocked.[107] The reader also learns why "the holdout juror" usually winds up "capitulat[ing] to the majority."[108]

What does any of this have to do with the sorry condition of indigent defense fifty years after *Gideon*?

To use the author's own words, *Chasing Gideon* is supposed to be a book about how—quite possibly because "no one can generate the political will necessary to change things"—"equal justice for all [still] eludes us."[109] But Chapter 4 is primarily about the administration of the death penalty. It belongs in a book about capital punishment, not one about the sorry state of indigent defense today.

No doubt Ms. Houppert would disagree with me. In her introduction, she suggests that the Rodney Young case is one where "valiant but underfunded defenders" were overwhelmed, and she observes that "disparate funding levels for prosecutors and public defenders can tip the balance between life and death."[110]

No doubt that has happened too many times because, as Professor Peter Arenella has observed, the "resource imbalance" between the state and the defense lawyer is "particularly egregious in death penalty prosecutions."[111] Continues Arenella:

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104. *Id.* at 220.

105. *Id.* at 221.

106. The so-called *Allen* charge was developed from *Allen v. United States*, 164 U.S. 492 (1896).

107. HOUPPERT, *supra* note 5, at 244.

108. *Id.* at 230.

109. *Id.* at 252.

110. *Id.* at x.

111. Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1235 (1996).

> Given the horrific nature of [many death penalty cases], the defendant's life often depends on the defense's ability and capacity to make the client's humanity apparent to the jury deciding his fate at the sentencing phase of the trial. Far too often, underpaid defense lawyers in capital cases spend less time and effort on death penalty cases than the [O.J.] Simpson defense team expended prepping for his preliminary hearing.[112]

I very much doubt, however, that the case Houppert concentrates on, the Rodney Young case, was one of those times when the "resource imbalance" between the prosecution and the defense was the basis for the death penalty. I believe that Houppert's own account of the case establishes that much.

Twelve former teachers, coaches, and guidance counselors testified on Mr. Young's behalf. They testified he was in special education classes throughout high school which meant he had an IQ under 70. (However, in precomputer days, records were thrown out after seven years. Therefore, there was nothing on paper which proved definitively that his IQ was below 70.)[113]

A social worker at Mr. Young's school, who had grown up in the same neighborhood with him, also told the jury about "the rough and violent neighborhood they lived in."[114] The social worker opposed the death penalty for Mr. Young because he believed the defendant could still be rehabilitated.[115]

Finally, the defendant's sixteen-year-old daughter testified on the defendant's behalf. She pleaded with the jury not to "kill my dad."[116]

There were undoubtedly a number of reasons that led the jury to convict Mr. Young of murder and sentence him to death. Among them were:

> (1) Although the defendant never admitted he committed the murder, the evidence that he did so was "[o]verwhelming";[117]
>
> (2) prosecutors maintained that the defendant murdered his ex-girlfriend's son "in order to . . . scare her back into his arms by making her think that roving, violent gangs were out to get her"[118]—an especially cold-blooded reason to kill someone;

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112. *Id.* (footnotes omitted).
113. HOUPPERT, *supra* note 5, at 208–09.
114. *Id.* at 239.
115. *Id.*
116. *Id.* at 240–41.
117. *Id.* at 206.
118. *Id.* at 183.

(3) the defendant received a football scholarship to attend college, something hard to reconcile with being mentally retarded;[119]

(4) the defendant held a job (although it was only putting labels on cans);[120] he "lived more or less on his own, [and] moved through the world like the rest of us";[121]

(5) after repeatedly being punched and kicked, another ex-girlfriend requested a restraining order against the defendant;[122] and

(6) as previously mentioned, the jury probably empathized with the murder victim because the victim "was just minding his own business"; indeed, the victim had just come home from church.[123]

I venture to say that, considering the prosecution's strong case against Mr. Rodney Young, even someone wealthy enough to pay for his own lawyer probably would have been convicted of murder and sentenced to death.

A final comment. In recent years, there has been a good deal of talk about "civil *Gideon*," "a shorthand for the idea that the right to appointed counsel for indigent criminal defendants recognized in *Gideon* should be extended to civil cases involving interests of a sufficient magnitude,"[124] e.g., child custody, housing, and domestic abuse cases. Ms. Houppert should have discussed this notion—even if she ultimately rejected it. At this point, the best argument against "civil *Gideon*" is probably the sorry state of "criminal *Gideon*"[125]—a condition vividly illustrated throughout Ms. Houppert's book.

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119. *Id.* at 209–10, 224.

120. *Id.* at 191.

121. *Id.* at 208.

122. *Id.* at 237.

123. *Id.* at 232.

124. Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 YALE L.J. 2106, 2108 (2013). *See generally* Symposium, *Toward a Civil Gideon: The Future of American Legal Services*, 7 HARV. L. & POL'Y REV. 1 (2013). The Supreme Court touched upon this issue but did not resolve it in *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011), where the noncustodial parent was found to be in civil contempt of court for failing to make child support payments and sentenced to prison for one year. *Id.* at 2512–14.

125. Lawrence J. Siskind, *Civil* Gideon*: An Idea Whose Time Should Not Come*, AM. THINKER, Aug. 6, 2011, http://www.americanthinker.com/2011/08/civil_gideon_an_idea_whose_time_should_not_come.html.

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Retuning *Gideon's Trumpet*: Telling the Story in the Context of Today's Criminal-Justice Crisis

Jonathan A. Rapping*

I. Introduction

Anthony Lewis was a masterful storyteller. He used his skills to raise public awareness about some of our nation's most important constitutional principles and to show how Supreme Court pronouncements translate into the realization of ideals that are fundamental to our democracy. Nowhere is Lewis's talent and influence more evident than in his work, *Gideon's Trumpet*, the David-and-Goliath story behind one of the nation's most important criminal procedure cases, *Gideon v. Wainwright*,[1] which ruled that any defendant in a criminal trial should be given a lawyer to defend him.[2] This book, and a subsequent Hollywood movie based on it,[3] taught the public about the Court's attempt to address a basic unfairness in our criminal-justice system. At a time when America was struggling to deal with a history of injustice in so many realms, *Gideon's Trumpet* shined a light on one of the country's most oppressive institutions, and it gave us hope that we could correct its deficiencies.

The *Gideon* Court recognized a truism: until we ensure that poor people have access to the same quality of counsel that people with means can pay for, we cannot have equal justice. This truism was starkly revealed by the different outcomes of Gideon's two similar journeys through the criminal-justice system; one without counsel and one with. It helped us understand the role of counsel in neutralizing the vast, often cruel, power of the state. And we cheered. We rooted for fairness. We hoped we reached a better day in our criminal-justice system; one in which there was not a correlation between justice and income.

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1. 372 U.S. 335 (1963).

2. *Id.* at 344–45. *Gideon* was about felonies but subsequently was extended to include misdemeanors and juvenile cases. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); *In re* Gault, 387 U.S. 1, 41 (1967) (holding a child has a right to be represented by counsel, and if he cannot afford counsel, then to have counsel appointed for him).

3. *See Gideon's Trumpet*, IMDB, http://www.imdb.com/title/tt0080789/.

But fifty years later, the world Anthony Lewis inspired us to believe in has not materialized. In so many ways, our criminal-justice system is less fair, less equal, less humane. Since *Gideon* was decided, the U.S. imprisonment rate has nearly quadrupled,[4] and the percentage of people charged with crimes who are poor has roughly doubled.[5] As compared to 1963, poor people today are more likely to be arrested, convicted, and sentenced to lengthier prison terms than their wealthier counterparts.

Given these depressing developments, some have questioned whether the right to counsel has made much of a difference for indigent defendants and whether it is even worth defending as a force to end the injustices of the system.[6] This Essay takes a different view of the problem and argues that a strong public defender system is necessary to achieve systemic reform. This is so both because of the role the public defender plays in interrupting a process that is increasingly designed to convict and punish poor people en masse and because of the potential of a strong community of public defenders to galvanize the movement needed to push for important policy reform.

There is no question that we have failed to live up to *Gideon*'s lofty ideals. In most of the country, the poor are given lawyers who have far too many cases to adequately handle, inadequate resources with which to do their work, and insufficient training and support.[7] They are provided representation that no one with means would accept. They are thrown into the front end of our criminal-justice system and swiftly processed out the other end. Without adequate counsel to ensure all the protections necessary to achieve justice are realized, the process is a charade.

To make matters worse, over the last fifty years, criminal-justice policies have become more expansive, more punitive, and more discriminatory.[8] As poor people are increasingly pulled into a criminal-

4. Paul D. Butler, Essay, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2179–80 (2013).

5. *Id.* at 2181 (citing a Bureau of Justice Statistics report that shows the indigency rate for state felony cases was 43% in 1963 and that "[t]oday approximately 80% of people charged with crime are poor").

6. *See id.* at 2178 (arguing that "*Gideon* has not improved the situation of accused persons, and may even have worsened their plight"); *see also* Gabriel J. Chin, Essay, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2238 (2013) (arguing that right-to-counsel jurisprudence is unlikely to address systemic racial disparities in the system and "may have made the predicament of African Americans and other racial minorities worse").

7. *See* Stephen B. Bright & Sia M. Sanneh, Essay, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2152 (2013) (arguing that "overwhelming caseloads and [a] lack of resources" lead to a violation of the right to counsel every day in "thousands of courtrooms across the nation").

8. *See* Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 WASHBURN L.J. 513, 537 (2012) (arguing that an increasingly expansive criminal code and harsher sentencing laws have helped shape today's

justice system with far more draconian consequences, a robust right to counsel is more important than ever. But, given the complexities of the current situation, simply ensuring that everyone accused of a crime has a good lawyer is no longer enough. While an army of passionate, trained, and resourced defenders are fighting to ensure that those dumped into the system have adequate counsel, its soldiers must also be part of a movement that challenges the inequalities of the system. And while this movement must include a broad collection of social-justice advocates, public defenders, as the voice of the disenfranchised community from within the criminal-justice system, are critical to this effort.

In this sense, *Gideon* becomes even more critical to realizing equal justice than anyone could have imagined when it was written, or that *Gideon* skeptics give it credit for. Not only does *Gideon* explicitly require that states provide defenders to guarantee that the people they prosecute receive equal justice in the process but also, in doing so, it demands that there be the human resources necessary to build a movement to push back against a wave of unwise criminal-justice policies that disproportionately impact the most vulnerable among us. Without such an army of defenders, the current crisis in indigent defense cannot be addressed, and *Gideon*'s promise cannot be realized.

II. The Importance of the Right to Counsel Today

While *Gideon* was meant to ensure that every person accused of a crime receive individualized protection, our failure to fulfill its promise has helped drive mass incarceration. To help understand this truism, think of the process that leads to mass incarceration as a swift conveyor belt, whisking people from arrest to sentencing. First, increasing numbers of people, mostly poor, are dumped onto the conveyor belt. With no friction to slow it down, the conveyor belt whisks those people to the other end. Once there, those people are dumped into prison cells, where they are held for increasingly longer periods of time. In this simplified model, mass incarceration can be understood in three stages: arrest, adjudication, and sentencing.

In the first stage, because of the increasing number of behaviors defined as criminal, more and more people are subject to arrest.[9] Driven largely by the War on Drugs,[10] and fueled by financial and political

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criminal-justice system); *see also* Butler, *supra* note 4, at 2179–81 (arguing that the criminal-justice system has increasingly been used against poor people and people of color).

9. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 703–12 (2005) (describing how America has criminalized many previously legal behaviors in recent decades).

10. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60 (rev. ed. 2012) (calling the War on Drugs "the single most important cause of the explosion in incarceration rates in the United States").

incentives to target inner city communities[11] as well as biases in the criminal-justice system that disadvantage the poor,[12] the number of indigent defendants accused of committing a crime grows at an alarming rate.[13]

Once a person is accused, our adversarial system of procedure is, ideally, designed to ensure that we do not too hastily punish a person based on an accusation. Important protections are put in place to make sure the accused actually engaged in behavior punishable by law and that the government followed rules of law consistent with American justice.[14] However, our failure to provide poor people, who make up 80% of the accused,[15] with lawyers who have the time, resources, and training to serve this critical role, has led to the breakdown of the adversarial process.[16] Public defenders often are forced to serve as the system's lubricant rather than in their true roles of providing the friction necessary to make sure no one reaches the other end without being afforded the required protections and making the road to sentencing less certain.

In the third stage, draconian sentencing laws, which include stiffer penalties, mandatory minimums, and a slew of sentencing enhancements, ensure that the accused who reaches the end of the conveyor belt will be more likely to get a stiff sentence and be sent away for perhaps years.[17]

By understanding the mass incarceration process as involving these stages, the importance of a lawyer with the time, resources, and training necessary to ensure the accused is not simply processed through the system is obvious.[18] But lawyers for the poor have sadly come to accept their role

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11. *See id.* at 72–74 (discussing financial incentives to carry on the War on Drugs and target poorer communities); Rapping, *supra* note 8, at 529–32 (discussing political pressures to target inner-city communities).

12. *See* Butler, *supra* note 4, at 2183 (discussing bias as a stage leading to mass incarceration); Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999 (2013) (examining how implicit bias drives decisions at every stage of the criminal-justice process).

13. *See* Butler, *supra* note 4, at 2182 (demonstrating that the disparities of poor and black people in the criminal-justice system have gotten worse since the 1970s).

14. *See* Rapping, *supra* note 8, at 523–28 (discussing procedural protections and the importance of counsel in an historical context).

15. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006).

16. *See* David E. Patton, Essay, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2590, 2602 (2013) (discussing how we have abandoned the adversarial process in the context of the federal criminal-justice system).

17. *See* Rapping, *supra* note 8, at 535–37 (discussing the evolution of harsher sentencing laws).

18. In concluding that providing poor people lawyers does not help to address the mass incarceration problem, Paul Butler discusses what he sees as the "five steps" of "[m]ass incarceration's process of control." Butler, *supra* note 4, at 2183–85. However, by not including a discussion of what I call the second stage, and in fact, not including any step that involves defense counsel, Butler essentially defines the role of the lawyer out of the process, ensuring his conclusion that lawyers do not matter. *See id.*

as helping to move cases rather than representing people.[19] Stories like Robert Surrency's are all too common.[20] Surrency held the contract to represent indigent defendants in Green County, Georgia for fourteen years.[21] As a part-time public defender, he would represent close to 400 clients a year, ushering more than 99% into pleas.[22] He began his public defender career as a young lawyer[23] and quickly adapted to the expected standards of practice. The judges demanded that he process his cases quickly, and he obliged.[24] Some days he would plead dozens of clients in a single court session with little effort to negotiate on their behalf.[25] More concerned with catering to systemic demands to move cases quickly and cheaply than engaging in an adversarial process, Surrency did not request investigative or expert services.[26] Over time, Surrency came to see his high-volume, plea bargain practice as "a uniquely productive way to do business."[27]

Unfortunately, representation for the poor more frequently looks like Green County than the constitutionally required world *Gideon* envisioned. Recently, two law students working for the Southern Center for Human Rights received a startling lesson about the gap between the ideals laid out in *Gideon* and the right to counsel in practice.[28] They spent a day court watching in Butts County, Georgia. The public defender, who happened to be the chief public defender of the Towaliga Judicial Circuit, which includes Butts, Lamar, and Monroe Counties, sat silent as twenty of her clients, primarily brought in for bond determinations and probation revocation hearings, had their day in court.[29] During these hearings, each with the accused's liberty on the line, the public defender sat silent as the defendant tried unsuccessfully to advocate for himself or herself.[30] Unreasonably high bonds were set and terms of probation revoked without

19. *See* Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 164–65 (2009) (suggesting that too often, public defenders have adapted to a culture that is hostile to the fundamental principles of representing indigents accused of crimes).

20. AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 12–28 (2009).

21. *Id.* at 12–13.

22. *See id.* at 13–14.

23. *See id.* at 12–13.

24. *Id.* at 13.

25. *Id.* at 14.

26. *Id.* at 15.

27. *Id.* at 13.

28. *See* Memorandum of Laura Bixby, Student, Stanford Law Sch., and Joshua Levin, Student, Yale Law Sch. (June 20, 2013) (on file with author).

29. *See id.* at 1. In fact, the complete lack of representation caused the students to initially assume these clients were pro se until it was made clear that they were represented by the public defender. *Id.*

30. *Id.* at 1–2.

the public defender even rising from her seat.[31] In one case, a client sobbed uncontrollably as she attempted to plead her case as her lawyer looked on in silence.[32] After the judge revoked her probation, and she was led away in tears, the public defender joined the court personnel in chuckling over the client's emotional reaction.[33] It was the first indication that the defender was even paying attention to anything unfolding before her. Talking to the students afterwards, the public defender talked about her clients with disdain, accusing them of being "manipulat[ive]" and trying to "beat the system."[34] Given that she hadn't taken the time to talk to any of them to find out if they had a valid defense, the remarks were clearly indicative of a lawyer who had long ago given up on being the accused's champion as *Gideon* envisioned.

A budget hearing before the Tennessee legislature last year illustrates how this breakdown of the adversarial process resulting from poor lawyering has systemic impact.[35] Members of the Tennessee District Public Defenders Conference were invited to testify before the Committee on Finance, Ways, and Means.[36] Among the presenters were the conference president, elected to represent the public defenders statewide, and its executive director.[37] The president, who is also the district public defender for the Twenty-Fourth Judicial District of Tennessee[38] and one of thirty-one district public defenders in the state, was asked to discuss his view of public defender resources. Focusing on his own district, he responded as follows:

> You all probably could get up here and you're always asking for more and more; but in my district, . . . I think I have enough assistants to cover the caseload that I have. I have a five county district. I have an attorney for each county. What I have done is converted one of my investigators into an attorney position so I could cover all the courts. And uh, then I have one investigator for my five county district. And our caseload, we do about four thousand cases a year. I have been blessed with retention of my staff which means I have experienced attorneys, which really helps a lot in being able to *process* cases. . . . They get good quality representation. Of course

31. *See id.* at 1–2, 4.

32. *Id.* at 3.

33. *Id.*

34. *Id.* at 5.

35. *See Budget Hearings Before the H. Comm. on Fin., Ways & Means*, 108th Leg., 1st Sess. (Tenn. 2013) [hereinafter *Budget Hearings*], *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=217&clip_id=6951.

36. *Id.* at 35:29–1:17:28.

37. *Id.* at 35:30 (statement of Jeff Henry, Executive Director, Tennessee District Public Defender's Conference).

38. *Id.* at 35:55.

> I'm, I'm bragging I guess, I'm biased. For one district in the state . . . , I think you have supplied what I need. . . .[39]

The sheer volume of cases that the conference president's lawyers handle—eight hundred per year each—and his attitude about the acceptability of this caseload suggest a district in which every client likely gets the representation described in the anecdotes above. That the elected representative of the conference of chief defenders in Tennessee, while accompanied by the executive director, could make these remarks to a committee that controls the state budget is further evidence that this lack of adversarialism is accepted systemically. Anthony Lewis might well weep to see what has become of the high ideals of the case he so vividly narrated.

It seems obvious that one cannot tell the story of mass incarceration without including the stage during which cases are shepherded from arrest to sentencing.[40] This processing, which plays out on a grand scale in courtrooms across the country daily, could not happen without the complicity of many public defenders, most of whom are well-intentioned but have had their expectations shaped by the systems in which they work.[41] It is the primary reason the accused can be so efficiently whisked through the process without any resistance. Our failure to provide poor people the representation the *Gideon* Court envisioned is largely responsible for our criminal-justice crisis. But in a system that is driven by unjust criminal-justice policies that are beyond the influence of the trial process, ensuring that every person has a good lawyer will not be enough to realize equal justice. The right to counsel must be part of a larger solution that includes policy reform. But policy reform cannot occur without an army of advocates doing the necessary legwork on the ground. And a strong public defender voice is critical to driving this effort. Although not its direct objective, in this sense *Gideon*, which mandated that each defendant be given a lawyer, becomes the vehicle through which we can fuel the movement that will be necessary to transform criminal justice. The skeptic,

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39. *Id.* at 44:15 (emphasis added).

40. A report by the Justice Policy Institute entitled *System Overload: The Costs of Under-Resourcing Public Defense* illustrates how a strong public defender presence from arrest through sentencing addresses systemic injustice. It points to five specific ways that poor lawyering can drive incarceration: "1. more pretrial detention for people who do not need it; 2. increased pressure to plead guilty; 3. wrongful convictions and other errors; 4. excessive and inappropriate sentences . . . ; and 5. increased barriers to successful re-entry into the community." JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 18 (2011), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf.

41. With few exceptions, even the most heroic public defenders will eventually have to adapt to the system or leave the profession as crushing caseloads, lacking resources, and systemic pressures to process clients wear down even the best. For a discussion about how idealistic public defenders are forced to redefine their roles in broken systems, see Jonathan Rapping, *Redefining Success as a Public Defender: A Rallying Cry for Those Most Committed to* Gideon*'s Promise*, CHAMPION, June 2012, at 30.

who only views the benefits of *Gideon* through the lens of individual representation, misses the systemic value of the role public defenders play beyond the courtroom.

III. The Broader Role of the Public Defender

Fully aware of what I have described above, when I first read Paul Butler's argument that "*Gideon* has not improved the situation of accused persons, and may even have worsened their plight,"[42] I was mystified by his position. It is similar to the view of George Bailey in the Frank Capra holiday classic, *It's a Wonderful Life*.[43] George spent his adult life fighting to help the working class people of Bedford Falls against a wealthy tyrant (Mr. Potter) who otherwise controlled the town. Potter hoped to control the entire town, and George was the only thing standing in his way. Potter surely heaped a significant amount of injustice on the townspeople, but the only thing that mitigated the total takeover by Potter was George's commitment to a Savings and Loan that kept many townspeople just out of Potter's reach. When George's fortunes hit a low and he begins to think he has not made a difference to the town and that the world would be better off without him, his guardian angel helps him see how much worse things would have been had he never existed. By allowing George to see Bedford Falls without his contributions, the angel helps him understand the value of his contribution to the world.

The analogy is apt, because Professor Butler asks us to view the worsened plight of the poor in the criminal-justice system and conclude that, because they are arguably worse off than they were in 1963, *Gideon*'s presence has not made a difference.[44] In Butler's story, increasingly inhumane criminal-justice policies substitute for Potter, the poor accused of crimes take the place of the townspeople of Bedford Falls, and *Gideon* plays the role of George Bailey. When times are especially bleak for indigent defendants, it is tempting to conclude that *Gideon* has not made a difference, particularly when one does not consider what the plight of the poor would be like without it. But, as discussed above, in much of the country, *Gideon* has never been realized. And so we are privy to a view of a criminal-justice system without *Gideon* lawyers to fight for the poor in the vein of George Bailey.

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42. Butler, *supra* note 4, at 2178.

43. *See It's a Wonderful Life*, IMDB, http://www.imdb.com/title/tt0038650/. This fitting analogy was brought to my attention by Dawn Deaner, the public defender for the City of Nashville and Davidson County (Nashville, TN), after discussing this argument with several public defender leaders with whom I work.

44. *See* Butler, *supra* note 4, at 2178.

We see this *Gideon*-less world in numerous counties across the country.[45] It may be that poor defendants in some of these places are better off than they would have been in 1963, just as it may be that the working poor of Bedford Falls may have been better off fifty years before either Mr. Potter or George Bailey were around. But that is not the relevant question. The question should be whether poor defendants in our nation's broken systems would be better off with a well-resourced, committed, zealous attorney or without anyone who cared about their plight in their corner.

There are countless tragic stories of people forced to rely on poor lawyers, who desperately wish they had a real advocate, that answer this question. But to truly understand a world without public defenders and the cost to equal justice, we must look beyond the myriad examples of people processed through the system without representation and consider the role public defender leaders play outside the courtroom. Just as stories of bad lawyers allow us to see the individual cost of not fulfilling *Gideon*'s promise, examples of ineffective public defender leaders illustrate the systemic cost. They do so by showing what a world without that leadership will look like and the ripple effect of its absence. It is a world where processing is enabled by people viewed as experts.

The president of the Tennessee District Public Defender Conference was able to position himself to be a voice at a legislative hearing, the fulcrum of where policy decisions are made. He was provided the opportunity to educate the presiding committee about what is happening in the criminal-justice system. Rather than sound the alarm on which his hand rested, he told the committee all is fine. His leadership, or lack thereof, virtually ensured that four thousand people a year will continue to be processed through the criminal-justice system in his district.[46] But the impact is far more extensive. He set a terribly low bar for every poor person in the state. He ensured that no conscientious defender could effectively advocate for justice. Consider what happens when a more

45. This phenomenon has been documented in countless articles over the years and during this fiftieth anniversary of *Gideon*. For examples, see generally Stephen B. Bright, Essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Bright & Sanneh, *supra* note 7, at 2160–71; David Cole, Gideon v. Wainwright *and* Strickland v. Washington*: Broken Promises*, *in* CRIMINAL PROCEDURE STORIES 101 (Carol S. Steiker ed., 2006); Rapping, *supra* note 19, at 164–73.

46. In this defender's district, each lawyer is expected to process eight hundred cases per year. *See Budget Hearings*, *supra* note 35, at 44:40 (noting that his office contains 5 lawyers handling 4,000 cases per year). Assuming defenders work sixty-hour workweeks and take two weeks a year for vacation, without any other sick leave or family time, each client receives roughly three hours and forty-five minutes of representation per year. When one considers all that goes into providing effective representation—client communication, investigation, discovery, conducting and litigating case-specific legal issues, court time, plea negotiations, etc.—it becomes obvious that this effective absence of counsel renders the process perfunctory.

thoughtful defender complains that poor people in his district are not getting adequate representation because each of his lawyers has four hundred cases per year—half of what the president's defenders handle but still far too many to represent effectively. Based on this testimony, the response may very well be, "Suck it up, they should be able to handle twice that number; just ask your conference president."

If this leader were so inclined, he could have helped the committee understand that public defense is broken in his district and statewide. He could rally members of the conference to collectively begin to educate stakeholders about the crisis and the very real costs, both in terms of economics and justice. He could lead the charge to reform broken aspects of the system, positively impacting the quality of justice for thousands of people a year in his district and hundreds of thousands per year statewide. This is a role that good public defender leaders play in our criminal-justice system.

A look at New Orleans illustrates this point well, as it is a rare example of a city that went from having one of the nation's most dysfunctional public defender offices to boasting of an office that is committed to trying to live up to the *Gideon* ideal. Hurricane Katrina provided an opportunity to rebuild New Orleans's public defender system, giving observers an opportunity to see if good public defenders make a difference in unjust systems.[47]

Pre-Katrina criminal justice in New Orleans was marked by structural deficiencies that drove the office and its lawyers to be beholden to the judges rather than their clients.[48] As part-time public defenders with private caseloads, these lawyers had little interest or incentive to spend any time with their clients beyond routine court proceedings.[49] With public defenders not appointed unless and until the prosecution decided to formally charge the accused, a process that took a minimum of forty-five days for a misdemeanor and sixty days for a felony,[50] the defendant who could not afford to hire a lawyer would sit in jail during this time without access to counsel,[51] thus preventing him or her from resolving even the simplest case before his or her life was tragically disrupted.

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47. This author was part of the management team that set out to rebuild Orleans Public Defenders in 2006. This experience is detailed in Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177 (2008).

48. *Id.* at 186–88.

49. *Id.* at 189.

50. *Id.* at 188 (citing to the original report, NICHOLAS L. CHIARKIS ET AL., AN ASSESSMENT OF THE INTERMEDIATE AND LONGER-TERM NEEDS OF THE NEW ORLEANS PUBLIC DEFENDER SYSTEM 7 (2006), *available at* http://jpo.wrlc.org/bitstream/handle/11204/119/2359.pdf?sequence=1).

51. *Id.* In a recently published article, I provide the following account of my first experience in a New Orleans courtroom in October 2006:

Katrina brought with it an opportunity to rebuild. A new management team fought intense battles to force reform in the system, eventually forging a full-time public defender office with well-trained, committed defenders, an investigative staff, and standards.[52] Against harsh opposition from the judges, this leadership team implemented a vertical system of representation where clients keep the same lawyer throughout the life of the case rather than being tethered to a judge, one of the American Bar Association's ten principles of effective indigent defense delivery systems that shifts control from the court to the client.[53] Defender-driven reforms have not only allowed tens of thousands of clients to be appointed defenders committed to interrupting a system designed to otherwise ensure their incarceration, rather than lawyers who are resigned to processing them through that system, but they have also completely changed the landscape of indigent defense.

For example, prior to Hurricane Katrina, the Orleans Parish Jail population exceeded 6,500 people per day.[54] Today that figure is closer to 2,000 and falling.[55] This shift is directly the result of public defender

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> I walked into a courtroom in Orleans Parish District Court for the first time. The scene was fairly chaotic. People, primarily men, in suits wandered about the well of the court chatting to one another. I assumed they were attorneys, although one could not discern the defenders from the prosecutors. The only players who could be readily identified were the judge, who sat on the bench in a robe, and the prisoners, who were lined up in a row, wearing orange jumpsuits, off to the left side of the courtroom. The suited men had no contact with the defendants. It was not clear that any of the lawyers had ever met any of the defendants before.
>
> When a case was called, one of the suited men would speak for the man whose name was connected to the case. However, none of the men in jumpsuits would be brought to his spokesman's side, and the lawyer often barely acknowledged his client. Then, the judge called a case with no suited spokesman. When it was clear that there was no lawyer claiming this particular client, the judge turned to the row of men in orange and asked the one whose case it was to stand. One of the prisoners rose. "Where is your lawyer?" asked the judge. "I haven't seen a lawyer since I got locked up," the man replied. "How long has that been?" asked the judge. "Seventy days," said the man, seemingly resigned to the treatment afforded him. "Have a seat," was the judge's response as he moved on to the next case.

Johnathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J.L. & SOC. CHANGE 331, 349 (2009–2010).

52. Rapping, *supra* note 47, at 194–95, 220.

53. *Id.* at 194–95; *see also* AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 3 (2002), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (setting forth Principle 7, which recommends that "the same attorney should continuously represent the client from initial assignment through the trial and sentencing").

54. NAT'L PRISON PROJECT, AM. CIVIL LIBERTIES UNION, ABANDONED & ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA 13 (2006), *available at* https://www.aclu.org/files/pdfs/prison/oppreport20060809.pdf.

55. As of August 27, 2013, the number of inmates totaled 2,400. Naomi Martin, *Size of New Orleans Parish Jail up to City Council*, TIMES-PICAYUNE (New Orleans), Aug. 27, 2013, http://www.nola.com/crime/index.ssf/2013/08/ new_orleans_city_council_to_de.html.

leadership that has insisted on being at the policy table while strengthening the practice.[56] First, the chief public defender successfully argued for, and worked with, the district attorney (DA)'s office to make expedited charging determinations, a top priority for the New Orleans Mayor's Criminal Justice Leadership Alliance.[57] Second, the chief public defender sat down with the DA, the sheriff, and other decision makers to come up with smart solutions to the pretrial detention problem and access to courts—successfully advocating for the implementation of independent pretrial services.[58] Third, the chief public defender served on the New Orleans mayor's criminal-justice working group, where he advocated for a smaller jail.[59] Ultimately, the working group voted to limit the new jail (currently under construction) to just over 1,400 beds, which was codified by city ordinance.[60] Finally, by assigning lawyers at the point of arrest, rather than the previous policy of waiting for the accused to be formally charged, lawyers at the Orleans Public Defenders Office are able to go to work within twenty-four hours of arrest, getting appropriate cases dismissed and clients released much earlier in the process.[61]

For anyone concerned about mass incarceration, this effort is especially noteworthy. Of the over 2.2 million people incarcerated in this

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56. *See History*, ORLEANS PUB. DEFENDERS (June 22, 2012), http://www.opdla.org/about-us-menu/about-opd/our-history (noting that after Katrina, the public defender office was revamped by public defender leaders such as the head of the Washington, D.C., public defender service).

57. The City of New Orleans adopted a Master Plan, titled *Plan for the 21st Century*, which is available at http://www.nola.gov/city-planning/master-plan/. In the appendix, the mayor, chief judge, district attorney, and public-defender leaders all signed a "Statement of Commitment to Implement a Criminal Justice Reform Agenda for New Orleans," which lays out several principles of reform, including making expedited charging determinations so that people would spend less time sitting in jail waiting to be charged with a crime. For that Statement, visit http://www.nola.gov/getattachment/ae42e6b4-6ef8-4411-8957-1e5b8ca48bee/Appendix-Ch-8-Criminal-Justice-Reform-Statement-of/.

58. *See* David Carroll, *Gideon Alert: New Orleans DA Questions Appointed Counsel for Those Who Make Bail*, JSERI BLOG, NAT'L LEGAL AID & DEFENDER ASS'N (Nov. 9, 2011, 9:48 AM), http://www.nlada.net/jseri/blog/gideon-alert-new-orleans-da-questions-appointed-counsel-those-who-make-bail (noting that "the district attorney and public defender agreed that a pre-trial services program would improve the situation by providing independent screening of defendants" (internal quotation marks omitted)).

59. *See* Katy Reckdahl, *Task Force Continues Debate over Proper Size for New Orleans Jail*, TIMES-PICAYUNE (New Orleans), Nov. 21, 2010, http://www.nola.com/politics/index.ssf/2010/11/task_force_continues_debate_ov.html (reporting that Derwyn Bunton, chief public defender and a member of the mayor's working group, advocated for a smaller jail because it "forces people to innovate").

60. Naomi Martin, *Orleans Parish Prison Reform Coalition Demands Mayor Mitch Landrieu Enforce 1,438-Bed Cap on New Jail*, TIMES-PICAYUNE (New Orleans), Sept. 13, 2013, http://www.nola.com/crime/index.ssf/2013/09/orleans_parish_prison_reform_c.html.

61. *See* Mac McClelland, *The Defense Never Rests*, MOTHER JONES, Jan./Feb. 2012, at 14, 14 (interviewing Derwyn Bunton, the chief public defender, who noted the successful effort to get access to arrestees much earlier in the process).

country,[62] over 20% have yet to be found guilty of a crime.[63] Therefore, addressing pretrial detention is significant to any effort to address the mass-incarceration problem, and providing poor people effective lawyers has a significant impact on these detention rates. According to one study, adequately prepared and resourced "defense attorneys at the first appearance results in defendants being released on their own recognizance twice as often than if they were unrepresented, and . . . bail [being] reduced four times as often for the remaining defendants."[64] The study concludes that "[t]his translates into a 20 percent reduction in the average amount of time spent in jail per defendant."[65]

Additionally, those released pretrial will likely experience lower incarceration rates after conviction. Another study found that "defendants who are incarcerated pretrial have worse case outcomes than defendants who are allowed to remain at liberty. . . . [They] are more likely to be convicted, if convicted they are more likely to be sentenced to incarceration, and if incarcerated their sentences are likely to be longer."[66] These findings support the importance of having a strong public defender voice advocating for systemic change and help one appreciate the significance of building a public defender office in New Orleans for criminal-justice reform.

The other lesson of New Orleans is just how precarious the implementation of policy reform can be without foot soldiers on the ground to make it a reality. There were strong forces resistant to change, and absent a strong public defender office fighting to ensure the opportunity did not slip away, New Orleans would surely not have made the progress it has to date.[67] There are certainly examples of promising policy reforms that

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62. Adam Liptak, *1 in 100 U.S. Adults Behind Bars, New Study Says*, N.Y. TIMES, Feb. 28, 2008, http://www.nytimes.com/2008/02/28/us/28cnd-prison.html?_r=0.

63. In 2008, 800,000 people were held in America's jails. Approximately 61% of these inmates have not yet been convicted of a crime. Therefore, roughly 488,000 people, or 21.2% of all incarcerated persons, are subject to pretrial detention each year. PRETRIAL JUSTICE INST., MACARTHUR FOUND., RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS 1 (2012), *available at* http://www.pretrial.org/Featured%20Resources%20Documents/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf.

64. John P. Gross & Jerry J. Cox, *The Cost of Representation Compared to the Cost of Incarceration*, CHAMPION, Mar. 2013, at 22, 23 (summarizing the study mentioned). For the actual study, see Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002).

65. Gross & Cox, *supra* note 64.

66. *Id.* (summarizing the second study). For the actual results of the second study, see MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, A DECADE OF BAIL RESEARCH IN NEW YORK CITY (2012), *available at* http://www.cjareports.org/reports/DecadeBailResearch.pdf.

67. *Cf.* Rapping, *supra* note 47, at 211 (offering solutions to help overcome resistance to cultural change).

never amounted to much without leadership on the ground to usher in actual change.

This is one example—although hardly the only one I could mention—of how public defender leadership can play a role in initiating and implementing reforms that help poor people receive more justice. Among the community of public defender leaders I work with (discussed below), there are countless examples like these that collectively have a palpable impact. And while such efforts may not have been the purpose of *Gideon*, it is certainly the result. A strong public defender ethos committed to a humane criminal-justice system for the poor and visionary leaders to push for reform grow out of a community of public defenders who possess the "mind-set, heart-set, [and] soul-set"[68] to live up to *Gideon*'s promise. *Gideon* provides the foot soldiers that can then be part of a larger, coordinated movement to realize justice.

IV. Building the Movement

For the past seven years, I have been working with a committed community of public defenders to build the movement necessary to drive criminal-justice reform. Aptly named Gideon's Promise,[69] this movement is based on the idea that there will never be meaningful reform until we transform a culture in our criminal-justice system that has come to accept an embarrassingly low standard of justice for poor people. This culture is driven by a set of assumptions that influence the mindset of not only those who work in the system (judges, prosecutors, police, defenders, etc.) but also policymakers and the public at large.[70] This culture is reflected in the way that police, prosecutors, and judges exercise their discretion in ways that promote the current system; defenders who have come to accept their role in maintaining the status quo; policymakers who support policies that drive these outcomes; and a public that does not understand this reality. Collectively, we have abandoned those values most essential to justice. It is the mission of Gideon's Promise to raise our national consciousness about the importance of these values and to advocate for reform consistent with them. Starting in the courts where the absence of these values causes the most damage, and spreading throughout the criminal-justice system and

68. Barbara Allen Babcock, Commentary, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 175 (1983–1984).

69. The organization was originally named the Southern Public Defender Training Center. It changed its name to Gideon's Promise in January 2013. For the philosophy behind the organization's theory of change, see Rapping, *supra* note 19, at 173–80. To learn more about Gideon's Promise, visit www.gideonspromise.org.

70. For a more comprehensive discussion of the theory behind transforming culture in the criminal-justice context, see Rapping, *supra* note 19, which outlines a model for defender-driven culture change, and Rapping, *supra* note 47, which discusses organizational culture in the context of indigent defense.

beyond, the public defenders at Gideon's Promise are changing the way people think about the importance of the work we do and the humanity of the people we represent.

Gideon's Promise is building a movement that provides comprehensive, ongoing training and support to new public defenders learning how to provide their clients the representation they deserve, mid-level defenders transitioning into leadership roles, and public defender leaders overseeing defender organizations. What started as a partnership with two public defender offices in 2007 has blossomed into a coalition that includes over thirty-five partner offices and more than two hundred fifty defenders in the South and beyond.[71] Gideon's Promise also works with chief defenders and trainers from public defender offices across the country who are interested in exporting its model and with law students and law school faculty, nationally, to encourage graduates to join the effort to raise the standard of representation in places with the greatest need.[72]

In addition to building a movement of public defender advocates, the Gideon's Promise community engages in extensive outreach and education to raise awareness of the criminal-justice crisis and to promote solutions. Gideon's Promise continues to develop relationships with members of the faith-based community, corporate America, the broader legal community, and social-justice organizations to help them appreciate how these issues impact their interests. Our lawyers advocate in courtrooms every day. Our leaders meet with decision makers at every level of state and local government to push for reform. Members of our community participate in trainings, panels, and presentations across the country. We recently partnered with a documentary filmmaker to create *Gideon's Army*, an award-winning HBO documentary that has helped raise public awareness of the criminal-justice crisis.[73]

Gideon's Promise is forging an army of public defenders to bring their clients justice today and developing them into the leaders of tomorrow. A successful movement needs both foci. This is a movement forged by a community of committed public defenders. They are lawyers who refuse to accept the status quo. They are leaders who drive efforts to enact policies that make the system more humane for poor people. Although they work in systems in which *Gideon* has never been respected, they would not be available for this fight if it were not for *Gideon* first forging the way by mandating that every defendant have a lawyer. But their work goes beyond the original *Gideon* mandate by pushing to demand even more from the

71. While Gideon's Promise started as an organization that worked with southern defenders, it has piloted its model in offices beyond the region and has a growth model that envisions a national presence.

72. *Our Solution*, GIDEON'S PROMISE, http://gideonspromise.org/our-solution/.

73. To learn more about Gideon's Army, visit www.gideonsarmythefilm.com.

system than *Gideon* first envisioned. They represent a small example of what a world with *Gideon* could look like.

V. Conclusion

Gideon said that ensuring poor people have effective advocates when their liberty is on the line is necessary to ensure equal justice. It never said this alone was sufficient. And while the *Gideon* Court could not have foreseen how hostile the larger criminal-justice system would become towards poor people, it correctly understood the value of a lawyer to help the accused navigate the adjudicatory process. But for those of us committed to criminal-justice reform, we absolutely need to look beyond a narrow view of the right to counsel as a panacea. It must be coupled with advocacy beyond the courtroom to reclaim saner and more equitable criminal-justice policies. Public defenders must be part of this effort, and those of us working in the indigent defense arena need to build a public defender movement working to change the way the public views our clients, the threat to equal justice that confronts them, and the role of the public defender in realizing a fairer criminal-justice system.

For skeptics of the importance of *Gideon*, none of this matters. They see an increasingly unjust criminal-justice system in a post-*Gideon* world and conclude that *Gideon* has made no difference. But this analysis ends with a very narrow view of the systemic benefit of *Gideon*: it falls short of appreciating what an army of public defenders means systemically. Therefore, this view is far too limiting for a meaningful discussion of the benefits of *Gideon*. We also have to examine what public defenders contribute beyond the courtroom to understand the impact of a case that serves as the engine for building a movement of public defenders.

In 1963, Anthony Lewis narrated an important story about the importance of the right to counsel in ensuring the criminal process is fair. His story, and the case upon which it is based, is no less important today than it was fifty years ago. However, in light of the changing criminal-justice landscape, there is a need for a sequel. A story that helps the public understand the enormity of the challenges that lie ahead, the need for a movement to address these challenges, and the critical role the public defender must play if this effort is to succeed. Given how unlikely it is that a storyteller with Mr. Lewis's skill and understanding of the subject matter will come along again, it will be left to this movement of advocates to tell this modern story of the importance of *Gideon* and what is needed to fulfill its promise.

Notes

Bridging the Information Gap: The Department of Justice's "Pattern or Practice" Suits and Community Organizations*

I. Introduction

When Jeffrey Thornton, a twenty-three-year-old African-American college student, observed Officer Michael Olsen responding to a fight on Sixth Street, he remarked on the officer's conduct to his friend.[1] Officer Olsen, who overheard Thornton, grabbed him and slammed his head into a police car, causing him to fall and strike his head on the ground.[2] When surveillance footage revealed that Officer Olsen had filed a false report regarding the incident, he was suspended for sixty days.[3] A grand jury indicted him, but the charges were later dropped.[4]

Unfortunately, this misconduct cannot be dismissed as an isolated occurrence.[5] Stories of police misconduct are common, and police brutality has been called "one of the most serious, enduring, and divisive human rights violations in the United States."[6] Scholars have recognized that it is not individual officers, but rather the police department as a whole, that is largely to blame.[7] The exclusionary rule, civil rights litigation, criminal

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1. Jordan Smith, *Naked City: APD Settles Thornton Suit*, AUSTIN CHRON., June 25, 2004, http://www.austinchronicle.com/news/2004-06-25/217569/.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See generally* Complaint, NAACP v. Austin Police Dep't (Dep't of Justice Civil Rights Div. filed June 27, 2012), *available at* http://texascivilrightsproject.org/docs/12/tcrp_titleVIcompt120625.pdf (describing the Austin Police Department (APD)'s problematic use-of-force policies and practices and requesting that the Department of Justice reopen its § 14141 investigation into the APD).

6. ALLYSON COLLINS, HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 1 (1998); *see also, e.g.*, Press Release, U.S. Dep't of Justice, Former Police Officer Pleads Guilty in Danziger Bridge Case (Apr. 7, 2010), *available at* http://www.justice.gov/opa/pr/2010/April/10-crt-379.html (describing the unjustified shooting of six civilians by New Orleans Police Department officers on Danziger Bridge in the aftermath of Hurricane Katrina).

7. *See, e.g.*, Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 456 (2004) (arguing that "theoretical and empirical scholarship on policing

prosecution, and citizen oversight boards have all been suggested as ways to curb police misconduct.[8] However, these solutions suffer from obstacles that make them less than successful as deterrents to police misconduct.[9]

The Violent Crime Control and Law Enforcement Act of 1994, which gave the Department of Justice the authority to sue police departments that showed a "pattern or practice" of violating constitutional rights,[10] has been hailed as a significant reform tool.[11] The cause of action, codified at § 14141, allows for broad structural changes in police departments and is particularly powerful given the significant role that organizational structure plays in police misconduct.[12] However, it quickly became clear that § 14141 had a serious flaw.[13] The Department of Justice lacks the resources to gather information about police departments that are in need of intervention.[14] Only by having essential information about police departments can the Department of Justice make informed decisions about which departments to investigate.[15]

This information gap has led many scholars to call for mandatory-reporting requirements for police departments.[16] Until such requirements are in place, however, the Department of Justice must still continue to pursue § 14141 litigation. Community advocacy groups are an overlooked potential resource to solve this information gap. While the Department of

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strongly suggests that the police organization bears significant responsibility for police misbehavior").

8. *See* Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 17–20, 22–24 (2003) (describing these reform measures and their various drawbacks).

9. *Id.*

10. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified at 42 U.S.C. § 14141 (2006)).

11. *See* Walker, *supra* note 8, at 51 (describing § 14141 as part of a "significant advance" in efforts to achieve police reform).

12. *See* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 8, 20 (2009) (describing § 14141 as advantageous because it affects organizational structures that have an enormous influence on police behaviors); Debra Livingston, Essay, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 815–17 (1999) (explaining the relief available under § 14141).

13. *See* Harmon, *supra* note 12, at 27–36 (describing the lack-of-information problem that the Department of Justice faces).

14. *See* Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 44 (2012) (listing the existence of 15,000 police departments across the country as a significant challenge to the Department of Justice's ability to achieve national reform).

15. *See* Harmon, *supra* note 12, at 5 (suggesting that without the data to make informed decisions, the Department of Justice "cannot set priorities intelligently").

16. *See, e.g.*, Armacost, *supra* note 7, at 531–33 (arguing that Congress should require all police departments to engage in record keeping and reporting by making it a condition of federal grants to law enforcement agencies); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 815 (2012) (suggesting that the implementation of mandatory-reporting requirements is a necessary first step for effective § 14141 enforcement).

Justice must handle 15,000 police departments,[17] a local community group need only watch one. By gathering information on a history of incidents in its local department and sending a report to the Department of Justice, the community group can provide the Department of Justice with the evidence it needs to justify an investigation. This solution provides the Department of Justice with much-needed information by relying on resources already in place, i.e., community groups that already monitor police in order to bring § 1983 claims or call for criminal prosecutions.

The idea of using community groups to gather information to support a Department of Justice investigation is deceptively simple. Both sides benefit from such an arrangement: the Department of Justice's job is made easier by the availability of comprehensive reports, and the community groups benefit from the possibility, or reality, of a Department of Justice suit to reform their police department. The Texas Civil Rights Project (TCRP)'s interaction with the Austin Police Department (APD) and the Department of Justice is a prime example of such a mutually beneficial relationship. The TCRP utilized a Title VI complaint to provide evidence to the Department of Justice of a possible pattern of unconstitutional misconduct within the APD.[18] In response, the Department of Justice initiated an investigation, which ended with a technical letter suggesting 165 reforms, 161 of which the APD accepted.[19]

While this example of success is promising, implementing such a strategy across the country may not be as feasible as it first appears. Several of the characteristics that enabled the TCRP to successfully implement this model of information gathering may not be widely present in every community and could be difficult to replicate on a large scale.[20] Moreover, even if these circumstances could be replicated, Title VI complaints can only provide a limited realm of information to the Department of Justice and miss important metrics that should be considered.[21]

This Note will examine the feasibility and desirability of providing the Department of Justice with needed information by implementing a model of information gathering by community groups. Part II of this Note will

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17. *See* BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ233982, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), *available at* http://www.bjs.gov/index.cfm?ty=dcdetail&iid=249 (detailing the 12,501 local police departments and 3,063 sheriffs' offices nationwide).

18. *See* Complaint, *supra* note 5, at 1–2.

19. Jordan Smith, *APD Implements Suggested 'Action Items,'* AUSTIN CHRON., Dec. 25, 2009, http://www.austinchronicle.com/news/2009-12-25/931608/; Letter from Art Acevedo, Chief, Austin Police Dep't, to Shanetta Y. Cutlar, Chief, Special Litig. Section, U.S. Dep't of Justice Civil Rights Div. (Nov. 24, 2009) [hereinafter Acevedo Letter] (on file with author).

20. *See infra* subpart IV(A).

21. *See infra* subpart IV(B).

examine traditional remedies such as the exclusionary rule, § 1983 claims, criminal prosecution, and civilian oversight models, and explain the advantages that § 14141 has over these measures. It will also detail the resources problem that the Department of Justice faces in pursuing § 14141 litigation. Part III will discuss using community groups to solve this problem and will discuss the TCRP and the APD as an example. Finally, Part IV will critically examine the feasibility and desirability of recreating such an experiment.

II. Remedying Police Misconduct

During 2002, there were 26,556 citizen complaints to large local and state law enforcement agencies regarding police use of force.[22] Of these complaints, approximately 2,100 of them were sustained, meaning sufficient evidence existed to support disciplinary action against the officer.[23] These numbers indicate that police misconduct, even in the narrow field of excessive force, is not uncommon. Of course, police misconduct includes much more than excessive use of force.[24] Remedies for police misconduct have typically been broken up into two categories: remedies aimed at punishing the individual officer and remedies aimed at changing the organization.

A. Remedies Aimed at the Individual

1. Judicial Intervention: The Exclusionary Rule.—In *Mapp v. Ohio*,[25] the Supreme Court held that evidence obtained through a search or seizure that violated the Fourth Amendment had to be excluded from state court trials.[26] While the exclusionary rule started out as a broad protection for defendants, recent exceptions to the rule have limited the applicability of the rule and its deterrent potential.[27] Even without these exceptions, there

22. MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ210296, CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 1 (2006), *available at* http://www.bjs.gov/content/pub/pdf/ccpuf.pdf.

23. *See id.* (noting that 8% of 26,556 complaints were sustained).

24. Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 360–61 (2011) (listing falsifying evidence, unconstitutional racial profiling, and perjury as just a few more examples of the scope of misconduct that occurs).

25. 367 U.S. 643 (1961).

26. *Id.* at 655.

27. *See* Herring v. United States, 555 U.S. 135, 147–48 (2009) (holding that the exclusionary rule does not apply to constitutional violations resulting from police negligence); United States v. Leon, 468 U.S. 897, 922–25 (1984) (creating a "good faith" exception to the exclusionary rule where police seize evidence in reasonable reliance on a later-invalidated search warrant); Nix v. Williams, 467 U.S. 431, 440–48 (1984) (adopting the inevitable discovery doctrine as an exception to the exclusionary rule); *cf.* People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)

are three main obstacles that limit the success of the exclusionary rule as a reform tool. First, because the rule is only applied in adjudicated cases, it cannot be enforced routinely in every police interaction.[28] Secondly, even when the rule is applied correctly, it only sets the constitutional minimum for what officers cannot do rather than setting best-practices standards for what they should be doing.[29] This limits the amount of reform that can stem from application of the rule. Finally, the rule is based on the assumption that officers will care if evidence is excluded.[30] However, officers' success in the department often depends not on the number of successful prosecutions but on the number of cases that are cleared by arrest.[31] The legal exceptions to the rule and the practical limits on its deterrent power render the exclusionary rule a useful, but highly imperfect, method by which to achieve police reform.

2. Private Civil Litigation: Section 1983 Claims.—One of the most common causes of action in cases involving police misconduct is 42 U.S.C. § 1983. The statute provides any private citizen a right of action against an individual who, under color of law, subjected the person to the deprivation of any right secured by the Constitution.[32] Which standard a court uses to analyze a § 1983 claim depends on which constitutional right the court deems to have been violated: for example, an "objective reasonableness" standard applies to Fourth Amendment violations,[33] while a "discriminatory purpose" standard applies to Fourteenth Amendment violations.[34] These standards can be hard for a plaintiff to meet.[35] In addition, qualified

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(Cardozo, J.) ("There has been no blinking the consequences. The criminal is to go free because the constable has blundered."), *abrogated by* Mapp v. Ohio, 367 U.S. 643 (1961).

28. *See* Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 498 (2008) (explaining that a court cannot apply the rule in the many cases that are never adjudicated before it).

29. Harmon, *supra* note 16, at 777 (suggesting that constitutional floors, while helpful, should not be the gold standard of police reform).

30. *See* Harmon, *supra* note 14, at 39 (observing that "excluding evidence cannot influence officers or departments uninterested in using illegally obtained evidence in a criminal prosecution").

31. *See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 377 (arguing that the exclusionary rule punishes the prosecutor more than the police officer, who cares primarily about getting the arrest).

32. 42 U.S.C. § 1983 (2006).

33. Graham v. Connor, 490 U.S. 386, 388 (1989).

34. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).

35. More than one court has held that uttering a racial epithet does not form the basis for a § 1983 claim because it does not show a discriminatory purpose. *See, e.g.*, Patton v. Przybylski, 822 F.2d 697, 700 (7th Cir. 1987) ("Defamation is not a deprivation of liberty within the meaning of the due process clause. No more is a derogatory racial epithet." (citations omitted)); Wade v. Fisk, 575 N.Y.S.2d 394, 396 (App. Div. 1991) ("[A] racial epithet, no matter how abhorrent or

immunity, standing requirements, and municipal-liability standards can all pose insurmountable legal obstacles to a § 1983 plaintiff.[36]

Unfortunately, even a successful § 1983 suit does not necessarily bring about the desired reform. This is most often attributed to the fact that the individual officer who faced the suit is rarely the one who ends up paying the damages.[37] The government normally handles the legal fees and indemnifies the officer against the judgment as long as the officer acted in good faith.[38] There is no real connection between the bad act and the punishment, which directly undermines the deterrent effect of § 1983.[39] While theoretically municipalities that pay these damages will pass along the punishment to the department through new policies, often municipalities believe the litigation costs are simply a cost of doing business.[40] Thus, even if a plaintiff can win a § 1983 case, there is little guarantee that the suit will deter future bad acts of the officer or the municipality.

3. Criminal Prosecution.—State and federal criminal prosecutions of officers who engage in police misconduct face a variety of obstacles that limit both the number of prosecutions and the reform effect of those few prosecutions. Prosecutions at both the state and federal level often fail because while the victims of police misconduct are not very sympathetic, the hardworking police defendants are.[41] In addition, the "blue wall of silence" that describes fellow officers' unwillingness to testify against the defendant often prevents prosecutors from developing a case.[42] State prosecutors face the added difficulty of having worked closely with the

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reprehensible, cannot of itself form the basis for a 42 U.S.C. § 1983 claim." (internal quotation marks omitted)).

36. *See, e.g.*, City of L.A. v. Lyons, 461 U.S. 95, 105–10 (1983) (finding that a police department's chokehold policy did not pose a sufficiently real and immediate threat of future harm to the plaintiff and thus that the plaintiff lacked standing to pursue equitable relief); DeGraff v. Dist. of Columbia, 120 F.3d 298, 302 (D.C. Cir. 1997) (noting that qualified immunity protects an officer from liability unless a reasonable jury could find that the officer's action was so contrary to the Constitution that no reasonable officer could have thought the action to be lawful); Harmon, *supra* note 12, at 9–10 (discussing the difficulties inherent in proving a municipal policy or custom and showing deliberate indifference on the part of supervisors); Marshall Miller, Note, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 155–56 (1998) (describing the difficulties in winning a § 1983 claim).

37. Armacost, *supra* note 7, at 473.

38. *See id.*; Miller, *supra* note 36, at 156.

39. *See* JON L. WILLIAMS, OPERANT LEARNING: PROCEDURES FOR CHANGING BEHAVIOR 154–55 (1973) (arguing that for "maximally effective" deterrence to occur, punishment must be given immediately after every incident of misconduct and it must be intense, such that it actually serves as punishment to the subject).

40. Armacost, *supra* note 7, at 474–75.

41. Harmon, *supra* note 12, at 9. This is also a problem for § 1983 claims. *See* Miller, *supra* note 36, at 155 (suggesting that it is difficult for juries to punish a hardworking cop).

42. John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 803.

officers they are now attempting to prosecute.[43] While federal prosecutors do not face that particular difficulty, they run into an entirely different obstacle. The Supreme Court in *Screws v. United States*[44] interpreted 18 U.S.C. § 52 to require prosecutors to prove that the defendant had the specific intent to deprive another of a clearly established federal right,[45] which is a particularly difficult standard to meet.[46] These state and federal obstacles make criminal prosecutions both rare and largely unsuccessful.[47]

While successful criminal prosecutions may have a stronger deterrent effect on the individual officer than the previous two remedies do, the cost of a criminal prosecution for the department as a whole is typically quite low. Successful criminal prosecutions allow departments to shift the blame of police misconduct to one or two "bad apples" and thereby avoid any substantive, organizational reform.[48] As organizational culture plays such a significant role in police misconduct, a reform effort that allows blame shifting away from the organization and to the individual does not fully address the realities of police misconduct.[49]

4. Civilian Oversight Committees.—There are many models of civilian oversight of police activities, and each one has its own particular advantages and disadvantages.[50] Two of the four models rely on civilians to conduct individual investigations into police misconduct, while a third relies on civilians to review past investigations into police misconduct.[51] The fourth model, often called the auditor model, is usually hailed as the most promising because of its focus on broader organizational changes

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43. *Id.* at 803–04; Walker, *supra* note 8, at 19.

44. 325 U.S. 91 (1945).

45. *Id.* at 93, 103, 107 (plurality opinion). 18 U.S.C. § 52, which *Screws* interpreted, is the criminal statute under which government agents are normally charged for unlawful misconduct. The current iteration of the statute is codified at 18 U.S.C. § 242 (2012).

46. *See* COLLINS, *supra* note 6, at 94 (describing an interview with Richard Roberts, then-chief of the Criminal Section of the Department of Justice Civil Rights Division, in which Roberts indicated that "federal civil rights prosecutions are difficult due to the requirement of proof of the accused officer's 'specific intent' to deprive an individual of his or her civil rights as distinguished, for example, from an intent simply to assault an individual").

47. *See id.* at 93 & tbl.2 (finding that of the 10,129 civil rights complaints reviewed in 1996, the Civil Rights Division of the Department of Justice filed only 79 cases, of which only 22 were official misconduct cases); *id.* at 102–03 (stating that data from 1997 show that, of the cases prosecuted by the Civil Rights Division, law enforcement officers consisted of nearly all of the acquittals and just half of the indictments).

48. *See* Harmon, *supra* note 14 (arguing that criminal convictions may reduce departmental blame by focusing on the individual who committed the act).

49. *See* Armacost, *supra* note 7.

50. For a detailed description of four common models of civilian oversight, see Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 11–19 (2009).

51. *Id.* at 12–17.

rather than just individual investigations.[52] In this model, a civilian auditor reviews all aspects of departmental policy and recommends changes.[53] This model depends heavily, however, on the talent of the auditor at "maintain[ing] a reputation for fairness and impartiality."[54] While the level of authority differs, as a whole, civilian oversight boards lack any substantial ability to require reform.[55] This, among other weaknesses in civilian oversight boards such as a lack of resources and contentious relationships with the police departments, means that what little say the boards do have does not tend to go very far towards reform.[56]

B. Section 14141: Department of Justice "Pattern or Practice" Suits

1. The Cause of Action.—Section 14141 was created to address some of the shortfalls of the above remedies. After the Rodney King beating, riots, and failed prosecutions, Congress held a series of hearings and determined that the federal government was limited in its ability to address such misconduct.[57] Existing case law at the time did not allow the government to litigate unconstitutional police practices.[58] To address that gap, Congress enacted § 14141 as § 210401 of the Violent Crime Control and Law Enforcement Act of 1994, which gave the Department of Justice the ability to sue when "a pattern or practice of conduct by law enforcement officers . . . deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[59]

The Special Litigation Section of the Civil Rights Division of the Department of Justice is in charge of handling complaints, investigations, and suits based on § 14141.[60] After receiving a complaint of a § 14141 violation, the Special Litigation Section makes a determination of whether the allegations rise to the level of a possible pattern or practice of

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52. *See id.* at 17–18.

53. *Id.*

54. *Id.* at 18.

55. *Id.* at 11.

56. *See* Simmons, *supra* note 28, at 503–04; Walker, *supra* note 8, at 22–24.

57. U.S. DEP'T OF JUSTICE, NCJ234458, TAKING STOCK: REPORT FROM THE 2010 ROUNDTABLE ON THE STATE AND LOCAL LAW ENFORCEMENT POLICE PATTERN OR PRACTICE PROGRAM (42 USC § 14141) 1–2 (2011), *available at* https://ncjrs.gov/pdffiles1/nij/234458.pdf; *see also* Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 4–5 (2001) (stating that "[r]eforms instituted after the Rodney King case apparently had failed").

58. United States v. City of Phila., 644 F.2d 187, 193, 199, 201, 203 (3d Cir. 1980) (holding that the federal government had no implied authority to sue to enjoin unconstitutional police conduct).

59. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified at 42 U.S.C. § 14141 (2006)); *see also* U.S. DEP'T OF JUSTICE, *supra* note 57.

60. U.S. DEP'T OF JUSTICE, *supra* note 57, at 1–3; Simmons, *supra* note 28, at 493.

misconduct.[61] If the answer is yes, the Special Litigation Section begins a formal investigation into the department.[62] These investigations can last for a period of years and can end in several different ways.[63] As of 2010, the Special Litigation Section had initiated "more than 50 investigations resulting in nine memorandums of agreement (MOA), two letter agreements, and eight consent decrees. Of the total, eight investigations were closed after providing the jurisdiction with technical assistance," fifteen were closed because allegations could not be sustained, and sixteen were ongoing.[64]

2. The Comparative Advantages of § 14141.—Unlike the traditional remedies discussed above, § 14141 is devoted to organizational, rather than individual, reform efforts. Thus, while the cause of action does have its own set of shortcomings, it is grounded in what has been termed the "new paradigm" of police reform.[65] The new paradigm is characterized by the realization that accountability and organizational norms drive police conduct, and it is only by influencing these factors that substantive police reform can occur.[66] This focus is the first, and most important, advantage of § 14141 over the other traditional methods of reform.[67] Unlike the exclusionary rule, § 1983 liability, criminal prosecutions, and many civilian oversight boards, which focus on deterrence in individual cases, § 14141 allows for changes both in the paper policies of the department as well as in the practical reality of how it completes tasks such as reporting, training, and supervision.[68]

While the organizational focus of § 14141's reform efforts is the most important advantage, there are other advantages. Technical letters, consent decrees, and memoranda of agreement that result from § 14141 investigations can help set national standards for reforms, thereby creating not just a minimum constitutional floor of acceptability but also a goal of

61. U.S. DEP'T OF JUSTICE, *supra* note 57, at 3.

62. *Id.*

63. *See id.*

64. *Id.*

65. *See* Walker, *supra* note 8, at 6.

66. *See* COLLINS, *supra* note 6, at 33, 45 (reporting that many of the problems identified in studies of police departments across the nation could be attributed to organizational culture); Walker, *supra* note 8, at 46 ("The new paradigm reaches deep into police organizations, shaping the on-the-street behavior of individual officers, and potentially changing the organizational culture of departments in a positive direction.").

67. *See* Armacost, *supra* note 7 (arguing that "current remedies are inadequate to the extent that they ignore or undervalue institutional and organizational factors").

68. *See* Harmon, *supra* note 12, at 20 (describing the advantages of § 14141 over other, traditional methods of reform).

best practices.[69] These letters and agreements can address practices within a department that are not necessarily unconstitutional and encourage reform in areas that traditional reforms cannot reach.[70] In addition, the Department of Justice has far more sway than an individual plaintiff does in driving cooperation and settlement with the police department.[71] Thus, the Department of Justice rarely faces the prospect of having to actually prove a pattern or practice before a jury.[72] Finally, § 14141 gives police departments the chance to save political capital in the community. A police department that willingly invites the Department of Justice to visit can argue to the community that it is dedicated to becoming a better, more professional police force.[73] This is not the case with a § 1983 claim or criminal prosecution, in which the police department is on the defensive and in which room for cooperation is not as great or public.

The comparative advantages of § 14141 can be summed up in one broad stroke: § 14141 has a much broader reach in terms of what practices it can affect. It can reach organizational, and not just individual, practices, and it can reach constitutional, but poorly thought out and intrusive, practices. It can also reach departments that would not be amenable to the power of one plaintiff or prosecution but would respond to a public investigation by the more powerful Department of Justice. These unique benefits of § 14141 make it all the more important to determine ways to minimize the shortcomings of § 14141.

3. The Shortcomings of § 14141.—Unfortunately, there are a few problems that plague the enforcement of § 14141. The first is that § 14141, similar to § 1983 municipal liability claims and other pattern or practice civil rights litigation statutes, requires proof of a pattern or practice of violations.[74] While the Department of Justice rarely has to present a § 14141 case in court due to the pressure it can bring to bear on

69. *See* Livingston, *supra* note 12, at 843 (suggesting that the Department of Justice's enforcement of § 14141 may promote the establishment of national standards regarding the responsibilities of police managers).

70. *See* Harmon, *supra* note 16, at 776–81 (criticizing constitutionally based police reforms because they allow policies that, while constitutional, are still disruptive and intrusive to citizens' rights).

71. *See* U.S. DEP'T OF JUSTICE, *supra* note 57, at 3 (noting that as of 2010, only one department out of more than fifty refused to cooperate with the Department of Justice investigation); Miller, *supra* note 36, at 187 (explaining that the Department of Justice operates from a "position of strength" in § 14141 investigations and settlements).

72. *See* U.S. DEP'T OF JUSTICE, *supra* note 57, at 3, app. B at 19–20 (chronicling the various outcomes of the investigations and noting that only a few ended in closure without some action by the Department of Justice and only one resulted in "contested litigation").

73. *See id.* at 2 (reporting that several police chiefs shared the sentiment, expressed by one police chief, that "[a] tremendous amount of good came out of the process, generating tremendous confidence in the police department by the community").

74. *See, e.g.*, 42 U.S.C. §§ 1971(e), 2000a-5 (2006); Miller, *supra* note 36, at 166.

departments,[75] the threat of suit must still be viable. This means the Department of Justice should only intervene when there is a strong case to be made for a pattern of violations. Unfortunately, it may not be easy for the Department of Justice to determine if facts facially meet the pattern or practice requirement, in part because it is not always clear whether individual instances of police conduct rise to the level of being unconstitutional misconduct.[76]

It is not entirely clear what proving a § 14141 pattern requires, but if it is something similar to the custom of misconduct that must be proved for municipal liability under § 1983,[77] then the Department of Justice faces a difficult burden indeed. If proving a pattern in the § 14141 context is more like proving a pattern in a Title VII or Fair Housing Act claim,[78] then the burden, while perhaps a little easier to meet than the § 1983 custom burden, is still a significant challenge requiring a wealth of proof. In *International Brotherhood of Teamsters v. United States*,[79] the Supreme Court indicated that the pattern or practice requirement of Title VII required the government to prove "more than the mere occurrence of isolated . . . or sporadic discriminatory acts. It had to establish . . . that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice."[80] While this standard seems straightforward, courts have struggled to consistently apply it, and several circuits have emphasized that there is no consistent threshold of discrimination, acknowledging instead that "[e]ach case must turn on its own facts."[81] This means that it is difficult for the Department of Justice to know which set of facts would uphold a finding of a pattern of misconduct.

Besides the difficulty of knowing what set of unconstitutional misconduct instances will satisfy the pattern requirement of § 14141, the Department of Justice faces the added difficulty of knowing whether individual instances of seeming police misconduct even rise to the level of unconstitutional acts. Instances of force might satisfy the Fourth Amendment requirement of being "objectively reasonable" and therefore

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75. *See* U.S. DEP'T OF JUSTICE, *supra* note 57, at 3.

76. *See id.* at 3, app. B at 19–20 (demonstrating that as of 2010, only one investigation had resulted in litigation, although some investigations were still ongoing at that time).

77. *See, e.g.*, Thelma D. *ex rel* Delores A. v. Bd. of Educ., 934 F.2d 929, 932–33 (8th Cir. 1991) (requiring a showing of a "continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees").

78. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977) (setting out the standard for proving a pattern or practice in the Title VII context).

79. 431 U.S. 324 (1977).

80. *Id.* at 336.

81. United States v. W. Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir. 1971); *see also, e.g.*, United States v. Balistrieri, 981 F.2d 916, 929–30 (7th Cir. 1992) (comparing two conflicting cases decided under the *International Brotherhood of Teamsters* standard and observing that "a finding of pattern is a factual finding, and each case must stand on its own facts").

fail to provide the Department of Justice with an unconstitutional act to add to its proof of a pattern or practice.[82] Thus, the Department of Justice may face incidents that appear to suggest a problem in the police department but perhaps do not on their face suggest a constitutional problem.

These issues with proving a violation under § 14141 mean that the Department of Justice needs convincing facts upon which to justify investigations and settlements. Unfortunately, this leads to two other shortcomings of § 14141: a lack of resources and a lack of information. The Special Litigation Section of the Civil Rights Division of the Department of Justice is the only entity with the power to bring suit under § 14141.[83] It is an entity with an extremely limited number of attorneys and a limited amount of monetary and political resources, leading to a finite number of § 14141 investigations.[84] Similarly, it means that the Department of Justice will be unable to go back to a department it already investigated, even if that department relapses.[85]

Related to the problem of limited resources is the problem of a lack of coherent information about which police departments need intervention. The limited number of attorneys means that the Department of Justice only has so much time to devote to gathering information on the thousands of police departments that exist across the nation.[86] In addition, the lack of a federal mandatory-reporting requirement for police stations and the existence of state statutes that prevent public access to data regarding police misconduct means that the Department of Justice has few official channels to turn to in order to gather data upon which to make investigation

82. *See* Graham v. Connor, 490 U.S. 386, 397 (1989) (recognizing that the standard for a Fourth Amendment violation is whether an officer's actions were objectively reasonable and affirming that an officer's evil intent will not make an objectively reasonable use of force unconstitutional).

83. The Omnibus Crime Control Act of 1991 included a provision for private enforcement of § 14141, *see* H.R. REP. NO. 102-242, pt. 1, at 24 (1991), but the bill died under a filibuster, *see* Joan Biskupic, *Crime Measure Is a Casualty of Partisan Skirmishing*, 49 CONG. Q. WKLY. REP. 3528, 3528 (1991), and the later version that was passed in 1994 under the name Violent Crime Control and Law Enforcement Act eliminated the private right of enforcement, *see* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified at 42 U.S.C. § 14141 (2006)).

84. *See* Jacobi, *supra* note 42, at 834–35 (describing the limited resources of the Civil Rights Division and the department's susceptibility to use as a tool for politicized enforcement).

85. Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57, 64–65 (2012) (describing relapses in departments that were already under consent decrees with the Department of Justice).

86. *See* REAVES, *supra* note 17; *see also* Harmon, *supra* note 12, at 21 (stating that "[t]he Special Litigation Section has fewer than forty attorneys to detect potential targets, investigate and sue departments, and monitor compliance in past cases, and many of these attorneys work on other civil rights programs").

decisions.[87] Thus, it often chooses where to intervene based on where the biggest news story happens to occur.[88]

This method is neither the most efficient nor the most rational method by which to choose which departments to investigate. One horrible incident, while certainly a tragedy, still might not indicate a pattern of unconstitutional behavior. A more comprehensive look at incidents over a period of time in a police department is much more revealing of whether an unconstitutional pattern might exist and allows the Department of Justice to make more informed decisions about where to intervene.[89] Scholars have consistently cited this lack of information as a justification for mandatory-reporting requirements for police departments.[90] This focus on mandatory-reporting requirements, however, ignores the shortcomings of such a scheme and limits the attention given to other possible solutions to the information gap.

III. Bridging the Information Gap

A. Information from the Ground

When discussing solutions to the absence of comprehensive information, scholars tend to quickly dismiss, or fail to mention, the possibility of assistance from community actors.[91] This failure is particularly interesting in light of the fact that arguments for community-actor involvement in the § 14141 process once the Department of Justice investigation begins abound.[92] The inclusion of community groups in the

87. *See* Harmon, *supra* note 16, at 808, 815.

88. *Cf.* William A. Geller & Hans Toch, *Understanding and Controlling Police Abuse of Force*, *in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 292, 321 (William A. Geller & Hans Toch eds., 1996) (calling for a national misconduct reporting system to promote federal civil rights intervention "in cases other than the headline grabbers").

89. *See* Armacost, *supra* note 7, at 532 (indicating the need for a shift in focus from analyzing "isolated incidents" to concentrating on "high incidence[s] of violent episodes, patterns of misconduct . . . , multiple police shootings, or other significant deviations from the norm").

90. *See, e.g.*, *id.* (claiming that mandatory reporting would facilitate the comparison of trends in order to discern "how departments stack up against each other and how they function over time" and concluding that this would ensure that the Department of Justice does not intervene only in high-profile cases); Harmon, *supra* note 12, at 29 (asserting that mandatory data collection and reporting would "provide a meaningful basis for allocating resources" and allow the Department of Justice to intervene more efficiently than its current, "purely responsive" strategy).

91. *See, e.g.*, Armacost, *supra* note 7, at 533 (dismissing outside agencies' ability to "collect and analyze information" because it "may lead police officers to be defensive and uncooperative"); Harmon, *supra* note 16 (mentioning only mandatory-reporting requirements as the solution that could "easily be carried out" to create more data to regulate the police); Harmon, *supra* note 12, at 29–36 (arguing that generating a prioritized list of bad departments in need of reform is "possible only with mandatory data collection and reporting").

92. *See* U.S. DEP'T OF JUSTICE, *supra* note 57, at 4 (noting suggestions from police chiefs that community organizations should be involved in the consent-decree process); Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 101–02, 105 (2001) (critiquing

consent-decree-negotiation process certainly makes sense. After all, it is the community that is most affected by police conduct, and it is that same community that is left with ensuring accountability once the Department of Justice leaves.[93] Involving community groups in crafting reforms also resonates with the philosophy of community policing, which values "cooperation between police officers and citizens with respect to crime prevention, problem solving, and easing police-community tensions."[94] The inclusion of these groups also increases the legitimacy of the process in the community.[95]

These rationales certainly explain why many have advocated for the inclusion of community groups in the consent-decree process. Given that these rationales also hold true for the value of community-group involvement earlier in the process, it is surprising that few have advocated for such early involvement. In 2010, the Department of Justice Civil Rights Division and Office of Justice Programs hosted a roundtable and asked participants to consider that very proposition.[96] In the background briefing paper that was distributed before the roundtable, the Department of Justice asked participants to consider, "What, if any role should local labor organizations, local advocacy organizations and community groups have in determining where and how § 14141 litigation is initiated?"[97] Despite asking the question, it seems the roundtable never actually discussed an answer. The report published after the roundtable makes no mention of any

typical consent decrees for failing to secure community involvement); Livingston, *supra* note 12, at 852 (lamenting that the first two consent decrees negotiated under § 14141 evinced "little . . . that would signal any commitment" to the philosophy of community policing embraced by the Clinton Administration); Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 408–10, 416–17, 419, 425 (2010) [hereinafter Simmons, *New Governance*] (arguing that community members should take part in the design and implementation of policies that affect them and criticizing § 14141's top-down approach to police reform); Simmons, *supra* note 28, at 494, 520 (encouraging the inclusion of community members and rank-and-file officers in the negotiation process of § 14141 litigation); Miller, *supra* note 36, at 178 (warning communities to be "vigilant" so that consent decrees are not entered without the presence and participation of advocacy groups, affected communities, and individual victims).

93. *See* Garrett, *supra* note 92, at 101, 105 (highlighting that the Department of Justice rarely attends the meetings negotiated for during the settlement process once the decree has been issued and insisting that "[r]emedies cannot remain stable where local groups are excluded").

94. Simmons, *supra* note 28, at 527.

95. *See* Simmons, *New Governance*, *supra* note 92, at 408 (arguing that insular police institutions and reform processes can "threaten[] the political legitimacy of police reform because [they] lack[] transparency and citizen involvement").

96. CIVIL RIGHTS DIV. & OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, ROUNDTABLE ON STATE AND LOCAL LAW ENFORCEMENT POLICE PATTERN OR PRACTICE PROGRAM, 42 USC § 14141: BACKGROUND BRIEFING PAPER 6 (2010).

97. *Id.*

discussion of the role of community groups in initiating Department of Justice investigations.[98]

One way to answer that question, and simultaneously assist in remedying the Department of Justice's lack of information on police departments, is to suggest that community advocacy groups assist in initiating § 14141 litigation by providing comprehensive data on their police departments to the Department of Justice. Local advocacy groups can gather information on police misconduct, such as the number of excessive-force incidents, police shootings, misconduct complaints, and civil lawsuits against the department, over a significant period of time.[99] They can combine this information with contextual data about the community, including crime rates, average household incomes, and population statistics.[100] This extensive and comprehensive combination of data will make it more readily apparent whether a pattern or practice of police misconduct might exist than if one were to look at only one police-misconduct incident.

Instead of just sending this information in the form of a typical citizen complaint, community groups can utilize Title VI as a means of demanding attention. Title VI, which prohibits "any program or activity receiving Federal financial assistance" from discriminating on the basis of race, color, or national origin,[101] works well in the context of police reform because almost all local law enforcement agencies receive federal funds.[102] Title VI authorizes federal agencies to enact "rules [and] regulations" intended to achieve the goals of the statute,[103] and the Department of Justice has done just that by enacting regulations that allow a Title VI disparate-impact claim.[104] This is an extension of the statute, which only authorizes a disparate-treatment theory of liability.[105] Disparate impact allows a federal

98. *See* U.S. DEP'T OF JUSTICE, *supra* note 57, at 4–5 (summarizing suggestions for improving the § 14141 litigation process that participants raised during the roundtable).

99. *See* Harmon, *supra* note 12, at 28 (describing these metrics as ones necessary for a comprehensive look at which departments need intervention the most).

100. *See id.*

101. 42 U.S.C. § 2000d (2006).

102. *See Grants by State*, COMMUNITY ORIENTED POLICE SERVICES, http://www.cops.usdoj.gov/Default.asp?Item=1082 (last updated July 31, 2008) (providing reports on every state and every department that has received federal grant assistance).

103. 42 U.S.C. § 2000d-1.

104. 28 C.F.R. § 42.104(b)(2) (2013) (providing that a recipient of federal funding "may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of [a protected class]").

105. *See* Alexander v. Sandoval, 532 U.S. 275, 280, 293 (2001) (acknowledging that § 601 of Title VI (42 U.S.C. § 2000d) prohibits only intentional discrimination and declining to recognize a private right of action to enforce the disparate-impact regulations promulgated under § 602 (42 U.S.C. § 2000d-1)).

agency to examine a department's policies to determine if they have the effect of discriminating instead of the stricter standard of whether policymakers had the intent to discriminate.[106] This theory, which requires different, and arguably lesser, proof than that required to, for example, find intentional discrimination under the Equal Protection Clause, allows the Department of Justice to intervene in situations that might not on their face rise to a violation of § 14141 but still indicate discrimination.[107]

This means that Title VI, which also allows for equitable relief against a police department as a whole, is often profitably leveraged alongside § 14141 in complaints to the Department of Justice.[108] After all, the type of evidence needed to support a Title VI complaint might appear more readily from statistics and individual stories than would the type of evidence required to support a § 14141 complaint.[109] Statistics do not necessarily reveal whether the activity in question was unconstitutional. Statistics can, however, reveal whether the activity in question had a disproportionate impact on a group.[110] By utilizing both Title VI and § 14141, a community organization can present a complaint that, on its face, appears to plausibly implicate the Department of Justice's enforcement obligations and justify further investigation.

This type of Title VI complaint can, arguably more than a complaint based solely on § 14141, justify the opening of a file on a particular department because it has made a facially valid case for intervention.[111] Once the file is open, the Department of Justice can then investigate in order to determine whether a department is likely to have a pattern or practice of unconstitutional conduct. This strategy of utilizing community groups to put together comprehensive data is useful regardless of how many community groups participate. The Department of Justice can use the information from one community group to much more intelligently evaluate that particular police department's need for intervention than if the decision were based on one news story. However, if more community groups did

106. *See id.* at 280–82 (discussing disparate-treatment and disparate-impact theories of liability under Title VI); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 607 (1983) (White, J.) (distinguishing "intentional" and "unintentional" violations of Title VI); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL 42 (2001), *available at* http://www.justice.gov/crt/about/cor/coord/vimanual.pdf (defining discriminatory conduct in terms of disparate treatment and disparate impact).

107. *See supra* section II(B)(3) (describing the difficulties of proving a pattern or practice of unconstitutional conduct).

108. Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 110–12 (2012).

109. *See* Ricci v. DeStefano, 557 U.S. 557, 587 (2009) (explaining that "a prima facie case of disparate-impact liability" is "essentially[] a threshold showing of a significant statistical disparity").

110. *See id.* at 579 (recognizing that the respondent undertook its impermissible action on the basis of statistics that demonstrated a disparate racial impact).

provide information to the Department of Justice, then a comparison of departments across similar metrics could occur.

The simplicity of this solution to the information gap faced by the Department of Justice is perhaps its greatest asset. Local advocacy groups are often already involved in gathering the type of information that the Department of Justice would need to determine whether cause exists for an investigation.[112] Utilizing these groups to provide information to the Department of Justice relies on the close relationship that these groups have to the local police department and avoids some of the pitfalls that would accompany a scheme based solely on mandatory reporting.

B. Comparative Advantages

1. A Closer Relationship.—While it is seemingly obvious that community groups have a much closer relationship to both the community and the police department, it is this connection that gives community groups the ability and the incentive to gather more information about a department than the Department of Justice can at a distance.[113] This closer relationship gives the community group three advantages in the context of information gathering. First, because that community is often the sole focus of the group, the group has much greater resources and time to spend on its police department. Second, the connection to the community often leads members of the community to seek out the group to discuss incidents of misconduct.[114] This lessens the amount of work that a community group has to do to gather information. Much of the information comes to it. Finally, this connection lends legitimacy to the community group's complaint to the Department of Justice. The complaint is not just coming from one individual but rather from a community organization that watches the department and collects not one, but many, incidents of misconduct.[115]

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111. *See supra* notes 101–07 and accompanying text.

112. *See, e.g.*, *Civil Rights*, TEX. CIV. RTS. PROJECT, http://www.texascivilrightsproject.org/programs-and-services/civil-rights/ (describing multiple suits brought by TCRP against police departments on behalf of individuals). The information gained from these individual suits could be put together to form the basis of a Title VI and § 14141 complaint to the Department of Justice.

113. *Cf.* Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 44 (2011) ("Lawyers, like community leaders, fundamentally need to be in relationships with others, and the extent, strength, and deliberateness of our relationships define our power." (emphasis omitted)).

114. *See id.* at 41 (noting that "[t]he [legal-services] lawyer is the first to see changes in the local community . . . in the pattern of clients coming through the door").

115. *See id.* at 41–42 (describing experienced community-organization lawyers as people who have had repeated interactions with institutions and thus know the actions, values, and procedures of those institutions). The same could be said of community groups who, through repeated interactions with a police department, gather information on multiple incidents of misconduct. *See, e.g.*, Complaint, *supra* note 5, at 2–16 (chronicling the long history of police misconduct in Austin).

Similarly, the community groups often have a closer relationship with the police department. While the relationship between the community organization and the police department is not always friendly, it still yields information.[116] The group can follow changes in policies and talk to the department about the effects of those policies.[117] In addition, the community group has a closer vantage point from which to monitor misconduct. Even if community members do not bring cases to the group, the group, by monitoring the police and the local news, can learn about incidents that the Department of Justice might never hear about.

Finally, these community groups also have greater incentives to closely monitor their individual police department than does the Department of Justice. Certainly, the Department of Justice wants to eliminate patterns or practices of unconstitutional conduct by police departments.[118] With 15,000 law enforcement agencies to monitor,[119] however, the Department of Justice does not have any particular incentive to focus on one department more than another. This is in contrast to a community group, which has only a few departments to monitor, depending on the reach of the organization. These are the departments whose policies impact the community members.[120] They are the "direct beneficiaries of the police department's services" and have a great interest in making sure that the department is acting in a constitutional manner.[121] This means that these community groups have fewer departments to monitor and greater incentive to do so.

The close relationship between the community group, the community, and the police department helps explain why community groups have the time, resources, and incentives to more closely follow and catalog police misconduct than does the Department of Justice. These factors also help illuminate some of the benefits that using community organizations to bridge the information gap has over using mandatory self-reporting by police departments.

2. A Limited Reliance on Mandatory Self-Reporting.—Mandatory-reporting requirements are often suggested as the solution to the

116. *See* Armacost, *supra* note 7, at 532–33 (affirming the value of external collection of data on police misconduct but recognizing that the "potentially adversarial framework" of litigation may provoke police resistance to such efforts).

117. *See* Simmons, *supra* note 28, at 525 (remarking that local community groups often lobby for reform in police-department policies).

118. *See Conduct of Law Enforcement Agencies, Civil Rights Division, Special Litigation*, U.S. DEP'T OF JUST., http://www.justice.gov/crt/about/spl/police.php (describing the work of the Special Litigation Section of the Civil Rights Division).

119. REAVES, *supra* note 17.

120. Simmons, *supra* note 28, at 525.

121. *Id.*

information gap,[122] and they are a noble, and probably necessary, goal of police reform. These requirements would most likely fit under current law, which authorizes the Department of Justice to "recommend[] national standards for data collection, and to collect and analyze statistical information about the operation of the justice system."[123] However, participation in current surveys of police departments is voluntary, and current surveys fail to identify many of the metrics that would be necessary to measure the existence of a pattern or practice of misconduct.[124] A mandatory-reporting requirement envisions surveys that are both mandatory and more comprehensive.[125] This would likely require a standardized system of creating police reports and tracking misconduct within each department so that the departments would be able to comply with the requirements.[126] The ability to fulfill these requirements would, of course, turn on each department's resources and would tend to be more easily implemented in larger departments.[127]

The advantage of these requirements is that they would create a nationwide database of important metrics on police conduct rather than just developing information one community at a time.[128] With full, mandated reporting, a comparison of departments' conduct would be possible, as would a comparison of the long-term effects of police reform.[129] In addition, it would provide a measure of accountability for departments that know that the Department of Justice is watching them through the database.[130] Imposing similar requirements in other contexts is not unheard-of and implies that imposing these requirements in the police context is achievable.[131]

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122. *See supra* note 16.

123. Harmon, *supra* note 12, at 29; *see also* 42 U.S.C. § 3732(c) (2006 & Supp. V 2012) (describing the duties of the Bureau of Justice Statistics).

124. *See* Harmon, *supra* note 12, at 29–30.

125. Geller & Toch, *supra* note 88, at 297–303 (calling for improvements in the current national data collection system and recommending various metrics for consideration, including use-of-force reports, service calls, and citizen complaints).

126. *See id.* at 298–99 (calling for standardization of department reporting procedures).

127. *See* Matthew J. Parlow, *The Great Recession and Its Implications for Community Policing*, 28 GA. ST. U. L. REV. 1193, 1204–05 (2012) (describing the intensive resources required for a department to effectively engage in community policing, particularly under the "broken windows" model).

128. *See* Armacost, *supra* note 7, at 532 (discussing the advantages of comparing the conduct of police departments rather than focusing on the conduct of individual officers or departments).

129. Harmon, *supra* note 12, at 28–29, 34.

130. *See* Armacost, *supra* note 7, at 531–32 (explaining that accountability mechanisms in the prison-rape context require the publishing of a worst prisons list based on rape statistics and analogizing the ability to do that in the police context).

131. *See* Prison Rape Elimination Act of 2003 § 4, 42 U.S.C. § 15603 (2006) (requiring the Bureau of Justice Statistics to publish an annual statistical review of the incidence of prison rape and allowing subpoenas to obtain the testimony of prison officials).

However, mandatory self-reporting is not without its own significant drawbacks. The benefit of mandatory self-reporting depends on the reliability of the reported data.[132] However, the reliability of line-officer reports is by no means guaranteed, especially since time creating reports means time spent off the street.[133] In addition, since the goal of mandatory self-reporting is increased scrutiny of police departments, police officers do not necessarily have the incentives to accurately report every incident that might reflect poorly on them or on their department.[134] Minimizing and underreporting incidents in order to avoid the appearance of being a department in need of reform is certainly a possibility.[135] Finally, and perhaps most saliently for this Note, these mandatory-reporting requirements have not been implemented as of yet. Considering the breadth of changes that would need to be implemented in order to create a mandatory-reporting requirement, and the breadth of oversight it would give the federal government into state and local police departments, it is also not likely a requirement that will be implemented without considerable backlash soon.[136] Regardless of the benefits of such a mechanism, reformers should not pin their hopes on it without considering other solutions that could be implemented more quickly.

Using community organizations to gather data on police misconduct has the advantage of a limited reliance on self-reporting by police departments. In this way, the strategy avoids the dangers of incomplete or false reports by line officers. Instead of trusting police officers in the worst departments to accurately report on the relevant metrics, this strategy relies on outside actors who have the incentives to accurately and completely report the incidents that occur.[137] While it is true that outside actors do not have all of the information that police departments do, many citizen complaints, excessive-force incidents, and police shootings are made widely public through newspaper reports and televised appeals processes.[138] In addition, community metrics such as population and income data are publicly available.[139] It is also true that one organization will not be able to

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132. *See* Armacost, *supra* note 7, at 532–33.

133. *See* DAVID DIXON, LAW IN POLICING: LEGAL REGULATION AND POLICE PRACTICES 94–95 (1997) (suggesting that many stops go unrecorded, despite the implementation of a recording process, because officers view the recording process as limiting the efficacy of the ability to stop).

134. *See* Armacost, *supra* note 7, at 533.

135. *See id.*; Harmon, *supra* note 12, at 32.

136. *See supra* notes 124–27 and accompanying text.

137. *See supra* section III(B)(1).

138. Jordan Smith, *Excessive Force Firing*, AUSTIN CHRON., Jan. 5, 2007, http://www.austinchronicle.com/news/2007-01-05/433594/ (reporting on the firing of one officer and the suspension of three supervisors for the officer's use of excessive force); Smith, *supra* note 1 (describing the Austin Police Department's settlement of an excessive-force suit).

139. *See, e.g.*, *Income Statistics*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/income/data/statistics/ (last updated Sept. 17, 2013) (compiling population and income data).

provide nationwide information to the Department of Justice, but the more organizations that implement a strategy of compiling complaints, the more comparisons will be made. As mentioned above, the most important benefit of this strategy over mandatory-reporting requirements is that it can be implemented now. Organizations have already begun sending complaints to the Department of Justice in this manner, and there is no reason that other organizations cannot begin compiling data, assuming they have not already, to send as well.[140]

What this discussion does reveal, however, is that both solutions are not complete solutions. Each has its own drawbacks that indicate that neither alone can solve the information gap. In reality, there probably does not exist one solution to the problem of gathering information on police misconduct. The best solution would be one that combines the nationwide scope of mandatory reporting with community-organization data compilations, which can serve as a check on the accuracy of, and a supplement to, the nationwide data. Until such a solution can be reached, however, community gathering of data seems like a viable, and immediately implementable, way to encourage more intelligent investigation decisions.

C. *A Real-Life Example: The Texas Civil Rights Project and the Austin Police Department*

The Austin Police Department is one of over fifty police departments that the Department of Justice has investigated to determine if there was a pattern or practice of unconstitutional police conduct.[141] The investigation extended over a period of four years and concluded in 2011, after the Department of Justice sent a technical assistance letter to the Austin Police Department recommending 165 policy changes.[142] What drew the Department of Justice to Austin was not, however, any particular nationally publicized incident of misconduct but rather a Title VI complaint filed with the Department of Justice by the Texas Civil Rights Project.[143]

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140. *See, e.g.*, Complaint, *supra* note 5 (calling for the Department of Justice to investigate the Austin Police Department); Miller, *supra* note 36, at 192 (describing the efforts of the ACLU of Pittsburgh, which sent a complaint detailing 66 incidents of misconduct to the Department of Justice).

141. U.S. DEP'T OF JUSTICE, *supra* note 57, app. B at 19–20.

142. Jordan Smith, *DOJ Closes Police Inquiry*, AUSTIN CHRON., June 3, 2011, http://www.austinchronicle.com/news/2011-06-03/doj-closes-police-inquiry/; Acevedo Letter, *supra* note 19; Letter from Shanetta Y. Cutlar, Chief, Special Litig. Section, U.S. Dep't of Justice Civil Rights Div., to Marc A. Ott, City Manager, City of Austin, Tex., and Arturo Acevedo, Chief, Austin Police Dep't. (Dec. 23, 2008) [hereinafter Cutlar Letter], *available at* http://www.justice.gov/crt/about/spl/documents/AustinPD_taletter_12-23-08.pdf.

143. Jordan Smith, *APD Shooting: What Went Down*, AUSTIN CHRON., June 8, 2007, http://www.austinchronicle.com/news/2007-06-08/481970/.

1. A Title VI Complaint.—On June 19, 2004, the Texas Civil Rights Project (TCRP), on behalf of the Austin branch of the National Association for the Advancement of Colored People (NAACP), filed a complaint against the Austin Police Department (APD) with the Department of Justice.[144] The complaint asked the Department of Justice, pursuant to its authority under 42 U.S.C. § 14141 and Title VI of the Civil Rights Act of 1964, to intervene by withholding federal monies to the City of Austin and its police department.[145] The NAACP and the TCRP alleged that there was "a pervasive and historically driven pattern of excessive force, too many deaths, and an abuse of search powers . . . at the hands of the Austin Police Department" and that it was "imperative that the Department of Justice investigate the systematic police abuse and misconduct that has plagued the African American and Hispanic communities in Austin."[146]

In support of this allegation, the TCRP submitted over twenty pages of information—spanning the original complaint and four subsequent supplements—detailing statistics and illustrative cases of police misconduct in Austin.[147] By providing comprehensive statistical data, the TCRP hoped to support a determination that, at the least, there was a disparate impact on minorities, and at most, there was a pattern or practice of unconstitutional conduct in Austin.[148] The data was compiled from a variety of sources, including an in-depth, multipart exposé published by the *Austin American-Statesman*, reports published by the Austin Police Monitor, findings of a study by the Steward Research Group, which examined racial profiling in Texas traffic stops, and findings by two respected academics who measured the differences in amounts of force used against minorities and Anglos in Austin.[149] These sources revealed that Austin police filed 1,582 use-of-force reports in 2002, which works out to 2.4 reports for every 1,000 people.[150] This exceeds the 0.4 reports for every 1,000 people reported by the Cincinnati Police Department,[151] which signed a Memorandum of Agreement with the Department of Justice in 2002 as a result of a § 14141 investigation.[152] In addition, statistics revealed that a "Hispanic person is

144. Complaint, *supra* note 5, attachment A.

145. *Id.* attachment A at 1.

146. *Id.* attachment A at 2.

147. *Id.* attachment A.

148. *See, e.g.*, *id.* attachment A at 4 ("The statistics show a pattern and practice of excessive use of force that disproportionately affects members of racial minority groups, particularly African American and Hispanic persons in and near Austin.").

149. *Id.* attachment A at 4–7.

150. *Id.* attachment A at 4.

151. *Id.*

152. Memorandum of Agreement Between the United States Department of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Department (Apr. 12, 2002), *available at* http://www.cincinnati-oh.gov/police/linkservid/EA1A2C00-DCB5-4212-8628197B6C923141/showMeta/0/.

25% more likely than an Anglo person to be involved in a[] use-of-force situation with Austin police, and an African American person is 100% more likely to be involved in such an incident."[153] In addition to more statistics like these, the TCRP also collected a series of case illustrations of police brutality from the preceding five years.[154]

These materials allowed the TCRP to utilize both § 14141 and Title VI because the statistics suggested that the department's use-of-force policy was not only excessively permissive but also disproportionately harmful to minorities. The TCRP complaint made a convincing case that the Austin Police Department had violated Title VI by engaging in discrimination on the basis of race while receiving federal funds and had violated § 14141 by engaging in a pattern or practice of unconstitutional conduct.[155] The Department of Justice responded by initiating an investigation into the APD, with a focus on use-of-force procedures, police-misconduct reporting and investigations, and supervisor policies.[156]

2. Results.—The Department of Justice investigation into the APD was announced in June of 2007, just days before Austin picked a new police chief, who immediately welcomed the Department of Justice and its reform efforts, and did not conclude until 2011.[157] The Department of Justice examined all of APD's policies and investigated the particular use-of-force incidents included in the TCRP complaint.[158] The result of the investigation was a technical assistance letter, which detailed 165 policy changes that were highly recommended.[159] Three years after the technical letter, and two years after the APD had implemented all but four of the recommended reforms, the Department of Justice informed the APD that it

153. Complaint, *supra* note 5, attachment A at 4.

154. *Id.* attachment A at 7–13.

155. *See* Smith, *supra* note 143 (reporting that the Department of Justice had decided to investigate the APD in response to the TCRP complaint to determine "whether [the department] is systematically violating constitutional rights" (alteration in original)).

156. *See* Cutlar Letter, *supra* note 142 (explaining the particular APD practices and policies that should be reformed).

157. *See* Patrick George, *Justice Department Closes Investigation of Austin Police Department*, AUSTIN AM.-STATESMAN, May 29, 2011, http://www.statesman.com/news/news/local/justice-department-closes-investigation-of-austi-1/nRbSH/; *see also* Jordan Smith, *Acevedo Chosen as New Police Chief: Let the Sun Shine In*, AUSTIN CHRON., June 22, 2007 [hereinafter Smith, *Sun Shine*], http://www.austinchronicle.com/news/2007-06-22/494092/; Smith, *supra* note 143; Letter from Jonathan M. Smith, Chief, Special Litig. Section, U.S. Dep't of Justice Civil Rights Div., to Karen Kennard, Acting City Att'y, City of Austin Law Dep't (May 27, 2011) [hereinafter Smith Letter] (on file with author).

158. *See* Smith, *supra* note 19 (describing the Department of Justice's investigation as examining both APD's policies and the particular high-profile cases of police misconduct).

159. *Id.*

did "not find reasonable cause to believe that APD has engaged in a pattern or practice that violated the Constitution or laws of the United States."[160]

The policy changes that came as a result of the Department of Justice investigation were hailed as "a 'major step' for 'professionalizing' the department."[161] The reforms implemented included changes in the use-of-force policy, standardization of ammunition and pistols, standardization of forms used to report incidents in the field, and training recommendations for mid-level supervisors.[162] Changes in policy, like the ones recommended and implemented in Austin, are often considered administrative rulemaking.[163] This kind of reform is particularly helpful in that "rules confine discretion by specifying what officers may and may not do in certain situations."[164] In addition, rules create accountability by requiring official, standardized reports of incidents that will be reviewed by supervisors.[165] These policy changes can help improve the accountability and transparency of the police.[166] Thus, the results of the TCRP complaint and the Department of Justice investigation arguably created a more accountable police department.

Certainly, policy changes do not guarantee lasting reform,[167] and the TCRP in Austin seems to agree—the organization filed a new complaint in 2012, urging the Department of Justice to renew its investigation.[168] While the investigation was not viewed as an unqualified success, the new, formal policies reflect a greater commitment to accountability.[169] Either way, the actions of the TCRP were successful in leveraging the Department of Justice investigation and creating a less discretionary police department through administrative rulemaking.

The TCRP's actions on behalf of the Austin community are a prime example of how a community organization can leverage its close connection to the community and the police department to gather enough

160. Smith Letter, *supra* note 157; *see also* Acevedo Letter, *supra* note 19 (stating APD's intention to implement all but four of the suggested reforms).

161. Smith, *supra* note 19 (quoting Jim Harrington, the founder of the TCRP and lead attorney on the original complaint).

162. Acevedo Letter, *supra* note 19, at 10, 12, 24–25.

163. *See, e.g.*, Walker, *supra* note 8, at 14–16.

164. *Id.* at 15.

165. *Id.* at 16.

166. Simmons, *New Governance*, *supra* note 92, at 401.

167. Walker, *supra* note 8, at 17 (discussing the limits of administrative rulemaking, which include the fact that the existence of a written rule hardly guarantees that it is implemented or that it will have verifiable impacts on police-department operations).

168. Complaint, *supra* note 5, at 1–2, 16–17.

169. *See, e.g.*, Acevedo Letter, *supra* note 19, at 21 (accepting policy recommendation number 59 that the APD should require more complete reporting by line officers involved in use-of-force incidents and implementing a specific policy, APD General Order B101c.01 D, to accomplish this goal of accountability).

information about police misconduct to justify a Department of Justice investigation. This example shows how both sides can benefit from the actions of community organizations: the Department of Justice learned of a department in need of reform that it likely would not have learned about through news stories, and the TCRP benefited from a Department of Justice investigation that led to policy changes and increased accountability.

IV. The Feasibility and Desirability of Systematically Replicating the Austin Experience

A. Conducive Circumstances

On the surface, the TCRP's actions on behalf of the Austin community seem to prove the point that community organizations can assist the Department of Justice by providing the agency with the information it lacks to make intelligent investigative decisions. The organization gathered information over a period of five years, used Title VI as a wedge for intervention, and provided the Department of Justice with a more nuanced and comprehensive look at police misconduct than a look at one incident could provide.[170] However, just because the TCRP utilized this process does not mean that all other organizations will be able to immediately replicate it. Certain conducive circumstances allowed the TCRP to be successful in providing the Department of Justice with information, but these circumstances may not exist uniformly in other communities. An examination of the factors that made the Austin experiment successful reveals that it might not be as feasible as it first appeared for community organizations to provide the information upon which the Department of Justice makes investigative decisions.

1. TCRP: Training and Resources.—First, the Austin community has the benefit of an organization such as the Texas Civil Rights Project.[171] The TCRP has several qualities that made it particularly qualified to prepare a complaint for the Department of Justice. The first of these qualities is the fact that TCRP possesses the legal skills necessary to formally make a Title VI and § 14141 complaint.[172] Organizations that have the legal skills

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170. *See* Complaint, *supra* note 5, attachment A.

171. The TCRP is the only one of its kind in Texas and only recently expanded to branch offices in five different locations around the state. *See Contact Us*, TEX. CIV. RTS. PROJECT, http://www.texascivilrightsproject.org/contact-us/ (listing current TRCP offices in Austin, Houston, El Paso, Alamo, and Odessa); *Our History*, TEX. CIV. RTS. PROJECT, http://www.texascivilrightsproject.org/81/our-history/ (last modified Mar. 18, 2007) (indicating that as of 2007, TRCP had offices only in Austin and the Rio Grande Valley).

172. *See* Grinthal, *supra* note 113, at 41 (discussing the powerful role played by attorneys in advocating because they possess "unique knowledge and skills uniquely adapted to the public arena"); *Civil Rights*, *supra* note 112 (describing the TCRP's various legal programs through which attorneys litigate civil rights violations).

necessary to make formal complaints and utilize legal causes of action have more tools with which to effectuate police reform.[173] These organizations have the ability to concentrate on Title VI and § 14141 actions rather than individual § 1983 suits (or worse, no legal suits at all). The fact that the TCRP is a legal organization that is dedicated to working to effectuate reforms of unconstitutional practices means it was already set up to process and analyze the information the Department of Justice would require.

The TCRP not only possesses legal skills that enable it to navigate the complicated political and legal waters of police reform,[174] but it is also funded entirely by grants and donations, so it does not have to rely on taking cases that will provide lucrative legal fees.[175] The TCRP is able to dedicate the time and resources to provide data to the Department of Justice without worrying whether the organization will be able to successfully sue for legal fees once the investigation ends in a settlement.[176] A legal organization that is not entirely donation- and grant-funded may find it more difficult to dedicate monetary resources and time to an activity, such as gathering information for the Department of Justice, that will not lead to any monetary recovery.

In addition, the TCRP has the benefit of being a clearinghouse for unconstitutional police-misconduct cases. The TCRP is well-known for winning cases on behalf of citizens who have been mistreated by police officers.[177] This encourages community members to file their case with the TCRP—even if the TCRP does not take the case, the misconduct has still been reported, which enables the organization to better judge the extent of police misconduct.[178] Organizations without such a focus on legal remedies

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173. *See* Grinthal, *supra* note 113, at 39 (explaining that lawyers are necessary to community organizations because they "provide resources in the form of knowledge, skills, relationships, [and] access to legal forums").

174. *Cf. id.* at 41–42 (suggesting that "[e]xperienced lawyers walk around with robust power maps in their heads" of all of the key political players and effective legal actions).

175. *See Archives for Donate*, TEX. CIV. RTS. PROJECT, http://www.texascivilrightsproject.org/category/donate/ (including pleas for donations and describing increases and decreases in grants that fund the project); *Volunteer*, TEX. CIV. RTS. PROJECT, http://www.texascivilrightsproject.org/volunteer/ (indicating that "TCRP is funded by donations from . . . members and through grants from private foundations and individuals").

176. *Cf.* Miller, *supra* note 36, at 192–93 (suggesting that a group's ability to pursue § 14141 suits may depend on its prospects of recovering attorneys' fees).

177. *See* Michael King, *Point Austin: Introducing the Constitution*, AUSTIN CHRON., Oct. 1, 2010, http://www.austinchronicle.com/news/2010-10-01/point-austin-introducing-the-constitution/ (describing the TCRP's "legacy of . . . defenses of civil liberties and the broader public good" and listing, among "[r]ecent headline TCRP wins," a lawsuit against the City of Austin to compel the release of an independent report on the police shooting of Austin resident Nathaniel Sanders II); *Civil Rights*, *supra* note 112 (citing multiple successful police brutality lawsuits brought by the TCRP).

178. *Cf.* Grinthal, *supra* note 113, at 41 (recognizing that the local legal-services lawyer has a relationship with many people and is "the first to see changes in the local community or economy in the pattern of clients coming through the door").

may not have the benefit of multiple clients reporting incidents of police misconduct to them and thus might be less able to create a comprehensive data set. The key to successfully initiating a Department of Justice § 14141 investigation is convincing the Department that there is a colorable claim of a pattern or practice.[179] An organization that can point to only one or two incidents because it is not a clearinghouse for cases may not be able to replicate that essential aspect of the complaint.[180]

Finally, the TCRP has an important connection to the community that enables it to better compile information. Many national civil rights groups have been perceived as excluding local community groups,[181] and this has the effect of both denying the legitimacy of the organization's efforts and divorcing the reform efforts from the community that the reforms are intended to benefit. A community legal advocacy group that is too focused on a particular case can often miss the objectives of the larger community movement.[182] While the TCRP, like any legal organization, faces critiques that it is not as connected to the community as it should be, the organization has made it a priority to be as connected to the community as possible.[183] This community trust enables the TCRP to receive more civilian complaints and provides the organization with a powerful voice when discussing reform efforts with the APD.

These characteristics of the TCRP make it particularly well situated to assist the Department of Justice's information gathering. However, these characteristics might be difficult to replicate in every organization.[184] Civil rights organizations at the state level often lack organization.[185] Unfortunately, just because the TCRP helped the Department of Justice gather information does not mean that every organization will be able to follow in its footsteps.

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179. *See* 42 U.S.C. § 14141 (2006) (characterizing as unlawful conduct engaging in a "pattern or practice" that deprives persons of rights); *Conduct of Law Enforcement Agencies*, *supra* note 118 (explaining that the Department of Justice "may act if [it] find[s] a pattern or practice by [a] law enforcement agency that systemically violates people's rights" and warning that "[h]arm to a single person, or isolated action, is usually not enough to show a pattern or practice that violates these laws").

180. *See Conduct of Law Enforcement Agencies*, *supra* note 118.

181. Garrett, *supra* note 92, at 63 & n.69.

182. *See* Jessica A. Rose, Comment, *Rebellious or Regnant: Police Brutality Lawyering in New York City*, 28 FORDHAM URB. L.J. 619, 653 (2000) (discussing the experiences of two community organizers working with progressive lawyers and legal institutions and describing the conflicts that can arise between a lawyer's organizational or professional interests, an individual client's desires, and the objectives of a larger community movement).

183. *See* King, *supra* note 177 (quoting TCRP founder Jim Harrington as saying, "[w]e try to take on cases that would support organizing that's going on in the community").

184. As an example, only the ACLU and the TCRP exist in Texas, and until recently, the TCRP only had two offices in the state. *See Who We Are*, AM. CIV. LIBERTIES UNION TEX., http://www.aclutx.org/who-we-are (describing the mission of the ACLU); *supra* note 171.

185. Harmon, *supra* note 16, at 813.

2. Austin, Texas: The Legal and Social Environment.—The success of the TCRP as an organization and the success of its efforts to initiate a Department of Justice investigation stem not only from its own characteristics but also from those of the state and city in which it operates. There are two primary factors that make Austin, Texas, a place where the TCRP can operate and that make Austin a good place for a Department of Justice investigation: the size and social characteristics of the city and the Texas Public Information Act. As discussed, the Department of Justice tends to initiate investigations where there are significant news stories, which can lead to a bias for bigger departments in bigger cities.[186] The size of the Austin Police Department might have made the Department of Justice more willing to intervene, since they arguably want the biggest return on their investment.[187] Austin also has a relatively liberal population that speaks out against misconduct.[188] This atmosphere allows the TCRP to function because there are enough citizens willing to support the cause.[189]

Additionally, the legal climate in Texas significantly helps organizations like the TCRP. Without the Texas Public Information Act, the TCRP would have been unable to gain much of the information it used to support its complaint. The Texas Public Information Act states that "each person is entitled . . . at all times to complete information about the affairs of government and the official acts of public officials and employees."[190] While there are exceptions to this general policy of disclosure, the Act has been praised as providing a broad legal right to gain relevant government information.[191] In states with more restrictive open-

186. *See supra* notes 86–88 and accompanying text.

187. *See* BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ231174, LOCAL POLICE DEPARTMENTS, 2007, at 34 app. tbl.1 (2010) (listing the APD as one of the fifty largest local police departments in the United States).

188. The *Texas Tribune*, *Austin American-Statesman*, and *Austin Chronicle* often cover civil rights violations. *See, e.g.*, Brandi Grissom, *Calls for Change in Wake of Wrongful Convictions*, TEX. TRIB., July 9, 2012, http://www.texastribune.org/2012/07/09/calls-change-wake-wrongful-convictions/; Ciara O'Rourke, *Civil Rights Group Questions Fatal Officer-Involved Shooting*, AUSTIN AM.-STATESMAN, Apr. 25, 2013, http://www.statesman.com/news/news/crime-law/civil-rights-group-questions-fatal-officer-involve/nXXkP/; Smith, *supra* note 19.

189. *See supra* note 176 and accompanying text (describing the TCRP as a donation- and grant-funded organization).

190. TEX. GOV'T CODE ANN. § 552.001 (West 2011); *see also Open Government: Frequently Asked Questions*, ATT'Y GEN. OF TEX., https://www.texasattorneygeneral.gov/open/og_faqs.shtml (last modified Nov. 29, 2011) (identifying Chapter 552 of the Texas Government Code as the Public Information Act and describing the scope of the Act's coverage).

191. *See, e.g.*, CHARLES L. BABCOCK ET AL., REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE: OPEN RECORDS AND MEETINGS LAWS IN TEXAS 1–2 (6th ed. 2011), *available at* http://www.rcfp.org/rcfp/orders/docs/ogg/TX.pdf (describing the Texas Open Meetings Act and the Texas Public Information Act as "among the strongest in the nation" and asserting that the state's open government laws "are among the most liberal in the United States and a great deal of information is released pursuant to the terms of these statutes"); BETTER GOV'T ASS'N, THE BGA - ALPER INTEGRITY INDEX 6 (2008), *available at* http://www.bettergov

records laws, it could be more difficult for an organization to gain information to present to the Department of Justice.[192]

3. APD: Poised for Change.—It was not just the TCRP and the City of Austin that were distinctive components of the investigation into the Austin Police Department. The resignation of the police chief, and the instatement of a new, reform-minded chief, also played an important role in the efficacy of the investigation.[193] Former Police Chief Stan Knee left the department just before the investigation, after he had promised to resign if relations with the African-American community had not improved.[194] The ACLU and the TCRP hailed the arrival of the new chief, Art Acevedo.[195]

This hope in the new chief was not unfounded: Acevedo welcomed the Department of Justice investigation into the APD immediately after his arrival.[196] Scholarship indicates that a police chief can have a significant impact on reform measures.[197] Police departments vary widely in their receptivity to innovations, and much of their receptivity depends on leadership.[198] While many chiefs would choose stricter methods for stopping crime over good community relations with minority groups and community organizations, Acevedo had a stronger incentive to support good community relations because the old chief had been so harshly criticized for the lack of such relationships.[199] The APD's recent change in leadership made it very receptive to innovation and the Department of Justice investigation, which is not something that community organizations, including the TCRP, can control or count on in every case.

.org/assets/1/News/BGA_Alper_Integrity_Index_2008.pdf (ranking Texas seventeenth in the nation, tied with six other states, for the quality of its freedom of information laws).

192. *See* BETTER GOV'T ASS'N, *supra* note 191 (ranking twenty-eight states below Texas in terms of open-records laws).

193. *See* Smith, *Sun Shine*, *supra* note 157 (describing the "giddy" excitement among both police and critics of the APD over the appointment of the new police chief).

194. Complaint, *supra* note 5, attachment A at 3.

195. Smith, *Sun Shine*, *supra* note 157 (quoting Jim Harrington of the TCRP as saying, "[t]oday, the sun has shined on the city of Austin, with the hopeful promise of a new era for relations between the police and the city's minority communities").

196. George, *supra* note 157.

197. *See, e.g.*, Walker, *supra* note 85, at 72 (noting that individual departments can change "dramatically as a result of new leadership").

198. *See* Wesley G. Skogan, *Why Reforms Fail*, 18 POLICING & SOC'Y 23, 32–33 (2008) (chronicling examples of dramatic changes in police departments due to leadership changes); Walker, *supra* note 85, at 73 (observing that "[v]ariations [in the organizational environments of police departments] are believed to be the result of certain management practices").

199. *See* Complaint, *supra* note 5, attachment A at 2–3 (describing the turbulent state of police–minority relations in Austin before the resignation of former Austin Police Chief Stan Knee); Harmon, *supra* note 16, at 811 (remarking that although "[p]olice chiefs have good reasons to promote civil rights," including the growing recognition that "harmful policing" can weaken community relations, "chiefs are usually better rewarded for maintaining order and reducing crime than protecting civil rights").

4. Corroborating Sources.—Another element of the TCRP's Title VI complaint that made it such a comprehensive data source for the Department of Justice was the extensive number of corroborating sources that supported its allegations. Even aside from the benefit of having two studies that had recently examined police conduct, the TCRP benefited from a watchful news organization and police monitor.[200] The *Austin American-Statesman* had recently published "a four-part, front-page investigative series highlighting alarming statistics about police brutality in Austin, focused on the marked racial disparity of the individuals involved in these incidents."[201] Having a news organization independently corroborate the TCRP's claims added to the legitimacy of the complaint and supported the proposition that the activities in Austin were pervasive.

Similarly, the Austin Police Monitor, created as a result of discussions between the City of Austin and the Austin Police Association, published an annual report that corroborated the TCRP's claims.[202] The reports that the monitor had created indicated that African-Americans and Hispanics filed complaints in a disproportionate number.[203] There are many models of civilian oversight, but a police monitor who not only reviews internal investigations into individual complaints to ensure fairness but also publishes reports analyzing annual data and suggesting reforms, can significantly aid an organization in the information-gathering process.[204] The Austin Police Monitor's focus on the department allowed it to create reports that sustained the TCRP's allegations of misconduct.[205]

These organizations, like the TCRP, often rely on the Texas Public Information Act in order to gain the necessary information, highlighting the importance of a state's legal environment.[206] Thus, due both to these organizations and to the legal environment, these corroborating sources were able to supplement the TCRP's efforts by providing data compiled from a variety of sources over a long period of time, which in turn allowed the TCRP to provide more data to the Department of Justice and make a far more convincing case for a § 14141 violation.

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200. *See* Complaint, *supra* note 5, attachment A at 3–7 (utilizing these four corroborating sources to make the point that the Austin Police Department was engaged in a pattern or practice of unconstitutional conduct).

201. *Id.* attachment A at 4.

202. *See* OFFICE OF THE POLICE MONITOR, CITY OF AUSTIN, ANNUAL REPORT: FEBRUARY 2002–FEBRUARY 2003, at 7, 30, 33, 36, 39 (n.d.), *available at* http://austintexas.gov/sites/default/files/files/Police_Monitor/Reports/opm-report1-40-2002.pdf.

203. *Id.* at 30, 39.

204. *See* Walker, *supra* note 85, at 85–91 (discussing the various models of police auditor and praising versions that focus on institutional reforms as well as individual complaints).

205. *Cf. id.* at 85–86 (recognizing the power of police auditors who can "investigate broadly" and "make their findings and recommendations public").

206. *See supra* section IV(A)(2).

5. The Applicability of Title VI.—Finally, the applicability of Title VI to the situation in Austin greatly increased the effectiveness of the TCRP complaint. While the TCRP could have made a complaint based solely on § 14141, utilizing Title VI created a more substantial claim upon which the Department of Justice could justify its investigation.[207] Title VI bolsters a § 14141 claim because it does not rely on a finding that the underlying incidents of alleged misconduct are unconstitutional. Rather, a prima facie case for Title VI requires only that statistics show that a practice or policy has a disproportionate impact on a protected class.[208] If the TCRP had made a complaint based on § 14141 alone, it is quite possible that it would have been ignored—after all, the complaint does not necessarily indicate whether all of the cited incidents were unconstitutional, and there are countless similar complaints.[209] These incidents, combined with the statistical findings of disparate impact that the TCRP included to support a Title VI claim, however, arguably justified giving this complaint more attention. The Department of Justice had a complaint that, on its face, suggested noncompliance with Title VI under Department of Justice regulations and that could, after more investigation, substantiate a § 14141 violation.[210] This combination is more convincing than a § 14141 complaint on its own and is, at least in part, a reason why the TCRP's complaint was effective.[211]

However, not every police-misconduct problem necessarily rises to the level of Title VI discrimination. Many past Department of Justice § 14141 investigations have focused on police departments whose use-of-force policies routinely led to excessive force in all situations, not just situations involving racial minorities.[212] Similarly, false reports can occur in every misconduct incident.[213] If the police misconduct is not targeted at, or does

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207. *See* Harmon, *supra* note 14, at 52–53 (arguing that Title VI is not being used "to its full deterrent potential" and that the pressure of financial consequences can be used to induce remedial measures designed to prevent discrimination by police officers); *supra* notes 155–56 and accompanying text.

208. *See supra* notes 109–10 and accompanying text.

209. *See Conduct of Law Enforcement Agencies*, *supra* note 118 (describing the dozens of complaints that come in from a variety of sources every month).

210. *See* 28 C.F.R. §§ 42.101, 42.104(b)(2) (2013) (prohibiting discriminatory practices by agencies receiving federal funds as part of Title VI, suggesting that a police agency's discrimination on the basis of race could constitute noncompliance with both Title VI and § 14141).

211. *See supra* subpart III(A).

212. The majority of Department of Justice investigations are aimed at use-of-force policies, both discriminatory ones and nondiscriminatory but excessively permissive ones. *See* Fan, *supra* note 108, at 109.

213. *See* Armacost, *supra* note 7, at 533 (identifying the incentives to "underreport or shade testimony about incidents in which oneself or one's colleagues have been involved" where such reports can lead to discipline or liability); Harmon, *supra* note 12, at 32 (discussing the unfortunate incentive for police officers to falsify reports in situations where they know the reports will lead to reform investigations under a mandatory-reporting scheme).

not have a disparate impact on, a particular minority, then Title VI would not be applicable, even if § 14141 might.[214] This means that not every organization would able to utilize the wedge of Title VI in order to bolster its § 14141 claim. Organizations that were unable to use Title VI as a wedge would be missing an important resource for making a convincing case before the Department of Justice.

The distinctive capabilities of the TCRP; the characteristics of Austin, Texas; a police department with a new chief; a wealth of corroborating sources; and the applicability of Title VI all created favorable conditions that allowed the TCRP to gather information for the Department of Justice. These particularly accommodating characteristics of the Austin situation could be difficult to replicate in other communities, which would necessarily limit the potential for community organizations to serve as information gatherers for the Department of Justice on a wide scale. Thus, while the idea of using community organizations to bridge the information gap has appeal because of its simplicity and advantages over self-reporting, it most likely cannot be the sole, or even the most feasible, solution to the Department of Justice's information problem.

B. The Limited Reach of Title VI

Besides concerns that the Austin example had distinctive characteristics that other community organizations might not be able to replicate, there is a concern that even if community organizations did manage to create a Title VI and § 14141 complaint, it would not be the most intelligent basis for the Department of Justice to make investigative decisions. Consider that Title VI, which only mandates relief when there is a racially discriminatory practice, does not reach many unconstitutional actions by police departments.[215] Furthermore, Title VI certainly does not reach actions that, while constitutional, are still "substantially and undesirably" harmful.[216] While technically § 14141 cannot reach these practices either, practically, § 14141 litigation suggests best practices all the time.[217] Thus, Title VI is significantly more limited than § 14141.

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214. *Compare* 42 U.S.C. § 2000d (2006) (requiring evidence of unconstitutional racial discrimination in departments receiving federal funding in order for a cause of action to exist), *and* 28 C.F.R. § 42.104(b)(2) (prohibiting recipients of federal funding from administering programs in a way that has a disparate impact on members of a protected class), *with* 42 U.S.C. § 14141 (requiring a pattern or practice of any unconstitutional conduct in order for the Department of Justice to bring suit).

215. *See supra* section IV(A)(5).

216. Harmon, *supra* note 16, at 778–80 (noting examples of such incidents, which include overly aggressive stop-and-frisk policies and arrests that, while based on probable cause, are not the most effective means of policing).

217. *See, e.g.*, Smith Letter, *supra* note 160 (finding no reasonable cause to believe that a pattern or practice of unconstitutional conduct occurred but commending the APD for implementing the Department of Justice's suggestions for best policy practices).

Even more important than the limited reach of Title VI is the fact that a complaint based on Title VI will not be able to convey some important metrics. If the Department of Justice were to base its investigative decisions solely on Title VI complaints, it would necessarily miss departments that do not violate Title VI—and these departments, with officers who hypothetically use too much force on everyone, or who lie routinely, might be the ones most in need of intervention. Thus, Title VI complaints can actually distract the Department of Justice from departments that need reform most. While Title VI complaints do better than high-profile news stories in conveying a complete picture of misconduct, they do not necessarily enable the Department of Justice to decide any more intelligently which police departments to investigate.[218]

C. Taking the Next Step: What Community Organizations Can Do

This analysis seems to suggest a bleak picture when it comes to the possibility of utilizing community organizations to provide the Department of Justice with comprehensive data on police misconduct. Arguably, such a model is not easily implementable in every community organization because they might not be able to replicate the particular circumstances that were present in Austin. Furthermore, such a model is not necessarily the best way for the Department of Justice to make its decisions because it can miss important metrics of misconduct.

Despite this, the above analysis does not sound the death knell of community organizers as information gatherers but rather suggests that their role will be, and should be, only one part of the solution to the Department of Justice's problem. As discussed in subpart III(B), combining mandatory self-reporting requirements with community organizations' data gathering might enable the Department of Justice to enjoy the best of both worlds. Mandatory self-reporting will provide the Department of Justice with all gatherable, relevant metrics that Title VI complaints cannot.[219] Community-organization complaints can provide a constant check on the reliability and honesty of police-department data, ensuring compliance with the reporting requirements and ensuring that investigation decisions are based on reliable and accurate information. Thus, the active participation of community organizations in gathering information to provide to the Department of Justice is still necessary, if not sufficient, for a successful § 14141 regime.

In turn, this means that community organizations that are concerned with local police reform but that might not have some of the characteristics

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218. *Cf.* Harmon, *supra* note 12, at 28–29 (calling for a comprehensive combination of factors for the Department of Justice to consider before making an investigative decision to ensure that decisions are made rationally and that reform is achieved in the worst departments first).

219. *See id.*

of the TCRP that made it so successful should take active steps to better enable information gathering for the Department of Justice. Community legal organizations should make efforts to closely connect with their communities.[220] As discussed above, community relationships provided the TCRP with more legitimacy in its efforts and enabled it to function as a clearinghouse for cases.[221] In addition, community legal groups without a large donor or grant base should work to increase these funding areas so that they are less dependent on legal fees. Organizations can follow the example set by the TCRP, which has successfully raised money through its own efforts, as well as through its partnerships with charity organizations such as "I Live Here, I Give Here."[222] Finally, in addition to other lobbying efforts, community groups should strive for the implementation of a police-oversight committee—like the Austin Police Monitor—that focuses on gathering department-wide statistics and suggesting policy reforms as well as overseeing investigations of individual complaints.[223] Annual reports by such committees can be very helpful in providing data and corroborating claims made in complaints to the Department of Justice.[224]

Finally, organizations should become creative with their complaints to the Department of Justice. Title VI is just one formal wedge into the process. Organizations are encouraged to consider Title IX, which prohibits discrimination on the basis of sex,[225] and the Americans with Disabilities Act, which prohibits discrimination against those with disabilities,[226] as mechanisms to leverage police reform.[227] These are just two examples of other civil rights statutes that can support complaints with facts that might not immediately suggest a pattern or practice of unconstitutional conduct but that do, on their face, suggest disparate treatment of, or a disparate impact on, a protected group. By using statutes like these to bolster their complaints, community organizations can help trigger the Department of Justice's enforcement obligations under agency regulations and can justify the creation of a file on the department, if not an investigation itself.

These efforts can help prepare organizations for a time when mandatory-reporting requirements are in place, and the data they gather

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220. *See* Grinthal, *supra* note 113, at 64–65 (encouraging lawyers to connect with marginalized groups in order to maximize the power available to those groups while assisting them in reaching their goals of community reform).

221. *See supra* section IV(A)(1).

222. *Archives for Donate*, *supra* note 175.

223. *See supra* notes 203–06 and accompanying text.

224. *See supra* section IV(A)(4).

225. 20 U.S.C. § 1681 (2012).

226. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (2006 & Supp. V 2012).

227. *See generally* James C. Harrington, *The ADA and Section 1983: Walking Hand in Hand*, 19 REV. LITIG. 435 (2000) (advocating for a more creative and active use of the ADA in the context of civil rights litigation).

serves as an important check on police departments. However, these efforts can also help organizations follow the TCRP's example now, before such requirements are in place. The Department of Justice cannot simply wait for mandatory-reporting requirements—it must continue to pursue § 14141 litigation in the meantime. While not a perfect measure of police reform, nor a measure that is as easily implemented as it first appeared, using community organizations as data gatherers for the Department of Justice can help the agency make more informed decisions than the ones it is currently making, which is certainly better than no improvement at all.

V. Conclusion

Much of police misconduct, like the kind that occurred when Jeffrey Thornton made the mistake of criticizing an officer's decisions, can be traced back to organizational influences. Values embodied in formal policies and in the informal signals sent by training, promotion, and disciplinary decisions all significantly impact the individual officer and his or her decisions on the street. The importance of organizational structure in police misconduct explains why remedies such as the exclusionary rule, § 1983 claims, criminal prosecutions of officers, and civilian oversight committees do not consistently deter police misconduct. These methods, with their focus on the individual officer's misconduct, fail to adequately incentivize organizational reform.

These failures explain the importance of § 14141 litigation, which targets an entire department. Section 14141 litigation can not only reform an organization's unconstitutional practices but also can suggest the implementation of best practices. In addition, § 14141 provides the opportunity for key stakeholders such as community groups, police unions, and the police departments themselves to work together to come up with a mutually acceptable agreement, which lends legitimacy to the process. These advantages of § 14141 suggest why it is so important to help solve the information gap the Department of Justice faces. While few scholars have examined the idea of using community groups to provide information to the Department of Justice, the idea has advantages. After all, these groups have the resources, relationships, and incentives to gather information and send it to the Department of Justice in the hopes of instigating a § 14141 investigation.

However, a closer examination of an organization that used this strategy, the TCRP, indicates that certain characteristics that enabled the organization to gather information for the Department of Justice might not be replicable in every organization. Furthermore, an examination of the information that such a strategy provides reveals that it is not as comprehensive as one might hope. Title VI complaints miss important metrics that would allow the Department of Justice to make the most rational investigative decisions. This is not to suggest that the idea should

be scrapped entirely, though. Until mandatory-reporting requirements are implemented, this strategy can provide the Department of Justice with more comprehensive information, if not the most comprehensive information, on police departments. Additionally, if mandatory-reporting requirements are implemented, this strategy can be utilized to provide a much-needed check on the reliability of self-reported data. As such, community organizations should take steps to ensure they can fulfill this role of information gatherer now and in the future.

Only by coming up with solutions to the lack of information that the Department of Justice faces will the full potential of § 14141 be realized. The importance of this measure as a tool for police reform mandates continued attention and creative solutions to the problem. While this Note discussed the potential, and pitfalls, of one such solution, future scholarship should continue the discussion by focusing on solutions other than mandatory-reporting requirements, which, while obviously important, do not further the problem-solving process.

—Alexandra Holmes

Qualified Immunity and Constitutional-Norm Generation in the Post-*Saucier* Era: "Clearly Establishing" the Law Through Civilian Oversight of Police*

Introduction

Civil rights litigation under 42 U.S.C. § 1983 constitutes one of the many tools of police regulation. Along with so-called police professionalism,[1] internal and external oversight, application of the exclusionary rule to evidence seized unconstitutionally for use in criminal proceedings, "pattern or practice" litigation under 42 U.S.C. § 14141, and criminal prosecutions of officers accused of unlawful behavior, § 1983 litigation serves to deter and redress police misconduct.[2] However, the unique advantage of § 1983 suits in police regulation—the potential to recover money damages from the offending officer—is also the source of its greatest procedural hurdle: Overcoming the officer's qualified immunity from suit.[3] Indeed, the doctrine of qualified immunity is the product of a concerted effort by the Supreme Court to strike a balance between recompense of constitutional violations and protection of government agents whose official duties expose them to civil liability.[4]

Consistent with this aim, the Supreme Court's qualified immunity jurisprudence is animated principally by two broad considerations: Notice

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1. *See* Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 11–14 (2003) (chronicling the emergence of the "police professionalism" movement and identifying as its hallmark the use of internal management techniques to regulate police conduct).

2. *See generally* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009) (advocating for "proactive" reform of police departments through targeted use of § 14141 litigation); Stephen Clarke, Note, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How it Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 4–9 (2009) (surveying the different mechanisms of police oversight and describing the resulting "oversight gap" that civilian oversight bodies are designed to fill).

3. *See* James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1611–18 (2011) (discussing the origin and evolution of qualified immunity doctrine).

4. Anderson v. Creighton, 483 U.S. 635, 638 (1987).

and fairness. As Justice Powell wrote in *Davis v. Scherer*,[5] qualified immunity "recognizes that officials can act without fear of harassing litigation only if they *reasonably can anticipate* when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated."[6] The doctrine accommodates "reasonable mistakes . . . as to the legal constraints on particular police conduct" and "ensure[s] that before they are subjected to suit, officers are *on notice* their conduct is unlawful."[7] As the doctrine has developed, the Court has clarified that "the object of the 'clearly established' immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying [18 U.S.C.] § 242."[8] In fact, officers named in suits under § 1983 "have the same right to fair notice" as defendants charged with federal civil rights violations under § 242.[9] Implicit in these formulations, then, is a third consideration, linked closely to both notice and fairness: Culpability. In an oft-quoted opinion, issued only four years after the Court first extended qualified immunity to officials sued under § 1983,[10] Justice White asserted that "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[11]

In its classic formulation, qualified immunity provides that "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[12] Correspondingly, the Supreme Court has prescribed a two-pronged analysis that asks whether the claimant's allegations, if true, evince a violation of her constitutional rights and whether the constitutional rights in question were "clearly established" at the time of the acts giving rise to the suit.[13]

While the Supreme Court initially mandated no specific order for this analysis, it long expressed a preference for a "merits-first approach"[14] and it

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5. 468 U.S. 183 (1984).

6. *Id.* at 195 (emphasis added).

7. Saucier v. Katz, 533 U.S. 194, 205, 206 (2001) (emphasis added).

8. United States v. Lanier, 520 U.S. 259, 270 (1997).

9. Hope v. Pelzer, 536 U.S. 730, 739 (2002).

10. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

11. Malley v. Briggs, 475 U.S. 335, 341 (1986).

12. *Harlow*, 457 U.S. at 818.

13. *E.g.*, Conn v. Gabbert, 526 U.S. 286, 290 (1999).

14. A merits-first approach calls for the resolution of the constitutional-violation question before the clearly-established-right question. *See, e.g.*, Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) ("[T]he better approach to resolving cases [of] qualified immunity . . . is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all[,] . . . then [to] ask whether the right allegedly implicated was clearly established at the time of the events in question."); *cf.* Siegert v. Gilley, 500 U.S. 226, 232 (1991) ("A necessary concomitant to

transformed this preference into a constitutional imperative in *Saucier v. Katz*.[15] This "order of battle,"[16] the Court reasoned, would ensure that constitutional law—and with it, § 1983 liability for violations of once-novel constitutional rights—would continue to evolve.[17] While the Court departed from the compulsory *Saucier* regime eight years later in *Pearson v. Callahan*,[18] Justice Alito, writing for the unanimous *Pearson* court, reaffirmed the value of merits-first analysis.[19] Among the reasons Justice Alito cited for the continued vitality of merits adjudication was the fact that "the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."[20] In this way, the Court signaled that constitutional articulation remains an important goal of qualified immunity doctrine and constitutional tort law.

As some scholars have suggested, the obligatory *Saucier* analytical sequence played a critical role in the development of constitutional norms.[21]

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the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.").

15. 533 U.S. 194, 201 (2001).

16. Pearson v. Callahan, 555 U.S. 223, 234 (2009); *see also, e.g.*, John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115 (adopting the Court's phrase); Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 SMU L. REV. 1539 (2007) (same).

17. *Saucier*, 553 U.S. at 201; *see also Lewis*, 523 U.S. at 841 n.5 ("What is more significant is that if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals.").

18. 555 U.S. 223, 227 (2009).

19. *See id.* at 236 ("[W]hile the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory.").

20. *Id.*

21. *See, e.g.*, Paul W. Hughes, *Not a Failed Experiment:* Wilson–Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 404 (2009) (reporting the results of an empirical study of judicial decisions before and after *Wilson* and *Saucier* and finding that constitutional-rights articulation increased substantially under mandatory sequencing); Jeffries, *supra* note 16, at 120 (drawing attention to "the degradation of constitutional rights that may result when *Saucier* is not followed and constitutional tort claims are resolved solely on grounds of qualified immunity"); Michael T. Kirkpatrick & Joshua Matz, *Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from* Saucier *to* Camreta *(and Beyond)*, 80 FORDHAM L. REV. 643, 644–45 (2011) (mounting a defense of *Saucier* and *Pearson* constitutional-rights articulation and advancing an argument for why the alternative vehicles of constitutional-norm generation are inadequate in comparison); Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 539 (2010) (contending that "mandatory sequencing has in fact resulted in a statistically significant increase in pro-plaintiff constitutional rights"). *But see* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 670 (2009) (finding, pursuant to an empirical analysis of court decisions both before and after *Siegert* and *Saucier*, that "[s]equencing leads to the articulation of more constitutional

In fact, there is reason to believe that the alternative avenues of rights articulation routinely cited by opponents of *Saucier*—suppression, municipal liability, and the other tools of police regulation listed above[22]—will not fill the void created by *Pearson*.[23] The principal reason for this disparity, as Justice Alito suggested in *Pearson*, is the fact that certain constitutional claims are unlikely to see litigation outside of the qualified immunity context—for example, Fourth Amendment searches and seizures not resulting in criminal prosecution[24] and incidents involving excessive force.[25] Logically, as the number of cases expressly recognizing constitutional rights decreases, the number of § 1983 suits that can be dismissed on clearly established grounds increases. This dilemma is especially pronounced in the Fourth Amendment context, as the Court has specified that the clearly established inquiry at issue is highly fact-bound.[26]

Although the Supreme Court has never expressly delineated the sources of law that can render a constitutional right clearly established, its decisions have relied on a wide range of sources beyond decisional law. In particular, the Court has carved out space for internal agency policies and the findings of nonjudicial bodies to support a finding of clearly established law.[27] Following the Court's lead, lower federal courts have cited to a variety of forms of nondecisional law that fall within the ambit of internal policies and nonjudicial bodies.[28] A significant source of such law, yet one that has largely escaped the attention of commentators,[29] is the work of police

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law, but not the expansion of constitutional rights," as courts required to reach the merits increasingly found no constitutional violations).

22. *E.g.*, Camreta v. Greene, 131 S. Ct. 2020, 2044 (2011) (Kennedy, J., dissenting).

23. *See infra* section I(B)(3).

24. Kirkpatrick & Matz, *supra* note 21, at 674–75.

25. *See, e.g.*, City of L.A. v. Lyons, 461 U.S. 95, 111–13 (1983) (denying standing to a plaintiff who sought an injunction against the City barring the use of chokeholds by police, on the ground that the plaintiff failed to show "irreparable injury," namely, "any real or immediate threat that the plaintiff will be wronged again").

26. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."); *id.* at 641 ("It follows from what we have said that the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials.").

27. *See infra* subpart II(B).

28. *See infra* subpart II(B).

29. Commentators surveying the sources of clearly established law have overwhelmingly focused on decisional law. *See, e.g.*, Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 TOURO L. REV. 501, 514–22 (2008) (discussing the standards for demonstrating clearly established law without reference to nondecisional law); Pamela S. Karlan, Essay, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1922–26 (2007) (same); Jeffrey D. May, *Determining the Reach of Qualified Immunity in Excessive Force Litigation: When Is the Law "Clearly Established?,"* 35 AM. J. TRIAL ADVOC. 585, 598–99 (2012) (same); Michael S. Catlett, Note, *Clearly Not Established:*

oversight bodies—in particular, civilian external investigatory bodies like the New York Civilian Complaint Review Board (CCRB).[30]

In the course of investigating discrete incidents of alleged police misconduct, civilian external investigatory bodies engage in fact-finding and identification and application of governing legal standards in much the same way as a court assesses a motion to suppress evidence or a § 1983 claim alleging a deprivation of constitutional rights.[31] More importantly, these bodies constantly encounter novel factual scenarios, particularly ones implicating the Fourth Amendment,[32] such that their findings epitomize the sort of fact-specific guidance endorsed by the Court.[33] Further, to the extent that they are empowered to make policy recommendations to the police departments they oversee, civilian external investigatory bodies also resemble compliance agencies like the U.S. Department of Justice (DOJ), whose advisory reports have helped to provide the sort of "notice" required to overcome an official's qualified immunity.[34] Consequently, the Court's qualified immunity jurisprudence appears to permit the findings of such bodies to contribute to the clearly-established-law analysis. At present, however, the work of civilian external investigatory bodies—work that produces a wealth of valuable information and often confronts

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Decisional Law and the Qualified Immunity Doctrine, 47 ARIZ. L. REV. 1031, 1041–50 (2005) (same). *But see* Amanda K. Eaton, Note, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of* Hope v. Pelzer *on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 705–06 (2004) (considering the role that regulations from administrative agencies could occupy in a proposed "reasonableness approach" to ascertaining clearly established law); Amelia A. Friedman, Note, *Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law*, 90 TEXAS L. REV. 1283, 1290 (2012) (observing that "[c]ircuit courts also divide on the issue of when, if ever, courts may consider policies and regulations as sources of clearly established law").

30. Scholars have identified several different models of civilian oversight bodies: Civilian in-house, civilian external supervisory, civilian external investigatory, and civilian auditor. Clarke, *supra* note 2, at 11 & n.54. This Note takes as its focus the civilian external investigatory model, with the CCRB as an exemplar, for the reasons outlined *infra* in subparts II(A) and II(C).

31. *See infra* subpart II(C).

32. *See, e.g.*, N.Y.C. CIVILIAN COMPLAINT REVIEW BD., 2013 REPORT: 20 YEARS OF INDEPENDENT INVESTIGATIONS 6–7 (2014) [hereinafter 2013 CCRB ANNUAL REPORT], *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/CCRB%20Annual_2013.pdf (indicating that 58% of all complaints received by the CCRB and categorized as falling within the agency's jurisdiction in 2012 contained at least one abuse-of-authority allegation and specifying that "allegations of stop, question, frisk and/or search make up the largest portion of all allegations" in the "abuse of authority" category); N.Y.C. CIVILIAN COMPLAINT REVIEW BD., 2012 ANNUAL REPORT 5–6 (2013) [hereinafter 2012 CCRB ANNUAL REPORT], *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/ccrb_annual_2012.pdf (placing the 2011 year-end proportion of abuse-of-authority allegations at 60% of all qualifying complaints and confirming the predominance of stop, question, frisk and/or search allegations in the abuse-of-authority category); N.Y.C. CIVILIAN COMPLAINT REVIEW BD., 2011 ANNUAL REPORT 6 (2012) [hereinafter 2011 CCRB ANNUAL REPORT], *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbann2011.pdf (calculating the 2011 year-end proportion of abuse-of-authority allegations at 61% of all qualifying complaints).

33. *See supra* note 26 and accompanying text.

34. *See infra* subpart II(B).

constitutional questions that might otherwise escape formal adjudication—is largely divorced from that of the courts.[35] This state of affairs represents a costly missed opportunity, especially in the wake of *Pearson*.

Accordingly, this Note argues that the work of civilian external investigatory oversight bodies can serve as at least a partial antidote to the constitutional stasis threatened by the end of mandatory *Saucier* sequencing. In particular, this Note advocates for the investigative findings and policy recommendations of agencies like the CCRB to be given at least the same weight as internal police regulations and advisory reports by external compliance agencies, and possibly as much weight as regional appellate court opinions, in the qualified immunity analysis. Not only is this proposal consistent with the purposes of § 1983 litigation and qualified immunity doctrine, but the work it envisions is already taking place at oversight boards around the nation. The sole structural changes necessary to optimally implement this proposal relate to the formalization and publication of the agencies' findings and recommendations.

Parts I and II provide the theoretical framework for this proposal: Part I explains the purpose and the structure of constitutional civil rights litigation and highlights the post-*Saucier* dilemma of constitutional stagnation. Part II describes the process of constitutional-norm generation occurring in civilian external investigatory bodies, taking the CCRB as an exemplar, and explores the jurisprudential foundations for treating the findings of oversight bodies as a source of clearly established constitutional law. Part III sketches the proposal described above, arguing in favor of utilizing civilian external investigatory oversight findings to promote the development of constitutional rights and overcome the high bar set by the Supreme Court to proving clearly established law in a § 1983 claim. This Part additionally anticipates and responds to a number of critiques and concludes by cautioning that while this proposal represents an important step toward strengthening police regulation and constitutional articulation, it is only one part of a larger regulatory framework.

I. Constitutional Civil Rights Litigation and the Risk of Constitutional Stasis

In order to contextualize the proposal advocated by this Note, it is necessary to first understand the policies underlying § 1983 litigation and qualified immunity, the mechanics of constitutional tort adjudication, and the threat to constitutional clarity posed by the disavowal of mandatory *Saucier* sequencing.

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35. *See infra* section II(C)(4).

A. The Framework of § 1983 Litigation

1. The Structure and Underlying Purposes of § 1983 Litigation.— Congress originally passed 42 U.S.C. § 1983 as § 1 of the Ku Klux Act of April 20, 1871, with the express purpose of enforcing the Fourteenth Amendment.[36] The statute creates a private cause of action against any person "who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[37]

Since first recognizing a private cause of action against state police in the 1961 case *Monroe v. Pape*,[38] the Court has elaborated on the functions of § 1983 litigation, and it is now settled that § 1983 serves three primary purposes: Redress of unconstitutional conduct by state actors, deterrence of such conduct, and vindication of constitutional rights.[39] Critically, § 1983 actions also reach conduct that other mechanisms of police regulation do not—namely, Fourth Amendment events that fail to discover incriminating evidence,[40] claims of excessive force that do not rise to the level of crimes,[41] and, most alarmingly, "searches and arrests not aimed at successful prosecution, but rather at the assertion of police authority or . . . police harassment."[42]

To state a claim for relief under § 1983, a plaintiff must allege that the defendant violated her constitutional rights while acting "under color" of state law.[43] Section 1983 liability extends to individual state officials as well as municipal governments and their departments, though the requirements for assessing liability on individuals and municipalities

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36. Monroe v. Pape, 365 U.S. 167, 171 (1961).

37. 42 U.S.C. § 1983 (2006).

38. 365 U.S. 167, 169, 187 (1961).

39. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 638 (1987) ("When government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.'" (alteration in original) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)); Karlan, *supra* note 29, at 1918 ("Damages litigation offers an opportunity not only to compensate individuals who have been injured by unconstitutional conduct, but to refine constitutional law as well."); Pfander, *supra* note 3, at 1611–12 ("In both [*Bivens* and § 1983 cases], the right of action confronts government officers with personal liability for violating the constitutional rights of the plaintiff[,] . . . thus promis[ing] to deter official wrongdoing and to compensate victims of unconstitutional conduct." (footnote omitted)).

40. *See supra* note 24 and accompanying text.

41. *See supra* note 25 and accompanying text.

42. Jeffries, *supra* note 16, at 136.

43. 42 U.S.C. § 1983 (2006); *see also* Karlan, *supra* note 29, at 1919 ("[T]he only reason the individual defendant *can* be sued is because he's acting under color of state law . . . .").

differ.[44] While a plaintiff may seek money damages or equitable relief under § 1983,[45] if she elects to pursue damages, she must overcome the official-defendant's affirmative defense of qualified immunity.[46]

2. The Structure and Underlying Purposes of Qualified Immunity.— Qualified immunity is a common law doctrine designed to protect government employees from the burdens of suits arising from actions taken in their official capacity.[47] Consistent with its purpose of ensuring that "'insubstantial claims' against government officials be resolved prior to discovery and on summary judgment if possible,"[48] the doctrine confers immunity from suit, rather than serving as a mere defense to liability.[49] However, in contrast with the absolute immunity granted to legislators, judges, and certain members of the Executive Branch,[50] the doctrine's protection is limited, reflecting the Supreme Court's sensitivity to the tension between securing redress of constitutional violations and formulating optimal incentives for government agents.[51] Accordingly, in order to defeat a state officer's claim of qualified immunity and impose individual liability under § 1983, a court must find *both* that (1) the plaintiff's allegations, if true, evince the violation of a constitutional right *and* (2) the constitutional right in question was clearly established at the time of the official's act.[52]

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44. Karlan, *supra* note 29, at 1919. Notably, municipalities cannot be held liable on a theory of respondeat superior; rather, the plaintiff must establish that the municipality caused her harm through the implementation of an unconstitutional policy or custom. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978). This can be an onerous showing. *See, e.g.*, Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1758–63 (1989) (drawing particular attention to the high burden of establishing "final policymaking authority" and causation).

45. 42 U.S.C. § 1983; *see also* Mitchum v. Foster, 407 U.S. 225, 242–43 (1972) (asserting that "Congress plainly authorized the federal courts to issue injunctions in § 1983 actions" and holding that § 1983 "is an Act of Congress that falls within the 'expressly authorized' exception of [the federal anti-injunction statute, 28 U.S.C. § 2283]").

46. Harlow v. Fitzgerald, 457 U.S. 800, 815, 818 (1982).

47. *Id.* at 814.

48. Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987) (quoting *Harlow*, 457 U.S. at 818–19).

49. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

50. *Harlow*, 457 U.S. at 807.

51. *Id.* at 807, 814; *see also Pearson*, 555 U.S. at 231 ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."); *Anderson*, 483 U.S. at 638 ("[P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.").

52. *E.g.*, Wilson v. Layne, 526 U.S. 603, 609 (1999).

Much to the chagrin of courts and commentators, the Court has never formulated a definitive set of criteria for determining when a constitutional right is clearly established.[53] In fact, in *Harlow v. Fitzgerald*,[54] the foundation of modern qualified immunity jurisprudence, the Court conspicuously declined to define clearly established law.[55] In the thirty years since *Harlow*, the Court has provided some guidance to the lower courts, but it has largely taken the form of general principles of adjudication. For instance, the Court held in *Anderson v. Creighton*[56] that the right alleged to have been violated by a government actor "must have been clearly established in a . . . particularized . . . sense," such that "in the light of pre-existing law the unlawfulness must be apparent"; "[t]he contours of the right," the Court explained, "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[57] The Court elaborated on the *Anderson* formulation in *United States v. Lanier*[58] and *Hope v. Pelzer*,[59] declaring that "fundamentally" or "materially" similar cases are not necessary to render the law clearly established.[60] Similarly, in *Wilson v. Layne*,[61] the Court suggested several sources that might clearly establish the law—Supreme Court decisions, controlling authority in the jurisdiction of the court hearing the case, and "a consensus of cases of persuasive authority"[62]—but did so only in the service of pointing out the deficiencies in the plaintiffs' case.[63] As a result, the circuit courts of appeals have devised a number of different approaches to the use of persuasive decisional law in the clearly established inquiry.[64]

Notwithstanding the obliqueness of the Court's counsel on this topic, its guiding principle is "fair notice"—adequate warning to state actors that their conduct will expose them to individual liability for violating constitutional rights.[65] As a practical matter, however, mere "notice" does not reflect the

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53. *See generally* Blum, *supra* note 29 (describing the Court's inconsistent case law on the subject); Catlett, *supra* note 29 (same).

54. 457 U.S. 800 (1982).

55. *Id.* at 818 n.32 ("[W]e need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.'" (quoting Procunier v. Navarette, 434 U.S. 555, 565 (1978))).

56. 483 U.S. 635 (1987).

57. *Id.* at 640 (internal quotation marks omitted). As explained above, the *Anderson* Court was specifically addressing Fourth Amendment rights, signaling that the elaboration of such rights is a highly fact-bound endeavor. *See supra* note 26 and accompanying text.

58. 520 U.S. 259 (1997).

59. 536 U.S. 730 (2002).

60. *Id.* at 741; *Lanier*, 520 U.S. at 269–70.

61. 526 U.S. 603 (1999).

62. *Id.* at 616–17.

63. *Id.* at 617.

64. Blum, *supra* note 29, at 515–22; Catlett, *supra* note 29.

65. *See, e.g.*, *Hope*, 536 U.S. at 739 ("Officers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal

stringency of the Court's approach: Considerations of fairness and culpability have long inflected the Court's qualified immunity holdings, as evidenced by the parallels the Court has drawn between § 1983 and its criminal counterpart, § 242, as well as the emphasis it has placed on the shelter afforded by the doctrine to "all but the plainly incompetent or those who knowingly violate the law."[66] Indeed, when Justice Scalia selectively quoted *Anderson* in *Ashcroft v. al-Kidd*,[67] transforming "a reasonable official" into "every reasonable official,"[68] no Justice questioned this formulation.[69]

Early iterations of the *Harlow* test permitted the assessment of the two prongs in any order.[70] Despite the Court's intimated preference for merits

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offense defined in 18 U.S.C. § 242."); *Lanier*, 520 U.S. at 270–71 (analogizing § 1983 civil liability to § 242 criminal liability and referring repeatedly to the notion of "fair warning"); Anderson v. Creighton, 483 U.S. 635, 638–40 (1987) (describing the foundations of qualified immunity doctrine, with a particular emphasis on officials' "reasonable" expectations and understandings of the law); Erwin Chemerinsky & Karen M. Blum, *Fourth Amendment Stops, Arrests and Searches in the Context of Qualified Immunity*, 25 TOURO L. REV. 781, 789–90 (2009) (interpreting the Court's use of the phrases "fair notice" and "fair warning" in *Hope* as suggesting that "[f]air warning is all you need").

66. *See supra* notes 8–11 and accompanying text.

67. 131 S. Ct. 2074 (2011).

68. *Compare id.* at 2083 ("A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that *every 'reasonable official* would have understood that what he is doing violates that right.'" (alterations in original) (emphasis added) (quoting *Anderson*, 483 U.S. at 640)), *with Anderson*, 483 U.S. at 640 ("The contours of the right must be sufficiently clear that *a reasonable official* would understand that what he is doing violates that right." (emphasis added)).

69. Justice Scalia's opinion for the Court was joined by Justices Roberts, Kennedy, Thomas, and Alito. *Al-Kidd*, 131 S. Ct. at 2078. Justices Kennedy, Ginsburg, and Sotomayor each wrote concurring opinions, none of which mentioned Justice Scalia's misreading of *Anderson*. *See id.* at 2085–90. Justice Kagan recused herself from the case. *Id.* at 2078. Of course, commentators were quick to detect the heightened burden Justice Scalia's rhetoric portended. *See, e.g.*, Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 654 (2013) ("More significantly, in *Ashcroft v. al-Kidd*, the Supreme Court recently raised the bar for plaintiffs to overcome the clearly-established-law hurdle. The majority opinion, written by Justice Scalia, added the 'every reasonable' phrase to the clearly established law test, surreptitiously changing the game when nobody was looking." (footnotes omitted)). Pondering the Justices' apparent passivity, Professor Chemerinsky surmised that "[p]erhaps . . . Justice Scalia did not call attention to the shift and the other Justices simply did not notice the change in the law." *Id.* at 656. Nevertheless, as Professor Blum observed, even as the lower courts "have taken note of the Supreme Court's conflicting messages and the current Court's raising of the qualified immunity bar," *id.* at 655, individual judges have recognized that *al-Kidd* did not overrule the *Hope* line of cases, *id.* 656 & n.168 (citing Morgan v. Swanson, 659 F.3d 359, 393 (5th Cir. 2011) (Dennis, J., specially concurring in part)).

70. *See, e.g.*, Davis v. Scherer, 468 U.S. 183, 197 (1984) ("A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue."); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred."); Hughes, *supra* note 21, at 408 ("Most courts [during the pre-*Saucier* era] felt free to choose either to address the substantive constitutional

adjudication,[71] lower courts quickly learned that the two prongs were not equally easy to satisfy.[72] Logically, an affirmative finding on the clearly established prong could compel a like conclusion with regard to the constitutional violation prong, while the inverse would not necessarily follow. Correspondingly, a court confronted with conflicting lines of precedent on the existence of a particular constitutional right could either engage in the thorny task of articulating a constitutional norm or summarily grant qualified immunity on the ground that the split of authority itself evidenced that the law was not clearly established.[73] Whether motivated by considerations of expediency or scrupulous adherence to the doctrine of constitutional avoidance, courts routinely avoided the merits of § 1983 claims.[74]

Cognizant of the risk that repeated invocations of qualified immunity might "stunt the development of the law and allow government officials to violate constitutional rights with impunity,"[75] the Court fixed the terms of qualified immunity analysis in *Saucier v. Katz*,[76] launching the opening salvo in the war over the "order of battle" in constitutional tort law.

B. The "Order of Battle" in Qualified Immunity Analysis

1. Diagnosing the Problem: Saucier v. Katz.—Confronted with the erroneous denial of qualified immunity on a federal-excessive-force claim,

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question at the outset, or to proceed first to the 'clearly established' prong of the qualified immunity analysis.").

71. *See supra* note 14 and accompanying text.

72. *See, e.g.*, Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 141–42 (contending that "courts can usually determine whether any right alleged is clearly established without defining the contours of the right itself or even determining whether the alleged right exists"); Pierre N. Leval, Madison Lecture, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1278 n.86 (2006) ("It is often immediately apparent that the claimed right was not clearly established at the time of the defendant's conduct, while it may be very difficult to determine whether the claimed right should be found to exist.").

73. *See* Pfander, *supra* note 3, at 1602 ("In cases of legal uncertainty, courts will often prefer to avoid the constitutional issue and dispose of the case on the ground that the right in question was not established with the requisite clarity.").

74. *See, e.g.*, Beermann, *supra* note 72, at 149 (explaining that "when a damages suit was the only realistic way to raise a constitutional issue[,] . . . . the court would not reach the merits of the constitutional claim if the right alleged was not clearly established at the time of the challenged conduct"); Hughes, *supra* note 21, at 418–29 (finding, incident to an empirical study of all circuit court opinions addressing qualified immunity in 1988, 1995, and 2005, that *Saucier* sequencing dramatically increased the rate of both positive and negative constitutional articulation); Sobolski & Steinberg, *supra* note 21, at 556 (reporting that, empirically, "*Saucier*'s mandatory sequencing regime makes courts less likely to avoid addressing the constitutional issue"); *cf.* Wells, *supra* note 16, at 1547–54 (discussing the policy of constitutional avoidance in the qualified immunity context).

75. Beermann, *supra* note 72, at 149.

76. 533 U.S. 194, 201 (2001).

the Supreme Court in *Saucier* set forth a rigid order of analysis for the dual prongs of qualified immunity.[77] Rejecting the Ninth Circuit's analytical framework, which called for a preliminary decision on the clearly established prong, the Court declared that "the requisites of a qualified immunity defense must be considered in proper sequence": "[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals."[78]

The Court cited several considerations in support of this new bright-line rule. First, insofar as qualified immunity constitutes "an *immunity from suit* rather than a mere defense to liability," proper application of the privilege demands a conclusive resolution of the matter "early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive."[79] Second, the assessment of whether a constitutional right was violated "is the process for the law's elaboration from case to case"; indeed, "[t]he law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."[80] Third, and relatedly, "the procedure permits courts in appropriate cases to elaborate the constitutional right with greater degrees of specificity."[81] With only one concurring opinion joined by two Justices and one opinion concurring in part and dissenting in part—an opinion exactly twenty-two words long[82]—the Court spoke with a clear voice in fixing the analytical structure of qualified immunity jurisprudence.

2. Critiques of the Mandatory Saucier *Regime.*—Despite the Court's near-unanimity in adopting the *Saucier* rule, dissenting views quickly emerged. In April 2004, less than three years after *Saucier*, a total of five Justices joined opinions respecting the denial of certiorari in *Bunting v. Mellen*[83] that overtly questioned the wisdom of mandatory sequencing.[84]

77. *See id.* at 199–201.

78. *Id.* at 199–200.

79. *Id.* at 200–01 (internal quotation marks omitted).

80. *Id.* at 201.

81. *Id.* at 207.

82. The opinion, written by Justice Souter, reads in its entirety, "I join Parts I and II of the Court's opinion, but would remand the case for application of the qualified immunity standard." *Id.* at 217 (Souter, J., concurring in part and dissenting in part). It merits note that Part II established the fixed sequencing regime. *Id.* at 200–01 (majority opinion).

83. 541 U.S. 1019 (2004) (order denying certiorari).

84. *See id.* at 1019 (Stevens, J., respecting denial of certiorari) (characterizing, in an opinion joined by Justices Ginsburg and Breyer, *Saucier* sequencing as "an unwise judge-made rule"); *id.* at 1023–24 (Scalia, J., dissenting from denial of certiorari) (contending, in an opinion joined by Chief Justice Rehnquist, that the *Saucier* rule "should not apply where a favorable judgment on

Eight months later, Justice Breyer penned a concurring opinion in *Brosseau v. Haugen*,[85] joined by Justices Scalia and Ginsburg, in which he urged the Court to reconsider *Saucier*.[86] Justice Breyer continued to advocate for the reversal of *Saucier* in 2007, when the Court heard both *Scott v. Harris*[87] and *Morse v. Frederick*,[88] punctuating his opinion in the latter case with the declaration, "I would end the failed *Saucier* experiment now."[89]

Justice Breyer's criticisms were largely representative of those expressed by lower courts and commentators. First, *Saucier*'s rigid order of analysis conflicts with the settled principle of constitutional avoidance, which dictates that Courts avoid the adjudication of constitutional issues when narrower grounds for decision are available.[90] Second, decisions rendered under the *Saucier* structure afford precedential weight to assertions that by definition qualify as dicta: A finding of a constitutional violation under *Saucier* step one, for instance, necessarily becomes dictum when the court grants qualified immunity on the ground that the law was not clearly established under *Saucier* step two.[91] Third, critics highlighted two potential deficiencies in the actual decisions produced under *Saucier* sequencing: Not only was there a risk of strategic preparation by parties who rationally anticipated victory on clearly established grounds, resulting in suboptimal briefing on the constitutional merits,[92] but courts obligated to reach the merits often produced highly fact-bound constitutional decisions that were of limited precedential value.[93] Finally, lower courts had devised a number of ways to avoid *Saucier*'s strictures, effectively treating the decision as advisory.[94] Against this background, the Court in 2008[95] agreed

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qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination" and observing that "[t]his problem has attracted the attention of lower courts").

85. 543 U.S. 194 (2004) (per curiam).

86. *Id.* at 201–02 (Breyer, J., concurring).

87. 550 U.S. 372, 387 (2007) (Breyer, J., concurring).

88. 551 U.S. 393, 425, 430 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part).

89. *Id.* at 432.

90. Pearson v. Callahan, 555 U.S. 223, 241 (2009); *Scott*, 550 U.S. at 388 (Breyer, J., concurring); Beermann, *supra* note 72; Leval, *supra* note 72, at 1277 & nn. 83–84.

91. *Pearson*, 555 U.S. at 240; Beermann, *supra* note 72, at 142, 154–56; Leval, *supra* note 72, at 1275–76. In light of this characterization, commentators attacked *Saucier* decisions as "advisory opinions" barred by Article III. *E.g.*, Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 895–905, 907 n.321, 920 (2005).

92. *Pearson*, 555 U.S. at 239; Jeffries, *supra* note 16, at 129–31; Kirkpatrick & Matz, *supra* note 21, at 652–53.

93. *Pearson*, 555 U.S. at 237; Beermann, *supra* note 72, at 166–67.

94. *See Pearson*, 555 U.S. at 234–35; Beermann, *supra* note 72, at 161–62; Leval, *supra* note 72, at 1276 n.81.

95. Pearson v. Callahan, 128 S. Ct. 1702, 1702 (2008) (mem.) (granting certiorari).

to hear an appeal by Cordell Pearson, a Utah police officer and the named defendant in a § 1983 suit, from an adverse qualified immunity judgment.[96]

3. Return to Judicial Discretion: Pearson v. Callahan.—Signaling its receptivity to the mounting criticism of *Saucier*, the Court expressly directed the parties in *Pearson* to address in briefing whether the mandatory sequencing regime should be retained.[97] Pearson and his cohort evidently made a compelling case—the Court unanimously reversed *Saucier*.[98] Writing for the Court, Justice Alito described the *Saucier* procedure as "beneficial" and "often appropriate," but concluded that "it should no longer be regarded as mandatory."[99] To this end, Justice Alito summarized the criticisms of *Saucier* voiced by lower courts and current Justices,[100] and he marshaled a list of the Court's own critiques, broadly mirroring those detailed above.[101]

Despite reaffirming the value of *Saucier* sequencing, however, Justice Alito never articulated criteria for when lower courts *should* reach the merits in qualified immunity decisions. Rather, he enumerated a series of circumstances under which courts should *not* announce constitutional holdings: Highly fact-bound cases, cases where the constitutional issue will soon be decided by a higher court, cases involving "uncertain interpretation[s] of state law," cases where qualified immunity is invoked at the pleading stage, cases plagued by "woefully inadequate" briefing of constitutional issues, and cases giving rise to unreviewable constitutional decisions "that may have a serious prospective effect on [the] operations [of government actors]."[102] Commentators have attempted to deduce a set of principles of merits adjudication from *Pearson*,[103] but this is the best available guidance to lower courts. Perhaps recognizing the jurisprudential consequences of granting lower courts unfettered discretion to structure their qualified immunity analyses, Justice Alito emphasized the availability of alternative vehicles of constitutional articulation—namely, suppression motions in criminal cases, § 1983 suits against municipalities, and § 1983 suits for injunctive relief.[104] Unfortunately, there is ample evidence that these vehicles are alone inadequate to the task: Suppression motions, for

96. *Pearson*, 555 U.S. at 227.

97. *Pearson*, 128 S. Ct. at 1702–03.

98. *See Pearson*, 555 U.S. at 227.

99. *Id.* at 236.

100. *Id.* at 234–35.

101. *See id.* at 236–42.

102. *Id.* at 237–40.

103. *See, e.g.*, Beermann, *supra* note 72, at 171, 175–78 (criticizing *Pearson* for failing to set forth affirmative standards for when courts should reach the constitutional merits and proposing guidelines that reflect several of Justice Alito's observations in *Pearson*).

104. *Pearson*, 555 U.S. at 242–43.

instance, require the introduction at trial of illegally seized evidence, and § 1983 suits that avoid qualified immunity nevertheless face onerous obstacles to establishing standing and entitlement to relief.[105] In this light, *Pearson*'s regime of complete judicial discretion threatens to stall constitutional articulation.

4. Opportunity and Peril: Camreta v. Greene.—In 2010, the Court granted certiorari in yet another case challenging a qualified immunity judgment.[106] What distinguished named petitioner Bob Camreta from his forebear Cordell Pearson, however, was the fact that Camreta had actually *prevailed* below—because the Ninth Circuit had affirmed summary judgment in his favor on clearly established grounds, Camreta sought to appeal the adverse constitutional ruling that served only as a precedent for future § 1983 claims.[107] Camreta's posture epitomized a critique often leveled at *Saucier* sequencing: A defendant's "win" on qualified immunity could somehow be coupled with a "loss" on constitutional compliance that was effectively insulated from appellate review.[108] Acknowledging the peculiar dilemma faced by such defendants, but unwilling to abandon the practice of merits adjudication, the Court recognized prevailing-party review of qualified immunity judgments.[109] Although the Court's holding was narrow in scope—it addressed only the Supreme Court's *power* to review prevailing party appeals, not its *choice* to grant a particular certiorari petition[110]—it nonetheless represented an emphatic response to critics of qualified immunity merits adjudication. By reaffirming the importance of strategic sequencing,[111] the Court signaled its continuing support for constitutional articulation—as Justice Kagan wrote for the majority, "This Court, needless to say, also plays a role in clarifying rights."[112]

The opportunity embodied in Justice Kagan's opinion, however, was counterbalanced by peril: Justices Scalia and Kennedy wrote separate opinions, the latter joined by Justice Thomas, urging the Court to end the

105. Jeffries, *supra* note 16, at 131–34; Kirkpatrick & Matz, *supra* note 21, at 673–76; *supra* note 25.

106. Camreta v. Greene, 131 S. Ct. 456, 456 (2010) (mem.) (granting certiorari).

107. Camreta v. Greene, 131 S. Ct. 2020, 2027 (2011).

108. *E.g.*, Bunting v. Mellen, 541 U.S. 1019, 1024–25 (2004) (Scalia, J., dissenting from denial of certiorari).

109. *Camreta*, 131 S. Ct. at 2030–33.

110. *Id.* at 2033.

111. *See id.* at 2031 ("[W]e have long recognized that . . . our regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo."); *id.* at 2032 ("[I]t remains true that following the two-step sequence—defining constitutional rights and only then conferring immunity—is sometimes beneficial to clarify the legal standards governing public officials.").

112. *Id.* at 2032.

practice of "unnecessary" merits adjudication.[113] Taking a cue from Justice Alito's opinion in *Pearson*, Justice Kennedy cited the vehicles of constitutional articulation that are unencumbered by qualified immunity.[114] And like Justice Alito before him, Justice Kennedy also glossed over the weaknesses inherent in these alternatives.[115]

Following *Pearson* and *Camreta*, the future of qualified immunity sequencing—and with it, an important conduit of constitutional-rights development—is uncertain. Freed of the imperative to reach the merits in constitutional tort claims, courts may increasingly grant qualified immunity to government agents without contributing to the substantive law that guides official conduct. As a result, a growing need exists for sources of clearly established law. Counterintuitively, it is nondecisional law that may hold the key to resolving this dilemma.

II. Civilian Oversight Agencies and Constitutional-Norm Generation

A. The Role of Civilian Oversight

Civilian oversight represents a critical component of the patchwork of police regulation in the United States.[116] Given the limited effect of constitutional criminal procedure,[117] the problems inherent in internal police oversight mechanisms,[118] and the de jure and de facto barriers to the successful assessment of criminal[119] or civil sanctions on individual police

113. *Id.* at 2036 (Scalia, J., concurring); *id.* at 2037, 2043–45 (Kennedy, J., dissenting).

114. *See id.* at 2043–44 (Kennedy, J., dissenting).

115. *See supra* note 105 and accompanying text.

116. *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 802, 804–05 (2012) (categorizing civilian oversight as part of the "law of the police" and noting that civilian oversight often interacts with the internal administrative processes that provide "the most commonly used remedy for misconduct"); Clarke, *supra* note 2, at 2 ("Civilian oversight has become commonplace because it satisfies a need in most American jurisdictions.").

117. *See, e.g.*, Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1016–23 (2001) (discussing the extent to which police have been able to circumvent the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), and positing that *Miranda* has not only "helped the police shield themselves from evidentiary challenges" but has also "reduce[d] the pressure on police to reform their practices on their own initiative"); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 368–406 (criticizing the ineffectiveness of the exclusionary sanction in shaping police conduct).

118. *See, e.g.*, Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 537 (2004) (citing "real or perceived conflicts of interest" and the consequent loss of "citizen perceptions of legitimacy," *inter alia*, as among the "most significant limitation[s] of internal review"); Clarke, *supra* note 2, at 9–10 (describing the shortcomings of internal police oversight, including perceptions of "bias[], ineffective[ness], and illegitima[cy]," as well as "[t]he hostility and skepticism that police officers commonly display toward civilians who attempt to file complaints").

119. *See, e.g.*, John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 803–04 (attributing the rarity of criminal prosecutions to the police "code of silence" and the conflict of interest between prosecutors and officers); *id.* at 806–11 (highlighting the limits of federal

officers[120] or municipalities,[121] external oversight bodies reach police conduct that might otherwise escape reproach. Further, given the rate at which municipalities settle lawsuits arising from police misconduct[122]—in fiscal year 2012, the City of New York settled approximately $152 million in suits against the New York City Police Department (NYPD), arising from 9,570 claims[123]—civilian oversight agencies play a vital role in developing the law of the police by addressing legal claims silenced by settlement in the civil arena. Moreover, civilian oversight has become commonplace in the United States since its emergence in the early twentieth century[124]: There are now over one hundred civilian oversight bodies in the nation, covering cities in thirty-six different states—from Akron, Ohio, to Yonkers, New York.[125]

Prominent police scholar Samuel Walker defines civilian oversight as "an agency or procedure that involves participation by persons who are not sworn officers (citizens) in the review of citizen complaints against the police and/or other allegations of misconduct by police officers."[126] This broad definition encompasses several types of civilian oversight bodies: civilian in-house, civilian external supervisory, civilian external investigatory, and civilian auditor.[127] Civilian in-house oversight bodies, like Chicago's Office of Professional Standards or Seattle's Office of Professional Accountability, place civilians in the internal affairs unit of the police department, in either an

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prosecution of police officers under 18 U.S.C. § 242); Clarke, *supra* note 2, at 4–6 (contending that prosecutions of criminal police misconduct "only occur in rare, highly-publicized cases" due to political pressures and the mutually dependent relationship between police and prosecutors).

120. *See supra* subpart I(A).

121. *See, e.g.*, Schuck, *supra* note 44, at 1758–63, 1772–81 (explaining the contours of municipal liability under § 1983 and criticizing the *Monell* "policy or custom" doctrine as excessively protective of municipalities).

122. *See, e.g.*, Henry Goldman, *NYPD Abuse Increases Settlements Costing City $735 Million*, BLOOMBERG (Sept. 4, 2012, 1:08 PM), http://www.bloomberg.com/news/2012-09-04/nyc-police-abuse-joins-pothole-settlements-costing-735-million.html (discussing the City of New York's settlement calculus and quoting the Law Department's torts division chief as stating, "In the vast number of cases, our police officers did the right thing, but from a risk-management point of view we want to settle meritorious claims, reviewing the venue, the sympathy factor, [and] the injury"); *cf.* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 874 n.184 (2012) (quoting statements by city officials in New York, Chicago, and San Francisco suggesting that settlements in police misconduct cases are often strategic business decisions divorced from the merits of the underlying claims).

123. JOHN C. LIU, CITY OF NEW YORK: OFFICE OF THE COMPTROLLER, CLAIMS REPORT—FISCAL YEAR 2012, at 43, 44 chart 18 (2013), *available at* http://comptroller.nyc.gov/wp-content/uploads/documents/2013_Claims-Report.pdf.

124. Samuel Walker, *The History of the Citizen Oversight*, *in* CITIZEN OVERSIGHT OF LAW ENFORCEMENT 1, 2–6 (Justina Cintrón Perino ed., 2006).

125. *See U.S. Oversight Agency Websites*, NAT'L ASS'N FOR CIVILIAN OVERSIGHT L. ENFORCEMENT (2013), http://nacole.org/resources/u-s-oversight-agency-websites/ (listing civilian oversight bodies by jurisdiction).

126. Walker, *supra* note 124, at 2.

127. *See supra* note 30.

investigatory or supervisory role.[128] Civilian external supervisory bodies, like the Los Angeles County Office of Independent Review, examine the investigations conducted by internal police investigative units.[129] Civilian external investigatory bodies, like the CCRB or the Washington, D.C., Office of Police Complaints (OPC), conduct independent investigations of police misconduct—and may, in some cases, possess the power to conduct policy review.[130] Civilian auditor bodies, like the Special Counsel for the County of Los Angeles, which monitors the Los Angeles Sheriff's Department, are generally provided "full access to police department records" and granted "wide-ranging authority to report on all aspects of departmental policy and to advocate for systemic reform."[131]

While each of these oversight models makes a unique contribution to the regulation of police and the promulgation of constitutional norms, this Note centers on civilian external investigatory bodies for several reasons. First, investigatory agencies "embody a *criminal trial model* of citizen oversight."[132] Investigations are directed at determining guilt or innocence in a discrete case and are governed by "elaborate rules of procedure designed to protect the rights of accused officers."[133] Further, investigations are highly fact intensive, requiring the collection of testimonial, physical, and documentary evidence akin to what might be seen in a criminal or civil trial.[134] In this regard, the investigative findings of oversight bodies resemble the sources of law that may support a ruling on qualified immunity. Second, unlike civilian in-house oversight bodies, civilian external investigatory bodies are entirely independent from the departments they regulate.[135] This separation confers a presumption of neutrality—and quasi-judicial legitimacy—on their investigative findings.[136] Lastly, by virtue of the novel factual scenarios they routinely encounter in the course of their investigations, civilian external investigatory bodies are constantly engaged in constitutional-norm generation. Considering that Fourth Amendment violations predominate a

128. Clarke, *supra* note 2, at 13–14.

129. *Id.* at 14–15.

130. *Id.* at 16–17, 21; *see also* Samuel Walker, *Alternative Models of Citizen Oversight*, *in* CITIZEN OVERSIGHT OF LAW ENFORCEMENT, *supra* note 124, at 11, 13 (identifying the CCRB and the OPC as "citizen review boards with full authority to receive and investigate complaints").

131. Clarke, *supra* note 2, at 17–18.

132. Walker, *supra* note 130.

133. *Id.*

134. *See, e.g.*, N.Y.C. CIVILIAN COMPLAINT REVIEW BD., JANUARY–JUNE 2012 REPORT 4 (2013) [hereinafter 2012 CCRB SEMI-ANNUAL REPORT], *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbsemi2012_Jan_Jun.pdf (describing the CCRB's investigative process and characterizing it as "an in-depth fact-finding inquiry").

135. Clarke, *supra* note 2, at 16.

136. *See* Walker, *supra* note 130, at 12–13; Clarke, *supra* note 2, at 16.

typical oversight agency's work,[137] the fact-intensive investigations conducted by civilian external investigatory bodies seem particularly responsive to the Supreme Court's demand for fact-specific guidance to clearly establish Fourth Amendment law.

This would be purely academic, of course, had the Court dictated that decisional law alone could clearly establish the law for qualified immunity purposes. In fact, the Court has endorsed the use of various forms of nondecisional law to demonstrate the sort of fair notice and culpability required to justify imposing individual § 1983 liability on a government agent.[138]

B. The Jurisprudential Foundations for Treating the Findings of Oversight Bodies as a Source of Clearly Established Law

As explained above, the Supreme Court has never set forth a categorical rule demarcating the sources of law that may clearly establish the relevant law to a reasonable official for the purposes of qualified immunity. To the contrary, the Court itself has cited to a variety of authorities other than decisional law in its qualified immunity holdings.

The Court first indicated its willingness to consider nondecisional law in the modern qualified immunity inquiry in *Wilson v. Layne*. In *Wilson*, the Court affirmed the grant of qualified immunity to federal and state law enforcement officers who invited representatives of the media to accompany them in the execution of an arrest warrant at a private residence.[139] While the Court held that the officers' actions violated the Fourth Amendment, it concluded that qualified immunity was nonetheless appropriate due to the "undeveloped" state of the law and the officers' reasonable reliance on departmental policies permitting—or at least not prohibiting—"ride-alongs" during warrant executions.[140] Although the Court made clear that its holding rested on the combined force of these considerations, it characterized the officers' reliance on their respective departmental guidelines as "important to [its] conclusion."[141]

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137. *See, e.g.*, *Recommended Training for Board and Commission Members*, NAT'L ASS'N FOR CIVILIAN OVERSIGHT L. ENFORCEMENT (2013), http://nacole.org/resources/recommended-training-for-board-and-commission-members/ (listing "[c]ase law concerning stops [and] detentions, search, seizure and arrest, [and] rights of arrested persons" as part of a recommended training curriculum for civilian oversight agency employees); *supra* sources cited note 32.

138. *See infra* subpart II(B).

139. Wilson v. Layne, 526 U.S. 603, 605–08 (1999).

140. *Id.* at 605–06, 617. The federal department's policy "explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests," whereas the state department's policy "did not expressly prohibit media entry into private homes." *Id.* at 617.

141. *Id.* at 617.

The Court built on *Wilson*'s foundation in *Hope v. Pelzer*, citing to an even broader array of nonlegal authority in denying qualified immunity to three Alabama prison guards accused of violating a prisoner's Eighth Amendment rights through the unjustified use of a "hitching post."[142] The guards had handcuffed the prisoner to a hitching post for a number of hours on two separate occasions, each apparently motivated by punitive—rather than compliance- or order-oriented—aims.[143] The Eleventh Circuit granted the guards qualified immunity, finding no cases with "materially similar" facts that would render the law clearly established.[144] To this end, the Eleventh Circuit deemed inapposite two circuit precedents at least arguably on point—one finding an Eighth Amendment violation in the practice of handcuffing inmates to cells or fences for prolonged periods of time, and the other setting forth the premise that "physical abuse directed at [a] prisoner *after* he terminate[s] his resistance to authority would constitute an actionable [E]ighth [A]mendment violation."[145] Rejecting the Eleventh Circuit's "rigid gloss" on the *Harlow* test, the Court reaffirmed its holding in *Lanier* that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[146] "[T]he salient question that the Court of Appeals ought to have asked," the Court continued, "is whether the state of the law in 1995 gave respondents *fair warning* that their alleged treatment of [the prisoner] was unconstitutional."[147]

In answering this question in the affirmative, the Court referenced the two circuit precedents discussed above, an Alabama Department of Corrections (ADOC) regulation circumscribing the use of the hitching post, and a report by the DOJ advising the ADOC of "the constitutional infirmity in its use of the hitching post."[148] The regulation, which the Court characterized as "[r]elevant to the question whether [one of the circuit precedents] provided fair warning to respondents that their conduct violated the Constitution," set forth guidelines for the use of the hitching post—guidelines that were routinely disregarded.[149] The Court ascribed significance to this norm of noncompliance: "A course of conduct that tends to prove that the requirement was merely a sham, or that respondents could

142. 536 U.S. 730, 735, 741–42, 746 (2002).

143. *Id.* at 733–35, 736 & n.5.

144. *Id.* at 735–36. Notably, the Eleventh Circuit also demanded that "the federal law by which the government official's conduct should be evaluated must be preexisting, obvious, and mandatory." *Id.* at 736 (quoting Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001)) (internal quotation marks omitted).

145. *Id.* at 741–43 (quoting Ort v. White, 813 F.2d 318, 324 (11th Cir. 1987)) (first alterations in original) (internal quotation marks omitted).

146. *Id.* at 739, 741.

147. *Id.* at 741 (emphasis added).

148. *Id.* at 741–43.

149. *Id.* at 743–44.

ignore it with impunity, provides equally strong support for the conclusion that they were fully aware of the wrongful character of their conduct."[150] As for the DOJ report, the Department had conducted a study of the state's use of the hitching post one year before the incident giving rise to the suit and had concluded, *inter alia*, that "the systematic use of the restraining bar [for ostensibly punitive purposes] constituted improper corporal punishment."[151] When the DOJ "advised the ADOC to cease use of the hitching post in order to meet constitutional standards," the state defended its practices.[152] Even without evidence that the results of the DOJ's investigation were communicated to the individual defendants, the Court determined, the "exchange" between the DOJ and the ADOC "lends support to the view that reasonable officials in the ADOC should have realized that the use of the hitching post under the circumstances alleged by [the prisoner] violated the Eighth Amendment."[153]

More recently, in *Groh v. Ramirez*,[154] the Court denied qualified immunity to an agent of the Bureau of Alcohol, Tobacco, and Firearms (ATF) who executed a search warrant that, while duly issued by a neutral magistrate, was entirely devoid of any description of the items to be seized.[155] Noting that the warrant was facially invalid under the express terms of the Fourth Amendment, the Court had no difficulty in finding the relevant law clearly established.[156] It bolstered its finding of notice, however, by reference to two ATF directives—one instructing agents not to execute warrants containing fatal deficiencies and another admonishing agents that they would be held individually liable for "exceed[ing] their authority while executing a search warrant."[157] Although the Court took care to dispel any inference that "an official is deprived of qualified immunity whenever he violates an internal guideline"[158]—echoing its holding in *Davis v. Scherer*[159]—it made clear that such guidelines may be relevant to the issue of notice.[160]

Following *Wilson*, *Hope*, and *Groh*, the lower federal courts have recognized the utility of nonjudicial statements of law in establishing notice to government agents asserting qualified immunity. Although the circuits

150. *Id.* at 744.

151. *Id.* at 744–45.

152. *Id.* at 745.

153. *Id.*

154. 540 U.S. 551 (2004).

155. *Id.* at 554–55, 564–66.

156. *Id.* at 563–64.

157. *Id.* at 564 (internal quotation marks omitted).

158. *Id.* at 564 n.7.

159. 468 U.S. 183, 194 & n.12 (1984) (holding that the violation of a statute or administrative regulation cannot alone defeat an official's qualified immunity, unless that statute or regulation supplies the basis for the cause of action).

160. *Groh*, 540 U.S. at 564 & n.7.

have approached the issue with varying degrees of enthusiasm and specificity, at least partial reliance on internal policies and guidelines is now commonplace. The Eighth Circuit, for instance, has announced that "[p]rison regulations governing the conduct of correctional officers are . . . relevant in determining whether an inmate's right was clearly established."[161] Not only has the Ninth Circuit expressly adopted the Eighth Circuit's view of regulations in the prison context,[162] but it has expanded this analysis to policing, stating that police department training materials "are relevant not only to whether the force employed in [a particular] case was objectively unreasonable but also to whether reasonable officers would have been on *notice* that the force employed was objectively unreasonable."[163] Other circuits evincing willingness to consider internal regulations in the qualified immunity inquiry include the First,[164] Second,[165] Fifth,[166] Sixth,[167] and Tenth[168] Circuits. Individual

161. Treats v. Morgan, 308 F.3d 868, 875 (8th Cir. 2002) (citing Hope v. Pelzer, 536 U.S. 730 (2002)).

162. Furnace v. Sullivan, 705 F.3d 1021, 1027 (9th Cir. 2013).

163. Drummond *ex rel.* Drummond v. City of Anaheim, 343 F.3d 1052, 1062 (9th Cir. 2003) (internal citations omitted).

164. *See, e.g.*, Raiche v. Pietroski, 623 F.3d 30, 39 (1st Cir. 2010) ("A reasonable officer with training on the Use of Force Continuum would not have needed prior case law on point to recognize that it is unconstitutional to tackle a person who has already stopped in response to the officer's command to stop and who presents no indications of dangerousness.").

165. *See, e.g.*, Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 433–34 (2d Cir. 2009) (noting that although "it is clear that '[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision,'" the court "may examine statutory or administrative provisions in conjunction with prevailing circuit or Supreme Court law to determine whether an individual had fair warning that his or her behavior would violate the victim's constitutional rights." (alteration in original) (citations omitted)); *see also* Williams v. City of N.Y., No. 05 Civ. 10230, 2007 WL 2214390, at *12 n.185, *13 (S.D.N.Y. July 26, 2007) (referencing the NYPD Patrol Guide procedure governing strip searches in denying summary judgment on qualified immunity grounds to officers who allegedly conducted a strip search of the plaintiff without reasonable suspicion).

166. *See, e.g.*, Gutierrez v. City of San Antonio, 139 F.3d 441, 446–47, 449–50 (5th Cir. 1998) (holding the law banning "hog-tying" to be clearly established and finding a material dispute of fact regarding the reasonableness of the officer-defendants' resort to hog-tying a suspect, based in part on two widely distributed publications describing the dangers of the practice and an internal memo "reminding" officers that the practice was forbidden). Although *Gutierrez* predates *Hope*, its partial reliance on nondecisional law is consistent with the Supreme Court's approach.

167. *See, e.g.*, Barker v. Goodrich, 649 F.3d 428, 431, 435–37 (6th Cir. 2011) (noting that "[a] defendant's deviation from normal practice and prison policies can . . . provide notice that his actions are improper" and relying on case law, coupled with "the notice given by normal prison practice and the obvious cruelty inherent in the conduct," to deny qualified immunity to correction officers who left a prisoner handcuffed in an observation cell for over twelve hours); Champion v. Outlook Nashville, Inc., 380 F.3d 893, 903 (6th Cir. 2004) ("In addition to prior precedent, the Officers' training demonstrates that they were aware of [the decedent's] clearly established right to be free from this type of excessive force."); Toms v. Taft, 338 F.3d 519, 521, 527 & n.5 (6th Cir. 2003) (citing *Hope* in support of the use of state Department of Corrections policies to determine whether the defendant warden "knowingly violated [a prisoner's] rights" by refusing to provide him affirmative assistance in securing a marriage license while incarcerated).

district courts have followed suit, even where their circuits have not explicitly adopted *Hope*-like rules.[169]

As this weight of authority indicates, the federal courts have reserved space for nonjudicial statements of the law to contribute to the qualified immunity analysis. Such sources of law are increasingly important in the post-*Saucier* era, as courts are now accorded largely unfettered discretion to reach the merits of constitutional tort claims.[170] It is in this context that the work of civilian external investigatory oversight bodies constitutes an essential—albeit untapped—resource for constitutional articulation. Without the promise of regular decisional law to promulgate constitutional norms and place officers on notice of constitutional infirmities in policing practices, grants of qualified immunity may become increasingly common and constitutional rights may stagnate. By engaging in fact-finding, legal research, objective evaluation of compliance with internal regulations, and, sometimes, policy review, civilian external investigatory oversight bodies mirror the work of courts and compliance agencies and serve a function similar to the internal policies and regulations cited by the federal courts. By harnessing the existing work of these bodies, then, it may be possible to counteract the stasis threatened by *Pearson* discretion, while remaining consistent with the notice, fairness, and culpability objectives of qualified immunity doctrine. It is to this work—and the distinctive features of the CCRB, in particular—that this Note now turns.

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168. *See, e.g.*, Weigel v. Broad, 544 F.3d 1143, 1149–50, 1154–55 (10th Cir. 2008) (citing to officers' training materials, in addition to case law from the circuit, to conclude that positional asphyxia caused by officers' application of pressure to a prone, restrained suspect's torso violated his clearly established constitutional rights).

169. *See, e.g.*, Estate of Gaither *ex rel.* Gaither v. Dist. of Columbia, 833 F. Supp. 2d 110, 123 n.7 (D.D.C. 2011) (citing *Hope* to observe that "regulations and policies may, in appropriate circumstances, provide a reasonable officer with warning that his conduct might be unconstitutional" but distinguishing *Hope* as evincing a "far less attenuated" connection between the relevant regulations and the alleged constitutional violation than in the instant case); Womack v. Smith, No. 1:06-CV-2348, 2011 WL 819558, at *14–15 (M.D. Pa. Mar. 2, 2011) (relying on *Hope* as well as prison regulations to deny qualified immunity to prison officials who kept a prisoner in ambulatory restraints for approximately one month); Hershell Gill Consulting Eng'rs., Inc. v. Miami–Dade Cnty., 333 F. Supp. 2d 1305, 1310, 1337–38 (S.D. Fla. 2004) (drawing on internal studies, warnings from fellow government employees, and the apparent failure to comply with internal guidelines to deny qualified immunity to government officials who employed Minority and Women Business Enterprise programs to award race- and gender-conscious contracts without the requisite evidence of discrimination); Niziol v. Dist. Sch. Bd., 240 F. Supp. 2d 1194, 1213 (M.D. Fla. 2002) ("Case authority, rules and regulations and controlling legal directives may all be proffered to make [the qualified immunity] showing." (citing Hope v. Pelzer, 536 U.S. 730 (2002))).

170. *See supra* section I(B)(3).

C. *The CCRB as an Exemplar of Civilian External Investigatory Oversight*

1. Overview of the CCRB.—The CCRB is the largest civilian oversight agency in the nation,[171] with a staff of approximately 100 investigators.[172] It is one of three agencies charged with overseeing the NYPD, though it is the sole external oversight body—the other two agencies, the Internal Affairs Bureau (IAB) and the Office of the Chief of Department (OCD), are arms of the NYPD.[173] The NYPD is by far the largest municipal police force in the nation—with approximately 34,500 officers,[174] it is nearly three times the size of the second-largest department, the 13,350-strong Chicago Police Department[175]—and it currently commands a budget of $4.6 billion.[176] By virtue of size alone, the NYPD and CCRB merit consideration in any discussion of police reform.

The CCRB's enabling legislation, codified at Section 440 of the New York City Charter, empowers the agency to "receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department."[177] The Charter circumscribes the agency's jurisdiction to complaints "that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability."[178] Using the first letter of each broad category of misconduct, the agency has developed an acronym for its jurisdiction: FADO (force, abuse of authority, discourtesy, and offensive

171. *History*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD (2014), http://www.nyc.gov/html/ccrb/html/about/history.shtml.

172. *See* 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134, at 11. The agency is currently authorized to employ 116 investigators, 2013 CCRB ANNUAL REPORT, *supra* note 32, at 2, down from an authorized headcount of roughly 150 investigators in 2007, *see* N.Y.C. CIVILIAN COMPLAINT REVIEW BD., JANUARY–DECEMBER 2006 REPORT 15–16 (2007) [hereinafter 2006 CCRB ANNUAL REPORT], *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbann2006.pdf.

173. U.S. COMM'N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY 51 (2000). The jurisdiction of the three agencies differs as well: The CCRB focuses on violations of departmental guidelines and constitutional standards, IAB investigates allegations of corruption and potentially criminal misconduct, and OCD addresses procedural missteps and personnel matters. *Id.* at 51–53.

174. *Frequently Asked Questions: Police Administration*, NYPD, http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml.

175. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 4 (2011), *available at* http://www.bjs.gov/content/pub/pdf/csllea08.pdf.

176. THE COUNCIL OF THE CITY OF N.Y., FIN. DIV., HEARING ON THE FISCAL YEAR 2014 EXECUTIVE BUDGET FOR THE POLICE DEPARTMENT 1–2 (2013), *available at* http://www.council.nyc.gov/downloads/pdf/budget/2014/execbudget/2police.pdf.

177. N.Y. CITY CHARTER § 440(c) (2010).

178. *Id.*

language).[179] These groupings are sufficiently expansive to embrace a wide array of misconduct, ranging from acts likely to see adjudication in parallel criminal or civil proceedings (e.g., fatal police-involved shootings or warrantless searches yielding incriminating evidence) to those resulting in only symbolic or *de minimis* harms (e.g., shoves, profane language, or street encounters of limited duration and intrusiveness).[180] Unsurprisingly, given the size of the NYPD and the scope of the CCRB's jurisdiction, the CCRB consistently receives and investigates a considerable number of complaints: Each year from 2008 to 2013, the CCRB received between 5,400 and 7,600 complaints within its jurisdiction, of which between 1,200 and 2,700 were subjected to full investigations.[181] The agency also has authority to refer to the NYPD "other misconduct" uncovered in the course of its investigations,[182] including officers' failure to prepare required reports, officers' falsification of statements or records, and officers' commission of "miscellaneous" misdeeds.[183]

2. The Investigations Division: Fact-Finding, Legal Research, and the Trial Court Paradigm.—Of the five units within the CCRB,[184] the unit most relevant to this Note is the Investigations Division. The Investigations Division is comprised of several teams of twelve to twenty civilian investigators.[185] Each investigator is tasked with managing her own docket of complaints, and for each complaint—which typically comprises a discrete incident involving one or more FADO allegations—the investigator must conduct a factual investigation encompassing sworn interviews with the involved parties, collection of pertinent records, and composition of a closing report detailing the investigator's findings of fact and law.[186] In

179. 2012 CCRB ANNUAL REPORT, *supra* note 32, at 5.

180. *See, e.g.*, 2011 CCRB ANNUAL REPORT, *supra* note 32, at 20–21 (profiling several CCRB cases).

181. *See* 2013 CCRB ANNUAL REPORT, *supra* note 32, at 3, 12; 2012 CCRB ANNUAL REPORT, *supra* note 32, at 2, 11; 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134, at 6, 10.

182. N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 38-a, § 1-44 (2013).

183. 2013 CCRB ANNUAL REPORT, *supra* note 32, at 14–15.

184. *See* 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134, at 2. The other four units are the Policy and Strategic Initiatives Division, the Administrative Prosecution Unit, the Administration Division, and the Mediation Unit. *Id.* at 2–3.

185. *See* 2013 CCRB ANNUAL REPORT, *supra* note 32, at 26 (listing the current managers of the agency's six investigative teams); N.Y.C. CIVILIAN COMPLAINT REVIEW BD., 2010 ANNUAL REPORT 25 (2011) [hereinafter 2010 CCRB ANNUAL REPORT], *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbann2010.pdf (indicating that there were five investigative teams as of December 31, 2010); *supra* note 172 (placing the agency's authorized headcount at 100–150 investigators).

186. 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134; *cf.* N.Y. CITY CHARTER § 440(c) (2010) ("The board shall have the power to receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department . . . . No finding or recommendation shall be based solely upon an *unsworn* complaint or statement . . . ." (emphasis added)).

2011, the most recent year for which interview data is available, investigators obtained sworn statements from approximately 6,000 officers and 5,000 civilians.[187] Each team has three supervisors who review complaints at several critical stages of investigation—most notably at the time a complaint is received and categorized as FADO or non-FADO and at the point immediately preceding submission to the agency's Board for final approval.[188] At these decisive points, supervisory staff may bring the agency's authority to bear on police conduct that at least arguably falls within the FADO framework. For example, by treating a police encounter as a potential abuse of authority, the agency labels the incident a Fourth Amendment event; and by subjecting the incident to a full investigation and submitting a finding to the board for approval, the agency behaves much like a prosecutor electing to file criminal charges or a trial court recognizing a cause of action and allowing a lawsuit to proceed.

Moreover, the actual conduct of CCRB investigations resembles judicial proceedings in a number of ways. First, the agency epitomizes the criminal trial model of oversight described above.[189] Investigations focus on the adjudication of individual acts of alleged misconduct, requiring in-depth fact-finding and adherence to a number of procedural protections for officers.[190] The agency is empowered to compel production of documents and witnesses,[191] and the Police Department is subject to a statutory duty to cooperate with CCRB investigations.[192] At the same time, interviews with police officers are closely regulated, requiring, *inter alia*, the pre-testimonial recitation of an officer's rights to notice, presence of counsel, and the privilege against compelled self-incrimination.[193] Second, case closing reports are designed to approximate judicial opinions. The reports have individual sections dedicated to summaries of testimony and evidence, identification of subject officers, findings of fact (i.e., reconciling discrepant evidence), application of governing legal standards, and

187. Daniel D. Chu, Chair, Civilian Complaint Review Bd., Testimony Before the Public Safety Committee of the New York City Council 1–2 (Mar. 15, 2012), *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/budget_testimony20120315.pdf.

188. N.Y.C. CIVILIAN COMPLAINT REVIEW BD., JANUARY-DECEMBER 2002 STATUS REPORT 4–5 (2003) [hereinafter 2002 CCRB ANNUAL REPORT], *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbann2002.pdf.

189. *See supra* notes 132–34 and accompanying text.

190. *See, e.g.*, N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 38-a, § 1-24 (2013) (setting forth rules for the conduct of officer interviews); *supra* note 134.

191. *See* N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 38-a, § 1-23 (conferring subpoena power on the board); N.Y. CITY CHARTER § 440(c)(3) (2010) (authorizing the board to "compel the attendance of witnesses and require the production of such records and other materials as are necessary for the investigation of complaints").

192. N.Y. CITY CHARTER § 440(d)(1) (2010).

193. N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 38-a, § 1-24.

recommended dispositions for each allegation.[194] Significantly, these legal standards are derived from NYPD Patrol Guide procedures, administrative trial opinions, and New York state and federal case law.[195] Third, and related, is the evidentiary standard to which investigative findings are subject—preponderance of the evidence,[196] the same standard as that applied in civil lawsuits. Notably, there is both anecdotal and circumstantial evidence that the agency in practice applies a stricter evidentiary standard—one closer to clear and convincing evidence.[197] Lastly, as is explained in greater depth below, investigative findings are subject to review and approval by a neutral arbiter: The board.

3. The Board: Complaint Adjudication, Policy Review, and the Appellate Court and Compliance Agency Paradigms.—The board occupies a unique space in the CCRB, with functions analogous to both an appellate court and a compliance agency. Although the board technically oversees the entire agency, its primary responsibility is to review closed cases and make the ultimate determination, based on the record and report compiled by the investigator, of whether misconduct occurred—and if so, what disciplinary measures are warranted.[198] The board consists of thirteen members who "reflect the diversity of the city's population": five members are designated by the mayor, five are designated by the city council (one for each of the five boroughs of New York City), and three are designated by the police commissioner.[199] The board meets in panels of three, comprising one representative of each designee group, to review closed cases and vote on the final disposition of each allegation.[200] The board recognizes three findings "on the merits" (substantiated, exonerated, and unfounded) and three "other" findings (unsubstantiated, officer(s) unidentified, and

194. *See* 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134 (describing, in broad strokes, the contents of case closing reports).

195. *See id.* (indicating that closing reports present "relevant case law and police department regulations"); 2002 CCRB ANNUAL REPORT, *supra* note 188, at 34–35 (describing the administrative case law, utilized by CCRB investigators, governing an officer's obligation to provide her name and/or shield number upon request); *cf.* Armacost, *supra* note 118, at 534 ("The legal standards that courts in civil and criminal cases employ . . . almost entirely define police norms about the use of force. This is evidenced by police departments' written policies governing uses of force, which virtually track word-for-word the judicial rules that govern legal liability.").

196. N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 38-a, § 1-33(b).

197. ROBERT A. PERRY, N.Y. CIVIL LIBERTIES UNION, MISSION FAILURE: CIVILIAN REVIEW OF POLICING IN NEW YORK CITY 1994–2006, at 32, 38 (2007).

198. *See* 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134, at 2–3 (clarifying the structure of the CCRB and the activities of the board). As the authority to impose discipline on police officers is vested exclusively in the police commissioner, the board may only make recommendations as to discipline. *Id.* at 3–4.

199. *Id.* at 3.

200. *Id.* at 4.

miscellaneous).[201] A finding on the merits "reflect[s] the board's determination on whether or not an officer's actions are misconduct," while other findings "reflect the board's decision that there is not enough evidence to determine whether or not what the officer did was wrong."[202] A panel can close a case by majority vote,[203] refer the case to the full board for discussion, or return the case to the Investigations Division for further investigation.[204] In addition, the board retains discretion to change the disposition of an allegation from the investigative staff's original recommendation.[205] Accordingly, the board's operations resemble those of an appellate court in several noteworthy respects: The board enjoys the power to affirm or reverse investigative findings, subject a case to en banc review, and remand a matter for further factual discovery.

If the board substantiates an allegation, indicating that it has found "sufficient credible evidence to believe that the subject officer committed the act charged and thereby engaged in misconduct," it forwards the case to the police department with a disciplinary recommendation; all other findings, whether or not on the merits, subject the allegations in question to administrative closure by the agency.[206] Significantly, the board has instructed the Investigations Division to conduct an analysis modeled on the *Harlow* qualified immunity test when seeking to substantiate an allegation: Officers may not be sanctioned for misconduct "when they act in good faith and their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[207] Responding to the critical comments of Police Commissioner Ray Kelly on the draft of the CCRB's 2007 Annual Report, then-Chair Franklin Stone wrote:

> Although you state that "good faith by the officer" is "rarely credited in his or her favor," the CCRB does consider an officer's good faith in evaluating whether misconduct occurred. Good faith is relevant, . . . except when an officer "obviously violates clearly established law."
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> . . . .

201. *Id.*

202. *Id.*

203. *Id.*

204. N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 38-a, § 1-32 (2013).

205. *Cf.* 2011 CCRB ANNUAL REPORT, *supra* note 32, at 11 (describing the manner in which the board "makes findings on the specific misconduct allegations[,] . . . assess[ing] individually the evidence and witness statements pertaining to each allegation").

206. 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134.

207. N.Y.C. CIVILIAN COMPLAINT REVIEW BD., JANUARY–DECEMBER 2007 REPORT 24 (2008) [hereinafter 2007 CCRB ANNUAL REPORT] (quoting DiPalma v. Phelan, 578 N.Y.S.2d 948, 950 (App. Div. 1992) (Doerr, J., dissenting in part) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)), *aff'd*, 609 N.E.2d 131 (N.Y. 1992)), *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbann2007_A.pdf.

> We agree that there are contours to search and seizure law that would stump judges, let alone police officers. However, the CCRB does take the "totality of the circumstances" into account and does not substantiate claims which "do not violate clearly established statutory or constitutional rights of which a reasonable person would have known[.]" . . . We substantiate only those cases in which a preponderance of the evidence shows that a police officer engaged in conduct that he or she knew or should have known was improper.[208]

In practice, the CCRB treats some broad legal standards as sufficiently clearly established as to charge officers with at least constructive knowledge of their mandates, effectively foreclosing a good-faith defense. For instance, because "[m]ost street stop encounters in New York City are governed by the well-articulated findings of the case of *People v.* [*De Bour*],[209] . . . officers are charged with knowing and understanding [*De Bour*]."[210] Given that officers are "instructed in the key points of [*De Bour*]," issued a printed copy of "the important principles of that case on their memobook flypage," and provided with "regularly issue[d] legal memos [from the NYPD Legal Bureau] on updates to [*De Bour*] and its progeny," the board views violations of *De Bour* as misconduct "regardless of [an officer's] intentions."[211]

Once a substantiated case arrives at the police department, the police commissioner has exclusive authority to assess discipline.[212] The commissioner can mandate "Instructions" (retraining of the subject officer), "Command Discipline" (a punishment imposed by the subject's commanding officer, up to a loss of ten vacation days), or "Charges and Specifications" (the filing of formal charges in anticipation of an administrative trial at the Department).[213] As is discussed in more detail below, the department conducted its own trials, with extremely limited CCRB involvement, until 2007.[214] Even after an administrative trial, the commissioner reserves the right to make new findings of fact and law—or simply to decline to impose punishment[215]—subject only to the requirement

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208. Letter from Franklin H. Stone, Chair, N.Y.C. Civilian Complaint Review Bd., to Raymond W. Kelly, Police Comm'r, N.Y.C. Police Dep't (June 16, 2008), *available at* http://home2.nyc.gov/html/ccrb/pdf/StoneLettertoKelly.pdf.

209. 352 N.E.2d 562 (N.Y. 1976). *De Bour* created a four-tiered framework for analyzing police encounters. *Id.* at 571–72.

210. 2007 CCRB ANNUAL REPORT, *supra* note 207.

211. *Id.*

212. 2011 CCRB ANNUAL REPORT, *supra* note 32, at 17.

213. *APU and Police Discipline*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD (2014), http://www.nyc.gov/html/ccrb/html/police/police.shtml.

214. *See infra* notes 229–33 and accompanying text.

215. N.Y.C. CIVILIAN COMPLAINT REVIEW BD., JANUARY–DECEMBER 2001 STATUS REPORT 11 (2002) [hereinafter 2001 CCRB ANNUAL REPORT], *available at* http://www

that he commit his findings to writing.[216] In all cases, substantiated allegations remain on an officer's record, though officers have the right to appeal adverse disciplinary decisions in state court.[217] While administrative trial opinions are not publicly accessible, in 2012 the New York Civil Liberties Union successfully brought suit in New York County Supreme Court to compel release of a limited number of opinions.[218]

The existence of this parallel adjudicative system may complicate the appellate court analogy, but it strengthens the CCRB's resemblance to a compliance agency: Just as the U.S. Department of Justice's report in *Hope* placed the Alabama Department of Corrections on notice of the unconstitutionality of its practices through a nonbinding recommendation independent of the ADOC's internal disciplinary system,[219] the CCRB's findings can provide the NYPD with notice of constitutional violations in policing, regardless of the Department's ultimate disciplinary decision.

In a further parallel to a compliance agency, the board also has the power to make nonbinding policy recommendations to the police commissioner.[220] Utilizing the data compiled in CCRB investigations, the board has reported on, *inter alia*, deficient training of officers assigned to patrol public housing developments, officers' failure to conform to appropriate legal standards in authorizing and conducting strip searches, and officers' refusal to provide their names and shield numbers to civilians upon request.[221] In many of these cases, the NYPD has adopted the CCRB's recommendations, either through Patrol Guide revisions or retraining of officers.[222]

.nyc.gov/html/ccrb/downloads/pdf/ccrbann2001.pdf; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 173, at 62.

216. 2001 CCRB ANNUAL REPORT, *supra* note 215.

217. *Id.*; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 173, at 62; *see also id.* at 62 n.94 ("If the subject officer disagrees with the commissioner's disciplinary decision, he may institute an Article 78 proceeding (a review of administrative proceedings) in New York State Supreme Court to have that decision ruled invalid.").

218. Decision and Order at 30–32, *In re* N.Y. Civil Liberties Union v. N.Y.C. Police Dep't, No. 102436/12 (N.Y. Sup. Ct. Oct. 9, 2012). The NYCLU requested the release of *all* disciplinary trial opinions, seeking "not the personnel file or any personal identification information of any officer, but rather the reasoning process of the Administrative Law judges who handle complaints against police officers." *Id.* at 31. Although the court recognized the public interest in this information, citing Justice Brandeis's statement that "[s]unlight is said to be the best of disinfectants," it found the request "exceedingly broad" and correspondingly ordered the Department "to disclose five decisions, edited to protect the officer or officers . . . involved." *Id.*

219. *See supra* notes 148–53 and accompanying text.

220. *Policy Recommendations*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD (2014), http://www.nyc.gov/html/ccrb/html/news/policy.shtml.

221. *See id.*

222. *See e.g.*, Letter from Hector Gonzales, Chair, and Florence L. Finkle, Exec. Dir., N.Y.C. Civilian Complaint Review Bd., to Raymond W. Kelly, Police Comm'r, N.Y.C. Police Dep't (May 12, 2004), *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/stripsearchletter.pdf (describing deficiencies in the Department's strip-search policies and highlighting the

4. The CCRB Staff: Legal Training and Orientation Toward Trial.— Consistent with the CCRB's various legal and quasi-legal functions, the agency has both a staff replete with attorneys and an operational orientation toward legal practice. Although legal experience is not a prerequisite for most CCRB positions—for example, prospective investigators need only a Bachelor's degree[223]—it is hardly surprising, in light of the strong legal bent of the agency's work, that the agency has often drawn attorneys to prominent roles. Attorneys have dominated the board in recent years,[224] and the Investigations Division has historically employed several attorneys in leadership positions. Although the current Deputy Executive Director for Investigations, who heads the division, is a career investigator,[225] his assistant—who also acts as Director of Training—is a former prosecutor.[226] Additionally, each of the three previous Deputy Executive Directors for

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Department's response); Press Release, N.Y.C. Civilian Complaint Review Bd., Based on CCRB Recommendation, NYPD Retrains Officers Who Patrol NYCHA Buildings (Oct. 27, 2010), *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/Police_Retraining_10_27_2010.pdf (explaining changes to the Department's trespass-enforcement policies in public housing developments); *Policy Recommendations*, *supra* note 220 (providing links to CCRB policy recommendations and corresponding NYPD reforms, including, *inter alia*, the department's responses to CCRB recommendations concerning officer-self-identification and search-warrant-execution procedures).

223. *Civilian Complaint Review Bd: Job Posting Notice—Investigator*, NYC.GOV, http://www1.nyc.gov/jobs/index.page (enter "CCRB" in the "Search for Open NYC Jobs" search box; then follow "Investigator" hyperlink).

224. The current board, with one vacancy, is made up of seven attorneys and five non-attorneys. *The Board*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD (2014), http://www.nyc.gov/html/ccrb/html/about/board.shtml (showing one vacancy at the time of printing). Of the non-attorneys, two are police commissioner designees, one is a mayoral designee, and two are city council designees. *Id.* In 2013, the board comprised eight attorneys and four non-attorneys, with one vacancy. *See* 2013 CCRB ANNUAL REPORT, *supra* note 32, at 22–25. In 2012, the board comprised seven attorneys and four non-attorneys, with two vacancies. *See* 2012 CCRB ANNUAL REPORT, *supra* note 32, at 20–23. In 2011, the board comprised eight attorneys and three non-attorneys, with two vacancies. *See* 2011 CCRB ANNUAL REPORT, *supra* note 32, at 22–25. In 2010, the board comprised nine attorneys and three non-attorneys, with one vacancy. *See* 2010 CCRB ANNUAL REPORT, *supra* note 185, at 21–24. In 2009, the most recent year during which the board was fully staffed, the board comprised ten attorneys and three non-attorneys. *See* N.Y.C. CIVILIAN COMPLAINT REVIEW BD., JANUARY–DECEMBER 2009 STATUS REPORT 2–6 (2010) [hereinafter 2009 CCRB ANNUAL REPORT], *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbann2009.pdf.

225. *See* 2013 CCRB ANNUAL REPORT, *supra* note 32, at 26 (identifying Denis McCormick as current Deputy Executive Director for Investigations); N.Y.C. CIVILIAN COMPLAINT REVIEW BD., PUBLIC MEETING OF THE CCRB: AUGUST 8, 2012, at 4–5 (2012), *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/pubmeeting_20120808.pdf (describing McCormick's education and his fourteen-year tenure at the CCRB).

226. *See* 2013 CCRB ANNUAL REPORT, *supra* note 32, at 26 (identifying Roger Smith, a former Assistant District Attorney, as current Assistant Deputy Executive Director for Investigations and Director of Training); *Personal Notes on Lawyers*, N.Y. L.J., Sept. 18, 1998, at 30 (announcing Smith's appointment as an assistant district attorney in the New York County District Attorney's Office). Smith is currently accompanied by two additional Assistant Deputy Executive Directors for Investigations, both of whom are also attorneys. 2013 CCRB ANNUAL REPORT, *supra* note 32, at 26.

Investigations were former prosecutors[227] or held similar legal positions.[228] Further, in 2007, the CCRB hired four attorneys to assist the Investigations Division by "review[ing] legal issues in cases"[229] and to lead a pilot prosecution program under which CCRB attorneys would "second seat" NYPD prosecutors in administrative trials at the police department.[230] The board heralded this reform as strengthening prosecutions[231] and orienting the agency's investigative work toward success at trial.[232] In April 2012, the CCRB and the NYPD drafted a Memorandum of Understanding authorizing CCRB attorneys to prosecute *all* substantiated cases destined for administrative trials, thereby replacing the pilot program with a permanent Administrative Prosecution Unit.[233] As for investigative staff, investigators receive comprehensive training, both at the CCRB and NYPD, on the Patrol Guide and legal principles and are supervised by staff with relevant legal experience.[234]

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227. *See* 2011 CCRB ANNUAL REPORT, *supra* note 32, at 26 (identifying Laura Edidin as then-Deputy Executive Director for Investigations); Al Baker, *Vow to Fight Police Misconduct Faces Skepticism*, N.Y. TIMES, Jan. 12, 2012, http://www.nytimes.com/2012/01/13/nyregion/bloombergs-pledge-to-fight-police-misconduct-faces-skepticism.html (describing Edidin as a former Assistant United States attorney).

228. Meera Joshi, the executive in charge of the Investigations Division in 2010 and 2009, was a former Inspector General in the N.Y.C. Department of Investigation. *See* 2009 CCRB ANNUAL REPORT, *supra* note 224, at 7 (identifying Joshi as then-First Deputy Executive Director); 2010 CCRB ANNUAL REPORT, *supra* note 185 (same); Press Release, N.Y.C. Dep't of Investigation, DOI Arrests Former Employee of the City Department of Correction for Padding Her Salary by More Than $8,000 During a 13-Month Period (Sept. 25, 2007), *available at* http://www.nyc.gov/html/doi/downloads/pdf/pr67wellington_9252007.pdf (describing Joshi as an Inspector General in the N.Y.C. Department of Investigation). Abigail Margulies, a former Assistant District Attorney, served as Deputy Executive Director of Investigations in 2009. *See* People's Response to Defendant's Motion to Set Aside Verdict at 1, People v. McNair, No. 5967/2002 (N.Y. Sup. Ct. Oct. 23, 2003), 2003 WL 25744127 (identifying Margulies as a New York County Assistant District Attorney then assigned to the Office of the Special Narcotics Prosecutor for the City of New York); N.Y.C. CIVILIAN COMPLAINT REVIEW BD., JANUARY–DECEMBER 2008 STATUS REPORT, 7 (2009), *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbann2008.pdf (naming Margulies as then-Deputy Executive Director for Investigations).

229. 2007 CCRB ANNUAL REPORT, *supra* note 207, at 11.

230. Press Release, N.Y.C. Civilian Complaint Review Bd., The CCRB and the NYPD Announce Pilot Prosecution Project (Sept. 10, 2008), *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/091008_pilot_prosecution_program.pdf.

231. *See* 2011 CCRB ANNUAL REPORT, *supra* note 32, at 19 ("[T]he CCRB's attorneys have provided the Police Department's judges . . . with important insights into the nature of CCRB investigations, thereby strengthening prosecutions.").

232. *See id.* (remarking that not only do "[t]he agency's attorneys now review investigations resulting in substantiated allegations with an eye towards what is needed to prevail at trial" but they also "spot and resolve potential obstacles to prosecution early on in an investigation and . . . anticipate what defenses will be raised at trial so that investigators can collect necessary rebuttal evidence before closing the investigation").

233. 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134, at 15.

234. *See Frequently Asked Questions*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD (2014), http://www.nyc.gov/html/ccrb/html/faq/faq.shtml.

5. Conclusion.—In sum, the CCRB has many of the characteristics of judicial bodies and compliance agencies—in structure as well as operations—and it serves an important function in generating constitutional norms in New York. Its compilation and analysis of Fourth Amendment claims is particularly valuable in light of the *Anderson* Court's call for fact-specific guidance in this context.[235] Nevertheless, the agency's work is substantially divorced from local civil and criminal processes at present: Neither lawsuits[236] nor suppressions of evidence[237] trigger CCRB investigations, and CCRB case files must be requested through New York's Freedom of Information Law for use in civil or criminal proceedings.[238] In this light, the CCRB is inhibited from reaching its full potential as a source of constitutional articulation after *Pearson*. While the agency has a number of unique features, its fact-finding structure and legal orientation—coupled with the prominence of the department it oversees—make it a useful model for the proposal outlined in this Note.

III. Directing Civilian Oversight Findings to Constitutional Development

Having demonstrated that civilian external investigatory oversight bodies like the CCRB are engaged in work resembling that of both judicial bodies and compliance agencies, and having established that the current state of qualified immunity doctrine not only permits the use of nonjudicial statements of law in the qualified immunity analysis but impliedly demands it as a practical matter for continued constitutional—especially Fourth Amendment—norm generation, this Note now proceeds to outline a proposal to imbue oversight findings with the authority they deserve. Recalling that qualified immunity doctrine is rooted in considerations of notice, fairness, and culpability,[239] the proposal rests on the premise that findings of external oversight bodies serve the same purpose—and bear many of the same characteristics—as the sources of law cited by the Supreme Court and the lower federal courts in qualified immunity rulings.

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235. *See supra* note 26 and accompanying text.

236. Schwartz, *supra* note 122.

237. Clarke, *supra* note 2, at 23.

238. *Cf.* N.Y. CIV. RIGHTS LAW § 50-a(1) (McKinney 2012) ("All personnel records . . . under the control of any police agency or department of the state or any political subdivision thereof . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer . . . except as may be mandated by lawful court order."); N.Y. PUB. OFF. LAW § 87(2)(a) (McKinney 2012) ("Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that . . . are specifically exempted from disclosure by state or federal statute.").

239. *See supra* notes 5–11, 65–66 and accompanying text.

A. Contours of the Proposal

First and foremost, the findings of oversight bodies should be entitled to at least the same weight in the qualified immunity analysis as internal police regulations and advisory reports by external compliance agencies, and possibly as much weight as regional appellate court opinions. Acknowledging that the weight accorded to oversight findings may be dependent on the existence of other legal authority, this proposal sets a baseline that reflects courts' present use of nonjudicial statements of the law—that is, as relevant to establish notice and culpability but not dispositive[240]—while reserving space for the uniquely court-like work of oversight bodies to play a more prominent role in the analysis. Indeed, this proposal places great emphasis on those features of oversight agencies that mirror the characteristics of trial and appellate courts: An adversarial process involving attorneys, subpoena power, sworn testimony, procedural safeguards for testifying officers, extensive factual discovery, multiple levels of impartial merits review, and a final arbiter with power to affirm or reverse findings or remand a case for further investigation.[241] Of course, this proposal also recognizes that police oversight bodies often interpret *local* law,[242] and while the state law of the police must conform to constitutional minimums, the findings of, say, the CCRB may not serve the same notice function outside of New York; for this reason, the upper bound of authority is a "regional" appellate court—a state court of appeals or a federal court of appeals applying the law of the oversight body's jurisdiction.

To concretize this continuum of authority, it is helpful to consider several different scenarios that a court might face when considering a claim of qualified immunity: First, where binding case law supports the existence of the right asserted by the plaintiff, an oversight finding can serve as additional evidence of notice or culpability, similar to the ATF directive in *Groh*[243] and the ADOC regulation and DOJ report in *Hope*.[244] Second, where binding case law is conflicting, an oversight finding can serve as a tiebreaker—occupying a space somewhere between an internal policy statement and a persuasive judicial opinion.[245] Third, where no binding case law exists on point and persuasive case law is either supportive or conflicting, an oversight finding can serve as a tiebreaker with a thumb on the scale in favor of recognizing the right in question—situating the finding closer to a binding judicial opinion. In these cases, marked by conflicting

240. *See supra* subpart II(B).

241. *See supra* sections II(C)(2)–(3).

242. *See supra* note 195 and accompanying text.

243. *See supra* notes 157–60 and accompanying text.

244. *See supra* notes 148–53 and accompanying text.

245. This category can be further subdivided to include instances where persuasive case law is supportive, conflicting, or opposed, but considering that oversight findings often reflect the state of binding case law, persuasive case law may be deprioritized here for the sake of simplicity.

or silent binding case law, the investigative and adjudicative processes of civilian oversight assume new significance: Far from simply announcing a general rule of conduct, like the regulations in *Groh* and *Hope*, an oversight finding reflects the result of an adversarial process focused on the resolution of a narrow factual or legal issue. Indeed, there is a reasonable basis to conclude that an officer whose conduct contravenes the specific standards enunciated in an oversight investigation is more culpable in the relevant sense (i.e., had more notice of the impropriety of her actions) than an officer who has simply violated departmental regulations, which are necessarily painted in broad strokes. Viewed in this light, the difference between a policy directive (e.g., "a stop must be supported by reasonable suspicion") and an oversight finding (e.g., "a stop based solely on a suspect's presence in a high-crime area and change of direction at the sight of an officer is not supported by reasonable suspicion") is patent.

Second, to ensure the optimal execution of this proposal, oversight bodies should formalize and publicize all of their merits findings. This aspect of the proposal is critical to satisfy the notice, fairness, and culpability concerns embedded in the Supreme Court's qualified immunity jurisprudence.[246] In the case of the CCRB, then, the complaint disposition letters sent to complainants and officers at the conclusion of an investigation[247] should include at least a brief summary of the reasoning underlying the finding. Similarly, the agency statistics and reports released to the public[248] should incorporate brief factual summaries of all substantiated cases, edited as necessary to preserve confidentiality in conformity with state law.[249] This would not require an inordinate amount

246. Notably, in two recent class action lawsuits challenging the NYPD's stop-and-frisk and public-housing-trespass-enforcement practices, the Southern District of New York found that CCRB reports provided notice of unconstitutionality to the Department and the City of New York. *See* Floyd v. City of N.Y., No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *46 & n.418 (S.D.N.Y. Aug. 12, 2013) (declaring that "CCRB complaints regarding stop and frisk . . . provided a further source of ongoing notice to the NYPD" and citing an officer's trial testimony "regarding CCRB complaints about his stop activity"); Davis v. City of N.Y., No. 10 Civ. 0699(SAS), 2013 WL 1288176, at *15 (S.D.N.Y. Mar. 28, 2013) (observing that "the City receive[d] notice of the unconstitutionality of its practices through individual CCRB reports and [a] CCRB study"). Although Judge Scheindlin, who decided both cases, was removed from *Floyd* by the Second Circuit because "the appearance of impartiality had been compromised by certain statements made by [the judge] during proceedings in the district court and in media interviews," the Second Circuit expressed no view on the merits of the underlying action. Ligon v. City of N.Y., 736 F.3d 118, 121–22 (2d Cir. 2013) (per curiam). In fact, in its most recent ruling, the Second Circuit granted the City's motion to remand the case for the purpose of exploring settlement and vacated its earlier order staying proceedings in the district court. Ligon v. City of N.Y., Nos. 13–3123–cv, 13–3088–cv, 13–3461–cv, 2014 WL 667358, at *1–2 (2d Cir. Feb. 21, 2014) (per curiam).

247. 2011 CCRB ANNUAL REPORT, *supra* note 32, at 11.

248. *See News, Reports & Statistics*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD (2014), http://www.nyc.gov/html/ccrb/html/news/news.shtml (providing public access to information "about agency operations, complaint activity, case dispositions and police department discipline").

249. *See supra* note 238.

of additional work, as substantiated cases make up a small percentage of all cases investigated by the CCRB—between seven and fifteen percent every year, historically[250]—and closing reports already include abbreviated summaries of findings.[251]

B. Critiques of the Proposal

The proposal is susceptible to criticism from both extremes—on the one hand, arguments that it "goes too far" in granting significant weight to oversight findings, and on the other, arguments that it "does not go far enough" to meaningfully advance constitutional rights.

Those who contend that the proposal goes too far may emphasize that oversight staff are not required to have formal legal training, and while the investigative process may *resemble* an adversarial proceeding, it lacks certain critical characteristics of the latter (e.g., the right to presence of counsel for all parties, final review by a neutral arbiter capable of making independent findings of fact and law, and rules of evidence). They may also assert that the administrative, criminal, and civil systems are currently treated as separate rather than interconnected,[252] such that the proposal represents a material alteration of the hierarchy of legal authority. Finally, they may question whether a complaint is only substantiated *because* it represents a violation of clearly established law, and if so, whether this renders the proposal superfluous.

In contrast, those who maintain that the proposal does not go far enough may draw attention to the fact that oversight bodies have narrowly cabined jurisdiction[253] and rely in many cases on self-reporting by either

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250. *See, e.g.*, 2013 CCRB ANNUAL REPORT, *supra* note 32, at 12 (calculating the 2013 year-end complaint substantiation rate at 14.4%); 2012 CCRB ANNUAL REPORT, *supra* note 32, at 11 (placing the 2012 year-end complaint substantiation rate at 15%, seven percentage points higher than the 2011 year-end rate of 8%, and remarking that the substantiation rate between 2008 and 2010 ranged from 7% to 11%).

251. It warrants note that other civilian external investigatory oversight bodies, including the Chicago Independent Police Review Authority, the District of Columbia Office of Police Complaints, and the San Francisco Office of Citizen Complaints, already release reports of sustained cases that include the sorts of details envisioned by this proposal. *See, Complaint Examiner Decisions*, D.C. OFF. POL. COMPLAINTS, http://policecomplaints.dc.gov/page/complaint-examiner-decisions (providing links to the decisions of the city's legally trained complaint examiners, which take the form of written opinions that cite both case law and police regulations); *Reports & Statistics*, CITY & COUNTY S.F. OFF. CITIZEN COMPLAINTS, http://www.sfgov3.org/index.aspx?page=515 (providing links to monthly openness reports and quarterly and annual reports issued by the Office of Citizen Complaints, which include summaries of investigative findings); *Sustained Cases 2013*, CITY CHI. INDEP. POLICE REV. AUTHORITY, http://www.iprachicago.org/sustained_cases_2013.html (providing links to monthly reports of the Independent Police Review Authority's substantiated cases that include summaries of the underlying allegations).

252. *See supra* notes 236–38 and accompanying text.

253. *See supra* text accompanying note 178.

civilians or officers,[254] with the result that oversight bodies are only exposed to a fraction of the police misconduct occurring in the locality. Relatedly, they may point out that the parallel treatment of the administrative, criminal, and civil systems, combined with the limited means of redress provided by oversight investigations,[255] incentivizes rational complainants *not* to initiate and participate in oversight investigations.

C. *Responses to Critiques*

The primary response to those who contend that the proposal goes too far calls for recognition of the fact that both the Supreme Court and the lower federal courts have already endorsed the use, in the clearly-established-law inquiry, of nondecisional statements of law that may be far less scrutinized, particularized, and formalized than oversight findings.[256] Internal regulations, for instance, often take the form of vague standards promulgated by administrators, and reports of compliance agencies are not necessarily subjected to the same in-depth factual investigation and multitiered review as oversight findings. Moreover, as noted above, the proposal is calculated to satisfy the Court's paramount interest in assuring that only officers with fair notice—and, as a corollary, the requisite culpability—are subject to liability.

As to the criticism regarding the absence of legal training, it may reasonably be argued that formal legal training need not be an absolute prerequisite to effectively analyzing police misconduct. Indeed, the fact that the CCRB, like much of its cohort, requires no legal experience for new investigators supports this premise.[257] Furthermore, it merits note that not

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254. *See* 2012 CCRB ANNUAL REPORT, *supra* note 32, at i (noting that the board encourages "members of the community to file complaints . . . [and] all parties involved in a complaint to come forward and present evidence").

255. The sole result of a substantiated allegation is the potential imposition of discipline on the subject officer. *See supra* note 206 and accompanying text.

256. *See supra* subpart II(B).

257. *See supra* note 223 and accompanying text; *see also, e.g.*, *Investigator*, D.C. OFF. POLICE COMPLAINTS (Jan. 9, 2014), http://policecomplaints.dc.gov/release/investigator-0 (advertising an open investigator position and indicating, in an attached posting, that applicants need only "a four-year degree from an accredited college or university," relevant investigative experience, interpersonal and writing skills, and high ethical standards). The National Association for Civilian Oversight of Law Enforcement (NACOLE), a nonprofit organization dedicated to establishing and improving police oversight in the United States, recommends similar qualifications for oversight investigators. *See Qualification Standards for Oversight Agencies*, NAT'L ASS'N FOR CIVILIAN OVERSIGHT L. ENFORCEMENT (2013), http://nacole.org/resources/qualification-standards-for-oversight-agencies/ (recommending that investigators possess "[a] Bachelor of Arts/Science, an equivalent degree, or a combination of education and relevant experience" and listing, as preferred experience, "[t]hree (3) years experience conducting civil, criminal or factual investigations that involved gathering, analyzing and evaluating evidence,

only do oversight bodies routinely employ attorneys in key positions,[258] they also provide in-depth legal training to investigative staff[259] and subject investigative findings to careful legal scrutiny.[260]

Although the contention that oversight investigations lack certain features of formal judicial proceedings has merit, it is not fatal to this proposal for three principal reasons: First, the characteristics that oversight agencies *do* share with judicial bodies amply secure the rights of involved parties and ensure that findings are held to appropriate evidentiary standards.[261] Second, as explained above, courts have sanctioned the use of less formalized statements of law in the clearly-established-law analysis. Third, and relatedly, under this proposal, the weight accorded to oversight findings may vary with the availability of other sources of legal authority.

With regard to the final two critiques from this group, one focusing on the parallel structure of the different judicial systems and the other questioning the utility of the proposal, they may be met by equally forceful rebuttals. First, although the administrative, civil, and criminal law systems may currently operate in isolation, this only represents a default state of affairs and does not preclude future intercourse: Records of oversight bodies, for instance, may be admissible in court,[262] investigative findings may be released pursuant to court order,[263] and even administrative opinions

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conducting interviews with friendly and adverse witnesses and documenting information in written form").

258. *See supra* section II(C)(3); *see also, e.g.*, CITY & CNTY. OF S.F., OFFICE OF CITIZEN COMPLAINTS, 2012 ANNUAL REPORT 27–28 (2013), *available at* http://www.sfgov3.org/modules/showdocument.aspx?documentid=4516 (summarizing the operations of the agency's Legal Unit); GOV'T OF D.C., OFFICE OF POLICE COMPLAINTS, ANNUAL REPORT: FISCAL YEAR 2012, at 3–4 (2013), *available at* http://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/OPC%20Annual%20Report%20FY%202012.pdf (listing multiple attorneys on the oversight agency's staff).

259. *See supra* section II(C)(3); *see also, e.g.*, CITY & CNTY. OF S.F., *supra* note 258, at 3–4 (summarizing the legal and tactical training received by investigative staff in 2012); ILANA B.R. ROSENZWEIG, INDEP. POLICE REVIEW AUTH., ANNUAL REPORT 2010–2012, at 14–18 (2013), *available at* http://www.iprachicago.org/IPRA_AnnualReport2010-2012.pdf (describing the investigative training provided to agency staff, including education on shooting reconstruction, interview and interrogation techniques, and Fourth Amendment law).

260. *See supra* section II(C)(2); *see also, e.g.*, CITY & CNTY. OF S.F., *supra* note 258 (indicating that the agency's Legal Unit, comprising "one supervising trial attorney, one full-time trial attorney, one full-time attorney policy analyst, and one part-time attorney mediation coordinator," provides legal opinions and analysis, reviews investigative findings "for merit, form, and legality," and presents substantiated cases to the police department); GOV'T OF D.C., OFFICE OF POLICE COMPLAINTS, ANNUAL REPORT: FISCAL YEAR 2005, at 4, 6–7 (2006), *available at* http://policecomplaints.dc.gov/sites/default/files/dc/sites/police%20complaints/publication/attachments/Annual_Report_FY05_Final.pdf (stating that completed investigations are reviewed by a supervisor and the executive director of the agency, a former senior attorney in the Civil Rights Division of the U.S. Department of Justice).

261. *See supra* sections II(C)(2)–(3).

262. *E.g.*, Williams v. McCarthy, No. 05-Civ.-10230(SAS), 2007 WL 3125314, at *6 & nn. 38–40 (S.D.N.Y. Oct. 25, 2007) (discussing the role of civilian complaint records in the court).

263. *See supra* note 238 and accompanying text.

may soon see the light of day.[264] Second, although complaints do often involve clearly established law, they also regularly implicate truly novel factual scenarios.[265] In this light, a finding of misconduct can represent a step toward making the law clearly established when *Pearson* might allow avoidance.

With regard to the critiques from the opposite extreme—those not already addressed above—two remarks are in order: First, oversight investigations are only *one part* of a complex patchwork of police oversight, so comprehensive coverage of all extant misconduct is neither necessary for this proposal nor even possible. Second, by forging a connection between oversight and civil liability—and increasing the likelihood of recovery under § 1983—this proposal may actually *incentivize* participation in oversight investigations.

Conclusion

This Note is founded on a simple premise: The vindication of constitutional rights is a critical aspect of police regulation. By recognizing a federal cause of action against officers who violate the constitutional rights of civilians, and conferring a defeasible form of immunity on officer-defendants, the Supreme Court has indicated that individual constitutional rights deserve protection in the courts of the United States. Despite the Court's repeated affirmation of the importance of constitutional articulation, however, the process of elaborating constitutional rights through decisional law faces a grave challenge in the form of *Pearson* discretion. This Note seeks to use one of the existing tools of police regulation—civilian external investigatory oversight—to surmount this challenge, recognizing that the necessary legal foundations are already in place and the vital work on the ground is already in progress across the nation. One word of caution: Although the proposal advocated by this Note represents one response to the modern qualified immunity dilemma, and one uniquely responsive to the Court's Fourth Amendment demands, it addresses only one fragment of the law of the police. Police regulation, no less than constitutional articulation, requires a creative, multifaceted approach—one sensitive to the strengths and weaknesses of both existing and prospective regulatory tools.

—Ryan E. Meltzer

264. *See supra* note 218 and accompanying text. As indicated above, several oversight bodies already release administrative opinions and reports of investigative findings. *See supra* note 251.

265. *See supra* subparts II(A), II(C).

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