Social Justice Conflicts in Public Law

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"Social justice" is everywhere in public law. Scholars and activists are calling for racial justice, climate justice, and health justice, among other claims. When commentators speak about multiple different social justice claims, it is often through an intersectional lens that views these claims as co-constitutive with one another, such as, "There is no climate justice without racial justice." These justice claims are important and long overdue.

But conflicts between different social justice claims—what this Article calls "justice conflicts"—are inevitable in policymaking. Justice conflicts occur when the multiple social justice claims involved in a policy issue point to opposing outcomes. The Biden Administration prioritized social justice and began to address how agencies should evaluate various social justice claims in policymaking. While an exciting first step, its initial actions did not give clear guidance to agencies and other institutions. As a result, political institutions often resolve justice conflicts through nontransparent political decisions, which ultimately harm affected political communities.

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This Article argues that political institutions should embrace "mid-level justice principles" to analyze justice conflicts. Mid-level justice principles are justice principles that apply across different policy areas and provide standing moral reasons to justify certain policy outcomes. Until now, public law has mostly embraced only procedural justice principles, such as consultation requirements and regulatory impact analyses. While helpful, these procedural measures do not provide substantive guidance about how to actually resolve justice conflicts. Mid-level justice principles fill this gap.

While political institutions have implicitly adopted some midlevel justice principles in an uneven fashion, this Article provides avenues for Congress, the President, and agencies to explicitly and consistently institutionalize mid-level justice principles. These proposals will improve policymaking and provide a mechanism to transparently analyze nonquantifiable normative values, which has thus far perplexed regulators, as well as both proponents and skeptics of cost-benefit analysis. While the Supreme Court has increasingly inserted itself as the institutional arbiter of social justice claims, the Court's assertion of its primacy to evaluate justice conflicts should be resisted on democratic and epistemic grounds. Instead, "democratic policymaking," which occurs via Congress, the President, and administrative agencies, should be the primary site to resolve justice conflicts in our society.

INTRODUCTION

In the early 2000s, the Navajo Nation petitioned the U.S. Environmental Protection Agency (EPA) for an air quality permit needed to build a new coal power plant in northeast Arizona.[1] The Clean Air Act (CAA) treats Native nations similar to states, so the EPA has authority to review any petition from Native nations for new pollution sources to ensure they fall within CAA emission standards.[2] The Navajo historically rely on coal for economic resources. Currently, the mining, production, and use of coal accounts for 42 percent of revenue in the Navajo Nation's General Fund.[3] The Navajo have also historically embraced their coal resources to promote their own sovereignty within the overarching colonial and capitalist structures they have been subjected to for most of America's history.[4] Coal-related economic activity provides thousands of well-paying jobs for Navajo members living on or near their reservation,[5] which has a 48.5 percent unemployment rate.[6] Navajo political leaders argued that the new plant, called Desert Rock, would serve a vital role in stabilizing their economy given plans to phase out existing power plants in the coming decades.[7]

1. Laura Paskus, *The Life and Death of Desert Rock*, HIGH COUNTRY NEWS (Aug. 13, 2010), https://www.hcn.org/articles/the-life-and-death-of-desert-rock [https://perma.cc/8ULK-3BSW]. For in-depth discussion of the Desert Rock saga, see DANA E. POWELL, LANDSCAPES OF POWER 113–229 (2018).

2. 42 U.S.C. § 7601(d); Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (Feb. 12, 1998) (to be codified at 40 C.F.R. pts. 9, 35, 49, 50, 81).

3. NAVAJO TRANSITIONAL ENERGY CO., 2022 OPERATIONAL REPORT 12 (2023), https://navenergy.com/wp-content/uploads/2023/06/2022-NTEC-Operational-Report-For-Web-compressed.pdf [https://perma.cc/S3LJ-PX3E].

4. ANDREW CURLEY, CARBON SOVEREIGNTY 60–91 (2023).

5. Jariel Arvin, *After Decades of Activism, the Navajo Coal Plant Has Been Demolished*, VOX (Dec. 19, 2020), https://www.vox.com/2020/12/19/22189046/navajo-coal-generating-station-smokestacks-demolished [https://perma.cc/V3T9-CQUS].

6. NAVAJO NATION DEP'T OF AGRIC., https://agriculture.navajo-nsn.gov/ [https://perma.cc/D3W3-WA9U].

7. Benjamin Storrow & E&E News, *Coal's Days in Navajo Country Are Numbered*, SCI. AM. (Apr. 8, 2019), https://www.scientificamerican.com/article/coals-days-in-navajo-country-are-numbered/ [https://perma.cc/R3SH-9K3N] (discussing the closure plans of existing power plants in or adjacent to the Navajo Nation).

In July 2008, the Bush Administration's EPA approved the Nation's air-quality permit for Desert Rock.[8] The State of New Mexico and environmental groups, including Earthjustice, appealed the EPA's approval, arguing the EPA failed to perform certain procedural requirements, including consulting with other agencies and considering how the plant would affect nearby national parks.[9] In early 2009, the EPA, now under the Obama Administration, announced that it would reconsider the permit, and then later reversed and withdrew the permit.[10] Desert Rock's fate then sat in limbo while the EPA, states, environmental groups, and the Navajo Nation continued to debate its merits. Desert Rock was finally cancelled in March 2011.[11] The Navajo Nation, EPA, and environmental groups have continued to clash in recent years as the Navajo have sought to construct new pollution sources and upgrade existing sources related to their coal activities.[12]

If one was a well-meaning EPA Administrator who cared about social justice, how should they have decided the Navajo Nation's pollution permit for Desert Rock? On one hand, the new plant would provide vital economic resources to the Nation and its citizens, who have long suffered from corporate mistreatment, racism, and colonial practices,[13] as well as promote the Nation's self-determination in setting its own socioeconomic policies.[14] On the other hand, as the effects of climate change become more pronounced, a massive new coal plant would only exacerbate local and national issues related to climate change.[15]

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8. *EPA Issues Air Permit for Desert Rock Energy Facility*, EPA (July 31, 2008), https://www.epa.gov/archive/epapages/newsroom_archive/newsreleases/8331e0972492f17c85257497005a37fb.html [https://perma.cc/DKY2-43G5].

9. *Groups Challenge EPA Over Desert Rock Air Permit*, EARTHJUSTICE (Aug. 14, 2008), https://earthjustice.org/press/2008/groups-challenge-epa-over-desert-rock-air-permit [https://perma.cc/2HJC-QTAD].

10. Timothy Gardner, *EPA Withdraws Permit for Navajo Coal Plant*, REUTERS (Apr. 28, 2009), https://www.reuters.com/article/idUSTRE53R4FL/ [https://perma.cc/8FSN-8BTX].

11. *Coal-Fired Power Plants*, DINÉ C.A.R.E., https://www.dine-care.org/coal-fired-power-plants [https://perma.cc/XV6C-5JQP].

12. *See, e.g.*, Curley, *supra* note 4, at 10–11; Keith Goldberg, *EPA Appeals Board Won't Review Navajo Coal Plant Permit*, LAW360 (Aug. 31, 2016), https://www.law360.com/environmental/articles/835060/epa-appeals-board-won-t-review-navajo-coal-plant-permit [https://perma.cc/U9VG-WY72].

13. For discussion of historical injustices towards the Navajo regarding their coal deposits, see RICHARD WHITE, THE ROOTS OF DEPENDENCY 314–90 (1984); Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENV'T L. 437, 441–65 (2010); LYNN A. ROBBINS, ENERGY DEVELOPMENTS AND THE NAVAJO NATION, *in* NATIVE AMERICANS AND ENERGY DEVELOPMENT 35–48 (Joseph G. Jorgensen, Richard O. Clemmer, Ronald L. Little, Nancy J. Owens & Lynn A. Robbins eds., 1978).

14. Curley, *supra* note 4 (discussing how control over its carbon resources allowed the Navajo Nation to expand its self-determination). The principle of self-determination is often considered part of the concept of justice. *See also* ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION 5 (2007) (arguing that the principle of self-determination is part of the concept of justice); Iris Marion Young, *Self-Determination as Principle of Justice*, 11 PHIL. F. 30, 30 (1979) (same).

15. Some grassroots Navajo environmental groups, such as Diné C.A.R.E., opposed the new coal plant due to its environmental effects. *See* Somana Yaiva, *Proposed Power Plant Faces Opposition*,

The Nation's permit saga raised multiple distinct types of social justice claims, including racial, economic, environmental, energy, and climate justice. In philosophical literature, each of these justice claims, such as racial justice or environmental justice, is known as an "applied justice" claim because the claim of what a group is owed is restricted to a specific policy domain.[16] For example, environmental justice pertains to the demands of justice only within the domain of environmental policy. In recent years, scholars and activists have created a number of different types of various applied justice claims. It is now commonplace to see calls for racial, gender, reproductive, economic, labor, health, environmental, climate, energy, and disability justice, among other applied justice claims.[17]

The Desert Rock example illustrates that specific policy issues can involve multiple applied justice claims. As scholars pointed out early in the environmental justice movement, environmental policy often concerns issues of racial justice, gender justice, and economic justice, among other claims.[18] When scholars and activists speak about policy issues that pertain to multiple applied justice claims, it is often through an intersectional lens that views the different applied justice claims as congruent with one another.[19] This intersectional lens is typified by phrases such as, "There is no climate justice without racial

NAVAJO-HOPI OBSERVER (Dec. 19, 2006), https://www.nhonews.com/news/2006/dec/19/proposed-power-plant-faces-opposition/ [https://perma.cc/3CVB-AFB8]. There has long been conflict within the Navajo Nation about how to utilize their carbon resources. *See* Curley, *supra* note 4, at 9, 154–82.

16. *See infra* Part II.A. The terms "social justice" and "justice" will be used synonymously because the Article does not consider non-social forms of justice. There is a longstanding debate regarding the domain of justice. *See generally* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (discussing the view that justice does not extend to interpersonal relations). *But see generally* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989) (critiquing this view and extending justice into family relations).

17. *See infra* Part I.A.

18. DAVID E. CAMACHO, ENVIRONMENTAL INJUSTICES, POLITICAL STRUGGLES 1 (1998) ("Much of the success of the environmental justice movement has come from the intersection of race, gender, and class groupings."); Benjamin A. Goldman, *What is the Future of Environmental Justice?*, 28 ANTIPODE 122, 126 (1996) ("[The environmental justice movement] took up where the anti-toxics movement left off: focusing attention on the injustice of pollution among urban and rural working people. It reached across race and gender lines, with many of its local and national leaders being women and people of color.").

19. It is debatable whether those adopting intersectionality always use the concept in a manner intended by Kimberlé Crenshaw in her initial formulation of the concept, whereby intersectionality refers to a mode of analysis that is sensitive to the unique and overlapping forms of oppression that are experienced by some groups in society. *See infra* Part I.B.

justice,"[20] or "There is no economic justice without reproductive justice."[21] These applied justice and intersectional claims are overdue and necessary given that law has long silenced the claims of underrepresented groups and ignored the systemic methods by which such silence actively harms them.[22]

But "justice conflicts" between these different applied justice claims are inevitable during policymaking on concrete policy issues. Justice conflicts arise when the various social justice claims involved in a policy issue point towards conflicting policy outcomes.[23] In the Desert Rock example, the permit acquisition process pitted racial and economic justice, which pointed towards granting the permit, against climate, environmental, and energy justice, which pointed towards denying the permit.[24] While scholars have recently mentioned the possibility of tension among social justice claims, few have attempted to evaluate the nature of the conflict in question or pose a framework to solve such conflicts.[25] Some scholars who have pointed out the potential for such tension

20. *See, e.g.*, David Lammy & Manish Bapna, *There Is No Climate Justice Without Racial Justice*, TIME (May 3, 2021), https://time.com/6017907/climate-emergency-racial-justice/ [https://perma.cc/CYN3-SZZV] ("[R]acial injustice and the legacy of colonialism are in fact inextricably linked with climate change."); Judy Fahys, Ilana Cohen, Evelyn Nieves, Marianne Lavelle & James Bruggers, *There Is No Climate Justice Without Racial Justice*, YES! MAG. (June 12, 2020), https://www.yesmagazine.org/environment/2020/06/12/climate-justice-racial-justice [https://perma.cc/T6CJ-6VPW] (highlighting the ways in which the racial justice and climate change movements overlap and support one another); *Featured Partner: Greenpeace*, GREEN 2.0, https://diversegreen.org/spotlight-greenpeace/ [https://perma.cc/9JCV-4Z32] ("After all, there is no climate justice without racial justice.").

21. *See, e.g.*, Dominique Derbigny Sims, *Georgia's Abortion Ban Threatens Violence and Economic Insecurity for Black Women*, GA. BUDGET & POL'Y INST. (Aug. 23, 2022), https://gbpi.org/georgias-abortion-ban-threatens-violence-and-economic-insecurity-for-black-women/ [https://perma.cc/8C5R-D6YF] ("Banning abortion perpetuates violence, impinges self-determination and economic opportunities for women and childbearing people, and worsens outcomes for Black women and children."); Josephine Kalipeni, *The Need for Paid Family Leave Didn't Start with Overturning 'Roe,'* REWIRE NEWS GRP. (Aug. 22, 2022), https://rewirenewsgroup.com/2022/08/22/the-need-for-paid-family-leave-didnt-start-with-overturning-roe/ [https://perma.cc/EX8Y-RVZA] ("Cherry-picking paid family leave while ignoring the larger socioeconomic and reproductive justice implications of the Court ruling is naive at best.").

22. *See* Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2197 (2019) (stating that intersectionality, among other theories, "tak[es] the ideas of women seriously and facilitat[es] the production of knowledge in areas that the legal academy has historically marginalized").

23. In a recent article, legal scholar Ruhan Nagra has pointed to the possibility of a "justice paradox," which occurs when different considerations within the same justice claim leads to different outcomes. *See generally* Ruhan Sidhu Nagra, *Relocating Justice*, 74 DUKE L.J. 441 (2024). A justice conflict differs from Nagra's concept of a justice paradox because a justice conflict occurs between different types of social justice claims (for example, between racial justice and climate justice), whereas a justice paradox occurs among different considerations within a single justice claim.

24. This list is not exhaustive of the applied justice claims involved in this particular justice conflict. On the tensions between the Navajo and environmentalist groups in response to the proposed coal power plant, see Felicity Barringer, *Navajos and Environmentalists Split on Power Plant*, N.Y. TIMES (July 27, 2007), https://www.nytimes.com/2007/07/27/us/27navajo.html [https://perma.cc/432T-WQJF].

25. For examples of scholars that note the potential for conflict between different social justice claims, see Elizabeth J. Kennedy, *Equitable, Sustainable, and Just: A Transition Framework*, 64 ARIZ.

have invited future theorizing regarding how to resolve such conflicts in policymaking.[26] This Article accepts that invitation.

This Article opens a conversation on whether there are principles of justice that public law can apply when grappling with how to resolve justice conflicts. In the wake of John Rawls publishing his groundbreaking *A Theory of Justice* in 1971,[27] public law scholars spent the next few decades trying to institutionalize "basic justice" principles, which attempt to establish the overall structures to distribute goods, benefits, or services within society.[28] As opposed to applied justice principles, which cover only one policy area, basic justice principles attempt to cover the entirety of social justice itself. However, given increased levels of moral pluralism and political polarization in America, by the end of the twentieth century, many scholars no longer believed that a consensus on basic justice principles was possible.[29]

L. REV. 1045, 1080 nn.192–93 (2022); Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENV'T L. REV. 1, 27 (2002) (noting the potential for "fundamental value conflict" between environmentalism and race). This is one area in which scholarship has historically lagged behind practice, as social organizing in the 1980s began to notice the blindness of environmental policy to its complex relationship with racial justice. K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977, 2018–20 (2020). For articles that describe a justice conflict in a specific policy area without using the term itself, see generally Rosser, *supra* note 13 (advocating that racial and economic justice claims of Native Tribes should be prioritized over environmental justice concerns); Richard J. Lazarus, *Pursuing Environment Justice: The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993) (discussing how environmental protection goals can create economic and racial justice problems).

26. Shelley Welton, *The Bounds of Energy Law*, 62 B.C. L. REV. 2339, 2382 (2021) ("I am eager to see scholars explore and develop the legal and policy contours of a climate change program that embraces these interconnections. But as tactically and ethically important as these new directions may be, they also pose a challenging agenda for energy law scholars . . . ."); Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 907 (2009) ("We therefore look for a method of reasoning that can reconcile conflicting interests and worldviews without privileging one over others. It is an open question whether this is possible.").

27. JOHN RAWLS, A THEORY OF JUSTICE (1971).

28. *See, e.g.*, Frank Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1972); Robert P. Burns, *Rawls and the Principles of Welfare Law*, 83 NW. L. REV. 184 (1989); Stephen M. Griffin, *Reconstructing Rawls's Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715 (1987); Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976); *see also* Lawrence. G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 427 n.19 (1993) ("These remarks owe an obvious debt to John Rawls."); Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1317 (1979) (describing Rawls's theory as "the only game in town"). Some scholars noted the limits of utilizing Rawls's theory to discern answers to concrete matters. *See* Sager, *supra*, at 420 n.11 ("Rawls himself does not imagine that the difference principle could be sufficiently crisp in its application to qualify as a 'constitutional essential' enforceable by the judiciary.").

29. *See, e.g.*, JEREMY WALDRON, LAW AND DISAGREEMENT 153 (1999) ("In the world we know, people definitely disagree—and disagree radically—about justice. Moreover their disagreement is not just about details but about fundamentals."); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 382 (2004) ("[I]nstitutional arrangements of one sort or another must be devised and evaluated even if political theory has not (yet) achieved consensus on the aims of constitutionalism, and perhaps will never do."); William K. Kelley, *Avoiding Constitutional*

Instead, public law largely embraced procedure over substance to grapple with normative values in policymaking.[30] Prominent examples include the National Environmental Policy Act (NEPA),[31] the Regulatory Flexibility Act (RFA),[32] Executive Order 12,866,[33] and the Administrative Procedure Act (APA) itself,[34] among others.[35] While procedural requirements improve policymaking,[36] they give policymakers little guidance on how they should consider substantive normative values that cannot be fully quantified, such as social justice.[37] As a result, many administrative agencies are hesitant to openly embrace such normative values. Instead, they opt to downplay their role in agency decision-making and cover their bases on technical reasoning and cost-benefit analysis (CBA).[38]

Questions as a Three-Branch Problem, 86 CORNELL L. REV. 831, 859 (2001) ("Thousands of pages of opinions, articles, and books reflect the lack of agreement on almost every constitutional question that one can imagine needs answering, as well as the lack of agreement as a matter of theory that one answer exists." (citations omitted)); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1734 (1995) ("The problem of social pluralism pervades the legal system.").

30. It is important to note that justice conflicts, and potential methods to address them, can occur at all levels of local, state, and federal policymaking. While this Article draws from examples and discussion of state justice conflicts for explanatory purposes, its primary focus will be on federal policymaking for generalizability purposes given that each local and state policymaking ecosystems have their own particular considerations that one should be cognizant of when designing legal, policy, and institutional design responses.

31. 42 U.S.C. §§ 4321–4347; *see, e.g.*, Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 239 (1973) (criticizing NEPA's lack of substantive requirements to promote environmental justice).

32. 5 U.S.C. §§ 601–612. The statute defines "small entities" as small businesses, small government jurisdictions, and some non-profit organizations. *Id.* § 601.6.

33. Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993). Cost-benefit analysis (CBA) is both procedural and substantive in nature. *See infra* Part II.B.

34. 5 U.S.C. §§ 551–559. The APA also contains substantive requirements given that agency action cannot be arbitrary or capricious. *See* Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 748, 812–18 (2023); Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1356–57 (2016).

35. Additional consultation or impact statement procedural requirements include Exec. Order No. 13,132, 64 Fed. Reg. 43255 (Aug. 10, 1999) (federalism summary impact statement); Exec. Order 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994) (environmental justice identification requirement); Exec. Order 13,175, 65 Fed. Reg. 67249 (Nov. 9, 2000) (Tribal consultation and coordination requirement). For an expanded discussion on how these statutes and executive orders have prioritized procedure over substance in policymaking, see also *infra* Part II.B.

36. Scholars have long criticized the procedural requirements of NEPA. *See* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 917–25 (2002) (discussing the historical criticism of NEPA). Some scholars criticized NEPA from the start that it lacked substantive requirements to promote environmental concerns. *See, e.g.*, Sax, *supra* note 31, at 239. For critique of administrative law's more general focus on procedures, see generally Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

37. *See infra* Part II.B.

38. Richard L. Revesz & Samantha P. Yi, *Distributional Consequences and Regulatory Analysis*, 52 ENV'T L. 53, 68 (2022) (reviewing the literature and examining major Obama Administration regulations to find that agencies "have not seriously considered distributional impacts" during regulation); Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. REG. 759, 829 (2023) ("[I]t is perhaps not surprising that public interest regulators seek safe harbor in statutory standards and the

While the Biden Administration made major strides to address the lack of guidelines concerning nonquantifiable normative values in policymaking,[39] the Administration's steps were tentative and permissive by focusing on agency process. As a result, agencies continue to lack guidance on how to actually include substantive values in policymaking.[40] Capitalizing on the prior Administration's insistence that agencies modernize regulatory analysis,[41] the growing importance of social justice in scholarship and activism, and the widespread nature of social justice conflicts in policymaking, now is the time for scholars to provide solutions for resolving justice conflicts.

This Article argues it is possible and desirable for public law to embrace substantive justice principles to evaluate and help resolve justice conflicts. To make this argument, it identifies the conceptual category of "mid-level justice principles" within the concept of justice. Mid-level justice principles are trans-substantive principles of justice that provide standing reasons to justify certain policy outcomes. Mid-level justice principles are trans-substantive because they cover multiple policy areas (and are therefore broader than applied justice principles), but they do not fundamentally structure all justice claims in society (and are therefore narrower than basic justice principles).[42] The existence of mid-level justice principles is occasionally assumed in public law, but their properties have not been examined, nor have there been attempts to explicitly institutionalize them.[43] Examples of well-known principles in public law that are

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seeming objectivity of efficiency and procedure. These agencies seldom consider substantive values in their public interest analyses *unless* such considerations are mandated by statute."); Jack Lienke, Justifying Redistributive Regulations 1, 8 (Oct. 19, 2023) (unpublished manuscript), https://policyintegrity.org/publications/detail/justifying-redistributive-regulations [https://perma.cc/HVM2-562R] (stating that, when it comes to justifying transfer rules, "agencies rarely invoke fairness as their primary justification for rulemaking—not even when remedying a perceived distributional inequity seems quite clearly to be the agency's actual goal"). Sometimes agencies include the consideration of substantive values during specific regulatory impact analyses, especially when a value is not easily quantifiable for the purposes of cost-benefit analysis. *See infra* Part II.B.

39. *See infra* Part II.C (discussing the Biden Administration's revisions to Office of Management and Budget Circular A-4).

40. *See id.* (discussing the limitations of the new Office of Management and Budget Circular A-4).

41. Memorandum for the Heads of Executive Departments and Agencies, Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 20, 2021).

42. *See infra* Part II.A (defining the category of mid-level justice principles).

43. A few public law articles assume the existence of mid-level principles, but they do not discuss the concept nor apply it to the concept of justice. *See, e.g.*, Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1355 n.106 (2018) (describing that the process of reflexive equilibrium "seeks coherence among our considered judgments about the rightness or wrongness of particular act-tokens and act-types . . . , mid-level rules or principles . . . , and the even more abstract or general theoretical considerations or commitments that shape, determine, or constitute the rules and principles . . ."); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1283 (2006) (describing that one way for courts to create judicially manageable standards "is a process of 'specification,' pursuant to which the mid-level generalities or implementing standards that emerge from adjudication perfectly express—by stating in more precise, context-specific terms—the meaning of the constitutional norm in question"); Sunstein, *supra* note 29. Mid-level principles do not constitute Sunstein's incompletely theorized agreements. *Id.* at 1739–40.

actually mid-level justice principles include procedural justice, anti-domination, capabilities theory, and restorative justice.[44] In fact, CBA itself is a mid-level justice principle. However, as currently structured, CBA suffers from multiple well-known shortcomings when policy issues involve normative values that resist quantification.[45]

The primary purpose of this Article is to determine whether public law can develop a principled framework to resolve justice conflicts and which political institutions should have the power to resolve them. In furtherance of this purpose, this Article articulates the category of mid-level justice principles and demonstrates how current and future political institutions, including presidential administrations, can use them to analyze policy involving social justice that resists quantification, such as with justice conflicts.[46] Adopting mid-level justice principles provides a consistent and principled mechanism for political institutions to qualitatively analyze important normative values, such as social justice. The Article also argues that institutions adopt and prioritize one particular mid-level justice principle, egalitarian reparative justice, due to its importance in rectifying past governmental harms and substantiating political equality in our democratic government. In the case of Desert Rock, this reparative justice principle creates strong *pro tanto* reasons that the EPA should have granted the Navajo Nation's permit, despite its harms to the climate.[47]

The current alternative to institutions adopting mid-level justice principles is the status quo, whereby institutions will continue to be without guidance on how to evaluate justice conflicts. This situation means that agencies will have to

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Only one article mentions the existence of mid-level principles of justice. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 232 (2004) (raising the potential objection regarding his arguments that "highly abstract, large-scale theories, like a theory of procedural justice, ought to be eschewed in favor of mid-level or low-level principles").

44. On procedural justice, see Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633 (2017); Solum, *supra* note 43; Tom R. Tyler, *What is Procedural Justice?*, 22 L. & SOC'Y REV. 103 (1988); John Thibaut, Laurens Walker, Stephen LaTour & Pauline Houlden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974). On restorative justice, see Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147 (2020); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. SOC. SCI. 161 (2007). On the capabilities approach, see MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT (2000); AMARTYA SEN, RESOURCES, VALUES, AND DEVELOPMENT (1984). On anti-domination, see K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2016); Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022); Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEX. L. REV. 89 (2022).

45. *See infra* Part II.B (discussing the limitations of CBA).

46. It is important to note that the normative desirability of adopting mid-level principles is, in part, based upon the desirability of the specific principle in question. I thank Dick Fallon for pressing me on this point.

47. *See infra* Part II.D. A "*pro tanto* reason" is a reason that is genuinely in favor of a certain outcome, but that reason is not decisive, meaning the *pro tanto* reason may be overridden or put aside through subsequent deliberation regarding the issue in question. For more on the different strengths that normative reasons can take, see *Reasons for Action: Justification vs. Explanation*, STAN. ENCYC. PHIL. (2009), https://plato.stanford.edu/ARCHIVES/WIN2009/entries/reasons-just-vs-expl/ [https://perma.cc/6YQ2-4U6X].

internally debate whether to adopt substantive justice principles on a case-by-case basis. This alternative is problematic for numerous reasons, including the lack of transparency to affected persons and reviewing courts, interagency variability, and the continued influence of well-funded interest groups in policymaking.

Multiple political institutions can adopt mid-level justice principles.[48] While drafting statutes, Congress can increase statutory specificity concerning which mid-level principles agencies should prioritize when promulgating regulations to implement the statute in question. In addition to providing improved guidance to agencies and explicitly communicating the importance of social justice, increased statutory specificity should also ameliorate current Supreme Court concerns that animate their expanded use of the major questions doctrine. Meanwhile, the President can coordinate and prioritize implementing mid-level justice principles.

However, due to congressional gridlock, the limits of top-down presidentialism on matters of regulatory experimentation,[49] and the vacillation between presidential administrations in caring about social justice, agencies will likely serve as the primary institution to substantiate mid-level justice principles. Given the experimental nature of structuring mid-level justice principles into policymaking, agencies should first utilize informal guidance to structure mid-level justice principles and then use stickier rules once they have settled on their best practices.[50]

Importantly, agencies institutionalizing mid-level justice principles as guidance or rules provides a structured mechanism for agencies to analyze normative values that resist quantification during regulatory review. This feature of mid-level justice principles should be appealing to both CBA proponents and detractors because it provides a principled framework to qualitatively analyze normative values that have been difficult to integrate into CBA.[51]

Despite the importance of social justice in congressional, executive, and agency policymaking, the Supreme Court has recently tried to claim primacy over social justice issues. Over the past few terms, the Supreme Court has expanded its imprint across public law, including augmenting presidential

48. *See infra* Parts III.A–C.

49. *See* Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POLI. SCI. 85, 86–97 (2015) (reviewing the literature on congressional gridlock and finding that Congress's problem-solving capacity has declined in recent years); *see also* Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 289–98 (2019) (discussing the limits of presidential control over administration); William F. West, *Presidential Leadership and Administrative Coordination*, 36 PRESIDENTIAL STUD. Q. 433, 433 (2006) (same).

50. This Article describes justice conflicts and delineates mid-level justice principles as a framework to analyze and resolve such conflicts. Therefore, it only focuses on analyzing the value of justice. Further research is necessary to determine whether the adoption of mid-level principles can also serve to evaluate other normative values that are often in policymaking.

51. *See infra* Part III.C.

removal powers,[52] revisiting the constitutional status of abortions[53] and affirmative action programs,[54] expanding the major questions doctrine,[55] and removing judicial deference to agency interpretations.[56] In doing so, the Court has inserted itself as not only the decider of *which other* institution should resolve justice conflicts, but has also increasingly determined that *the Court itself* should arbitrate justice conflicts. This move should be resisted for those who care about institutionalizing social justice given the Court's historic hostility to many social justice claims,[57] as well as lingering democratic and epistemic concerns regarding the Court. Instead, what this Article calls "democratic policymaking"—which occurs via Congress, the President, *and* administrative agencies—should reclaim its place as the primary site to resolve justice conflicts in our society.

This Article proceeds as follows. Part I traces the recent proliferation of applied social justice and intersectional justice claims in public law. It then introduces the problem of justice conflicts and provides historical and contemporary examples of justice conflicts. The Part ends by discussing how policymakers can distinguish genuine justice conflicts from "illusory justice conflicts," which are false justice dichotomies generated by social justice opponents for strategic political and jurisprudential purposes.

Part II describes the three different conceptual levels at which principles of justice can operate—applied, mid-level, and basic. The Part then describes how public law has abandoned the project of seeking substantive basic justice principles and has instead focused on procedural justice principles. While helpful, this procedural focus has left agencies without guidance on how to utilize substantive justice principles. The notable exception here is CBA, but it suffers from well-known problems when policy issues involve normative values that escape full quantification. This Part then critically engages with the Biden Administration's actions to improve normative evaluation in policymaking. While laudable, the permissive and general nature of their actions still left agencies without substantive guidance to integrate social justice principles into policymaking. This Part ends by proposing one attractive way that this can be done—political institutions should embrace substantive mid-level justice principles as standing default rules for future policymaking.

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52. *See* United States v. Arthrex, Inc., 594 U.S. 1 (2021); Lucia v. SEC, 583 U.S. 1089 (2018).

53. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

54. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023).

55. *See* Biden v. Nebraska, 600 U.S. 477 (2023); West Virginia v. EPA, 597 U.S. 697 (2022); Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758 (2021).

56. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024). The Court's actions have been so pronounced that legal scholar Mark Lemley has called the Court "the imperial Supreme Court." Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022).

57. *See infra* Part III.D.

Part III provides ways for Congress, the President, and agencies to institutionalize substantive mid-level justice principles. The Part ends by arguing that the Supreme Court's power grab to arbitrate justice conflicts should be concerning for those who care about institutionalizing social justice claims given the Court's historic hostility to such claims. The Court's increased power to resolve justice conflicts should also be normatively resisted given the comparative democratic and epistemic weaknesses of judicial policymaking compared to the dialogic and iterative nature of democratic policymaking between Congress, the President, and agencies.

Before progressing, a few caveats and explanations are necessary. First, this Article was written in a generative spirit to help identify mechanisms for those concerned with social justice to translate important social justice claims into concrete policies. Therefore, it is meant to provide guidance to well-meaning policymakers who are concerned with promoting social justice but are not sure how to translate their general concerns into concrete policy.[58]

Further, this Article is meant to open a conversation about a phenomenon that is widespread in local, state, and federal policymaking but has thus far escaped examination. Moreover, it was written recognizing that it will hopefully open a conversation, rather than purport to end one. Relatedly, it is an interdisciplinary project that touches on multiple disciplines with their own conversations about social justice. Given this interdisciplinary nature, the Article's primary purpose is to advance an overarching framework for examining justice conflicts that creates analytical space for others to push the conversation forward regarding their preferred substantive theories of social justice. Finally, this Article operates with the assumption of taking social justice scholars and activists at face value that their claims are ones regarding the content of justice as a normative concept.[59]

58. In a recent article, Daniel Farber adopts a similar perspective—a well-meaning regulator—regarding mechanisms to address forms of social inequality. *See generally* Daniel A. Farber, *Inequality and Regulation: Designing Rules to Address Race, Poverty, and Environmental Justice*, 3 AM. J.L. EQUAL. 2 (2023).

59. Other commentators have criticized social justice claims as misunderstanding the nature of justice or not properly being claims of justice. It is not fruitful to rehash those debates here. *See, e.g.*, FRIEDRICH A. VON HAYEK, LAW, LEGISLATION, AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE vii, xvi (1976) (calling social justice a "mirage" that "meant nothing at all"); Jeffrey A. Rosen, *'Social Justice Reform' Is No Justice at All*, WASH. POST (Nov. 27, 2019), https://www.washingtonpost.com/opinions/social-justice-reform-is-no-justice-at-all/2019/11/27/139dff76-109b-11ea-b0fc-62cc38411ebb_story.html [https://perma.cc/6T76-LJAY]. Another potential line of criticism is that the recent surge in discussions around social justice is akin to "rights talk," in which the language of social justice presents a rhetoric to organize and press sociopolitical claims against public and private actors, rather than a theorization of the concept of justice itself. *See generally* MARY ANN GLENDON, RIGHTS TALK (1991); Amy Bunger, *Rights Talk as a Form of Political Communication*, *in* POLITICS, DISCOURSE, AND AMERICAN SOCIETY 71–90 (Roderick P. Hart & Bartholomew Sparrow eds., 2001).

I.
SOCIAL JUSTICE CLAIMS IN PUBLIC LAW

Recently, there has been a proliferation of social justice claims in law and policy. Some of these calls for social justice occur in isolation—"Climate justice now!"[60] However, many scholars and activists adopt an intersectional lens to argue that different social justice claims must be achieved together. For example, many women's groups now proclaim, "There is no reproductive justice without racial justice."[61] Indeed, some commentators argue that different social justice claims must be related to other ones at a conceptual level.[62]

But it's not always the case that these different social justice claims will run together to support the same policy outcome. Sometimes, the various social justice claims implicated by a policy issue will create justice conflicts. While public law scholars concerned with social justice have occasionally mentioned the possibility of such conflict, few have described or evaluated the nature of these conflicts.[63] However, these justice conflicts are unavoidable as abstract claims for social justice are concretized during policymaking. This Part traces the rise of social justice claims in public law and analyzes when policy issues create justice conflicts.

A. The Proliferation of Social Justice Claims in Public Law

Social justice claims are not new. Martin Luther King, Jr.,[64] President Lyndon B. Johnson,[65] and racial equality advocates[66] adopted the language of racial justice throughout their fight for civil rights and racial equality in the mid-twentieth century. In the late 1960s, Justice Thurgood Marshall evoked the language of racial justice in a series of speeches to commemorate the ratification of the Fourteenth Amendment.[67] By the early 1970s, the language of racial

60. This slogan is the name of a global coalition of organizations working on climate justice issues. CLIMATE JUSTICE NOW!, https://www.climate-justice-now.org/ [https://perma.cc/HF9M-ENQZ].

61. *IPPF Statement on Racial Injustice*, INT'L PLANNED PARENTHOOD FED'N (June 3, 2020), https://www.ippf.org/news/ippf-statement-racial-injustice [https://perma.cc/Q67D-P4S7] ("The International Planned Parenthood Federation believes that there is no reproductive justice without racial justice.").

62. *See infra* Part I.B.

63. *See, e.g.*, sources cited *supra* note 25 (examples of scholars that note the potential for conflict between different social justice claims).

64. *See generally* Martin Luther King, Jr., *Non-Violence and Racial Justice*, 74 CHRISTIAN CENTURY 165 (1957).

65. Lyndon B. Johnson, Howard University Commencement Address (June 4, 1965) https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights [https://perma.cc/V5W5-SDY2].

66. *See generally, e.g.*, JACK MENDELSOHN, THE MARTYRS: 16 WHO GAVE THEIR LIVES FOR RACIAL JUSTICE (1966); William J. Kenealy, *Equal Justice under Law—Aid to Education*, 11 LOY. L. REV. 183 (1962).

67. Thurgood Marshall, *The Continuing Challenge of the Fourteenth Amendment*, 3 GA. L. REV. 1 (1968) (publishing Justice Marshall's speech given at the University of Georgia); Thurgood

justice began to percolate in law,[68] history,[69] and sociology,[70] among other academic disciplines. Calls for economic justice have an even older lineage going back to early twentieth-century social reformers.[71] Gender justice claims soon followed in the second half of the 1980s.[72] By the end of the 1990s, law had become immersed with claims for gender and reproductive justice.[73]

Many activists and scholars have also adopted a social justice framework without explicitly adopting the language of "social justice." This situation occurred in the nascent environmental justice community during grassroots protests against corporate dumping in minority communities in the late 1970s and early 1980s.[74] Meanwhile, law scholars lagged behind activists, not embracing the concept of environmental justice until the late 1980s and early 1990s.[75]

Marshall, *The Continuing Challenge of the 14th Amendment*, 1968 WIS. L. REV. 979 (1968) (publishing Justice Marshall's speech given at the University of Wisconsin). Not all who advocated for racial peace included conceptions of racial justice in their advocacy, such as segregationists who favored racial exclusion. *See* Yuvraj Joshi, *Racial Justice and Peace*, 110 GEO. L.J. 1325, 1337–38 (2022).

68. *See, e.g.*, Henry W. McGee, Jr., *Minority Students in Law School: Black Lawyers and the Struggle for Racial Justice in the American Social Order*, 20 BUFF. L. REV. 423 (1970).

69. *See, e.g.*, HANS L. TREFOUSSE, THE RADICAL REPUBLICANS: LINCOLN'S VANGUARD FOR RACIAL JUSTICE (1968).

70. *See, e.g.*, John Rex, *The Future of Race Relations Research in Britain: Sociological Research and the Politics of Racial Justice*, 14 RACE 481 (1973).

71. JOSEPH A. LEIGHTON, SOCIAL PHILOSOPHIES IN CONFLICT, at v (1938) ("How, in the face of an increasing concentration of economic control, can economic Justice for the common man be secured without the sacrifice of civil and spiritual liberties?"); Charles W. Pipkin, *Review*, 8 SW. POL. SOC. SCI. Q. 196, 199 (1927) (reviewing THOMAS NIXON CARVER, THE PRESENT ECONOMIC REVOLUTION IN THE UNITED STATES (1925)) ("It is inevitable that the social incentives for profit making shall become less in a democracy intent upon economic justice, and it would be well for the politics of our democracy to prepare in its special way for that revolution in industry which present-day economics hopefully forecast."); Rexford G. Tugwell, *The Economic Basis for Business Regulation*, 11 AM. ECON. REV. 643, 644 (1921). *See generally* Harry Allen Overstreet, *Philosophy and the New Justice*, 25 INT'L J. ETHICS 277 (1915).

72. *See generally* DAVID L. KIRP, MARK G. YUDOF & MARLENE STRONG FRANKS, GENDER JUSTICE (1986); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1988).

73. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY 311 (1997); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 192–93 (1990); OKIN, *supra* note 16, at 4; Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALB. L. REV. 999, 1052 (1999); Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994).

74. *See* Eileen Maura McGurty, *From NIMBY to Civil Rights: The Origins of the Environmental Justice Movement*, 2 ENV'T HIST. 301 (1997); Rachel D. Godsil & James S. Freeman, *Jobs, Trees, and Autonomy: The Convergence of the Environmental Justice Movement and Community Economic Development*, 5 MD. J. CONTEMP. LEGAL ISSUES 25, 29 (1994) (discussing how minority communities considered the issues associated with environmental justice long before the movement began using the term); Colin Crawford, *Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits*, 74 B.U. L. REV. 267, 268–69 (1994) (discussing the importance of early 1980s grassroots protests to the creation of the modern environmental justice movement); Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 9 (1995) (similarly discussing the importance of grassroots movements to the environmental justice movement).

75. *See generally, e.g.*, PETER S. WENZ, ENVIRONMENTAL JUSTICE (1988); Robert D. Bullard, *Race and Environmental Justice in the United States*, 18 YALE J. INT'L L. 319 (1993); Lazarus, *supra*

Over the past ten to fifteen years, the types of social justice claims made in legal scholarship and activism have proliferated. Climate justice entered public law around roughly 2008–2010,[76] energy justice arrived in the first half of the 2010s,[77] and health justice was first used around 2014–2015.[78] In recent years, discussions of disability justice,[79] just transitions,[80] and coastal justice,[81] among other new types of social justice claims have also sprouted up.

The frequency of social justice in legal scholarship has also increased. For example, references to gender justice went from averaging around twenty mentions per year in the mid-2000s, to around seventy in the mid-2010s, to 145 annual mentions over the past three years.[82] The increase is more pronounced for newer types of social justice claims. For climate justice, usage increased from the single digits in the mid-2000s to averaging ninety-four mentions per year over the last three years.[83] Similar patterns of increased usage apply to many types of social justice.[84]

B. Intersectional Social Justice Claims

Given the proliferation of social justice claims within legal scholarship, analyzing how these claims actually interact in policymaking has become increasingly pertinent. More and more, social justice claims are being understood through an intersectional lens. Intersectionality theory was developed by

note 25; Richard O. Brooks, *An Introduction to the Vermont Law Review Section on Developments and Issues in Environmental Law*, 13 VT. L. REV. 627, 632 (1989).

76. *See* Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197 (2010); Kirsten H. Engel, *Damages, Injunctions, and Climate Justice: A Reply to Jonathan Zasloff*, 58 UCLA L. REV. DISCOURSE 189 (2011); Maxine Burkett, *Just Solutions for Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169 (2008); Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565 (2008).

77. *See* Darren McCauley, Raphael J. Heffron, Hannes Stephan & Kirsten Jenkins, *Advancing Energy Justice: The Triumvirate of Tenets and Systems Thinking*, 32 INT'L ENERGY L. REV. 107 (2013); Lakshman Guruswamy, *Energy Justice and Sustainable Development*, 21 COLO. J. INT'L ENV'T L. & POL'Y 231 (2010).

78. *See* Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Justice*, 65 AM. U. L. REV. 275 (2015); Eric A. Friedman & Lawrence O. Gostin, *Imagining Global Health with Justice: In Defense of the Right to Health*, 23 HEALTH CARE ANALYSIS 308 (2015); Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J.L. & PUB. POL'Y 47 (2014).

79. *See* Seema Mohapatra, *Law in the Time of Zika: Disability Rights and Reproductive Justice Collide*, 84 BROOK. L. REV. 325, 352 (2019); Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 989 (2019).

80. *See* Ann M. Eisenberg, *Just Transitions*, 92 S. CAL. L. REV. 273 (2019); David J. Doorey, *Just Transitions Law: Putting Labour Law to Work on Climate Change*, 30 J. ENV'T L. & PRAC. 201 (2017).

81. *See* Marcela Gutiérrez-Graudiņš & Gregg P. Macey, *Coastal Justice: Lessons from the Frontlines*, 14 GEO. WASH. J. ENERGY & ENV'T L. 81 (2023).

82. WEB OF SCIENCE, www.webofscience.com (search results on file with author).

83. *Id.*

84. *Id.*

Kimberlé Crenshaw in a series of pathbreaking articles in 1989 and 1991.[85] First described as a metaphor[86] and then a "provisional concept,"[87] Crenshaw used the concept of intersectionality to explain the inadequacies of existing legal categories, which atomized different forms of oppression that could actually overlap among groups.[88] While Crenshaw focused on explaining how neither racial nor gender discrimination claims adequately addressed the unique harms experienced by Black women in America,[89] she recognized such oppression likely applied to other groups as well.[90]

In the following decades, intersectionality became nearly synonymous with social justice.[91] Scholars and activists who work in many different types of social justice explicitly state that they use an intersectional approach to analyze policy issues that involve their social justice claims.[92]

Within legal scholarship, claims regarding the intersectionality of social justice claims are often made in two different ways. For the first kind of claim, which I call the internal account, a commentator will state that a specific social

85. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) [hereinafter Crenshaw, *Mapping the Margins*]; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) [hereinafter Crenshaw, *Demarginalizing*]. Other feminist scholars in the 1980s also adopted frameworks similar to intersectionality without using the term. *See generally, e.g.*, AUDRE LORDE, SISTER OUTSIDER: ESSAYS AND SPEECHES (1984); ANGELA Y. DAVIS, WOMEN, RACE AND CLASS (1981); BELL HOOKS, AIN'T I A WOMAN? BLACK WOMEN AND FEMINISM (1981); Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, 30 FEMINIST REV. 61 (1988).

86. Crenshaw, *Demarginalizing*, *supra* note 85, at 149.

87. Crenshaw, *Mapping the Margins*, *supra* note 85, at 1244 n.9.

88. Crenshaw, *Demarginalizing*, *supra* note 85, at 166.

89. Crenshaw, *Mapping the Margins*, *supra* note 85, at 1270.

90. *Id.* at 1244–45.

91. Jennifer C. Nash, *'Home Truths' on Intersectionality*, 23 YALE J.L. & FEMINISM 445, 456 (2011) (arguing the concept of intersectionality was essential to "institutionalize" Black feminist thought in the academy). *See also* Carbado & Harris, *supra* note 22, at 2194–95 (surveying the different uses of intersectionality across legal scholarship). As a result of its institutionalization in the academy, intersectionality has sometimes been stretched or misinterpreted beyond Crenshaw's formulation, which Crenshaw herself has noted. Michele Tracy Berger & Kathleen Guidroz, *A Conversation with Founding Scholars of Intersectionality Kimberlé Crenshaw, Nira Yuval-Davis, and Michelle Fine*, *in* THE INTERSECTIONAL APPROACH: TRANSFORMING THE ACADEMY THROUGH RACE, CLASS, AND GENDER 65 (Michele Tracy Berger & Kathleen Guidroz eds., 2009) (quoting Crenshaw as stating that intersectionality is both "over- and underused; sometimes I can't even recognize it in the literature anymore"). *See also* Carbado & Harris, *supra* note 22, at 2199–200 (arguing that scholars often conflate intersectionality with anti-essentialism); Anna Carastathis, *The Concept of Intersectionality in Feminist Theory*, 9 PHIL. COMPASS 304, 305 (2014) ("The aim of this essay is to clarify the origins of intersectionality as a metaphor, by examining its theorization in Crenshaw's work, followed by its uptake by feminist theorists in a middle period marked by its widespread and rather unquestioned—if, at times, superficial and inattentive—usage.").

92. *See*, *e.g.*, Kennedy, *supra* note 25, at 1072; Welton, *supra* note 26, at 2390; Catherine Jampel, *Intersections of Disability Justice, Racial Justice, and Environmental Justice*, 4 ENV'T SOCIO. 122 (2018); Rachel Rebouché, *How Radical Is Reproductive Justice? Remarks for the FIU Law Review Symposium*, 12 FIU L. REV. 9, 16 (2016).

justice claim encompasses other social justice claims as well. For example, some environmental and energy justice advocates say that the concept includes climate justice, racial justice, and gender justice, among others.[93] For the internal claim, the specific social justice claim is intersectional because it includes the other types of social justice claims.

For the second kind of claim, which I call the external account, the commentator will claim that a specific social justice claim cannot be achieved without another social justice claim also being achieved. Take, for example, the popular statement in the reproductive justice community, "There is no reproductive justice without racial justice." Framed in this manner, racial justice does not become a component of reproductive justice, but rather their fates run together because they are theoretically inextricable.

The correctness or coherence of the internal or external account is beyond the scope of this Article.[94] Rather, this Article is interested in the fact that on both accounts, the different social justice claims are either definitionally intertwined with each other (internal account) or run together (external account). Both accounts describe the various social justice claims as agreeing with one another or pointing in the same direction as to the desired policy objectives and outcomes. However, once you drill down into discrete policy issues, different social justice claims do not always point towards similar policy outcomes. Sometimes they conflict with each other.

C. The Problem of Justice Conflicts

Sometimes, policy issues arise where different social justice claims will not run together. By "not run together," I mean that analyzing the policy issue in question according to one or another type of social justice claim will suggest different policy outcomes that cannot be reconciled. As a result, the chosen policy will change depending on which social justice claim is prioritized. I call this a justice conflict. To speak in the abstract, a justice conflict is as follows:

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93. *See, e.g.*, Gregory Miao, Katie Hannon Michel & Katie Yuen, *A Health Justice Agenda for Local Governments to Address Environmental Health Inequities*, 50 J.L. MED. & ETHICS 758, 765 (2022) ("When so construed, environmental justice work can include a broad range of policies to advance social and racial justice."); Rebecca Maung & David N. Pellow, *Environmental Justice*, *in* HANDBOOK OF ENVIRONMENTAL SOCIOLOGY 35, 42 (Beth Schaefer Caniglia, Andrew Jorgenson, Stephanie A. Malin, Lori Peek, David N. Pellow & Xiaorui Huang eds., 2021) ("Critically, this work revolves around the idea that racial justice struggles *are* environmental struggles, and vice versa.") (internal citations omitted).

94. Scholars in other disciplines are better situated to address these theoretical questions. Indeed, there is a large literature discussing the problems concerning the definition, scope, and methods of intersectionality. For discussions of the tensions involved in adopting an intersectional lens to study power relations, see, for example, Carbado & Harris, *supra* note 22, at 2195–96 n.14 (canvassing the various scholarly debates about intersectionality); Carastathis, *supra* note 91, at 307–11; Maria Carbin & Sara Edenheim, *The Intersectional Turn in Feminist Theory: A Dream of a Common Language?*, 20 EUR. J. WOMEN'S STUD. 233, 235–41 (2013); Sirma Bilge, *Recent Feminist Outlooks on Intersectionality*, 225 DIOGENES 58, 59–65 (2010); Jennifer C. Nash, *Re-thinking Intersectionality*, 89 FEMINIST REV. 1, 4–13 (2008).

Assume that Outcomes *X* and *Y* are opposing outcomes that cannot be reconciled.

1) Policy Issue *P* involves Social Justice Claims *A* and *B*.

2) If Claim *A* is applied to *P*, then Outcome *X* should be adopted.

3) If Claim *B* is applied to *P*, then Outcome *Y* should be adopted.

4) Given that Outcomes *X* and *Y* are opposing outcomes, Policy Issue *P* cannot be solved by appealing to Social Justice Claims *A* and *B* because each one advocates for the adoption of a different Outcome (*X* and *Y*, respectively).

One prominent historical example of a justice conflict took place during the labor unionization push in the early twentieth century and resulting union mergers in the mid-twentieth century. Early twentieth century labor unions had different strategic ways to increase membership.[95] On one hand, unions could expand membership to women and minority groups, which would further racial and gender justice goals. However, this strategy ran the risk of reducing the number of White men who would join because racist and misogynist White men might in turn reject unions as an organizing strategy or create competing exclusionary unions. This outcome would hinder the economic justice goals of the union, given that White men were the numerically dominant group in the labor force at the time.

On the other hand, unions could let local union chapters decide for themselves whether to exclude women and minorities, allowing the national union to silently acquiesce to racial and gender discrimination among its chapters. This position would consolidate their White male membership to improve their economic justice goals at the cost of harming gender and racial justice goals. Thus, labor unions were left with a choice—expand membership to improve racial and gender justice or restrict membership to maximize economic justice. In the early twentieth century, unions differed on which social justice claims to prioritize. However, in the 1950s, the biggest union in America, the newly merged AFL-CIO, chose the latter strategy to prioritize economic justice over racial and gender justice and subsequently dominated the union landscape in the ensuing decades.[96]

Presently, environmental and energy law are rife with justice conflicts given the massive socioeconomic restructuring that is needed to reduce our reliance on fossil fuels. In addition to various Native American Tribes continuing to seek EPA permits for energy production,[97] the transition to renewable resources is creating justice conflicts not previously contemplated. One contentious justice conflict in climate policy is determining the net metering rate,

95. Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1771–79 (2001) (discussing the contrasting organizing strategies of the Knights of Labor and International Workers with the strategies of the AFL and CIO).

96. *Id.* at 1779–84.

97. *See supra* Introduction.

or the monetary rate at which customers who produce excess energy from their solar panels sell that excess energy back to the utilities company. Initially, many states set the net metering rate at the full retail rate as an incentive for individuals to add solar panels. This meant that customers sold their excess energy to the utilities company at the same rate at which they bought the energy. Setting the net metering rate at the retail rate proved to be a significant incentive for solar adoption.[98]

However, given that solar panels continue to be expensive to purchase and install, solar panel installation has been heavily skewed among wealthy, White, and home-owning individuals.[99] While this distributional skew is concerning by itself, the downstream economic effect of this problem is often that utilities companies are making less money from these individuals and therefore need to increase prices on customers who are unable to install solar panels.[100] Prominently, the California Utilities Commission found that pegging its net metering rate to the retail rate "negatively impacts non-participating ratepayers" and "disproportionately harms low-income ratepayers."[101] In effect, lower-income, minority, and renting individuals were subsidizing the reduced utility payments of those wealthier, Whiter, and home-owning individuals who installed solar panels.[102] Recently, multiple state public utilities commissions,

98. Daniel C. Matisoff & Erik P. Johnson, *The Comparative Effectiveness of Residential Solar Incentives*, 108 ENERGY POL'Y 44, 44 (2017).

99. For an in-depth look at the income and demographic trends of those who adopt solar panels, see generally Sydney Forrester, Galen Barbose, Eric O'Shaughnessy & Naïm Darghouth, *Residential Solar-Adopter Income and Demographic Trends: 2024 Update, Lawrence Berkeley National Laboratory* (Dec. 2024), https://eta-publications.lbl.gov/sites/default/files/2024-12/2024_solar-adopter_income_trends_final_v2.pdf [https://perma.cc/GZU2-YKTB]. *See also* Gillian B. White, *Why Should Only the Wealthy Get Solar Panels?*, ATLANTIC (July 26, 2016), https://www.theatlantic.com/business/archive/2016/07/dc-solar-panels/493106/ [https://perma.cc/8E9M-JNLZ].

100. *See* Michelle Cooke, *Proposed Decision*, PUB. UTIL. COMM'N 2–3 (Nov. 10, 2022), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M498/K526/498526033.PDF [https://perma.cc/B6RN-DE63]; Terri Hendry, *Nevada PUC Chair Speaks Out on Solar Decision*, NEWS 4 (Mar. 4, 2016), https://mynews4.com/news/local/pucn-chair-speaks-out-on-solar-decision [https://perma.cc/C3PQ-ZVR8].

101. Cooke, *supra* note 100, at 2–3.

102. Hendry, *supra* note 100 (quoting the Nevada Public Utilities Chairman as saying, "If I reduce the burden for one individual or group of people, I have to increase it for someone else. It is that simple").

including Hawaii,[103] Nevada,[104] Arizona,[105] and California,[106] have lowered their net metering rate below the retail rate. The net metering issue creates a justice conflict between maximizing environmental and climate justice and balancing these with economic and racial justice.

Another justice conflicts site in environmental and energy law occurs when policymakers determine how the benefits and burdens of our collective transition away from fossil fuels should be distributed. Labelled "Just Transitions" law,[107] one difficult issue is whether certain groups should get priority for new renewable energy jobs and training programs.[108] Some advocate that those workers who have become unemployed as a result of the transition should be prioritized, such as coal mining and production workers.[109] New Mexico and Colorado have followed this path.[110] Other states, such as Hawaii and New York, have instead prioritized improving the lives of those groups who have been most harmed by our carbon economy, such as low-income communities who live near energy production facilities and groups that may not receive a fair share of the economic benefits from a green economy.[111] This question of prioritization generates a complex justice conflict involving racial, energy, environmental, gender, and labor justice claims, among others.

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103. Herman K. Trabish, *Hawaii PUC Chair Defends Landmark Decision to End Retail Rate Net Metering*, UTIL. DRIVE (Oct. 26, 2015), https://www.utilitydive.com/news/hawaii-puc-chair-defends-landmark-decision-to-end-retail-rate-net-metering/407984/ [https://perma.cc/K8U5-NDH6].

104. Julia Pyper, *Nevada Regulators Eliminate Retail Rate Net Metering for New and Existing Solar Customers*, GREENTECH MEDIA (Dec. 23, 2015), https://www.greentechmedia.com/articles/read/nevada-regulators-eliminate-retail-rate-net-metering-for-new-and-existing-s [https://perma.cc/UJ5S-W4GZ].

105. Julia Pyper, *Arizona Vote Puts an End to Net Metering for Solar Customers*, GREENTECH MEDIA (Dec. 21, 2016), https://www.greentechmedia.com/articles/read/arizona-vote-puts-an-end-to-net-metering-for-solar-customers [https://perma.cc/8LQJ-USX2].

106. Emil Barth, *California Ends Retail Rate Net Metering for Distributed Generation; Adopts Lower Compensation Through New "Net Billing" Program*, BAKER BOTTS, https://www.bakerbotts.com/thought-leadership/publications/2023/april/2022-energy-memo_california-ends-retail-rate-net-metering-for-distributed-generation [https://perma.cc/J6ES-8DGQ]. However, given the agency problems within the corporate governance structure of public utilities, there are reasons to doubt the sincerity of these concerns. *See generally* Aneil Kovvali & Joshua C. Macey, *Hidden Value Transfers in Public Utilities*, 171 U. PA. L. REV. 2129 (2023).

107. *See* sources cited *supra* note 80.

108. *See generally* Kennedy, *supra* note 25; Eisenberg, *supra* note 80.

109. BlueGreen Alliance, for example, is a non-profit that seeks to unite blue collar workers and environmentalists in our shift to a greener economy. The Alliance has prioritized the interests of coal workers when analyzing state measures to transition our economy away from carbon resources. *Fact Sheet: Lessons Learned from the Colorado Office of Just Transitions*, BLUEGREEN ALL. (Nov. 9, 2023), https://www.bluegreenalliance.org/resources/fact-sheet-lessons-learned-from-the-colorado-office-of-just-transition/ [https://perma.cc/D9Y8-8R66].

110. Sam Ricketts, Rita Cliffton, Lola Oduyeru & Bill Holland, *States Are Laying a Road Map for Climate Leadership*, CTR. AM. PROGRESS (Apr. 30, 2020), https://www.americanprogress.org/article/states-laying-road-map-climate-leadership/ [https://perma.cc/EQB9-LJYH] (discussing how new laws in Colorado and New Mexico provide subsidies and job retraining for communities affected by coal plant closures).

111. *Id.*

Many commentators who advocate for social justice claims discuss policymaking at a very high level of granularity. For example, some climate justice scholars seek to determine the holistic legal, political, and technical solutions at the state, national, or international level that are needed to transition our economy away from fossil fuels.[112] This high level of structural thinking is important if we are to transition an entire integrated socioeconomic system that has existed for over a century. It is also a type of analysis that academics are in a unique position to address given our vocation and expertise.

However, such a high level of abstraction obscures the sharp edges down below.[113] It is easy to abstract away from conflicts within a policy issue if, on the whole, different social justice claims *tend to* run together over the entire policy domain (in this case, climate policy). But when policymaking is analyzed at the more granular level of individual policy choices, justice conflicts become unavoidable.[114] In this situation, when abstract social justice concerns are crystallized into a specific policy outcome, the policymaker is put in an unenviable position of choosing between social justice claims. While public law scholars have extensively discussed the fact that policymakers must make tradeoffs *between different* normative values, such as efficiency and fairness,[115] the literature has thus far paid less attention to the fact that tradeoffs also exist *within* normative values. In this case, justice conflicts present difficult tradeoffs within the concept of social justice.

Finally, it is important to note that commentators who adopt the internal and external accounts are right that social justice claims will often point toward the same outcome. While this Article advocates that scholars and practitioners should be mindful of the potential for justice conflicts and analyze them when

112. *See, e.g.*, Shelley Welton & Joel Eisen, *Clean Energy Justice: Charting an Emerging Agenda*, 43 HARV. ENV'T L. REV. 307 (2019); Uma Outka, *Fairness in the Low-Carbon Shift: Learning from Environmental Justice*, 82 BROOK. L. REV. 789 (2017); J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENV'T L. 363 (2010).

113. *Cf.* Curley, *supra* note 4, at 11 (discussing how a critical grant reviewer for his research project on the relationship between the Navajo and coal "wanted . . . a universal claim about the experience of coal work . . . while ignoring or downplaying the messy details about the place in order to arrive at some generalizable sociological facts").

114. Martha Minow & Joseph William Singer, *In Favor of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice*, 90 B.U. L. REV. 903, 913 (2010) (discussing how judicial opinions in hard cases should "acknowledge the messiness of the situation, the complexity of the relevant values and the fact that they do not easily sit together but pull us in opposing directions").

115. *See, e.g.*, Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1429 (1996) ("In a world of limited resources and pluralist political action, the tradeoff between efficiency and justice is a central consideration for public institutions."); *see also* Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633, 693–95 (2018); Minow & Singer, *supra* note 114, at 904–09; Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 70–71 (1983). I thank Cristina Rodríguez for pushing me to crystallize this point. Sometimes federal rules explicitly call for the substantiation of multiple normative values, which directly force issues related to balancing and tradeoffs. *See, e.g.*, FED. R. CIV. P. 1 ("Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action . . . .").

they are present, not all policy areas that involve social justice necessarily involve a justice conflict. Consider the Dakota Access Pipeline project, which sought to build a 1,100 mile underground pipeline to transport oil from North Dakota to Illinois.[116] The pipeline passed under the Missouri River, the only water supply for the Standing Rock Sioux Tribe, which led to sustained protests and lawsuits by the Tribe and its allies.[117] As of October 2024, the easement had not been granted for this section of the pipeline.[118] In the case of Standing Rock, the different social justice claims—economic, racial, environmental, and climate justice—point to the same outcome of denying the easement for this stretch of the pipeline.[119] On many policy issues that concern matters of social justice, there will be no justice conflict.

D. Genuine vs. Illusory Justice Conflicts

Because of the widespread nature of justice conflicts, it is important to delineate a genuine justice conflict from an "illusory justice conflict," or a conflict that appears like a justice conflict but can actually be resolved without appealing to higher-level principles, i.e., mid-level or basic justice principles.[120] Properly recognizing genuine and illusory justice conflicts is important for two reasons. The first reason is to mitigate false negatives. Given that much of public policy concerns allocating goods, resources, and privileges between different groups in society, policymaking conflicts could in fact be genuine justice conflicts even if policy actors do not use the language of social justice. This situation is likely to occur when policy actors avoid using the language of "social justice" for political or ideological reasons.[121]

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116. *The Dakota Access Pipeline*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, https://eelp.law.harvard.edu/2017/10/dakota-access-pipeline/ [https://perma.cc/8U53-WVJH].

117. Rebecca Hersher, *Key Moments in The Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017), https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight [https://perma.cc/3YUJ-9M92]. For an in-depth discussion of the protests, see generally NICK ESTES, OUR HISTORY IS THE FUTURE (2019).

118. *The Dakota Access Pipeline*, *supra* note 116.

119. *See generally, e.g.*, Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction*, 112 CALIF. L. REV. 103 (2024) (discussing how Native Nations' embrace of restorative justice dispute mechanisms is also improving criminal and Tribal justice in Native territory).

120. Similar issues regarding delineating "real" and "false" conflicts come up in choice of law. *See generally* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448 (1999); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1 (1989).

121. For example, there is active debate within conservative politics about whether conservative ideology should embrace a unique theory of social justice or reject the value of social justice. *Compare* Ryan T. Anderson, *Conservatives Do Believe in Social Justice. Here's What Our Vision Looks Like.*, HERITAGE FOUND. (Mar. 20, 2017), https://www.heritage.org/civil-society/commentary/conservatives-do-believe-social-justice-heres-what-our-vision-looks [https://perma.cc/HD7Y-CZ8J], *and* Arthur C. Brooks, *A Conservative Social Justice Agenda*, AM. ENTER. INST. (Jan. 31, 2014), https://www.aei.org/special-features/a-conservative-social-justice-agenda/ [https://perma.cc/4GHZ-DFUT], *with* Hayek, *supra* note 59, at vxi (rejecting the concept of social justice as not having any analytical power). *See also* Helen Louise Herndon, *Time to Reject 'Social Justice' and Replace It with*

The second reason is to mitigate false positives. Recognizing illusory justice conflicts is important because opponents of social justice often create illusory justice conflicts opportunistically as a political strategy to block social change. One prominent example of this tactic is its use by the police, who strategically make racial justice appeals grounded in the right of minority populations to live in a safe community as a means to reduce support for criminal justice reform. Dream Defenders, an abolitionist non-profit organization in Florida, ran into this potential justice conflict when it began its criminal justice reform advocacy efforts in Florida.[122] Their polling found that minority groups were receptive to the police's framing, potentially complicating their understanding of the relationship between criminal and racial justice.[123] However, Dream Defenders subsequently found that being able to concretize alternative conceptions of what minority community safety could look like without more police led to increased support for reducing police funding among minority groups.[124] Dream Defenders found alternative means to satisfy the twin claims of criminal and racial justice by embracing the problems raised by their community, but rejecting the police's framing of the solution.

Another recent example, which legal scholar Melissa Murray has extensively discussed, is Justice Thomas raising racial eugenics concerns regarding abortion to strategically pit reproductive and racial justice advocates against one another.[125] In her article, Murray argues that Justice Thomas failed to consider a number of considerations relevant to a comprehensive social justice analysis when he attempted to pit racial and reproductive justice in conflict concerning abortion. On Murray's account, Justice Thomas did not include the voices of Black women regarding access to reproductive services and the structural barriers faced by women of color on reproductive decision-making matters.[126] These two considerations—centering the voices of Black women and considering structural barriers—are factors that should be included when examining applied justice claims of reproductive and racial justice regarding abortion. As Murray shows, once these additional factors are considered in the analysis, the appearance of conflict between racial and reproductive justice

Real Justice, MISES INST. (July 25, 2024), https://mises.org/mises-wire/time-reject-social-justice-and-replace-it-real-justice [https://perma.cc/AM4J-3QUZ].

122. LPE Project, *Power-Building for the Long Haul with Rachel Gilmer, Astra Taylor, and Tara Raghuveer*, YOUTUBE (Nov. 20, 2023), https://www.youtube.com/watch?v=72suQr4_eYA [https://perma.cc/62T9-FWUS].

123. *Id.*

124. *Id.*

125. Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2089 (2021) (describing Justice Thomas's argument as "opportunistically co-opting the reproductive justice movement's interest in the intersection of race and abortion rights").

126. *Id.* at 2089–94.

concerning abortion is significantly mitigated.[127] In these situations, actors framing the policy issue as a conflict for strategic reasons merely presents the illusion of a justice conflict.[128]

II.
THE DIFFERENT LEVELS OF JUSTICE, IN THEORY AND LAW

Famously called "the first virtue of social institutions" by philosopher John Rawls,[129] justice is considered one of the most important principles in normative value theory.[130] Given the extensive literature on the subject and taking commentators at face value that their claims are about justice, this Article does not rehash debates regarding the content of justice. Let us simply consider the concept of social justice as giving persons and groups of persons in society what they are due or owed and the sociopolitical arrangements necessary to achieve such ends.[131] Thus, social justice is closely related to other normative concepts, including fairness and equality.[132] This definition is broad so it can include various forms of social justice, including distributive, procedural, and corrective justice.

127. This example demonstrates that not all methods of parsing what is considered a real or illusory justice conflict will be similar to each other because the distinction between the two concepts will rely, in part, on the underlying theories of justice that are being advocated and whether there is overlap between the theories. As Rawls frames the problem, there is a practical distinction between the concept of justice and competing conceptions of justice held by persons. RAWLS, *supra* note 27, at 5. I thank Dick Fallon for raising this issue.

128. In fact, Murray points out this was not the first time Justice Thomas employed the tactic of attempting to splinter different social justice claims. Murray, *supra* note 125, at 2068–71. For discussion of how overturning *Roe* actually harms minority communities, see generally Khiara M. Bridges, *Deploying Death*, 68 UCLA L. REV. 1510 (2022).

129. RAWLS, *supra* note 27, at 3.

130. The term "normative value theory" refers to theory concerning matters of the good or living a good life in moral, social, political, and legal theory.

131. This definition of justice is meant to be theoretically inclusive regarding the many debates about the nature and content of justice, such as whether justice is primarily or purely distributional in nature and whether justice is properly considered an individual or group-based value. For discussion of some of these debates, compare Young, *supra* note 73, at 15–65 (critiquing conceptions of justice that are purely distributional or individual in nature and instead advocating for a conception of justice concerned with material distribution, individual capacities, and group cooperation), with BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 24–26 (1982) (defending a liberal conception of justice that is primarily material, distributional, and individual). The careful reader will notice the switch from the term justice to that of social justice, which was done because this Article is only concerned with justice as it concerns social relations, rather than any personal conception of justice.

132. To make justice synonymous with fairness or equity will remove some theories of social justice from consideration, as it assumes a baseline property of relations between persons.

This Part delineates a conceptual point regarding the concept of justice that is occasionally assumed in public law,[133] but has yet to be examined.[134] The concept of social justice operates at three different levels of abstraction: basic, mid-level, and applied. Once these different levels of social justice are explained, it will be shown that public law has largely focused on substantiating only the procedural justice elements of mid-level justice principles. While cost benefit analysis (CBA) is the prominent exception here, it suffers from well-known analytical problems when policy issues involve normative values that cannot be fully quantified. As a result, political institutions are currently without substantive guidance on how to make decisions on policy issues that create justice conflicts, which often leads them to publicly downplay the importance of such nonquantifiable normative values in their decision-making. The Part ends by advocating that institutions should adopt substantive mid-level justice principles as standing default rules in policymaking.

A. The Levels of Justice—Basic, Mid-Level, and Applied

There are many different kinds of social justice. The literature is replete with arguments regarding racial justice, procedural justice, gender justice, transformative justice, and a myriad of other types of justice. Some taxonomical housework is needed to organize these different parts of social justice so we can address what to do when justice conflicts arise. For our purposes, the level of abstraction of each type of social justice claim provides a helpful analytical vantage point. This focus will allow us to organize different social justice claims according to their place in the overall concept of social justice, in turn bringing us closer to a framework to analyze and potentially resolve justice conflicts.

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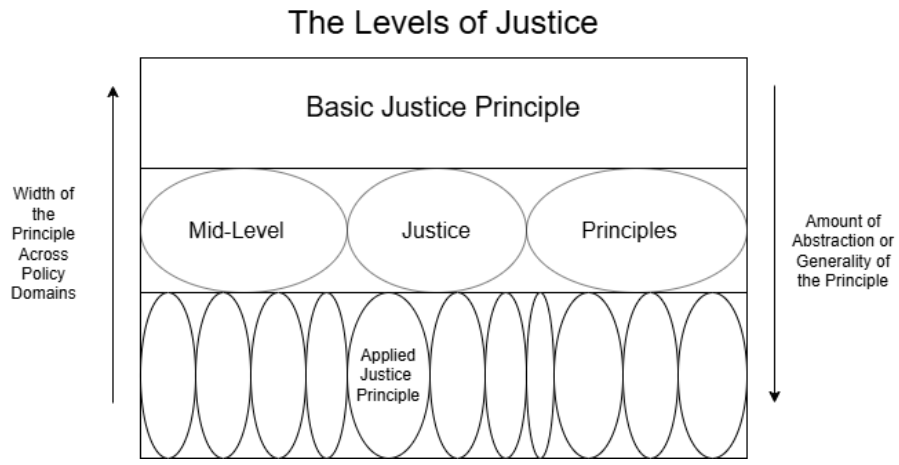
133. *See* sources cited *supra* note 43 (citing references to mid-level justice principles in public law and philosophy literatures). The term "mid-level principles," which are *within* a specific normative concept such as justice, is distinct from the usage of the term "midlevel principles" in some legal fields, such as intellectual property, to describe *different* normative concepts, such as proportionality, dignity, and efficiency, which operate in the field. *See generally* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011) (arguing for the existence of these midlevel principles in IP law); David H. Blankfein-Tabachnick, *Intellectual Property Doctrine and Midlevel Principles*, 101 CALIF. L. REV. 1315 (2013) (examining such an account).

134. Only a few philosophical articles discuss mid-level principles. *See generally* José Juan Moreso & Chiara Valentini, *In the Region of Middle Axioms: Judicial Dialogue as Wide Reflexive Equilibrium and Mid-Level Principles*, 40 LAW & PHIL. 545 (2021); Kenneth Henley, *Abstract Principles, Mid-Level Principles, and the Rule of Law*, 12 LAW & PHIL. 121 (1993); Bayles, *supra* note 43; Michael D. Bayles, *Moral Theory and Application*, 10 SOC. THEORY & PRAC. 97 (1984). The concept is often used without discussion in bioethics due to Beauchamp and Childress advocating for the adoption of mid-level principles in the field. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 407 (5th ed. 2001) (advocating for an approach to bioethics that focuses on building "mid-level principles, polished analyses of the moral virtues, and coherent statements on transnational human rights" rather than building a general, abstract theory); Nicolas Espinoza & Martin Peterson, *Risk and Mid-Level Moral Principles*, 26 BIOETHICS 1, 8 (2012) ("The term mid-level moral principle is closely associated with an approach to practical ethics articulated by Beauchamp and Childress . . . .").

There are at least three different levels of abstraction among social justice principles—basic, mid-level, and applied.[135] These levels vary along three dimensions: (1) their level of abstraction, which is synonymous with their level of generality, (2) their domain, meaning the scope of policy areas that they cover, and (3) the normative weight, or the strength of the reason they provide to act, that they provide to analyze a specific policy issue.

Diagram 1: Visual representation of the different levels of justice.



Assume for the purposes of this diagram that each vertical ellipse of an applied justice principle represents a single policy domain. A "basic justice" principle is the most abstract or general level of social justice claim. It purports to analyze what is owed to individuals or groups over the totality of social relations. Therefore, a basic justice principle seeks to have a domain that is synonymous with the domain of social justice itself. In short, it covers the entirety of social justice.

Rawls's two principles of justice (the equal basic liberties principle and the fair equality of opportunity and difference principle) are the prototypical principles of basic justice.[136] According to Rawls, these principles should guide

135. "Specification" could be used instead of "abstraction" if the levels flipped their ordering, making an applied principle the least abstract and most specified level. Philosopher Michael Bayles argued there are four types of moral statements: fundamental norms, mid-level principles, rules, and particular judgements. Bayles, *supra* note 43, at 49. However, his categories cannot fully be distinguished based on their level of abstraction. *See id.* at 56 ("Principles and rules are not distinguished by their generality . . . ."). For criticism of Bayles's position, see Henley, *supra* note 134, at 123 ("I think that mid-level principles also operate in a different direction. Mid-level principles and their weighting [also] connect to underlying theory . . . through specification, with the specifying done by the mid-level principles.").

136. RAWLS, *supra* note 27, at 302 (describing the first principle as "[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all;" and the second principle as, "[s]ocial and economic inequalities are to be arranged so

the creation of a new political state, including its constitution, economic system, and public institutions. However, the structural nature of Rawls's basic justice principles mean that the principles are unable to provide any normative weight to analyze and determine the outcome for a specific policy issue, as will be explained more below.[137] Alternative basic justice principles include welfarism[138] and egalitarianism,[139] among others.

On the opposite end of abstraction is an "applied justice" principle. An applied justice principle operates at the least abstract, or most concrete, level because it determines the outcome for only one policy area as a matter of justice. Examples of applied justice principles include (1) in the case of a shortage, ventilators should first be given to younger patients,[140] (2) individuals charged with a crime should have a lawyer at all stages of the criminal trial process,[141] and (3) environmental law should be organized around a precautionary principle to mitigate the likelihood of significant harms.[142]

The exact level of specificity among different applied justice principles can vary. The problem of ventilator shortages during a public health crisis is more specific than the theory that should organize environmental law. However, notice that each applied justice principle operates within a single substantive policy area—public health, criminal law, and environmental law, respectively. This property delineates the domain of an applied justice principle; its scope or coverage is limited to a single policy area. To call for the precautionary principle to organize environmental law says nothing about whether the principle should organize a different area of law, such as criminal law. Therefore, an applied justice theory has a specific and demarcated *domain restriction*—the scope the

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that they are both: (a) to the greatest benefit of the least advantaged . . . and (b) attached to offices and positions open to all under conditions of fair equality of opportunity"). Both the difference principle and the equal opportunity principle form the second principle of justice. *Id.* In *Political Liberalism*, Rawls describes his theory of justice as covering the domains of "constitutional essentials and basic justice." JOHN RAWLS, POLITICAL LIBERALISM 224 (1993).

137. *Cf.* Young, *supra* note 73, at 4 (critiquing such theories of justice as "simply too abstract to be useful in evaluating actual institutions and practices").

138. *See generally, e.g.*, NILS HOLTUNG, PERSONS, INTERESTS, AND JUSTICE (2010) (developing a welfarist account of justice); Richard J. Arneson, *Welfare Should Be the Currency of Justice*, 30 CAN. J. PHIL. 497 (2000) (same).

139. *See generally, e.g.*, G.A. COHEN, IF YOU'RE AN EGALITARIAN, HOW COME YOU'RE SO RICH? (2001) (developing a strict egalitarianism account of justice); Kai Nielsen, *Radical Egalitarian Justice: Justice as Equality*, 5 SOC. THEORY & PRAC. 209 (1979) (same).

140. *See generally* Douglas B. White & Bernard Lo, *A Framework for Rationing Ventilators and Critical Care Beds During the COVID-19 Pandemic*, 323 JAMA 1773 (2020).

141. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

142. *See* Ethyl Corp. v. EPA, 541 F.2d 1, 28 (D.C. Cir. 1976) ("Where a statute is precautionary in nature . . . we will not demand rigorous step-by-step proof of cause and effect. Such proof may be impossible to obtain if the precautionary principle of the statute is to be served."). *See generally* Daniel Bodansky, *The Precautionary Principle in US Environmental Law*, *in* TIMOTHY O'RIORDAN & JAMES CAMERON, INTERPRETING THE PRECAUTIONARY PRINCIPLE 203–28 (1994); James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1 (1991).

theory pertains to—of one substantive policy area and cannot extend into other areas without additional theoretical scaffolding.

Regarding its normative weight, an applied justice principle is meant to provide a reason that is *decisive* as a matter of justice with respect to policy issues within its singular domain. Alternatively phrased, an applied justice principle, unlike a basic justice principle, gives you an outcome that you should adopt as a matter of social justice.[143] In Cass Sunstein's influential phrasing, applied justice principles constitute the "low-level principles" that generate "incompletely theorized agreements."[144]

To further elaborate the distinction between these levels of justice, it is useful to discuss how these levels can be misused when analyzing policy issues. One potential misuse of Rawls's principles of justice is to ask how these principles would answer specific public policy issues. For example, one might ask, "How much should the top 1 percent be taxed under Rawls's principles of justice?" Asking this question of Rawls's principles would be a category mistake. The principles operate on a basic justice level, not an applied justice level. In short, there is a mischaracterization of the principles' level of abstraction and their resulting ability to address the policy issue. The abstraction level of the tax policy issue (applied justice) does not match the abstraction level of the principle (basic justice). Thus, the basic justice principle does not provide any normative weight to answer the specific policy question at issue. An applied justice principle is needed if one seeks a principle that provides an outcome to determine the tax rate for the top 1 percent as a matter of justice.

The basic and applied justice literatures are extensive. However, there is a third level of justice principles that has received much less attention in public law or philosophy. I call this level mid-level justice principles.[145] As the name implies, mid-level justice principles are more concrete than a basic justice principle, but more abstract than an applied justice principle. Similarly, mid-level justice principles have a domain restriction that is wider than one policy area (applied justice principles), but less than the totality of social justice (basic justice principles). Mid-level justice principles provide *pro tanto* normative commitments that must be weighed or balanced against other values and the particular facts of specific issues before a decision can be reached.[146] Principles already discussed in public law that are actually mid-level justice principles

143. It is possible that normative principles not within the domain of justice may suggest different outcomes. The applied justice principle provides reasons that are only decisive as far as social justice is concerned.

144. Sunstein, *supra* note 29, at 1740.

145. "Mid-level principle" is a term that is sometimes used, but rarely analyzed, in philosophy. *See* sources cited *supra* note 134.

146. Dick Timmer, *Limitarianism: Pattern, Principle, or Presumption?*, 38 J. APPLIED PHIL. 760, 764 (2021); Bayles, *supra* note 43, at 53.

include principles of procedural justice,[147] restorative justice,[148] the capabilities approach,[149] anti-domination,[150] and CBA,[151] among others.

Given their amorphous intermediate character, it is helpful to contrast mid-level justice principles from basic and applied justice principles. Mid-level justice principles are distinguished from applied justice principles by two features. First, a mid-level justice principle's domain is wider than one single policy issue, and second, its normative weight is merely *pro tanto*, which is of a lesser weight than being decisive, as is the case for an applied justice principle. Regarding their domain, a mid-level justice principle can cover multiple policy areas, such as environmental, energy, and climate justice. The covered policy areas do not need to be related. In this respect, mid-level justice principles are trans-substantive, while applied justice principles are not. Consider cost-benefit analysis (CBA), which, as discussed in the next Part, is a mid-level justice principle.[152] CBA is trans-substantive because it can be used to analyze policy issues across different domains, such as environmental, securities regulation, and criminal justice policies.

However, in contrast to basic justice principles, mid-level justice principles do not purport to cover the totality of social justice. Therefore, different basic justice principles can potentially endorse the same mid-level justice principle.[153] It may be possible for both a Rawlsian and a welfarist to agree on a mid-level justice principle. As will be discussed later, it is also theoretically possible for multiple mid-level justice principles to overlap in a specific policy domain.[154] Consequently, while mid-level justice principles are trans-substantive, they do not cover the totality of all domains in which social justice operates, unlike a basic justice principle.

The second difference between mid-level justice principles and the other two levels of justice is the strength of the reasons it provides for resolving specific policy issues. In contrast to applied justice principles, which provide decisive reasons as a matter of justice for a specific outcome, mid-level justice principles provide merely *pro tanto* reasons, which point in favor of an outcome absent further justification. For example, the CBA result of a specific policy

147. *See generally, e.g.*, Stancil, *supra* note 44; Solum, *supra* note 43; Tyler, *supra* note 44; Thibaut et al., *supra* note 44.

148. *See generally, e.g.*, González, *supra* note 44; Menkel-Meadow, *supra* note 44.

149. *See generally* NUSSBAUM, *supra* note 44; SEN, *supra* note 44.

150. *See generally, e.g.*, RAHMAN, *supra* note 44; Bowie & Renan, *supra* note 44; Macey & Richardson, *supra* note 44. I am referring to the principle of anti-domination discussed in public law. The principle of nondomination as used in the theory of neo-republicanism operates as a principle of basic justice. *See generally* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997).

151. *See infra* Part II.B.

152. *See infra* Part II.B.

153. *See* Henley, *supra* note 134, at 123 ("[Q]uite different theories converge on many of the same mid-level principles . . . .").

154. *See infra* Part III.B.

issue should then be evaluated in light of relevant variables that could not be included within the analysis, such as those values that cannot be quantified. Thus CBA, on its own, does not provide a decisive reason to adopt a certain policy outcome but instead provides a reason in favor of or against certain outcomes.[155] Instead, the CBA result should be analyzed with the other normative principles or values that could not be included in CBA to reach a final policy outcome. However, in contrast to basic justice principles, which are not useful when evaluating specific policy issues because of their breadth, mid-level justice principles can evaluate specific issues and provide reasons to adopt specific outcomes.

After the publication of *A Theory of Justice* by John Rawls in 1971, public law became fascinated with trying to build out Rawls's principles of justice for constitutional matters.[156] By the end of the decade, the primacy of Rawls's theory was so complete that legal theorist Mark Tushnet declared it was "the only game in town."[157] Rawls's dominance as a basic justice theorist in public law continued through the civic republicanism trend in the late 1980s and early 1990s, which attempted to fuse aspects of Rawls's theory with the neo-republican revival taking place in intellectual history.[158]

However, the multiculturalism and pluralism debates of the 1980s and 1990s took their toll. Scholars began to push beyond liberalism's basic proposition that the state should minimally interfere in conceptions of the good life and instead doubted the ability of our legal culture to agree on principles of basic justice.[159] This shift was most emblematic in Sunstein's work. In the late 1980s, Sunstein argued for the Rawlsian-influenced civic republican revival.[160] However, by 1995 he began arguing that judges should make decisions based on "incompletely theorized agreements" given that judges likely disagree on matters of basic justice and other abstract normative theories.[161]

Even Rawls himself turned his back on his initial formulation of his theory after extended criticism questioned the ability of people who hold conflicting

155. For the purposes of this example, nonquantifiable values are considered external to CBA. As will be discussed below, it is possible for CBA to include such values to varying degrees of analytical precision. *See infra* Parts II.C, III.C.

156. See *generally, e.g.*, *supra* sources cited note 28; *see also* Sager, *supra* note 28, at 427 n.19 ("These remarks owe an obvious debt to John Rawls.").

157. Tushnet, *supra* note 28, at 1317.

158. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1567 (1988) ("Certain aspects of Rawls' *A Theory of Justice* speak powerfully for these features of the liberal tradition and embody much of the contemporary appeal of republican thought.") (internal citations omitted). The *Yale Law Journal*'s 1988 Symposium covered the civic republicanism trend in public law and contains some of the now seminal articles on the topic. *See generally, e.g.*, Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Sunstein, *supra*.

159. *See supra* sources cited note 29.

160. Sunstein, *supra* note 158.

161. Sunstein, *supra* note 29.

religious and ethical views to come to consensus on basic justice.[162] He then republished his new account in 2001[163] after publishing a series of articles during the mid-1980s to mid-1990s where he significantly modified his views.[164] As legal theorist Scott Shapiro noted in his 1997 review of Sunstein's book on incompletely theorized agreements,[165] a "fear of theory" had begun to pervade public law and legal theory.[166] By the twenty-first century, building out principles of basic justice in public law appeared to be a lost cause. Public law has instead mostly embraced only procedural mid-level justice principles.

B. Public Law Has Primarily Adopted Only Mid-Level Procedural Justice Principles

Mid-level justice principles are not wholly foreign to public law. While these debates regarding basic justice were going on, policymakers worked to implement principles of social justice. In the second half of the twentieth century, Congress and the Executive passed a host of different measures that arguably improved social justice in policymaking. However, most of these measures only instituted procedural mid-level justice principles that require agencies to conduct certain additional procedures during policymaking. The notable exception is CBA, which is both a procedural and substantive mid-level justice principle. However, CBA suffers from well-known problems when attempting to include normative values that resist quantification. As a result, agencies and other political institutions currently have no consistent or principled mechanism to resolve justice conflicts that cannot be fully quantified when they arise in policymaking.

On the congressional side, statutes passed that included mid-level justice principles include NEPA, which requires agencies to conduct environmental impact analyses;[167] RFA, which requires agencies to conduct small entities impact analyses;[168] the Unfunded Mandates Reform Act (UMRA),[169] which requires consultation with state, local, or Tribal governments (SLTs) if a rule may result in SLTs spending over $100 million; the Freedom of Information Act

162. *See generally, e.g.*, CHARLES W. MILLS, THE RACIAL CONTRACT (1997); Okin, *supra* note 16; MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); ALASDAIR MACINTYRE, AFTER VIRTUE (1981); Chantal Mouffe, *Democracy and Pluralism: A Critique of the Rationalist Approach*, 16 CARDOZO L. REV. 1533 (1995).

163. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (2001).

164. *See generally* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997); John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233 (1989); John Rawls, *The Priority of the Right and Ideas of the Good*, 17 PHIL. & PUB. AFFS. 249 (1988); John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFFS. 223 (1985).

165. *See generally* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996).

166. Scott J. Shapiro, *Fear of Theory*, 64 U. CHI. L. REV. 389, 389 (1997).

167. 42 U.S.C. §§ 4321–4347.

168. 5 U.S.C. §§ 601–612. The statute defines "small entities" as small businesses, small government jurisdictions, and some non-profit organizations. 5 U.S.C. § 601(6).

169. 2 U.S.C. §§ 1501–1571.

(FOIA),[170] which requires agencies to make their records available to persons if requested; the Paperwork Reduction Act,[171] which requires agencies to submit Information Collection Requests to the Office of Management and Budget (OMB) under certain conditions; and multiple amendments and alterations to the APA.[172]

These statutes, if they overlap with matters of justice, are primarily mid-level procedural justice principles.[173] Most requirements in these statutes require agencies to conduct specific types of analyses, consider potential alternatives to proposed actions, or consult with certain segments of the population before making decisions. In essence, these requirements mandate that agencies engage in specific procedures. However, they do not actually provide any reasons for or against adopting certain substantive outcomes. An agency could propose a rule, submit it through all of these procedural requirements, and still come out the other end with the exact same proposed rule without any substantive alterations.

Congress is not the only institution that has promulgated rules regarding the form and structure of policymaking. The President has also issued several trans-substantive executive orders (EO) that dictate how policymaking should be conducted.[174] However, most of these EOs have the same procedural focus. For example, EO 13,132 singles out a substantive value of importance—federalism—and imposes additional procedures for agencies to follow, such as providing a federalism impact statement and consulting with state and local officials about the proposed rule.[175] The connection between procedure and substance, if there is one, is nebulous.[176] Therefore, it appears public law has

170. 5 U.S.C. § 552.

171. 44 U.S.C. §§ 3501–3521.

172. *See* Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 634–35 (2017) (discussing these changes to administrative law).

173. *See generally* MICHAEL D. BAYLES, PROCEDURAL JUSTICE (1990); Solum, *supra* note 43; Tom R. Tyler & E. Allan Lind, *Procedural Justice*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 65–92 (Joseph Sanders & V. Lee Hamilton eds., 2001); William Nelson, *The Very Idea of Pure Procedural Justice*, 90 ETHICS 502 (1980); Thibaut et al., *supra* note 147.

174. *See, e.g.*, Exec. Order No. 13,132, 64 Fed. Reg. 43255 (Aug. 10, 1999) (encouraging agencies to promote federalism through generating a federalism impact statement and consulting with local and state governments); Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000) (encouraging agencies to consult and coordinate agency policymaking with Tribal governments through generating a Tribal impact statement and consulting with Tribes); Exec. Order No. 14,096, 88 Fed. Reg. 25251 (April 21, 2023) (encouraging agencies to promote environmental justice by requiring agencies to analyze and evaluate various dimensions of environmental justice, discuss matters related to environmental justice with the public, and create an environmental justice strategic plan, among other procedural requirements).

175. Exec. Order No. 13,132 §§ 3(b), (d)(3)–(4), 4(d), 6, 64 Fed. Reg. 43255 (Aug. 10, 1999) (discussing consultation requirements); *Id.* § 6(c)(2) (discussing federalism impact analysis requirement).

176. The Executive Order provides "federalism principles," but they are merely general statements about the nature of the federal government and the concept of federalism. *See, e.g.*, *id.* § 2(d)e ("The Framers recognized that the States possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy."). The only substantive principle in the Executive Order is that agencies should only find express preclusion and have a high bar for

adopted procedural mid-level justice principles, but it has been silent on adopting any substantive mid-level justice principles.

CBA is the major exception. First required by President Reagan[177] and continued by each subsequent President,[178] CBA has become fully entrenched in executive policymaking.[179] CBA is both a procedural and substantive mid-level justice principle.[180] It is procedural because it requires agencies to engage in specific procedures, such as quantifying, monetizing, and adding up the benefits and costs of the proposed action. It is substantive because CBA asks agencies to adopt a specific decisional principle: Do not go forward with the proposed action unless the benefits outweigh the costs.[181] As such, CBA substantiates a welfarist mid-level principle of justice.[182]

Limitations and criticisms of CBA are extensive, so only a few brief points are needed. CBA forces policymakers to quantify, if not monetize, purported costs and benefits of a policy, including normative values such as fairness and

finding implied preclusion. *Id.* § 4. However, this section merely restated preclusion doctrine from the time it was promulgated. *See* Block v. Comm. Nutrition Inst., 467 U.S. 340, 351 (1984) (stating that when "doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling").

177. Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 17, 1981). The antecedents of CBA entered regulatory analysis in 1970s. *See* Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2146–52 (2024); William Boyd, *Genealogies of Risk: Searching for Safety, 1930s–1970s*, 39 ECOLOGY L.Q. 895, 972–77 (2012).

178. Clinton rescinded Reagan's initial Executive Order and then promulgated his own Executive Order, which has remained in place since then. Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993). President Obama reaffirmed Executive Order 12,866, while adding suggestions for agencies to coordinate their rulemaking activities, minimize the burdens of regulation, and include likely affected persons in the policymaking process. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

179. *See generally* Jonathan S. Gould, *Cost-Benefit Analysis in Polarized Times*, 75 ADMIN. L. REV. 695 (2023).

180. Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 981 (2018) (discussing that CBA is both a "decision procedure" and "also requires substantive judgements"). If CBA was adopted as mandatory across all domains of policymaking, then it would be a basic justice principle applying welfarism. However, multiple important policy domains are exempt from CBA. Exec. Order No. 12,866 § 3(d)(2), 58 Fed. Reg. 51735 (Sept. 30, 1993); (exempting national security and military regulations); Brian Galle & Stephen Shay, *Admin Law and the Crisis of Tax Administration*, 101 N.C. L. REV. 1645, 1663 (2023) (discussing the history of IRS tax regulations being exempted from CBA). These exemptions mean that CBA does not cover the full domain of social justice, placing it as a mid-level principle rather than a basic one. In addition, CBA is conceptually deficient to analyze certain types of regulations, such as transfer rules. *See* Eric A. Posner, *Transfer Regulations and Cost-Effectiveness Analysis*, 53 DUKE L.J. 1067, 1067 (2003) ("Cost-benefit analysis cannot be used to evaluate transfer regulations . . . ."); Lienke, *supra* note 38, at 12–24. I thank Ash Ahmed for pushing me on this point.

181. CBA is also substantive in a structural sense because certain policy areas, including national security and tax policy, are exempt from having to conduct it during their regulatory analysis. *See* Exec. Order No. 12,866 § 3(d)(2), 58 Fed. Reg. 51735 (Sept. 30, 1993) (exempting national security and military regulations); Galle & Shay, *supra* note 180, at 1663. I thank Jon Gould for raising this point.

182. Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 VA. L. REV. 1809, 1832 (2017) (stating that "regulatory welfarism" is "implemented through cost-benefit analysis"); Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 194 (1999) (stating that CBA "is properly conceptualized as a *welfarist decision procedure*").

justice, which are notoriously difficult to quantify.[183] In addition, these normative values are important, in part, because they are multi-scalar, meaning that the normative values are substantiated by multiple underlying justifications. CBA forces the various reasons supporting these values to be flattened through its cost-benefit decision-making structure.[184] The difficulty of quantifying normative values, combined with the flattening of these values, creates the possibility that CBA is structurally biased in favor of regulatory costs. These costs are often borne by industries that are incentivized to perform detailed cost analyses to prevent proposed regulatory policies from being implemented.[185]

Additionally, an incommensurability problem occurs when trying to compare different types of values during CBA.[186] Further, CBA masks distributional shifts between groups since it only aggregates costs and benefits.[187] Even some analytical choices within CBA itself, such as setting the discount rate, involve controversial normative choices.[188] Finally, the practice of quantification arguably degrades some values by asking how much individuals are willing to pay to be treated fairly or with respect.[189] In fact, simply framing the attainment of a basic normative principle in monetary terms may strike some as absurd or repulsive.[190]

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183. *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS 8–10 (2004); Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369, 1373–84 (2014).

184. *See* DOUGLAS A. KYSAR, REGULATING FROM NOWHERE 17 (2010) (stating that economic approaches to environmental law "tend to crowd out other ways of conceptualizing well-being and promoting its attainment . . ."); SALLY ENGLE MERRY, THE SEDUCTIONS OF QUANTIFICATION 1 (2016) (arguing that quantification "risks distorting the complexity of social phenomena"); Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367, 1402 n.90 (2001) (discussing the complexity of happiness as a value).

185. *See* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY 10 (2008); Daniel A. Farber, *Rethinking the Role of Cost-Benefit Analysis*, 76 U. CHI. L. REV. 1355, 1365–66 (2009).

186. *See* Richard Craswell, *Incommensurability, Welfare, Economics, and Law*, 146 U. PA. L. REV. 1419, 1429–32 (1998); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 840–43 (1994). *See generally* Matthew D. Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371 (1998).

187. *See* Gould, *supra* note 179, at 703; Caroline Cecot & Robert W. Hahn, *Incorporating Equity and Justice Concerns in Regulation*, 18 REG. & GOV. 99, 99 (2022) (stating that CBA "often masks the fact that most policies have winners and losers"). Some CBA proponents have argued CBA should consider distributional effects and have proposed methods to include them. *See generally, e.g.*, Caroline Cecot, *Efficiency and Equity in Regulation*, 76 VAND. L. REV. 361 (2023); Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489 (2018); H. Spencer Banzhaf, *Regulatory Impact Analysis of Environmental Justice Effects*, 27 J. LAND USE & ENV'T L. 1 (2011).

188. *See generally* Arden Rowell, *Ethical Choices Inside Regulatory Cost-Benefit Analysis*, 19 GEO. J. L. & PUB. POL'Y 693 (2021).

189. *See* Gould, *supra* note 179, at 702; Lynn E. Blais, *Beyond Cost/Benefit: The Maturation of Economic Analysis of the Law and Its Consequences for Environmental Policymaking*, 2000 U. ILL. L. REV. 237, 247 (2000) ("[S]cholars are beginning to explore the possibility that we do damage to these values merely by attempting to quantify them.").

190. *See* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 190–216 (1993); Lisa Heinzerling, *Cost-Benefit Jumps the Shark: The Department of Justice's Economic Analysis of Prison Rape*, GEO. L. FAC. BLOG (June 13, 2012),

As a result of these shortcomings, agencies neither have guidance on how to analyze nonquantifiable normative values, nor how to fold such values into CBA.[191] For example, the EPA's *Technical Guidance for Assessing Environmental Justice in Regulatory Actions*, a one hundred twenty page document that delineates how EPA officials should analyze environmental justice concerns in regulatory actions, declined to provide any guidance on how EPA officials should analyze non-health related impacts of EPA actions because such impacts were too difficult to quantify.[192] Therefore, both EPA civil servants and potentially affected communities are left in the dark about how nonquantifiable dimensions of environmental justice are involved in EPA policymaking, if at all. Considering these problems, CBA appears methodologically difficult and normatively problematic as a standalone mid-level justice principle when important normative values are involved. Additional substantive mid-level justice principles are needed.

C. The Biden Administration's Embrace of Analyzing Normative Values

Throughout its term, the Biden Administration began to update regulatory analysis to account for CBA's shortfalls in situations when agencies should consider important normative values during policymaking. This focus was most evident in two Biden White House initiatives: (1) the Office of Management and Budget (OMB) finalizing new Circulars A-4 and A-94, which detailed how agencies should analyze regulations under EO 12,866,[193] and (2) the Justice40

http://gulcfac.typepad.com/georgetownuniversity_1aw/2012/06/cost-benefit-jumpsthe-shark.html [https://perma.cc/W5U9-9WNA].

191. *Cf.* Revesz & Yi, *supra* note 38, at 62 (explaining how the Obama Administration did not "provide guidance on how to assess, or address" issues pertaining to the distributional consequences of regulations).

192. EPA, TECHNICAL GUIDANCE FOR ASSESSING ENVIRONMENTAL JUSTICE IN REGULATORY ACTIONS 59 (2016), https://www.epa.gov/sites/default/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf [https://perma.cc/68AF-SYBC].

193. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS (2023); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-94, GUIDELINES AND DISCOUNT RATE FOR BENEFIT-COST ANALYSIS OF FEDERAL PROGRAMS (2023). While Executive Order 12,866 states that agencies can include nonquantifiable values in their regulatory analysis when applicable, it provided no detail on how such values should be included. Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51735 (Sept. 30, 1993) ("[I]n choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach."). OMB also revised their Circular A-94 in a similar manner, which covers regulatory analysis pertaining to federal programs and projects. The Trump Administration revoked the Biden OMB Circular A-4 on January 31, 2025. *Unleashing Prosperity Through Deregulation*, WHITE HOUSE (Jan. 31, 2025) https://www.whitehouse.gov/presidential-actions/2025/01/unleashing-prosperity-through-deregulation/ [https://perma.cc/3TPN-TSVA]. The Trump Administration also rescinded the Biden OMB Circular A-94 on April 8, 2025. *See* OMB Memorandum M-25-23, Rescission and Reinstatement of Circular No. A-94, April 8, 2025, https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-23-Rescission-and-Reinstatement-of-Circular-No.-A-

Initiative,[194] requiring 40 percent of the benefits of certain federal environmental and infrastructure programs to be directed towards disadvantaged communities. Given that Justice40 showed the benefits and problems with a President-led effort to institutionalize a substantive mid-level justice principle, it will be discussed in more detail in Part III.[195]

The Biden Circular A-4, among other changes,[196] provided additional details on how agencies should engage in qualitative reasoning[197] and incorporate the distributional effects of agency actions.[198] It is clear from the Biden Circular that OMB focused on existing critiques of CBA and examined how to better include normative considerations into regulatory analysis. These efforts from the Biden Administration were laudatory.

However, the Biden Circular A-4 was permissive by design. It demonstrated the various ways that agencies *could* involve qualitative and normative reasoning into regulatory analysis. For example, the A-4 stated that "it would not be appropriate to attempt to fully measure the value of human dignity, civil rights and liberties, equity, justice, or indigenous cultures," thereby giving agencies permission to not quantify some normative values.[199] However, it provided no guidelines about how agencies should actually analyze human dignity, civil rights and liberties, or any other normative value that resists quantification.[200]

The procedure for deciding how to include nonquantifiable normative values in regulatory analysis was also written in general terms—the agency should "present any relevant information that would inform an understanding of those effects . . . along with a description of the unquantified effects, such as (in the context of assessing a regulation that affects the environment) ecological gains or ecosystem services, improvements in quality of life, viewshed improvement, and indigenous culture preservation."[201] The Biden A-4 used

94.pdf?utm_medium=email&_hsmi=356535816&utm_content=356535816&utm_source=hs_email [https://perma.cc/ESN7-382D].

194. Exec. Order No. 14,008, § 223, 86 Fed. Reg. 7619, (Jan. 27, 2021). The Trump Administration rescinded Justice40 on January 20, 2025. *Initial Recissions of Harmful Executive Orders and Actions*, WHITE HOUSE (Jan. 31, 2025) https://www.whitehouse.gov/presidential-actions/2025/01/initial-rescissions-of-harmful-executive-orders-and-actions/ [https://perma.cc/P2HU-BBAJ].

195. *See infra* Part III.D.

196. For discussion of the changes in the new OMB A-4 Circular, see generally William R. Levi & Jeremy Rozanksy, *New Circular A-4: A Revolution in Cost-Benefit Analysis*, SIDLEY AUSTIN (Nov. 20, 2023), https://www.sidley.com/en/insights/newsupdates/2023/11/new-circular-a4-a-revolution-in-cost-benefit-analysis [https://perma.cc/D2VY-6ELK].

197. OMB CIRCULAR A-4, *supra* note 193, at 27–51.

198. *Id.* at 61–67.

199. *Id.* at 44.

200. *See generally* Rachel Bayefsky, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123 YALE L.J. 1732 (2014) (discussing how dignity considerations should fit in CBA).

201. OMB CIRCULAR A-4, *supra* note 193, at 44–45. In such situations, the A-4 suggests, but does not require, a break-even analysis, which analyzes how big the value would have to be, if it could be monetized, for it to "break-even" with the costs. *Id.* at 47.

similarly general and permissive language when discussing when and how agencies could engage in distributional analysis during agency policymaking.[202] The only substantive suggestion in the A-4 was that the agency could choose to use distributional weights based on the diminishing marginal utility of benefits according to certain segments of the population. However, the guidance was again in general terms.[203]

Therefore, while the Biden Administration said agencies *could* consider substantive justice principles, agencies were still largely left to fend for themselves when deciding *whether*, *which*, and *how* normative values should be incorporated into policymaking.[204] As will be discussed more below,[205] the problem here is that agencies can strategically choose not to engage with normative concerns during their regulatory impact analyses.[206] Given this state of affairs, some agencies chose to either avoid the thorny normative and political issues relating to social justice or to consider such values in nontransparent ways during policymaking.[207]

D. Political Institutions Should Adopt Substantive Mid-Level Justice Principles

Given the long-standing deficiencies with CBA and prior presidential administrations' lack of concrete guidance of how to incorporate normative values into regulatory analysis, there is currently an absence of substantive normative principles to guide political institutions. Yet, as the previous Part documented,[208] conflicts within normative values, such as social justice, are widespread in policymaking and will only proliferate as contemporary policymaking continues to get more complex. Importantly, as previously

202. *Id.* at 61–67.

203. *Id.* at 65–67. For more about the concept of distributional weighting, see generally Daniel J. Acland & David H. Greenberg, *Distributional Weighting and Welfare/Equity Tradeoffs*, 14 J. BENEFIT-COST ANALYSIS 68 (2023); David A. Weisbach, *Distributionally Weighted Cost-Benefit Analysis: Welfare Economics Meets Organizational Design*, 7 J. LEGAL ANALYSIS 151 (2015).

204. The recent Justice40 initiative and its requirement that 40 percent of the benefits of certain environmental and infrastructure projects must be directed towards disadvantaged communities was a noteworthy exception that takes the form of a substantive mid-level justice principle. However, as will be discussed in the next Part, the initiative's broad definition of what constitutes disadvantaged for the purposes of the initiatives provided minimal guidance to agencies regarding which communities to prioritize in practice. *See infra* Part III.B.

205. *See supra* Part II.C.

206. Cecot & Hahn, *supra* note 187, at 100–02 (finding that agencies only considered the distributional costs or benefits of a proposed regulation around 20 percent of the time despite Executive Order 12,866 and the previous Circular A-4 both stating that agencies should consider distributional effects of potential regulation during their regulatory impact analyses); Lisa A. Robinson, James K. Hammitt & Richard J. Zeckhauser, *Attention to Distribution in U.S. Regulatory Analyses*, 10 REV. ENV'T ECON. & POL'Y 308, 313 (2016) (finding that agencies "rarely quantify" distributional effects of potential rules).

207. *See infra* Part III.C (discussing DOJ minimizing the importance of the value of dignity in its prison rape regulation).

208. *See supra* Part I.C.

discussed,[209] justice conflicts will continue to occur in policymaking whether or not political institutions or government actors explicitly recognize them or speak of them in the rhetoric of social justice. This Article proposes one attractive method for political institutions, including future presidential administrations, to adopt substantive guidelines for analyzing normative values—political institutions should adopt mid-level justice principles as standing default rules.[210]

Political institutions can adopt specific mid-level justice principles to serve as standing methods of qualitative reasoning to analyze social justice claims and resolve justice conflicts. By doing so, the political institution justified *ex ante* its adoption of the mid-level justice principle before the institution engages in policymaking regarding any specific policy issue. The institution is not creating ad hoc forms of qualitative reasoning to resolve a particular justice conflict, but rather calling upon an already justified second-order mode of decision to help resolve this particular justice conflict and similar ones in the future.

Mid-level justice principles should operate as *pro tanto* normative reasons, or standing default rules, for political institutions to resolve justice conflicts. In doing so, they would provide a defeasible reason to support a certain outcome to resolve justice conflicts.[211] For any particular policy issue, there may be weightier countervailing reasons for an alternative outcome. However, those countervailing reasons would only apply for *that specific policy issue*. The mid-level justice principle would remain the standing default. While this discussion is in general terms, the next Part discusses multiple concrete ways that Congress, the President, and agencies can adopt mid-level justice principles.[212]

One might ask why mid-level justice principles should be institutionalized as default rules instead of rules of decision. There are two reasons. The primary reason is ontological. A mid-level justice principle serves as a general standing reason across the trans-substantive domain it covers. Given their generalized nature, mid-level justice principles cannot solve justice conflicts within a particular policy issue without additional theorizing and fact-sensitive analysis. Instead, these principles must be balanced or weighed against other normative

209. *See supra* Parts II.C–II.D.

210. *Cf.* Henley, *supra* note 134, at 125 (advocating that mid-level principles are needed to justify problematic rule application situations). To my knowledge, only two scholars have proposed to institutionalize a mid-level justice principle that could analyze social justice claims, but neither recognizes their theory as implementing mid-level justice principles. *See* MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION (2011) (proposing that potential regulations be analyzed according to their social welfare functions while embracing the theory of prioritiarianism to evaluate them); Farber, *supra* note 58, at 29 (proposing a theory of social justice based on "equal protection from equal harms"). Such mid-level theories of justice, if deemed normatively desirable, can be folded into the wider conceptual argument and framework of this Article.

211. *See generally* EINER ELHAUGE, STATUTORY DEFAULT RULES (2008); John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. L. REV. 825 (2006).

212. See *infra* Parts III.A–III.B.

and factual considerations relevant to that particular policy issue.[213] The additional theoretical scaffolding needed to resolve a discrete policy issue could come from within the concept of justice, such as if an institution adopted multiple mid-level justice principles that potentially conflict in a specific policy issue[214] or normative considerations relevant given the particularities of the specific policy issue, or other normative values, practical considerations, or political concerns.[215] As such, when adopting mid-level justice principles, institutions can still consider other normative, practical, or political values that may be important in certain policy areas.[216]

Second, mid-level justice principles do not consider values that are beyond the domain of justice. It follows that using mid-level justice principles as default rules allows institutions added flexibility to consider how to resolve the specific policy issue in question. For example, agencies analyzing specific policy issues can choose how to fold their mid-level justice principles into existing CBA practices regarding proposed regulations that contain social justice considerations.[217] In short, the institution can do a more comprehensive "cost-benefit analysis" if additional normative reasons can enter its analysis.

The adoption of mid-level justice principles as default rules has multiple normative benefits compared to the status quo.[218] First, mid-level justice principles provide a standing, and thereby stable, method to help resolve justice conflicts. Relatedly, these default rules, which will likely be adopted by higher-level officials given their general applicability, will provide concrete guidance

213. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22–28 (1977) (discussing the distinction between principles and rules); Singer, *supra* note 26, at 972–77 (discussing the various analytical methods for normative reasoning).

214. For example, if a political institution has adopted multiple mid-level justice principles and they point to different outcomes in a specific justice conflict, then this situation can be resolved in at least two different ways. First, the institution could adopt a lexical prioritization of adopted mid-level justice principles. Importantly, a prioritization among mid-level justice principles does not require a basic justice principle given that mid-level justice principles can vacillate in their specificity—a more abstract mid-level justice principle could resolve a conflict between two more specified mid-level justice principles. Alternatively, the balancing of these mid-level justice principles may differ based upon the unique factual considerations present in the specific justice conflict at issue. *See* Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4 (1992); Bayles, *supra* note 43, at 59.

215. *See, e.g.*, Waldron, *supra* note 214, at 16–17 (discussing how a principle of historical injustice may be overridden by other practical or normative values).

216. *See generally* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009) (arguing that agencies adopting rules for political reasons is not arbitrary and capricious). *But see* Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (2012) (arguing that courts reviewing agency actions should not consider political reasons for agency rules).

217. *See infra* Part III.C.

218. The strength of these arguments will vary based upon the type of action taken. In the context of agencies, the reasons to adopt mid-level justice principles as standing default rules is strongest for legislative-like forms of policymaking, such as planning and rulemaking actions, and weakest for adjudications that are intensely fact-specific and only binding for the party at issue. I thank Ash Ahmed for raising this point.

to the frontline officials who carry out agency policies.[219] Additionally, interested parties know *ex ante* the modes of reasoning the institution will use to resolve justice conflicts, improving the institution's transparency and shaping the types of arguments that interested parties make to the institution. Further, as will be discussed more below, institutions will likely be more resistant to interest group capture and rogue political actors, as they will have to justify any deviations from their adopted mid-level justice principles.[220]

The alternative to this proposal is a lack of standardized guidance for political institutions about how they should consider social justice claims when there are justice conflicts, thereby letting each institution figure it out on its own each time a justice conflict arises in policymaking. In essence, the alternative is the status quo.

However, recent doctrinal changes will make it more difficult for political institutions to reconcile justice conflicts in an ad hoc manner. For example, in the context of congressional delegations, the Supreme Court has cracked down on Congress delegating policymaking to agencies on significant political or economic issues absent clear statutory language through the major questions doctrine (MQD).[221] Recently unmoored from previous doctrinal limits,[222] the MQD now appears to be a roving license for courts to strike down agency policymaking on issues that contain significant social justice claims if such agency action cannot be tied back to existing statutory language.

Despite the A-4 Circular implemented by the Biden Administration, agencies continue to be without substantive guidance about whether and how social justice considerations should be involved in policymaking. When agencies are without clear standards about how to apply normative values, many agencies choose to not publicly discuss such normative values and instead retreat into forms of reasoning that are known to be accepted by reviewing courts, including technocratic reasoning and CBA.[223] Agency reticence to publicly disclose their normative principles creates variability between agencies concerning whether they disclose their analysis of normative values,[224] which is likely driven by agencies having different cultures of litigation risk tolerance rather than any underlying statutory and normative reason for such variation.

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219. On the relationship between political and frontline agency officials, see generally Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 95 S. CAL. L. REV. 731 (2021); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016).

220. *See infra* Part III.C.

221. Biden v. Nebraska, 600 U.S. 477 (2023); West Virginia v. EPA, 597 U.S. 697 (2022); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758 (2021).

222. *See infra* Part III.C (discussing the Court's recent expansion of the MQD).

223. Revesz & Yi, *supra* note 38, at 68; Short, *supra* note 38, at 831–34; Cecot & Hahn, *supra* note 187, at 100–02; Lienke, *supra* note 38, at 8, 30.

224. Short, *supra* note 38, at 780–811 (finding that the ICC, FCC, and FERC differ in how frequently they justify agency actions on public interest rationales).

Alternatively, some scholars argue that agencies only consider normative values strategically in situations where they seek to promulgate a rule regardless of the quantified CBA estimates.[225] While agencies must often engage in normative reasoning given the moral considerations involved in many regulations,[226] agencies risk losing their legitimacy if they are not consistently and publicly reasoning how they weigh normative values.[227] Neither of these alternatives is appealing. This proposal provides an action-guiding method for agencies to conduct normative reasoning concerning social justice claims that is transparent to interested parties and legally justifiable to courts.[228]

One may question why this Article lacks a detailed list of preferred substantive mid-level justice principles. This Article does not provide such a list for multiple reasons. First, as will be discussed more below, specific mid-level justice principles will likely vary between institutions.[229] Therefore, a full cataloguing of preferred substantive mid-level justice principles will likely be both unhelpful and counterproductive given this institutional variation.

Second, political institutions should themselves generate their preferred mid-level justice principles in deliberation with those they represent and other affected persons. As I've previously argued in the context of the administrative state, a theory of democracy grounded in a thick conception of political equality requires policymaking to be structured in a manner that prioritizes the inclusion of persons who will potentially be affected by the policy in question.[230] Political theorist Danielle Allen has recently extended such a position by arguing that democratic governance is required for a political community to attain justice because democratic practices are the only ones by which the citizenry are

225. Daniel H. Cole, *Law, Politics, and Cost-Benefit Analysis*, 64 ALA. L. REV. 55, 57 (2012) ("In reality, CBA inevitably requires value judgments that are inherently subjective, rendering the analyses potentially manipulable for political ends."); William W. Buzbee, *Regulatory Reform or Statutory Muddle*, 5 N.Y.U. ENV'T L.J. 298, 301 (1996) (stating that "the nature of cost-benefit analysis itself . . . provide[s] agencies and regulated entities heightened opportunity to manipulate the rulemaking process").

226. For discussion of how normative values permeate agency policymaking, see Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2074–75 (2018); Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927, 987–88 (2014).

227. *See* Havasy, *supra* note 34, at 812–18 (arguing that the legitimacy of the administrative state hinges, in part, on a reasonableness proviso, which states that potentially affected parties must be able to rationally understand agency decisions); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1254, 1325–26 (2009) (arguing the stronger claim that agency legitimacy hinges, in part, on agency outcomes being rational to all citizens).

228. *See infra* Part III.B (discussing the legal justifiability of agencies adopting mid-level justice principles).

229. *See id.*

230. S*ee generally* Havasy, *supra* note 34. For more detail on theorizing a thick conception of political equality, see CHARLES R. BEITZ, POLITICAL EQUALITY 124 (1989); JOSHUA COHEN, PHILOSOPHY, POLITICS, DEMOCRACY: SELECTED ESSAYS 271 (2009); Christopher S. Havasy, *Radical Administrative Law*, 77 VAND. L. REV. 647, 707–09 (2024); Harry Brighouse, *Egalitarianism and the Equal Availability of Political Influence*, 4 J. POLI. PHIL. 118, 119 (1996); Niko Kolodny, *Rule Over None II: Social Equality and the Justification of Democracy*, 42 PHIL. & PUB. AFFS. 287, 309 (2014).

meaningfully involved in determining the parameters of their own flourishing.[231] Crenshaw's concept of political intersectionality is also important here, as political institutions should have processes for inclusion that are sensitive to the different overlapping forms of subordination faced by different groups within the general category of affected persons.[232]

In short, democratic policymaking itself should guide the adoption of preferred mid-level justice principles, rather than abstract, *ex ante* theorizing unconnected to affected persons. Therefore, the normative desirability of implementing specific mid-level justice principles is likely to vary according to multiple variables, including the institution and affected political communities in question. Instead, the primary purpose of this Article is to make the conceptual point regarding the existence of mid-level justice principles within the concept of justice, advocate that political institutions should adopt them to analyze justice conflicts, and demonstrate how institutions can structure them into policymaking.

This being said, one mid-level justice principle likely to be normatively desirable across political institutions is an egalitarian reparative justice principle.[233] This principle would entail that institutions have a defeasible obligation to resolve justice conflicts in favor of the claim that gives what is owed to groups who have been previously unjustly harmed by the federal government until such groups stand in qualitatively equal relations to groups who have not been harmed.[234] That is to say, when such groups will be affected by a policy issue, political institutions should prioritize the claims of those who have been previously harmed by the American government to help equalize relations

231. DANIELLE ALLEN, JUSTICE BY MEANS OF DEMOCRACY 4, 33 (2023).

232. *See* Crenshaw, *Mapping the Margins*, *supra* note 85, at 1251–52.

233. For more on reparative justice, see generally Chiara Cordelli, *Reparative Justice and the Moral Limits of Discretionary Philanthropy*, *in* PHILANTHROPY IN DEMOCRATIC SOCIETIES 244–66 (Rob Reich, Chiara Cordelli & Lucy Bernholz eds., 2016); Christopher Kutz, *Justice in Reparations: The Cost of Memory and the Value of Talk*, 32 PHIL. & PUB. AFFS. 277 (2004); Rahul Kumar & David Silver, *The Legacy of Injustice: Wronging the Future, Responsibility for the Past*, *in* JUSTICE IN TIME: RESPONDING TO HISTORICAL INJUSTICE 145–58 (Lukas H. Meyer, ed., 2004).

234. *Cf.* Kysar, *supra* note 184, at 240 (advocating for our "constitutional framework" to "better accommodate the need for continuing ethical conversation regarding the status of marginalized or unreachable interest holders"); *id.* at 252 ("The same [liberal] individualism that works to protect preexisting members of a community from being dismissed or maligned as other *works an othering* when applied to those who are not already self-present members of the political community."). In practice, given the difficulties of making qualitative intergroup equality comparisons of equality, it is likely that a reparative justice principle takes a sufficientarian form. *See generally* Elizabeth Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 ETHICS 595 (2007); Harry Frankfurt, *Equality as a Moral Ideal*, 98 ETHICS 21 (1987). As this Article discusses the reparative nature of potential future entitlements, rather than the redistribution of existing entitlements, the strength of Waldron's supersession critique of repairing historical injustice is weakened. Waldron, *supra* note 214, at 16–17.

between citizens.[235] An egalitarian reparative justice principle should be adopted because democratic governance is ultimately grounded in a principle of political equality between persons tied to a conception of joint authorship.[236] Political equality cannot be achieved in theory or practice so long as groups in this country continue to be scarred by the political, social, and economic effects of past state-sanctioned harms because such harms continue to alter their ability to meaningfully participate in democratic policymaking.[237]

Groups likely to be prioritized in policymaking according to this reparative justice principle include Native persons,[238] some minority ethnic and racial communities,[239] and LGBTQ+ communities,[240] among others. For example, Colorado recently harmonized the term "disproportionately impacted communities" across various statutes to include historically marginalized communities,[241] defined as communities who have suffered prior and continuing state-directed harms.[242] This statutory language serves as a template of how communities can be identified under a reparative justice principle, and how such a principle can be implemented across different statutory and regulatory regimes.

Given current equal protection caselaw,[243] institutions adopting explicitly race conscious policies face an uphill hurdle.[244] However, an egalitarian

235. As a theoretical matter, it is not necessarily the case that such groups will be affected in every policy issue. This feature means that this egalitarian reparative justice principle is a mid-level justice principle, rather than a basic justice principle.

236. For political equality justifications of democracy, see sources cited *supra* note 230.

237. *Cf.* Yuvraj Joshi, *Affirmative Action as Transitional Justice*, 2020 WIS. L. REV. 1 (2020) (arguing that affirmative action policies should be considered part of a transitional justice toolkit to reduce structural inequalities during periods of transition).

238. *See generally, e.g.*, JEFFREY OSTLER, SURVIVING GENOCIDE: NATIVE NATIONS AND THE UNITED STATES FROM THE AMERICAN REVOLUTION TO BLEEDING KANSAS (2019); ALEX ALVAREZ, NATIVE AMERICA AND THE QUESTION OF GENOCIDE (2014); GARY CLAYTON ANDERSON, ETHNIC CLEANSING AND THE INDIAN (2014).

239. *See generally, e.g.*, RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1998); MARY FRANCES BERRY, BLACK RESISTANCE, WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA (1971); T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325 (1992).

240. *See generally, e.g.*, JOEY L. MOGUL, ANDREA J. RITCHIE, & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (2011); Brian L. Levy & Denise L. Levy, *When Love Meets Hate: The Relationship Between State Policies on Gay and Lesbian Rights and Hate Crime Incidence*, 51 SOC. SCI. RSCH. 142 (2017); Jonathan Rauch, *The U.S. Should Apologize to Gay People*, ATLANTIC (Jan. 26, 2024), https://www.theatlantic.com/ideas/archive/2024/01/lavender-scare-gay-people-public-service-erasure/677236/ [https://perma.cc/GY8A-7WG3].

241. H.B. 23-1233, 74th Gen. Assemb., Reg. Sess. § 14 (Colo. 2023).

242. *Id.*

243. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 208 (2023) ("[A]cceptance of race-based state action is rare for a reason. Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." (internal citations omitted)).

244. *See* Farber, *supra* note 58, at 34–39 (discussing the legal problems with race-conscious policies to target forms of inequality). Given recent jurisprudence, even private organizations adopting

reparative justice principle could likely withstand constitutional challenge on equal protection grounds given that it is facially race neutral and the prioritization can be linked to past state or state-sanctioned harms against the community in question.[245] In fact, federal agencies have used, and continue to use, economic or social disadvantage to preference applicants for government services and contracts for decades.[246]

In the case of the Navajo petition to build Desert Rock, this reparative justice principle would create weighty *pro tanto* reasons that the EPA should have granted the pollution permit despite the environmental harms that would result, so long as the Navajo Nation has determined building the plant is the best path forward for their community.[247] The strength of the Nation's claim under this reparative justice principle is further strengthened because the U.S. government and multiple corporations made the Navajo lands into extractive spaces in the first place.[248]

One concern with adopting mid-level justice principles may be whether the proposal is radical enough. Many commentators invoke social justice claims to inspire radical changes to law and politics.[249] This criticism states that having

race-conscious reparative efforts may be legally prohibited under 42 U.S.C. § 1981. *See* Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, 103 F.4th 765, 769 (11th Cir. 2024).

245. As Dan Farber recently noted, while the Supreme Court has not squarely addressed the use of race neutral means to redress historic harms, "[racially neutral] regulations designed at least in part to reduce racial disparities in health outcomes seem to face a limited risk of invalidation on constitutional grounds." Farber, *supra* note 58, at 42.

246. *See, e.g.*, 15 U.S.C. § 637(a) (aid to small businesses); 7 U.S.C. § 2279 (farming opportunities training and outreach); H.R. Res. 3684, 117th Cong. (2021) (enacted) (Infrastructure Investment and Jobs Act). *But see* Nuziard v. Minority Bus. Dev. Agency, 721 F. Supp. 3d 431, 448, 473 (N.D. Tex. 2024) (finding the Minority Business Development Agency's equating people from certain ethnicities as "socially or economically disadvantaged" was unconstitutional).

247. *See supra* Introduction. Climate justice advocates might instead argue that the EPA should work with the Navajo to find alternative economic projects that might equally improve the socioeconomic position of the Nation. However, this alternative ignores the Nation's right to Tribal self-determination as part of social justice. *See supra* sources cited note 14.

248. Curley, *supra* note 4, at 12, 32. This being said, the Navajo did subsequently embrace coal. *Id.* at 16. In making this argument about how the reparative justice principle would have resolved the Desert Rock permit issue, it is important to note that the plant would have been located on Navajo land and away from major population centers. The closest city to Desert Rock would have been Farmington, New Mexico, roughly twenty-five miles away. Paskus, *supra* note 1. Meanwhile, the EPA recommends at least a three-mile radius between fossil fuel plants and surrounding communities. *Power Plants and Neighboring Communities*, EPA, https://www.epa.gov/power-sector/power-plants-and-neighboring-communities [https://perma.cc/K3UB-AKPQ]. Situations in which proposed siting decisions create significant justice-based externalities would create a more complex analysis where the normative considerations are likely to vary based upon the factual particulars of the given situation. I thank Alex Klass for raising this point.

249. *See generally* Amna S. Akbar, *Towards a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018). *See also* Welton, *supra* note 26, at 2380 (describing how tools proposed by leading energy justice scholars "are useful tools, to be sure, but hardly radical new ideas for the field"); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 851 (2021) (describing how various social justice movements are "are rooted in a struggle for a radically reconstituted society"); Marina Bell, *Abolition: A New Paradigm for Reform*, 46 LAW & SOC. INQUIRY 32, 45 (2021) (stating that prison abolition "requires a radical restructuring of society and the redistribution of resources, a

political institutions consider mid-level justice principles may be normatively beneficial, but it hardly seems like the radical reformation that many social justice movements aspire to achieve in our society.

There are a few responses to this concern. First, institutions having a standing, public default rule that prioritizes certain mid-level substantive justice principles across the board is a quite radical departure from existing policymaking, which currently only include social justice considerations on an uneven, ad hoc, and nontransparent basis.

Second, while abstract calls for "radical imagination"[250] and "wholesale transformation"[251] are important to shift our conceptions of what is possible, these calls need to be concretized and institutionalized if they are to guide policymakers. This proposal is meant to begin a conversation about how social justice claims should be embedded within the state itself.[252] It's not an either-or situation; both forms of action are needed and can work together synergistically.[253]

A related concern is that while justice conflicts do arise in discrete policy issues, focusing on the conflict masks the underlying structural features that gave rise to the policy choices that generated the justice conflict in the first place.[254] Such structural features of sociopolitical power should not be abstracted from view during policymaking. However, the strength of this concern depends on the particular institution it is directed toward and the actors involved in the policy issue in question. In short, structural critique should integrate agentic and institutional dynamics regarding specific policy issues.[255]

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fundamental transformation in the societal response to 'crime', and a transformation in our collective understanding of several basic concepts such as crime and justice," among other requirements).

250. Akbar, *supra* note 249, at 405.

251. Akbar, *supra* note 249, at 476.

252. Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of The Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 740 (2022) (arguing that "the interventions proposed in this Article could be a step towards a more radical rethinking . . . .").

253. *Id.* ("The question becomes what interventions can we invest in for these [current] prosecutions while we undergo more transformational change?"); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 308 (1987) ("[S]ome incremental changes may bring revolutionary changes closer, not push them further away. Not all small reforms induce complacency; some may whet the appetite for further combat.").

254. For seminal interventions on structural features of domination and oppression, see, for example, PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 277 (2000) (discussing that "[a]n impressive array of U.S. social institutions lie . . . at the heart of the structural domain of power"); Akbar, *supra* note 249, at 454–58 (briefly tracing structural critiques regarding the connections between law and racial capitalism); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993) (explaining that "evolution of whiteness from color to race to status to property as a progression historically rooted in white supremacy and economic hegemony over Black and Native American peoples"); Crenshaw, *Mapping the Margins*, *supra* note 85, at 1245–51 (discussing the concept of "structural intersectionality").

255. *See* Curley, *supra* note 4, at 16–18 (proposing that structural critique should be put into conversation with acknowledging the agency of the specific actors in question).

At the institutional level, the concern is strongest when lodged at Congress, which has the explicit constitutional power to fundamentally reshape our sociopolitical order to address underlying sources of structural hindrances.[256] However, many policymakers don't have the power to substantiate radical transformations of our sociopolitical order absent new or explicit statutory authority.[257] Meanwhile, the ability of agencies to reinterpret old statutes for new regulatory purposes has recently been curtailed by the rise of the MQD, as will be discussed in the next Part.[258] Nevertheless, frontline policymakers need guidance now about what to do when they are faced with justice conflicts given their existing authority. Adopting mid-level justice principles provides one appealing method for how well-meaning policymakers concerned about social justice can institutionalize these concerns.

III.
INSTITUTIONALIZING MID-LEVEL JUSTICE PRINCIPLES

The previous Part advocated that political institutions should adopt mid-level justice principles as standing default rules to evaluate policy issues in which justice claims are present. This Part focuses on the mechanisms for institutions to adopt mid-level justice principles. Part III.A focuses on Congress, Part III.B turns its attention to the executive branch, and Part III.C to agencies. Part III.C further argues that the combination of congressional gridlock, the limits of top-down presidentialism to implement experimental regulations, and the vacillations of executive interest in pursuing social justice means that agencies will likely serve as the primary political institution to utilize mid-level justice

256. *See* U.S. CONST. art. I, § 8 (listing Congress's powers, which include, among other powers, the power to tax, to provide for the general welfare, and to regulate interstate commerce). For a recent interpretation of the General Welfare Clause that permits Congress to legislate regarding any national problem, see generally David S. Schwartz, *Recovering the Lost General Welfare Clause*, 63 WM. & MARY L. REV. 857 (2022).

257. *See* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 145 (2010) ("[W]hen agencies act, they usually do so on the basis of a statutory mandate given to them by Congress, authority that they identify in the action under review."). This argument should not be read to discount the fact that agencies do have some means to address background structural issues in different policy areas. As previously discussed, the Biden Administration began to implement distributional concerns and nonquantifiable normative values into agency policymaking, which could shift underlying power distributions between different groups of affected parties. *See supra* Part II.B. Immigration law scholars have also noted that agency discretion in immigration law is a structural feature of agency policymaking. *See, e.g.*, Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1603, 1632 (2024) (discussing how structural administrative hierarchies and relationships can harm vulnerable populations using DHS as a case study); Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM. L. REV. 2049, 2069–93 (2021) (discussing the problems with DHS discretion in implementing the Immigration and Nationality Act); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 292–94 (2010) (discussing structural concerns with prosecutorial discretion in the immigration context).

258. *See infra* Part III.A.

principles in policymaking.[259] Part III.C.1 discusses the different methods that agencies should adopt to institutionalize mid-level justice principles given the regulatory experimentalism that will be required to implement them. Part III.C.2 then concludes by arguing that both proponents and detractors of cost-benefit analysis (CBA) should find institutionalizing mid-level justice principles appealing.

Part III ends by turning its attention to the latent separation-of-powers issue lurking behind this discussion: Which political institution(s) should be the primary one(s) to make social justice policy? In recent years, the Supreme Court has proclaimed itself not only the institution to decide which other institutions should solve social justice claims, but it has also increasingly anointed itself as the arbiter of social justice. This move should be resisted on both descriptive and normative grounds. Instead, what this Article calls "democratic policymaking" between Congress, the President, *and* administrative agencies should be the primary site to resolve justice conflicts in our society.

A. Congress: Statutory Specificity and the Major Questions Doctrine

As the institution that formally initiates most federal policymaking, Congress has a wide degree of latitude to institutionalize mid-level justice principles. Perhaps the most obvious method is also the most important—Congress could explicitly include preferred mid-level justice principles within statutes and direct other institutions to utilize them when they execute or interpret the statute in question. While Congress often passes generally worded statutes that delegate significant discretion to other institutions, Congress also drafts statutes with specificity to prioritize certain normative values and limit agency discretion.

One prominent example of Congress specifying its preferred mid-level justice principle is the Occupational Safety and Health Act (OSHA).[260] OSHA specifies that the Secretary of Labor "shall set the standard" regarding any toxic materials or harmful physical agents that "most adequately assures . . . that no employee will suffer material impairment of health or functional capacity," and then lists other factors that the Secretary may consider when promulgating rules under the statute.[261] The Act specifies both the pertinent mid-level justice principle ("no employee will suffer material impairment of health or functional capacity"), as well as other factors the Secretary may consider in addition to this mid-level justice principle. In accordance with how mid-level principles operate in practice, these additional factors may modify the strength or justifiability of

259. *See* Glen Staszewski, *Justice by Means of the Administrative State*, 122 MICH. L. REV. 1231, 1240–41 (2024) (arguing the administrative state should be the primary institution to substantiate the principles of justice discussed in ALLEN, *supra* note 231).

260. 29 U.S.C. §§ 651–678. I thank Jon Gould for bringing this example to my attention.

261. *Id.* § 655(b)(5).

the mid-level principle on an individual basis, but do not alter the general strength of the mid-level principle itself.

This proposal may initially appear like an applied justice claim given that it would be placed within specific statutes. However, it must be remembered that a statute can create entire regulatory systems. The Dodd-Frank Act, for example, created a new financial regulation ecosystem across many different policy areas by requiring over a dozen agencies engage in 390 separate regulatory actions.[262]

Congress providing mid-level justice principles that agencies must incorporate would provide a powerful mechanism to substantiate social justice across policy domains. Congress explicitly placing social justice principles in statutes would also provide both political cover and legal ammunition for agencies that are traditionally hesitant to enact regulatory purposes beyond the statutory text.[263]

Congress could even go broader and pass trans-substantive "super statutes" that mandate mid-level justice principles across the board.[264] However, such statutes are less normatively desirable for two reasons. First, such statutes would likely be less useful to agencies given the vast range of policy issues within each agency's jurisdiction and the fact that mid-level justice principles have domain restrictions on the types of policy that they address. Second, such statutes could be harmful if they create new litigation rights for private parties to sue agencies executing their statutes.[265] Such a situation would remove needed agency flexibility to implement mid-level justice priorities in discrete policy areas.

One important legal benefit of Congress explicitly putting mid-level justice principles into statutes is that such language can guide subsequent policymaking and judicial review involving the statute. Regarding agency policymaking, explicitly placing such principles into statutes provides binding requirements that agencies should consider the mid-level justice principle in question during interpretation and regulatory analysis.[266] This serves two benefits. First, it is action-guiding on agencies to prioritize social justice during deliberation and

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262. Lydia Wheeler, *Racing to Cement a Wall Street Legacy*, HILL (Jan. 7, 2016), https://thehill.com/regulation/finance/265021-racing-to-cement-a-wall-street-legacy/ [https://perma.cc/B8N7-3PHZ].

263. *See* Short, *supra* note 38, at 829; Lienke, *supra* note 38, at 8.

264. *See generally* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2000). Note that "super statutes" that mandate mid-level principles broadly are still different from basic justice principles in that the principles would only apply when certain factual or normative considerations are present in the specific policy area, rather than in all policy areas.

265. On Congress creating new private rights of action, see Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1492–1502 (2022); Matthew C. Stephenson, *Public Regulation of Private Enforcement*, 91 VA. L. REV. 93, 98–105 (2005).

266. On Congress's ability to bind agencies through statutory specificity, see LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, THE REGULATORY STATE 127–28 (4th ed. 2024); Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 888 (2015) ("Some regulatory statutes make highly specific authorizations; for instance, an agency's power over particular matters may be vested by a provision relating to a specific program or subagency charged with administering the task.").

helps them to legally justify their chosen action. Second, it provides a mechanism to establish congressional priorities and thereby limit the discretion of recalcitrant agency officials, political appointees, and other executive branch actors if a President is elected who is dismissive of social justice considerations.[267]

On the flip side, explicit statutory language of congressional social justice priorities provides ammunition for those concerned with social justice to threaten or commence litigation if recalcitrant agencies or courts refuse to consider a statutory mid-level justice principle.[268] This feature is all the more important in the wake of *Loper Bright Enterprises v. Raimondo*,[269] which overturned *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[270] Given *Loper Bright*, lower federal courts will likely have increased discretion to interpret statutes according to own their preferred interpretations, given that they no longer have to defer to reasonable agency interpretations of ambiguous statutes. Combined with the rise of ideological forum shopping,[271] judges now have increased room to interpret statutes according to their own ideological assumptions or positions.

However, specific statutory language provides a clear congressional purpose that limits the ability of judges to impute their own ideological priorities during judicial review of agency actions. The mid-level justice principle would then help to frame both questions of agency statutory interpretation, as well as arbitrary and capricious review.[272] If interpretive matters arise, then the mid-level justice principle should inform the court's interpretation of the statute,[273] as well as their review of the agency's thoroughness of their reasoning under *Skidmore* deference.[274] In addition, failure to consider Congress's prioritized

267. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1066–68 (2015) (discussing agency officials' views of themselves as the faithful agent of Congress); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2350 (2001) (advocating for Congress to draft more detailed statutes to restrict presidential administration). For general discussion of the law as a legal constraint on the President, see Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1114–21 (2013).

268. *Cf.* Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1740–49 (2012) (finding public interest groups challenging EPA rulemaking had a high win rate in federal courts).

269. 603 U.S. 369 (2024).

270. 467 U.S. 837 (1984).

271. *See, e.g.*, Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPS. 97, 113 (2021); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 42–51 (2019).

272. 5 U.S.C. § 706(2)(A)–(C) (stating courts should set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

273. *See Loper Bright*, 603 U.S. at 391–92.

274. *See id.* at 388–89.

mid-level justice principle could go to whether the agency's chosen policy was ultimately arbitrary and capricious.[275]

Congress including preferred mid-level justice principles in statutes has the additional benefit of getting around the MQD. In a series of recent cases, the Court has invalidated agency regulations on policy matters that are of "vast economic and political significance," absent a clear congressional signal that it intended to delegate such powers.[276] Congress explicitly placing into a statute *how* it expects agencies to evaluate social justice considerations is exactly such a signal. Meanwhile, because mid-level justice principles have a broad domain and serve as only a default rule for agency decision-making, agencies would retain flexibility to apply their expertise to evaluate the statutorily imposed mid-level justice principle during policymaking.

While explicitly placing mid-level justice principles into statutes is the most obvious method for Congress to substantiate these principles, it is not the only one. Despite the perception of perpetual gridlock, the various duties of congresspersons means that time is an important congressional resource.[277] Consequently, the agenda setting period is exceptionally important in policymaking, given that legislation starts in congressional committees.[278] During this period, congressional committees could adopt specific mid-level justice principles as governing principles for a given session.

This possibility would put interest groups on notice about the normative values the committee will prioritize in the session. Thus, groups that don't have the time or resources to be generally involved in legislative policymaking can instead target specific committees and attempt to persuade the committee that the group's policy issues align with the committee's chosen mid-level justice priorities. Available empirical research shows that business groups have their highest influence over policymaking during the agenda setting period,[279] but public interest groups are considered significant policy actors when they engage

275. Under *State Farm*, the agency should rely on factors Congress intended it to consider and address important aspects of the problem in question, among other requirements. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

276. West Virginia v. EPA, 597 U.S. 697, 716 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

277. One of the leading theories of lobbying is that lobbyists provide an information subsidy to congresspersons, thus "buying" members more time. *See* Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POLI. SCI. REV. 69, 81 (2006) ("It's an unhappy fact that members of Congress do not have the time to vigorously represent all of their constituents on all issues that concern them . . . . That's where lobbyists come in. They enlarge the resources that legislators have to work on behalf of their constituents.").

278. *See* GARY W. COX & MATTHEW D. MCCUBBINS, SETTING THE AGENDA 9–11 (2005) (arguing that the majority party in a legislature cartelizes agenda setting control); Erin L. Rossiter, *Measuring Agenda Setting in Interactive Political Communication*, 66 AM. J. POLI. SCI. 337, 337 (2022) ("[A]genda setting in political interactions is important because their purpose is often to confine the set of issues relevant for downstream stages of politics.").

279. FRANK BAUMGARTNER, JEFFREY M. BERRY, MARIE HOJNACKI, DAVID C. KIMBALL & BETH L. LEECH, LOBBYING AND POLICY CHANGE 257 (2009).

in agenda setting lobbying.[280] Therefore, committees adopting mid-level justice principles could send a credible signal to public interest groups that the committee is concerned with the same matters as the public interest groups, thus spurring these groups to lobby the relevant committee.

Despite the legal and statutory benefits of decisive congressional activity to substantiate mid-level justice principles, the current political reality of congressional inaction means that the President and agencies are more likely to be implementing these principles.[281]

B. The President: Coordination and Prioritization

The President and agencies can structure substantive mid-level justice principles in a number of ways. The first question is at what institutional level should the principles be structured: Should they be implemented uniformly across the executive branch, agency by agency, or something in between? Once this institutional question is answered, what form the mid-level justice principle should take will then become easier to answer. Analyzing this institutional question leads to the conclusion that the President should focus on intra- and interagency coordination measures, while agencies should serve as the primary site to structure mid-level justice principles into policymaking. This Part focuses on the role of the President, and the next will cover agencies.

A President who embraces social justice could establish their preferred substantive mid-level justice principles. Most likely, this would come from the Office of Management and Budget (OMB), or another OMB-like office also within the Executive Office of the President (EOP). Some scholars, such as Richard Revesz, the former director of the Office of Information and Regulatory Affairs (OIRA), have called for an OIRA-like EOP agency to be focused on distributional matters,[282] and establishing mid-level justice principles could be the responsibility of such an office. A top-down approach could also include further amending Circular A-4 or creating new circulars to guide agencies on how to analyze justice conflicts.

The main benefits of a top-down approach are that it provides uniformity and the democratic imprimatur of the President.[283] Given that agencies face limited resources, a host of different priorities, and legally binding statutory mandates, the President directly communicating to agencies the importance of implementing preferred mid-level justice principles would send an important signal for agencies to prioritize the effort. This effect was recently seen in the

280. *Id.* at 11.

281. *See generally* Binder, *supra* note 49 (discussing current congressional gridlock); Sheryl Gay Stolberg & Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom Is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html [https://perma.cc/CAH8-Y4W6].

282. Revesz, *supra* note 187.

283. *See* Cristina M. Rodríguez, *Regime Change*, 135 HARV. L. REV. 1, 107–08 (2021); Kagan, *supra* note 267, at 2332, 2341.

Biden White House's Justice40 Initiative, which attempted to implement a mid-level justice principle by requiring 40 percent of certain federal environmental and infrastructure program benefits to be directed towards disadvantaged communities.[284] In only a few years, the Biden White House pushed over a dozen agencies to begin to implement the initiative and publicly report their findings and progress.[285] Given the amount of planning, research, and coordination required to launch a new initiative that applied to over a dozen separate agencies, this activity demonstrates the benefits of strong central executive leadership.

In addition, the value of uniformity should not be overlooked, given CBA's shortcomings.[286] As previously discussed, the Biden Administration began to address how social justice concerns can enter regulatory analysis, but their approach was largely permissive in nature.[287] OMB spearheading efforts to provide substantive mid-level justice principles would help mitigate some of CBA's limitations, providing agencies legal and political cover and support directly from the President. However, given the potentially wide domains of mid-level justice principles, it is unlikely that OMB could create a group of mid-level justice principles that should be prioritized in policymaking across the board. The result would likely be similar to the new A-4 Circular in that it would be permissively written for agencies.

This permissiveness is also evident in the Biden Administration's Justice40 initiative. In an attempt to be as comprehensive as possible, the White House's screening tool to identify "disadvantaged" communities adopted an exceptionally broad definition of the term, allowing over thirty different community features to constitute "disadvantaged."[288] Although race is surprisingly not included as a factor,[289] factors that were considered include such

284. Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

285. *See, e.g.*, *Justice40 Initiative*, U.S. DEP'T OF TRANSP. (Jan. 2025), https://www.transportation.gov/equity-Justice40 [https://perma.cc/L454-XXWT]; *Justice40 Initiative*, U.S. DEP'T OF ENERGY (Jan. 2025), https://www.energy.gov/justice/justice40-initiative [https://perma.cc/3DWS-QEBA]; *Justice40 at EPA*, U.S. ENV'T PROT. AGENCY (Mar. 18, 2024), https://www.epa.gov/environmentaljustice/justice40-epa [https://perma.cc/7ZBB-NA5B]. To see the full list of covered agencies, see generally *Justice40 Covered Programs List*, WHITE HOUSE (Nov. 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/Justice40-Initiative-Covered-Programs-List_v2.0_11.23_FINAL.pdf [https://perma.cc/SJ8T-EHYL].

286. *See supra* Part II.C.

287. *Id.*

288. *Climate and Economic Justice Screening Tool*, EXEC. OFFICE OF THE PRESIDENT, COUNCIL ON ENV'T QUALITY, https://screeningtool.geoplatform.gov/en/methodology [https://perma.cc/8H8V-9EFP].

289. For criticism of the screening tool not including race as a factor, see generally Delger Erdenesanaa, *Signature Biden Program Won't Fix Racial Gap in Air Quality, Study Suggests*, N.Y. TIMES (July 20, 2023), https://www.nytimes.com/2023/07/20/climate/justice40-pollution-environmental-justice.html [https://perma.cc/ZXD8-T7PH]; Jean Chemnick, *Experts to White House: EJ Screening Tool Should Consider Race*, CLIMATEWIRE (June 1, 2022), https://www.eenews.net/articles/experts-to-white-house-ejscreening-tool-should-consider-race/ [https://perma.cc/5XMG-Y87D].

disparate items as a community having an abandoned mine, having a former defense site, or having traffic at the top 90th percentile of traffic volume.[290]

These types of permissive mandates, if implemented without additional measures, would have at least four potential problems. First, they run the risk of being inadequately action-guiding for agencies, given agencies' limited policy jurisdiction. In short, agencies would not know whether such permissive mandates applied to them and how they should implement them into their own unique regulatory ecosystem. Second, imposing top-down permissive mandates might provoke bureaucratic backlash from career civil servants who are accustomed to previous methods of regulatory analysis.[291] Third, they run the risk of being temporary because executive orders can easily be repealed by the next administration,[292] which may not be as supportive of social justice measures. Finally, a permissive mandate would fail to address the current variability in how transparently agencies discuss nonquantifiable normative values.

For example, in the context of Justice40, each agency could determine for itself how to distribute benefits among each of the over thirty disadvantaged factors and therefore choose to prioritize and deprioritize certain types of disadvantaged communities. This situation could lead to stark variability between which disadvantaged communities benefit from the initiative. In addition to the harms caused by such nontransparent interagency variability, this permissiveness of the Justice40 initiative regarding how agencies could define and prioritize disadvantaged communities could also create new justice conflicts. These new justice conflicts would be created, for example, if an agency is choosing between directing benefits towards a disadvantaged community whose economy previously relied on fossil fuel extraction (abandoned mine and at or below 65th percentile for the low-income factor for disadvantaged under the Justice40 screening tool) or a marginalized community whose air was polluted from such fossil fuel extraction (90th percentile for PM2.5 in the air and at/below 65th percentile for the low-income factor for disadvantaged under the Justice40 screening tool).[293] By taking such a permissive approach to defining disadvantaged communities for the sake of comprehensiveness, the Justice40 initiative did not provide any mechanism for agencies to mitigate justice conflicts. As a result, EOP-led initiatives are unlikely to be enough on their own to institutionalize mid-level justice principles.

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290. *See Climate and Economic Justice Screening Tool*, *supra* note 288.

291. On the ability of civil service officials to frustrate the priorities of political appointees, see Feinstein & Wood, *supra* note 219, at 741–43; Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 142–44 (2018); Michaels, *supra* note 219, at 238–39.

292. *See generally* Sharece Thrower, *To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity*, 61 AM. J. POLI. SCI. 642, 643 (2017) ("[E]xecutive orders are often amended or revoked by subsequent presidents, thus altering or invalidating their content.").

293. *See supra* Part I.C.

This being said, the President should serve important coordination and prioritization functions for implementing mid-level justice principles through OMB.[294] For example, OIRA could collect and publish best practices as they are developed by agencies and coordinate how different agencies should conduct such normative analyses. Therefore, presidential involvement is likely to be helpful to provide guidance, interagency coordination, and political cover to agencies, but it probably will not suffice on its own to provide concrete substantive guidance. Additionally, presidential interest in social justice is likely to vary both within and between administrations depending on a number of variables, including the administration's current policy priorities, whether any external shocks occur during an administration, the President's political party and the party in control of Congress, and the President's specific electoral coalition. As a result of these shortcomings, the next level down from the President—the agency level—is likely to be where the most substantive work can be done to institutionalize mid-level justice principles.[295]

C. Agencies: The Primary Institutions to Adopt Mid-Level Justice Principles

Given that agencies will likely be the primary institution to utilize mid-level justice principles in policymaking, great care should be spent in elucidating how this process should be structured. This care is all the more important given that it is unlikely that agencies will always have explicit guidance from Congress regarding how this process should be done, and agencies no longer receive deference in their interpretations of their governing statutes. The first subsection argues that agencies should first structure mid-level justice principles as guidance documents and then gradually shift to promulgating them as rules once agencies settle on preferred mid-level justice principles and the best analytical practices. The second subsection then demonstrates that adding mid-level justice principles should be appealing to both proponents and detractors of CBA during regulatory analysis as a consistent and principled framework to evaluate normative values that resist quantification.

1. Structuring Mid-Level Justice Principles into Agency Policymaking

Before discussing agency institutionalization of mid-level justice principles, the question must first be asked whether agencies can consider them

294. *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013) (stating that interagency coordination matters are a "key featur[e]" of OIRA's day-to-day operations). *Cf.* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-151, DODD-FRANK ACT REGULATIONS: IMPLEMENTATION COULD BENEFIT FROM ADDITIONAL ANALYSES AND COORDINATION 15 (2011) (describing OMB Circular A-4, as "serv[ing] as best practices for conducting regulatory analysis").

295. Selecting agencies as the primary site of embedding mid-level justice principles also has the epistemic benefit of allowing for policy experimentation between different policymakers. *See generally* Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480 (2008).

at all. As previously discussed,[296] the clearest mechanism for agencies to implement mid-level justice principles is if Congress explicitly wrote them into statutes. In these situations, the statute authorizes or commands the agency to include the identified mid-level justice principle when implementing regulations pursuant to the statute.

However, this proposal would not be a total panacea, given that agencies also administer old statutes that are unlikely to be modified anytime soon.[297] When this occurs, agency consideration of mid-level justice principles depends on the specific statutory language. Some statutes explicitly use the language of justice, such as the widely adopted phrase across utilities law that agencies should adopt rules that are "just and reasonable."[298] Oftentimes, statutes speak in general terms by saying that rules should be adopted "in the public interest."[299] Such statutory language provides textual justification for agencies that want to consider social justice. Concerning judicial review, reviewing courts have historically been deferential regarding agency interpretations of vague congressional purposes, absent explicit textual limitations.[300]

There are several ways that agencies could institutionalize adopting mid-level justice principles. The main distinction between them is the amount of legal "stickiness," or the amount of effort required to alter or repeal the action in question. [301] At the stickiest, agencies could promulgate a rule through notice-and-comment, articulating the mid-level justice principles they will prioritize and the mechanism by which these principles would be folded into regulatory analysis.[302] Agencywide rules have the benefit of publicly spanning the entire agency, thus promoting transparency and uniformity.

The rule would also remain legally binding on the agency until amended or repealed. Thus, the rule would apply across presidential administrations, if a President dismissive of social justice does not think it is worth the political fight to repeal the principle in question.[303] Further, the repeal process would also have

296. *See supra* Part III.A.

297. *See generally* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014).

298. *See, e.g.*, 16 U.S.C. § 824d(a); 15 U.S.C. § 717c(a). *But see* City of Chicago v. Fed. Power Comm'n, 458 F.2d 731, 750 (D.C. Cir. 1971) (stating the terms "just and reasonable" "have no intrinsic meaning").

299. Short, *supra* note 38, at 765 (finding there are over 1,200 public interest standards in federal law).

300. *See* Short, *supra* note 38, at 771.

301. *See generally* Aaron L. Neilson, *Sticky Regulations*, 85 U. CHI. L. REV. 85 (2018).

302. Agencies can enact general policies through informal rulemaking procedures, even if the general policies will later be used in adjudications. *See* Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 482 F. 2d 672, 679–80 (D.C. Cir. 1973).

303. The APA defines "rule making" as an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5); Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 446 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983). Courts refuse agencies the ability to repeal rules through alternative procedures. *See, e.g.*, Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544, 557 (D.C. Cir. 2015); Conservation Nw. v. Sherman, 715 F.3d 1181, 1188 (9th Cir. 2013). The stickiness of agency

to follow notice-and-comment procedure, providing another level of stickiness to the rule on the back end. As a final layer of stickiness, arbitrary and capricious review demands agencies provide reasons to explain why they are changing course and why they chose to repeal the rule, rather than amend it to apply possible alternatives.[304] Recent caselaw, including *Department of Homeland Security v. Regents of the University of California*,[305] has further heightened the standard of review for rescission in situations where affected parties have built up significant reliance interests.[306] However, the downsides of notice-and-comment are well known. It takes a long time to get important regulations through informal rulemaking, which is deleterious for agencies experimenting with new regulatory methods.[307]

Adding mid-level justice principles to agency policymaking will not occur overnight. CBA has taken decades to embed itself into regulatory analysis.[308] If adopted, this proposal marks the beginning of a similar decades-long process to embed other methods of substantive normative reasoning into regulatory analysis. As a result, agencies will require time to deliberate on which mid-level justice principles to adopt and experiment with how such principles should be structured. This fact suggests that agencies should initially adopt less sticky means to structure mid-level justice principles into policymaking.[309]

A promising alternative would be for agencies to first promulgate mid-level justice principles as guidance documents,[310] such as an interpretive rule[311] or a general statement of policy.[312] Promulgating mid-level justice principles through guidance documents should survive judicial review because a guidance document prioritizing a mid-level justice principle as a default rule does not

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rules across administrations explains, in part, the spark of agency activity to finalize rules before a new administration comes into office. *See generally* Nina Mendelson, *Agency Burrowing*, 78 N.Y.U. L. REV. 557 (2003).

304. *See* Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

305. 591 U.S. 1 (2020).

306. *Id.* at 29–32.

307. *See generally, e.g.*, Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

308. *See* ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST 180–201 (2022); Gould, *supra* note 179; Boyd, *supra* note 177, at 972.

309. The regulatory innovation literature generally favors such muti-step, iterative processes of decision settlement when regulatory policymaking enters new policy areas. *See* Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129, 136–39 (2014); Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1842–43 (2011); Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 267 (2007). *But see generally* Nathan Cortez, *Regulating Disruptive Innovation*, 29 BERKELEY TECH. L.J. 175 (2014) (arguing that agencies should proceed with methods of flexible binding regulation).

310. "Guidance documents" refers to the four exceptions to notice-and-comment rulemaking in the APA: general statements of policy, rules of agency organization, interpretive rules, and the good cause exception. 5 U.S.C. § 553 (b)(3)(A)–(B).

311. *Id.*

312. *Id.*

legally bind affected parties to any specific agency outcomes.[313] Alternatively phrased, an agency adopting a mid-level justice principle as a default rule does not, by itself, alter any legal rights or duties of affected persons for any specific policy issues.[314] As previously discussed, the mid-level justice principle provides *pro tanto* reasons for an agency resolving a justice conflict in a certain direction.[315] It does not, on its own, decide policy outcomes because other normative, factual, or political reasons may also be present.[316] An additional benefit of agencies promulgating mid-level justice principles though guidance documents is that guidance is not subject to the APA's requirements for informal rulemaking, thus reducing the amount of time and energy needed during any periods of agency policy experimentation.[317]

Therefore, agencies should proceed in a bottom-up fashion to structure mid-level justice principles into regulatory analysis. First, an agency should begin with quicker and less sticky means to adopt mid-level justice principles, such as guidance documents. While this is being done, the agency can continue to deliberate with interested persons and other institutions about the means, ends, and best practices of structuring such principles into regulatory analysis. Then, as an agency coalesces on its preferred mid-level justice principles and methods, the agency should increase the stickiness by adopting these principles through informal rulemaking. If the agency wants to experiment further before finalizing its preferred mid-level justice principles, then it could adopt experimental rules, sunset provisions, or other mechanisms that allow the agency to test other principles.[318]

One recent agency action that models how agencies could adopt mid-level justice principles is the Federal Energy Regulatory Commission's (FERC) recent policy guidance on permitting hydroelectric projects on Native lands. The Federal Power Act requires businesses to file applications for preliminary

313. Circuit courts disagree on the legal test to determine whether an agency validly promulgated a guidance document. *See* Nadav D. Ben Zur, *Differentiating Legislative from Nonlegislative Rules: An Empirical and Qualitative Analysis*, 87 FORDHAM L. REV. 2125, 2136 (2019); Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 294–97 (2018). This being said, courts and commentators appear to be coalescing around a legal rule based on whether agency intends the proposed guidance document to be binding on affected parties. *See, e.g.*, Azar v. Allina Health Servs., 587 U.S. 566, 582 (2019); Ass'n of Flight Attendants v. Huerta, 785 F.3d 710, 716–17 (D.C. Cir. 2015); Gen. Elec. Co. v. EPA, 290 F.3d 377, 383 (D.C. Cir. 2002). For discussion, see Havasy, *supra* note 34, at 812–18; Levin, *supra* note 313, at 268; Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1373–74 (1992).

314. *Allina Health Servs.*, 587 U.S. at 573 (ruling a Medicare payment change to require notice-and-comment procedures because, in part, it alters the hospitals' right to payments); Havasy, *supra* note 34, at 814 (advocating for courts to further adopt a "unified test" for guidance documents based upon "whether the proposed rule binds private parties to alter their legal rights or obligations").

315. *See supra* Part II.A.

316. *See id.*

317. 5 U.S.C. § 553(b)(3)(A).

318. *See* Gubler, *supra* note 309, at 136–49; Cortez, *supra* note 309, at 182.

permits for hydroelectric power facilities to FERC.[319] In 2003, FERC adopted a policy statement requiring businesses to consult with Tribal nations if the hydroelectric projects disturbed Tribal lands.[320] This policy statement merely gave Native nations consultation rights, which has become customary in public law, as previously discussed.[321] Demonstrating the disconnect between requiring additional procedures and altering the substance of agency actions, FERC nonetheless routinely approved of preliminary permits even if Native nations opposed the project.[322]

In February 2024, FERC rejected multiple permits by announcing a new policy guidance that stated mere Tribal consultation was not enough.[323] Instead, FERC announced it would henceforth deny preliminary permits for hydroelectric projects if the project did not have the affirmative consent of the affected Native nations.[324] By this policy statement, FERC has adopted a principle of social justice—Tribal consent—and applied it to all hydroelectric projects. Currently, this Tribal consent principle is an applied justice principle because it only pertains to one policy domain (hydroelectric facilities) and is outcome decisive. However, with some modification,[325] the principle could be expanded across multiple policy areas where the federal government is involved in economic, community, or housing development projects on Native lands, and thus turned into a mid-level principle.[326]

Given FERC's recent application of this Tribal consent principle, other political institutions should analyze whether the principle should operate as a

319. 16 U.S.C. § 797(f).

320. Policy Statement on Consultation with Indian Tribes in Commission Proceedings, 68 Fed. Reg. 46452-01 (Aug. 6, 2003) (codified at 18 C.F.R. § 2.1c (2023)).

321. *See supra* Part II.B.

322. *See, e.g.*, Navajo Energy Storage Station LLC, 174 FERC ¶ 61,106 (Feb. 18, 2021) (approving a preliminary permit despite Tribal opposition); *see also* Pumped Hydro Storage LLC, 171 FERC ¶ 61,137, para. 18, 22 (2020) (same).

323. *See, e.g.*, Nature and People First Ariz. PHS, LLC, 186 FERC ¶ 61,117 (2024); Nature and People First N.M. PHS, LLC, 186 FERC ¶ 61,118 (2024); TranSource, LLC v. PJM Interconnection, 186 FERC ¶ 61,119 (2019).

324. Nature and People First Ariz. PHS, LLC, 186 FERC ¶ 61,117, para. 8 (2024) ("[W]e are establishing a new policy that the Commission will not issue preliminary permits for projects proposing to use Tribal lands if the Tribe on whose lands the project is to be located opposes the permit.").

325. If the Tribal consent principle is applied across policy domains, then the normative weight of the principle would need to be altered, because FERC's current principle appears to be decisive rather than *pro tanto* in strength. There may be normative reasons outside of the domain of justice that advocates for the principle to be stronger than a typical mid-level justice principle.

326. As an example of how the Tribal consent principle could be applied to other policy areas, consider that a local, county, or state government applying for a grant under the Department of Transportation's Nationally Significant Federal Lands and Tribal Projects Program was required to be sponsored by a federal land management agency or a federally recognized Native Tribe. *See Nationally Significant Federal Lands and Tribal Projects Program*, U.S. DEP'T OF TRANSP. (Oct. 17, 2024), https://www.transportation.gov/rural/grant-toolkit/nationally-significant-federal-lands-and-tribal-projects-program [https://perma.cc/9J2D-V43H]. However, this requirement is weaker than FERC's Tribal consent principle, given that a federal land management agency can sponsor a local, county, or state grant application instead of a Native Tribe.

mid-level justice principle. At the executive level, OIRA, other relevant EOP offices, and agencies could engage in executive-led, interagency coordination to study whether such this Tribal consent principle is attractive to implement across policy domains, and how it could be institutionalized.[327] At the congressional level, multiple relevant committees, such as the House Energy and Commerce Committee, Senate Committee on Indian Affairs, or the Senate Committee on Energy and Natural Resources, could take up the question of whether such a Tribal consent principle should be inserted into future legislation that concerns Native affairs.

One potential criticism of adopting mid-level justice principles is to question whether we want agencies engaging in deliberation about social justice—isn't this proposal turning policymakers into amateur philosophers? The response to this question is simple. Agency officials *already* deliberate on important normative issues, including questions of justice, when they regulate. Given that contemporary statutes are vaguely written and must be applied to discrete regulatory situations, agencies often make important normative decisions to implement statutes.[328]

Instead, the question that should be asked is *how* we want agencies to deliberate about social justice. Currently, agencies face the option of disclosing their normative values and thus risking litigation,[329] or minimizing the nonquantifiable normative dimension of any regulatory analysis and thus providing opaque or inaccurate reasons about why the agency adopted a policy. Given this choice, it is unsurprising that agencies often choose the latter option and publicly minimize the importance of normative considerations to their regulatory analysis.[330] One example of such minimization is the final rule adopted by the Department of Justice (DOJ) to reduce prison rape,[331] which is lauded by CBA proponents as an example of how nonquantifiable benefits should enter into CBA.[332] Even though considerations of human dignity and autonomy are of central importance to justifying the final rule, the word "dignity" appears only six times throughout the entire the final rule, and the final

327. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1155–80 (2012) (discussing the various mechanisms for interagency coordination); Sunstein, *supra* note 294, at 1850 (discussing OIRA's role in interagency coordination).

328. *See supra* text accompanying note 218.

329. Agencies risk litigation when disclosing nonquantifiable normative values relied upon during policymaking because the Court in *State Farm* said that agency reliance on impermissible factors was grounds for agency policy being deemed arbitrary and capricious under the APA. *See* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co, 463 U.S. 29, 42–43 (1983). The potential for such litigation is especially concerning if the governing statutory regime is not explicit regarding the specific factors that the agency can consider during policymaking.

330. *See* Short, *supra* note 38, at 829; Lienke, *supra* note 38, at 8.

331. National Standards to Prevent, Detect, and Respond to Prison Rape: Final Rule, 77 Fed. Reg. 37106 (June 20, 2012) (codified at 28 C.F.R. pt. 115).

332. *See* Posner & Sunstein, *supra* note 182, at 1847–49; Sunstein, *supra* note 183, at 1399–1401.

rule fails to provide any analysis of how dignity actually applies to the policy issue at hand.[333] Further, the entire "Non-Monetizable Benefits" section is less than a page in length over the 128 page final rule.[334] Despite the essential nature of human dignity arguments to justify a rule to reduce prison rapes, DOJ's discussion of normative values receded into the background when it publicly justified the final rule.

This lack of transparency about the importance of normative values during policymaking is concerning for multiple reasons. Most obviously, agencies choosing to hide normative decisions behind other justifications offends the bedrock administrative law principle that agencies must provide their genuine reasons for selecting an outcome.[335] The Court has recently highlighted that agencies cannot provide pretextual reasons for their decisions,[336] putting federal courts on heightened notice to ensure agencies provide the genuine reasons for their actions.[337] In the prison rape example, one likely reason why the final rule downplays nonquantifiable normative values is because the question of how these values were analyzed was elevated from career officials to political appointees, who made a judgement call about how to balance the relevant normative values and whether to proceed with the rule.[338] However, if this hypothesis is accurate, then this entire process of elevation and the ensuing decision-making by the political appointee was hidden from public view and scrutiny.

There is an additional dimension to agencies publicly suppressing the importance of normative values that is not widely discussed. By virtue of what agencies do and how they publicly justify their actions, agencies establish the

333. DEPT. OF JUST., *supra* note 331, at 37111, 37139, 37192 (listing "dignity" only as a value of importance, not explaining why dignity as a value is served through the new rule).

334. National Standards to Prevent, Detect, and Respond to Prison Rape: Final Rule, 77 Fed. Reg. 37106, 37192 (June 20, 2012) (codified at 28 C.F.R. pt. 115).

335. *See* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co, 463 U.S. 29, 43 (1982) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)) (holding that "the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made"); SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) ("If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable.").

336. *See* Dep't of Com. v. New York, 588 U.S. 752, 782 (2019).

337. *See* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1760 (2021) ("By insisting on certain kinds of explanations for purposes of judicial review, therefore, courts can exercise indirect control over the kinds of explanations that will be available to the public . . . . My central argument is that the Roberts Court's most recent APA decisions have seized on this logic and begun to use arbitrariness review in just this way.").

338. *See* Sunstein, *supra* note 294, at 1856–58 (describing how the process of "elevation" is used to solve disagreement in agency decision-making). Decisions made by political appointees are often downplayed in public documents due to the uncertainty in administrative law of whether political decisions are legally acceptable reasons for agency action. For discussion regarding this uncertainty, see generally Short, *supra* note 38. I thank Jennifer Nou for raising this point.

terms of their relationships with persons affected by agency actions.[339] In effect, an agency will signal what it considers important to the citizenry through what is in the rulemaking record and the Federal Register.[340] When agencies downplay the importance of social justice principles to their actions, they signal to affected persons that principles of justice were not important to them. Therefore, the signaling mechanism fails.

However, the agency's signaling only *partially* fails. Sophisticated or well-resourced groups can still learn that justice principles were important to the agency through ex parte communications with agency officials. However, less organized or well-resourced groups, such as public interest and grassroots groups who are likely to promote social justice claims, only receive the incorrect public signal because they do not have the means to privately communicate with agency officials.[341] The result is the depressingly ironic position that groups who want to attack principles of social justice know when agencies are concerned with social justice, while the groups who value social justice are left out of this process and thereby have no means to support the agency when the agency engages in policymaking to enhance social justice claims.

2. Mid-Level Justice Principles and Cost-Benefit Analysis

Importantly, agency adoption of mid-level justice principles should be appealing to both proponents and detractors of CBA.[342] For proponents who seek to address CBA's uneasy relationship with nonquantifiable normative values,[343] agencies could fold additional mid-level justice principles into existing regulatory analysis. The mid-level justice principles could then serve as standing default rules for regulations that involve social justice considerations. In *Michigan v. EPA*,[344] the Court ruled that EPA's refusal to consider the costs of the rule in question was not a reasonable interpretation of a statute under *Chevron* deference because the statute required the EPA to determine whether rules were

339. *See* Havasy, *supra* note 34, at 781–98 (advocating for the relationship between agencies and persons who are potentially affected by agency action to be structured according to certain procedural, substantive, and relational values).

340. On agency signaling, see Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 775–78 (2008); Rui J.P. de Figueiredo, Jr., Pablo T. Spiller & Santiago Urbiztondo, *An Informational Perspective on Administrative Procedures*, 15 J.L. ECON. & ORG. 283, 287–300 (1999); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 258–59 (1987).

341. On the domination of ex parte communications by sophisticated parties like elite lawyers and lobbyists, see generally Adam Candeub & Sherrod Blanker, *Whispering into Princes' Ears: An Empirical Descriptive Analysis of Comments and Ex Parte Meetings at the Federal Communications Commission*, TPRC 46: The 46th Research Conference on Communication, Information and Internet Policy (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3138588 [https://perma.cc/F4B9-HAAU].

342. I thank Josh Macey for pushing me to crystalize this point.

343. *See generally, e.g.*, Sunstein, *supra* note 183; Sunstein & Posner, *supra* note 182.

344. 576 U.S. 743 (2015).

"appropriate and necessary."[345] Given that the Court found such an interpretation unreasonable in light of *Chevron* deference, *Loper Bright* will only increase the ability of judges to require agencies to consider costs in the future. Under current doctrine, the most likely path forward to implement additional mid-level justice principles will involve folding these principles into CBA.[346]

To address mid-level justice principles in the context of CBA, additional analytical detail will be required to explain the relationship between welfarism and other mid-level justice principles. This being said, some CBA proponents have already begun to reconcile the relationship between CBA and other normative values.[347] Including additional mid-level principles would be a natural extension of this work. One question that would need to be resolved is the lexical ordering, or prioritization, between welfarism and other mid-level justice principles. In one version, the other mid-level justice principles could serve as the initial default rule, overridden only if the CBA showed that the quantified net costs outweighed quantified net benefits by a predetermined amount. Alternatively, CBA's decision rule could be the standing default, which would be overridden if the other mid-level justice principle has a certain normative weight in a specific regulation.[348] Either way, this discussion demonstrates that multiple mid-level justice principles can theoretically operate in tandem within the same policy space.

For detractors who wish to minimize CBA's importance,[349] mid-level justice principles provide ammunition for how agencies can reason with normative values in a stable manner without the need for quantification. In doing so, mid-level justice principles rebut two criticisms regarding how regulatory analysis would be conducted if it was unmoored from CBA: the raw politics charge and the lack of consistency charge.

First, some CBA proponents advocate that CBA disciplines the politics of regulatory policymaking, as policymaking absent CBA would become "raw politics" whereby wealthy and well-connected interest groups would win over

345. *Id.* at 751.

346. One way for this synthesis to occur would be for mid-level justice principles to be folded into a program like the Biden Administration's Justice40 initiative, which attempted to measure the costs and benefits of environmental and energy programs for marginalized communities. *See supra* text accompanying note 204.

347. *See generally, e.g.*, Revesz & Yi, *supra* note 38, at 96–97 (discussing how distributional analysis can be analyzed with CBA under an unquantified benefits framework); Cecot, *supra* note 187 (suggesting how CBA can include distributional considerations); Matthew D. Adler & Ole F. Norheim, *Introduction*, *in* PRIORITARIANISM IN PRACTICE 1–36 (Matthew D. Adler & Ole. F. Norheim eds., 2022) (surveying recent work to structure policymaking around a prioritarianism theory of justice).

348. If additional mid-level justice principles are folded into the CBA process, this analysis is akin to a qualitative "break-even analysis," where the agency determines the magnitude of the nonmonetized normative value at which the action in question is justified. *See* OMB CIRCULAR A-4, *supra* note 193, at 47–48; Daniel A. Farber, *Breaking Bad? The Uneasy Case for Regulatory Break-Even Analysis*, 102 CALIF. L. REV. 1469, 1473–80 (2014).

349. *See generally, e.g.*, Ackerman & Heinzerling, *supra* note 183; Farber, *supra* note 58; Heinzerling, *supra* note 190.

disadvantaged groups.[350] This concern is important and is likely to resonate with many social justice advocates.[351] However, this problem is muted if agencies adopt mid-level justice principles as standing default rules given the transparent nature of the adoption and the fact that agencies would have to justify deviations from the principle to other affected persons and institutions.

Second, other CBA proponents support CBA because it gives agencies clear answers.[352] In comparison, moral evaluations appear murky and unstable. However, agency adoption of mid-level justice principles mitigates this charge because it provides agencies with a standing default rule to be applied across different policy domains. Further, both the agency adoption of principles and its application to any specific agency action ideally occurs through an open and deliberative process between the agency and interested parties. Far from being unclear, agency policymaking could become a site of what Rawls calls "reflective equilibrium," a method of moral reasoning based on the refinement of normative principles over time as they are applied to specific problems.[353]

D. The Primacy of Democratic Policymaking

The likely alternative to Congress, the President, and agencies taking the lead on institutionalizing social justice is that the Supreme Court will define substantive social justice principles. In many ways, this predicament describes our current separation-of-powers situation. However, there are weighty historical and normative reasons to fight against the status quo of the Court's apparent primacy on social justice policy.

In recent years, the Supreme Court has increasingly intervened to determine different applied justice claims. On reproductive justice, the Court overruled the forty-nine year precedent of *Roe v. Wade*[354] in *Dobbs v. Jackson Women's Health Organization*[355] after the Court repeatedly narrowed *Roe* in the preceding decades.[356] On racial and economic justice, the Court de facto ended the forty-

350. Cecot, *supra* note 187, at 364–65. *But see* Lienke, *supra* note 38, at 33–35 (discussing how Department of Education's CBA for a borrower defense rule to discharging student loans radically shifted between the Obama and Trump Administrations and critiquing the soundness of both CBAs).

351. I have previously identified that rectifying socioeconomic disparities among interested parties is a matter of primary importance to improving the legitimacy of agency policymaking. Havasy, *supra* note 236 at 712–14; Havasy, *supra* note 34, at 820–21.

352. *See, e.g.*, Cass R. Sunstein, *Cost-Benefit Analysis and the Environment*, 115 ETHICS 351, 354–55 (2005) (arguing for a qualified defense of CBA on the grounds that "[w]ithout some sense of both costs and benefits . . . regulators will be making a stab in the dark . . . . By contrast, the Precautionary Principle approaches incoherence.").

353. RAWLS, *supra* note 27, at 48–49.

354. *See* 410 U.S. 113 (1973).

355. *See* 597 U.S. 215, 292–93 (2022).

356. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (holding that a partial-term abortion ban with no health exception for the mother was constitutional); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (rejecting *Roe*'s trimester-based framework and adopting a framework based on fetal viability); Webster v. Reprod. Health Servs., 492 U.S. 490, 516–17, 522 (1989) (holding that a statute which presumed fetal viability at twenty weeks was constitutional). In the abortion context, Robin

five-year precedent[357] of affirmative action's constitutionality in *Students For Fair Admissions v. Presidents and Fellows of Harvard College*,[358] again after repeatedly narrowing the constitutionality of affirmative action in preceding decades.[359] The Court has recently restricted social justice claims in other policy areas, including environmental and climate justice, where the Court frequently hampered the powers of the EPA and public interest organizations to reduce greenhouse gas emissions and toxic chemicals.[360]

In fact, the pendulum regarding racial justice claims has swung so far that legal scholar Khiara Bridges recently argued that contemporary racial discrimination claims must resemble claims from the Jim Crow Era to be actionable under the Equal Protection Clause.[361] Regarding the scope of racial injustice claims under the Equal Protection Clause, Bridges argued that the Court has inserted this "historical-resemblance test"[362] as its new operating theory.[363] Arguably, the Court's current resistance to racial justice claims is higher than at

West prominently argued to de-constitutionalize abortion rights on reproductive justice grounds, in part, due to the fact that the right to an abortion was "hostage to the whims of the people on the Supreme Court." Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1414 (2009).

357. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978) (holding that a racially diverse student body was a compelling interest to justify racial affirmative action programs and was thus constitutional).

358. 600 U.S. 181, 213–14 (2023) (holding that Harvard's and the University of North Carolina's interests in a racially diverse student body did not satisfy strict scrutiny and were thus unconstitutional).

359. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 311 (2013) (holding that a university receives no deference for the means through which it chooses to attain its diversity goals); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 703, 732 (2007) (holding that schools must demonstrate the use of race-based classifications is "narrowly tailored" to achieve a "compelling government interest," and that "racial balancing" is not a compelling interest); Grutter v. Bollinger, 539 U.S. 306, 308–09, 343 (2003) (holding that racial affirmative action could be used to achieve an undefined "critical mass" of students from historically discriminated groups and expecting that affirmative action programs will no longer be needed in twenty-five years); Gratz v. Bollinger, 539 U.S. 244, 276 (2003) (holding that granting one-fifth of the total points to guarantee undergraduate admission based on race violated the Equal Protection Clause).

360. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 700–01 (2022) (holding that Congress did not grant the EPA authority to devise emissions caps); Michigan v. EPA, 576 U.S. 743, 755 (2015) (holding that the EPA unreasonably interpreted the Clean Air Act by determining the Act did not require the agency to consider costs when deciding how to regulate power plants); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 273 (2009) (holding that the Army Corps of Engineers could issue permits for firms to discharge mining waste with pollutants into lakes, despite potentially violating the Clean Water Act). The Court also stepped to delay a climate change related suit brought by children claiming a civil right to safe air. *See* Umair Irfan, *The Supreme Court is About to Decide if the Children's Climate Lawsuit Can Proceed*, VOX (Oct. 30, 2018), https://www.vox.com/energy-and-environment/2018/10/23/18010582/childrens-climate-lawsuit-supreme-court [https://perma.cc/LF9Z-UF9K].

361. Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 129 (2022) ("The Court seems to be looking for the identical techniques that white supremacists deployed in the days of Jim Crow to disenfranchise [B]lack people."); *see also* Harawa, *supra* note 252, at 705–07.

362. *See* Dorothy E. Roberts, *Racism, Abolition, and Historical Resemblance*, 136 HARV. L. REV. F. 37, 37 (2022) (calling Bridges' theory "the historical-resemblance test").

363. *See* Bridges, *supra* note 361, at 25–26.

any other point in recent memory. This resistance should alarm scholars and practitioners who press social justice claims upon the federal government.

The Court's *recent* hostility to social justice should not be surprising given the Court's *historic* hostility to social justice. As Niko Bowie and Daphna Renan have shown, the Court took a central role to roll back congressional attempts to improve the sociopolitical status of African Americans after the Civil War.[364] More recently, judicial responses to the rise of the environmental justice movement are illustrative. In short, federal courts were uniformly hostile to substantive environmental and racial justice claims brought by litigants. Given the Supreme Court's exceptionally high requirement of showing discriminatory intent for constitutional equal protection claims,[365] environmental justice advocates have faced insurmountable odds when arguing toxic waste facilities sited in predominantly minority neighborhoods constituted constitutional violations.[366]

Advocates faced similarly difficult hurdles pressing environmental justice claims under statutory civil rights causes of action.[367] While early commentators were hopeful for the potential of statutory civil rights claims to advance environmental justice claims,[368] *Alexander v. Sandoval* squashed those dreams when the Court removed the ability of private individuals and organizations to bring disparate impact claims under Title VI.[369] Instead, given that administrative law has primarily advanced procedural justice, as previously

364. Bowie & Renan, *supra* note 44, at 2047–71.

365. Washington v. Davis, 426 U.S. 229, 242, 45 (1976) (holding that "disproportionate impact" is not relevant in equal protection cases and discriminatory purpose must be shown); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977) (holding that "discriminatory intent" must be proven for an act to be deemed unconstitutional under the Fourteenth Amendment). As Jedidiah Britton-Purdy and his coauthors show, this move was part of the Court's larger "Twentieth-Century Synthesis" to protect the economic market from claims of justice and inequality. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework, Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1807 (2020) ("The first key move on the public-law side of the Synthesis was to render material and structural inequality irrelevant to the Fourteenth Amendment's principles of equal protection and personal liberty.").

366. *See* Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U. L. REV. 1327, 1354–56 (2016) ("[T]hose who suffer environmental injustices have little recourse under the Fifth or Fourteenth Amendments of the U.S. Constitution and that the burdens for proving environmental siting decisions or environmental inequities . . . is often too high or simply not attainable."); *see also* Lazarus, *supra* note 25, at 828 (stating "virtually" no civil rights lawsuits have been successful); Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 408–09 (1991) (stating this group will find it "difficult to obtain a judicial remedy" under equal protection). For a rare example of a federal court finding discriminatory intent sufficient for an Equal Protection Clause violation, see generally Fallon Paiute-Shoshone Tribe v. City of Fallon, 174 F. Supp. 2d 1088 (D. Nev. 2001) (finding a city's refusal to give sewer hookups to the Fallon Paiute-Shoshone Tribe, despite giving hookups to non-Tribal individuals, constituted an equal protection violation).

367. Kaiman, *supra* note 366, at 1356–57.

368. Lazarus, *supra* note 25, at 834–42.

369. 532 U.S. 275, 293 (2001) (holding that Title VI does not "display an intent to create a freestanding private right of action" for disparate impact claims).

discussed,[370] social justice advocates pivoted to allege failures in agency processes to indirectly vindicate what were actually substantive social justice claims at their core.[371] In fact this exact situation played out in the Desert Rock saga as New Mexico and Earthjustice alleged procedural failures in their suit against the EPA, after the agency first approved the Navajo Nation's pollution permit.[372] However, procedural remedies have no means to ensure that substantive social justice principles will become embedded within policymaking.[373] As a result, the Warren Court's advancement of social justice looks more like a small blip on the radar once one adopts a widened historical lens when analyzing how substantive social justice claims have fared before the Supreme Court.[374]

There is a further structural point regarding the Court's recent social justice jurisprudence that is even more alarming. Given our system of judicial review,[375] the Court has the power through its separation-of-powers jurisprudence to decide which political institutions should decide which social justice principles will operate in our society. In a sense, this structural question helps determine the substantive content of social justice by determining which institutions decide social justice claims. As Bowie and Renan have demonstrated, this "juristocratic" conception of separation of powers has embedded itself in constitutional law.[376]

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370. *See supra* Part II.B.

371. Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice*,*"* 47 AM. U. L. REV. 221, 250–51 (1997) ("If an agency fails to consider demographic impacts as required under federal or state environmental review statutes, that failure could provide the basis for asserting a claim of distributional injustice. The remedy is somewhat limited, however, because NEPA has been interpreted to impose only procedural, not substantive, requirements.") (internal citations omitted). *See also* Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597, 601 (1996) (criticizing this procedural approach to environmental justice claims).

372. *See supra* Introduction.

373. Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1046–47 (2003) ("It is not clear, however, that procedural requirements enhancing public participation will necessarily lead to substantive decisions that are more responsive to public opinion.").

374. ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 120–58 (2014); Ryan D. Doerfler & Samuel Moyn, *After Courts: Democratizing Statutory Law*, 123 MICH. L. REV. 867, 886 (2025) ("[T]his narrative about the relative progressive credentials of judges fares poorly in view of the Court's actual history."); Jamal Greene, *(Anti)Canonizing Courts*, DAEDALUS, Summer 2014, at 157, 158 (2014) (arguing that the "aggrandizement of courts . . . helps to enable a process of collective neutralization of historic injustice, and racial injustice most particularly").

375. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) (holding that states must obey decisions of the Supreme Court); Martin v. Hunter's Lessee, 14 U.S. 304, 327 (1816) (holding that the Supreme Court has appellate jurisdiction over all cases for which it does not have original jurisdiction); Marbury v. Madison, 5 U.S. 137, 177 (1803) (establishing federal judicial review of congressional statutes). For criticism of American "strong" judicial review, see generally Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

376. Bowie & Renan, *supra* note 44, at 2024–25. For additional criticism of the Court determining the contours of the Constitution's separation-of-powers principles, see generally JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

This argument can now be further extended. Not only is the Court now deciding *which other* political institution should decide social justice claims, it is also increasingly determining that *the Court itself* should arbitrate these claims. The expansion of the major questions doctrine (MQD) is emblematic of this power grab. The MQD first arose as an exception to *Chevron* Step 1 in *FDA v. Brown & Williamson Tobacco Corporation*.[377] Although its legal grounding was debatable,[378] there was arguably intuitive appeal to the idea that courts should pause before accepting agency interpretations that gave the agency broad powers to implement matters likely to be politically salient to Congress, especially if *Chevron* itself was grounded on an implicit delegation theory.[379]

However, the Court has pushed the MQD beyond any doctrinal limits. In *West Virginia v. EPA*, in which the Court invalidated the EPA's attempt to regulate carbon dioxide emissions based on the MQD, Chief Justice Roberts's majority opinion did not even mention *Chevron*.[380] Neither did Justice Gorsuch in his concurrence that attempted to delineate legal standards for when the MQD should be invoked.[381] *Chevron* was also not mentioned when the Court invalidated the Center for Disease Control's (CDC) eviction moratorium[382] and the Secretary of Education's student debt forgiveness plan.[383] In all three cases, *Chevron* was nowhere to be found, despite the fact that it was still good law when these cases were decided.[384]

In each of these cases, the President and agencies were addressing policy issues with important social justice dimensions. For the eviction moratorium, the CDC was attempting to limit the spread of COVID-19 among people who rented housing, which advocates argued promoted health, racial, and economic justice

377. 529 U.S. 120, 159 (2000). The Court previously hinted at a major questions doctrine exception in *MCI Telecommunications Corp. v. AT&T Corp.* when it interpreted that the Telecommunications Act did not give the FCC the authority to make "major" changes to telecommunications policy, though it was not clear on its grounding. 512 U.S. 218, 231–33 (1994).

378. For early criticism, see Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 459–60 (2008); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (Or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 610–16 (2008); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2605–07 (2006).

379. *See* Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 699–700 (2007); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 902–03 (2001).

380. *See* 597 U.S. 697, 706–26 (2022).

381. *See id.* at 706–52 (Gorsuch, J., concurring).

382. Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 766 (2021) (holding that the Director of the Center for Disease Control cannot impose an eviction moratorium due to the COVID-19 pandemic unless Congress "specifically authorize[d] it").

383. Biden v. Nebraska, 600 U.S. 477, 505–06 (2023) (requiring that "Congress speak clearly" to empower the Secretary of Education to cancel federal student loans).

384. *See* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263–64 (2022) (arguing that recent MQD cases have "unhitched the major question exception from *Chevron*").

claims.[385] For the Biden Administration's student debt cancellation, student debt relief advocates framed debt cancellation as a racial and economic justice issue due to its effects on minority and low-income communities and the predatory nature of the student loan industry.[386] And yet, on each occasion, the Court stepped in to rule that the agency did not have the authority to advance these social justice claims.

Currently, it is unclear whether the MQD has any doctrinal mooring or whether it is instead a freestanding limit on the power of agencies.[387] The Court overturning *Chevron* in *Loper Bright* points to the latter.[388] Regardless, what is clear is that *the Supreme Court itself* determines whether an agency action is one of such "vast economic and political significance" that it triggers the MQD.[389] The same move is made under Justice Gorsuch's proposed MQD standards—the Court determines the threshold question of whether the agency action concerns matters of great political significance, a significant portion of the economy, or state law.[390] These are not easily justiciable categories. In essence, the Court has grabbed the power to determine if a policy issue that concerns social justice claims is too important for the President or an agency to address *after the President or an agency has already addressed the issue*.[391] For social justice

385. Eviction moratorium advocates argued the policy would promote these social justice claims given the socioeconomic demographics and rates of homeownership in the United States. *See, e.g.*, Emily A. Benfer, Seema Mohapatra, Lindsay F. Wiley & Ruqaiijah Yearby, *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL'Y, L. & ETHICS 122, 147–62 (2020); Yael Cannon, *Injustice Is an Underlying Condition*, 6 U. PA. J.L. & PUB. AFFS. 201, 253–55 (2020).

386. *See, e.g.*, Chrystin Ondersma, *Borrowing Equality*, 120 COLUM. L. REV. F. 299, 308–09, 313–14 (2020); Aarthi Swaminathan, *Student Loan Cancellation 'Is a Matter of Racial and Economic Justice,' Democratic Congresswoman Ayanna Pressley Argues*, YAHOO! FIN. (Dec. 10, 2020), https://finance.yahoo.com/news/student-loan-cancellation-democrat-ayanna-pressley-argues-205611285.html [https://perma.cc/VYB5-97KL]; Darrick Hamilton & Naomi Zewde, *Promote Economic and Racial Justice: Eliminate Student Loan Debt and Establish a Right to Higher Education Across the United States*, WASH. CTR. FOR EQUITABLE GROWTH (Feb. 18, 2020), https://equitablegrowth.org/promote-economic-and-racial-justice-eliminate-student-loan-debt-and-establish-a-right-to-higher-education-across-the-united-states/ [https://perma.cc/9YMN-JQTA].

387. Commentators debate whether the MQD is a linguistic canon, substantive canon, or something else. *See generally, e.g.*, Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909 (2024) (advocating that the MQD is a linguistic canon); Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV 465 (2024) (advocating that the MQD is a substantive canon); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191 (2023) (arguing the MQD is a clear statement rule).

388. Loper Bright Enter. v. Raimondo, 603 U.S. 369, 410–13 (2024) (holding that "the only way" to ensure principled development of the law is "for the Court to leave *Chevron* behind").

389. Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

390. West Virginia v. EPA, 597 U.S. 697, 742–43 (2022) (Gorsuch, J., concurring).

391. Commentators have pointed out the MQD expands the powers of the Court. *See, e.g.*, Havasy, *supra* note 236, at 718–20; Walters, *supra* note 387, at 51–52; Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 650–51 (2023); Jody Freeman & Matthew Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 13–19 (2023).

advocates, the Court's position here is yet another cruel irony, as the Court in *West Virginia v. EPA*, *Biden v. Nebraska*, and *Alabama Association of Realtors v. Department of Health and Human Services* repeatedly used the MQD to quash attempts by the Biden Administration to address pressing social justice claims.

The Court's recent move to make itself the primary arbiter of social justice claims should be resisted. Instead, democratic policymaking, which includes Congress, the President, *and* agencies, should be the primary institutional forum for decision-making on matters of social justice.[392] Most obviously, congressional, presidential, and administrative policymaking all have better democratic pedigrees than judicial policymaking on matters of social justice. While congressional and presidential democratic superiority may appear self-evident given their electoral nature, agencies engage in extensive formal and informal deliberations with potentially affected persons during policymaking, giving them a nonrepresentative mechanism of democratic legitimacy.[393] Importantly, the democratic superiority of Congress, the President, and agencies to the courts occurs on both procedural[394] and substantive[395] theories of democracy. The strength of these arguments is heightened when the policy issue pertains to social justice. This occurs because of the theoretical centrality of social justice to democratic politics[396] and the increased political salience of social justice matters to the citizenry maximize the likelihood for extensive citizen attention and participation during policymaking.[397] Simply put,

392. *Cf.* Doerfler & Moyn, *supra* note 374, at 917–26 (advocating for congressional and administrative primacy over judicial courts on matters of statutory interpretation to achieve "democratic law").

393. *See* Havasy, *supra* note 34, at 775–97; Seidenfeld, *supra* note 227, at 1541–61.

394. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962) (arguing the counter-majoritarian difficulty makes it difficult to justify judicial review over congressional and executive actions); Waldron, *supra* note 375, at 1386–94 (arguing that process-based reasons favor legislative decision-making over judicial decision-making).

395. *See* Bowie & Renan, *supra* note 44, at 2032–40 (arguing their republican separation of powers theory instills the substantive values of political equality, rule of law, and nondomination into democratic politics); Macey & Richardson, *supra* note 44, at 162 (advocating for the separation-of-powers doctrine to be orientated towards a substantive theory of anti-domination).

396. *See* ALLEN, *supra* note 231, at 4; JEREMY WALDRON, THE DIGNITY OF LEGISLATION 90 (1999) ("It is in the legislature that we or our representatives argue about justice . . . .").

397. Agency policymaking on issues of high political salience often attracts significant amounts of comments. For example, when the FCC proposed to change their net neutrality policies in 2017, 1.3 million unique comments were submitted. Paul Hitlin, Kenneth Olmstead & Skye Toor, *Public Comments to the Federal Communications Commission About Net Neutrality Contain Many Inaccuracies and Duplicates*, PEW RSCH. CTR. (Nov. 29, 2017), https://www.pewresearch.org/internet/2017/11/29/public-comments-to-the-federal-communications-commission-about-net-neutrality-contain-many-inaccuracies-and-duplicates/ [https://perma.cc/SZ3K-PEX7]. For discussion regarding the benefits and downsides of mass commenting, see generally Steven J. Balla, Reeve Bull, Bridget C.E. Dooling, Emily Hammond, Michael Herz, Michael Livermore & Beth Simone Noveck, *Responding to Mass, Computer-Generated, and Malattributed Comments*, 74 ADMIN. L. REV. 95 (2022); Michael Herz, *Fraudulent Malattributed Comments in Agency Rulemaking*, 42 CARDOZO L. REV. 1 (2020); Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-mail*, 79 GEO. WASH. L. REV. 1343 (2011).

democratic policymaking is how we, as a political community, select between competing social justice claims and instill our chosen conception of social justice across our society.[398]

In addition, the practice of utilizing democratic policymaking as the primary site to instill social justice claims has important epistemic benefits compared to judicial policymaking. Contemporary democratic policymaking is a temporally elongated process between many political actors.[399] This elongated process provides multiple benefits. First, it allows communication between the different institutions involved in policymaking. On the congressional side, executive and agency officials are often involved in statutory drafting within their policy jurisdictions.[400] On the agency side, Congress and the President have a number of formal and informal tools to register their preferences with agency officials.[401] This inter-institutional deliberation allows each political institution involved in democratic policymaking to iteratively and frequently communicate their preferences, priorities, and expertise with regard to the content of social justice across institutions.

Second, the extended temporal dimension of democratic policymaking provides additional benefits. Modern policymaking is not the simplistic and atomistic process often taught in Administrative Law, where Congress passes a statute and an agency promulgates a rule to implement that statute.[402] Instead, the entire process of passing a piece of legislation and then having an agency (or multiple agencies) implement various regulations occurs on the order of years. In the case of Dodd-Frank, it took over a year for the President and Congress to settle on a political agreement regarding its contents, draft it, and pass it.[403] The

398. ALLEN, *supra* note 231, at 4 (proposing that "the surest path to justice is the protection of political equality," and that "justice is therefore best, and perhaps only" achieved by means of democracy"); IAN SHAPIRO, DEMOCRATIC JUSTICE 5 (2001) (advocating that the most attractive means to advance social justice is through democratic means). This argument only extends to determining which political institutions should be the *primary* site to substantiate social justice in the polity. It is not a more general criticism of judicial review.

399. JAMES LINDLEY WILSON, DEMOCRATIC EQUALITY 76–79 (2019) (discussing the temporally elongated nature of modern policymaking).

400. *See* Walker, *supra* note 267, at 1005 (finding that nearly 80 percent of drafters reported agencies were involved in technical drafting and 60 percent reported agencies were involved in policy or substantive drafting of statutes).

401. *See* Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1189, 1202 (2018) (discussing efforts to strengthen congressional influence over agencies); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 989–91 (1997) (discussing efforts to strengthen presidential influence over agencies).

402. *See generally* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014). *Cf.* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 911 (2013) ("The foundational scholarship of federal legislation has, for the most part, been based on a generic and stylized account of statutory drafting . . . .").

403. President Obama first proposed to overhaul the financial regulation system in June 2009. WSJ Staff, *Obama's Financial Reform Plan: The Condensed Version*, WALL ST. J. (June 17, 2009), https://www.wsj.com/articles/BL-WB-10771 [https://perma.cc/TBZ6-RU9P]. Dodd-Frank was signed into law on July 21, 2010. Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES

Act then required multiple agencies to implement 390 rules.[404] Five years later, around 30 percent of those rules still had not been finalized by the implementing agencies.[405]

Beneficially, a result of the iterative and ongoing nature of democratic policymaking is that inter-institutional deliberation does not only occur at a single point in policymaking. Rather, there is near-constant communication between the various political actors involved in democratic policymaking. This process allows for inter-institutional deliberation and collaboration over the entire policymaking process, whereby not only the statute itself but also the pre-promulgated and finalized regulations are the result of the collective experience and expertise of various political institutions.[406] Further, persons who are likely affected by the policy in question have multiple different institutional sites to register their concerns, experience, and suggestions, thus providing multiple institutional points to maximize deliberation between institutions and affected persons.

Judicial deliberation provides none of these epistemic benefits. Courts are notoriously secretive while deciding cases.[407] At the Supreme Court, the only means of inter-institutional deliberation between the Court and other political institutions proceeds through the highly formalized means of the briefing and oral argument processes.[408] Extra-record deliberation is widely recognized as unethical due to the unfairness to the litigants before the Court.[409] Meanwhile,

(July 21, 2010), https://www.nytimes.com/2010/07/22/business/22regulate.html [https://perma.cc/ZRD6-L8GE].

404. *See* Wheeler, *supra* note 262.

405. *Id.*

406. For discussion of interagency deliberation during the implementation of statutes, see generally Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745 (2011); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012). Cass Sunstein has pointed to OIRA's interagency communication facilitation role as an OIRA function that is underappreciated. Sunstein, *supra* note 294, at 1840. For discussion of agency involvement in drafting statutes, see generally Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451 (2017); Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377 (2017).

407. *See* Daniel Epps, *The Supreme Court is Leaking. That's a Good Thing.*, WASH. POST (Aug. 3, 2020), https://www.washingtonpost.com/outlook/2020/08/03/supreme-court-leaks-cnn-biskupic-confidentiality/ [https://perma.cc/7RAX-YN9B] (discussing the secrecy rules and norms of the Supreme Court).

408. Multiple justices have highlighted the central importance of the briefs to their deliberations. *See* BRYAN A. GARNER, THE SCRIBES JOURNAL OF LEGAL WRITING 5–6, 101–03, 137 (2010) (Justices Roberts, Thomas, and Ginsburg discussing the importance and influence of good briefs to their decision-making). On the influence of briefs to Supreme Court outcomes, see MORGAN L.W. HAZELTON & RACHEL K. HINKLE, PERSUADING THE SUPREME COURT 127–200 (2022).

409. Federal courts and many state courts have judicial ethics rules regarding ex parte communications. C.T. Harhut, *Ex Parte Communication Initiated by a Presiding Judge*, 68 TEMP. L. REV. 673, 674–75 (1995). The Supreme Court recently adopted a nonbinding code of conduct that says Justices should not engage in ex parte communications regarding a pending case. *See* SUP. CT. OF THE U.S., STATEMENT OF THE COURT REGARDING THE CODE OF CONDUCT 1–2 (Nov. 13, 2023),

all of the diverse opinions and expertise of the various agencies and the President are channeled into the Office of the Solicitor General.[410] While congressional members can submit amici curiae briefs, other executive or administrative institutions are cut off from the Court's deliberative process and the information flow is only one way—from these institutions to the Court. It is not surprising then that the Court often highly stylizes and simplifies the complexities of modern democratic policymaking and the role of each political institution in it.[411] As a result, judicial deliberation is not one that is meant to register the diverse perspectives and information from the various political institutions and interested parties involved in policymaking.

Loper Bright will only further expand the domain of judicial deliberation by allowing courts to refuse to give any deference to agency interpretations that were generated in accordance with the democratic policymaking process. Thus, federal courts now have an increased ability to disregard the interagency and stakeholder communication that typically occurs during the democratic policymaking process to instead insert their own preferred interpretation of the relevant statute. Given these factors, judicial policymaking on matters of social justice appears both normatively and epistemically inferior to democratic policymaking.[412]

CONCLUSION

Over the past decade, there has been a surge of conversation around different types of social justice claims. When these justice claims are discussed together, it is often through an intersectional lens, whereby the different social justice claims point towards the same policy outcome. These social justice claims are important and long overdue.

However, the rise of social justice discussions also raises problems that law has too often ignored. In particular, problems arise when abstract justice claims are translated into specific policy measures. More often than proponents have

https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/5J6X-NBPV].

410. For in-depth discussions regarding the relationship of the Solicitor General and administrative agencies, see generally Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255 (1994); Todd Lochner, *The Relationship Between the Office of the Solicitor General and the Independent Agencies: A Reevaluation*, 79 VA. L. REV. 549 (1993).

411. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 728 (2022) (stylizing the EPA claiming authority to regulate carbon dioxide as meaning that the EPA is arguing that "Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy"); *id.* at 737 (Gorsuch, J., concurring) (arguing the MQD is needed to prevent "a regime administered by a ruling class of largely unaccountable 'ministers").

412. In her recent article, Anya Bernstein persuasively argues that judicial decision-making is also less accountable than agency policymaking, thus further strengthening the normative argument against courts vis-à-vis the democratic policymaking process. *See* Anya Bernstein, *Judicial Accountability*, 113 GEO. L.J. 651, 651, 680–95 (2025).

admitted, concretizing calls for different intersecting social justice claims during policymaking creates justice conflicts. Currently, public law lacks any principled mechanism to analyze and resolve justice conflicts. Instead, political institutions are often engaging by nontransparent case-by-case political decisions, harming affected communities in the process.

Policymakers should analyze justice conflicts by selecting mid-level justice principles to prioritize as standing default rules during policymaking. By providing standing moral reasons to favor certain policy outcomes across intersecting social justice domains, mid-level principles provide stable and transparent default rules for political actors to mitigate justice conflicts when they arise in policymaking. Mid-level justice principles also present an appealing and structured approach to engaging in qualitative normative reasoning, which has thus far perplexed both advocates and critics of cost-benefit analysis.

In addition to the egalitarian reparative justice principle advocated for in this Article, future research will be needed to generate specific mid-level justice principles that should be implemented by different political institutions. This research should be sensitive to the fact that the desirability of specific mid-level justice principles is likely to vary based upon multiple considerations, including the political institution and affected communities in question.

Given the iterative nature of modern democratic policymaking, multiple political institutions can institutionalize mid-level justice principles. Congress could specify certain mid-level justice principles in statutes that implementing agencies should prioritize. The President could issue executive orders specifying how mid-level justice principles should be included during regulatory analysis and coordinate best practices between agencies. Agencies could promulgate rules or guidance documents to establish standing preferences regarding which mid-level justice principles should be prioritized in regulatory analysis. These mechanisms to institutionalize mid-level justice principles would improve the consideration of nonquantifiable values during CBA, provide transparent and consistent default rules to guide policymaking, and insulate the outcomes of democratic policymaking from the Supreme Court's recent expansion of its powers to resolve cases involving social justice claims.