The Experience of Structure

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How do we experience constitutional structure? We understand structure—federalism and the separation of powers—as the ordering of governmental bodies. Rarely, however, do we ask how those structures affect our daily lives. Courts treat this question abstractly, if they address it at all. They assert that federalism and separation of powers create "liberty" for individuals without specifying what that liberty looks like and who enjoys it. They speculate about the values of federalism and the normative virtues of the separation of powers. This is structural reasoning that sounds in human experience, but it is empty, based on little more than conjecture. The consequence is a faulty jurisprudential logic that permits courts to diminish federal rights for specific individuals in favor of uncertain, speculative, and generalized structural benefits that only some enjoy.

In this Article, I make the case for centering a broad base of human experience in structural constitutional law and provide a methodology for doing so. I argue that we experience constitutional structure as a calibration of the role and degree of federal and state governments in our lives. Since we all experience government differently—in ways that often relate to race and wealth—so too do we experience constitutional structure differently. I call this variability experiential pluralism and argue that engaging with this pluralism is essential to the constitutional project of equality. Reasoning from experience, rather than abstract normative theory, requires us to broaden our structural logic so that human experience becomes its primary epistemic source. Doing so both provides the intellectual foundations for a progressive,

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inclusive structural constitutional law and generates new perspectives on otherwise stalled structural issues like state sovereignty and criminal justice.

INTRODUCTION

Federalism and the separation of powers affect everything around us, from the organization of our government to the air we breathe.[1] Constitutional structure shapes our rights,[2] our remedies,[3] and our relationship with our government.[4] We experience constitutional structure in our daily lives.

Yet courts reason about structure abstractly in a way that both ignores and erases human experience. For example, courts speculate that federalism and the separation of powers promote individual liberty[5] without explaining how that liberty manifests or who enjoys it. They assign other speculative benefits to these structures as well, including the "values of federalism" (like increased governmental responsiveness and experimentation)[6] and virtues of the separation of powers (like increased governmental accountability and

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1. *See* Hannah J. Wiseman, *Delegation and Dysfunction*, 35 YALE J. ON REG. 233, 243 (2018) (describing the Clean Air Act as a "classic cooperative federalism scheme"); Robert V. Percival, *Separation of Powers, the Presidency and the Environment*, 21 J. LAND RES. & ENV'T L. 25, 25 (2001) (noting that "[c]ompetition between executive, legislative and judicial actors" has shaped environmental law).

2. *See generally* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000) (describing how the Supreme Court has used federalism and separation of powers to constrain federal antidiscrimination law).

3. *See* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 647 n.166 (1983) ("Local autonomy and other federalism values have often played a role in shaping remedies in constitutional cases . . . ."); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1017 (2004) (noting inconsistency between some judicial remedies and traditional notions of separation of powers).

4. *See* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1109–13 (2014) (describing how federalism permits people to identify differently with different governments).

5. *See* THE FEDERALIST No. 47, at 216 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self[-]appointed, or elective, . . . [is] . . . the very definition of tyranny."); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 525 (1995) ("[T]he Framers saw the separation of powers horizontally, among the branches of the federal government, and vertically, between the federal and state governments, as the best safeguard against autocratic rule."); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 380 ("[T]he most frequently mentioned function of the federal system is the one it shares to a large extent with the separation of powers, namely, the protection of the citizen against governmental oppression—the 'tyranny' that the Framers were so concerned about.").

6. In all, the values of federalism (in addition to greater liberty) loosely include increased sensitivity to the needs of a large and varied society, greater experimentation in the policymaking process, increased competition between governments, and greater opportunity to be involved in the democratic process. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–1511 (1987); Bond v. United States, 564 U.S. 211, 221 (2011).

efficiency).[7] These claims necessarily sound in experience—as the Court has held, the values of constitutional structure accrue to individuals, not institutions[8]—but rely on abstract institutional theory or conjecture about human behavior for support rather than investigation into human life. This reasoning is *experientially empty*, and it is commonplace throughout structural constitutional law.[9]

Empty structural reasoning allows courts and scholars to reason about structure in a way that is disconnected from the world. It provides normative support to constrain federal power—and often federal rights—in the name of protecting individuals through structure without providing justification that structure protects anyone. In this way, empty structural reasoning has allowed the Court to strike down federal rights for specific individuals in favor of uncertain, speculative, or generalized structural benefits that only some enjoy.

Here is an example. In *Gregory v. Ashcroft*, the Court held that the federal Age Discrimination in Employment Act ("ADEA") did not protect Missourian judges aged seventy and older who were otherwise forced by state law to retire.[10] The Court insulated the state from the equality guarantees of the ADEA in part to promote the "promise of liberty" inherent in the struggle between the federal government and the states, as well as the "values of federalism" that attach to strong states.[11] But whose liberty did the Court's holding preserve? What evidence suggests *anyone* experienced liberty as a consequence of *Gregory v. Ashcroft*? The Court provided none. Instead, it drew its conclusions from the institutional theory that federal-state conflict increases liberty, presumably for all.

Consider what the Court *missed* by relying on empty structural reasoning: the opportunity and ability to demonstrate that its structural claim was justified by considering the varied people of Missouri and how their liberties were promoted, or not, by the limitation on federal power. Judges forced by Missouri to retire experienced an infringement, not a vindication, of their liberty. They experienced an infringement of equality as well, having been treated differently from younger judges by the state. Missourians generally experienced the liberty to express their policy preferences through state law

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7. *See* Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 380–91 (2016); Loving v. United States, 517 U.S. 748, 757 (1996).

8. *See infra* Section 0.

9. *See infra* Part I.

10. *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991).

11. *Id.* at 455.

without federal interference, but their liberty to do the same through federal law without state interference was diminished. The emptiness of the Court's structural reasoning thus allowed it to limit the ADEA in the name of individual liberty without providing any reason why the presumed liberty of an unidentified group mattered more than the liberty and equality of senior judges. In other words, the Court traded the concrete equality guarantee of the ADEA for the speculative and uncertain promise of liberty for some.[12]

In this Article, I make the case for a new structural discourse that centers human experience and argue that failing to do so has hurt constitutional law. I contend that we experience constitutional structure as a calibration of the role and degree of the federal and state governments in our lives. Since we all experience government differently—in ways that often relate to race and wealth[13]—so too do we experience constitutional structure differently. I call this variability *experiential pluralism* and propose methods for both gathering experiential information and incorporating it into our constitutional doctrine so that human experience becomes a primary epistemic source for structural analysis.[14]

An experiential approach provides a doctrinal path for a structural constitutional law more attuned to equality, inclusion, and change than it currently is. Whereas our notion of constitutional rights has evolved to gradually include more and more individuals as worthy of constitutional protection, our structural constitutional law has not. To the contrary, equality concerns have fallen to the wayside in structural constitutional law.[15] Engaging in structural debate on an experiential plane would provide guidance in circumstances where structural values are either infringed upon or distributed unequally—as they often are—and provide the foundation for

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12. For many more examples of this dynamic, see *infra* Section 0.

13. A large political science literature describes the ways that government is less responsive to—and often hostile towards—people of color and low-income individuals. *See infra* notes 79–80 and accompanying text.

14. Definitionally, I use the term "experience" to refer to experience that is at least partly recognizable by others; in other words, experience that is in some way objective, rather than purely subjective. Teasing objective and subjective experience apart is not always easy. As Barbara Flagg has noted in a different context, "subjective experience is never truly subjective; the lived experience of real people is always filtered through one objective lens or another. At a minimum, some objective manifestation of subjective experience must be present for that experience to be cognizable by others." Barbara J. Flagg, *The Algebra of Pluralism: Subjective Experience as a Constitutional Variable*, 47 VAND. L. REV. 273, 318 (1994). In this Article, however, I elide this complex relationship between subjective and objective experience, *see id.* at 331, and treat experience as a set of observable facts in the world.

15. *See, e.g.*, Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 95 (2021).

a human-centered perspective that the Court's structural doctrine currently lacks.

Three overlapping intellectual traditions that each centers human experience inform this Article. First is the "humanist" school in the law, which includes scholars like John Noonan, who recognized that "the neglect of the person by legal casebooks, legal histories, and treatises of jurisprudence . . . led to the worst sins for which American lawyers were accountable,"[16] and Robert Cover, who understood that legal interpretation could not be understood in the abstract but rather "takes place in a field of pain and death."[17] Second is scholarship that seeks to uncover the law on the ground and especially how the law affects those who are often overlooked. This includes local government scholars like Michelle Anderson, who has done important work on the experience of the law in poor and unincorporated spaces,[18] Michael Lipsky, who attends to the ways that bureaucracies interact with human beings, often through public service administration at the local level,[19] and Monica Bell, who has recentered policing and public assistance scholarship around the voices of those who experience those institutions.[20] Third is the Critical Race Theory movement, which took as its starting point the experiences of people of color and used those experiences to both build a belief system that acknowledges entrenched power and racial inequalities and also critique other systems that ignore these inequalities. Scholars like Mari Matsuda, who believes that "[t]he method of looking to the bottom [could]

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16. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS, at vii (1976).

17. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986); *see also* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1574–75 (1987). A recent example comes from Matthew Lawrence, who, in an extraordinarily humane and sophisticated article, demonstrates how separation of powers jurisprudence subordinates – and should instead incorporate anti-subordination norms. *See* Lawrence, *supra* note 15, at 86.

18. *See, e.g.*, MICHELLE WILDE ANDERSON, THE FIGHT TO SAVE THE TOWN: REIMAGINING DISCARDED AMERICA (2022); Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095 (2008).

19. *See, e.g.*, MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: THE DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE (1980).

20. *See, e.g.*, Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017); Monica Bell et al., *Laboratories of Suffering: Toward Democratic Welfare Governance*, *in* HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY (Ezra Rosser ed., 2019); *see also* Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403 (2020) (describing ways in which policies that promote access to credit ignore corrosive effects of debt that accompanies those policies, especially on women and African Americans); Joy Milligan & Karen Tani, *Seeing Race in Administrative Law: An Interdisciplinary Perspective*, YALE J. ON REG. NOTICE & COMMENT (Sept. 16, 2020), https://www.yalejreg.com/nc/seeing-race-in-administrative-law-an-interdisciplinary-perspective-by-joy-milligan-and-karen-tani/ [https://perma.cc/9MUG-4ULV].

lead to concepts of law radically different from those generated at the top,"[21] and Kimberlé Crenshaw, whose pathbreaking work on intersectionality helped legal scholars to understand that well-established categories fall apart when we pay attention to the experiences of those who do not always fit neatly into those categories.[22] In addition, this paper draws deeply from the robust literature on constitutional structure.[23]

The Article has two parts: the first critical, the second constructive. Part I critiques structural reasoning as experientially empty. Sections I.A–I.C explain how the Court's structural jurisprudence relies on normativity arguments—about the values and benefits of federalism and the separation of powers—which are speculative and abstract and ignore the diversity of ways that people experience these structures. Section I.D argues that this approach to constitutional structure infects not just constitutional doctrine but also the categories that frame the study of structural constitutional law more fundamentally.

Part II describes how to orient our structural constitutional law toward, rather than away from, human experience. Section II.A introduces the concept of experiential pluralism, which is the simple observation that we all experience constitutional structure differently, and explains how the experience of structure relates to the experience of state and federal governments in our lives. Section II.B offers a methodology for incorporating experiential reasoning into structural analysis. Section II.C argues that doing so is necessary to promote equality and inclusion in structural constitutional law. Section II.D describes how an experiential approach sheds light on two contemporary structural issues: the constitutionality of the Texas Heartbeat Act and the place of plea bargaining in the criminal justice system.

This project is, in a sense, focused on failure and on identifying failure, including my own. I seek to theorize the exclusion of experience from

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21. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 326 (1987); *see also* Bijal Shah, *Deploying the Internal Separation of Powers Against Racial Tyranny*, 116 NW. L. REV. ONLINE 244 (Oct. 29, 2021), https://northwesternlawreview.org/articles/deploying-the-internal-separation-of-powers-against-racial-tyranny/ [https://perma.cc/5A7G-TKL8].

22. *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

23. This includes scholarship on federalism or the separation of powers singly, but especially those ambitious articles that take on both structural features at once. *See, e.g.*, John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1 (2014); Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016); Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014); Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59 (2022).

structural constitutional analysis, but in doing so will inevitably fail to see dissonance between my own ideas and facts on the ground I'm not aware of. But the project of recognizing exclusion from the constitutional conversation and seeking to remedy it is, at the very least, a first step.

I. EMPTY STRUCTURAL REASONING

Normativity arguments flourish in structural constitutional law,[24] in part because there is little textual guidance. As others have noted, the Constitution has no "separation of powers" clause;[25] it simply separates powers. Federalism draws some textual support from the Tenth Amendment but is primarily something the Constitution creates by limiting and enumerating federal power.[26] Consequently, when courts and scholars reason about constitutional structure, they often seek to maximize the normative values of that structure: values like liberty, accountability, responsive government, and democratic experimentalism.[27]

According to the Court, these values accrue to individuals.[28] They are personal, abstract, and loosely defined. "Liberty" can mean different things to different people and has, throughout the history of the United States.[29] Responsive government, policy experimentation, governmental accountability, efficiency, and the other values of structural constitutional law are similarly contingent.[30] Arguments that seek to maximize those values are thus hypotheses about how individuals experience structure.

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24. *See, e.g.*, Huq & Michaels, *supra* note 7, at 380–91 ("In recent cases, the Court has rooted the separation of powers in ideals of liberty, efficiency, democratic accountability, and the often-elusive rule of law."). Scholars do this as well. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–1511 (1987) (describing the values of federalism).

25. E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 508 (1989) ("There is no discrete 'Separation of Powers Clause' in the Constitution. Rather, the term 'separation of powers' is used to encapsulate the general principles of constitutional structure and design that are immanent throughout the Framers' Constitution.").

26. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2205 (2020) ("It is true that there is no 'removal clause' in the Constitution, but neither is there a 'separation of powers clause' or a 'federalism clause.' These foundational doctrines are instead evident from the Constitution's vesting of certain powers in certain bodies." (citation omitted)).

27. *See infra* Section 0.

28. *See infra* Sections 0 (liberty), 0 (federalism), and 0 (separation of powers).

29. *See* ERIC FONER, THE STORY OF AMERICAN FREEDOM, at xiv (1998) (describing the history of liberty as "a tale of debates, disagreements, and struggles rather than a set of timeless categories of an evolutionary narrative toward a preordained goal").

30. *See infra* Sections 0–0.

But as this Part argues, the Court's structural jurisprudence ignores the varied reality of human experience. Rather than consult evidence about how structural outcomes affect individuals—and affect different individuals differently—the Court treats the benefits of structure in an empty way—as little more than tropes, almost. It has created a structural jurisprudence blind to the immense variability of lived experience.

This approach has high stakes and serious costs. For years, the Court has deployed constitutional structure—both federalism[31] and the separation of powers[32]—to constrain federal power. In many of these cases, the Court traded equality for liberty. That is, it constrained (in some form) a federal equality law in the name of structural constitutional principles, often justified by the pursuit of liberty or other normative goals.[33] But the Court has never evaluated its normative claims by reference to specific human experience, instead excluding from its analysis individuals whose lives are not well-described by the old structural tropes—often the very individuals protected by the federal right in the first place. Sections I.A–I.C develop this argument and provide examples.

Empty structural reasoning also pervades the categories scholars use to delimit and organize constitutional structure. Section I.D argues that three categorical distinctions foundational to structural analysis—structure and rights, federalism and localism, and formalism and functionalism—only make sense by ignoring lived experience. Employing those distinctions as organizing principles for structural constitutional law erases human experience from structural discourse.

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31. *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 2–3 (2004); Justin Weinstein-Tull, Federalism, Localism, and the Unknown (draft manuscript on file with author) (describing a multitude of ways that the Court's recent federalism opinions have constrained federal power).

32. *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (striking down the appointment scheme for Consumer Financial Protection Bureau's Director on separation of powers grounds); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (striking down the removal scheme for Public Company Accounting Oversight Board on separation of powers grounds); Clinton v. City of New York, 524 U.S. 417 (1998) (striking down part of the Line Item Veto Act on separation of powers grounds); Bowsher v. Synar, 478 U.S. 714 (1986) (striking down the Balanced Budget and Emergency Deficit Control Act on separation of powers grounds); Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (striking down part of the Immigration and Nationality Act on separation of powers grounds).

33. *See, e.g.*, Shelby Cnty., v. Holder, 570 U.S. 529 (2013) (disabling part of the Voting Rights Act on federalism grounds); Gregory v. Ashcroft, 501 U.S. 452 (1991) (limiting the Age Discrimination in Employment Act on federalism grounds); *Seila Law*, 140 S. Ct. 2183 (limiting the independence of the Consumer Financial Protection Bureau's Director on separation of powers grounds).

A. Liberty and Tyranny

Preserving individual liberty and preventing tyranny are among the primary purposes of our constitutional structure, both federalism and the separation of powers.[34] As John Hill has described, "[n]o concept has exercised so complete a hold on the normative imagination of a people as has the ideal of freedom in the American political consciousness."[35] Liberty and tyranny are notoriously difficult concepts to define,[36] but, for purposes of this article, I will use the definitions that the Framers and the Court have largely adopted and define tyranny as arbitrary and unjustified governmental action,[37] and liberty as "the rights of the individual against arbitrary or unfair treatment at the hands of the government."[38]

The Framers and the Court, both throughout history and in recent years, have relied on judgments about liberty to motivate structural constitutional jurisprudence. As for federalism, Hamilton believed that "[p]ower being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."[39] As a consequence, according to Madison, "a double security arises to the rights of the people."[40] The Court has applied this reasoning liberally in its federalism jurisprudence.[41] As for the separation of powers, Madison believed that "[t]he

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34. *See* Rapaczynski, *supra* note 5, at 380.

35. John Lawrence Hill, *A Third Theory of Liberty: The Evolution of Our Conception of Freedom in American Constitutional Thought*, 29 HASTINGS CONST. L.Q. 115, 115 (2002).

36. *Id.* ("[T]he meaning of liberty as it has been understood by various schools of political thought remains a tangled thicket of overlapping and sometimes contradictory notions."); FONER, *supra* note 29, at xv ("Since freedom embodies not a single idea but a complex of values, the struggle to define its meaning is simultaneously an intellectual, social, economic, and political contest."); David Landau et al., *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1193 (2020) ("Tyranny is a word with many meanings, both historically and today.").

37. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1534 (1991); *see also* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York*,* Printz*, and* Yeskey, 1998 SUP. CT. REV. 71, 80 (1998) ("Broadly speaking, we suggest, 'tyranny' can be understood as the unjustified responsiveness of governmental policies, or actions, or decisions, to particular groups or persons.").

38. *See* Brown, *supra* note 37, at 1513–14.

39. THE FEDERALIST NO. 28, 180–81 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Similarly, Madison believed that because in a federalist government "power surrendered by the people is first divided between two distinct governments, . . . [t]he different governments will control each other, at the same time that each will be controlled by itself." THE FEDERALIST NO. 51, 323 (James Madison) (Clinton Rossiter ed., 1961).

40. THE FEDERALIST NO. 51, 323 (James Madison) (Clinton Rossiter ed., 1961).

41. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991) (noting that "the principal benefit of the federalist system" was "a check on abuses of government power," and concluding

accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed [sic], or elective," was "the very definition of tyranny."[42] The Court has imported these ideas into its separation of powers jurisprudence as well.[43]

The founders thus believed that the purpose of constitutional structure was to protect the liberty of *individuals*, and the Court has promoted that idea as well. In *New York v. United States*, for example, the Court explained that

> [t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."[44]

This idea has also motivated the Court's separation of powers doctrine,[45] as well as its standing doctrine in structural cases.[46]

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that in the struggle between the federal and state governments "lies the promise of liberty"); Printz v. United States, 521 U.S. 898, 921 (1997) (noting that federalism secures individuals against tyranny and abuse from both federal government and states).

42. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). This idea derives from Montesquieu, who believed that "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Charles Louis de Secondat, Baron de Montesquieu, THE SPIRIT OF LAWS, bk. 11, ch. 6 (Thomas Nugent trans., 1873) (1748).

43. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.").

44. New York v. United States, 505 U.S. 144, 181 (1992) (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). The Court revisited this idea more recently in *Bond v. United States*, 564 U.S. 211, 221–22 (2011) (noting that "[f]ederalism secures the freedom of the individual," and that "the individual liberty secured by federalism is not simply derivative of the rights of the States").

45. *See, e.g.*, Bank Markazi v. Peterson, 578 U.S. 212, 238 (2016) (Roberts, C.J., dissenting) ("The separation of powers . . . safeguards individual freedom."); *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring) (noting that "[t]he individual loses liberty in a real sense" when tax policy is created by the executive alone, without sufficient checks from Congress).

46. The Court has held that because the balance of power between states and the federal government promotes individual rights, individuals themselves (and not just states) have standing to challenge the constitutionality of federal laws that infringe upon state sovereignty. *See Bond*, 564 U.S. at 222 ("An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States . . . ."). Similarly, states cannot consent to an increase of federal power that exceeds constitutionally permissible limits

These claims—that structural constitutional law protects us from governmental tyranny—are ultimately claims about the way that we experience structure. The Court does not conceptualize them as experiential, but they do not make sense otherwise. If liberty is not an abstract, institutional idea but rather an individual's right to freedom from arbitrary and tyrannical government, we will each enjoy that freedom, or not enjoy it, by reference to our own individual circumstances, lived experiences, and interactions with government.[47]

The Court does not support its liberty claims by reference to those human experiences, however. In fact, the Court does not support its liberty claims at all. To the contrary, it engages in "ritualistic incantations of Madison and Montesquieu"[48] (for separation of powers) and conclusory "'reminders' regarding the institutional commitments of dual sovereignty"[49] (for federalism).[50] This is empty experiential reasoning.

As an example, take *National Federation of Independent Business v. Sebelius*,[51] where the Court struck down the provision of the Affordable Care Act ("ACA") that required states to increase their Medicaid coverage (largely on the federal government's dime) or risk losing previous federal Medicaid funding.[52] The Court held that the Medicaid expansion "coerced" states into

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because it is individuals, and not just institutions, who benefit from the limits on federal power. *See New York*, 505 U.S. at 182 ("Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").

47. For a more detailed explanation of how this happens, see *infra* Section I0.

48. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 727 (2000).

49. Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2010 (2003).

50. Others have critiqued the connections between constitutional structure and liberty, for other reasons. Joy Milligan, for example, has expressed skepticism that the structural features of our constitution have actually protected vulnerable groups from tyranny. *See* Joy Milligan, *Protecting Disfavored Minorities: Toward Institutional Realism*, 63 UCLA L. REV. 894, 962–63 (2016) ("Have features of American government—like separated powers, the representation of overlapping majorities, and federalism—in fact sheltered vulnerable groups from majority tyranny? . . . [W]e should consider whether our institutions' design truly serves constitutional values—particularly for the disfavored groups who most urgently require constitutional protection."). Erwin Chemerinsky and Richard Briffault have questioned the connection between federalism and liberty specifically. *See* Erwin Chemerinsky, *Does Federalism Advance Liberty?*, 47 WAYNE L. REV. 911, 913 (2001) ("[T]here is no reason to believe that federalism will increase freedom. The traditional explanations for why the vertical division of powers enhances liberty do not withstand scrutiny."); Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1323 (1994) ("Unfortunately, no necessary linkage of federalism and freedom has ever been demonstrated.").

51. Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

52. *Id.* at 575–84.

administering this new federal priority by threatening to pull funding associated with Spending Clause legislation, and was thus unconstitutional.[53]

The Court's coercion holding in *Sebelius* is grounded in unsupported experiential conclusions about individual liberty. The Court acknowledged Congress's power to "secure state compliance with federal objectives,"[54] but noted that this power may not "undermine the status of the States as independent sovereigns in our federal system. That system 'rests on what might at first seem a counter-intuitive insight, that "freedom is enhanced by the creation of two governments, not one."'"[55] Failing to respect state authority in this way would cause "the two-government system established by the Framers [to] give way to a system that vests power in one central government, and individual liberty would suffer."[56]

But why? A claim that the Medicaid expansion diminishes individual liberty requires, at minimum, some description of the people whose liberty would suffer under the Medicaid expansion. (Better, it requires thinking about the many ways that people experience the expansion, as I describe in Part II.) But viewing individual liberty as freedom from arbitrary or unfair government action, it is unclear how the expansion would threaten anyone's liberty. Individuals in states that accepted the expansion could choose to receive government health care at higher income eligibility limits. Individuals in states that declined the expansion might lose their coverage if the federal government stopped funding Medicaid in those states. But that isn't arbitrary or unfair: never has the Court held that Congress could not *terminate* a federal program that wasn't constitutionally required.[57]

The Court could have argued that, as an abstract matter, the Medicaid expansion eroded everyone's liberty by decreasing state power to check the federal government. Accepting as true that concentrating authority to provide health care in the hands of a single government leads to decreased personal liberty—although even that claim is abstract and called into question by research demonstrating how states were able to check federal power from

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53. *See id.*

54. *Id.* at 576.

55. *Id.* at 577.

56. *Id.*; *see also id.* at 536 ("The independent power of the States also serves as a check on the power of the Federal Government: 'By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.'" (quoting Bond v. United States, 564 U.S. 211, 222 (2011)).

57. Chief Justice Roberts implicitly acknowledged in footnotes that repealing Medicaid would face political pressure, not constitutional pressure. *See id.* at 583 n.14.

within the ACA framework[58]—that argument still has a baseline problem: why does the ACA's Medicaid expansion make states too weak to check the federal government, whereas the original Medicaid program did not? The ACA empowered the federal government to terminate its funding if states decided not to expand their Medicaid programs, but who is to say that the prior status quo was the arrangement with the optimal amount of liberty?[59]

Rather than justifying its holding by examining how individuals experience liberty in the context of health care, the Court focused its argument on the experience of *states*. It anthropomorphized states (as it has previously[60]) by using the rhetoric of coercion, even though the idea of coercion only makes sense as applied to individuals or state actors, not states *qua* states. The language of coercion invokes the idea of federal tyranny: a tyrannical federal government coerces. But states themselves possess no liberty interest; as the Court has repeatedly held, individuals do. And the Medicaid expansion did not coerce individuals.

The emptiness of the Court's structural reasoning allowed it to engage in a bait and switch. While claiming to protect individuals via normative arguments about liberty, it instead protected abstract state interests, neglecting any analysis of individuals. This is an important and problematic move: in a doctrinal area where the text of the Constitution provides no guidance,[61] the Court used the credibility of historical, normative arguments

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58. Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare for?*, 70 STAN. L. REV. 1689, 1734–46 (2018) (describing how states that chose to expand their Medicaid programs pursuant to the ACA did so in ways that sometimes pushed back against federal priorities).

59. Scholars have noted the problem of baselines in structural constitutional law. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1993–2005 (2011) (arguing that no historical support exists for an idea of a separation of powers baseline from which to judge deviations); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 623–25 (2001) (casting doubt on the viability of using history, tradition, and current practices as a baseline for separation of powers jurisprudence). Other scholars have evaluated factors that could be baselines. *See* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1359–74 (1984) (proposing history, equality, and prediction as possible baselines for questions of liberty).

60. The Court has anthropomorphized states in its federalism doctrine by speaking about the "dignity" interest of states. *See* Robert A. Schapiro, *States of Inequality: Fiscal Federalism, Unequal States, and Unequal People*, 108 CALIF. 1531, 1596 (2020) ("In its federalism decisions, the Supreme Court sometimes speaks formalistically of the 'dignity' of states, as if states were people . . . . The Court's focus on state dignity seems in contrast to a focus on human dignity."); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 24–28 (2003).

61. Nothing in the Constitution mentions coercion limits on federal Spending Clause legislation.

to justify striking down a law that likely did not infringe on individual liberty.[62]

B. The Values of Federalism

The promise of liberty is not the only normative promise the Court has made about federalism; it has described other "values of federalism" as well. As with liberty, these values sound in the circumstances of human life but the Court has deployed them in an empty way, without reference to human experience. And as with liberty, this approach to constitutional structure gives the Court normative ammunition to constrain federal power in the name of protecting individuals, even when that protection is highly speculative.

In *Gregory v. Ashcroft*, the Court spelled out the values of federalism.[63] It held that federalism

> preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[64]

The Court derived these values from academic literature on federalism, and two foundational articles by Michael McConnell[65] and Deborah Jones Merritt in particular.[66] Those articles in turn largely draw from political

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62. Although this Section uses a federalism example, it is easy to find examples among the separation of powers cases as well. In *Clinton v. City of New York*, 524 U.S. 417 (1998), for example, the Court struck down parts of the Line Item Veto Act on separation of powers grounds. Justice Kennedy's concurrence argues that individual liberty is infringed upon when tax policy is not subject to the usual checks of both the executive and legislative branches. *Id.* at 451 (Kennedy, J., concurring). Justice Breyer's dissent claims that because the Act does not violate abstract separation of powers principles, it does not threaten individual liberty. *Id.* at 496–97 (Breyer, J., dissenting). Both arguments reason about structure in an empty way by failing to engage with how the structural features of the Act would affect the experience of those subject to the policies it changed.

63. Gregory v. Ashcroft, 501 U.S. 452 (1991). The Court reaffirmed these values more recently in *Bond v. United States*, 564 U.S. 211, 221 (2011).

64. 501 U.S. at 458.

65. McConnell, *supra* note 24, at 1491–511.

66. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988).

commentators at the time of the founding[67] and theories of public choice and economics.[68]

According to the Court, these values of federalism accrue to individuals, and not just governments.[69] They are thus guesses about how we experience federalism, based largely on abstract institutional theory. A guess that we will experience state government as more sensitive to our needs than the federal government; a guess that we will experience state government as more accessible to participation; a guess that we will appreciate the experience of state innovation and experimentation; and a guess that we will choose the state government that best fits our needs.

Each claim is highly questionable. Although not framed as experiential criticisms, others have criticized the values of federalism as not reflective of the world we live in.[70] Miriam Seifter has argued that states are not as responsive to their constituents as federalism theory suggests because state bureaucracy is "opaque and byzantine" and largely outside of public view.[71] David Schleicher has argued that the values of federalism rest on incorrect assumptions about voters' knowledge of state government and policy.[72] Michael Livermore has argued that decentralized policy experimentation is as likely to lead to "mischief" as "insight."[73] Erwin Chemerinsky has argued that even if states engage in more policy experimentation than the federal government, it is impossible to determine the proper amount of

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67. *See id.* (drawing from similar sources, including letters from the founders); McConnell, *supra* note 24, at 1492–96, 1500–03, 1507–10 (drawing from the *Federalist* and the *Anti-Federalist*, as well as Alexis de Tocqueville's *Democracy in America*).

68. *See* McConnell, *supra* note 24, at 1494, 1498–500.

69. *See* Bond v. United States, 564 U.S. 211, 222 (2011) ("States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate." (citation omitted)).

70. For a summary of some of these arguments, see Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1588–92 (2019).

71. *See* Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 130–31, 147–48 (2018) ("The public is not deeply engaged with the work of state agencies; in some cases state residents may be scarcely aware of those agencies at all, and state interest groups and media outlets do not serve as educative intermediaries as much as they do at the national level. The public and its intermediaries therefore do not as commonly clamor for particular agency actions or protest agency slack.").

72. *See generally* David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763 (2017).

73. *See* Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 638 (2017).

experimentation[74] and has concluded that "the descriptive accuracy" of the values of federalism "is highly questionable."[75] Charles Tyler and Heather Gerken have argued that "[t]he laboratories account . . . is little more than a campfire story."[76] And Edward Rubin and Malcolm Feeley have argued that to the extent the values of federalism exist, they are actually products of decentralization, not federalism.[77]

As an abstract matter, this research demonstrates that what the Court believes to be the values of federalism do not correspond with the experience of federalism; as a practical matter, that disconnect exists in the specific cases where the Court has invoked the values. In *Bond v. United States*, for example, the Court invoked the values of federalism to justify awarding standing to a criminal defendant to challenge the constitutionality of a federal crime as exceeding Congress's powers.[78] As in *Gregory v. Ashcroft*, described above,[79] however, the Court deployed the values of federalism without even gesturing toward a human justification for why its holding would promote them.

Furthermore, to the extent that federalism does promote the values of federalism, those values are not evenly distributed. David Schleicher points out that the interstate mobility necessary for "voting with your feet" is often out of reach for low-income residents.[80] As for democratic responsiveness, David Butler and David Brookman have found that state legislators are less responsive to requests from Black constituents.[81] These values are thus less likely to help low-income individuals and people of color.

Taking an empty approach to the values of federalism permits the Court to paper over the fact that what it claims as normative benefits for all are, at best, benefits for some.

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74. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 528–30 (1995).

75. *Id.* at 530.

76. Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2190 (2022).

77. Edward L. Rubin & Malcolm M. Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 914–26 (1994); *see also* Briffault, *supra* note 50, at 1327 ("In short, federalism may not be necessary to promote the values it is said to advance.").

78. *See* Bond v. United States, 564 U.S. 211, 221 (2011).

79. *See supra* notes 63–64 and accompanying text.

80. David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 84 (2017) ("[S]tate and local (and a few federal) laws and policies have created substantial barriers to interstate mobility, particularly for lower-income Americans.").

81. *See generally* David M. Butler & David E. Broockman, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AM. J. POL. SCI. 463 (2011).

C. The Virtues of the Separation of Powers

The Court has also set out the normative ends of the separation of powers, although they are not as neatly packaged as those of federalism.[82] In addition to liberty, the Court has identified democratic accountability and governmental efficiency as the benefits of a proper separation of powers,[83] and these benefits guide the Court's structural doctrines. Like liberty and the values of federalism, the virtues of the separation of powers accrue to individuals, and not just institutions.[84] And also like liberty and the values of federalism, the Court reasons about these virtues in empty ways.

As for accountability, the Court has held that a clear separation of powers between branches allows voters to identify the officials responsible for governance, and hold them to account.[85] Conversely, diffusing power between the branches "carries with it a diffusion of accountability . . . . Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure . . . ought really to fall.'"[86] This concern echoes that of Alexander Hamilton, who wrote that "one of the weightiest objections to a plurality in the Executive . . . is, that it tends to conceal faults and destroy responsibility."[87]

Accountability is not an abstract concept. It has meaning only in relation to the connection between two real entities. As Nicholas Stephanopoulos defines it, "[e]lectoral accountability exists when voters reward elected officials for good records by voting for them, and punish officials for bad

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82. *See* Huq & Michaels, *supra* note 7, at 382 (describing the "normative pluralism" that pervades the Court's separation of powers jurisprudence and describing how the Court favors some values over others at different moments).

83. *See, e.g.*, Loving v. United States, 517 U.S. 748, 757 (1996) ("Deterrence of arbitrary or tyrannical rule is not the sole reason for dispersing the federal power among three branches, however. By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable.").

84. The Court has held that "individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations . . . . The structural principles secured by the separation of powers protect the individual as well" as the branches of government. *See* Bond v. United States, 564 U.S. 211, 222 (2011). For this reason, individuals (and not institutions) "have been the principal source of judicial decisions concerning separation of powers and checks and balances." *Id.* at 222–23 (citing cases that make this assertion).

85. *See Loving*, 517 U.S. at 758 ("The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.").

86. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497–98 (2010) (quoting THE FEDERALIST NO. 72, at 476 (Alexander Hamilton) (J. Cooke ed., 1961)); *see* Huq & Michaels, *supra* note 7, at 385–86 (2016) (noting that *Free Enterprise Fund* "incorporated such ex post democratic accountability directly into the jurisprudence").

87. THE FEDERALIST NO. 70, at 405 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

records by voting against them."[88] Accountability can be, and has been, measured empirically.[89]

Yet the Court deploys the idea in an abstract way. As an example, consider the recent separation of powers case *Seila Law LLC v. Consumer Financial Protection Bureau*.[90] In *Seila Law*, the Court considered whether the leadership structure of the federal Consumer Financial Protection Bureau ("CFPB") unconstitutionally infringed upon the President's power to remove administrative officers. The CFPB statutory framework set out that the CFPB would be governed by a single Director, appointed for five years, and removable by the President "only for 'inefficiency, neglect of duty, or malfeasance in office.'"[91]

The majority held that this leadership structure violated the separation of powers by making the CFPB Director "accountable to no one," including the President, who could not remove the Director at will.[92] The Director's five-year term meant that some presidents might not get the chance to appoint a Director at all.[93] This arrangement contravened the "constitutional strategy" of the separation of powers, which, according to the majority, "is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections."[94]

This is empty structural reasoning because it makes unsupported accountability claims that sound in experience. The history of the CFPB provides crucial context. The CFPB was enacted to end abusive lending practices. In the lead-up to the collapse of the housing market, "[h]undreds of thousands of Black and Hispanic families were charged more for mortgages than their white counterparts or steered into expensive subprime loans, even though they qualified for cheaper prime loans."[95] The unusual

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88. Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989, 999 (2018).

89. *See, e.g.*, Edward H. Stiglitz, *Unitary Innovations and Political Accountability*, 99 CORNELL L. REV. 1133, 1136–37 (2014) (noting that "[s]cholars have long considered the issue of 'representativeness' in bureaucracy" and providing examples of empirical studies).

90. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

91. *Id.* at 2193 (quoting 12 U.S.C. § 5491(c)(3)).

92. *Id.* at 2203.

93. *Id.* at 2204.

94. *Id.* at 2203. For an insightful critique of the Court's flawed use of political theory in deciding cases of administrative law, including *Seila Law*, see Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371 (2022).

95. Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 352 (2020).

leadership structure was intended to ensure the CFPB would maintain some independence from the shifting political sentiment caused by changing presidents.[96] To claim that this structure made CFPB less accountable, rather than more, would require understanding why voters voted for the President that they did. Did they seek to blunt the CFPB's impact with their votes, or did they vote comfortable in the knowledge that the CFPB would continue to operate somewhat independent of the winning President? The Court doesn't know. And yet, the CFPB's Director's "insulation from removal" on accountability was "enough to render the agency's structure unconstitutional."[97]

You can see the pattern here. The Court deployed empty reasoning—by failing to specify whose accountability was diminished, and how—to strike down the CFPB's leadership scheme – a scheme which was intended to protect from political pressure the CFPB's mission to improve the lives of minority loan holders. The Court could only reach its structural conclusion by ignoring the accountability experience of those minority loan holders, and instead making abstract claims about accountability.

The second virtue of the separation of powers that the Court has identified is efficiency. In the context of executive power and national security, for example, the Court has emphasized the need for a functional government[98] and the need for the executive to have strong authority over the aspects of foreign relations it is most competent to address.[99] In Appointments Clause cases, the Court has similarly emphasized the need for Congress to be able to create administrative positions free from political interference.[100]

Efficiency often takes a backseat to liberty and accountability in separation of powers cases.[101] And frankly, because efficiency is less obviously about individuals than those values, it is also less obviously hollow. Nonetheless, to the extent that efficiency could affect individuals

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96. *See Seila Law*, 140 S. Ct. at 2210 ("Congress preferred an independent CFPB to a dependent one . . . .").

97. *Id.* at 2204.

98. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.").

99. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting) (arguing that "structural advantages of a unitary Executive are essential" in military and national security matters).

100. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935).

101. In *INS v. Chadha*, for example, the Court held that "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983); *see also* Huq & Michaels, *supra* note 7, at 383 ("The Court has credited [efficiency] at some moments, but elsewhere resisted it.").

through the experience of functional or dysfunctional government, the Court makes no mention of those effects in its holdings—nor does it justify its arguments about institutional efficiency through data or observation.

D. Experientially Empty Categories

The empty nature of our structural reasoning goes beyond the doctrine, however. It underlies the conceptual organization of public law itself. Viewed experientially, this conceptual organization falls apart. This Section examines three basic, categorical distinctions within the realm of constitutional structure: structure and rights, federalism and localism, and formalism and functionalism. Each has shaped the way we think about constitutional structure; each rests on an understanding of the law that ignores human experience.

By ignoring experience, these organizing distinctions also obscure it. Creating categories is a useful—even necessary—way of shaping and defining a theoretical space. It allows us to conduct deep analysis of a set of legal issues without having to continually delimit the foundations of the analysis. But categories also restrict us. It can be difficult to see beyond the categories that we employ.[102] Because experience is not salient to the categories we have chosen as frameworks for understanding constitutional structure, those categories give us no reason to seek out experience.

One of the primary distinctions that organizes constitutional law is that between structure and rights. Here, "structure" refers to the shape of government set out by the Constitution; "rights" refers to individual rights provided by specific amendments, like the First and Second Amendments, the criminal procedure amendments (Fourth, Fifth, and Sixth), and the Reconstruction Amendments (Thirteenth, Fourteenth, and Fifteenth). In this telling, structure organizes government; rights protect individuals from government.

We make the rights/structure distinction in numerous ways. The study of constitutional law at many law schools is divided between first-year courses on structure and advanced courses on rights. Many constitutional law

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102. *See generally* GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987); Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMMC'N & RHETORIC: JALWD 39, 39–40 (2016) ("Although categories are helpful for converting law's messy landscape into a clean linear form, categories can be harmful because they tend to erase important context from the client's story, obscure the power relations that produce category choices, and oversimplify complex problems.").

textbooks similarly separate their content into two major sections on structure and rights.[103] The categorization extends to academic scholarship as well.[104]

Scholars have critiqued this distinction on various grounds. Akhil Amar, for example, has argued that at the time of the founding, structural considerations of "[f]ederalism, separation of powers, bicameralism, representation, amendment . . . were understood as central to the preservation of liberty," and that "rights were intimately intertwined with structural considerations."[105] Heather Gerken has argued that the "division of labor" between rights and structure research is "a mistake" because "[i]t has blinded us to the crucial role that structure plays in furthering integration and fostering debate."[106]

My critique of the rights/structure distinction is different. I believe that the distinction is not just inaccurate because it offers an incomplete analysis; it is perilous because it excludes human experience. Considering rights without structure ignores how structure severely limits the way we experience constitutional rights. Considering structure without rights ignores the experience and purpose of structure in the first place, which was to strengthen individual rights.

On the rights side, take the experience of the Fourteenth Amendment right to equal protection of the laws. As Daryl Levinson has noted, "constitutional rights are inevitably shaped by, and incorporate, remedial concerns."[107] These remedial concerns, in turn, are shaped by the judiciary's worries about structure. Going back to desegregation, the Court has been careful to protect state and local institutions from federal intrusion by limiting the remedies

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103. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991) (noting that "[l]eading constitutional casebooks treat 'the structure of government' and 'individual rights' as separate blocks").

104. *See id.* ("[T]oday's scholars rarely consider the rich interplay between the original Constitution and the Bill of Rights."). The Social Science Research Network also separates its U.S. constitutional law articles into three categories: "Separation of Powers & Federalism," "Rights & Liberties," and "Interpretation & Judicial Review." *See LSN eJournal Offerings*, SOC. SCI. RSCH. NETWORK, https://www.ssrn.com/index.cfm/en/lsn/lsn-ejournals/ [https://perma.cc/Y7Z3-PR2W].

There are too many examples of the distinction in scholarship to list, but one prominent one comes from Jesse Choper, who argued that judicial review should be available for rights disputes, but not structural disputes. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 175 (1980).

105. Amar, *supra* note 103, at 1205.

106. Heather K. Gerken, *Abandoning Bad Ideas and Disregarding Good Ones for the Right Reasons: Reflections on a Festschrift*, 48 TULSA L. REV. 535, 536 (2013).

107. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873 (1999).

available for civil rights violations.[108] The Court has largely been guided by a principle of right-remedy proportionality,[109] and built into that principle is explicit sensitivity to state and local interests.[110]

The Court's understanding of rights and the remedies sufficient to address them has reflected a narrow vision of how people experience institutions rights violations. In *Milliken v. Bradley*, the Court rejected a remedial order desegregating Detroit public schools by requiring busing from outside the Detroit school district because that *inter*district remedy exceeded the *intra*district constitutional violation.[111] The Court reached this conclusion even though the state of Michigan itself had been involved in managing Detroit's segregated school district.[112] Intrusion into state and local policymaking was on the Court's mind as it noted that the interdistrict remedy "would deprive the people of control of schools through their elected representatives."[113] The Court's sensitivity to the state's interest—i.e., to structural constitutional law—limited the plaintiffs' experience of their rights.

Considering structure without rights similarly obscures experience. The Court has repeatedly held that the structural guarantees of the Constitution serve "to protect individual rights."[114] As Rebecca Brown has argued, "the structure of the government is a vital part of a constitutional organism whose final cause is the protection of individual rights."[115] Any structural analysis, then, must be at least partly evaluated by reference to that primary goal, which can only be evaluated experientially.

As an example, take criminal law. The separation of powers in criminal law buttresses individual liberty by requiring all branches of government to

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108. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (noting that district courts should effectuate *Brown*'s desegregation directive not as fast as possible, but "with all deliberate speed"); Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1096–97 (2018) (describing how "[f]rom the late 1970s through the '90s, the Supreme Court circumscribed its previous broad approval" of institutional remedies for civil rights violations).

109. Milliken v. Bradley, 433 U.S. 267, 280 (1977) ("[T]he nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation.").

110. *Id.* at 280–81 ("[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.").

111. *See* Milliken v. Bradley, 418 U.S. 717, 744–47 (1974).

112. *Id.* at 745–56. Despite the state's involvement, the Court held the constitutional violation only existed within the "established geographic and administrative school system." *Id.* at 746.

113. *Id.* at 743–44.

114. *See* United States v. Munoz-Flores, 495 U.S. 385, 395 (1990). To see this argument through history, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1531–40 (1991).

115. *Id.* at 1514.

participate in a federal prosecution:[116] Congress must enact criminal law, the President (via the Department of Justice) must choose to prosecute, and a federal court must try the case.[117] This requirement—for extensive and coordinated governmental action before depriving individuals of their bodily liberty—is not an abstract exercise; it stands between individuals and governmental tyranny.

Because we separate structure from rights, however, we have failed to adequately assess whether the current involvement of the branches in the criminal justice system might abridge individual rights and the experience of liberty. As Rachel Barkow has observed, we have largely regulated the criminal justice system through the Fourth, Fifth, and Sixth Amendments,[118] rather than the separation of powers.[119] This is so despite the fact that the criminal justice system has turned away from trials and toward pleas, altering the balance of powers between the branches by allowing prosecutors "to bypass the check of the judicial process."[120] As I discuss below, an experiential approach to plea bargaining reveals potentially actionable, structural challenges to the criminal justice system.[121]

A second distinction that obscures human experience is that between federalism and localism. The study of federalism has long centered on two players: the federal government and the states. And yet it is local governments, often acting independently from their states, that are the governmental actors closest to people's lives. The federalism/localism distinction is not one that scholars make outright; rather, they reveal it through the consistent omission of the local in federalism analysis. In scholarly accounts of the federal-state balance of powers, it is the exception, rather than the rule, to consider local governments.

Excluding local governments from the study of federalism, however, is an explicit rejection of the experience of structure because we largely experience federalism at the local level. As one report from the now-defunct Advisory Commission on Intergovernmental Relations put it, local governments are

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116. *See In re* Sealed Case, 838 F.2d 476, 488 (D.C. Cir. 1988) (this ensures that "citizens may not be endangered by one branch acting alone"), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

117. *See id.* at 488–89.

118. *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1032 (2006).

119. *See id.* at 1031–34.

120. *Id.* at 1050.

121. *See infra* Section I0.

"federalism's workhorses."[122] In many states, it is local agencies that administer elections,[123] local governments that make zoning decisions,[124] local agencies that issue marriage licenses,[125] local sheriffs and police officers who enforce state laws and local district attorneys who prosecute those laws,[126] local courts that try most judicial disputes,[127] and local jails that imprison people.[128] This is especially true for the poor, who depend on local governments to administer public assistance programs,[129] provide public hospitals that care for those who cannot afford their own treatment,[130] and provide attorneys for criminal defendants who cannot afford their own.[131] It is also especially true for Black and Latino communities, who are disproportionately targeted by police,[132] and, because of a system of mass

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122. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE AND LOCAL ROLES IN THE FEDERAL SYSTEM 11 (1981), https://library.unt.edu/gpo/acir/Reports/brief/B-6.pdf [https://perma.cc/J7SL-U68P].

123. *See* ALEC C. EWALD, THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE 3 (2009) (noting that elections in the United States are "*hyper*federalized," that is, administered at local levels); Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 752–53 (2016) (describing ways that the elections system is decentralized).

124. *See* George E.H. Gay, *State Solutions to Growth Management: Vermont, Oregon, and A Synthesis*, NAT. RES. & ENV'T, Winter 1996, at 13 ("Land use control has traditionally been the prerogative of local government . . . . Virtually every state now has a zoning enabling act authorizing local governments to adopt and implement zoning controls, and more than ten thousand local governments exercise zoning power.").

125. *See* Carl Tobias, *Implementing Marriage Equality in America*, 65 DUKE L.J. ONLINE 25, 39 (2015).

126. *See* W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates - and Why It Should*, 28 GA. ST. U. L. REV. 987, 991 (2013) ("Local officials, not state officials, control the inflow into prison, through decisions about which crimes to investigate, whom to arrest, and whom to prosecute.").

127. *See* Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1039 (2020) ("Local courts are, by far, the most commonly used courts in our justice system.").

128. *See, e.g.*, Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 852 (2017) ("California houses many prisoners—convicted of state crimes and incarcerated pursuant to state authority—in county jails rather than state prisons.").

129. *See id.* at 848 (noting "local governments frequently administer the Food Stamp Act, Medicaid, and programs derived from the Americans with Disabilities Act (ADA) and the Rehabilitation Act").

130. *See* Drew E. Altman & Douglas H. Morgan, *The Role of State and Local Government in Health*, 2 HEALTH AFFS. 7, 12 (1983) (noting the "core" of public health delivery system is composed of "urban public hospitals owned by city or county government" as well as "state-owned university hospitals").

131. *See* Weinstein-Tull, *supra* note 128, at 855 (describing how "[m]any states . . . abdicate" their responsibility to provide criminal defense counsel "to their local governments").

132. *See, e.g.*, Ashley Southall & Michael Gold, *Why 'Stop-and-Frisk' Inflamed Black and Hispanic Neighborhoods: Michael Bloomberg Has Apologized for Overseeing an Expansion of the Controversial Street-Stop Program as Mayor*, N.Y. TIMES (Feb. 19,

incarceration, have disproportionately more experience with local prosecutors and jails.[133]

As I and others have shown, dissolving the federalism/localism distinction allows us to attend to the ways that people actually experience federalism and decentralization, and even changes our understanding of the federal-state balance of power. Election administration, for example, is highly decentralized: although states are ostensibly responsible for most election administration, they in fact delegate much of that responsibility downward.[134] Excluding local governments from an analysis of federal election laws blinds us to vast local noncompliance with those laws.[135] Including local governments in the analysis, by contrast, makes it clear that the reach of federal election laws is dramatically curtailed by state delegation of federal responsibilities to local governments and the political complexities of the state-local relationship.[136] Richard Schragger has observed that, although federalism grants states broad regulatory powers, people actually experience the benefits of federalism as a consequence of policies and economic productivity at the city—rather than state—level,[137] even as "state governments in particular are increasingly defunding, defanging, and seeking to delegitimize cities."[138] This insight suggests that any federalism analysis that excludes the study of local governments ignores how we experience government and, as a consequence, is susceptible to unsupportable conclusions about the proper balance of state and federal power.

Finally, the formalism/functionalism distinction. To bring order to the Court's inconsistent separation of powers jurisprudence,[139] scholars have

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2020), https://www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html ("During his tenure, from 2002 to 2013, police officers stopped and questioned people they believed to be engaged in criminal activity on the street more than five million times. Officers often then searched the detainees—the vast majority of whom were young black and Latino men — for weapons that rarely materialized.").

133. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

134. *See* EWALD, *supra* note 123, at 3.

135. *See* Weinstein-Tull, *supra* note 123, at 759–60 (describing widespread noncompliance with federal election laws at the local level).

136. *See id.* at 771–75 (describing how the state-local relationship bears on noncompliance with federal election laws in context of a set of state responsibilities that have been delegated downward).

137. *See* Schragger, *supra* note 70, at 1541 (arguing that "mismatch between the prevailing sites of productive economic activity and the location of the regulation and redistribution of that economic output subverts one of federalism's stated aims").

138. *Id.*

139. *See, e.g.*, Brown, *supra* note 114, at 1517 ("[O]ne point on which the literature has spoken virtually in unison is no cause for celebration: the Supreme Court's treatment of the

argued that these cases can be coherently divided into two buckets: formalist opinions and functionalist opinions.[140] Formalist opinions favor bright-line rules over standards, text over prudence, and clear separation between the branches.[141] Functionalist opinions favor more flexible standards, governance that adapts to modern times, and interbranch relations that emphasize checks and balances rather than strict separation.[142] Some have critiqued the formalist/functionalist distinction,[143] but, as Aziz Huq and Jon Michaels have observed, "efforts to transcend the dichotomy are framed largely as variations of that debate."[144] The formalist/functionalist distinction continues to "dominate discussions of the separation of powers."[145]

Although the formalist/functionalist distinction provides an appealing framework for debate, it excludes meaningful conversation about experience. This omission is problematic because it obscures the simple observation that both formalist and functionalist arguments are grounded in largely unsupported observations about the normative ends of the separation of powers. Formalist opinions tend to argue that these values arise from strict separation between the branches.[146] Functionalist opinions, by contrast, tend

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constitutional separation of powers is an incoherent muddle."). As Brown has noted, when it comes to separation of powers cases, the Court "has adopted no theory, embraced no doctrine, endorsed no philosophy, that would provide even a starting-point for debate." *Id.* at 1518.

140. For an early exposition of this distinction, see Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) ("The Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened.").

141. *See generally* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998); Manning, *supra* note 59, at 1950.

142. *See* Manning, *supra* note 59, at 1952.

143. *See, e.g.*, Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After* Noel Canning, 64 DUKE L.J. 1513, 1545 (2015) (arguing that both formalism and functionalism "routinely fail to yield workable solutions to difficult separation-of-powers problems").

144. *See* Huq & Michaels, *supra* note 7, at 354–55.

145. *Id.* at 355.

146. See, for example, Chief Justice Roberts's explicitly formalist dissent in *Wellness International Network, Ltd. v. Sharif*, 575 U.S. 665, 688 (2015) (Roberts, C.J., dissenting) (noting he "would not yield so fully to functionalism"). Roberts was motivated by a desire to protect liberty: "[b]y diffusing federal powers among three different branches, and by protecting each branch against incursions from the others, the Framers devised a structure of government that promotes both liberty and accountability." *Id.* at 695. Delegations of authority to bankruptcy courts, like the ones at issue in that case, "threaten liberty and thwart accountability by empowering entities that lack the structural protections the Framers carefully devised." *Id.* at 701.

to argue that they arise from situation-specific checks that the branches impose on each other.[147] Evaluating those arguments requires more closely examining what each means by "liberty" and the other virtues which, as discussed above, involves better understanding experience.

For dueling formalist and functionalist opinions that illustrate the experiential emptiness of the distinction, take *Clinton v. City of New York*,[148] in which the Court struck down the line-item veto.[149] Justices Kennedy and Breyer staked out formalist and functionalist positions, respectively. Justice Kennedy wrote that the separation of powers protects individuals,[150] but his argument that the line-item veto infringed upon individual liberty was an abstract, conclusory one: "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."[151] Justice Breyer agreed that the separation of powers protects individual liberty[152] but argued instead that

> [t]he Act does not undermine what this Court has often described as the principal function of the Separation of Powers, which is to maintain the tripartite structure of the Federal Government—and thereby protect individual liberty—by providing a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[153]

This is an experientially empty dispute, emblematic of the general disagreement between formalists and functionalists: ultimately about the human experience of structure but played out through the abstract and speculative language of institutional design. Each side claims fidelity to the virtues of the separation of powers, and each has an unsupported theory about how best to vindicate those values.

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147. See, for example, Justice White's classic dissent in *INS v. Chadha*, 462 U.S. 919, 968, 978 (1983) (White, J., dissenting) (arguing that legislative veto in statutory immigration scheme is functionally identical to bicameralism requirement of Constitution and preserves liberty interests intended by separation of powers as well as efficiency and accountability values).

148. Clinton v. City of New York, 524 U.S. 417, 421 (1998).

149. *Id.*

150. *Id.* at 452 (Kennedy, J., concurring) ("The citizen has a vital interest in the regularity of the exercise of governmental power. . . . By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.").

151. *Id.* at 450.

152. *Id.* at 496–97 (Breyer, J., dissenting) (stating that since policies at issue "comply with Separation of Powers principles," they do not "threaten the liberties of individual citizens").

153. *Id.* at 482 (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)).

II. REASONING FROM EXPERIENCE

Structural reasoning that rejects experience thus both shapes the doctrine and also constrains our thinking. It allows courts to cloak their opinions in abstraction. The opposite approach—reasoning from experience—grounds constitutional structure in the lives of individuals. It embraces the variability of individual experience and would encourage judges to grapple with the ways that their structural holdings affect people differently.

This Part describes how we can reason about constitutional structure from experience and what theoretical and doctrinal implications result. In Section II.A, I argue that we experience structure as a means of calibrating the role that government plays in our lives. Because our varied life circumstances means that we all experience government differently, we also experience constitutional structure differently. I call this collective *experiential pluralism*, and, in Section II.B, I describe both where that pluralism belongs within structural constitutional law and how to embrace it. In Section II.C, I argue that recognizing experiential pluralism is necessary for the constitutional project of equality. In Section II.D, I argue that key structural doctrines look different when we incorporate experience and discuss two: federalism and state sovereignty, and separation of powers and plea bargaining.

A. Experiential Pluralism and Governmental Calibration

Constitutional structure constrains government by dividing constitutional powers.[154] Federalism splits *governmental* power by permitting the federal government to act only according to its "enumerated powers."[155] Everything else is left to the states.[156] The separation of powers splits *federal* power by limiting the powers possessed by each branch and requiring interbranch cooperation for the federal government to exercise its most significant powers.[157] Given this aim, most structural controversies litigate whether a

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154. *See* Levinson, *supra* note 23, at 92–93 ("The central organizing principle of the structural constitution is that power should be divided, diffused, or balanced to prevent the 'accumulation of all powers . . . in the same hands' and hence 'tyranny.' By dividing power between the states and the national government, among the branches of the national government, . . . the constitutional structure of government is supposed to create the very opposite of tyranny: a political system in which power is spread broadly among many different hands.").

155. *See* U.S. CONST. art. I, § 8 (listing federal powers).

156. *See* U.S. CONST. amend. X (reserving non-federal powers to the states and the people).

157. *See In re* Sealed Case, 838 F.2d 476, 488 (D.C. Cir. 1988) ("The Constitution . . . carefully distributes the various responsibilities for criminal prosecution among

particular government or government official exceeded its powers. Sometimes the government in question is the federal government[158] or one of its branches,[159] or a state or state official[160]—but the issue is similar: whether the governmental actor has exercised power permissibly.

Structural doctrines thus determine the extent to which the government may act. They calibrate the reach and form of federal power in our lives. In federalism cases, the Court is calibrating the balance of state and federal power. State and local law is the default in the absence of federal law;[161] when constitutional structure constrains federal laws, it leaves state law behind.[162] Separation of powers cases similarly calibrate the nature and reach of federal law, with increased or decreased roles for state law as default.

This calibration is easiest to see in federalism cases. As an example, take *Nevada Department of Human Resources v. Hibbs*,[163] where the Court upheld the constitutionality of the federal Family and Medical Leave Act of 1993 ("FMLA") and its enforcement mechanism, which allows qualified leave recipients to sue state or local institutions that fail to comply.[164] Prior to the FMLA, states were inconsistent in the leave that they offered—particularly in how they offered differing amounts of leave to men and women.[165] After the FMLA and *Hibbs*, people were entitled to a federally-provided baseline of leave, no matter the underlying state policy. Federal law thus played a role

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each of the three branches, so that citizens may not be endangered by one branch acting alone."), *rev'd sub nom. on other grounds*, Morrison v. Olson, 487 U.S. 654 (1988).

158. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 601–02 (2000) (striking down the federal civil remedy provision for gender motivated violence as exceeding Congress's powers).

159. *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015) (affirming the executive branch's authority to recognize (and decline to recognize) foreign governments).

160. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 416 (2012) (holding that parts of Arizona's immigration enforcement law were preempted by federal immigration law); Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 363–64 (2023) (affirming California's ability to enact animal welfare regulations despite Dormant Commerce Clause doctrine).

161. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954) (noting "[n]ational action has . . . always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case").

162. *Id.* at 545 (stating that federal laws "accomplish limited objectives, supplanting state-created norms only so far as may be necessary for the purpose").

163. Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 724–25 (2003).

164. *Id. Hibbs* is a federalism case because it evaluates federal and state power—in this case, the federal power to enforce the Fourteenth Amendment and abrogate the states' Eleventh Amendment immunity from suit. *Id.* at 727–28.

165. *Id.* at 730 ("[A] 1990 Bureau of Labor Statistics (BLS) survey stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies.").

in some people's lives that had previously been filled by either the existence or absence of state leave law.

Governmental calibration is similar in separation of powers cases, with a supporting role for state law. As an example, take *Youngstown Sheet & Tube Co. v. Sawyer*,[166] which created a framework for executive power.[167] In *Youngstown*, the Court struck down as unconstitutional an executive order by President Truman directing the Secretary of Commerce to take control of a number of steel mills during the Korean War in order to prevent employee strikes that the President believed would have jeopardized the war effort.[168] The experiential effect of *Youngstown* on the litigants was to exempt them from the heightened federal executive involvement of the executive order. *Youngstown* left in place the federal Taft-Hartley Act, which governed the role of the federal executive in mediating labor disputes. Rather than executive action that would have stripped the steel mills of autonomy, the mills were subject to more moderate federal legislation and any baseline state labor laws that governed employee-employer relations.

Another important set of separation of powers cases—appointment and removal power cases—demonstrates a similar dynamic, with a more attenuated role for state law. Consider *Morrison v. Olson*,[169] in which the Court upheld parts of the Ethics in Government Act that allowed the Attorney General to refer a criminal investigation of high-level executive officials to an independent prosecutor appointed by a special court.[170] The independent prosecutor would possess all investigative and prosecutorial functions possessed by the Department of Justice, and be subject to limited oversight by the Attorney General.[171] In *Morrison*, the independent prosecutor had been investigating Ted Olson for potentially providing misleading testimony to Congress in his role as Assistant Attorney General for the Office of Legal Counsel.[172]

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166. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952).

167. *See* Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015) ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer* . . . ."). In brief, when questions about the extent of executive power arise, the Court considers whether the President is acting pursuant to a grant of authority by Congress, in the absence of congressional direction, or contrary to congressional direction. The President's powers are greatest in the first scenario, contingent on the circumstances of the case in the second, and weakest in the third. *See id.*

168. 343 U.S. at 582–89.

169. Morrison v. Olson, 487 U.S. 654 (1988).

170. *Id.* at 659–61.

171. *See id.* at 662–65.

172. *Id.* at 665–66.

The opinion—and the separation of powers law that it effectuates—had experiential stakes: Olson was subject to investigation and potential prosecution by the independent counsel (who ultimately declined to prosecute[173]), rather than by prosecutors within the Department of Justice. Justice Scalia, in a strikingly empathetic moment,[174] speculated about Olson's experience of the investigation:

> How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment.[175]

We can't know whether the two processes in question—via independent counsel or Department of Justice attorney—would have reached different conclusions. What we do know is that for Ted Olson, separation of powers law calibrated the form of federal involvement in his life by subjecting him to an investigation by an independent prosecutor, largely disconnected from the rest of the executive branch, rather than a more integrated Department of Justice lawyer.

But Ted Olson wasn't the only person with experiential stakes in *Morrison v. Olson*. The opinion affected the public at large as well by sanctioning, on separation of powers grounds, high-level executive officials being subject to independent prosecutors supervised by special courts. Whereas Scalia was concerned about Olson's experience and potential infringements to his liberty, he neglected the experience of others outside of government, who perhaps experienced the opinion to vindicate a different virtue of the separation of powers: federal governmental accountability.

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173. FED. JUD. CTR., MORRISON V. OLSON (1988), at 6 (2020), https://www.fjc.gov/sites/default/files/cases-that-shaped-the-federal-courts/pdf/Morrison_0.pdf [https://perma.cc/PZ6G-6MC2] ("Morrison ultimately concluded that while Olson's testimony to Congress was 'misleading,' he had not committed perjury or any other crime.").

174. We can only speculate whether Justice Scalia's empathy for Olson's predicament stemmed from the fact that a decade prior, Scalia himself was Assistant Attorney General for the Office of Legal Counsel—the same role as Olson, and perhaps subject to similar scrutiny. *Office of Legal Counsel*, WIKIPEDIA, https://en.wikipedia.org/wiki/Office_of_Legal_Counsel [https://perma.cc/Q3KJ-U64L].

175. *Morrison*, 487 U.S. at 732 (Scalia, J., dissenting).

In these examples and in many others,[176] the Court employed constitutional structure to alter the involvement or form of federal authority in our lives. Understanding how people experience *structure* therefore reduces in part to understanding how they experience *government*. That topic—how people experience government—has received a great deal of scholarly attention. I won't replicate the literature here, but I will note one takeaway that how people experience government is contingent on a number of factors, including personal circumstances and the baseline local, state, and federal policies that govern.[177]

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176. This dynamic aptly describes *preemption cases*. For example, in *Arizona v. United States*, 567 U.S. 387 (2012), the Court held that parts of Arizona's immigration enforcement law were preempted by federal immigration law. For immigrants in Arizona, then, the Court was calibrating the degree of federal and state law that they experienced in their lives. Though many federalism cases restrict federal power against a state baseline, preemption cases do the opposite: they restrict state law against the backdrop of federal law. They still calibrate the level of federal and state governmental involvement in our lives, however.

It describes *commerce clause cases*. In *United States v. Lopez*, 514 U.S. 549 (1995), for example, the Court struck down the federal Gun-Free School Zones Act as exceeding Congress's Commerce Clause authority. In so doing, it calibrated the degree of federal involvement in and regulation of school zones against the backdrop of existing state and local regulations.

It describes *dormant commerce clause cases*. In *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994), for example, the Court struck down a local waste ordinance as impermissibly regulating interstate commerce and infringing upon federal authority. In so doing, it calibrated the involvement of state and federal waste policy in the lives of the people of Clarkstown, New York.

It describes *taxing and spending clause cases*. In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Court made the Medicaid expansion included in the Affordable Care Act a voluntary state choice, rather than one that exacted a penalty on states for declining to enact, which it held would have exceeded Congress's Spending Clause authority. In so doing, it again calibrated the degree of federal involvement against the backdrop of previous state Medicaid policy. The Court also upheld the ACA's individual mandate as a constitutional exercise of Congress's taxing power and calibrated the degree of federal involvement in our health care decisions.

It describes *commandeering cases*. In *New York v. United States*, 505 U.S. 144 (1992), for example, the Court struck down the federal Low-Level Radioactive Waste Policy Act because it impermissibly commandeered state legislatures. By striking down the Act, the Court calibrated the involvement of federal and state waste policy in our lives, leaving pre-existing state and local policies in place.

And it describes *federal jurisdiction cases*. In *Younger v. Harris*, 401 U.S. 37 (1971), for example, the Court held that federal courts did not have jurisdiction to hear state court misconduct claims while the state court proceedings were ongoing. In so doing, the Court calibrated the degree of federal judicial involvement in the lives of people already involved in state litigation.

177. For just a few examples, see generally MARTIN GILENS, AFFLUENCE & INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2014) (describing how policy tends to reflect preferences of the affluent, especially where those preferences conflict with those of low-income individuals); Daniel M. Butler & David E. Broockman, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AM. J. POL. SCI.

To see how the experience of structure translates into the experience of government, consider *Shelby County v. Holder*. In *Shelby County*, the Court disabled Section 5 of the Voting Rights Act, a provision that required some state and local jurisdictions (many of them in the South) to "preclear" any change to their voting systems with the federal government before executing them.[178] A voting change could be precleared if it "neither [had] the purpose nor will have [had] the effect of denying or abridging the right to vote on account of race or color."[179] Congress enacted Section 5 in response to widespread vote discrimination in the South in the 1960s and reauthorized it in 2006 based on extensive findings of continuing discrimination.[180]

The Court struck the law down as exceeding Congress's authority to intrude upon state sovereignty.[181] In particular, it held that Congress's overreach infringed upon individual liberty. The federal-state balance, the Court held, "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."[182] The majority in *Shelby County* thus claimed that Section 5 diminished individual liberty by unduly concentrating governance authority in the hands of the federal government and taking it away from states, and that an assertion of federalism principles was necessary to correct that miscalibration.

This is empty structural reasoning, at best a guess about the connection between federalism and liberty. But it doesn't have to be: we can determine how people actually experienced that connection by examining how people

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463 (2011) (finding that state legislators are less responsive to requests from Black constituents); Katherine Levine Einstein & David M. Glick, *Does Race Affect Access to Government Services?: An Experiment Exploring Street-Level Bureaucrats and Access to Public Housing*, 61 AM. J. POL. SCI. 100 (2017) (finding decreased bureaucratic responsiveness to Hispanic requests); Bertrall L. Ross II & Terry Smith, *Minimum Responsiveness and the Political Exclusion of the Poor*, 72 L. & CONTEMP. PROBS. 197 (2009); Austin Sarat, *". . . The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUM. 343, 344 (1990) (describing "the legal consciousness of the welfare poor" and noting that it is "substantially different from other groups in society for whom law is a less immediate and visible presence"); Robin West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43, 48–51 (1990) (describing different ways that people experience the criminal justice system, and noting that "[c]riminal defendants, suspects, and arrestees undoubtedly fared the worst. At virtually every stage of the criminal proceeding, from the definition of the crime through arrest, trial, punishment, and execution, the state's power to achieve its professed ends was strengthened at the expense of individual liberty. . . . By contrast, the civil liberties of the more powerful or privileged members of society remained static or even grew.").

178. Shelby Cnty. v. Holder, 570 U.S. 529, 537 (2013).

179. 52 U.S.C. § 10304(a).

180. *Shelby Cnty.*, 570 U.S. at 564–66 (Ginsburg, J., dissenting) (describing the record before Congress in 2006).

181. *See id.* at 550–57.

182. *Id.* at 543.

experienced government, and specifically the electoral process in the jurisdictions where Section 5 applied. Take, for example, the Department of Justice's objection to an action by a Board of Registrars in Randolph County, Georgia. Henry Cook represented district five on the Randolph County Board of Education.[183] Mr. Cook was a Black man and lived on the border between districts four and five, but both the most recent redistricting plan and a 2002 superior court lawsuit determined that Mr. Cook lived in district five. In 2006, in a special meeting that Mr. Cook was not aware of, the all-White Randolph County Board of Registrars voted to reassign Mr. Cook to district four. Whereas district five was seventy percent Black, district four was seventy percent White.[184]

The Department objected to the voting change, writing that

> [t]his sequence of events is procedurally and substantively unusual. The Board resurrected the issue of Mr. Cook's residency after it had been settled for three years, without any intervening change in fact or law, and without notifying Mr. Cook that it was doing so. Moreover, it is particularly unusual for officials with no legal training to overturn, in effect, a decision by a judge in order to disturb an incumbent officeholder.[185]

Because the facts undermined the explanations of the Board of Registrars, DOJ concluded that the County did not "sustain its burden of showing that the submitted change lacks a discriminatory purpose."[186]

Prior to *Shelby County*, state actors played an oppressive and tyrannical role in Mr. Cook's life, at least in this instance; Section 5 of the Voting Rights Act, through the DOJ's objection, provided freedom from that oppression. Mr. Cook thus experienced the constitutional structure that permitted Congress to enact Section 5 as an increase of his individual liberty, not, as the Court guessed, a narrowing of that liberty.

As another example, take the voting changes that North Carolina, which had previously been covered by Section 5, enacted immediately after *Shelby County*: an elections bill that (in part) increased voter identification requirements, increased voter registration requirements, and decreased early

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183. Letter from Wan J. Kim, Assistant Att'y Gen., Civ. Rts. Div., U.S. Dep't of Just., to Tommy Coleman, Esquire 2 (Sept. 12, 2006), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-2700.pdf [https://perma.cc/D4LJ-QUGP].

184. *Id.*

185. *Id.*

186. *Id.* at 3.

voting opportunities.[187] In striking down these laws as violative of another part of the Voting Rights Act (Section 2), the Fourth Circuit found that "the new provisions target African Americans with almost surgical precision"[188] and that "the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent."[189] The court concluded that "the State took away [minority voters'] opportunity because [they] were about to exercise it."[190]

Some voters of color[191] in these covered jurisdictions thus experienced Section 5—and the federalism principles that permitted Congress to enact Section 5—as a boon to their freedom, not a burden. Section 5, through federal governmental action, *removed* burdensome and discriminatory state actions from the lives of voters in those jurisdictions, freeing them to vote without having to navigate hostile state and local laws. The federalism created by the *Shelby County* Court, on the other hand, eliminated that liberty.[192]

There is a cruel irony here. In striking down Section 5, the Court's structural reasoning ignored the experience of the very people Section 5 sought to protect. The purpose of constitutional structure is to ensure that tyranny in one part of our government may be checked by other parts of our government.[193] Section 5 vindicated that structural promise by checking state tyranny. By striking down Section 5, the Court used federalism principles to *recreate* state tyranny.

The Court thus missed a crucial point. Constitutional structure should not have threatened Section 5; constitutional structure should have *justified* it. Because we distinguish structure from rights,[194] we tend not to think about federal rights laws as justified by structural constitutional principles—only

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187. N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 216 (4th Cir. 2016).

188. *Id.* at 214.

189. *Id.* at 215.

190. *Id.* (quoting League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 440 (2006)) (additions in *McCrory*).

191. It oversimplifies to generalize about the experiences of "voters of color" or "voters in covered jurisdictions." Experience is more personal and more varied than those phrases permit. But in the context of voting, race and geography matter—and acknowledging broadly divergent voting experiences, while not an endpoint, is perhaps a starting point.

192. It might be the case that Section 5 diminished the individual liberties of White voters in covered jurisdictions. The best argument for this claim is that Section 5 transferred some authority over state elections from state and local governments to the federal government. That transfer gave the federal government power, unchecked by the states, which perhaps diminished individual liberty. That argument is abstract and speculative, but it is at least colorable.

193. *See supra* Section 0.

194. *See supra* Section 0.

by constitutional rights. But experience makes plain the deep resonance—not dissonance—between constitutional structure and Section 5.

One caveat and a potential objection. First, I do not mean to suggest that we only experience structure in the context of specific judicial opinions. It may be easiest to *see* experience in that context, but we experience structure more broadly. It is in the ether. Structure limits the ways that government can act in every circumstance. Take the COVID-19 pandemic, for example. Federalism decentralizes responsibilities for public health, so the response to the pandemic occurred at all levels: federal, state, and local.[195] We thus experienced federalism during the pandemic as a calibration of federal and state/local pandemic policy in our lives, outside the context of the judiciary. As is often the case in experiential analysis, that federal/state calibration meant different things for different people, depending on where we lived and who we were.[196]

Second, I want to address a possible objection to these previous arguments: that I am not cynical enough. That I am naïve to believe that what the Court says about the normative values of structure—whether about liberty, the values of federalism, or the virtues of the separation of powers—is anything more than lip service to historical precedent or post hoc rationalization, and the Court will reach the result it wants regardless. Judges generate "judicial bullshit"[197] or "transcendental nonsense"[198] all the time, and this is just one example.[199] Or that I am equally naïve to think that a more experientially grounded set of structural values would change anyone's mind. The experiential information I propose gathering is already out in the world,

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195. *See generally* Yanbai Andrea Wang & Justin Weinstein-Tull, *Pandemic Governance*, 63 B.C. L. REV. 1949 (2022).

196. *See id.* (describing both how people's experience of pandemic response varied by their location, and also how the pandemic (and pandemic response) created racial inequality in a variety of ways).

197. *See* Adam J. Kolber, *Supreme Judicial Bullshit*, 50 ARIZ. ST. L.J. 141, 144 (2018) (arguing that "judges sometimes resort to bullshit to: keep precedents malleable, avoid line drawing, hide the arbitrariness of line drawing, sound important, be memorable, gloss over inconvenient facts, sound poetic, seem as though their hands are tied, and seem principled rather than strategic"). And perhaps there are benefits to judicial arguments that stay at the surface level. *See* Richard M. Re, *Reason and Rhetoric in* Edwards v. Vannoy, 17 DUKE J. CONST. L. & PUB. POL'Y 63, 98 (2022) (noting that "[t]he legal system itself often benefits from keeping things at a surface or rhetorical level").

198. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821, 821 n.32 (1935) (noting that many realist legal scholars were "in fundamental agreement in their disrespect for 'mechanical jurisprudence,' for legal magic and word-jugglery" and citing sources).

199. Louis Seidman might call these arguments "substitute arguments." *See generally* Louis Michael Seidman, *Substitute Arguments in Constitutional Law*, 31 J.L. & POL. 237 (2016).

the justices are aware of it, and they don't care. When the *Shelby County* Court discussed individual liberty, for example, that discussion was merely a rhetorical way for rights-hostile justices to use the language of the law to reach an outcome they favored on political or personal grounds, and correcting their account of liberty to reflect human experience wouldn't change anything.

I understand the power of this objection, but I believe it misunderstands judicial decision-making. Judges hold multiple commitments at once: to judicial and interpretive philosophies, to political ideologies, to beliefs about democracy, to beliefs about the role of the Court, to preferred policy outcomes, and more.[200] Different judges prioritize different commitments. It oversimplifies the decision-making process to suggest that judges will reach their preferred policy outcome no matter the impact on their other commitments, and in fact we often see justices vote against their presumed political beliefs.[201] So I dispute the idea that a new perspective on a theory that matters to the justices is inconsequential. But even if treating structure experientially does not change outcomes, it would still improve the administration of justice by centering people's lives in the law.

B. Experience as Methodology

Understanding how we experience structure is a first step—the second is incorporating those experiences into constitutional doctrine and theory. In this Section, I describe how seeking out experiential pluralism can be a methodology for structural constitutional interpretation. I first briefly describe, as examples, three intellectual movements that have achieved a move toward experience and then describe how structural constitutional law can do something similar.

Other scholars have productively focused on experience—though not in the context of constitutional structure—providing powerful analogs. Critical race theory is one example. Professor Mari Matsuda, in her pathbreaking article *Looking to the Bottom: Critical Legal Studies and Reparations*, argued

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200. *See generally* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 263, 270–329 (2005) (describing various political and ideological pulls on judges); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) (describing modalities of constitutional interpretation).

201. *See, e.g.*, Kalvis Golde, *In Barrett's First Term, Conservative Majority Is Dominant but Divided*, SCOTUSBLOG (July 2, 2021, 6:37 PM), https://www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-but-divided/ [https://perma.cc/UMJ3-SAH2].

that the experiences of people of color provided more than just the foundations of a critique of traditional legal thought, they provided a new epistemological source from which normative claims would naturally arise.[202] More recently, Professors Amna Akbar, Sameer Ashar, and Jocelyn Simonson advocated "shifting the episteme" to center the worldviews and source materials of social movements in legal analysis.[203] These epistemic sources are important because they "contend with the violence and inequality of the law," "represent experiences and histories often erased or flattened by doctrine and scholarship," and "represent people locked out of meaningful representation in the formal channels of statecraft."[204]

The feminist movement similarly advocated for an approach to legal analysis that centers lived experience through the practice of *consciousness raising*, "an interactive and collaborative process of articulating one's experiences and making meaning of them with others who also articulate their experiences."[205] "In consciousness raising, often in groups, the impact of male dominance is concretely uncovered and analyzed through the collective speaking of women's experience, from the perspective of that experience."[206] Consciousness raising, as a method, "transcends the theory and practice dichotomy. Consciousness-raising groups start with personal and concrete experience, integrate this experience into theory, and then, in effect, reshape theory based upon experience and experience based upon theory."[207]

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202. Matsuda, *supra* note 21, at 324–26. Matsuda critiqued the practice of *imagining*, in an abstract way, the experience of the least advantaged, suggesting instead that we should "study[] the actual experience of black poverty and listen[] to those who have done so." *Id.*

203. Amna A. Akbar et al., *Movement Law*, 73 STAN. L. REV. 821, 859 (2021).

204. *Id.* at 851. Many other scholars of critical race theory have advocated for a methodology that seeks out experience—too many to list. But for some additional examples, see E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1568, 1569 n.231 (2019) (centering experience of migrants in international law, and noting that "[m]igrants themselves, and especially those who move without authorization, represent an important source of knowledge regarding the benchmark for justice in immigration and what a legal arrangement faithful to that benchmark would look like"); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243–45 (1991).

205. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 863–64 (1990). *See generally* Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 519 (1982) ("Consciousness raising is the major technique of analysis, structure of organization, method of practice, and theory of social change of the women's movement.").

206. MacKinnon, *supra* note 205, at 519–20.

207. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 602 (1986). For an example of feminist scholarship

My final example is *interpretative phenomenological analysis* ("IPA"), which is a qualitative methodology in the social sciences. IPA takes experience as its subject, which it "aims to understand in the context of the concrete and meaningful world of human beings."[208] IPA arose out of the more abstract philosophical disciplines of phenomenology and hermeneutics and incorporated insights from each in its methodology.[209] The IPA methodology encourages researchers to interpret texts—often subject interview transcripts—through the lenses of both empathy and suspicion, in order to reach a fuller understanding of both the subject's experience as well as their own biases as interpreters.[210]

These examples instruct because they engage in a process that mirrors the aims of this Article.[211] Each example offers a critique of a prevailing way of thinking that fails to grapple with human experience. But each also develops a methodology for reconstructing a new set of theories. For Matsuda and critical race theory, it is pursuing "the actual experience, history, culture, and intellectual tradition of people of color in America."[212] For the women's movement, it is promoting group discussions that center women's experience of male dominance. For IPA, it is approaching the project of textual interpretation by centering the lived experience of the speaker.

We can apply these insights here by developing a methodology to incorporate experience into structural reasoning. The Court has already provided space for it. Although the Court's structural reasoning is lifeless in

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that defends the importance of lived experience narrative in legal argument, see Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. 971 (1991).

208. Virginia Eatough & Jonathan A. Smith, *Interpretative Phenomenological Analysis*, *in* THE SAGE HANDBOOK OF QUALITATIVE RESEARCH IN PSYCHOLOGY 193, 196 (Carla Willig & Wendy Stainton Rogers eds., 2017).

209. *Id.* at 193–96 (noting that IPA incorporates phenomenology's focus on human experience and hermeneutic's nuanced understanding of personal experience and bias in practice of interpretation).

210. *Id.* at 195–96; *see also* Michael J. Gill, *Phenomenological Approaches to Research*, *in* QUALITATIVE ANALYSIS: EIGHT APPROACHES FOR THE SOCIAL SCIENCES 73 (Nanna Mik-Meyer & Margaretha Järvinen eds., 2020).

211. These examples are not an exclusive list, of course. The law's turn toward the social sciences is another example of a movement away from the abstract and toward human experience, broadly defined. The "Brandeis brief" was one early example of advocates using social sciences to make a legal argument. *See* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1770 (2014) ("A 'Brandeis brief' is the colloquial name given to a brief filed at the Supreme Court that presents non-legal data to aid the Court in making a legal rule."). Legal pragmatists embrace this turn as well, especially in seeking to understand the human and factual consequences of legal rules. *See generally* Charles L. Barzun, *Three Forms of Legal Pragmatism*, 95 WASH. U. L. REV. 1003 (2018) (describing the origins of and differences between legal pragmatists).

212. Matsuda, *supra* note 21, at 325.

practice, as Part I described, the concepts it employs sound in experience. The first step in an experiential methodology, then, is for judges to fill the spaces they have already created in a way that embraces, rather than elides, experience. When the Court discusses liberty, it must recognize that people experience liberty differently. When the Court recites the values of federalism and the virtues of the separation of powers, it must at the very least move away from abstract institutional arguments and toward human examples.

In other words, the Court must bake experience into the doctrine itself. And not just experience, but broad and deep accounts of experiential pluralism—thus incentivizing litigants to provide courts with the experiential accounts that best advance their causes. Amici curiae can and should provide experiential arguments as well. Professor Linda Edwards has written about what she calls "voices briefs": briefs submitted by amici that share stories of personal experience with the issues before the court.[213] Edwards provides examples of these kinds of briefs, including a brief filed in *Whole Woman's Health v. Hellerstedt* that described the experiences of "more than 100 women lawyers, law students, law professors, and former judges" in choosing to have abortions, and briefs filed in *Obergefell v. Hodges* that provided first-person accounts of same-sex relationships.[214] Edwards argues that these briefs, which have existed since the 1980s but have increased in frequency in recent years, are useful for a variety of reasons, including educating the justices, providing information about policy, and demonstrating that certain claims meet legal standards.[215]

Voices briefs are another avenue for providing experiential information to courts. Although these briefs have largely been employed in abortion rights and marriage equality cases,[216] groups could submit them for structural cases as well. And to take the idea a step further, the Court could request these briefs from organizations in the same way that it often calls for the views of the Solicitor General.[217]

This idea—that the Court should solicit a wide range of experiences in deciding structural cases—raises a methodological difficulty. How should the Court grapple with conflicting experiences?

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213. Linda H. Edwards, *Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation*, 29 YALE J.L. & FEMINISM 29, 29 (2017).

214. *Id.* at 30–32, 37–39.

215. *Id.* at 35, 53–59, 70–72.

216. *Id.* at 39.

217. *See* Neal Devins & Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859, 861 (2013).

Consider this question in the context of *Shelby County*. As I described above, an experiential approach to federalism and liberty in *Shelby County* requires the justices to think about whose experience matters. As it was, the majority made an implicit choice about whose experience to credit: Whites in covered jurisdictions. That is, those voters not already experiencing discriminatory state action, for whom federal (and not state) legislation potentially infringed upon their liberty. A fairer process would require the Court to distinguish the liberty interests of the residents of covered jurisdictions generally—who may have felt limited in their ability to enact voting laws by the federal requirements of Section 5—from voters of color in covered jurisdictions, whose liberty to vote could be infringed upon by state and local voting restrictions. How should it weigh the differing stakeholder interests that arose from an experiential pluralism analysis?

This question has no easy answer, but it is the right question to ask. Some justices would inevitably find the liberty interests of broadly covered jurisdiction residents generally most compelling, while others would find the liberty interests of those protected from state misconduct most compelling. Still others would seek to balance these interests. That disagreement would be productive, not problematic. It would center the ways that government policies and constitutional structure affect human beings. Judges could disagree about the role and purpose of structure, but those disagreements would turn not on conclusory statements about values but on the experiences of the people their rulings will affect.[218]

Balancing competing experiences would force the Court to consider what to do in circumstances where structural values are either infringed upon or distributed unequally—as they often are. That analysis bridges questions of structure and equality, which I take up in the next Section.

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218. Social scientists might object that to the extent I seek to incorporate experience into constitutional decision making, I am replacing one problem with another: though there is value in surveying experience, it is impossible to survey completely, and, even if we could, we couldn't possibly incorporate it into the law. First, however, having too much experiential evidence is a good problem to have. Once we decide to value experiential pluralism, experiential evidence should push us toward inclusion, away from exclusion. And second, a new wave of scholarship in experimental jurisprudence is demonstrating that an empirical approach to legal theory is possible. Scholars like Roseanna Sommers and Kevin Tobia are demonstrating the viability of experimental approaches to jurisprudential questions. *See, e.g.*, Roseanna Sommers, *Experimental Jurisprudence*, 373 SCIENCE 394, 394 (2021); Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2238 (2020). For an approach including constitutional questions, see, for example, Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735, 764 (2022).

C. Inclusion, Equality, and Structure

Whereas our notion of constitutional rights has evolved to gradually include more and more individuals as worthy of constitutional protection, our structural constitutional law has not. Rather, equality concerns have fallen to the wayside in structural constitutional law.[219] In this Section, I describe how taking an experiential approach introduces an equality perspective into structural analysis, and how that perspective could provide a guide for balancing competing experiences.

So much constitutional change in the context of rights has occurred because the judiciary, often in concert with other governmental actors and social movements,[220] came to understand a broader and broader swath of individuals as deserving constitutional protection.[221] When the Court struck down school segregation in *Brown v. Board of Education*, it did so in part because it acknowledged, for the first time, the experience of Black children under segregation.[222] When the Court held that the principle of Equal Protection protected women as well as racial minorities, it did so in part because it understood, finally, that women experienced "romantic paternalism," akin to being put "in a cage" rather than "on a pedestal."[223] When the Court held that the Fourteenth Amendment prevented states from enacting bans on marriage equality, it did so in part because it understood that without the protections of marriage, same-sex couples would not experience the same safeguards and comforts that married couples enjoy.[224]

Through these cases, the Court came to see different kinds of human experience as relevant to constitutional law where it had not previously seen them as relevant. That process, a broadening of constitutional consciousness, has not occurred in the structural realm. Two vignettes demonstrate how our

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219. *See, e.g.*, Lawrence, *supra* note 15, at 95.

220. *See, e.g.*, Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. 1323, 1323 (2006) (describing the ways that social movements can influence judicially created constitutional law).

221. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2329 (2022) (joint dissent) ("Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded.").

222. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("To separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

223. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

224. In Justice Kennedy's words, "[m]arriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other." Obergefell v. Hodges, 576 U.S. 644, 667 (2015).

understanding of "liberty"—as a structural feature—has remained experientially stunted.

The first comes from the time of the founding, when Americans began agitating for their freedom from the British. Eric Foner, in his extraordinary book on the history of liberty in the United States, describes a time when White elites in the eighteenth-century colonies understood their station as a kind of slavery to the British monarchy. Thomas Paine called British rule "a species of slavery," whereas representative government was "freedom."[225] These ideas about liberty and freedom were limited to *White* liberty from British rule, however, and did not extend to Black freedom from literal slavery. The language of freedom "was employed without irony even in areas where a majority of the population in fact consisted of slaves."[226] Those affected by slavery understood the contradiction. "[S]laves themselves appreciated that by defining freedom as a universal right, the revolutionists had devised a rhetoric that could be deployed against chattel bondage. The language of liberty echoed in slave communities, North and South . . . . Blacks recognized both hypocrisy and opportunity in the ideology of freedom."[227]

White revolutionaries thus defined freedom solely by reference to their own circumstances. What is more, they failed to acknowledge that they deprived slaves of liberty far more fundamental than the liberty they themselves sought. White revolutionaries experienced the lack of liberty as a lack of representation in government—political violence, a metaphor for violence. Black slaves experienced the lack of liberty as the absence of control over their bodies, families, and livelihoods—literal violence.

The second vignette comes from the present. Two central events of 2020—the COVID-19 pandemic and the Black Lives Matter protests of widespread police violence, brought into focus by the killing of George Floyd by a Minneapolis cop[228]—demonstrated continuing neglect for the structural freedoms (and absence of freedoms) of nonwhite individuals.

The COVID-19 pandemic created an unprecedented need for mask requirements, stay-at-home orders, and business restrictions to slow

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225. FONER, *supra* note 29, at 29–31. Some advocates linked freedom for the White colonialists with freedom for slaves. *See id.* at 32.

226. *Id.* at 31.

227. *Id.* at 33–34.

228. *See* Paul Starr, *Two National Crises, the Pandemic and Police Violence, Have One Common Thread*, AM. PROSPECT (July 8, 2020), https://prospect.org/coronavirus/pandemic-police-violence-failure-to-protect/ [https://perma.cc/696S-2DKG] ("One crisis this year has been followed by another, the COVID-19 pandemic by the crisis over police violence and Black lives.").

transmission of the virus.[229] Through these policies, state and local governments infringed on individual freedom in the name of responsible pandemic policy. These infringements were short-term, however, and enacted to preserve the potential for long-term freedom once the pandemic lessened.

Opposition to these policies sounded in liberty and freedom. Senator Rand Paul, one vocal critic, accused Dr. Anthony Fauci, a government health official, of being "unconcerned with liberty."[230] Responding to masking requirements, Paul said, "I shouldn't have to prove I want to be free and left alone . . . . I want to breathe the air."[231] Senator Ron Johnson has questioned why the federal government was "pushing" the vaccine on "everybody"[232] and stated that "[w]e should respect everyone's freedom and liberty and their ability to choose whether to get vaccinated or not."[233]

At the same time, however, many of these same advocates for freedom and liberty in the context of pandemic policy had little to say about the serious intrusions on individual and bodily liberty caused by police violence and mass incarceration.[234] Senator Johnson, for example, has not supported federal police reform efforts[235] and has expressed his fear of Black Lives

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229. *See* Wang & Weinstein-Tull, *supra* note 195, at 1959 ("Across the country, thousands of state and local-level public health authorities hold broad but dispersed power to respond to outbreaks through quarantines, stay-at-home orders, and business restrictions.").

230. Charles Creitz, *Sen. Rand Paul Rips Fauci as 'Unconcerned with Liberty,' 'Not Being Honest with the American Public*,' FOX NEWS (Mar. 20, 2021), https://www.foxnews.com/politics/rand-paul-fauci-masks-vaccine-immunity [https://perma.cc/54D7-M8VY].

231. *Id.*

232. *U.S. Sen. Johnson: On Fox News – We Shouldn't Be Shaming, Pressuring or Mandating Anybody Get This Vaccine*, WISPOLITICS (May 12, 2021), https://www.wispolitics.com/2021/u-s-sen-johnson-on-fox-news-we-shouldnt-be-shaming-pressuring-or-mandating-anybody-get-this-vaccine/ [https://perma.cc/WS3V-7ZWZ].

233. Ron Johnson (@senronjohnson), X (May 11, 2021, 6:55 PM), https://twitter.com/senronjohnson/status/1392297445309222914?lang=en [https://perma.cc/B4Z5-66CQ].

234. Others have noted a similar disconnect between abortion restrictions and other health regulations. *See* Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on* June Medical, 2020 SUP. CT. REV. 277, 278; Dahlia Lithwick & Mark Joseph Stern, *Republicans' New Stance on COVID Contradicts Everything They've Said About Abortion*, SLATE (Aug. 19, 2021), https://slate.com/news-and-politics/2021/08/texas-covid-abortion-greg-abbott-james-ho.html [https://perma.cc/NE4B-HPHP] ("A Trump judge and a GOP governor push an incoherent theory of freedom that coddles COVID deniers and torments abortion patients.").

235. Johnson believes police reform efforts are "by and large a state and local issue." *DC Wrap: Johnson Says Senate Republicans Recognize Need for "Real Reforms" to Policing*, WISPOLITICS (June 11, 2020), https://www.wispolitics.com/2020/dc-wrap-johnson-says-senate-republicans-recognize-need-for-real-reforms-to-policing/ [https://perma.cc/7E79-BZ7L].

Matter protestors.[236] Senator Paul, for his part, was the lone Senator to block a federal anti-lynching bill.[237]

Though these examples come from outside the Court, the Court has exhibited similar blindness to experiential pluralism in recent years. During the COVID-19 pandemic, the Court enjoined California from enforcing its capacity restrictions on indoor worship services.[238] The order lacked a formal opinion, but Justices Gorsuch, Thomas, and Alito grounded the decision in questions of constitutional liberty and objected to California "adopting new benchmarks that always seem to put restoration of liberty just around the corner."[239]

And yet in a similar time frame, the Court declined to revisit the doctrine of qualified immunity—a doctrine partly grounded in structural protections for state and state actors[240]—despite having a number of vehicles for doing so,[241] despite the widespread belief that qualified immunity is a flawed doctrine,[242] and despite the fact that qualified immunity has rendered the protections of the Constitution from state misconduct "hollow."[243]

Eight months into the pandemic, Justice Alito gave a speech to the Federalist Society. He said that "[t]he pandemic has resulted in previously unimaginable restrictions on individual Liberty . . . . We have never before seen restrictions as severe, extensive and prolonged as those experienced for

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236. WBAY NEWS STAFF, *Johnson Says He Doesn't Regret Comments Made on Radio Show, Some Lawmakers Call for His Resignation*, WSAW-TV (Mar. 21, 2021), https://www.wsaw.com/2021/03/21/johnson-says-he-doesnt-regret-comments-made-on-radio-show-some-lawmakers-call-for-his-resignation/ [https://perma.cc/23MR-T9V2].

237. *See* David Smith, *Rand Paul Stalls Bill that Would Make Lynching a Federal Hate Crime*, GUARDIAN (June 11, 2020), https://www.theguardian.com/us-news/2020/jun/11/rand-paul-lynching-hate-crime-bill-limbo [https://perma.cc/HVS2-67A3].

238. *See* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021).

239. *Id.* at 720 (statement of Gorsuch, J.).

240. *See* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 234 (2020) (arguing that "[f]ederalism is the core of qualified immunity in at least three respects," one of which is that "Supreme Court precedent demonstrates that many of the justifications for qualified immunity most naturally sound in concerns about state sovereignty").

241. *See* Nina Totenberg, *Supreme Court Will Not Reexamine Doctrine That Shields Police in Misconduct Suits*, NPR (June 15, 2020), https://www.npr.org/2020/06/15/876853817/supreme-court-will-not-re-examine-doctrine-that-shields-police-in-misconduct-sui [https://perma.cc/LD27-LJTZ].

242. For critiques of qualified immunity from two ends of the political spectrum, compare Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018), with William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. 45 (2018).

243. *See* Schwartz, *supra* note 242, at 1814–20 (describing the ways that qualified immunity frustrates constitutional restrictions on state actors).

most of 2020."[244] This, Justice Alito thought, "is an indisputable statement of fact."[245]

Perhaps Justice Alito has forgotten about the decades of governmental action that deprived an entire race of humans of nearly all freedoms,[246] the decades of state-sanctioned forced labor that followed the formal end of slavery,[247] the decades of Jim Crow laws that limited freedom and opportunity for nonwhites,[248] the decades of redlining that limited housing opportunity and maintained segregation even after *Brown v. Board*,[249] or the system of mass incarceration that continues to deprive millions of bodily liberty today.[250] Or perhaps Justice Alito genuinely believes that a monthslong set of restrictions on liberty, necessary to stave off a deadly pandemic, is simply an indisputably more "severe, extensive, and prolonged" set of restrictions.

Either way, I am reminded of the quote attributed to Anaïs Nin: "We don't see things as they are, we see them as *we* are."[251] And, perhaps unintentionally, Justice Alito said something similar in his speech with this quote from Learned Hand: "Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, no court can do much to help it."[252] I think Justice Alito meant that courts can only do so much to protect liberty. But his words are correct in a phenomenological sense as well: we understand liberty in accordance with our own experiences. This is, of course,

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244. *Supreme Court Justice Samuel Alito Speech Transcript to Federalist Society*, REV (Nov. 12, 2020), https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society [https://perma.cc/T269-KD3L].

245. *Id.* Justice Gorsuch made a similar comment. *See* Arizona v. Mayorkas, 143 S. Ct. 1312, 1314 (2023) ("Since March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country.") (statement of Gorsuch, J.).

246. *See generally* slavery.

247. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

248. *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

249. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); Joy Milligan, Plessy *Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924 (2020); Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631 [https://perma.cc/XUH9-NYU9].

250. *See generally* ALEXANDER, *supra* note 133.

251. *See* Deb Amlen, *'We Do Not See Things as They Are,'* N.Y. TIMES (Aug. 4, 2017), https://www.nytimes.com/2017/08/04/crosswords/daily-puzzle-2017-08-05.html [https://perma.cc/9AGY-YKQ6].

252. *Supreme Court Justice Samuel Alito Speech Transcript to Federalist Society*, *supra* note 244.

one of the main insights of the legal realist school[253] and, in more recent years, of the empirical work on the effects of judge experience on judicial decision-making.[254]

The contradictions internal to the examples above resonate with the idea of "White blindness." Professor Charles Mills, drawing on W.E.B. Du Bois, theorized that selective editing of textbooks and historical narratives whitewash the history of Native and Black oppression, which

> enables a self-representation in which differential white privilege, and the need to correct for it, does not exist. In other words, the mystification of the past underwrites a mystification of the present. The erasure of the history of Jim Crow makes it possible to represent the playing field as historically level, so that current black poverty just proves blacks' unwillingness to work. As individual memory is assisted through a larger social memory, so individual amnesia is then assisted by a larger collective amnesia.[255]

Professor Norman Spaulding has also written about the ways that the Court has, in its federalism doctrine, selectively erased the significance of slavery, the Civil War, and the Reconstruction Amendments.[256] In his words, "The historical consciousness of the federalism revival, the logic of its memory work, turns on a chillingly amnesic reproduction of antebellum conceptions of state sovereignty . . . ."[257] It is hard not to see Justice Alito's conclusions about liberty as chillingly amnesic.

There is thus a way in which the values of constitutional structure get allocated unequally. The empty discourse of structural doctrine preserves that inequality by allowing judges and scholars to reason about structure without considering experiences that would reshape the analysis. Identifying this inequality, however, is one way to evaluate competing claims of experience. *Shelby County* is an example: the liberty *benefits* that the Court believed

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253. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (Harvard Univ. Press 2009) (1881) ("The life of the law has not been logic: it has been experience.").

254. *See, e.g.*, Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges To Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 37 (2015) (finding that "judges with daughters consistently vote in a more feminist fashion on gender issues than judges who have only sons").

255. Charles W. Mills, *White Ignorance*, *in* RACE AND EPISTEMOLOGIES OF IGNORANCE 13, 30–31 (Shannon Sullivan & Nancy Tuana eds., 2007).

256. Norman W. Spaulding, *supra* note 49, at 2006 ("More precisely, I contend that federalism, in the strong sense the Court has endorsed, is viable *only* as an expression of monumental historical consciousness—that is to say, only as the result of memory work predicated on forgetting the structural significance of the Civil War and Reconstruction Amendments.").

257. *Id.* at 2015.

would arise from disabling Section 5 would be distributed largely to Whites in covered jurisdictions. The liberty *costs* would be borne by voters of color.

A different example: police violence and reform. Federalism is a rationale commonly deployed against federal intervention in local police departments.[258] And yet, any argument that federal restraint in matters of police misconduct is necessary to preserve liberty ignores the experience of those targeted or attacked by police, whose liberty is jeopardized by these police encounters. Because communities of color are often targeted by police at greater rates than white communities,[259] the liberty interest in strong states is distributed in a discriminatory way.

The removal power also lends itself to this form of analysis. *Seila Law* concerned the political independence of the Consumer Financial Protection Bureau ("CFPB"), which Congress enacted in part to address the fact that "[i]n the years leading up to the 2008 financial crisis, financial institutions targeted communities of color with expensive and risky subprime mortgage products."[260] The *Seila Law* majority struck down CFPB's leadership structure because of its concerns about lack of accountability. But, as I described above, that accountability likely accrued in a racially discriminatory way.[261]

As these examples demonstrate, embracing experiential pluralism entails weighing differing experiences and determining how the benefits and costs of constitutional structure accrue. When benefits accrue in a discriminatory way, courts must, at the very least, acknowledge that inequality.[262] This

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258. *See* Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 392 n.14 (1992) ("[O]nce a court has determined that a modification is warranted, we think that principles of federalism and simple common sense require the court to give significant weight to the views of the local government officials who must implement any modification."); Memorandum from the Off. of the Att'y Gen. on Principles and Procs. for Civ. Consent Decrees and Settlement Agreements with State and Local Governmental Entities, to the Heads of Civ. Litigating Components U.S. Att'ys. 2 (Nov. 7, 2018), https://www.justice.gov/opa/press-release/file/1109621/download [https://perma.cc/H5BE-R2GH] (arguing that consent decrees with local police departments "'raise sensitive federalism concerns'" (quoting Horne v. Flores, 557 U.S. 433, 448 (2009))).

259. *See, e.g.*, Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 643 (2021) ("[J]udicial doctrines permitting police officers to engage in pretextual traffic stops contribute to a statistically significant increase in racial profiling of minority drivers.").

260. Sitaraman, *supra* note 95, at 352.

261. *See supra* notes 90–97 and accompanying text.

262. This argument is consistent with Matthew Lawrence's suggestion that, in separation of powers cases, we should ask "who pays" for the power that these principles provide, and that "generalized harm should be seen as potentially preferable, all else being equal, to targeted harm." Lawrence, *supra* note 15, at 152–54. As Lawrence argues, whereas the claimed benefits of the separation of powers are generalized through society, the costs of the separation of powers tend

approach might seem complicated, but it isn't. It is simply an equality approach to constitutional structure—an approach traditionally obscured by the traditional categorical distinction between structure and rights but made plain by a focus on human experience. Incorporating experiential pluralism into the doctrine can act as a forced consciousness-raising: an engine to drive constitutional inclusion[263] and allow constitutional structure to protect ever broader groups in the way that constitutional rights have.

D. Examples

This can all feel a bit abstract. So here I provide two final examples—the first in federalism and the second in separation of powers—and use them to demonstrate how an experiential approach provides new insight into settled structural debates.

In 2021, in an effort to dramatically limit the federal right to an abortion—before *Dobbs v. Jackson Women's Health Organization* actually eliminated it[264]—Texas enacted Senate Bill 8 ("S.B. 8"), known as the Texas Heartbeat Act.[265] S.B. 8 prohibited physicians from "knowingly perform[ing] or induc[ing] an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child."[266] The bill thus prohibited abortions after approximately six weeks of pregnancy,[267] but because of how pregnancy is measured, it actually prohibited abortions approximately fourteen days after a missed period.[268] And because many women do not experience regular twenty-eight-day menstrual cycles, and may not know they are pregnant

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to be targeted in certain communities, "including Native peoples, the poor (which disproportionately means Black people), and family caretakers (which disproportionately means women)." *Id.* at 87 (footnote omitted).

263. For a fantastic essay that describes the informational, democratic, and ethical benefits of inclusivity, and constitutional inclusivity in particular, see generally Fred O. Smith, Jr., *The Other Ordinary Persons*, 78 WASH. & LEE L. REV. 1071 (2021).

264. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (holding that the Constitution does not provide a right to an abortion).

265. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

266. TEX. HEALTH & SAFETY CODE ANN. § 171.204(a).

267. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 543 (2021) (Roberts, C.J., concurring in part and dissenting in part).

268. Jennifer Weiss-Wolf, *When 'Six Weeks' Is Actually Two: Understanding Periods Is Essential to Fighting Abortion Bans*, BRENNAN CTR. JUST. (Nov. 9, 2021), https://www.brennancenter.org/our-work/analysis-opinion/when-six-weeks-actually-two-understanding-periods-essential-fighting [https://perma.cc/6542-79Z8].

before six weeks of pregnancy, S.B. 8 prohibited abortion completely for some.[269]

S.B. 8 implicated federalism because it is a state law that (when it was enacted) contravened a federal constitutional right. But S.B. 8 also sought to prevent judicial review of the law by permitting only private enforcement of its provisions,[270] rather than state enforcement, thus eliminating the involvement of any state actor who could be enjoined by a court as a way to prevent the law from taking effect. The law thus weaponized constitutional structure and judicial concerns about state sovereignty to diminish—and in some circumstances, eliminate—the federal constitutional right to an abortion.

In *Whole Woman's Health v. Jackson*, the Supreme Court considered whether this enforcement feature permitted Texas to evade constitutional review by federal court. It held that most state officials could not be sued (including a state-court judge, a state-court clerk, and the Texas Attorney General),[271] but that four state health officials could.[272] The Court declined to enjoin enforcement of the law, however, allowing Texas to infringe the abortion right.[273]

The majority opinion employs empty structural reasoning. It leans on the idea of state sovereign immunity to dismiss the suit against the state court officials, citing *Alden v. Maine* and *Ex Parte Young* in support.[274] But state sovereign immunity, as *Alden* describes, is grounded in the state-federal balance of powers and ultimately, at least in part, in the familiar normative idea of liberty. As the Court described in *Alden*, "[w]hen the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government."[275]

Despite relying on structural arguments grounded in liberty, the *Jackson* majority does not actually discuss how S.B. 8 implicates liberty.[276] The

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269. *See id.*

270. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.207(a), 171.208(a)(2)–(3).

271. *See Jackson*, 142 S. Ct. at 530–35.

272. *Id.* at 535–37.

273. *Id.* at 545, 551 (Sotomayor, J., concurring in part and dissenting in part).

274. *Id.* at 532.

275. Alden v. Maine, 527 U.S. 706, 751 (1999).

276. This is especially surprising given that Justice Gorsuch, who authored the *Jackson* majority opinion, has multiple times emphasized the link between structure and liberty. In *Gamble v. United States*, for example, Justice Gorsuch dissented from the holding that the Double Jeopardy Clause did not prohibit successive prosecutions by federal and state governments. *See generally* Gamble v. United States, 139 S. Ct. 1960 (2019). In his dissent, Gorsuch wrote:

majority *does not once* say the words "woman" or "women" outside the language of the Texas statute,[277] even though the federalism features the Court draws from protect not the state of Texas, or Texas officials, but individuals including Texas women seeking abortions.[278] Erasing women from this opinion is shocking, enabled by previous empty structural reasoning that erases the people it affects.

Reasoning from experience provides a different structural logic. Since the question of enforceability hinges on state sovereignty, federalism, and liberty, the question becomes: how do Texans experience the federalism principles that either shelter S.B. 8 or subject it to federal oversight? A pluralism approach means being aware that different people will experience those principles differently.

For Texas women seeking abortions, personal liberty interests cut against sovereign immunity here, as S.B. 8 is a governmental infringement on bodily and medical liberty. In addition, many women who seek abortions are low-income,[279] meaning that the federalism value of "voting with your feet" is less likely to be vindicated: the resources necessary to seek an out-of-state abortion are high, and only available to women with means.[280] Increased

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> As this Court has explained, '[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.' Yet today's Court invokes federalism not to protect individual liberty but to threaten it, allowing two governments to achieve together an objective denied to each.

Id. at 2000 (footnote omitted). In *National Federation of Independent Business v. Department of Labor*, 595 U.S. 109 (2022), Justice Gorsuch similarly linked the separation of powers with individual liberty. *See id.* at 126 (Gorsuch, J., concurring) ("[I]f this Court were to abide [the law's demands] only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little.").

277. *See generally Jackson*, 142 S. Ct. 522.

278. And others who might seek abortions. *See* Neelam Bohra, *"Left Out of the Conversation": Transgender Texans Feel the Impact of State's Restrictive Abortion Law*, TEX. TRIB. (Dec. 21, 2021, 5:00 AM), https://www.texastribune.org/2021/12/21/texas-abortion-law-transgender-pregnancy/ [https://perma.cc/VG6P-6VHB].

279. *See* GUTTMACHER INST., INDUCED ABORTION IN THE UNITED STATES 1 (Sept. 2019), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf [https://perma.cc/7MM4-HQ68].

280. *See* Ederlina Co, *Abortion Privilege*, 75 RUTGERS U. L. REV. 1, 17–19 (2021). One study found that S.B. 8 increased the average one-way driving distance to access a legal abortion from 17 miles to 247 miles. *See* Elizabeth Nash et al., *Impact of Texas' Abortion Ban: A 14-Fold Increase in Driving Distance To Get an Abortion*, GUTTMACHER INST. (Sept. 15, 2021), https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion [https://perma.cc/EZ6B-7ETF].

travel time to access legal abortions increases the costs of abortions generally, including gas, time off from work, lost wages, childcare, and lodging costs—costs that disproportionately disadvantage low-income women, women of color, immigrants, and women with disabilities.[281]

Another group of people who experience *Jackson*'s federalism principles are Texas residents more broadly, who have an interest in a state government responsive to their policy preferences. This group may also have a liberty interest inherent in their struggle against federal law and ensuring that federal law does not stifle their policy preferences. This is the group that the *Jackson* decision implicitly privileges.

These two sets of experiences are different. Although the second group may be larger, the scope of its members and their structural interests are more speculative. S.B. 8 wasn't a particularly popular piece of legislation,[282] so it isn't clear exactly how large the set of voters was whose policy preferences would have been frustrated by enjoining it. Among supporters of S.B. 8, it isn't clear why their *liberty* interests would be infringed by federal court review, except in the speculative way that the Court discusses liberty as the result of federal and state contestation.[283] By contrast, the first group is easily identifiable (women seeking abortions), is directly affected by the lack of federal judicial review, and bears distinct costs to its freedoms.

An approach to constitutional structure that acknowledges experiential pluralism and incorporates equality principles counsels against a structural analysis that privileges speculative structural norms when those benefits come with specific costs to identifiable groups. In order words, the *Jackson* opinion is flawed not just because it allows Texas to frustrate a federal right, as commentators have noted.[284] It is flawed because it fails *on its own structural terms*: the structural principles it employs to protect Texas, if

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281. *See* Jolie McCullough & Neelam Bohra, *As Texans Fill Up Abortion Clinics in Other States, Low-Income People Get Left Behind*, TEX. TRIB. (Sept. 3, 2021, 11:00 AM), https://www.texastribune.org/2021/09/02/texas-abortion-out-of-state-people-of-color/ [https://perma.cc/K3HF-AN4P].

282. U. OF HOUS. & TEX. S. UNIV., TEXAS TRENDS SURVEY 2021: ABORTION AND TRANSGENDER ATHLETE POLICIES 4 (2021), https://uh.edu/hobby/txtrends/txtrends2021_report1.pdf [https://perma.cc/J5EY-6B7X] (finding that sixty-nine percent of those polled held the position that current Texas abortion law was too restrictive).

283. *See supra* note 276 and accompanying text.

284. *See, e.g.*, Mark Joseph Stern, *The Supreme Court's Texas Abortion Decision Is a Disaster for Constitutional Rights*, SLATE (Dec. 10, 2021, 11:54 AM), https://slate.com/news-and-politics/2021/12/supreme-court-texas-abortion-sb8-gorsuch-sotomayor.html [https://perma.cc/S5CH-NJ3U] ("In the guise of a compromise decision, five justices gave states a road map to nullify fundamental liberties.").

evaluated fairly, by reference to human experience rather than abstract theory, counsel in favor of federal interference, not state sovereign immunity.

My second example, from separation of powers, comes from the criminal justice system and plea bargains in particular. The overwhelming majority of defendants in federal criminal cases plead guilty: in 2020–21, of the 60,813 criminal defendants charged with a federal crime, 55,274 (90.9%) pled guilty.[285] For most federal criminal defendants, then, the judiciary plays only a small role in their arrest, prosecution, and punishment.[286]

Plea bargains thus implicate the separation of powers. In general, imprisoning an individual so seriously deprives them of liberty that we require all three branches of government to act before allowing it.[287] Plea bargains, by contrast, permit litigants and the executive to circumvent the checking power of the judiciary. However, perhaps because we tend to see rights and structure as categorically distinct[288] and understand the criminal justice system as regulated by the Fourth, Fifth, and Sixth Amendments, we haven't focused on how criminal defendants experience the absence of the separation of powers driven by the rise in plea bargaining.[289]

Reasoning from experience demonstrates a complex relationship between the system of plea bargaining and the separation of powers. As described above, we experience constitutional structure as a calibration of the level of governmental involvement in our lives. In the criminal justice context, structural constraints prevent any one branch from invading our lives without the involvement—in some form—of the others. Weaker structural protections, caused by the judiciary bowing out of the plea system, increases the presence of government in our lives, and in this case, the presence of the criminal justice system.

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285. *See Table D-4—U.S. District Courts–Criminal Statistical Tables for The Federal Judiciary (June 30, 2021)*, U.S. CTS., https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2021/06/30 [https://perma.cc/JTH4-2SUA]. These statistics are not pandemic-specific. *See* John Gramlich, *Only 2% of Federal Criminal Defendants Went to Trial in 2018, and Most Who Did Were Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/QYE4-LU7B].

286. *See* Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 79 (2018) ("The U.S. Supreme Court eventually shut down the Federal Constitution as a basis for many of these ways that [federal] judges could oversee the fairness of plea negotiation practices . . . . It tied the constitutional law of plea negotiations closely to the law of private contract negotiations, and it broadly discouraged courts from scrutinizing either prosecutors' motives and justifications or the substantive fairness of plea agreements.").

287. *See supra* note 157 and accompanying text.

288. *See supra* Section 0.

289. Barkow, *supra* note 118, at 1031–34.

One normative value that the separation of powers arrangement inherent in plea bargaining vindicates is efficiency. It permits prosecutors to convict far more individuals than they would otherwise be able to, were they forced to take each to trial.[290] To the extent the criminal justice system carries normative benefits to the public at large, the plea bargaining system's efficiency confers those benefits at a greater scale than otherwise available.

An experiential pluralism approach encourages a broader perspective. Not everyone experiences the criminal justice system equally. A robust literature describes the ways that the criminal justice system disadvantages people of color, especially via racially biased arrests[291] and disparate assignment of criminal charges.[292] But evidence also exists that we experience the plea system, in particular, differently by race.[293] In a recent illuminating study, Professor Carlos Berdejó found that the plea bargaining process resulted in systematically different outcomes for White and Black defendants.[294] He found that White defendants were "twenty-five percent more likely than black defendants to have their most serious initial charge dropped or reduced to a less severe charge" during plea bargaining, resulting in a finding that "white defendants who face initial felony charges are approximately fifteen percent more likely than black defendants to end up being convicted of a misdemeanor instead."[295] Additionally, "white defendants initially charged with misdemeanors are approximately seventy-five percent more likely than

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290. *See* Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2001 (2022) (describing a prosecutor admitting that plea bargaining was a "way to win vastly more convictions than could ever be obtained in a system that actually afforded people the constitutional 'right to a speedy and public trial'").

291. *See, e.g.*, Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 203 (2013) (noting that African Americans make up thirty-five percent of arrests for suspicion of drug crimes, despite drug usage being roughly equal between the races); Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity*,*'* USA TODAY (Nov. 19, 2014, 2:24 PM), https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207 [https://perma.cc/87MZ-B5ES] ("Blacks are far more likely to be arrested than any other racial group in the USA. In some places, dramatically so.").

292. *See, e.g.*, M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1335–36 (2014) ("[T]here is a dramatic disparity disfavoring blacks in the likelihood of facing severe charges. All else equal, black arrestees are much more likely to initially face a charge carrying a mandatory minimum (7.5 percent for the average white arrestee compared to 12.4 percent for a comparable black arrestee). . .").

293. *See generally* Cynthia Alkon, *Bargaining Without Bias*, 73 RUTGERS U. L. REV. 1337, 1344–47 (2021) (describing the literature on racial bias in the plea bargaining system).

294. *See* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. REV. 1187, 1213–38 (2018).

295. *Id.* at 1191.

black defendants to be convicted for crimes carrying no possible incarceration, or not to be convicted at all."[296]

Since the plea system decreases judicial checks on the prosecutorial prerogative to arrest, prosecute, and negotiate a guilty plea, it subjects bodily liberty not to the carefully calibrated system of checks and balances that criminal justice demands, but to an all-powerful executive[297] able to wield criminal law without meaningful oversight. And since research shows that some prosecutors act in a racially unequal manner, people of color experience the lack of separation of powers in the criminal justice system as an abdication of the judiciary's role as protector against arbitrary or racist governmental action.

An experiential pluralism approach demonstrates that the plea bargaining system defeats the protections that constitutional structure is supposed to confer. It forces us to weigh the generalized, attenuated experience of efficiency against specific liberty infringements, illustrating how the experiential benefits of constitutional structure accrue in unequal ways.

III. CONCLUSION

In this Article, I have offered what I believe to be a novel approach to constitutional structure by advocating a shift in our primary epistemic source from values-in-theory to human experience. That approach, while methodologically multifaceted, more fairly evaluates the set of normative values that currently guide structural constitutional law. Centering human experience in structure should encourage courts and scholars to engage with the varied experiences that people have with the law and acknowledge that some experience structure in a way that complicates the existing categories that shape our thinking.

There is an urgency to this project. The Court uses empty experiential reasoning to strike down federal legislation meant to improve the lives of the very people whose experience the Court ignores. Reasoning from experience

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296. *Id.*

297. *See* David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 480 (2016) ("The starting point for virtually every discussion of prosecutors in the United States is their tremendous clout."); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) ("The law-on-the-street—the law that determines who goes to prison and for how long—is chiefly written by prosecutors, not by legislators or judges."). *But see* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1305–06 (2018) (describing an "unseen but essential body of law . . . that time and again establishes the mechanisms and legal frameworks through which prosecutorial plea bargaining power is generated and deployed").

demonstrates the broken logic of that approach and provides a methodology that both creates a more accurate and inclusive structural constitutional law and remains faithful to the deep normative values that our constitutional structure seeks to vindicate.