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For what avail the plough or sail
Or land or life, if freedom fail?
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This Volume of

New York University Annual Survey of American Law

is respectfully dedicated to

SALLY KATZEN

SALLY KATZEN

SALLY KATZEN

Professor Sally Katzen is a Professor of Practice and Distinguished Scholar in Residence at the New York University School of Law. She was born in Pittsburgh, Pennsylvania, and received her B.A. in Government, *magna cum laude*, from Smith College. She earned her J.D., *magna cum laude*, from the University of Michigan Law School, where she was the first woman to serve as editor-in-chief of the Michigan Law Review. After law school, she clerked for Judge J. Skelly Wright on the United States Court of Appeals for the District of Columbia Circuit.

Following her clerkship, Professor Katzen worked at Wilmer, Cutler & Pickering, becoming a partner on January 1, 1975. While at Wilmer, she served as chair of the American Bar Association's Section on Administrative Law and Regulatory Practice and as District of Columbia delegate to the ABA's House of Delegates. She also served as the president of the Federal Communications Bar Association and of the Women's Legal Defense Fund. In 1993, President Bill Clinton nominated Professor Katzen to serve as the Administrator of the Office of Information and Regulatory Affairs. She served in that role until 1998, after which she became the deputy assistant to the president for economic policy and deputy director of the National Economic Council. From 1999 to 2001, Professor Katzen served as the Office of Management and Budget's deputy director for management. During the Obama Administration, she was the head of the Agency Review Working Group, with responsibility for the Executive Office of the President and all government-wide agencies. Since then, Professor Katzen has taught at numerous law schools, including the University of Pennsylvania Carey Law School and her alma mater, the University of Michigan Law School. She joined New York University School of Law's faculty in 2011. Professor Katzen created the Legislative and Regulatory Process Clinic and teaches both introductory and advanced administrative law courses. She has been a member of the National Academy of Public Administration since 2007 and a member of the American Law Institute since 2016.

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TRIBUTE TO SALLY KATZEN

MAX S. MILLER

Good evening. Thank you, Dean McKenzie, for that introduction. And thank you to everyone for being here tonight. In particular, I want to thank everyone on Annual Survey for their contributions to the Journal this year. Events like tonight would not be possible without all of you.

For those who don't know me, my name is Max Miller, and I am the editor-in-chief of the NYU Annual Survey of American Law. On behalf of all of Annual Survey, welcome to this year's Dedication Ceremony, where we are more than honored to be dedicating our 81st volume to Professor Sally Katzen.

If you are unfamiliar with Annual Survey, our Journal was founded in the 1940s by NYU Law faculty members with the purpose of publishing practitioner-oriented scholarship. Specifically, we pay special attention to emerging legal trends, significant court decisions and legislation, and other practitioner-facing legal developments.

To further achieve the Journal's mission of engaging with those who have contributed to the development of American law in an outstanding manner, the Journal selects an individual each year who has done just that: advanced American law in a way few others have. These individuals include former and current judges and Supreme Court Justices, distinguished academics and thinkers, and other profoundly impactful practitioners. So, when we thought about to whom the Journal's forthcoming volume should be dedicated, Professor Katzen was an obvious decision, as few have contributed to American law as deeply and for as long as she has.

Professor Katzen's career of transforming the legal field began while she was at Michigan Law—from where she graduated *magna cum laude*. While at Michigan Law, she was the first woman to serve as editor-in-chief of the Michigan Law Review, doing so at a time when few women were even admitted to the nation's law schools. She then went on to clerk for Judge J. Skelly Wright of the U.S. Court of Appeals for the D.C. Circuit, beginning what would be a significantly influential career.

Professor Katzen continued to push American law forward after her clerkship, joining the ranks of one of the nation's premier law firms, Wilmer, Cutler & Pickering, now WilmerHale, where she eventually worked her way to partnership. As if doing so wasn't impressive

enough, she left the private sector to take on various roles within the federal government, ultimately serving as the Administrator for the Office of Information and Regulatory Affairs (OIRA) and the Deputy Director for Management within the Office of Management and Budget. Of particular importance, Professor Katzen occupied her position in OIRA during the White House's shift from the Reagan and Bush administrations to the Clinton administration, a time where it was unclear what role OIRA would play in future White House administrations. She defined OIRA's role. The measures she implemented during her tenure continue to govern executive oversight of administrative agencies to this day.

Professor Katzen has also helped cultivate many young legal minds, and she has done so in a way that directly aligns with Annual Survey's mission. Namely, she serves as a Professor of Practice and co-directs the Legislative and Regulatory Process Clinic here at NYU Law, all the while teaching both a fundamental doctrinal, Legislation and the Regulatory State, and a seminar, Advanced Administrative Law.

It is for all these reasons—and many more—that Annual Survey is honored to be here tonight to celebrate Professor Sally Katzen.

Dean McKenzie will be coming back on stage to introduce our first speaker, Administrator Revesz, who will be speaking in his individual capacity. Once again, thank you everyone for being here tonight, particularly our speakers. Welcome Professor Katzen: We are more than excited to be dedicating our 81st volume to you. Thank you.

TRIBUTE TO SALLY KATZEN

RICHARD REVESZ

I can't think of any individual who has had the kind of relationship with a federal agency that Sally Katzen has had with OIRA over more than three decades. She is both the George Washington and the den mother of the agency that I now have the honor to lead.

Some of you may be wondering: what is OIRA, and is being the George Washington of this agency actually significant? The acronym OIRA stands for the Office of Information and Regulatory Affairs, which is part of the White House Office of Management and Budget in the Executive Office of the President. When the media discusses OIRA, it almost always calls my agency "obscure." On good days, though, it calls us "obscure but important," and I'll explain why Sally deserves a great deal of credit for the good days.

OIRA reviews all significant executive agency proposed and final rules to ensure that they are supported by the best science and economics and that the benefits of the rules justify their costs. It also coordinates a centralized process that solicits the perspectives of policy and legal experts throughout the Executive Branch, including the Executive Office of the President. Through this work, OIRA seeks to ensure that agency rules are consistent with law, the President's priorities, and available evidence, and that the federal government does not work at cross-purposes.

OIRA's regulatory review role dates back to an Executive Order promulgated by President Reagan in 1981. At the time, both centralized review and benefit-cost analysis were viewed as important components of the Reagan Administration's anti-regulatory program. Therefore, it would not have been surprising if President Clinton had repealed the Reagan Executive Order and put an end to this experiment. Instead, he replaced it with a new Executive Order, Executive Order 12866, which kept both centralized review and the role of benefit-cost analysis in place, though with some important modifications.

Sally, who served as OIRA Administrator for the first five years of the Clinton administration, is widely regarded to be the drafter of Executive Order 12866. Sally's work on the Executive Order and her subsequent leadership of OIRA established a bipartisan consensus which recognized that centralized review helps ensure that agencies do not work at cross-purposes, and that when the government takes

a significant action, it should understand the consequences (both positive and negative) of what it is doing. Even in today's era of political back-and-forths, Sally's work has proved durable. The Clinton Executive Order has now been in effect for more than thirty years, through five presidential administrations.

And the establishment of OIRA as a durable institution was hardly Sally's only contribution to the Executive Office of the President. In the Carter Administration, she was the General Counsel and Deputy Director of the Council on Wage and Price Stability, which was a predecessor of OIRA; in the Clinton Administration, following her OIRA leadership, she was Deputy Director of the National Economic Council and Deputy Director for Management of the Office of Management and Budget; and she ran the Obama Administration's transition team for the Executive Office of the President, which includes OIRA. Through all this work across three presidential administrations and more than a quarter of a century, Sally became an enormously experienced, knowledgeable, and influential regulatory expert in the federal government, particularly with respect to the work of the Executive Office of the President.

In particular, Sally's deft work in her recasting of OIRA's role away from its anti-regulatory origins and into a durable institution that promotes rationality in regulatory actions is what makes her the George Washington of the agency. And that's wonderful for those of us who have followed in her footsteps. Because while it hasn't been possible for a very long time to have lunch with George Washington, it's definitely possible (and delightful) to have lunch (and breakfast and dinner, as well) with Sally. There's no better seminar on how to do the job with effectiveness, humility, and integrity.

Unlike George Washington, Sally did not retire (to a farm or elsewhere) and disengage from the institution that she had led. That brings me to the den mother side of Sally's connection to OIRA. Ever since she left OIRA, Sally has kept in close touch with numerous OIRA career officials and political appointees and has served as a mentor to many of them. She continues to attend holiday parties and employee retirement parties. At first glance, this might sound merely admirable. It's what all good former leaders should do, though not many do it. But what makes Sally's role unique is that none of OIRA's current employees—not a single one—worked at the agency when Sally served as Administrator. All her former staff have either retired or moved to other jobs. She is therefore the den mother of the agency, not just the mentor of her former employees. In this role, she shows that she cares deeply not only about the lofty

principles that guide the Executive Branch but also about the dedicated individuals who carry out its work.

Sally is the den mother in so many other ways. Executive Order 12866, Sally's brainchild, is the only Executive Order I know that celebrates its birthdays. I've already gone to its 25th and 30th birthday parties. Sally is at the center of these events, which are both celebratory and substantive. It's largely a result of Sally's personality and inclusiveness that these are bipartisan events that exhibit a strong sense of shared purpose and are attended by political leaders of different administrations.

I want to end by thanking Sally. I'm one of those OIRA employees whom she mentored. In my case, she started her mentorship well before I began my work at OIRA; I'll call this anticipatory den mother work. And I owe her an enormous debt of gratitude for my own scholarship. For example, my two co-authored books about OIRA resulted from an exchange I had with Sally at a conference about the effects of interest groups in the development of benefit-cost analysis. The encouragement of someone as distinguished as Sally convinced me that it was worth investing further effort in this work.

One of my proudest accomplishments as Dean of NYU Law School was persuading Sally (and Bob Bauer) to come to NYU and, among other things, run our D.C. clinic, which has now been in operation for more than a decade. This clinic provides a truly extraordinary experience for its students, launching many of them into careers by opening the doors of government agencies that would otherwise have been closed to recent law school graduates. In my current role, I am a beneficiary of that wonderful institution, which has placed two spectacularly talented students to work full-time in OIRA in each of the last two years.

Thank you, Sally, for all you have done over such a long time, to nurture both an institution and the individuals who carry out its work, myself included. While the George Washington and den mother labels might seem like an uneasy fit, you embody both perfectly!

TRIBUTE TO SALLY KATZEN

BOB BAUER

I was walking one day from my office to the elevator when Professor Sally Katzen ambushed me and within a matter of minutes—just minutes—she had drafted me to be Co-Director with her of NYU Law's Legislative and Regulatory Process Clinic. We would accept students on application for a semester's placement with government law offices in Congress or the Executive Branch, or on the legal staffs of NGOs, supplementing this practical experience with a weekly seminar and paper.

Sally may have asked if I was interested and willing; but this is not how I remember it. She expressed an expectation, and I complied with it. But she pulled this off with a compellingly presented case for the value of the project—and a clearcut unwillingness to take "no" for an answer. She brought this special gift for persuasion to our work together on behalf of our Clinic students, as when we arranged for their placements or secured them tickets for Supreme Court arguments.

This was how I came to be a close colleague and good friend of Sally's. And an admirer of what she stands for—what she represents—as a lawyer and legal educator. And I have seen what she means to the students we have taught together.

Begin with craft values—the art of lawyering. Sifting through fact and law, discarding what is unimportant while zeroing in on the essentials, anticipating where the law might be going rather than getting stuck in stale histories and old ways of framing and addressing hard legal problems. And when the end result of this work is advocacy, making the strongest case possible.

What a lawyer she is!

Let's move onto professional integrity and, on this score, there can be no conceivable question, reservation, objection, or qualification about Sally. She is clear in her views but respectful of those of others; clear in her expression but precise in her choice of words: never seeking to show off or pull the wool over anybody's eyes. Sally has served in high positions in government, and she has been in our nation's capital for a long time; and I can report from that corner of the world that, in this tense and polarized time, Sally is highly respected by Democrats and Republicans alike. No minor achievement. Sally has testified countless times as the well-recognized expert

on administrative law that she is—and, now out of government, she still receives requests for testimony, because she knows what she is talking about and, in the world of Capital Hill theatrics, she offers a refuge where substance and informed guidance may be blessedly rediscovered.

An excellent lawyer with a character to match: other lawyers of this caliber are found in Washington D.C. but not always in abundant supply, or in the right places at the right times.

Sally recognizes the special responsibility that lawyers in government play. I teach a course on government lawyering ethics that the Law School was kind enough to let me devise, entitled the Role of the Lawyer in Public Life. Sally has been such a lawyer, possessing the keenest sense of what is required of lawyers who serve the public. We know from bitter experience that some lawyers privileged to have these opportunities are bewitched by the prospects of political and personal advancement. They want to please the boss, score one for the home team, read about their achievements in the press. Sally is old school: she'll have none of that.

A story: a senior government official, a lawyer just appointed to a senior policy-making role, once asked Sally and me to have lunch with her in the West Wing. This official was seeking our advice, based on our own experiences in government, on how she should think about her new job. How to define success and bring it about? What are the pitfalls? Sally opened with this one-word counsel: "discretion." The government is a leaky, gossipy place: people trade on information or make a display of possessing it. Stay away from those people, don't let them recruit you into their schemes, Sally advised. Build trust in your discretion.

This was how Sally started—not with tips on how this official might plan to expand her portfolio, map out her moves in palace intrigues, build back-door alliances on the Hill, and attract notice in the press. Her emphasis in the first instance was: be a professional—attract notice, make a name for yourself, but for all the right reasons and in the right ways.

This is one of Sally's great strengths in the classroom: what she communicates to these students about what kind of lawyers they should aspire to be. They learn from her in the richest sense of the term: from her knowledge and experience, but also *from her*, from what they observe about her professional values.

As an educator, Sally has a knack for being absolutely clear with students about her standards. She is nothing if not plain-spoken. But, like any fine teacher, she uses the occasion to express confidence that—if they work hard enough, if they *care* enough—her students

can meet these expectations. Her message is: this is what needs to be done, this is how you go about doing it, and, yes, you will succeed at this task. Sally's line-by-line, paragraph-by-paragraph, comments on papers are something to behold. Because of Sally, our clinic doubles as a master class in legal writing.

And it is remarkable how our students stay in touch with us. They let us know how they are doing, show up at opening or closing events for Clinic semesters, long after these alumni have graduated and embarked on their careers. I like to think that this loyalty is a tribute to both of us, but I know better.

One more story: a number of former students asked whether we could all just get together and talk about what was on their minds. They had thoughts and questions about the direction of the country; they wanted to catch up with us and their colleagues about what they were up to, how things were going. So, Sally hosted the event at her home. We assembled all sorts of pastries and other treats. We talked for two hours. *Former* students. Sally presided.

Now speaking of treats: Sally is incorruptible, but she loves chocolate—for that matter, almost anything with sugar in it. So, if you are looking to soften Sally up for some line of argument, put aside for a moment the disciplines of the craft and start instead with confectionery sugar and cocoa. In a volume entitled *American Smooth*, published in 2004, the poet Rita Dove has written her own tribute to chocolate, in a poem by that name that acknowledges that for the taste of chocolate, "*any woman would gladly crumble to ruin.*"

I'm just saying.

I'm grateful to have been invited to give these remarks, because I so treasure working with Sally, so respect Sally, and am so glad she intercepted me years ago on my way to the third-floor elevator in Vanderbilt Hall, because it has made possible this wonderful professional experience and personal friendship. I hate to think about what I would have missed if I had taken the stairs.

TRIBUTE TO SALLY KATZEN

RACHEL ROTHSCHILD

I have been excitedly waiting for the opportunity to speak to you all about Sally tonight. I don't think you could find anyone more deserving of this award than she is. You have heard this evening about her extraordinary professional accomplishments and the indelible mark she has made on administrative law over the course of her career. But in addition to her achievements in government service and private practice, Sally will leave a lasting and significant legacy through the students that she taught at NYU. I hope I can do justice to the enormous role she has played in my life and those of so many others.

I had the incredible good fortune to learn from Sally when I attended NYU Law, first as a student in her legislation and regulation course and then as her teaching and research assistant during my final two years here. As anyone who has spent a bit of time with Sally will know, she has a fantastic sense of humor and doesn't take herself too seriously. So, in honor of her wonderful spirit, I will try to work a few laughs and some gentle ribbing into these remarks. But full disclosure—I've yet to make it through this speech without getting a bit choked up. And I know it's long, but I promise I've cut it down from its original form. Consider yourselves forewarned.

The very fact that Sally asked me to speak to you all about what she was like in the classroom should give you an indication of how important teaching is to her. She was, truly, one of the best professors I ever had the privilege to learn from—and given the many, many years I spent getting both a JD and PhD, that judgment should carry a bit of weight. One of the things that made Sally so special was that she came to teaching later in her career after thoroughly conquering the D.C. legal world. When I met her during my first year in law school, I had spent most of the past decade ensconced in the ivory tower, and I acutely felt my lack of real-world experience. After just a few classes with Sally, I was hanging on her every word. In addition to her mastery of the law, Sally regularly brought into the classroom stories from her work on the frontlines of regulatory policy. I nearly fell out of my chair when, after grilling a student about some confusing phrases in Executive Order 12866, Sally confessed to us that she, in fact, had drafted it. I soaked up her wealth of knowledge about government and her stories from the trenches, and

I know my classmates did too. I will always chuckle at Sally's depiction of agency officials receiving one of Congressman John Dingell's "Dingellgrams," and wonder about which Clinton-era regulation—she never did say—required the President to settle a difference of opinion between Sally and other members of the administration.

My phenomenal experience as Sally's student was not unique. Sally made a point of getting to know everyone in my ninety-person section and identifying the individual talents of my classmates. She remembered who among us had worked in Congress and could be called upon to discuss the messy process of legislative drafting. She knew who had scientific training and could reflect on the challenges of integrating technical expertise into the rulemaking process. She even let my friend with a Classics PhD show off his Latin whenever we came across an unpronounceable canon of statutory construction.

As I was drafting these remarks, I reached out to former NYU students to get their thoughts on her teaching, and the response from my fellow alums was overwhelming. Sally's ears would burn from the effusive praise sent my way. Her former students describe Sally as a deeply devoted professor, a warrior, and an inspiration. Over and over, they emphasized how lucky NYU Law students have been to learn from Sally.

When I became her teaching assistant, I saw firsthand the significant work and preparation that went into Sally's courses. Sally had pages of lecture notes for each class, which she would print out and place in three-ring binders to mark up on the Acela train to New York each week. The number of trees she sacrificed did, I confess, initially trouble this environmentalist. But now that I'm a professor, I find myself doing the very same thing. Sally taught me how to design and pace a class so that students not only come away with a thorough understanding of particular legal concepts, but also have some fun in the process. I am beyond grateful to have seen firsthand what it takes to create the magic that Sally did every single class, and it is something I try to replicate in my own courses at Michigan.

The past couple of years have not been an easy time to transition to law teaching. The country seems to be growing increasingly polarized, and the legal community is no exception to these trends. But if one were looking for a model for how professors can foster discussions on contentious subjects with poise and charm, Sally is it. While she made no secret of her own opinions, Sally took pains to make sure her students critically examined multiple perspectives and engaged those with opposing views. She taught with a textbook authored by more "conservative" administrative law scholars to provide a counterpoint to her lectures, and she encouraged us not to

shut down even in the face of those who might be hostile to our arguments. I watched Sally live this ethos in her own professional engagements as she attended events and conferences with an anti-administrative bent, where she would often jokingly refer to herself as the "skunk at the party." I so admired the way she made her points forcefully but cheerfully, always remaining respectful and committed to dialogue. At Michigan, I don't tend to have a lot of conservative-leaning students in my environmental law courses, but I've had a few. And one of my proudest moments as a professor thus far was when one of those students thanked me for my willingness to entertain different perspectives on the issues we discussed, even when he and I disagreed. I owe it to Sally for showing me how to create a classroom environment in which students feel respected and we can have difficult debates about some of the most important legal questions we face today.

All of this just touches the surface of what a treasure Sally has been to NYU Law. To better capture what made her such a wonderful professor and mentor, I want to share a few personal stories from working with her.

I first met Sally at a pivotal moment in my time at NYU. I found the transition from my PhD program to law school to be difficult (and that's putting it mildly). I began my studies here with a toddler in tow, and I was the only woman my year with a child. Juggling classes, readings, and study groups with daycare pickups and bedtime routines proved more challenging than I expected. When my first semester grades came out, I was despondent. Even though I had done just fine by law school standards, I had not performed up to the level that I wanted. I wasn't sure I could handle the workload. I wasn't sure I wanted to stay.

Sally, like many law professors who teach spring semester first-years, evidently had experience with the day that students receive their fall grades. It was one of our first course meetings, and she could tell by the looks on our faces—well, some of our faces!—what had just happened. Instead of diving into the material, she spent the first five minutes of class giving us a much-needed pep talk. I remember her saying not to let those grades define us or change our goals in the legal profession. She reminded us that exams were just four-hour snapshots of our capabilities. The atmosphere in the room palpably shifted after she spoke, and everyone seemed to depart class a bit lighter than when they had walked in the door. I have never told Sally this, but what she said that day gave me the push I needed to throw myself back into law school.

After the academic year ended, I didn't see Sally again until I bumped into her at a law school conference when classes started in September. Several students I knew had clustered around her to talk about how they were looking forward to taking Sally's advanced administrative law course. When I mentioned to the group how sad I was that I couldn't enroll because of a scheduling conflict, Sally offered to have me work as her research and teaching assistant so I could learn the material that way instead. I said yes on the spot, in utter disbelief at my luck in running into her that day and determined to make the most of the opportunity to work with her.

Over the next two years, Sally became one of my most trusted mentors and confidants. When she learned that I had been juggling law school with a small child, she started bringing a special treat for my son nearly every time she saw me. As some of you may know, Sally has quite a sweet tooth—she joked once that she rewarded herself for grading each final exam with a piece of chocolate. So, these were not some run-of-the-mill selections from the corner store, but the finest treats you can find in New York City. After our meetings, I would travel home to Brooklyn on the subway carrying decadent cupcakes, candy, and even some chocolate-covered matzo around Passover. My son eventually came to call Sally his "fairy godmother," and it meant so much to me that someone like her recognized, in this small way, that I was navigating law school with other responsibilities.

It isn't a coincidence that I began to excel in law school as I worked with Sally. Watching how she analyzed judicial opinions, assisting her with research, and helping her edit recent administrative law cases sharpened my legal skills. Whether over dinners at Washington Square restaurants or over the phone from miles away, Sally gave me the incredible gift of her time and guidance. I truly don't know how she did it, given all the demands on her. I do know that I would not be where I am today without Sally's mentorship.

Unfortunately, I had a few more hurdles to overcome during my last two years of law school, and Sally was by my side for all of them. She was the person I leaned on most when I lost two pregnancies during my second and third years and faced the prospect of not being able to have any more children. When I got pregnant for a third time, I was an anxious wreck. Sally checked in on me often and kept my spirits up as I made it through each critical milestone and prenatal test.

And then, several months later, the pandemic hit. In the early days of March just before the city shut down, I received a frantic call from Sally. She sounded awful and was obviously very sick. I felt absolute terror, fearing she had caught this novel virus. But Sally

reassured me that she would be alright, and quickly turned her attention to me. She was worried that I had caught whatever virus she had, since I had seen her only a few days before; she was worried about my baby. In what was certainly a frightening moment for her, Sally was more concerned about my well-being. Thankfully, we both made it through that period relatively unscathed, and I gave birth to a healthy baby boy shortly after I graduated. But I could not have managed those early pandemic months without her support, and her selflessness and concern for me are something I will never forget.

I don't get to see Sally nearly as much as I'd like, now that I live so far away, but I think of her every time I walk into my classroom at Michigan. And whenever I am having a particularly tough day, I replay an old voicemail she left me years ago after I received an offer to clerk for a judge—yes, Sally, I still have it saved, and I can prove it afterwards. Sally had reached out to congratulate me, but I missed her call when I was on the subway home from my interview. Among other things, she wanted to tell me that I had achieved my success not just because of my academic accomplishments, but also because of how I treated people. If that's true of anyone, though, it's true of Sally. Her success as a professor and mentor is a testament to Sally's kindness, generosity, and character.

With all my love, thank you, Sally, for everything that you have done for me and countless other law students at NYU.

ACKNOWLEDGMENT

SALLY KATZEN

I so appreciate this special honor. Thanks to the Board of the NYU Annual Survey of American Law, and thanks to my colleagues and students and friends for attending this afternoon.

According to my research, which my TAs and RAs will tell you is *not* my strongest suit, this distinction goes back to 1942—coincidentally, the year of my birth—and has been given to many of my heroes and heroines. I am very grateful to have been invited to join this illustrious group.

My great thanks, also, to Troy, Bob, Ricky, and Rachel. But, a cautionary note, they are *too* kind! Don't believe everything you heard this evening. My father would have believed every word. My mother would have been dubious at best. My brother drove today from Pittsburgh—thanks so much for coming, Bob. It means the world to me. He will confirm that I speak the truth.

In any event, the speakers were wonderful.

Troy—who is a very good dean—has a lot of practice with these kinds of things, but he is always elegant, informative, and to the point.

I owe Ricky special thanks for convincing me to try teaching at NYU despite my intimidation by the big city. And thank you, Ricky, for your consistent support and your many, many humorous manifestations of friendship and respect—I did so love his use of "den mother" as an apt descriptor of my "leadership." My favorite agency, OIRA, is obviously in good hands.

Bob and I have been teaching together for over a decade, and I can think of no one as courteous, collaborative, and congenial as he has been. He also keeps me humble.

And Rachel. Perhaps the best compensation for teaching is watching your students "get it," appreciate what you are offering them inside and outside the classroom, and then incorporate some small part of it in developing and pursuing their own interests. She is only one of many TAs I have had and enjoyed, but she is especially dear to me, and I thank her for flying from Ann Arbor to be here today. As you heard, I graduated from the University of Michigan—Go Blue! She is now on the faculty there and getting rave reviews for her teaching of environmental law. I am not the least bit surprised.

Having been given a microphone, a captive audience, and an opportunity to speak my mind in these turbulent times, I would like to touch on the headnotes—or the short version, if you will—about where I am coming from, what I am concerned about, and what I hope for the future.

As you all know, my field is administrative law and regulatory process, which is currently undergoing sweeping changes. That's putting it mildly. In just the last few years, the Supreme Court has been "greatly troubled" by the growth of the administrative state, and it has increasingly questioned the legitimacy of, and then started cutting back on the ability of, the agencies to function effectively.

The Court has, among other things, in no order of importance: first, put into place, and into regular practice, the Major Questions Doctrine—see most recently *West Virginia v. EPA* and *NFIB v. OSHA* (the Vaccine-or-Test Case). To be sure, there were antecedents in *FDA v. Brown & Williamson Tobacco Corp.*, but I think Sandra Day O'Connor would be surprised—and not pleasantly—by the transformation from its use in truly exceptional circumstances to a go-to justification when the Court holds that agencies can't do what they plan to do. By the way, the Court says Congress must be clear—it must be exquisitely explicit. Is the Court treading on separation of powers by telling Congress how to do its job? It's a legitimate question. But please note that the Major Questions Doctrine is so less frightening than the resurrection of the Nondelegation Doctrine. The former could be cured by a functioning Congress—if we had one. The latter would require a constitutional amendment—not foreseeable in my lifetime or even yours.

Second, the Court eliminated the *Chevron* Doctrine in giving deference to agencies' interpretations of their statutory authority in rulemaking when Congress is unclear. That was *Loper Bright*, with a "force multiplier" in *Corner Post*'s extending the statute of limitations for challenging government action. And who knows what it has done to agency adjudications with its redefining heretofore accepted exceptions for the right to a jury trial in administrative proceedings—see *Jarkesy*.

Third, the Court has continued to tighten the test for standing by those challenging government action, with some exceptions to its developing dogma for cases it seems it really wants to hear, such as the *Dobbs* case overturning *Roe v. Wade* and *Biden v. Nebraska*, the student loan case.

Finally, the Court is racing down a truly slippery slope in the area of agency personnel—in defining who is an "officer" for purposes of appointments—see *Freytag* and *Lucia*. And with respect to

removal, it has created—out of whole cloth—a prohibition of "dual for-cause protection" to protect the President of the United States, the most powerful person on the planet, from being restricted by Congress in his ability to remove a member of a subagency of an Independent Regulatory Commission (that's the *PCAOB* case), or an Administrative Law Judge at the SEC in *Lucia*. This does not bode well for the civil service protections that have been in place for over a century-and-a-half. In which case, the "deep state" could be in deep trouble, as evidenced by all the investment in Schedule F in Project 2025.

All of this, and more, is coming from the Supreme Court, which I first became interested in in the 1960s. Then, the Court, the Warren Court, reflected my own values in opening access to the courts; protecting minority rights; expanding our notions of "rights and privileges;" and respecting the expertise and experience of administrative agencies that carry out the many complicated aspects of translating Congress's words into operative practices.

Only now can I appreciate the deep *dis*content of conservatives when the New Deal Court, and then the Warren Court, changed the law as they knew it. They were mostly aghast and very disturbed. But appreciating what they thought then doesn't make me feel any better now.

* * * * *

Regrettably, it is not just the Supreme Court that is part of the threat to the administrative state. There was a time when the American public turned to government to ensure that our food was pure; our air and water were clean; and our cars, trains, planes, and our workplaces were safe. We trusted the government to verify the safety and efficacy of our drugs, that our money was secure in various financial institutions, and that our markets were fair and competitive.

These were bipartisan efforts. It was, after all, Teddy Roosevelt who created the Forest Service, the Food and Drug Administration, and the meat inspection services of the U.S. Department of Agriculture. It was Richard Nixon who created the Environmental Protection Agency, and George Herbert Walker Bush who called himself the "Environmental President" and helped push through the 1990 amendments to the Clean Air Act. Whether you were an "R" or a "D," you saw the need for government action in certain circumstances, and, indeed, government regulation. There were, to be sure, differences of opinion about many of the details, but there was general acceptance that government intervention, in the form of regulations, was necessary and appropriate.

But no longer. No longer is there any consensus as to whether the government is a place to look to solve our nation's problems. No more is there uniform, or at least majority, confidence in our federal institutions.

At the end of the twentieth century, some Republicans successfully zeroed in on the administrative state as a call to arms. Ronald Reagan, in his inaugural address in 1981, famously said, "[G]overnment is not the solution to our problem; government is the problem." Grover Norquist, who founded Americans for Tax Reform, chimed in, in 2001, with his call to shrink the government until it was small enough to "drown it in the bathtub." From the 80s to the present, Republicans running for office followed this winning script: virtually all of them—even incumbents—campaigned as "outsiders" who would go to Washington to straighten things out, clean up the mess, or—in its most recent iteration—"drain the swamp" or "deconstruct the administrative state."

By this time, government rules and regulations were held up as the epitome of what was wrong with Washington: there are too many rules; they are too costly and thus a drag on the economy; they stifle entrepreneurship, innovation, and creativity; they compromise our freedom; and, most importantly, threaten our liberty.

Adding insult to injury, these rules are promulgated by unelected, and therefore unaccountable, bureaucrats. And, particularly since Newt Gingrich, "bureaucrat bashing" is Washington's, and the country's, favorite spectator sport.

While this attack has come mainly from Republicans, Democrats did not fight back. Sure, they may have talked about the need or desirability of certain government programs, but there was no full-throated endorsement of the legitimacy of the administrative state. Some would couch their praise for new rules they favored as "smart" regulations. As if the rest of the ones on the books were dumb? And even President Clinton, in his State of the Union address in 1996, joined the chorus and announced that "the era of big government is over."

Not surprisingly, with these kinds of attacks and restrained endorsements, we have witnessed a demonstrable downturn in trust in the federal government by voters in both political parties. And as the public's faith in government goes south, the confidence in the administrative state goes with it.

* * * * *

Nonetheless, despite the turmoil in the field of administrative law and the even darker clouds on the horizon, I remain, at heart,

somewhat optimistic—I don't know why or how—and I am determined to help bring civility and constructive engagement to the fore. So, I continue to testify before Congress, speak to the press and other audiences on these issues, and teach.

As Dean McKenzie noted, teaching was not my first career. First, private practice, which I loved, and then government service, which I loved even more. When I left government, I took some time off and cleaned out our medicine cabinets and then, one day, I called my husband in his chambers to announce that I had just alphabetized the spices in the kitchen. He said, "Hang up the phone, get out of the house, and get a job or you will drive both of us crazy."

"But what should I do?" I asked.

He said, "You always wanted to inspire young people to work for the government. Go teach." And thus began my third career.

Teaching has many rewards. It keeps you young. Learning from your students what they care about, what they value, and what they want for themselves and for our society. It keeps you humble. The students at NYU are very smart, well-versed in some aspects of government, and freewheeling in their comments and/or criticism of "conventional wisdom." So, I get to rethink, recalibrate, and sometimes even outright change my views. I trust my students have learned a lot from me—certainly, I have learned a lot from them.

I have loved teaching and have been rewarded by having so many of my students choose careers in, or devote a few years of their professional lives to, public service. Public service is indeed a noble calling, whether as a career civil servant or as a political appointee, as a lawyer or as a policy person, in the federal government or at the state or local level.

There's so much that can and should be done by thoughtful, talented, dedicated, responsible, and responsive people to help restore faith in the government and confidence in its ability to confront and solve the pressing problems of the day for the American people.

My husband was right, as he usually is, and he knows me so well and has been so encouraging and supportive throughout my career. I could not have accomplished what I have without him and am delighted to acknowledge publicly my indebtedness and love for him.

And now, I do not want to overextend my welcome, so I will simply say to all assembled: thank you from the bottom of my heart for this great honor.

PRESUMED GUILTY: "ILLEGAL ALIEN" EVIDENCE AND THE RIGHTS OF NON-CITIZEN DEFENDANTS

*CHRISTIAN POWELL SUNDQUIST**

ABSTRACT

Dangerous political rhetoric demonizing migrants and racialized persons has altered social norms regarding the acceptability of racism while ushering in a new era of white nationalism across the world. The increasing normalization of racism has shaken bedrock American constitutional principles of equality and fair treatment under the law. As such, it has become commonplace for courts to admit prejudicial evidence of a Latinx criminal defendant's lack of citizenship and undocumented immigration status in non-immigration proceedings. Relying on recent empirical research on juror cognitive biases, this Article argues that the strategic use of a criminal defendant's immigration and citizenship status to signify criminality and untruthfulness undermines the defendant's constitutional rights to a fair trial and equal application of our evidentiary laws while reifying racialized stereotypes about undocumented non-citizens.

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* Professor of Law, University of Pittsburgh, School of Law. I am extremely grateful to César Cuauhtémoc García Hernández (Ohio State) for his insightful comments on this Article, as well as for the helpful suggestions made by Greer Donley (Pitt Law), Darrell D. Jackson (Wyoming Law), and Areto Imoukhuede (FAMU Law). This Article was influenced by my experience providing expert witness services for the criminal defense in the Colorado case, *People v. Garcia-Bravo*, No. 17-CR-1736 (Colo. Dist. Ct. El Paso Cnty. 2019). In that case, the defendant unsuccessfully moved the trial court to consider the potential biasing impact that prosecutorial references to his undocumented immigration status (including remarks by the prosecutor at trial that the defendant was an "illegal alien") had on jury decision-making. *Id.* While I regret that the trial court ultimately denied the defense motion, I am grateful to defense counsel Carrie Lynn Thompson for engaging me in the case and for valiantly striving to protect her clients from racism in the administration of justice.

I.
INTRODUCTION

Criminal defendants are entitled to equal treatment under the law, regardless of their race, nationality, or immigration status.[1] Introducing evidence of a criminal defendant's race, nationality, or immigration status in non-immigration related criminal trials, with remarkably few exceptions, amounts to "unjust and illegal discrimination[] between persons in similar circumstances" that violates the Equal Protection Clause of the Fourteenth Amendment.[2] This bedrock constitutional doctrine was recognized generations ago by the United States Supreme Court in its seminal decision, *Yick Wo v. Hopkins*, which declared that our laws must be applied equally to criminal defendants without regard to their race, nationality, or immigration status.[3] The constitutional and statutory right to have our evidentiary rules applied equally, nonetheless, has been eroded by the widespread acceptance of evidence concerning the immigration and citizenship status of undocumented non-citizen criminal defendants for the stated purposes of witness impeachment and post-verdict sentence enhancement.

1. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).
2. *See id.* at 374.
3. *See id.* at 369 ("[A]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens . . . ." (quoting 42 U.S.C. § 1981)) (noting that the "provisions" of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws").

State and federal courts are divided as to the admissibility of immigration status evidence in criminal prosecutions and sentencing.[4] Some states—such as Washington, Pennsylvania, Illinois, Oregon, and California—have proactively legislated to exclude immigration status evidence for non-citizen criminal defendants.[5] Nonetheless, other states—as well as many federal courts—routinely admit such evidence against undocumented non-citizen criminal defendants as proof of untruthfulness or a lack of fidelity to the law.[6] The overwhelming majority of such cases involve the admission of "illegal alien" evidence against undocumented Latinx criminal defendants. While courts tend to view evidence of a Latinx criminal defendant's citizenship and immigration status as race-neutral, empirical research has demonstrated that the presentation of such evidence activates juror racial bias due to negative stereotyping of Latinx persons as "illegal aliens" and criminals.[7] Juror expression of latent racial bias against Latinx criminal defendants is facilitated when seemingly non-racial factors (such as the defendant's citizenship and immigration status) are introduced at trial, which allow jurors to justify, and thus express, their underlying prejudice in a manner that accords with prevailing social norms.

This Article argues that the admission of evidence concerning a Latinx criminal defendant's immigration status in non-immigration related criminal trials runs afoul of our evidentiary rules concerning relevance, impeachment, character, and unfair prejudice while violating the defendant's Sixth and Fourteenth Amendment constitutional rights to a fair trial free from racial bias. While many scholars have explored the modern criminalization of immigration

4. *See infra* Part IV.

5. *See* WASH. R. EVID. 413 (amended effective Nov. 2, 2021) (stating that "evidence of a party's or a witness's immigration status" is generally inadmissible in both civil and criminal cases); PA. R. EVID. 413 (effective Oct. 1, 2021) (stating that "evidence of a party's or a witness's immigration status" is generally inadmissible in both civil and criminal cases) (noting that it was modeled after WASH. R. EVID. 413); 735 ILL. COMP. STAT. ANN. 5/8-2901 (West, Westlaw through P.A. 103-1065 of the 2024 Reg. Sess.) (stating that evidence of a person's immigration status is generally inadmissible in civil cases); OR. REV. STAT. § 135.983 (2023) (stating that evidence of a defendant's immigration status is generally inadmissible in criminal proceedings); CAL. EVID. CODE §§ 351.2–351.4 (West, Westlaw through Ch. 1017 of 2024 Reg. Sess.) (providing that evidence of a person's immigration status is generally inadmissible in civil and criminal proceedings); CAL. COMM. REP., A.B. 2159, 2015–2016 Reg. Sess. (Cal. 2015); CAL. COMM. REP., S.B. 836, 2021–2022 Reg. Sess. (Cal. 2022).

6. *See infra* Part IV.

7. *See infra* Part III.

("crimmigration"),[8] and others have broadly identified how the criminal process can disadvantage non-citizen defendants,[9] this Article is the first to provide a critical analysis of the important constitutional and statutory issues raised by the admission of immigration status evidence against non-citizen criminal defendants at trial and during sentencing. Empirical research in cognitive psychology has thoroughly demonstrated that the introduction of citizenship and immigration status evidence against a Latinx criminal defendant facilitates the expression of latent juror racial bias.[10] One study, for example, found that evidence of a "Mexican" criminal defendant's undocumented immigration status activated racial biases that led mock jurors to convict and punish at a much higher rate as compared to situations where the jurors were not informed of the defendant's immigration status.[11] This Article thus argues that the strategic use of a Latinx criminal defendant's immigration and citizenship status to signify criminality and untruthfulness undermines the defendant's constitutional rights to a fair trial and equal application of our evidentiary laws while reifying racialized stereotypes about Latinx persons and immigrants.

Part II of the Article examines the intersection of immigration status, nationality, and race in contemporary America. This Part examines the role of political rhetoric, selective media coverage, and racially restrictive immigration policy in promoting the social conflation of Latinx racial identity with criminality and a lack of citizenship and immigration status. Part III of the Article examines empirical psychological research on the factors that facilitate the expression of juror racial bias against criminal defendants. Jurors are much more likely to engage in racially prejudiced decision-making when they are enabled to rationalize their decisions on the basis of seemingly non-racial factors—such as proof introduced at trial regarding a Latinx criminal defendant's immigration status. Finally, Part IV of the Article explores the admissibility of evidence concerning a Latinx criminal defendant's immigration status in state and federal courts. Courts have largely allowed such evidence to be introduced during opening and closing statements, witness impeachment, and criminal

8. *See generally* César Cuauhtémoc García Hernández, Crimmigration Law (2d ed. 2021).

9. *See generally* Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. Rev. 1417, 1423–33 (2011).

10. *See infra* Part III.

11. Russ K.E. Espinoza et al., *The Impact of Ethnicity, Immigration Status, and Socioeconomic Status on Juror Decision Making*, 13 J. Ethnicity Crim. Just. 197, 207 (2015).

sentencing, notwithstanding the empirically demonstrated risk that such evidence will enable racially biased juror decision-making in violation of the defendant's evidentiary and constitutional rights.

II.
THE INTERSECTION OF IMMIGRATION STATUS, CITIZENSHIP, AND RACE

Race, immigration, and citizenship intersect in the criminal justice system in a variety of ways: non-citizen defendants convicted of certain serious crimes may face deportation from the country; non-white defendants are often subjected to racial discrimination in arrests, guilt adjudication, and sentencing; and prejudice against non-citizen, non-white defendants is commonplace. This Part examines racial disparities in criminal justice outcomes while identifying the role of political rhetoric and media coverage in promoting the social conflation of Latinx racial identity with criminality and lack of citizenship and immigration status.

A. Racial Bias in the Criminal Justice System

The United States Constitution seeks to prohibit racial discrimination in the administration of criminal justice.[12] The "central purpose of the Fourteenth Amendment," in particular, is "to eliminate racial discrimination emanating from official sources in the States."[13] The U.S. Supreme Court has held that "[t]he Constitution prohibits racially biased prosecutorial arguments,"[14] racial discrimination in the selection of jurors,[15] and the exclusion of prospective jurors on

12. U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see* U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . .").

13. McLaughlin v. Florida, 379 U.S. 184, 192 (1964); *see also* Strauder v. West Virginia, 100 U.S. 303, 305–09 (1880) (applying the Fourteenth Amendment to prohibit the exclusion of racial minorities from criminal juries); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (finding that the Fourteenth Amendment prohibits racially-based juror peremptory strikes); Ham v. South Carolina, 409 U.S. 524, 526–27 (1973) (interpreting the Fourteenth Amendment to require trial judges in criminal cases to ask prospective jurors about their potential racial biases).

14. McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).

15. *Strauder*, 100 U.S. at 306, 309 ("[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing

the basis of race through seemingly race-neutral peremptory challenges.[16] The U.S. Supreme Court has thus recognized that "[t]he unmistakable principle underlying these precedents is that discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'"[17]

The constitutional prohibition against racial bias in the criminal justice system applies to all people in the United States without regard to nationality, citizenship, or immigration status.[18] Of particular relevance, the U.S. Supreme Court's seminal decision in *Yick Wo v. Hopkins* established that our laws must be applied equally to criminal defendants without regard to their race, nationality, or immigration status.[19] The petitioners in *Yick Wo*—Chinese immigrants who were temporary or permanent residents of the United States—challenged the racially disparate enforcement of a facially-neutral California ordinance that criminalized the permit-less operation of laundries in San Francisco.[20] The Supreme Court held that the protections of the

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to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. . . . [The Fourteenth Amendment] was designed . . . to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States." (racist reference to "the superior race" in the original)); *see also* Neal v. Delaware, 103 U.S. 370, 386 (1881); Hollins v. Oklahoma, 295 U.S. 394, 395 (1935) (per curiam); Avery v. Georgia, 345 U.S. 559, 561 (1953); Hernandez v. Texas, 347 U.S. 475, 479 (1954); Castaneda v. Partida, 430 U.S. 482, 496, 499 (1977). Nearly 100 years after its decision in *Strauder*, the U.S. Supreme Court also belatedly held that prospective jurors could be "interrogated on the issue of racial bias" during the pre-trial voir dire process. *See Ham*, 409 U.S. at 527.

16. *Batson*, 476 U.S. at 89; *see also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 617–18 (1991); Georgia v. McCollum, 505 U.S. 42, 59 (1992); Flowers v. Mississippi, 588 U.S. 284, 288 (2019); Clark v. Mississippi, 143 S. Ct. 2406, 2408 (2023) (mem.) (Sotomayor, J., dissenting from denial of certiorari).

17. Peña-Rodriguez v. Colorado, 580 U.S. 206, 223 (2017) (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)).

18. *See* Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886) (invalidating a California statute that criminalized the operation of laundries without an official permit—which was not made available to Chinese Americans or Chinese immigrants—and finding that the Fourteenth Amendment rights of the petitioners "are not less because they are" not United States citizens).

19. *Id.* at 369 (noting that the protection provisions of the Fourteenth Amendment extend "to all persons within the territorial jurisdiction, without regard to any differences" in race, nationality, or citizenship status and that "all persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings . . . as is enjoyed by [W]hite citizens" (quoting 42 U.S.C. § 1981)).

20. *Id.* at 359, 374 (noting that the petitioners submitted non-contested evidence that all permit applications made by persons of Chinese descent were

Constitution "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."[21] The disparate enforcement of the ordinance based on the race, nationality, and citizenship status of applicants therefore constituted "unjust and illegal discrimination[] between persons in similar circumstances" that violated the Equal Protection Clause of the Fourteenth Amendment.[22]

The constitutional prohibition against racial bias in the administration of criminal justice can be found not only within the Fourteenth Amendment's equal protection guarantees but also in the Sixth Amendment's right to an impartial jury.[23] Prosecutorial appeals that threaten to create racial bias in a jury "equally offend[] the defendant's right to an impartial jury."[24] The U.S. Supreme Court has thus recognized that a "constitutional rule that racial bias in the justice system must be addressed . . . is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."[25] Our courts thus perform a vital role in upholding the "criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'"[26]

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denied by the city, while nearly all permit applications made by white persons were granted).

21. *Id.* at 368–69 (holding that "[t]he [F]ourteenth [A]mendment to the [C]onstitution is not confined to the protection of citizens" based on the plain language of the text which provides that every "person" is entitled to equal protection of the laws)

22. *Id.* at 373–74 ("[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities . . . with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to . . . all . . . persons, by the broad and benign provisions of the [F]ourteenth [A]mendment . . . . Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand . . . the denial of equal justice is still within the prohibition of the [C]onstitution.")

23. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . .").

24. Calhoun v. United States, 568 U.S. 1206, 1207 (2013) (mem.) (Sotomayor, J., statement respecting denial of certiorari).

25. Peña-Rodriguez v. Colorado, 580 U.S 206, 225 (2017).

26. *See* McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (quoting Strauder v. West Virginia, 100 U.S. 303, 309 (1880)); *see also Peña-Rodriguez*, 580 U.S at 224 (finding racial bias to be "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice").

Notwithstanding the constitutional prohibitions against race and nationality discrimination in civil and criminal trials, the American criminal justice system has long been plagued by racial discrimination and race-based disparities in outcomes.[27] Our adversarial system of laws developed in a socio-historical context in which de jure discrimination based on racial difference was accepted as a matter of law and social policy.[28] Racial discrimination was an early defining feature of the American criminal trial system.[29] Non-white persons were, inter alia, prevented from testifying in court and serving as jurors, while prosecutors were permitted by law to engage in racially discriminatory peremptory exclusions of non-white prospective jurors.[30] Following the end of chattel slavery, an important goal of the Reconstruction Amendments was to eliminate the de jure features of racial bias in the criminal justice system, with a particular focus on ending "racial discrimination emanating from official sources in the States."[31] While de jure slavery ended with the passage of the Reconstruction Amendments, state resistance to full equality took the form of racially discriminatory laws (rooted in slave-era legal codes) and "Jim Crow" segregation policies that sought to harness the power of the criminal justice system to re-entrench racial inequality and de facto patterns of slavery.[32]

The entrenchment of racial discrimination in courts has been difficult to overcome, and racial bias continues to pervade the criminal justice system, leading to significant race-based disparities in trial outcomes and sentencing.[33] While our laws are now race-neutral in their language, racial disparities in the criminal justice system

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27. *See, e.g.*, Jelani Jefferson Exum, *Sentencing Disparities and the Dangerous Perpetuation of Racial Bias*, 26 Wash. & Lee J.C.R. & Soc. Just. 491, 492–93 (2020).

28. *See, e.g.*, Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 187 (rev. ed. 2012).

29. *Cf., e.g.*, Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 Harv. L. Rev. 1, 51–54 (2019) (discussing "the exclusion of Africans and Native tribes" from the Constitution's vision of democracy); Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1599–1604 (2018) (describing the first integrated juries in the Reconstruction-era South).

30. *See* Hiroshi Fukurai, Edgar W. Butler & Richard Krooth, Race and the Jury: Racial Disenfranchisement and the Search for Justice, at v, 4, 13–14 (1993).

31. McLaughlin v. Florida, 379 U.S. 184, 192 (1964); *see also Peña-Rodriguez*, 580 U.S at 224 ("[R]acial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.").

32. *See* Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 Calif. L. Rev. 371, 383–87 (2022).

33. *See id.* at 395–98.

abound. For example, Black men receive longer federal prison sentences than white men for *similar* convictions,[34] while over 38% of prison inmates are Black despite constituting only 13% of the overall population.[35] Research has similarly demonstrated that "biased attitudes against Latino immigrants have been on the rise [since 2011]" and that racial bias and discrimination against Latinx persons in the criminal justice system is pervasive.[36]

B. The Racialization of Immigration and Citizenship Status

Discrimination against criminal defendants based on their race or nationality is clearly prohibited by the United States Constitution.[37] Similarly, discrimination against racialized defendants in non-immigration proceedings based on their immigration status is constitutionally invalid given the likelihood that jurors will conflate a defendant's immigration status (e.g., as undocumented) with the defendant's race and nationality.[38]

The vast majority of Latinx persons in the United States are citizens, lawful permanent residents, or documented immigrants.[39]

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34. U.S. Sent'g Comm'n, Demographic Differences in Federal Sentencing 3–4 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf [https://perma.cc/6D9X-WPZV].

35. Mike Wessler, *Updated Charts Provide Insights on Racial Disparities, Correctional Control, Jail Suicides, and More*, Prison Pol'y Initiative (May 19, 2022), https://www.prisonpolicy.org/blog/2022/05/19/updated_charts/ [https://perma.cc/G6UR-DNB6]. The racial disparities inherent in the imposition of the death penalty are even more striking. An independent study by the U.S. General Accounting Office (renamed Government Accountability Office) analyzed dozens of empirical studies on racial bias and the death penalty, and concluded that "[i]n 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered [B]lacks." U.S. Gen. Acct. Off., GGD-90-57, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities 5 (1990).

36. Espinoza et al., *supra* note 11, at 199–200 (referencing research studies demonstrating that "there is a history of prejudice toward Latinos within the [American] legal system").

37. *See* discussion *supra* Section II.A.

38. *See infra* notes 124–40 and accompanying text.

39. *See* Mohamad Moslimani & Luis Noe-Bustamante, *Facts on Latinos in the U.S.*, Pew Rsch. Ctr. (Aug. 16, 2023), https://www.pewresearch.org/race-and-ethnicity/fact-sheet/latinos-in-the-us-fact-sheet/ [https://perma.cc/59BT-4WHC] (noting that 81% of the Latinx population in the United States possess U.S. citizenship); Espinoza et al., *supra* note 11, at 199 ("Although there is a long history of Mexican immigration to the United States, the undocumented are not the majority of the Latino population." (citation omitted)); Evin Millet & Jacquelyn Pavilon,

Nonetheless, numerous empirical studies have found that a significant number of Americans falsely assume that Latinx and Asian persons living in America are undocumented immigrants and lack United States citizenship.[40] The prejudiced conflation of Latinx persons as undocumented immigrants continues to persist today, and arguably has increased with the continued rise of anti-Latinx and anti-immigrant media and political rhetoric.[41] As one research study explained, "[a]nti-Latino bias is related to anti-immigrant bias because Latinos are one ethnic group commonly associated with immigration. Greater prejudice toward Latinos among [w]hite participants is related to more negative perceptions of undocumented immigrants."[42]

The biased perception that the majority of Latinx persons are "illegal aliens" is directly connected with the racial stereotyping of Latinx persons as being more likely to engage in criminal acts and

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Demographic Profile of Undocumented Hispanic Immigrants in the United States, Ctr. for Migration Stud. N.Y. (Oct. 2022) (estimating that of the approximately 21 million immigrants of Hispanic origin living in the United States, approximately 7.4 million are undocumented), https://cmsny.org/wp-content/uploads/2022/04/Hispanic_undocumented.pdf [https://perma.cc/DA8R-CPVL].

40. *See, e.g.*, John Gramlich, *How Americans See Illegal Immigration, the Border Wall and Political Compromise*, Pew Rsch. Ctr. (Jan. 16, 2019), https://www.pewresearch.org/short-reads/2019/01/16/how-americans-see-illegal-immigration-the-border-wall-and-political-compromise/ [https://perma.cc/N6SE-HRKS] (finding that despite the fact that the overwhelming majority of immigrants residing in the United States are authorized to do so by the government, more than a third of Americans erroneously believe that most immigrants are in America "illegally"); Espinoza et al., *supra* note 11, at 199 (finding that "a sizeable portion of non-Latinos [wrongly] believe that the majority of Latinos are undocumented immigrants" (citing research studies)); Esmeralda Navarro, Wendy P. Heath & Joshua R. Stein, *Mock Juror Decisions Regarding an Undocumented Immigrant: Similarity of Defendant-Juror Ethnicity Matters*, 20 J. Ethnicity Crim. Just. 227, 240 (2022) ("It is . . . worth noting that citizens may link the issue of being undocumented with being Hispanic. This could be due to media influence."); *see also id.* (referencing an empirical study that "found that almost all undocumented immigrants presented in [U.S. cable and network] news coverage were Hispanic").

41. Espinoza et al., *supra* note 11, at 199 (citing research studies in finding that "media representations fail to make [the fact that the majority of Latinx persons are U.S. citizens or documented immigrants] clear and focus on negative aspects of Latino undocumented immigrants rather than positive aspects").

42. Mauricio J. Alvarez & Monica K. Miller, *How Defendants' Legal Status and Ethnicity and Participants' Political Orientation Relate to Death Penalty Sentencing Decisions*, 3 Translational Issues Psych. Sci. 298, 300 (2017) (citation omitted). The authors similarly note that "[n]egative attitudes toward immigrants and support for restrictive immigration policies are linked to prejudice against Mexicans, and support for policies that facilitate the deportation of undocumented immigrants is stronger when the prototypical target of this policy is Mexican, compared to Euro-Canadian." *Id.* (citations omitted) (citing research studies).

threaten public safety.[43] The false equivalence between residing in the United States without authorization[44] and being "innately criminal, violent, and dangerous"[45] has contributed to the widespread conflation of Latinx ethnicity with undocumented immigration. Studies have demonstrated that "[i]mmigrants are commonly depicted as being criminals, especially when describing undocumented immigrants"[46] and that a striking 73% of Americans believe that "more immigrants cause higher crime rates."[47] Mexican American individuals, in particular, "are not only believed to be in the United States illegally [sic] but also believed to be more prone to criminal behavior compared with U.S. citizens and immigrants from other countries."[48]

The common perception that Latinx persons and immigrants (whether documented or undocumented) are prone to criminality, however, has been thoroughly demonstrated to be false.[49] As one

43. Espinoza et al., *supra* note 11, at 199 (referencing research studies in stating that "Mexican American immigrants are not only believed to be in the United States illegally [sic] but also believed to be more prone to criminal behavior compared with U.S. citizens and immigrants from other countries").

44. *See* 8 U.S.C. §§ 1158, 1227.

45. Sheri Lynn Johnson, *The Influence of Latino Ethnicity on the Imposition of the Death Penalty*, 16 Ann. Rev. L. & Soc. Sci. 421, 426 (2020) (referencing the findings of numerous studies).

46. Laura P. Minero & Russ K.E. Espinoza, *The Influence of Defendant Immigration Status, Country of Origin, and Ethnicity on Juror Decisions: An Aversive Racism Explanation for Juror Bias*, 38 Hisp. J. Behav. Scis. 55, 56–57 (2016) (citing studies that have found that the "increase in the Latino population within the United States has influenced prejudicial attitudes that stereotype Mexican Americans as 'illegal aliens,' poor, lazy, and uneducated"). *See generally* Russ K.E. Espinoza, *Juror Bias and the Death Penalty: Deleterious Effects of Ethnicity, SES and Case Circumstances*, 13 Am. Ass'n Behav. & Soc. Scis. J. 33, 33 (2009) (citing research studies); Johnson, *supra* note 45, at 426 (noting that "[n]umerous studies have found that Latinos are viewed as innately criminal, violent, and dangerous" and that "stereotypes that Latinos are drug traffickers and gang members are common").

47. Minero & Espinoza, *supra* note 46, at 56–57 (quoting Tom W. Smith et al., *General Social Survey, 1972-2010 [Cumulative File] (ICPSR 31521)*, ICPSR (Feb. 7, 2013), https://www.icpsr.umich.edu/web/ICPSR/studies/31521 (choose "Variables"; then search "IMMCRMUP")) (analyzing FBI data from 1990 to 2010 in finding that, despite this popular misconception, both violent crime and crime rates decreased 45% and 42%, respectively, despite a significant increase in immigration during the same period); *see also* Navarro et al., *supra* note 40, at 228 (citing other research studies that found that "approximately half of those surveyed historically and even recently believe that immigrants contribute to crime").

48. Espinoza et al., *supra* note 11, at 199 (noting that numerous research studies have found that "there is a criminal stereotype of Mexican Americans and Mexican immigrants").

49. *See also* Navarro et al., *supra* note 40, at 228 ("Despite the often-observed negative relationship between the prevalence of immigrants and the prevalence of crime, people often perceive a positive association between immigrants and

study observed, "[r]esearchers have long considered the relationship between immigration and crime, and they have generally found that this relationship is non-existent or negative, with crime rates often falling as the number of immigrants in a community increase."[50] Undocumented immigration is likewise not associated with an increase in violent crime or crime rates in the United States.[51] A recent study that examined the connection between crime rates and undocumented immigration in Texas, for example, found that "undocumented immigrants are far less likely to be arrested for violent and property crimes as well as drug and felony traffic offenses than U.S. citizens and legal immigrants."[52] Researchers have concluded that, in light of this and other empirical studies, "undocumented immigrants pose substantially less criminal risk than native U.S. citizens."[53]

C. Popular Immigration Rhetoric and Racial Bias

Conservative political rhetoric and disingenuous media reporting, nonetheless, have distorted public perception of the criminality of Latinx immigrants through the use of racist "dog whistles" and racial stereotypes.[54] Exposure to anti-Latinx and anti-immigrant rhetoric by politicians "who have espoused the [false] link between

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crime."); *see generally* Minero & Espinoza, *supra* note 46, at 55–57 (citing a study in concluding that "[d]espite the contrary relationship between crime rates and immigration influx rates, this misconception of immigrants remains prominent").

50. Navarro et al., *supra* note 40, at 227.

51. *See generally id.* at 227–28; Michael T. Light et al., *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born U.S. Citizens in Texas*, 117 Proc. Nat'l Acad. Scis. U.S. 32340 (2020).

52. Navarro et al., *supra* note 40, at 228 (citing Light et al., *supra* note 51, at 32340).

53. Light et al., *supra* note 51, at 32345.

54. Other factors contributing to the misconception of Latinx immigrants as dangerous criminals include the failure of most Americans to distinguish between documented and undocumented immigrants, racial prejudice against immigrants from Latinx countries, and the continuing impact of the United States' history of racially restrictive immigration policies. *See* Navarro et al., *supra* note 40, at 228–29 (referencing a 2018 study by the Pew Research Center that found that "only 45% of Americans recognized that most immigrants are in the country legally" and concluding that "for many, the link between immigration and crime may exist because of a belief that if one was born in another country, but resides in the U.S., it is evidence of a crime"); Tiane L. Lee & Susan T. Fiske, *Not an Outgroup, Not Yet an Ingroup: Immigrants in the Stereotype Content Model*, 30 Int'l J. Intercultural Rels. 751, 758–59 (2006) (finding that prejudice against immigrant groups was influenced by their country of origin); Minero & Espinoza, *supra* note 46, at 57 (noting that while United States' "immigration policy has traditionally favored individuals of European and Canadian descent," it has racially restricted immigration "from Asia, Africa, Latin America, and the Caribbean" and that "Latinos and persons of African

crime and immigration," as well as pervasive media portrayals of Latinx persons as "illegal aliens" and criminals, has been empirically demonstrated to increase racial bias against Latinx persons.[55]

The media not only contributes to the false perception that most Latinx persons are undocumented immigrants, but also exacerbates stereotypes of Latinx persons as being "innately criminal, violent, and dangerous."[56] Research demonstrates, for example, that the media rarely individualizes its stories about Latinx immigrants, but rather essentializes Latinx citizen and non-citizen identity by grouping all Latinx people together when reporting on crime and immigration reform.[57] While Latinx persons constitute slightly more than 17% of the United States population, "stories about Latinos . . . constitute less than 1% of national news programs—and the primary topics of that coverage are negative and generally connected to immigration and crime."[58]

The American public has similarly been inundated with anti-immigrant political rhetoric during the last few decades, as conservatives and other political groups have relied on immigrant and racial fearmongering for political gain.[59] The Republican Party, for example, has actively encouraged conservative political candidates to spread false claims about the supposed criminality and economic

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heritage are perceived as lazy and burdens on society and are much more likely to be the target of prejudiced behaviors").

55. *See* Navarro et al., *supra* note 40, at 228.

56. Johnson, *supra* note 45, at 426–27.

57. *See* Matt A. Barreto et al., Nat'l Hisp. Media Coal., The Impact of Media Stereotypes on Opinions and Attitudes Towards Latinos 22 (2012), https://www.chicano.ucla.edu/files/news/NHMCLatinoDecisionsReport.pdf [https://perma.cc/F5AQ-T2E5] ("There is a common perception that Latinos and undocumented, or in this case, 'illegal' immigrants are one in [sic] the same."); *see also* Maritza Perez, Los Lazos Viven*: California's Death Row and Systematic Latino Lynching*, 37 Whittier L. Rev. 377, 384–85 (2016) (discussing misrepresentations of the Latino community by the media); Navarro et al., *supra* note 40, at 240 (stating that the conflation of the Latinx population with being undocumented "could be due to media influence" and referencing a study that "found that almost all undocumented immigrants presented in [U.S. cable and network] news coverage were Hispanic").

58. Johnson, *supra* note 45, at 426–27 (referencing findings made by assistant federal public defender Walter I. Gonçalves, Jr. in *Narrative, Culture, and Individuation: A Criminal Defense Lawyer's Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 Seattle J. for Soc. Just. 333, 370 (2020)); Espinoza et al., *supra* note 11, at 199 (referencing studies finding that "media representations fail to [dispel the myth of Latinx immigrant criminality] and focus on negative aspects of Latino undocumented immigrants rather than the positive aspects").

59. *See generally* Ian Haney López, Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class (2015).

drain of both documented and undocumented immigrants.[60] The rise of "Trumpism" and white supremacy during and following the 2016 presidential candidacy of Donald Trump has similarly increased public exposure to media coverage of racist and violent rhetoric concerning both immigrants and Latinx persons.[61] President Donald Trump, in particular, has made innumerable false and racist statements associating Latinx persons with criminality and undocumented immigration status during the last eight years.[62] The falsehoods espoused by Trump and other conservative political leaders have continued unabated, as such racist anti-immigrant "dog whistles" tap into deep-seated American racial fears and biases, which have led to political success for the Republican Party.[63] Indeed, the success of Donald Trump in winning a second presidential term can be attributed in part to his use of racialized anti-immigrant rhetoric that appealed to American voters.[64]

Empirical studies have demonstrated that exposure to media coverage of crimes purportedly committed by immigrants and racial minorities leads to an increase in cognitive bias against those groups.[65] Professor Jerry Kang provides a succinct analogy as to how

60. *See* Perez, *supra* note 57, at 392–93 (documenting how Republican consultant Frank Luntz issued policy directives to Republican candidates to repeat the unfounded narrative that "immigrants believe that 'breaking the law brings more benefit to them than abiding by it'" (quoting López, *supra* note 59, at 121–22)).

61. *See* Orestis Papakyriakopoulos & Ethan Zuckerman, *The Media During the Rise of Trump: Identity Politics, Immigration, "Mexican" Demonization and Hate-Crime*, 15 Proc. Int'l AAAI Conf. on Web & Soc. Media 467, 468 (2021) (noting that "candidates such as Donald Trump . . . attract disproportionate attention both on social media and news media" through the use of racialized immigration rhetoric); *cf.* Lisa A. Flores, Deportable and Disposable: Public Rhetoric and the Making of the "Illegal" Immigrant (2021).

62. *See, e.g.*, Trip Gabriel, *Trump Escalates Anti-Immigrant Rhetoric with 'Poisoning the Blood' Comment*, N.Y. Times (Oct. 5. 2023), https://www.nytimes.com/2023/10/05/us/politics/trump-immigration-rhetoric.html [https://perma.cc/VK7X-KXYD] (stating that Trump's recent comment that immigrants are "poisoning the blood of our country" is similar to past Nazi-era nativist rhetoric while referencing Trump's history of anti-immigrant and racist comments); David A. Graham et al., *An Oral History of Trump's Bigotry*, Atlantic, June 2019, at 52.

63. *See generally* López, *supra* note 59.

64. *See, e.g.*, Mike Ludwig, *Trump Sails to Presidency in Election Fueled by Racism and Anti-Immigrant Hate*, Truthout (Nov. 6, 2024), https://truthout.org/articles/trump-sails-to-presidency-in-election-fueled-by-racism-and-anti-immigrant-hate/ [https://perma.cc/H34G-7UUQ] (describing challenges voting rights groups and election officials faced during the election, including bomb threats and reports of racist voter intimidation fueled by anti-immigrant conspiracy theories).

65. *See* Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1491–94, 1555 n.355 (2005).

media portrayals of immigrants and other racialized groups can lead to increased levels of cognitive bias:

> [L]ocal news programs, dense with images of racial minorities committing violent crimes in one's own community, can be analogized to Trojan Horse viruses. A type of computer virus, a Trojan Horse installs itself on a user's computer without her awareness. That small program then runs in the background, without the user's knowledge, and silently waits to take action—whether by corrupting files, e-mailing pornographic spam, or launching a "denial of service" attack—which the user, if conscious of it, would disavow.
>
> . . . [W]e turn on the television in search of local news, and with that information comes a Trojan Horse that alters our racial schemas. The images we see are more powerful than mere words. As local news, they speak of threats nearby, not in some abstract, distant land. The stories are not fiction but a brutal reality. They come from the most popular and trusted source.[66]

The activation and expression of racial bias is connected to the use of racialized stereotypes and language, including anti-immigrant rhetoric and racially biased terminology such as "illegal aliens" and "illegals."[67] Anti-immigrant language and stereotypes are linked to anti-Mexican and anti-Latino racial stereotyping processes, such that the expression of seemingly race-neutral anti-immigrant words and phrases is also linked to the expression of racial bias. The use of seemingly race-neutral language by politicians and the media, such as "illegal aliens" and "illegals," can encode racial prejudice and increase the likelihood that racial bias will be expressed.[68]

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66. *Id.* at 1553–55 (footnotes omitted).

67. *See generally* Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 Fordham L. Rev. 1545 (2011) (marshalling cognitive linguistics research to demonstrate how metaphorical labels such as "illegal alien" dehumanizes Latinx persons).

68. *See* Lilian Jiménez, *America's Legacy of Xenophobia: The Curious Origins of Arizona Senate Bill 1070*, 48 Cal. W. L. Rev. 279, 287 (2012) (discussing how the term "'illegal alien' . . . activate[s] racist concepts that have already been planted in the public consciousness, and can be purposefully or accidentally activated by political elites, campaign activities, or media coverage"). The federal government under President Biden, for example, issued a Policy Memorandum in 2021 that instructed the Executive Office for Immigration Review (EOIR) to replace the dehumanizing term "illegal alien" with the more accurate term "undocumented noncitizen." *See* Policy Memorandum 21-27 from Jean King, Acting Dir., Exec. Off. of Immigr. Rev., U.S. Dep't of Just. 2 (July 23, 2021); *see generally* 8 C.F.R. § 1003.0 (2021). This Memorandum was rescinded during Trump's second presidential term. Policy Memorandum 25-07 from Sirce E. Owen, Acting Dir., Exec. Off. of Immigr. Rev.,

The emerging field of neurorhetoric helps us understand how racial stereotyping through the use of rhetoric alters the neural pathways of the brain. Research on neurorhetoric has found that repeated exposure to persuasive language—such as political rhetoric—can embed racial stereotypes on a neurophysiological level.[69] Professor Lucy Jewel succinctly describes how persuasive messaging can impact the structure of the brain such that the expression of racial bias becomes normalized:

> [R]acially coded categories . . . create neural pathways that, upon continued use, become collectively entrenched. An entrenched neural pathway offers a smooth and rapid path for a conclusory message to reach an individual's consciousness. Coded categories are harmful because they encourage rapid unconscious thinking that has the effect of hardwiring stereotypes into the pathways of the brain. The rapid way in which a term raises these unspoken conclusions makes it difficult to imagine other narrative possibilities or engage in reasoned deliberation about the issue.[70]

The widespread popular and legal description of undocumented immigrants as "illegal aliens" demonstrates how linguistic rhetoric can canalize racial stereotypes.[71] Neurorhetoric research explains how the use of "illegal alien" language in the courtroom can prime jurors for the expression of racial bias:

> A freighted word that is frequently reiterated, the term likely triggers neural networks connected to deep-seated fears of unknown persons, crime, and more generalized fears of the "other." As a descriptor for people existing outside the bounds of what is familiar and safe, the term removes the humanity from an entire population of people because "they" are not like "us." In this way, the term rapidly and unconsciously generates

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U.S. Dep't of Just. (Jan. 29, 2025). Notably, the Library of Congress refrained from using the term "alien" in 2016 after determining that "the phrase *illegal aliens* has become pejorative." *See* Libr. of Cong., Library of Congress to Cancel the Subject Heading "Illegal Aliens" (2016), https://www.loc.gov/catdir/cpso/illegal-aliens-decision.pdf [https://perma.cc/4PCY-UEAP].

69. Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 Md. L. Rev. 663 (2017) (examining the science of neurorhetoric and how stereotypes can become embedded in cognitive processing).

70. *Id.* at 664.

71. *Id.* The dated Immigration and Nationality Act of 1952, for example, uses the term "alien" to describe any person that is "not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3).

collective support for policies of removal, detention, and deportation of Mexican immigrants.[72]

Prosecutorial rhetoric that demonizes a Latinx criminal defendant as an "illegal alien" thus primes jurors for the cognitive expression of racial bias against the defendant in their decision-making.[73]

III.
RACIALIZED ANTI-IMMIGRANT BIAS AND JURY DECISION-MAKING

Empirical research in cognitive psychology has thoroughly demonstrated that juror decision-making is distorted by cognitive biases and other non-legal factors.[74] The race and ethnicity of both the juror and the criminal defendant has been shown to "negatively influence[] verdict outcomes, length of sentence, and culpability assignment."[75] Recent research has discovered that juror racial biases against Latinx defendants are more readily expressed when seemingly non-racial evidence of the defendant's undocumented immigration status is presented at trial.[76] The introduction of such racially-coded, yet facially neutral, evidence about the defendant allows jurors to rationalize the expression of racial bias while believing that they still adhere to socially-acceptable norms of equality and fairness.

A. Race, Citizenship, and Juror Bias

The continuing presence of anti-immigrant racial bias continues to thwart the equitable administration of justice while distorting the jury decision-making process.[77] Psychological studies have

72. Jewel, *supra* note 69, at 683–84 (footnote omitted).

73. *Id.*

74. *See generally* Cynthia Willis Esqueda, Russ K.E. Espinoza & Scott E. Culhane, *The Effects of Ethnicity, SES, and Crime Status on Juror Decision Making*, 30 Hisp. J. Behav. Scis. 181, 181 (2008); *see also* Alvarez & Miller, *supra* note 42, at 299 (citing research demonstrating that "[j]urors are influenced by extralegal factors, including the defendant's race").

75. Esqueda et al., *supra* note 74, at 182 (citations omitted) (summarizing research studies); *see* Espinoza et al., *supra* note 11, at 198 ("Research indicates that race bias intrudes into the jury decision-making process." (citations omitted)).

76. *See* Espinoza et al., *supra* note 11, at 206–07; Minero & Espinoza, *supra* note 46, at 55; Esqueda et al., *supra* note 74, at 181; Navarro et al., *supra* note 40, at 237; Matthew P. West et al., *How Mock Jurors' Cognitive Processing and Defendants' Immigrant Status and Ethnicity Relate to Decisions in Capital Trials*, 17 J. Experimental Criminology 423, 423 (2021).

77. *See generally* Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 Legal & Criminological Psych. 171, 171–72 (2007) (collecting studies).

advanced a number of models to better understand the expression of racial bias (or prejudice) in individuals, as well as how such bias may impact individual and group decision-making.[78] Underlying these models is an understanding that individuals naturally rely on stereotypes—or "cognitive schemas"—as mental heuristics to enable more efficient decision-making.[79]

People engage in various types of stereotyping in order to categorize others into distinct social categories—based on perceived racial, gender, sexuality, and other identity statuses.[80] The development of a positive as opposed to a negative stereotype about others is strongly influenced by ingroup and outgroup bias, with negative stereotyping occurring most often against persons who are not perceived as members of the same identity group.[81] The use of a racial stereotype, then, refers to a mental association between a particular racial group and a particular social trait—such as criminality, unintelligence, laziness, hypersexuality, and so forth.[82] Psychological research on juror decision-making has found that "[j]urors and mock jurors hold schemas regarding what constitutes specific crimes, as well as what offenders should look and act like. The use of schemas and stereotypical information can lead jurors to make biased or prejudiced verdict and sentencing decisions."[83]

Empirical studies have developed a variety of psychological models to help understand the expression of racial bias. Traditional theories—such as the dominative racism model—focus on understanding direct forms of racism that typically involve the expression of explicit racial slurs and/or bigoted statements tied to specific racial stereotypes.[84] Modern psychological theories of racism—such as the aversive racism, symbolic racism, and implicit bias models—focus on understanding the more indirect and subtle forms of racial bias.[85] These models focus on situations where an

78. *See generally* Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 Ann. Rev. L. & Soc. Sci. 269, 275–77 (2015) (examining empirical studies on the impact of race on jury decision-making).

79. *See id.* at 276.

80. *See id.*

81. *See id.* at 275.

82. *See* Riquel Hafdahl et al., *Social Cognitive Processes of Jurors*, 61 Washburn L.J. 305, 331–32 (2022).

83. Charles Edwards, Riquel Hafdahl & Monica K. Miller, *Social Cognition of Jury Decision-Making*, *in* The Cambridge Handbook of Psychology and Legal Decision-Making 309, 311 (Monica K. Miller et al. eds., 2024) (citations omitted).

84. *See generally* Joel Kovel, White Racism: A Psychohistory 54 (1970).

85. *See* John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 Advances Experimental Soc. Psych. 1, 6–7 (2004).

individual has not communicated an explicitly racial statement (such as a racial slur or directly equating membership in a particular racial group with a specific social or intellectual trait), but whose decision-making is nonetheless impacted by underlying racial bias.[86]

The aversive model of racism has found that some individuals may identify as "non-racist" and even support racial equality in theory, and yet are influenced by psychological processes to express racial bias.[87] Such persons "consciously recognize and endorse egalitarian values and because they truly aspire to be nonprejudiced, they will *not* discriminate in situations with strong social norms when discrimination would be obvious to others and to themselves" in order to "avoid the attribution of racist intent."[88] The likelihood that racial bias will be expressed can thus be reduced by creating a social situation where the expression of bias violates stated norms of behavior:[89]

> [A]versive racism postulates that people genuinely believe that they have egalitarian values, but yet feel uncomfortable when interacting with members of minority groups. This prejudicial aversive feeling that arises because of race can be ameliorated when it is displaced onto another perceived negative [non-racial] variable . . . . Thus, individuals do not feel guilty for being prejudiced toward members of minority groups when they have another perceived negative variable to substitute for race and/or ethnicity.[90]

A central finding of research on aversive racism is that the cognitive expression of racial bias is more likely to occur when an individual can attribute their negatively biased behavior and thoughts to seemingly non-racial factors. Research studies have found that "jurors demonstrate bias towards minority defendants . . . when they can attribute behavior to factors other than ethnicity"[91] and that people express more negative attitudes towards immigration when provided with a non-race-based opportunity to do so.[92] This finding is connected to research that demonstrates that cognitive biases—including racial biases—are often activated when new information

86. *Id.*
87. *Id.* at 3, 6–7.
88. *Id.* at 7.
89. *See id.*
90. Minero & Espinoza, *supra* note 46, at 59 (citation omitted) (noting that the "theory of aversive racism suggests that negative attitudes are manifested in subtle, indirect, and rationalized ways").
91. Espinoza, *supra* note 46, at 34 (collecting research studies).
92. *Cf. id.*

is introduced that the brain then associates with existing biases.[93] "Priming" individuals with negative racial stereotypes increases the likelihood that racial bias will be expressed when engaging in decision-making.[94] For example, one study found that research participants "who were primed with more [negative racial] stereotypes judged the person's ambiguous behavior more harshly than participants who were primed with fewer stereotypes."[95]

Psychological theories based on aversive racism research—such as the symbolic model of racism, the implicit bias model of racism, cognitive-experiential self-theory, and the justification-suppression model of prejudice—have similarly found that the expression of racial bias is often tied to the ability of a person to rationalize and justify their negative racial feelings.[96] The symbolic model of racism has found that the expression of racial bias is often rationalized by individuals by reference to broader, seemingly race-neutral political beliefs.[97] Such individuals may feel comfortable expressing racial bias in situations where they can defend their statements—such as that certain racial groups have a poor work ethic or are culturally deficient—by reference to an overarching political belief.[98]

The aptly named justification-suppression model of racial bias aligns with aversive racism theory in its finding that the cognitive expression of racial prejudice is mediated by social norms.[99] This model posits that while racial "prejudice is an automatic reaction to members of groups associated with negative schemas," social norms (such as non-racism or egalitarianism) can suppress the actual expression

93. *See* Linda L. Berger & Kathryn M. Stanchi, Legal Persuasion: A Rhetorical Approach to the Science 117–18, 132 (2018); Karenna F. Malavanti et al., *Subtle Contextual Influences on Racial Bias in the Courtroom*, Jury Expert, May 2012, at 2, 5 (defining priming as "the unconscious influence of individuals' environmental cues on their behaviors").

94. *See* Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243, 1267–68.

95. *Id.* at 1268 (citing Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 329 (2010)).

96. *See* Dovidio & Gaertner, *supra* note 85, at 6–7; West et al., *supra* note 76, at 425; Alvarez & Miller, *supra* note 42, at 301–02.

97. *See* Dovidio & Gaertner, *supra* note 85, at 6 ("Symbolic Racism Theory emphasizes that beliefs about individualism and meritocracy that become racialized motivate opposition to policies designed to benefit racial and ethnic minorities.").

98. *See id.*

99. *See* West et al., *supra* note 76, at 425 (describing justification-suppression model research that has found that while "the *experience* of prejudice is automatic, . . . the *expression* of prejudice depends on social norms").

of racial bias.[100] It is important to note that while some individuals may be successful in suppressing the expression of their racial prejudice to abide by prevailing social norms, "[i]t is more likely . . . that individuals will attempt to justify their prejudice" against others through reliance on seemingly non-racial factors (such as one's perceived immigration status).[101]

Finally, cognitive-experiential self-theory ("CEST") has found that individuals employ two separate information processing systems: rational and experiential.[102] Whereas the experiential system is "quick, intuitive, preconscious, and emotional," the rational processing system is characterized by conscious deliberation.[103] Research studies applying CEST have found that experiential processing of information enables juror decision-making based on extralegal factors, which allow for the expression of racial prejudice—such as the defendant's race, ethnicity, and immigration status.[104]

Numerous empirical studies have found that the prevalence of racial bias in society has negatively impacted juror decision-making in criminal cases. The negative impact of racial bias on juror thought processes is due in part to the activation of cognitive schemas that rely on racialized stereotypes to associate non-white defendants—and in particular Latinx and Black defendants—with criminality.[105] The expression of racial bias is particularly strong in situations where a defendant is on trial for a crime that is stereotypically linked to the defendant's own racial group.[106] For example, a study found that mock jurors were more likely to express racial biases against a Latinx criminal defendant when the alleged crime was "low status" (such as crimes involving violence, drugs, or theft) as opposed to "high status" (such as crimes of "art theft, embezzlement, insider trading, [or] corporate fraud").[107]

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100. Alvarez & Miller, *supra* note 42, at 301–02 (collecting studies and describing the justification-suppression model of prejudice as demonstrating how "individuals develop unique cognitive systems that determine whether to express their prejudice, based on social norms that govern the [acceptability of the] expression of prejudice").

101. *Id.* at 302.

102. West et al., *supra* note 76, at 425.

103. *Id.*

104. *Id.* ("[M]ock jurors' tendency to process information experientially might moderate the effects of a defendant's ethnicity and immigrant status. In contrast, rational processing among mock jurors is associated with leniency and following judge's instructions." (citations omitted)).

105. *See* Hunt, *supra* note 78, at 275–76.

106. Esqueda et al., *supra* note 74, at 184 (collecting studies). Stereotype-activation theory has demonstrated that a jury is more likely to find a defendant guilty and deserving of more severe punishment if the case involves "a stereotypical crime for the defendant's social group." *Id.*

107. *Id.*

Psychological studies have found that white mock jurors are "often harsher in their judgments of out-group vs. in-group defendants" as well as in their "sentencing recommendations for Black vs. [w]hite defendants" due to the activation of both explicit and implicit racial cognitive biases.[108] Research has also demonstrated that mock jurors "held implicit associations between Black and Guilty compared to White and Guilty" in a judicial setting,[109] and "that juror interpretations of ambiguous evidence 'varied based upon whether they had been exposed to a photo of a darker- or lighter-skinned perpetrator.'"[110] Based on these and other research findings, criminal justice experts argue that jurors are prone to "fill in the gaps" and "complete the story" by relying on racial stereotypes during criminal trials.[111] Jurors similarly resort to racial stereotypes when their recollection of facts presented at trial is faulty.[112]

B. Juror Bias Against Latinx Persons and Racialized Immigrants

Racial bias against Latinx criminal defendants has also been demonstrated to negatively impact juror decision-making due to the racial stereotyping of Latinx persons as undocumented immigrants, gang members, and criminals.[113] Research has found, for example,

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108. Sommers, *supra* note 77, at 172–73.

109. Justin D. Levinson et al., Commentary, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 Ohio St. J. Crim. L. 187, 190 (2010).

110. Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 Denv. L. Rev. 309, 346 (2019) (citing Levinson & Young, *supra* note 95, at 337); *see* Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 Yale L.J.F. 406, 406 n.4 (2017).

111. Thompson, *supra* note 94, at 1267; *see* Demetria D. Frank, *The Proof Is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 Harv. J. on Racial & Ethnic Just. 1, 26–27 (2016).

112. Thompson, *supra* note 94, at 1271; *see* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 376–77 (2007).

113. *See* Alvarez & Miller, *supra* note 42, at 300 (collecting studies); Esqueda et al., *supra* note 74, at 191 (conducting two empirical studies that found that with "the introduction of [non-racial] negative characteristics [such as low socioeconomic status and low status criminal charges], European American participants showed biases in culpability, guilt, sentencing, and underlying trait ascription decisions for the Mexican American defendant"); Espinoza, *supra* note 46, at 33 ("Results demonstrated that jurors showed bias against the low SES [socioeconomic status], Mexican-American defendant significantly more than all other conditions . . . ."); *see also* Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 Harv. C.R.-C.L. L. Rev. 297, 304–07 (2009) (discussing how racial and cultural stereotypes have contributed to historical underreporting of Latino lynchings). *See generally* Martin G. Urbina, *A Qualitative Analysis of Latinos Executed in the United States Between 1975 and 1995: Who Were They?*, 31 Soc. Just., nos. 1–2, 2004, at 242, 242–43

that "[w]hite jurors are biased against Latino defendants" and perceive Mexican American defendants, in particular, to be more blameworthy, more responsible, and less credible as compared to white defendants.[114] Similarly, empirical research has demonstrated that prejudice against non-citizen immigrant criminal defendants is pervasive, with jurors more likely to render guilty verdicts and to recommend more severe punishment when the defendant is an immigrant as opposed to a United States citizen.[115]

The U.S. Supreme Court recently acknowledged the role that racial bias plays in negatively impacting juror decision-making in criminal trials.[116] In *Peña-Rodriguez v. Colorado*, the Court held that criminal defendants were entitled under the Sixth and Fourteenth Amendments to a post-verdict judicial inquiry as to whether their rights to a fair trial and equal protection of the laws were violated when there was clear evidence that juror racial bias may have infected jury deliberations.[117] The *Peña-Rodriguez* majority found that a juror's statements during deliberations that the Latinx defendant was guilty because he was Mexican violated the defendant's constitutional rights.[118] The Court also recognized that juror racial bias against immigrant defense witnesses undermined the defendant's constitutional rights,[119] noting that the juror in question stated during deliberations that "he did not find [the defendant's] alibi witness credible because . . . the [Latinx] witness was 'an illegal'"

(mentioning findings that show discrimination against Latinx criminal defendants in death sentencing outcomes).

114. *See* Alvarez & Miller, *supra* note 42, at 300 (collecting studies).

115. *See* Michael T. Light, Michael Massoglia & Ryan D. King, *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79 Am. Socio. Rev. 825 (2014) (reviewing federal sentencing data and finding that non-citizen criminal defendants, and in particular undocumented defendants, received more severe criminal sentences than U.S. citizens for the same crime).

116. *See* Peña-Rodriguez v. Colorado, 580 U.S. 206 (2017).

117. *Id.* at 225 ("[T]he Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.")

118. The juror in question told other jurors that he "believed the defendant was guilty [in the sexual assault trial] because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women" and that "I think he did it because he's Mexican and Mexican men take whatever they want." *Id.* at 212–13.

119. *Id.* at 226–27.

(despite the fact that the witness was actually a legal resident of the United States).[120] The Court thus held that the defendant's constitutional right to a fair trial under the Sixth Amendment was violated by the failure of the trial court to conduct a post-verdict inquiry into juror racial bias.[121]

An emerging field of research has focused directly on the intersection between the criminal defendant's race and immigration status. As discussed previously in Part II of this Article, anti-Latinx "bias is related to anti-immigrant bias because Latinos are one ethnic group commonly associated with immigration."[122] The conflation of the defendant's Latinx race and immigration status in jurors' minds can lead jurors to discriminate against Latinx defendants on racial grounds when evidence of the defendant's immigration status or lack of citizenship is allowed at trial. As Professor Leti Volpp observes:

> Today the conflation of the racial identity "Mexican" with the term "illegal alien" is indisputable. The two terms completely subsume one another . . . . [T]he "illegal alien" was produced as a new legal and political subject and . . . became synonymous with the racial identity "Mexican."[123]

Juror racial bias against Latinx defendants is more prevalent when seemingly non-racial factors (such as the defendant's citizenship and immigrations status) are introduced at trial, which then allow jurors to justify, and thus express, their underlying prejudice in a manner that accords with prevailing social norms. A 2015 empirical study by Espinoza, Willis-Esqueda, Toscano, and Coons examined the extent to which the immigration status, ethnicity, and socioeconomic status ("SES") of criminal defendants activate juror bias.[124] The study participants included 320 white venire persons called for jury duty at a courthouse in Southern California.[125] The participants were asked to volunteer to act as mock jurors and were then shown one of eight criminal trial transcripts that varied, among other factors, the ethnicity ("White Canadian or Mexican"), immigration status (undocumented or documented), and socioeconomic

120. *Id.* at 213.

121. *Id.* at 225.

122. Alvarez & Miller, *supra* note 42, at 300.

123. Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1597 (2005) (footnotes omitted); *see also* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (updated ed. 2014) (discussing the conflation of the term "illegal alien" with Mexican racial identity).

124. *See generally* Espinoza et al., *supra* note 11.

125. *Id.* at 202.

status (low or high) of the criminal defendant.[126] The results from the study "indicated that the low-SES undocumented Mexican defendant was found guilty more often, given a more severe sentence, thought to be more culpable, and rated lower on a number of trait measures compared with all other conditions."[127] The authors of the study found that "[s]ubtle bias theories, such as aversive racism, appear to best explain the biases in juror decisions."[128]

A related empirical study from 2016 examined juror expression of racial prejudice, through the lens of the aversive racism model, against immigrant defendants based on immigration status, country of origin, and ethnicity.[129] In this study, 320 undergraduate students reviewed a criminal court trial packet that included information about the criminal charges (murder), the defendant's racial ethnicity (white or Latinx), the defendant's nationality (Canadian or Mexican), and the defendant's immigration status (legal or "illegal").[130] Participants were asked to act as though they were an actual juror deciding the case, and to render a verdict and sentencing recommendations.[131] The researchers found that "European American mock jurors found undocumented, Latino immigrants from Mexico guilty significantly more often, more culpable, and rated this defendant more negatively on various trait measures in comparison with all other conditions."[132] The study also found that "participants were most confident in their decisions for the undocumented, Latino defendant from Mexico and placed the most blame on this defendant compared with all other conditions."[133] The study authors found that the expression of juror racial bias was facilitated when "other perceived negative variables were coupled with ethnicity."[134] The study interpreted these findings as according with aversive racism theory, given that juror racial bias was activated only once a seemingly non-racial factor—such as the defendant's undocumented immigration status—was included in the trial evidence.[135] Additional empirical studies have similarly found juror racial bias against Latinx

126. *Id.* at 197, 202–03.

127. *Id.* at 197, 207 ("[T]he results confirmed . . . and provided evidence of modern bias operating in legal decision making by actual venire persons.").

128. *Id.* at 197.

129. Minero & Espinoza, *supra* note 46, at 55.

130. *Id.* at 60–61.

131. *Id.*

132. *Id.* at 55 (noting that Latinx mock jurors "did not demonstrate ingroup favoritism or outgroup bias").

133. *Id.* at 63.

134. *Id.* at 67.

135. Minero & Espinoza, *supra* note 46, at 59, 67.

criminal defendants,[136] and that such bias is more freely expressed when jurors are provided evidence of seemingly non-racial factors (such as immigration status and socioeconomic status) about the defendant.[137]

These empirical findings accord with modern aversive racism models, such as justification-suppression theory and cognitive-experiential self-theory.[138] As predicted by the justification-suppression model, jurors were more likely to express their latent racial biases against Latinx criminal defendants when the trial facts included evidence of seemingly non-racial factors about the defendant (such as the defendant's undocumented immigration status and lack of U.S. citizenship).[139] Similarly, these studies align with cognitive-experiential self-theory in demonstrating that jurors relied on preconscious experiential processing in expressing racial bias once presented with extralegal factors (such as immigration status) about the defendant.[140]

C. Limiting the Expression of Juror Racial Bias

Researchers, judicial committees, and policymakers have striven for decades to identify and implement measures to reduce the likelihood that racial bias will be expressed by jurors.[141] Modern anti-racism initiatives attempt to translate empirical research findings on the reduction of racial bias into practical interventions geared towards the traditional criminal trial. The vast majority of anti-racism juror interventions involve educating jurors about the possibility of racial bias and the reliance on stereotypes during decision-making—that is, making racism education a salient and important aspect of juror selection, training, and instructions.[142] Making jurors aware of

136. *See generally* Esqueda et al., *supra* note 74, at 181 (finding that white mock jurors racially discriminated against low socioeconomic status Mexican American defendants); Espinoza, *supra* note 46, at 40 ("Mock jurors gave the low SES, Mexican-American defendant who committed a crime with extenuating aggravating circumstances the death penalty significantly more often than all other conditions.").

137. *See, e.g.*, Navarro et al., *supra* note 40, at 237 (finding that "[w]hite participants saw the Hispanic defendant as more likely to commit a crime . . . than Hispanic participants"); West et al., *supra* note 76, at 423 (concluding that a "defendant's immigrant status and ethnicity might indirectly lead to punitive decisions in capital cases because they influence how jurors weigh aggravators and mitigators").

138. *See supra* Part II for a more thorough summary of these cognitive bias models.

139. *See, e.g.*, West et al., *supra* note 76, at 425.

140. *See id.*

141. *See generally* Jacqueline M. Kirshenbaum & Monica K. Miller, *Judges' Experiences with Mitigating Jurors' Implicit Biases*, 28 PSYCHIATRY PSYCH. & L. 683 (2021) (discussing judicial attempts to reduce juror racial bias).

142. *See id.* at 684.

their own possible latent racial bias and stereotypes, through specialized jury instructions, has been linked to the reduction of later expressions of bias.[143] Aversive models of racism have found that people (at least those who consider themselves to be non-prejudiced) "will *not* discriminate in situations with strong social norms when discrimination would be obvious to others and to themselves" in order to "avoid the attribution of racist intent."[144] For example, empirical research has demonstrated that white jurors are more likely to evaluate the culpability of Black defendants similarly to white defendants when they are made aware of their potential for racially biased decision-making—whether through voir dire questioning, opening and closing statements, or specialized judicial instructions.[145] Research has also found that encouraging people to conform to their personal understandings of egalitarianism is correlated with a reduction in expressions of both explicit and implicit bias.[146] These research findings suggest that raising juror awareness of their own potential racial bias—whether prior to, during, or after trial—may promote fairness in jury decision-making.[147]

The American Bar Association ("ABA"), as well as an increasing number of state and federal courts, has developed model jury instructions intended to reduce the expression of juror racial bias.[148] The ABA model instruction, which was heavily informed by

143. *See id.* at 685.

144. Dovidio & Gaertner, *supra* note 85, at 7.

145. *See, e.g.*, Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 867–69 (2015).

146. *See, e.g.*, Lisa Legault et al., *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (but Also Increase) Prejudice*, 22 PSYCH. SCI. 1472, 1475–76 (2011) (finding that people are motivated to suppress their expression of prejudice when educational messaging appeals to their personal understandings of fairness and equality). The emerging field of neurorhetoric, *see supra* notes 69–73 and accompanying text, similarly suggests that presenting jurors with non-biased messaging can counteract embedded racial stereotypes. *See* Jewel, *supra* note 69, at 692–93 ("[J]ust as negative thought structures can become entrenched in the brain . . . , they can also be weakened, or even removed, with alternative discourses.").

147. *See* Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71, 141–42 (2010) (citing Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCH. 856 (2001)); Lee, *supra* note 145, at 866–69.

148. *See, e.g.*, Colin Miller, *The Constitutional Right to an Implicit Bias Jury Instruction*, 59 AM. CRIM. L. REV. 349, 354–61 (2022). The Western District of Washington has also been a leader in addressing racial bias in the courtroom. They developed a similar model of jury instructions based on empirical research regarding the suppression of cognitive bias:

> I want to remind you about your duties as jurors. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in

empirical psychological findings, provides a representative example of such efforts:

> Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence.
>
> Scientists have taught us some ways to be more careful in our thinking that I ask you to use as you consider the evidence in this case:
>
> Take the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence.
>
> - Focus on individual facts, don't jump to conclusions that may have been influenced by unintended stereotypes or associations.
> - Try taking another perspective. Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group?
> - You must each reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.
>
> Working together will help achieve a fair result.[149]

> the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.

W. Dist. Wash., Criminal Jury Instructions—Unconscious Bias (footnotes omitted), https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf [https://perma.cc/5EJP-8BNK].

149. Am. Bar Ass'n, Achieving an Impartial Jury (AIJ) Toolbox 17–20 (footnotes omitted), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf [https://perma.cc/K4SH-R765].

The practical effectiveness of juror interventions that rely solely on anti-racism education is nonetheless unclear.[150] A 2021 study funded by the U.S. Department of Justice and conducted by leading cognitive bias empiricists, for example, was unable to find any "differences in verdict outcomes between those who heard the implicit bias instructions compared to those who heard the standard instructions" when using jury instructions modeled after those created by the Western District of Washington.[151]

One possible explanation for the failure of recent research to find that anti-racist juror instructions reduce the expression of racial bias is that such research assumes that most jurors view themselves as being non-racist and egalitarian. It is possible that maintaining a non-racist and egalitarian identity is no longer important to a significant proportion of the population, given the rise of Trumpism and white supremacy in recent years. The expression of racial prejudice has arguably become normalized for many individuals who observed President Trump and senior government leaders expressing explicitly racist thoughts without significant political or legal consequences.[152] The November 2024 re-election of Trump to the Presidency, along with Trump's planned appointment of noted white supremacists to cabinet-level positions in the new administration, indicate that expressing explicitly racist views are no longer taboo to a significant portion of society.[153] Policy initiatives to reduce juror racial

150. *See* Mona Lynch & Emily Shaw, Can Jury Instructions Have an Impact on Trial Outcomes? 16–17 (2021), https://www.ojp.gov/pdffiles1/nij/grants/300717.pdf [https://perma.cc/X76N-LDRS].

151. *Id.* at 3–4, 16. The study authors opined that the dearth of findings could be due to various limitations inherent in the empirical model, such as the small size of juror groups, the type of crime (drug conspiracy), and the awareness of participants that they were not *actually* rendering a decision on the guilt of a real defendant. *Id.* at 28–29.

152. *See* Abby Corrington et al., *The Influence of Social Norms on the Expression of Anti-Black Bias*, 38 J. Bus. & Psych. 89 (2023) (demonstrating empirically that changing social norms were strongly related to the expression of racial bias). *See generally* Federica Berdini & Sofia Bonicalzi, *Normalization of Racism and Moral Responsibility: Against the Exculpatory Stance*, 40 J. Applied Phil. 246 (2023) (examining the normalization of racism generally, with Italy as a case study to explore its implications for moral responsibility).

153. *See, e.g.*, Martin Pengelly, *Trump's White House Circle Takes Shape Amid Fears Over Extremist Appointments*, Guardian (Nov. 10, 2024, 7:00 AM), https://www.theguardian.com/us-news/2024/nov/10/trump-white-house-circle [https://perma.cc/247U-K9U7]; Ellie Quinlan Houghtaling, *Trump Brings Back White Nationalist Stephen Miller for Second Term*, New Republic (Nov. 11, 2024, 12:18 PM), https://newrepublic.com/post/188254/trump-white-nationalist-stephen-miller-second-term-policy [https://perma.cc/2XKZ-49ZK]; Michelle L. Price & Alex Connor, *A Guide to Key Figures in Donald Trump's Orbit*, Associated Press (Nov. 11,

bias in the courtroom, then, should consider bolder measures in addition to anti-racist jury instructions—such as racial bias testing of prospective jurors[154] and encouraging the inclusion of jurors with the same racial identity as the defendant.[155]

IV.
THE ADMISSION OF IMMIGRATION STATUS EVIDENCE AT TRIAL

Evidence of a criminal defendant's citizenship and immigration status is routinely introduced in non-immigration state and federal trials, notwithstanding the aforementioned risk that such evidence will facilitate juror expression of racial bias against the defendant.[156] Prosecutors have referenced a Latinx defendant's undocumented immigration status in opening and closing jury statements to malign the defendant as being prone to criminality and untruthfulness, attempted to use such evidence to establish the elements of a crime, relied on immigration status evidence to attack the credibility of Latinx defendants (and defense witnesses) during cross-examination, and introduced immigration status evidence for the purpose of sentence enhancement. Such strategic uses of a defendant's immigration status to signify criminality and untruthfulness undermine the defendant's constitutional rights to a fair trial and equal application of our evidentiary laws while reifying racialized stereotypes about Latinx persons and immigrants.[157]

A. Opening and Closing Arguments

Prosecutors have unconstitutionally remarked on the immigration status of a Latinx criminal defendant during opening and closing statements to the jury to demonstrate that the defendant is

2024, 1:00 PM), https://apnews.com/article/trump-key-people-transition-election-93605a3ffa9f929cb1b74fde7f1ee877 [https://perma.cc/ZRK9-NZYY].

154. *See generally* Ariana R. Levinson et al., *Challenging Jurors' Racism*, 57 Gonz. L. Rev. 365, 398–99 (2022) (noting that judges and lawyers can use various validated psychological tests, such as the Modern Racism Scale, the Symbolic Racism 2000 Scale, and the Color-Blind Racial Attitudes Scale, to eliminate jurors with explicitly racist views).

155. *See generally* Espinoza et al., *supra* note 11, at 209 (referencing various empirical studies that have found that the inclusion of jurors that identify with the same race as the criminal defendant operates to reduce juror racial bias).

156. *See supra* Part III.

157. *See supra* Part II for a more detailed analysis of the constitutional issues implicated by immigration status evidence in criminal prosecutions.

untruthful and prone to criminality.[158] Courts traditionally afford criminal litigants with wide discretion in the presentation of opening and closing arguments. There are no rules within either the Federal Rules of Criminal Procedure[159] or the Federal Rules of Evidence[160] that directly address restrictions on the content of such arguments. Rather, limitations on the content of opening statements and closing arguments are typically regulated by the Sixth and Fourteenth Amendments to the United States Constitution, the common law, and ethical guidelines.[161] Counsel nonetheless is prohibited during opening and closing statements from appealing to the potential racial, social, religious, and other prejudices of the jury.[162] Courts have

158. This is a technique commonly used by prosecutors. *See, e.g.*, United States v. Lopez-Medina, 596 F.3d 716, 739 (10th Cir. 2010) ("Now defense counsel tried to show him as a nice person, as a person that was law abiding and never committed crime. He's here illegally. Been so for 13 years. He's living the lie."); Portillo v. United States, 609 A.2d 687, 690 (D.C. 1992) ("Where the prosecutor went wrong concerning appellant's immigration status, however, was to suggest that the illegal entry itself was 'the grandest deception,' which rendered appellant's testimony incredible."); Commonwealth v. Kouma, 53 A.3d 760 (Pa. Super. Ct. 2012). *Cf., e.g.*, United States v. Saeku, 436 F. App'x 154 (4th Cir. 2011) (discussing prosecutor's remarks calling attention to the defendant's immigration status but admonishing the jury not to consider it); Kashkoul v. State, No. 36A05-0908-CR-478, 2010 WL 1539966, at *2–3 (Ind. Ct. App. Apr. 19, 2010) (calling attention to defendant's immigration status and national origin).

159. Fed. R. Crim. P. 29.1, for instance, merely sets forth the order that closing arguments must follow.

160. Nonetheless, the Federal Rules of Evidence do provide that the evidence presented cannot be irrelevant (Fed. R. Evid. 402), unfairly prejudicial (Fed. R. Evid. 403) or lure the jury into improper consideration of the defendant's character (Fed. R. Evid. 404). *See, e.g.*, United States v. Santana-Camacho, 833 F.2d 371, 373 (1st Cir. 1987) (finding reversible error when the prosecutor referred to the Latinx defendant in closing arguments as an "illegal alien," when the evidence established otherwise).

161. For a general overview of the law on opening statements, *see* J. Alexander Tanford, The Trial Process: Law, Tactics, and Ethics 153–58 (3d ed. 2002) (noting that the common limitations on opening statements include (a) limitations on discussion of the facts or law involved in the case, (b) prohibitions against personal attacks on the judge, attorneys, witnesses, or parties to the case, and (c) prohibitions against appeals to racial and other prejudices).

162. *See generally* A.S. Frank, Annotation, *Counsel's Appeal to Racial, Religious, Social, or Political Prejudices or Prejudice against Corporations as Ground for a New Trial or Reversal*, 78 A.L.R. 1438 (2024) ("It is a general rule, applicable in civil and in criminal cases alike, that an improper appeal by counsel to racial, religious, social, or political prejudices, resulting injuriously to the adverse party, is ground for granting a new trial or reversing a judgment where the effect of the improper appeal was not sufficiently counteracted by action in the trial court, and where proper preliminary steps have been taken by the party aggrieved to preserve his right to relief."); United States v. Raney, 633 F.3d 385, 395 (5th Cir. 2011) ("A prosecutor is 'not

found that such appeals to prejudice undermine the criminal defendant's right to a fair trial under the Sixth Amendment and violate the Fourteenth Amendment's right to equal protection.[163]

Courts have, nonetheless, often upheld references to a Latinx defendant's immigration and citizenship status during a prosecutor's closing statements based on the common law "opening the door" doctrine.[164] The doctrine provides that a party may inadvertently "open the door" to the admission of otherwise inadmissible evidence if it first introduces evidence on the topic.[165] The doctrine is premised on sub-constitutional fairness grounds which allows courts to engage in "curative admissibility" only when necessary to counter any unfair prejudice that the original evidence may have caused to the other party.[166] The U.S. Constitution, however, prohibits the

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permitted to make an appeal to passion or prejudice calculated to inflame the jury.'" (quoting United States v. Crooks, 83 F.3d 103, 107 n.15 (5th Cir. 1996))); Tashjian v. Bos. & Me. R.R., 80 F.2d 320, 321 (1st Cir. 1935) (closing arguments "must be confined to the evidence and must not appeal to passion or prejudice or sympathy in an unfair way"); Victorino v. State, 127 So. 3d 478, 494 (Fla. 2013) ("[C]omments in closing argument [that] are intended to and do inject elements of passion and fear into the jury's deliberations . . . [are] far outside the scope of proper argument." (alteration in original) (quoting King v. State, 623 So. 2d 486, 488 (Fla. 1993))).

163. *See, e.g.*, Williams v. Henderson, 451 F. Supp. 328, 333 (E.D.N.Y.), *aff'd*, 584 F.2d 974 (2d Cir. 1978); Chandler v. State, 572 P.2d 285, 290 (Okla. Crim. App. 1977); Commonwealth v. Mayberry, 387 A.2d 815, 818 (Pa. 1978).

164. *See, e.g.*, United States v. Saeku, 436 F. App'x 154, 158–59, 164 (4th Cir. 2011) (finding no error when the prosecutor asked the jury during closing arguments to "find the defendant guilty, whether [he is] a citizen or whether [he is] a visitor," where the defendant had referenced his nationality and immigration status repeatedly during trial); Kashkoul v. State, No. 36A05-0908-CR-478, 2010 WL 1539966, at *2–3 (Ind. Ct. App. Apr. 19, 2010) (finding no fundamental error occurred when the prosecutor in closing arguments stated that the defendant is "an immigrant to this country. We're all immigrants to this country . . . but that doesn't give you the right to go commit a crime and take the law into your own hands," given that the defendant had introduced evidence of his immigration status and nationality during his opening arguments and testimony); Commonwealth v. Kouma, 53 A.3d 760, 769–70 (Pa. Super. Ct. 2012) (holding that the defendant's rights were not violated when the trial judge held that if the defendant chose to introduce character witness testimony that he was a law-abiding person, that their testimony could be rebutted with evidence that the defendant was "an illegal alien"); Portillo v. United States, 609 A.2d 687, 690 (D.C. 1992) ("Once appellant admitted that he had entered 'without papers,' he opened the door to the government's exploration of his status with the Immigration and Naturalization Service.").

165. *See generally* United States v. Martinez, 988 F.2d 685, 702 (7th Cir. 1993).

166. *Id.* (noting that "[t]he extent to which an opponent may counter with evidence is within the discretion of the . . . court"); JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW § 15 (4th ed., 2025-1 Cum. Supp. 1985), VitalLaw (database updated Dec. 2024); United States v. Winston, 447 F.2d 1236, 1240 (D.C. Cir. 1971) (holding that otherwise inadmissible evidence is

doctrine from being "subverted into a rule for [the] injection of prejudice."[167] Indeed, the U.S. Supreme Court recently held in *Hemphill v. New York* that the "open the door" doctrine does not permit the introduction of hearsay evidence that would otherwise be inadmissible under the Confrontation Clause of the Sixth Amendment.[168] The Supreme Court held that "[e]ven [if the Court] . . . has recognized and reaffirmed the vital truth-seeking function of a trial, the Court has not allowed such considerations to override the rights the Constitution confers upon criminal defendants."[169]

In *United States v. Lopez-Medina*, the trial judge denied the Latinx defendant's motion for a new trial based, in part, on the prosecutor's references to the defendant's undocumented immigration status during both cross-examination and closing arguments.[170] Gerardo Lopez-Medina was charged with possession of methamphetamine with intent to distribute and testified to his innocence at trial.[171] Lopez-Medina testified on direct that he was born in Mexico but had lived in the United States for between thirteen and fourteen years and that his only previous arrest was for a traffic ticket.[172] On cross-examination, the prosecutor asked the leading questions, "[y]ou are illegally here, aren't you," and "[h]ave you been breaking the law for 13 or 14 years?"[173] The prosecutor continued to reference Lopez-Medina's immigration status during closing arguments, telling the jury that the "defense counsel tried to show him as a nice person, as a person that was law abiding and never committed crime. He's here illegally. Been so for 13 years. He's living the lie."[174]

Lopez-Medina was ultimately convicted and appealed on the grounds that the references to his "illegal" immigration status during cross-examination and closing arguments constituted reversible prosecutorial misconduct.[175] The Tenth Circuit disagreed and affirmed his conviction, holding that Lopez-Medina "opened the

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allowed "only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence" (quoting Cal. Ins. Co. v. Allen, 235 F.2d 178, 180 (5th Cir. 1956))).

167. United States v. Johnson, 502 F.2d 1373, 1376 (7th Cir. 1974) (quoting *Winston*, 447 F.2d at 1240).

168. Hemphill v. New York, 595 U.S. 140, 152–53 (2022).

169. *Id.* at 153.

170. United States v. Lopez-Medina, No. 1:05-CR-00112, 2008 WL 11266683, at *1 (D. Utah Feb. 29, 2008) (finding "that there is no basis in law or fact to support Defendant's request for a new trial"), *aff'd*, 596 F.3d 716 (10th Cir. 2010).

171. *Lopez-Medina*, 596 F.3d at 722–23, 728–29.

172. *Id.* at 728.

173. *Id.*

174. *Id.* at 739.

175. *Id.*

door for inquiry about his illegal status by testifying about his clean record" and that evidence of his immigration status was relevant to "counter his suggestion [that] he was a law-abiding citizen wrongly accused of his half-brother's criminal acts."[176]

The permission of prosecutorial references to a Latinx criminal defendant's immigration status on the grounds that the defendant "opened the door" to such appeals to prejudice, however, runs afoul of basic evidentiary principles and the U.S. Constitution.

The common law "open the door" doctrine must cede to a defendant's constitutional rights to equal protection and a fair trial whenever improper prosecutorial references to a criminal defendant's immigration status raise the specter that the jury's decision-making will be influenced by prejudice.[177] For example, the D.C. Court of Appeals found in *Portillo v. United States* that the prosecutor's statement during closing argument that Cristino Portillo "'engaged in the grandest form of deception' by illegally entering the country" constituted prosecutorial misconduct, despite finding that the defendant had earlier opened the door by testifying on direct about his immigration status.[178] The court found that the statement wrongly "implie[d] that anyone who—for whatever reason—ha[d] crossed our borders in violation of the government's immigration procedures should not believed," even though Portillo's "unlawful presence in this country did not bear directly upon his veracity in respect to the issue of his guilt on the charge of distributing drugs."[179]

The Eighth Circuit reached a similar conclusion in *United States v. Cruz-Padilla*, finding that the prosecutor's linkage of the defendant's undocumented immigration status to a character for untruthfulness during closing arguments was prohibited.[180] In *Cruz-Padilla*, the

176. *Id.* The Tenth Circuit erroneously characterized the defendant's testimony as stating that he was a United States citizen, a characterization of the facts that is not supported by the trial record.

177. *See* Portillo v. United States, 609 A.2d 687, 690 (D.C. 1992) ("If an improper remark drew an objection from defense counsel at trial, we will nevertheless affirm the conviction unless the defendant suffered 'substantial prejudice.' . . . If, on the other hand, the defendant failed to object to the improper remark, in order to obtain a reversal, appellant must show plain error, *i.e.*, 'error "so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial."'" (footnote omitted) (citations omitted) (quoting McGrier v. United States, 597 A.2d 36, 41 (D.C. 1991))).

178. *Id.* at 689–91. The court did find, however, that the "open the door" doctrine allowed limited cross-examination of Portillo during the trial regarding his immigration status. *Id.* at 690.

179. *Id.* at 690–91. The court ultimately affirmed, however, because "none of the improprieties alleged by the appellant . . . rose to the level of plain error." *Id.* at 691.

180. *See* United States v. Cruz-Padilla, 227 F.3d 1064, 1070 (8th Cir. 2000).

prosecutor told the jury in its closing that the defendant Alejandro Cruz-Padilla's testimony should be disbelieved as the defendant "had been living a lie ever since he came to this country . . . and as such . . . lying and deceiving to Mr. Cruz-Padilla is not something that is hard to do or out of the ordinary."[181] In reversing Cruz-Padilla's conviction and granting him a new trial, the Eighth Circuit affirmed the long-standing principle that "[t]he Constitution prohibits racially biased prosecutorial arguments"[182] in finding that the prosecutor's "repeated references to Cruz-Padilla's [undocumented immigration] status reinforced to the jury his foreign origin and contributed nothing of legitimate evidentiary value."[183]

B. Witness Impeachment

State and federal courts are conflicted as to whether the credibility of Latinx criminal defendants and their defense witnesses can be impeached with extrinsic evidence of their nationality and/or immigration status.[184] State and federal evidentiary principles provide that the credibility of witnesses can be called into question for bias,[185]

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181. *Id.* at 1068.

182. *Id.* at 1069 (quoting the Fourteenth Amendment U.S. Supreme Court decision in McCleskey v. Kemp, 418 U.S. 279, 309 n.30 (1987)).

183. *Id.* The Eighth Circuit found that the prosecutor's statements during closing arguments prejudicially affected the substantial rights of Cruz-Padilla so as to deprive him of a fair trial under the Sixth Amendment. *Id.* ("A prosecutor . . . [has as much of a] 'duty to refrain from improper methods calculated to produce a wrongful conviction as [they do] to use every legitimate means to bring about a just one.'" (quoting Berger v. United States, 295 U.S. 78, 88 (1935))).

184. *See, e.g.*, United States v. Lopez-Medina, 596 F.3d 716, 739 (10th Cir. 2010) (holding no plain error to refer to defendant's immigration status as defendant opened the door to inquiry by testifying that he was "law abiding and never committed a crime"); United States v. Garcia, 994 F.2d 1499, 1507 (10th Cir. 1993) (finding that a prosecutor's question about the defendant's awareness that a conviction would render him deportable was relevant to credibility because it meant that the defendant had a reason to testify falsely and analogizing to a defendant knowing that they will go to jail if convicted); State v. Gallegos-Olivera, No. A19-0023, 2019 WL 7049557, at *1 (Minn. Ct. App. Dec. 23, 2019) (finding that cross-examination of a defense witness in a domestic violence case about the immigration consequences that the defendant might suffer if convicted was relevant to showing that the witness had a motive to lie to protect the defendant); Commonwealth v. Kouma, 53 A.3d 760, 761 (Pa. Super. Ct. 2012) (holding that evidence of being an "illegal alien" is relevant to whether a defendant is "law-abiding" if defendant opens the door by offering character evidence of being law abiding).

185. *See* Fed. R. Evid. 607 ("Any party . . . may attack the witness's credibility."); United States v. Abel, 469 U.S. 45, 51 (1984). Case law interpreting Rule 607 has clarified that the rule encompasses the common-law tradition allowing impeachment of witnesses for bias, motive, inaccurate perception, faulty recollection, inconsistent

motive,[186] perception and/or memory issues,[187] making inconsistent statements,[188] making false claims,[189] and for having an untruthful disposition.[190] As to the latter, non-conviction extrinsic evidence is not admissible to impugn a witness's character for untruthfulness except on cross-examination and at the discretion of the trial court.[191] The admissibility of impeachment evidence also depends on whether other rules of evidence and the U.S. Constitution would be violated by its introduction.[192] As such, impeachment evidence is only admissible if it is found to be relevant to assessing the credibility[193] or untrustworthy character[194] of a witness and is not unfairly prejudicial to the opposing party.[195]

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statements, and contradiction. *See* ROBERT P. MOSTELLER ET AL., MCCORMICK ON EVIDENCE §§ 33–50 (8th ed. 2020) [hereinafter MCCORMICK ON EVIDENCE].

186. MCCORMICK ON EVIDENCE, *supra* note 185, § 39.

187. *Id.* § 44.

188. *Id.* §§ 34–38; United States v. Ince, 21 F.3d 576, 579 (4th Cir. 1994); *see also* FED. R. EVID. 613(b) (setting forth procedural requirements for impeaching a witness with a prior inconsistent statement).

189. *See* MCCORMICK ON EVIDENCE, *supra* note 185, § 39 (self-interestedness resulting in false testimony), § 42 (prior convictions relating to false statements).

190. *See* FED. R. EVID. 608 (permitting non-conviction evidence pertinent to a witness's character for truthfulness or untruthfulness in limited situations); FED. R. EVID. 609 (permitting the impeachment of a witness's character for truthfulness by using evidence of the witness's past criminal conviction in limited situations).

191. *See* FED. R. EVID. 608(b). Some states, such as Texas, do not allow for the admission of extrinsic evidence to attack a witness's character for untruthfulness even during cross-examination. *See* Sanchez v. Davis, 888 F.3d 746, 750 (5th Cir. 2018).

192. *See* FED. R. EVID. 402; *see also* FED. R. EVID. 105 (limiting the admission of evidence that is not admissible for other purposes); FED. R. EVID. 403 (allowing the trial court to exclude otherwise admissible evidence if there is a substantial likelihood that the jury might misuse the evidence in an improper manner).

193. *See* FED. R. EVID. 402 (only relevant evidence is admissible, unless some other rule, federal statute, or the U.S Constitution provides for its admissibility).

194. *Id.*; *see also* FED. R. EVID. 608(b) (stating that while "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness . . . the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: [a] witness"); FED. R. EVID. 609(a). Rule 609 adopts a per se finding that all felony criminal convictions are at least minimally probative of a witness's character for untruthfulness, and that all convictions, regardless of punishment, are probative of such if the elements of the crime required proving—or the witness's admitting—the commission of a dishonest act or false statement. *Id.* The racial bias and disparities that attend the admission of prior convictions under Rule 609 has been much documented and criticized. *See generally* Anna Roberts & Julia Simon-Kerr, *Reforming Prior Conviction Impeachment*, 50 FORDHAM URB. L.J. 377, 380–81 (2023).

195. *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . .");

Some courts have permitted the impeachment of the defendant with evidence of their undocumented immigration status on the rationale that such evidence is relevant to demonstrating that the defendant has a motive to lie at trial. While the D.C. Court of Appeals' decision in *Portillo v. United States* held that prosecutorial references to the defendant's immigration status during closing arguments was prohibited, it also found that using such evidence to impeach the defendant was appropriate.[196] Portillo appealed his conviction, in part, on the grounds that the prosecutor's references to his citizenship and immigration status "improperly appealed to the prejudice and racial or ethnic bias of the jury" and deprived him of a fair trial.[197] The prosecutor in this case disparagingly addressed the defendant as "Señor Portillo" and questioned Portillo about his immigration status and the risk of deportation upon conviction during cross-examination.[198] The prosecutor also "remarked, without evidentiary foundation, that 'no one on the streets of D.C. carries their life savings around,'" and told the jury that Portillo had "'engaged in the grandest form of deception' by illegally entering the country."[199] The prosecutor later told the jury that Portillo was not being truthful about his fluency in English.[200]

The D.C. Court of Appeals rejected Portillo's concerns that the prosecutor's statements appealed to jury racial bias.[201] The court, somehow, found that the prosecutor's reference to the defendant as "Señor Portillo" "was an isolated incident, was not inherently derogatory, and . . . may have been inadvertent."[202] The court also found that Portillo opened the door to questions on cross-examination about his immigration status after he testified on direct examination that he had entered the United States "without papers" in order to rebut the negative inference stemming from his possession of a significant amount of cash.[203]

Old Chief v. United States, 519 U.S. 172, 180 (1997) ("[Rule 403's] term 'unfair prejudice' . . . speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.")

196. Portillo v. United States, 609 A.2d 687, 690–92 (D.C. 1992).

197. *Id.* at 688.

198. *Id.* at 689.

199. *Id.*

200. *Id.*

201. *Id.* at 691–92.

202. *Portillo*, 609 A.2d at 690 ("[W]e cannot say that a single reference to the defendant by a common form of address in his native language amounted to prosecutorial misconduct.").

203. *Id.* at 690 n.7.

Relatedly, the Tenth Circuit in *United States v. Garcia* upheld the prosecutor's cross-examination of the defendant Sergio Garcia concerning his awareness of the deportation consequences of conviction[204]—thus presenting information to the jury that Garcia was not a United States citizen and was subject to removal.[205] The Tenth Circuit rejected Garcia's argument that information regarding his immigration and citizenship status was irrelevant to his credibility, finding that "a defendant who knows he will be deported if convicted has a reason to testify falsely."[206]

The Minnesota Court of Appeals reached a similar conclusion, finding that impeachment questioning concerning a defense witness's knowledge of the potential immigration consequences that might face the Latinx defendant upon conviction was relevant to credibility.[207] The court rejected the defendant's argument that evidence about his immigration status was irrelevant and unfairly prejudicial, holding that it was relevant to show that the defense witness had a potential motive to lie.[208]

The admission of impeachment evidence concerning a criminal defendant's citizenship and immigration status, however, runs afoul of both our evidentiary rules on witness impeachment and the Sixth Amendment's right to a fair trial. Evidence of a Latinx defendant's citizenship and immigration status simply does not make it "more or less probable" that the witness lacks credibility.[209] It is not objectively reasonable for the jury to conclude that a witness is not telling the truth based merely on the citizenship and immigration status of the witness. Even if such evidence were relevant to credibility, it should be excluded on the grounds that its low probative value is substantially outweighed by the risk that the Latinx defendant will be unfairly prejudiced—given the empirically demonstrated likelihood that juror racial bias will be activated.[210] Such prosecutorial

204. United States v. Garcia, 994 F.2d 1499, 1507 (10th Cir. 1993).

205. Persons possessing United States citizenship are not removable from the United States. Persons that are not United States citizens—including lawful permanent residents, asylees, temporary non-immigrants, and undocumented immigrants—are subject to deportation under the Immigration and Nationality Act for various offenses. *See generally* Immigrant and Nationality Act, 8 U.S.C. § 1227 ("Deportable aliens").

206. *Garcia*, 994 F.2d at 1507.

207. State v. Gallegos-Olivera, No. A19-0023, 2019 WL 7049557, at *1 (Minn. Ct. App. Dec. 23, 2019).

208. *Id.* at *3.

209. Fed. R. Evid. 401.

210. *See* Fed. R. Evid. 403; *supra* Part III.

appeals to juror racial and nationality biases are strictly forbidden by the Constitution.[211]

A handful of state and federal courts have begun to recognize as much, holding that impeachment evidence of a defendant's immigration status is irrelevant to demonstrating a motive to lie and is so unfairly prejudicial and inflammatory as to amount to a violation of the defendant's Sixth Amendment right to a fair trial.[212] The Fifth Circuit in *Sanchez v. Davis*, in particular, found that evidence of "a defendant's illegal [sic] status is considered so inflammatory that it is often the subject of motions in limine, the point of which is to ensure that testimony is not revealed to the jury that is so prejudicial that even a subsequent instruction to disregard cannot undo the damage."[213] The New Jersey Supreme Court in *State v. Sanchez-Medina* relatedly found that such evidence is inadmissible to assess the defendant's credibility given its irrelevance and substantial prejudice, and that "a defendant's immigration status is likewise not admissible under other rules of evidence," such as Rule 404 or Rule 608 of the New Jersey Rules of Evidence.[214] The American Civil Liberties

211. *See generally supra* Part III.

212. *See* State v. Sanchez-Medina, 176 A.3d 788, 794–95 (N.J. 2018) (finding reversible error for the trial court to allow evidence of the defendant's immigration status to impeach witness during cross-examination) ("As a general rule, . . . evidence [of immigration status] should not be presented to a jury" given its irrelevance and prejudicial effect.); Sanchez v. Davis, 888 F.3d 746, 752 (5th Cir. 2018) (finding that questioning a witness about the defendant's immigration status was irrelevant and unfairly prejudicial); *see also* Andrade v. Walgreens-OptionCare, Inc., 784 F. Supp. 2d 533, 535 (E.D. Pa. 2011) ("Many courts have opined that references to a party's immigration status expose that party to a substantial risk of unfair prejudice." (citing cases)); Escamilla v. Shiel Sexton Co., 73 N.E.3d 663, 675 (Ind. 2017) (finding that evidence of a party's immigration status "carr[ies] some risk of unfair prejudice"); TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 244 (Tex. 2010) (finding that the "prejudicial potential" of evidence of a party's immigration status "substantially outweighed any probative value"); Salas v. Hi-Tech Erectors, 230 P.3d 583, 587 (Wash. 2010) (en banc) (finding that "the probative value of a plaintiff's undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice"); Gonzalez v. City of Franklin, 403 N.W.2d 747, 760 (Wis. 1987) (noting the "obvious prejudicial effect" of allowing evidence of a party's undocumented immigration status).

213. *Sanchez*, 888 F.3d at 751 (noting that "illegal immigration has . . . become a more 'highly charged' issue" in recent years (quoting Republic Waste Servs., Ltd. v. Martinez, 335 S.W.3d 401, 409 (Tex. Ct. App. 2011))). The *Sanchez* court also noted that extrinsic evidence of a criminal defendant's immigration status is not admissible under Texas law for credibility purposes, as Texas does not recognize the exception contained in FED. R. EVID. 608(b) for the discretionary admission of extrinsic evidence of a witness's character for truthfulness on cross-examination. *Id.* at 750.

214. *Sanchez-Medina*, 176 A.3d at 794–95. FED. R. EVID. 404 provides a general prohibition against the admission of character evidence with limited exceptions,

Union, granted leave to appear as amicus curiae in *Sanchez-Medina*, "stress[ed] that evidence of a defendant's federal immigration status is rarely probative . . . and can 'arous[e] public passion and prejudice against undocumented immigrants.'"[215]

C. As Substantive Evidence

State and federal courts have generally found evidence regarding the immigration status of parties to be irrelevant to establishing substantive, non-impeachment issues at trial. Courts have held that such evidence is inadmissible on relevancy and unfair prejudice grounds when introduced against a criminal defendant to prove a substantive legal issue in the case.[216] As the Georgia Supreme Court succinctly observed,

> [A]n appeal to national or other prejudice is improper . . . and evidence as to . . . race, color, or nationality . . . is not admissible, where such evidence is introduced for such purpose and is not relevant to any issue in the action . . . . [T]his rule is equally applicable to evidence as to an individual's immigration status.[217]

Courts have also generally found immigration status evidence offered against civil parties to be irrelevant when offered for substantive non-impeachment purposes.[218]

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while FED. R. EVID. 608 bars extrinsic evidence of a witness's character for truthfulness except for on cross-examination, within the discretion of the trial judge, if it is found to be probative of the witness's character for truthfulness.

215. *Sanchez-Medina*, 176 A.3d at 793–94.

216. *See, e.g.*, Sandoval v. State, 442 S.E.2d 746, 747–48 (Ga. 1994) (finding evidence of the defendant's immigration status to not be relevant to any issue in the case, but upholding the conviction on harmless error grounds); Commonwealth v. Sanchez, 595 A.2d 617, 620 (Pa. Super. Ct. 1991) (finding that reference to the defendant as an "illegal alien" was irrelevant and prejudicial); United States v. Delgado, No. CR-05-920, 2006 WL 1308303, at *1–2 (D.N.M. Feb. 9, 2006) (granting defense motion in limine to exclude evidence of the defendant's undocumented immigration status as irrelevant in heroin possession with intent to distribute case) ("Pursuant to [Federal Rule of Evidence] 402, the Court does not believe . . . that evidence of Cruz-Barajas' potential illegal immigration status, if any, is relevant to the charges . . . .").

217. *Sandoval*, 442 S.E.2d at 747 (citations omitted).

218. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1075 (9th Cir. 2004) (finding plaintiff's immigration status not relevant in disparate impact discrimination claim under Title VII); Walsh v. Fusion Japanese Steakhouse, Inc., 585 F. Supp. 3d 766, 790–91 (W.D. Pa. 2022) (holding that evidence of an employee's immigration status is irrelevant in Fair Labor Standards Act ("FLSA") action); Francois v. Mazer, No. 09 Civ. 3275, 2012 WL 1506054 (S.D.N.Y. Apr. 24, 2012) (granting motion in limine to exclude evidence of plaintiff's immigration status as irrelevant and prejudicial in

A number of states have only recently recognized the evidentiary and constitutional dangers of allowing evidence of the defendant's immigration status to be admitted at trial (whether for impeachment purposes *or* as substantive evidence). Pennsylvania,[219]

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an FLSA action); Romero v. Prindle Hill Constr., LLC, No. 3:14-CV-01835, 2017 WL 3390242, at *2 (D. Conn. Aug. 7, 2017) (granting plaintiff's motion in limine to exclude evidence of his immigration status in FLSA action as both irrelevant and unduly prejudicial); Hocza v. City of New York, No. 06 Civ. 3340, 2009 WL 124701 (S.D.N.Y. Jan. 20, 2009) (holding that evidence of plaintiff's immigration status, standing alone, was irrelevant in state labor law action); Mancilla v. Chesapeake Outdoor Servs., LLC, No. 1:22-CV-00032, 2024 WL 361328, at *2 (D. Md. Jan. 31, 2024) (holding that evidence of plaintiff's immigration status was irrelevant in FLSA actions); Perez v. El Tequila, LLC, No. 12-CV-588, 2015 WL 12999709 (N.D. Okla. July 10, 2015) (holding that evidence of employee immigration status in FLSA actions was irrelevant and thus inadmissible) (collecting cases); Velasquez v. Centrome, Inc., 183 Cal. Rptr. 3d 150, 153–54 (Ct. App. 2015) (finding worker's status as an undocumented immigrant was irrelevant to claim that he would need a future lung transplant in negligence action against food flavoring factory); Salas v. Hi-Tech Erectors, 230 P.3d 583, 586–87 (Wash. 2010) (en banc) (excluding evidence of immigration status in construction worker's lawsuit against employer as being unduly prejudicial (though minimally relevant to future earnings) as illegal immigration is a "politically sensitive issue" that "can inspire passionate responses" that interfere with a jury's deliberation).

Some courts have found immigration status to be relevant, but unduly prejudicial. *See* Republic Waste Servs., Ltd. v. Martinez, 335 S.W.3d 401, 406–11 (Tex. Ct. App. 2011) (finding employee's status as "illegal immigrant" was relevant to claim for lost future income in wrongful death action but prejudicial effect substantially outweighed probative value); Ayala v. Lee, 81 A.3d 584, 596–99 (Md. Ct. Spec. App. 2013) (finding plaintiff's status as an undocumented immigrant in personal injury action was not relevant or admissible for impeachment purposes, and prejudicial effect may substantially outweigh probative value as to future likelihood of earnings); *see also* Escamilla v. Shiel Sexton Co., 54 N.E.3d 1013, 1022 (Ind. Ct. App. 2016) (finding evidence of plaintiff employee's immigration status relevant to claim of lost earning capacity in workplace injury action), *vacated*, 73 N.E.3d 663, 669–70, 675 (Ind. 2017) (holding that evidence of immigration status was relevant to future earnings, yet only admissible if the employer could prove by a preponderance of the evidence that the employee would be deported, due to unfair prejudice concerns) ("Most courts . . . have concluded that immigration status is relevant to damages . . . in a decreased earning capacity claim."); Doe v. Bd. of Trs. of Neb. State Colls., No. 8:17-CV-00265, 2020 WL 2793558, at *2 (D. Neb. May 29, 2020) (noting that evidence of plaintiff's immigration status in gender discrimination action under Title IX was irrelevant to damages and other issues in the case); Maldonado v. Allstate Ins. Co., 789 So. 2d 464, 470 (Fla. Dist. Ct. App. 2001) (holding that any probative value of plaintiff's immigration status in car accident case was "thoroughly outweighed by unfair prejudice, confusion of the issues, and misleading the jury"); Magers v. Diamondhead Resort, LLC, 224 So. 3d 106, 113 (Miss. Ct. App. 2016) (finding that evidence that the guest that assaulted plaintiff was an "illegal immigrant" was irrelevant to issues in premises liability action against hotel where sexual assault took place).

219. Pa. R. Evid. 413 (effective Oct. 1, 2021) (stating that evidence of a party's or witness's immigration status is generally inadmissible in both civil and

Illinois,[220] Washington,[221] California,[222] and Oregon[223] have all passed state legislation within the last few years that exclude evidence of a party's or witness's immigration status in civil and/or criminal trials.[224] These states made legislative findings that evidence concerning the immigration status of civil parties, criminal defendants, and witnesses is generally irrelevant to credibility and the substantive issues involved at trial and is unfairly prejudicial.[225] The legislative history of Washington state's law—which was the model for all other state efforts to regulate the admission of immigration status evidence—is particularly insightful. The Washington state legislature stated that preventing the admission of immigration status evidence in most civil and criminal cases was critical to "[p]roviding immigrants with access to the courts and a fair trial."[226] The legislature found that the introduction of immigration status evidence "poses serious obstacles to our courts' ability to deliver a fair trial" under the Sixth Amendment given that "[i]ssues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation."[227] The legislature ultimately concluded that a rule restricting the admission

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criminal cases and noting this rule was modeled after Washington State's Rule of Evidence 413).

220. 735 Ill. Comp. Stat. Ann. 5/8-2901 (West, Westlaw through P.A. 103-1065 of the 2024 Reg. Sess.) (stating that evidence of a person's immigration status is generally inadmissible in civil trials).

221. Wash. R. Evid. 413 (amended effective Nov. 2, 2021) (stating that evidence of a party's or witness's immigration status is generally inadmissible in both civil and criminal cases).

222. Cal. Evid. Code § 351.2 (West, Westlaw through Ch. 1017 of 2024 Reg. Sess.) (providing that evidence of a person's immigration status is inadmissible in civil proceedings for personal injury or wrongful death); *id.* § 351.3 (providing that in all other civil proceedings, evidence of a person's immigration status can only be disclosed after an in camera hearing); *id.* § 351.4 (same in criminal proceedings).

223. Or. Rev. Stat. § 135.983 (2023) (preventing courts from inquiring into defendants' immigration status in criminal proceedings).

224. Note that parties and witnesses remain free to voluntarily introduce evidence of their immigration status under these provisions.

225. *See* Cal. Lab. Code § 1171.5 (West 2018); 225 Pa. Code. R. 413 cmt. (noting that "the introduction of immigration status has received heightened consideration in terms of relevancy and prejudice" and that the Pennsylvania Rule 413 is "warranted to avoid potential intimidation of witnesses for fear of deportation" (citing Commonwealth v. Sanchez, 595 A.2d 617, 620 (Pa. Super. Ct. 1991))).

226. 5A Elizabeth A. Turner & Karl B. Tegland, Washington Practice: Evidence Law and Practice § 413.2, Westlaw (database updated Aug. 2024) (Drafter's Comments accompanying original Wash. R. Evid. 413).

227. *Id.* (quoting Salas v. Hi-Tech Erectors, 230 P.3d 583, 586 (Wash. 2010)) (noting that Rule 413 would accord with other evidentiary rules that restrict the introduction of prejudicial evidence, such as Fed. R. Evid. 411 (restricting evidence of

of immigration status evidence "would promote equitable access to justice by removing the potential for racial and ethnic stereotyping that inevitably results from the unnecessary injection of immigration status evidence into the fact-finding process."[228] Washington's new evidentiary Rule 413, then, was "designed to protect Washington's immigrants and ensure they can obtain access to the justice system without fear of the legal process being overtaken by racial, ethnic, or anti-immigrant prejudice."[229]

The state legislatures of the remaining forty-five states, as well as the federal legislative branch, should strongly consider implementing similar evidentiary rules in order to protect the constitutional right of non-citizen criminal defendants to a fair and equitable trial free from racial bias and unfair prejudice.

D. As an Aggravating Factor in Criminal Sentencing

Allowing the jury to consider evidence of a Latinx criminal defendant's immigration and citizenship status in non-immigration related trials greatly enhances the likelihood that the jury will engage in racially biased decision-making prohibited by the Constitution.[230] The law is similarly clear that a court may not base any sentencing determination on a defendant's race or national origin, or on the fact that he or she is a citizen of a foreign state.[231] The prohibition in sentencing from considering the defendant's race, nationality, and citizenship applies with equal force to the sentencing of undocumented criminal defendants.[232]

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a party's insurance coverage) and FED. R. EVID. 412 (limiting evidence of a sexual assault victim's past sexual behavior)).

228. *Id.*

229. *Id.*

230. *See supra* Part III.

231. United States v. Leung, 40 F.3d 577, 586 (2d Cir. 1994); *see also* Pepper v. United States, 562 U.S. 476, 489 n.8 (2011) ("A defendant's race or nationality may play no adverse role in the administration of justice, including at sentencing." (quoting *Leung*, 40 F.3d at 586)); United States v. Onwuemene, 933 F.2d 650, 651–52 (8th Cir. 1991) (finding that the defendant's due process rights were violated when the trial court imposed a harsher sentence based on defendant's national origin and alienage); United States v. Borrero-Isaza, 887 F.2d 1349, 1352–55 (9th Cir. 1989) (holding that criminal sentencing that relies on the defendant's national origin or alienage as a factor violates due process).

232. *See, e.g.*, Trujillo v. State, 698 S.E.2d 350, 354 (Ga. Ct. App. 2010) (The trial court's "broad discretion when determining the appropriate sentence to impose upon a criminal defendant . . . must . . . be exercised within the perimeters of the Fourteenth Amendment, which protects all 'persons'—including those residing in this country illegally—from invidious governmental discrimination based solely upon their immigration status." (citing Plyler v. Doe, 457 U.S. 202, 210 (1982)

State and federal courts, nonetheless, have allowed evidence demonstrating that a defendant lacks United States citizenship and an authorized immigration status to be considered as a non-listed aggravating factor in criminal sentencing decisions.[233] Given the popular social conflation of Latinx racial identity with "illegal immigration," the admission of such evidence creates an undue risk that the factfinder will engage in racialized decision-making. These decisions attempt to justify consideration of the defendant's undocumented immigration status by making a tenuous distinction between discrimination based on race, citizenship, and nationality with discrimination based on immigration status—despite the myriad ways in which those factors are intertwined and often conflated.[234] Courts that rely on this thin distinction generally devote minimal, if any, analysis in support of their conclusion and rather mechanically cite to older case precedent holding that a defendant's civil immigration status is relevant to a "disregard for the law."[235] Rote reliance on constitutionally invalid precedent, however, is clearly insufficient to

("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.")))).

233. *See, e.g.*, United States v. Flores-Olague, 717 F.3d 526, 534 (7th Cir. 2013); Chavez v. United States, 499 A.2d 813, 815 (D.C. 1985); United States v. Gomez, 797 F.2d 417, 419 (7th Cir. 1986); United States v. Cervantes-Rubio, 275 F. App'x 601, 604 (9th Cir. 2008); United States v. Garcia-Cardenas, 242 F. App'x 579, 583 (10th Cir. 2007); Yemson v. United States, 764 A.2d 816, 819 (D.C. 2001); United States v. Loaiza-Sanchez, 622 F.3d 939, 942 (8th Cir. 2010); United States v. Lopez-Salas, 266 F.3d 842, 846 n.1 (8th Cir. 2001); State v. Beltran, 706 P.2d 85, 86–87 (Idaho Ct. App. 1985); Viera v. State, 532 So. 2d 743, 745 (Fla. Dist. Ct. App. 1988); State v. Salas Gayton, 882 N.W.2d 459, 471–72 (Wis. 2016); Escobedo v. State, 987 N.E.2d 103 (Ind. Ct. App.), *aff'd in relevant part*, 989 N.E.2d 1248 (Ind. 2013); *Trujillo*, 698 S.E.2d at 354–55; People v. Sanchez, 235 Cal. Rptr. 264, 267 (Ct. App. 1987); People v. Hernandez-Clavel, 186 P.3d 96, 99 (Colo. App. 2008); State v. Svay, 828 A.2d 790, 794–95 (Me. 2003); State v. Zavala-Ramos, 840 P.2d 1314, 1316 (Or. Ct. App. 1992); State v. Alcala, No. 2 CA-CR 2007-0161, 2008 WL 2756496, at *5 (Ariz. Ct. App. May 8, 2008); People v. Cesar, 14 N.Y.S.3d 100, 106 (App. Div. 2015). *But see* Martinez v. State, 961 P.2d 143, 145 (Nev. 1998) (finding that trial court "violated appellants' due process rights, if it based its sentencing decision, in part, upon appellants' status as illegal aliens").

234. *See, e.g.*, *Hernandez-Clavel*, 186 P.3d at 99 (rejecting the defendant's concerns of racial, alienage, and citizenship prejudice by stating that "nothing in the record indicates that . . . the sentencing court was punishing defendant for his race, national origin, or Mexican citizenship"); *supra* Part III. Latinx defendants in many of these cases appealed their sentencing on the ground that the reliance on immigration status as an aggravating factor "invoked prejudicial stereotypes and was an intrinsically improper factor," but to no avail. *See, e.g.*, *Salas Gayton*, 882 N.W.2d at 471.

235. *See supra* note 233.

override the due process, equal protection, and fair trial demands of the Fifth, Sixth, and Fourteenth Amendments.[236]

A defendant's past "disregard for the law" is typically not included as a listed aggravating factor in state and federal law.[237] Nonetheless, both state and federal law provide discretion to the trial court in considering any other aggravating factors that are relevant to the facts of the case.[238] Courts have tended to refer to a defendant's past "disregard for the law" as part of a broader examination of the defendant's character.[239] For example, the Indiana Court of Appeals in *Alexander v. State* found that the trial court was allowed to consider the defendant's status as an "illegal alien" as bearing on his disregard for the laws "of this country," even though "he had no choice" when he was brought to the United States without documents as a young child.[240] The court incredulously believed that Alexander "could have rectified his illegal alien [sic] status by returning to his native country or by applying for a visa in this country"—even though neither option provided a realistic opportunity for Alexander to obtain authorized status in the United States.[241]

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236. *See* U.S. Const. art. VI, cl. 2 (the "Supremacy Clause").

237. For example, Indiana statutory law lists aggravating factors such as whether the defendant committed a crime of violence, had recently violated the conditions of probation or parole, or had a history of criminal behavior. Ind. Code § 35-38-1-7.1 (2024). The Violent Crime Control and Law Enforcement Act of 1994 allows courts to consider aggravating factors for homicide such as whether the defendant has been convicted of certain serious felonies (including violent felonies involving firearms, child molestation, sexual assault, and repeated felony drug distribution). 18 U.S.C. § 3592(c).

238. *See, e.g.*, 18 U.S.C. § 3592 (stating that the trier of fact "may consider whether any other aggravating factor . . . exists"); 18 U.S.C. § 3553(b)(1) (permitting a court to find "that there exists an aggravating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating [these sentencing] guidelines"); Ind. Code § 35-38-1-7.1(c) (2024) (noting that the listed statutory aggravators "do not limit the matters that the court may consider in determining the sentence").

239. *See Salas Gayton*, 882 N.W.2d at 472–73 (finding that the defendant's status as an "illegal alien" and "an illegal" was relevant to his character and demonstrated his disregard for law as an aggravating factor); Escobedo v. State, 987 N.E.2d 103, 119–20 (Ind. Ct. App.), *aff'd in relevant part*, 989 N.E.2d 1248 (Ind. 2013) (same).

240. Alexander v. State, 837 N.E.2d 552, 556 (Ind. Ct. App. 2005).

241. *Id.* Departing the United States would have almost certainly rendered Alexander inadmissible to the United States for the remainder of his lifetime. *See* Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i) (providing that an "alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designation by the Attorney General, is inadmissible") Applying for a temporary or permanent visa while residing in the United States in an undocumented status is generally prohibited by federal immigration law (Immigration and Nationality Act §§ 237, 245,

Courts have thus erroneously equated the offense of possessing an undocumented immigration status with the commission of past serious criminal offenses.[242] Indeed, a defendant's violation of immigration laws is the predominant, if only, context in which courts have enhanced criminal sentencing based on the commission of past civil offenses. Rather, trial courts focus on a criminal defendant's history of criminal felony disregard for the law in the vast majority of reported decisions. Evidence of a criminal defendant's "disregard for the law" is typically found to exist when the defendant has been convicted of very serious (and often violent) past felonies—such as child molestation, aggravated assault, and gun crimes.[243] The false equivalence of immigration offenses—either unintentionally for defendants that arrived in the United States as a child, or intentionally so as to escape violence, persecution, and/or poverty in their

8 U.S.C. §§ 1227, 1255), save for limited situations such as the much-contested Deferred Action for Childhood Arrivals executive policy.

242. Unauthorized presence in the United States historically was treated as a civil offense that was not subject to criminal punishment. *See* Immigration and Nationality Act §§ 208, 237, 8 U.S.C. §§ 1158, 1227. Nonetheless, anti-immigrant political rhetoric has led to an increasing criminalization of immigration law, such that certain immigration violations (such as entering the United States without authorization and smuggling) are now subject to criminal punishment. *See generally* HERNÁNDEZ, *supra* note 8, at 145–84.

243. *See* State v. Hughes, 110 P.3d 192, 204 (Wash. 2005) (repeated felony offense of child molestation just three months after release for child molestation); Flores v. Kernan, No. 1:05-CV-00379, 2008 WL 683462, at *14 (E.D. Cal. Mar. 10, 2008) (two convictions for assault with semiautomatic weapon, convictions for narcotics transportation, aggravated gassing and battery); Field v. State, 843 N.E.2d 1008, 1011 (Ind. Ct. App. 2006) (extensive criminal history including three felony convictions: theft, violating probation, felony battery with a deadly weapon, and felony drug possession); State v. Goodman, 30 P.3d 516, 520 (Wash. Ct. App. 2001) (burning down wife's house in domestic violence conviction established "extraordinary disregard for the law"); State v. Cham, 267 P.3d 528, 535 (Wash. Ct. App. 2011) (commission of felony domestic assault, unlawful imprisonment, and other crimes within one hour of release from incarceration for felony domestic assault); State v. Sanders, No. A-3377-07T4, 2009 WL 2168776, at *7 (N.J. Super. Ct. App. Div. July 22, 2009) (finding the twenty-three year old defendant already had a "longstanding pattern of disregard for the law" based on a conviction for aggravated assault as well as four drug convictions); Shepherd v. State, No. 70A01-0911-CR-529, 2010 WL 2834961, at *3 (Ind. Ct. App. July 20, 2010) (convictions for attempted robbery, aggravated battery, possession of cocaine, delivery of a controlled substance, and domestic battery); People v. Bolagh, No. E028258, 2002 WL 32655, at *7 (Cal. Ct. App. Jan. 11, 2002) (convictions for attempted voluntary manslaughter and attempted terroristic threat); United States v. Scott, No. 23-1324, 2023 WL 8433687, at *2 (8th Cir. Dec. 5, 2023) (two violent felon in possession convictions prior to current conviction for same offense).

birth countries—with violent criminal felonies is as illogical as it is discriminatory.[244]

V.
CONCLUSION

The constitutional and evidentiary rights of Latinx non-citizen defendants have long been infringed by the introduction of evidence concerning their citizenship and immigration status during non-immigration related criminal trials. A wealth of empirical psychological research has demonstrated that informing the jury that a Latinx criminal defendant is not a United States citizen and/or is an "illegal alien" greatly increases the likelihood that racial bias will infect the decision-making process. The possibility that juror racial bias will be activated by such proof is significant, especially given the recent increase in conservative political rhetoric falsely equating Latinx racial identity and immigration with criminality. The presentation of immigration status evidence—whether during opening and closing statements, as proof of substantive legal issues, for witness impeachment, or as an aggravating sentencing factor—violates the defendant's right to an impartial jury and equal application of the law.

244. Johnson, *supra* note 45, at 426–27 (referencing the findings of numerous empirical studies).

CONTRACT LAW FOR THE SPENDING CLAUSE

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ABSTRACT

The Second Circuit's recent en banc decision in Soule v. Connecticut Ass'n of Schools, *addressing transgender athletes' participation in school sports under Title IX, brings into sharp relief the problematic evolution of the* Pennhurst *doctrine, a cornerstone of Spending Clause jurisprudence. Under* Pennhurst, *damages actions are only available under statutes providing conditional federal aid to states when the statutory terms provide "clear notice" of a recipient state's legal obligations. The rationale underlying the doctrine is the contractual nature of such Spending Clause legislation. However, as* Soule *helps demonstrate, lower courts have increasingly applied the doctrine in a manner inconsistent with its purported contractual foundations, transforming the doctrine into a defense akin to qualified immunity. This trend threatens to undermine civil rights statutes by narrowing the circumstances in which they can be enforced through actions for damages.*

This Article uses the Soule *decision as an entry point to critically examine the* Pennhurst *doctrine's development and application. Drawing on principles such as the void-for-vagueness rule,* contra proferentem, *the implied covenant of good faith and fair dealing, and doctrines relating to changed circumstances, this Article proposes a reconstruction of the* Pennhurst *doctrine that better aligns with its contractual rationale and the distinctive federalism concerns implicated by conditional aid under Spending Clause legislation. This approach offers a more nuanced and flexible framework for interpreting Spending Clause legislation, particularly in evolving areas like Title IX enforcement—an area implicated by, among other things, recent litigation challenging the Biden Administration's regulations expanding the scope of Title IX to protect sexual orientation and gender identity discrimination. This revised doctrine can provide courts with a toolkit for navigating complex disputes in federal-state partnerships, balancing the need for clear congressional mandates with the realities of rapidly changing social norms and policy needs.*

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I.
INTRODUCTION

In June 2020, the U.S. Supreme Court issued a landmark decision in *Bostock v. Clayton County*, ruling by a 6-3 majority that Title VII of the Civil Rights Act of 1964's prohibition on sex discrimination in employments extends to discrimination on the basis of sexual orientation and gender identity.[1] The decision was a watershed moment for LGBTQIA rights, with some commentators calling it a "super precedent" likely to have "broad ramifications" beyond its particular facts.[2] But what was cause for celebration for some was cause célèbre for others: in his dissent, Justice Alito warned that the decision was "virtually certain to have far-reaching consequences," noting that "[o]ver 100 federal statutes prohibit discrimination because of sex."[3]

Among the likely flashpoints highlighted by his dissent, Justice Alito emphasized the question of "[w]omen's sports."[4] While

1. Bostock v. Clayton County, 590 U.S. 644 (2020).

2. William N. Eskridge Jr. & Christopher R. Riano, Bostock*: A Statutory Super-Precedent for Sex and Gender Minorities*, Am. Const. Soc'y: Expert F. (July 1, 2020), https://www.acslaw.org/expertforum/bostock-a-statutory-super-precedent-for-sex-and-gender-minorities [https://perma.cc/S43W-UQH4].

3. *Bostock*, 590 U.S. at 724 (Alito, J., dissenting) ("What the Court has done today—interpreting discrimination because of 'sex' to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences.").

4. *Id.* at 727–28 (emphasis omitted).

challenges involving transgender athletes—and particularly student athletes—are not new,[5] public debate over the participation of transgender women and girls in traditionally sex-segregated sports teams has reached a fever pitch in recent years.[6] A focal point of these debates is Title IX of the Education Amendments of 1972, which bans sex discrimination in educational institutions that receive federal funding.[7] In his dissent, Justice Alito cautioned that under the Court's reasoning, Title IX could be read to prevent the exclusion of transgender student athletes from participating in sports teams consistent with their gender identity.[8]

Seeking to highlight the "threat" such a consequence would have, Justice Alito pointed to a complaint filed just a few months earlier in a federal district court by four Connecticut high school girls, including one Selina Soule, alleging that the Connecticut Interscholastic Athletic Conference ("CIAC") was violating Title IX through its policy permitting transgender students to participate in sex-segregated high school athletics.[9] According to the *Soule v. Connecticut Ass'n of Schools* complaint, the policy has cost the plaintiffs trophies and accolades because they have been forced to compete against transgender girls.[10] Justice Alito pointed to the *Soule* allegations as illustrating how

5. *See* Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 Wis. J.L. Gender & Soc'y 271, 272 (2013) (writing about transgender athletes in women's and girls' sports seven years before *Bostock*).

6. *See, e.g.*, Jeré Longman, *Sport Is Again Divided Over Inclusiveness and a Level Playing Field*, N.Y. Times (June 23, 2022), https://www.nytimes.com/2022/06/22/sports/olympics/transgender-athletes-fina.html [https://perma.cc/MC2R-SDE6]; Gillian R. Brassil & Jeré Longman, *Who Should Compete in Women's Sports? There Are 'Two Almost Irreconcilable Positions,'* N.Y. Times (Aug. 3, 2021), https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html [https://perma.cc/FZR4-4UMM]; Remy Tumin, *Title IX and the New Rule on Transgender Athletes Explained*, N.Y. Times (Apr. 7, 2023), https://www.nytimes.com/article/title-ix-transgender-athletes-school-sports.html [https://perma.cc/P58S-H878].

7. 20 U.S.C. §§ 1681–1687.

8. *Bostock*, 590 U.S. at 727 (Alito, J., dissenting) ("Another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex.").

9. *See id.*; Second Amended Verified Complaint for Declaratory & Injunctive Relief & Damages at 2–3 [hereinafter *Soule* Complaint], Soule v. Conn. Ass'n of Schs. (*Soule I*), No. 3:20-CV-00201, 2021 WL 1617206 (D. Conn. Apr. 25, 2021), *aff'd*, 57 F.4th 43 (2d Cir. 2022), *vacated en banc and remanded*, 90 F.4th 34 (2d Cir. 2023).

10. *See Soule* Complaint, *supra* note 9, at 30–31 ("In sum, the real-world result of the CIAC Policy is that in Connecticut interscholastic track competitions, while highly competitive girls are experiencing the no doubt character-building 'agony of defeat,' they are systematically being deprived of a fair and equal opportunity to experience the 'thrill of victory.'").

the *Bostock* majority's reasoning may "undermine one of [Title IX's] major achievements, giving young women an equal opportunity to participate in sports."[11]

The *Soule* complaint was filed in 2020. Given the central billing the *Soule* action received in Justice Alito's dissent, one might have expected the case to have resulted in a notable opinion or two grappling with the question of whether Title IX provides the complainants in the case the protection they allege. And yet, while the case has worked its way up from a district court in Connecticut to a panel and then an en banc sitting of the Second Circuit Court of Appeals, it was not until the fall of 2024 that a court even touched on the merits of the plaintiffs' allegations. The reason for this long delay? The district court dismissed the entire suit right at the jump on jurisdictional grounds.[12]

The court's reasoning relied, in part, on the little-known *Pennhurst* doctrine.[13] The doctrine requires that statutes enacted pursuant to the Spending Clause—including Title VII, Title IX, and many others—provide "clear notice" of any enforceable legal obligations.[14] Originating in Justice Rehnquist's 1981 opinion in *Pennhurst State School & Hospital v. Halderman*, the doctrine has been characterized by some lower courts as a "clear statement" rule pursuant to which a defendant can only be found liable for damages for breaching a statutory proscription if the violation is "clear."[15] Applying this

11. *Bostock*, 590 U.S. at 727 (Alito, J., dissenting).

12. *Soule I*, 2021 WL 1617206, at *1.

13. The *Pennhurst* case went up to the Supreme Court twice. The "*Pennhurst* doctrine" referred to throughout this Article is the "clear statement" rule articulated by the Supreme Court in *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst I*), 451 U.S. 1, 17–18 (1981), not the sovereign immunity rule set out when the case returned to the Court a few years later in *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst II*), 465 U.S. 89, 98–99 (1984).

14. Soule v. Conn. Ass'n of Schs. (*Soule III*), 90 F.4th 34, 57 (2d Cir. 2023) (en banc) (Menashi, J., concurring) (quoting *Pennhurst I*, 451 U.S. at 25).

15. *See, e.g.*, Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 815 (11th Cir. 2022); Doe v. Elkhorn Area Sch. Dist., No. 24-CV-354, 2024 WL 3617470, at *15–16 (E.D. Wis. Aug. 1, 2024); J.A.W. v. Evansville Vanderburgh Sch. Corp., 396 F. Supp. 3d 833, 840–41 (S.D. Ind. 2019). The Supreme Court has characterized *Pennhurst I* as a "clear statement rule," Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (citing *Pennhurst I*, 451 U.S. 1), though—as is discussed herein—the Court's understanding of the rule does not necessarily align with how it has been applied by lower courts. Although not a focus of this Article, recent Supreme Court precedent suggests the doctrine applies to all forms of relief, not just damages. *See* Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 220 (2022) ("A particular remedy is thus 'appropriate relief' in a private Spending Clause action 'only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature.'" (quoting Barnes v. Gorman, 536 U.S. 181, 187 (2002))).

understanding of the rule to the allegations in *Soule*, the district court, and then the three-judge Second Circuit panel, held that this rule required dismissal of the complaint on the ground that there was not sufficiently "clear" notice of whether CIAC would violate Title IX if it permitted transgender athletes to participate in women's sports in light of the text of the law, prior judicial precedent, and agency guidance.[16]

Pennhurst's "clear statement" rule can insulate defendants from the reach of important civil rights statutes by invoking ill-defined concepts of clarity and notice. As initially interpreted by the district court and appellate panel in *Soule I* and *II*, the *Pennhurst* doctrine operates like a form of super-charged qualified immunity as it shields state actors, and not just individual officers,[17] from the reach of certain federal laws. And yet, despite the doctrine's potential significance, *Pennhurst*'s "clear statement" rule—in marked contrast to another "clear statement" rule, the Major Questions Doctrine—has largely evaded scholarly and judicial engagement and critique.[18]

That obscurity, this Article argues, has allowed the doctrine to metastasize far beyond what its rationale can support. As first articulated, the *Pennhurst* doctrine expressed the long-established notion that statutes enacted pursuant to the Spending Clause are essentially contracts: though the Spending Clause provides Congress with no authority to generate substantive law, Congress can leverage its

16. *See Soule I*, 2021 WL 1617206, at *8–10; Soule v. Conn. Ass'n of Schs. (*Soule II*), 57 F.4th 43, 54–56 (2d Cir. 2022), *vacated en banc and remanded*, 90 F.4th 34 (2d Cir. 2023).

17. *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 554–55, 557 (1967) (holding that the qualified immunity defense protects a police officer from liability under the Civil Rights Act of 1871, so long as the officer acts in good faith and with probable cause).

18. *See generally* Mila Sohoni, Case Comment, *The Major Questions Quartet*, 136 Harv. L. Rev. 262 (2022); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009 (2023); Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 Fla. L. Rev. 251 (2024); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 Admin. L. Rev. 217 (2022); Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 Harv. L. Rev. 515 (2023); Jack M. Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegation,* Chevron*, and More*, 65 Wm. & Mary L. Rev. 1265 (2024); Chad Squitieri, *Who Determines Majorness?*, 44 Harv. J.L. & Pub. Pol'y 463 (2021); Kevin Tobia et al., *Major Questions, Common Sense?*, 97 S. Cal. L. Rev. 1153 (2024).

power of the purse to induce state actors to agree to take on substantive obligations with those obligations then having the force of law.[19] Because those statutory obligations are, if not literally, at least analogous to contractual provisions, core contractual principles apply—including the very basic idea that vague or hortatory terms are unenforceable.

So far, so good. But some lower courts have transformed the *Pennhurst* doctrine into something more extreme. These courts have drawn on imprecise language in the *Pennhurst* decision itself to justify taking a qualified immunity-like approach to the doctrine that bars damages actions under arguably ambiguous statutory terms, not only ones that meet the narrow void-for-vagueness standard.[20] This development threatens to undermine virtually every major Spending Clause statute. But it is not just problematic from a policy perspective. It also lacks doctrinal coherence. This is because the qualified immunity-like approach flips the doctrine's contractual rationale on its head.

Contract law generally treats ambiguity, unlike vagueness, as an issue of interpretation, not enforcement. Courts seek to resolve ambiguities by discerning the parties' intent and giving effect to the essence of their agreement, rather than invalidating contracts due to imprecise language.[21] By not requiring parties to foresee and plan for every contingency, this approach lowers the cost of contracting and, so, promotes valuable exchanges. The qualified immunity version of the *Pennhurst* doctrine displayed in *Soule I and II*, on the other hand, does the opposite—it impedes Congress's ability to craft Spending Clause legislation by forcing legislators to anticipate and respond to all future possibilities or else see its Spending Clause legislation given limited effect. Consequently, this approach may stifle legislative innovation and limit the federal government's capacity to

19. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576–77 (2012); South Dakota v. Dole, 483 U.S. 203, 210–11 (1987); Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937); United States v. Butler, 297 U.S. 1, 64 (1936); David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1, 34–35 (1994).

20. *See Soule III*, 90 F.4th at 57, 61–63 (Menashi, J., concurring) (describing the resemblance between qualified immunity and the district court's application of *Pennhurst I*); *Soule I*, 2021 WL 1617206, at *9 (framing the *Pennhurst* issue in terms of "clear notice," and finding that "OCR did not provide the defendants with clear notice that they would be liable for money damages if they permitted Yearwood and Miller to compete in girls' track").

21. *See* Restatement (Second) of Conts. §§ 200–204 (Am. L. Inst. 1981); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 91–92 (1989).

address complex, evolving societal issues through cooperative federalism frameworks.

But while this ambiguity-focused conception of the *Pennhurst* doctrine ought to be rejected, the doctrine need not be narrowed to nothing more than a vagueness rule. We propose that a more nuanced view of contract law provides a path towards constructing a different conception of the doctrine, one that better aligns with the contract-based rationale articulated in the Supreme Court's original decision, while still expanding the doctrine beyond the narrow concept of void for vagueness. This reconstruction would draw on established contract law principles such as *contra proferentem*, the implied covenant of good faith and fair dealing, and changed circumstances.[22] It would also acknowledge that Congress sometimes intentionally uses open-textured language in statutes like Title IX to delegate discretionary authority to federal agencies, as even the Court's recent *Loper Bright* decision recognized. Such delegation allows for flexibility in implementing broad mandates like prohibiting sex discrimination in education. Rather than applying a rigid "clear statement" rule, courts could focus on whether the statute implies such a delegation. If so, they could then apply contract law principles like the implied covenant of good faith and fair dealing to ensure that this discretion is exercised reasonably and in line with the parties' expectations.

This reconstructed—or, perhaps more accurately, reimagined—doctrine would provide a more sophisticated framework for courts to navigate challenging issues like transgender athletes' participation in sports under Title IX, balancing the need for clear congressional mandates with the realities of evolving social norms and adaptive policymaking in federal-state partnerships.

II.
BACKGROUND

The Spending Clause has long been a powerful tool for federal policymaking, yet its reach and limitations remain subjects of ongoing legal debate. This Part examines the Spending Clause's scope and the evolution of the *Pennhurst* doctrine. Beginning with an overview of the Spending Power's historical development and constraints, the discussion then turns to the origins and rationale of *Pennhurst*'s "clear statement" rule.

In so doing, this Part highlights a significant divergence that has emerged in the doctrine's application: while the Supreme Court

22. *See infra* Sections V.B, V.C, V.D.

has primarily invoked *Pennhurst* to emphasize the contractual nature of Spending Clause legislation, lower courts have focused on its "clear statement" rule as an interpretive canon. This split legacy has created considerable uncertainty in how the doctrine should be applied, particularly in complex cases involving evolving social norms and policies. By exploring this dichotomy and its implications, we set the stage for a critical reevaluation of the *Pennhurst* doctrine's role in modern Spending Clause litigation.

A. The Scope and Limits of the Spending Power

The Taxing and Spending Clause of the Constitution, the first clause of Article I, Section 8, empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."[23] Modern doctrine interprets this Clause to confer no independent regulatory power, unlike Congress's other powers enumerated in the remaining clauses of Article I, Section 8—such as the Commerce Clause and the Postal Clause. And yet, Congress's authority under the Spending Clause remains a potent tool for federal policymaking. In large part, this is due to the Supreme Court's determination that the Clause permits Congress to constitutionally condition federal aid to states, thus incentivizing states to cooperate in achieving federal aims that are beyond the scope of Congress's direct regulatory authority under its other enumerated powers.

Congress's history of using conditional grants of federal aid dates to at least the Reconstruction period, when in 1890, Congress passed the Second Morrill Act.[24] That law authorized the Secretary of Treasury to withhold funding for state colleges and universities that excluded black students.[25] The authorization of the federal income tax following the ratification of the Sixteenth Amendment enlarged the federal government's revenue and, as a result, expanded Congress's capacity to utilize such conditioned grants.[26] This facilitated, among other things, one of the federal government's first forays into social welfare legislation—the Sheppard-Towner Act of 1921, commonly referred to as the "Maternity Act," which provided

23. U.S. Const. art. I, § 8, cl. 1.

24. *See* Douglas M. Spencer, *Sanctuary Cities and the Power of the Purse: An Executive* Dole *Test*, 106 Iowa L. Rev. 1209, 1219 (2021).

25. Agricultural College Act of 1890, ch. 841, § 1, 26 Stat. 417 (codified as amended at 7 U.S.C. § 323). However, the Second Morrill Act did allow states to maintain these colleges "separately for white and colored students." *Id.*

26. Spencer, *supra* note 24, at 1219; Health & Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 218 (2023) (Thomas, J., dissenting).

states with funds to be spent on public health programs targeting infant and maternal mortality.[27]

Congress's use of conditioned grants only grew in the decades to follow, from the enactment of the Social Security Act of 1935 during the New Deal to the establishment of Medicaid in 1965 as part of President Johnson's "Great Society."[28] But one of the most significant developments in Congress's exercise of its spending power has been in connection with its enactment of statutes imposing general conditions not linked to any particular grant of federal funds. Examples include Title VI of the Civil Rights Act of 1964,[29] section 504 of the Rehabilitation Act of 1973,[30] and Title IX of the Education Amendments of 1972,[31] which prohibit race-, disability-, and sex-based discrimination, respectively. Rather than grant funds themselves, these provisions set out threshold conditions for receiving federal aid distributed pursuant to other programs: Title VI and section 504 govern "any program or activity receiving Federal financial assistance," and Title IX governs "any education program or activity receiving Federal financial assistance."[32]

Though Congress's power under the Spending Clause is a powerful lever for achieving policy aims, it is not unlimited. To prevent Congress's spending power from swallowing its enumerated ones, the Supreme Court has identified four restrictions on the use of federal funding conditions. First, the condition must relate to the program or funding it restricts.[33] Second, the condition may not be unduly coercive.[34] Third, the condition may not induce the recipients to violate a separate provision of the Constitution.[35] And fourth, and most relevant for present purposes, a recipient must have clear notice of its obligations under the statutory conditions.[36]

While "clear notice" is a familiar constitutional concept, with clarity and notice playing important roles in many constitutional

27. *See* Spencer, *supra* note 24, at 1219–20, 1220 n.52; Sheppard-Towner Act, ch. 135, 42 Stat. 224 (1921) (expired 1929). The Supreme Court dismissed a challenge to the constitutionality of the Act in *Massachusetts v. Mellon*, 262 U.S. 447, 479–80 (1923).

28. Spencer, *supra* note 24, at 1220–21; *see Talevski*, 599 U.S. at 218–19 (Thomas, J., dissenting).

29. 42 U.S.C. § 2000d.

30. 29 U.S.C. § 794.

31. 20 U.S.C. § 1681(a).

32. 42 U.S.C. § 2000d; 29 U.S.C. § 794; 20 U.S.C. § 1681(a).

33. South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

34. *Id.* at 211.

35. *Id.* at 207–08.

36. *Id.* (citing *Pennhurst I*, 451 U.S. 1, 17 (1981)).

doctrines such as due process,[37] the application of this concept to state bodies is distinctive. Unlike in due process cases where states are bound by the Fourteenth Amendment, in the context of Spending Clause legislation, states become the beneficiaries of a notice requirement.[38] This unusual inversion stems from an analogy to contract law, which provides the rationale for the *Pennhurst* doctrine. Understanding this contractual foundation is crucial for proper application of the doctrine and helps courts avoid conflating Spending Clause "clear notice" with similar concepts in other areas of constitutional law.

B. Pennhurst*'s "Clear Statement" Rule*

The "clear notice" requirement originated in *Pennhurst State School & Hospital v. Halderman*, decided in 1981. *Pennhurst* involved the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (the "DDA Act"), under which Congress made funding available for states to provide services to individuals with developmental disabilities.[39] To receive funding under the program established by the statute, a state had to first "submit an overall plan [for providing services] satisfactory to the Secretary of HHS."[40] The Secretary, in turn, could approve the plan only if it complied "with several specific conditions set forth in [42 U.S.C.] § 6063," such as the requirement that any services provided "be consistent with standards prescribed by the Secretary."[41]

The DDA Act also contained a findings section, 42 U.S.C. § 6010, referred to as the "bill of rights," stating, among other things, that persons with developmental disabilities have "a right to 'appropriate treatment'" and that such treatment should be provided in "the setting that is least restrictive of . . . personal liberty."[42] Residents of the Pennhurst State School and Hospital, located in Pennsylvania,

37. *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

38. *Cf.* South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union . . . ."); Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976) (stating that the Fourteenth Amendment "protect[s] people, not States").

39. *Pennhurst I*, 451 U.S. at 5.

40. *Id.* at 14.

41. *Id.*

42. *Id.* at 8 (quoting Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, sec. 201, § 111(1)–(2), 89 Stat. 486, 502 (1975) (repealed 2000)).

a state that had accepted funds pursuant to the Act, claimed that the hospital violated the "bill of rights" section of the statute by subjecting them to dangerous and inhumane living conditions—including, as the district court found, physical abuse and drugging by staff members.[43] The question on appeal before the Supreme Court then was whether these "rights" found in the findings section created additional conditions for the recipient of federal funds that could serve as a basis for a suit by private actors.[44]

This was, in a sense, a very standard issue of statutory interpretation: based on the language of the statute, were the findings part of the conditions? Although the statute required recipient states to implement plans that made "satisfactory" "assurances" that they would "protect[]" the "rights" of persons with developmental disabilities "consistent with" the findings section of the Act, there was nothing explicit in the Act suggesting that satisfaction of these rights was a condition for receipt of the funds, let alone that their violation might support a private cause of action.[45] As one of the lawyers for the resident plaintiffs would later acknowledge, "nobody thought" that the states were actually bound to satisfy the "lovely language" of the Act's "[b]ill of [r]ights"; the Third Circuit nonetheless directed them to brief this argument.[46]

But rather than simply engage with the text, the Supreme Court—in an opinion by Justice Rehnquist—began by examining Spending Clause legislation on a conceptual level. Justice Rehnquist explained that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."[47] Additionally, the opinion continued, "[t]he legitimacy of Congress'[s] power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"[48]

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43. *Id.* at 7. Plaintiffs also asserted constitutional claims and statutory claims under the 1973 Rehabilitation Act. *See* Karen M. Tani, *The* Pennhurst *Doctrines and the Lost Disability History of the "New Federalism,"* 110 CALIF. L. REV. 1157, 1183–84 (2022) (explaining that, although the district court relied on these other claims in granting relief, the Third Circuit, on appeal, relied on the claims under the Developmentally Disabled Assistance and Bill of Rights Act and Pennsylvania's Mental Health and Mental Retardation Act of 1966).

44. *Pennhurst I*, 451 U.S. at 10.

45. *Id.* at 26.

46. Tani, *supra* note 43, at 1189 n.226 (quoting plaintiffs' attorney, Tom Gilhool); *see id.* at 1183 (explaining that the statutory "bill of rights" claims were only added in plaintiffs' second amended complaint).

47. *Pennhurst I*, 451 U.S. at 17.

48. *Id.*

Drawing on this contractual theory, Justice Rehnquist went on to establish what has come to be known as *Pennhurst*'s "clear statement" rule[49]: because there can "be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it . . . if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[50] Applying this principle, the Court noted that, in contrast to the conditions spelled out "in clear terms" elsewhere in the statute, there was an "absence of conditional language in § 6010."[51] Given this contrast, the Court concluded that the findings located in the "bill of rights" were merely precatory statements, as the language of the statute "fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010."[52]

Reading the *Pennhurst* decision today, it is challenging to see what work Justice Rehnquist's "clear statement" rule is doing. From the textualist perspective that now dominates the judiciary, it is not hard to conclude that a findings section is merely "hortatory," as the Court described them, and thus creates no mandatory obligations.[53] But 1981 was a different time. For one, the march toward modern textualism—which arguably began when Justice Scalia joined the Court in 1986—was still years away.[54] Moreover, the Court was then still in the early stages of what we can now recognize as an extended period of retrenchment in terms of the recognition of enforceable private rights.[55] Only two years earlier, Justice Rehnquist concurred in a decision—*Cannon v. University of Chicago*—that recognized an implied private right of action to enforce Title IX, albeit in an opinion that raised the burden for recognizing such implied causes of action in the future.[56] *Pennhurst* would prove to be a marker of a turning tide. In the years that followed, the Court would continue

49. Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

50. *Pennhurst I*, 451 U.S. at 17.

51. *Id.* at 23.

52. *Id.* at 25.

53. *Id.* at 24.

54. Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 Nw. U. L. Rev. 1033, 1070 (2023).

55. *See, e.g.*, Pauline E. Calande, Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 Yale L.J. 1144, 1144–47 (1985); Stephen B. Burbank & Sean Farhang, Rights and Retrenchment: The Counterrevolution against Federal Litigation 130–91 (2017).

56. Cannon v. Univ. of Chi., 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) ("Not only is it 'far better' for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.").

to narrow the circumstances under which it would find that federal statutes gave rise to private causes of action and, by the turn of the twenty-first century, made clear its break from the approach to recognizing statutory rights that it had embraced in the decades before.[57]

C. Pennhurst*'s Contract-Analogy Legacy*

Perhaps because of these broader shifts in the Supreme Court's jurisprudence, the legacy of the *Pennhurst* doctrine in the U.S. Supreme Court has been defined less by its creation of the specific "clear statement" rule and more by its analogization of Spending Clause legislation to contracts. To take one recent example, in *Cummings v. Premier Rehab Keller, P.L.L.C.*, the Court held that emotional distress damages are not recoverable in private actions to enforce either the Rehabilitation Act of 1973 or the Affordable Care Act (both Spending Clause statutes) in light of the "hornbook law that 'emotional distress is generally not compensable in contract.'"[58] And similarly, in *Barnes v. Gorman*, the Court invoked *Pennhurst* to conclude that punitive damages—a form of relief "generally not available for breach of contract"—are not recoverable in actions under the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, both enacted pursuant to the Spending Clause.[59]

The contract analogy has also played a role in shaping the doctrine surrounding the availability of damages in private actions brought pursuant to Title IX—the issue central to *Soule*. In 1992, in *Franklin v. Gwinnett County Public Schools*, the Court first recognized the availability of damages in such suits, holding that a high school student could pursue monetary relief against her school district for taking no action to stop the repeated sexual harassment she incurred from a teacher despite the school being made aware of the continuing wrongdoing.[60] Six years later, in *Gebser v. Lago Vista Independent School District*, the Court was asked to extend this holding to a case similar in all but one regard. Like the plaintiff in *Franklin*, Alida Gebser alleged that she was sexually harassed by her high school teacher and sued her school district for damages.[61] But unlike in

57. *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (no private cause of action to enforce regulations promulgated under section 602 of Title VI of the Civil Rights Act of 1964).

58. Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 221 (2022) (quoting Douglas Laycock & Richard L. Hasen, Modern American Remedies 216 (5th ed. 2018)).

59. Barnes v. Gorman, 536 U.S. 181, 186–87, 189 (2002).

60. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 63–64, 76 (1992).

61. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277–79 (1998).

Franklin, the complaint in *Gebser* contained no allegations that the school district had actual notice of the harassment or had otherwise done anything wrong.[62]

The Court declined to hold that damages were available in such a situation, explaining that, based on the majority's reading of the statute, "Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice."[63] In reaching this decision, the Court relied, in part, on "Title IX's contractual nature," citing *Pennhurst*.[64] The Court's invocation of *Pennhurst* is somewhat obscure, but the key insight seems to be this: given the language of the statute, while a school board accepting federal funds would understand it was agreeing "not to discriminate on the basis of sex," it would not expect to be liable for its employees' discriminatory acts on the basis of respondeat superior[65]—a doctrine grounded in tort law, not contract.[66]

As these cases reflect, the Supreme Court usually invokes *Pennhurst* to draw on its "contract-law analogy," as Justice Kavanaugh recently referred to it,[67] to narrow the scope of the obligations generated by Spending Clause legislation. Thus, while *Pennhurst* has been cited regularly by the Court in the decades since it was first decided, there are precious few decisions that actually offer guidance on how a court should go about determining whether a statute speaks with the requisite degree of clarity.[68] But the opposite trend can be observed among the lower courts. In federal district and circuit courts, *Pennhurst* is generally invoked not for the broad concept

62. *Id.* at 279.

63. *Id.* at 288.

64. *Id.* at 286–87.

65. *Id.* at 287–88 (quoting Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 654 (5th Cir. 1997)).

66. *See* Phila. & Reading R.R. Co. v. Derby, 55 U.S. (14 How.) 468, 485 (1852) ("[T]he maxim of '*respondeat superior*' . . . is wholly irrespective of any contract, express or implied . . . .").

67. Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 230–31 (2022) (Kavanaugh, J., concurring).

68. A rare example of the *Pennhurst* doctrine appearing to function in a Supreme Court decision as a true "clear statement" rule is *Arlington Central School District Board of Education v. Murphy*, where the Court invoked the doctrine to narrowly construct the scope of potential damages available under the Individuals with Disabilities Education Act. *See* 548 U.S. 291, 296–304 (2006). Other instances in which *Pennhurst I* was invoked as a "clear statement" rule within the pages of the U.S. Reports are largely found in dissents. For example, Justice Kennedy accused the majority of adopting a "watered-down version of the Spending Clause clear-statement rule" in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629, 686 (1999) (Kennedy, J., dissenting).

that Spending Clause legislation is contractual in nature, but rather as the source of an interpretive "clear statement" rule—a thumb on the scale against interpreting a statute to find an obligation imposed on the states—or something similar.[69]

This split legacy is understandable: consistent with the more doctrinal approach to case resolution typical of the federal district and circuit courts, lower courts have frequently treated the *Pennhurst* doctrine as creating a familiar form of substantive canon. The Supreme Court, by contrast, has looked to the more theoretical apparatus of the contract-law analogy as a resource—though not without resistance[70]—in resolving the sometimes-perplexing issues of first impression that typify its docket. At the same time, the Court has done little to clarify how the "clear statement" formulation should apply (or even whether it is still good law).[71] Important, even fundamental, questions about how the *Pennhurst* doctrine should be applied have been left unresolved as a result.

To understand the nature of this uncertainty, one need look no further than the recent controversy over a different "clear

69. *See, e.g.*, Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 584 F.3d 253, 271 (6th Cir. 2009) ("This is not to say that the Secretary's interpretation of the Act is frivolous. But the only relevant question is whether the Act provides *clear notice to the States* of their obligation."); Saint Anthony Hosp. v. Whitehorn, 100 F.4th 767, 788 (7th Cir. 2024) ("We think Congress spoke sufficiently clearly here. The clear-statement rule explains that 'States cannot knowingly accept conditions of which they are "unaware" or which they are "unable to ascertain."'" (quoting *Arlington*, 548 U.S. at 296)), *vacated and reh'g en banc granted*, No. 21-2325, 2024 WL 3561942 (7th Cir. July 24, 2024); Pierre-Noel *ex rel.* K.N. v. Bridges Pub. Charter Sch., 113 F.4th 970, 979 (D.C. Cir. 2024) (stating that "we need only apply ordinary tools of statutory construction" to determine "whether the District made an 'informed choice' to assume" the obligation at issue (quoting *Pennhurst I*, 451 U.S. 1, 25 (1981))). There are exceptions, however. Particularly in recent years, circuit courts have questioned the idea that *Pennhurst I* is a "rule of construction," and instead viewed it through the lens of "principles of contract law." West Virginia v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1142 (11th Cir. 2023); *see also* Texas v. Yellen, 105 F.4th 755, 769 (5th Cir. 2024) (rejecting argument that *Pennhurst I*'s restriction is a "mere rule[] of statutory construction" and noting that the decision is "explicit in relying on principles of contract").

70. *See Cummings*, 596 U.S. at 230–31 (Kavanaugh, J., concurring) (questioning the relevance of the contract-law analogy in the case).

71. To the contrary, invocations of *Pennhurst* within the U.S. Reports have probably contributed to the confusion. For example, in her dissent in *Sossamon v. Texas*, a case about sovereign immunity, Justice Sotomayor appears to conflate *Pennhurst II*'s sovereign immunity rule with the "clear statement" rule set out in the 1981 *Pennhurst I* decision. *See* Sossamon v. Texas, 563 U.S. 277, 295 (2011) (Sotomayor, J., dissenting). Likely due to this conflation, Judge Bush recently invoked *Sossamon* as an example of a case applying *Pennhurst*'s "clear statement" rule. *See* Kentucky v. Yellen, 67 F.4th 322, 325–27 (6th Cir. 2023) (mem.) (Bush, J., statement).

statement" rule—the Major Questions Doctrine, which directs courts to approach certain agency policies with "skepticism" and demands that the agency "point to 'clear congressional authorization.'"[72] In the short time since the Supreme Court explicitly recognized the doctrine in *West Virginia v. EPA*, judicial and scholarly engagement with—and criticism of—the Major Questions Doctrine has exploded.[73] In particular, many have puzzled over how it is to be applied and integrated into the standard statutory interpretation suite—with some asking how "major" a question need be for the rule to be triggered, and when congressional authorization is "clear" enough to overcome it.[74] And only a year after announcing the Major Questions Doctrine, Justice Barrett wrote a concurring opinion, in *Biden v. Nebraska*, seeking to dispel some of the uncertainty, in which she denied that the doctrine even is a "clear statement" rule, and (predictably) touched off a whole new wave of debate and controversy.[75]

But *Pennhurst*'s "clear notice" rule has never attracted that level of attention or engagement. As a result, questions have been raised as to its application—such as what role agency or judicial interpretations can have in either providing clarity or giving rise to a lack of clarity—which have gone unanswered for decades.[76] But while *Pennhurst* has remained out of the spotlight, it has not been dormant. To the contrary, though unnoticed by commentators, the doctrine has metastasized into something that bears little resemblance to its contract-analogy roots or even the "clear statement" canon with which the decision has come to be associated. As illustrated by the *Soule* decisions, *Pennhurst*'s notice rule has come to operate more like a form of qualified immunity. We turn next to that development.

III.
SOULE V. CONNECTICUT ASS'N OF SCHOOLS: A CASE STUDY

Rehearings en banc are famously rare in the Second Circuit.[77] But in February 2023, the court did something apparently unprece-

72. West Virginia v. EPA, 597 U.S. 697, 732 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

73. *See* Anita S. Krishnakumar, *What the New Major Questions Doctrine Is* Not, 92 Geo. Wash. L. Rev. 1117, 1119–20 nn.6–13 (2024) (collecting cases and articles discussing the Major Questions Doctrine).

74. *See, e.g.*, Deacon & Litman, *supra* note 18, at 1015.

75. *See* Biden v. Nebraska, 600 U.S. 477, 510–11 (2023) (Barrett, J., concurring).

76. *See, e.g.*, Peter J. Smith, Pennhurst*,* Chevron*, and the Spending Power*, 110 Yale L.J. 1187, 1188–91 (2001).

77. *See* Ricci v. DeStefano, 530 F.3d 88, 89–90 (2d Cir. 2008) (mem.) (Katzmann, J., concurring in the denial of rehearing en banc).

dented: it sua sponte issued an order for rehearing en banc in *Soule*. The scope of the rehearing was limited primarily to two threshold issues: (1) the plaintiffs' standing to pursue monetary damages and injunctive relief in connection to their challenge to CIAC's transgender-inclusion policy, and (2) whether the *Pennhurst* doctrine barred the plaintiffs from seeking damages on their Title IX claim.[78] In limiting the scope of the rehearing in this manner, the Second Circuit zeroed in on the grounds that had allowed the district court to avoid addressing plaintiffs' claims on the merits. This Part discusses how these threshold questions barred relief in the district court and in the panel decision before turning to the en banc court's rulings.

A. "Notice" as a Qualified Immunity-Like Analysis

The *Soule* plaintiffs—female, cisgender high school students who ran for their school's track team—initiated their suit in February 2020, alleging that CIAC and its member high schools violated Title IX by enforcing the Transgender Participation Policy (the "Policy"),[79] which permits high school students to compete on gender-specific athletic teams consistent with their gender identity if they meet certain criteria.[80] The plaintiffs, who sought both damages and injunctive relief, all alleged to have competed in races in which they placed after one of two transgender students, Andraya Yearwood and Terry Miller.[81] But before the district court could hear the plaintiffs, the COVID-19 pandemic closed schools throughout Connecticut and all "interscholastic athletic competition was suspended indefinitely."[82]

In August 2020, CIAC and the high school, along with Yearwood and Miller, who had joined the case as defendants-intervenors, moved to dismiss the complaint, and, a few months later, on April 25, 2021, the district court granted the motion, holding that (1) the plaintiffs' requests for injunctive relief were moot given that the two

78. *See Soule III*, 90 F.4th 34, 44–45 (2d Cir. 2023) (en banc).

79. *Soule I*, No. 3:20-CV-00201, 2021 WL 1617206, at *1–2 (D. Conn. Apr. 25, 2021), *aff'd*, 57 F.4th 43 (2d Cir. 2022), *vacated en banc and remanded*, 90 F.4th 34 (2d Cir. 2023).

80. The Policy requires schools to determine a student's eligibility "based on the gender identification of that student in current school records and daily life activities in the school and community." Students are not permitted to participate on gender-specific teams "that are different from their publicly identified gender identity . . . or to try out simultaneously for CIAC sports teams of both genders." *Soule III*, 90 F.4th at 42 (quoting Conn. Intersch. Athl. Conf., *CIAC By-Laws*, *in* 2024–2025 Handbook 48, 65 (2024)).

81. *Soule I*, 2021 WL 1617206, at *1, *3; *Soule II*, 57 F.4th 43, 48 (2d Cir. 2022), *vacated en banc and remanded*, 90 F.4th 34 (2d Cir. 2023).

82. *Soule I*, 2021 WL 1617206, at *2.

transgender students had graduated, and (2) the plaintiffs' requests for damages were barred by *Pennhurst* because CIAC did not receive adequate notice whether its Policy violated Title IX.[83]

In support of the second holding, the district court emphasized the lack of consistent guidance from the Federal Department of Education, which has been statutorily authorized to promulgate regulations pursuant to Title IX's broad prohibition of sex discrimination.[84] The court walked through the last decade of guidance provided by the Department of Education's Office of Civil Rights ("OCR"), which has on multiple occasions "reversed course" with changes in presidential administrations—at times interpreting the statute as protecting transgender students, while at others seemingly viewing it as requiring such students' exclusion.[85] The district court also noted the lack of judicial decisions indicating that Title XI re-

83. *Id.* at *5–6, *8, *10.

84. *See id.* at *8–9 ("In light of [the Department of Education's contradictory guidance on transgender athletes from 2016–2021] . . . [the Department] did not provide the defendants with clear notice that they would be liable for money damages if they permitted Yearwood and Miller to compete in girls' track.").

85. The background set out by the district court features a number of turns and reversals:

> Beginning in 2014, [OCR] notified schools that "[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX." In 2015, OCR gave notice that "[t]he Department's Title IX regulations permit schools to provide sex-segregated . . . athletic teams . . . [and] [w]hen a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity." In 2016, OCR went further, stating unequivocally that "transgender students must be allowed to participate in such activities . . . consistent with their gender identity."
>
> Plaintiffs argue that OCR reversed course when it issued a Dear Colleague letter in 2017. The 2017 letter did not provide any new or different guidance, however. Instead, it stated that OCR was rescinding the 2016 Guidance "in order to further and more completely consider the legal issues involved." The letter expressed OCR's belief that it was required to give "due regard for the primary role of the States and local school districts in establishing educational policy." . . .
>
> No further guidance was provided to the defendants until May 2020, several months after this action was brought, when OCR sent them a Letter of Impending Enforcement Action based on a complaint it had received about Yearwood and Miller competing in girls' track. In August 2020, a Revised Letter of Impending Enforcement Action was issued to the defendants, informing them for the first time that OCR interpreted Title IX and its implementing regulations to require that sex-specific sports teams be separated based on biological sex. This letter and the previous letter were withdrawn in February 2021. In withdrawing the Revised Enforcement Letter, OCR stated that the letter had been "issued without the review

quires exclusion of transgender students, further supporting the position that CIAC would not have been on notice that its Policy violated the law, assuming it did.[86]

The panel decision on appeal, written by Judge Chin, was similar in its reasoning, noting both the lack of clear agency guidance as well as the fact that many judicial decisions—including the *Bostock* decision and several other circuit courts—all pointed away from a finding that the defendants violated the law.[87] The panel determined that this constellation of previous authorities, though not actually resolving the question at issue in the case, implied that the defendants lacked "clear notice" of any liability they might face under Title IX, if any.[88]

At a level of abstraction, the line of reasoning followed by both opinions is consistent with the broad notion of "notice." But it is foreign when compared to the application of a standard "clear statement" rule. As discussed above, typically, a "clear statement" rule functions as a thumb on the scale for courts resolving statutory interpretation questions, weighing in favor of resolving the ultimate merits issue in a particular manner—such as against a finding that a federal law preempts state law[89] or that an amendment applies retroactively[90]—but not otherwise altering the merits disposition.

But as articulated by the *Soule* courts, the *Pennhurst* doctrine differs in two major ways. First, while the *Pennhurst* decision invoked the "clear statement" requirement in resolving the merits question of whether the "bill of rights" granted privately enforceable rights, in *Soule*, the *Pennhurst* doctrine operated as a defense to liability (though only a partial one, since it only blocked a damages action, not one for injunctive relief), leaving the ultimate merits question unresolved. Second, while the *Pennhurst* court confined its inquiry to

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required for agency guidance documents" and should therefore "not be relied upon in this or any other matter."

Id. at *9 (citations omitted).

86. *See id.* at *10 ("Courts across the country have consistently held that Title IX requires schools to treat transgender students consistent with their gender identity. . . . This unbroken line of authority reinforces the conclusion that the plaintiffs' claims for money damages are barred." (citations omitted)).

87. *See Soule II*, 57 F.4th 43, 55–56 (2d Cir. 2022) ("[T]he Supreme Court's recent decision in *Bostock v. Clayton County*, interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and the decisions of our sister circuits interpreting Title IX strongly support the conclusion that the CIAC and its member schools lacked notice that a policy such as that at issue here violates Title IX." (citation omitted)), *vacated en banc and remanded*, 90 F.4th 34 (2d Cir. 2023).

88. *Id.* at 56.

89. *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009).

90. *See* Greene v. United States, 376 U.S. 149, 160 (1964).

the "clarity" of the statute itself, the *Soule* courts' inquiry considered a broader constellation of potential authorities, including agency guidance and judicial decisions.[91]

Though these characteristics distinguish the "clear notice" requirement invoked in *Soule* from other "clear statement" rules, it bears a remarkable resemblance to a very different doctrine: qualified immunity. Qualified immunity shields government actors in their personal capacities from suit when they have not violated a plaintiff's "clearly established" rights.[92] According to the Supreme Court, "[q]ualified 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."[93] *Pennhurst*'s "clear statement" rule, in the hands of the district court and the panel, likewise shields funding recipients from liability for damages absent clear notice of a potential violation of a statutory funding condition.[94]

The issues of when and how lower courts should apply the "clear statement" rule raised in *Soule* were sufficiently thorny for consideration by an en banc Second Circuit.[95] But apparently unable to agree on how the doctrine should apply in the case, a majority instead vacated and remanded on the narrow ground that the district court should not have treated the doctrine as jurisdictional without providing further guidance on whether either of the lower courts had correctly analyzed the adequacy of notice.[96] Of the various opinions in the case—including three concurrences, three further concurrences in part, and a dissent—only Judge Menashi's concurrence (joined by Judge Park) engaged at length with *Pennhurst*'s contract rationale.[97]

Drawing on the rationale in support of the majority's jurisdictional holding, Judge Menashi explained his view that "[b]ecause the question is whether there has been an *acceptance* of contractual terms, *Pennhurst* operates as a defense to liability. Such a defense is

91. The *Soule* decisions were not unique in this regard. *See, e.g.*, Tennessee v. Becerra, 117 F.4th 348, 359 (6th Cir. 2024) ("True, the statutory language does not illuminate the nature of any such conditions on the grant. But these questions can be resolved by looking to both statutes *and* an agency's authorized regulations.").

92. *E.g.*, Pearson v. Callahan, 555 U.S. 223, 231 (2009).

93. *Id.*

94. *See Soule III*, 90 F.4th 34, 57 (2d Cir. 2023) (en banc) (Menashi, J., concurring) (stating that the *Pennhurst I* clear notice requirement operates as a waivable defense to liability).

95. *See generally Soule III*, 90 F.4th 34.

96. *Id.* at 53.

97. *Id.* at 57 (Menashi, J., concurring).

waivable and not jurisdictional."[98] He continued that he would have gone further than the majority to hold that the district court erred by "failing to address whether the [challenged policy] was intentional conduct and therefore not subject to the notice requirement at all," suggesting that the *Pennhurst* doctrine should be narrowed so as not to reach "intentional conduct" like the promulgation of an official policy.[99]

Judge Menashi's suggested limitation of the *Pennhurst* doctrine so as not to apply to "intentional" actions addresses one of the most glaring incongruities between this doctrine, as originally conceived, and the qualified immunity-like quality it has assumed. Qualified immunity is best justified when it is used to afford officers discretion in making split-second decisions, often in high-pressure situations involving potential use of force.[100] This rationale has no relevance to state actors deliberating and adopting policies on issues like transgender student participation in sports teams. But while offering a sensible limitation of the qualified immunity model of the doctrine, Judge Menashi neither grounded this limitation in contractual principles nor offered any insight into the more fundamental issue of why any version of the *Pennhurst* doctrine's "clear statement" rule is justified.

To the contrary, his position that *Pennhurst* was inapplicable because the challenged policy constituted "intentional conduct that violates the clear terms of the statute"[101] is, in some sense, redundant. The *Pennhurst* doctrine applies only when a statute is unclear. So, if conduct violates the statute's "clear terms," the doctrine has no applicability—regardless of whether the conduct was intentional or not. Thus, though Judge Menashi's reading rejects the qualified immunity conception of the "clear statement" rule, it provides only a limited path forward for making sense of this doctrine. Accordingly, the opinions of the en banc court provide little guidance for how *Pennhurst*'s "clear statement" rule ought to be understood. If anything, considered together, they make only more salient the challenge

98. *Id.* (footnote omitted).

99. *Id.* at 55, 58.

100. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

101. *Soule III*, 90 F.4th at 58, 61 (Menashi, J., concurring) (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 642 (1999)) ("Because the CIAC Policy is intentional conduct, the remaining question is whether that conduct 'violates the clear terms of the statute.'" (quoting *Davis*, 526 U.S. at 642)).

of articulating a coherent and functional framework for applying the *Pennhurst* doctrine.[102]

IV.
THE APPARENT DISANALOGY BETWEEN THE "CLEAR STATEMENT" REQUIREMENT AND CONTRACT DOCTRINE

At a certain level of abstraction, the appeal to contract principles to justify the "clear statement" rule reflected in *Pennhurst* seems plausible. According to Justice Rehnquist, the "clear statement" rule ensures that recipient states have assented to the conditions of their "contract" with Congress under Spending Clause legislation. Ambiguous terms, on this view, vitiate a recipient state's assent: you cannot have assented to terms you could not have known were there, the logic goes.[103] But simple as this view may be, it misconceives a fundamental feature of contract law: rather than treating ambiguous terms as a problem of contract formation (including of mutual assent), contract law instead treats ambiguous terms as a problem of contract interpretation.[104]

Under blackletter contract doctrine, courts usually construe ambiguous terms rather than voiding them, so long as the terms are "reasonably certain."[105] It is ordinarily no defense for an allegedly breaching party to claim that they understood the term differently.[106] In the absence of affirmative misfeasance by their counterparty, a

102. Perhaps reflecting this challenge, on remand the district court side-stepped the question of whether "the clear-notice requirement of *Pennhurst*" bars the plaintiffs' request for monetary relief, holding only that the plaintiffs are "not necessarily preclude[d]" from obtaining such relief and suggesting the requirement "can be better assessed" later in the case. Soule v. Conn. Ass'n of Schs., No. 3:20-CV-00201, 2024 WL 4680533, at *20 (D. Conn. Nov. 5, 2024).

103. *Pennhurst I*, 451 U.S. 1, 17 (1981).

104. *See* Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 Conn. L. Rev. 155, 172 (2004).

105. *See* Restatement (Second) of Conts. § 33(1) (Am. L. Inst. 1981); *cf.* Ayres & Gertner, *supra* note 21, at 91–92.

106. Friedrich Kessler, Grant Gilmore & Anthony T. Kronman, Contracts: Cases and Materials 179 (3d ed. 1986) ("[O]nce the objective manifestations of assent are present, their author is bound, even if he did not read the contract or understand the meaning of its terms." (citing Restatement (Second) of Conts. § 26 (Am. L. Inst. 1981) for the proposition that, this notwithstanding, a manifestation of willingness to enter into a bargain does not always imply a manifestation of assent)).

party with contractual capacity is generally bound by even ambiguous terms to which they agree.[107]

Courts address ambiguity in this manner for a reason. "Incomplete contracts—contracts that do not clearly instruct the court how they should be applied in all circumstances—are both inevitable and often deliberately drafted by contracting parties."[108] Rather than treating the ambiguous terms that attend incomplete contracts as a defense in a damages action for breach, contract law facilitates incomplete contracting to promote efficiency and deploys a variety of doctrinal tools to "manage[] incompleteness, by curtailing transaction costs and ensuring that ambiguities and oversights will not be used as an opportunity for strategic behavior or risk-shifting."[109] The *Pennhurst* doctrine, when treated simply as a "clear statement" rule, flips this around, treating ambiguity as a reason for shielding states and state actors from liability. In this manner, the "clear statement" rule goes beyond what the contractual nature of Spending Clause legislation can logically support.

Thus, the *Pennhurst* doctrine, particularly as it has been developed in the lower courts, sits uneasily with its purported roots within contract principles. The doctrine's approach to ambiguity in Spending Clause legislation diverges from contract law's treatment of ambiguous terms, which generally favors interpretation and enforcement over invalidation. Moreover, lower courts' application of the *Pennhurst* doctrine as only barring monetary relief, and not injunctive relief, further undermines its contractual justification, as contract principles do not typically differentiate between types of remedies when determining the validity or interpretation of

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> Anxious not to incur the reproach of being a destroyer of bargains, modern contract law has abandoned the idea advanced during the last century that a contract presupposes a meeting of minds in full and final agreement, a consensus of mind. All that is required is the mutual manifestation of assent. The law, furthermore, permits the parties to keep the arrangement flexible and takes into account that businessmen often "record the most important agreements in crude and summary fashion." . . . [B]efore courts are ready to strike down a bargain, "indefiniteness must reach the point where construction becomes futile."
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> . . . .
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> . . . [C]ourts . . . frequently resort to using the "hypothetical intentions" of the parties, [before finding such indefiniteness] if this technique of filling gaps and preserving the contract can be reconciled with notions of fairness and justice.

Id. at 180–81 (citations and footnotes omitted).

108. Galle, *supra* note 104, at 172.

109. *Id.*

contractual terms—and to the extent they do, generally favor damages over injunctive relief.[110]

One possible conclusion to draw is that the invocation of contract law to justify the *Pennhurst* doctrine is mere rhetoric and that the doctrine's true foundations may lie elsewhere, perhaps in concerns about federalism or judicial interpretive authority, rather than in contract law. For example, one might situate the "clear statement" rule as an extension of the Constitution's anticommandeering principle, purportedly serving as a safeguard against federal overreach by preventing the federal government from using ambiguous language to effectively commandeer state resources.[111] Something in this direction was suggested by the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, which cited *Pennhurst*'s view of Spending Clause legislation being "much in the nature of a *contract*" as a source of the "insight [that] has led [the] Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes."[112]

Reading the *Sebelius* decision, lower courts may be tempted to jettison the contractual analogy and instead accept the *Pennhurst* doctrine as nothing more than a "clear statement" rule grounded in principles of federalism and constitutional structure. But such a move would be unwise, as it would only magnify the degree to which the doctrine acts as a constraint on Congress's ability to craft effective legislation, particularly in complex or evolving policy areas. This concern is amplified by the Supreme Court's recent *Loper Bright* decision, which narrowed the deference given to federal agencies on interpretive questions, thereby placing additional pressure on Congress to legislate with precision.[113] The combination of a stringent *Pennhurst* doctrine and reduced agency deference could create a legislative straitjacket, making it increasingly difficult for Congress to address broad policy goals without exhaustive specificity.[114]

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110. *See* Restatement (Second) of Conts. § 33 cmt. b (Am. L. Inst. 1981) (discussing authority for the position that greater clarity is sometimes required before specific performance, as opposed to damages, will be awarded).

111. The anticommandeering doctrine encapsulates the Tenth Amendment's bar on Congress "command[ing] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." Printz v. United States, 521 U.S. 898, 935 (1997).

112. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576–77 (2012) (quoting Barnes v. Gorman, 536 U.S. 181, 186 (2002)).

113. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

114. The relationship between the *Loper Bright* decision and *Pennhurst I* is discussed further in the next Part. *See infra* notes 149–50 and accompanying text. As a practical matter, the actual impact of *Loper Bright* on agency deference is hard

Considering these challenges, courts instead should aim to reconstruct the *Pennhurst* doctrine in a way that respects the fundamental principle of contract law: parties need not anticipate every specific future scenario to create a binding agreement.[115] Such a reconstruction is consistent with the Supreme Court's recent *Talevski* decision, which reaffirmed that "firmly rooted" principles of contract law may be relevant in determining how such legislation may be enforced.[116] As the next Part aims to illustrate, adhering to those principles would allow more flexible and adaptable Spending Clause legislation, enabling Congress to maintain its role in shaping policy while still respecting state sovereignty in our federal system.

V.
REIMAGINING THE *PENNHURST* DOCTRINE

The *Pennhurst* doctrine, with its "clear statement" rule, has long been a cornerstone of Spending Clause jurisprudence.[117] But, as this Article has demonstrated, its application and interpretation have often diverged from the contract law principles that supposedly underpin it. This Part seeks to imagine how the doctrine can be re-grounded in these contractual foundations by exploring various

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to predict. Empirical studies suggest that courts are generally reluctant to second guess agency decisions, particularly those that have factual—in addition to legal—components. *See, e.g.*, John C. Brinkerhoff Jr. & Daniel B. Listwa, Essay, *Deference Conservation—FOIA's Lessons for a* Chevron*-less World*, 71 Stan. L. Rev. Online 146, 147–48 (2018) (observing that, in the FOIA context, courts shift deference on matters of statutory interpretation to other aspects of litigation, and suggesting that a similar dynamic might reveal itself more broadly in administrative law cases following *Chevron*'s abrogation); Daniel B. Listwa & Lydia K. Fuller, Note, *Constraint Through Independence*, 129 Yale L.J. 548, 552–54 (2019) (observing that courts will defer to agency fact-finding in the absence of "red flags" in the administrative record suggesting evidence of factual manipulation).

115. *See infra* Part V.

116. *See* Health & Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 178 (2023). *Talevski* presented the question of whether the Federal Nursing Home Reform Act, a Spending Clause act that established the minimum standards of care that nursing-home facilities must satisfy to receive funding through Medicaid, created rights enforceable by private plaintiffs via 42 U.S.C. § 1983. *Id.* at 171–72. In holding that it does, the Supreme Court rejected an argument raised by petitioners that beneficiaries to Spending Clause legislation are essentially third-party beneficiaries to a contract between the state and the federal government and, as such, have no standing to sue because third-party beneficiaries to a contract purportedly could not sue to enforce a contract under the common law as it was established at the time § 1983 was enacted. *Id.* at 178. In declining to adopt this position, the Court relied on evidence that contradicted the claim that third-party beneficiaries lacked standing to enforce a contract in the 1870s. *Id.* at 179.

117. *See supra* Section II.B.

contract interpretation principles—including void for vagueness, *contra proferentem*, the implied covenant of good faith and fair dealing, and doctrines of changed circumstances—and evaluating how they can be used to support and further develop the *Pennhurst* doctrine. In so doing, its goal is to provide courts and litigants with the starting points for novel approaches to interpreting and applying Spending Clause legislation.

This collection of contract law principles yields a framework that often proves more favorable to federal authority than a traditional "clear statement" approach. Reflecting contract law's general reluctance to render agreements unenforceable, doctrines like void for vagueness are quite limited in scope, applying only where obligations are entirely indeterminate rather than merely subject to interpretation. Meanwhile, principles like *contra proferentem* give way when broad language reflects an intentional delegation of authority, and the implied covenant of good faith and fair dealing primarily serves to police unreasonable deviations from settled expectations rather than cabin discretion entirely. Even doctrines of changed circumstances, while protecting states from truly unexpected shifts in obligations, set a high bar for rendering commitments unenforceable. The result is a framework that, while still protective of state interests, better accommodates the complex and evolving nature of federal-state partnerships under the Spending Clause.

A. Void for Vagueness

We begin by recalling the facts of *Pennhurst* that gave rise to the doctrine's "clear statement" rule. The dispute there was over the statute's "bill of rights," whose aspirational language the Court took to be merely "hortatory, not mandatory."[118] That is more than a finding that the terms in the statutory "contract" were ambiguous; it is a finding that these statutory provisions were either not terms at all or, at the very least, created no obligations of performance. This rationale is familiar to common law contract doctrine: courts adjudicating contract disputes must first use principles of contract construction to decide what terms are within the four corners of the agreement between the parties.[119] As part of this determination, under the framework of what is sometimes called the "void-for-vagueness

118. *Pennhurst I*, 451 U.S. 1, 24 (1981).

119. Daniel Markovits & Gabriel Rauterberg, Contracts: Law, Theory, and Practice 605 (2018).

doctrine,"[120] courts in contract cases will render unenforceable vague statements of purpose—finding that they do not actually give rise to obligations.[121]

Contractual promises require "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."[122] Even when expressed through "words of promise," "mere statements of intention" that "by their terms make performance entirely optional with the 'promisor' whatever may happen, or whatever course of conduct in other respects he may pursue" will not give rise to a contract.[123] An enforceable contractual promise "must be distinguished from a statement of opinion or a mere prediction of future events."[124] Aspirational or hortatory language is therefore insufficiently definite to create a binding contractual obligation.[125]

Accordingly, one way to read *Pennhurst* consistent with contract doctrine is to see the Court's construction of the contract between Congress and recipient states as excluding the hortatory "bill of rights" on a void-for-vagueness basis. As the Court said, "[n]othing in either the 'overall' or 'specific' purposes of the Act reveals an intent to require the States to fund new, substantive rights."[126] The language

120. Likely because of the term's close association with the constitutional doctrine of "void for vagueness," the term is not now commonly invoked in connection to contract disputes—with courts instead referring more generally to contracts being "unenforceably vague." *See, e.g.*, Cook v. Birmingham News, 618 F.2d 1149, 1152 (5th Cir. 1980) ("This agreement is unenforceably vague."). This is somewhat ironic given evidence that the modern due process "void-for-vagueness" doctrine "did not emerge until the turn of the 20th century," *see* Sessions v. Dimaya, 584 U.S. 148, 208–09 (2018) (Thomas, J., dissenting), while courts have been addressing common law "void-for-vagueness" arguments in connection to contract disputes since at least the mid-19th century, *see, e.g.*, Blair v. Snodgrass, 33 Tenn. (1 Sneed) 27 (1853) ("If these papers be taken separately, it is perfectly clear that, as contracts, they are void for vagueness and uncertainty."); Ives v. Armstrong, 5 R.I. 567, 588–89 (1855) ("The contract itself, as set forth in the memorandum, is void for vagueness, uncertainty, and inconsistency. . . . It is not a case of ambiguous or inadequate description, or of false or superfluous description, but of no description at all; is void for insufficiency of description, and is incapable of being aided by parol at the common law.").

121. *See* 1 Timothy Murray, Corbin on Contracts § 4.1, LEXIS (database updated Nov. 2024) ("Vagueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract.").

122. Restatement (Second) of Conts. § 2 (Am. L. Inst. 1981).

123. *Id.* § 2 cmt. e.

124. *Id.* § 2 cmt. f.

125. *See generally id.*

126. *Pennhurst I*, 451 U.S. 1, 18 (1981).

in the Act's "bill of rights" was merely, as a lawyer for the plaintiffs put it, "lovely language" that "nobody thought" created binding obligations.[127] This interpretation of *Pennhurst* thus understands the decision as extending a version of the constitutional "void-for-vagueness" defense that typically only applies to federal penal laws to all legislation under the Spending Clause.[128]

While such a reading of the *Pennhurst* decision brings a conceptual coherence to its eponymous doctrine, it also renders that doctrine far, far narrower than it is often understood. Consider *Soule* once again. There, the issue was whether CIAC's transgender participation policy violated Title IX's prohibition of discrimination on the basis of "sex."[129] There was no question that Title IX's prohibition was generally enforceable. Rather, the dispute was with how this prohibition extended to specific issues involving transgender students. But contractual vagueness deals with whether a contract has been formed, not how it applies in particular cases.[130] Because there is no contention that Title IX's prohibition on sex discrimination is missing the "essential" elements so as to be generally unenforceable,[131] the contractual vagueness defense is beside the point.[132]

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127. Tani, *supra* note 43, at 1189 n.226 (quoting plaintiffs' attorney, Tom Gilhool).

128. Pursuant to the constitutional void-for-vagueness doctrine, a penal statute is unenforceable where it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Johnson v. United States, 576 U.S. 591, 595 (2015). The doctrine applies to both criminal statutes and civil statutes—such as civil forfeiture—that impose a penalty on any person who transgresses them. *See* Wooden v. United States, 595 U.S. 360, 396 n.5 (2022) (Gorsuch, J., concurring in the judgment) (stating that "'penal' laws" historically extended to all "laws inflicting any form of punishment, including ones we might now consider 'civil' forfeitures or fines"). Notably, Justice Thomas has recently argued that the void-for-vagueness doctrine lacks a legitimate basis in the Due Process clause. *See* Sessions v. Dimaya, 584 U.S. 148, 206 (2018) (Thomas, J., dissenting).

129. *Soule III*, 90 F.4th 34, 40 (2d Cir. 2023) (en banc).

130. *See* RESTATEMENT (SECOND) OF CONTS. § 33 cmt. a (AM. L. INST. 1981) ("If the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract."); *see also* 1 MURRAY, *supra* note 121, § 4.1 ("If the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left.").

131. *Cf.* RESTATEMENT (SECOND) OF CONTS. § 33 cmt. a (AM. L. INST. 1981).

132. Another way of putting this is that a contract will only be void on vagueness grounds if it is unenforceably vague in every context in which it could be enforced—that is, contractual vagueness is a ground for facial invalidity. *See* United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would

The inapplicability of the contractual void-for-vagueness doctrine to Title IX's prohibition of sex-based discrimination has direct implications for ongoing litigation that, like *Soule*, involves the relationship between Title IX and transgender rights. In a final rule promulgated in April 2024, the Department of Education amended regulations implementing Title IX so as to make explicit that sex discrimination encompasses discrimination on the basis of sexual orientation and gender identity.[133] Though these regulations should not directly impact the litigation in *Soule*, since that litigation focuses on liability for conduct predating these new regulations, the challenges to these new regulations have nonetheless implicated the *Pennhurst* doctrine. At least two dozen state attorneys general filed suit in federal district courts seeking to enjoin the regulations from going into effect on the ground that they are inconsistent with the statutory text of Title IX.[134] A number of these suits have been successful, resulting in temporary injunctions.[135] And in August 2024,

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be valid."); *see also* Wagner v. BRP Grp., Inc., 316 A.3d 826, 879 n.241 (Del. Ch. 2024) (discussing facial invalidity challenges to contracts and the applicability of the *Salerno* standard). This is, potentially, a place where contractual void for vagueness breaks from its due process cousin. Though there are cases suggesting a challenged provision will be void for vagueness "only if the enactment is impermissibly vague in all of its applications," Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 494–95 (1982), other cases suggest a provision may be void even when "there will be straightforward cases" enforcing it, Johnson v. United States, 576 U.S. 591, 602 (2015); *see also id.* at 637 (Alito, J., dissenting).

133. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.10 (2024).

134. *See* Alabama v. Cardona, No. 7:24-CV-533, 2024 WL 3607492 (N.D. Ala.), *preliminary injunction pending appeal granted sub nom.* Alabama v. U.S. Sec'y of Educ., No. 24-12444, 2024 WL 3981994 (11th Cir. Aug. 22, 2024); Arkansas v. U.S. Dep't of Educ., 742 F. Supp. 3d 919 (E.D. Mo. 2024); Carroll Indep. Sch. Dist. v. U.S. Dep't of Educ., 741 F. Supp. 3d 515 (N.D. Tex. 2024); Kansas v. U.S. Dep't of Educ., 739 F. Supp. 3d 902 (D. Kan.), *appeal filed*, No. 24-3097 (10th Cir. July 11, 2024); Louisiana v. U.S. Dep't of Educ., 737 F. Supp. 3d 377 (W.D. La.), *partial stay denied*, No. 24-30399, 2024 WL 3452887 (5th Cir.), *denial of partial stay aff'd*, 603 U.S. 866 (2024) (per curiam); Rapides Par. Sch. Bd. v. U.S. Dep't of Educ., No. 1:24-CV-00567 (W.D. La.) (consolidated with Louisiana v. U.S. Dep't of Educ., No. 3:24-CV-00563); Okla. State Dep't of Educ. v. United States, No. 5:24-CV-00459 (W.D. Okla. Jan. 16, 2025); Oklahoma v. Cardona, No. 5:24-CV-00461, 2024 WL 3609109 (W.D. Okla. July 31, 2024); Tennessee v. Cardona, 737 F. Supp. 3d 510 (E.D. Ky.), *partial stay denied*, No. 24-5588, 2024 WL 3453880 (6th Cir.), *denial of partial stay aff'd sub nom.* Dep't of Educ. v. Louisiana, 603 U.S. 866 (2024) (per curiam); Texas v. Cardona, No. 4:23-CV-00604, 2024 WL 3658767 (N.D. Tex. Aug. 5, 2024).

135. *See Louisiana*, 737 F. Supp. 3d at 410; *Tennessee*, 737 F. Supp. 3d at 572; *Kansas*, 739 F. Supp. 3d at 936–37; Texas v. United States, 740 F. Supp. 3d 537, 559 (N.D. Tex. 2024); *Carroll Indep. Sch. Dist.*, 741 F. Supp. 3d at 526; *Arkansas*, 742 F. Supp. 3d at 951.

the Supreme Court declined the Department of Education's request to stay the injunctions while the litigation challenging the new regulations continue.[136]

In at least some of these cases, the courts have cited the *Pennhurst* doctrine as part of the justification for enjoining the regulations.[137] For example, in a decision by the Sixth Circuit denying a stay of a preliminary injunction, Chief Judge Sutton cited *Pennhurst*'s "clear statement" rule as weighing against the Department of Education's more expansive reading of the statute.[138] In so doing, he treated it as a standard "clear statement" rule, providing a thumb on the scale against the Department of Education's argument that *Bostock*'s broad reading of sex discrimination in the Title VII context should be imported to Title IX.[139] Thus, somewhat ironically, in this context, the *Pennhurst* doctrine is being used to shield states resisting transgender protections, in contrast to *Soule*, where it was raised to defend a state seeking to be inclusive of transgender athletes. But, the *Pennhurst* doctrine, at least under a contractual void-of-vagueness understanding, is an equally awkward fit—in either case, it cannot be said that Title IX fails to give rise to an enforceable obligation. Accordingly, if the *Pennhurst* doctrine is understood to incorporate only contractual void-for-vagueness, then it offers no defense in these sorts of disputes arising from Title IX.

B. Contra Proferentem

But *Pennhurst* need not be understood to incorporate only void-for-vagueness. Other principles of contract law may also be justifiably invoked under the broader contract analogy. One such principle is the canon of *contra proferentem*, which counsels courts to construe an ambiguous term against the drafter when it has exhausted other interpretive tools—a thumb on the scale in favor of the non-drafter.[140]

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136. Dep't of Educ. v. Louisiana, 603 U.S. 866 (2024) (per curiam).

137. *See, e.g.*, *Louisiana*, 737 F. Supp. 3d at 403; *Arkansas*, 742 F. Supp. 3d at 936, 939.

138. Tennessee v. Cardona, No. 24-5588, 2024 WL 3453880, at *3 (6th Cir.), *denial of partial stay aff'd sub nom.* Dep't of Educ. v. Louisiana, 603 U.S. 866 (2024) (per curiam).

139. *Id.* ("Congress enacted Title IX as an exercise of its Spending Clause power, which means that Congress must speak with a clear voice before it imposes new mandates on the States. The same is not true of Title VII. All of this explains why we have been skeptical of attempts to export Title VII's expansive meaning of sex discrimination to other settings." (citations omitted)).

140. 5 Timothy Murray, Corbin on Contracts § 24.19, LEXIS (database updated Nov. 2024) ("The maxim '*verba chartarum fortius accipiunter contra proferentem*'— '[c]ontract terms will be most strongly interpreted against the drafter'—is a

This canon is appropriately used "where the written contract is standardized and between parties of unequal bargaining power."[141] As the Supreme Court has repeatedly explained, the *Pennhurst* doctrine and its "clear statement" rule reflect the risk that Congress will use its Spending Clause power to coerce recipient states.[142] This is a standard case of unequal bargaining power. The application of *contra proferentem* to Spending Clause legislation aligns with the power dynamics between Congress and states in federal funding scenarios. Just as this canon protects the weaker party in standard form contracts, it could serve to safeguard states' interests when interpreting ambiguous terms in federal legislation.

But the *contra proferentem* canon has its limits. The canon typically does not apply when it can be inferred that both parties understood the contract to have been intentionally written broadly so as to grant discretion to the drafter.[143] This is because the anti-drafter principle is meant to protect against unfair surprises or unclear terms, not to override mutually understood and agreed-upon flexibility.[144] When both parties acknowledge that the contract's broad language is deliberate and designed to allow discretion, interpreting ambiguities against the drafter would contradict the contract's purpose and the parties' intentions.

The same principle should apply to the *Pennhurst* doctrine. The Supreme Court has essentially recognized as much. In *Bennett v. Kentucky Department of Education*, a case addressing whether Kentucky had complied with the conditions of a Title I education grant, the Court rejected the argument that ambiguities should be resolved

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rule of construction applied to ambiguous contracts when all conventional methods of interpretation have failed and two reasonable meanings are possible. It is applied when the terms of a written contract have been authored by one of the parties and merely assented to by the other. It works *in favor* of the underdog non-drafting party, and *against* the drafting party." (alteration in original) (footnote omitted) (quoting Balanoff v. 83 Maiden LLC, No. 1:98-CV-06442, 2000 U.S. Dist. LEXIS 109, at *21 n.3 (S.D.N.Y. Jan. 10, 2000))).

141. Westfield Ins. Co. v. Galatis, 797 N.E.2d 1256, 1262 (Ohio 2003).

142. *E.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577–78 (2012).

143. *See* RESTATEMENT (SECOND) OF CONTS. § 206 reporter's note, cmt. a (AM. L. INST. 1981) (stating that the canon "has less force when the other party has taken an active role in the drafting process, or is particularly knowledgeable").

144. *See id. § 206* cmt. a ("Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.").

against the drafting party.[145] The Court emphasized that the structure of Title I established an ongoing, cooperative endeavor between the federal government and the states, in which the federal government set "general guidelines for the allocation and use of funds, and the [s]tates agreed to follow those guidelines in approving and monitoring specific projects developed and operated at the local level."[146] "Given the structure of the grant program, the [f]ederal [g]overnment simply could not prospectively resolve every possible ambiguity concerning particular applications of the requirements of Title I," and "grant recipients had an opportunity to seek clarification of the program requirements."[147] The Court reasoned that applying the anti-drafter rule in this context would be inappropriate, as it would unduly restrict the federal government's ability to manage and adapt the program over time.[148]

The *Bennett* Court recognized that sometimes statutes—like private contracts—utilize broad language to effectuate an intentional delegation of discretion to one of the parties. To apply the anti-drafter canon in this context would thus undermine the particular bargain struck. The idea of broad language effecting a delegation is a familiar one in statutory interpretation—it has long been part of the justification for *Chevron* deference.[149] Importantly, the *Loper Bright* decision, though overturning *Chevron*, recognized that statutes sometimes "delegate[] discretionary authority to an agency."[150] Questions remain as to what exactly this means—including what type of language implies a delegation—but one implication would seem to be that where a delegation can be inferred from the text, a "clear statement" rule derived from contract law would not militate in favor of narrowing that discretion, at least on anti-drafter grounds.

Title IX fits this model of intentional delegation because it expressly grants authority to federal agencies to promulgate rules. Specifically, Title IX authorizes the Department of Education to issue regulations to effectuate the law's prohibition of sex discrimination in education programs receiving federal funding.[151] This explicit delegation of rulemaking power indicates Congress's intent to allow for flexibility and discretion in implementing Title IX's broad

145. *See* Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 669 (1985).

146. *Id.* at 669; Jeff Gordon, *Statutory Contracts*, 42 YALE J. ON REGUL. (forthcoming 2025).

147. *Bennett*, 470 U.S. at 669.

148. *See id.*

149. *See, e.g.*, Smith, *supra* note 76, at 1193–95.

150. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024).

151. 20 U.S.C. § 1682.

mandate. As such, applying a strict anti-drafter interpretation or "clear statement" rule to Title IX would be inconsistent with the statute's purpose of granting agencies the ability to adapt and refine the law's application over time in response to evolving understandings of sex discrimination in education. This has direct implications for the ongoing litigation challenging the Department of Education's expanded Title IX regulations, indicating that *contra proferentem* cannot be relied on to invalidate the regulations.[152]

C. The Implied Covenant of Good Faith and Fair Dealing

But a finding that a statute delegates discretion to a federal agency does not end the inquiry. To the contrary, various doctrines in contract law apply even in cases of delegation to protect the expectations of the parties. Foremost among these is the implied covenant of good faith and fair dealing.[153] When a contract grants broad discretion to one party, this covenant operates as a constraint, ensuring that the discretionary power is not exercised arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.[154] It essentially imposes a duty to exercise discretion reasonably and with proper motive, preventing abuse of

152. *See supra* notes 133–39 and accompanying text.

153. Restatement (Second) of Conts. § 205 (Am. L. Inst. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

154. *Id.* § 205 cmt. a ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."); *see, e.g.*, Hometown Folks, LLC v. S & B Wilson, Inc., 643 F.3d 520, 527 (6th Cir. 2011) ("The purpose of [the] implied covenant [of good faith and fair dealing] is: '(1) to honor the reasonable expectations of the contracting parties and (2) to protect the rights of the parties to receive the benefits of the agreement into which they entered.'" (quoting Lamar Advert. Co. v. By-Pass Partners, 313 S.W.3d 779, 791 (Tenn. Ct. App. 2009))); Dieckman v. Regency GP LP, 155 A.3d 358, 367 (Del. 2017) ("The implied covenant is inherent in all contracts and is used to infer contract terms 'to handle developments or contractual gaps that the asserting party pleads neither party anticipated.' It applies 'when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected.' The reasonable expectations of the contracting parties are assessed at the time of contracting." (footnotes omitted) (quoting Nemec v. Shrader, 991 A.2d 1120, 1125–26 (Del. 2010))).

discretionary authority while still preserving the flexibility intended in the agreement.[155]

Such an inquiry bears resemblance to the application of the arbitrary and capricious standard used to review agency regulations pursuant to the Administrative Procedure Act (the "APA").[156] But the challenge would be procedurally different: for example, in the context of a declaratory judgment action, rather than a section 704 APA challenge. This would provide a means for challenging agency actions—like the promulgation of an interpretive letter—that are not "final agency actions" and thus cannot be challenged under section 704.[157] The substantive standard would also be different and, arguably, more friendly to the regulated entity (here, the state actor). Because the implied covenant places greater emphasis on the parties' reasonable expectations—including their reliance interests[158]—while an agency's action might be deemed "arbitrary and capricious" for failing to *consider* reliance interests, so long as the agency has documented its reasons for nonetheless diverging from its prior policy, the new policy would likely survive review under the APA.[159] In contrast, where a party can show that the contracting parties' past practice gave rise to settled expectations as to how the contract would be performed, deviation from that practice may well be sufficient to show a breach of the implied covenant.[160]

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155. *See* Daniel B. Listwa, *Cooperative Covenants: Good Faith for the Alternative Entity*, 24 Stan. J.L. Bus. & Fin. 137, 179 (2019).

156. *See id.*

157. Ripeness would still be a jurisdictional barrier, even in the absence of a final agency action requirement. *See* Abbott Lab'ys v. Gardner, 387 U.S. 136, 148–49 (1967). Some courts have required final agency action to satisfy ripeness, apparently as a means of blocking declaratory judgment actions seen as trying to circumvent the APA's limitations. *See, e.g.*, Consensys Software, Inc. v. SEC, No. 4:24-CV-00369, 2024 WL 4438969, at *3 (N.D. Tex. Sept. 19, 2024) (dismissing declaratory judgment action as unripe where the "[p]laintiff failed to identify final agency action that would render the claim fit for judicial review").

158. 1 Murray, *supra* note 121, § 1.1 ("[O]ne of the chief rationales for protecting the reasonable expectations of promisees is to promote and facilitate reliance on agreements." (citing Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: 1*, 46 Yale L.J. 52, 59–62 (1936))).

159. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 30–31 (2020) (explaining that "[i]t would be arbitrary and capricious to ignore" reliance interests and that "consideration [of any reliance interests] must be undertaken by the agency in the first instance" (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009))).

160. *See* Listwa, *supra* note 155, at 150; Steven J. Burton, *History and Theory of Good Faith Performance in the United States*, *in* Comparative Contract Law: British and American Perspectives 210, 212–13, 218 (Larry DiMatteo & Martin Hogg eds., 2016).

Unlike the void-for-vagueness doctrine, the implied covenant of good faith and fair dealing is a theory of breach, not a defense of breach. Nevertheless, good faith provides a framework for considering invocations of the *Pennhurst* doctrine. Consider, once again, the *Soule* decision. Had there been a long-running agency interpretation of Title IX requiring the exclusion of transgender athletes from sex-segregated teams, plaintiffs could have cited such an interpretation as evidence of a settled expectation. However, because the Department of Education had given contradictory guidance on the issue leading up to the lawsuit, as the district court observed, the position that CIAC breached its obligations was undercut.[161] Likewise, in the ongoing litigation relating to the recent Title IX regulations, the Department of Education can cite the absence of any settled expectation as a defense against the charge that newly promulgated rules represent a bad faith break from an established understanding.[162]

Thinking about the *Pennhurst* doctrine through the lens of the implied covenant thus broadens the relevant "notice" inquiry beyond the words of the statutory text to consider other grounds upon which a regulated entity might reasonably develop expectations for how a particular statutory scheme would be enforced, such as past agency practices or judicial decisions. But it broadens this inquiry while also confining it by requiring a regulated entity to demonstrate both a preexisting settled expectation, and that the expectation was disturbed. The implied covenant thus provides a contractual basis for the type of broader inquiry followed by some courts—including in *Soule I* and *II*[163]—ostensibly under the *Pennhurst* notice framework, while also supplying guardrails on what might otherwise be an amorphous examination.

161. *See Soule I*, No. 3:20-CV-00201, 2021 WL 1617206, at *9 (D. Conn. Apr. 25, 2021), *aff'd*, 57 F.4th 43 (2d Cir. 2022), *vacated en banc and remanded*, 90 F.4th 34 (2d Cir. 2023); *see also supra* note 85 and accompanying text.

162. Invocation of the implied covenant may also provide a means for scrutinizing the agency's motives, something that the APA typically precludes, at least absent egregious facts. *Compare* Wilson v. Amerada Hess Corp., 773 A.2d 1121, 1129–30 (N.J. 2001), *with* Dep't of Com. v. New York, 588 U.S. 752, 781–82 (2019). This raises the question of whether a litigant challenging an agency's regulation might be able to argue that it is unenforceable because it was adopted in bad faith.

163. *See supra* note 91 and accompanying text; *see also* J.S. v. N.Y. State Dep't of Corr. & Cmty. Supervision, 76 F.4th 32, 48 (2d Cir. 2023) (noting that for "textual, historical, and other reasons[,]" a state would have known its obligations under the federal statute).

D. Changed Circumstances

Beyond the implied covenant and other contract doctrines discussed in this Part, various defenses relating to changed circumstances—including impossibility,[164] impracticability,[165] and frustration of purpose[166]—can be invoked to protect state actors from the unexpected. A state that agrees to receive funding in return for enforcing anti-discrimination laws, for example, does so against a background legal framework that specifies the content and purpose of its obligations. When subsequent agency interpretations, statutes, or court decisions unilaterally modify those obligations after a state agrees to a funding condition in reliance on the previous legal framework, these doctrines arguably furnish the states with an affirmative defense to a damages action for breach of the funding condition. As the Court in *Pennhurst* explained, "[t]hough Congress'[s] power to legislate under the spending power is broad, it does not include surprising participating [s]tates with post acceptance or 'retroactive' conditions."[167] Understanding the *Pennhurst* doctrine as broadly encompassing these contractual principles thus provides a means of achieving what the *Pennhurst* court set out to do in a manner far better than a "clear statement" rule.

Like the principles of good faith discussed in the previous section, doctrines like changed circumstances center the reliance interests and expectations of the parties.[168] But one key difference is that while the implied covenant of good faith focuses on actions by one of the parties to the agreement that purportedly upset expectations, the doctrine of changed circumstances instead looks to events external to the parties. In the Spending Clause legislation context, this would imply that, while actions by the agency empowered to enforce the statute in question could be covered by the implied covenant, unexpected shifts caused by other actors—such as courts—might be addressed through a changed circumstances lens.

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164. Restatement (First) of Conts. §§ 454–469 (Am. L. Inst. 1932).

165. Restatement (Second) of Conts. § 261 (Am. L. Inst. 1981) ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.").

166. *Id.* § 265.

167. *Pennhurst I*, 451 U.S. 1, 25 (1981).

168. Something similar could be said of the void-for-vagueness doctrine. One scholar has observed that the constitutional void for vagueness doctrine can be understood as an impossibility defense. *See* Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 Tex. L. Rev. 1049, 1097 (2020).

Consider the Court's recent decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*.[169] One could imagine follow-on litigation seeking to hold universities liable for damages due to past practices that were widely considered lawful under previous interpretations of Title VI and the Equal Protection Clause. Contract doctrines relating to changed circumstances would give lower courts a toolkit for assessing whether monetary damages should be available in these challenges. Specifically, universities could argue that the Supreme Court's decision in *Students for Fair Admissions* represented a fundamental change in circumstances that altered the very nature of their obligations under Title VI. They could contend that when they initially accepted federal funding, they did so with the reasonable expectation that tailored race-conscious admissions policies were permissible under both constitutional and statutory law. The sudden shift in legal interpretation, they might argue, frustrates the purpose of their agreement to comply with Title VI as it was understood at the time—making the point that they understood their affirmative action policies to forward the anti-discrimination purposes of Title VI, not violate them. This defense, rooted in contract law principles, could shield universities from retrospective damages liability while still requiring them to adjust their policies going forward.

Whether courts will find such arguments compelling is yet to be seen. But what this Article has sought to show is that when reimagined through the lens of contract law, the *Pennhurst* doctrine can offer a more nuanced approach to interpreting Spending Clause legislation and assessing alleged violations. By incorporating principles of changed circumstances and frustrated purposes—along with doctrines such as void for vagueness, *contra proferentem*, and the implied covenant of good faith and fair dealing—it is possible to construct a framework that better balances the need for clear congressional mandates with the realities of complex federal-state partnerships. The result is a framework allowing for intentional delegations of discretion while still protecting states from unfair surprises or retroactive conditions.

VI.
CONCLUSION

Courts have struggled to reconcile the *Pennhurst* doctrine's "clear statement" rule with its purported foundations in contract law and constitutional principles. This Article has demonstrated that

169. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

the doctrine's current application often diverges from its purported contractual grounding, creating tension between theoretical justification and practical implementation. Yet rather than abandon the contract-law analogy altogether, we propose that courts can better serve both federalism principles and congressional intent by embracing a more nuanced understanding of how contract law actually treats ambiguity.

At its core, contract law recognizes that so long as terms are "reasonably certain" and not so vague as to make it impossible for courts to detect a breach or craft a remedy, ambiguous terms in an agreement should be enforced rather than invalidated.[170] Contract law accepts the ambiguity that attends incomplete contracting as inevitable and even desirable. Rather than invalidating ambiguous terms, courts adjudicating contract claims employ a variety of doctrinal tools—doctrines such as *contra proferentem*, the implied covenant of good faith and fair dealing, and rules related to changed circumstances—to manage ambiguity.

This sophisticated approach to managing ambiguous terms offers a rich framework for reimagining the *Pennhurst* doctrine. Such a reconstruction allows courts to move beyond the rigid confines of a simple "clear statement" rule while still protecting state sovereignty and legitimate reliance interests. Moreover, it provides a more coherent theoretical foundation for distinguishing between prospective and retrospective relief, a distinction that has long been central to the doctrine's application but has lacked a convincing rationale.

The implications of this reconstructed doctrine extend beyond academic interest. As courts continue to grapple with novel questions arising under Spending Clause legislation—from transgender rights in education to race-conscious admissions policies—they need interpretive tools that can accommodate both evolving social understandings and settled expectations. The framework proposed here offers precisely that: a means of protecting state sovereignty without unduly constraining Congress's ability to craft effective legislation or agencies' capacity to adapt to changing circumstances.

This Article's proposed reconstruction of the *Pennhurst* doctrine suggests a path forward that better aligns with both contract law principles and the practical realities of cooperative federalism. By drawing on contract law's nuanced treatment of ambiguity, courts can develop a more sophisticated approach to interpreting Spending Clause legislation—one that promotes clarity and predictability while still maintaining the flexibility necessary for effective

170. *See supra* note 105 and accompanying text.

governance in our complex federal system. As the Supreme Court continues to reshape the landscape of anti-discrimination law and administrative authority, such a reconstruction becomes not merely desirable but essential for maintaining the delicate balance between federal policy objectives and state autonomy.

IN DEFENSE OF "ACTINGS"

*PIETER C. S. BROWER**

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I.
INTRODUCTION

Two years into his first administration, President Donald Trump forced Attorney General Jeff Sessions out of office.[1] At the time, sources differed on the proper characterization of the change in personnel—was Sessions fired, or did President Trump merely request his resignation?[2] In the end, the distinction probably would not have

* J.D. 2024, New York University School of Law; A.B. 2018, Brown University. I am indebted to the guidance of Emma Kaufman, Noah Rosenblum, Barry Friedman, and all the participants in the Furman Academic Scholars Program in the conception of this Note. I would also like to thank the staff of the Annual Survey for shepherding me through the production process.

1. Peter Baker, Katie Benner & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. Times (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html [https://perma.cc/2SVW-AD93].

2. *Compare Trump Fires Attorney General Jeff Sessions*, BBC (Nov. 8, 2018), https://www.bbc.com/news/world-us-canada-46132348 [https://perma.cc/LG42-AG6S] (stating "US Attorney General Jeff Sessions has been fired by President Donald

made a difference,[3] and whether a requested resignation amounts to a firing is a semantic game that need not be resolved now. At any rate, Trump had long complained about Sessions' decision to recuse himself from the Mueller investigation,[4] and the forced resignation (or firing) immediately drew comparisons to the infamous "Saturday Night Massacre" under Richard Nixon.[5] Once again—it at least appeared—a corrupt President had tried to influence an investigation into their campaign activities.

The circumstances of Sessions' departure also thrust the relatively obscure acting officials into the spotlight. Instead of letting Deputy Attorney General Rod Rosenstein perform the duties of the now-vacant office, Trump tapped Matthew Whitaker, a career employee and Sessions' chief of staff, to serve as the acting Attorney General.[6] The appointment immediately engendered controversy, with critics calling it unconstitutional and the Department of Justice stepping up to defend the President.[7] Eventually, Trump nominated and the Senate confirmed William Barr for the vacancy, but Whitaker

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Trump"), *with* Devlin Barrett, Matt Zapotosky & Josh Dawsey, *Jeff Sessions Forced Out as Attorney General*, Wash. Post (Nov. 7, 2018, 7:01 PM), https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html [https://perma.cc/4WWT-KG23] (stating "Attorney General Jeff Sessions resigned"). The New York Times alternated between saying Trump "fired" Sessions and that Sessions "delivered his resignation letter to the White House." Baker et al., *supra* note 1.

3. Contemporary OLC guidance stated that the legal effect would have been the same whether or not Sessions had resigned. *See* Designating an Acting Att'y Gen., 42 Op. O.L.C., slip op. at 4 n.1 (Nov. 14, 2018) [hereinafter Acting Att'y Gen.], https://www.justice.gov/olc/file/2018-11-14-acting-ag/dl [https://perma.cc/FT7F-S7JB].

4. Julia Ainsley, *President Trump Has Replaced Sessions. Here's What That Means for the Mueller Probe.*, NBC News (Nov. 7, 2018, 5:03 PM), https://www.nbcnews.com/politics/justice-department/president-trump-has-replaced-ag-sessions-here-s-what-means-n933676 [https://perma.cc/S8EA-EXRA].

5. Walter M. Shaub, Jr., *This Is the Saturday Night Massacre*, Slate (Nov. 14, 2018, 3:55 PM), https://slate.com/news-and-politics/2018/11/jeff-sessions-firing-saturday-night-massacre-matthew-whitaker.html [https://perma.cc/73M3-WADQ].

6. Baker et al., *supra* note 1.

7. *See, e.g.*, Neal K. Katyal & George T. Conway III, Opinion, *Trump's Appointment of the Acting Attorney General Is Unconstitutional*, N.Y. Times (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/trump-attorney-general-sessions-unconstitutional.html [https://perma.cc/C28Y-VPBB]; Will Baude, *Who Is Lawfully the Attorney General Right Now?*, Reason: The Volokh Conspiracy (Nov. 10, 2018, 3:48 PM), https://reason.com/volokh/2018/11/10/who-is-lawfully-the-attorney-general-rig/ [https://perma.cc/4GLV-K47S]; Charlie Savage, *Justice Dept. Defends Legality of Trump's Appointment of Acting Attorney General*, N.Y. Times (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/us/politics/matthew-whitaker-justice-dept-trump.html [https://perma.cc/D8RU-HEB9]. Justice Department officials argued that

performed the extensive duties of Attorney General for over three months.[8]

Whitaker's tenure as Attorney General was far from the only acting official-related controversy during the first Trump Administration. At one point—shortly after the Sessions saga—"the Departments of Defense and Interior, the Environmental Protection Agency (EPA), and the Social Security Administration (SSA) were all" led by interim, unconfirmed officials.[9] A vacancy in the Consumer Financial Protection Bureau a year earlier resulted in two competing acting directors, only one of whom was tapped by the President, who each claimed to be the rightful leader of the agency.[10] Later in 2019, due to opposition from Republican Senators, President Trump appointed former Virginia Attorney General Ken Cuccinelli to a newly created position in the Department of Homeland Security so that he could serve as acting Director of U.S. Citizenship and Immigration Services (USCIS).[11] And the list goes on.[12]

The sheer volume of Trump-era controversies surrounding acting officials attracted particular notoriety, but his administration's use of acting officials was hardly without precedent. "President Obama . . . submitted far fewer agency nominations in his final two years than other recent two-term Presidents, turning instead to acting leaders and delegated authority in many important agency positions."[13] To name just one example: after the director of the Bureau of Alcohol, Tobacco, Firearms and Explosives stepped down in 2015, President Obama studiously avoided submitting a nominee to fill the vacancy. As a result, an unconfirmed career deputy led the agency

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the appointment complied with the terms of the Federal Vacancies Reform Act (FVRA) and the Appointments Clause. *See* Acting Att'y Gen., *supra* note 3, at 1.

8. David Shortell, *William Barr Confirmed as Attorney General*, CNN (Feb. 14, 2019, 1:44 PM), https://www.cnn.com/2019/02/14/politics/william-barr-senate-confirmation-vote/index.html [https://perma.cc/9JM5-SUYU].

9. Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 Admin. L. Rev. 533, 535–36 (2020).

10. Katie Rogers, *2 Bosses Show Up to Lead the Consumer Financial Protection Bureau*, N.Y. Times (Nov. 27, 2017), https://www.nytimes.com/2017/11/27/us/politics/cfpb-leandra-english-mulvaney.html [https://perma.cc/XV52-CELN].

11. Ted Hesson, *Cuccinelli Starts as Acting Immigration Official Despite GOP Opposition*, Politico (June 10, 2019, 2:59 PM), https://www.politico.com/story/2019/06/10/cuccinelli-acting-uscis-director-1520304 [https://perma.cc/6S75-K5KV].

12. *See, e.g.*, Aaron Blake, *Trump's Government Full of Temps*, Wash. Post (Feb. 21, 2020, 6:30 AM), https://www.washingtonpost.com/politics/2020/02/21/trump-has-had-an-acting-official-cabinet-level-job-1-out-every-9-days [https://perma.cc/5D8D-A4FB].

13. Anne Joseph O'Connell, *Actings*, 120 Colum. L. Rev. 613, 623 (2020).

for four years.[14] Trump's affection for his "actings" may have garnered the most headlines, but he was by no means the first President to rely on temporary leadership.

The increasing awareness of the pervasiveness of acting officials—and their potential for abuse—has spurred more scholarly engagement with the phenomenon. Commentators have focused on how the President can leverage these temporary appointments to evade the Senate confirmation process.[15] The few commentators have generally questioned whether the appointment of acting officials—at least for some high-level positions—is unconstitutional.[16] Some critics of the Trump-era reliance on acting officials labeled the practice antidemocratic,[17] and limitations on acting service were included as one element of the proposed Protecting Our Democracy Act during the 117th Congress.[18] Scholars and several Supreme Court Justices have characterized the Senate confirmation process as an essential safeguard,[19] implicitly arguing that any attempt to

14. *Id.* at 635.

15. *See id.* at 667 (describing how acting officials can "operate[] as a workaround to the constitutionally prescribed process that splits authority between the two political branches"); Mendelson, *supra* note 9, at 541–42 (cataloging similar concerns).

16. *See, e.g.*, Baude, *supra* note 7; Katyal & Conway, *supra* note 7; Joshua L. Stayn, Note, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional*, 50 Duke L.J. 1511, 1513 (2001); Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 Wash. U. L.Q. 1039, 1040–41 (1998); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1514–17 (2005) (defending the appointment of acting officials as "deriv[ing] from [Congress's] constitutional authority to define the duties of the offices it creates"); E. Garrett West, Note, *Congressional Power over Office Creation*, 128 Yale L.J. 166, 210 (2018) (presenting a similar defense of Congress's authority to provide for the appointment of acting officials).

17. *See, e.g.*, Nicholas Bornstein, *Unconfirmed and Unaccountable: Trump's Embrace of Acting Agency Heads Erodes Democracy*, Democratic Erosion Consortium (Feb. 13, 2019), https://www.democratic-erosion.com/2019/02/13/unconfirmed-and-unaccountable-trumps-embrace-of-acting-agency-heads-erodes-democracy-by-nicholas-bornstein/ [https://perma.cc/A4JJ-ETJD] ("Allowing these acting officials to serve for extended periods erodes American democracy . . . .").

18. H.R. 5314, 117th Cong. §§ 901–02 (2021).

19. *See, e.g.*, David M. Driesen, *Appointment and Removal*, 74 Admin. L. Rev. 421, 469 (2022) ("[T]he Framers recognized that concentrating too much control over officials in the President could lead to the establishment of an autocracy . . . ."); Denning, *supra* note 16, at 1041 ("By involving the Senate in the appointment of executive and judicial officers, the Framers intended to provide a check on the power of the Executive."); NLRB v. Noel Canning, 573 U.S. 513, 570, 578–79 (2014) (Scalia, J., concurring) (describing Senate confirmation as a protection against despotism); NLRB v. SW Gen., Inc., 580 U.S. 288, 317 (2017) (Thomas, J., concurring) (arguing the Framers "recognized the serious risk for abuse and corruption posed by permitting one person to fill every office").

circumvent the process—using acting officials or otherwise—raises grave concerns for our constitutional order.

Relatively underdiscussed in the literature is the impact of acting officials on democracy, a consideration that could help inform a more functional evaluation of the phenomenon. Professor Anne Joseph O'Connell, probably the foremost expert on acting officials, has argued that in terms of accountability, "acting officials are hard to defend."[20] However, the fact that acting officials are less accountable *to the Senate* does not mean they are less accountable *to the public*. Professor Nina A. Mendelson, in another extensive analysis of acting officials, allows that acting officials could increase the accountability of the executive branch.[21] Mendelson, however, ultimately equivocates, concluding that "[b]ypassing confirmation has conflicting effects on . . . democratic responsiveness" since it depreciates "the substantial democratic contribution of the Senate."[22]

These critiques take the Senate's supposed "substantial democratic contribution" for granted, a stance that seems more grounded in an idealistic vision of American governance than in contemporary political realities. This Note posits that in many circumstances, acting officials increase the responsiveness and democratic accountability of the executive branch, a lesson that counsels against increasing the Senate's power in this area. In an extreme scenario of democratic breakdown, actings could ensure the President's ability to vindicate their democratic mandate without unnecessarily centralizing the activities of the administrative state under the executive's personal control. Furthermore, the case of acting officials suggests that the appointment process is the best way for the President to bring their democratic bona fides to bear on the machinery of government and that supporting expansive presidential power in this area does not require embracing the imperial presidency in its most extreme form.

The realities of modern government make it difficult to imagine a world where acting officials are no longer part of the presidential toolbox. The proliferation of Senate-confirmed positions and the growing size of the bureaucracy make it impossible to fill every vacancy expediently, especially when a presidential election necessitates a turnover in the political oversight of the executive branch. Moreover, with rising partisan polarization and the increasing unrepresentativeness of our political institutions, acting officials could

20. O'Connell, *supra* note 13, at 701.

21. *See* Mendelson, *supra* note 9, at 591 ("[O]fficials may operate the agencies more consistently with presidential preferences and, presumably, with public preferences expressed in the electoral process.").

22. *Id.* at 591–92.

also serve as a potential safety valve in the event of an intractable interbranch standoff.

Reformers ignore these possibilities at their peril. Although it is understandable that commentators have coalesced around proposals designed to crack down on the use of acting officials, given the recency bias engendered by Trump-era controversies, there are tradeoffs in both directions. Blithe assumptions about the Senate's supposed democratic pedigree should not go unexamined. The ill effects of Senate malapportionment and partisan gerrymandering mean that we do not live in a perfect democracy with perfectly functioning institutions—we have to take our politics as they come, at least in the short term. A more nuanced consideration of acting official's democratic imprimatur counsels for a more flexible approach. This is not to say, of course, that the Senate confirmation process serves no purpose whatsoever, just that it is not at all clear that it furthers the cause of democratic accountability.

The argument proceeds as follows: Part II examines the rise of "actings," detailing the history of their use and describing the Federal Vacancies Reform Act (FVRA), the current vacancies statute that applies to most executive branch offices. The Part will conclude by examining some of the controversies associated with the FVRA. Part III discusses the permissibility of acting officials from the standpoint of democracy, developing a more nuanced description of American democracy to help shed light on the proper balance of Senate and presidential power in this area before considering the possibilities of Senate recalcitrance and extreme partisan polarization. Considering this analysis, Part IV offers a few recommendations about proposed reforms to the FVRA and concludes by discussing the unitary executive theory in light of the connection between acting officials, democratic accountability, and presidential appointments more broadly.

II.
THE RISE OF ACTINGS

For all the recent consternation it has engendered, the phenomenon of actings is almost as old as the Republic itself.[23] Congress first addressed the subject during George Washington's presidency,

23. *See* O'Connell, *supra* note 13, at 625; Valerie C. Brannon, Cong. Rsch. Serv., R44997, The Vacancies Act: A Legal Overview 1 (14th ver. 2022) ("Congress has long provided that individuals who were not appointed to that office may *temporarily* perform the functions of that office."); Doolin Sec. Sav. Bank v. Off. of Thrift Supervision, 139 F.3d 203, 209–10 (D.C. Cir. 1998) (offering a history of acting officials since 1792).

enacting a statute in 1792 that allowed the President to direct "any person or persons" to perform the duties of vacant offices in the early executive departments.[24] Deployment of acting officials was hardly uncommon during the first few decades of American political life—a recent opinion by the Department of Justice's Office of Legal Counsel cataloged over 160 instances prior to 1860 in which non-Senate-confirmed functionaries assumed the duties of important executive branch offices.[25] A post-Civil War statute, for the first time, limited the permissible pool of acting officeholders[26] and was amended at various points until the last major overhaul in 1998.[27] While the history of vacancies statutes suggests some tension between Congress and the President as to the acceptability of acting officials,[28] the remarkable consistency of the practice indicates long-standing interbranch acquiescence to their use, at least as a general principle.[29]

A. The FVRA

The push-and-pull between Congress and the President with respect to acting officials culminated in the passage of the current vacancies statute: the FVRA. The statute governs the appointment of acting officials to most of the approximately 900 executive branch offices that require Senate confirmation,[30] the so-called "PAS

24. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281 (repealed 1868). *See also Doolin*, 139 F.3d at 209–10 (discussing the circumstances surrounding the passage of the 1792 statute).

25. Acting Att'y Gen., *supra* note 3, at 2.

26. Act of July 23, 1868, ch. 227, 15 Stat. 168, 168–69.

27. Christopher D. Johnson, Note, *Too Much "Acting," Not Enough Confirming: The Constitutional Imbalance Between the President and Senate Under the Federal Vacancies Reform Act*, 105 Cornell L. Rev. 2023, 2028 (2020); O'Connell, *supra* note 13, at 625–26.

28. *See* NLRB v. SW Gen., Inc., 580 U.S. 288, 294 (2017) ("During the 1970s and 1980s, interbranch conflict arose over the [then-current] Vacancies Act.").

29. *See id.* at 293 (recognizing that "Congress has long accounted for" vacancies in positions that normally require Senate confirmation).

30. By last official count, there are 936 such offices. S. Comm. on Homeland Sec. & Governmental Affs., 118th Cong., United States Government Policy & Supporting Positions, app. at 212 (Comm. Print 2024). In addition to the FVRA, a number of agencies have their own succession statutes that provide for specific procedures. *See* O'Connell, *supra* note 13, at 636. The FVRA is supposed to be the "exclusive means" of designating acting officials, unless an agency-specific statute "expressly" displaces it. 5 U.S.C. § 3347(a). The existence of an alternate statute, however, does not mean that the President cannot use the FVRA, and there is some controversy about the interaction between the FVRA and agency succession statutes. *See* Brannon, *supra* note 23, at 20–25.

positions."[31] Originally enacted in response to "perceived massive noncompliance" with earlier statutes, the FVRA further expanded the pool of potential acting officials while imposing harsher penalties for noncompliance.[32] The FVRA comes into play when an officer in a PAS position "dies, resigns, or is otherwise unable to perform the functions and duties of the office."[33] In the event of such a vacancy, the statute identifies three different methods of filling it temporarily, subject to the President's discretion.[34]

The first and default option is for the "first assistant" to the vacant office to step in and assume its duties.[35] In this scenario, the FVRA functions automatically, without any intervention by the President or another executive branch official, and the Supreme Court has described it as the "default rule."[36] However, the simplicity of this first provision is somewhat misleading since the FVRA does not define what counts as a "first assistant," and other statutes or regulations do not always designate a "first assistant" for a given PAS office.[37] As such, the identity of the "first assistant" for a given position is sometimes subject to debate.[38]

As an alternative to the default rule, the FVRA allows "the President (and only the President)"[39] to designate someone from two other categories of officials to take on the acting role. The first option is to pick an officer who already holds a PAS position to temporarily fulfill the vacancy.[40] A recent example occurred when President Trump tapped Mick Mulvaney, the Senate-confirmed Director of the Office of Management and Budget, to serve as the acting head of the

31. *SW Gen.*, 580 U.S. at 292 (describing this commonly accepted terminology). The FVRA does not apply to any agency headed by a multimember leadership team and exempts government corporations, Article I courts, and the Government Accountability Office. O'Connell, *supra* note 13, at 627. This does not mean that these entities have no access to temporary leadership—they may be governed by specific succession statutes or provisions that allow prior officeholders to remain in power until a successor is confirmed. *Id.* at 627 n.64.

32. O'Connell, *supra* note 13, at 626.

33. 5 U.S.C. § 3345(a).

34. § 3345(a)(1)–(3). For additional summaries of the FVRA's provisions, *see generally* O'Connell, *supra* note 13, at 625–36; Johnson, *supra* note 27, at 2028–34; Mendelson, *supra* note 9, at 548–53.

35. § 3345(a)(1).

36. *SW Gen.*, 580 U.S. at 293.

37. Brannon, *supra* note 23, at 10–11.

38. *Id.*

39. § 3345(a)(2)–(3). The quoted language is identical in both subsections.

40. § 3345(a)(2).

Consumer Financial Protection Bureau.[41] There is no requirement that the acting official come from the same agency as the vacancy, although that is typically the case.[42]

Second, the President may designate another "officer or employee" to serve in the acting capacity, so long as they have worked in the agency for at least ninety days during the year prior to the vacancy and they are paid at the GS-15 level or above.[43] Officials drawn from this pool of potential actings may be career civil servants or political appointees,[44] but in each case, they perform the duties of a PAS position without ever having obtained Senate confirmation.[45] Crucially for the purpose of this Note, Presidents disproportionately rely on this last method of filling vacancies at the beginning of an administration, "when there are few first assistants and confirmed officials."[46] In these cases, the operation of the FVRA represents the clearest conflict between the respective constitutional roles of the Senate and the President when it comes to staffing an administration since the Senate will have had no opportunity to evaluate an official who is performing the duties of a Senate-confirmed post.

In addition to identifying the candidate pools for acting officers, the FVRA imposes time limits on their tenure.[47] Actings may serve "for no longer than 210 days beginning on the date the vacancy occurs;"[48] for vacancies at the beginning of an administration, the period is extended to 300 days.[49] In the event the President makes a nomination for the vacant position, then the acting can remain in the role during the pendency of the nomination; if the Senate rejects the nomination or it is withdrawn, then a second 210-day clock starts running at that time.[50] As others have noted,[51] these time limits are hardly a significant restriction on the President's deployment of

41. Victoria Guida, *Trump Taps Mulvaney to Head CFPB, Sparking Confusion Over Agency's Leadership*, Politico (Nov. 24, 2017, 4:45 PM), https://www.politico.com/story/2017/11/24/richard-cordray-successor-cfpb-leandra-english-259612 [https://perma.cc/EQ34-KCAT].

42. *See* O'Connell, *supra* note 13, at 629.

43. § 3345(a)(3).

44. *See* O'Connell, *supra* note 13, at 648.

45. *See* Johnson, *supra* note 27, at 2031 (observing that the third FVRA process "doubles as a largely unobstructed path for the President to evade the constitutional prescription that the Senate confirm Executive Branch nominees").

46. O'Connell, *supra* note 13, at 629.

47. § 3346.

48. § 3346(a)(1).

49. § 3349a(b).

50. § 3346(a)(2)–(b)(1).

51. *See, e.g.*, Johnson, *supra* note 27, at 2032 (describing the FVRA's time limits as "eminently lenient"); Mendelson, *supra* note 9, at 549 (arguing the FVRA

acting officials and are more generous than previous iterations of the vacancies statute.[52] Moreover, the interaction between the typical time limit and the one applicable when there's a pending nomination means that an acting official could effectively serve for over two years.[53] The tenure of an acting official has, at times, rivaled or even surpassed that of their Senate-confirmed counterparts.[54]

In exchange for these longer tenures, the FVRA imposes stronger limits on acting officials than previous statutes, a tradeoff that likely motivated the legislation.[55] While the Act itself doesn't provide a mechanism to remove an acting official once the time limits are exceeded,[56] it specifies that certain actions performed by noncompliant officers shall have "no force or effect."[57] Injured parties, however, must sue to strike down any such actions, and there have been few reported cases that cite this section of the statute.[58] Equitable doctrines like the de facto officer doctrine may, in practice, render this enforcement mechanism "much more porous than generally believed."[59]

Acting officials, while prominent, are not the end of the story when it comes to executive branch vacancies. Despite ostensible restrictions in the FVRA, "many functions and duties are regularly delegated to lower-level officials when vacancies arise, particularly after the Act's time limits for acting service have expired."[60] This workaround has allowed the same official to continue performing

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gives "substantial flexibility" to Presidents due to, in part, the "long" time periods); O'Connell, *supra* note 13, at 630.

52. *Compare* 5 U.S.C. § 3346 (providing for a 210-day limit), *with* Act of July 23, 1868, ch. 227, § 3, 15 Stat. 168, 168 (10-day limit), *and* Act of Feb. 6, 1891, ch. 113, 26 Stat. 733 (30-day limit).

53. O'Connell, *supra* note 13, at 630–31. An acting official could serve the default 210-day period, during the pendency of a nomination, a second 210-day period, during the pendency of a second nomination, and then for a final 210-day period. *Id.*

54. *See, e.g.*, *id.* at 650 tbl.7 (showing that the tenure of some acting EPA officials was longer than that of confirmed officeholders occupying the same position).

55. *See id.* at 632 ("The Act thus offered something to both the White House (longer time limits) and Congress (harsh penalties once they expired).").

56. *See* Brannon, *supra* note 23, at 15–16.

57. 5 U.S.C. § 3348(d)(1).

58. *See* O'Connell, *supra* note 13, at 632.

59. Taylor Nicolas, Note, *Modern Vacancies, Ancient Remedy: How the De Facto Officer Doctrine Applies to Vacancies Act Violations (And How It Should)*, 74 Stan. L. Rev. 687, 692 (2022).

60. O'Connell, *supra* note 13, at 634. Although the FVRA purports to prevent the delegation of an office's exclusive duties, "[m]ost, and in many cases all, the responsibilities performed by a [Senate-confirmed] officer will not be exclusive, and the Act permits non-exclusive responsibilities to be delegated to other appropriate

the duties of a vacant office, even after the FVRA time limits have expired.[61] In the lower ranks of the federal bureaucracy, the duties of vacant positions are likely delegated twice as often as those performed by an acting official.[62]

B. Quantifying the Phenomenon

The Trump Administration, as discussed, attracted considerable attention for its reliance on actings,[63] but the Obama and Bush Administrations faced similar criticism.[64] Most observers expected the Biden Administration to employ the tool,[65] a prediction that has been vindicated. At the time of this writing, many key positions in the executive branch remain unfilled, even though President Biden's first term is over halfway done.[66] In the summer of 2023, administration officials increasingly recognized that acting officials could be a helpful tool to avoid tense confirmation battles, even with a Democratic Senate majority.[67]

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officers and employees in the agency." Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 72 (1999) [hereinafter FVRA Guidance].

61. O'Connell, *supra* note 13, at 634–35.

62. *Id.* at 655.

63. *See supra* text accompanying notes 1–12.

64. *See, e.g.*, Darren Samuelsohn, *Obama's Vanishing Administration*, Politico (Jan. 5, 2016, 5:13 AM), https://www.politico.com/story/2016/01/obamas-vanishing-administration-217344 [https://perma.cc/PQ76-3QQ8]; Philip Shenon, *Interim Heads Increasingly Run Federal Agencies*, N.Y. Times (Oct. 15, 2007), https://www.nytimes.com/2007/10/15/washington/15interim.html [https://perma.cc/Q8BM-XEHT]; O'Connell, *supra* note 13, at 637–38 (describing concern about acting officials in those Administrations); Mendelson, *supra* note 9, at 538 (noting that "the Trump Administration's use of acting officials has hardly been unique").

65. *See* Mendelson, *supra* note 9, at 538 (predicting that President Biden would "undoubtedly rely upon acting officials as well"); Anne Joseph O'Connell, *Waiting for Confirmed Leaders: President Biden's Actings*, Brookings Inst. (Feb. 4, 2021), https://www.brookings.edu/research/president-bidens-actings/ [https://perma.cc/78WT-5VAQ] (describing the Biden Administration's initial slate of actings).

66. *Biden Political Appointee Tracker*, Wash. Post, https://www.washingtonpost.com/politics/interactive/2020/biden-appointee-tracker (last visited Jan. 5, 2022) [https://perma.cc/8L63-8B34] (identifying at least 300 PAS positions without a Senate-confirmed occupant as of January 2022); *see also* Fatima Hussein et al., *Biden Agency Vacancies to Drag on White House Priorities*, Associated Press (Feb. 22, 2022, 12:06 AM), https://apnews.com/article/joe-biden-coronavirus-pandemic-health-business-executive-branch-473c0e65d77d558e0b30b0c035a487e7 [https://perma.cc/7FN6-GB3Z].

67. *See* Burgess Everett, Jennifer Haberkorn & Daniella Diaz, *The Surprising Corner of the Senate That's Sinking Biden Nominees*, Politico (June 12, 2023, 4:30 AM), https://www.politico.com/news/2023/06/12/biden-nominees-commerce-committee-00101132 [https://perma.cc/NM37-WHKU].

Reliable statistics on the number of acting officials in any given administration are difficult to find, a paucity that likely "derives largely from the absence of centrally collected data on acting agency leaders."[68] In a study of cabinet-level vacancies from the Reagan Administration through the beginning of 2020, Professor O'Connell found that nearly half of cabinet secretaries were unconfirmed.[69] While "[a]ll modern Presidents have relied heavily on acting officials," President Trump alone "used more acting secretaries than confirmed secretaries."[70] Although acting officials in cabinet positions typically had short tenures, twenty-two (across different administrations) served for at least one hundred days.[71]

Many acting secretaries during the first Trump Administration, but not all, were the deputy secretary (the "first assistant")[72] or otherwise occupied a PAS office.[73] The Trump Administration relied on twelve acting secretaries who were never confirmed to any position, while the Obama Administration used three such officials.[74] In comparison, the George W. Bush and the Clinton Administrations did not use any.[75] These unconfirmed actings are far more common in lower-level vacancies.[76] To help shed light on the scope of the phenomenon in the lower ranks of the bureaucracy, O'Connell analyzed vacancies in the Environmental Protection Agency.[77] In some instances, acting officials occupied PAS positions in the EPA for longer

68. O'Connell, *supra* note 13, at 639 & n.143 (citing NLRB v. Noel Canning, 573 U.S. 513, 545 (2014) ("The Congressional Research Service is 'unaware of any official source of information tracking the dates of vacancies in federal offices.'")).

69. *See id.* at 645 ("45.8% percent of cabinet secretaries in this period were not confirmed or recess appointed . . . .").

70. *Id.* at 643. O'Connell's research counted acting officials in the Trump Administration until January 19, 2020. President Trump continued to rely on actings throughout 2020. *See, e.g.*, Charlie Savage & Eric Schmitt, *He Sidestepped Pompeo and Got Slapped Down. Now He's the New Pentagon Chief.*, N.Y. Times (Nov. 11, 2020), https://www.nytimes.com/2020/11/11/us/politics/christopher-miller-pentagon-shabab.html [https://perma.cc/2SGP-BP95] (describing the selection of Christopher C. Miller as Acting Secretary of Defense); Carrie Johnson, *Who is Jeffrey Rosen, New Acting Attorney General?*, NPR (Dec. 15, 2020, 3:51 PM), https://www.npr.org/2020/12/15/946827318/who-is-jeffrey-rosen-new-acting-attorney-general [https://perma.cc/66XW-J3UZ] (describing Jeffrey Rosen's selection as Acting Attorney General).

71. O'Connell, *supra* note 13, at 645–46.

72. 5 U.S.C. § 3345(a)(1).

73. *See* O'Connell, *supra* note 13, at 648 tbl.5.

74. *Id.*

75. *Id.*

76. *Id.* at 648.

77. *See id.* at 649–52.

than confirmed ones,[78] and there was greater reliance on unconfirmed employees.[79]

The research to date demonstrates the importance of acting officials to the functioning of the federal bureaucracy,[80] as well as a growing reliance on unconfirmed officials in the roles. The result is that "we regularly face the specter of missing Senate-confirmed officials in the agencies."[81] Professor Nina Mendelson argues that the growing prominence of acting officials should be understood as part of presidential administrations' move "toward 'politicizing' agencies as a means of policy control by '[p]opulat[ing] the bureaucracy with politically responsive actors.'"[82] President Trump himself seemed to express an affection for his actings due to the greater flexibility they afforded him in pursuing his agenda.[83] Given these developments, it's hardly surprising that the rise of actings has engendered some backlash.

C. Angst About Actings

Before the Trump Administration controversies, the use of acting officials and the FVRA attracted relatively little attention.[84] Observers, however, have long recognized several open legal questions in its application.[85] First, commentators have questioned whether a first assistant can be appointed after a vacancy arises, thereby stepping into the vacant role under the automatic operation of the default provision.[86] Although this process complies with

78. *See id.* at 650 tbl.7.

79. O'Connell, *supra* note 13, at 650 ("There have been more acting than confirmed leaders in all three positions.").

80. *See id.* at 651 (arguing that the "case study also shows . . . acting officials play critical roles in the federal bureaucracy").

81. Mendelson, *supra* note 9, at 540.

82. *Id.* at 545 (quoting David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 Geo. Wash. L. Rev. 1095, 1102 (2008)).

83. *See* John T. Bennett, *Frustrated by "My Generals," Trump Turns to "My Actings,"* Roll Call (Jan. 14, 2019, 5:05 AM), https://rollcall.com/2019/01/14/frustrated-by-my-generals-trump-turns-to-my-actings/ [https://perma.cc/JY84-J799] ("But I sort of like 'acting.' It gives me more flexibility.").

84. *See* Richard E. Levy, *Presidential Power in the Obama and Trump Administrations*, J. Kan. Bar Ass'n, Sept. 2018, at 46, 54 (characterizing the FVRA as "an obscure statute").

85. *See, e.g.*, O'Connell, *supra* note 13, at 667–82 (describing questions of statutory interpretation with respect to the FVRA); Brannon, *supra* note 23, at 20–29 (cataloging "evolving legal issues" with the FVRA).

86. *See* Johnson, *supra* note 27, at 2033 ("The first [open question] . . . is whether someone can become the acting officer on account of being the first assistant if

the text of the statute, critics charge that this loophole allows the President to take advantage of existing vacancies to install officials they otherwise may not be able to get confirmed. Another open question is whether the President may take advantage of the FVRA after removing an official from office.[87] The first issue arose with respect to President Trump's selection of Ken Cuccinelli to serve as acting Director of USCIS;[88] the second has not been directly confronted, although the possibility was referenced in OLC guidance about designating former Attorney General Jeff Sessions' replacement.[89] Scholars have also discussed uncertainty about the interaction between the FVRA and agency-specific succession statutes.[90]

Most relevant to this Note, however, is that the FVRA raises unsettled constitutional questions.[91] The Appointments Clause details requirements for the selection of so-called "Officers of the United States"—most officers must be appointed by the President and confirmed by the Senate.[92] Senate confirmation is required for principal officers, while Congress may vest the appointment of "inferior [o]fficers . . . in the President alone, in the Courts of Law, or in the Heads of Departments."[93] Doctrinally, the distinction between inferior and principal officers is evolving; although some positions, like cabinet secretaries, are indisputably principal officers, the

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that person took on the first assistant title after the vacancy occurred."). The OLC initially opined that a potential acting official had to occupy the first assistant post at the time of the vacancy, *see* FVRA Guidance, *supra* note 60, at 63–64, but later reversed its position, *see* Designation of Acting Assoc. Att'y Gen., 25 Op. O.L.C. 177, 179 (2001). *See generally* O'Connell, *supra* note 13, at 675–79 (discussing this issue).

87. *See* Johnson, *supra* note 27, at 2034 ("One of the other questions the FVRA leaves unanswered is whether the FVRA can be used to . . . fill a vacancy caused by presidential removal."). *See generally* O'Connell, *supra* note 13, at 672–75 (discussing this issue).

88. *See supra* text accompanying note 11.

89. *See* Acting Att'y Gen., *supra* note 3, at 4 n.1 ("Even if Attorney General Sessions had declined to resign and was removed by the President, he still would have been rendered 'otherwise unable to perform the functions and duties of the office' for purposes of section 3345(a).").

90. *See, e.g.*, O'Connell, *supra* note 13, at 667–71 (analyzing such concerns); Brannon, *supra* note 23, at 20–25 (same).

91. *See, e.g.*, Brannon, *supra* note 23, at 29–33 (describing how "[s]ome have questioned whether the Vacancies Act is consistent with the U.S. Constitution's Appointments Clause, at least with respect to particular types of acting service").

92. U.S. Const. art. II, § 2, cl. 2.

93. *Id.*; *see also* United States v. Arthrex, Inc., 594 U.S. 1, 11–13 (2021) (quoting U.S. Const. art. II, § 2, cl. 2) (explaining the Appointments Clause and the distinction between principal and inferior officers).

distinction grows blurrier the further one travels down the bureaucratic hierarchy.[94]

Because the FVRA allows functionaries who have never been confirmed by the Senate to perform the duties of principal officers, some, including Justice Thomas, have argued that such appointments may violate the Appointments Clause.[95] The problem most obviously arises in the third pool of potential acting officials,[96] but the first assistants from the default provision are not always Senate-confirmed either.[97] And even when the acting official occupies a different Senate-confirmed position, it's not obvious why that alleviates any constitutional concerns associated with shuffling political appointees from position to position—there's no reason that confirmation as the Secretary of Housing and Urban Development, for example, should allow a given officer to serve as acting Secretary of Defense, even if the FVRA would allow that absurd scenario.

The Supreme Court has only squarely addressed the permissibility of acting service once, holding in *United States v. Eaton* that the inferior officer is not "transformed into the superior and permanent official" by assuming the duties of the principal officer.[98] This resolution, however, has not held up well over time; Professor Mendelson argues that "the *Eaton* Court's apparent focus on the impermanent nature of an acting official's service obscures other

94. *See* Mendelson, *supra* note 9, at 568–69 ("While the Constitution clearly requires Senate confirmation for principal officers, we lack needed clarity on *which* executive officers are principal officers."). An additional wrinkle is that Senate confirmation is the default for *all* officers, not just principal ones, *see* Edmond v. United States, 520 U.S. 651, 660 (1997), so the correspondence between PAS positions and principal officers is not necessarily one-to-one.

95. *See, e.g.*, NLRB v. SW Gen., Inc., 580 U.S. 288, 313 (2017) (Thomas, J., concurring) ("Appointing principal officers under the FVRA, however, raises grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate."); Stayn, *supra* note 16, at 1513, 1536–37; Katyal & Conway, *supra* note 7; Baude, *supra* note 7; Denning, *supra* note 16, at 1040–41.

96. *See* 5 U.S.C. § 3345(a)(3).

97. The Deputy Director of the CFPB, for example, is "appointed by the Director"—so must be an inferior officer—and is empowered to "serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5).

98. United States v. Eaton, 169 U.S. 331, 343 (1898). Legal scholars have justified the FVRA on similar grounds. *See, e.g.*, Rappaport, *supra* note 16, at 1515 (defending the appointment of acting officials as "deriv[ing] from [Congress's] constitutional authority to define the duties of the offices it creates"); West, *supra* note 16, at 219–20 (citing *Eaton*, 169 U.S. at 343) (presenting a similar defense to provide for the appointment of acting officials).

meaningful issues."[99] The tenure of acting officials is not always that temporary in modern practice,[100] and the Supreme Court has expressly evaluated the nature of the duties exercised by a government official when determining whether they count as a principal officer for Appointments Clause purposes.[101] Plus, if a subordinate position in the bureaucracy is the hallmark of inferior officers, as suggested by the Court, then the temporary nature of acting service does not account for the fact that acting Cabinet-level officials have no supervisor other than the President.[102]

In light of this constitutional concern, commentators have argued that the FVRA concentrates too much power in the President at the Senate's expense.[103] While the conventional wisdom once held that Presidents uniformly prefer to install confirmed officials,[104] at times, they may "find an acting official appealing . . . to empower someone whose policy commitments and loyalties more closely resemble [theirs] than the Senate's."[105] Acting officials, therefore, have

99. Mendelson, *supra* note 9, at 573. Mendelson notes that the *Eaton* Court confronted "relatively unusual facts" in a "consular vacancy in a far-flung land" that are not easily generalizable to the modern phenomenon of acting officials. *Id.*

100. As discussed, the FVRA could allow acting service in excess of two years. *See supra* Section II.A.

101. *See, e.g.*, United States v. Arthrex, Inc., 594 U.S. 1, 17 (2021) (noting that the Court's precedents require "an appraisal of how much power an officer exercises free from control by a superior"); Jennifer Mascott & John F. Duffy, *Executive Decisions After* Arthrex, 2021 Sup. Ct. Rev. 225, 227 (describing *Arthrex* as turning on the "distribution of decisional power between principal officers and the mass of lower-level officials"); Mendelson, *supra* note 9, at 571–73 (describing this doctrinal development). Moreover, "an acting official is traditionally understood to possess the full powers of the office for the duration of the appointment"—the temporary nature of their service is far from the only relevant factor. *Id.* at 573.

102. *See Arthrex*, 594 U.S. at 13 ("An inferior officer must be 'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" (quoting Edmond v. United States, 520 U.S. 651, 663 (1997))); Mendelson, *supra* note 9, at 572 (observing that an unconfirmed acting official "is subject to no greater formal supervision" than a principal officer that has been duly appointed and confirmed).

103. *See, e.g.*, Johnson, *supra* note 27, at 2044 ("[T]he FVRA allows the President to sidestep the Senate 'Advice and Consent' requirement in the Appointments Clause.").

104. *See* Mendelson, *supra* note 9, at 545–46 ("Political scientists have long assumed that Presidents prefer to promptly nominate individuals to fill vacancies in Senate-confirmed offices." (citing Christina M. Kinane, Control Without Confirmation: The Politics of Vacancies in Presidential Appointments 5 (Nov. 14, 2019) (unpublished manuscript), https://harris.uchicago.edu/files/kinane_harris_2019.pdf [https://perma.cc/4ZLM-KYLW])).

105. *Id.* at 546.

the potential to serve as a potent tool in Presidents' efforts to effect greater control over the executive branch.[106]

Concentrating the President's power in this way and disregarding the Senate's check on appointments have led to charges that contemporary use of acting officials is antidemocratic.[107] On this account, the Senate confirmation process constitutes a crucial bulwark against autocracy,[108] and any deviation from this constitutional requirement should be viewed with suspicion. In light of these arguments, alongside salient examples of perceived Trump-era exploitation of the FVRA, it is hardly surprising that observers and legislators have advocated for greater limits on presidential deployment of acting officials.[109]

This knee-jerk reaction to Trump-driven controversies, however, takes for granted that tilting the balance of power in this area back towards the Senate is an obvious solution. Such arguments, however, rely on an antiquated, romanticized vision of checks and balances and American democracy that doesn't withstand much scrutiny. The rise of partisan politics and the Senate's unrepresentativeness have undermined the assumptions of the Framers' design.[110] And whatever the flaws of the contemporary Presidency, it is equally difficult to argue that the Senate confirmation process is an unalloyed good, particularly in terms of democratic responsiveness, again because of the overrepresentation of smaller states. By considering how acting officials can advance democracy and accountability, we can better evaluate potential reforms to the FVRA and reflect on the larger project of ensuring democratic accountability throughout the executive branch.

III.
ACTING OFFICIALS AND DEMOCRACY

The phenomenon of acting officials represents perhaps the starkest example of the tension between the President and the Senate (and Congress more broadly), but this tension recurs throughout

106. *See id.* at 547 ("[A] presidential strategy to politicize agencies—to bring agency leadership preferences closer to those of the President—might well include reliance on acting officers in preference to Senate-confirmed individuals.").

107. *See supra* note 17 and accompanying text.

108. *See supra* note 19 and accompanying text.

109. *E.g.*, Johnson, *supra* note 27, at 2048–57; O'Connell, *supra* note 13, at 707–27; Mendelson, *supra* note 9, at 601–06; Bornstein, *supra* note 17; *see also* H.R. 5314, 117th Cong. §§ 901–02 (2021) (proposing stricter limits on the use of acting officials).

110. *See infra* Section III.B.

contemporary separation of powers controversies.[111] As is common in this area of doctrine, acting officials are a manifestation of the conflict between congressional power and the President's obligation to "take Care that the Laws be faithfully executed."[112] Defenders of executive power frequently point to the Take Care Clause as a source of authority, although other scholars doubt the provision has any substantive content.[113] Even if we could, there's no need to resolve this debate now—it's obvious that executive branch vacancies impede the President's role under the Take Care Clause, whether or not it's characterized as an obligation or a duty.[114] Ultimately, "the Constitution does not speak directly to the permissibility of an unconfirmed acting official serving in a Senate-confirmed position[;]"[115] a formalist approach to the controversy does not help resolve this tension.

One possible way to settle this and other separation of powers controversies is with reference to the value of democracy. Professor Peter M. Shane has posited that "the motivating value most appropriate to guiding current interpretation of the constitutional presidency is democracy."[116] The Supreme Court itself has arguably adopted such a functionalist approach in its appointments and removal jurisprudence,[117] although its democratic theorizing leaves something to be desired. In particular, the Court "stress[es] the democratic powers of the President" in removal cases while privileging "the

111. *See* Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 376 (2022) (discussing the "question of the balance between legislative and executive power in the . . . administrative state"); Driesen, *supra* note 19, at 423–24.

112. U.S. CONST. art. II, § 3; *see also* Johnson, *supra* note 27, at 2039 ("In particular, appointments made pursuant to the Appointments Clause are defined in part by the tension between the Senate's 'Advice and Consent' duty and the President's mandate to 'take Care that the Laws be faithfully executed.'" (footnote omitted)); Mendelson, *supra* note 9, at 543–44 (arguing that a complete analysis of acting officials must consider "the Take Care and Vesting Clauses").

113. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 235–38, 241–43, 262 (2020) (providing an overview of the contours of this debate and principally addressing the Vesting Clause).

114. *See, e.g.*, Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 935–46 (2009) (discussing how agency vacancies can impede agency functioning); Alexander I. Platt, Note, *Preserving the Appointments Safety Valve*, 30 YALE L. & POL'Y REV. 255, 284–86 (2011).

115. Mendelson, *supra* note 9, at 574.

116. PETER M. SHANE, DEMOCRACY'S CHIEF EXECUTIVE 142 (2022).

117. *See* Driesen, *supra* note 19, at 424 (observing that "the Court frequently employs functional arguments to help resolve cases coming before it" in this area); Emerson, *supra* note 111, at 373 (arguing that "[t]he conservative Justices explicitly reinforce their criticism of administrative agencies with normative judgments").

competing democratic claims of Congress" in nondelegation cases, all without recognizing "that a fair accounting of democratic impacts requires consideration of both."[118] Because both institutions' claims to democratic legitimacy are flawed at best, we must move beyond the Court's overly simplistic theorizing to adjudicate this interbranch competition. This Part seeks to develop a more nuanced conception of democracy in the context of acting officials.

A. Two Facets of Democracy

A comprehensive analysis of democracy and the wide range of values it encompasses is far beyond the scope of this Note, but a good place to start is by considering "both the electoral and deliberative sides" of our "hybrid democracy."[119] Evaluating the respective roles of the Senate and the President in this light can help determine the proper balance between the Senate's role in confirmation and the President's take care obligation.

1. Responsiveness

First and foremost, democracy connotes responsive government. According to political scientist Robert Dahl, "responsiveness of the government to the preferences of its citizens" is one of democracy's "key characteristic[s]."[120] This conception of democracy primarily coincides with the electoral side of our government: the reliability of relatively frequent, free, and fair elections undergirds the system of responsive government.[121] By ensuring accountability of government officials and providing avenues for citizen participation, elections are the primary legitimating force in democratic governance.[122]

But regular elections are not the whole story. After all, the volume of policy decisions required in a modern state overwhelms the ability to tie the entire enterprise to an individual voter's periodic trip to the ballot box, and, as has been painstakingly documented, elections and legislatures do not always afford the equality of political power that we might hope for.[123] Given the shortcomings of the election-focused approach, political scientists in the latter half of the

118. Emerson, *supra* note 111, at 413.
119. Shane, *supra* note 116, at 142.
120. Robert A. Dahl, Polyarchy 1 (1971).
121. Robert A. Dahl, *What Political Institutions Does Large-Scale Democracy Require?*, 120 Pol. Sci. Q. 187, 188 (2005).
122. *See* Shane, *supra* note 116, at 143.
123. *See id.*

twentieth century began to conceptualize our system of government as something more than just "electoral democracy."[124]

2. Deliberation

One such response was the notion of "deliberative democracy." In this conception of democracy, "the citizenry would reason, or deliberate, *through* their representatives"[125] instead of deciding amongst themselves in a form of undiluted direct democracy. Elected legislators could rely on their expertise and take advantage of collective, institutionalized deliberation in the form of the legislative process, tools that were unavailable to the citizen masses. In this framework, elections would supply the necessary linkage to ensure that the elected officials reflect the values of the people.[126] This goal of deliberation helps account for many elements of our constitutional design, including the bicameral Congress, the federal judiciary, and the agencies of the executive branch.[127]

Conveniently for our purposes, the President and the Senate can be associated with these two fundamental aspects of American democracy. The President represents our "most democratic and politically accountable official" who is "elected by the entire Nation."[128] Presidential elections, notwithstanding the inanities of the process, are the closest thing Americans get to a national plebiscite. The Senate, on the other hand, almost perfectly embodies the Framers' vision for deliberative democracy.[129]

Of course, all this tells us is that the Senate and the President both have claims to democratic legitimacy, even if they reflect different aspects of our hybrid democracy. This discussion, without more, does not help resolve the competition between the two institutions. Implicit in the foregoing analysis, however, is that both institutions embody these values perfectly. Considering their shortcomings goes a long way to elucidating the proper balance between the two in this area.

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124. *Id.* at 144.

125. Joseph M. Bessette, The Mild Voice of Reason 1 (1994).

126. *Id.* at 2.

127. Shane, *supra* note 116, at 144.

128. Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 224 (2020).

129. *See* Bessette, *supra* note 125, at 3 (observing that "Congress was designed to be the principal locus of deliberation in American national government"). Professor Mendelson also points to the Senate's status as a forum for deliberation as one aspect of its "substantial democratic contribution." Mendelson, *supra* note 9, at 591–92.

B. Imperfect Institutions

To begin, the President's claim to perfect responsiveness is at least more nuanced than Chief Justice Roberts's description of the office suggests. While the President usually claims a majority of the popular vote, that is obviously not always the case.[130] Contrary to popular belief, however, the Electoral College does not seriously overweight the influence of small states; instead, it tilts the playing field towards whichever states just happen to be electorally competitive.[131] The partisan valence of this erratic bias tends to change over time—as recently as 2012, the Democratic Party enjoyed an advantage.[132]

Moreover, the Senate fares far worse when it comes to democratic responsiveness. Not only does the systematic small-state bias lead to wildly disproportionate voting power—in spite of the constitutional mandate for equal voting in other contexts[133]—it also privileges white voters at the expense of minority communities.[134] The upshot of these structural limitations is that the Senate has the largest right-wing bias of a legislative chamber in any consolidated democracy.[135] These electoral flaws, combined with the chamber's staggered terms, make it difficult to invoke Senate election results as a barometer of the country's mood—in 2018, Democrats actually lost Senate seats despite winning the concurrent House elections by a wide margin.[136] The Senate filibuster and other countermajoritarian

130. Emerson, *supra* note 111, at 414.

131. *See* Nate Cohn, *The Electoral College's Real Problem: It's Biased Toward the Big Battlegrounds*, N.Y. Times (Mar. 22, 2019), https://www.nytimes.com/2019/03/22/upshot/electoral-college-votes-states.html [https://perma.cc/CLK2-DCQD].

132. *See* Nate Silver, *Will the Electoral College Doom the Democrats Again?*, FiveThirtyEight (Nov. 14, 2016, 2:59 PM), https://fivethirtyeight.com/features/will-the-electoral-college-doom-the-democrats-again/ [https://perma.cc/34CH-BXJA].

133. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964). The *Reynolds* Court itself recognized the conflict between the logic of its voting jurisprudence and the institutional design of the Senate. *See id.* at 574.

134. Matthew Yglesias, *American Democracy's Senate Problem, Explained*, Vox (Dec. 17, 2019, 11:40 AM), https://www.vox.com/policy-and-politics/2019/12/17/21011079/senate-bias-2020-data-for-progress [https://perma.cc/V68U-7KH6].

135. *See Upper Legislative Houses Tend to Be Biased and Malapportioned*, The Economist (Mar. 14, 2023), https://www.economist.com/graphic-detail/2023/03/14/upper-legislative-houses-tend-to-be-biased-and-malapportioned [https://perma.cc/M5RA-CZ5B].

136. Jonathan Martin & Alexander Burns, *Democrats Capture Control of House; G.O.P. Holds Senate*, N.Y. Times (Nov. 6, 2018), https://www.nytimes.com/2018/11/06/us/politics/midterm-elections-results.html [https://perma.cc/F4U8-JUMZ].

procedural devices only heighten this disparity.[137] The Senate's flaws as a representative institution are, of course, inherent to our constitutional design, but keeping them in mind counsels against aggrandizing the Senate's power in the name of democracy.

Viewed from the standpoint of deliberative democracy, the Senate's unrepresentativeness is not necessarily disqualifying. After all, one of the points of such deliberation is "to check or moderate unreflective popular sentiments," no matter how widely held.[138] But the compounding effects of the Senate's unequal representation—and particularly the impact on minority voters—suggests that there is no guarantee the institution remains "rooted in popular interests and inclinations,"[139] a necessary component for the workings of deliberative democracy.

Even setting aside the question of representativeness, the Senate's quality as a venue for deliberative democracy is hardly unassailable. Complaints about the supposed decline of the Senate have become something of a Washington tradition for current and former members,[140] and the rise of partisan polarization has fomented gridlock and transformed legislative dynamics on Capitol Hill.[141] As other scholars have argued, this increased partisanship undermines the logic of the institutional checks and balances that define the Constitution.[142] Under a unified government, it's questionable whether the Senate and the Congress as a whole represent a meaningful check on the President. Conversely, under divided government, the Senate increasingly pursues knee-jerk obstruction at any cost, a far cry from any idea of good faith deliberation.

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137. David R. Mayhew, Yale Univ., James Madison Lecture: Supermajority Rule in the U.S. Senate (Aug. 30, 2002), *in* 36 PS 31, 31 (2003).

138. Bessette, *supra* note 125, at 1.

139. *Id.* at 2.

140. *See, e.g.*, Olympia J. Snowe, Opinion, *Olympia Snowe: Why I'm Leaving the Senate*, Wash. Post (Mar. 1, 2012, 8:47 PM), https://www.washingtonpost.com/opinions/olympia-snowe-why-im-leaving-the-senate/2012/03/01/gIQApGYZlR_story.html [https://perma.cc/6F8B-J4SK]; Evan Bayh, Opinion, *Why I'm Leaving the Senate*, N.Y. Times (Feb. 20, 2010), https://www.nytimes.com/2010/02/21/opinion/21bayh.html [https://perma.cc/BKY8-P2RU]; George Packer, *The Empty Chamber*, New Yorker (Aug. 2, 2010), https://www.newyorker.com/magazine/2010/08/09/the-empty-chamber [https://perma.cc/6XX3-XB8S] (collecting complaints from then-Senators).

141. *E.g.*, David R. Jones, *Party Polarization and Legislative Gridlock*, 54 Pol. Rsch. Q. 125 (2001); *see also* The U.S. Senate: From Deliberation to Dysfunction (Burdett A. Loomis ed., 2012).

142. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2312–16 (2006).

In light of these developments, it's no wonder that "the politics of executive branch appointments is . . . becoming even more dysfunctional."[143] While historically presidential nominees routinely reached the floor and enjoyed unanimous confirmation votes, the process has grown more divisive over the past few decades.[144] In many cases, a recalcitrant Senate (or a fraction thereof) appears motivated more by policy disagreements than by substantive objections to the qualifications of a given nominee.[145] The inanities of Senate procedure, with anonymous holds and majority-party control of the agenda, also make it very easy to quash nominations without the public accountability of a formal up-or-down vote.[146] These strictures necessarily imply a status quo bias, and at worst could serve to cripple the functioning of the entire federal government.[147] In anticipation of such a crisis, some commentators have even suggested that the President should be able to install nominees without an affirmative vote from the Senate, at least in some circumstances.[148]

As a worst-case scenario, consider a President who enters office with a healthy Electoral College and popular vote majority but faces a Senate controlled by the opposite party. Given the Senate's structural bias, such a divergence is increasingly plausible—according to analysts, Democrats could win fifty-one percent of the overall popular vote and lose seven Senate seats.[149] At the state level, this dire scenario is already playing out—the Wisconsin Senate, for example,

143. Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 942 (2013).

144. Alvin Chang, *Partisanship of Cabinet Confirmations Is Rising. But Trump's Picks Are Still Different*, VOX (Feb. 7, 2017, 8:10 AM), https://www.vox.com/policy-and-politics/2017/2/7/14523808/trump-cabinet-partisan-confirmation [https://perma.cc/Y2P9-LJDE].

145. Stephenson, *supra* note 143, at 942.

146. *Id.* at 947–48.

147. *See id* at 948.

148. *See id.* at 942 (arguing "it is not at all clear that the Senate must affirmatively vote in favor of a nominee in order to provide the required advice and consent"); Lyle Denniston, *Constitution Check: Could Obama Bypass the Senate on Garland Nomination?*, NAT'L CONST. CTR.: CONST. DAILY BLOG (Apr. 12, 2016), https://constitutioncenter.org/blog/constitution-check-could-obama-bypass-the-senate-on-garland-nomination [https://perma.cc/E66V-NQVY].

149. Ezra Klein, Opinion, *David Shor Is Telling Democrats What They Don't Want to Hear*, N.Y. TIMES (Oct. 8, 2021), https://www.nytimes.com/2021/10/08/opinion/democrats-david-shor-education-polarization.html [https://perma.cc/7X9X-8CZL] (describing the 2022 elections); *see also* Ed Kilgore, *2024 Looks Very Dark for Senate Democrats*, N.Y. MAG. (Jan. 29, 2023), https://nymag.com/intelligencer/2023/01/democrats-enter-perilous-2024-senate-landscape.html [https://perma.cc/NM8V-4X9U] (describing the daunting Senate math for Democrats in the 2024 elections).

has refused to confirm nearly 180 gubernatorial appointees, despite the incumbent governor's fairly comfortable reelection.[150]

To be sure, an obstructionist Senate represents an extreme case, but the inexorable march towards partisan polarization makes it all the more plausible. Reforming the FVRA to crack down on acting officials without recognizing this possibility could end up doing more harm than good, removing a sort of pressure release valve that could help defuse an irreconcilable conflict between the two institutions. Contemplating this extreme also underscores the vital role that the appointment power serves for democratic accountability in the executive branch and suggests that Senate confirmation alone does not add much to the equation.

Additionally, it's worth remembering that in selecting acting officials, the President acts pursuant to congressional authorization, including acquiescence from the more democratic House of Representatives. This is not a question of unilateral presidential action in the face of ambiguity or opposition by the legislative branch.[151]

In short, if democracy is something we care about, it's not obvious that acting officials represent much of an affront to it. Scholarly laments about circumventing the Senate confirmation process depend on a clichéd perception of American democracy that bears little resemblance to contemporary political dynamics. With respect to the responsive or electoral side of American democracy, the President clearly has an upper hand when compared to the Senate. Likewise, the Senate's questionable quality as a locus of deliberative democracy does little to compensate for its growing unrepresentativeness. With further partisan polarization, the prospect of an obstructionist majority is all too plausible, highlighting the possibility that acting officials could serve as a sort of pressure release valve in such a conflict. Some flexibility here is desirable—as Justice Oliver Wendell Holmes Jr. once wrote, "[T]he machinery of government would not work if it were not allowed a little play in its joints."[152]

150. Sarah Lehr, *Gov. Tony Evers Is Starting His Second Term, But Nearly 180 of His Appointees Remain Unconfirmed*, Wisc. Pub. Radio (Jan. 3, 2023), https://www.wpr.org/gov-tony-evers-second-term-appointees-unconfirmed-gop-senate [https://perma.cc/R8JN-Y29E].

151. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

152. Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931).

IV.
IMPLICATIONS

Presidential reliance on acting officials could actually serve to increase the responsiveness of the federal government, illustrating how the appointment process is a vital mechanism for linking the machinery of administration to the democratic mandate of the President. Considering the need for acting officials in the context of a recalcitrant, unrepresentative Senate underscores the connection between democratic legitimacy and executive branch personnel. This Part will focus first on how the insights of the foregoing analysis should inform efforts to reform the FVRA before turning to a discussion of presidential authority over appointments in the context of the unitary executive theory.

A. FVRA Reforms

Recent discussion about acting officials has, understandably, focused on the perceived excesses of the Trump Administration, even though every recent President has employed them. Inattention to the democratic imprimatur of acting officials, however, threatens to shift the balance of power too far back to the Senate, with predictable consequences given increased partisan polarization and the increasing unrepresentativeness of the institution.

1. Types

One commonly proposed reform concerns the third pool of potential acting officials: officers or employees at the GS-15 level or above who have held their position for at least ninety days.[153] Several commentators have called for excising or severely limiting the applicability of this provision entirely,[154] largely because this would "increase the likelihood that the official pressed into acting service has been appointed pursuant to the Appointments Clause in the past."[155] If the permissible pool of acting officials is limited to those that already occupy PAS positions, then this solution would seem to obviate any Appointments Clause-related concerns with acting officials.

153. 5 U.S.C. § 3345(a)(3).

154. *See, e.g.*, Johnson, *supra* note 27, at 2051–53; O'Connell, *supra* note 13, at 712–14; Walter Dellinger & Marty Lederman, *Initial Reactions to OLC's Opinion on the Whitaker Designation as "Acting" Attorney General*, Just Sec. (Nov. 15, 2018), https://www.justsecurity.org/61483/initial-reactions-olc-opinion-whitaker-designation-acting-attorney-general [https://perma.cc/9RFR-UGHM] (restricting the statute with an exigency requirement).

155. Johnson, *supra* note 27, at 2052.

Limiting the pool in this way, however, does not necessarily solve the problem. Not every "first assistant"—the default acting official[156]—is necessarily Senate-confirmed, and the division between principal and inferior officers is evolving and doctrinally unstable.[157] The availability of career civil service employees as potential acting officials also increases the likelihood that the acting officials have superior expertise in the agency's subject matter, which is by no means guaranteed if the President just directs another PAS official—possibly from another agency entirely—to step in.[158]

Plus, eliminating the third category of acting officials threatens to hobble the transition from one administration to another. The greatest need for acting officials likely comes at the beginning of an administration, "when there are few first assistants and confirmed officials" to draw upon.[159] Restricting the flexibility of appointment could saddle an incoming administration with holdovers that may be actively hostile to the new President's agenda, which undoubtedly frustrates the democratic responsiveness of the executive branch.

A possible compromise would be to limit the permissibility of non-confirmed acting officials to the start of a presidential administration, which is when they are most common anyway.[160] The current version of the FVRA already recognizes that the dawn of a new administration is a special period when it comes to staffing an administration.[161] This period is also when the conflict between a President and an obstructionist Senate is most problematic in terms of democratic legitimacy. Overall, however, the problem of democratic responsiveness counsels towards preserving flexibility in this area.

2. Tenures

Commentators have also frequently proposed limiting the tenures of acting officials, which have been characterized as overgenerous. One suggestion is to limit the initial tenure of acting service

156. 5 U.S.C. § 3345(a)(1).

157. *See supra* note 94 and accompanying text.

158. *See* Johnson, *supra* note 27, at 2052 ("In many cases, officials who satisfy these two requirements, by dint of their extensive experience in the affected agency and well-honed expertise on its area of work, not only may be qualified to serve in the vacated position; they also may be the best choice under the circumstances."); Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 Duke L.J. 1571, 1599 (2015).

159. O'Connell, *supra* note 13, at 629.

160. *Cf. id.* ("[T]his category is not [currently] restricted to the early months of a new President's term . . . .").

161. *See* 5 U.S.C. § 3349a(b) (providing for longer acting tenures at the beginning of an administration).

from the current 210 days to just sixty;[162] another proposes a limit of thirty to forty days.[163] Stricter limits, the argument goes, would reduce the temptation for Presidents to sidestep the confirmation process entirely.

Many of these proposals, however, ignore the "empirical realities" about the dysfunction of the modern confirmation process,[164] which only stand to get worse under the scenarios contemplated in this Note. There was a reason, after all, that Congress extended the limits in the first place—it is hardly unprecedented for vacancies to last longer than the limits envisioned, even in the current version of the FVRA.[165]

Given the concerns about Senate obstructionism, one possible reform would be to do away with the overall time limits on acting service entirely. This does not necessarily imply that acting tenures must be limitless; instead, acting service should be directly tied to the submission of a nomination. After the initial grace period (necessary to vet potential nominees), acting service should only extend while a nomination is pending in the Senate. If a nomination is withdrawn or rejected, the President should have another short period—perhaps thirty days—to submit another nomination and extend the period of acting service. This proposal would recognize the realities of a contentious nomination process while preserving the incentive to submit nominees.

3. Other Constraints

The Act's limits, even if generous, on the identity and tenure of acting officials represent a real constraint on unbridled presidential authority. Apart from the formal limits, scholars have documented drawbacks to overreliance on acting officials, ranging from an inability to execute policy programs to negative impacts on agency employees' performance and morale,[166] even if they are preferable to leaving important positions unfilled. And as the Trump-era controversies demonstrate, acting officials are hardly free from scrutiny. The Senate confirmation process is not the sole political check

162. Johnson, *supra* note 27, at 2055–57.

163. Mendelson, *supra* note 9, at 602.

164. O'Connell, *supra* note 13, at 715. O'Connell observes that the modern-day appointments process takes a considerable amount of time, with nominations often languishing in the machinery of the Senate for hundreds of days. *See id.*

165. *Id.* at 715–16.

166. *Id.* at 696–98.

against poor quality appointments.[167] The practical and political costs associated with acting officials serve as another check against abuse of the phenomenon.

As a final consideration, relying on acting officials is preferable to the alternative of delegating the powers of the vacant office elsewhere in the agencies, which greatly reduces transparency. Most FVRA reform proposals have recognized this tension, noting that cracking down on acting officials increases pressure to rely on delegation.[168] This potential workaround illustrates how Presidents may seek to implement their agenda even without the assistance of their preferred personnel, straying perilously close to a vision of the executive branch where it is really the President—not the statutorily authorized officers—calling the shots.[169] Preserving some flexibility regarding appointments likely ameliorates the impulse to concentrate all decision-making authority in the President.

B. Acting Officials and Unitary Executives

The discussion in Part III demonstrates how acting officials (and presidential appointments in general) serve as a vital link between the President's popular mandate and the functioning of the federal government. Even without the involvement of the Senate, presidential appointments have a strong democratic imprimatur. The nation elects the President with the expectation that they will appoint officials to occupy the important posts of government, and it is equally understood that the President will receive the credit (or blame) for their performance in office.[170] Vacancies severely impede executive branch agencies' ability to carry out their mandates and therefore undermine the President's duty under the Take Care Clause, which underscores the need for flexibility in this area, particularly in the face of Senate obstructionism. Given the realities of contemporary politics, the case for presidential power is arguably "at its apex" when it comes to appointments.[171]

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167. *See* Mendelson, *supra* note 9, at 597 ("Even without the Senate confirmation process, the President's political accountability might deter poor quality acting appointments.").

168. *See* O'Connell, *supra* note 13, at 724 (arguing "restricting delegation is also required to incentivize nominations").

169. For an overview of this strong version of the unitary executive theory, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 549–50 (1994).

170. Stephenson, *supra* note 143, at 948.

171. *Id.* at 949.

Recognizing the President's superior claim to democratic legitimacy in this area, however, does not necessarily justify the most expansive vision of presidential power. It is worth emphasizing that the FVRA does not apply to independent agencies,[172] and the history of acting officials suggests that there is congressional acquiescence by both chambers to the practice. Of course, proponents of such maximalist views frequently justify their conceptions on similar grounds,[173] but it does not necessarily follow that expansive control over personnel should imply totalizing authority over the entire executive branch. The Take Care Clause, after all, implies that other officials will perform the work of executing; the President is left with a passive, supervisory role.[174] Maximal control over appointments is still consistent with this conception of the President as an overseer of administrative activity.

Underscoring the links between democratic responsiveness, the President, and administrative personnel also points towards a more holistic account of political control of the executive branch. Professor Cristina Rodríguez stresses that "the advent of a new presidential administration brings into office not just a new Chief Executive, but a whole set of political actors . . . who perform much of the work of bringing into being new interpretations of the law and the policy initiatives that flow from those innovations."[175] This layer of political officials "create[s] venues for democratic politics and agitation to inform administration and policymaking."[176] The totalizing focus on the Presidency obscures the importance of this work and indicates how vindicating presidential power over personnel does not inherently lead to excessive presidentialism.

This vision of political control in the executive branch does require an "appetite for some centralization and high-level direction

172. *See* O'Connell, *supra* note 13, at 627.

173. *See, e.g.*, Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23, 48–70, 81–86 (1995); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2331–46 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 85–106 (1994).

174. Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 Yale L.J. 1836, 1875–76 (2015); *see also* Peter L. Strauss, Response, *A Softer Formalism*, 124 Harv. L. Rev. F. 55, 60 (2011) ("[T]he passive voice of the Take Care Clause, hidden between [their] (not that important) responsibilities to receive ambassadors and to commission officers, confirms that the President is not the one whose direct action is contemplated.").

175. Cristina M. Rodríguez, Foreword, *Regime Change*, 135 Harv. L. Rev. 1, 73–74 (2021).

176. *Id.* at 75.

within the administrative state."[177] But under current political conditions, a degree of presidentialism is probably here to stay.[178] The President's institutional advantages in ensuring oversight are undeniable, so observers frequently called for greater presidential involvement in response to the perceived ills of administration.[179] Since the President ultimately bears responsibility for the workings of the entire bureaucracy, there will be an irresistible impulse to vindicate their electoral mandate by influencing the work of the executive branch. Channeling this power through the supervisory vision of presidential control creates an internal check and mitigates the danger of an autocratic, imperial presidency.

To be sure, this democratic account of presidential power is hardly an originalist view. Despite the Supreme Court's intimation to the contrary,[180] the Framers sought to shield the Presidency from popular control, rejecting a proposal that the office should be directly elected.[181] But it is notable that the emergence of the President as a popular, democratic figure in the Jacksonian era coincided with a recognition of the office's potential to legitimize the work of administration.[182] President Jackson's "political program to democratize administration through rotation in office" represented a radical departure from the Federalist-era model of rule by local notables, heralding a revolution in the growth and development of administrative law.[183] Then, as now, accountable personnel were the key to the administration's democratic legitimacy, not necessarily the President's personal control over the machinery of the state. Progressive– and New Deal–era reformers similarly looked to the President as a legitimating force,

177. *Id.* at 70.

178. *See* Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 726 (2016).

179. *See, e.g.*, Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1409–14 (1975); Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 461–63 (1979).

180. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 224 (2020) ("[T]he Framers made the President the most democratic and politically accountable official in Government.").

181. *See* CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 132–34 (1923) (describing convention debates about the method of selecting the President); MCCONNELL, *supra* note 113, at 54–56 (same).

182. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 147–50 (2012) (detailing the political developments of the Jacksonian era).

183. *See id.* at 149–50.

concomitant with the early development of the modern administrative bureaucracy.[184]

Alternatives to this personnel-focused conception of political control have their own shortcomings. Legislative solutions appear lacking—the federal government is simply too large for robust legislative oversight. In the wake of the New Deal, Congress attempted to reassert control over the new regulatory state, but "promises of improved oversight proved more significant than the actual results."[185] Reforms like the Administrative Procedure Act "worked little change in administrative practice,"[186] and the procedural rigor of contemporary administrative practice has not ensured popular legitimacy.[187] Ultimately, "these diffuse forms of popular participation will not be enough to ensure that government and its capacities evolve to address the demands of politics and our world."[188] These failures help explain why reformers concerned with democratic legitimacy repeatedly return to the question of political control and why "[u]nwinding [the President's] institutional advantage seems a fanciful proposition."[189]

V.
CONCLUSION

Recent discussion about the FVRA and acting officials have centered on the need to constrain the phenomenon, no doubt in light of a recency bias occasioned by the many Trump-era controversies. The impulse to restrict the use of acting officials, while understandable, threatens to create another problem—insisting on the Senate's virtues requires turning a blind eye to modern political dysfunction. Because of the strong link between acting officials and the President's democratic responsiveness, acting officials represent something of a pressure release in times of extreme partisan polarization. Obstructing presidential appointees stands to severely impede the machinery of government, and in such an extreme

184. *See generally* Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 Colum. L. Rev. 1 (2022).

185. Joanna L. Grisinger, The Unwieldy American State: Administrative Politics Since the New Deal 11 (2012).

186. *Id.* at 11–12.

187. *See* Nicholas Bagley, *The Procedure Fetish*, 118 Mich. L. Rev. 345, 349 (2019) (arguing that while "[p]roceduralism has a role to play in preserving legitimacy and discouraging capture, . . . it advances those goals more obliquely than is commonly assumed and may exacerbate the very problems it aims to address").

188. Rodríguez, *supra* note 175, at 71.

189. *Id.* at 76.

scenario, something will have to give way eventually. Embracing a strong version of presidential power over appointments need not entail an unthinking acceptance of the unitary executive theory in its strongest form; instead, recognizing appointments as a mechanism for vindicating the President's superior democratic mandate helps highlight a less centralized conception of political control in the executive branch.

SCRAMBLED STANDARDS: RETHINKING NO-POACH AGREEMENTS IN RULE 23(B) CLASS ACTIONS

*ASLESHA PARCHURE**

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I.
INTRODUCTION

No-poach agreements are contracts between or among employers who agree not to hire each other's employees. These agreements have recently received attention in the franchise context.[1] No-poach agreements between franchisors and franchisees contribute to wage suppression and restrict worker mobility, often affecting workers who already have low wages.[2] It is often difficult for employees to pursue legal action against companies that use no-poach provisions in their franchise agreements because employees may lack the resources or access to information to demonstrate harm and seek relief.[3] For this reason, class actions, which allow a large group of private litigants to pool their resources to pursue legal action, should be encouraged in this context.[4] Instead, courts hinder class actions by using substantive decisions on the antitrust legal standards to address the procedural hurdle of class certification.[5] Specifically, courts make it difficult for plaintiff classes to satisfy the predominance requirement for class certification under Federal Rule of Civil Procedure 23(b).[6]

In this Note, I argue that courts should (1) use a per se standard (i.e., hold the agreement to be unlawful without an inquiry into procompetitive justifications) when adjudicating franchise no-poach agreement cases, (2) if a per se standard is difficult to adopt, use the quick-look standard, or alternatively, (3) avoid determining which standard to use when evaluating an agreement until after the class certification phase has concluded. All of these approaches would allow plaintiff classes to more easily satisfy the predominance requirement in class certification than under the current approach of examining franchise no-poach agreements under the rule of reason.

In Part II, this Note delves into the role of antitrust law in labor markets, the relevant business aspects of franchises, and the mechanics of class actions in antitrust litigation. Part III then explains why franchise no-poach agreements are difficult to challenge via class actions by exploring the current conversations and cases concerning this issue. Part IV proposes three approaches courts can use in

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1. *See* Michael Lindsay & Katherine Santon, *No Poaching Allowed: Antitrust Issues in Labor Markets*, ANTITRUST, Summer 2012, at 73, 73–74.

2. *See infra* Section II.A.

3. *See infra* Section II.C.

4. *See infra* Sections II.C, III.B.

5. *See infra* Section III.A.

6. *See id.*; Steven B. Pet, Note, *Preserving Antitrust Class Actions: Rule 23(b)(3) Predominance and the Goals of Private Antitrust Enforcement*, 12 VA. L. & BUS. REV. 149, 153 (2017).

franchise no-poach cases when deciding whether a class of employees should be certified. Part IV also addresses substantive rebuttals to arguments that favor defendant franchise companies in such cases.

II.
ANTITRUST LAW IN LABOR MARKETS AND CLASS ACTIONS

A. Antitrust Law and Labor Issues

Labor monopsonies can harm workers in a labor market (which can be defined by geography, type of job, or other characteristics of the pool of workers) because employers are able to suppress wages and opportunities for employment mobility. A labor monopsony results from a lack of competition in the buyer market for labor (i.e., employers).[7] Concentration in the labor market (which occurs when there are only a few employers that hire a specific type of worker in a given area where workers live and commute), search frictions for workers, and differentiation in job amenities can reduce competition.[8] The existence of only a few employers in a market makes it difficult for employees to switch employers to earn higher wages, thus allowing incumbent employers to suppress wages.[9] Employers can overtly or tacitly collude more easily when there is high employer concentration.[10] This further limits workers' abilities to switch employers in pursuit of higher wages.[11] Workers face greater difficulties, known as search frictions, in finding alternative employment after termination of their current employment due to a lack of transparency in the labor market, which makes it difficult to find and compare jobs.[12] Job differentiation distinguishes the amenities and benefits offered in a specific job—including shift flexibility, childcare, vacation time, and cultural environment.[13] In addition to

7. Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 Cornell L. Rev. 1343, 1345–46 (2020).

8. *Id.* at 1349–50.

9. *Id.* at 1349 ("Concentration means that only one or a few employers hire a particular kind of worker in an area where workers reside and commute. When few employers exist, workers who are underpaid by their existing employer are limited in their ability to quit and work for an alternative employer for a higher wage. This allows the incumbent employer to suppress the wage." (footnote omitted)).

10. *Id.* For instance, "one firm acts as a 'wage leader' by periodically announcing wage increases that other firms match[,]" thus reducing competition across the firms to pay the highest possible wages. *Id.*

11. *Id.*

12. *Id.* at 1349–50; *see also* James Albrecht, *Search Theory: The 2010 Nobel Memorial Prize in Economic Sciences*, 113 Scandinavian J. Econ. 237, 237 (2011).

13. Marinescu & Posner, *supra* note 7, at 1350.

employer concentration and search frictions, job differentiation disincentivizes some employees from leaving a given position in which they prefer the job-specific benefits, similar to the way product differentiation may encourage consumers to opt for a more expensive product over an inexpensive substitute.[14] While economists used to consider labor markets to be highly competitive,[15] this view has been refuted because of employer concentration and other factors that affect these markets.

Many labor markets are rural or semi-rural, where only a few employers cover a sparse population that is spread out over a large area, causing employer concentration in these regions.[16] Agreements between employers further exacerbate the problem of employer concentration. "A no-poach agreement is made between two or more entities (including franchisees of the same company or competitors within an industry) not to compete for each other's employees, either during their active employment or for a period after termination of their employment."[17] These include, among other things, agreements not to recruit, solicit, or hire employees from participating employers. In more densely populated areas, where employer concentration is less of an issue, non-competes and no-poach agreements make it harder for workers to switch employers, thus reducing robust competition in the market for labor.[18]

Economically, labor monopsonies and product market monopolies pose similar threats—mispricing of resources, material or human, which results in the underemployment of those resources, and consequently, inequitable outcomes.[19] Labor markets are different from product markets because workers are less mobile than goods.[20] The lack of worker mobility often leads to more fragmentation in labor markets because workers are unlikely to move to different

14. *Id.* ("Workers sort themselves across employers according to the amenities that are offered, but as a result they may become vulnerable to wage suppression because they cannot credibly threaten to leave one job for another where the amenities are quite different."); *see* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 554 (2018) (comparing workplace amenities in labor markets to product differentiation in product markets).

15. Marinescu & Posner, *supra* note 7, at 1346.

16. *Id.*; *see* José Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, LAB. ECON., Oct. 2020, at 1, 5–9, https://doi.org/10.1016/j.labeco.2020.101886.

17. Jason Hartley & Fatima Brizuela, *The Complexities of Litigating a No-Poach Class Claim in the Franchise Context*, COMPETITION, Fall 2019, at 1, 1.

18. Marinescu & Posner, *supra* note 7, at 1346.

19. *Id.*

20. Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of the Law*, 57 J. HUM. RES. (SPECIAL ISSUE) S284, S298 (2022).

employers that are further away from where they live, even if those employers offer slightly better wages.[21] While there are similarities between labor and product markets, the Clayton Act (stating that labor is not a commodity or an article of commerce) demonstrated congressional intent that labor markets be distinguished,[22] and in practice, courts have treated labor differently from products and commodities in the antitrust context.[23] Despite the harmful effects of concentrated employer market power on workers, there has been less government enforcement to address labor market monopsonies compared to product market monopolies.[24] Increased antitrust litigation is necessary to ensure competition in labor markets.

Antitrust litigation may be brought under the Sherman Act, an antitrust statute that was passed to preserve competition.[25] Section 1 of the Sherman Act provides that restraints of trade are unlawful.[26] Plaintiffs may plead an unreasonable restraint of trade under Section 1 of the Sherman Act under one of three standards: per se, quick-look, or rule of reason.[27]

The per se standard applies to nakedly anticompetitive agreements (e.g., price-fixing and wage-fixing) and is the most plaintiff-friendly standard because the plaintiff only needs to show that the defendant took part in unlawful activities; the defendant cannot make arguments about procompetitive justifications for their unlawful actions.[28]

The rule of reason standard is the most defendant-friendly. After the plaintiff proves an anticompetitive agreement, the burden shifts to the defendant to present procompetitive justifications, and if these are accepted, the burden returns to the plaintiff to rebut these justifications by showing that the anticompetitive harms outweigh the justifications or that there is a less restrictive alternative

21. *See id.* at S298–99.

22. 15 U.S.C. § 17 ("The labor of a human being is not a commodity or article of commerce.").

23. *See, e.g.*, Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 314–15 (1st Cir. 2022) (distinguishing between antitrust labor disputes and antitrust disputes over the sale of products for the purposes of applying the labor exemption).

24. Naidu & Posner, *supra* note 20, at S297.

25. *See* 54 Am. Jur. 2d *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 1, Westlaw (database updated Oct. 2024).

26. 15 U.S.C. § 1.

27. *In re* Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d 464, 478–81 (W.D. Pa. 2019) (citing Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., No. 17cv205, 2018 WL 3032552, at *8 (S.D. Cal. June 19, 2018)).

28. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

that the defendant could have taken.[29] The rule of reason applies when an agreement is ancillary to a business (i.e., "reasonably necessary" to achieving a pro-competitive purpose).[30] Plaintiffs rarely prevail in rule of reason cases. One study showed that 96.8% of rule of reason cases resulted in plaintiffs losing at the first step of the three-step framework.[31]

Lastly, the quick-look standard is an intermediate mode of analysis between the per se standard and the rule of reason, in which courts acknowledge that the defendants' agreement "so obviously threaten[s] to reduce output and raise prices that they might be . . . rejected after only a quick look."[32] But recognizing their limits on mastering an understanding of efficiencies in an entire industry, courts still consider procompetitive justifications.[33] This standard is considered an abbreviated form of the rule of reason, but it relieves the plaintiff of the initial burden of showing market power and anticompetitive effects of the challenged restraints.[34] It applies when conduct falls short of the kind that is labeled per se anticompetitive but that is also not subject to a complete rule of reason analysis.[35] The quick-look analysis is used when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[36] In practice, judges condemn agreements under the quick-look standard when the agreements involve price restraints that judges hesitate to condemn as per se illegal.[37] Further, "[a] firm that enjoys monopsony power over a labor market and uses that power to pay its workers below the competitive rate is not liable under the antitrust laws, as long as the firm did not take intentional

29. *See* Ohio v. Am. Express Co., 585 U.S. 529, 541–42 (2018) (describing the "three-step, burden-shifting framework" but omitting balancing in the third step); *id.* at 554 (Breyer, J., dissenting) (articulating the third step of the framework).

30. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 280–81 (6th Cir. 1898), *aff'd & modified*, 175 U.S. 211 (1899).

31. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 829 (2009).

32. NCAA v. Alston, 594 U.S. 69, 89 (2021).

33. Christopher R. Leslie, *Disapproval of Quick-Look Approval: Antitrust After* NCAA v. Alston, 100 Wash. U. L. Rev. 1, 11 (2022); *see also Alston*, 594 U.S. at 89 (listing reasons courts should be cautious in applying the quick-look standard).

34. Michael Iadevaia, *Poach-No-More: Antitrust Considerations of Intra-Franchise No-Poach Agreements*, 35 ABA J. Lab. & Emp. L. 151, 160–61 (2020).

35. Leslie, *supra* note 33, at 10–11.

36. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

37. Leslie, *supra* note 33, at 13.

actions to obtain that power[;]"[38] this protects employers that unilaterally exercise market power by suppressing wages.

It is important to highlight that the quick-look standard has received some criticism due to the lack of clarity regarding when it applies. The quick-look standard originated in *NCAA v. Board of Regents*, in which two universities challenged the NCAA's policy of limiting the number of televised football games for each member school, creating a horizontal restraint, "an agreement among competitors on the way in which they will compete with one another."[39] While this agreement had characteristics of per se illegality due to its horizontal nature, the Supreme Court declined to apply a per se rule because the NCAA needed to impose some horizontal restraints "if the product [of college football] is to be available at all."[40] The Court examined the horizontal restraint by considering the procompetitive justifications because the horizontal agreement to limit output (of televised games) could have been an intrinsic aspect of operating a sports league.[41] Here, one scholar has referred to the quick-look approach as "neither rule of reason nor per se, but rather a muddle."[42] Later, in *NCAA v. Alston*, the Court affirmed that limits on education-related benefits that schools could offer student athletes constituted a Sherman Act Section 1 violation but expanded the quick-look standard to be more defendant-friendly by holding that "a quick look is sufficient for *approval* or condemnation."[43] While the quick-look standard was meant to be plaintiff-friendly, the birth of quick-look approval in *Alston* created an "evil doppelganger of quick-look condemnation" by allowing courts to exonerate defendants' agreements more easily.[44] Quick-look approval, as it appears in *Alston*, diverges from the pre-*Alston* standard of quick-look condemnation that "recognized a presumption of anticompetitiveness" for defendants' agreements.[45]

38. Alan B. Krueger & Eric A. Posner, A Proposal for Protecting Low-Income Workers from Monopsony and Collusion 9 (2018), https://www.hamiltonproject.org/wp-content/uploads/2023/01/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp-1.pdf [https://perma.cc/EX9Q-SX5D].

39. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88, 99 (1984).

40. *Id.* at 101.

41. *See* Leslie, *supra* note 33, at 7–8. Ultimately, the Court found the procompetitive justifications to be insufficient and held that the agreement was unlawful. *See Bd. of Regents*, 468 U.S. at 120.

42. Leslie, *supra* note 33, at 9.

43. *See* NCAA v. Alston, 594 U.S. 69, 88, 107 (2021) (emphasis added).

44. Leslie, *supra* note 33, at 3.

45. *Id.* at 22–23.

Antitrust plaintiffs usually have more favorable outcomes when a per se, or at least quick-look, standard is used instead of the rule of reason to assess an agreement under Section 1 of the Sherman Act. However, the three legal standards for antitrust adjudication are not always clear-cut. There are no bright lines to distinguish conduct that falls in one category as opposed to another.[46] The Supreme Court has described the three standards as lying on a continuum, reflecting the lack of distinct categories for antitrust modes of analysis.[47]

To pursue a Sherman Act Section 1 claim, plaintiffs face the often-difficult task of showing (1) the existence of an agreement (i.e., a "contract, combination . . . [,] or conspiracy")[48] and (2) that the aforementioned agreement is between economically separate actors.[49] Employee classes need to show a "meeting of minds or a conscious commitment to a common scheme" in order to prevail in no-poach cases,[50] which is often difficult because communications between employers may be inaccessible when initially pursuing a case. Further, plaintiffs must show that the agreement or conspiracy is between separate entities without a "unity of interest," which can be complicated when the entities have shared interests but also compete with each other.[51] Hence, many potential labor-related antitrust cases may not get litigated because plaintiffs have trouble pleading the existence of an agreement between different entities at the start.[52]

A notable subject of potential antitrust litigation in labor markets comes from no-poach agreements. No-poach agreements are agreements between employers (horizontal agreements), whereas non-compete agreements are agreements between an employer and employee (vertical agreements) that limit the employee's ability to

46. *Id.* at 19.

47. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779–80 (1999).

48. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984) (quoting 15 U.S.C. § 1).

49. Am. Needle, Inc. v. NFL, 560 U.S. 183, 195 (2010) (citing *Copperweld*, 467 U.S. at 769).

50. *See In re* Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d 464, 486 (W.D. Pa. 2019) (quoting *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010)); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (explaining that evidence must "tend[] to exclude the possibility that the [parties] were acting independently").

51. *See Copperweld*, 467 U.S. at 771 (articulating how the coordinated activities of a parent company and its subsidiaries should be viewed as a single enterprise that has a complete unity of interest).

52. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–57 (2007). While *Twombly* sets out pleading standards in the product market context, its general holding applies to labor market antitrust cases as well.

work for a different employer.[53] Traditional non-compete agreements have been considered lawful under antitrust law, but this has been challenged by the FTC's proposed ban on non-competes.[54] No-poach agreements are likely unlawful, whether entered into directly or through a third-party intermediary.[55] As a result, State Attorneys General have been filing lawsuits to curtail no-poach agreements.[56] Nonetheless, franchise no-poach agreements are difficult for private plaintiffs to challenge as a result of the complexity of the franchise business model.

B. Franchises as Separate Entities

Franchising is

> [a] contractual relationship between the franchisor and the franchisee in which the franchisor offers or is obliged to maintain a continuing interest in the business of the franchisee in such areas as know-how and training; wherein the franchisee operates under a common trade name, format or procedure owned by or controlled by the franchisor, and in which the franchisee has made or will make a substantial capital investment in his business from his own resources.[57]

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53. James H. Mutchnik, John H. Johnson IV & Charles Fields, *The Evolution of DOJ's Views on No-Poach Litigation*, Antitrust, Summer 2022, at 35, 36.

54. Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 Santa Clara L. Rev. 663, 678, 695–96 (2020); Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912). The rule was recently set aside by a district court, and the FTC appealed the decision to the Fifth Circuit. Ryan, LLC v. FTC, No. 3:24-CV-00986, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024); Notice of Appeal, *Ryan*, 2024 WL 3879954 (No. 3:24-CV-00986).

55. U.S. Dep't of Just., Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals 3 (2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/B722-R3HL]; *see infra* Section III.C.

56. *See, e.g.*, Press Release, U.S. Dep't of Just., Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses (Mar. 30, 2021), https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses [https://perma.cc/5T6Y-44S2]; Angel A. Perez & Brian E. Spang, *Illinois Attorney General's Office on the Lookout for Unlawful No-Poach Agreements*, Epstein Becker Green: Trade Secrets & Emps. Mobility (June 23, 2021), https://www.tradesecretsandemployeemobility.com/2021/06/articles/non-compete-agreements/illinois-attorney-generals-office-on-the-lookout-for-unlawful-no-poach-agreements [https://perma.cc/FGM5-99WA] (noting that the Attorney General of Illinois filed suit).

57. *What Is Franchising? Learn the Basics of This Popular Business Method*, Franchise Direct, https://www.franchisedirect.com/ultimate-guide-to-franchising/what-is-franchising/ [https://perma.cc/H833-ZRL7].

Franchising entails "a relationship between franchisors and franchisees of mutual interdependence and reliance[,]" which involves sharing common goals.[58] However, the franchisee has to work independently to grow their own branch of the business and run the day-to-day operations.[59] The fast-food franchising segment is the most common type of franchising segment, constituting about 25% of total U.S. franchise establishments across all industries.[60] It has been claimed that, as of 2018, about 80% of fast-food franchisors used no-poach provisions in their standard franchise agreements.[61] From an antitrust lens, it is not always clear whether individual franchises that operate under the same brand are direct competitors, creating a gray area for courts dealing with franchise no-poach agreements.

While no-poach agreements are clearly illegal across competitor employers, the law is less clear on how franchises should be treated. There are a handful of factors that have been used to evaluate whether a franchise no-poach agreement violates antitrust laws. One factor is whether the no-poach provision is unilateral—only the franchisee has the obligation not to poach—or mutual—the franchisor and the franchisee agree not to poach.[62] Another consideration is whether the obligation is limited to employees of other franchised units (e.g., other restaurant locations) or if it extends to units owned by the franchisor.[63] Though most agreements apply to solicitation and hiring, if an agreement is limited to just one of those activities, there might be less likelihood of government scrutiny for antitrust violations.[64] Another factor that weighs in favor of reduced government

58. *See* William S. Wincent, *The Basics of Franchising: The Relationship*, Int'l Franchise Ass'n (Apr. 12, 2019), https://www.franchise.org/franchise-information/the-basics-of-franchising-the-relationship [https://perma.cc/WL5A-3RJ3].

59. *The Franchise Business Model 101 – Introduction and How Does It Work*, Franchise Bus. Rev. (Nov. 30, 2021), https://franchisebusinessreview.com/post/franchise-business-model/ [https://perma.cc/PB65-RSS9].

60. Renee Bailey, *Food Franchise Industry Report 2021*, Franchise Direct (Dec. 30, 2020), https://www.franchisedirect.com/information/food-franchise-report-2021 [https://perma.cc/D9XC-XVCT].

61. Anthony Noto, *New York AG Joins Coalition to Go After Fast-Food Franchisors*, N.Y. Bus. J. (July 9, 2018), https://www.bizjournals.com/newyork/news/2018/07/09/new-york-ag-joins-coalition-to-go-after-fast-food.html [https://perma.cc/CUX5-ZHD7] (citing Letter from Cynthia Mark, Fair Lab. Div. Chief, Mass. Off. of the Att'y Gen., et al. (July 9, 2018), https://www.mass.gov/doc/npnhletter [https://perma.cc/K665-CX8X]).

62. Josh M. Piper & Erik Ruda, *Employee "No-Poaching" Clauses in Franchise Agreements: An Assessment in Light of Recent Developments*, 38 Franchise L.J. 185, 186 (2018).

63. *Id.*

64. *See id.*

scrutiny is a limitation of the no-poach restriction to a specific type of employee, like managers with extensive training and possible access to trade secrets, instead of all employees.[65] Moreover, no-poach agreements generally apply for a specified number of months after termination of employment, so this time period can also be taken into consideration.[66] Finally, no-poach agreements may have a specified geographic scope or can apply to all locations.[67] These factors all play a role in plaintiffs' arguments against no-poach agreements.

C. Class Actions

Class action lawsuits utilize procedural devices that allow groups of plaintiffs to litigate claims of absent members and bind all class members with the exception of those who opt out.[68] Private antitrust litigation can be pursued through a class action or by corporate rivals.[69] In labor-related antitrust class actions, the plaintiffs tend to be a small class of employees, specific to a geographic area.[70] A court must certify a class under Federal Rule of Civil Procedure 23 for such a case to proceed; otherwise, the case continues as individual actions, which are generally not economically feasible for the plaintiffs. Per Rule 23(a), a proposed class must exhibit the following: (1) numerosity: the class must be so numerous that joinder is impractical; (2) commonality: there must be questions of law or fact common to the class; (3) typicality: the claims or defenses of the representatives must be typical of those of the class; and (4) adequacy: the representatives must fairly and adequately protect the interests of the class.[71]

Generally, numerosity is straightforward to satisfy if there are more than forty individuals in the class.[72] After *Wal-Mart Stores, Inc. v. Dukes*, courts have become more demanding with respect to the commonality requirement, requiring that a common question must be present *and* the question must be essential to the case's outcome.[73] Typicality and adequacy can be complex to satisfy depending on the

65. *See id.*
66. *Id.*
67. *See id.* at 187.
68. Karen L. Stevenson & James E. Fitzgerald, Federal Civil Procedure Before Trial: National Edition ¶ 10:250 (2024), Westlaw NATFCIVP.
69. Marinescu & Posner, *supra* note 7, at 1379.
70. *Id.* at 1380.
71. Fed. R. Civ. P. 23(a).
72. Stevenson & Fitzgerald, *supra* note 68, ¶ 10:261 (citing Ansari v. N.Y. Univ., 179 F.R.D. 112, 114 (S.D.N.Y. 1998)).
73. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

context. In no-poach antitrust actions however, typicality is satisfied when claims "are based on the same alleged facts and legal theory—that a no-hire agreement existed between the defendants and that the agreement injured the [employees] by suppressing their compensation and causing monetary damages."[74] Generally, adequacy is satisfied when "named plaintiffs' claims are not antagonistic to the class and . . . the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class."[75] Typicality and adequacy can introduce complexity into class certification decisions in no-poach cases, but those inquiries are beyond the scope of this Note.

Next, the class must satisfy the requirements for one of the subsections in Rule 23(b). Antitrust cases are often brought under Rule 23(b)(3), which sets out two additional requirements: superiority and predominance.[76] The predominance inquiry assesses whether the proposed class is "sufficiently cohesive to warrant adjudication by representation."[77] The predominance standard in particular poses a challenge for plaintiffs seeking to certify class actions, as it demands a "rigorous analysis" that "will frequently entail 'overlap with the merits of the plaintiff's underlying claim.'"[78] Courts hesitate to certify classes without this rigorous analysis because courts do not want to risk erroneously certifying a class, which would put "unwarranted settlement pressure" on the defendant.[79] A defendant facing a class action is likely to agree to a large settlement to avoid incurring the costs of litigation and "potentially ruinous liability."[80] Hence, the requirements of Rule 23 can pose a notable hurdle to plaintiffs seeking to pursue a class action.

Class actions help courts and defendants avoid multiplicity of similar individual actions; allow individuals to assert small claims that would not have been otherwise litigated due to the magnitude

74. Seaman v. Duke Univ., No. 1:15-CV-00462, 2018 WL 671239, at *10 (M.D.N.C. Feb. 1, 2018).

75. Baby Neal for & by Kanter v. Casey, 43 F.3d 48, 55 (3d Cir. 1994).

76. Fed. R. Civ. P. 23(b)(3) (requiring that class actions be "superior to other available methods for fairly and efficiently adjudicating the controversy"); *id.* (requiring that "questions of law or fact common to class members predominate over any questions affecting only individual members").

77. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997).

78. Comcast Corp. v. Behrend, 569 U.S. 27, 33–34 (2013) (quoting *Dukes*, 564 U.S. at 350–51); *see* Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 187 (3d Cir. 2001).

79. Pet, *supra* note 6, at 168 (quoting *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008)).

80. *Id.*

of litigation costs; and serve a deterrence function.[81] Class actions are economical for plaintiffs and beneficial for defendants because defendants do not have to face separate lawsuits for similar claims, which could lead to inconsistent judgments.[82] Private citizens benefit from using class actions as a tool to pool their limited resources.[83] Without class actions, many individuals would not have the incentives to sue even when their claims are valid because their potential recoveries would be overshadowed by the cost of litigation.[84] When class certification is denied in labor-side antitrust cases, plaintiffs typically cannot afford to continue the case individually, because they likely lack the resources and incentives to sue employers, thus allowing labor monopsony power to go unchecked.[85] In practice,

> [s]o-called procedural decisions about class certification are decided in the shadow of the fact that everyone . . . knows that the decision frequently is not between class certification and individual litigation. The real decision is between class certification and no recovery at all, since most plaintiffs seeking small damages will never pursue their claims in any other form.[86]

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81. *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 349 (1983); Wallach v. Eaton Corp., 837 F.3d 356, 374 (3d Cir. 2016); Robert H. Lande, *Class Warfare: Why Antitrust Class Actions Are Essential for Compensation and Deterrence*, Antitrust, Spring 2016, at 81, 81, 83 (discussing the compensation and deterrence functions of antitrust class actions).

82. Stevenson & Fitzgerald, *supra* note 68, ¶¶ 10:250, :252; *see* Fed. R. Civ. P. 23(b)(1) (noting a risk of "inconsistent or varying adjudications with respect to individual class members" as one of the reasons to proceed a class action).

83. John J. Dvorske et al., Federal Procedure: Lawyer's Edition ¶ 54:247 (2024), Westlaw FEDPROC; *see* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 266 (1972).

84. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))).

85. *See* Krueger & Posner, *supra* note 38, at 9 ("Individual employees will almost never have the resources or incentives to sue employers for antitrust violations because of the vast cost of an antitrust suit along with the relatively small sums at stake. Private wage suppression suits therefore require a class action . . . .").

86. Spencer Weber Waller & Olivia Popal, *The Fall and Rise of the Antitrust Class Action*, 39 World Competition 29, 29 (2016).

Since class certification is so crucial, the losing party is allowed to immediately appeal a class certification decision, underscoring the importance of this step.[87]

In the antitrust context, class actions can accomplish the congressional goals behind Section 4 of the Clayton Act: deterrence of anticompetitive activity and compensation for those affected.[88] Further, the Clayton Act provides for treble damages, prejudgment interest, and cost of suit, including attorney fees,[89] underscoring legislative encouragement of private antitrust litigation; this further incentivizes plaintiff classes to pursue antitrust cases.

There have been some recent victories for private plaintiff classes in no-poach lawsuits, indicating courts' inclinations to view no-poach agreements critically. In July 2022, Papa John's paid out $5 million to settle class claims over its franchise no-poach agreements.[90] Likewise, Jiffy Lube agreed to pay out $2 million to settle claims over a franchise no-poach agreement that prevented franchisees from hiring workers who had been employed by another Jiffy Lube franchisee within the past six months.[91] Outside of the franchise context, a major class action against Duke University and the University of North Carolina regarding a no-poach agreement that applied to faculty resulted in a $19 million settlement.[92] An aerospace company reached a $7.4 million settlement in a class action filed by former workers alleging antitrust violations from no-poach

87. *See* Fed. R. Civ. P. 23(f).

88. Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15); Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977) (stating that Congress passed Section 4 to "deter[] violators and . . . compensate victims of antitrust violations for their injuries"); Lande, *supra* note 81, at 81.

89. 15 U.S.C. §§ 15–15a.

90. Bryan Koenig, *Papa John's to Pay $5M to End No-Poach Class Action*, Law360 (July 28, 2022, 4:25 PM), https://www.law360.com/articles/1515935/papa-john-s-to-pay-5m-to-end-no-poach-class-action [https://perma.cc/JG5L-FK34]; *see generally In re* Papa John's Emp. & Franchisee Emp. Antitrust Litig., No. 3:18-CV-00825, 2019 WL 5386484, at *12 (W.D. Ky. Oct. 21, 2019) (denying motion to strike class allegations).

91. Laura Pennington, *Jiffy Lube Inks $2M Settlement with Workers over No-Poach Rule*, Top Class Actions (July 27, 2022), https://topclassactions.com/lawsuit-settlements/employment-labor/jiffy-lube-class-action-lawsuit-alleges-illegal-no-poach-agreement [https://perma.cc/VU8E-NRH7].

92. Mike Leonard, *Duke's $19 Million Faculty No-Poach Settlement Gets Judge's Nod*, Bloomberg L. (Aug. 31, 2021, 10:53 AM), https://news.bloomberglaw.com/antitrust/dukes-19-million-faculty-no-poach-settlement-gets-judges-nod [https://perma.cc/W5FG-3GS2].

agreements.[93] These lawsuits and settlements show a trend of using class actions as tools to end the no-poach practice.

III.
FRANCHISE NO-POACH AGREEMENTS ARE DIFFICULT FOR EMPLOYEES TO CHALLENGE THROUGH CLASS ACTIONS

A. Class Certification Hurdles in Labor-Side Antitrust Cases

While the predominance requirement used to be easily satisfied in antitrust class actions, courts today are more demanding.[94] Predominance has become a barrier to class certification in antitrust cases because substantive issues are assessed at the certification stage in determining whether common questions predominate.[95] The predominance inquiry now involves diving into the merits of the case.[96] The added requirement of "common proof across the class to calculate damages" as a part of the predominance requirement is chilling private antitrust litigation by creating barriers that prevent class certification.[97] Shifting from per se liability to the rule of reason in antitrust cases, as the Supreme Court has been doing, poses a difficulty for antitrust plaintiffs in class actions (especially in franchise no-poach cases) and leaves open questions regarding how this shift affects the predominance requirement for class certification.[98] A broad background trend of courts shifting away from class certification only exacerbates this problem for plaintiff classes, especially in "a variety of contexts where formerly class certification had seemed

93. Katie Arcieri, *Aerospace Company Settles No-Poach Suit for $7.4 Million*, Bloomberg L. (Jan. 25, 2024, 1:56 PM), https://news.bloomberglaw.com/antitrust/aerospace-company-settles-no-poach-suit-for-7-4-million [https://perma.cc/3N3A-MWVZ].

94. Pet, *supra* note 6, at 153 ("Though courts, until recently, found the predominance requirement 'readily met' in antitrust class actions, this is not the case today. Courts now conduct a 'rigorous analysis' of the evidence and require plaintiffs to show common evidence of antitrust injury, an inquiry that often requires resolution of disputed merits issues.").

95. *Id.*

96. *Id.* at 158.

97. Christine P. Bartholomew, *Antitrust Class Actions in the Wake of Procedural Reform*, 97 Ind. L.J. 1315, 1327–28 (2022) (citing Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013)).

98. Pet, *supra* note 6, at 155 ("Changes in *substantive* antitrust law—particularly the Supreme Court's decades-long shift away from per se liability and toward the rule of reason—have also complicated the task of obtaining antitrust relief through class actions."); *see also* Marinescu & Posner, *supra* note 7, at 1379 (discussing how the DOJ's shift towards analyzing franchise no-poach agreements under the rule of reason makes private actions harder to pursue).

automatic."[99] It has been argued that the tightening of the predominance standard is unwarranted, and that class actions, when permitted, help accomplish the goals of compensation and deterrence.[100] Previously, the predominance requirement was generally "satisfied in antitrust cases when a conspiracy [was] alleged."[101] Unfortunately, in more recent years, "[p]laintiffs can no longer show predominance by merely representing—either through class counsel or an expert economist—that key questions of liability may, at some later point, be proven with common evidence at trial."[102]

Furthermore, the class certification stage often involves a full evidentiary hearing in which plaintiffs need to demonstrate how they will prove class-wide injury and damages.[103] Today, courts increasingly consider the merits at the class certification stage. The Third Circuit promoted resolving merits disputes at the class certification stage, stating that "overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met."[104] Similarly, the Seventh Circuit gave license to judges to enter into factual inquiries early on, stating that "[b]efore deciding whether to allow a case to proceed as a class action . . . a judge should make whatever factual and legal inquiries are necessary under Rule 23."[105] This ongoing trend towards resolving factual and legal merits-based inquiries early on can stifle class actions that have the potential to result in meaningful settlements and deter anticompetitive activity.

The characteristics of employee classes in labor-related antitrust actions also contribute to the difficulties of pursuing labor-side class actions. Employees face greater difficulties with class certification than consumers in product-side antitrust class actions because employees in a class may differ along a multitude of qualitative dimensions (e.g., whether the employee's contract was a result of arms-length negotiation and the employee's willingness to relocate

99. John C. Coffee, Jr. & Stefan Paulovic, *Class Certification: Developments Over the Last Five Years 2002–2007*, *in* Class Action Litigation 2008: Prosecution and Defense Strategies 195, 195–96 (Joel S. Feldman & Keith M. Fleischman eds., 2008).

100. Pet, *supra* note 6, at 153.

101. *Id.* at 156 (quoting Alicia Swiatlowski, Note, *The Predominance Requirement: Antitrust Class Actions and the "Commercially Unique" Product*, 27 Syracuse L. Rev. 1257, 1261 (1976)).

102. *Id.* at 157 (citing Waller & Popal, *supra* note 86, at 34).

103. *Id.*

104. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 (3d Cir. 2008).

105. Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001).

to a distant competitor).[106] Meanwhile, a class consisting of purchasers of the same product can show similarity in their injury if they bought the same product and paid the same unreasonably higher price, and subtle differences (e.g., volume discounts) can be algorithmically addressed more easily.[107] Informational asymmetry also hinders labor-side antitrust plaintiffs; employers generally keep wage data confidential, so it is difficult for class action lawyers to access necessary wage information to pursue an antitrust claim.[108]

The individualized nature of some of the questions about employee classes, the lack of transparency in wages, and the substantive shifts toward defendant-friendly standards in antitrust cases result in difficulty with class certification, and therefore litigation, in labor-side antitrust cases.

B. Antitrust Labor Class Actions Should Be Encouraged as a Matter of Policy

There has been increasing national concern over ending no-poach agreements. While antitrust law covers labor market monopsony, "[c]ourts rarely adjudicate section 1 labor market cases."[109] State and federal authorities are working towards addressing the under-enforcement of antitrust laws in labor markets.[110] Collusion also seems easier to accomplish in labor markets than in product markets due to greater concentration in labor markets, so courts should be at least as plaintiff-friendly in labor antitrust class actions as they are in product markets class actions, if not more so.[111] No-poach agreements have become more common in the franchise context. For example, in an empirical study of forty-four contracts between the top fifty fast-food franchisors and their franchisees, thirty-six of the contracts contained job mobility restrictions.[112] Similarly, other studies show that over half of major franchise companies have some

106. Marinescu & Posner, *supra* note 7, at 1380 (quoting Weisfeld v. Sun Chem. Corp., 210 F.R.D. 136, 144 (D.N.J. 2002), *aff'd*, 84 F. App'x 257, 257 (3d Cir. 2004)).

107. *Id.*

108. *Id.* at 1381.

109. *Id.* at 1365 n.103 (A Westlaw search suggested that there were about six Section 1 labor market cases a year between 2016 and 2018, "[b]ased on a Westlaw search for 'section /3 1 /3 sherman +1 act & labor +1 market' (January 18, 2019), which yielded 6 hits for the last year and 17 hits for the last three years.").

110. *See infra* Section III.C.

111. Marinescu & Posner, *supra* note 7, at 1389; *see also* U.S. Dep't of Just. & Fed. Trade Comm'n, Merger Guidelines 5 (2023) (discussing market concentration as a motivation for hostility towards mergers).

112. Kati L. Griffith, *An Empirical Study of Fast-Food Franchising Contracts: Towards a New "Intermediary" Theory of Joint Employment*, 94 Wash. L. Rev. 171, 191–93 (2019).

form of a no-poach agreement.[113] A study has shown that industries with a high new-hire rate (a proxy for turnover) and lower wages are more likely to have no-poach agreements, and there is little association between the likelihood of no-poach agreements arising in an industry and the extent of specific training, intellectual property, or employee education level.[114] Fast-food restaurants have one of the highest employee turnover rates, about 130–150% per year.[115] Mobility restrictions in no-poach agreements could plausibly hinder employees who otherwise would want to change jobs, shown by the high industry turnover rate combined with the industry's trend of using no-poach agreements.

When multiple franchisees exist in a single labor market and those franchisees collectively constitute a dominant employer in that labor market, a no-poach agreement can suppress wages.[116] Seven fast-food companies (Arby's, Auntie Anne's, Buffalo Wild Wings, Carl's Jr., Cinnabon, McDonald's, and Jimmy John's) entered into binding agreements to drop no-poach provisions from future franchise agreements and to stop enforcing no-poach provisions in existing franchise agreements at all of their locations nationwide.[117] The phenomenon also expanded to cover other industries like hotels,

113. Krueger & Posner, *supra* note 38, at 8 (finding that, in 2016, 53.3% of major franchise companies had a no-poaching clause, up from 35.6% in 1996); Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 J. Hum. Res. (Special Issue) S324, S327 (2022) ("A total of 58 percent of the franchise agreements contained some restriction on franchisees' ability to recruit and hire employees away from another franchise or corporate unit in the same franchise chain. If weighted by the total number of units in the chain, the fraction with a no-poaching agreement is 55 percent.").

114. Krueger & Ashenfelter, *supra* note 113, at S335–38.

115. Eric Rosenbaum, *Panera is Losing Nearly 100% of Its Workers Every Year as Fast-Food Turnover Crisis Worsens*, CNBC (Aug. 29, 2019, 9:58 AM), https://www.cnbc.com/2019/08/29/fast-food-restaurants-in-america-are-losing-100percent-of-workers-every-year.html [https://perma.cc/MZ8M-98ZP].

116. Krueger & Posner, *supra* note 38, at 5.

117. Press Release, Washington State Office of the Attorney General, AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide (July 12, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers [https://perma.cc/68R3-E9KE]; Jiamie Chen, "*No-Poach" Agreements as Sherman Act § 1 Violations: How We Got Here and Where We're Going*, Competition, Fall 2018, at 82, 99; Sean Higgins, *Corporations Targeted for Directing Franchise Hiring*, Wash. Exam'r (July 24, 2018, 4:01 AM), https://www.washingtonexaminer.com/news/2634590/corporations-targeted-for-directing-franchise-hiring/ [https://perma.cc/BH96-TVKC].

convenience stores, and child care.[118] The Washington State Attorney General also sued Jersey Mike's in 2018 when it refused to sign an agreement with the Washington State AG to remove no-poach provisions from its franchise agreements; Jersey Mike's ultimately settled for $150,000 and ended its no-poach provisions.[119] On a similar note, President Biden's executive order on competition encourages the FTC to exercise its rulemaking authority to curb non-compete clauses (which will be discussed later) and similar agreements.[120] These efforts show that federal and state governments want to eliminate no-poach agreements and other conspiracies that lower wages.

Notwithstanding some successful efforts to eliminate no-poach agreements, government enforcement of antitrust laws still falls short of what is necessary to reach a healthy competitive landscape in labor markets, so class actions can and should close this gap.[121] Moreover, class actions are crucial in labor markets because the government dedicates fewer resources to antitrust enforcement in the labor sector than to antitrust enforcement in product market cases.[122] Private plaintiffs in labor-side antitrust cases face an added obstacle because "[a] large portion of private product-side litigation piggybacks on government investigations and litigation, which both uncover otherwise unknown antitrust violations and establish useful precedents"—a phenomenon that does not similarly help labor-side plaintiffs.[123]

The government faces difficulty in pursuing labor-related antitrust actions because it is constrained by limited resources and avoids high risk actions.[124] Private actions are needed, especially in antitrust cases, because government enforcement is limited by, among other things, "budgetary constraints; undue fear of losing cases; lack of awareness of industry conditions; overly suspicious views about complaints by 'losers' that they were in fact victims of anticompetitive behavior[,]" and political motivations that interfere with enforcement.[125] By awarding treble damages to prevailing plaintiffs in antitrust cases, Congress demonstrated intent to encourage private

118. *See* Wash. State Att'y Gen.'s Off., No-Poach Initiative 5 (2020), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/NoPoachReport_June2020.pdf [https://perma.cc/5QKW-NJX3].

119. *Id.* at 10.

120. Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,992 (July 9, 2021).

121. *See* Marinescu & Posner, *supra* note 7, at 1379 (describing government neglect in enforcing antitrust law in labor markets until recently).

122. *See id.*

123. *Id.*

124. Krueger & Posner, *supra* note 38, at 9–10.

125. Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty* Cases, 42 U.S.F. L. Rev. 879, 906 (2008) (footnotes omitted).

citizens to take on the role of private attorneys general in antitrust cases specifically (as opposed to other types of class actions).[126] The fear of false positives, or the risk of holding innocent defendants liable, has been a primary driver in antitrust doctrine, but scholars argue that the risk of false negatives, which in part comes from class certification being unfairly denied, has been underemphasized.[127] The increasing application of quick-look approval to antitrust class actions (as suggested in *Alston*'s dicta) could add to the problem of false negatives, resulting in pro-defendant decisions at the expense of consumers.[128] Therefore, as a matter of policy, labor-side antitrust class actions need to be encouraged and promoted as a tool to check labor market power.

C. Current Discussion Around Franchise No-Poach Agreements

Courts have been harsher on claims against no-poach agreements in the franchise context compared to no-poach agreements across distinct companies. Outside the franchise context, Judge Koh in the Northern District of California found the predominance requirement to be satisfied and thus certified classes in two major no-poach cases involving skilled employees in tech and animation.[129] Likewise, Judge Davila held that the question of whether an alleged no-poach agreement regarding senior-level employees is subject to a per se or quick-look analysis, or whether it was ancillary to a legitimate business purpose, cannot be determined on a motion to dismiss.[130] A court has even considered no-poach agreements in non-franchise contexts to be per se illegal, sometimes even warranting criminal indictments.[131]

Courts have been inconsistent with their treatment of no-poach agreements in the franchise context. Two recent challenges against McDonald's and Jimmy John's, *Deslandes v. McDonald's USA, LLC* and *Conrad v. Jimmy John's Franchise, LLC*, were denied class certification at the district court level because the predominance requirement was

126. Bartholomew, *supra* note 97, at 1369.

127. *See* Leslie, *supra* note 33, at 27 (discussing the neglect of false negatives in the antitrust context more broadly).

128. *See id.*

129. *See In re* High-Tech Emp. Antitrust Litig., 985 F. Supp. 2d 1167, 1172–73, 1177, 1187 (N.D. Cal. 2013); Nitsch v. DreamWorks Animation SKG Inc., 315 F.R.D. 270, 287, 317 (N.D. Cal. 2016).

130. United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1033, 1039–40 (N.D. Cal. 2013).

131. *See* United States v. Patel, No. 3:21-CR-00220, 2022 WL 17404509, at *19 (D. Conn. Dec. 2, 2022).

not satisfied when applying the rule of reason to the agreements.[132] On appeal, the Seventh Circuit reversed the denial of class certification in *Deslandes*, in part because "the district judge jettisoned the per se rule too early."[133] The Eleventh Circuit recently reversed the dismissal of a class action against Burger King in the Southern District of Florida, holding that the plaintiff class sufficiently pled concerted action.[134] Since Burger King and its franchisees "separately pursue their own economic interests when hiring employees," the agreement was between distinct economic entities.[135] This recent decision shows a large step towards plaintiff-friendly treatment in franchise no-poach cases, similar to the trend in other no-poach cases.

1. *Deslandes v. McDonald's USA, LLC*

In *Deslandes*, Leinani Deslandes, a former McDonald's department manager in Florida, filed a putative class action against McDonald's in the Northern District of Illinois regarding its franchise no-poach agreements.[136] Plaintiffs alleged that McDonald's required franchisees to enter into no-poach agreements. The relevant language from the franchise agreement stated:

> Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph [] shall not be violated

132. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2021 WL 3187668, at *14–15 (N.D. Ill. July 28, 2021); Conrad v. Jimmy John's Franchise, LLC, No. 3:18-CV-00133, 2021 WL 3268339, at *8–9, *12 (S.D. Ill. July 30, 2021); A. Christopher Young et al., *Class Certification Denied in Two Fast-Food Franchise No-Poach Antitrust Lawsuits*, Bus. L. Today (Sept. 15, 2021), https://businesslawtoday.org/2021/09/class-certification-denied-in-two-fast-food-franchise-no-poach-antitrust-lawsuits/ [https://perma.cc/S95X-9F3L]; *cf.* Marinescu & Posner, *supra* note 7, at 1379 (discussing how the DOJ's shift towards analyzing franchise no-poaching agreements under the rule of reason makes private actions harder to pursue).

133. Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023) (emphasis omitted), *cert. denied*, 144 S. Ct. 1057 (2024).

134. Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247, 1250 (11th Cir. 2022).

135. *Id.* at 1256.

136. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2018 WL 3105955, at *3 (N.D. Ill. June 25, 2018), *vacated & remanded*, 81 F.4th 699 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

> if such person has left the employ of any of the foregoing parties for a period in excess of six [6] months.[137]

Deslandes started as an entry-level employee with a wage of $7.00 per hour and worked her way up to a managerial position that paid $12.00 per hour.[138] Deslandes was signed up to take a training course to make her eligible for a General Manager position, but her supervisors canceled the training upon learning that she was pregnant, leading Deslandes to look for positions at other McDonald's franchises.[139] Deslandes was offered a position at a competing franchise, with a wage of $13.75 per hour and an expected raise to $14.75 upon conclusion of a 90-day probationary period. However, Deslandes could not start this position unless she was "released" by her current franchise employer.[140] The plaintiff moved to certify a class of "[a]ll persons who were employed at a McDonald's-branded restaurant in the United States from June 28, 2013 to July 12, 2018."[141] In denying class certification, the Northern District of Illinois emphasized that the predominance requirement was not satisfied.[142] However, the Seventh Circuit left open the possibility of per se treatment, since the no-poach agreement was horizontal and may not have been ancillary.[143] Specifically, Judge Easterbrook indicated that the district court's assumption that the franchise agreements expand the output of burgers and fries wrongly "treats benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing)" and implies that "antitrust law is unconcerned with competition in the markets for inputs . . . ."[144] The Supreme Court denied certiorari after McDonald's appealed.[145]

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137. Amended Class Action Complaint at 22, Deslandes v. McDonald's USA, LLC, 2022 WL 2316187 (N.D. Ill. June 28, 2022), *vacated & remanded*, 81 F.4th 699 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024) (No. 1:17-CV-04857), 2017 WL 4481055 (alteration in original).

138. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2018 WL 3105955, at *3 (N.D. Ill. June 25, 2018), *vacated & remanded*, 81 F.4th 699 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

139. *Id.*

140. *Id.*

141. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2021 WL 3187668, at *2 (N.D. Ill. July 28, 2021).

142. *Id.* at *14–15.

143. Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703–04 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

144. *Id.* at 703.

145. McDonald's USA, LLC v. Deslandes, 144 S. Ct. 1057 (2024) (denying certiorari).

2. *Conrad v. Jimmy John's Franchise, LLC*

Similar to *Deslandes*, a class of employees sued Jimmy John's as a result of its franchise agreement, which provided that franchisees would not "solicit or initiate recruitment of any person then employed, or who was employed within the preceding twelve (12) months, by [Jimmy John's], any of [Jimmy John's] affiliates, or another Jimmy John's Restaurant franchisee."[146] Plaintiff Conrad moved to certify a class of "[a]ll persons in the United States who were employed at a Jimmy John's-branded restaurant at any time between January 24, 2014 to July 12, 2018, whether owned and operated as a corporate store or a franchise store."[147] Like the court in *Deslandes*, the Southern District of Illinois denied class certification, reasoning that the predominance requirement had not been satisfied.[148]

3. *Robinson v. Jackson Hewitt, Inc.*

In *Robinson v. Jackson Hewitt, Inc.*, plaintiffs were former employees who sued Jackson Hewitt and Tax Services of America for allegedly engaging in a conspiracy not to compete for employees and potential employees, in part by agreeing not to solicit, recruit, or hire each other's employees without prior approval.[149] In the franchise agreement, the franchisees acknowledged that they were independent contractors and that they had no fiduciary relation with Jackson Hewitt.[150] Further, the franchisees held themselves out as "independently owned and operated" and were notified that they might face competition from other franchisees or outlets that Jackson Hewitt owned or controlled.[151] Hence, the franchise agreements point to horizontal agreements between economically separate entities as opposed to agreements within the same entity. The plaintiffs moved for class certification for "[a]ll persons who worked in a tax preparer position at any company-owned Jackson Hewitt location in the United States at any time between December 10, 2014 and the present[,]" arguing that predominance would be established

146. First Amended Class Action Complaint at 18, Conrad v. Jimmy John's Franchise, LLC, 2021 WL 3268339 (S.D. Ill. July 30, 2021) (No. 3:18-CV-00133), 2019 WL 1806508 (alterations in original).

147. Conrad v. Jimmy John's Franchise, LLC, No. 3:18-CV-00133, 2021 WL 3268339, at *2 (S.D. Ill. July 30, 2021).

148. *Id.* at *9, *12.

149. Robinson v. Jackson Hewitt, Inc., No. 2:19-CV-09066, 2019 WL 5617512, at *1 (D.N.J. Oct. 31, 2019); Robinson v. C&B Tax Inc., No. 4:21-MC-2-RJ, 2021 WL 5632086, at *1 (E.D.N.C. Nov. 19, 2021).

150. *Jackson Hewitt*, 2019 WL 5617512, at *1.

151. *Id.*

regardless of which antitrust standard of review was used.[152] The Department of Justice and a group of State Attorneys General filed amicus briefs, arguing that the franchise no-poach agreements at issue were horizontal market allocation agreements that should be deemed per se unlawful.[153] Jackson Hewitt agreed to settle the lawsuit for $10.8 million, an amount that "reflected how much an expert for the plaintiffs said the tax prep workers were owed in damages."[154] The court's treatment of the class in this franchise no-poach case could have implications for similar classes, especially given the plaintiff class's arguments regarding predominance.

4. *Arrington v. Burger King Worldwide, Inc.*

In *Arrington v. Burger King Worldwide, Inc.*, the Eleventh Circuit reversed the Southern District of Florida's decision and took a plaintiff-friendly approach at the motion to dismiss stage. Since over 99% of Burger King's restaurants worldwide are independently owned franchises,[155] this decision could serve as a quintessential model for courts to consider when evaluating other franchise no-poach agreements. The standard Burger King franchise agreement included a no-hire agreement, which applied to employees for six months after leaving a Burger King franchise.[156] The agreement stated:

> Neither BKC nor Franchisee will attempt, directly or indirectly, to entice or induce, or attempt to entice or induce any employee of the other or of another Franchisee of BKC to leave such employment, or employ such employee within six (6) months after his or her termination of employment with such employer, except with the prior written consent of such employer.[157]

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152. Memorandum in Support of Plaintiffs' Motion for Class Certification at 18, 28–29, *Jackson Hewitt*, No. 2:19-CV-09066 (D.N.J. filed Aug. 30, 2022), 2022 WL 22632190.

153. Brief for States of New Jersey et al. as Amici Curiae at 11, *Jackson Hewitt*, No. 2:19-CV-09066 (D.N.J. filed Oct. 20, 2023), ECF No. 274-1; Brief for the United States of America as Amicus Curiae at 7–8, *Jackson Hewitt*, No. 2:19-CV-09066 (D.N.J. filed Oct. 20, 2023), ECF No. 282.

154. Mike Scarcella, *Tax Preparer Jackson Hewitt Settles 'No Poach' Case for $10 Million*, Reuters (Apr. 8, 2024, 12:57 PM), https://www.reuters.com/legal/litigation/tax-preparer-jackson-hewitt-settles-no-poach-case-10-million-2024-04-08/ [https://perma.cc/9L7K-YQY6].

155. Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247, 1251 (11th Cir. 2022).

156. *Id.*

157. Class Action Complaint at 3, Arrington v. Burger King Worldwide, Inc., 448 F. Supp. 3d 1322 (S.D. Fla. 2020) (No. 1:18-CV-24128), *rev'd & remanded*, 47 F.4th 1247 (11th Cir. 2022) (No. 20-13561), 2018 WL 4897041.

Consequences for breaching this provision included paying legal costs incurred in enforcing the agreement and the possibility of Burger King terminating the franchisee's right to operate the franchise.[158] The Eleventh Circuit began its analysis by comparing the Burger King franchisees to the NFL teams in *American Needle, Inc. v. NFL* to show that the franchisees could partake in concerted action because the franchises were separate decisionmakers.[159] The court found that the franchise agreement showed that each franchise separately pursued their own economic interests when hiring employees because the agreement explicitly stated that the franchisee "may face competition from other franchisees."[160] The agreement also characterized franchisees as independent centers of decision-making with respect to hiring or employment since franchisees retain the sole right to hire employees and establish terms and conditions of employment without approval from the corporation.[161] Evidence of different recruitment approaches, bonus structures for managers, and employee benefits bolstered the idea that the franchisees were independent decisionmakers in relation to hiring.[162] In light of these differences across franchisees, the court concluded that the absence of a no-hire agreement could have led the franchisees to try to entice employees from other franchisees to join their own restaurants by offering better employment conditions, so the existence of the agreement seemed to deprive the labor market of actual or potential competition for employees in the fast-food industry.[163] The Eleventh Circuit reversed and remanded this case to the district court without explicitly determining the applicable legal standard (per se, quick-look, or rule of reason).

5. Government Enforcement Efforts

State Attorneys General have pushed for plaintiff-friendly treatment of franchise no-poach agreements. Several states advocated for the per se standard in the *Deslandes* appeal, arguing that the Northern District of Illinois should have characterized the franchise agreement as a horizontal hub-and-spoke conspiracy in which McDonald's acted as the hub and the franchisees acted as the spokes.[164] The Washington

158. *Arrington*, 47 F.4th at 1251–52.
159. *Id.* at 1254 (citing Am. Needle, Inc. v. NFL, 560 U.S. 183, 195–96 (2010)).
160. *Id.* at 1256.
161. *Id.*
162. *Id.*
163. *Id.*
164. Brief of Amici Curiae Illinois, et al. in Support of Plaintiffs-Appellants and Reversal at 13, 17–20, Deslandes v. McDonald's USA, LLC, 81 F.4th 699 (7th Cir.

State Attorney General successfully undertook an initiative to eliminate franchise no-poach agreements with all companies that have three or more locations in the state.[165] This initiative serves as a "natural experiment" that demonstrates how eliminating no-poach agreements in franchises could help workers.[166] A study on this no-poach enforcement campaign suggests that the campaign increased annual salaries in posted job ads by 6.6% and increased worker-reported earnings by about 4%, highlighting the efficacy of the campaign.[167]

The federal enforcement agencies have been less friendly towards plaintiffs in the past but are now shifting towards the Washington State Attorney General's position. Previously, the DOJ "filed notices in several class actions in which it argued that the franchise no-poaching agreements being challenged should be evaluated under the rule of reason rather than the per se rule."[168] The DOJ's statement of interest in three Washington State franchise no-poach cases argued that hub-and-spoke conspiracies in franchise agreements are subject to the rule of reason.[169] This was because there was no "rim" to the franchise agreement to render the agreement horizontal across franchisees.[170] Instead, the arrangement is a set of vertical agreements that is subject to the rule of reason.[171] In contrast, the Washington State Attorney General's amicus brief in the same trio of cases argued that when an agreement restricts hiring among franchisees and a corporate-owned store, which is a clear horizontal competitor of the franchisees, the agreement is horizontal and should be considered a per se restraint.[172] However,

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2023) (Nos. 22-2333 and 22-2334) [hereinafter States Brief], *cert. denied*, 144 S. Ct. 1057 (2024). *See generally* United States v. Apple, Inc., 791 F.3d 290, 314 (2d Cir. 2015) (providing background on hub-and-spoke conspiracies).

165. Press Release, Washington State Office of the Attorney General, AG Report: Ferguson's Initiative Ends No-Poach Practices Nationally at 237 Corporate Franchise Chains (June 16, 2020), https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate [https://perma.cc/K8EC-U5TV].

166. Michael L. Sturm, *Franchise Anti-Poaching Provisions: After Four Years, What Have We Learned?*, Franchise Law., Winter 2022, at 3, 7.

167. Brian Callaci et al., *The Effect of Franchise No-Poaching Restrictions on Worker Earnings* 2, 27 (IZA Inst. of Lab. Econ., Discussion Paper No. 16330, 2023).

168. Marinescu & Posner, *supra* note 7, at 1379.

169. Corrected Statement of Interest of the United States of America at 13–16, Stigar v. Dough Dough, Inc., No. 2:18-CV-00244 (E.D. Wash. filed Mar. 8, 2019), ECF No. 34.

170. *Id.* at 15–16.

171. *Id.* at 12, 16.

172. Amicus Curiae Brief by the Attorney General of Washington at 6–7, *Stigar*, No. 2:18-CV-00244 (E.D. Wash. filed Mar. 11, 2019).

the FTC and DOJ jointly filed an amicus brief in the aforementioned *Deslandes* appeal to the Seventh Circuit arguing for per se treatment of franchise no-poach agreements unless defendants establish that the agreements are ancillary to a procompetitive purpose.[173] This argument aligns with the position taken by several State Attorneys General who filed an amicus brief arguing for per se treatment in *Deslandes* on appeal.[174] Lawmakers are also paying attention to the detrimental effects of franchise no-poach agreements. In 2023, the End Employer Collusion Act was reintroduced, which would give the FTC the power to enforce a ban on franchise no-poach agreements and other restrictive employment agreements between employers.[175]

6. Final FTC Rule on Non-Compete Clauses

The FTC's final rule to ban non-compete agreements demonstrates the growing view that worker mobility should be encouraged (albeit outside the franchise context).[176] The FTC "estimates that approximately one in five American workers"—about 30 million workers—are bound by a non-compete clause.[177] By banning non-compete clauses, the FTC predicts that competition in labor markets will be restored, leading to better job mobility and higher pay and benefits, amounting to a collective wage increase of nearly $300 billion per year.[178] Banning non-competes could also improve worker equity, potentially closing wage gaps between white men and other demographic groups by 1.5–3.8%.[179] Notably, the final rule classifies the use of non-compete clauses as an unfair method of competition.[180] The final rule also discusses a final consent order alleging that a

173. Brief for the United States of America and the FTC as Amici Curiae in Support of Neither Party at 14, 18, Deslandes v. McDonald's USA, LLC, 81 F.4th 699 (7th Cir. 2023) (Nos. 22-2333 and 22-2334) [hereinafter U.S. Amicus Brief], *cert. denied*, 144 S. Ct. 1057 (2024).

174. States Brief, *supra* note 164, at 11.

175. *See* End Employer Collusion Act, H.R. 4932, 118th Cong. (2023); End Employer Collusion Act, S. 2535, 118th Cong. (2023).

176. *See generally* Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912). The rule was recently set aside by a district court, and the FTC appealed the decision to the Fifth Circuit. Ryan, LLC v. FTC, No. 3:24-CV-00986, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024); Notice of Appeal, *Ryan*, 2024 WL 3879954 (No. 3:24-CV-00986).

177. Non-Compete Clause Rule, 89 Fed. Reg. at 38343.

178. *Id.* at 38467.

179. *See* Matthew S. Johnson et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31929, 2023).

180. Non-Compete Clause Rule, 89 Fed. Reg. at 38342.

firm's use of non-competes limited worker mobility and took advantage of unequal bargaining power.[181] Nonetheless, the rule explicitly states that the non-compete ban would not apply to franchisees, as "§ 910.1(f) . . . clarified . . . that 'non-competes between franchisors and franchisees remain subject to [F]ederal antitrust law as well as all other applicable law.'"[182] Hence, while this rulemaking effort could result in significant strides for worker mobility, it would not address the problem of franchise no-poaches.

7. Scholars' Approaches

Scholars have also advocated for a quick-look standard for franchise no-poach agreements.[183] Even if an agreement between a franchisor and a franchisee is considered vertical, it could still warrant a quick-look approach if the anticompetitive effects are obvious.[184] The no-poach provisions within franchises are not ancillary because they are not necessary to make the franchise effective, so it is improper to characterize them as restraints that fall under the rule of reason.[185]

Another approach proposed by scholars is that franchise no-poach agreements could be evaluated in line with the treatment in contract law of covenants-not-to-compete, which are typically unenforceable when they are not tailored toward specific employees and "almost always unenforceable when imposed on low-skill workers."[186] If the FTC's rule banning non-competes is upheld, this approach may be strengthened. In the franchise context, which often tends to involve fast-food restaurant businesses, this would mean that courts could allow no-poach agreements when they only involve managerial employees who have access to proprietary information or received comprehensive training at the franchise level.[187] In contrast, courts should evaluate franchise no-poach agreements under the per se rule when they are broad.[188]

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181. *See id.* at 38344.
182. *Id.* at 38369.
183. *See, e.g.*, Iadevaia, *supra* note 34, at 178.
184. *See* Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 793 (S.D. Ill. 2018) (citing Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999)).
185. *See* Hartley & Brizuela, *supra* note 17, at 8.
186. Marinescu & Posner, *supra* note 7, at 1388, 1388 n.219.
187. *Id.* at 1388.
188. *Id.*

IV.
PROCEDURAL CHANGES TO MAINTAIN PLAINTIFF CLASSES IN FRANCHISE NO-POACH CASES

A. Per Se Standard for Franchise and Other No-Poach Agreements

Courts should apply the per se illegality standard when evaluating no-poach agreements in the franchise context to eliminate the procedural inconsistency between class certification standards in franchise cases and other no-poach cases. Rule of reason treatment for an antitrust case inevitably creates procedural hurdles to class certification.[189] The added difficulty of bringing a labor antitrust case, as opposed to a product antitrust case, compounds the hurdle of pursuing class actions against franchise no-poach agreements under the rule of reason framework.[190] In the two major franchise no-poach class actions discussed, *Deslandes* and *Conrad*, the application of the rule of reason to the agreements made it harder to satisfy the predominance requirement because the courts needed to conduct individualized inquiries.[191] In *Conrad*, where the decision to apply the rule of reason was determined at the class certification stage, the court noted that the rule of reason "raise[d] more individualized issues precluding class certification" given the increasingly complex structure of business enterprise.[192] However, these issues, while relevant to the defendant's antitrust liability, showed little about whether individualized inquiry would similarly be required for members of the plaintiff class. The district court in *Deslandes* denied nationwide class certification in part because the plaintiffs did not show that corporate-owned stores compete with franchisees in every part of the United States. Thus, in locations where there was no competition between franchisees and corporate-owned restaurants, the agreement

189. *See* Pet, *supra* note 6, at 155 ("Changes in *substantive* antitrust law—particularly the Supreme Court's decades-long shift away from per se liability and toward the rule of reason—have also complicated the task of obtaining antitrust relief through class actions." (emphasis in original)).

190. *See* Marinescu & Posner, *supra* note 7, at 1380 (explaining that labor antitrust cases may be harder to bring because lawyers gravitate towards products-related class actions, and employee classes are more difficult to certify).

191. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2021 WL 3187668, at *4 (N.D. Ill. July 28, 2021); Conrad v. Jimmy John's Franchise, LLC, No. 3:18-CV-00133, 2021 WL 3268339, at *10 (S.D. Ill. July 30, 2021).

192. *Conrad*, 2021 WL 3268339, at *10 (citing Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 773 (1984)) (explaining how the complexity of business structures makes antitrust law difficult to apply).

was not horizontal, creating the need for individualized inquiries based on location.[193]

On appeal, the Seventh Circuit held that Deslandes would not prevail under the rule of reason or quick-look approaches because the plaintiffs did not allege that McDonald's and its franchises have market power, rejecting the argument that the market power was obvious because workers at McDonald's could be treated as a single economic market.[194] However, the Seventh Circuit held that per se treatment may apply to the franchise no-poach agreements at issue because the agreements were horizontal and may not have been ancillary to a procompetitive purpose. This was because the lower court opinion (1) neglected antitrust's role in the input or labor market and (2) prevented workers from reaping the benefits of skills training that could be realized if they had opportunities to seek similar employment.[195]

While the Seventh Circuit's decision leaves open the possibility for franchise no-poach class actions to prevail on a per se standard of illegality, the unavailability of the rule of reason and quick-look approaches could have a chilling effect on these cases. If a quick-look approach is allowed based on allegations that the franchisor and franchisees have market power, courts adjudicating cases like *Deslandes* could also have plaintiffs certify a more limited class that only includes employees in locations with multiple restaurants where the franchise no-poach agreement is clearly horizontal. This way, the rule of reason inquiry will not cut into class certification so easily. If the court narrowed the plaintiff class to only the employees in locations with multiple competing McDonald's locations, this argument could have been circumvented, and the district court could have justified a quick-look approach more easily. This would be similar to narrowing the class from all employees to a technical class of employees in *In re High-Tech Employee Antitrust Litigation*,[196] or narrowing the class to just healthcare workers in *In re Geisinger Health &*

193. *Deslandes*, 2021 WL 3187668, at *10.

194. Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 702–03 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

195. *Id.* at 703–04 ("What we mean is this: People who choose to work at McDonald's or one of its franchises acquire business-specific (or location-specific) skills. Employees may choose to work for less . . . to compensate the employer for the training. In a competitive market, workers recover these investments as their wages rise over time, in response to their greater productivity. But if McDonald's specifies a limited number of classifications of workers . . . that may delay promotion and frustrate workers' ability to recoup their investments in training.").

196. Hartley & Brizuela, *supra* note 17, at 12–13; *In re* High-Tech Emp. Antitrust Litig., 985 F. Supp. 2d 1167, 1174, 1177 (N.D. Cal. 2013).

Evangelical Community Hospital Healthcare Workers Antitrust Litigation to satisfy the Rule 23 requirements.[197] Using a plaintiff-friendly legal standard would circumvent the extraneous individualized inquiries that cut against class certification in the predominance analysis.

Various parties have also supported the plaintiffs in the *Deslandes* appeal to the Seventh Circuit, arguing in favor of a per se rule against franchise no-poach agreements. The Open Markets Institute advocated for a per se standard for franchise no-poach agreements even if the agreements were considered vertical.[198] While vertical non-price restraints in manufacturer-distributor contexts are subject to the rule of reason, the Supreme Court in *Continental T.V., Inc. v. GTE Sylvania Inc.* set aside the possibility that some vertical restraints can be per se illegal when "based upon demonstrable economic effect."[199] The Open Markets Institute argued that franchise no-poach agreements, even if considered to be vertical restraints, constituted "airtight . . . customer allocation[,]" thus warranting per se treatment under *GTE Sylvania*.[200] The DOJ took a different approach in arguing for per se illegality. In its amicus brief for neither party, the DOJ argued that the franchise no-poach agreements across McDonald's franchises should be per se illegal "unless defendants establish ancillarity" because such employee allocations "inherently 'eliminat[e] . . . competition' by limiting employers' ability to compete."[201] Essentially, regardless of whether the no-poach agreements are horizontal or vertical, there is reason to hold these agreements per se illegal.

Normatively, it should be just as easy or difficult to certify a class for franchise no-poach cases as compared to other no-poach cases. The nature of the classes and the alleged injuries are the same in both types of cases, but for a distinction of legal form between an agreement across different corporate entities and one across franchisees of a single entity (with some, but not overpowering economic

197. *In re* Geisinger Health & Evangelical Cmty. Hosp. Healthcare Workers Antitrust Litig., No. 4:21-CV-00196, 2022 WL 1911375, at *4 (M.D. Pa. June 3, 2022).

198. Brief of Amici Curiae Open Markets Institute et al. in Support of Plaintiffs-Appellants at iv, *Deslandes*, 81 F.4th 699 (Nos. 22-2333 and 22-2334) [hereinafter Open Markets Amicus].

199. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977).

200. Open Markets Amicus, *supra* note 198, at xiv (quoting Robert Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1, 22 (1978)).

201. U.S. Amicus Brief, *supra* note 173, at 19–20 (alteration in original) (first citing *In re* Outpatient Med. Ctr. Emp. Antitrust Litig., 630 F. Supp. 3d 968, 986–87 (N.D. Ill. 2022), and then citing Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995)).

substance).[202] Recently, the Eleventh Circuit articulated the independent nature of the franchisees' relationships with Burger King, highlighting provisions of the Burger King Franchise Disclosure Document implying that "Burger King and its franchisees compete against each other and have separate and different economic interests."[203] The independence derived from separate economic interests also extends to hiring decisions, so Burger King's franchisees were considered economically separate actors, just like the competing firms in *In re High-Tech Employee Antitrust Litigation* and *Nitsch v. DreamWorks Animation SKG Inc.*[204] Based on the conflicting views articulated by courts, the DOJ, and State Attorneys General, the question of what standard to apply remains in dispute and requires deeper factual inquiry that should not be done at the class certification stage.[205] Hence, the same substantive standard should be used to certify a class for franchise no-poach agreements and other no-poach agreements as a matter of procedural equity since the classes are experiencing the same injury. This would also remedy the lack of class certification for franchise no-poach agreements.

While there are some procompetitive arguments raised by franchise defendants in no-poach cases that have been used to justify a rule of reason standard (which has then been used to deny class certification), these arguments do not apply to the franchise context. First, the procompetitive effects asserted by franchisors fall in the *product* market and should not be considered valid justifications for restraints in the *labor* market.[206] The uniqueness of labor markets and the economics of ancillarity justified the rule of reason in *Aya Healthcare Services v. AMN Healthcare, Inc.*, where non-solicitation agreements were used to prevent a subcontracting staffing company

202. *Cf.* Am. Needle, Inc. v. NFL, 560 U.S. 183, 195 (2010) ("[S]ubstance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1." (second alteration in original) (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 773 n.21 (1984))).

203. Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247, 1256 (11th Cir. 2022).

204. *See In re* High-Tech Emp. Antitrust Litig., 985 F. Supp. 2d 1167, 1172, 1187–88 (N.D. Cal. 2013); Nitsch v. DreamWorks Animation SKG Inc., 315 F.R.D. 270, 274–75 (N.D. Cal. 2016).

205. *See* 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 3:12 (21st ed. 2024), Westlaw MCLAUGHLIN ("It is axiomatic that at the class certification stage a court may not resolve substantial, disputed factual issues concerning the merits unless those issues also are relevant to a Rule 23 determination.").

206. Iadevaia, *supra* note 34, at 179; Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023) ("[I]t is equivalent to saying that antitrust law is unconcerned with competition in the markets for inputs, and *Alston* establishes otherwise."), *cert. denied*, 144 S. Ct. 1057 (2024).

from poaching travel nurses after they were identified and staffed on a project.[207] However, the labor market differs in the context of franchises.[208] While one can argue that operating through franchises should not change the way courts treat a single corporation for antitrust purposes, the economic reality is that unions cannot organize as easily against a corporation that runs through franchises.[209]

A second procompetitive argument is that no-poach restrictions address the free-rider problem created by the franchise model: franchisees are incentived to cut corners to boost their profits, which hurts the overall brand but benefits the individual franchisees.[210] This is especially a concern in the context of training, as individual franchisees would be less invested in training their employees if other franchisees could free-ride on the investment by hiring away their trained employees.[211] However, the procompetitive goal of protecting each restaurant's investment in its employees' training,[212] which was set forth in *Deslandes*, can be refuted because "most individuals in the low-skill employment market do not have the luxury of being unemployed by choice for six months," meaning the no-hire provision limited McDonald's stores and franchises from competing for workers.[213] Defendants in no-poach cases have focused this procompetitive justification on the loss of investments in training *management-level* employees,[214] but this does not justify using no-poach agreements that restrict other employees.[215] Bonuses could be offered as an incentive to keep strong employees with a particular franchise; this is a less restrictive alternative to no-poach agreements.[216] As a matter of policy and fair-

207. Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1106, 1111 (9th Cir. 2021) ("This case involves the non-solicitation provision within [a] contract. We conclude that this provision is both ancillary to the parties' broader agreement to collaborate, and a reasonable, pro-competitive restraint.").

208. *Cf.* Mutchnik, Johnson IV & Fields, *supra* note 53, at 38–39 (citing *Aya Healthcare*, 9 F.4th 1102) (explaining the procompetitive justifications for restrictions in a non-franchise context).

209. *See* Marinescu & Posner, *supra* note 7, at 1386–87.

210. *Cf.* Catherine E. Schaefer, *Disagreeing over Agreements: A Cross-Sectional Analysis of No-Poaching Agreements in the Franchise Sector*, 87 Fordham L. Rev. 2285, 2307 (2019).

211. *See* Mary Strimel et al., *No-Poach Agreements Land Franchisors in Hot Water*, Bloomberg L. (Apr. 10, 2018, 6:43 PM) https://news.bloomberglaw.com/daily-labor-report/no-poach-agreements-land-franchisors-in-hot-water [https://perma.cc/95Q6-RET4].

212. *See* Iadevaia, *supra* note 34, at 174.

213. Marinescu & Posner, *supra* note 7, at 1387 (quoting Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2018 WL 3105955, at *1 (N.D. Ill. June 25, 2018)).

214. Schaefer, *supra* note 210, at 2307.

215. Iadevaia, *supra* note 34, at 174.

216. Krueger & Posner, *supra* note 38, at 13.

ness, courts should view no-poach agreements in franchises with more skepticism, especially since they tend to target low-wage employees, as opposed to managerial employees; this should uncover a clearer path to certification for employee classes and address the lack of enforcement in labor-side antitrust issues.

In sum, applying per se illegality to no-poach agreements in franchises would lead to consistency across no-poach cases and would accurately capture the economic realities of these restrictions. Courts should consider franchisee inputs and labor when applying antitrust law rather than focusing solely on product markets.[217]

B. Quick-Look Standard

While a per se standard would be ideal for addressing franchise no-poach agreements, a quick-look approach would be an appropriate alternative if courts hesitate to adopt a per se rule.[218] The quick-look approach, which has been described as "the per se rule with a pause button," may help courts arrive at similar results as the per se approach in practice.[219] Unlike the rule of reason, conduct under the quick-look standard will be viewed as inherently suspect, but defendants may still rebut this presumption by showing procompetitive justifications for their conduct.[220] This is more plaintiff-friendly than rule of reason cases, the vast majority of which get dismissed at the first step.[221] The Open Markets Institute advocated for a presumption of illegality, as delineated in *California Dental Ass'n v. FTC*, in its amicus brief for the plaintiffs in *Deslandes*, and argued that McDonald's should not be allowed to rebut this presumption by showing procompetitive effects in downstream product markets, "but only in the same labor market in which the restraints operate."[222]

On the other hand, the DOJ's amicus brief in *Deslandes* demonstrated a strong preference for the per se approach because of a key factual difference between franchise no-poach agreements and the restraints discussed in *NCAA v. Board of Regents*, a major quick-look case: no-poach agreements are not essential for labor markets to function, whereas the agreements in *Board of Regents* were necessary for making the product of televised college sports available.[223] The district

217. *See* Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

218. *See, e.g.*, NCAA v. Alston, 594 U.S. 69, 89 (2021).

219. Leslie, *supra* note 33, at 13.

220. *Id.* at 11–12.

221. *See* Carrier, *supra* note 31, at 828–29.

222. Open Markets Amicus, *supra* note 198, at xvii.

223. U.S. Amicus Brief, *supra* note 173, at 32–33.

court's rationale for applying the rule of reason over the abbreviated quick-look standard in *Deslandes* rested on a lack of experience with franchise no-poach agreements.[224] However, the DOJ argued that this reasoning was erroneous because judicial experience is only relevant when applying "a *new* per se rule," not an *existing* one.[225] While a quick-look approach is certainly preferable over a rule of reason approach, its power to help plaintiffs has diminished since *Alston*.[226]

C. Courts Should Refrain from Determining the Legal Standard for Franchise No-Poach Agreements During the Class Certification Inquiry

Alternatively, I argue that courts should determine the legal standard to apply to an agreement (per se, quick look, or rule of reason) only after a class has been certified; that is, courts should make the determination of class certification (a procedural question) before digging into the substantive arguments set forth by the defendant. This approach would help plaintiff classes because courts would be more likely to certify classes if they are not muddling the predominance inquiry with the procompetitive justifications from a rule of reason analysis, as they do now. The predominance requirement is particularly difficult to satisfy for no-poach cases involving franchises because courts have been prematurely determining that franchise no-poach agreements are subject to a rule of reason analysis, as opposed to a per se or quick-look standard.[227] However, the inquiries that go into determining the applicable standard for a franchise no-poach case may "require careful economic analysis" and can be complex.[228] The court in *In re High-Tech Employee Antitrust Litigation* refrained from deciding the legal standard at the motion to dismiss stage, deeming this decision to be more appropriate for the summary judgment phase.[229] In Judge Koh's later decision to certify the class,

224. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2021 WL 3187668, at *7 (N.D. Ill. July 28, 2021) (citing NCAA v. Alston, 594 U.S. 69, 89 (2021)).

225. U.S. Amicus Brief, *supra* note 173, at 33 (quoting Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 349 n.19 (1982)).

226. Leslie, *supra* note 33, at 19 ("Before *Alston*, a consensus prevailed that the quick-look approach existed exclusively to condemn restraints, not exonerate them. The *Alston* opinion, however, distorts the quick-look apparatus." (footnotes omitted)).

227. *See supra* Section IV.A.

228. *See* Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 705 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

229. *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012).

she did not determine whether the per se or rule of reason standard would be used to assess the no-poach agreement between tech companies; instead, she certified the class based on a common antitrust violation, impact, and damages faced by the class.[230] It has been argued that courts' tendencies to weigh and resolve disputed merits issues at the class certification stage is "a task usually (and perhaps more appropriately) reserved for the jury."[231] Applying this idea to cases like *Deslandes* and *Conrad*, the legal standard should be determined during the summary judgment stage and not during the class certification stage, especially given that no-poach agreements in franchise contexts do not fall cleanly into one legal standard.

Although this approach goes against the trend among courts of evaluating the merits at class certification, it would be a viable way to make the class certification decision more procedural than substantive, consistent with the goals of Rule 23. While a predominance analysis involves some overlap with the merits of a plaintiff's claim, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."[232] In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, a major securities class action involving a heavy predominance inquiry, the inquiry into the merits was necessary "to ensure that the questions of law or fact common to the class will 'predominate over any questions affecting only individual members.'"[233] This type of merits-based inquiry differs from the standard of review inquiry in the antitrust context in terms of its relevance to predominance and common questions. In cases like *Amgen*, where the merits question related to the commonality of class members, the merits inquiries are inseparable from the procedural question of predominance. In cases like *Deslandes*, on the other hand, the merits inquiries relate to the defendant's conduct, not to the plaintiff class members, so the court does not need to decide the applicable legal standard before assessing predominance. Similarly, in *In re Initial Public Offerings Securities Litigation*, the Second Circuit conducted a merits-based inquiry into knowledge that a security price was affected by the alleged market manipulation.[234] Here, the court had a strong reason to inquire into the merits of the claim, since the individualized nature of the knowledge questions directly related to the inquiry of whether common questions predominated. The court

230. *See In re* High-Tech Emp. Antitrust Litig., 985 F. Supp. 2d 1167, 1226–27 (N.D. Cal. 2013).

231. Pet, *supra* note 6, at 161.

232. Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 465–66 (2013).

233. *Id.* at 467 (emphasis omitted) (citing FED. R. CIV. P. 23(b)(3)).

234. *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 43 (2d Cir. 2006).

found that lack of knowledge was too individualized of an inquiry and therefore did not satisfy predominance.[235]

The procompetitive justifications that arise in a rule of reason analysis should not be used to justify a deep merits inquiry at the class certification stage.[236] The text of Rule 23 does not authorize an inquiry into the merits of a case, so the procompetitive justifications must be pertinent to the class certification of a case in order to be relevant at this phase.[237] Although courts have shifted towards allowing merits inquiries during class certification, with the Supreme Court indicating that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'"[238] *Eisen v. Carlisle & Jacquelin*'s principle of avoiding unnecessary merits inquiries should be applied in franchise no-poach cases because determining the relevant antitrust standard is a merits inquiry that focuses on the defendants' conduct, not the commonality of the plaintiff class. The rigorous analysis that a court conducts in a class certification decision should preclude merits inquiries that are not necessary to determine a Rule 23 requirement, and in the spirit of the rule itself, which does not mention merits inquiries, courts should address merits issues only as necessary during class certification.[239] The district court in *Deslandes*, however, made the substantive decision to use the rule of reason at the class certification stage.[240] Rule 23 is supposed to focus on the plaintiff class, so the court should avoid conducting in-depth substantive inquiries when determining the procedural aspects of a case.

While the standard to satisfy Rule 23 is greater than a "mere pleading standard[,]"[241] the policy of the rule "is to favor maintenance of class actions."[242] Ideally, this should involve delaying

235. *Id.* at 43–44.

236. Chen, *supra* note 117, at 87–88 (citing Weisfeld v. Sun Chem. Corp., 84 F. App'x 257, 260 (3d Cir. 2004) (unpublished table decision)).

237. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

238. Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) (quoting Mercantile Nat'l Bank at Dall. v. Langdeau, 371 U.S. 555, 558 (1963)).

239. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316–17 (3d Cir. 2008).

240. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2021 WL 3187668, at *11 (N.D. Ill. July 28, 2021).

241. Conrad v. Jimmy John's Franchise, LLC, No. 3:18-CV-00133, 2021 WL 3268339, at *3 (S.D. Ill. July 30, 2021) (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011)).

242. *Id.* (quoting King v. Kan. City S. Indus., 519 F.2d 20, 25–26 (7th Cir. 1975)).

substantive inquiries about the applicable antitrust standard until after class certification has been determined because the policy of the rule leans toward a plaintiff-friendly application. Rule 23(b)(3) only sets out a requirement that the *questions* common to the class predominate; it does not require a showing that the answers to those questions will favor the class on the merits.[243] However, courts and defendants argue that in reality, the Rule 23(b)(3) predominance analysis "begins, of course, with the elements of the underlying cause of action."[244] While further merits-based inquiries are necessary to determine whether a class should be certified in some contexts, in *Weisfeld v. Sun Chemical Corp.*, the Third Circuit explicitly determined that the issue of whether the defendants' no-poach agreement was a per se violation or should be analyzed under the rule of reason was "irrelevant to whether the requirements of Rule 23(b)(3) [we] re met for class certification purposes."[245] Nonetheless, courts should adhere to the text and underlying policy behind Rule 23, balance the individualized questions with the common questions, consider the deterrence and compensation rationales for antitrust class actions, and determine whether the predominance requirement is satisfied accordingly, as opposed to prematurely using merits inquiries to find individualized issues and deny certification in franchise no-poach cases.[246]

V.
CONCLUSION

In summation, franchise no-poach agreements harm workers by depressing their wages and cementing labor market power, so they should be made easier to address via class action litigation. To accomplish this goal, courts should either presume that a per se or quick-look standard applies to these restraints or delay determining the legal standard for these restraints until after the class certification stage to avoid entangling substantive factual inquiries with the procedural question of predominance. Doing so would prevent a scrambling of procedural class certification standards and substantive antitrust standards, helping employees seek a fair opportunity to protect their interests as participants in the labor market.

243. Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 459 (2013).

244. Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011).

245. Weisfeld v. Sun Chem. Corp., 84 F. App'x 257, 260 (3d Cir. 2004) (unpublished table decision).

246. *See* Pet, *supra* note 6, at 171–72.