

DISPARATE LIMBO: HOW ADMINISTRATIVE LAW ERASED ANTIDISCRIMINATION*

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Abstract

Administrative law has a blind spot. It is blackletter doctrine that an agency’s failure to consider the impacts of its conduct can invalidate its decision as arbitrary and capricious. Judges have set aside agency action for failures to consider differential impacts on subgroups of businessowners, 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. Whether 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.

This Article uncovers how modern administrative law erased antidiscrimination principles. That story began 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 Ruth Bader Ginsburg, held that § 704 of the APA barred civil rights plaintiffs from bringing an APA challenge because Title VI provided an alternative “adequate remedy.” Subsequent courts have seized on the D.C. Circuit’s § 704 dodge, using it to channel antidiscrimination claims away from the APA. Worse,

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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, unable to make out the stringent intent showings required under increasingly inhospitable civil rights laws, but also barred from mounting APA claims against agency discrimination for violations of administrative law's baseline guarantee of non-arbitrariness.

Remedying disparate limbo is urgently needed, particularly as the nation enters a new round of soul-searching on 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 1980s and 1990s of muscular “hard look” review and a more intrusive judicial role in administrative governance—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”¹ equipment you cannot afford, you can ask the courts to protect you from the differential impacts of the federal agency’s policy.² 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” water craft users.³ And if you are a Hawaii dolphin in a small pod, not a larger pod, you can rest assured that the courts will consider the impacts on your sub-population, rather than lumping you in with all the other dolphins.⁴ In these cases, as in others, the Administrative Procedure Act (APA) considered 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 (human)⁵ person in a protected class, you will face a steeper climb when you assert an antidiscrimination claim within the APA.⁶

¹ See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 558 (2009) (Breyer, J., dissenting) (arguing that the new policy by the FCC [Federal Communications Commission] disproportionately impacts local broadcasters because “the costs of beeping/delay systems . . . place that technology beyond the financial reach of many smaller independent local stations.”).

² See *id.* (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.”).

³ *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.”).

⁴ See *Nat. Res. Def. Council v. Pritzker*, 62 F. Supp. 3d 969, 1017 (N.D. Cal. 2014), *rev’d and remanded sub nom. Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125 (9th Cir. 2016) (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).

⁵ Many of our APA cases involve animal sub-populations, 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 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.

⁶ 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 USDA); *Hinojosa v. Horn*, 896 F.3d 305 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1319 (2019) (rejecting the APA claims of U.S.

While the APA readily accepts some kinds of claims about “differential impacts”—impacts on *small* broadcasters,⁷ *non-motorized* watercraft users,⁸ or *Hawaiian* bottlenose dolphins⁹—judicial interpretations of the APA have mostly stymied claims about racial differential impact. Disparate impact on members of more conventional protected classes—for instance, Black farmers or Latinx schoolchildren—is curiously absent from administrative law.¹⁰

How did we get here? How did we arrive at a place where the APA protects subgroups like kayakers and small dolphin pods, but not subgroups like Black farmers¹¹ or Latinx schoolchildren?¹² Why this puzzling double standard? The answer requires a deep excavation of the history of the Civil Rights Act of 1964 and judicial interpretation of the relationship of civil rights and the APA, particularly § 704’s ouster of claims when there is already an “adequate remedy.”¹³ Performing that spadework, we examine the legislative struggles around the Civil Rights Act, then subsequent APA cases,¹⁴ and finally the Supreme Court’s more recent disparate impact jurisprudence.¹⁵ By carefully tracing this statutory and doctrinal evolution, we show how the APA erased race. When agencies *act* in ways that have significant differential effects along racial or ethnic lines, a claim to that effect is cognizable neither under 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 non-arbitrariness.

citizens born along Mexican border and denied passports); *Garcia v. McCarthy*, No. 13-CV-03939-WHO, 2014 WL 187386 (N.D. Cal. Jan. 16, 2014), *aff’d*, 649 F. App’x 589 (9th Cir. 2016) (rejecting the APA claims of Latinx schoolchildren who were disproportionately exposed to dangerous pesticides).

⁷ *Fox Television*, 556 U.S. 502.

⁸ *Hells Canyon All.*, 227 F.3d 1170.

⁹ *Nat. Res. Def. Council*, 62 F. Supp. 3d 969.

¹⁰ 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.

¹¹ *See Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009) (rejecting the APA claims of minority farmers denied loans by the USDA); *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000) (rejecting the claims of a class-action group of Black farmers who were denied loans).

¹² *Garcia v. McCarthy*, 2014 WL 187386.

¹³ 42 U.S.C. §§ 2000d et seq.

¹⁴ *See, e.g., Women’s Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990); *Council of and for the Blind of Delaware Cty. Valley, Inc. v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983).

¹⁵ Most notably, we focus on the implications of *Alexander v. Sandoval*, 532 U.S. 275 (2001).

Understanding the many twists and turns of disparate limbo’s evolution is important to pinpoint 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 origins 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 had already 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 quickened 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.¹⁶ Other key contributions step

¹⁶ See, e.g., 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); 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 Franklin Delano Roosevelt’s New Deal and the birth of the Administrative Procedure Act 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* (Daniel 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 (2016) (reviewing DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN*

back further in time, to the nineteenth century and the birth of a professional civil service,¹⁷ or earlier still to the Founding, when the American regulatory state was a glimmer in the eye of modern state-builders,¹⁸ in order to understand administrative law's evolution.

Far fewer have reckoned with race as a central explanation for administrative law's modern-day form.¹⁹ Indeed, race is often glossed

AMERICA, 1900-1940 (2014)) (identifying a “rule of lawyers” whereby agencies developed a “model of lawyerly administration”). Interestingly, New Deal administration did not intersect with race as much as one might expect because key New Deal programs excluded African-Americans. *See, e.g.*, JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1996) (arguing that anti-poverty campaigns from FDR to Johnson failed to address racial inequality, and that this omission undermined the war on poverty).

¹⁷ DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928* (2002) (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 American 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).

¹⁸ *See, e.g.*, PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (tracing the origins of administrative principles to the medieval and early modern English period, and arguing that the Founders of the United States Constitution rejected administrative principles); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012) (describing Congress' early delegations to 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.*, Nicholas Bagley & Julian Davis Mortenson, *Delegation at the Founding*, *COLUM. L. REV.* (forthcoming 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.* (forthcoming 2021); Ilan Wurman, *Nondelegation at the Founding*, 130 *YALE L.J.* (forthcoming 2021).

¹⁹ *See, e.g.*, Jennifer Alexander, *Avoiding the Issue: Racisms and Administrative Responsibility in Public Administration*, 27 *AM. REV. PUB. ADMIN.* 344, 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 (2019) (noting the “thin empirical foundation” of studies of government administration and “marginalized and non-elite populations”); Bernard Bell, *Race and Administrative Law*, *Notice & Comment Blog* (Aug. 10, 2020), <https://www.yalejreg.com/nc/race-and-administrative-law-by-bernard-bell/> (“Most of administrative law scholarship, and certainly the most

over in scholarship and teaching,²⁰ and scholars have only begun to explore the ways race and racism is deeply entrenched in specific areas like immigration law²¹ and Indian law,²² or to consider the possibility

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*, 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/> (“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 . . .”).

²⁰ See, e.g., Joy Milligan & Karen Tani, *Seeing Race in Administrative Law: An Interdisciplinary Perspective*, 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/> (“[A]dministrative law, as traditionally taught and studied, often avoids confronting questions of race and racial inequality.”).

²¹ See, e.g., ESTELLE T. LAU, PAPER FAMILIES: IDENTITY, IMMIGRATION ADMINISTRATION, AND CHINESE EXCLUSION (2007) (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 (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. INQ. 1 (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. REV. 1, 5 (2002) (arguing that the Supreme Court’s early immigration jurisprudence was 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 (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*, 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/> (“[DACA] offers a case through which to examine the racialized nature of administrative law.”); Carrie Rosenbaum, *Unequal Protection in Immigration Law*, Notice & Comment Blog (July 22, 2020), <https://www.yalejreg.com/nc/unequal-protection-in-immigration-law-by-carrie-rosenbaum/> (“Immigration law has contributed to shaping and reinforcing the construct of race more than any other area of administrative law.”).

²² See, e.g., STEPHEN J. ROCKWELL, INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY (2010) at 3 (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,

that discrimination is endemic in core agency processes, from adjudication²³ to notice-and-comment rulemaking²⁴ to cost-benefit analysis.²⁵ 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.²⁶

Indian Affairs and Administrative Law, Notice & Comment Blog (Aug. 25, 2020), <https://www.yalejreg.com/nc/indian-affairs-and-administrative-law-by-craig-green/>; Victoria Sutton, *Native Americans and Discriminatory Administration with Facially Neutral Rules*, Notice & Comment Blog (July 15, 2020), <https://www.yalejreg.com/nc/native-americans-and-discriminatory-administration-with-facially-neutral-rules-by-victoria-sutton/>.

²³ See 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?* 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/> (arguing that arbitrary and capricious review may permit “racial disparities in federal (and state) agency distribution of grants, loans, and licenses”).

²⁴ Dorothy M. Daley & Tony Reams, *Public Participation and Environmental Justice: Access to Federal Decision Making*, in *FAILED PROMISES: EVALUATING THE FEDERAL GOVERNMENT’S RESPONSE TO ENVIRONMENTAL JUSTICE* (Konisky ed. 2015) (discussing the “uneven” efforts by agencies to increase public participation of minority and low-income groups in environmental rulemaking); Gwendolyn McKee, *Noticing Notice*, Notice & Comment Blog (Aug. 25, 2020), <https://www.yalejreg.com/nc/noticing-notice-by-gwendolyn-mckee/> (noting that the process of rulemaking, which involves publication in the Federal Register, “is a system that specifically rewards insiders with the knowledge and understanding to take part in it”).

²⁵ See, e.g., James Goodwin, *Cost-Benefit Analysis Is Racist*, The Center For Progressive Reform (undated), <http://progressivereform.org/our-work/regulatory-policy/cost-benefit-analysis-racist/> (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*, 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/> (arguing that cost-benefit analysis in agency risk regulation “tends to generate racially biased outcomes”).

²⁶ See, e.g., WILLIAM N. ESKRIDGE & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) (recounting the role of agencies in elaborating constitutional and statutory protections against discrimination on the basis of sex and sexual orientation); RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2010) (recounting the role of the early civil rights division of the 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* (2014) (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* (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,

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. No scholars, however, have seriously grappled with race and racism's more concrete doctrinal roots within the APA. 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 to the 1990s when antidiscrimination forces shaped the path of the modern American administrative state and its regulation, helps chart a new course for thinking 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” on subgroups, such as distinct types of animals, park-goers, or businessowners, the APA has proven less hospitable to claims of differential impact on racial subgroups and other conventional protected classes.²⁷ Courts often

The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 63 STAN. L. REV. 1071 (2011) (describing the state-level employment discrimination laws that 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 (2010) (describing “administrative constitutionalism,” or the process whereby agencies interpret the Constitution, via case studies of equal employment rulemaking at the Federal Communications Commission (FCC) and the Federal Power Commission (FPC)); Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 124 (2020) (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 (2018) (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 (2006) (arguing that “private attorney-generals” can help promote the rule of law when they challenge agency decisions favorable to regulated entities, and citing *United Church of Christ v. FCC* case to demonstrate how private attorney-generals challenged racism in telecommunications administration); Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121 (2014) (disputing one popular scholarly view about the creation of the Department of Justice (DOJ), which held that “Congress created the DOJ to enforce Reconstruction and ex-slaves’ civil rights,” 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 (2019).

²⁷ Just as the APA channels away antidiscrimination claims that involve race, the APA has also channeled away antidiscrimination cases based on disability, gender, and

turn to one administrative law provision, APA § 704, to channel antidiscrimination claims away from the APA.²⁸

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.²⁹ 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 precedent 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 Ruth Bader Ginsburg, that 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.³⁰ But the Court’s subsequent revocation³¹ of an implied right of action to assert disparate impact claims under agency 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. Whether or not courts are willing to revisit the issue, *Women’s Equity* has already cast a long shadow over the field, for its § 704 maneuver deprived administrative law of any significant tradition of considering antidiscrimination claims via arbitrary and capricious review, despite its being a natural vehicle for doing so, and at a key moment in its development, as courts minted new and muscular forms of judicial review of agency action.

Part III develops legal and policy implications from our account. Using our mapping of multiple statutory and doctrinal wrong turns throughout the 1980s and 1990s, we offer some interventions

other protected classes. *See, e.g.*, *Am. Disabled for Attendant Programs Today v. U.S. Dep’t of Hous. & Urban Dev.*, 170 F.3d 381, 391 (3d Cir. 1999) (dismissing claims of disability rights group because “it has not met the requirement under section 704”); *West v. Spellings*, 480 F. Supp. 2d 213 (D.D.C. 2007) (dismissing discrimination claim by 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), *aff’d*, 315 F. App’x 347 (2d Cir. 2009) (dismissing claims of disability-related discrimination because an alternative “adequate” right “precludes a remedy under the APA”).

²⁸ APA § 704 makes agency actions reviewable if “there is no other adequate remedy in a court.” 5 U.S.C. § 704.

²⁹ *See* 42 U.S.C. § 2000d, also called Title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination in any program that receives federal funds.

³⁰ *See Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (finding an implied private right of action in Title VI and Title IX).

³¹ *See Sandoval*, 532 U.S. 275 (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).

that could help alleviate disparate limbo without merely importing Title VI into the APA. 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. We also suggest legislative and executive mechanisms to subject agency actions that 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.³² These new digital tools bring heightened risk of bias that, because 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*,³³ *State Farm*,³⁴ *Nova Scotia*,³⁵ 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. The implication is profound: 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, was built upon its 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 differential impact for a particular subgroup? The caselaw says yes. In the past, courts have found arbitrary and capricious violations when agencies failed to consider differential impacts on

³² See notes 107–111 and accompanying discussion, *infra*.

³³ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (discussing standard for judicial review and noting presumption of reviewability).

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

³⁵ *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240 (2d Cir. 1977) (holding that agencies must disclose the evidentiary basis for decisions).

small dolphin pods,³⁶ subgroups of healthcare beneficiaries,³⁷ small businessowners,³⁸ and more. In multiple areas of law, courts have invalidated agency action as arbitrary and capricious when the agency failed to consider differential impact.³⁹

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,”⁴⁰ small pods of bottlenose dolphins,⁴¹ oysters in the Long Island Sound,⁴² and adult and subadult Yosemite toads.⁴³ 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, 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 § 706.⁴⁴

³⁶ Nat. Res. Def. Council v. Pritzker, 62 F. Supp. 3d 969, 1017 (N.D. Cal. 2014), *rev'd and remanded sub nom.* Nat. Res. Def. Council, Inc. v. Pritzker, 828 F.3d 1125 (9th Cir. 2016).

³⁷ Stewart v. Azar, 313 F. Supp. 3d 237, 263 (D.D.C. 2018) (invalidating as arbitrary and capricious a Department of Health and Human Services action because the agency failed to consider the relevant factors, including the “the estimated 95,000 people who would lose coverage”).

³⁸ See, e.g., Harlan Land Co. v. U.S. Dep't of Agr., 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”).

³⁹ A note on our terminology: an agency may fail to consider differential impact, or an agency may generate differential impact. (And the two categories are not mutually exclusive nor exhaustive.) But for the sake of simplicity, we will use the phrase “generate differential impact” as a shorthand for both categories.

⁴⁰ Pac. Rivers Council v. U.S. Forest Serv., 668 F.3d 609, 630–31 (9th Cir.), *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 was arbitrary and capricious because it “‘entirely failed to consider’ environmental consequences . . . on individual species of fish.”).

⁴¹ Nat. Res. Def. Council, 62 F. Supp. 3d at 1016–17 (“Defendants acted arbitrarily and capriciously in failing to use the best available data when they used the basin-wide pelagic numbers for the bottlenose dolphin rather than the more current smaller stocks.”).

⁴² Connecticut v. U.S. Dep't of Commerce, 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.”).

⁴³ High Sierra Hikers Assn 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.”).

⁴⁴ 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. 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. Nat. Res. Def. Council, 62 F. Supp. 3d 969. But the failure to use the

Some of the environmental cases bring an added wrinkle: the presence of organic statutes, such as the National Environmental Policy Act, which sometimes require agencies to consider impacts at the species or subspecies level, thus fortifying the APA's concern with arbitrary or irrational treatment of groups.⁴⁵ (We will discuss this complication in more detail in Part III, because the presence of organic statutes may in fact point us toward a legislative intervention.) But for now, the point remains: policies that generate differential impacts on distinct subgroups may be arbitrary and capricious under APA § 706.

Reasoned decision-making under the APA often involves trade-offs between different subgroups. As one Ninth Circuit judge put it, “the agency was well aware of conflict between motorized and non-motorized users, and made a reasoned and reasonably informed decision to . . . reduce that conflict.”⁴⁶ In this 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 non-motorized users. While the court ultimately upheld the agency's plan against an arbitrary and capricious challenge, the court keenly acknowledged how difficult it is to balance the competing interests of different subgroups: either the kayakers or the jetboaters would be unhappy.⁴⁷

The court's grappling with differential impact is not surprising because, according to one theory, regulation is primarily driven by the challenges of distributing costs and benefits between different segments of society.⁴⁸ These distributive questions thus arise in

new data is arbitrary and capricious precisely 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 its 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.

⁴⁵ 42 U.S.C. § 4321 et seq.

⁴⁶ *Hells Canyon All. v. U.S. Forest Serv.*, 227 F.3d 1170, 1182 (9th Cir. 2000), *as amended* (Nov. 29, 2000).

⁴⁷ *Id.* at 1182–83 (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 non-motorized users).

⁴⁸ Public choice theory compares regulatory decision-making to market decision-making, and public choice theory often criticizes agencies for having been “captured” by special interest groups. *See, e.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1285 (2006) (exploring the agency capture theory with regard to the Office of Management and Budget); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 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

multiple areas of administrative law, including Supreme Court cases about arbitrary and capricious review. In *State Farm*, a seminal administrative law case, the Supreme Court briefly considered a rule's differential impacts on small cars, where the agency argued that the rule's implementation was easier for large cars than small cars.⁴⁹ While the Court summarily dealt with the agency's argument on other grounds,⁵⁰ the *State Farm* discussion illustrates how 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*.⁵¹ Here, the differential impact fell upon a subgroup: local broadcasters, who had much smaller budgets than larger broadcasters to, for instance, monitor live events for indecent language. Under the FCC's new rule, small broadcasters would have had to pay "significant equipment and personnel costs" to censor expletives.⁵² Both the majority and the dissent expressed concern about the differential impact on small broadcasters, although the majority ultimately dismissed the concern on empirical grounds.⁵³ The dissent, however, would have found an arbitrary and capricious violation because the FCC "failed to consider the potential impact of its new policy upon local broadcasting coverage."⁵⁴

. . . that agencies deliver regulatory benefits to well organized political interest groups, which profit at the expense of the general, unorganized public.”)

⁴⁹ See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 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.”).

⁵⁰ *Id.* (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.”).

⁵¹ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

⁵² *Id.* at 558 (Breyer, J., dissenting) (“They [small broadcasters] told the FCC, for example, that the costs of bleeping/delay systems, up to \$100,000 for installation and annual operation, place that technology beyond the financial reach of many smaller independent local stations.”).

⁵³ *Id.* at 527 (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.”).

⁵⁴ *Id.* at 556 (Breyer, J., dissenting). One might argue that the consideration of small broadcasters stems from existing FCC policy to promote local coverage, *id.* at 557 (noting that “the concept of localism has been a cornerstone of broadcast regulation for decades”) (quoting FCC proceeding), or the Regulatory Flexibility Act, 5 U.S.C. ch. 6 § 601 et seq. (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.

Lower courts, too, have widely considered differential impact on subgroups under the APA. Sometimes courts consider explicit differential impact claims, where plaintiffs explicitly argue that a rule is unfair because it disproportionately burdens them. In other instances, the claim is more implicit, such as when a subgroup points out that it faces a severe burden resulting from agency action. In *United States v. Nova Scotia*, for instance, the Second Circuit considered differential impacts upon a subgroup of food producers who processed whitefish.⁵⁵ While the case is best known for articulating an agency's duty to maintain a record of its decision, it can also be read as a differential impact case. The agency promulgated a facially neutral rule that applied to all fish producers. But Nova Scotia Food Products argued that its subgroup, whitefish producers, would be disproportionately impacted: the rule would “destroy”⁵⁶ its whitefish products, and moreover, the impact was unnecessarily severe, because whitefish had not caused botulism in over a decade.⁵⁷

The Court agreed. Whitefish producers would be severely impacted, it reasoned, and the agency should have considered the rule's disproportionate 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.⁵⁸

Similarly, in *SLPR v. San Diego Unified Port Dist.*, the Southern District of California upheld a challenge by a subgroup of the general San Diego population.⁵⁹ The 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 their bay-front properties⁶⁰ and threatened to eventually erode the foundations of their houses.⁶¹ 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.”⁶²

In other cases, an agency's duty to consider differential impact might be conceptualized as an informational duty that requires the

⁵⁵ *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240 (2d Cir. 1977).

⁵⁶ *Id.* at 245.

⁵⁷ *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.”).

⁵⁸ *Id.* at 253.

⁵⁹ *SLPR, LLC v. San Diego Unified Port Dist.*, No. 06 CV 1327 MMA (POR), 2009 WL 10672895 (S.D. Cal. Aug. 4, 2009).

⁶⁰ *See id.* at *1 (“Three homeowners claim the Navy's . . . dredging operations have caused erosion of their bay-front properties.”).

⁶¹ *Id.* at *9 (“This could begin to erode house foundations in approximately 10 years.”).

⁶² *Id.*

agency to gather sufficient information about severely impacted subgroups. This was the framing in *Stewart v. Azar*, where the D.C. Circuit chastised an agency's failure to consider impacts on low-income healthcare beneficiaries: "the 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."⁶³ 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.⁶⁴ In this court's framing, the agency's failure was an informational failure, since it neglected to ventilate the differential impact that had been brought to its attention during notice and comment.⁶⁵

Finally, sometimes an agency's duty to consider differential impact is also strengthened by cross-cutting statutory requirements. The Regulatory Flexibility Act, for example, requires agencies assess a rule's differential impact on small businesses.⁶⁶ An agency's failure to ventilate these issues can earn it an arbitrary and capricious reprimand, as in a 2001 case where the court remanded a final rule to the agency "for consideration of the economic impact that the [rule] will have on small businesses."⁶⁷

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. Courts do this not only when directed to by organic statutes (as in *Fax*

⁶³ 313 F. Supp. 3d 237, 262 (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).

⁶⁴ *Id.* at 263 ("Nor did he [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.").

⁶⁵ *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 [the Department of Health and Human Services] 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.'") (internal citation omitted).

⁶⁶ The Regulatory Flexibility Act, enacted in 1980, requires agencies to consider impacts on "small entities" including small businesses. *See* 5 U.S.C. § 601 et seq. ([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.").

⁶⁷ *See Harlan Land Co. v. U.S. Dep't of Agr.*, 186 F. Supp. 2d 1076, 1097 (E.D. Cal. 2001) (invalidating as arbitrary and capricious a rule by the Department of Agriculture after a challenge by citrus growers).

Television and *Harlan*⁶⁸), but also under garden-variety APA review (as in *Nova Scotia* and *SLPR*⁶⁹). 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.

B. Race-Related Differential 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 infeasible or impossible. Via § 704, administrative law has effectively scrubbed antidiscrimination norms from the APA.

For instance, in *Garcia v. McCarthy*, a group of parents argued that the Environmental Protection Agency (EPA) violated the APA when it failed, in its oversight of a California state agency, to take account of disproportionate impacts upon a vulnerable subgroup: Latinx schoolchildren.⁷⁰ 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 pesticides.⁷¹ Yet despite a finding of differential impact, the court nevertheless dismissed the plaintiffs’ APA claims. The court, and the EPA, both acknowledged the overwhelming evidence: the facts showed that “Latino schoolchildren were disparately exposed to both short-term acute . . . and long-term chronic

⁶⁸ *Fox Television* involved organic statutes that promote “localism” in broadcasting. See 556 U.S. at 557 (“[T]he concept of localism has been a cornerstone of broadcast regulation for decades.”). *Harlan* involved a cross-cutting statute, the Regulatory Flexibility Act, that requires agencies to consider impacts on small businesses. See 186 F. Supp. 2d 1076, 1096 (E.D. Cal. 2001) (“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. . .”).

⁶⁹ 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. 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 NEPA and other environmental statutes, these statutes in no way single out bay-facing homeowners for special protection).

⁷⁰ No. 13-CV-03939-WHO, 2014 WL 187386, *4 (N.D. Cal. Jan. 16, 2014), *aff’d*, 649 F. App’x 589 (9th Cir. 2016) (“The plaintiffs seek a declaration that EPA arbitrarily and capriciously settled and dismissed *Angelita C.* [the plaintiffs’ prior lawsuit] . . . plaintiffs also seek . . . to remedy the disparate adverse effects against Latino schoolchildren from exposure to methyl bromide and other fumigants.”).

⁷¹ *Id.* at *6.

... levels of methyl bromide.”⁷² And the EPA even issued a preliminary finding of disparate impact, finding that there was “sufficient evidence to make a preliminary finding of . . . disparate adverse impact upon Latino schoolchildren.”⁷³

Yet administrative doctrine channeled the case away from the APA. The district court cited APA § 704⁷⁴ in arguing that its hands were tied,⁷⁵ and the Ninth Circuit affirmed.⁷⁶ 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.⁷⁷ The court noted that the alternative remedy might be arduous or even “ridiculous,”⁷⁸ since it would require plaintiffs to file yearly lawsuits for each pesticide permit. But APA § 704, the court nevertheless concluded, precluded review.⁷⁹

Garcia v. McCarthy is only the tip of the iceberg. In *Garcia v. Vilsack*⁸⁰ and *Pigford v. Glickman*,⁸¹ for example, § 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 United States Department of Agriculture (USDA) in the early

⁷² *Id.* at *2.

⁷³ *Id.* at *2.

⁷⁴ *See id.* at *14 (“[P]laintiffs have an adequate alternative remedy at law . . .”).

⁷⁵ In addition to citing § 704, the *Garcia v. McCarthy* court also cited *Heckler v. Chaney*, 470 U.S. 821 (1985), to argue that plaintiffs’ APA claim was barred. *See* 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.’”). We return to *Heckler v. Chaney*, which holds that agency nonenforcement decisions are bars courts from reviewing “committed to agency discretion by law,” 470 U.S. at 838, in Part III, as agency discretion can manifest in discrimination.

⁷⁶ *See Garcia v. McCarthy*, 649 F. App’x 589, 592 (9th Cir. 2016) (affirming the District Court’s dismissal of plaintiffs’ APA claims against the EPA)

⁷⁷ *Garcia v. McCarthy*, 2014 WL 187386 at *11 (“EPA argues that the ‘Plaintiffs have an adequate alternative remedy, namely, state law action challenging the Ventura County Agricultural Commissioner’s decision to award permits for the use of methyl bromide . . .’”).

⁷⁸ *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).

⁷⁹ *See* 5 U.S.C. § 704 (emphasis added) (“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.”).

⁸⁰ *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009).

⁸¹ *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000).

2000s.⁸² They alleged both disparate treatment and disparate impact,⁸³ based upon decades of discrimination when applying for USDA loans.⁸⁴ Plaintiffs alleged that USDA field offices would reject forms for typos or small errors⁸⁵ or delay loan applications indefinitely.⁸⁶ Internal investigations 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.’”⁸⁷ And USDA’s discrimination spanned decades: in 1997, the USDA “publicly acknowledged that in the early 1980s it ‘effectively dismantled’ its civil rights enforcement apparatus.”⁸⁸

Yet again, plaintiffs’ APA lawsuit was foiled by § 704. At the district court level, the court held that plaintiffs had no APA claim

⁸² See Sarah L. Brinton, *Toward Adequacy*, 69 N.Y.U. ANN. SURV. AM. L. 357, 378 (2013) (“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*.”).

⁸³ Appellants’ Corrected Opening Brief at 18, *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009) No. 08-5110, 2008 WL 5016245 (C.A.D.C.) (“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.”).

⁸⁴ *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...’”) (alteration in original) (citation omitted).

⁸⁵ Class Action Complaint at 17, *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004), *aff’d and remanded sub nom.* *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006) No. 1:00CV02445, 2000 WL 35747889 (D.D.C.) (“The 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.”) (emphasis in original).

⁸⁶ USDA’s discrimination, one might argue, effectively transformed its program into affirmative action for white farmers. Ira Katznelson has pursued this same line of argument in his historical analysis of government aid programs created during the New Deal and the Fair Deal. See IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2006).

⁸⁷ Appellants’ Corrected Opening Brief, *supra* note 83, at 2 (“[M]inority farmers ‘lost their family land ... because of the color of their skin.’”) (alteration in original).

⁸⁸ *Garcia v. Vilsack*, 563 F.3d 519, 521 (D.C. Cir. 2009) (“Indeed, in 1997 the USDA publicly acknowledged that in the early 1980s it ‘effectively dismantled’ its civil rights enforcement apparatus.”) (citation omitted).

because they could pursue an alternative “adequate remedy” via the Equal Credit Opportunity Act.⁸⁹ At the appellate level, the D.C. Circuit reiterated the district court’s § 704 maneuver, writing that the litigants had an “adequate remedy” elsewhere.⁹⁰ The adequate remedy need not be “as effective as an APA lawsuit,” the appellate court wrote, but merely “adequate.”⁹¹ And the court set the “adequacy” bar quite low: the alternative remedy “may be adequate even if such actions ‘cannot redress the systemic lags and lapses by federal monitors’ and even if such [s]uits . . . may be more arduous, and less effective in providing systemic relief[.]”⁹² In short, litigants should look elsewhere for antidiscrimination relief. Even where the relief available is at best anemic, 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 unfriendly to civil rights. APA § 704 has been used to dismiss the lawsuits of Latinx U.S. citizens denied passports,⁹³ minority renters alleging housing discrimination,⁹⁴ disability rights plaintiffs

⁸⁹ See *Garcia v. Johanns*, 444 F.3d 625, 630 (D.C. Cir. 2006) (ruling that plaintiffs’ claim was “not cognizable under the APA because ECOA [the Equal Credit Opportunity Act] provides ‘an adequate remedy.’”).

⁹⁰ *Garcia v. Vilsack*, 563 F.3d 519, 521 (D.C. Cir. 2009) (“[A]ppellants fail to show they lack an adequate remedy in a court . . .”).

⁹¹ *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, but whether the private suit remedy provided by Congress is adequate.”) (citing *Council of and for the Blind*, 709 F.2d at 1532 and *Women’s Equity*, 906 F.2d at 751).

⁹² *Id.* (quoting *Women’s Equity*, 906 F.2d at 751) (alteration in original).

⁹³ 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, at 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. 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), *cert. denied*, 139 S. Ct. 1319, 203 L. Ed. 2d 564 (2019) (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 other statutes “provide[] an adequate alternative remedy to APA review” and affirming the district court’s dismissal of plaintiffs’ APA claims).

⁹⁴ In the housing context, § 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. & Urban Dev.*, 449 F.3d 536, 541 (3d Cir. 2006) (dismissing plaintiff’s APA claim because “5 U.S.C. § 704 bars the judicial review sought in this action”); *Godwin*

alleging education and housing discrimination,⁹⁵ minority employees alleging employment discrimination,⁹⁶ and college students alleging gender discrimination.⁹⁷ Some of these cases involved disparate impact specifically, while other cases involved antidiscrimination claims more generally, without specifying whether the discrimination constituted disparate impact or disparate treatment.⁹⁸ Regardless, the pattern remains: when conventionally protected classes file APA-and-antidiscrimination claims, these subgroups often see their claims channeled away from the APA. The APA recognizes differential impact of agency decisions on subgroups like dolphins and bay-facing homeowners, but it closes its eyes to differential impact claims by protected classes. The APA, in this sense, inverts the meaning of “protected” classes.

C. Administrative Law’s Erasure of Race

v. Sec’y of Hous. & Urban Dev., 356 F.3d 310, 312 (D.C. Cir. 2004) (dismissing plaintiff’s APA claim because plaintiff had “an adequate alternative remedy” elsewhere); *Marinoff v. U.S. Dep’t of Hous. & Urban Dev.*, 892 F. Supp. 493, 497 (S.D.N.Y. 1995), *aff’d*, 78 F.3d 64 (2d Cir. 1996) (dismissing plaintiff’s APA claim because “plaintiff has a reasonable alternative and therefore review under APA is not available”). 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. & Urban Dev.*, 348 F. Supp. 2d 398, (D. Md. 2005) (considering, but rejecting, APA § 704 as a barrier to plaintiffs’ claims).

⁹⁵ *See Am. Disabled for Attendant Programs Today v. U.S. Dep’t of Hous. & Urban Dev.*, 170 F.3d 381, 391 (3d Cir. 1999) (dismissing claims of disability rights group because “it has not met the requirement under section 704”); *West v. Spellings*, 480 F. Supp. 2d 213 (D.D.C. 2007) (dismissing discrimination claim by 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), *aff’d*, 315 F. App’x 347 (2d Cir. 2009) (dismissing claims of disability-related discrimination because an alternative “adequate” right “precludes a remedy under the APA”).

⁹⁶ *See Nielsen v. Hagel*, 666 F. App’x 225, 231 (4th Cir. 2016) (holding that plaintiff had an “adequate remedy” outside the APA); *Arora v. Daniels*, No. 3:17-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”).

⁹⁷ *See Doe v. United States Dep’t of Health & Human Servs.*, 85 F. Supp. 3d 1, 10 (D.D.C. 2015) (dismissing 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 Action League v. Cavazos*”).

⁹⁸ 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 antidiscrimination cases we discuss.

At the heart of cases engaging in the § 704 maneuver⁹⁹ is the D.C. Circuit's 1990 decision in *Women's Equity Action League*.¹⁰⁰ *Women's Equity*, also known as the *Adams* litigation,¹⁰¹ popularized the use of § 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 governments 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 from the APA.¹⁰² Due to *Women's Equity's* apparent influence, administrative law never developed a tradition of engaging with claims of differential impact by race.

Understanding the role of *Women's Equity* and the doctrinal line it helped spawn 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.¹⁰³ 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

⁹⁹ For the careful readers keeping track, here is a list of the major cases in Part IB, and whether they cite *Women's Equity*: the methyl bromide case *Garcia v. McCarthy* cites *Women's Equity*; the USDA farm loans case *Garcia v. Vilsack* cites *Women's Equity*; the Latinx passport denials cases *Hinojosa* and *De La Garza* do not cite *Women's Equity* but do use § 704; the housing discrimination cases *Godwin*, *Turner*, *Marinoff*, *Thomson* use § 704 and *Godwin* cites *Council of and for the Blind*, a case closely related to *Women's Equity*, and *Thomson* cites (but does not apply) *Women's Equity*; the disability rights cases *Am. Disabled*, *West*, *Sherman*, all cite *Women's Equity*; the employment discrimination cases *Nielsen & Arora* use § 704 and *Nielsen* cites *Women's Equity*; and the college gender discrimination case *Doe* cites *Women's Equity*.

¹⁰⁰ *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990).

¹⁰¹ The case was originally called *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973), and it spanned about twenty years between 1970 and 1990.

¹⁰² We will discuss this in more detail in Part II and Part III, but for now, a brief preview: the USDA farm loans cases, *Garcia v. Vilsack*, did not involve any subfederal actors. The plaintiffs challenged USDA's own policies, not USDA's decisions to fund allegedly discriminatory subfederal actors. So the posture of *Garcia v. Vilsack's* is wholly unlike the *Women's Equity* posture—yet the courts applied *Women's Equity* anyway (and we would argue, erroneously).

¹⁰³ In fall 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 REG., Notice & Comment Blog (2020), <https://www.yalejreg.com/topic/racism-in-administrative-law-symposium/>.

Deferred Action for Child Arrivals (DACA),¹⁰⁴ the 2020 census litigation,¹⁰⁵ and legal challenges to the Trump administration's efforts to retrench vital social welfare programs.¹⁰⁶ 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 § 704 maneuver or, at a minimum, lead to the adjudication of claims asserting agency arbitrariness without any robust antidiscrimination tradition or case law that can point the way. 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.¹⁰⁷ Researchers have documented serious potential for such tools to generate disparate

¹⁰⁴ In the DACA case, the majority opinion by Chief Justice Roberts hinged on the arbitrary and capricious determination. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020).

¹⁰⁵ In the 2020 census, the Trump administration attempted to add a citizenship question, even though experts generally agreed that this would have a disparate impact on Latinx census respondents. *See Kravitz v. United States Dep't of Commerce*, 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. *See* 366 F. Supp. 3d 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.”).

¹⁰⁶ 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 differential impact was arbitrary and capricious. *See* Complaint at 47, *D.C. v. U.S. Dep't of Agric.*, No. CV 20-119 (BAH) (D.D.C. Mar. 13, 2020) 2020 WL 253268 (“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.”).

¹⁰⁷ The Securities and Exchange Commission, for example, is using natural language processing to screen financial documents for fraud. The Social Security Agency is using algorithms to process appeals. And the Food and Drug Administration, which approves vaccines and other medical treatments, is using machine learning to help predict dangerous side effects. *See* DAVID FREEMAN ENGSTROM, DANIEL E. HO, CATHERINE SHARKEY, & MARIANO-FLORENTINO CUÉLLAR, *GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES* (2020) [hereinafter “ACUS Report”], <http://law.stanford.edu/ACUS-AI-Report> (report submitted to the Administrative Conference of the United States).

impact, such as in facial recognition,¹⁰⁸ natural language processing,¹⁰⁹ and more.¹¹⁰ 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.¹¹¹ As federal agencies increasingly rely on algorithmic tools to perform key governance tasks going forward, and as they oversee subfederal government agencies that are adopting 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 questions:¹¹² (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

¹⁰⁸ In 2018, for example, researchers found that many facial recognition systems, including those sold to local police departments, mis-identified dark-skinned faces and female faces more often than light-skinned or male faces. See Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. MACHINE LEARNING RES. 77 (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>.

¹⁰⁹ 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 homemaker. Tolga Bolukbasi, Kai-Wei Chang, James Zou, Venkatesh Saligrama, Adam Kala, *Man is to Computer Programmer as Woman is to Homemaker? Debiasing Word Embeddings*, 30TH CONF. NEURAL INFO. PROCESSING SYSTEMS (2016).

¹¹⁰ SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018).

¹¹¹ David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, & Mariano-Florentino Cuéllar, *Bias, Disparate Treatment, and Disparate Impact*, in ACUS Report, *supra* note 107; Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671 (2016).

¹¹² 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 (1995); CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT (2014).

agencies and the courts to fill in the gaps. The courts, led by the D.C. Circuit, did so and thus 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.¹¹³ If a state or local actor discriminates,¹¹⁴ then Title VI allows the federal government to cut off funding to that recipient.¹¹⁵ Yet Congress left key details of Title VI undefined. As described by historian Charles Abernathy, Congress accepted a “compromise position” where it deliberately punted contentious questions to agencies and the courts.¹¹⁶ Agencies and the courts, not Congress, created a definition for “discrimination,” and agencies and the courts, not Congress, defined plaintiffs’ rights under Title VI.¹¹⁷

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.¹¹⁸

¹¹³ 42 U.S.C. § 2000d (“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.”).

¹¹⁴ Over time, Title VI has been interpreted as applying to state or local actors, but not to federal agencies. *See, e.g.*, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, TITLE VI LEGAL MANUAL, 20 (2001), <https://web.archive.org/web/20160501163007/https://www.justice.gov/sites/default/files/crt/legacy/2011/06/23/vimanual.pdf> [hereinafter Title VI Legal Manual] (“Title VI does not apply to the Federal government. Therefore, a Federal agency cannot be considered a ‘recipient’ within the meaning of Title VI.”)

¹¹⁵ 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 (requiring the federal agency to file a “full written report of the circumstances and the grounds for [the funding cut-off]”).

¹¹⁶ Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining “Discrimination,”* 70 GEO. L.J. 1, 4–7 (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 Title VI.”).

¹¹⁷ *Id.* at 22 (“The Congress that considered Title 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.”).

¹¹⁸ *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,

In the first fifteen years after its enactment, would-be litigants were unsure if Title VI would “support an independent claim for relief.”¹¹⁹

In 1979, the Supreme Court held in *Cannon v. University of Chicago* that plaintiffs have an implied private right of action in Title VI.¹²⁰ 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.”¹²¹ At best, the legislative history indicates an absence of Congressional intent to foreclose a private right of action.¹²²

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 (EEOC).”)

¹¹⁹ See *id.* at 1296 n.12 (quoting Alan Jenkins, *Title VI of the Civil Rights Act of 1964: Racial Discrimination in Federally Funded Programs*, in 10 NAT'L LAWYERS GUILD, CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 173, 193 (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 Chicago*, 441 U.S. 677, 696 (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.”).

¹²⁰ See 441 U.S. 677, 702–03 (1979) (“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.”).

¹²¹ *Id.* at 711 (“[N]one of the excerpts from the legislative history cited by respondents evidences any hostility toward an implied private remedy for terminating the offending discrimination. Nor is there any other 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.”).

¹²² 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?

Under *Cannon*, actors could seek relief under Title VI, as long as the discriminatory actor was a state or subfederal funding recipient.¹²³ 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 or local entities, even to private entities that receive federal funds, but not to federal agencies.¹²⁴ According to the Department of Justice, “Title VI does not apply to the Federal government. Therefore, a Federal agency cannot be considered a ‘recipient’ within the meaning of Title VI.”¹²⁵

If you are a would-be plaintiff, then, and the discriminatory party is a federal agency, Title VI will be no help. Title VI will not provide you with a private 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 action can seek judicial review.¹²⁶ 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’ 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 in courts and in the scholarly literature. Title VI necessarily implicates federal agencies, since federal agencies investigate discrimination by funding recipients¹²⁷ and cut off funds.¹²⁸

Mr. COOK. Under this title?

Mr. PELL. Yes.

Mr. COOK. Oh yes.”

441 U.S. 677 at 700 n.28.

¹²³ See Title VI Legal Manual, *supra* note 114, at 20 (“[A] recipient may be a public (e.g., a State, local or municipal agency) or a private entity.”).

¹²⁴ 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.”)

¹²⁵ *Id.*

¹²⁶ See 5 U.S.C. § 702 (“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.”).

¹²⁷ See Title VI Legal Manual, *supra* note 114, 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.”).

¹²⁸ 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*

Yet while Congress debated the relationship between the APA and § 603, it never clarified how the two statutes should interact. Instead, Congress punted the question to agencies and the courts, leaving behind scattered bits of legislative history.

As the legislative history shows, Congress did indeed contemplate that litigants would use the APA’s right of action in cases involving Title VI.¹²⁹ In debating what became § 603, Congress considered two types of challengers in two distinct postures: (1) the use of the APA as a shield, to protect funding recipients against funding cut-offs; and (2) the use of the APA as a sword, to challenge discriminatory funding decisions by federal agencies.

The first posture—with the APA 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.¹³⁰ They argued that the President could do so unilaterally, without waiting for Congressional authorization, because he already had executive power to do so.¹³¹

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 [a federal commission], and I would think it would probably be unwise to give the President of the United States that kind of power.”¹³² Instead, President Kennedy pushed for specific

Program”, 52 INDIANA L.J. 651, 664–65 n.68 (1977) (quoting VI UNITED STATES COMM’N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHT’S ENFORCEMENT EFFORT—1974 (1975) (“Although fund termination is obviously an excellent method of enforcement, it is rarely used.”).

¹²⁹ 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 (“[A]ny person aggrieved . . . may obtain judicial review of such action in accordance with chapter 7 of Title 5 [of the APA] . . .”); *see also* *Hearing on H.R. 7152 Before the House Committee on Rules*, 88th Cong. 175 (1963) (statement of Rep. 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.”).

¹³⁰ *See* 110 CONG. REC. 7,264 (1963) (statement of Sen. 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.’”).

¹³¹ *See* Abernathy, *supra* note 116, 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 [Title VI] was unnecessary because the Constitution already required what Congress proposed to do in Title VI.”).

¹³² *See* 110 CONG. REC. 7,264 (1963) (statement of Sen. Ellender) (“In a press conference on April 17, President Kennedy said: 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

legislation that could authorize, but also cabin, the executive's power to withhold funds.¹³³

The early versions of Title VI, however, failed to assuage concerns about executive overreach. Congress members 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' good behavior.¹³⁴ 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.”¹³⁵

To mollify them,¹³⁶ 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.¹³⁷ Judicial review

think it would probably be unwise to give the President of the United States that kind of power.”).

¹³³ 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”—a 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 112, at 72–3.

¹³⁴ *Hearings Before Subcommittee No. 5 of the Committee on the Judiciary House of Representatives: Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States*, 88th Cong. 1583 (1963) (statement of Rep. Dorn) (“There is no end to where this type of power could lead conferred in the hands of unelected, empire-building Government bureaucrats.”).

¹³⁵ 110 CONG. REC. 7,264 (1963) (statement of Sen. Ellender) (“This title [Title VI] constitutes blackmail, pure and simple. It is a club to hold over the heads of the States and it can be used to coerce them into almost any position the executive department wishes.”).

¹³⁶ *Hearings Before Subcommittee No. 5 of the Committee on the Judiciary House of Representatives: Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States*, 88th Cong. 1547(1963) (statement of Rep. McCulloch) (“[T]here is a need for some review by somebody somewhere.”).

¹³⁷ 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, at <https://www.nytimes.com/1964/02/08/archives/house-approves-federal-aid->

was meant to curb the powers that Title VI granted to the executive branch. But by bringing in 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.¹³⁸

Whatever its other ambiguities, § 603 guarantees judicial review to any person aggrieved by an agency decision to cut off funds.¹³⁹ The statute is two-pronged. The first half of § 603 preserves judicial review of agency funding decisions under extant miscellaneous statutes or regulations, “as may otherwise be provided by law.”¹⁴⁰ Second, if such review is not available, § 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.”¹⁴¹ Importantly, the provision expressly overrides reviewability concerns: an agency cannot assert that its

curb-in-the-rights-bill-rejects-attack.html (“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 112, at 158–59 (describing the incident with the Oren Harris amendment).

¹³⁸ 42 U.S.C. § 2000d-2.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 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 et seq.

actions are “committed to agency discretion by law.”¹⁴² The language of § 603 clearly precludes insulation from judicial review.¹⁴³

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 the legislative history. Representative Ashmore from South Carolina, for example, raised a hypothetical about a “disabled veteran” whose federal funds were “feeding his family.”¹⁴⁴ 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.¹⁴⁵

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 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.”¹⁴⁶ 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, then, 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

¹⁴² Traditionally, APA review is not available if the agency action was “committed to agency discretion by law.” 5 U.S.C. § 701. We discuss reviewability and *Heckler v. Chaney*, 470 U.S. 821 (1985), in Part III.

¹⁴³ 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, which the Supreme Court discussed in *Cannon* and *Sandoval*, has been construed as containing 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.

¹⁴⁴ *Hearings on H.R. 7152 As Amended by Subcommittee No. 5, Before the House Comm. on the Judiciary*, 88th Cong. 2,741 (1963) (statement of Rep. Ashmore).

¹⁴⁵ *Id.*

¹⁴⁶ *Hearing on H.R. 7152 to Enforce the Constitutional Right to Vote Before the House Committee on Rules*, 88th Cong. 175 (1963) (statement of Rep. Celler)

APA's right of action to protect themselves from arbitrary funding cut-offs.¹⁴⁷

Less clear is how to square § 603 and the APA in the second posture, where the APA is invoked as a sword by private litigants 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 part of § 603. After all, that part of § 603 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 mentions only terminations and agency 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, which defines action as including an agency's "failure to act."¹⁴⁸ 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 under § 602. To be sure, other APA constraints might apply, including the reviewability barrier under APA § 701(a)(2)¹⁴⁹ 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 § 603,¹⁵⁰ while the more recent

¹⁴⁷ But § 603's judicial review provision was not enough to satisfy the staunchest opponents of the Civil Rights Act. Representative Ervin from North Carolina, for example, argued that the judicial review provision was inadequate because there are "as many systems of procedure as there are varieties of Heinz's pickles," 110 CONG. REC. 5,604 (Mar. 18, 1963). He maintained that "a man does not have his full day in court if he is entitled only to a judicial review." *Hearing on H.R. 7152 to Enforce the Constitutional Right to Vote Before the House Committee on Rules, Part II*, 88th Cong. 378 (1963). Throughout the proceedings, Representative Ervin attempted to stall the Civil Rights Act by "nitpicking points" and "poking at minutiae." *See* RISEN, *supra* note 112, at 219, 103 (describing Representative Ervin's many speeches as a "strategy of attrition").

¹⁴⁸ *See* 5 U.S.C. § 551(13) (defining "agency action" as including an agency's "failure to act").

¹⁴⁹ *See* 5 U.S.C. § 701(a)(2) (barring APA review for agency actions "committed to agency discretion by law"); *see also Heckler v. Chaney*, 470 U.S. 821 (1985).

¹⁵⁰ *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

trend, as articulated in the recent case of *Garcia v. McCarthy*, runs against any such interpretation.¹⁵¹

If § 603's text and the case law interpreting it is ambiguous, then the legislative history is less so, though hardly determinative. Indeed, use of § 603 as a sword surfaces only fleetingly, and only in comments by two opponents of the Civil Rights Act, Representatives Poff and Cramer. Those comments came in a somewhat puzzling House Judiciary Committee report:¹⁵² the bulk of the report supported the Civil Rights Act, but Representatives Poff and Cramer authored a separate section that opposed the Civil Rights Act.¹⁵³ Wrote Poff and Cramer, "We regard it as our duty to protest the manner in which this legislation was handled in committee."¹⁵⁴ They proceeded to attack the Civil Rights Act, section by section—raising a litany of concerns.

Their more specific comments about the sword-like § 603 posture occurred in the Title VI section titled "Cut off the Funds."¹⁵⁵ 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 federal dockets because its right of action was a sword for plaintiffs alleging discrimination, not just a shield for plaintiffs protesting funding cut-offs.¹⁵⁶ 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

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. 21 FED. PROC., L. Ed. § 50:470 (citations 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.

¹⁵¹ See *Garcia v. McCarthy*, No. 13-CV-03939-WHO, 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.") (alteration in original).

¹⁵² *Civil Rights Act of 1963, Committee on the Judiciary Report to Accompany H.R. 1752*, H.R. REP. NO. 88-914 (1963).

¹⁵³ *Id.* at 95.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 102–07.

¹⁵⁶ *Id.* at 103.

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.¹⁵⁷

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.¹⁵⁸ 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.¹⁵⁹

While the submissions of two staunch legislative opponents are plainly insufficient to bolster the availability 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. And in so doing, Congress left a canvas that, if not entirely blank, nonetheless provided ample room for maneuver as courts entertained a growing tide of litigation challenging federal agency oversight of the nation’s civil rights laws.

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 cognate 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 and for the Blind (1983)

In the decades after enactment of the Civil Rights Act, the D.C. Circuit began filling in the gaps in the APA-and-Title-VI schema. And one of its first innovations was to use APA § 704 to channel antidiscrimination claims away from the APA.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ The Poff and Cramer comments were repeated, verbatim, in a separate part of the legislative history, but they were never again actively discussed. *See Hearings Before the Committee on the Judiciary, House Of Representatives, on HR 1752, 88th Cong. 95 (1963)*. Later courts erred, we believe, when they cited the Poff and Cramer comments as conclusive of Congressional intent. *See, e.g., Nat'l Ass'n for Advancement of Colored People v. Wilmington Med. Ctr., Inc.*, 453 F. Supp. 280, 296 (D. Del. 1978) (citing Representative Poff and Cramer’s minority view) (“Representatives Poff and Cramer issued a separate minority statement which expressed their concern . . .”).

The § 704 maneuver first surfaced in an early antidiscrimination case, *Council of and for the Blind*.¹⁶⁰ There, the D.C. Circuit, in a closely divided en banc decision, affirmed the dismissal of plaintiffs' APA-and-antidiscrimination challenge to a federal agency, concluding that plaintiffs could pursue an "adequate remedy" via alternative remedies outside the APA.¹⁶¹

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 local communities while respecting federalism principles.¹⁶² 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.¹⁶³ One such program came in 1972 as part of the Revenue Sharing Act, as overseen by the Office of Revenue Sharing (ORS).¹⁶⁴ In 1976, when an agency-only oversight and enforcement scheme proved inadequate, Congress bolstered the scheme by specifying a process for agency enforcement efforts and also a private right of action to challenge a funding recipient's discriminatory decision if the agency's process stalled.¹⁶⁵ However, and of critical importance to the

¹⁶⁰ *Council of and for the Blind of Delaware Cty. Valley, Inc. v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983)

¹⁶¹ *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.") (alteration in original).

¹⁶² 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).

¹⁶³ *Id.* (describing community tensions over federal grants and how "many black communities organized and demanded authority over the program's priorities and decision-making").

¹⁶⁴ The State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92–512, 86 Stat. 919 (1972) (codified, as amended, at 31 U.S.C. § 1221–1265).

¹⁶⁵ 709 F.2d at 1526 (D.C. Cir. 1983) ("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 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.")

case, Congress did not, as the court would put it, “expressly delineate who can be a defendant in such a suit” once ORS had refused to proceed administratively.¹⁶⁶

When ORS failed to move on their duly filed administrative complaint, 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,¹⁶⁷ charging that ORS had routinely ignored discrimination complaints and continued to fund local agencies even after finding they had discriminated.¹⁶⁸ Notably, the complaint sought an injunction against ORS to force the federal agency to comply with antidiscrimination norms, but 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.¹⁶⁹

A bare en banc majority comprising six of the eleven judges of the D.C. Circuit—and a group that included then-Judge Scalia and Judge Bork, among other judicial luminaries at the time—dismissed plaintiffs’ APA claim.¹⁷⁰ 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.¹⁷¹ After dwelling only briefly on these textual details, the majority instead put a gloss on the Act, offering up multiple out-takes from the legislative record—many of them 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.

¹⁶⁶ *Id.* at 1527.

¹⁶⁷ *Id.* at 1537 (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).

¹⁶⁸ According to the complaint, the federal agency “in two instances” conducted an investigation which “result[ed] in a determination that the recipient had transgress,” 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.*

¹⁶⁹ *Id.* at 1524–5 (“[A]ppellants asserted that the ORS [the federal agency] 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.”).

¹⁷⁰ *Id.* at 1530–35 (dismissing the APA claim on § 704 grounds).

¹⁷¹ *Id.* at 1527–28.

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.”¹⁷² 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.”¹⁷³

The majority made equally quick work of the appellants’ APA arguments. Zeroing in on § 704’s limitation on judicial review to 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.¹⁷⁴ But that finding was ultimately unnecessary: “[E]ven if . . . a nationwide suit would be more effective,” the majority found, “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.”¹⁷⁵ APA § 704 thus barred plaintiffs from seeking an injunction against the agency.¹⁷⁶

Chief Judge Spottswood Robinson III, writing for the remaining five judges—a group that included an equally illustrious group, among them then-Judge Ginsburg—concurring 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. Concluding that separate suits against fundees are “tantamount to little or no solution at all,”¹⁷⁷ 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 “grossly disproportionate” to ORS’s systematic failures to discharge its statutory duties.¹⁷⁸

¹⁷² *Id.* at 1533.

¹⁷³ *Id.* at 1529–30.

¹⁷⁴ *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.”).

¹⁷⁵ *Id.* at 1532–33 (“Therefore, even if, as appellants argue, a nationwide suit would be more *effective* than several section 124 suits [suits under a separate antidiscrimination statute], we hold that the remedy provided by Congress is *adequate* to redress the discrimination allegedly encountered by appellants.”).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1551 (C.J. Robinson, concurring in part and dissenting in part, joined by J. Skelly Wright, Wald, Mikva And Harry T. Edwards) (“I believe Section 124 [a separate antidiscrimination statute] not only does not promise a legally adequate remedy, but is tantamount to little or no solution at all.”).

¹⁷⁸ *Id.* at 1551 (C.J. Robinson, concurring in part and dissenting in part, joined by J. Skelly Wright, Wald, Mikva And Harry T. Edwards) (“Not only is Section 124

But from there, the opinion raised a more fundamental concern: the remedies afforded by a single suit against ORS and those afforded by plural suits against fundees “diverge radically.”¹⁷⁹ 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.¹⁸⁰ Because the two remedies targeted different behaviors, it was incoherent to suggest that the two were substantially equivalent, or that plural suits against funding recipients were an “adequate” substitute for Plaintiffs’ action against ORS within the meaning of § 704.

Against the majority’s claim that the suit targeted “ORS’s entire civil rights enforcement effort,”¹⁸¹ 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.¹⁸² 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 against profligate, nationwide suits. This suggestion, however, came from the losing side—more a plaintive fade-out than a concrete proposal. Plaintiffs’ APA claim was dismissed.

2. *Women’s Equity Action League* (1990)

Council of and 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 critically important civil rights suit, this time with Judge Ginsburg holding the pen.¹⁸³

litigation less efficient from the citizens' viewpoint but impractical as well. Lawsuits are expensive, time-consuming and burdensome. Realistically, the number of Section 124 actions that citizens and their organizations can be expected to bring and maintain is grossly disproportionate to the problem as appellants pose it. With an aggregate citizens effort under Section 124 hardly more than pathetic, the blight of discriminatory expenditures of revenue-sharing funds will remain unabated.”).

¹⁷⁹ *Id.* at 1550.

¹⁸⁰ *Id.* at 1552 (C.J. Robinson, concurring in part and dissenting in part, joined by J. Skelly Wright, Wald, Mikva And Harry T. Edwards) (“In my judgment, an injunction directing ORS [the federal agency] to perform its statutory functions is the only adequate remedy for the wholesale statutory violations appellants lay at ORS’ doorstep.”).

¹⁸¹ *Id.* at 1524.

¹⁸² *Id.* at 1545–46.

¹⁸³ *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990).

Women's Equity, also called the *Adams*¹⁸⁴ litigation, was a juggernaut of a case. Initiated in 1970 by Black students in segregated schools in seventeen states,¹⁸⁵ the case soon snowballed. In the case's original guise, the plaintiffs challenged federal funding for discriminatory schools, from the elementary to the university level, alleging that the Department of Health, Education, and Welfare (HEW) flouted Title VI by continuing to fund them.¹⁸⁶ 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. 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.¹⁸⁷ By the time Judge Ginsburg took the pen, the case had reached, in her words, "colossal proportions."¹⁸⁸

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 "abdicated" its responsibility to enforce Title VI and sought an injunction compelling the agency to address discrimination among schools receiving HEW funding.¹⁸⁹ In that initial guise, the case had quickly yielded a district court decree requiring HEW to initiate enforcement proceedings upon determining non-compliance with Title VI. As the case expanded, however, plaintiffs had softened their

¹⁸⁴ Throughout its twenty-year span, the case went by many names: *Adams v. Bennett*, 675 F. Supp. 668 (D.D.C. 1987); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973); and finally *Women's Equity Action League v. Cavazos*, 879 F.2d 880 (D.C. Cir. 1989), *supplemented*, 906 F.2d 742 (D.C. Cir. 1990).

¹⁸⁵ *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.")

¹⁸⁶ 879 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.")

¹⁸⁷ *See Adams v. Mathews*, 536 F.2d 417, 418 (D.C. Cir. 1976) ("The WEAL [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.")

¹⁸⁸ *Women's Equity*, 906 F.2d at 744.

¹⁸⁹ *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.'")

claims of deliberate defiance and also their insinuation of a calculated effort by the Nixon Administration to remove “the teeth of Title VI.”¹⁹⁰ In their place came a less slashing set of allegations sounding more in 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.¹⁹¹ 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.¹⁹² In 1977, the parties entered into a consent decree that largely duplicated many of the specifics of the district court’s injunctive orders.

Writing for a unanimous three-judge panel, Judge Ginsburg first summarized these and other twists and turns in nearly two decades of litigation, including all three of the case’s previous trips to the D.C. Circuit. 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. 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 non-enforcement of the Revenue Code against private “segregation academies” that had sprouted in *Brown v. Board’s* wake.¹⁹³ In *Women’s Equity*, the D.C. Circuit, with Justice 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.¹⁹⁴ 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 because enforcement of Title VI was committed to agency discretion by law under APA § 701(a)(2), a harbinger of the Supreme Court’s decision in *Heckler v. Chaney* more than ten years later.¹⁹⁵ With those issues cleared away, there remained a single question that stretched all the way back to Congress’s tortured

¹⁹⁰ *Id.* at 745 (internal citation omitted).

¹⁹¹ *Id.* at 751.

¹⁹² *Id.* at 746.

¹⁹³ *Allen v. Wright*, 468 U.S. 737, 743–44 (1984).

¹⁹⁴ *Women’s Equity*, 879 F.2d at 885 (“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.”) (citations omitted).

¹⁹⁵ *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973).

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. 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.”¹⁹⁶ 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 for situation specific” lawsuits against funding recipients, but not challenges to federal agency overseers.¹⁹⁷ The court likewise summarily rejected plaintiffs’ argument that their claims sought to correct agency failures to promptly process complaints and conduct compliance reviews, not funding cut-offs. The court rejected this argument, and with it the gravamen of the dissent in *Council of and for the Blind*: Because the consent decree’s terms pointed to fund termination if voluntary compliance were 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.

Turning to the APA, the court reached its conclusion that 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. But turning to the further question of whether *Council of and for the Blind* controlled the case, the opinion walked a tightrope. Noting that the court in *Council* had deferred to what it saw as a congressional judgment about the need for an APA remedy, the court conceded that *Council* could not control on that basis alone. After all, Title VI’s tortured legislative history hardly matched the situation in *Council*, where Congress had created a bespoke system of review, including a private right of action against entities receiving funds under the Revenue Sharing Act, with the express intent of bolstering a failed agency-only system of

¹⁹⁶ *Cannon*, 441 U.S. 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 same).

¹⁹⁷ *Women’s Equity*, 906 F.2d at 749 n.9 (noting the *Cannon* Court’s “implicit approbation of situation-specific decisions”).

review.¹⁹⁸ Instead, and unlike in *Council*, § 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.¹⁹⁹

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.²⁰⁰ "But under our precedent, situation-specific litigation affords an adequate, even if imperfect, remedy."²⁰¹ Leaning heavily, if not quite 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 and for the Blind*, the *Women's Equity* plaintiffs should file individual state- and local-level suits, rather than seeking an injunction against the federal agency at the top.²⁰²

It may seem peculiar that Judge Ginsburg, a lifelong civil rights champion, dismissed a landmark case. One possibility 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 and for the Blind*.²⁰³ But if so, then her failure even to mention *Bowen v. Massachusetts*, the Supreme Court's most recent and also its most in-depth statement on § 704 to that point, is puzzling.²⁰⁴ In *Bowen*, Massachusetts sued the Secretary of Health and Human Services 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 not equitable relief available under the APA. The *Bowen* Court concluded

¹⁹⁸ *Id.* at 751; *Council of and 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").

¹⁹⁹ *Id.* at 751 ("*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 . . .").

²⁰⁰ *Id.* at 751.

²⁰¹ *Id.* at 751.

²⁰² *Id.* at 751 ("*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 . . .").

²⁰³ *Id.* at 744.

²⁰⁴ *Bowen v. Massachusetts*, 487 U.S. 879 (1988) (sustaining plaintiffs' APA lawsuit despite a potential § 704 hurdle).

that the Tucker Act provided only “doubtful and limited relief” and so did not qualify as a sufficiently “adequate” remedy to trigger § 704.²⁰⁵ 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. . . .”²⁰⁶ If Judge Ginsburg was looking to give credence to the plaintiffs’ argument, and to revive the position of the dissent in *Council of and 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.” Likewise, the “overseer” turn-of-phrase featured repeatedly.²⁰⁷ The district court had overstepped its role: it had “cast [itself] . . . as nationwide overseer,”²⁰⁸ it had taken on “continuing, across-the-board federal court superintendence of executive enforcement”²⁰⁹ and it had enabled “across-the-board judicial supervision of continuing federal agency enforcement.”²¹⁰ Over and over, Ginsburg repeated the words “overseer,” “across-the-board,” and “supervision” to underscore the point that it was inappropriate for a D.C. district court to superintend a federal agency that itself oversaw thousands of state and local actors.

An alternative reading of these flourishes is that they helped draw into relief an important clarification that has often gone missing in *Women’s Equity*’s application in the years since. Buried in Judge Ginsburg’s discussion of Title VI’s legislative history—and quoting liberally from a footnote in *Council of and 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.”²¹¹ Soon after, a footnote bolstered the point in explaining that “recipient-specific suits against

²⁰⁵ *Id.* at 901.

²⁰⁶ *Id.* at 904.

²⁰⁷ *See, e.g., id.* at 748 (“[I]f other remedies are adequate, federal courts will not oversee the overseer.”).

²⁰⁸ *Id.* at 744.

²⁰⁹ *Id.* at 747.

²¹⁰ *Id.*

²¹¹ *Id.* at 749 (citing *Council of and for the Blind*, 709 F.2d at 1531 n.67) (removing bracketed language)

the federal funding agency are not equivalent to the action plaintiffs pursue here.”²¹² 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.

Finally, perhaps Judge Ginsburg and the panel for which she was writing legitimately saw Title VI lawsuits as a potent, albeit “imperfect,” source of relief. With an implied private right of action under Title VI securely 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, even with the obvious concerns about the arduousness and resource-intensiveness of mounting hundreds or even thousands of “situation-specific” suits against subfederal fundees, may have seemed at least plausible.

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 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, the Fair Housing Act of 1968, the Equal Credit Opportunity Act of 1974, the Americans with Disabilities Act of 1990, and the Civil Rights Act of 1991.²¹³ And 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 plaintiffs’ APA claims.²¹⁴ In a disability rights housing case, the alternative remedy was the Federal Fair Housing Amendments Act.²¹⁵ In a government employment discrimination case, the alternative remedy was Title VII.²¹⁶ As an expanding menu of civil rights guarantees has

²¹² *Id.* at 749 n.9.

²¹³ *See, e.g.*, Fair Housing Act of 1968, Pub. L. No. 90-284 (codified at 82 U.S.C. 73); Equal Credit Opportunity Act of 1974, Pub. L. No. 90-321 (codified at 15 U.S.C. § 1691 et seq.); Americans with Disabilities Act of 1990, Pub. L. No. 101-336 (codified at 42 U.S.C. § 12101); Civil Rights Act of 1991, Pub. L. No. 102-166 (codified at 1981 et seq.).

²¹⁴ *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* (“WEAL”), 906 F.2d 742 (1990)—make clear that an ECOA [Equal Credit Opportunity Act] discrimination claim filed directly against the USDA would be adequate to preclude a cause of action under the APA.”).

²¹⁵ *See Am. Disabled for Attendant Programs Today v. U.S. Dep’t of Hous. & Urban 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 HUD and trigger HUD’s mandatory duty to investigate.”).

²¹⁶ *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

created more and more collisions between American antidiscrimination law and the APA, *Women's Equity's* influence has grown, garnering citations in district and appeals court opinions in at least ten other circuits.²¹⁷

As discussed in more detail below, sometimes these new civil rights guarantees provide a robust alternative remedy. Other times they plainly do not. Sometimes courts that rely on *Women's Equity* have shown themselves attuned to the subtleties of its concern with courts playing an overseer role.²¹⁸ 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 so no overseer concerns at all.²¹⁹ And courts applying *Women's Equity* have only sometimes noted the decision's preservation of more targeted suits against concrete agency failures to enforce upon finding discrimination.²²⁰

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 in the civil rights landscape that existed when Judge Ginsburg wrote her opinion. In *Alexander v. Sandoval*, the Court found that § 601 does not support a private right of action on a disparate impact theory, leaving only disparate treatment claims, with their exacting and often fatal requirement that a plaintiff show an intent to discriminate.²²¹ We turn now to that decision—and the final piece of the puzzle of disparate limbo.

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.”)

²¹⁷ This is based on the Westlaw citing references.

²¹⁸ See, e.g., *Garcia v. McCarthy*, No. 13-CV-03939-WHO, 2014 WL 187386, at *16 (N.D. Cal. Jan. 16, 2014), *aff'd*, 649 F. App'x 589 (9th Cir. 2016) (citing *Women's Equity* and providing an in-depth discussion of adequacy and reviewability issues).

²¹⁹ See, e.g., *Garcia v. Vilsack*, 563 F.3d at 524 (citing *Women's Equity* even though 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 plaintiff's APA claim against the Department of Education for 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*).

²²⁰ See, e.g., *SAI v. Dep't of Homeland Sec.*, 149 F. Supp. 3d 99, 117 (D.D.C. 2015) (providing an in-depth discussion of *Women's Equity* and related adequacy cases, and ultimately rejecting the government's claim that § 704 barred a targeted suit by a disability rights plaintiff in a non-overseer context involving no subfederal actors); *but see Sherman v. Black*, 510 F. Supp. 2d 193, 198 (E.D.N.Y. 2007), *aff'd*, 315 F. App'x 347 (2d Cir. 2009) (providing only boilerplate citations to *Women's Equity* and neglecting to provide an in-depth discussion, and rejecting a targeted suit by plaintiff against federal actors).

²²¹ *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

3. *Sandoval* (2001)

Whether or not the original § 704 maneuver was ill-conceived, the ground has since shifted out from under it. Indeed, *Alexander v. Sandoval*, decided in 2001, renders the § 704 maneuver fundamentally incoherent. In *Sandoval*, the Supreme Court sharply limited Title VI's implied private right of action.²²² 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. *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).

While *Sandoval* did not technically overrule *Cannon*,²²³ it limited *Cannon*'s implied private right to cases arising under Title VI § 601 for intentional discrimination.²²⁴ Section 601 prohibits “discrimination” in federal programs, interpreted to mean only intentional discrimination.²²⁵ Section 602 directs agencies to enact implementing regulations, including regulations which banned “unintentional” discrimination (disparate impact). *Sandoval* found a private right of action only in § 601, and not in § 602, so the end-result of *Sandoval* was to effectively eliminate a private right of action for disparate impact.²²⁶ As a result of the *Sandoval* ruling, private plaintiffs could no longer challenge “unintentional” discrimination resulting from facially neutral policies.²²⁷

²²² See *id.* at 293 (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 right of action for § 602 regulations, including disparate impact regulations, does not exist).

²²³ *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

²²⁴ Title VI § 602 authorizes agencies to cut off funds from subfederal recipients that violate § 601's prohibition against discrimination. Section 602 also commands agencies to enact implementing regulations to enforce § 601. 42 U.S.C. § 2000d-1.

²²⁵ In a series of highly-contested cases, the Supreme Court construed Title VI's statutory language as prohibiting only disparate treatment, not disparate impact. See, e.g. *Alexander v. Choate*, 469 U.S. 287, 293 (1985) (“[T]he Court held that Title VI itself directly reached only instances of intentional discrimination.”) (citing *Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983)); *Cannon*, 441 U.S. at 280 (“[Section] 601 prohibits only intentional discrimination.”).

²²⁶ *Sandoval*, 532 U.S. 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.”).

²²⁷ 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

Sandoval effectively gutted private enforcement of disparate impact. In the years since the enactment of Title VI, federal agencies had enacted dozens of antidiscrimination regulations under § 602.²²⁸ These antidiscrimination regulations were centrally coordinated by the White House and the Department of Justice,²²⁹ and they targeted both disparate treatment and disparate impact.²³⁰ Federal agency regulations, for example, formalized the “effects” test, which tests whether a facially neutral policy generates a disparate impact.²³¹

Post-*Sandoval*, such disparate impact regulations lost their teeth. 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: recall the USDA farm loan case,

disproportionately affects protected groups. (For example, an airline policy that requires all flight attendants to have straight hair.)

²²⁸ 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.

²²⁹ See, e.g., Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 133 (2014) (“[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 (2002-2003) (“[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.”).

²³⁰ The HEW regulations created an “effects” test for discrimination, which is often synonymous with disparate impact. See 45 CFR § 80.1–80.8, PART 80 (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, CONG. RES. SERV., CIVIL RIGHTS AT SCHOOL: AGENCY ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (2019), <https://crsreports.congress.gov/product/pdf/R/R45665>.

²³¹ See *Guardians Ass’n v. Civil Serv. Comm’n of City of New York*, 463 U.S. 582, 618 (1983) (J. Marshall, 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).

where the USDA ignored internal petitions “for years.”²³² In limiting Title VI’s implied private right of action,²³³ *Sandoval* left private plaintiffs with few options, as they could no longer sue to enforce disparate impact regulations.²³⁴

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, has become a demonstrably feeble and ineffectual one.

* * *

Viewed retrospectively, *Women’s Equity* can begin to look like a case that was wrongly decided—or at the very least, like a case that has been over-cited and over-applied in cases far removed from its original posture. Judge Ginsburg may not have been able to foresee the ripple effects of *Women’s Equity*. But when we trace its citation history through the past thirty years, we find that *Women’s Equity* has created a line of APA caselaw inhospitable to civil rights, effectively scrubbing antidiscrimination from administrative law.²³⁵

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 is based. Second, and in any event, *Women’s Equity* should be limited to its proper domain, to cases involving federal supervision of subfederal programs, not direct challenges to federal agency action. Next, we describe a pair of policy interventions, to be achieved not by courts but by congressional or

²³² *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 the USDA publicly acknowledged that in the early 1980s it ‘effectively dismantled’ its civil rights enforcement apparatus.”) (citation omitted).

²³³ For more on disappearing remedies, albeit in the context of policing, see generally Leah Litman, *Remedial Convergence and Collapse*, 106 CAL. L. REV. 1477 (2018) (“[C]ourts frequently deny one remedy on the ground that another remedy is available and preferable to the remedy that a party has sought.”).

²³⁴ Of course, public enforcement is still an option: the government can sue federal and local agencies for noncompliance with Title VI. *Sandoval* did not eliminate that right of action.

²³⁵ 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 93–97 and accompanying discussion. While these cases do not all cite *Women’s Equity* (some cite its progeny instead), all used the § 704 maneuver.

executive action mandating disparate impact assessments, that would likewise help 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. *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 Judge Ginsburg's reasoning in *Women's Equity*. Judge Ginsburg had reasoned that the *Women's Equity* plaintiffs had an alternative remedy in Title VI, because at the time she decided the case, *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, because that Title VI remedy no longer exists.²³⁶

Sandoval may just be 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.²³⁷ 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.”²³⁸ In *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, Justice Alito criticized the majority for upholding a disparate impact provision in the Fair Housing Act,

²³⁶ Technically, the remedy still exists—the agency regulations promulgated under Title VI § 602 can still validly proscribe disparate impact—but plaintiffs' implied private right of action has disappeared. So in practice, the remedy is inaccessible, because *Sandoval* removed plaintiffs' right of action. 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.

²³⁷ See, e.g. Johnson, *supra* note 229, 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. 767 (2011) (writing that the past twenty years have brought about “[t]he almost absolute foreclosure of disparate impact claims” within constitutional litigation).

²³⁸ *Ricci v. DeStefano*, 557 U.S. 557, 595–96 (2009) (Scalia, J., dissenting).

writing in a four-person dissent that the majority “today makes a serious mistake.”²³⁹ 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,”²⁴⁰ and his opinion imposed a “robust causality requirement” on plaintiffs seeking to prove disparate impact under the Fair Housing Act.²⁴¹ In recent years, agencies have joined in on the attacks on disparate impact: the Department of Housing and Urban Development in 2020 finalized a rule making it more difficult for plaintiffs to prove disparate impact under the Fair Housing Act,²⁴² and the Department of Justice in 2020 attempted to strip Title VI of its disparate impact protections.²⁴³

As legal scholar Richard Primus put it, the current debate “makes things look bleak for the disparate impact standard.”²⁴⁴ And indeed, disparate impact has been weakened not just within Title VI, but also within a wide variety of statutory frameworks, from Title VII to the Fair Housing Act. Just as *Sandoval* calls for a reevaluation of § 704 in the Title VI context, the weakening of disparate impact more broadly calls for a reevaluation of the § 704 maneuver. Courts should not reflexively deploy § 704 against disparate impact plaintiffs who bring APA-and-antidiscrimination claims, whether that be under Title

²³⁹ Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519, 590 (2015) (Alito, J., dissenting).

²⁴⁰ *Id.* at 542.

²⁴¹ *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.”).

²⁴² 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 FR 60288 (Sept. 24, 2020) (“This rule revises the burden-shifting test for determining whether a given practice has an unjustified discriminatory effect. . .”).

²⁴³ See Department of Justice, Amendment of Title VI Regulations, 28 CFR Part 42, CRT Docket No. 140; AG Order No. RIN 1190-NYD (draft document) (undated), <https://context-cdn.washingtonpost.com/notes/prod/default/documents/1e57c678-5bc3-4849-b92d-3365414bc4cb/note/d9e70b41-14a0-4ed4-8a59-dcf516b71506.#page=1>; see also Laura Meckler & Devlin Barrett, *Trump Administration Seeks to Undo Decades-Long Rules on Discrimination*, WASH. POST, Jan. 5, 2021, https://www.washingtonpost.com/education/civil-rights-act-disparate-impact-discrimination/2021/01/05/4f57001a-4fc1-11eb-bda4-615aaefd0555_story.html (“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.”).

²⁴⁴ 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.”).

²⁴⁴ 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.”).

VI, Title VII, the Fair Housing Act, or other statutes. Although § 704 has been used against plaintiffs in all these contexts,²⁴⁵ the courts should rethink its use—because recent years have cast serious doubt on the “adequacy” of disparate impact provisions within various statutory frameworks.

In implementing our proposal, courts should look to *Bowen*,²⁴⁶ where the Supreme Court rejected a “restrictive interpretation” of § 704, arguing that “[a] restrictive interpretation of § 704 would unquestionably . . . ‘run counter to § 10 and § 12 of the Administrative Procedure Act.’”²⁴⁷ The *Bowen* court seemed genuinely concerned about the “adequacy” of the alternative remedy, writing that “the doubtful and limited relief available in the Claims Court is not an adequate substitute for review in the District Court.”²⁴⁸ Even though an alternative remedy existed, the Court allowed plaintiffs to pursue their APA claims anyway, because a merely hypothetical remedy would have effectively left plaintiffs with no relief.²⁴⁹

The *Bowen* interpretation of § 704 deviates significantly from the *Women’s Equity*. This deviation could be chalked up to poor lawyering, as attorneys in *Women’s Equity* never seemed to brief *Bowen*. Had it been briefed, one might imagine that the § 704 maneuver might never have gained traction as a tool to channel antidiscrimination away from the APA. Although § 704 might appropriately be used to avoid duplicative remedies, our account suggests that administrative law has gone too far—administrative law has been using § 704 to scrub away antidiscrimination despite the inadequacy of alternative remedies, contrary to what the APA demands.

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

Even if § 704 applies in some domains, there is a second implication of the account above. *Women’s Equity* should be limited to

²⁴⁵ See, e.g., *supra* notes 94–96 and accompanying discussion.

²⁴⁶ *Bowen v. Massachusetts*, 487 U.S. 879 (1988) (sustaining plaintiffs’ APA lawsuit despite a potential § 704 hurdle).

²⁴⁷ See *id.* at 904 (“A restrictive interpretation of § 704 would unquestionably, in the words of Justice Black, ‘run counter to § 10 and § 12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes.’”).

²⁴⁸ *Id.* at 901.

²⁴⁹ *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 under the Tucker Act. 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.”).

claims against subfederal actors, the primary setting raising Judge Ginsburg's concerns about "oversee[ing] the overseer." In other words, *Women's Equity* should not bar plaintiffs' APA claims when a direct challenge is made against a federal agency.

Here, a bit of clarifying terminology is in order. APA-and-antidiscrimination cases usually fall into two camps: direct or indirect challenges. Indirect challenges contest a federal agency's supervision of subfederal funding recipients. *Women's Equity* was an indirect challenge, as was *Council of and for the Blind*, and this genre of cases tends to raise overseer concerns because it asks the courts to oversee a large federal agency which itself oversees dozens of subfederal actors. But a large swath of cases falls into a second camp, which we call *direct challenges*. In direct challenges, plaintiffs allege that a federal agency's rule or policy is itself discriminatory. The allegedly discriminatory actor is not the subfederal funding recipient, but rather the federal agency itself.

This distinction illuminates the creeping overreliance on *Women's Equity*. *Women's Equity* was an indirect challenge that raised serious overseer concerns. "[F]ederal courts will not oversee the overseer,"²⁵⁰ Judge Ginsburg wrote, and she repeatedly castigated the district court for having "cast [itself] . . . as a nationwide overseer."²⁵¹ During the twenty-year litigation, the courts had applied "continuing, across-the-board federal court superintendence"²⁵² to a federal agency which itself oversaw hundreds of state and local actors—an inappropriate aggrandizement of judicial power. This overseer concern may have been a driving force behind the case. And if such concerns animate *Women's Equity*, then the case should be limited to indirect challenges involving subfederal actors.

Yet in the past thirty years of litigation, the opposite has come to pass: the courts have applied *Women's Equity* to direct challenges which raise no overseer concerns whatsoever. *Garcia v. Vilsack*, for example, was a direct challenge: the plaintiffs, minority farmers, challenged the USDA for systematically denying them loans.²⁵³ Here, the district court was not tasked with overseeing a federal agency which itself oversaw dozens of subfederal actors—the case involved exclusively federal conduct. But the court relied on *Women's Equity* anyway, citing it in its § 704 dismissal of plaintiffs' claims.²⁵⁴ In other cases like *De La Garza Gutierrez*, where plaintiffs challenged the Department of State's denial of passports to people with Hispanic

²⁵⁰ *Women's Equity*, 906 F.2d at 748 (quoting *Coker v. Sullivan*, 902 F.2d 84, 89 (D.C.Cir.1990)).

²⁵¹ *Id.* at 744.

²⁵² *Id.* at 747.

²⁵³ *Garcia v. Vilsack*, 563 F.3d 519, 524 (D.C. Cir. 2009).

²⁵⁴ *Id.* at 524.

surnames,²⁵⁵ the courts have deployed the *Women's Equity* § 704 maneuver against plaintiffs who bring direct challenges.

This is a doctrinal error because *Women's Equity* should be applied only to indirect challenges that raise overseer concerns. If the courts heed our gloss on *Women's Equity*, our intervention will clear a path for direct challenges to federal agency discrimination.

3. Potential Objections

We now address three potential objections to these doctrinal refinements. The first sounds in statutory interpretation, the other two in futility. None is defeating.

First, a critic might worry that our proposal simply imports Title VI into the APA, contravening congressional intent and impermissibly end-running a long line of case law, beginning with *Washington v. Davis*,²⁵⁶ placing 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.²⁵⁷ In addition, the proposal does not graft something foreign and unwanted on to administrative law, but rather restores principles of nonarbitrary treatment that are fundamental to the APA. Arbitrary and capricious review was designed for judges to review difficult, fact-laden records, and in cases from *Overton Park* to *State Farm*, the courts have handled

²⁵⁵ *De La Garza Gutierrez* is one of several cases that challenged a Department of State policy denying passports to U.S. citizens with Hispanic surnames born near the Mexican border. 741 F. App'x 994 (5th Cir. 2018). While *De La Garza Gutierrez* did not cite *Women's Equity*, it cited its progeny *Garcia v. Vilsack* and it used the § 704 maneuver. See *supra* note 93 and accompanying discussion.

²⁵⁶ *Washington v. Davis*, 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.”).

²⁵⁷ 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.” See, e.g.,s 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”); *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926) (“The presumption of regularity supports the official 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). *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 547 (1978), which holds that courts may not add to APA procedures, is also animated by concerns of appropriate deference to prevent “Monday morning quarterbacking.”

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 differential 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,²⁵⁸ which allows courts to reverse agency decisions as arbitrary and capricious when the agency “entirely failed to consider an important aspect of the problem.”²⁵⁹ In *Fox Television Stations*, for example, Justice Breyer cited *State Farm* when highlighting the differential impact on local broadcasters:²⁶⁰ the FCC “entirely failed to discuss this aspect of the regulatory problem,”²⁶¹ he wrote, when it ignored “the potential impact of its new policy upon local broadcasting coverage.”²⁶² 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.²⁶³

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,²⁶⁴ then the court might find

²⁵⁸ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

²⁵⁹ *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.”).

²⁶⁰ *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 . . .”).

²⁶¹ *Id.* at 560.

²⁶² *Id.* at 556.

²⁶³ *Id.* at *7 (“[T]he Court concludes that the ACOE [Army Corps of Engineers] “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.”).

²⁶⁴ In a 1978 case, for example, the Department of Health, Education and Welfare moved a hospital from the city to the suburbs. *See Nat'l Ass'n for Advancement of Colored People v. Wilmington Med. Ctr., Inc.*, 453 F. Supp. 280, 312 (D. Del. 1978). The move disproportionately impacted minority patients, who faced higher

the agency reasonable. If, however, the agency entirely overlooked disparate impact, or if it failed to consider alternatives to mitigate impact, then the court might find action to be arbitrary and capricious. 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 holds that our doctrinal interventions are insufficient. Indeed, perhaps the interventions are futile, because plaintiffs will be unable to overcome questions about the reviewability of agency decisions to enforce Title VI against funding recipients.²⁶⁵ *Heckler v. Chaney* created a presumption against reviewability of non-enforcement decisions, finding such decisions “committed to agency discretion by law.”²⁶⁶ This reviewability doctrine could thus bar judicial review for many APA-and-antidiscrimination cases, where plaintiffs seek to compel federal agency enforcement of Title VI against federal funding recipients. *Garcia v. McCarthy*, for example, relied on *Heckler v. Chaney*,²⁶⁷ as did others.²⁶⁸

This criticism has some force but is hardly fatal. For starters, *Heckler*’s presumption against reviewability would not apply to direct challenges to federal agency action, except perhaps where the asserted discrimination involves an agency’s failure to enforce a substantive antidiscrimination mandate it is charged with implementing. Indirect

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.

²⁶⁵ *Heckler v. Chaney*, 470 U.S. 821 (1985).

²⁶⁶ *Id.* at 848.

²⁶⁷ *Heckler v. Chaney* figured prominently in *Garcia v. McCarthy*, where plaintiffs, Latinx schoolchildren, challenged the EPA’s enforcement action against a California state agency. *See Garcia v. McCarthy*, No. 13-CV-03939-WHO, 2014 WL 187386, at *5 (N.D. Cal. Jan. 16, 2014), *aff’d*, 649 F. App’x 589 (9th Cir. 2016) (“The plaintiffs urge, in essence, that the broad anti-discriminatory purpose and language of 8 Title VI provide a basis for the Court to find that EPA’s enforcement action and settlement with CDPR are not within its complete discretion, despite *Heckler v. Chaney*, 470 U.S. 821 (1985), and its progeny. While the facts, as alleged, point to serious problems that the EPA could have addressed more meaningfully, the law does not allow the Court to wade into this dispute.”).

²⁶⁸ *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) (citing *Heckler v. Chaney*). And 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. & Urban Dev.*, No. CIV. A. 96-5881, 1998 WL 113802, at *3 (E.D. Pa. Mar. 12, 1998), *aff’d*, 170 F.3d 381 (3d Cir. 1999) (“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.”).

challenges to agency funding decisions, such as *Women's Equity* and *Council of and for the Blind*, raise *Heckler v. Chaney* questions because of the discretionary nature of a federal agency's supervision of subfederal actors. Direct challenges to affirmative agency actions, by contrast, do not typically 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 budget, the absence of exercise of the coercive power of the state, and longstanding norms governing prosecutorial discretion—that animate *Heckler's* presumption.

Even in indirect challenges to agency funding decisions, *Heckler* need not bar review. For starters, *Women's Equity* suits, if not blocked by § 704, may qualify for either of two *Heckler* exceptions. The first is where an agency's non-enforcement decisions rise to the level of an “abdication of its statutory responsibilities.”²⁶⁹ Indeed, it is notable here that the sole example offered by the Supreme Court in *Heckler* of an agency that has “consciously and expressly adopted a general policy” of nonenforcement was none other than the *Women's Equity* litigation.²⁷⁰ Where an agency is failing to enforce Title VI or some other funding-related mandate against subfederal actors, there is rarely only one. As in *Women's Equity*, or *Council of and for the Blind* before it and many cases after, agency failures to enforce antidiscrimination norms will often form a pattern.²⁷¹ The other *Heckler* exception is available in litigations of the sort that Judge Ginsburg envisioned in *Women's Equity* itself targeting *specific* agency failures to enforce Title VI even after a finding of discrimination. Those agency failures clear the *Heckler* hurdle under *Dunlop v. Bachowski*, decided before *Heckler* and cited approvingly by the *Heckler* Court, that rebuts the presumption of

²⁶⁹ *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).

²⁷⁰ *Heckler v. Chaney* specifically mentioned *Women's Equity* (then called the *Adams* litigation) in a footnote that criticized HEW for “consciously and expressly adopted a general policy” of nonenforcement of Title VI. 470 U.S. at 833 n.4.

²⁷¹ 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, but it could also be used to conceal patterns of agency incompetence, discrimination, or other unsavory motives. In the concurrence to *Heckler*, 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.”

470 U.S. at 848 (Marshall, J., concurring) (quoting L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 375 (1965)) (alteration in original).

unreviewability where the statute in question provides a mandate and standards against which to measure the agency's inaction.²⁷² Even beyond this pair of exceptions, *Heckler* may be losing some of its luster. In an era of political polarization, when programmatic enforcement swings wildly from one extreme to another along with partisan turnover of the White House, fewer and fewer enforcement decisions result from green-eye-shaded decisions about where to put scarce agency budget.²⁷³

A third and final potential objection sounds in a different notion of futility: Our doctrinal interventions may be a hollow hope,²⁷⁴ as courts rarely have the power to effect major social change even when enforcing substantive antidiscrimination norms, let alone indirect challenges to agency oversight of the actions of others.²⁷⁵ 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, holds 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 the environmental law requiring that agencies complete "impact statements." For now, it is worth noting that the leading version of the "hollow hope" argument argues that major civil rights victories like *Brown v. Board of Education*²⁷⁶ did little to change segregated schools,²⁷⁷ and "[t]he numbers show that the Supreme

²⁷² *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

²⁷³ See David Freeman Engstrom, *The Puzzling Presumption of Nonreviewability*, (unpublished manuscript 2021).

²⁷⁴ In Gerald 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?* 88 (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.").

²⁷⁵ *Id.* at 87 (finding that "courts contributed virtually nothing directly to civil rights in the decade when they acted alone" and arguing that the courts need support from Congress and the President, along with other social and political actors, to effect social change).

²⁷⁶ *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) (holding that racial segregation in public schools is unconstitutional).

²⁷⁷ Rosenberg, *supra* note 274, at 64–5 ("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. . . .").

Court contributed virtually *nothing* to ending segregation.”²⁷⁸ True progress came ten years later, with Congress’s passage of the Civil Rights Act and with increased executive enforcement.²⁷⁹ More concretely, it was *bureaucracies*, particularly HEW,²⁸⁰ that played a critical role in school desegregation by using funding strings to induce compliance: “[f]inancially strapped school districts found the lure of federal dollars irresistible.”²⁸¹

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.²⁸² But it remains the case that our intervention focuses judicial power on a further 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

1. A Statutory Mandate for Disparate Impact Assessments

In addition to the doctrinal implications above, we also propose two policy interventions flowing from our account: a

²⁷⁸ *Id.* (“The numbers show that the Supreme Court contributed virtually nothing to ending segregation of the public school in the Southern states in the decade following *Brown*. The entrance of Congress and the executive branch into the battle changed this.”).

²⁷⁹ *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 and 1965 ESEA [Elementary and Secondary Education Act]. Only after the passage of these acts was there any desegregation of public schools in the South.”).

²⁸⁰ *Id.* at 119–121 (“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.”).

²⁸¹ *Id.* at 121.

²⁸² According to Michael Klarman’s “backlash thesis,” *Brown* generated tremendous backlash that “propel[ed] southern politics toward racial fanaticism[.]” See 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 to politicians in the South toward the “violent suppression of civil rights demonstrations,” which were televised and which in turn “aroused previously indifferent northern whites to demand federal intervention to inter Jim Crow.”)

disparate impact assessment mandate via legislation or via the Office of Management and Budget (OMB).

Congress could enact a new civil rights law modeled on the National Environmental Policy Act of 1969 (NEPA)²⁸³ or the Regulatory Flexibility Act.²⁸⁴ Each act requires agencies to affirmatively consider differential impacts along specific dimensions.²⁸⁵

Under NEPA, agencies must publish environmental impact statements before finalizing major rules.²⁸⁶ 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.²⁸⁷ If an agency fails to publish an environmental impact statement, or if it publishes a statement that ignores the relevant issues,²⁸⁸ a court can invalidate the agency’s rule during arbitrary and capricious review.

A civil rights version of NEPA would mandate disparate impact assessments, thus pushing agencies to consider disparate impact in their rulemaking and program administration.²⁸⁹ The

²⁸³ 42 U.S.C. § 4321.

²⁸⁴ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601).

²⁸⁵ See U.S. Small Business Administration Office of Advocacy, *How to Comply with the Regulatory Flexibility Act* (Aug. 2017), <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf> (“Under the Regulatory Flexibility Act, agencies must take into account differential impacts on small business owners and consider ‘minimizing the burden on small entities.’”).

²⁸⁶ See 42 U.S.C. § 4332 (requiring agencies to publish “a detailed statement” about environmental impacts); American Bar Association, *What Is an Environmental Impact Statement?* (Dec. 17, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/teaching-legal-docs—what-is-an-environmental-impact-statement/ (“Depending on the context, agencies may be required to publish an environmental impact statement (EIS) or a shorter environmental assessment (EA). Not all agency actions require a statement.”)

²⁸⁷ *Id.*

²⁸⁸ *Id.* (“In 1970, days after the Bureau of Land Management submitted their EIS [environmental impact statement] 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.”).

²⁸⁹ Other legal scholars have made similar suggestions for civil rights laws modeled on NEPA’s environmental impact statements. 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 (2019) (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 CAL. L. REV. 1359, 1389 (2012) (proposing an “Equity Impact Assessment” to ventilate discrimination and implicit bias in federal agency

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.²⁹⁰) When legislating a NEPA-like civil rights law, Congress could include both procedural requirements (such as disparate impact assessments), and also substantive requirements (such as mandatory mitigation measures).

A NEPA-like civil rights law, then, could be powerful: it would bind agencies by statute, potentially reducing reviewability challenges for indirect actions, and it would cement disparate impact's place within arbitrary and capricious review. But as NEPA demonstrates, the devil is in the details—many scholars argue that NEPA has been ineffectual,²⁹¹ and they accuse it of creating “evermore complex and intricate requirements for processing papers.”²⁹² 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.

2. An Executive Mandate for Disparate Impact Assessments

Another way to ensure proper ventilation of differential impact would be for the President to require it via an executive mandate. The President, for instance, could order the Office of Information and Regulatory Affairs (OIRA),²⁹³ which reviews major

decision-making); Jerett Yan, *Rousing the Sleeping Giant: Administrative Enforcement of Title VI and New Routes to Equity in Transit Planning*, 101 CAL. L. REV. 1131, 1176 (2013) (proposing that the Federal Transit Administration incorporate disparate impact analyses into its Environmental Impact Statements to assess the “equitable impacts of transportation projects”).

²⁹⁰ California's Environmental Quality Act, for example, mandates mitigation: agencies must “deny approval of a project with significant adverse effects when feasible alternatives or feasible mitigation measures can substantially lessen those effects.” Cal. Pub. Res. Code § 21000; Relationship to NEPA and other statutes, Cal. Civ. Prac. Environmental Litigation § 8:3.

²⁹¹ See, e.g., H. Paul Friesema & Paul J. Culhane, *Social Impacts, Politics, and the Environmental Impact Statement Process*, 16 NAT. RESOURCES J. 339, 339 (1976) (noting that NEPA has been accused of “squandering massive amounts of time, talent, public and private moneys.”).

²⁹² See, e.g., Sally K. Fairfax, *A Disaster in the Environmental Movement*, 199 SCI. 743, 747 (1978) (calling NEPA a “disaster” that wasted the resources of the environmental movement and merely created “evermore complex and intricate requirements for processing papers.”).

²⁹³ All “significant” agency rules must pass OIRA review before enactment. See generally Office of Management and Budget, Information and Regulatory Affairs, *OIRA Pages*, <https://www.whitehouse.gov/omb/information-regulatory-affairs/>

rulemakings, to require disparate impact assessments.²⁹⁴ 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.”²⁹⁵

The “distributional consequences” and “distributional effects” language has long been included in OIRA guidance,²⁹⁶ but OIRA’s cost-benefit analysis could be refined to more directly incorporate differential impact. Under President Bush’s 2003 guidance, agencies were instructed to consider their rule’s “distributional effects.”²⁹⁷ These “distributional effects” were defined as “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).”²⁹⁸ Notably, “distributional effects” may include impacts on protected classes like “race” and “sex.”²⁹⁹ Thus, the cost-benefit framework could lend itself quite naturally to a disparate impact assessment, and a pro-civil-rights President could require it via executive order.³⁰⁰ Along these same lines, President Biden has issued

²⁹⁴ 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 (2001).

²⁹⁵ Modernizing Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies, 86 Fed. Reg. 7,223, (Jan. 20, 2021).

²⁹⁶ President Reagan established OIRA in 1980, and his executive order required 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.

46 Fed. Reg. 13,193 (Feb. 17, 1981).

²⁹⁷ *See* Office of Management and Budget, Circular A-4, Sept. 17, 2003 at 14 <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf> (“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* Office of Management and Budget *Regulatory Impact Analysis: A Primer*, https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf

²⁹⁸ *See* Office of Management and Budget, Circular A-4, Sept. 17, 2003 at 14 <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

²⁹⁹ *Id.* at 14 (“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).”).

³⁰⁰ For example, a 2011 executive order by President Obama strengthened the “distributional effects” mandate and instructed agencies to consider “values that are

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.³⁰¹

While President Biden’s executive order is a first step, it lacks one key element: enforcement by private actors. To push past 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.³⁰² If an agency’s own regulations require disparate impact assessments, then this opens 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.³⁰³ 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.

3. Illustration of 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 instance from the Obama administration: the Oakland Airport Connector, discussed earlier also

difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.” *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 18, 2011). Nevertheless, some scholars have criticized the cost-benefit framework as discouraging racial disparate impact analysis and perpetuating discrimination. See Melissa J. Luttrell and Jorge Roman-Romero, *Regulatory (In)Justice: Racism and CBA Review* 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/> (“[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.”).

³⁰¹ See Exec. Order No. 13,985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 86 Fed. Reg. 7,009 (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.”).

³⁰² Olatunde 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”).

³⁰³ See *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932) (sustaining a private action against a federal agency because the agency unreasonably failed to follow its own rule).

by Olatunde Johnson.³⁰⁴ This case illustrates both the promise—and the potential limitations—of federal agency ventilation of disparate impact.

In 2009, the Federal Transit Administration was involved in the Oakland Airport Connector, a plan to build a high-speed connector to the Oakland Airport.³⁰⁵ The proposed connector traversed one of Oakland’s historically Black neighborhoods, and it also crossed the Hegenberger corridor, an area with many low-wage jobs held by minority employees.³⁰⁶ In the lead-up to the project, community organizers raised numerous equity concerns: the connector was too expensive for low-income riders,³⁰⁷ it did not include intermediate stops for local residents,³⁰⁸ and it was an expensive \$500 million³⁰⁹ project 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.”³¹⁰ 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

³⁰⁴ See Johnson, *supra* note 302 (discussing the Oakland connector as an example of “equality directives” that push the administrative state to enforce antidiscrimination norms).

³⁰⁵ Complaint by Public Advocates, Urban Habitat Program v. Bay Area Rapid Transit, filed with the Department of Transportation (2009), https://www.publicadvocates.org/wp-content/uploads/fta_titlevi_complaint_09109final-1.pdf.

³⁰⁶ *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. . . .”).

³⁰⁷ In initial planning, the connector’s fare was set at \$2 and was comparable to other public transit options in the area. But later planning raised the connector’s fare to \$6 one way, making it too expensive for most low-income residents. See *id.* at 1 (noting that initial versions of the included two intermediate stops and a fare of \$2); see also *id.* at 9 (“[T]hey [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.”).

³⁰⁸ 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).

³⁰⁹ *Id.* at 1.

³¹⁰ *Id.* at 15.

primarily served low-income residents,³¹¹ was considering a 15 percent service cut.³¹²

After a nonprofit filed a complaint with the connector's federal funding agency, the Federal Transit Administration (FTA), the FTA launched a civil rights review.³¹³ It found that the local agency, Bay Area Rapid Transit (BART), had failed to meet multiple Title VI requirements,³¹⁴ including notifying beneficiaries about transit changes, pursuing inclusive public participation, and completing a required equity analysis mandated by law.³¹⁵ Because BART was not in compliance with Title VI, the FTA was statutorily required to withdraw federal funds.³¹⁶ The FTA funding was disbursed to other local transit

³¹¹ *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”).

³¹² *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.”).

³¹³ See Public Advocates, *BART/Oakland Airport Connector* (2020), <https://www.publicadvocates.org/our-work/transportation-justice-issues/bartoakland-airport-connector-oac/> (“In September 2009, Public Advocates filed a successful civil rights and Environmental Justice administrative complaint with the Federal Transit Administration”).

³¹⁴ See Title VI Compliance Review, Draft Report (Feb. 10, 2010), Prepared for the U.S. Department of Transportation, Federal Transit Administration, Office of Civil Rights at 19, <https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/bart-title-vi-compliance> (“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.”).

³¹⁵ Complaint by Public Advocates, *supra* note 305, at 20 (“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. FTA C 4702.1A at V-5.”); see also Peter M. Rogoff, Federal Transit Administration, Letter to BART (Jan. 15, 2010), at 1, https://www.bart.gov/sites/default/files/docs/BART_MTC_Letter_On_OAC.pdf (noting that BART had “failed to conduct an equity analysis for service and fare changes for the Project.”).

³¹⁶ See Peter M. Rogoff, Federal Transit Administration, Letter to BART (Feb. 12, 2010), at 2, https://www.publicadvocates.org/wp-content/uploads/feb_12_bart_mtc_letter.pdf, (“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 OAC [Oakland Airport Connector] 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

agencies, and the airport connector was ultimately completed without the earmarked FTA funds.³¹⁷

As the Oakland Airport Connector illustrates, federal agencies can push for ventilation of disparate impact. Yet this example also highlights the limits of this approach. Despite the increased ventilation, BART still built the connector³¹⁸ without intermediate stops and without reducing its expensive \$6 one-way fare,³¹⁹ so civil rights advocates did not see concrete substantive changes. Yet civil rights advocates' FTA complaint does seem to have spurred other improvements, since the \$70 million in federal funds was recaptured to maintain existing transit,³²⁰ and since BART instituted several process changes³²¹ including its adoption of "equity analysis" reports.³²² While ventilation alone is no guarantee, it is a start.

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.").

³¹⁷ 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/> ("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.").

³¹⁸ BART News, *BART Board Approves New Oakland Airport Connector Funding Plan* (July 22, 2010), <https://www.bart.gov/news/articles/2010/news20100722> ("In order to replace the \$70 million [withdrawn by the Federal Transit Administration], the Board approved the new funding package in a vote of 8 to 1.").

³¹⁹ See BART, *BART to OAK Service: Frequently Asked Questions*, <https://www.oaklandairport.com/wp-content/uploads/2016/05/BARTtoOAKFAQ.pdf> (setting the connector's one-way fare at \$6 and describing future plans to build an "intermediate stop").

³²⁰ See Johnson, *supra* note 302 at 1406 ("Agreeing that BART's impact analyses were insufficient, the DOT reallocated \$70 million from the airport connection project to other BART projects. The BART case illustrates the power of the administrative complaint process as a means of enforcing equality directives.").

³²¹ 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 *Appendix I: Corrective Action Plan Excerpt*, https://www.bart.gov/sites/default/files/docs/Appendix_I-L.pdf at I-1 ("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.").

³²² 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*, (July

IV. Disparate Limbo and the Making of Modern Administrative Law

To this point, our account has excavated the origins of disparate limbo. It has also 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 is a bracing conjecture: modern administrative law's empire—the steady judicialization of agency action from the 1960s onwards—was *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. Race, and 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.³²³ 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 Department of Justice in pushing civil rights law away from economic rights as a way of conceptualizing anti-discrimination and toward the project of racial integration.³²⁴ John Ferejohn and Bill Eskridge show how the EEOC worked to adapt anti-discrimination norms to account for discrimination on the basis of sex and sexual

2010), https://www.bart.gov/sites/default/files/docs/Temp_Rollback_TitleVI_ExecSum.pdf at 2 (“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.” Public Advocates, *Latest Updates: Continued Changes at BART*, <https://www.publicadvocates.org/our-work/transportation-justice-issues/bartoakland-airport-connector-oac/>.

³²³ See notes 19-26, *infra*, and accompanying text.

³²⁴ GOLUBOFF, *supra* note 26.

orientation.³²⁵ Sophia Lee shows how civil rights’ groups pressed the National Labor Relations Board to take the lead on giving meaning to equal protection.³²⁶ Jed Shugerman discusses the intersection of the federal government’s growing commitment to civil rights enforcement and civil service reform at the early Department of Justice.³²⁷ And, perhaps most relevant to our project, Joy 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.³²⁸ A further 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—think here of the lodging of primary authority to implement Title VII in federal courts rather than a toothless EEOC—shaped those norms’ subsequent elaboration.³²⁹

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 within the American system. Our account 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 interrogate agency action at the same time that they created a walled garden that shut out race. Think here of *Abbott Labs*’s presumption of reviewability,³³⁰ the

³²⁵ ESKRIDGE & FEREJOHN, *supra* note 26.

³²⁶ LEE, THE WORKPLACE CONSTITUTION, *supra* note 26; Lee, *Race, Sex, and Rulemaking*, *supra* note 26.

³²⁷ Shugerman, *supra* note 26.

³²⁸ Milligan, *Plessy Preserved*, *supra* note 26.

³²⁹ See SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010) (arguing that Congress has multiple incentives to empower private-attorney generals to enforce federal statutes, thus achieving “regulatory aims through a decentralized army of private lawyers, rather than by well-staffed bureaucracies under the president’s influence”); Engstrom, *supra* note 26; Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363 (2010).

³³⁰ *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

advent of hard look review under *Overton Park*³³¹ and *State Farm*,³³² and *Nova Scotia*'s requirement that agencies disclose and explain the scientific and other evidentiary basis undergirding their decisions.³³³ These iconic cases form the backbone of modern administrative law. These developments generally reflected a trend in the 1970s and 1980s toward greater judicial review of agency action. 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.³³⁴ 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.³³⁵

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.³³⁶

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, antidiscrimination advanced in fits and starts. The next decades saw some notable victories, like the passage of the Fair Housing Act,³³⁷ the

³³¹ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

³³² *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

³³³ *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240 (2d Cir. 1977).

³³⁴ Ronald J. Jr. Krotoszynski, *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.”).

³³⁵ See *supra* note 48 and accompanying discussion of agency capture; 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 decisionmaking 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. 1669, 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.”).

³³⁶ Krotoszynski, *supra* note 334.

³³⁷ The Fair Housing Act of 1968, Pub. L. No. 90-284 (codified at 82 U.S.C. § 73).

Supreme Court’s approval of interracial marriage in *Loving v. Virginia*,³³⁸ and other civil rights expansions.³³⁹ But these same decades also brought significant setbacks, including *Washington v. Davis*,³⁴⁰ where the 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.³⁴¹ As Kenji Yoshino has argued, it is difficult to draw a straight trendline through the antidiscrimination jurisprudence of the past decades.³⁴² 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 challenges to growing efforts by the Reagan and Bush 41 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*,³⁴³ plaintiffs asked the Supreme Court to end IRS subsidies to “segregation academies,”—and the Court pulled back.³⁴⁴ But the collision was teed up most directly in the APA-and-antidiscrimination cases. In *Council of and for*

³³⁸ *Loving v. Virginia*, 388 U.S. 1 (1967).

³³⁹ *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).

³⁴⁰ *Washington v. Davis*, 426 U.S. 229 (1976).

³⁴¹ *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).

³⁴² *See* Yoshino, *supra* note 237, at 785–6 (“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.”).

³⁴³ *See* *Allen v. Wright*, 468 U.S. 737, 756–57 (1984) (“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.”).

³⁴⁴ *See* Bell, *supra* note 19 (“*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) and standing doctrine is a key threshold for administrative law suits, it is commonly considered part of the broader administrative law terrain.

the Blind, plaintiffs asked the D.C. Circuit to end federal funding for discriminatory local actors—and the courts pulled back.³⁴⁵ And in *Women’s Equity*, plaintiffs again asked the court for protection from the discriminatory policies of a vast network of discriminatory subfederal entities and supine federal overseers—and, once again, the D.C. Circuit declined to intervene.³⁴⁶ When the muscular hard look review of administrative law collided with the more ambivalent trends in antidiscrimination 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.³⁴⁷ State-sanctioned segregation schemes were central to post-

³⁴⁵ 709 F.2d 1521.

³⁴⁶ 906 F.2d 742.

³⁴⁷ 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 3–4 (“[U]ntil the last quarter of the 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.”).

World War II government policy, from government-backed mortgage loans,³⁴⁸ to tax exemptions,³⁴⁹ highway routing,³⁵⁰ and farm subsidies.³⁵¹

One need look no further than *Overton Park* to visualize the potential backlash if hard look review had crossed the color line.³⁵² In the Supreme Court's description, the case was a decision about the routing of a highway through Memphis's celebrated Overton Park. But as Peter Strauss has lucidly written, racial dynamics inflected the political process in the decades leading up to the Supreme Court decision.³⁵³ The park itself was still segregated in the 1950s. Urban renewal often took freeway paths straight through minority

³⁴⁸ 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.’”).

³⁴⁹ 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, were also 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.”).

³⁵⁰ 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 slums and deteriorated areas.’”).

³⁵¹ See PETE DANIEL, DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN THE AGE OF CIVIL RIGHTS (2015) at 194 (“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 officials,’ adding that the USDA seemed more concerned with ‘protecting noncomplying recipients than those people whom the law seeks to protect.’”); IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2006) (documenting the calculated exclusion of minorities by many federal government programs).

³⁵² *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977).

³⁵³ Peter L. Strauss, *Citizens to Preserve Overton Park v. Volpe—of Politics and Law, Young Lawyers and the Highway Goliath*, in PETER L. STRAUSS, ADMINISTRATIVE LAW STORIES (2005).

neighborhoods, sometimes by design.³⁵⁴ Two hundred miles away in Nashville, for instance, the proposed freeway route would have separated two historically black colleges from the African American community.³⁵⁵ The routing decision and alternative parkland would have potentially had considerable implications for White and Black communities within Memphis. Curiously, 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, as American cities burned. 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.³⁵⁶

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 differential 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 be given the concerns the Supreme Court had recently articulated in *Washington v. Davis* in importing into equal protection doctrine a stringent and often fatal requirement that plaintiffs show an intent to discriminate?³⁵⁷

Because of such dynamics, judges may have opted to channel antidiscrimination away from the APA. Inside this walled garden of administrative law, judges created expansive review doctrines, but ones that would be only *selectively* applied, to broadcasters, boaters, and dolphins but not black and brown farmers, schoolchildren, or renters, hence avoiding potential backlash. The erasure of antidiscrimination, then, is not 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

³⁵⁴ See ROTHSTEIN, *supra* note 350 (discussing how state and local governments deliberately designed interstate highway routes to destroy urban African American communities).

³⁵⁵ Strauss, *supra* note 353.

³⁵⁶ Strauss, *supra* note 19.

³⁵⁷ *Washington v. Davis*, 426 U.S. 229 (1976).

see the counterfactual, and 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.³⁵⁸ 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.³⁵⁹ But it is harder to say that the same forces that sought to keep HEW small and ineffectual might also have acted on judges, particularly those enjoying Article III’s insulation from the pull and haul of politics via life tenure and salary protection.

In short, more and 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.

An 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 grand “rights-based” litigation strategy designed to point up the yawning gulf between American ideals and systemic discrimination, particularly social segregation, on the ground.³⁶⁰ So, too, the *Women’s Equity* plaintiffs, spurred by a receptive district court, sought ever more sweeping remedies and ever more systematic oversight efforts. The *Women’s Equity* plaintiffs, the argument might go, would have received a different reception had they maintained a more tractable and less sprawling focus on remedying specific failures to enforce at HEW and the Department of Labor rather than seeking omnibus judicial oversight. The APA’s erasure of race, may have, emanated from that fateful choice in litigation strategy. Yet even if civil rights groups consciously adopted a grand litigation strategy or went large in seeking systematic oversight, that does not negate the fact that the *Women’s Equity* court narrowly refused to entertain APA-style claims when

³⁵⁸ 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).

³⁵⁹ See Milligan, *Subsidizing Segregation*, *supra* note 26.

³⁶⁰ See GOLUBOFF, *supra* note 26, at 12 (2007) (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 (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).

presented, or that many subsequent courts, often facing cases in very different postures, proved all-too-willing to continue the doctrinal line.

A second objection might be that our account of judicial incentives is incorrect. By the time *Women's Equity* was decided, hard look review may have been firmly ensconced and, to the extent 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, was already on the wane.³⁶¹ This is perhaps the most forceful critique about timing, but even if judges did not fear direct congressional reversal, they may still have been concerned about the implications for the future prospects of administrative law if forced to wade into contentious race-related claims. Moreover, appellate judges may also have been worried about *executive* backlash from agencies forced to reckon with remands on race-related issues.

A third objection is that we give too much credit to administrative law, for the erasure of race stemmed less from maneuvers like § 704 and more from developments in antidiscrimination law, like the rise of the anti-classification perspective and *Washington v. Davis*.³⁶² Anti-classification, the notion that government should not classify based on race, may have pushed administrative law toward colorblindness. And *Washington v. Davis* repudiated disparate impact theory in the equal protection context. The fear, by the *Washington v. Davis* court, 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.³⁶³

³⁶¹ See DAVID A. BATEMAN, IRA KATZNELSON & JOHN S. LAPINSKI, SOUTHERN NATION: CONGRESS AND WHITE SUPREMACY AFTER RECONSTRUCTION (2018); Ira Katznelson, *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 POL. SCI. Q. 283 (1993).

³⁶² 426 U.S. 229.

³⁶³ 426 U.S. at 247–48. 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).

While these concerns about deference to government agencies certainly play into administrative law, *Washington v. Davis* was limited to constitutional review under the equal protection clause. It did not answer the question under the APA of the standard of review for differential impact by race. That was an affirmative move by the *Women's Equity* court, with long-lasting effects.

Fourth, some might object that our account has very little explanatory power compared to, say, a public choice account of judicial review, under which APA review serves to prevent agency capture by interest groups.³⁶⁴ Whether race was part of the equation or not, the argument might go, deepening concerns about political pathologies and skepticism about the ability of the system to faithfully translate public preferences into policies would have resulted in the same fortification of judicial review. Yet public choice theory is woefully underspecified when it comes to questions of race. Are minority claimants in *Women's Equity* rent-seekers or protectors of the public interest? Does their theory depend on a general theory of discrimination?³⁶⁵ Our account is arguably more consistent with a full public choice account that places judges as constrained and vigilant actors within an institutional setting.³⁶⁶

Just as other accounts have shown how abstention doctrines insulated the federal courts from contentious civil rights issues,³⁶⁷ how the standing doctrine achieved political preferences for insulating New Deal agencies from challenges,³⁶⁸ or how judges defer during war to elected branches in civil rights and liberties cases,³⁶⁹ 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 noted above, thus heightening the need for legislative or executive intervention.

Conclusion

The administrative state is coming under ever-more vociferous attacks while, at the same time, the United States is once more grappling with graphic and horrifying images of institutional racism. In

³⁶⁴ See *supra* note 48 and accompanying discussion of agency capture.

³⁶⁵ GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957).

³⁶⁶ LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

³⁶⁷ See, e.g., Irma Ascher, *Restrictions on Access to the Federal Courts in Civil Rights Actions: The Role of Abstention and Res Judicata*, 6 *FORDHAM URBAN L.J.* 481 (1978).

³⁶⁸ 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).

³⁶⁹ Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis*, 80 *N.Y.U. L. REV.* 1 (2005).

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.³⁷⁰ But for the American civil rights struggle, a more significant moment were the 1970s through the 1990s, when antidiscrimination forces shaped the path of modern administrative law. By scrubbing away 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 species of animals, 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 California schoolchildren, who were exposed to toxic chemicals far above EPA guidelines. 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 creation of disparate limbo. Administrative law ignored race, and it diverged from the American civil rights struggle at a critical juncture. But if we ignore race, we cannot understand how present-day administrative law came to be. By understanding these shortcomings, our account lights the way for administrative law to make good on its promise of bureaucratic justice for all.

³⁷⁰ See *supra* notes 16–18 and accompanying discussion.