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Disparate Limbo: How Administrative Law Erased Antidiscrimination

ABSTRACT. Administrative law has a blind spot. It is blackletter doctrine that an agency's failure to consider the impacts of its conduct can lead to court invalidation of its decision as arbitrary and capricious. Judges have set aside agency action for failures to consider differential impacts on subgroups of business owners, park visitors, and animals. Yet when it comes to differential impact based on race or ethnicity, courts have, by and large, refused to entertain claims. If you are a Black farmer denied a federal loan, a Latinx schoolchild exposed to dangerous pesticides, a Latinx U.S. citizen denied a passport, or a Black renter suffering from housing discrimination, modern administrative law offers precious little recourse.

Our Article uncovers how modern administrative law erased antidiscrimination principles. This story begins with the Civil Rights Act of 1964, when Congress punted on questions about disparate impact and the relationship between Title VI and the Administrative Procedure Act (APA). But the plot thickened when the D.C. Circuit, in an opinion by then-Judge Ginsburg, held that § 704 of the APA barred civil rights plaintiffs from bringing an APA challenge because Title VI provided an alternative "adequate remedy."¹ Subsequent courts seized on the D.C. Circuit's § 704 dodge, using it to channel antidiscrimination claims away from the APA. Worse, courts have reflexively applied § 704 to oust civil rights claims, even after the Supreme Court's decision in *Alexander v. Sandoval* rendered Title VI demonstrably inadequate.

Antidiscrimination's erasure from the APA, built on a mistaken relic of statutory interpretation, has consigned civil rights plaintiffs to a paralyzing limbo. Plaintiffs, unable to make out the stringent intent showings required under increasingly inhospitable civil rights laws, are also barred from mounting APA claims against agency discrimination for violations of administrative law's baseline guarantee of nonarbitrariness.

Remedying disparate limbo is urgently needed, particularly as the nation enters a new round of soul-searching on the government's role in racial stratification, and as agencies at all levels take up new digital-governance tools that raise vexing bias concerns. Yet understanding the current state of disparate limbo also holds vitally important lessons about the broader sweep of modern administrative law and its relationship to the American civil rights struggle. Indeed, doctrinal developments that are core to the field – most notably the emergence throughout the 1970s and 1980s of muscular "hard look" review and a more intrusive judicial role in administrative governance –

1. 5 U.S.C. § 704 (2018).



may only have been feasible because courts simultaneously excised divisive issues of race from administrative law's purview. Our account isolates a critical contingent moment when civil rights and administrative law diverged. In so doing, we place race and the scrubbing of antidiscrimination from the APA at the center of the construction of modern administrative law's empire.

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INTRODUCTION

If you are a local broadcaster and a new broadcasting policy will force you to buy expensive “bleeping”² equipment you cannot afford, you can ask the courts to protect you from the differential impacts of the federal agency’s policy.³ If you are a kayaker in a federally-managed recreation area, and the agency’s new management plan will introduce noisy and disruptive jetboaters, you can ask the courts to reconsider the plan’s impacts on your subgroup of “non-motorized” watercraft users.⁴ And if you are a Hawaiian dolphin in a small pod, rather than a large pod, you can rest assured that the courts will consider harms from sonar to your subpopulation, rather than lumping you in with all the other dolphin pods.⁵ In cases like these, courts will entertain claims⁶ under the Administrative Procedure Act (APA) by subgroups that were potentially negatively impacted by an agency’s facially neutral rule or policy.

Not so if you are a member of a racial, ethnic, or gender group. If you are a human⁷ member of a protected class, you will face a steeper climb when you

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2. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 558 (2009) (Breyer, J., dissenting) (arguing that the new policy by the Federal Communications Commission (FCC) disproportionately impacts local broadcasters because “the costs of bleeping/delay systems . . . place that technology beyond the financial reach of many smaller independent local stations”).
 3. See *id.* at 556 (arguing that the FCC’s rule was arbitrary and capricious because “the FCC failed to consider the potential impact of its new policy upon local broadcasting coverage”).
 4. See *Hells Canyon All. v. U.S. Forest Serv.*, 227 F.3d 1170, 1172-73 (9th Cir. 2000), *as amended* (Nov. 29, 2000) (“This appeal brings to mind the maxim that you can please all of the people some of the time, and some of the people all of the time, but you can’t please all of the people all of the time. At issue are the regulations for motorized water craft adopted by the United States Forest Service (‘Forest Service’) for portions of the Snake River within the diverse and spectacular area known as the Hells Canyon National Recreation Area. Balancing the competing and often conflicting interests of motorized water craft users, including jetboaters, and non-motorized water craft users, such as rafters and kayakers, is no easy task.”).
 5. See *Nat. Res. Def. Council v. Pritzker*, 62 F. Supp. 3d 969, 1017 (N.D. Cal. 2014) (holding that the Navy acted arbitrarily and capriciously when it used “basin-wide pelagic numbers” rather than smaller subpopulation numbers when estimating its impact on Hawaii bottlenose dolphins), *rev’d and remanded*, 828 F.3d 1125 (9th Cir. 2016).
 6. To be sure, not all subgroups necessarily *win* their Administrative Procedure Act (APA) claims, and indeed, the courts ultimately ruled against the local broadcasters and nonmotorized watercraft users. Yet administrative law readily entertained these subgroups’ differential-impact claims under garden-variety arbitrary-and-capricious review. This stands in stark contrast to the APA’s treatment of claims brought by protected classes, whose disparate-impact claims are often channeled away from the APA.
 7. Many of our APA cases involve animal subpopulations, such as different species of fish or different groups of grizzly bears. And we want to acknowledge, at the outset, that it can be awkward and potentially dehumanizing to compare subgroups of animals and subgroups of

assert an antidiscrimination claim under the APA.⁸ While the APA readily entertains some kinds of claims about “differential impacts” – impacts on *small* broadcasters,⁹ *nonmotorized* watercraft users,¹⁰ or *small* pods of bottlenose dolphins¹¹ – judicial interpretations of the APA have mostly stymied claims about racial differential impact.¹² Disparate impact on members of more conventional protected classes – for instance, Black farmers or Latinx¹³ schoolchildren – is curiously absent from administrative law.¹⁴

How did we get here? How did we arrive at a place where the APA will consider claims from subgroups like kayakers and small dolphin pods, but not subgroups like Black farmers¹⁵ or Latinx schoolchildren?¹⁶ The answer requires a deep excavation of the history of the Civil Rights Act of 1964 and judicial interpretation of the relationship between civil rights and the APA, particularly

humans. It is discomfiting (and it should be discomfiting) to realize that, in many cases, the APA grants stronger legal protections to fish subspecies than it does to, say, Latinx schoolchildren.

8. See, e.g., *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009) (rejecting the APA claims of minority farmers denied loans by the U.S. Department of Agriculture (USDA)); *Hinojosa v. Horn*, 896 F.3d 305 (5th Cir. 2018) (rejecting the APA claims of U.S. citizens born along the Mexican border and denied passports); *Garcia v. McCarthy*, No. 13-CV-03939, 2014 WL 187386 (N.D. Cal. Jan. 16, 2014) (rejecting the APA claims of Latinx schoolchildren who were disproportionately exposed to dangerous pesticides), *aff'd*, 649 F. App'x 589 (9th Cir. 2016).
9. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 527-28 (2009).
10. *Hells Canyon All. v. U.S. Forest Serv.*, 227 F.3d 1170, 1172-73 (9th Cir. 2000).
11. *Nat. Res. Def. Council v. Pritzker*, 62 F. Supp. 3d 969, 1017 (N.D. Cal. 2014), *rev'd and remanded*, 828 F.3d 1125 (9th Cir. 2016).
12. Throughout the paper, we use the term “disparate impact” to refer to claims involving attributes conventionally protected by civil rights law, like race, gender, national origin, and disability. We use the term “differential impact” more generally to encompass disproportionate impact on a subgroup that may not be a protected category by convention. We do so to avoid confusion between “disparate impact” claims recognized under antidiscrimination law and “differential impact” cases that may be recognized under arbitrary-and-capricious review.
13. Throughout this paper, we use the term “Latinx” rather than “Latino” because the latter term excludes nonbinary and transgender people, among others. However, we recognize that “Latinx” can be difficult to pronounce in Spanish and that many Spanish speakers do not identify as such. For now, we have settled upon a convention of using “Latinx” when writing for English-speaking audiences, as here.
14. Our argument focuses on racial disparate impact, but it also highlights how the APA ignores disparate impact to subgroups based on gender, disability, national origin, and other protected classes.
15. See *Garcia v. Vilsack*, 563 F.3d 519, 519 (D.C. Cir. 2009) (rejecting the APA claims of minority farmers denied loans by USDA).
16. *Garcia v. McCarthy*, No. 13-CV-03939, 2014 WL 187386 (N.D. Cal. Jan. 16, 2014), *aff'd*, 649 F. App'x 589 (9th Cir. 2016).

§ 704's ouster of claims when there is already an "adequate remedy."¹⁷ Performing that spadework, we examine the legislative struggles surrounding the Civil Rights Act, then subsequent APA cases,¹⁸ and finally the Supreme Court's more recent disparate-impact jurisprudence.¹⁹ By carefully tracing this statutory and doctrinal evolution, we show how the APA erased race from its purview. When agencies act in ways that have significantly different effects along racial or ethnic lines, a claim to that effect is cognizable under neither administrative law nor antidiscrimination law. Civil rights plaintiffs sit in what we call "disparate limbo," unable to make out the stringent intent showings required under the nation's increasingly inhospitable civil rights laws, but simultaneously barred from mounting claims invoking the APA's baseline guarantee of nonarbitrariness.

Understanding the many twists and turns of disparate limbo's evolution is important to pinpointing the ways courts, Congress, or the President could remedy the situation. But our project is also a larger one – not merely descriptive and prescriptive, but also richly explanatory. If correct, our origin story can explain how the erasure of race *constructed* modern administrative law. Doctrinal developments that sit at the field's core – most notably the emergence of "hard look" review and a more intrusive judicial role in administrative governance – may only have been feasible because courts excised differential impact by race from administrative law's domain. And this erasure allowed courts to harden their review, while simultaneously steering clear of increasingly divisive civil rights questions that imperiled courts' growing institutional power and their efforts to cabin and contain the modern administrative state. Our account thus places race – and the scrubbing of antidiscrimination from the APA – at the center of the construction of modern administrative law's empire.

That wider reckoning is long overdue. As the struggle over the future of the American administrative state has accelerated in recent years, scholars have focused attention on other pivotal moments in the creation of modern administrative law, particularly the 1930s and 1940s, when an alphabet soup of agencies sprang up alongside new regulatory powers and legal constraints.²⁰ Other key

17. 42 U.S.C. §§ 2000a to 2000h-6 (2018); 5 U.S.C. § 704 (2018).

18. See, e.g., *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990); *Council of & for the Blind of Del. Cnty. Valley, Inc. v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983).

19. Most notably, we focus on the implications of *Alexander v. Sandoval*, 532 U.S. 275 (2001).

20. See generally BLAKE EMERSON, *THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* (2019) (tracing how progressive ideals animated New Deal administration in particular); DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014) (describing the role lawyers played in constructing the administrative state and imbuing it with values like due process and individual rights);

contributions step back further in time, to the nineteenth century and the birth of a professional civil service,²¹ or earlier still to the Founding, when the American regulatory state was a glimmer in the eye of modern state-builders,²² in order to understand administrative law's evolution and present-day legitimacy.

KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972* (2016) (describing the state- and local-level bureaucracies that administered New Deal programs and exploring the tensions these programs raised with respect to localism and federalism); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 *STAN. L. REV.* 591 (2010) (demonstrating how liberal Justices deployed the standing doctrine to insulate New Deal administrative agencies from judicial review); Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 *HARV. L. REV.* 1 (2017) (describing President Franklin D. Roosevelt's New Deal and the birth of the APA in 1946); Reuel E. Schiller, *The Era of Deference: Courts, Expertise and the Emergence of New Deal Administrative Law*, 106 *MICH. L. REV.* 399 (2007) (discussing how FDR-appointed judges created a "model of judicial deference" that sharply limited the role of the courts in overseeing the administrative state); Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in *TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II* 185 (Daniel R. Ernst & Victor Jew eds., 2002) (arguing that World War II diminished Americans' trust in the administrative state and thus impelled greater judicial control over agencies); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 *HARV. L. REV.* 718, 732-33 (2016) (reviewing ERNST, *supra*) (identifying a "rule of lawyers" whereby agencies developed a "model of lawyerly administration"). Interestingly, the New Deal's administration did not intersect with race as much as one might expect because key New Deal programs excluded African Americans. See generally JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1995) (arguing that antipoverty campaigns from FDR to President Johnson failed to address racial inequality and that this omission undermined the war on poverty).

21. See, e.g., DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928* (2001) (describing how middle-level officials in increasingly professionalized bureaucracies built coalitions with outside groups to bolster autonomy from political overseers); WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (describing state and local regulatory regimes in the period from the Revolution to the Civil War, and arguing, contra the "myth of liberal individualism," that American society of that time was in fact highly regulated); NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940* (2013) (tracing the "salarization" of the professional civil service from the late nineteenth century through the early twentieth century, and arguing that salarization helped legitimate the early administrative state); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* (1982) (examining the rise of the administrative state through historical data on institutions).
22. See, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (tracing the origins of administrative-law principles to the medieval and early-modern English periods, and arguing that the Founders of the U.S. Constitution rejected administrative-law principles); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012) (describing Congress's early delegations to

Far fewer have reckoned with race as a central explanation for administrative law's modern-day form.²³ Indeed, race is often glossed over in scholarship and teaching,²⁴ and scholars have only just begun to explore the ways in which racism is deeply entrenched in specific areas like immigration law²⁵ and Indian

administrative agencies from the 1780s through the 1880s, and arguing that administrative-law principles were established long before the enactment of the 1930s New Deal). Consider in this regard a recent profusion of historical work on nondelegation. See, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

23. See, e.g., Jennifer Alexander, *Avoiding the Issue: Racisms and Administrative Responsibility in Public Administration*, 27 AM. REV. PUB. ADMIN. 343, 344 (1997) (arguing that “public administrators” have ignored race and calling on them to analyze “the racial dynamics within their particular institution”); Karen M. Tani, *Administrative Constitutionalism at the “Borders of Belonging”*: *Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603, 1603-04 (2019) (noting the “thin empirical foundation” of studies of government administration and “marginalized and non-elite populations”); Bernard Bell, *Race and Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Aug. 10, 2020), <https://www.yalejreg.com/nc/race-and-administrative-law-by-bernard-bell> [<https://perma.cc/6V4C-23J4>] (“Most of administrative law scholarship, and certainly the most widely cited and acclaimed scholarly contributions to the field, appear to be color-blind.”); Peter L. Strauss, *Citizens to Preserve Overton Park—Race-Inflected Below Its Surface*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (July 16, 2020), <https://www.yalejreg.com/nc/citizens-to-preserve-overton-park-race-inflected-below-its-surface-by-peter-l-strauss> [<https://perma.cc/8SXF-QLHY>] (“I learned then of a lengthy political struggle between the route’s proponents . . . and its opponents, those (White) citizens whose homes would be taken by the route or affected by its noise and fumes. The Court had never learned of those struggles or of the impact of the circumferential route’s impact on Black neighborhoods . . .”).
24. See, e.g., Joy Milligan & Karen Tani, *Seeing Race in Administrative Law: An Interdisciplinary Perspective*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Sept. 16, 2020), <https://www.yalejreg.com/nc/seeing-race-in-administrative-law-an-interdisciplinary-perspective-by-joy-milligan-and-karen-tani> [<https://perma.cc/6EQJ-NJSC>] (“[A]dministrative law, as traditionally taught and studied, often avoids confronting questions of race and racial inequality.”).
25. See, e.g., ESTELLE T. LAU, PAPER FAMILIES: IDENTITY, IMMIGRATION ADMINISTRATION, AND CHINESE EXCLUSION 1-5 (2006) (recounting the effects of the Chinese Exclusion Act on Chinese American communities and analyzing attempts by immigrants to create “paper families” to bypass immigration laws); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 1-4 (2000) (arguing that the early legal struggles between Chinese immigrants, immigration agencies, and federal courts laid the foundations for American immigration law); Kitty Calavita, *The Paradoxes of Race, Class, Identity, and “Passing”*: *Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 LAW & SOC. INQUIRY 1, 2 (2000) (studying the enforcement of the Chinese Exclusion Act, and arguing that enforcement by immigration officers was based on assumptions about race, class, and identity); Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 5 (2002) (arguing that the Supreme Court’s early immigration jurisprudence was

law,²⁶ or to consider the possibility that discrimination is endemic in core agency processes, from adjudication²⁷ to notice-and-comment rulemaking²⁸ to cost-

likely infected with racism, and noting that the “Court appears to have envisioned Asian immigration as a form of war that justified extreme governmental intervention”); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2134-38 (2014) (arguing that *jus sanguinis* laws of citizenship were motivated by “racially nativist policies” that aimed to “deny the citizenship claims of nonwhite children”); Raquel Muñoz, *DACA Through the Critical Systems Thinking (CST) Lens: Unpacking Racialization in Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Aug. 18, 2020), <https://www.yalejreg.com/nc/daca-through-the-critical-systems-thinking-cst-lens-unpacking-racialization-in-administrative-law-by-raquel-muniz> [<https://perma.cc/EZ5F-BMS5>] (“[DACA] offers a case through which to examine the racialized nature of administrative law.”); Carrie Rosenbaum, *Unequal Protection in Immigration Law*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (July 22, 2020), <https://www.yalejreg.com/nc/unequal-protection-in-immigration-law-by-carrie-rosenbaum> [<https://perma.cc/F89P-4NJB>] (“Immigration law has contributed to shaping and reinforcing the construct of race more than any other area of administrative law.”).

26. See, e.g., STEPHEN J. ROCKWELL, INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY 3 (2010) (disputing the conventional narrative of a small and rudimentary nineteenth-century administrative state, and instead documenting the “vibrant, complicated federal bureaucracy” that managed Indian affairs and westward expansion throughout the nineteenth century); Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1633 (2019) (discussing the Northwest Ordinance, in which Congress “delegated executive, legislative, and judicial power” to federal officials in charge of the Northwest Territory, and its implications for administrative law); Craig Green, *Indian Affairs and Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Aug. 25, 2020), <https://www.yalejreg.com/nc/indian-affairs-and-administrative-law-by-craig-green> [<https://perma.cc/U6LM-AWB5>]; Victoria Sutton, *Native Americans and Discriminatory Administration with Facially Neutral Rules*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (July 15, 2020), <https://www.yalejreg.com/nc/native-americans-and-discriminatory-administration-with-facially-neutral-rules-by-victoria-sutton> [<https://perma.cc/S59N-PHJG>].
27. See, e.g., Elaine Golin, Note, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532, 1534 (1995) (discussing gender and racial bias in adjudication by administrative-law judges and proposing “carefully structured agency complaint resolution procedures” to help address these problems); Steph Tai, *Racism and Informal Agency Adjudicatory Decisions, or, Is Racism Arbitrary and Capricious?*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Aug. 5, 2020), <https://www.yalejreg.com/nc/racism-and-informal-agency-adjudicatory-decisions-or-is-racism-arbitrary-and-capricious-by-steph-tai> [<https://perma.cc/Q39Q-5EFJ>] (arguing that arbitrary-and-capricious review may permit “racial disparities in federal (and state) agency distribution of grants, loans, and licenses”).
28. See, e.g., Dorothy M. Daley & Tony G. Reames, *Public Participation and Environmental Justice: Access to Federal Decision Making*, in FAILED PROMISES: EVALUATING THE FEDERAL GOVERNMENT’S RESPONSE TO ENVIRONMENTAL JUSTICE 143 (David M. Konisky ed., 2015) (discussing agencies’ “uneven” efforts to increase public participation from minority and low-income groups in environmental rulemaking); Gwendolyn McKee, *Noticing Notice*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Aug. 3, 2020), <https://www.yalejreg.com/nc/noticing-notice-by-gwendolyn-mckee> [<https://perma.cc/8Z2Y-2475>] (noting that the process of rule-making, which involves publication in the Federal Register, is “a system that specifically rewards insiders with the knowledge and understanding to take part in it”).

benefit analysis.²⁹ Only environmental-justice scholarship has considered administrative law's neglect of antidiscrimination in any substantial detail or highlighted the gap between Title VI and the APA.³⁰ Finally, a small but growing body of work traces how particular agencies, entrusted with regulatory authority in housing, labor and employment, transportation, and telecommunications, shaped key civil rights protections, including constitutional ones.³¹

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29. See, e.g., James Goodwin, *Cost-Benefit Analysis Is Racist*, CTR. FOR PROGRESSIVE REFORM, <http://progressivereform.org/our-work/regulatory-policy/cost-benefit-analysis-racist> [https://perma.cc/GXF5-A3AE] (arguing that cost-benefit analysis is “an effective conduit for injecting racism into regulatory decision making”); Melissa J. Luttrell & Jorge Roman-Romero, *Regulatory (In)Justice: Racism and CBA Review*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Oct. 27, 2020), <https://www.yalejreg.com/nc/regulatory-injustice-racism-and-cba-review-by-melissa-j-luttrell-and-jorge-roman-romero> [https://perma.cc/9E9D-2WTX] (arguing that cost-benefit analysis in agency risk regulation “tends to generate racially biased outcomes”).
30. See, e.g., Christopher D. Ahlers, *Race, Ethnicity, and Air Pollution: New Directions in Environmental Justice*, 46 ENV'T L. 713, 728-29 (2016); Rachel Calvert, *Reviving the Environmental Justice Potential of Title VI Through Heightened Judicial Review*, 90 U. COLO. L. REV. 867, 880 (2019); Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENV'T L. 285, 317 (1995) (“In general, two types of suits can be filed under Title VI: suit against the recipient of federal funds, or a suit against the funding agency itself. The first type of suit is much easier to undertake because courts’ interpretations of Title VI and the Administrative Procedure Act . . . have limited the availability of actions against funding agencies.”); Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 B.C. ENV'T AFF. L. REV. 27, 39 (2004) (“Currently, individuals are not entitled to bring an action under the Administrative Procedure Act . . . to compel federal agencies to enforce their Title VI regulations, leaving little recourse for challenging EPA’s lethargy with Title VI complaints. Courts have reasoned that APA suits are unnecessary because plaintiffs have the option of directly challenging, in court, the recipients of funds who are violating Title VI. But, in light of the Supreme Court’s holding in *Sandoval*, the rationale for such decisions no longer exists, opening up the possibility that courts may begin to allow challenges under the APA.”).
31. See, e.g., WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 31 (2010) (recounting the role of agencies in elaborating constitutional and statutory protections against discrimination on the basis of sex and sexual orientation); RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 10 (2007) (recounting the role of the early Civil Rights Division of the U.S. Department of Justice (DOJ) in pushing equal protection toward integration rather than economic rights); SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 47 (2014) [hereinafter LEE, *THE WORKPLACE CONSTITUTION*] (arguing that agencies played an important and mostly overlooked role in shaping Americans’ constitutional rights in the workplace); BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920* xiii-xv (2001) (tracing the litigation that emerged from the expansion of interstate railroads, and arguing that these legal battles fomented the use of state regulatory power to protect individuals); David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071, 1071 (2011) (describing the state-level employment-discrimination laws that

All of these lines of inquiry are worthy and welcome, particularly as the nation undergoes a new round of soul-searching in its continuing efforts to live up to its ideals.³² No previous scholars, however, have seriously grappled with racism's more concrete doctrinal roots within the APA.³³ We do so here, identifying the specific cases and APA mechanisms, namely APA § 704, that courts have used to scrub antidiscrimination from American administrative law. Our account, centered on the 1970s through the 1990s, helps chart a new course for thinking

preceded the Civil Rights Act of 1964, and examining the effects of the choice by legislators and civil rights groups to vest primary implementation authority in agencies rather than courts); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010) [hereinafter Lee, *Race, Sex, and Rulemaking*] (describing “administrative constitutionalism,” or the process whereby agencies interpret the Constitution, via case studies of equal employment rulemaking at the FCC and the Federal Power Commission); Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924, 924 (2020) [hereinafter Milligan, *Plessy Preserved*] (arguing that federal housing administrators preserved a separate-but-equal doctrine of segregation throughout the twentieth century); Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847, 847-48 (2018) [hereinafter Milligan, *Subsidizing Segregation*] (recounting how federal education officials declined to enforce the Equal Protection Clause and continued to fund racially segregated schools, even post-*Brown v. Board of Education*, and arguing that an agency’s institutional design and mandate affects how that agency interprets the Constitution); Sidney A. Shapiro, *United Church of Christ v. FCC: Private Attorneys General and the Rule of Law*, 58 ADMIN. L. REV. 939, 940-41 (2006) (arguing that “private attorneys general” can help promote the rule of law when they challenge agency decisions favorable to regulated entities, and citing the *United Church of Christ* case to demonstrate how private attorneys general challenged racism in telecommunications administration (citing Off. of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Off. of Communications of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969))); Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 121 (2014) (disputing one popular scholarly view about the creation of the DOJ, which held that “Congress created the DOJ to enforce Reconstruction and ex-slaves’ civil rights,” and instead arguing that the DOJ’s creation was driven by budget-cutting concerns since the DOJ bill eliminated about one third of federal legal staff). For an insightful overview of work focused on “administrative constitutionalism,” see Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1703-05 (2019).

32. See, e.g., Michelle Alexander, Opinion, *America, This Is Your Chance*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/opinion/george-floyd-protests-race.html> [<https://perma.cc/S82Z-SNZ4>] (“Millions of us watched a black man in Minnesota lie on the ground for nearly nine minutes, begging for his life and calling out to his dead mother, while a white police officer pressed his knee into his neck, killing him, with his hand casually resting in his pocket—all in broad daylight in front of people screaming for the officer to stop.”).
33. A forthcoming article by Joy Milligan, which we cite repeatedly below, offers a more historically focused complement to the work we attempt here. Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid*, U. CHI. L. REV. (forthcoming 2021), <https://ssrn.com/abstract=3849599> [<https://perma.cc/P5KF-EQXD>].

about the evolution of the American regulatory state by isolating a critical contingent moment when civil rights and administrative law diverged.

Our Article proceeds in four Parts. Part I lays out the core puzzle by identifying a curious double standard. While administrative law readily acknowledges “differential impact”³⁴ on subgroups, such as distinct types of animals, park-goers, or business owners, the APA has proven less hospitable to claims of disparate impact on racial subgroups and other conventional protected classes.³⁵ Courts often turn to one administrative-law provision, APA § 704, to channel antidiscrimination claims away from the APA on the theory that some other statute provides an “adequate” alternative remedy.³⁶

Part II turns to the origins of disparate limbo. We examine the history of the Civil Rights Act and identify an “original sin,” as it were — a critical set of textual ambiguities regarding the interaction between the APA and Title VI, particularly where a federal agency oversees subfederal fundees alleged to be engaged in unlawful discrimination.³⁷ Congress never clarified the relationship between the two statutes, instead punting difficult questions to agencies and courts. These unanswered questions had far-reaching implications, for they spawned a line of APA precedents unfriendly to civil rights, anchored by the D.C. Circuit’s *Women’s Equity* case (sometimes referred to as the *Adams* case). Penned by then-Judge Ginsburg, *Women’s Equity* ousted civil rights claims under § 704 and channeled antidiscrimination away from the APA. Judge Ginsburg’s opinion may have made sense at the time given that the Supreme Court had found in Title VI a private right of action — an arguably robust alternative to an APA challenge.³⁸ But

34. As we noted earlier, we use the term “differential impact” to refer to the general case when there is a disproportionate impact on a subgroup, even when antidiscrimination law has not conventionally deemed that subgroup to be a protected class. See *supra* note 12.

35. Just as the APA channels away antidiscrimination claims that involve race, the APA has also channeled away antidiscrimination cases based on disability, gender, and other protected classes. For cases on disability, see, for example, *American Disabled for Attendant Programs Today v. U.S. Department of Housing & Urban Development*, 170 F.3d 381, 391 (3d Cir. 1999), which dismissed the claims of a disability-rights group because it “ha[d] not met the requirement under section 704”; *West v. Spellings*, 480 F. Supp. 2d 213, 217 (D.D.C. 2007), which dismissed a discrimination claim by a student with a disability because he had an alternative “right of action [that] is adequate to redress discrimination”; and *Sherman v. Black*, 510 F. Supp. 2d 193, 198 (E.D.N.Y. 2007), *aff’d*, 315 F. App’x 347 (2d Cir. 2009), which dismissed claims of disability-related discrimination because an alternative “adequate” right “precludes a remedy under the APA.”

36. APA § 704 makes agency actions reviewable if “there is no other adequate remedy in a court.” 5 U.S.C. § 704 (2018).

37. See Civil Rights Act of 1964, 42 U.S.C. § 2000d (2018) (Title VI). Title VI prohibits discrimination in any program that receives federal funds.

38. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709, 716 (1979) (finding an implied private right of action in Title VI and Title IX).

the Court's subsequent revocation³⁹ of an implied right of action to assert disparate-impact claims under agencies' Title VI implementing regulations raises serious questions about whether *Women's Equity* still holds, now that the gap between Title VI and an APA challenge has inarguably widened to a chasm. Courts have also problematically extended *Women's Equity* beyond its original setting, which involved federal-agency supervision of subfederal actors⁴⁰ (labeled "subfederal" cases below), to cases that involve only federal agencies (or "federal" cases) and so raise unique concerns.

Whether or not courts are willing to revisit these issues, *Women's Equity* has already cast a long shadow over the field. The § 704 maneuver deprived administrative law of any significant tradition of considering antidiscrimination claims via arbitrary-and-capricious review, despite APA § 706 being a natural vehicle for considering these kinds of claims. Moreover, it did so at a key moment in administrative law's development, just as courts minted newly muscular forms of judicial review of agency action.

Part III develops the legal and policy implications that follow from our account. Using our mapping of multiple statutory and doctrinal wrong turns throughout the 1980s and 1990s, we offer some interventions that could help alleviate disparate limbo without merely importing Title VI into the APA wholesale. At a minimum, courts should revisit *Women's Equity* and the § 704 maneuver in light of *Sandoval's* neutering of private enforcement under Title VI.⁴¹ We also suggest legislative and executive mechanisms to subject agency actions that

39. See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (finding that there is no implied private right of action in Title VI for disparate-impact claims and limiting Title VI's private right of action to disparate-treatment claims only).

40. We discuss the "federal" and "subfederal" categories in more detail in Section III.A.2. While our discussion of the "subfederal" category mostly involves cases with state or local governmental agencies receiving federal funds, the "subfederal" category also covers private entities that receive federal funding, since Title VI extends to private entities. See C.R. Div., *Title VI Legal Manual*, U.S. DEP'T JUST. 20 (Jan. 11, 2001) [hereinafter *Title VI Legal Manual*], <https://web.archive.org/web/20160501163007/https://www.justice.gov/sites/default/files/crt/legacy/2011/06/23/vimanual.pdf> [<https://perma.cc/K77Y-3L2R>] (describing a "recipient" for Title VI purposes as a public or private entity receiving federal funds).

41. Nicholas Bagley and Eli Savit made a similar point in 2018, when they argued that *Sandoval* could help open a path for disparate-impact plaintiffs to bring APA challenges. See Nicholas Bagley & Eli Savit, *Disparate Impact and the Administrative Procedure Act*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (May 10, 2018), <https://www.yalejreg.com/nc/disparate-impact-and-the-administrativeprocedure-act> [<https://perma.cc/A9NR-UHRH>] ("*Sandoval* changed all that by eliminating a private right of action for disparate impact claims. Absent that 'special, alternative remedy,' an APA claim to enforce an agency's compliance with its Title VI regulations should now be viable."). For more discussion, see *infra* text accompanying notes 352-376.

may have a disparate impact to meaningful judicial review and public ventilation. Adopting one or more of these fixes, we submit, is vitally important now. But fixing disparate limbo will only grow in importance in the years to come. As just one example, agencies at all levels of government, including subfederal entities that many federal agencies oversee, are adopting new automated tools to perform the work of governance.⁴² These new digital tools bring heightened risk of bias that, because it is embedded deep in code or data, may not be cognizable under disparate treatment or other intent-based conceptualizations of discrimination.

Part IV steps back and places our account within the arc of administrative law's history. The post-Civil Rights Act years were foundational decades for modern administrative law, yielding *Overton Park*,⁴³ *State Farm*,⁴⁴ *Nova Scotia*,⁴⁵ and other seminal APA cases in which courts progressively inserted themselves into administrative governance. Yet those same decades also gave us the now-dominant interpretation of APA § 704, *Women's Equity*, and the channeling away of APA and antidiscrimination claims. Modern administrative doctrine was invigorated right when courts scrubbed antidiscrimination from the APA. This leads to a provocative implication: if courts had not engaged in the § 704 maneuver to distance administrative law from a third rail of U.S. politics, administrative doctrine might never have taken the form it did. Modern administrative law's empire, in other words, may have been built upon a deliberate distancing from one of the most legally and politically divisive issues of its day: the American color line.

I. THE PUZZLE OF DISPARATE LIMBO

A. "Differential Impact" Claims Under the APA

Can agency action be "arbitrary and capricious" because it generates a differential impact for a particular subgroup?⁴⁶ The case law says yes. In the past, courts have found arbitrary-and-capricious violations when agencies failed to

42. See *infra* notes 126-130 and accompanying text.

43. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (discussing the standard for judicial review and noting the presumption of reviewability), *abrogated by* *Califano v. Sanders*, 430 U.S. 99 (1977).

44. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 34 (1983) (applying arbitrary-and-capricious hard-look review).

45. *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251-52 (2d Cir. 1977) (holding that agencies must disclose the evidentiary basis for their decisions).

46. 5 U.S.C. § 706 (2018).

consider differential impacts on subgroups of healthcare beneficiaries,⁴⁷ small business owners,⁴⁸ small dolphin pods,⁴⁹ and more. In multiple areas of law, courts have invalidated agency action as arbitrary and capricious when the agency failed to consider differential impact.⁵⁰

In environmental law, for example, differential-impact cases abound. Courts have found arbitrary-and-capricious violations based on differential impacts to “individual species of fish,”⁵¹ oysters in the Long Island Sound,⁵² and adult and subadult Yosemite toads.⁵³ These cases usually follow a similar template. A federal agency applies a facially neutral rule to a large population, yet the agency fails to consider the differential impact upon a specific subgroup of that population – be it a subgroup of fish, dolphins, crustaceans, toads, or others. Upon an APA challenge, the court finds that the agency’s failure to consider the subgroup constitutes an arbitrary-and-capricious violation under APA § 706.⁵⁴

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47. *Stewart v. Azar*, 313 F. Supp. 3d 237, 263 (D.D.C. 2018) (invalidating as arbitrary and capricious a U.S. Department of Health and Human Services (HHS) action because the agency failed to consider the relevant factors, including “the estimated 95,000 people who would lose coverage”).
48. *See, e.g., Harlan Land Co. v. U.S. Dep’t of Agric.*, 186 F. Supp. 2d 1076, 1097 (E.D. Cal. 2001) (remanding the agency’s rule and instructing the agency to consider the rule’s “economic impact” on “small businesses”).
49. *Nat. Res. Def. Council v. Pritzker*, 62 F. Supp. 3d 969, 1017 (N.D. Cal. 2014), *rev’d and remanded*, 828 F.3d 1125 (9th Cir. 2016).
50. A note on our terminology: an agency may fail to consider differential impact, or an agency may generate differential impact. For expositional simplicity, we will use the phrase “generate differential impact” as a shorthand where the distinction is unnecessary.
51. *Pac. Rivers Council v. U.S. Forest Serv.*, 668 F.3d 609, 630-31 (9th Cir. 2012), *withdrawn and superseded on denial of reh’g en banc*, 689 F.3d 1012 (9th Cir. 2012), *vacated*, 570 U.S. 901 (2013) (holding that the agency’s decision was arbitrary and capricious because it “‘entirely failed to consider’ environmental consequences . . . on individual species of fish” (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008))).
52. *Connecticut v. U.S. Dep’t of Com.*, No. 04-1271, 2007 WL 2349894, at *1-2 (D. Conn. Aug. 15, 2007) (“The Secretary failed to address an important aspect of the problem because he effectively ignored the adverse effects on oysters . . .”).
53. *High Sierra Hikers Ass’n v. Weingardt*, 521 F. Supp. 2d 1065, 1085 (N.D. Cal. 2007) (ruling that the Forest Service “entirely failed to consider an important aspect of the problem” because it “almost completely ignored the habitat needs of subadult and adult Yosemite Toads”).
54. A critic might quibble that some cases are styled as more traditional arbitrary-and-capricious claims for failure to examine an important aspect of a problem, rather than differential-impact cases. In the dolphin-pod case, for example, the court ruled that the agency was arbitrary and capricious when it failed to use newer data, which broke out dolphins into separate pods, and instead used the older data, which grouped all the dolphins into one large population. *Pritzker*, 62 F. Supp. 3d at 1013-14. But the failure to use the new data is arbitrary and capricious pre-

Some of the environmental cases create a complicating wrinkle: the presence of organic statutes, such as the National Environmental Policy Act (NEPA), which sometimes require agencies to consider impacts at the species or subspecies level—thus fortifying the APA’s concerns about the arbitrary treatment of groups.⁵⁵ We discuss this complication in more detail in Part III because the presence of organic statutes may in fact point us toward a potential legislative intervention. But for now, the more general point remains: policies that generate differential impacts on distinct subgroups may be arbitrary and capricious under APA § 706.

This makes sense, for reasoned decision-making under the APA often involves difficult trade-offs between different subgroups. For example, in one case, the Ninth Circuit considered an agency plan to preserve a wildlife area by regulating its use by kayakers, rafters, jetboaters, and other motorized and nonmotorized users.⁵⁶ As the judge put it, “the agency was well aware of conflict between motorized and nonmotorized users, and made a reasoned and reasonably informed decision to . . . reduce that conflict.”⁵⁷ While the court ultimately upheld the agency’s plan against an arbitrary-and-capricious challenge, the court keenly acknowledged the difficulty of balancing the competing interests of different subgroups: either the kayakers or the jetboaters would be unhappy with its decision.⁵⁸

The Ninth Circuit’s grappling with differential impact is not surprising because, according to public-choice theory, regulation is primarily driven by the challenges of distributing costs and benefits across different segments of society.⁵⁹ Distributive questions thus loom large in multiple areas of administrative

cisely because the old data did not allow the agency to consider differential impact on subgroups. The agency had an informational duty to gather information about the rule’s costs and benefits, including the costs on specific subgroups—and it failed to fulfill this duty. So, while the court’s reasoning may include traditional arbitrary-and-capricious language, the opinion is driven by the agency’s failure to consider differential impact.

55. 42 U.S.C. §§ 4321 to 4370m-12 (2018).

56. *Hells Canyon All. v. U.S. Forest Serv.*, 227 F.3d 1170, 1172-73 (9th Cir. 2000).

57. *Id.* at 1182.

58. *Id.* at 1182-84 (finding no arbitrary-and-capricious violation because “[t]he Forest Service provided a reasoned basis for its decision,” balancing the needs of motorized users with those of nonmotorized users).

59. Public-choice theory compares regulatory decision-making to market decision-making, and often criticizes agencies for having been “captured” by special-interest groups who enjoy structural advantages within the regulatory process. See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284-90 (2006) (exploring the agency-capture theory with regard to the Office of Management and Budget (OMB)); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*,

law, including Supreme Court cases about arbitrary-and-capricious review. For example, in *Motor Vehicle Manufacturers Ass'n v. State Farm*, a seminal administrative-law case, the Supreme Court briefly considered a rule's differential impacts on small cars after the agency argued that the rule's implementation was easier for large cars than small cars.⁶⁰ While the Court summarily dealt with the agency's argument on other grounds,⁶¹ the *State Farm* discussion demonstrates that differential-impact arguments fall under the arbitrary-and-capricious banner.

More recently, in 2009, the Supreme Court considered the differential impact of an indecency policy in *FCC v. Fox Television Stations, Inc.*⁶² Here, the differential impact fell upon a different subgroup: local broadcasters, who had much smaller budgets than national broadcasters to, for instance, monitor live events for indecent language. Under the Federal Communications Commission (FCC)'s new rule, small broadcasters would have had to pay "significant equipment and personnel costs" to censor expletives.⁶³ Both the majority and the dissent expressed concern about the differential impact on small broadcasters, although the majority ultimately dismissed it on empirical grounds.⁶⁴ The dissent, however, would have found an arbitrary-and-capricious violation because the

89 TEX. L. REV. 15, 18 (2010) ("The Article begins in Part I by identifying the main reasons why policy makers seek to create independent agencies in the first place, highlighting that a concern with agency capture and lopsided partisan and interest group pressure has been a driving force."); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 4 (1998) ("The public choice account holds . . . that agencies deliver regulatory benefits to well organized political interest groups, which profit at the expense of the general, unorganized public."). See generally PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 2-3 (Daniel Carpenter & David A. Moss eds., 2013) (reviewing capture theory, including its public-choice variants).

60. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 49-50 (1983) ("[P]etitioners recite a number of difficulties that they believe would be posed by a mandatory airbag standard. These range from questions concerning the installation of airbags in small cars to that of adverse public reaction.").
61. *Id.* at 50 (rejecting the "small cars" differential-impact argument because "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself").
62. 556 U.S. 502 (2009).
63. *Id.* at 558 (Breyer, J., dissenting) ("[Small broadcasters] told the FCC, for example, that the costs of beeping/delay systems, up to \$100,000 for installation and annual operation, place that technology beyond the financial reach of many smaller independent local stations.").
64. *Id.* at 527 (majority opinion) (reasoning that small-town broadcasters would not be disproportionately impacted because their "down-home local guests" use fewer profanities than "foul-mouthed glitteratae from Hollywood").

FCC “failed to consider the potential impact of its new policy upon local broadcasting coverage.”⁶⁵

Other courts, too, have widely considered differential impact on subgroups under the APA. Sometimes courts consider explicit differential-impact claims, where plaintiffs argue that a rule is unfair because it imposes a *disproportionate* burden on their subgroup. In other instances, the claim is more implicit, such as when a subgroup argues that it faces a *severe* burden resulting from agency action.

In *United States v. Nova Scotia*, for instance, the Second Circuit considered the differential impact of a rule upon a subgroup of food producers who processed whitefish.⁶⁶ While the case is best known for articulating an agency’s duty to maintain a record of its decision-making process, it is also a differential-impact case. The agency promulgated a facially neutral rule that required all fish producers to smoke fish products at a certain temperature to prevent botulism. But Nova Scotia Food Products argued that its subgroup, whitefish producers, would be severely impacted: the rule’s high temperatures would “destroy”⁶⁷ its whitefish products, and moreover, the impact was unnecessarily severe because whitefish had not caused botulism in over a decade.⁶⁸ The court agreed. Whitefish producers would be severely impacted, it reasoned, and the agency should have considered the impact upon that particular subgroup. The agency “neither discussed nor answered” the impact on whitefish producers, and this error, among others, constituted an arbitrary-and-capricious violation.⁶⁹

Similarly, in *SLPR v. San Diego Unified Port District*, the Southern District of California upheld a challenge by a subgroup of the San Diego population.⁷⁰ The

65. *Id.* at 556 (Breyer, J., dissenting). One might argue that the consideration of small broadcasters stems from existing FCC policy to promote local coverage and the Regulatory Flexibility Act. *See id.* at 557 (noting that “the concept of localism has been a cornerstone of broadcast regulation for decades” (quoting an FCC proceeding)); 5 U.S.C. §§ 601–612 (2018) (requiring consideration of impact on small businesses). We turn to this question in Part III below. At this juncture, it is worth noting that if small businesses receive attention under arbitrary-and-capricious review solely because of the Regulatory Flexibility Act (when the *FCC v. Fox* Court never cited the statute), then the Act has granted greater protection to small businesses than to racial minorities, making the legislative and executive interventions we articulate even more urgent.

66. *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977).

67. *Id.* at 245.

68. *Id.* at 250–51 (“[T]here has not been a single case of botulism associated with commercially prepared whitefish since 1963, though 2,750,000 pounds of whitefish are processed annually.”).

69. *Id.* at 253.

70. *SLPR, L.L.C. v. San Diego Unified Port Dist.*, No. 06-CV-1327, 2009 WL 10672895 (S.D. Cal. Aug. 4, 2009).

subgroup, three homeowners with bay-facing properties, argued that the agency had ignored a severe impact of its dredging plan, which eroded the soil on the owners' bay-front properties⁷¹ and threatened to eventually erode the foundations of their homes.⁷² They filed an APA claim, and the district court agreed, writing that the agency had generated an "adverse impact" and that "[t]he [agency's] flawed decision is adversely affecting them."⁷³

In other cases, an agency's duty to consider differential impact might be conceptualized as an informational duty that requires the agency to gather sufficient information about severely impacted subgroups. This was the framing in *Stewart v. Azar*, where the district court chastised an agency's failure to consider impacts on low-income healthcare beneficiaries: "[T]he Secretary never once mentions the estimated 95,000 people who would lose coverage, which gives the Court little reason to think that he seriously grappled with the bottom-line impact on healthcare."⁷⁴ The court added that the agency had a duty to gather "additional information," especially given that the differential-impact issue was brought to the agency's attention during the notice-and-comment period.⁷⁵ In this court's framing, the agency's failure was informational, since it neglected to ventilate the differential impact that had been brought to its attention during notice and comment.⁷⁶

Sometimes an agency's duty to consider differential impact is strengthened by cross-cutting statutory requirements. The Regulatory Flexibility Act, for ex-

71. *Id.* at *1 ("Three homeowners claim the Navy's . . . dredging operations have caused erosion of their bay-front properties.").

72. *Id.* at *9 ("This could begin to erode house foundations in approximately 10 years.").

73. *Id.* In the *SLPR* case, the bay-facing homeowners were likely the *only* group impacted, which distinguishes *SLPR* from other cases where a minority group was disproportionately impacted. However, both types of cases fall under the umbrella of "differential impact."

74. *Stewart v. Azar*, 313 F. Supp. 3d 237, 263 (D.D.C. 2018) (invalidating an agency action as arbitrary and capricious because the agency failed to consider impacts on subgroups of low-income Medicaid beneficiaries that would lose coverage).

75. *Id.* ("Nor did [the Secretary] 'request . . . additional information related to the project's impact on recipients' or offer 'any information refuting plaintiffs' substantial documentary evidence' that the action would reduce healthcare coverage." (quoting *Benito v. Shalala*, 30 F.3d 1057, 1074 (9th Cir. 1994))).

76. *Id.* at 262 ("Commenters, too, put the Secretary on notice that the Act might well reduce health coverage for low-income individuals. As required, HHS provided a 30-day public notice-and-comment period regarding the proposed program. The vast majority of those comments voiced concerns that Kentucky HEALTH would 'significantly reduce low-income people's participation in health coverage programs.'" (quoting a comment submitted by the American Congress of Obstetricians and Gynecologists)).

ample, requires agencies to assess a rule's differential impact on small businesses.⁷⁷ An agency's failure to ventilate these issues can earn it an arbitrary-and-capricious reprimand, as in a 2001 case where the Eastern District of California remanded a final rule to the agency "for consideration of the economic impact that the [rule] will have on small businesses."⁷⁸

In sum, differential impact, or the failure to adequately consider differential impact, can be arbitrary and capricious. Courts can and do consider differential impact, explicitly and implicitly.⁷⁹ Courts do this not only when directed to by organic statutes (as in *Fox Television* and *Harlan*),⁸⁰ but also under garden-variety APA review (as in *Nova Scotia* and *SLPR*).⁸¹ If an agency rule generates a differential impact for a subgroup and the agency fails to adequately address that differential impact, that rule may be arbitrary and capricious under APA § 706.

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77. The Regulatory Flexibility Act, enacted in 1980, requires agencies to consider impacts on "small entities" including small businesses. See 5 U.S.C. § 603 (2018) ("[T]he agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities.").
78. *Harlan Land Co. v. U.S. Dep't of Agric.*, 186 F. Supp. 2d 1076, 1097 (E.D. Cal. 2001) (invalidating a rule by USDA as arbitrary and capricious after a challenge by citrus growers).
79. As we discussed in the text, courts consider differential impact both explicitly and implicitly. An example of an explicit consideration of disparate impact is *FCC v. Fox Television Stations, Inc.*, where Justice Breyer explicitly cited the disproportionate impact on small broadcasters. 556 U.S. 502, 557-61 (2009) (Breyer, J., dissenting). An example of a court's implicit consideration of differential impact might be *SLPR*, where the court was solicitous of the small subgroup of homeowners who brought the claim. *SLPR, L.L.C. v. San Diego Unified Port Dist.*, No. 06-CV-1327, 2009 WL 10672895, at *9-10 (S.D. Cal. Aug. 4, 2009) (discussing the rule's effect on the homes' habitability).
80. *Fox Television* involved organic statutes that promote "localism" in broadcasting. *Fox Television*, 556 U.S. at 557 (Breyer, J., dissenting) ("[T]he concept of localism has been a cornerstone of broadcast regulation for decades." (quoting *In re Broadcast Localism*, 23 FCC Rcd. 1324, 1327, ¶ 5 (2008))). *Harlan* involved a cross-cutting statute, the Regulatory Flexibility Act, that requires agencies to consider impacts on small businesses. *Harlan*, 186 F. Supp. 2d at 1096 ("The Regulatory Flexibility Act requires agencies . . . to prepare an initial and final regulatory economic analysis assessing the negative impact of the rule on small businesses whenever it promulgates a new rule.").
81. In *Nova Scotia*, the court considered differential impact upon a subgroup (whitefish producers), even though the group was not protected by an organic statute. Congress never passed a law requiring special protections for whitefish producers—but the *Nova Scotia* court protected them anyway. *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 250-51 (2d Cir. 1977). Similarly, Congress never passed a law requiring special protections for bay-facing homeowners, but the *SLPR* court went ahead and protected them anyway. (While the *SLPR* opinion does invoke the National Environmental Policy Act (NEPA) and other environmental statutes, these statutes in no way single out bay-facing homeowners for special protection.) *SLPR*, 2009 WL 10672895, at *9.

B. Race-Related Disparate-Impact Claims Under the APA

The doctrinal picture is very different when the group is a racial or ethnic minority. In these cases, when protected classes plead differential impact, their claims are channeled away from the APA and toward alternative remedies that, under modern doctrine, may be unavailable. Via APA § 704, administrative law has effectively scrubbed antidiscrimination norms from the APA.

For instance, in *Garcia v. McCarthy*, a group of parents argued that the U.S. Environmental Protection Agency (EPA) violated the APA when it failed, in its oversight of a California state agency, to take account of the disproportionate impacts upon a vulnerable subgroup: Latinx schoolchildren.⁸² The parents specifically used the language of disparate impact, alleging that the agency was arbitrary and capricious because it failed to “remedy the disparate adverse effects of methyl bromide and other pesticide[s].”⁸³ Yet, despite a finding of disparate impact, the court nevertheless dismissed the plaintiffs’ APA claims. The court and EPA both acknowledged the overwhelming evidence showing that “Latino schoolchildren were disparately exposed to both short-term acute . . . and long-term chronic . . . levels of methyl bromide.”⁸⁴ And EPA even issued a preliminary finding of racial discrimination, finding that there was “sufficient evidence to make a preliminary finding of . . . disparate adverse impact upon Latino schoolchildren.”⁸⁵

Yet administrative doctrine channeled the case away from the APA. The district court cited APA § 704⁸⁶ in arguing that its hands were tied,⁸⁷ and the Ninth

82. No. 13-CV-03939, 2014 WL 187386, at *4 (N.D. Cal. Jan. 16, 2014) (“The plaintiffs seek a declaration that [the U.S. Environmental Protection Agency (EPA)] arbitrarily and capriciously settled and dismissed [the plaintiffs’ prior lawsuit] The plaintiffs also seek . . . to remedy the disparate adverse effects against Latino schoolchildren from exposure to methyl bromide and other fumigants.”), *aff’d*, 649 F. App’x 589 (9th Cir. 2016).

83. *Id.* at *6.

84. *Id.* at *2.

85. *Id.*

86. *Id.* at *14 (“[P]laintiffs have an adequate alternative remedy at law”); *see id.* at *11-14 (discussing the plaintiffs’ alternative adequate remedy); *see also* 5 U.S.C. § 704 (2018) (stating that agency action is subject to judicial review under the APA when there is “no other adequate remedy in a court”).

87. In addition to citing § 704, the *Garcia v. McCarthy* court also cited *Heckler v. Chaney*, 470 U.S. 821 (1985), to argue that the plaintiffs’ APA claim was barred. *See McCarthy*, 2014 WL 187386, at *7 (“Federal law provides for judicial review of agency actions except where ‘agency action is committed to agency discretion by law.’” (quoting 5 U.S.C. § 701(a)(2) (2012))). *Heckler v. Chaney* holds that agency nonenforcement decisions are barred from judicial review because they are “committed to agency discretion.” *Heckler*, 470 U.S. at 838 (quoting 5 U.S.C. § 701(a)(2) (1982)). We return to *Heckler v. Chaney* in Part III, as agency discretion can manifest in discrimination.

Circuit affirmed.⁸⁸ The plaintiffs had an alternative adequate remedy, the court reasoned, because they could file individual state-level suits against the California agency that issued pesticide permits.⁸⁹ The court noted that the alternative remedy might be arduous or even “ridiculous,”⁹⁰ since it would require plaintiffs to file yearly lawsuits for each pesticide permit. But APA § 704, the court nevertheless concluded, precluded review.⁹¹

Garcia v. McCarthy is only the tip of the iceberg. In *Garcia v. Vilsack*⁹² and *Pigford v. Glickman*,⁹³ for example, APA § 704 was again used to dismiss the claims of subgroups harmed by agency discrimination. Groups of Black, Latinx, Native American, and women farmers sued the U.S. Department of Agriculture (USDA) in the early 2000s.⁹⁴ They alleged both disparate treatment and disparate impact,⁹⁵ based upon decades of discrimination when applying for USDA

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88. See *Garcia v. McCarthy*, 649 F. App'x 589 (9th Cir. 2016), *aff'g* No. 13-CV-03939, 2014 WL 187386 (affirming the district court's dismissal of plaintiffs' APA claims against EPA).
89. *McCarthy*, 2014 WL 187386, at *11 (“EPA argues that the ‘Plaintiffs have an adequate alternative remedy, namely, state law action[s] challenging the Ventura County Agricultural Commissioner’s decision to award permits for the use of methyl bromide’” (quoting Reply Brief in Support of Motion to Dismiss Amended Complaint at 6, *McCarthy*, 2014 WL 187386 (No. 13-CV-03939))).
90. *Id.* at *14 (“The plaintiffs assert that challenging permits is not feasible, however, because they ‘would have to file multiple challenges each year . . . a ridiculous proposition with an unclear remedial outcome.’ But the fact that the alternative remedy ‘may be more arduous, and less effective in providing systemic relief’ does not make it inadequate.” (alteration in original) (citation omitted) (first quoting Plaintiff’s Opposition to Motion to Dismiss Amended Complaint at 19, *McCarthy*, 2014 WL 187386 (No. 13-CV-03939); and then quoting Women’s Equity Action League v. Cavazos, 906 F.2d 742, 751 (D.C. Cir. 1990))).
91. *Id.*; see also 5 U.S.C. § 704 (2018) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” (emphasis added)).
92. 563 F.3d 519 (D.C. Cir. 2009).
93. 206 F.3d 1212 (D.C. Cir. 2000).
94. See Sarah L. Brinton, *Toward Adequacy*, 69 N.Y.U. ANN. SURV. AM. L. 357, 378 (2014) (“The case, *Garcia v. Vilsack*, was one of four filed by the same lead counsel, alleging the same causes of action for four categories of plaintiff farmers: (1) Hispanic Farmers, *Garcia v. Vilsack*; (2) black farmers – *Pigford v. Glickman*; (3) Native American farmers – *Keepseagle v. Glickman*; and (4) women farmers – *Love v. Johanns*.” (footnotes omitted)).
95. Appellants’ Corrected Opening Brief at 18, *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009) (No. 08-5110), 2008 WL 5016245 (“Plaintiffs filed this case on October 13, 2000, alleging that USDA engaged in disparate impact and disparate treatment discrimination against Hispanic farmers by denying them access to USDA-administered farm loans, debt servicing and disaster benefit programs, just as it did African American, Native American and women farmers.”); *id.* at x (“The plaintiffs in *Pigford* alleged the same discrimination as alleged in *Love* and *Garcia*.”).

loans.⁹⁶ The plaintiffs alleged that USDA field offices would reject forms for small errors,⁹⁷ or delay loan applications indefinitely.⁹⁸ Internal investigations had found that “USDA has admitted that the ‘systemic exclusion of minority farmers remains the standard operating procedure’ and that minority farmers ‘lost their family land . . . because of the color of their skin.’”⁹⁹ And USDA’s discrimination spanned decades: in 1997, USDA “publicly acknowledged that in the early 1980s it ‘effectively dismantled’ its civil rights enforcement apparatus.”¹⁰⁰

Yet again, the plaintiffs’ APA lawsuit was ousted under APA § 704. At the district-court level, the U.S. District Court for the District of Columbia held that the plaintiffs had no APA claim because they could pursue an alternative “adequate remedy” via the Equal Credit Opportunity Act.¹⁰¹ At the appellate level, the D.C. Circuit reiterated the district court’s § 704 maneuver, writing that the litigants had an “adequate remedy” elsewhere.¹⁰² The adequate remedy need not be “as effective as an APA lawsuit,” the appellate court wrote, but merely “adequate.”¹⁰³ And the court set the “adequacy” bar quite low: the alternative remedy

96. *Id.* at 2 (“The fact of USDA’s well-documented ‘long history’ of unlawful discrimination against minority farmers is not in dispute. USDA has admitted that the ‘systemic exclusion of minority farmers remains the standard operating procedure’ . . .” (citations omitted)).

97. Class Action Complaint at 17, *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004) (“The [Farm Service Agency (FSA)] county office *might claim to have no applications available* and ask the farmer to return later. Upon returning, the farmer might receive an application *without any assistance* in completing it, then be asked repeatedly to correct mistakes or complete oversight in the loan application. Often those requests for correcting the application could be stretched for months, since they would come only if the minority farmer contacted the office to check on the loan processing. *By the time processing is completed, even when the loan is approved, planting season has already passed* and the farmer either has not been able to plant at all, or has obtained limited credit on the strength of an expected FSA loan to plant a small crop, usually without the fertilizer and other supplies necessary for the best yields. The farmer’s profit is then reduced.”), *aff’d and remanded sub nom.* *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006).

98. USDA’s discrimination, one might argue, effectively transformed its program into affirmative action for white farmers. *See generally* IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005) (pursuing this same line of argument in historical analysis of government aid programs created during the New Deal and the Fair Deal).

99. Appellants’ Corrected Opening Brief, *supra* note 95, at 2 (alteration in original).

100. *Garcia v. Vilsack*, 563 F.3d 519, 521 (D.C. Cir. 2009).

101. *Garcia v. Johanns*, 444 F.3d 625, 630 (D.C. Cir. 2006) (noting that the district court ruled that plaintiffs’ claim was “not cognizable under the APA because [the Equal Credit Opportunity Act (ECOA)] provides ‘an adequate remedy’”).

102. *Vilsack*, 563 F.3d at 521 (“Because appellants fail to show they lack an adequate remedy in a court, we affirm the dismissals of their APA failure-to-investigate claims . . .”).

103. *Id.* at 525 (“The relevant question under the APA, then, is not whether private lawsuits against the third-party wrongdoer are as effective as an APA lawsuit against the regulating agency,

“may be adequate even if such actions ‘cannot redress the systemic lags and lapses by federal monitors’ and even if such ‘[s]uits directly against the discriminating entities may be more arduous, and less effective in providing systemic relief’”¹⁰⁴ In short, litigants should look elsewhere for antidiscrimination relief. Even where alternative avenues of relief are at best anemic,¹⁰⁵ the APA is closed.

In doubling down on the § 704 maneuver, the D.C. Circuit has repeated the pattern from *Garcia v. McCarthy* and perpetuated a line of APA precedent that is unfriendly to civil rights. APA § 704 has been used to dismiss the lawsuits of Black homeowners challenging the placement of a highway bypass near a Black neighborhood,¹⁰⁶ Latinx U.S. citizens seeking passports,¹⁰⁷ minority renters alleging housing discrimination,¹⁰⁸ disability-rights plaintiffs alleging education

but whether the private suit remedy provided by Congress is adequate.” (first citing *Council of & for the Blind of Del. Cnty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1532 (D.C. Cir. 1983); and then citing *Women’s Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990)).

104. *Id.* (quoting *Women’s Equity*, 906 F.2d at 751 (alteration in original)).

105. In *Garcia v. Vilsack*, relief via the ECOA would have been anemic and even “illusory,” plaintiffs argued, because “no plaintiff has yet obtained *de novo* district court review pursuant to Section 741(b) [the Congressional Act that extended ECOA’s statute of limitations].” *Id.* at 524.

106. In *Jersey Heights Neighborhood Ass’n v. Glendening*, a group of Black homeowners challenged a decision funded by the U.S. Department of Transportation (DOT) to place a highway bypass near a predominantly Black neighborhood. 174 F.3d 180 (4th Cir. 1999). The Fourth Circuit dismissed their APA claim on the grounds that plaintiffs had a Title VI remedy that was “adequate” and APA § 704 therefore barred review. *Id.* at 191–92.

107. The passport lawsuits span several decades and several presidential administrations. Under the Bush Administration, the Obama Administration, and the Trump Administration, immigration agencies have denied the passport requests of Latinx Americans born near the U.S.-Mexico border. For citizens born outside of hospitals, and whose birth certificates were signed by midwives, agency officials have alleged that midwife-signed birth certificates are fraudulent. See Kevin Sieff, *U.S. Is Denying Passports to Americans Along the Border, Throwing Their Citizenship into Question*, WASH. POST (Sept. 13, 2018, 6:18 PM EDT), https://www.washingtonpost.com/world/the_americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5_story.html [https://perma.cc/W49L-2QKX]. Some of these passport cases were settled, but others were denied on APA § 704 grounds. See, e.g., *Hinojosa v. Horn*, 896 F.3d 305, 310 (5th Cir. 2018) (reviewing “the adequacy requirement under the APA” and affirming the district court’s dismissal of plaintiffs’ APA claims); *De La Garza Gutierrez v. Pompeo*, 741 F. App’x 994, 997 (5th Cir. 2018) (holding that another statute “provides an adequate alternative remedy to APA review” and affirming the district court’s dismissal of plaintiffs’ APA claims).

108. In the housing context, APA § 704 has been commonly used to dismiss the APA and antidiscrimination claims of minority residents. See *Turner v. Sec’y of U.S. Dep’t of Hous. & Urb. Dev.*, 449 F.3d 536, 541 (3d Cir. 2006) (dismissing the plaintiff’s APA claim because “5 U.S.C. § 704 bars the judicial review sought in this action”); *Godwin v. Sec’y of Hous. & Urb. Dev.*,

and housing discrimination,¹⁰⁹ a homeowner challenging federal funding for a port in a predominantly minority neighborhood,¹¹⁰ minority employees alleging employment discrimination,¹¹¹ and college students alleging gender discrimination.¹¹² Some of these cases involved disparate impact specifically, while others involved antidiscrimination claims more generally, without specifying whether

356 F.3d 310, 312 (D.C. Cir. 2004) (dismissing the plaintiff's APA claim because the plaintiff had "an adequate alternative remedy" elsewhere); *Marinoff v. U.S. Dep't of Hous. & Urb. Dev.*, 892 F. Supp. 493, 497 (S.D.N.Y. 1995) (dismissing the plaintiff's APA claim because the "plaintiff has a reasonable alternative and therefore review under APA is not available"), *aff'd*, 78 F.3d 64 (2d Cir. 1996). That said, in the housing context, some courts have been more friendly to civil rights, and have distinguished the setting from *Women's Equity*. See, e.g., *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, 348 F. Supp. 2d 398, 422 (D. Md. 2005) (considering, but rejecting, APA § 704 as a barrier to the plaintiffs' claims).

109. See *Am. Disabled for Attendant Programs Today v. U.S. Dep't of Hous. & Urb. Dev.*, 170 F.3d 381, 391 (3d Cir. 1999) (dismissing the claims of a disability-rights group because it "has not met the requirement under section 704"); *West v. Spellings*, 480 F. Supp. 2d 213, 217 (D.D.C. 2007) (dismissing a discrimination claim by a student with a disability because he had an alternative "right of action [that] is adequate to redress discrimination"); *Sherman v. Black*, 510 F. Supp. 2d 193, 198 (E.D.N.Y. 2007) (dismissing the claims of disability-related discrimination because an alternative "adequate" right "precludes a remedy under the APA"), *aff'd*, 315 F. App'x 347 (2d Cir. 2009).
110. In *Rollerson v. Port Freeport*, the United States Army Corps of Engineers (ACOE) funded a port in a "minority-majority" neighborhood with a population that was "predominately (sic) Hispanic (71 percent) or African American (15 percent)." No. 18-CV-00235, 2019 WL 4394584, at *1 (S.D. Tex. Sept. 13, 2019), *aff'd sub nom.* *Rollerson v. Brazos River Harbor Navigation Dist.*, 6 F.4th 633 (5th Cir. 2021). The plaintiff alleged that agencies "threatened property owners in the community with condemnation" and made "below-market offers to property owners," without providing appraisals. *Id.* Nevertheless, the district court initially dismissed the plaintiff's APA claim on the grounds that "Title VI provides an adequate alternative remedy." *Rollerson v. Port Freeport*, No. 18-CV-00235, 2019 WL 5397623, at *4 (S.D. Tex. Oct. 21, 2019), *report and recommendation adopted*, No. 18-CV-00235, 2019 WL 6053410 (S.D. Tex. Nov. 15, 2019), *rev'd and remanded sub nom.* *Rollerson v. Brazos River Harbor Navigation Dist.*, 6 F.4th 633 (5th Cir. 2021). But the district court's initial decision was reversed and remanded by the Fifth Circuit. In July 2021, the Fifth Circuit held that § 704 did not bar the plaintiffs' claim and that the district court had erred in dismissing the plaintiffs' APA claim. *Rollerson*, 6 F.4th at 644 ("Therefore, the district court erred by concluding that Rollerson's § 601 [Title VI] claim against the Port was an adequate alternative to his APA claim against the Corps.").
111. See *Nielsen v. Hagel*, 666 F. App'x 225, 231 (4th Cir. 2016) (holding that the plaintiff had an "adequate remedy" outside the APA); *Arora v. Daniels*, No. 17-CV-134, 2018 WL 1597705, at *13 (W.D.N.C. Apr. 2, 2018) (holding that "APA review is not a valid form of relief" because the plaintiff had an alternative "adequate remedy").
112. See *Doe v. U.S. Dep't of Health & Hum. Servs.*, 85 F. Supp. 3d 1, 10 (D.D.C. 2015) (dismissing the plaintiff's claims against federal agencies that failed to address sexual harassment because "[t]he plaintiff's APA claim is foreclosed by directly applicable D.C. Circuit precedent," namely *Women's Equity*).

the discrimination constituted disparate impact or disparate treatment.¹¹³ Regardless, the pattern remains: when conventionally protected classes file APA and antidiscrimination claims, these subgroups often see their claims erased or channeled away from the APA. The pattern holds both when plaintiffs challenge agency adjudication (as in the above examples),¹¹⁴ and when plaintiffs challenge agency rulemaking.¹¹⁵ While the APA recognizes the differential impact of agency decisions on subgroups like dolphins and bay-facing homeowners, it closes its eyes to disparate-impact claims by protected classes. The APA, in this sense, inverts the meaning of “protected” in protected classes.

113. Recall that disparate treatment is often called “intentional” discrimination, while disparate impact is often called “unintentional” discrimination. An example of disparate *treatment* is a law that prohibits Black people from dining at a restaurant. An example of disparate *impact* is a dress code that requires all employees to wear their hair straight. Our Article deals primarily with disparate impact, but both disparate impact and disparate treatment arise in many of the antidiscrimination cases we discuss.

114. Most of the cases discussed in Section I.B involve informal agency adjudication, not notice-and-comment rulemaking. The conventional distinctions in the APA are, of course, (a) action that is rulemaking versus adjudication, and (b) informal versus formal modes. For an argument that the APA actually contemplated stages, not modes, of adjudication, see Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. (forthcoming 2021), <https://ssrn.com/abstract=3793949> [<https://perma.cc/FC32-HRWK>].

115. The most extensive administrative case law on the erasure of disparate impact comes from adjudication. Yet when antidiscrimination plaintiffs challenge agency rulemaking, similar erasures occur. In a 2019 case, *City & County of San Francisco v. Azar*, several plaintiffs challenged a new HHS rule that would have disparately impacted medical care for women and LGBTQ individuals. 411 F. Supp. 3d 1001, 1011 (N.D. Cal. 2019). The Santa Clara County plaintiffs raised the differential-impact claim in their briefings, arguing that “[t]he Rule imposes particular burdens on LGBT individuals, and especially transgender and gender-nonconforming individuals.” Plaintiffs’ Motion for Nationwide Preliminary Injunction and Memorandum of Points and Authorities at 10, *City & Cnty. of S.F.*, 411 F. Supp. 3d 1001 (No. 19-CV-02916). Yet the district court largely avoided mentioning the disparate impact when considering APA claims.

C. Administrative Law's Erasure of Race

Many of the cases that use the § 704 maneuver¹¹⁶ cite *Women's Equity Action League v. Cavazos*, a 1990 D.C. Circuit case.¹¹⁷ *Women's Equity*, also known as the *Adams* litigation,¹¹⁸ popularized the use of APA § 704 to channel antidiscrimination cases away from the APA. And its impact, due at least in part to its authorship by then-Judge Ginsburg, has since spread far beyond its original posture. *Women's Equity* involved a challenge to a federal agency's funding for subfederal actors. Yet even in cases having nothing to do with subfederal actors or other recipients of federal funds within the purview of Title VI of the Civil Rights Act, courts continue to cite *Women's Equity* to channel antidiscrimination claims away

116. For the careful readers keeping track, here is a list of the major cases in Section I.B, and whether they cite *Women's Equity*: the methyl-bromide case *Garcia v. McCarthy*, 563 F.3d 519, 524 (D.C. Cir. 2009), cites *Women's Equity*. The USDA farm-loans case *Garcia v. Vilsack* cites *Women's Equity*; the Latinx passport-denial cases *Hinojosa v. Horn*, 896 F.3d 305, 310-12 (5th Cir. 2018), and *De La Garza Gutierrez v. Pompeo*, 741 F. App'x 994, 997-1000 (5th Cir. 2018), do not cite *Women's Equity* but do use § 704. The housing-discrimination cases *Turner v. Secretary of U.S. Department of Housing & Urban Development*, 449 F.3d 536, 541 (3d Cir. 2006), *Godwin v. Secretary of Housing & Urban Development*, 356 F.3d 310, 312-13 (D.C. Cir. 2004), *Marinoff v. U.S. Department of Housing & Urban Development*, 892 F. Supp. 493, 496-97 & n.4 (S.D.N.Y. 1995), *aff'd*, 78 F.3d 64 (2d Cir. 1996); and *Thompson v. U.S. Department of Housing & Urban Development*, 348 F. Supp. 2d 398, 422-23 (D. Md. 2005) all use § 704, *Godwin* cites *Council of & for the Blind*, a case closely related to *Women's Equity*, and *Thompson* cites (but does not apply) *Women's Equity*. The disability-rights cases *American Disabled for Attendant Programs Today v. U.S. Department of Housing & Urban Development*, 170 F.3d 381, 390 (3d Cir. 1999); *West v. Spellings*, 480 F. Supp. 2d 213 (D.D.C. 2007); and *Sherman v. Black*, 510 F. Supp. 2d 193, 197 n.3, 198-199 (E.D.N.Y. 2007), *aff'd*, 315 F. App'x 347 (2d Cir. 2009) all cite *Women's Equity*. The employment-discrimination cases *Nielsen v. Hagel*, 666 F. App'x 225, 231 (4th Cir. 2016) and *Arora v. Daniels*, No. 17-CV-134, 2018 WL 1597705, at *13 (W.D.N.C. Apr. 2, 2018) use § 704 and *Nielsen* cites *Women's Equity*. And the college gender-discrimination case *Doe*, 85 F. Supp. 3d at 10, cites *Women's Equity*. See *supra* notes 82, 92, 107-109, 111-112 and accompanying text.

117. 906 F.2d 742 (D.C. Cir. 1990).

118. The case was originally called *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973), and it spanned almost twenty years between 1970 and 1990.

from the APA.¹¹⁹ Due to *Women's Equity's* influence, administrative law never developed a tradition of engaging with claims of disparate impact by race.¹²⁰

Understanding these doctrinal dynamics and *Women's Equity's* role in creating them is important in its own right. Administrative-law scholars are only now beginning to grapple with claims of institutional racism and the ways in which the field can perpetuate discrimination.¹²¹ We return in Part IV to how our account fits with other efforts to understand the evolution of the American administrative state.

But reckoning with administrative law's erasure of race will also be highly relevant going forward. First, the APA is an increasingly prominent feature of lawsuits against federal-agency discrimination. The APA played a starring role in the Supreme Court's decision on Deferred Action for Child Arrivals

119. We will discuss this in more detail in Parts II and III, but for now, a brief preview: the USDA farm-loans case, *Garcia v. Vilsack*, did not involve any subfederal actors. See 563 F.3d 519, 521 (D.C. Cir. 2009). The plaintiffs challenged USDA's own policies, not USDA's decisions to fund allegedly discriminatory subfederal actors. *Id.* So the posture of *Garcia v. Vilsack* is wholly unlike the *Women's Equity* posture — yet the courts applied *Women's Equity* anyway (we would argue, erroneously).

120. *Women's Equity* involved an agency's informal adjudication, but as we discussed in notes 114–115, its pattern extends to both adjudication and rulemaking. One strand of cases suggests that § 704 applies to both adjudication and rulemaking. See, e.g., *Williams v. Conner*, 522 F. Supp. 2d 92, 103 (D.D.C. 2007) (“Circuit precedent does indeed hold that an adequate alternative remedy for discrimination by agencies generally prevents recourse to the APA.”). Yet other case law seems to gloss § 704 as being limited to the enforcement context. See *Coker v. Sullivan*, 902 F.2d 84, 87 (D.C. Cir. 1990). In one notable recent case, the district court and federal agency accepted that the agency's rulemaking should have considered disparate impact. *District of Columbia v. U.S. Dep't of Agric.*, 496 F. Supp. 3d 213 (D.D.C. 2020). The court faulted the government for its failure to meaningfully discuss disparate impact, while the government argued that its rulemaking had taken into account disparate impact. *Id.* at 257 (“[T]he agency's recognition of the disparate impact on protected groups, without any meaningful discussion of the issue in the context of alternatives to the rule's policy choices, points to the agency's failure to ‘consider an important aspect’ of the effects of the Rule.” (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983))).

121. In the fall of 2020, for example, the *Yale Journal on Regulation* organized a symposium on racism in administrative law, which highlighted how administrative scholars have neglected issues of racism and antidiscrimination. *Symposium on Racism in Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (2020), <https://www.yalejreg.com/topic/racism-in-administrative-law-symposium> [<https://perma.cc/22RW-U8Y5>].

(DACA),¹²² the 2020 census litigation,¹²³ and legal challenges to the Trump administration's efforts to retrench vital social welfare programs.¹²⁴ These contemporary APA and antidiscrimination cases play out within the *Women's Equity* framework developed decades earlier and either result in the ouster of claims using the APA § 704 maneuver or, at a minimum, lead to the adjudication of claims asserting agency arbitrariness without any robust antidiscrimination tradition or concrete case law that can point the way.¹²⁵

Second, the APA's treatment of disparate impact will be vitally important as administrative agencies at all levels of government increasingly rely on new forms of automation, including machine learning and other algorithmic tools, to perform the work of governance.¹²⁶ Researchers have documented serious po-

122. In the Deferred Action for Childhood Arrivals (DACA) case, the majority opinion by Chief Justice Roberts hinged on arbitrary-and-capricious review. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1898-99 (2020). For a longer discussion of the role the APA played in Roberts' decision, and the ways in which the decision can be characterized as "whitewashing" away the racial dimensions of the case, see Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 *YALE L.J.* 1748, 1822-25 (2021).

123. For the 2020 census, the Trump Administration attempted to add a citizenship question to the census even though experts generally agreed that this would have a disparate impact on Latinx census respondents. See *Kravitz v. U.S. Dep't of Com.*, 366 F. Supp. 3d 681, 754 (D. Md. 2019). The case centered on APA questions, and in fact, the government even raised § 704 in an attempt to dismiss the case. The court, however, dismissed the § 704 argument in a footnote. *Id.* at 754 n.29 ("The Court is not persuaded by Defendants' argument that if Plaintiffs may pursue a claim against federal employees in their official capacity under 42 U.S.C. § 1985(3) then their claims under the APA must be dismissed because they have an adequate alternative remedy.").

124. In 2019, the Trump Administration attempted to curtail the Supplemental Nutrition Assistance Program (SNAP) and limit states' discretion in awarding SNAP benefits. Several states, including California and New York, filed suit under the APA. The plaintiffs alleged that the government's failure to consider disparate impact was arbitrary and capricious. See *Complaint* at 47, *District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1 (D.D.C. 2020) (No. 20-CV-00119) ("The Rule is also arbitrary and capricious because, by USDA's own admission, the changes would bear most heavily on protected classes, and USDA fails to address how it will mitigate or address this disparate impact.").

125. A stronger antidiscrimination tradition could point the way by, for example, providing judges and plaintiffs with precedents for *successful* APA and antidiscrimination cases. Imagine, for example, that *Women's Equity* had come out differently and that the D.C. Circuit had allowed the plaintiffs' APA claim to proceed – this version of *Women's Equity* would then have pointed the way for subsequent APA and antidiscrimination plaintiffs and for the courts.

126. The Securities and Exchange Commission, for example, is using natural-language processing to screen financial documents for fraud. See David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey & Mariano-Florentino Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, ADMIN. CONF. U.S. 23-24 (2020), <https://www-cdn.law>

tential for such tools to generate disparate impacts, such as in facial recognition,¹²⁷ natural language processing,¹²⁸ and more.¹²⁹ Importantly, challenges to agency use of those systems, with an array of policy judgments and biases deeply embedded in code, will rarely support claims of intentional discrimination.¹³⁰ As federal agencies increasingly rely on algorithmic tools to perform key governance tasks, and as they oversee subfederal government agencies that are adopting

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- .stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf [https://perma.cc/9284-KR9E]. The Social Security Agency is using algorithms to process appeals. *Id.* at 39-40. And the Food and Drug Administration (FDA), which approves vaccines and other medical treatments, is using machine learning to help predict dangerous side effects. *Id.* at 55.
127. In 2018, for example, researchers found that many facial-recognition systems, including those sold to local police departments, misidentified dark-skinned faces and female faces more often than light-skinned or male faces. Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. MACH. LEARNING RSCH. 1, 1 (2018) (evaluating several commercial algorithms and finding that “darker-skinned females are the most misclassified group (with error rates of up to 34.7%),” while “[t]he maximum error rate for lighter-skinned males is 0.8%”); see also Nick Wingfield, *Amazon Pushes Facial Recognition to Police. Critics See Surveillance Risk.*, N.Y. TIMES (May 22, 2018), https://www.nytimes.com/2018/05/22/technology/amazon-facial-recognition.html [https://perma.cc/54CQ-FDLB] (describing criticisms of Amazon’s facial recognition technology partially based on disparate-impact concerns).
128. In 2016, researchers found that a widely used word database contained gender biases that generated analogies such as “‘man is to computer programmer as woman is to x ’ with $x=home-maker$.” Tolga Bolukbasi, Kai-Wei Chang, James Zou, Venkatesh Saligrama & Adam Kalai, *Man Is to Computer Programmer as Woman Is to Homemaker? Debiasing Word Embeddings*, 30TH CONF. NEURAL INFO. PROCESSING SYS. 1, 1 (2016), https://dl.acm.org/doi/pdf/10.5555/3157382.3157584 [https://perma.cc/P2ML-TP88].
129. See, e.g., SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 1-4 (2018); Elinor Benami, Reid Whitaker, Vincent La, Hongjin Lin, Brandon R. Anderson & Daniel E. Ho, *The Distributive Effects of Risk Prediction in Environmental Compliance: Algorithmic Design, Environmental Justice, and Public Policy*, PROC. 2021 ACM CONF. FAIRNESS, ACCOUNTABILITY & TRANSPARENCY 90 (2021), https://dl.acm.org/doi/pdf/10.1145/3442188.3445873 [https://perma.cc/4A5B-SQEE] (discussing environmental enforcement); Amanda Coston, Neel Guha, Derek Ouyang, Lisa Lu, Alexandra Chouldechova & Daniel E. Ho, *Leveraging Administrative Data for Bias Audits: Assessing Disparate Coverage with Mobility Data for COVID-19 Policy*, PROC. 2021 ACM CONF. FAIRNESS, ACCOUNTABILITY & TRANSPARENCY 173 (2021), https://dl.acm.org/doi/pdf/10.1145/3442188.3445881 [https://perma.cc/TL3D-NYHZ] (discussing the allocation of public health resources based on mobility data); Ziad Obermeyer, Brian Powers, Christine Vogeli & Sendhil Mullainathan, *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 SCI. 447 (2019) (discussing population health management efforts); James Zou & Londa Schiebinger, *Design AI So That It’s Fair*, 559 NATURE 324 (2018) (highlighting various examples of disparate impact).
130. See Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CALIF. L. REV. 671, 694-701 (2016); see also Engstrom et al., *supra* note 126, at 79-81 (highlighting the potential for bias in the use of AI tools by administrative agencies and describing the legal barriers to ameliorating this bias).

their own algorithmic toolkits, the logic of *Women's Equity*, and its scrubbing of racial disparate-impact claims from the APA, will become ever more important.

In the next Part, we examine the legislative history of the Civil Rights Act of 1964, and then its uptake by the D.C. Circuit. We trace the strange – and sometimes counterintuitive – interplay between the APA and Title VI of the Civil Rights Act, and in so doing, uncover the origins of disparate limbo.

II. THE ORIGINS OF DISPARATE LIMBO

This Part traces the origins of the APA § 704 maneuver that erased race from modern administrative law. Our analysis centers on two questions¹³¹: (1) whether a private right of action can be implied in Title VI § 601 and against whom; and (2) how to understand Title VI § 603's creation of a further private right of action and its express preservation of certain claims under the APA. Congress considered but never fully answered these two questions, instead punting them to agencies and the courts to fill in the gaps. The courts, we argue, led by the D.C. Circuit, then created a disparate limbo for antidiscrimination plaintiffs, who could rely on neither the APA nor Title VI. We examine each step of that process, from legislation to litigation, in turn.

A. Legislating Disparate Limbo

1. Section 601's Implied Private Right of Action

Title VI prohibits discrimination within any “program or activity” that receives federal assistance.¹³² If a state or local actor discriminates,¹³³ then Title VI

131. To complete our process tracing, we researched the voluminous legislative history of the Civil Rights Act and also relied on secondary sources. See, e.g., STEPHEN C. HALPERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* (1995); CLAY RISEN, *THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT* (2014); HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972* (1990); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

132. 42 U.S.C. § 2000d (2018) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

133. Over time, Title VI has been interpreted as applying to state or local actors, but not to federal agencies. See, e.g., *Title VI Legal Manual*, *supra* note 40, at 20 (“Title VI does not apply to the Federal government. Therefore, a Federal agency cannot be considered a ‘recipient’ within the meaning of Title VI.”).

requires the federal government to cut off funding to that recipient.¹³⁴ Yet Congress left key details of Title VI undefined. As described by historian Charles F. Abernathy, Congress accepted a “compromise position” where it deliberately punted contentious questions to agencies and the courts.¹³⁵ Agencies and the courts, not Congress, created a definition for “discrimination,” and ultimately defined who could enforce Title VI’s provisions.¹³⁶

Private plaintiffs’ right to sue under Title VI—a private right of action—was one of the questions that Congress left unanswered. Section 601 of Title VI prohibits discrimination, but unlike other civil rights statutes, it does not contain an express private right of action.¹³⁷ In the first fifteen years after its enactment, would-be litigants were unsure if Title VI would “support an independent claim for relief.”¹³⁸

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134. Title VI also contains several safeguards for funding recipients. Before cutting off funds, the federal agency must attempt to secure voluntary compliance from the recipient. It must issue an “express finding on the record” that gives the recipient the opportunity for a hearing. And it must submit a report to Congress. See 42 U.S.C. § 2000d-1 (2018) (requiring the federal agency to file a “full written report of the circumstances and the grounds for [the funding cut-off]”).
135. Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining “Discrimination,”* 70 GEO. L.J. 1, 1, 3 (1981) (arguing that Congress adopted a “complicated compromise” on the definition of discrimination, and that Congress gave agencies the power “to define the discrimination forbidden by [T]itle VI”).
136. *Id.* at 22 (“The Congress that considered [T]itle VI was aware of the ambiguity inherent in the word ‘discrimination,’ and indeed this central definitional problem set the agenda for legislative action. Congress, however, resolved the problem not with a flurry of rhetoric, but with a carefully constructed compromise.”); see also *id.* at 28–30 (describing the legislative compromise to confer power on executive agencies to define discrimination).
137. See Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1296–97 (2014) (comparing Title VI, which does not contain an explicit right of action, to Title VII, which “contains a private right of action, allowing individuals to file a claim in court after first filing with the Equal Employment Opportunity Commission”).
138. Alan Jenkins, *Title VI of the Civil Rights Act of 1964: Racial Discrimination in Federally Funded Programs*, in 10 NAT’L LAWS. GUILD, CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 173, 180 (Steven Saltzman & Barbara M. Wolvovitz eds., 1995) (“[T]here was uncertainty during the statute’s first 15 years of operation as to whether it would support an independent claim for relief.”). In 1967, the Fifth Circuit relied on Title VI’s private right of action in sustaining a school-desegregation claim brought by private plaintiffs. See *Bossier Par. Sch. Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967); see also *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696 n.21 (1979) (“In addition to the Fifth Circuit in *Bossier*, at least four other federal courts explicitly relied on Title VI as the basis for a cause of action on the part of a private victim of discrimination against the alleged discriminator.” (citing *Blackshear Residents Org. v. Hous. Auth. of Austin*, 347 F. Supp. 1138, 1146 (WD Tex. 1972); *Hawthorne v. Kenbridge Recreation Ass’n*, 341 F. Supp. 1382, 1383–1384 (ED Va. 1972); *Gautreaux v. Chi. Hous. Auth.*, supra; *Bossier*, 240 F. Supp. 709, 713 (WD La. 1965), *aff’d*, 370 F.2d 847 (5th Cir. 1967)).

In 1979, the Supreme Court held in *Cannon v. University of Chicago* that plaintiffs have an implied private right of action in Title VI.¹³⁹ But even *Cannon* acknowledged the statutory ambiguity: while Congress did not foreclose an implied private right of action, neither did it wholeheartedly endorse one. According to *Cannon*, the legislative history does not “evidence[] any hostility toward an implied private” right of action, and there is no “indication in the legislative history that any Member of Congress voted in favor of the statute in reliance on an understanding that Title VI did not include a private remedy.”¹⁴⁰ At best, the legislative history indicates an absence of congressional intent to foreclose a private right of action.¹⁴¹

Under *Cannon*, actors could seek relief under Title VI, as long as the discriminatory actor was a subfederal funding recipient.¹⁴² But if the discriminatory actor was a federal agency, no relief was available under Title VI. Over time, Title VI was interpreted as applying to state, local, and even private entities that receive federal funds, but not to federal agencies.¹⁴³

If you are a would-be plaintiff, then, and the discriminatory party is a federal agency, Title VI will be of no help. Title VI will not provide you with a private

139. *Cannon*, 441 U.S. at 703 (“We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.”).

140. *Id.* at 711, 716.

141. Ultimately, *Cannon*’s reasoning hinged on the legislative history of the 1972 Congress, which enacted Title IX and patterned it on Title VI, rather than the legislative history of the 1964 Congress, which enacted Title VI. The *Cannon* majority cited the 1972 Congressional debate, writing:

In exploring the meaning of the provision, the question arose as to what might occur if a private litigant attempted to sue the Federal Government to force compliance with Title VII of the Education Amendments of 1972. The following colloquy took place:

“Mr. COOK. [I]f the Federal Government is defendant, and if the Federal Government is found guilty of violation of this act [Title VII of the Education Amendments of 1972], and it is in fact discriminating, then it is conceivable that the attorney’s fees and the costs could go against the Federal Government.

“Mr. PELL. But can an individual sue the Federal Government?”

“Mr. COOK. Under this title?”

“Mr. PELL. Yes.

“Mr. COOK. Oh yes.”

441 U.S. at 700-01 n.28.

142. See *Title VI Legal Manual*, *supra* note 40, at 20 (“[A] recipient may be a public (e.g., a State, local or municipal agency) or a private entity.”).

143. Recall that federal actors are not funding “recipients” within the meaning of Title VI. See *id.* (“Title VI does not apply to the Federal government. Therefore, a Federal agency cannot be considered a ‘recipient’ within the meaning of Title VI.”).

right of action because your opposing party would be a federal agency, not a funding “recipient” within the meaning of Title VI.

So, you might look instead to the APA. The APA provides a broad, explicit right of action: any person “adversely affected or aggrieved” by a federal agency’s action can seek judicial review.¹⁴⁴ For a would-be plaintiff, the APA seems to offer a different path to challenge discrimination by federal agencies—and this leads us to Congress’s second unanswered question about the APA and Title VI schema.

2. Section 603’s Express Right of Action and APA Review

The second question—the interaction between the APA and the further private right of action created by Title VI § 603—has been mostly overlooked by courts and academics. Title VI necessarily implicates federal agencies, since federal agencies investigate discrimination by funding recipients¹⁴⁵ and cut off funds.¹⁴⁶ Yet while Congress debated the relationship between the APA and § 603, it never clarified how the two statutes should interact. Instead, Congress punted this question to agencies and the courts.

As the legislative history shows, Congress did indeed contemplate that litigants would use the APA’s right of action in cases involving Title VI.¹⁴⁷ In debating what became § 603, Congress considered two types of challengers in two distinct postures: (1) those seeking to use the APA as a shield in order to protect funding recipients from funding cut-offs; and (2) those seeking to use the APA

144. See 5 U.S.C. § 702 (2018) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

145. See *Title VI Legal Manual*, *supra* note 40, at 72 (“The Federal agency providing the financial assistance is primarily responsible for enforcing Title VI as it applies to its recipients. . . . Evaluation mechanisms, discussed below, include pre-award reviews, post-award compliance reviews, and investigations of complaints.”).

146. Federal agencies usually try to encourage voluntary compliance with Title VI, and they rarely take the more drastic action of cutting off funds. See Myrna E. Friedman, *Administrative Cutoff of Federal Funding Under Title VI: A Proposed Interpretation of “Program,”* 52 *IND. L.J.* 651, 665 n.68 (1977) (“Although fund termination is obviously an excellent method of enforcement, it is rarely used.”).

147. When drafting Title VI, Congress added a judicial-review provision, Title VI § 603, which permits APA review of Title VI-related funding decisions. See 42 U.S.C. § 2000d-2 (2018) (“[A]ny person aggrieved . . . may obtain judicial review of such action in accordance with [the APA].”); see also *Hearings on H.R. 7152 to Enforce the Constitutional Right to Vote Before the H. Comm. on Rules*, 88th Cong. 175 (1964) [hereinafter *Rules Hearings*] (statement of Rep. Emanuel Celler) (“[T]his provision has a judicial review. Anyone who feels aggrieved can go into court We made provision for anyone aggrieved to go into court. That was not in the original bill.”).

as a sword in order to challenge discriminatory funding decisions by federal agencies.

The first posture – where the APA serves as a shield for funding recipients – stemmed from concerns about federal overreach. In the lead-up to the Civil Rights Act, civil rights groups pressed President Kennedy to cut off funds from discriminatory state and local agencies.¹⁴⁸ They argued that the President could do so unilaterally, without waiting for congressional authorization, because he already had executive power to do so.¹⁴⁹

President Kennedy, however, disclaimed this cut-off power. At a press conference in 1963, he explained: “I don’t have the power to cut off aid in a general way as was proposed by the Civil Rights Commission, and I would think it would probably be unwise to give the President of the United States that kind of power.”¹⁵⁰ Instead, President Kennedy pushed for specific legislation that could authorize, but also cabin, the Executive’s power to withhold funds.¹⁵¹

The early versions of Title VI, however, failed to assuage concerns about executive overreach. Members of Congress from southern states feared that Title VI granted too much power to federal bureaucrats, who could cut off funds as they pleased. They worried that federal agencies – filled with “unelected, empire-building Government bureaucrats” – would hold funds hostage to states’

148. See 110 CONG. REC. 7,264 (1964) (statement of Sen. Allen Ellender) (“In April 1963, the Civil Rights Commission [a federal commission] recommended that [President Kennedy] seek power to suspend Federal funds to States which fail to ‘comply with the Constitution and laws of the United States.’”).

149. See Abernathy, *supra* note 135, at 7-8 (“Civil rights organizations tended to support the Commission’s view [that the President could cut off funds], some even arguing that the title was unnecessary because the Constitution already required what Congress proposed to do in Title VI.”).

150. See 110 CONG. REC. 7,264 (1964) (statement of Sen. Allen Ellender).

151. Adam Clayton Powell Jr., a Representative from New York, was one of the originators of the funding cut-off idea. As one of the few Black members of Congress, Representative Powell would add “Powell amendments” to many bills in an attempt to ensure that federal programs would not fund discrimination:

For years now, Representative Adam Clayton Powell Jr. of Harlem, a fiery and controversial black politician, had appended “Powell amendments” – requirements that whatever the program was, it could not be implemented in a discriminatory manner – to various pieces of domestic legislation, in essence turning otherwise innocuous bills into civil rights proposals . . . [T]he weekend before the bill was introduced, Kennedy called O’Hara [a Representative and an ally of the Civil Rights Act] at home and asked him to draft a Powell plank to add to the bill . . . This new plank, which came to be known as Title VI, gave the president the power to cut off funds to a state or local program that used them in a discriminatory manner.

RISEN, *supra* note 131, at 72-73.

good behavior.¹⁵² Title VI was “blackmail, pure and simple,” they claimed, and it gave agencies “a club to hold over the heads of the States . . . to coerce them into almost any position the executive department wishes.”¹⁵³

To mollify them,¹⁵⁴ supporters of the bill introduced amendments, including the judicial-review provision in § 603. Under § 603, agencies would retain the power to cut off funds, but the agency’s decision would be reviewable by the courts.¹⁵⁵ Judicial review was meant to curb the powers that Title VI granted to the executive branch. But by introducing judicial review, Congress muddied the APA and Title VI schema, because the review guaranteed under § 603 contemplated both APA and non-APA review. Title VI’s judicial-review provision, § 603, provides:

Any department or agency action taken pursuant to [Title VI § 602 (authorizing agencies to cut off funds)] shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to [§ 602], any person aggrieved . . . may obtain judicial review of such action in accordance with [the APA], and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.¹⁵⁶

152. *Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 88th Cong. 1583 (1963) [hereinafter *Judiciary Hearings*] (statement of Rep. W.J. Bryan Dorn) (“There is no end to where this type of power could lead conferred in the hands of unelected, empire-building Government bureaucrats.”).

153. 110 CONG. REC. 7,264 (1964) (statement of Sen. Allen Ellender).

154. *Judiciary Hearings*, *supra* note 152, at 1547 (statement of Rep. William M. McCulloch) (“[T]here is need for some review by somebody somewhere.”).

155. The House debate on Title VI was tumultuous and filled with attempts to sabotage the bill. See, e.g., *House Approves Federal Aid Curb in the Rights Bill; Rejects Attack on Plan to Cut off Funds for Areas that Discriminate*, N.Y. TIMES (Feb. 8, 1964), <https://www.nytimes.com/1964/02/08/archives/house-approves-federal-aid-curb-in-the-rights-bill-rejects-attack.html> [https://perma.cc/CB3P-FWJX] (“Then just before 5 P.M., as the debate waxed hotter and the Southern cause was plainly lost, two Southern leaders tried a dramatic maneuver to save the day. Representative Oren Harris, Democrat of Arkansas, got up and proposed that in place of the section framed by the Judiciary Committee the House go back to the original version proposed last June by President Kennedy The House was immediately in an uproar There was great huir’rying [sic] and scurrying When the teller vote was taken, the Harris amendment was beaten 206 to 80.”); see also RISEN, *supra* note 131, at 158-59 (describing the incident with the Oren Harris amendment).

156. 42 U.S.C. § 2000d-2 (2018).

Whatever its other ambiguities, § 603 plainly guarantees judicial review to any person aggrieved by an agency decision to cut off funds.¹⁵⁷ The statute has two prongs. The first prong of § 603 preserves judicial review of agency funding decisions under extant miscellaneous statutes or regulations, “as may otherwise be provided by law.”¹⁵⁸ If such review is not available, the second prong of § 603 guarantees that an aggrieved party retains the ability to seek APA review as to particular species of decisions: those “terminating or refusing to grant or to continue financial assistance.”¹⁵⁹ Importantly, the second prong expressly overrides reviewability concerns: an agency cannot assert that its actions are “committed to agency discretion by law” and thus barred under APA § 701(a)(2).¹⁶⁰ The language of § 603 clearly precludes insulation from judicial review.¹⁶¹

Nor is § 603 ambiguous as to whether its private right of action can be used by private litigants, as opposed to state or local grantees, at least when it is invoked as a shield to defend against funding cut-offs. That much is clear from the text of the statute, as well as its legislative history. Representative Robert Ashmore from South Carolina, for example, raised a hypothetical about a “disabled veteran” whose federal funds were “feeding his family.”¹⁶² According to Representative Ashmore, § 603 review was too slow, because the disabled veteran might starve while waiting for a court’s decision:

Well, the funds are already cut off. You have got to go through court. His money is stopped. He may be feeding his family with it, he may be a disabled veteran, he might not be able to work a lick, he may be a social security recipient. What are you going to do then? We get right back to your point – you have to go to court.¹⁶³

157. *Id.*

158. *Id.*

159. *Id.* This chapter of the APA describes the kinds of judicial review that are available to a person “adversely affected or aggrieved by agency action.” 5 U.S.C. § 702 (2018).

160. Traditionally, APA review is not available if the agency action was “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2) (2018). We discuss reviewability and *Heckler v. Chaney*, 470 U.S. 821 (1985), in Part III.

161. Note that, with the addition of § 603, Title VI now included not just one, but *two* rights of action: an implied private right of action in § 601 and an express right of action in § 603. Section 601, as interpreted by *Alexander v. Sandoval*, 532 U.S. 275 (2001), contains an implied private right of action against disparate treatment only (not disparate impact). Section 603, by contrast, contains an express right of action, and it guarantees judicial review (including APA review) to any person aggrieved by an agency decision that halts the flow of funds.

162. *Hearings on H.R. 7152 as Amended by Subcommittee No. 5 Before the H. Comm. on the Judiciary*, 88th Cong. 2741 (1963) (statement of Rep. Robert Ashmore).

163. *Id.*

Representative Ashmore's hypothetical assumed that private actors, like a disabled veteran, could bring claims under § 603. And while Representative Ashmore opposed Title VI, even supporters of Title VI agreed that private actors could use § 603. Representative Emanuel Celler, a supporter of Title VI, described § 603 by saying, "[T]his provision has a judicial review. Anyone who feels aggrieved can go into court."¹⁶⁴ Even though Representatives Ashmore and Celler were on opposing sides of Title VI, both read § 603 as extending an express right of action to private litigants, not just to state and local actors.

Section 603 gives us the first glimpse into the APA and Title VI schema. And in this first posture, Congress unmistakably activated the APA as a shield for funding recipients. Funding recipients, including state, local, and even private actors, could use the APA's right of action to protect themselves from arbitrary funding cut-offs.¹⁶⁵

Less clear is how to square § 603 and the APA in the second posture, where private litigants invoke the APA as a sword to challenge federal-agency failures to enforce Title VI's antidiscrimination mandate against subfederal funding recipients. The availability of a sword-like action is at least plausible under the first prong of § 603. After all, that prong refers to "such judicial review as may otherwise be provided by law," which would include the APA.

Beyond this, however, the ambiguities quickly mount. Section 603 further refers to agency "action" taken pursuant to § 602's grant of authority to agencies to effectuate § 601. On the one hand, § 602 only mentions funding terminations and cut-offs. If the agency "action" subject to challenge under § 603 is so limited, then § 603 authorizes only shield-like suits. On the other hand, agency "action," which goes undefined in the Civil Rights Act, is not so narrowly defined in other statutes, including the APA itself. The APA defines action as including an agency's "failure to act."¹⁶⁶ It is but a short step from there to the use of § 603 as a sword against an agency's failure to cut off a discriminatory funding recipient

164. *Rules Hearings*, *supra* note 147, at 175 (statement of Rep. Emanuel Celler).

165. But § 603's judicial-review provision was not enough to satisfy the staunchest opponents of the Civil Rights Act. Senator Sam Ervin from North Carolina, for example, argued that the judicial-review provision was inadequate because there are "as many procedures as Heinz has pickles." 110 CONG. REC. 5605 (1964) (statement of Sen. Sam Ervin). Representative Richard Harding Poff of Virginia maintained that "a man does not have his full day in court if he is entitled only to a judicial review." *Rules Hearing*, *supra* note 147, at 378 (statement of Rep. Richard Harding Poff). Throughout the proceedings, Senator Ervin attempted to stall the Civil Rights Act by "nitpicking points" and "poking at minutiae." RISEN, *supra* note 131, at 219; *see also* RISEN, *supra* note 131, at 103 (describing Senator Ervin's many speeches as a "strategy of attrition").

166. 5 U.S.C. § 551(13) (2018).

under § 602. To be sure, other APA constraints might apply, including the reviewability barrier under APA § 701(a)(2)¹⁶⁷ noted previously, but the basic cause of action would be, at the least, theoretically available. Perhaps reflecting these and other textual ambiguities, some litigants have convinced courts that sword-like actions can lie under § 603,¹⁶⁸ while the more recent trend, as articulated in *Garcia v. McCarthy*, runs against any such interpretation.¹⁶⁹

If § 603's text and the case law interpreting it are ambiguous, then the legislative history is less so – though it is hardly determinative. Indeed, use of § 603 as a sword surfaces only fleetingly, and only in comments by two steadfast opponents of the Civil Rights Act, Representatives Richard Harding Poff and William C. Cramer. Those comments came in a somewhat puzzling House Judiciary Committee report.¹⁷⁰ The bulk of the report supported the Civil Rights Act, but Representatives Poff and Cramer authored a separate section in opposition.¹⁷¹ They wrote: “We regard it as our duty to protest the manner in which this legislation was handled in committee.”¹⁷² They proceeded to attack the Civil Rights Act section by section, raising a litany of concerns.

167. See *id.* § 701(a)(2); see also *Heckler v. Chaney*, 470 U.S. 821, 838 (1985) (discussing the “general exception to reviewability provided by § 701(a)(2)”).

168. See, e.g., *Hardy v. Leonard*, 377 F. Supp. 831, 837 (N.D. Cal. 1974) (“Neither these cases nor any other authority . . . suggests why judicial review of a final agency decision *not* to terminate funds is not equally proper and necessary if the integrity of the scheme erected by Congress under Title VI is to be protected.”). Similarly, some of the secondary literature suggests that § 603 is both a sword and shield. The *Federal Procedure Practice Manual*, for example, states that § 603's cause of action may be used by (1) “the recipient of the benefits of a program who is injured by termination of funds to the program,” who would use it as a shield, and also by (2) “a third party who is injured by the discriminatory actions of a program to which the department or agency does not terminate funding,” who would use it as a sword. Ashworth et al., *Job Discrimination*, in 21 FEDERAL PROCEDURE § 50:470 (Lawyer's ed. 2021) (footnotes omitted). Note, however, that this statement does not distinguish between maintenance of a claim under the first part of § 603 or the second part, where claimants can duck reviewability concerns.

169. See No. 13-CV-03939, 2014 WL 187386, at *10 (N.D. Cal. Jan. 16, 2014), *aff'd*, 649 F. App'x 589 (9th Cir. 2016) (“The Court rejects the plaintiffs' interpretation. The most natural reading of the statute is that ‘refusing’ modifies both ‘grant’ and ‘continue.’ First, the phrase ‘refusing to grant or continue’ is separated from the rest of the provision by commas, suggesting it is an independent clause, with ‘refusing’ modifying both ‘grant’ and ‘continue.’ Second, the identical simple present tenses of ‘grant’ and ‘continue’ suggest that they are modified by ‘refusing to’; to read ‘continue’ as being independent, as the plaintiffs wish the Court to do, would result in an ungrammatical sentence that essentially reads, ‘in the case of any action terminating . . . or continue[] assistance’ The verb tenses would not be parallel.”).

170. H.R. REP. NO. 88-914 (1963).

171. *Id.* at 95.

172. *Id.*

Their more specific comments about the sword-like § 603 posture come in the Title VI section titled “Cut Off the Funds.”¹⁷³ There, Representatives Poff and Cramer repeated the familiar concerns about agency overreach, as they worried that Title VI gave too much power to unaccountable bureaucrats. Next, they aired a novel concern: that § 603 would “clutter the docket” of the federal courts because its right of action was a sword for plaintiffs alleging discrimination, not just a shield for plaintiffs protesting funding cut-offs.¹⁷⁴ They wrote:

It should also be remembered that this judicial procedure [§ 603 review] is available to those who bring charges of discrimination and who are aggrieved by the negative ruling of the administrative agency. Thus, no matter how frivolous the charge may be, the complainant may demand and the circuit courts must entertain petitions for judicial review. It is obvious that the passage of this legislation would clutter the docket of the circuit court with an unmanageable workload.¹⁷⁵

In short, federal dockets would be filled with “frivolous” antidiscrimination lawsuits brought under § 603 by private actors challenging agency refusals to enforce Title VI’s antidiscrimination mandate against funding recipients.¹⁷⁶ In this second posture, private litigants would use the APA as a sword, not just as a shield, to compel federal agencies to enforce Title VI.¹⁷⁷

While the submissions of two staunch legislative opponents are plainly insufficient to prove the availability of sword-like claims, they nonetheless underscore the wider ambiguities in § 603’s invocation of the APA. Perhaps the best that can be said is that Congress never fully clarified the APA and Title VI schema. Instead, Congress left a canvas that, if not entirely blank, nonetheless provided ample room to maneuver as courts entertained a growing tide of litigation challenging federal-agency oversight of the nation’s civil rights laws.

173. *Id.* at 102-07.

174. *Id.* at 103.

175. *Id.*

176. *Id.*

177. The comments by Representatives Richard Harding Poff and William C. Cramer were repeated, verbatim, in a separate part of the legislative history, but they were never again actively discussed. See *Judiciary Hearings*, *supra* note 152, at 95. Later courts erred, we believe, when they cited the Poff and Cramer comments as conclusive of congressional intent. See, e.g., *NAACP v. Wilmington Med. Ctr., Inc.*, 453 F. Supp. 280, 296 (D. Del. 1978) (citing Representatives Poff and Cramer’s minority view) (“Representatives Poff and Cramer issued a separate minority statement which expressed their concern . . .”).

B. Litigating Disparate Limbo

The ambiguities that emerged from Congress's fevered efforts to enact the Civil Rights Act in 1964 would inevitably put courts center stage in squaring Title VI and other antidiscrimination laws with the APA. Disparate limbo was a judicial act in three parts, as the nation's continuing struggles around civil rights thrust courts into one of the most hotly contested political issues of the day and put the Civil Rights Act and the APA on a collision course.

1. Council of & for the Blind (1983)

In the decades after the enactment of the Civil Rights Act, the D.C. Circuit began filling in the gaps in the APA and Title VI schema. And an increasingly conservative D.C. Circuit began using APA § 704 to channel antidiscrimination claims away from the APA.¹⁷⁸

The § 704 maneuver first surfaced in an early antidiscrimination case, *Council of & for the Blind*.¹⁷⁹ There, the D.C. Circuit, in a closely divided en banc decision, affirmed the dismissal of the plaintiffs' APA and antidiscrimination challenge to a federal agency, concluding that they could pursue an "adequate remedy" outside of the APA.¹⁸⁰

Block grants to subfederal governments with few or no strings attached to their allocation were an innovation of the late 1960s and 1970s – an extension of the War on Poverty's effort to stimulate "maximum feasible participation" within

178. See Milligan, *supra* note 33 (manuscript at 54-55). Milligan's important account discusses the constitutional story under the Fifth Amendment, focusing primarily on the federal courts' creation and then retrenchment of what she calls the "no-aid principle" – the notion that federal agencies should not fund or otherwise assist unlawful discrimination. See *id.* (manuscript at 3). As Milligan notes, in the 1980s the Supreme Court began to retrench the no-aid principle by raising new procedural barriers for antidiscrimination plaintiffs such as standing (in *Allen v. Wright*, 468 U.S. 737 (1984)) and reviewability (*Heckler v. Chaney*, 470 U.S. 821 (1985)). *Id.* (manuscript at 48-51, 52-53). The D.C. Circuit built upon the Supreme Court's barriers via APA § 704. See *id.* (manuscript at 55) ("The key D.C. Circuit cases played out on the domain of APA reviewability. Rather than rule that suits challenging federal subsidies for discrimination failed for lack of standing or that *Heckler* barred review of such administrative 'inaction,' the D.C. Circuit instead relied upon the APA's requirement that 'no other adequate remedy in a court' be available.").

179. *Council of & for the Blind of Del. Cnty. Valley, Inc. v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983).

180. *Id.* at 1531 ("[T]he APA limits judicial review to '[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.' . . . [I]n determining whether appellants have stated a cause of action under the APA, the key inquiry is whether section 124 [a different antidiscrimination statute] provides an adequate remedy for the wrong allegedly inflicted on appellants by the ORS. We conclude that it does." (footnote omitted)).

local communities while respecting federalism principles.¹⁸¹ But no-strings grants also raised the specter of discriminatory distribution by local officials who had proven all too willing to violate the civil rights of racial and ethnic minorities and women.¹⁸² One such program came in 1972 as part of the Revenue Sharing Act, overseen by the Office of Revenue Sharing (ORS).¹⁸³ In 1976, when the agency-only oversight and enforcement scheme proved inadequate, Congress bolstered it by outlining a process for agency-enforcement efforts and recognizing a private right of action to challenge a funding recipient's discriminatory decision if the agency's process stalled.¹⁸⁴ However, and of critical importance to the case, Congress had not "expressly delineate[d] who [could] be a defendant in such a suit" if ORS refused to proceed administratively.¹⁸⁵

When ORS failed to move on duly filed administrative complaints, plaintiffs, a group of seven organizations from across the United States, filed suit under both the Revenue Sharing Act's new private right of action and the APA,¹⁸⁶ charging that ORS had routinely ignored discrimination complaints and contin-

181. The alternative to block grants was categorical grants. See, e.g., Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 872-73 (2001) (discussing the War on Poverty and the Economic Opportunity Act of 1964, which promoted the "maximum feasible participation of the poor" in its antipoverty programs (citing the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508) (codified as amended in scattered sections of 42 U.S.C.)).

182. *Id.* (describing community tensions over federal grants and how "many black communities organized and demanded authority over the program's priorities and decision making").

183. State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (codified as amended in part at 31 U.S.C. §§ 1221-1265 (2018)).

184. *Council of & for the Blind*, 709 F.2d at 1526 ("From its inception, the revenue sharing program was premised on the 'no strings' philosophy, in contrast to the categorical grant programs then in existence. Thus, the [Office of Revenue Sharing (ORS)] was to have a relatively small staff to administer the provisions of section 122, and extensive reliance was placed on the investigative and auditing powers of other state and federal agencies. This enforcement scheme did not prove adequate, however, and in 1976 when the revenue sharing program was extended, changes were made in the enforcement mechanism. A review of the resulting enforcement scheme shows that while Congress was aware that the ORS might not adequately handle discrimination complaints, it deliberately structured the manner in which revenue sharing nondiscrimination obligations could be monitored and challenged with a view to avoiding large expansion of the ORS's staff").

185. *Id.* at 1527.

186. *Id.* at 1537 n.12 (describing how the federal agency "has elected not to initiate the investigations required" by antidiscrimination statutes, and describing allegations against the agency's funding recipients, including Memphis, Tennessee, which "maintained racially discriminatory employment practices," and against Sutter County, California, which "engaged in employment practices which discriminate on the basis of race, national origin and sex" (citations omitted)).

ued to fund local agencies even after making findings that they had discriminated against minority groups.¹⁸⁷ Notably, the complaint sought an injunction against ORS to force the federal agency to comply with antidiscrimination norms. However, it neither sought separate remedies against nor even named any of the dozens of local actors that were alleged in the complaint to be making discriminatory distributions.¹⁸⁸

A bare en banc majority comprising six of the eleven judges of the D.C. Circuit—a group that included all four of the court’s conservatives, including then-Judge Scalia and Judge Bork, but also the more liberal then-Judge Ginsburg—dismissed plaintiffs’ APA claim.¹⁸⁹ The majority first rejected the possibility that the Revenue Sharing Act provided a right of action against ORS, despite the Act’s explicit provision of injunctive relief in the form of “suspension, termination, or repayment of funds” or the award of attorneys’ fees against ORS.¹⁹⁰ After dwelling only briefly on these textual details, the majority instead put a gloss on the Act, offering up multiple outtakes from the legislative record—many of which were debatable and in clear tension with the ardent textualism of several of the signatories—and finding in them a clear congressional intent to train private enforcement efforts on funding recipients, not the agency. In a final line of argument, the majority noted the demands of “continuing supervision” that would be placed on courts by a single, omnibus suit challenging “ORS’s entire civil rights enforcement effort.”¹⁹¹ DOJ, too, would quickly be overwhelmed, and its enforcement powers “severely limited,” if private suits under the Act could be maintained against the “Federal government.”¹⁹²

187. According to the complaint, the federal agency “in two instances” conducted an investigation which “result[ed] in a determination that the recipient had transgressed the Act,” but that the federal agency nevertheless “failed to secure a compliance agreement or impose sanctions.” *Id.* The complaint cited the City of Santa Maria, California, which was found “out of conformity” because it “engaged in employment practices which discriminate against blacks, Mexican-Americans and women,” and San Luis Obispo County, California, which was found to be “in violation” of antidiscrimination statutes given its “practice of employment discrimination against blacks, Mexican-Americans, Spanish-surnamed persons and women.” *Id.* (citing Amended Complaint ¶¶ 42–47, *Council of & for the Blind*, 709 F.2d 1521 (D.C. Cir. 1983) (No. 81–1389)).

188. *Id.* at 1525 (“[A]ppellants asserted that the ORS was not adequately enforcing the nondiscrimination provision, and they asked the court to do whatever was necessary to ensure that the ORS improved its performance . . .”).

189. *Id.* at 1531–35 (dismissing the APA claim on § 704 grounds).

190. *Id.* at 1527–28.

191. *Id.* at 1533, 1524.

192. *Id.* at 1529–30.

The majority made equally quick work of the appellants' APA arguments. Zeroing in on APA § 704's limitation on judicial review to only those agency actions "for which there is no other adequate remedy in a court," the majority questioned whether "a nationwide suit" would "remedy appellants' grievances more effectively" than multiple suits against funding recipients.¹⁹³ But that finding, the court suggested, was ultimately unnecessary: "[E]ven if . . . a nationwide suit would be more effective, the remedy provided by Congress" — a remedy that the majority had just limited to suits against funding recipients — "is adequate to redress the discrimination allegedly encountered by appellants."¹⁹⁴ APA § 704 thus barred plaintiffs from seeking an injunction against the agency.¹⁹⁵

Chief Judge Robinson, writing for the remaining five judges — a group that included equally illustrious liberal members, Judges Mikva, Wald, and Skelly Wright — concurred and dissented in part, agreeing with the majority that the Revenue Sharing Act contemplated only suits against fundees, but hotly contesting the majority's approach to squaring the Revenue Sharing Act and the APA. Chief Judge Robinson started by sounding a practical note: individual lawsuits are "expensive, time-consuming and burdensome," and the resulting flow of suits that one could realistically expect would be "grossly disproportionate" to ORS's systematic failures to discharge its statutory duties.¹⁹⁶ Myriad separate suits against fundees, Chief Judge Robinson concluded, were thus "tantamount to little or no solution at all."¹⁹⁷

But from there, the opinion raised a more fundamental concern: legally speaking, the types of remedies afforded by a single suit against ORS and those afforded by plural suits against fundees "diverge radically."¹⁹⁸ Thousands of suits against grantees might achieve funding cut-offs (that is, so long as ORS was a nominal party to effect an injunctive remedy), but frozen funding would accomplish precisely nothing in terms of correcting ORS's repeated derelictions in discharging its statutory responsibilities.¹⁹⁹ Because the two remedies targeted different behaviors, it was incoherent to suggest that the two were substantially

193. *Id.* at 1531-32; *see also id.* at 1532 ("However, it is not clear at all that a nationwide suit would remedy appellants' grievances more effectively than several section 124 suits.").

194. *Id.* at 1532-33 (emphasis omitted).

195. *Id.*

196. *Id.* at 1551 (Robinson, C.J., concurring in part and dissenting in part); *see also id.* ("With an aggregate citizens effort under Section 124 hardly more than pathetic, the blight of discriminatory expenditures of revenue-sharing funds will remain unabated.").

197. *Id.*

198. *Id.* at 1550.

199. *Id.* at 1552 ("In my judgment, an injunction directing ORS to perform its statutory functions is the only adequate remedy for the wholesale statutory violations appellants lay at ORS' doorstep.").

equivalent, or that plural suits against funding recipients were an “adequate” substitute for plaintiffs’ action against ORS within the meaning of APA § 704.

Against the majority’s claim that the suit targeted “ORS’s entire civil rights enforcement effort,”²⁰⁰ Chief Judge Robinson offered a procedural way out: rather than affirming its dismissal, the district court could instead restart class certification, which the court had previously denied without prejudice, and use Rule 23’s strictures to manage the litigation’s scope.²⁰¹ Rule 23’s requirements, in other words, would serve to cabin suits against federal agencies like ORS—for instance, limiting claims to those who had already lodged administrative complaints—thus safeguarding ORS against profligate, nationwide suits. Chief Judge Robinson’s proposal reflected his experience at the NAACP, where he had decades earlier litigated *Brown v. Board of Education* and so “knew the stakes of holding the national government accountable for funding discrimination.”²⁰² Yet Chief Judge Robinson’s proposal came from the losing side—more a plaintive fade-out than a concrete proposal. The plaintiffs’ APA claim was dismissed.

2. Women’s Equity Action League (1990)

Council of & for the Blind was a close case, decided by a bare majority of the en banc court, and it is not hard to imagine the decision coming out the other way. Harder to grasp is how, just seven years later, the D.C. Circuit could double down on the § 704 maneuver and dismiss a more consequential civil rights suit, this time with then-Judge Ginsburg holding the pen.²⁰³

Women’s Equity, also called the *Adams*²⁰⁴ litigation, was a juggernaut of a case. Initiated in 1970 by Black students in segregated schools in seventeen states,²⁰⁵ the case soon snowballed. In the case’s original guise, the plaintiffs alleged that

200. *Id.* at 1524 (majority opinion).

201. *Id.* at 1541-47 (Robinson, C.J., concurring in part and dissenting in part) (citing FED. R. CIV. P. 23(a)).

202. See Milligan, *supra* note 33 (manuscript at 57) (“Judge Spottswood Robinson wrote for the dissenters. Decades earlier as an NAACP lawyer, Robinson had argued before the Supreme Court in *Brown v. Board of Education*. He knew the stakes of holding the national government accountable for funding discrimination.”).

203. *Women’s Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990).

204. Throughout its twenty-year span, the case went by many names: *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973); *Adams v. Bennett*, 675 F. Supp. 668 (D.D.C. 1987); and *Women’s Equity Action League v. Cavazos*, 879 F.2d 880 (D.C. Cir. 1989), *supplemented*, 906 F.2d 742 (D.C. Cir. 1990).

205. See *Women’s Equity*, 906 F.2d at 744 (“This litigation began in 1970 when black students attending racially segregated public schools in seventeen states complained of the delinquency of the Department of Health, Education, and Welfare (HEW) in enforcing Title VI of the Civil Rights Act of 1964.”).

the U.S. Department of Health, Education, and Welfare (HEW) was flouting Title VI by continuing to provide federal funding for discriminatory schools, from the elementary to the university level.²⁰⁶ But by 1990, the case had grown substantially and come to encompass schools in all fifty states, as overseen by multiple enforcement units of the Departments of Education and Labor implementing four different civil rights measures, including Title VI, Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act, and Executive Order 11,246.²⁰⁷ With the addition of new civil rights guarantees came new classes of plaintiffs, including women's-rights groups, disability-rights groups, and a group of Mexican-American plaintiffs, among others.²⁰⁸ By the time Judge Ginsburg took the pen, the case had reached, in her words, "colossal proportions."²⁰⁹

The case sitting before the D.C. Circuit in 1990 had morphed in other critical ways as well. The original complaint asserted that HEW had "abdicat[ed]" its responsibility to enforce Title VI and sought an injunction compelling the agency to address discrimination among schools receiving HEW funding.²¹⁰ In that initial guise, the case had quickly yielded a district-court decree requiring HEW to initiate enforcement proceedings upon determining noncompliance with Title VI.²¹¹ As the case expanded, however, the plaintiffs had softened their claims of deliberate agency defiance and also their insinuation of a widescale and calculated effort by the Nixon Administration to "remove 'the teeth of Title VI.'"²¹² In their place came a less accusatory set of allegations sounding more in

206. *Women's Equity*, 879 F.2d at 881 ("The initiating plaintiffs alleged that, in violation of the fifth and fourteenth amendments and, most particularly, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1982), HEW's Office of Civil Rights (OCR) continued to countenance the channeling of federal funds to racially discriminatory institutions.").

207. *Women's Equity*, 906 F.2d at 746 ("The litigation, next, swelled to encompass additional classes of plaintiffs as well as other statutory civil rights guarantees—Title IX, Executive Order 11246, and section 504 of the Rehabilitation Act of 1973.").

208. See *Adams v. Mathews*, 536 F.2d 417, 418 (D.C. Cir. 1976) ("The [*Women's Equity Action League*] plaintiffs moved to intervene in *Adams* on March 17. They joined, as applicants for intervention, a group of Mexican-Americans who sought to secure HEW enforcement of 'national origin' desegregation under Title VI, and who had moved to intervene on January 22."); *Women's Equity*, 879 F.2d at 883 ("Completing the classes represented, the National Federation of the Blind (NFB) intervened in 1977 . . . NFB complained of the failure of federal officers to process handicap discrimination complaints within a reasonable time and to conduct a reasonable number of handicap discrimination compliance reviews.").

209. *Women's Equity*, 906 F.2d at 744.

210. *Id.* at 746 (repeating plaintiffs' allegation that "HEW had 'consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty'" (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973))).

211. *Adams v. Richardson*, 356 F. Supp. 92, 98 (D.D.C.), *modified*, 480 F.2d 1159 (D.C. Cir. 1973).

212. *Women's Equity*, 906 F.2d at 745.

bureaucratic foot-dragging and centered around a more concrete litany of “lags and lapses”: agency failures to process complaints, perform investigations, or launch enforcement actions.²¹³ As the case shifted in its focus and embraced new civil rights guarantees, new agencies, and new plaintiffs, the district court’s injunction expanded accordingly, encompassing future complaints of racial discrimination and prescribing specific agency actions, from complaint processing to court-ordered, institution-specific “compliance reviews,” with detailed time schedules for each.²¹⁴ In 1977, the parties entered into a consent decree that largely duplicated many of the specifics of the district court’s injunctive orders.²¹⁵

Writing for a unanimous three-judge panel, Judge Ginsburg first summarized these and other twists and turns from nearly two decades of litigation, including all three of the case’s previous trips to the D.C. Circuit.²¹⁶ Those earlier appeals had come amidst an ever-changing government position on the case, as control of the White House ping-ponged from Republican to Democratic control and back again.²¹⁷ The prior appeals had also contended with a shifting doctrinal landscape, particularly the Supreme Court’s 1984 decision in *Allen v. Wright*, which held that a group of Black plaintiffs lacked Article III standing to challenge the IRS’s nonenforcement of the Revenue Code against private segregation academies that had sprouted in *Brown v. Board of Education*’s wake.²¹⁸ In 1989, the D.C. Circuit, with Judge Ginsburg again writing for the panel, had steered a treacherous course between *Allen*’s rationales, thus preserving the *Women’s Equity* plaintiffs’ standing to sue.²¹⁹ An earlier appeal in 1973, *Adams v. Richardson*, had likewise turned back a challenge asserting that the plaintiffs lacked a right of action under the APA.²²⁰ The government had argued that enforcement of Title VI was committed to agency discretion by law under APA § 701(a)(2),²²¹ a harbinger of the Supreme Court’s decision in *Heckler v. Chaney*

213. *Id.* at 751.

214. *Id.* at 746.

215. *Adams v. Califano*, 430 F. Supp. 118, 119 (D.D.C. 1977).

216. *Women’s Equity*, 906 F.2d at 744-47.

217. *Adams v. Bennett*, 675 F. Supp. 668, 674 (D.D.C. 1987); *Women’s Equity*, 906 F.2d at 747.

218. *Allen v. Wright*, 468 U.S. 737, 743-44, 765-66 (1984).

219. *Women’s Equity Action League v. Cavazos*, 879 F.2d 880, 885 (D.C. Cir. 1989) (“The direct injury absent in *Allen* is alleged and emphasized by the plaintiffs before us. They assert no ‘abstract denigration injury.’ Fitting their claims into a familiar mold, these plaintiffs, ‘like the plaintiffs having standing in virtually any equal protection case,’ allege that they are ‘personally subject to the challenged discrimination.’ The *Allen* Court, in sum, excluded the bystander, but preserved court access for persons claiming direct exposure to government-aided facilities that engage in proscribed discrimination.” (footnote and citations omitted)).

220. 480 F.2d 1159, 1166 (D.C. Cir. 1973).

221. *Id.* at 1161-62.

more than ten years later. With those issues cleared away, there remained a single question that stretched all the way back to Congress's tortured debates over § 603: whether Title VI or, in the alternative, the APA could support a private right of action against federal funding agencies.

Judge Ginsburg's opinion methodically rejected both statutory hooks. Turning first to the possibility that Title VI might support a private right of action against federal agencies with supervisory duties, the opinion rested heavily on the Supreme Court's *Cannon* decision finding an implied private right of action under Title VI § 601.²²² Particular weight was given to the *Cannon* Court's parsing of the legislative record and its finding therein "a compromise aimed at protecting individual rights without subjecting the Government to suits."²²³ Noting that nearly every circuit to address the issue since *Cannon* had come out similarly and hewing to *Cannon's* gloss on § 601's legislative history (but without so much as mentioning § 603), Judge Ginsburg's opinion found that Congress had signaled "implicit approbation of situation-specific" lawsuits against funding recipients but not challenges to federal agencies acting in an overseer role.²²⁴ The court likewise summarily rejected the plaintiffs' argument that their claims sought to correct agency failures to promptly process complaints and conduct compliance reviews, but did not seek funding cut-offs.²²⁵ The court rejected this argument, and with it the gravamen of the dissent in *Council of & for the Blind*, because the consent decree's terms pointed to fund termination if voluntary compliance was not achieved: the two species of suit—one against discriminating subfederal funding recipients, the other against a foot-dragging federal agency—were really one and the same.²²⁶

Turning to the APA, the court reached its conclusion that the plaintiffs lacked a cause of action using some of the same raw materials. Judge Ginsburg once more began with Title VI's legislative history and the *Cannon* Court's holding that plaintiffs possessed an implied private right of action under Title VI against funding recipients.²²⁷ But turning to the further question of whether *Council of & for the Blind* controlled the case, the opinion walked a tightrope. Noting that

222. *Women's Equity*, 906 F.2d at 747-48.

223. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 715 (1979); see also *id.* at 715 n.51 (concluding that the legislative "compromise" struck was "conducive to implication of a private remedy against a discriminatory recipient," but not "to implication of a private remedy against the Government"); *Women's Equity*, 906 F.2d at 750 (quoting the same).

224. *Women's Equity*, 906 F.2d at 749 n.9 (noting the *Cannon* Court's "implicit approbation of situation-specific decisions").

225. *Id.* at 750.

226. *Id.*; *Council of & for the Blind of Del. Cnty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1534-53 (D.C. Cir. 1983) (Robinson, C.J., concurring in part and dissenting in part).

227. *Women's Equity*, 906 F.2d at 750.

the court in *Council* had deferred to what it saw as a congressional judgment about the need for an APA remedy in conjunction with the Revenue Sharing Act, the court conceded that *Council* could not control on that basis alone.²²⁸ After all, Title VI's tortured legislative history hardly matched the Revenue Sharing Act, where Congress had created a bespoke system of review, including a private right of action against entities receiving funds, with the express intent of bolstering a failed agency-only system of review.²²⁹ Unlike in *Council*, APA § 704's application to the *Women's Equity* plaintiffs would turn not on an appraisal of congressional judgment, but rather on the court's independent assessment of the *adequacy* of the alternative remedies Congress had provided.²³⁰

But having steered the case toward the adequacy issue, Judge Ginsburg's opinion quickly found Title VI suits sufficient. "Suits directly against the discriminating entities may be more arduous, and less effective in providing systemic relief, than continuing judicial oversight of federal government enforcement," Judge Ginsburg noted.²³¹ "But under our precedent, situation-specific litigation affords an adequate, even if imperfect, remedy."²³² Leaning heavily, if not exclusively, on its own view of the adequacy of the remedies Title VI afforded against funding recipients, the court moved swiftly to its conclusion that APA § 704 barred review. Like the plaintiffs in *Council of & for the Blind*, the court concluded that the *Women's Equity* plaintiffs should file individual state- and local-level suits rather than seek an injunction against the federal agency at the top.²³³

It may seem peculiar that Judge Ginsburg, a lifelong civil rights champion, dismissed a landmark civil rights case. One explanation is that she was simply too boxed in by precedent. Indeed, Judge Ginsburg was at pains to note in the opinion's introduction that the holding to follow was "impelled" by past precedent, including *Cannon* and *Council of & for the Blind*.²³⁴ But if so, then her failure to even mention *Bowen v. Massachusetts*, the Supreme Court's most recent and

228. *Id.* at 751.

229. *Id.*; *Council of & for the Blind*, 709 F.2d at 1531 n.69 (noting that the ORS scenario was distinguishable from the Title VI scenario because "Congress did not expressly provide a remedy for the agency's failure to enforce the nondiscrimination provision of Title VI").

230. *Women's Equity*, 906 F.2d at 751.

231. *Id.*

232. *Id.*

233. *Id.* ("*Council of and for the Blind*, we conclude, controls our decision here. The remedies available to the plaintiffs before us are of the same genre as the one held sufficient to preclude the APA remedy in that case. . . . We cannot avoid the force of our precedent . . .").

234. *Id.* at 744.

most in-depth statement on APA § 704 up to that point, is puzzling.²³⁵ In *Bowen*, Massachusetts sued the Secretary of the U.S. Department of Health and Human Services (HHS) over its Medicaid allocation. The Tucker Act provides a private right of action against the federal government in the U.S. Court of Claims to recover monies in certain contractor and tax contexts, but does not provide the equitable relief available under the APA. The *Bowen* Court concluded that the Tucker Act provided only “doubtful and limited relief” and so did not qualify as a sufficiently “adequate” remedy to trigger APA § 704.²³⁶ In so holding, the *Bowen* Court warned against placing a “restrictive interpretation” on § 704, citing approvingly to Justice Black’s observation in *Shaughnessy v. Pedreiro* that the purpose of the APA was to “remove obstacles to judicial review of agency action under subsequently enacted statutes.”²³⁷ If Judge Ginsburg was looking to lift up the plaintiffs’ argument and revive the position of the dissent in *Council of & for the Blind* that suits against a discriminatory fundee and suits against a foot-dragging federal overseer are seeking fundamentally different types of relief, *Bowen* could be read, with just enough squinting, to extend an invitation.

Another possibility is that the panel, and even Judge Ginsburg, harbored concerns about the metastatic tendencies of the *Women’s Equity* litigation. The case’s massive scale received repeated mention: a “grand scale action”; “colossal”; a “nationwide suit seeking grand-scale relief”; and an “overarching, broad-gauged suit.”²³⁸ Likewise, the “overseer” turn-of-phrase featured repeatedly.²³⁹ The district court had overstepped its role: it had “cast [itself] . . . as nationwide overseer,”²⁴⁰ it had taken on “continuing, across-the-board federal court superintendence of executive enforcement,”²⁴¹ and it had enabled “across-the-board judicial supervision of continuing federal agency enforcement.”²⁴² Over and over, Judge Ginsburg repeated the words “overseer,” “across-the-board,” and “supervision” to underscore the point that it was inappropriate for a district court to superintend a federal agency that itself oversaw thousands of state and local actors.

235. 487 U.S. 879, 901-04, 910 (1988) (sustaining the plaintiffs’ APA lawsuit despite a potential § 704 hurdle).

236. *Id.* at 901.

237. *Id.* at 904 (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)).

238. *Women’s Equity*, 906 F.2d at 744, 749 n.9, 750 (quoting *Council of & for the Blind of Del. Cnty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1530 n.67 (D.C. Cir. 1983)).

239. *See, e.g., id.* at 748 (“[I]f other remedies are adequate, federal courts will not oversee the overseer.” (quoting *Coker v. Sullivan*, 902 F.2d 84, 89 (D.C. Cir. 1990))).

240. *Id.* at 744.

241. *Id.* at 747.

242. *Id.* at 749.

An alternative reading of these flourishes is that they draw into relief an important clarification that has often gone missing in *Women's Equity's* application in the years since it was handed down. Buried in Judge Ginsburg's discussion of Title VI's legislative history – and quoting liberally from a footnote in *Council of & for the Blind* – is a statement of what both panels were *not* deciding: “We do not decide,” wrote Judge Ginsburg, “whether a person aggrieved by conduct of a . . . fund recipient” could “bring an action directly against the agency” where the agency had, upon a finding of discrimination, “refused to proceed against the recipient to terminate funds.”²⁴³ Soon after, a footnote bolstered that point by explaining that “recipient-specific suits against the federal funding agency are not equivalent to the action plaintiffs pursue here.”²⁴⁴ By repeatedly playing up *Women's Equity's* sprawling nature, perhaps Judge Ginsburg sought to spotlight, and thus preserve against an unsympathetic panel, the possibility of more targeted suits aimed at more specific procedural failures.²⁴⁵ Yet even if the panel intended to preserve specific suits, the resulting situation-specific remedies would not address the larger problem of federal funding for discriminatory agencies, as Joy Milligan has eloquently noted.²⁴⁶

Finally, perhaps Judge Ginsburg – and the panel for which she was writing – legitimately saw Title VI lawsuits as potent, albeit “imperfect,” sources of relief. With an implied private right of action under Title VI seemingly established by *Cannon*, and with a growing set of lawsuits demonstrating the civil rights community's will and capacity to litigate, the prospect of robust Title VI enforcement may have at least seemed plausible, even with the obvious concerns about the arduousness and resource intensiveness of mounting hundreds or even thousands of “situation-specific” suits against subfederal fundees.

Whatever the motivation, and whatever the opinion's frailties, *Women's Equity* and its § 704 maneuver have proven a tempting and oft-used doctrinal hook

243. *Id.* (quoting *Council of & for the Blind*, 709 F.2d at 1530 n.67) (brackets omitted).

244. *Id.* at 749 n.9.

245. See Milligan, *supra* note 33 (manuscript at 59) (“Possibly leaving a small opening for future suits, the court seemed to distinguish instances where the federal agency was charged ‘as provider of financial assistance, with facilitating or encouraging a specific fund recipient’s discrimination.’”).

246. Milligan's discussion of *Women's Equity* focuses on the plaintiffs' Fifth Amendment claim and the no-aid principle, which holds that the “Fifth Amendment's equal protection component barred federal subsidies or support for racial discrimination.” *Id.* (manuscript at 1). The *Women's Equity* plaintiffs brought a Fifth Amendment no-aid claim, along with their Title VI claim and APA claim, but as Milligan noted, the *Women's Equity* plaintiffs' no-aid claim was instead “recharacterized” as a “generalized attempt[] to force the federal government to pursue stronger civil rights enforcement, triggering courts' reluctance to interfere with administrators' decisions about how to allocate limited enforcement resources.” *Id.* (manuscript at 48).

in civil rights cases. Since legislating the Civil Rights Act of 1964, Congress has enacted a host of antidiscrimination provisions, among them the Age Discrimination in Employment Act of 1967,²⁴⁷ the Fair Housing Act of 1968,²⁴⁸ the Equal Credit Opportunity Act of 1974,²⁴⁹ the Americans with Disabilities Act of 1990,²⁵⁰ and the Civil Rights Act of 1991.²⁵¹ Each new law has presented new opportunities for courts to use the § 704 hook to dismiss an APA and antidiscrimination case. In the USDA farm-loan cases, for example, the court used the Equal Credit Opportunity Act to dismiss the plaintiffs' APA claims.²⁵² In a disability-rights housing case, the alternative remedy was the Federal Fair Housing Amendments Act.²⁵³ In an employment-discrimination case against the government, the alternative remedy was Title VII.²⁵⁴ As an expanding menu of civil rights guarantees has created more and more collisions between antidiscrimination law and the APA, *Women's Equity's* influence has grown, garnering citations in district and appeals court opinions in at least eleven circuits.²⁵⁵ And a trilogy

247. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (2018)).

248. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3619 (2018)).

249. Equal Credit Opportunity Act of 1974, Pub. L. No. 93-495, 88 Stat. 1521 (codified as amended at 15 U.S.C. §§ 1691-1691f (2018)).

250. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2018) and scattered sections of 47 U.S.C.).

251. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

252. See *Garcia v. Vilsack*, 563 F.3d 519, 524 (D.C. Cir. 2009) ("This court's precedent in *Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521 (1983) (en banc), and its progeny—*Coker v. Sullivan*, 902 F.2d 84 (1990), and *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (1990)—make clear that an ECOA discrimination claim filed directly against the USDA would be adequate to preclude a cause of action under the APA.").

253. See *Am. Disabled for Attendant Programs Today v. U.S. Dep't of Hous. & Urb. Dev.*, 170 F.3d 381, 390 (3d Cir. 1999) (holding that plaintiffs had an alternative "adequate judicial remedy" because "[t]hey can pursue their claims of housing discrimination directly against federal-funding recipients, or they may bring administrative claims to [the U.S. Department of Housing and Urban Development (HUD)] and trigger HUD's mandatory duty to investigate").

254. See *Nielsen v. Hagel*, 666 F. App'x 225, 231 (4th Cir. 2016) ("We therefore conclude that the cause of action provided by Title VII afforded Nielsen an 'adequate remedy' of judicial review for his claims of employment discrimination, thereby precluding judicial review of the Department's action under Section 704 of the APA.").

255. The Westlaw citing references show that at least eleven circuits have cited *Women's Equity*. At the appellate level, *Women's Equity* has been cited in seven different circuits, in cases that include but are not limited to: *Sherman v. Black*, 315 F. App'x 347, 349 (2d Cir. 2009); *American Disabled for Attendant Programs Today*, 170 F.3d at 390; *Jersey Heights Neighborhood Ass'n v.*

of D.C. Circuit cases — cases brought by *opponents* of affirmative-action programs and other federal Title VI programs — cemented *Women's Equity* and its APA § 704 move.²⁵⁶

As discussed in more detail below, sometimes these new civil rights guarantees provide robust alternative remedies. But other times, they plainly do not. Sometimes courts that rely on *Women's Equity* have shown themselves to be attuned to the subtleties of its concern with courts playing an overseer role.²⁵⁷ But sometimes, they have not, citing *Women's Equity* in direct challenges to federal agency action where there are no subfederal entities, no federal funding streams, and thus no overseer concerns at all.²⁵⁸ Indeed, courts applying *Women's Equity*

Glendening, 174 F.3d 180, 191 (4th Cir. 1999); *Rollerson v. Brazos River Harbor Navigation District of Brazoria County*, 6 F.4th 633, 642 (5th Cir. 2021); *Stimac v. Barr*, 10 F.3d 808, at *1 (9th Cir. 1993); *United States v. Copeman*, 458 F.3d 1070, 1073 (10th Cir. 2006); and *Vilsack*, 563 F.3d at 524. At the district-court level, district courts in the First Circuit, Sixth Circuit, Eighth Circuit, and Eleventh Circuit have cited *Women's Equity* in cases such as: *Campbell v. Bristol Community College*, No. 16-11232, 2018 WL 457172, at *3 (D. Mass. Jan. 17, 2018); *Erve v. U.S. Department of Education*, No. 13-11617, 2014 WL 12781340, at *3 (E.D. Mich. Feb. 13, 2014); *Cobb v. U.S. Department of Education Office for Civil Rights*, 487 F. Supp. 2d 1049, 1054 (D. Minn. 2007); and *Dortch, Figures & Sons, Inc. v. City of Mobile*, No. 18-00213-KD-C, 2019 WL 5431314, at *12 (S.D. Ala. Oct. 22, 2019).

256. As Milligan describes it, “right-of-center” groups attempted to challenge federal Title VI policy by invoking the Fifth Amendment no-aid principle, but were thwarted by “liberal D.C. Circuit judge[s].” Milligan, *supra* note 33 (manuscript at 60). In *Washington Legal Foundation v. Alexander*, 984 F.2d 483, 484-85 (D.C. Cir. 1993), white students challenged a U.S. Department of Education (DoE) scholarship program for minorities but were rebuffed by the D.C. Circuit. *Id.* (manuscript at 60). Judge Edwards, a liberal judge who had been “once a dissenter in *Council of and for the Blind*,” led the panel. *Id.* In *Freedom Republicans v. Federal Election Commission*, 13 F.3d 412 (D.C. Cir. 1994), a “right-of-center” group challenged federal funding for the Republican National Convention but was blocked by “another liberal D.C. Circuit judge,” Judge Wald. *Id.* (manuscript at 60-61). Finally, in *National Wrestling Coaches Ass’n v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004), a group of men’s college wrestling coaches attacked DoE’s Title IX gender-equality guidance, but were rebuffed once again by Judge Edwards. *Id.* Judge Edwards cited *Council of & for the Blind* and *Women's Equity* to reject the plaintiffs’ claims. *National Wrestling Coaches*, 366 F.3d at 946.
257. See, e.g., *Garcia v. McCarthy*, No. 13-CV-03939, 2014 WL 187386, at *11 (N.D. Cal. Jan. 16, 2014) (citing *Women's Equity* and providing an in-depth discussion of adequacy and reviewability issues), *aff’d*, 649 F. App’x 589 (9th Cir. 2016).
258. See, e.g., *Vilsack*, 563 F.3d at 524 (citing *Women's Equity* even though the case involved no federal funding streams and no subfederal actors); *Sherman v. Black*, 510 F. Supp. 2d 193, 198 (E.D.N.Y. 2007), *aff’d*, 315 F. App’x 347 (2d Cir. 2009) (citing *Women's Equity* as the basis for dismissing the plaintiff’s APA claim against DoE for its failure to investigate his disability-discrimination complaint, but providing only a short citation and failing to discuss any of the overseer complexities in *Women's Equity*).

have rarely noted the decision's preservation of more targeted suits against concrete agency failures to enforce upon findings of discrimination.²⁵⁹

But perhaps most jarring of all, courts have continued to cite *Women's Equity* for the proposition that Title VI offers an "adequate" alternative to an APA cause of action even after the Supreme Court triggered a sudden and seismic shift from the civil rights landscape that existed when Judge Ginsburg wrote her opinion. In *Alexander v. Sandoval*, the Court found that Title VI § 601 does not support a private right of action for disparate-impact claims, leaving only disparate-treatment claims, with their exacting and often fatal requirement that a plaintiff show an intent to discriminate, available.²⁶⁰ We turn now to that decision – and the final piece of the disparate-limbo puzzle.

3. *Sandoval* (2001)

Whether or not the original § 704 maneuver was well conceived, the ground has since shifted. *Alexander v. Sandoval*, decided in 2001, renders the § 704 maneuver in *Women's Equity* fundamentally incoherent. In *Sandoval*, the Supreme Court sharply limited Title VI's implied private right of action.²⁶¹ As we noted earlier, Title VI contains two rights of action: an implied private right of action in § 601 and an express right of action in § 603, contemplating APA review.²⁶² *Sandoval* curtailed the implied private right of action in § 601, but it did not touch the express right of action in § 603 (indeed, *Sandoval* never once mentioned § 603).

259. See, e.g., *Sherman*, 510 F. Supp. 2d at 198–99 (providing only boilerplate citations to *Women's Equity* and neglecting to provide an in-depth discussion before rejecting a targeted suit against federal actors). *But see* *Sai v. Dep't of Homeland Sec.*, 149 F. Supp. 3d 99, 116–19 (D.D.C. 2015) (providing an in-depth discussion of *Women's Equity* and related adequacy cases before ultimately rejecting the government's claim that § 704 barred a targeted suit by a disability-rights plaintiff in a nonoverseer context involving no subfederal actors).

260. 532 U.S. 275, 293 (2001). Recall that disparate treatment is often called "intentional" discrimination, while disparate impact is often called "unintentional" discrimination. Disparate treatment usually involves a law that explicitly singles out a person's race, gender, or other protected class (for example, a law that prohibits Black people from using public pools). By contrast, disparate impact usually involves a facially neutral policy which does not explicitly name characteristics like race or gender, but which disproportionately affects protected groups (for example, an airline policy that requires all flight attendants to have straight hair).

261. See *id.* (holding that Title VI does not "display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602" and that a private right of action for § 602 regulations, including disparate-impact regulations, does not exist).

262. See *supra* note 161.

While *Sandoval* did not technically overrule *Cannon*,²⁶³ it limited *Cannon*'s implied private right of action for "discrimination" claims arising under Title VI § 601 to intentional discrimination (disparate treatment).²⁶⁴ Though § 602 directs agencies to enact implementing regulations, including regulations to ban "unintentional" discrimination (disparate impact),²⁶⁵ *Sandoval* found a private right of action only in § 601 and not in § 602.²⁶⁶ The end result of *Sandoval* was to effectively eliminate a private right of action for disparate impact.²⁶⁷ Private plaintiffs could no longer challenge "unintentional" discrimination resulting from facially neutral policies.

In the years after the enactment of Title VI, federal agencies enacted dozens of antidiscrimination regulations under § 602.²⁶⁸ These antidiscrimination regulations were centrally coordinated by the White House and DOJ,²⁶⁹ and they targeted both disparate treatment and disparate impact.²⁷⁰ Federal agency regulations, for example, formalized the "effects" test, which determines whether a

263. *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

264. *Sandoval*, 532 U.S. at 280 ("[Section] 601 prohibits only intentional discrimination.").

265. See 42 U.S.C. § 2000d-1 (2018). Title VI § 602 also authorizes agencies to cut off funds from subfederal recipients that violate § 601's prohibition against discrimination. *Id.*

266. 532 U.S. at 293.

267. *Id.* at 291 ("[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.").

268. Title VI § 602 tasked agencies with creating antidiscrimination regulations:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title [Title VI § 601] . . . by issuing rules, regulations, or orders of general applicability.

42 U.S.C. § 2000d-1 (2018).

269. See Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 139 (2014); see also *id.* at 133 ("[A]gencies were the first movers in developing disparate impact standards in both Title VI and Title VII of the Civil Rights Act."); Bradford Mank, *Are Title VI's Disparate Impact Regulations Valid?*, 71 U. CIN. L. REV. 517, 529 (2003) ("[I]n 1964, shortly after the statute [Title VI] was enacted, a presidential task force developed disparate impact regulations for HEW, and then used these regulations as a model in drafting regulations for twenty-one additional agencies or commissions that all prohibited disparate impact discrimination.").

270. The HEW regulations created an "effects" test for discrimination, which is often synonymous with disparate impact. See 45 C.F.R. §§ 80.1-80.8 (2020) (creating an "effects" test for the Title VI implementing regulations). Other agencies later patterned their regulations on the HEW regulations, and they "served as the 'standard' by which DOJ reviewed and approved other agencies' regulations, a fact which explains their general uniformity to this day." Jared P. Cole, *Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964*, CONG. RSCH. SERV. 11 n.86 (Apr. 4, 2019), <https://crsreports.congress.gov/product/pdf/R/R45665> [<https://perma.cc/6B29-QK5G>].

facially neutral policy generates a disparate impact.²⁷¹ *Sandoval* effectively gutted private enforcement of these disparate-impact regulations. While plaintiffs could still file internal petitions with a federal agency to report disparate impact, internal petitions lack force if an agency refuses to investigate them.²⁷² In enacting procedural limitations on Title VI's implied private right of action,²⁷³ *Sandoval* left private plaintiffs with few options.²⁷⁴

The move made by the *Sandoval* Court echoes a pattern noted by other scholars. In 2017, Stephen B. Burbank and Sean Farhang argued that an increasingly conservative Court often does its work through procedural doctrines because they fall under the political radar.²⁷⁵ Milligan makes another version of this argument, when she notes in her forthcoming article that the Court foreclosed a robust Fifth Amendment no-aid principle via procedural moves in *Cannon*, *Allen v. Wright*, and *Heckler*.²⁷⁶ The APA § 704 move squarely falls into this pattern, as the D.C. Circuit used a procedural hurdle to effectively shut the APA door on civil rights litigants.

271. See *Guardians Ass'n v. Civ. Serv. Comm'n*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting) (“Shortly after the enactment of Title VI, a presidential task force produced model Title VI enforcement regulations specifying that recipients of federal funds not use ‘criteria or methods of administration which have the effect of subjecting individuals to discrimination.’ The Justice Department, which had helped draft the language of Title VI, participated heavily in preparing the regulations. Seven federal agencies and departments carrying out the mandate of Title VI soon promulgated regulations that applied a disparate impact or ‘effects’ test. As a contemporaneous construction of a statute by those charged with setting the law in motion, these regulations deserve substantial respect in determining the meaning of Title VI.” (citations omitted)).

272. In the USDA farm-loan case, for example, USDA ignored internal petitions “for years.” *Garcia v. Vilsack*, 563 F.3d 519, 521 (D.C. Cir. 2009) (“Appellants allege . . . that for years the USDA ignored discrimination complaints like theirs. Indeed, in 1997 USDA publicly acknowledged that in the early 1980s it ‘effectively dismantled’ its civil rights enforcement apparatus.” (footnote omitted)).

273. For more on disappearing remedies, albeit in the context of policing, see generally Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1477 (2018), observing that “courts frequently deny one remedy on the ground that another remedy is available and preferable to the remedy that a party has sought.”

274. Of course, public enforcement is still an option. The government can sue state and local agencies for noncompliance with Title VI. *Sandoval* did not eliminate that right of action.

275. STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017). For additional discussion, see ERWIN CHEREMINSKY, *CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE* (2017); and Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

276. Milligan, *supra* note 33 (manuscript at 48-53) (noting that “[t]he Supreme Court constructs new procedural limits” in these cases).

Regardless of the correctness of *Women's Equity's* § 704 maneuver when decided, *Sandoval* definitively removed the adequate alternative remedy for disparate impact. An “arduous” and “imperfect” remedy, as Judge Ginsburg put it in *Women's Equity*, has since become a demonstrably feeble and ineffectual one.²⁷⁷

4. *The Current State of Disparate Limbo*

The legacy of *Women's Equity* is imprinted in present-day administrative law, particularly in its lack of an antidiscrimination tradition. While some contemporary lower courts have proven willing to entertain antidiscrimination claims, the APA's weak antidiscrimination tradition hampers those courts' ability to consider disparate impact within arbitrary-and-capricious review.

The lack of a robust antidiscrimination tradition in administrative law is perhaps most evident at the Supreme Court. The Court remains reluctant to consider claims of disparate impact or racial animus within the APA. In *Department of Commerce v. New York*, where plaintiffs disputed the government's attempt to add a citizenship question to the 2020 census, the Supreme Court sidestepped the plaintiffs' claims about disparate impact.²⁷⁸ While the majority opinion was ultimately favorable toward the plaintiffs, it glossed over the disparate impact on Latinx communities and decided the case on different, race-neutral grounds.²⁷⁹ The Supreme Court similarly sidestepped disparate impact in the DACA case.²⁸⁰ There, Justice Sotomayor criticized the Court's plurality opinion for “minimiz[ing] the disproportionate impact . . . on Latinos after considering this point in isolation.”²⁸¹ And the pattern is evident outside the APA context. The 2018 “Muslim ban” case, where the Supreme Court shied away from considering racial animus despite the case's obvious racial implications, serves as another example.²⁸²

By contrast, some lower courts in recent years have shown greater willingness to recognize disparate-impact claims within the APA. In 2020, for example, a group of plaintiffs challenged a new USDA rule that would have restricted ac-

277. *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990).

278. 139 S. Ct. 2551 (2019).

279. *Id.* at 2570–72 (holding that the Secretary's decision to add a citizenship question was not arbitrary and capricious given that the Secretary “carefully considered” the decision's effects on response rate, but providing very little discussion of the disparate impact of lowered response rates along racial and ethnic lines).

280. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

281. *Id.* at 1917 (Sotomayor, J., concurring).

282. *Trump v. Hawaii*, 138 S. Ct. 2392, 2417, 2421 (2018) (holding that the text “does not support an inference of religious hostility” despite the President calling it a “Muslim ban”).

cess to the Supplemental Nutrition Assistance Program (SNAP), with a disparate impact on minorities.²⁸³ The district court held that the agency should have provided a “meaningful discussion of [the disparate impact on protected groups]” and it overturned the agency’s decision as arbitrary and capricious.²⁸⁴ In the SNAP case, the district court struck a blow against disparate limbo.

Yet other lower courts have perpetuated disparate limbo. In *City & County of San Francisco v. Azar*, plaintiffs challenged a 2019 HHS rule that would have disparately impacted medical care for women and LGBTQ individuals.²⁸⁵ While the district court’s ruling was generally favorable toward plaintiffs, it effectively ignored the disparate-impact claim they made.²⁸⁶ Despite the disproportionate burden the rule placed on gender minorities, the district court never once mentioned the words “disparate impact.”²⁸⁷

* * *

In short, APA and antidiscrimination plaintiffs continue to find themselves in disparate limbo. *Women’s Equity* continues to be applied in cases far from its original posture, even after *Sandoval* undercut its basis.²⁸⁸

III. RECKONING WITH DISPARATE LIMBO

Several concrete implications follow from our account. We begin with two clear doctrinal implications. First, courts should revisit the § 704 maneuver in light of *Sandoval*’s gutting of the Title VI remedies on which the maneuver was

²⁸³. *District of Columbia v. U.S. Dep’t of Agric.*, 496 F. Supp. 3d 213 (D.D.C. 2020).

²⁸⁴. *See id.* at 257 (“[T]he agency’s recognition of the disparate impact on protected groups, without any meaningful discussion of the issue in the context of alternatives to the rule’s policy choices, points to the agency’s failure to ‘consider an important aspect’ of the effects of the Rule.” (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983))).

²⁸⁵. 411 F. Supp. 3d 1001, 1025 (N.D. Cal. 2019).

²⁸⁶. The Santa Clara County plaintiffs raised the disparate-impact claim in their briefings, arguing that “[t]he Rule imposes particular burdens on LGBT individuals, and especially transgender and gender-nonconforming individuals.” Plaintiffs’ Motion for Nationwide Preliminary Injunction and Memorandum of Points and Authorities at 10, *City & Cnty. of S.F.*, 411 F. Supp. 3d 1001 (No. 19-CV-2916).

²⁸⁷. *See City & Cnty. of S.F.*, 411 F. Supp. 3d at 1025 (ruling in plaintiffs’ favor but failing to discuss the plaintiffs’ disparate-impact argument).

²⁸⁸. As previously discussed, the § 704 maneuver has been used to dismiss the lawsuits of Latinx U.S. citizens denied passports, minority renters alleging housing discrimination, disability-rights plaintiffs alleging education and housing discrimination, minority employees alleging employment discrimination, and college students alleging gender discrimination. *See supra* notes 106–112 and accompanying discussion (citing either *Women’s Equity* or its progeny, all of which used the § 704 maneuver).

originally based. Second, and in any event, *Women's Equity* should be limited to its proper domain: cases involving federal supervision of subfederal programs. While both legs of our proposal could be implemented by courts acting alone, we also describe a pair of policy interventions to be achieved not by courts, but by congressional or executive action mandating disparate-impact assessments that would help to alleviate disparate limbo.

A. Doctrinal Implications

1. Revisiting the § 704 Maneuver in Light of *Sandoval*

Courts should stop applying the § 704 maneuver to most APA and antidiscrimination cases, thus ending the reflexive channeling away of antidiscrimination claims. *Sandoval's* elimination of the Title VI private remedy for disparate impact, and the weakening of disparate-impact law more generally, casts doubt on the “adequacy” of alternative remedies.

As described above, *Sandoval* eliminated Title VI as an alternative adequate remedy for private plaintiffs alleging disparate impact. In so doing, *Sandoval* invalidated a key premise of then-Judge Ginsburg's reasoning in the 1990 *Women's Equity* decision. Judge Ginsburg had reasoned that the *Women's Equity* plaintiffs had an alternative remedy in Title VI, because, at the time, *Cannon* had given Title VI a broad private right of action. But Judge Ginsburg's reasoning should not be applied to cases after the 2001 *Sandoval* decision, when that alternative remedy all but disappeared. It is logically incoherent for courts to tell disparate-impact plaintiffs to look outside the APA for an alternative remedy in Title VI when that Title VI remedy no longer exists.²⁸⁹ Yet some courts (erroneously) continue to do so—indeed, as recently as 2019, the district court in *Rollerson* committed this same error.²⁹⁰

²⁸⁹. Technically, the remedy still exists—agency regulations promulgated under Title VI § 602 can still validly proscribe disparate impact—but private plaintiffs' implied private right of action has disappeared. So, in practice, the remedy is inaccessible. Note also that *Sandoval* preserved the § 601 private right of action for disparate treatment, so our § 704 argument may not apply to Title VI claims of disparate treatment.

²⁹⁰. *Rollerson v. Port Freeport*, discussed at note 110, exemplifies how the courts have continued to apply *Women's Equity* even after the 2001 *Sandoval* decision. No. 18-CV-00235, 2019 WL 5397623 (S.D. Tex. Oct. 21, 2019), *report and recommendation adopted*, No. 18-CV-00235, 2019 WL 6053410 (S.D. Tex. Nov. 15, 2019), *rev'd and remanded sub nom.* *Rollerson v. Brazos River Harbor Navigation Dist.*, 6 F.4th 633 (5th Cir. 2021). The plaintiff brought APA claims and Title VI claims, alleging both disparate impact and disparate treatment on minority homeowners whose properties would be displaced by the new port. *See id.* at *4 (“Rollerson con-

Sandoval may be just the tip of the iceberg: over the past twenty years, agencies and the courts have chipped away at disparate impact not just within Title VI, but also within other statutory frameworks.²⁹¹ In *Ricci v. DeStefano* in 2009, Justice Scalia cast doubt on the constitutional validity of Title VII's disparate-impact provisions and stated that "the war between disparate impact and equal protection will be waged sooner or later . . ."²⁹² In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, Justice Alito criticized the majority for upholding a disparate-impact provision in the Fair Housing Act, writing in a four-person dissent that the majority "today makes a serious mistake."²⁹³ And even the majority in *Inclusive Communities* seemed wary of disparate impact: Justice Kennedy, who authored the Court's opinion, wrote that certain forms of "disparate-impact liability might [raise] . . . serious constitutional questions,"²⁹⁴ and his opinion imposed a "robust causality requirement" on plaintiffs seeking to prove disparate impact under the Fair Housing Act.²⁹⁵ In recent years, agencies have joined in on the attacks on disparate impact: the U.S. Department of Housing and Urban Development (HUD) in 2020 finalized a rule making it more difficult for plaintiffs to prove disparate impact under the Fair

tends that although Title VI only provides a private cause of action for intentional discrimination, actions having an unjustifiable disparate impact on minorities are redressable through agency regulations designed to implement the purposes of Title VI."). The district court nevertheless initially applied *Women's Equity* to dismiss Rollerson's claims, finding that § 704 barred Rollerson's claims because "Title VI provides an adequate alternative remedy." *Id.*

We would argue that the district court's application of *Women's Equity* is erroneous. And our argument is buttressed by the Fifth Circuit's recent decision, issued in July 2021, that reversed and remanded to the district court. The Fifth Circuit recognized that *Sandoval* had changed the landscape of APA and antidiscrimination cases, and it held that APA § 704 did not bar Rollerson's claim. See *Rollerson*, 6 F.4th at 639 (holding that the district court "erred in dismissing [Rollerson's] APA claim").

291. See, e.g., Johnson, *supra* note 269, at 125-26 ("Rulings by the Supreme Court in recent years have shaken the disparate impact standard's footing."); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 767 (2011) (writing that the past twenty years have brought about "[t]he almost absolute foreclosure of disparate impact claims" within constitutional litigation).

292. 557 U.S. 557, 595-96 (2009) (Scalia, J., concurring).

293. 576 U.S. 519, 590 (2015) (Alito, J., dissenting).

294. *Id.* at 542 (majority opinion).

295. *Id.* at 521 ("A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas.").

Housing Act,²⁹⁶ and DOJ in 2020 attempted to strip Title VI of its disparate-impact protections.²⁹⁷

The current debate, as legal scholar Richard Primus put it, “makes things look bleak for the disparate impact standard.”²⁹⁸ Indeed, disparate impact has been weakened not just within Title VI, but also within a wide variety of statutory frameworks, including Title VII and the Fair Housing Act.²⁹⁹ Just as *Sandoval* calls for a reevaluation of APA § 704 in the Title VI context, the weakening of disparate impact more broadly calls for courts to completely reevaluate the § 704 maneuver. Recent years have cast serious doubt on the “adequacy” of disparate-impact provisions within these various statutory frameworks.

In implementing our proposal, courts should look not to *Women’s Equity* but to *Bowen*,³⁰⁰ where the Supreme Court rejected a “restrictive interpretation” of APA § 704, concluding that “[a] restrictive interpretation of § 704 would unquestionably . . . ‘run counter to § 10 and § 12 of the Administrative Procedure Act.’”³⁰¹ The *Bowen* Court seemed genuinely concerned about the adequacy of the alternative remedy, writing that “the doubtful and limited relief available in

296. In fall 2020, HUD finalized a disparate-impact rule that modified its prior 2013 rule. The new rule changes the burden-shifting scheme for proving disparate impact. See 85 Fed. Reg. 60,288, 60,288 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100) (“This rule revises the burden-shifting test for determining whether a given practice has an unjustified discriminatory effect . . .”).

297. See C.R. Div., *Amendment of Title VI Regulations*, 28 CFR Part 42, CRT Docket No. 140, U.S. DEP’T JUST 4-5 (undated), <https://context-cdn.washingtonpost.com/notes/prod/default/documents/1e57c678-5bc3-4849-b92d-3365414bc4cb/note/d9e70b41-14a0-4ed4-8a59-dcf516b71506> [<https://perma.cc/BK7P-PGES>] (proposing in a draft document a final rule to remove the effects test from DOJ’s Title VI implementing regulations at 28 C.F.R. § 42.104 (2021)); see also Laura Meckler & Devlin Barrett, *Trump Administration Seeks to Undo Decades-Long Rules on Discrimination*, WASH. POST (Jan. 5, 2021, 10:37 PM EST), https://www.washingtonpost.com/education/civil-rights-act-disparate-impact-discrimination/2021/01/05/4f57001a-4fc1-11eb-bda4-615aaefd0555_story.html [<https://perma.cc/SG3N-UCGY>] (“The Trump administration is pushing in its final days to undo decades-long protections against discrimination, a last-ditch effort to accomplish a longtime goal of conservative legal activists. The Justice Department is seeking to change interpretation of Title VI of the 1964 Civil Rights Act, which bars discrimination on the basis of race, color or national origin by recipients of federal funding.”).

298. Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1344 (2010) (“A conflict between disparate impact and disparate treatment is also a conflict between disparate impact and equal protection. And that makes things look bleak for the disparate impact standard. A Title VII doctrine can stand its ground against another Title VII doctrine, but not against the Constitution.”).

299. See, e.g., *supra* notes 292-295 and accompanying text.

300. *Bowen v. Massachusetts*, 487 U.S. 879 (1988) (sustaining the plaintiffs’ APA lawsuit despite a potential § 704 hurdle).

301. *Id.* at 904 (citing *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)).

the Claims Court is not an adequate substitute for review in the District Court.”³⁰² Even though an alternative remedy existed, the Court allowed the plaintiffs to pursue their APA claims regardless, because a merely hypothetical remedy would have effectively left plaintiffs without relief.³⁰³

The *Bowen* interpretation of APA § 704 deviates significantly from the *Women’s Equity* interpretation. This deviation could be chalked up to poor lawyering, as attorneys in *Women’s Equity* do not appear to have briefed *Bowen*. Had it been briefed, one could imagine that the § 704 maneuver might never have gained traction as a tool to channel antidiscrimination claims away from the APA. Although APA § 704 might appropriately be used to avoid duplicative remedies, our account suggests that administrative law has gone too far. Administrative law has been using APA § 704 to scrub away antidiscrimination despite the inadequacy of alternative remedies, contrary to the APA’s demands.

2. Limiting Women’s Equity to Its “Overseer” Scenario

Even if APA § 704 applies in some domains, the account above has a second implication. *Women’s Equity* should be limited, if it is to retain any vitality at all, to claims against federal agencies that oversee subfederal actors, the primary setting that raises Judge Ginsburg’s concerns about “oversee[ing] the overseer.”³⁰⁴ In other words, *Women’s Equity* should not bar plaintiffs’ APA claims when a case involves only federal agencies and does not involve federal-agency supervision of subfederal actors.

Here, a bit of clarifying terminology is in order. APA and antidiscrimination cases usually fall into two camps: first, cases that involve only federal agencies (which we call “federal” cases), and second, cases that involve both federal agencies and the subfederal agencies they supervise (or “subfederal” cases). *Women’s Equity* and *Council of & for the Blind* fall into this second category (“subfederal”), and these cases tend to raise overseer concerns because they often ask the courts to oversee a large federal agency, which itself oversees dozens of subfederal actors. A large swath of cases, by contrast, fall into the “federal” category. In this

302. *Id.* at 901.

303. *Id.* at 904-05 (“The Secretary argues that § 704 should be construed to bar review of the agency action in the District Court because monetary relief against the United States is available in the Claims Court This restrictive – and unprecedented – interpretation of § 704 should be rejected because the remedy available to the State in the Claims Court is plainly not the kind of ‘special and adequate review procedure’ that will oust a district court of its normal jurisdiction under the APA. Moreover, the availability of any review of a disallowance decision in the Claims Court is doubtful.” (footnote omitted)).

304. *Women’s Equity Action League v. Cavazos*, 906 F.2d 742, 748 (D.C. Cir. 1990) (citing *Coker v. Sullivan*, 902 F.2d 84, 89 (D.C. Cir. 1990)).

first genre of cases, plaintiffs allege that a federal agency's rule or policy is itself discriminatory. The allegedly discriminatory action originates not with the sub-federal funding recipient, but rather with the federal agency itself, and these cases do not raise the same overseer concerns.

This distinction illuminates the creeping overreliance on *Women's Equity*. *Women's Equity* was a subfederal case and raised serious overseer concerns. “[F]ederal courts will not oversee the overseer,” Judge Ginsburg wrote, and she repeatedly castigated the district court for having “cast [itself] . . . as [a] nationwide overseer.”³⁰⁵ During the twenty-year litigation, the courts had steadily accrued “continuing, across-the-board federal-court superintendence”³⁰⁶ of a federal agency's oversight of subfederal actors. The agency oversaw hundreds of state and local actors—creating an inappropriate aggrandizement of judicial power. This overseer concern was a driving force behind the case. And if such concerns animate *Women's Equity*, then the case should be limited to challenges involving subfederal actors.

Yet in the past thirty years of litigation, the opposite has come to pass: courts have repeatedly applied *Women's Equity* to cases in the “federal” category, which raise no overseer concerns whatsoever. In these cases, one could at least argue that there is less of a reason to tolerate a substantial gap between the remedies available under the APA and those available under an alternative statute such as Title VI. *Garcia v. Vilsack*, for example, involved only federal actors: the plaintiffs, minority farmers, challenged USDA for systematically denying them loans.³⁰⁷ Here, the district court was not tasked with overseeing a federal agency that itself oversaw dozens of subfederal actors—the case involved exclusively federal conduct. But the D.C. Circuit relied on *Women's Equity* anyway, citing it in its APA § 704 dismissal of the plaintiffs' claims.³⁰⁸ Courts have similarly deployed the *Women's Equity* § 704 maneuver outside of the overseer context in other federal cases, like *De La Garza Gutierrez*, where plaintiffs challenged the Department of State's denial of passports to people with Hispanic surnames.³⁰⁹

305. *Id.* at 744.

306. *Id.* at 747.

307. 563 F.3d 519 (D.C. Cir. 2009).

308. In *Garcia v. Vilsack*, the court channeled the plaintiffs' claims away from the APA and toward the ECOA, arguing that the ECOA provided an adequate alternative remedy. *Id.* at 520-21 (“[A]ppellants fail to show they lack an adequate remedy in a court . . .”). The court used *Women's Equity* to do so. *See id.* at 524. We argue that this was a doctrinal error, because *Women's Equity* was driven by overseer concerns which do not appear in *Garcia v. Vilsack*.

309. *De La Garza Gutierrez v. Pompeo*, 741 F. App'x 994 (5th Cir. 2018). *De La Garza Gutierrez* is one of several cases that challenged a U.S. Department of State policy denying passports to U.S. citizens with Hispanic surnames born near the Mexican border. *See supra* note 107 and

In these “federal” cases, courts have mistakenly relied on *Women’s Equity* to channel APA and antidiscrimination cases away from the APA and toward alternative statutory frameworks.³¹⁰

Women’s Equity should be limited to subfederal cases, which would clear a path for plaintiffs to challenge federal-agency discrimination under the APA.

3. Potential Objections

We now address three potential objections to the above doctrinal refinements. The first sounds in statutory interpretation, the other two in futility.

First, a critic might worry that our proposal simply imports Title VI into the APA wholesale, thus contravening congressional intent and impermissibly end-running a long line of case law, beginning with *Washington v. Davis*,³¹¹ that places careful limits on disparate-impact doctrine. Our proposal threatens to upend those boundaries, a critic might argue, because it imports Title VI into the APA without also importing the Supreme Court’s carefully considered boundaries.

This concern is overstated for two reasons. Antidiscrimination principles would not be imported verbatim, but would instead be bounded by the APA’s judicial-deference doctrines.³¹² In addition, the proposal does not graft some-

accompanying text. While the *De La Garza Gutierrez* court did not cite *Women’s Equity*, the court cited its progeny, *Garcia v. Vilsack*, 563 F.3d 519, and it used the § 704 maneuver to channel the plaintiffs’ claims away from the APA and toward the Immigration and Nationality Act (INA). See *De La Garza Gutierrez*, 741 F. App’x at 1000 (“We therefore conclude that § 1503 [of the INA] provides an adequate alternative remedy to APA review.”). A similar channeling away occurred in *Hinojosa v. Horn*, another passport case, where the Fifth Circuit held that section 1503 of the INA was an “adequate alternative” to APA relief. 896 F.3d 305, 312 (5th Cir. 2018).

310. The statutory framework that plaintiffs get channeled toward is not always Title VI. In *Garcia v. Vilsack*, the statutory framework was the ECOA, and in *Hinojosa v. Horn*, the statutory framework was the INA. Regardless, we argue that the *Women’s Equity* APA § 704 maneuver was incorrectly applied in these cases, because they were “federal” cases that raised no overseer concerns.
311. 426 U.S. 229, 239 (1976) (“We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.”).
312. Review of agency action is informed by multiple sources of deference. For example, agencies are granted a “presumption of regularity” where “courts presume that [public officers] have properly discharged their official duties.” ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 120-21 (2016) (writing that the “presumption of regularity” stems from judicial deference to “agencies’ front-line experience and superior information about the substance of relevant programs”); see, e.g., *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (“The presumption of regularity supports the official

thing foreign and unwanted onto administrative law, but rather restores principles of nonarbitrary treatment that are fundamental to the APA. Arbitrary-and-capricious review was designed for judges to scrutinize difficult, fact-laden records, and in cases from *Overton Park* to *State Farm*, the courts have handled thorny questions about how an agency distributes costs and benefits between social groups. These questions are the bread and butter of arbitrary-and-capricious review, and the adjudication of disparate-impact claims pertaining to race would have arisen there but for the erroneous channeling away of APA and antidiscrimination cases.

As we highlighted in Part I, arbitrary-and-capricious review already considers differential impact to subgroups like different types of businesses, animals, and individuals. This review is usually nested within the *State Farm* framework,³¹³ which allows courts to reverse agency decisions as arbitrary and capricious when the agency “entirely failed to consider an important aspect of the problem.”³¹⁴ In *Fox Television Stations*, for example, Justice Breyer cited *State Farm* when highlighting the differential impact on local broadcasters³¹⁵: the FCC “entirely failed to discuss this aspect of the regulatory problem,”³¹⁶ he wrote, when it ignored “the potential impact of its new policy upon local broadcasting coverage.”³¹⁷ Likewise, the *SLPR* court used *State Farm* in writing that the agency “entirely failed to consider an important aspect of the problem” when it ignored erosion impacts on bay-facing homeowners.³¹⁸

acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” (citation omitted)); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 547 (1978) (holding that courts may not add to APA procedures and articulating concerns of appropriate deference to prevent “Monday morning quarterbacking”).

313. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983).

314. *Id.* at 43 (“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

315. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 553 (2009) (Breyer, J., dissenting) (“The FCC failed to satisfy [State Farm’s] requirement, for it failed to consider two critically important aspects of the problem . . .”).

316. *Id.* at 560.

317. *Id.* at 556.

318. *SLPR, L.L.C. v. San Diego Unified Port Dist.*, No. 06-CV-1327, 2009 WL 10672895, at *7 (S.D. Cal. Aug. 4, 2009) (“[T]he Court concludes that the ACOE ‘entirely failed to consider an important aspect of the problem’ by ignoring its own Coronado Shoreline Report when it evaluated the environmental impact of dredging the central navigation channel.” (quoting *State Farm*, 463 U.S. at 43)).

In the same manner, the courts should use *State Farm's* arbitrary-and-capricious framework to consider differential impacts to subgroups based on race, gender, and other protected classes when the issue is relevant. Courts should ask: did the agency consider disparate impact on protected classes? And if so, was the agency action reasonable? If the agency considered disparate impact, and then explained why such impact could not be avoided or implemented mitigating measures to soften the impact,³¹⁹ then the court might find that the agency acted reasonably. If, however, the agency entirely overlooked disparate impact, or if it failed to consider alternatives to mitigate the impact, then the court might find the action to be arbitrary and capricious.³²⁰ This light-touch review would not be a full-bore Title VI inquiry, but would ensure that agencies consider, rather than turn a blind eye to, differential impact along protected classes.

A second potential objection is that our doctrinal interventions are insufficient, and perhaps even futile, because plaintiffs will be unable to overcome questions about the reviewability of agency decisions not to enforce antidiscrimination mandates against funding recipients.³²¹ *Heckler v. Chaney* created a presumption against reviewability of nonenforcement decisions, finding such decisions “committed to agency discretion *by law*.”³²² As Milligan has noted, the *Heckler* decision “bod[ed] poorly for plaintiffs seeking to bring no-aid claims” (i.e., claims challenging federal funding for discriminatory actors).³²³ While

319. In a 1978 case, for example, HEW moved a hospital from the city to the suburbs. See *NAACP v. Wilmington Med. Ctr.*, 453 F. Supp. 280, 312 (D. Del. 1978). The move disproportionately impacted minority patients, who faced higher transportation costs to the new, majority-white suburban location. The court, however, ultimately approved the move after the hospital took mitigating steps, such as a free shuttle service, that softened the disparate impact on minority patients. *Id.* at 311-16.

320. For example, the Third Circuit in 2014 ruled that an FCC action was arbitrary and capricious because it failed to consider its impact on minority television ownership. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 421 (3d Cir. 2004), *as amended* (June 3, 2016) (“In repealing [the rule] without any discussion of the effect of its decision on minority television station ownership . . . the Commission ‘entirely failed to consider an important aspect of the problem,’ and this amounts to arbitrary and capricious rulemaking.”). *But see* *FCC v. Prometheus Radio Project*, No. 19-1231, slip op. at 2 (Apr. 1, 2021) (“[W]e conclude that the FCC’s 2017 order was reasonable and reasonably explained for purposes of the APA’s deferential arbitrary-and-capricious standard. We therefore reverse the judgment of the Third Circuit.”).

321. See *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985).

322. *Id.* at 843.

323. Milligan, *supra* note 33 (manuscript at 52) (“In 1985, the Supreme Court significantly expanded the category of agency action deemed unreviewable under the APA, in a decision boding poorly for plaintiffs seeking to bring no-aid claims. In *Heckler v. Chaney*, the Court ruled that agency decisions to refuse to bring enforcement actions would be presumed unreviewable, as determinations ‘committed to agency discretion by law.’” (footnote omitted)).

Heckler's reviewability doctrine sounded mainly in procedural terms – expanding the “category of agency action deemed unreviewable under the APA”³²⁴ – it also had significant constitutional implications for the Fifth Amendment’s equal-protection mandate, because *Heckler* curtailed civil rights plaintiffs’ ability to bring both constitutional and APA claims.³²⁵ *Heckler's* expansion of unreviewability could bar judicial review for many APA and antidiscrimination cases, where plaintiffs seek to compel federal-agency enforcement of Title VI or other nondiscrimination norms against federal-funding recipients. *Garcia v. McCarthy*, for example, relied on *Heckler v. Chaney*,³²⁶ as did others.³²⁷

This criticism has some force, but it is hardly fatal. For starters, *Heckler's* presumption against reviewability would not apply at all to one subset of cases: cases in the “federal” category, where there are no overseer concerns, and where the agency’s action is nondiscretionary.³²⁸ For example, the State Department might choose to deny the passport applications of Americans with Hispanic surnames born near the U.S.-Mexico border³²⁹ – but those denials would almost

324. *Id.*

325. *Id.* (manuscript at 48) (“Once the Fifth Amendment ‘illegal subsidies’ claim was translated into statutory terms, it readily morphed into an argument for the federal government to do a better job of enforcing its own civil right statutes, like Title VI, against others (instead of one for the federal government to itself comply with the Constitution). Such suits were easily recharacterized as generalized attempts to force the federal government to pursue stronger civil rights enforcement, triggering courts’ reluctance to interfere with administrators’ decisions about how to allocate limited enforcement resources.”).

326. *Heckler v. Chaney*, 470 U.S. 821 (1985), figured prominently in *Garcia v. McCarthy*, where plaintiffs, Latinx schoolchildren, challenged EPA’s enforcement action against a California state agency. See *Garcia v. McCarthy*, No. 13-CV-03939, 2014 WL 187386, at *5 (N.D. Cal. Jan. 16, 2014) (“The plaintiffs urge, in essence, that the broad anti-discriminatory purpose and language of Title VI provide a basis for the Court to find that EPA’s enforcement action and settlement with CDPH are not within its complete discretion, despite *Heckler v. Chaney* and its progeny. While the facts, as alleged, point to serious problems that EPA could have addressed more meaningfully, the law does not allow the Court to wade into this dispute.” (citation omitted)), *aff’d*, 649 F. App’x 589 (9th Cir. 2016).

327. *Heckler v. Chaney* was also cited in one of the class-action cases associated with the *Garcia v. Vilsack* challenge to USDA’s discriminatory farm loans. See *Love v. Connor*, 525 F. Supp. 2d 155, 158 (D.D.C. 2007), *aff’d and remanded sub nom.* *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009). Another case by disability-rights plaintiffs against HUD also cited the *Heckler v. Chaney* bar. See *Am. Disabled for Attendant Programs Today v. U.S. Dep’t of Hous. & Urb. Dev.*, No. CIV. A. 96-5881, 1998 WL 113802, at *3 (E.D. Pa. Mar. 12, 1998) (“In *Heckler* the Supreme Court established that agency decisions to undertake or forego investigative or enforcement action . . . should be presumed committed to agency discretion, and therefore unreviewable. . . . In this case . . . [the statutes] compel me to conclude that HUD’s alleged inaction with regard to self-initiated enforcement activities is not reviewable.”), *aff’d*, 170 F.3d 381 (3d Cir. 1999).

328. For a lengthier explanation of the federal and nonfederal distinction, see Appendix, Table 1.

329. For more information about the passport-denial cases, see note 107 and accompanying text.

certainly not be protected by *Heckler* because they do not involve an agency's prosecutorial discretion or other factors, like the allocation of agency budget, enumerated in *Heckler*. Similarly, the U.S. Census Bureau's choice to add a citizenship question to the census — an agency action (not inaction) — would not be protected by *Heckler* since it does not involve prosecutorial discretion or other *Heckler* factors.³³⁰ In these examples, our interventions would help antidiscrimination plaintiffs bring claims against federal agencies that would not be barred by *Heckler's* presumption against reviewability. Put another way, the *Heckler* presumption does not arise in every APA and antidiscrimination case: many challenges to federal agencies do not involve either agency forbearance or discretionary supervision of third parties and so do not raise the kinds of concerns — about agency discretion to balance enforcement factors and allocate scarce funds, the absence of exercise of the coercive power of the state, and longstanding norms governing prosecutorial discretion — that animate *Heckler's* presumption.

Cases in our “subfederal” category face a more serious *Heckler* problem, but even there the challenge is not insurmountable. To begin, some subfederal cases will sit safely outside *Heckler's* ambit. For example, a decision by the Secretary of HHS to grant a waiver to a subfederal funding recipient under section 1115 of the Social Security Act, if it generates a disparate impact on the basis of race, would be reviewable.³³¹ A waiver decision is plainly an agency action, not inaction, and so would be presumptively reviewable under *Overton Park* and its progeny.³³² Agency decisions that lack a prosecutorial thrust may likewise sit outside the *Heckler* presumption. In *Thompson v. U.S. Department of Housing & Urban Development*, the court pushed aside a *Heckler* challenge because the federal agency's

330. In note 123, we discussed *Kravitz v. United States Department of Commerce*, 366 F. Supp. 3d 681 (D. Md. 2019), where the Trump administration attempted to add a citizenship question to the 2020 census. The case falls in the “federal” category, and the Supreme Court held that *Heckler's* presumption against reviewability does not apply. In 2019, the Supreme Court held that *Heckler* did not apply because “[t]he taking of the census is not one of those areas traditionally committed to agency discretion.” *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2568 (2019).

331. See Bagley & Savit, *supra* note 41 (arguing that § 704 would not bar an APA claim challenging a federal agency's waiver decision permitting a state to apply welfare-work requirements differently across whiter counties and blacker cities); Nicholas Bagley & Eli Savit, *Michigan's Discriminatory Work Requirements*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/opinion/michigan-medicaid-work-requirement.html> [<https://perma.cc/4Z9X-T2A5>].

332. Numerous circuits have found waiver decisions to be reviewable under the APA. See *Aguayo v. Richardson*, 473 F.2d 1090, 1103 (2d Cir. 1973); *C.K. v. N.J. Dep’t of Health & Hum. Servs.*, 92 F.3d 171, 181-88 (3d Cir. 1996); *Beno v. Shalala*, 30 F.3d 1057, 1066-67 (9th Cir. 1994); see also *Shalala*, 30 F.3d at 1067 & n.24 (“Every court which has considered the issue has concluded that § 1315(a) waivers are subject to APA review.”).

oversight of a municipal housing authority was not prosecutorial in the conventional sense.³³³ “HUD’s position is not passive,” the court wrote.³³⁴ “Rather, HUD acts affirmatively, funding and providing operational support for housing initiatives.”³³⁵ The federal agency’s role vis-à-vis federal funding recipients was a supportive and even collaborative one, not an arm’s-length prosecutorial one.³³⁶ Still other possibilities include cases where the agency’s inaction is tethered to an affirmative agency act (e.g., the agency’s review and acceptance of mortgage applications) or, as in the recent DACA litigation, where the agency’s failure to act confers collateral benefits on the would-be enforcement targets. In each of these contexts, the *Heckler* presumption may fall away.

Challenges to agency decisions not to terminate funds on Title VI or other nondiscrimination grounds, as in *Women’s Equity* and *Council of & for the Blind*, are different. They more squarely raise *Heckler* questions because of the discretionary nature of a federal agency’s supervision of subfederal actors. Even so, *Women’s Equity*-like claims under the APA may nonetheless qualify for either of two possible *Heckler* exceptions: first, where an agency can be said to have abdicated its statutory responsibilities; and second, where an agency has violated its own implementing regulations or other rules. One or both of these exceptions to the *Heckler* presumption is arguably met in suits of the *Women’s Equity* sort.

The first of the two exceptions arises out of a footnote in *Heckler* stating that the presumption against reviewability can be rebutted where an agency has “consciously or expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.”³³⁷ While the Court offered no further elaboration,³³⁸ it is notable that the sole example provided of an abdicating

333. 348 F. Supp. 2d 398, 421-22 (D. Md. 2005).

334. *Id.* at 422.

335. *Id.*

336. *Id.* Interestingly, this cabining of *Heckler* to the enforcement context gained support in the Supreme Court’s recent decision in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), where the Court referred to *Heckler* as a “limited category of unreviewable actions [that] includes an agency’s decision not to institute enforcement proceedings.” *Id.* at 1905.

337. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (noting that an agency’s “abdication of its statutory responsibilities” might create an exception to nonreviewability).

338. In her forthcoming article, Joy Milligan elaborates on *Heckler*’s abdication exception, writing that “*Heckler* left open the possibility that enforcing the Fifth Amendment’s no-aid principle remained viable under the APA.” Milligan, *supra* note 33 (manuscript at 53). Milligan also argues that *Heckler* does not bar Fifth Amendment claims by plaintiffs whose equal-protection rights are violated by federal funding for discriminatory programs. *See id.* (“[Justice] Rehnquist noted that the *Heckler* ruling did not address situations where an agency’s nonenforcement itself violated constitutional rights. Claims that a federal agency had violated the

agency that had “consciously and expressly adopted a general policy” of nonenforcement was none other than the federal agencies targeted in the *Women’s Equity* litigation.³³⁹ That said, the line between retail and wholesale refusals to enforce, between legitimate discretion and abdication, and between “[i]ndividual, isolated nonenforcement decisions,” as Justice Brennan put it in his concurrence, and categorical, congealed patterns of inaction, is also famously difficult to draw.³⁴⁰ The exercise raises acute baseline problems, which may explain why many lower courts have shown little appetite to elaborate the “abdication” exception further.³⁴¹

Despite these administrability concerns, some courts have nonetheless seized on the abdication exception to help APA and antidiscrimination plaintiffs overcome the *Heckler* hurdle. Most notably, in *NAACP v. Secretary of Housing & Urban Development*, civil rights plaintiffs sued the Secretary of HUD for failing to administer the Department’s housing programs, including the oversight of municipal-housing authorities, in a nondiscriminatory way.³⁴² In finding *Heckler’s* abdication exception triggered, the First Circuit pointed to a “pattern of activity,” including refusals to act, that demonstrated the Department’s acquiescence to

Fifth Amendment by willfully ignoring systemic discrimination by its funding recipients might therefore survive.” (footnote omitted)).

339. *Id.* (quoting *Heckler*, 470 U.S. at 833 n.4 (invoking the *Adams* litigation as the sole example)).

340. Plainly seeking to cabin the reach of the majority’s decision, Justice Brennan lauded the majority for “properly” declining to decide whether the Court’s presumption against reviewability applied to flat claims of nonjurisdiction, an agency’s “pattern of nonenforcement of clear statutory language,” an agency’s refusal to enforce its own regulation, or constitutional violations. *Heckler*, 470 U.S. at 839 (Brennan, J., concurring). In contrasting these situations with “[i]ndividual, isolated nonenforcement decisions,” Justice Brennan thus invoked, but did little to resolve, the question of where to draw the line between atomized nonenforcement decisions as against categorical, congealed patterns of nonenforcement. *Id.*

341. *See, e.g.,* *Jerome Stevens Pharms., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1256–58 (D.C. Cir. 2005) (affirming the lower court’s determination that the FDA’s extension of drug approval deadlines did not amount to an “abdication of its statutory responsibilities” because they were not a “permanent policy”); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 164–71 (2d Cir. 2004) (holding that the Nuclear Regulatory Commission did not abdicate its responsibility to maintain nuclear-plant safety by declining to initiate enforcement in one case); *Balt. Gas & Elec. Co. v. Fed. Energy Regul. Comm’n*, 252 F.3d 456, 460–61 (D.C. Cir. 2001) (holding that the Federal Energy Regulatory Commission’s decision to settle a case was not an abdication); *Sierra Club v. Larson*, 882 F.2d 128, 132–33 (4th Cir. 1989) (holding that the Federal Highway Administration did not abdicate its responsibility to regulate advertising along highways); *Mass. Pub. Int. Rsch. Grp., Inc. v. U.S. Nuclear Regul. Comm’n*, 852 F.2d 9, 19 (1st Cir. 1988) (holding that the Commission had not abdicated its responsibility). In *Northern Indiana Public Service Co. v. Federal Energy Regulatory Commission*, 782 F.2d 730, 745–46 (7th Cir. 1986), the court embraced the anti-abdication principle, holding an agency nonenforcement decision arbitrary and capricious, but without citing *Heckler’s* footnote.

342. 817 F.2d 149, 151 (1st Cir. 1987).

the city's chronic violation of statutory and constitutional prohibitions.³⁴³ Other appeals courts have arrived at a similar place, where agency decisions not to take even fully discretionary actions may congeal into a pattern.³⁴⁴ Importantly, agency failures to enforce nondiscrimination norms against funding recipients may fit especially well with this pattern-based framing. Where an agency fails to supervise subfederal actors, there is often more than one funding recipient. As in *Women's Equity*, and *Council of & for the Blind* before it, agency failures to enforce antidiscrimination norms will often form a pattern across multiple fundees.³⁴⁵

It is also important to note that the *Heckler* presumption against reviewability is far more fluid in the hands of lower courts than in the Court's decades-old *Heckler* decision. Multiple circuits have found that the *Heckler* presumption can be overcome where an agency makes a legal determination under cover of a decision not to enforce – which might be thought of as a species of abdication.³⁴⁶ Alternatively referred to as the “legal issues” exception,³⁴⁷ this path around *Heckler* would be available whenever a federal agency refuses to cut loose fundees

343. *Id.* at 158.

344. *See, e.g., Iowa ex rel. Miller v. Block*, 771 F.2d 347, 349–52 (8th Cir. 1985) (permitting review of the Secretary of Agriculture's failure to implement discretionary disaster-relief programs).

345. Justice Marshall's gloss on *Heckler v. Chaney*, albeit in the concurrence, was sensitive to these patterns of discrimination. Justice Marshall's concurrence would have softened but not eliminated judicial review, because he believed discretion should not give agencies blanket immunity from judicial review. While discretion might be necessary for agency flexibility, it could also be used to conceal patterns of agency incompetence, discrimination, or other unsavory motives. Justice Marshall wrote:

Discretion may well be necessary to carry out a variety of important administrative functions, but discretion can be a veil for laziness, corruption, incompetency, lack of will, or other motives, and for that reason “*the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion.*”

Heckler, 470 U.S. at 848 (Marshall, J., concurring in the judgment) (quoting LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 375 (1965)).

346. *See, e.g., UAW v. Brock*, 783 F.2d 237, 245 (D.C. Cir. 1986) (holding that a U.S. Department of Labor legal determination that certain employer actions were not reportable sat outside the *Heckler* presumption); *Mont. Air Chapter No. 29 v. Fed. Lab. Rels. Auth.*, 898 F.2d 753, 758 (9th Cir. 1990) (“When the [Federal Labor Relations Authority] implements a statutory interpretation in the course of a refusal to issue an unfair labor practice complaint, ‘courts are emphatically qualified to decide whether an agency has acted outside of the bounds of reason.’” (quoting *Int'l Union v. Brock*, 783 F.2d at 245)); *Farmworker Just. Fund, Inc. v. Brock*, 811 F.2d 613, 622 (D.C. Cir.) (noting that *Heckler* “in no way precludes judicial review of agency decisions that are contrary to law” and noting that “[t]his principle applies to agency inaction as well as agency action”), *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987).

347. *See, e.g., JERRY L. MASHAW, RICHARD A. MERRILL, PETER M. SHANE, M. ELIZABETH MAGILL, MARIANO-FLORENTINO CUÉLLAR & NICHOLAS R. PARILLO, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 1092 (8th ed. 2019).

based on its interpretation of what constitutes unlawful discrimination within the meaning of Title VI. Closely related are cases that reject *Heckler* arguments where an agency announces a rule with implications for its wider enforcement program via notice and comment or some other procedure carrying at least some degree of formality.³⁴⁸ Still another line of cases expressly limits *Heckler's* reach to individual, “single-shot” enforcement decisions rather than decisions that operate in bulk.³⁴⁹ Of course, agencies that wish to avoid judicial review will not be so foolish as to publicly announce their abdication. But Title VI implementing regulations, many of which prescribe a process for receiving and investigating administrative petitions or complaints, give some agencies little room to maneuver in that regard.³⁵⁰ As discussed in more detail below, those regulations require an agency to make preliminary findings in response to an administrative complaint asserting discrimination by the agency or its fundees, and courts have held that an agency’s adherence to those requirements is mandatory.³⁵¹

348. See *Shell Oil Co. v. EPA*, 950 F.2d 741, 764 (D.C. Cir. 1991) (rejecting a *Heckler* argument as to the reviewability of agency action where EPA had announced by way of rulemaking that it would “not take enforcement actions in a whole class of cases”); *Nat’l Treasury Emps. Union v. Horner*, 854 F.2d 490, 496 (D.C. Cir. 1988) (noting that rulemaking under the APA “provides a focal point for judicial review – quite unlike the internal agency decision making that precedes decisions not to seek enforcement”); *All. for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166, 171 (D.D.C. 2000) (holding that, though not subject to notice and comment, the FDA’s “formal publication of [a] Statement of Policy” could provide a “focal point” for judicial review (citing *Horner*, 854 F.2d at 496)).

349. See, e.g., *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (rejecting a *Heckler* argument by distinguishing between “an agency’s statement of a general enforcement policy” and a “single-shot non-enforcement decision” (quoting *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994))); *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996) (“[W]e do not believe the Court in *Chaney* intended its definition of ‘enforcement action’ to include an interpretation by an agency that the statute’s goals could be met by adopting a certain permanent standard.”); *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 330, 333 (D.C. Cir. 1993) (holding that an agency’s “statement of its enforcement policy” is “not the type of discretionary judgment concerning the allocation of enforcement resources that *Heckler* shields from judicial review”); *Nat’l Wildlife Fed’n v. EPA*, 980 F.2d 765, 773 (D.C. Cir. 1992) (holding that a universal policy statement might be reviewable in the face of a *Heckler* challenge because, among other things, it was more akin to a “facial challenge” to the agency’s statutory interpretation than a challenge to “a particular enforcement decision”).

350. See, e.g., 40 C.F.R. § 7.115(c)(1) (2020) (EPA) (“Within 180 calendar days from the start of the compliance review or complaint investigation, the OCR will notify the recipient in writing by certified mail, return receipt requested, of: (i) Preliminary findings; (ii) Recommendations, if any, for achieving voluntary compliance; and (iii) Recipient’s right to engage in voluntary compliance negotiations where appropriate.”); *id.* at § 7.120(d)(1)-(2) (stating that, upon accepting a complaint for investigation, the agency “will” review and reject or refer a complaint within 20 days and must attempt to resolve the complaint informally “whenever possible”).

351. See *infra* notes 357-366 and accompanying text.

The second possible exception, and another potential avenue for overcoming the *Heckler* presumption, lies in the many Title VI implementing regulations that federal agencies charged with administering federal funding streams have promulgated obligating the agency to investigate complaints asserting that a subfederal fundee is engaged in unlawful discrimination.³⁵² As with the abdication exception, this path around unreviewability comes from *Heckler* itself, where the Court raised, but then set aside, the question of whether an agency rule “might under certain circumstances provide courts with adequate guidelines for informed judicial review of decisions not to enforce.”³⁵³ Numerous courts, beginning shortly after *Heckler*, have taken up the Court’s invitation and held that an agency’s own regulations, when framed in sufficiently mandatory terms, can provide the necessary “law to apply,” even where the statute the regulations implement is framed in vague or hortatory terms.³⁵⁴ The result is a route around

352. 7 C.F.R. pt. 15 (2021) (Agriculture); 15 C.F.R. pt. 8 (2021) (Commerce); 32 C.F.R. pt. 195 (2020) (Defense); 34 C.F.R. pt. 100 (2020) (DoE); 10 C.F.R. pt. 1040 (2021) (Energy); 40 C.F.R. pt. 7 (2020) (EPA); 45 C.F.R. pt. 80 (2020) (HHS); 6 C.F.R. pt. 21 (2021) (Homeland Security); 24 C.F.R. pt. 1 (2020) (HUD); 43 C.F.R. pt. 17, subpt. A (2020) (Interior); 28 C.F.R. pt. 42, subpt. C (2020) (Justice); 29 C.F.R. pt. 31 (2020) (Labor); 22 C.F.R. pt. 141 (2020) (State); 49 C.F.R. pt. 21 (2020) (Transportation); 31 C.F.R. pt. 22 (2020) (Treasury); 38 C.F.R. pt. 18, subpt. A (2020) (Veterans Affairs). In addition to these Cabinet-level departments, a number of other agencies have also promulgated rules or, in some cases, guidance pursuant to § 602 of Title VI. *See, e.g.*, 45 C.F.R. pt. 1203 (2020) (Corporation for National and Community Service); 44 C.F.R. pt. 7, subpt. A (2020) (Federal Emergency Management Agency); 41 C.F.R. subpt. 101-6.201 (2020) (General Services Administration); 14 C.F.R. pt. 1250 (2021) (NASA); 13 C.F.R. pt. 112 (2021) (Small Business Administration); 18 C.F.R. pt. 1302 (2020) (Tennessee Valley Authority).

353. *Heckler v. Chaney*, 470 U.S. 821, 836 (1985).

354. *See, e.g.*, *Greater L.A. Council on Deafness, Inc. v. Baldrige*, 827 F.2d 1353, 1361 (9th Cir. 1987) (holding that an agency’s regulation obligating it to investigate every complaint alleging a statutory violation and to inform the complainant of its reason for declining to enforce provided sufficient “law to apply” to rebut the *Heckler* presumption); *GoJet Airlines, LLC v. FAA*, 743 F.3d 1168, 1173 (8th Cir. 2014) (holding a Federal Aviation Administration decision to initiate a civil action was reviewable despite the *Heckler* presumption because of an agency policy statement committing the agency to nonenforcement where an airline voluntarily disclosed a violation); *Socop-Gonzalez v. INS*, 208 F.3d 838, 845 (9th Cir. 2000) (holding that past decisions by the Board of Immigration Appeals (BIA) provided “law to apply” sufficient to rebut the *Heckler* presumption in a challenge to the BIA’s refusal to reopen a deportation proceeding), *rev’d on reh’g en banc*, 272 F.3d 1176 (9th Cir. 2001). Many other courts have invoked *Accardi* as an end-run around *Heckler* in cases involving agency inaction beyond the enforcement context. *See, e.g.*, *McAlpine v. United States*, 112 F.3d 1429, 1434 (10th Cir. 1997) (“Even assuming that the statutory language . . . does not provide ‘law to apply’ in this case, we hold that the regulatory factors for evaluating trust land acquisition requests . . . do provide ‘law to apply’ in evaluating the Secretary’s exercise of his discretion.”); *City of Colo. Springs v. Solis*, 589 F.3d 1121, 1130 (10th Cir. 2009) (holding that the Department of Labor’s decision

the *Heckler* presumption that sounds in the principle typically associated with *United States ex rel. Accardi v. Shaughnessy*: that agencies must follow their own regulations unless and until those rules are amended or rescinded.³⁵⁵

Like the abdication exception, the *Accardi* exception to *Heckler* is hardly iron-clad. Some of the potential hurdles are real, but surmountable. One is the commonsense requirement that if an agency regulation is to provide “law to apply” and serve as a self-binding constraint on agency discretion, it must be framed as

to impose a labor-related requirement on a city as a condition of federal assistance was reviewable because the agency had issued guidelines and characterized those guidelines as binding, thus providing “law to apply”); *Clifford v. Pena*, 77 F.3d 1414, 1417 (D.C. Cir. 1996) (concluding that an agency decision to grant a statutory waiver was reviewable because the agency had “over the years . . . supplied a list of factors” guiding its judgment such that the “agency’s policies . . . provided standards rendering what might arguably be unreviewable agency action reviewable”); *Cardoza v. Commodity Futures Trading Comm’n*, 768 F.2d 1542 (7th Cir. 1985) (holding that the Commodity Futures Trading Commission’s regulations provided standards by which to assess its failure to review disciplinary action by the Chicago Board of Trade, which would otherwise not be reviewable); *Miami Nation of Indians v. U.S. Dep’t of the Interior*, 255 F.3d 342, 348 (7th Cir. 2001) (holding that an agency decision not to recognize an Indian tribe, normally unreviewable, was reviewable because of Department of Interior regulations identifying criteria for the agency’s decision that were “‘legal’ in the sense not just of being obligatory but of being the kind of criteria that courts are capable of applying”); *Diebold v. United States*, 947 F.2d 787, 810 (6th Cir. 1991) (determining that the Army’s decision whether to contract out food services, which would be unreviewable in other circumstances, was reviewable at least in part because of OMB-supplied criteria adopted by Army regulations setting forth legal guidelines for making the determination); *Kenney*, 96 F.3d at 1124 (finding that regulations and policies regarding meat processing provided the necessary “law to apply,” but only after concluding that the agency action in question was not a case-level enforcement decision subject to *Heckler*). Still other decisions closely assess whether agency regulations were sufficiently discretion-constraining, implying that appropriate regulations can rebut the *Heckler* presumption. *See, e.g., Ctr. for Auto Safety v. Dole*, 846 F.2d 1532, 1534-35 (D.C. Cir. 1988) (per curiam) (noting that “[j]ust as Congress can provide the basis for judicial review of nonenforcement decisions by spelling out statutory factors to be measured by the courts, so an agency can provide such factors by regulation” such that “the presumption against reviewability recognized in *Chaney* must give way”); *Ellison v. Connor*, 153 F.3d 247, 251, 253 (5th Cir. 1998) (noting that “[a]n agency’s own regulations can provide the requisite ‘law to apply’” but then holding that neither the statute nor the regulations implementing the statute provided sufficient “law to apply” to support judicial review of the agency’s permitting decision); *Am. Disabled for Attendant Programs Today v. U.S. Dep’t of Hous. & Urb. Dev.*, 170 F.3d 381, 385-87 (3d Cir. 1999) (considering but rejecting plaintiffs’ argument that HUD implementing regulations could provide the necessary “law to apply”).

355. The *Accardi* principle reached full bloom in the 1950s with a trio of cases: *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); and *Service v. Dulles*, 354 U.S. 363, 372 (1957). The principle is also often referred to as the *Arizona Grocery* rule. *See Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932). For general overviews of the *Accardi* principle, see Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569 (2006); and Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009).

an unequivocal command.³⁵⁶ Some Title VI regulations fit more easily into that description than others. At one end of the spectrum are the implementing regulations promulgated by EPA mandating that the agency make preliminary findings in response to an administrative complaint within 180 days of the start of the agency's investigation.³⁵⁷ In the recent case of *Californians for Renewable Energy v. EPA*,³⁵⁸ the challengers successfully sought review of years of EPA inaction in the face of duly-filed complaints alleging discrimination by multiple government-funded facilities by targeting the agency's failure to issue preliminary findings within those express time limits.³⁵⁹ The U.S. Department of Energy's (Energy) Title VI implementing regulations contain a similar cascade of mandates regarding the conduct of investigations that could trigger *Accardi* obligations.³⁶⁰ Those regulations provide that the Director of the Federally Assisted Programs Division, part of the Department's Office of Equal Opportunity, "shall investigate complaints of discrimination"³⁶¹ and then "shall" render a view on initial jurisdiction within thirty-five days and, once jurisdiction has been established, "shall" transmit preliminary findings and recommendations for voluntary compliance to the parties within 90 days.³⁶² Either agency's failure to adhere to these procedures could suffice to clear the *Heckler* hurdle, opening up the agency's substantive reasoning in rejecting a discrimination claim to court review as arbitrary and capricious or inconsistent with the agency's statutory mandate or regulation.

356. See, e.g., *Dole*, 846 F.2d at 1535 (holding that regulations governing the submission and disposition of petitions did not sufficiently constrain the National Highway Traffic Safety Administration's discretion or provide the needed "law to apply" to do so); *Harmon Cove Condo. Ass'n v. Marsh*, 815 F.2d 949, 952 (3d Cir. 1987) (considering but rejecting the plaintiffs' argument that an EPA-issued permit imposed on the agency a mandatory duty to enforce compliance conditions set forth in the permit).

357. See 40 C.F.R. § 7.115(c)(1) (2020) ("Within 180 calendar days from the start of the compliance review or complaint investigation, the OCR will notify the recipient in writing by certified mail, return receipt requested, of: (i) Preliminary findings; (ii) Recommendations, if any, for achieving voluntary compliance; and (iii) Recipient's right to engage in voluntary compliance negotiations where appropriate."); *id.* § 7.120(d)(1), (2) (stating that, upon accepting a complaint for investigation, the agency must attempt to resolve the complaint informally "whenever possible" and "will" issue preliminary findings within twenty calendar days after acknowledgement of the complaint).

358. No. C 15-3292, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018).

359. *Id.* at *12-13. Note that the district court did not analyze the case through the lens of *Heckler*. Instead, the mandatory nature of the regulations was important to establish that the challenged inaction was a nondiscretionary duty within the meaning of APA § 706(1), as interpreted in *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004). *Californians for Renewable Energy*, 2018 WL 1586211, at *9.

360. See 10 C.F.R. § 1040 (2021).

361. *Id.* § 1040.104(a).

362. *Id.* § 1040.104(c).

At the other end of the spectrum are regulations promulgated by USDA—an agency, it should be noted, that is no stranger to civil rights concerns³⁶³—that retain complete agency discretion in the conduct of investigations, specifying only that discrimination complaints “shall be investigated in the manner determined by the Assistant Secretary for Civil Rights and such further action taken by the agency or the Secretary as may be warranted.”³⁶⁴ Those regulations plainly could not support an *Accardi*-based exception to *Heckler*.

Sitting somewhere in the middle of both extremes, and illustrating some further limitations of the *Accardi* exception, are the Title VI regulations of many other agencies. Those regulations, like the rules promulgated by EPA and Energy, are framed in mandatory terms, specifying that the agency “shall” make a “prompt” investigation upon receipt of a complaint indicating a “possible failure” of compliance, but they lack the further, fine-grained requirements in EPA and Energy rules around entry of preliminary findings or timelines for doing so.³⁶⁵ The regulations further provide that, once an investigation is complete and a mandatory effort at informal resolution has failed, the agency retains complete discretion over whether to initiate a full-scale enforcement action and seek suspension or termination of funds.³⁶⁶ These enforcement regulations suggest that *Accardi*-based efforts to rebut *Heckler* will be limited to an agency’s conduct of investigations, not its ultimate decision to suspend or terminate funds. But even the investigation set of regulations, given its lack of specific mandates around investigatory findings and timelines, could make an *Accardi*-based exception a hard sell. The Third Circuit, for example, rejected plaintiffs’ effort to rebut *Heck-*

363. See, e.g., *Pigford v. Johanns*, 416 F.3d 12, 14 (D.C. Cir. 2005).

364. 7 C.F.R. § 15.6 (2021).

365. A representative example, with only minor deviations at other agencies, is HUD’s Title VI implementing regulations. Paralleling EPA and U.S. Department of Energy (Energy) regulations, they provide as follows: “The responsible Department official or his designee shall make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part 1.” 24 C.F.R. § 1.7(c) (2020). However, the HUD regulations do not, in an important departure from EPA and Energy regulations, go on to prescribe procedures around preliminary findings or time limits and instead immediately cross-reference to provisions providing full agency discretion whether to seek suspension or termination of federal assistance. See *id.* § 1.8(a).

366. The HUD regulations once again provide a representative example: “If there appears to be a failure or threatened failure to comply with this part 1, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part 1 *may* be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance, or by any other means authorized by law.” 24 C.F.R. § 1.8(a) (2020) (emphasis added).

ler using HUD's similar regulations implementing the antidiscrimination provisions of section 504 of the Federal Vocational and Rehabilitation Act.³⁶⁷ Though the regulations mandated a prompt investigation and even provided a bright-line substantive rule specifying the number of apartments that must provide disabled access, the court found the agency's inaction unreviewable because the regulations did not provide a justiciable standard against which a reviewing court could evaluate the agency's exercise of discretion in choosing between suspected violations.³⁶⁸ Put another way, the regulations were silent on *which* among likely violations to investigate.

The Third Circuit's analysis was brief and debatable, but it suggests a deeper issue: the *Accardi* route around *Heckler* may only be available for procedural regulations, not substantive ones. Outside the *Heckler* context, *Accardi* is conventionally thought to apply to both types of regulation.³⁶⁹ It matters not whether the regulations at issue specify rules of primary conduct (for instance, in the Title VI context, a rule on what constitutes unlawful discrimination) or instead impose mere procedural requirements (for instance, protocols for the agency's handling of administrative complaints). But it is not at all clear that a *Heckler* exception based on *Accardi* should hold for the former, substantive type of regulation. The essence of the reviewability challenge in *Heckler* was a lack of a "meaningful standard against which to judge the agency's exercise of discretion."³⁷⁰ Where an agency has promulgated a procedural rule specifying an internal protocol and framed that protocol as an unequivocal command, the agency's failure to follow that process can and should support a judicial challenge. Indeed, the promulgating agency can be thought to have waived its right to invoke extrastatutory concerns at the heart of the *Heckler* presumption about the optimal use of a scarce budget, the likelihood of the enforcement action's success, and the agency's overall policy priorities.³⁷¹ By contrast, where the regulations at issue are substantive,

367. See *Am. Disabled for Attendant Programs Today v. U.S. Dep't of Hous. & Urb. Dev.*, 170 F.3d 381, 385-86 (3d Cir. 1999) (rejecting the plaintiffs' effort to establish an *Accardi*-based *Heckler* exception where a HUD regulation mandated that the agency "shall" initiate an investigation for a "possible failure" of compliance and even provided a numerical rule of primary conduct specifying the proportion of apartments that must be accessible to disabled tenants).

368. Plaintiffs, the court concluded, had "confuse[d] the existence of a standard restricting federal funding recipients with the existence of a standard by which to judge [the agency's] conduct." *Id.* at 385.

369. See Merrill, *supra* note 355, at 588-90 (reviewing nearly 100 cases asserting *Accardi* claims in the D.C. Circuit and concluding that while roughly three-fourths of the decisions had procedural regulations as the source, the doctrine was still applied to substantive regulations).

370. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

371. See, e.g., *Davis Enter. v. EPA*, 877 F.2d 1181, 1186 (3d Cir. 1989) ("Once the agency has articulated factors to be considered in [making its decision], the agency effectively has limited its

the *Accardi* exception merely restates the *Heckler* problem. Faced with a pool of potential enforcement candidates, an agency could demur because, though the conduct at issue plainly runs afoul of an agency regulation sharpening a statutorily specified rule of conduct, the agency simply lacks the resources, given its other priorities, to pursue every case.³⁷²

A last obstacle to an *Accardi* route around *Heckler* sweeps more broadly: there is good reason to doubt, given the Supreme Court's changing composition and its seeming skepticism about disparate-impact claims in other contexts, whether agencies can promulgate regulations that prohibit policies or actions based on a disparate-impact theory of discrimination in the first place.³⁷³ Members of the Court seemed to suggest agencies could some forty years ago in *Guardians Ass'n v. Civil Service Commission of New York*.³⁷⁴ More recently, in 2015, the Court narrowly reaffirmed the validity of HUD's disparate-impact regulations promulgated under the Fair Housing Act.³⁷⁵ But the Court remains dubious of disparate-impact regulations.³⁷⁶ Were the Court to revise its view and hold that Title

own discretion and would not be free to make a decision based exclusively on factors not contained in the regulations.”).

372. In addition to being potentially limited to procedural regulations, *Accardi* claims might also be available only for regulations that are fully “binding” in the sense of carrying the force of law. As a general matter, it remains an open question whether interpretative rules or policy statements can trigger the *Accardi* constraint. Compare *Blassingame v. Sec’y of the Navy*, 866 F.2d 556, 560 (2d Cir. 1989) (upholding an *Accardi* challenge based on a Navy policy manual without determining its bindingness), and *Morris v. McCaddin*, 553 F.2d 866, 870 (4th Cir. 1977) (upholding an *Accardi* challenge based on a personnel “pamphlet” without determining its bindingness), with *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986) (reversing and remanding where the Federal Mine Safety and Health Review Commission had improperly regarded a Labor Department policy statement as a legally binding regulation in dismissing an enforcement citation as improper), and *Viet. Veterans of Am. v. Sec’y of the Navy*, 843 F.2d 528, 539 (D.C. Cir. 1988) (holding that an agency memorandum was nonbinding and so provided no legally enforceable rights against the agency for servicemen seeking an amendment to their discharge). Even were it a universal position, however, such a limit on the *Accardi* exception would not defeat its utility in mitigating disparate limbo when it comes to Title VI regulations because all of them were promulgated after full notice and comment. See *supra* notes 357, 360-362, 364-366 (cataloging Title VI regulations). But it might retain force in other contexts.
373. See *Bagley & Savit*, *supra* note 41. The current Court’s relationship to disparate impact is at best strained. See *supra* notes 292-295 and accompanying text.
374. *Guardians Ass’n v. Civ. Serv. Comm’n*, 463 U.S. 582, 593 (1983) (opinion of White, J.) (“Title VI reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination.”).
375. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 522 (2015) (holding that disparate-impact claims are cognizable under the Fair Housing Act).
376. See, e.g., *id.* at 521 (“But disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise under the [Fair Housing Act], e.g., if such liability were imposed based solely on a showing of a statistical disparity.”).

VI regulations cannot embrace a disparate-impact theory, the *Accardi* route would vanish along with a large chunk of the Code of Federal Regulations.

In the end, none of the available routes around *Heckler*—not the abdication exception or its “legal issues” offshoot, and not the *Accardi* end-run—is a silver bullet. Some civil rights plaintiffs, freed of APA § 704’s outmoded, pre-*Sandoval* constraints, will clear the *Heckler* hurdle using one of the above pathways. With § 704 disabled, civil rights complainants at EPA and Energy may experience particular success in compelling expanded agency supervision over subfederal fundees. So, too, might civil rights complainants at HUD, given the unique statutory provision in the Fair Housing Act directing the agency to “affirmatively further fair housing.”³⁷⁷ As already noted, at least one court found that this language gave HUD “an affirmative role in local housing policy,” placing agency inaction beyond *Heckler*’s enforcement-specific reach.³⁷⁸

Other plaintiffs, however, will avoid a § 704 ouster only to see their cases dismissed on reviewability grounds. They will remain stuck in disparate limbo. For this group, perhaps the best that can be said is that fully fixing disparate limbo, and reversing administrative law’s erasure of antidiscrimination, will require further action that courts alone cannot supply. Thus, agencies could, whether of their own volition or by executive order or Office of Management & Budget (OMB) guidance, promulgate fully binding, mandatory procedural protocols for handling administrative complaints or terminating funds that provide the requisite “law to apply.” Even better (though less likely in politically polarized times), Congress could provide a legislative fix, whether by supplying judicially manageable standards for judging how and when an agency should exercise its discretion or by specifying, as in the Fair Housing Act, that the agency is to “af-

377. 42 U.S.C. § 3608(e)(5) (2018).

378. See *Thompson v. U.S. Dep’t of Hous. & Urb. Dev.*, No. Civ.A.MJH-95-309, 2006 WL 581260, at *9 (D. Md. Jan. 10, 2006). Note here that there is an interesting and unexplored tension between decisions holding that there is no “law to apply” where plaintiffs are challenging “general agency actions” as opposed to specific instances of nonenforcement and decisions suggesting that a challenge to an agency’s announcement of a permanent standard for enforcement or other general policy statement sits outside *Heckler* because *Heckler* is trained on specific enforcement decisions. Indeed, some courts have held that the FHA’s “affirmatively further” language “does not provide a substantive standard by which to judge agency action where a plaintiff is challenging general agency actions, as opposed to an instance of nonenforcement.” *Vaughn v. Consumer Home Mortg., Inc.*, 293 F. Supp. 2d 206, 212 (E.D.N.Y. 2003); see also *Am. Disabled for Attendant Programs Today v. U.S. Dep’t of Hous. & Urb. Dev.*, 170 F.3d 381, 387 (3d Cir. 1999) (holding that HUD’s “general investigative and enforcement policies are not reviewable”). But this is distinct from those courts, noted previously, see *supra* note 349 and accompanying text, that find that neither general statements of enforcement policy nor individual instances of nonenforcement are subject to *Heckler*’s presumption of reviewability.

firmatively further” civil rights. Most straightforward of all, Congress could explicitly authorize judicial review of agency (non)enforcement decisions regarding subfederal fundees. We take up each of these potential fixes in Section III.B.

A third and final potential objection sounds in a different notion of futility: our doctrinal interventions may be a “hollow hope,”³⁷⁹ as courts rarely have the power to effect major social change even when enforcing substantive antidiscrimination norms,³⁸⁰ let alone indirect challenges to agency oversight of the actions of others. This concern might be thought especially acute if, out of sensitivity to concerns about the wholesale importation of Title VI into the APA, courts were to adopt a light-touch approach to testing an agency’s consideration and ventilation of discrimination concerns.

This objection, too, carries some force but is ultimately unpersuasive. We turn in a moment to a more detailed examination of what arbitrary-and-capricious review could accomplish, analogizing to policy interventions in environmental law requiring agencies to complete “impact statements.”³⁸¹ For now, it is worth noting that the leading version of the hollow-hope argument maintains that major civil rights victories like *Brown v. Board of Education*³⁸² did little to change segregated schools,³⁸³ and “[t]he numbers show that the Supreme Court contributed virtually *nothing* to ending segregation.”³⁸⁴ True progress came ten years later, with Congress’s passage of the Civil Rights Act and with increased executive enforcement.³⁸⁵ More concretely, it was *bureaucracies*, particularly

379. In Gerald N. Rosenberg’s account, courts cannot effect social change without the backing of Congress and the President. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 70–71 (1991) (“The use of the courts in the civil rights movement is considered the paradigm of a successful strategy for social change. . . . Yet, a closer examination reveals that before Congress and the executive branch acted, courts had virtually *no direct effect* on ending discrimination In terms of judicial effects, then, *Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform.”).

380. See *id.* at 72 (“[C]ourts contributed virtually nothing directly to civil rights in the decade when they acted alone.”).

381. See *infra* Section 452.

382. 347 U.S. 483, 495 (1954) (holding that racial segregation in public schools is unconstitutional).

383. ROSENBERG, *supra* note 379, at 52 (“The statistics from the Southern states are truly amazing. For ten years, 1954–64, virtually *nothing happened*. Ten years after *Brown* only 1.2 percent of Black schoolchildren in the South attended school with whites Despite the unanimity and forcefulness of the *Brown* opinion . . . its decree was flagrantly disobeyed The Court ordered an end to segregation and segregation was not ended.”).

384. *Id.*

385. *Id.* (“[D]esegregation took off after 1964, reaching 91.3 percent in 1972 The actions of the Supreme Court appear irrelevant to desegregation from *Brown* to the enactment of the 1964 Civil Rights Act and 1965 [Elementary and Secondary Education Act]. Only after the passage of these acts was there any desegregation of public schools in the South.”).

HEW,³⁸⁶ that played a critical role in school desegregation by using funding strings to induce compliance: “Financially strapped school districts found the lure of federal dollars irresistible.”³⁸⁷

To that extent, the “hollow hope” critique does as much to affirm the power of bureaucracies as to question the power of courts. And this bureaucratic power is precisely the kind of power that would be harnessed by our doctrinal interventions, which would enable plaintiffs to use the APA, and thus the powers of the administrative state, to counter discrimination. To be sure, courts implementing a new doctrinal landscape around Title VI and the APA may still be wary of potential backlash—a further and important part of the hollow-hope account.³⁸⁸ But it remains the case that our intervention focuses judicial power on a key type of institutional power—the funding power of administrative agencies—and a key ingredient that drove *successful* social change in the 1960s.

B. Policy Implications

We now consider a range of statutory and executive interventions to reduce disparate limbo, focusing on the role of administrative law. We note that a separate set of interventions, not covered here, might focus instead on civil rights law. For instance, our analysis may bolster calls for legislatively overriding *Sandoval* and reinstating a private cause of action for disparate impact under Title VI, thereby moving the alternative remedy closer to “adequacy” under APA § 704. Such proposals are discussed in other works,³⁸⁹ and our focus on the APA is not to imply that such proposals should not be taken seriously.

386. *Id.* at 97–100 (“When the federal government made money available to local school districts that desegregated, it loosed a powerful and attractive force on segregated schools. . . . [A]long with the lure of federal dollars was the threat of having them taken away. HEW did bring enforcement proceedings and did terminate the eligibility of some school districts. School boards throughout the South, ‘realizing that the loss of monies was intolerable,’ took some steps to desegregate.” (citation omitted)).

387. *Id.* at 99.

388. According to Michael Klarman’s “backlash thesis,” *Brown* generated tremendous backlash that “propel[led] southern politics toward racial fanaticism.” Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 91 (1994) (arguing that the backlash after *Brown* led politicians in the South toward “the violent suppression of civil rights demonstrations,” which were televised and “in turn aroused previously indifferent northern whites to demand federal legislative intervention to inter Jim Crow”).

389. See, e.g., Derek Black, *Picking up the Pieces After Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356, 363 (2002) (“Only further litigation and court decisions, or new legislation by Congress, will settle the matter.”); Sam Spital, *Restoring Brown’s Promise of Equality After Alexander v. Sandoval: Why We Can’t Wait*, 19 HARV. BLACKLETTER L.J. 93, 120–25 (2003) (discussing congressional reversal of *Sandoval* as a preferred solution to § 1983 suits).

We make two brief remarks at the outset on our decision to focus our interventions on administrative law. First, a civil rights strategy will require proceeding statute by statute (e.g., under the Civil Rights Act, the Fair Housing Act, and the Immigration and Nationality Act), whereas administrative-law reform will have transsubstantive effect. Second, the strategies are by no means mutually exclusive, and implementation of civil rights mandates will necessarily require a form of “administrative lawyering.”³⁹⁰ Put differently, given the role of the state in social stratification, civil rights cannot avoid engagement with administrative law.

1. *A Statutory Mandate for Disparate-Impact Assessments*

In addition to the doctrinal implications discussed above, we propose two policy interventions: a disparate-impact assessment mandate through legislation enacted by Congress or via executive order directed at OMB.

Congress could enact a new civil rights law modeled on the NEPA³⁹¹ or the Regulatory Flexibility Act.³⁹² Each Act requires agencies to affirmatively consider differential impacts along specific dimensions.³⁹³

Under NEPA, agencies must publish an environmental impact statement (EIS) before finalizing major rules.³⁹⁴ Statements must include a description of the rule’s “positive and negative effects for the environment,” the costs and benefits of alternative actions, and the costs and benefits of inaction.³⁹⁵ If an agency

390. See Johnson, *supra* note 137, at 1330–32.

391. 42 U.S.C. §§ 4321–4347 (2018).

392. 5 U.S.C. §§ 601–612 (2018).

393. See 42 U.S.C. § 4332(C) (2018) (requiring agencies to publish “a detailed statement” about environmental impacts); OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT 2 (Aug. 2017), <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf> [<https://perma.cc/MT49-U7EY>] (stating that under the Regulatory Flexibility Act, agencies must take into account differential impacts on small business owners and consider “minimizing the burden on small entities”).

394. See 42 U.S.C. § 4332(C) (2018); Tiffany Middleton, *What Is an Environmental Impact Statement?*, AM. BAR ASS’N (Mar. 2, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/teaching-legal-docs--what-is-an-environmental-impact-statement- [<https://perma.cc/MB7Z-DZEZ>] (“The environmental impact statement (EIS) is a government document that outlines the impact of a proposed project on its surrounding environment Not *all* major federal projects that could affect the environment require an EIS Smaller projects might require an environmental assessment . . . [which is] a simpler investigation of environmental impact.”).

395. Middleton, *supra* note 394; see also 42 U.S.C. § 4332(C) (2018) (specifying that an EIS must include “any adverse environmental effects which cannot be avoided should the proposal be implemented” and “alternatives to the proposed action”).

fails to publish an EIS, or if it publishes a statement that ignores the relevant issues,³⁹⁶ a court can invalidate the agency’s rule during arbitrary-and-capricious review.³⁹⁷

A civil rights version of NEPA would mandate disparate-impact assessments, thus pushing agencies to consider disparate impact in their rulemaking and program administration.³⁹⁸ The requirement could sweep further and require agencies to implement feasible mitigation measures or to explain why they rejected mitigation measures. The California Environmental Quality Act, for example, was modeled on NEPA and mandates feasible mitigation measures.³⁹⁹ When legislating a NEPA-like civil rights law, Congress could include both procedural requirements (such as disparate-impact assessments) and substantive requirements (such as mandatory mitigation measures). To remove *Heckler*-like obstacles from plaintiffs’ path, Congress could explicitly authorize judicial review of agency enforcement and nonenforcement decisions.

By pushing agencies to consider disparate impact during agency rulemaking, Congress could help remedy some of the problems we identified in Part I. As *District of Columbia v. U.S. Department of Agriculture* and *City & County of San Francisco v. Azar* demonstrate,⁴⁰⁰ agency rulemaking can ignore or erase disparate impact. The same erasure occurs in agency informal adjudications that have wide

396. See, e.g., Middleton, *supra* note 394 (“In 1970, days after the Bureau of Land Management submitted their EIS for the Trans-Alaska Pipeline, three organizations raised concerns that the statement – at just eight pages – was inadequate given the complexities of the permafrost environment in Alaska.”).

397. See, e.g., Pub. Citizen v. Dep’t of Transp., 316 F.3d 1002, 1029 (9th Cir. 2003) (holding that DOT’s failure to prepare an EIS was arbitrary and capricious), *rev’d*, 541 U.S. 752 (2004).

398. Other legal scholars have made similar suggestions for civil rights laws modeled on NEPA’s EIS’s. See, e.g., Monica Mercola, *The Hard Look Doctrine: How Disparate Impact Theory Can Inform Agencies on Proper Implementation of NEPA Regulations*, 28 J.L. & POL’Y 318, 326 (2020) (arguing that “disparate-impact analysis should be incorporated into the hard-look test as it applies to environmental law to ensure that low-income and minority communities will receive environmental justice”); L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CALIF. L. REV. 1359, 1389 (2012) (proposing an “Equity Impact Assessment” to ventilate discrimination and implicit bias in federal agency decision-making); Jerett Yan, *Rousing the Sleeping Giant: Administrative Enforcement of Title VI and New Routes to Equity in Transit Planning*, 101 CALIF. L. REV. 1131, 1176 (2013) (proposing that the Federal Transit Administration (FTA) incorporate disparate-impact analyses into its EIS’s to assess the “equitable impacts of transportation projects”).

399. California’s Environmental Quality Act, for example, mandates mitigation: “[A]gencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects . . .” CAL. PUB. RES. CODE § 21002 (West 2019); see RONALD B. ROBIE, DIANE R. SMITH & SUMMER L. NASTICH, CALIFORNIA CIVIL PRACTICE ENVIRONMENTAL LITIGATION § 8:3 (2020) (discussing the California statute’s relationship to NEPA and other statutes).

400. See *supra* notes 115 & 120 and accompanying text.

and rule-like effects. Agency decisions about where to place a highway bypass⁴⁰¹ or where to build a port,⁴⁰² for instance, are informal adjudications (not rule-making), but they nevertheless have far-ranging and rule-like effects.⁴⁰³ Disparate limbo seems to stretch across both spheres of agency action, rulemaking and adjudication, and erases the claims of antidiscrimination plaintiffs in both contexts. A NEPA-like civil rights law could require agencies to consider disparate impact in both rulemaking and adjudication.

A NEPA-like civil rights law, then, could be powerful: it would bind agencies by statute, potentially reducing reviewability challenges for subfederal cases, and it would cement disparate impact's place within arbitrary-and-capricious review. But it would also heighten looming constitutional questions about disparate impact: could one claim that it is disparate treatment for an agency to change course because of disparate impact?⁴⁰⁴ Furthermore, its effectiveness might be limited: many scholars argue that NEPA has been ineffective⁴⁰⁵ and they accuse it of creating "evermore complex and intricate requirements for processing papers."⁴⁰⁶ In enacting new civil rights legislation, Congress would have to choose a mix of procedural and substantive requirements, and legislators' choices might define the effectiveness of the intervention.

401. In *Jersey Heights Neighborhood Ass'n v. Glendening*, a group of Black homeowners challenged a DOT-funded decision to place a highway bypass through a predominantly Black neighborhood, yet plaintiffs' APA claim was channeled away by § 704. 174 F.3d 180, 185-87 (4th Cir. 1999). A NEPA-like civil rights act, we argue, would have bolstered plaintiffs' APA claim and forced the agency to think twice about the disparate impact of its decision.

402. See *supra* note 110.

403. *Overton Park* affirmed that arbitrary-and-capricious review applies to informal adjudication. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977). So the antidiscrimination cases discussed in Section I.B (many of which are informal adjudication), as well as the antidiscrimination claims in *Jersey Heights* and *Rollerson*, would all be subject to judicial review.

404. There are obvious constitutional implications that would flow from a NEPA-like civil rights law that instructs agencies to consider disparate impact. While the Supreme Court has narrowly upheld disparate-impact statutory frameworks, the Court has nevertheless raised constitutional doubts and imposed strict causality requirements. See *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 540 (2015) ("[D]isparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity."). For a more extensive analysis of the constitutional questions, which is outside the scope of this Article, see, for example, Primus, *supra* note 298 (discussing the constitutional questions that arise in disparate-impact statutory schemes).

405. See, e.g., H. Paul Friesema & Paul J. Culhane, *Social Impacts, Politics, and the Environmental Impact Statement Process*, 16 NAT. RES. J. 339, 339 (1976) (noting that NEPA has been accused of "squandering massive amounts of time, talent, public and private moneys").

406. Sally K. Fairfax, *A Disaster in the Environmental Movement*, 199 SCI. 743, 747 (1978).

2. *An Executive Mandate for Disparate-Impact Assessments*

While a NEPA-like civil rights law has already been discussed by legal scholars,⁴⁰⁷ a more novel (and perhaps more politically feasible) approach would be for the President to require disparate-impact assessments via an executive mandate. The President could, for instance, order the Office of Information and Regulatory Affairs (OIRA), which reviews major rulemakings,⁴⁰⁸ to require disparate-impact assessments.⁴⁰⁹ The Biden administration has already taken steps in that direction, via a memo that instructed OIRA to “take into account the distributional consequences of regulations.”⁴¹⁰

The “distributional consequences” and “distributional effects” language has long been included in OIRA guidance,⁴¹¹ but OIRA’s cost-benefit analysis could be refined to more directly incorporate disparate impact. Under President Bush’s 2003 guidance, agencies were instructed to consider their rules’ “distributional effects.”⁴¹² These “distributional effects” were defined as “the impact of a regulatory action across the population and economy, divided up in various ways (e.g.,

407. See *supra* note 398 for a discussion of other scholarship on statutory civil rights mandates.

408. All “significant” agency rules must pass OIRA review before enactment. See generally Off. of Mgmt. & Budget, *OIRA Pages*, WHITE HOUSE, <https://www.whitehouse.gov/omb/information-regulatory-affairs> [<https://perma.cc/A7KM-T5WG>] (describing the OIRA process).

409. The President oversees the OIRA process, and legal scholars have documented the ways that the President can exert significant control over agencies via OIRA. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277-99 (2001).

410. Modernizing Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies, 86 Fed. Reg. 7,223 (Jan. 20, 2021).

411. After establishing OIRA in 1980, President Reagan issued an executive order requiring agencies to publish cost-benefit analyses for new rules. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981). According to President Reagan’s order, the cost-benefit analysis must include:

(1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;

(2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs.

Id. at 13,194.

412. See OFF. OF MGMT. & BUDGET, CIRCULAR A-4, at 14 (2003), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf> [<https://perma.cc/NR9K-C69C>] (“Those who bear the costs of a regulation and those who enjoy its benefits often are not the same people. The term ‘distributional effect’ refers to the impact of a regulatory action across the population and economy, divided up in various ways (e.g., income groups, race, sex, industrial sector, geography).”); see also Off. Info. & Regul. Affs., *Regulatory Impact Analysis: A*

income groups, race, sex, industrial sector, geography).⁴¹³ Notably, “distributional effects” may include impacts on protected classes like “race” and “sex.”⁴¹⁴ The cost-benefit framework could thus lend itself quite naturally to a disparate-impact assessment, and a pro-civil rights president could require it via executive order.⁴¹⁵ Along these same lines, President Biden has issued an executive order creating an “Equitable Data Working Group,” which will aim to disaggregate federal data along lines of race, gender, and other protected classes.⁴¹⁶

While President Biden’s executive order is a first step, it lacks one key element: enforcement by private actors. To overcome this, and to create a stronger mandate for antidiscrimination, another possibility would be an executive order requiring agencies to update or issue Title VI implementing regulations to require a disparate-impact report for major actions.⁴¹⁷ Per our discussion of the *Accardi* principle above, agency regulations requiring disparate-impact assessments can open the door to APA enforcement by private actors. An agency’s failure to provide a disparate-impact report would itself constitute a violation of an agency’s own rules, and hence be potentially enforceable under the APA.⁴¹⁸ Such implementing regulations would of course take time. But, in contrast to OIRA review, this approach would enlist a wider range of private parties to ensure faithful examination of racially disparate effects.

Primer, OFF. OF MGMT. & BUDGET 7-8, https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf [<https://perma.cc/Q4EM-F9JZ>] (defining “distributional effects” and offering guidance on their use in regulatory impact analysis).

413. See OFF. OF MGMT. & BUDGET, *supra* note 412, at 14.

414. *Id.*

415. For example, a 2011 executive order by President Obama strengthened the “distributional effects” mandate and instructed agencies to consider “values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.” Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,821 (Jan. 18, 2011). Nevertheless, some scholars have criticized the cost-benefit framework as discouraging racial disparate-impact analysis and perpetuating discrimination. See Luttrell & Roman-Romero, *supra* note 29 (“[A]gency reliance on fully quantitative cost-benefit analysis (CBA) to set regulatory limits on risk tends to generate racially biased outcomes in many areas of risk regulation.”).

416. See Exec. Order No. 13,985, 86 Fed. Reg. 7,009, 7,011 (Jan. 20, 2021) (“Many Federal datasets are not disaggregated by race, ethnicity, gender, disability, income, veteran status, or other key demographic variables. This lack of data has cascading effects and impedes efforts to measure and advance equity. A first step to promoting equity in Government action is to gather the data necessary to inform that effort.”).

417. Olatunde C.A. Johnson has discussed a similar proposal with respect to agency implementing regulations. See Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1363 (2012) (discussing equality directives or “statutes and implementing regulations that operate as directives to the administrative state”).

418. See *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 389-90 (1932) (sustaining a private action against a federal agency because the agency unreasonably failed to follow its own rule).

3. *Illustration of a Disparate-Impact Assessment*

Whether by doctrine, statute, executive order, or regulation, the above interventions aim to draw agencies' attention to disparate impact, thus harnessing the funding powers of the administrative state to enforce antidiscrimination norms. We illustrate the role of disparate-impact assessments using a unique example from the Obama Administration: the Oakland Airport Connector, discussed earlier by Olatunde Johnson.⁴¹⁹ This case illustrates both the promise – and the potential limitations – of federal-agency ventilation of disparate impact.

In 2009, the Federal Transit Administration (FTA) was involved in a plan to expand the San Francisco Bay Area transit system with a high-speed connector to the Oakland Airport.⁴²⁰ The Oakland Airport Connector would traverse one of Oakland's historically Black neighborhoods and the Hegenberger corridor, an area with many low-wage jobs held by minority employees.⁴²¹ In the lead-up to the project, community organizers raised numerous equity concerns: the connector was too expensive for low-income riders,⁴²² it did not include intermediate stops for local residents,⁴²³ and it was an expensive \$500 million⁴²⁴ project

419. See Johnson, *supra* note 417, at 1405-07 (discussing the complaint regarding the Oakland connector as an example of “equality directives” that push the administrative state to enforce antidiscrimination norms).

420. Complaint Under Title VI of the Civil Rights Act of 1964 and Executive Order 12898, *Urb. Habitat Program v. Bay Area Rapid Transit Dist.*, filed with the Dep't of Transp. (2009), https://www.publicadvocates.org/wp-content/uploads/fta_titlevi_complaint_09109final-1.pdf [<https://perma.cc/E3CV-YDXB>].

421. *Id.* at 1 (“Situated in an East Oakland community with a very high minority and low-income population, the OAC [Oakland Airport Connector] will traverse a corridor with many low-wage jobs that employ local residents.”); see also *id.* at 1-2 (“BART’s failure to evaluate the equity impacts of the OAC project, and weigh appropriate alternatives to find a less discriminatory one, is likely to have disparate impacts on Environmental Justice populations in East Oakland, low-income and minority BART riders, and the many low-wage workers with jobs at the Airport and along the Hegenberger corridor.”).

422. In initial planning, the connector’s fare was set at two dollars and was comparable to other public transit options in the area. But later planning raised the connector’s fare to six dollars one way, making it too expensive for most low-income residents. See *id.* at 1 (noting that initial versions of the connector included two intermediate stops and a fare of two dollars); see also *id.* at 9 (“[Local residents and community groups] expressed concern over the elimination of the intermediate stops and the prohibitive impact a \$6 fare would have on low-income residents and low-wage Airport workers.”).

423. Early versions of the connector included two intermediate stops, which would have served local residents and employees in the Hegenberger corridor. Yet later versions of the connector removed the intermediate stops. See *id.* at 6 (noting that the agency’s updated plan apparently eliminated the two intermediate stops).

424. *Id.* at 1.

that, in the words of one nonprofit leader, “will serve almost exclusively passengers that can afford airplane tickets, while many [community] members struggle to afford bus tickets.”⁴²⁵ The \$500 million price tag seemed out of proportion, as local transit agencies were facing a financial crunch, and AC Transit, a bus agency that primarily served low-income residents,⁴²⁶ was considering a fifteen percent service cut.⁴²⁷

After a nonprofit filed a complaint with the connector’s federal funding agency, the FTA, the agency launched a civil rights review.⁴²⁸ It found that the local agency, Bay Area Rapid Transit (BART), had failed to meet multiple Title VI requirements,⁴²⁹ including notifying beneficiaries about transit changes, pursuing inclusive public participation, and completing a required equity analysis mandated by law.⁴³⁰ Because BART was not in compliance with Title VI, the FTA

425. *Id.* at 15.

426. *Id.* at 3 (“Nearly 80 percent of AC Transit’s local riders are people of color and more than a third of all AC Transit riders have household incomes below \$25,000.”).

427. *Id.* at 3-4 (“AC Transit is considering reducing service . . . as a result of a fiscal emergency that is expected to result in the elimination of 15 percent of its total bus service.”).

428. See *BART/Oakland Airport Connector (OAC)*, PUB. ADVOCES., <https://www.publicadvocates.org/our-work/transportation-justice-issues/bartoakland-airport-connector-oac> [<https://perma.cc/P9NF-L3JX>] (“In September 2009, Public Advocates filed a successful civil rights and Environmental Justice administrative complaint with the Federal Transit Administration.”).

429. See DMP Group, LLC, *Title VI Compliance Review of the San Francisco Bay Area Rapid Transit District (BART): Draft Report*, U.S. DEP’T TRANSP., FED. TRANSIT ADMIN. 19 (Feb. 10, 2010), <https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/bart-title-vi-compliance> [<https://perma.cc/GUJ7-H3UA>] (“Deficiencies were identified in the following Title VI requirement areas:

- Inclusive Public Participation
- Notification to Beneficiaries
- Limited English Proficiency
- Environmental Justice Analysis of Construction Projects
- Submit Title VI Program
- Equity Analysis of Fare and Service Changes
- Monitoring Transit Service.”).

430. Complaint Under Title VI of the Civil Rights Act of 1964 and Executive Order 12898, *supra* note 420, at 20 (“[Bay Area Rapid Transit (BART)] is required to ‘evaluate significant system-wide service and fare changes and proposed improvements at the planning and programming stages to determine whether those changes have a discriminatory impact’ on minority populations and low-income populations.”); see also Letter from Peter Rogoff, Adm’r, FTA, to Steve Heminger, Exec. Dir., Metro. Transp. Comm’n & Dorothy Dugger, Gen. Manager, San Francisco BART Dist., at 1 (Jan. 15, 2010), https://www.bart.gov/sites/default/files/docs/BART_MTC_Letter_On_OAC.pdf [<https://perma.cc/C77K-8XZR>] (noting that BART had “failed to conduct an equity analysis for service and fare changes for the Project”).

was statutorily required to withdraw federal funds.⁴³¹ The FTA funding was disbursed to other local transit agencies, and the airport connector was ultimately completed without the earmarked FTA funds.⁴³²

As the Oakland Airport Connector illustrates, federal agencies can push for ventilation of disparate impact. But the example also highlights the limits of this approach. Despite the increased ventilation, BART still built the connector⁴³³ without intermediate stops and without reducing its expensive six-dollar one-way fare,⁴³⁴ so civil rights advocates did not see concrete substantive changes. Still, the civil rights advocates' FTA complaint does seem to have spurred other improvements. After all, the \$70 million in federal funds was recaptured to maintain existing transit⁴³⁵ and BART instituted several process changes,⁴³⁶ including its adoption of "equity analysis" reports.⁴³⁷ While ventilation alone is no guarantee, it is a start.⁴³⁸

431. See Letter from Peter Rogoff, Adm'r, Fed. Transit Admin., to Steve Heminger, Exec. Dir., Metro. Transp. Comm'n & Dorothy Dugger, Gen. Manager, San Francisco BART Transit Dist., at 2 (Feb. 12, 2010), https://www.publicadvocates.org/wp-content/uploads/feb_12_bart_mtc_letter.pdf [<https://perma.cc/EQ88-4H6Q>] ("I am required to reject your plan for the following reasons. Based on the timelines submitted by BART, there is no way the agency can come into full compliance with Title VI by September 30, 2010 And since I cannot allow BART to draw any funds for the [Oakland Airport Connector (OAC)] project prior to coming into full compliance, it is clear that pursuit of the OAC project would result in the funds either being reallocated out of the Bay area or lapsed. Both scenarios are unacceptable to me as I am sure they are to you. Let me say that, based on FTA's experience in other cities, BART is being unrealistic in admitting that the process of coming into full compliance will take considerably longer than the 8+ months that remain before the September 30 deadline. I appreciate and respect your honesty in this regard.").

432. Ayako Mie, *\$70 Million for Airport Connector Project to Be Diverted to Regional Transit Agencies*, OAKLAND N. (Feb. 21, 2010), <https://oaklandnorth.net/2010/02/21/70-million-for-airport-connector-project-to-be-diverted-to-regional-transit-agencies> [<https://perma.cc/W6AF-FEQK>] ("The Metropolitan Transportation Commission on Wednesday said \$70 million in federal stimulus funding denied to the Bay Area Rapid Transit Agency for the Oakland Airport Connector project, intended to link BART directly to the airport, will be reallocated for regional rail and bus improvements instead.").

433. *BART Board Approves New Oakland Airport Connector Funding Plan*, BART NEWS, (July 22, 2010), <https://www.bart.gov/news/articles/2010/news20100722> [<https://perma.cc/9K9X-ZXSE>] ("In order to replace the \$70 million [withdrawn by FTA], the Board approved the new funding package in a vote of 8 to 1.").

434. See *BART to OAK Service: Frequently Asked Questions*, OAKLAND AIRPORT, <https://www.oaklandairport.com/wp-content/uploads/2016/05/BARTtoOAKFAQ.pdf> [<https://perma.cc/69RP-GLMP>] (setting the connector's one-way fare at six dollars and describing future plans to build an "intermediate stop").

435. See Johnson, *supra* note 417, at 1406 ("Agreeing that BART's impact analyses were insufficient, the DOT reallocated \$70 million from the airport connection project to other BART projects.

IV. DISPARATE LIMBO AND THE MAKING OF MODERN ADMINISTRATIVE LAW

To this point, our account has excavated the origins of disparate limbo and proposed some ways to fix it. This Part steps back and considers the wider implications of our project for the field of administrative law. Core to our argument

The BART case illustrates the power of the administrative complaint process as a means of enforcing equality directives.”).

436. BART made several improvements to its processes as a result of the Title VI compliance review: BART increased its efforts to gather community input and revamped its “inclusive public participation” plan. See *Bart Public Participation Plan, Appendix I: Corrective Action Plan Excerpt*, BAY AREA RAPID TRANSIT AUTH., at I-1, https://www.bart.gov/sites/default/files/docs/Appendix_I-L.pdf [<https://perma.cc/GV2Y-R2DY>] (“Our inclusive public participation process will be constantly improving and expanding to include contacts with community-based organizations and networks that can reach the minority, low-income and LEP populations.”). BART also used census-tract data to identify BART stations that served areas with higher-than-average minority populations. *Id.* at I-3 (“Provide 2000 (or more recent) census tract maps of BART station service areas to identify communities that have higher than average minority populations.”).
437. BART created a new “equity analysis” reporting requirement to analyze impacts on minority populations and on low-income populations. See, e.g., *San Francisco Bay Area Rapid Transit District Title VI Corrective Action Plan: Action Plan Item 5.1*, BAY AREA RAPID TRANSIT AUTH. 2 (July 16, 2010), https://www.bart.gov/sites/default/files/docs/Temp_Rollback_TitleVI_ExecSum.pdf [<https://perma.cc/UDV7-7UTZ>] (“As approved by the Federal Transit Administration (FTA) on April 21, 2010, BART’s Title VI Corrective Action Plan includes the requirement to analyze any potential fare change to determine if that fare change would have a disproportionately high and adverse effect on minority and low-income populations.”). BART has apparently continued to use these “equity analysis” reports even after the completion of the Oakland Airport Connector project. According to Public Advocates, the nonprofit that filed the initial complaint with the FTA: “Our Title VI enforcement efforts continue to change BART’s behavior. For a success story on how BART is now using equity analyses to influence its service change policies, see our blog post ‘BART Late Night Plan Not Fair.’” *Latest Updates: Continued Changes at BART*, PUB. ADVOCs. (July 28, 2011), <https://www.publicadvocates.org/our-work/transportation-justice-issues/bartoakland-airport-connector-oac> [<https://perma.cc/YN9K-K32C>].
438. The literature on the Oakland Airport Connector, as well as other recent scholarship, reflects some innovation in civil rights strategies. Alexander Reinert, Joanna C. Schwartz, and James E. Pfander, for example, argue that state and local actors can play a powerful role in civil rights enforcement. See Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, NW. UNIV. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3776882 [<https://perma.cc/8QVM-M486>]. Brian D. Feinstein uncovers agencies’ internal design mechanisms, which he calls “identity-conscious measures,” which he argues can help address disparate impact and improve agency decision-making. Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, GEO. WASH. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787704&dgcid=ejournal_html_email_u.s.:administrative:law:ejournal_abstractlink [<https://perma.cc/3797-LBXJ>].

is a bracing conjecture: modern administrative law's empire – the steady judicialization of agency action from the 1960s onwards – may have been *constructed* by erasing race. More specifically, had administrative law not erased race, and if arbitrary-and-capricious review had applied equally to questions of differential racial impact, courts might have re-evaluated the virtues of a more muscular approach to judicial review of agency action. Rather than become embroiled in the quickening and deeply divisive politics of civil rights and even risk congressional intervention on administrative procedures, judges might have learned to cast a quick glance at agency action rather than a hard look. Racism, and the courts' neglect of it, may thus be central to the evolutionary path that modern American administrative law has traveled.

We are, of course, not the first to map collisions between race and American administrative law or the regulatory state it governs. As noted at the outset, a small but growing body of scholarship, much of it recent and primed by yet another round of national soul-searching on questions of race, explores these collisions from multiple angles.⁴³⁹ Of particular relevance are contributions that look inside agencies to understand how agency action shaped antidiscrimination norms at key moments in time. Risa Goluboff magisterially recounts the role of the early DOJ in pushing civil rights law toward the project of racial integration, as a way of conceptualizing antidiscrimination.⁴⁴⁰ John Ferejohn and William N. Eskridge show how the Equal Employment Opportunity Commission (EEOC) worked to adapt antidiscrimination norms to account for discrimination on the basis of sex and sexual orientation.⁴⁴¹ Sophia Z. Lee shows how civil rights groups pressed the National Labor Relations Board to take the lead on giving meaning to equal protection.⁴⁴² Jed Shugerman discusses the intersection of the federal government's growing commitment to civil rights enforcement and civil-service reform at the early DOJ.⁴⁴³ Milligan examines how federal housing administrators defended *Plessy's* "separate but equal" principle during the 1960s and, indeed, were shielded by procedural barriers from court review in doing so.⁴⁴⁴ And, perhaps most relevant to our project, Milligan examines the judicial retrenchment from a Fifth Amendment no-aid principle, which would have barred federal funding for actors engaged in discriminatory conduct.⁴⁴⁵ Another

439. See *supra* notes 23–31 and accompanying text.

440. GOLUBOFF, *supra* note 31.

441. ESKRIDGE & FEREJOHN, *supra* note 31.

442. LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 31; Lee, *Race, Sex, and Rulemaking*, *supra* note 31.

443. Shugerman, *supra* note 31.

444. Milligan, *Plessy Preserved*, *supra* note 31; Milligan, *supra* note 33.

445. See Milligan, *supra* note 33.

notable strand of scholarship attempts to understand how the initial choice between agencies and courts as the primary implementers and regulators of anti-discrimination norms shaped those norms' subsequent elaboration—think here of Congress lodging the primary authority to implement Title VII in federal courts, rather than a toothless EEOC.⁴⁴⁶

These many contributions to the debate, united in their effort to enrich our understanding of “administrative constitutionalism” and agencies’ role in shaping antidiscrimination norms in a separation-of-powers system, are worthy and important. But they are also largely internal to civil rights and antidiscrimination law. Our conjecture is both wider-ranging and more concrete. If true, our account links the American struggle with questions of race to a core *doctrine* of administrative law—and the primary and, indeed, default means by which courts review agency action for rationality and regularity. Our conjecture puts race at the very center of the evolution of modern American administrative law.

A. *Administrative Law's Selective Empire*

Start with the context and timing. Beginning shortly after the passage of the Civil Rights Act of 1964, courts developed modern administrative-law doctrines that more rigorously interrogated agency action. They also created a walled garden that shut out race. Think here of *Abbott Labs'* presumption of reviewability,⁴⁴⁷ the advent of hard-look review under *Overton Park*⁴⁴⁸ and *State Farm*,⁴⁴⁹ and *Nova Scotia's* requirement that agencies disclose and explain the scientific and other evidentiary bases undergirding their decisions.⁴⁵⁰ These iconic cases generally reflected a trend in the 1970s and 1980s toward greater judicial review of agency action. They now form the backbone of modern administrative law.

446. See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 214 (2010) (arguing that Congress has multiple incentives to empower private attorneys general to enforce federal statutes, thus “a great deal of American regulatory state control has taken the form of radically decentralized intervention by an army of litigants and lawyers” rather than a “centralized bureaucratic . . . model of state strength”); Engstrom, *supra* note 31; Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363 (2010).

447. *Abbott Lab's v. Gardner*, 387 U.S. 136 (1967).

448. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977).

449. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983).

450. *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977).

At the time, in the D.C. Circuit, Judges Leventhal and Bazelon carried on a “grand debate” about the proper role of courts within the burgeoning administrative state.⁴⁵¹ And in academic circles, public-choice scholars claimed that administrative agencies had been “captured” by interest groups, and they urged judges to correct the failings of “captured” agency officials.⁴⁵² Emboldened by this rhetoric of agency capture, the D.C. Circuit asserted judicial review. For Judges Leventhal and Bazelon, the question was not *whether* courts should intervene in agency decision-making, but *how*. In the 1970s and 1980s, these two judges expanded judicial review, refined the substance/process distinction, and helped establish arbitrary-and-capricious “hard look” review.⁴⁵³

Yet at the same time that administrative law was gathering strength and exercising dominion over more and more forms of agency action, a separate trend uncoiled within antidiscrimination law. After a historic expansion with the passage of the Civil Rights Act, American antidiscrimination law advanced in fits and starts. The next decades saw some notable victories, like the passage of the Fair Housing Act,⁴⁵⁴ the Supreme Court’s approval of interracial marriage in *Loving v. Virginia*,⁴⁵⁵ and other civil rights expansions.⁴⁵⁶ But these same decades also brought significant setbacks, including *Washington v. Davis*,⁴⁵⁷ where the

451. Ronald J. Krotoszynski Jr., “History Belongs to the Winners”: *The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 999 (2006) (“Beginning in the 1970s, Judges David Bazelon and Harold Leventhal engaged each other, and their colleagues on the D.C. Circuit, in an extended debate about the proper scope and limits of judicial review of agency action.”).

452. See *supra* note 59; see also Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997) (“Starting in the late 1960s, many federal judges became convinced that agencies were prone to capture and related defects and – more importantly – that they were in a position to do something about it. In particular, these judges thought that by changing the procedural rules that govern agency decision-making and by engaging in more aggressive review of agency decisions they could force agencies to open their doors – and their minds – to formerly unrepresented points of view, with the result that capture would be eliminated or at least reduced.”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713 (1975) (“It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.” (footnotes omitted)).

453. Krotoszynski, *supra* note 451, at 996.

454. The Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3619 (2018)).

455. 388 U.S. 1 (1967).

456. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (strengthening Title VII protections against employment discrimination); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (holding that federal law bars private discrimination in housing).

457. 426 U.S. 229 (1976).

Supreme Court curbed disparate impact under the Fourteenth Amendment, and a series of cases where the courts declined to extend heightened scrutiny to other vulnerable groups.⁴⁵⁸ As Kenji Yoshino has argued, it is difficult to draw a straight trendline through the antidiscrimination jurisprudence of the past decades.⁴⁵⁹ The trend was instead one of ambivalence, as judges stepped hesitantly forward, and then hesitantly back, on civil rights.

The two trends, which had arisen largely in isolation from one another, collided in a set of cases pitting growing efforts by the Reagan and first Bush administrations to retrench civil rights enforcement against administrative law's growing empire – and the courts blinked. Sometimes the collision was resolved via further innovations to standing doctrine. In *Allen v. Wright*,⁴⁶⁰ plaintiffs asked the Supreme Court to end Internal Revenue Service subsidies to “segregation academies,” and the Court pulled back.⁴⁶¹ But the collision was teed up most directly in the APA and antidiscrimination cases. In *Council of & for the Blind*, plaintiffs asked the D.C. Circuit to end federal funding for discriminatory local actors – and the courts pulled back.⁴⁶² And in *Women's Equity*, plaintiffs again asked the court for protection from the discriminatory policies of a vast network

458. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (denying heightened scrutiny to classification of mentally disabled residents); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (per curiam) (denying heightened scrutiny to mandatory retirement age laws); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (denying heightened scrutiny to classifications based on indigency).

459. See Yoshino, *supra* note 291, at 776, 785-86 (“Since the end of the Warren Court era (1953–1969), the Court has undoubtedly moved significantly to the right, with the Burger Court (1969–1986), the Rehnquist Court (1986–2005), and the Roberts Court (2005–present). This rightward shift has certainly played some role in contributing to the foreclosure of traditional equality-based claims. Yet the three opening doors in the liberty context belie the idea that the Court has been driven only by its increasing conservatism. If the Court were motivated simply by its increasing conservatism, one would expect a more decisive foreclosure of all constitutional civil rights claims.” (footnotes omitted)).

460. 468 U.S. 737 (1984); see also *id.* at 756-57 (“Despite the constitutional importance of curing the injury alleged by respondents, however, the federal judiciary may not redress it unless standing requirements are met. In this case, respondents’ second claim of injury cannot support standing because the injury alleged is not fairly traceable to the Government conduct respondents challenge as unlawful.”).

461. See Bell, *supra* note 23 (“*Allen v. Wright* . . . exemplif[ies] the challenges African-Americans have faced in establishing standing in court or an entitlement to participate in agency proceedings in seeking to prod federal agencies to properly respond to discriminatory conduct by private actors.”). We note that *Allen v. Wright* did not present an APA claim per se, but because it was a challenge against a federal agency (the Internal Revenue Service (IRS)) and standing doctrine is a key threshold for administrative lawsuits, it is commonly considered part of the broader administrative-law terrain.

462. *Council of & for the Blind of Del. Cnty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1523-25 (D.C. Cir. 1983).

of discriminatory subfederal entities and supine federal overseers—and, once again, the D.C. Circuit declined to intervene.⁴⁶³ When the muscular hard-look review of administrative law collided with the more ambivalent trends in anti-discrimination law, ambivalence won out.

Why did courts blink? Strategic judges may have deployed the § 704 maneuver to insulate hard-look review from divisive questions of racism and antidiscrimination. As historian Richard Rothstein has documented, race remained a lightning rod throughout the 1970s and 1980s.⁴⁶⁴ State-sanctioned segregation schemes were central to post-World War II government policy, from government-backed mortgage loans⁴⁶⁵ to tax exemptions,⁴⁶⁶ highway routing,⁴⁶⁷ and

463. *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 744-48 (D.C. Cir. 1990).

464. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017). Rothstein's historical account documents state and federal policies that segregated major metropolitan areas like San Francisco, Chicago, New York, and many others. *Id.* at vii-viii (“[U]ntil the last quarter of the twentieth century, racially explicit policies of federal, state, and local governments defined where whites and African Americans should live. Today's residential segregation in the North, South, Midwest, and West is not the unintended consequence of individual choices and of otherwise well-meaning law or regulation but of unhidden public policy that explicitly segregated every metropolitan area in the United States.”).

465. See *id.* at 64-65 (“Congress and President Roosevelt created the Federal Housing Administration in 1934. The FHA insured bank mortgages Because the FHA's appraisal standards included a whites-only requirement, racial segregation now became an official requirement of the federal mortgage insurance program [T]he FHA provided them [private real estate agents] with an *Underwriting Manual*. The first, issued in 1935, gave this instruction: ‘If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in values.’”).

466. See *id.* at 102 (“[U]ntil 1970, sixteen years after *Brown v. Board of Education*, the IRS granted tax exemptions to private whites-only academies that had been established throughout the South to evade the ruling. It rejected the exemptions only in response to a court injunction won by civil rights groups.”); *id.* at 105 (“Tax-exempt colleges and universities, some religious-affiliated and some not, also were active in promoting segregation. In Whittier, a Los Angeles suburb, the Quaker-affiliated Whittier College participated in a restrictive covenant covering its neighborhood. The University of Chicago organized and guided property owners' associations that were devoted to preventing black families from moving nearby. The university not only subsidized the associations but from 1933 to 1947 spent \$100,000 on legal services to defend covenants and evict African Americans who had arrived in its neighborhood.”).

467. See *id.* at 127-28 (“In many cases, state and local governments, with federal acquiescence, designed interstate highway routes to destroy urban African American communities. Highway planners did not hide their racial motivations In 1943, the American Concrete Institute urged the construction of urban expressways for ‘the elimination of slums and blighted areas.’ In 1949, the American Road Builders Association wrote to President Truman that if interstates were properly routed through metropolitan areas, they could ‘contribute in a substantial manner to the elimination of slum and deteriorated areas.’”).

farm subsidies.⁴⁶⁸

One need look no further than *Overton Park* to imagine the potential backlash that would have resulted if hard-look review had crossed the color line.⁴⁶⁹ In the Supreme Court's description, the case involved a decision about the routing of a highway through Memphis's celebrated Overton Park. As Peter Strauss has lucidly written, racial dynamics inflected the political process in the decades leading up to the Supreme Court's decision.⁴⁷⁰ The park itself was still segregated in the 1950s.⁴⁷¹ Urban renewal often took freeway paths straight through minority neighborhoods, sometimes by design.⁴⁷² Two hundred miles away in Nashville, for instance, a proposed freeway route would have separated two historically Black colleges from the African American community.⁴⁷³ The routing decision and alternative parkland in *Overton Park* would have had potentially considerable implications for white and Black communities within Memphis. Curiously, however, race was absent from the briefs, so the Court did not have the chance to examine disparate impact in the APA setting. Perhaps that briefing choice was itself a strategic decision to avoid an emotive and, indeed, downright raw racial overhang to the case. After all, the final city council vote at the heart of the case took place the same day that Martin Luther King Jr. was assassinated across town and American cities across the country burned.⁴⁷⁴

Regardless of whether optics shaped litigation choices, the counterfactual to contemplate is this: would *Overton Park's* foundation-laying framework for hard-look review have come out differently if a principal claim had been about

468. See PETE DANIEL, DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN THE AGE OF CIVIL RIGHTS 194 (2013) ("The Civil Rights Commission in 1975 found 'blatant and widespread' violations of equal rights laws as well as 'the continuing complicity of the USDA secretary and other high-level USDA officials,' adding that the USDA seemed more concerned with 'protecting noncomplying recipients than those people whom the law seeks to protect.'"). See generally KATZNELSON, *supra* note 98 (documenting the calculated exclusion of minorities by many federal government programs).

469. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977).

470. Peter L. Strauss, *Citizens to Preserve Overton Park v. Volpe—of Politics and Law*, *Young Lawyers and the Highway Goliath*, in *ADMINISTRATIVE LAW STORIES* 258, 280-317 (Peter L. Strauss ed., 2006).

471. *Id.* at 280-82.

472. See ROTHSTEIN, *supra* note 464, at 127-31, 188-89 (discussing how state and local governments deliberately designed interstate highway routes to destroy urban African American communities).

473. Strauss, *supra* note 470, at 281-82; see also *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179, 184-85 (6th Cir. 1967) (rejecting the plaintiffs' argument that the highway project was discriminatory because it deprived Nashville's Black community of due process and equal protection).

474. Strauss, *supra* note 23.

the disparate impact of the routing decisions on minority communities? Would the Court have been so eager to construct its administrative-law empire via a more robust form of arbitrary-and-capricious review when doing so would have demanded grappling with contentious issues of race, segregation, and potential bias in the political process? Would *Overton Park* still be *Overton Park* had the Court been forced to grapple with Memphis's complex racial dynamics? And how hard could hard-look review have become in such cases given the concerns the Supreme Court had recently articulated in *Washington v. Davis* while importing into equal-protection doctrine a stringent and often fatal requirement that plaintiffs show an intent to discriminate?⁴⁷⁵

Because of such dynamics, judges may have opted to channel antidiscrimination away from the APA. Inside this walled garden of administrative law, judges created review doctrines that were expansive, but that would be *selectively* applied to broadcasters, boaters, and dolphins, but not to Black and Brown farmers, schoolchildren, or renters—thereby avoiding potential backlash. The erasure of antidiscrimination, then, may not be merely incidental to modern administrative law, but rather core to its creation.

B. Potential Objections

While our conjecture about race and the making of modern administrative law is arresting, it is by no means ironclad. We cannot observe the counterfactual, nor can we interrogate the judicial mind to reconstruct motivations the same way we might crunch congressional votes or examine shifting public opinion in search of a causal explanation for executive or legislative actions taken or not taken.⁴⁷⁶ As just one example, past work on agency implementation of civil rights laws uses rich archival materials to show how the Department of Education—for much of its life an “Office of Education” embedded in HEW—was kept deliberately small and underfunded because of its potential to desegregate American public schools.⁴⁷⁷ But it is harder to say that the same forces that sought to keep HEW small and ineffectual might have also acted on judges, particularly

475. In *Washington v. Davis*, the Court showed its wariness toward expanding disparate-impact doctrine. 426 U.S. 229, 242 (1976) (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”); *id.* at 239–42. We argue that administrative law took up the Court’s wariness toward disparate impact and extended it to the APA—even though lower courts were not required to since *Washington v. Davis*’s holding applied to the Equal Protection Clause and not to the APA. The courts, via *Women’s Equity* and APA § 704, thus chose to erase race from the APA.

476. For an astute meditation on measuring judicial behavior, see Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008).

477. See Milligan, *Subsidizing Segregation*, *supra* note 31, at 861–66.

those enjoying Article III's insulation from the push and pull of politics via life tenure and salary protection.⁴⁷⁸

In short, more challenging work remains to be done to button down the causal relationships between modern administrative law's evolution and the American civil rights struggle. Our ambition in what remains is more realistic, and aimed at responding to a set of four initial objections that might be raised against our broader account.

One initial objection is that our account places too much of the blame on the judiciary and, in turn, allocates too little agency to civil rights groups who launched and piloted key litigations. With scarce resources and dependent on membership financing, civil rights groups adopted a sweeping "rights-based" litigation strategy designed to highlight the yawning gulf between American ideals and systemic discrimination, particularly social segregation, on the ground.⁴⁷⁹ So, too, the *Women's Equity* plaintiffs, spurred by a receptive district court,⁴⁸⁰ sought ever more sweeping remedies and ever more systematic agency oversight efforts.⁴⁸¹ The *Women's Equity* plaintiffs, the argument might go, would have received a different reception had they maintained a more targeted and tractable litigation approach that focused on remedying specific agency failures to enforce at HEW and the U.S. Department of Labor, rather than seeking omnibus judicial oversight. In other words, perhaps the APA's erasure of race emanated from those fateful choices in litigation strategy. But even if civil rights groups consciously adopted a grand litigation strategy or went large in seeking systematic judicial oversight of administrative action, that would not negate the fact that the *Women's Equity* Court narrowly refused to entertain APA-style claims when presented, or that many subsequent courts, often facing cases in very different postures, proved all too willing to continue the doctrinal line.

478. And even if judges were insulated by life tenure, they were not necessarily insulated from *all* political pressures: some judges, like Justices Scalia, Bork, and even Ginsburg, may have avoided racially contentious issues because they wanted to remain politically viable as Supreme Court nominees. Notably, these particular judges were involved in the two key D.C. Circuit decisions that established the APA § 704 maneuver, *Women's Equity* and *Council of & for the Blind*.

479. See GOLUBOFF, *supra* note 31, at 11-12 (arguing that civil rights groups pushed away from mobilization around economic and labor issues and instead pursued a rights-based attack on social segregation); Risa L. Goluboff, "We Live's in a Free House Such as It Is": *Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977, 2010-18 (2003) (same). But see Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 352-54 (2005) (offering a more textured view of mid-century legal mobilizations).

480. See *Adams v. Bennett*, 675 F. Supp. 668 (D.D.C. 1987), *rev'd sub nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990).

481. See *Women's Equity Action League*, 906 F.2d at 745 (describing the evolution and increasing scope of the plaintiffs' claims and noting that "[a]s the litigation swelled in scope, it shifted in focus").

A second objection might be that our account of judicial incentives gets the timing wrong. By the time *Women's Equity* was decided, hard-look review may have been firmly ensconced, weakening the connection between the two. To the extent that judges worried about legislative reversal, the power of southern committee chairs, who might have been moved to counter growing judicial oversight of the regulatory state via statutory changes to administrative procedures, had already waned.⁴⁸² This timing critique is perhaps the most persuasive. But even if judges did not fear direct congressional reversal, they may still have been concerned about other forms of backlash—for example, *executive* backlash from agencies forced to reckon with remands on race-related issues. And backlash may have come from other sources, as judges may have been worried about implications for the prospects of administrative law if forced to wade into contentious race-related claims. By the 1980s, judges faced a sustained backlash to the judicial “activism” of prior decades.⁴⁸³ Milligan writes that there was a “widespread sense that the courts had taken too prominent a role in social reform.”⁴⁸⁴ Facing criticism from both the left and the right,⁴⁸⁵ judges began to step back from socially contentious issues like federal funding for discriminatory fundees.⁴⁸⁶ This retreat was facilitated by a widespread judicial “amnesia,” as many judges “seem to have forgotten, or repressed,” the federal government’s own complicity in Jim Crow.⁴⁸⁷

482. See generally DAVID A. BATEMAN, IRA KATZNELSON & JOHN S. LAPINSKI, *SOUTHERN NATION: CONGRESS AND WHITE SUPREMACY AFTER RECONSTRUCTION* (2018) (exploring the effects of southern behavior and influence on lawmaking after Reconstruction and before the New Deal); Ira Katznelson, Kim Geiger & Daniel Kryder, *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 POL. SCI. Q. 283 (1993) (probing the southern veto through analysis of Senate and House roll calls).

483. See Milligan, *supra* note 33 (manuscript at 64) (“[B]y the 1980s, sustained backlash to judicial ‘activism’ left courts fatigued and doubtful about their capacity to monitor other governmental institutions. The federal government’s sweeping Spending Clause programs were too overwhelming to oversee.”).

484. *Id.* (manuscript at 68).

485. See *id.* (“Over time, political attacks, along with disappointment regarding the outcomes of structural reform litigation, fueled legal observers’ doubts about sweeping judicial interventions and oversight of executive officials. Critiques came from the left as well as the right, challenging whether courts could or should attempt to mandate social reforms.”).

486. See *id.* (manuscript at 68-69).

487. Milligan decries the judicial “amnesia” about the role that the federal government played in perpetuating Jim Crow. *Id.* (manuscript at 69). She writes:

[J]udges and other legal actors seemed to have forgotten, or repressed, the ways in which the federal government had actively aided Jim Crow In fact, the enact-

A similar timing objection might point out that administrative law's empire was mostly constructed *before* the key cases created disparate limbo. *Overton Park*, for instance, was decided over ten years before *Council of & for the Blind*. Does that suggest that administrative law was, at least in part, constructed without erasing race? This may be true in the short run. But even if hard-look review was crafted without *contemporaneously* considering its implications for civil rights, it may not have survived in the long run without dodging issues of race. Antidiscrimination plaintiffs, then, were casualties of the growing power of administrative law.

A third objection is that our theory gives too much credit to administrative law because the erasure of race stemmed less from maneuvers like APA § 704 and more from developments in antidiscrimination law, like the rise of the anticlassification perspective and *Washington v. Davis*.⁴⁸⁸ Anticlassification, the notion that equal protection prohibits classification based on race, may have pushed administrative law toward colorblindness all on its own. And *Davis* had already repudiated disparate-impact theory in the equal-protection context. The *Davis* Court's fear was that such judicial review would sweep too far:

[Disparate-impact review] involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, *regulatory*, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.⁴⁸⁹

While these concerns about deference to government agencies certainly play into administrative law, *Davis* was limited to constitutional review under the Equal Protection Clause. It did not answer the question of the standard of review for

ment of Title VI and its analogs seems to have aided the process of forgetting, allowing the federal government to be framed as an enforcer of civil rights – not a potential violator in its own right.

Id. (manuscript at 64).

⁴⁸⁸ 426 U.S. 229 (1976).

⁴⁸⁹ *Id.* at 247-48 (emphasis added). For an astute account of the rise of intentionality as the keystone of equal-protection doctrine, see Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).

disparate impact under the APA. That was an affirmative move by the *Women's Equity* court, with long-lasting effects.

Fourth, some might object that our account lacks explanatory power compared to, say, a public-choice account of judicial review that links more muscular APA review to a growing concern at the time about agency capture by interest groups.⁴⁹⁰ Whether race was part of the equation or not, the objection might go, deepening concerns about political pathologies and skepticism about the ability of the system to faithfully translate democratic preferences into policies would have resulted in the same fortification of judicial review. Fortifying this critique is the fact that the growing public-choice critique of administration certainly interacted with race, as well. In the years leading up to *Women's Equity*, some judges and administrators came to view civil rights groups as special-interest groups intent on “capturing” federal agencies. In 1969, for example, William Rehnquist, then-head of the Office of Legal Counsel, drafted a memorandum to Deputy Attorney General Richard Kleindienst on whether and how to revise EEOC enforcement power in light of its first few years of experience implementing Title VII.⁴⁹¹ Rehnquist’s memorandum warned that the EEOC, and other administrative agencies, were vulnerable to capture by civil rights groups: “Administrative agencies . . . lack objectivity and tend to favor one or another of the groups whose interests are protected by their statute. This would be particularly true of the EEOC,” he wrote.⁴⁹² Later, in a White House meeting, Rehnquist reportedly objected that the EEOC “was biased in favor of the employee-complainant.”⁴⁹³ Rehnquist’s views are reflected in the case law⁴⁹⁴ and scholarly literature⁴⁹⁵ of the

490. See *supra* note 59 and accompanying text.

491. GRAHAM, *supra* note 131, at 424-25.

492. *Id.* at 425.

493. *Id.*

494. In 1987, the Supreme Court heard a challenge to the affirmative action plan of a public transportation agency, where Justice Scalia’s dissent (joined by Chief Justice Rehnquist) developed a public-choice critique of affirmative action plans administered by agencies. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (“It is unlikely that today’s result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and governmental employers . . . for whom the cost of hiring less qualified workers is often substantially less – and infinitely more predictable – than the cost of litigating Title VII cases and of seeking to convince federal agencies by nonnumerical means that no discrimination exists.”).

495. In 1988, legal scholar William N. Eskridge, Jr. discussed the public-choice theory of affirmative action articulated by Justice Scalia. See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 335-36 (1988)

time, which discussed how agencies might be vulnerable to pressure from civil rights groups. Perhaps then, the rise of a public-choice critique of administration explains both the emergence of hard-look review *and* the erasure of race in administrative law.

Here, too, more work remains to be done. For starters, public-choice theory is underspecified when it comes to questions of race. Are the civil rights claimants in *Women's Equity* rent-seekers or protectors of the public interest? Does the theory depend on a general theory of discrimination?⁴⁹⁶ More generally, our account is arguably more consistent with a fuller public-choice account that places judges as constrained and vigilant actors within an institutional setting.⁴⁹⁷ Just as other accounts have shown how abstention doctrines insulated the federal courts from contentious civil rights issues,⁴⁹⁸ how the standing doctrine achieved political preferences for insulating New Deal agencies from challenges,⁴⁹⁹ and how judges defer to elected branches in civil rights and liberties cases during war,⁵⁰⁰ our account illustrates that precisely because of public-choice constraints, judges may have *selectively* created administrative law's empire. Therein lies perhaps the sharpest critique: if the strategic environment *explains* administrative law's erasure of race, it may also weaken the impact of the doctrinal interventions

("Employers and unions fearing [T]itle VII liability because of their own past discrimination, or even because of hard-to-explain continuing imbalances in their workforces, can effectively avoid liability (and potential backpay awards against them) by voluntarily adopting affirmative action plans. These plans shift much of the costs onto white male employees. 'This situation is more likely to obtain,' Justice Scalia reminded the Court, 'with respect to the least skilled jobs – perversely creating an incentive to discriminate against precisely those members of the nonfavored groups *least* likely to have profited from societal discrimination in the past.' This group, though numerous, is diffuse and politically unorganized. By expanding upon a statutory exception that hurts that group, the Court is being unfair in ways that Congress will not likely correct, because the best-organized groups – civil rights organizations, unions, employers – are by and large happy with the decision. In short, the public choice perspective eloquently articulated by Justice Scalia suggests that the Court's expansive approach to affirmative action might be politically unfair.").

496. See, e.g., GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 82-103 (1957) (setting forth a theory of discrimination focused on the joint effects of discrimination by employers, employees, and governments).

497. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 112-77 (1998) (discussing how institutions structure the relations among Justices and their interactions with external actors).

498. See, e.g., Irma B. Ascher, Comment, *Restrictions on Access to the Federal Courts in Civil Rights Actions: The Role of Abstention and Res Judicata*, 6 *FORDHAM URB. L.J.* 481 (1978).

499. Ho & Ross, *supra* note 20.

500. Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 *N.Y.U. L. REV.* 1 (2005).

noted above, thus heightening the need for legislative or executive intervention.⁵⁰¹

CONCLUSION

The administrative state is coming under ever more vociferous attack. At the same time, the United States is once more grappling with graphic and horrifying images of institutional racism. In times like these, it is even more important to understand the origins of the administrative state. Many scholarly “origin stories” focus on the New Deal and the crucible of the 1930s and 1940s.⁵⁰² But for the American civil rights struggle, a more significant moment was the 1970s through the 1990s, when antidiscrimination forces shaped the path of modern administrative law. By scrubbing antidiscrimination from its purview, administrative law created disparate limbo and constructed a colorblind modern administrative state.

While it has protected small businesses, unmotorized vehicle users, and animal subgroups, administrative law remains blind to racial groups: it has cast protected classes into disparate limbo. As a result, the recent history of administrative law is littered with failures. In *Allen v. Wright*, the administrative state failed Black schoolchildren. In *Women’s Equity*, the administrative state failed school desegregationists. In *Garcia v. Vilsack*, the administrative state failed minority farmers. And in *Garcia v. McCarthy*, the administrative state failed Latinx schoolchildren. But these failures are not preordained, and our account points to doctrinal and policy interventions that can help remedy disparate limbo.

Ultimately, our account calls for a racial reckoning within administrative law. Scholars, lawyers, judges, and policymakers must recognize administrative law’s erasure of race and its implications for the field. By ignoring race, administrative law diverged from the American civil rights struggle at a critical juncture and created the present-day’s disparate limbo. By understanding these shortcomings, our account lights the way for administrative law to make good on its promise of bureaucratic justice for all.

501. The strategic environment may of course be different today, given the salience of racial reckoning in contemporary politics. See, e.g., Joe Biden, President of the U.S., Remarks on Racial Justice and Equality and an Exchange with Reporters at 3-4, 2021 DAILY COMP. PRES. DOC 00087 (Jan. 26, 2021). Yet constraints might still operate differently on judges. Recent Supreme Court decisions, for instance, largely avoid discussing contentious issues of race. See, e.g., *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (dismissing the plaintiffs’ equal-protection claim and deciding the case on race-neutral grounds); *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2570-72 (2019) (providing very little discussion of differential impact along racial and ethnic lines).

502. See *supra* note 20 and accompanying text.

APPENDIX: FEDERAL AND SUBFEDERAL CATEGORIES

	DISCRETIONARY ACTION	NONDISCRETIONARY ACTION
<p>“FEDERAL” WITH EXCLUSIVELY FEDERAL ACTORS</p> <p><i>While Title VI has been interpreted to not apply to federal agencies, other antidiscrimination statutes, such as the ECOA, do apply. Federal agencies are also subject to general antidiscrimination norms via the APA’s nonarbitrariness requirement.</i></p>	<p>The federal agency exercises its discretion in declining to act.</p>	<p>The federal agency’s action is nondiscretionary and thus not protected by <i>Heckler’s</i> presumption against reviewability. <i>See, e.g., Dep’t of Com. v. New York</i>, 139 S. Ct. 2551 (2019).</p>
<p>“SUBFEDERAL”</p>	<p>The federal agency exercises its discretion in supervising its subfederal fundees. <i>See, e.g., Women’s Equity Action League v. Cavazos</i>, 906 F.2d 742 (D.C. Cir. 1990); <i>Council of & for the Blind of Del. Cnty. Valley, Inc. v. Regan</i>, 709 F.2d 1521 (D.C. Cir. 1983).</p>	<p>The federal agency’s supervision of its fundees is nondiscretionary. This category is likely rare, since supervisory decisions are usually discretionary and thus protected by <i>Heckler’s</i> presumption against reviewability. But occasionally, a court may rule that a federal agency’s supervisory action is nondiscretionary since, for example, the agency has an affirmative obligation to act. <i>See e.g., Thompson v. U.S. Dep’t of Hous. & Urb. Dev.</i>, 348 F. Supp. 2d 398 (D. Md. 2005).</p>