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Racialized Red Tape: Unraveling Administrative Burdens in Liquor Licensing

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ABSTRACT

Americans often bemoan 'red tape' as cumbersome but necessary formalities within administrative governance. Though frustrating, red tape seems to assuage public confidence by portraying bureaucratic decisionmaking as democratic, thorough, and—most importantly—impartial. This Article counters that passive frame, repositioning administrative procedures as active producers of structural inequity. Drawing on the experiences of small minority-owned businesses seeking to obtain or retain liquor licenses, this Article constructs regulatory bodies as sites that delineate access, agency, and belonging among marginalized groups despite decades of equity interventions. Part I contextualizes liquor licensing within this endeavor, situating it as an unassuming administrative practice that underlies historical and contemporary disparities in spatial and economic autonomy. Part II evaluates the role of state agencies and agents in advancing "racialized administrative burdens," or the learning, psychological, and compliance barriers that conceal exclusionary practices. Relying on qualitative focused case narratives, Part III interprets how racialized administrative burdens in liquor licensing are both operationalized

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and insulated through normative appeals to neutrality and public safety. Part IV prescribes "historically informed rulemaking" as an analytical framework for rule design and enforcement in contested regulatory domains. This Article invites legal scholars, policymakers, and agency officials to take seriously the distributive properties of bureaucratic procedure.

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INTRODUCTION

The promise of the American Dream, with its vision of equal opportunity for all, falls short for Black entrepreneurs whose dreams are obstructed by administrative barriers. An endeavor that is both spiritual and material, many small business owners believe that entrepreneurial spirit drives their calling, securing a better future regardless of race or ethnicity.[1] And yet, for far too many Black founders, that promise represents an illusion, one hollowed out by regulatory obstacles within a system that, in retrospect, has failed to extend its full embrace to all.[2] This elusiveness points to a systemic brokenness that, as Professor Regina Austin observed, has led a new generation of entrepreneurs to forge a different path—one not *via* the promises of the American Dream but *in defiance of* the systems that have denied them full inclusion.[3]

The gap between theory and reality that drives Black entrepreneurs to apostasy is particularly evident in liquor licensing, where administrative power is deeply ensconced in the corridors of alcohol regulatory boards and commissions. Liquor licensing, which sits at the intersection of public interest and private enterprise, is among the most heavily regulated sectors of entrepreneurship.[4] The contemporary model is born out of post-Prohibition efforts to reintroduce alcohol markets under extensive state oversight to maintain a sheen of morality. In capturing this ubiquity, the Supreme Court described liquor licensing laws as "pervasive regulatory schemes under which the State dictates and continually supervises virtually every detail of the operation of the licensee's business."[5] In the Court's view, few business enterprises come close to the "complete state involvement" that liquor license regulation entails.[6] Because state and local agencies control whether a license is issued, renewed, or revoked, entry into and survival within the industry depend on continuous governmental approval.[7] Equally restrictive is the broad discretion exercised by agency officials. Instead of being under an obligation to uniformly enforce the rules in all situations, government agencies and the officials who serve in them

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[1] Yochai Benkler & Talha Syed, *Reconstructing Class Analysis*, 4 J. L. & POL. ECON. 731, 734 (2024) (critiquing how theories of class and social mobility overlook structural inequities in the distribution of power and opportunity).

[2] *See generally* Khiara M. Bridges, *Excavating Race-Based Disadvantage Among Class-Privileged People of Color*, 53 HARV. C.R.-C.L. L. REV. 65 (2018); Deborah N. Archer, *Exile from Main Street*, 55 HARV. C.R.-C.L. L. REV. 788 (2020); Andrea Freeman, *Unconstitutional Food Inequality*, 55 HARV. C.R.-C.L. L. REV. 840 (2020); Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703 (2019).

[3] *See* Regina Austin, *"An Honest Living": Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2119 (1994) ("Thus, what is characterized as economic deviance in the eyes of a majority of people may be viewed as economic resistance by a significant number of blacks.").

[4] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 184–85 (1972) (holding that state liquor licensing alone does not convert private discrimination into state action); *cf.* Shelley Ross Saxer, *License to Sell: Constitutional Protection against State or Local Government Regulation of Liquor Licensing*, 22 HASTINGS CONST. L.Q. 441, 444 (1995) (explaining how liquor licensing simultaneously operates as a regulatory privilege and a mechanism of state control).

[5] Moose Lodge, 407 U.S. at 184-85.

[6] *Id*.

[7] *See, e.g.,* Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517 (2018).

exercise judgment that, as a practical matter, is insulated from meaningful judicial review.[8] What this structure produces, then, is dependence. Regulators' decisions to grant or deny a liquor license, putatively based on considerations of public health, safety, morals, or general welfare,[9] determine whether a business operates or shuts down. Businesses function in a space where survival hinges on administrative judgment, and where the standards governing that judgment are opaque, subjective, and difficult to challenge. As such, state agents do not merely enforce liquor regulations enacted by legislators; they have the authority to regulate access to entrepreneurial opportunity itself. Far from incidental, liquor licensing authorities determine who may participate in the economy as entrepreneurs owning and operating a business, and, by extrapolation, who is deemed worthy of full inclusion in public economic life with access to the leisure and recreation that it entails.[10]

This Article argues that, in managing the minutiae of everyday decision-making in administrative agencies, officials and the institutions they represent often engage in a critical dispossession of Black entrepreneurs, a harm thus far overlooked in civil rights law and administrative law discourse.[11] To be sure, causes of Black business failure have been a topic of heated discussion on which reasonable scholars differ. Some interpretations focus on deficiencies within the Black business sector,[12] while other theories attribute racial disparities in entrepreneurship to flaws in banking, housing, or political infrastructures.[13] Yet again, others consider business failure to be the inevitable consequence of inequities in education, training, opportunity recognition, management skills, or access to capital, often classified as individual shortfalls.[14] This Article does not attempt to resolve those debates, but instead it brings into view the outsized barrier of something more local and quotidian: the role of the administrative state on lost entrepreneurial opportunity and, hence, economic loss. Liquor licensing offers a clear view into this phenomenon because, within Black neighborhoods, restaurants and nightclubs have historically generated and

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[8] *Id.*
[9] Saxer, *supra* note 4, at 444.
[10] *See, e.g.*, BEG Invs., LLC v. Alberti, 85 F. Supp. 3d 13, 21 (D.D.C. 2015) (nightclub alleging that the conditions on their license were designed to "inhibit[] the free association of young black African Americans" and to suppress 'urban' music genres, including R&B, hip–hop and go–go).
[11] Garry D. Bruton, Alexander Lewis, Jose A. Cerecedo-Lopez, & Kenneth Chapman, *A Racialized View of Entrepreneurship: A Review and Proposal for Future Research*, 17 ACAD. MGMT. ANNALS 492, 496 (2023) (highlighting the need for scholarly attention to why underrepresented minorities are disadvantaged in entrepreneurship "given that open racial animus is no longer widely expressed in the United States"); Cristina Isabel Ceballos, David Freeman Engstrom, & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370, 384–401 (2021) (discussing the retrenchment of a civil rights lens within Administrative Procedure Act jurisprudence).
[12] This conversation has been ongoing for decades. *See generally* Robert E. Suggs, *Bringing Small Business Development to Urban Neighborhoods*, 30 HARV. C.R.-C.L. L. REV. 487 (1995).
[13] Professor Mehrsa Baradaran has written extensively regarding the compilation of social, economic, and legal barriers that economically disenfranchise marginalized groups. *See generally* THE QUIET COUP: NEOLIBERALISM AND THE LOOTING OF AMERICA (2024), THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP (2017).
[14] Wilton Hyman, *Empowerment Zones, Enterprise Communities, Black Business, and Unemployment*, 53 WASH. U. J. URB. & CONTEMP. L. 143, 160-162 (1998) (comparing outcomes for the different types of Black-owned businesses).

circulated revenue locally. These establishments shape how the community's leisure dollars are spent and who benefits from the economic ecosystem of employees, contractors, artists, vendors, and other small minority-owned businesses. Because their viability is inseparable from the ability to sell alcohol, access to liquor licensing is a make-or-break threshold, especially for nighttime venues. Yet, despite the visibility of struggle and collective advancement across many spheres of Black life, barriers to liquor licensing go unnoticed—widely recognized among Black entrepreneurs, but by few others, and even then, only anecdotally so.[15]

To make sense of this patterned yet invisible exclusion, integral to this narrative is the fact that state officials impose 'racialized administrative burdens.'[16] Victor Ray, Pamela Herd, and Donald Moynihan defined the term as an administrative practice "that normalizes and reinforces patterns of racial inequality in public services, simultaneously reproducing disparate treatment while obscuring discrimination because bureaucratic actors are 'just following the rules.'"[17] Whether promulgated through exercises of discretion, plausibly deniable bias, or facially neutral policy design, racially administrative burdens are the mechanisms through which state agents transform innocuous processes that promote compliance into techniques that reproduce racial inequality.[18] Thus, it is through silence and banality that racialized administrative burdens are most stringent, embedding inequity in ordinary regulatory governance.

Unlike existing inquiries of racialized harm that focus on micro-level (individual bias) or macro-level (structural conditions) analyses, this Article adopts a meso-level (organizational) approach.[19] Directing attention to the organizational level allows us to interrogate the racialized administrative burdens that transform individual agencies into institutions where racial capitalism is both sustained and perpetuated.[20] The meso-level approach has received renewed attention in equity analyses, with Professor Aliyah Saperstein and colleagues likening this worldview to "racial projects" tying individuals to "entrenched bureaucracy, institutional inertia, and the

[15] Angela E. Addae, *Booze, Bars, and Bias: Anti-Blackness in Liquor Licensing Enforcement*, 81 WASH. & LEE L. REV. 1855 (2025).

[16] *See generally* Grant H. Blume, "*As Expected": Theoretical Implications for Racialized Administrative Power as the Status Quo*, 33 J. OF PUB. ADMIN. RES. THEORY 30 (2023).

[17] Victor Ray, Pamela Herd, & Donald Moynihan, *Racialized Burdens: Applying Racialized Organization Theory to the Administrative State*, 33 J. PUB. ADMIN. RESEARCH & THEORY 139 (2023).

[18] *See also* Leslie Book, *Tax Administration and Racial Justice: The Illegal Denial of Tax-Based Pandemic Relief to the Nation's Incarcerated Population*, 72 S.C. L. REV. 667, 689-94 (2021) (summarizing the conceptualization and origins of racialized burdens); Daiquiri J. Steele, *Enforcing Equity*, 118 NW. U. L. REV. 577, 595 (2023) (noting that "racialized administrative burdens evolved once more direct forms of racial discrimination were outlawed").

[19] Aliya Saperstein, Andrew M. Penner & Ryan Light, *Racial Formation in Perspective: Connecting Individuals, Institutions, and Power Relations*, 39 ANN. REV. OF SOCIO. 359, 367 (2013); *see also* Alasdair Roberts, *Bridging Levels of Public Administration: How Macro Shapes Meso and Micro*, 52 ADMIN. & SOC. 631, 638–39 (2020).

[20] Racial capitalism is a term that originated in South African traditions and was refined by political theorist Cedric J. Robinson to describe how capitalism depends on racial hierarchies, requiring the social and economic subordination of Black people and other marginalized groups to sustain systems of accumulation and control. *See generally* Cedric J. Robinson, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION (2000); andré douglas pond cummings, *The Farcical Samaritan's Dilemma*, 35 J. C. R. & ECON. DEV. 219, 228–32 (2022) (providing an overview of racial capitalism and its evolution).

everyday grind of hiring workers, teaching students, judging cases, or diagnosing patients."[21] Recognizing the potential of the meso-level realm to offer novel explanations of structural inequality, I respond to calls in the academic literature to take seriously the role of institutions as racial actors.[22] To treat organizations as actors is to examine the practices through which they exercise power, so—combining organizational theory, sociolegal inquiry, and qualitative methods—this Article turns to administrative practices as the unit of analysis. It offers liquor licensing as one example among many that demonstrates how racialized administrative burdens shape citizen-state relationships in general and economic access in particular.[23]

To explore the impact of racialized administrative burdens on minority entrepreneurs, this Article has four main objectives. Part I offers historical context on the longstanding relationship between liquor licensing and economic rights. This relationship is a small part of a storied history of law as a mechanism of control, which has substantially shaped social meaning and commerce.[24] Part II presents a theoretical framework to expand the discourse on race and administrative governance.[25] It introduces racialized administrative burdens as legally salient mechanisms that normalize and reproduce exclusion within bureaucratic structures. Building on the work of

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[21] Saperstein et al., *supra* note 19, at 367.

[22] *Id.* (describing organizations and institutions as "the terrain where official policies, racial stereotypes, and cultural representations collide with individual racial identities and perceptions"); Sophia Z. Lee, *Racial Justice and Administrative Procedure*, 97 CHI.-KENT L. REV. 161, 181–87 (2022) (calling for a fuller examination of how administrative structures advance or disrupt inequality); Michael Omi & Howard Winant, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 57 (2015) (commenting that, in the U.S., "the state has always regulated capitalist development by means of race-based law and racial policy-making"); Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 181 (1998) (examining cases where courts determined an individual's racial classification and showing that whiteness was constructed and contested in courtrooms); Leslie Book, T. Keith Fogg, & Nina E. Olson, *Reducing Administrative Burdens to Protect Taxpayer Rights*, 74 OKLA. L. REV. 527, 536 (2022) (calling for in-depth examinations of racialized burdens because "burdens that fall disproportionately on traditionally disadvantaged racial or ethnic groups contribute to perpetuating racial inequity and are worthy of additional agency attention"); Emily R. D. Murphy, *Collective Cognitive Capital*, 63 WM. & MARY L. REV. 1347, 1388 (2022) (describing how the state's consumption of "cognitive capital" through bureaucratic processes disproportionately burdens marginalized groups, with regressive and racialized consequences that perpetuate inequality); Barbara F. Reskin, *Including Mechanisms in our Models of Ascriptive Inequality*, 68 AM. SOCIO. REV. 1, 2 (2003); Vincent J. Roscigno, Diana L. Karafin & Griff Tester, *The Complexities and Processes of Racial Housing Discrimination*, 56 SOC. PROBLEMS 49, 50 (2009).

[23] PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 131–159 (2009) (examining how county clerks who issued marriage licenses enforced miscegenation laws and, in doing so, played a central role in constructing and maintaining racial categories, even when acting without personal animus). As Pascoe observes, "'[it] was precisely because marriage license clerks operated a one remove from the center of attention—that is, they carried out their tasks as a matter of bureaucratic routine rather than criminal enforcement, in quite county offices rather than dramatic courtrooms—that they would come to be so crucial to the enforcement of miscegenation law." *Id.* at 133.

[24] *See, e.g.,* Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, 129 YALE L. J. 924 (2020); Allison Brownell Tirress, *Exclusion from Within: Noncitizens and the Rise of Discriminatory Licensing Laws*, 49 L. & SOC. INQUIRY 1783 (2024).

[25] In 2020, the *Yale Journal on Regulation* published contributions on the topic of race from over two dozen administrative law scholars. *See generally* Symposium on Racism in Administrative Law, YALE J. ON REGUL. (2020), https://www.yalejreg.com/topic/racism-in-administrative-law-symposium/ (last accessed May 2, 2025). I further that conversation by shifting focus to state and local governments and by centering the lived experiences of Black entrepreneurs.

Ray, Herd, and Moynihan,[26] Part II brings forward bureaucratic "red tape" as central to understanding inequity in administrative governance, from environmental protections and higher education to farm lending programs.[27] It thereby challenges the conventional assumption that administrative agencies are passive spaces that apply neutral rules and instead posits that they are influential actors with the ability to disenfranchise marginalized groups.

Part III offers a doctrinal intervention that leverages qualitative tools to categorize three Black entrepreneurs' battles with racialized administrative burdens.[28] By reconstructing their stories through in-depth interviews and content analyses of court documents, public records, administrative proceedings, and media accounts, Part III advances the growing body of legal scholarship that assesses narrative, lived experience, and institutional context as primary legal sources.[29] Furthermore, the focused case narratives in Part III fortify the link between subordination and the use of police powers as tools to restrict spatial and commercial use.[30]

The same administrative burdens that Black business owners encounter in liquor licensing also exist in education, public safety net access, housing, land use, and healthcare.[31] In this respect, racialized administrative burdens are a feature of regulatory governance, and liquor licensing merely offers a microcosmic view of the state's broader role in distributing opportunity across racial lines.[32] Part IV reframes the problem of racialized

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[26] Pamela Herd & David Moynihan, *Administrative Burdens in the Social Safety Net*, 39 J. OF ECON. PERSP. 1, 129–50 (2025); Ray, Herd, & Moynihan, *supra* note 17.

[27] *See, e.g.,* Dorothy Roberts, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022) (describing the procedural hurdles that families face in child welfare agencies); Alyssa Sloan, *Pigford v. Glickman and The Remnants of Racism*, 8 OIL & GAS, NAT. RESOURCES & ENERGY J. 19 (2022) (discussing how a farm lending program was administered in a way that harmed Black farmers); Tanner Corley, *Regulating Beauty: The Licensing of Barbers and Beauticians in Alabama and the Nation*, 2025 ENTERPRISE & SOCIETY 1 (2025) (discussing cosmetology licenses); Krittiya Kanachote, *Legal Violence: The Struggles of Thai Women in Thai Massage Businesses*, Frontiers 238 (2024) (discussing massage therapy licensing). *See also* Sarah J. Adams, *The White Supremacist Structure of American Zoning Law*, 88 BROOK. L. REV. 1225 (2023); Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. & POL'Y REV. 511 (2020-2021).

[28] Katerina Linos & Melissa Carlson, *Qualitative Methods for Law Review Writing*, 84 U. CHI. L. REV. 213 (2017) ("Court decisions alone offer unusually extensive and in-depth perspectives on law, on the actions of various stakeholders, and on the societal context in which these operate.").

[29] By attending to the voices and experiences of those most impacted by the law, qualitative approaches bring the human dimension into focus. For examples of the use of qualitative methods in legal scholarship to illuminate the lived experiences of everyday people, *see* OSAGIE OBASOGIE, BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND (2013); KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION (2011).

[30] For example, police presence, particularly in Black entertainment spaces, carries a historical weight and evokes a legacy of racial surveillance and state-sanctioned violence. Prominently visible law enforcement can deter attendance, disrupt business operations, and reinforce the notion that Black nightlife is inherently suspect or dangerous. The Fifth Circuit addressed this dynamic, concluding that police presence, even if used as an intimidation tactic, is constitutional: "Similarly, the passive attendance and visibility of the deputy sheriffs at Club Retro before and during the Paul Wall concert was not a violation of First Amendment rights. The deputy sheriffs had every right to attend the show and park in the parking lot just as any other patron." Club Retro LLC v. Hilton, 568 F.3d 181, 212 (5th Cir. 2009).

[31] Although unquestionably important, these other settings are issues beyond the limited scope of this Article.

[32] For example, this dynamic has been well documented in education policy and practice, where researchers identify administrative burdens as critical to reproducing inequality despite neutral bureaucratic

administrative burdens as the product of regulation built atop sedimented histories of exclusion, control, and moralized governance. These burdens persist because agencies operate without knowledge of the relics embedded in their rulebooks. If the problem is structurally and historically embedded, then so too must be the solution—as will be the case for permitting, benefits administration, and other state-mediated systems. Part IV calls for a proactive approach to reform grounded in "*historically informed rulemaking*"—a framework that enables agencies to account for the newly constructed realities through memory, mapping, and modification. It offers guidance for policymakers charged with equitable administration and legal scholars uniquely positioned to excavate the idiosyncrasies of bureaucratic bias and abuse.

I. LIQUOR LICENSING AND THE ERASURE OF BLACK ENTREPRENEURS

Liquor licensing provides a representative domain to observe the operation of administrative 'red tape.' As a closely supervised sector, it encompasses the administrative challenges Black-owned businesses face compared to applicants from dominant groups, while also highlighting the broader impact of regulatory practices on community economic infrastructures. When Black entrepreneurs engage with liquor licensing agencies in a bid to comply with alcohol laws, they face various obstacles that range from arbitrary denials and abuse of discretion to agency inaction.[33] Far from isolated incidents, these administrative encounters—compounded over individual applications, across states, and across generations—constitute a discrete mechanism that shuts Black-owned businesses out of

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procedures. *See, e.g.*, Asmus Leth Olsen, Jonas Høgh Jeppesen & Donald P. Moynihan, *The Unequal Distribution of Opportunity: A National Audit Study of Bureaucratic Discrimination in Primary School Access*, 57 AM. J. POL. SCI. 587 (2022); Andrene J. Castro & Taryn Goodwin Traylor, *Navigating Racialized Administrative Burdens in Teacher Licensure and Certification*, 126 TEACHERS COLL. REC. 114–46 (2024); Dominique J. Baker & Laila McCloud, *Too Much or Nothing at All: Racialized Administrative Burdens and Higher Education Policy Communication in Texas*, 98 PEABODY J. EDUC. 49–65 (2023); Jennifer A. Mallinen, *The Role of Whiteness in the Disparate Impacts of Needs-Based Public Service Administrative Burdens* (M.A. thesis, Univ. of Colo. Denver 2021); Jackie Pedota, *Institutionalization of a Latinx Campus Cultural Center: Exploring a Case of Racialized Administrative Burdens Faced by Latinx Staff and Students*, 27 J. CASES EDUC. LEADERSHIP 34–46 (2024); Andrea Briceño Mosquera, *"They Asked for More, More, and More Paperwork": Administrative Burdens When Undocumented Youth Claim In-State Resident Tuition Policy Benefits*, 46 EDUC. EVAL. & POL'Y ANALYSIS 623–45 (2024); Kristen A. Copeland, Amy King, Julietta Ladipo, Desiré Bennett, Alexis Amsterdam, Cynthia White, Heather Gerker, & J'Mag Karbeah, *Barriers to Early Childhood Education for Black Families and Calls for Equitable Solutions from a Qualitative Study Using Peer Researchers and an Antiracist Lens*, 69 EARLY CHILDHOOD RES. Q. S26, S26–38 (2024) (finding that Black parents experienced "significant racialized administrative burdens or hoops to jump through" to access early childhood education).

[33] *See generally,* Addae, *supra* note 15; *see also* Jonathan Fong, *Midtown Restaurant Closes After Just 1 Year; Owner Said City's Liquor License Rules Crippled Business*, KSDK.COM (Mar. 29, 2025), https://www.ksdk.com/article/money/business/small-business/st-louis-rogue-bistro-restaurant-closes-midtown-liquor-license/63-3226c398-d323-47dd-9d2e-c1c4879094b8; Daniel Johnson, *Black-owned Colorado Bar Battles Liquor License Suspension Amid Allegations of Racial Discrimination*, BLACK ENTERPRISE (Aug. 24, 2023) https://www.blackenterprise.com/bar-colorado-fighting-racism/; Mauricio Peña, *DrinkHaus, Greektown Bar Shut Down By City, Closed for Good After Owners Surrender Liquor License*, BLOCK CLUB CHICAGO (Aug. 29, 2019) https://blockclubchicago.org/2019/08/29/drinkhaus-supper-club-shut-down-after-owners-surrender-licenses/.

the marketplace and further complicates Black engagement within the alcohol-serving industry. Alongside that is the consuming nature of it all, where state officials facilitate a slow death-by-a-thousand-cuts, adding administrative burden to administrative burden by demanding ever more time, money, and labor from Black applicants seeking to obtain or renew liquor licenses.

Despite its prevalence as an exclusionary device, liquor licenses are rarely at the top of racial and economic justice agendas. Unlike discrimination in housing, education, or the criminal legal system, the effect of a liquor license on a broad segment of society is less obvious. To the contrary, some community advocates consider alcohol a social harm and thus see the strict regulation of its sale as both appropriate and necessary. And justifiably so—alcohol abuse has destroyed families, fueled addiction, and invited criminal activity into Black neighborhoods. However, this perspective ignores the vital role of the licensees, liquor-serving establishments. In many Black communities, liquor-serving establishments like bars, restaurants, and nightclubs act as third places that facilitate socialization and foster community cohesion—oftentimes displacing underground economies by providing regulated, visible spaces for congregation. When access into the sector is restricted for these businesses, both governments and communities have less control over who is permitted to structure and occupy public space. Consequently, residents' leisure spending flows outward instead of circulating locally, draining capital from already fragile commercial sectors. Beyond spatial and economic disorder, the ability to engage in lawful onsite alcohol sales also implicates individual rights that constitute full civic participation in a democratic society: economic mobility, access to public space, cultural expression, and social infrastructure.[34] Ownership, in this context, extends beyond the license to engage in onsite alcohol sales and encompasses the right to exercise control over commercial property, revenue generation, cultivation of community norms and values, and participation in lawful enterprise. Thus, unimpeded access to liquor licensing is a step toward full citizenship for historically disenfranchised and subordinated populations.

Notwithstanding its absence in the social justice discourse, exclusion vis-à-vis liquor licensing is both historical and contemporary. Previous scholarship delineated *why*, for centuries, liquor licensing served as a tool of social control, tracing its function to policing and limiting Black economic activity, regulating Black recreation and congregation, and constraining Black mobility.[35] Now, I turn to the contemporary period to explore *how*, investigating the present-day mechanisms through which state and local

[34] *See, e.g.*, District of Columbia Human Rights Act, D.C. Code § 2-1402.01 (2012) (providing that "[e]very individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District . . . including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations"); Regina Austin, "*Not Just for the Fun of It!": Governmental Restraints on Black Leisure*, *Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667(1998).

[35] *See* Addae, *supra* note 15 (unpacking the extensive historical legacy between race and liquor licensing from the colonial era through the twentieth century).

liquor licensing agencies sustain harms originating in chattel slavery.[36] Administrative burdens seep into regulatory decision-making, inflicting adverse outcomes for powerless groups who are left to bear the brunt of invidious exclusion. On its face, the granting and denying of liquor licenses appear as procedural, routine executive functions. However, underlying this ball-and-strike process, to use a sports analogy, lies a composite of learning, compliance, and financial costs that work together to surveil and impede entrepreneurs of color who interact with administrative agencies.[37] In liquor licensing, these obstacles are pronounced along a clear divide, with tropes influencing license access to entrepreneurs who seek to entertain and serve alcohol to Black consumers.[38] For example, officials routinely subject bars, restaurants, and nightclubs catering to Black clientele to bureaucratic policing or harassment—namely, selective enforcement, heightened scrutiny, excessive conditions, frequent inspections, and arbitrary denials—projecting stereotypes of Black criminality.[39] Dozens of federal district court cases from jurisdictions all over the United States bear out this assertion.[40]

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[36] Former president of the American Sociological Association, Professor Barbara Reskin, urged scholars to move beyond documenting inequality to interrogating its causes in her 2002 presidential address. She specifically encouraged researchers to consider how organizational-level practices reproduce inequality and identified "discrimination lawsuits" as a ripe area for systematic analysis. Barbara Reskin, *Including Mechanisms In Our Models of Ascriptive Inequality*, 68 AM. SOCIO. REV. 1, 14-15 (2003).

[37] Ray, Herd, & Moynihan, *supra* note 17, at 143; *See generally* Pamela Herd & Donald Moynihan, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS (2018). Scholars have explored these costs in examining the relationship between landlords and housing inequality for justice-involved individuals. *See, e.g.,* Dr. Lucius Couloute & Kacie Snyder, *Housing Insecurity Among People with Criminal Records: A Focus on Landlords*, 32 KAN. J.L. & PUB. POL'Y 21, 37-50 (2023) (arguing that housing inequality is shaped by meso-level mechanisms such as discretion, policy enforcement, and cultural signaling, thereby structuring exclusionary outcomes in ways that disproportionately burden individuals with criminal records).

[38] The dense regulatory web is intentional. Today's liquor licensing frameworks emerged in the aftermath of Prohibition, as states rebuilt alcohol markets in the shadows of temperance-era moral reform.

[39] Delia Goncalves & Laura Wainman, *DC Bar Says Liquor License Was Revoked 'Without Proper Due Process,'* WUSA9.com (Mar. 25, 2021).

[40] BEG Invs., LLC v. Alberti, *supra* note 10, at 20-23 (alleging that the D.C. Alcoholic Beverage Control Board engaged in racially motivated regulatory harassment by conditioning liquor license renewals on costly police detail requirements, retaliating against the business following civil rights litigation, and targeting the venue's predominantly Black clientele and musical genres associated with Black American culture); USA Entm't Grp., Inc. v. Israel, 2020 U.S. Dist. LEXIS 108471 at *3-4 (S.D. Fla. June 18, 2020) (claiming that Broward County Sheriff's Office engaged in excessive and militarized police presence at a Black-owned nightclub, including officers in tactical gear at concerts, which allegedly chilled expressive conduct and contributed to the venue's closure); Wallace v. City of Tarpon Springs, 2007 U.S. Dist. LEXIS 2779 (M.D. Fla. Jan. 12, 2007) (alleging that a Black-owned bar and restaurant was subjected to heightened scrutiny, repeated surveillance, and prolonged conditional use permitting delays by city officials and police, ultimately resulting in business closure); Ward v. Lenexa, Kan. Police Dep't, 2014 U.S. Dist. LEXIS 61614 at *6-10 (D. Kan. May 5, 2014) (alleging that the Lenexa Police Department conducted at least 70 visits over a five-year span, including tavern checks, early closures, and noise citations that forced the closure of a Black-owned nightclub); Thames v. City of Portland, No. 3:16-CV-1634-PK, 2018 WL 2749630, at *1 (D. Or. Mar. 6, 2018), report and recommendation adopted sub nom. Thames v. City of Portland, No. 3:16-CV-01634-PK, 2018 WL 2749570 (D. Or. June 7, 2018) (alleging that Portland's liquor commission and city officials subjected a Black-owned nightclub to excessive security requirements, retaliatory inspections, wrongful arrest of the owner, and the imposition of a curfew-based abatement plan, forcing the business to close despite a record of full compliance with licensing conditions); Dewalt v. City of Brooklyn Park, No. 15-cv-4355, 2017 U.S. Dist. LEXIS 75453 at *1-11 (D. Minn. May 17, 2017) (alleging that city officials denied a conditional use permit and liquor license to a proposed Black-owned nightclub by narrowly construing restaurant requirements and imposing heightened scrutiny on kitchen equipment and menu offerings); L.A. Globe v. City of Lansing, No. 5:01-cv-54, 2003 U.S. Dist. LEXIS 2040, at *3-5 (W.D. Mich. Jan. 30, 2003) (alleging that city officials

From coast to coast, liquor-governing bodies convert purported safeguards like notice requirements, inspections, and abatement plans into inequality-producing mechanisms in a sustained manner that defies coincidence.[41]

The theoretical and practical stakes of this meso-level inquiry are high. Too often, reformative discussions address individual behavior, focusing on affirmative action, diversity, equity, and inclusion initiatives, and anti-bias training.[42] Yet, reforms aimed at individuals leave intact the organizational frameworks and practices through which inequality is reproduced even in the absence of malicious actors, and all the more when such actors are present. Reform is further complicated as policymakers constrain explicit equity tools, forcing the mechanics of institutional design to take on heightened importance. With increased scrutiny of the administrative state and resistance in the face of diversity initiatives, attention to how agencies structure opportunity is urgent. These political and judicial interventions leave state and local administrative agencies and their agents—all of whom play an integral role in constructing the landscape of economic opportunity—largely absent from mainstream social justice discourse. This Article pushes these key actors toward center stage by formulating a comprehensive understanding of the regulatory mechanisms that may drive economic inequality.

To this end, Part II demonstrates that biased discretionary practices are not simply an effect of malicious individuals, but symptomatic of a much

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targeted a Black-owned nightclub with excessive scrutiny and profiling, culminating in the nonrenewal of its liquor license despite prior approval and compliance with licensing requirements); Keelen v. Borough of Keansburg, No. 17-4521(FLW), 2018 U.S. Dist. LEXIS 50417, at *2-5 (D.N.J. Mar. 27, 2018) (alleging that municipal officials conspired to revoke a longstanding liquor license and force the sale of a Black-patronized bar by invoking narcotics activity as pretext, targeting the establishment's Black clientele and entertainment); Beverly Hills Suites LLC v. Town of Windsor Locks, 136 F. Supp. 3d 167, 172-82 (D. Conn. 2015) (alleging that police and municipal officials targeted a hotel and nightclub catering to young Black and Latino patrons with parking lot blockades, exaggerated public safety claims, and liquor license interference, resulting in forced closures and financial harm); Do Corp. v. Town of Stoughton, No. 13-11726-DJC, 2013 WL 6383035, at *1–3 (D. Mass. Dec. 6, 2013) (alleging that a nightclub serving a predominantly Black and Latino clientele faced heightened scrutiny, crowd control enforcement, and eventual license revocation based on associations with hip-hop music and "urban" patrons).

[41] Reginald A. Byron and Vincent J. Roscigno, *Bureaucracy, Discrimination, and the Racialized Character of Organizational Life*, in RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS: RACE, ORGANIZATIONS, AND THE ORGANIZING PROCESS 151, 161 (Melissa Wooten ed., 2019) (likening "unevenness in the application of bureaucratic rules and oversight" to "racialized bureaucratic policing"); *See also* Stephanie Bonnes, *The Bureaucratic Harassment of U.S. Servicewomen,* 31 GENDER & SOC. 804, 808 (2017) (defining bureaucratic harassment as "the purposeful manipulation of legitimate administrative policies and procedures, perpetrated by individuals who hold institutional power over others and used to undermine colleagues' professional experiences and careers"). Sociologists have examined this feature of workplace discrimination. *See e.g.*, Reginald A. Byron, *Discrimination, Complexity, and the Public/Private Sector Question*, 37 WORK AND OCCUPATIONS 435-437 (2010); Vincent J. Roscigno, *Power, Revisited,* 90 SOC. FORCES 349, 350 (2011).

[42] Bernard Bell, *Race and Administrative Law*, NOTICE & COMMENT, YALE J. REG. (Aug. 10, 2020), https://www.yalejreg.com/nc/race-and-administrative-law-by-bernard-bell/. In one example of the colorblind nature of administrative law scholarship, Professor Bernard Bell first expressed his sense that "critical race theorist[s] focus[] much more intently on the impact of governmental policy and the racialized assumptions underlying it, than upon the process by which government policy is created." *Id*. He is skeptical that attention to "process issues, such as reasoned decision-making, ensuring broad-scale participation, transparency, political accountability, and the availability and scope of judicial review" constitutes "fertile grounds for a critique of the administrative state as contributing to racial injustice." *Id*. For Bell, "[t]he more potent critique is likely based on policy analysis of the substance of the actions that agencies take, the decisions they make, and the unexamined assumptions that underlie them." *Id*.

deeper institutional logic. In this context, bureaucracy functions *both* as a tool that has the potential to be wielded by malicious individuals toward nefarious ends or as a system of unequal reproduction, without the need for ill will on the part of the people who operate within it.

II. BUREAUCRACY AS RACIALIZED AUTHORITY

Organizational behavior and field-level dynamics, which is to say the norms and pressures that influence how organizations relate to one another, shape access to fundamental rights and critical resources.[43] Despite the centrality of these meso-level processes, legal scholars rarely engage institutional theory[44] in analyses about how administrative agencies make decisions.[45] This disconnect is particularly troubling given that, as Professor Bijal Shah observed, the study of administrative agencies "lacks a comprehensive examination of its own contribution to subordination and marginalization," the reason being an absence of "a robust tradition of critical legal studies."[46] Rather than taking into consideration systemic dynamics, traditional legal discourse ignores them by attributing racial disparities in regulation to individual bias and isolated bad actors.[47] In practice, this manifests as assumptions so deeply ingrained in the law that courts require plaintiffs to prove intentional racial discrimination by regulatory bodies before granting relief in federal civil rights claims.[48] Because anti-discrimination jurisprudence operates from this individual-centric disposition, even when plaintiffs meet this demanding intent standard, their allegations are yet again reduced to the incidental

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[43] Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOCIO. REV. 147, (1983); Michael T. Hannan & John Freeman, *The Population Ecology of Organizations*, 82 AM. J. SOC. 929, (1977).

[44] However, a growing body of legal scholarship leverages insights from organizational sociology to explain inequality and institutional behavior. *See, e.g.*, Atinuke O. Adediran, *The Relational Costs of Free Legal Services*, 55 HARV. C.R.-C.L. L. REV. 357 (2020) (using organizational sociology to explain inequality in nonprofit legal services organizations); Couloute & Snyder, *supra* note 37; Shauhin Talesh, *A New Institutional Theory of Insurance*, 5 U.C. IRVINE L. REV. 617, 21 (2015) (drawing on organizational sociology to understand how organizations and organizational fields influence law); Susannah Camic Tahk, *Crossing the Tax Code's For-Profit/Nonprofit Border*, 118 PENN ST. L. REV. 489, 504 (2014) (drawing on organizational sociology to explain the tax implications of fluidity between nonprofit and for-profit sectors); David Freeman Engstrom, *The Civil Rights Act at Fifty: Past, Present, Future*, 66 STAN. L. REV. 1195, 1201 (2014).

[45] Bijal Shah, *Toward a Critical Theory of Administrative Law,* NOTICE & COMMENT, YALE J. REG. (July 30, 2020), https://www.yalejreg.com/nc/toward-a-critical-theory-of-administrative-law-by-bijal-shah/.

[46] *Id*.

[47] *See* Byron & Roscigno, *supra* note 41, at 151-169; Daniel Borowczyk-Martins, Jake Bradley, & Linas Tarasonis, *Racial Discrimination in the U.S. Labor Market: Employment and Wage Differentials by Skill*, 49 Lab. Econ 106, 106-27 (2017); Susan T. Fiske & Tiane L. Lee, *Stereotypes and Prejudice Create Workplace Discrimination*, in DIVERSITY AT WORK: CAMBRIDGE COMPANIONS TO MANAGEMENT 13-52 (Arthur P. Brief ed., 2008). A similar deficiency was observed in studies of environmental racism, where identification of harms had been limited to individual, malicious citing decisions. Laura Pulido, *Rethinking Environmental Racism: White Privilege and Urban Development in Southern California*, 90 ANNALS ASS'N AM. GEOGRAPHERS 12, 30 (2000).

[48] Flores v. Pierce, 617 F.2d 1386, 1388-90 (9th Cir. 1980) (affirming that liquor license protests against Mexican-American applicants, combined with deviation from "previous procedural patterns," "ad hoc method of decision making," and reference to "the large number of Mexican field workers in the area to harvest the grapes" provided sufficient evidence for a jury to find intentional discrimination); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555 (1977); Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976).

misjudgment of well-meaning decision-makers or to occasional misconduct in an otherwise neutral system.[49] By condensing racial discrimination to individual deviations, legal doctrines treat administrative structures and the practices that shape them as incidental instead of causal. Thus, existing legal tools are ill-suited to diagnose and/or remedy systemic bureaucratic harms.

Part II calls for a paradigm shift to account for patterned, race-contingent decisions. It frames administrative regulation as a mechanism that explicitly distributes power, resources, and access to the economy.[50]

A. Recognizing Bureaucracy's Role in Sustaining Exclusion

Both classical and contemporary scholars agree that bureaucracy is a power structure that reflects and sustains existing social hierarchies, particularly as a neutral and rational system designed to standardize decision-making and remove personal bias.[51] However, the same design features that provide for impartiality also insulate bureaucratic structures from accountability and enable them to administer and control affected groups.[52]

In his seminal 1921 essay, "Bureaucracy," the German sociologist Max Weber asserts that bureaucracy functions as a system of rationalized control, designed to operate "without regard for persons"[53] while also acknowledging that a bureaucracy is "both an instrument of governance and a structure of domination—one that, in theory should function impartially, but in practice, embeds and reinforces social hierarchies."[54] Bureaucratic governance, he argues, is characterized by its rigid, rule-based system, where authority is exercised through jurisdictionally defined spheres of influence and rules that define official activities. In contrast to earlier systems of governance rooted in personal rule, nepotism, or arbitrary power, bureaucratic authority is objective and calculable.[55] Under this view, bureaucracy's fairness stems from its uniform application to all individuals

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[49] Fiske & Lee, *supra* note 47, at 13-52; Desi's Pizza, Inc. v. City of Wilkes-Barre, No. 3:CV-01-0480, 2006 U.S. Dist. LEXIS 59610, at *79 (M.D. Pa. Aug. 23, 2006) ("We find that, for present purposes, the Plaintiffs' evidence is sufficient to allow a jury to find that the Plaintiffs' have met their burden of establishing a discriminatory motive with respect to their equal protection claim. However, we do not find that the Plaintiffs have produced sufficient evidence that the Defendant City of Wilkes-Barre had a custom or policy of driving out minorities from its communities.").

[50] Tsedale M. Melaku, *The Awakening: The Impact of Covid-19 Racial Upheaval, and Political Polarization on Black Women Lawyers*, 89 FORDHAM L. REV. 2519, 2522 (2021) (describing law firms as white institutional spaces because they control access, resources, and exclude racial minorities from institutional means).

[51] Tom Ginsburg, *The Jurisprudence of Anti-Erosion*, 66 DRAKE L. REV. 823, 830 (2018) (describing the benefits of a neutral bureaucracy); Victor Ray & Danielle Purifoy, *The Colorblind Organization*, in RACE, ORGANIZATIONS, AND THE ORGANIZING PROCESS (Melissa E. Wooten, ed. 2019) (drawing on Eduardo Bonilla-Silva's colorblindness theories to explain organizational behavior).

[52] *But see* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600 (2023). Drawing on their qualitative study of agency officials, Professors Bernstein and Rodríguez offer a different perspective, finding that accountability appears in a variety of forms and is inherently infused in agency work by promoting values of deliberation, inclusivity, and responsiveness.

[53] WEBER'S RATIONALISM AND MODERN SOCIETY: NEW TRANSLATIONS ON POLITICS, BUREAUCRACY, AND SOCIAL STRATIFICATION (Tony Waters and Dagmar Waters eds., 2015).

[54] *Id*.

[55] *Id*.

in a predictable manner that produces efficiency.[56] For Weber, bureaucracy's consistency makes it ideal for state governance because "[p]recision, speed, unambiguity, knowledge of the files, continuity, discretion, unity, strict subordination, reduction of friction and of material and personal costs [. . .] are raised to the optimum point in the strictly bureaucratic administration, and especially in its monocratic form."[57] Compared to other tools, he concludes, "trained bureaucracy is superior on all these points."[58] At the same time, Weber cautions that bureaucracy is self-perpetuating, resistant to change, and at times insulated from democratic oversight.[59] What is more, a fully established bureaucracy "is among those social structures which are the hardest to destroy[,]" capable of grafting itself into a power relationship that is "practically unshatterable."[60] While Weber hailed bureaucracy's rule-bound and mechanical nature, these qualities create the conditions through which hierarchies are sustained. Bureaucratic structures position decisions as the predictable—and therefore seemingly inevitable and unquestionable—outcomes of rule application.

Central to Weber's thesis is the displacement of visible choice and the narrowing of opportunities to contest it: decisions come from 'the system,' not a person. He attributes this to a de-emphasis on the agency of the individual bureaucrat. Rather than portray administrative officials as autonomous agents, Weber describes them as mere functionaries operating within a larger institutional order:

> [T]he professional bureaucrat is chained to his activity by his entire material and ideal existence. In the great majority of cases, he is only a single cog in an ever-moving mechanism which prescribes to him an essentially fixed route of march.[61]

This "fixed route of march" is a defining characteristic that creates a love-hate relationship with bureaucracy. Because authority is vested in the office in lieu of the individual, it is what makes administrative systems powerful, effective, continuous, efficient, *and* hard to hold accountable. Implementation, therefore, becomes a collective, faceless effort, and outcomes are correspondingly difficult to challenge. Under this arrangement, decisions are justified through a web of rules and norms—no matter how imperfect.

Though Weber's framework explains why bureaucracy is often resistant to change, his ongoing influence—implicit though it might be—

[56] *See id.*
[57] *Id.*
[58] WEBER'S RATIONALISM AND MODERN SOCIETY: NEW TRANSLATIONS ON POLITICS, BUREAUCRACY, AND SOCIAL STRATIFICATION (Tony Waters and Dagmar Waters eds., 2015).
[59] *Id.*
[60] *Id.*
[61] *Id.*

does not fully account for how bureaucratic institutions are actively formed and shaped by racial hierarchies.[62]

B. Bureaucracy's Potential as a Site of Repair

A simple transference of Weberian theory to a United States context excludes the profound implications of the nation's history and how the institution of chattel slavery molded American society, especially its organizational structure. In the United States, bureaucracy did not arise on neutral ground, for agencies were built alongside and, oftentimes, in service of established hierarchies at all levels of the political system. From the nation's inception, racial identity so deeply dictated allocations of second-class citizenship that a parallel society was necessary to accommodate legal and social separation: education, housing, employment, consumption, healthcare, and recreation. In response to this racialized order, Black churches, Black civic organizations, and Black-owned businesses adapted to Black exclusion and subsequently evolved into enclaves for cultural expression and affinity.[63] This pattern extended into education, as Historically Black Colleges and Universities (HBCUs) were established because state laws barred Black students from attending white institutions,[64] forcing philanthropic groups and the federal government to develop alternative pathways for higher learning. Even these parallel institutions were not free from administrative mishandling. For over a century, land grant HBCUs received unequal funding and endured excessive bureaucratic scrutiny at the hands of state agencies.[65]

Modern Black enterprises developed under comparable conditions within a segregated institutional landscape. The enduring dynamics of race are most exemplary in recent litigation involving the administration of a

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[62] *See, e.g.*, John M. Hobson, *Decolonizing Weber: The Eurocentrism of Weber's IR and Historical Sociology,* in MAX WEBER AND INTERNATIONAL RELATIONS 145 (Richard Ned Lebow ed., 2017) (criticizing the theory as Eurocentric).

[63] Melissa E. Wooten, Soapbox*: Editorial Essays: Race and Strategic Organization*, 4 STRATEGIC ORGANIZATION 191, 194 (2006) (describing these institutions as racialized organizations, or "organizations created to sustain the racial separation ideologies that so permeated American economic, cultural, and political systems throughout much of the country's history.")

[64] *Id*.

[65] Recent data reflects the enduring nature of racialized bureaucratic containment. In September 2023, then U.S. Secretary of Education Miguel Cardona and U.S. Secretary of Agriculture Thomas J. Vilsack issued joint letters to sixteen state governors detailing the gross underfunding of historically Black land grant institutions, which they calculated to total nearly $13 billion. The letters emphasized that under the Second Morrill Act of 1890, states that created separate land-grant institutions for Black students were legally required to distribute funding equitably between their 1862 (predominately white) and 1890 (HBCU) land-grant institutions. The disparities were staggering: Kentucky State University was shorted $172 million, while Tennessee State University was underfunded by $2.1 billion. Bureaucratic oversight neglected Black institutions and actively underdeveloped them, creating racial disparities in higher education governance that persist. Katherine Knott, States Underfunded Historically Black Land Grants by $13 Billion Over 3 Decades, INSIDE HIGHER ED (Sept. 20, 2023), https://www.insidehighered.com/news/government/2023/09/20/states-underfunded-black-land-grants-13b-over-30-years (last accessed Feb. 25, 2025). September 18, 2023 Letters from Miguel Cardona and Thomas Vilsack to 16 governors (https://sites.ed.gov/whhbcu/files/2023/09/Secretary-letter-1890.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=) last accessed Feb. 25, 2025. *See also*, Adam Harris, THE STATE MUST PROVIDE: A NARRATIVE HISTORY OF RACIAL INEQUALITY IN HIGHER EDUCATION (2022).

federal farm lending program. In *Pigford v. Glickman*,[66] Black farmers filed a class-action lawsuit against the U.S. Department of Agriculture (USDA), alleging decades of racial discrimination in the administration of farm loans and assistance programs.[67] The lawsuit revealed that the USDA used bureaucratic processes to systematically delay or outright deny funding to Black farmers, subjecting them to the classic 'run around.' Lengthy delays resulted in funding arriving too late to be of any use, forcing many Black farmers into foreclosure. Regulatory actions quite literally drove the Black-owned farm out of existence, as over 90 percent of Black farmers lost their land.[68] The *Pigford* litigation ultimately led to a $1 billion settlement, one of the largest civil rights settlements in U.S. history, revealing just how deeply these historical institutional patterns were operating within modern administrative governance.[69] Because the events that led to the *Pigford* litigation occurred within a federal program that was administered nationally, the patterns were sufficiently visible to attract legal and political scrutiny. Unlike *Pigford*, when comparable harms occur at the local or state level, their effects are far less likely to attract public attention.

To make sense of this continuity, scholars have turned to organizational analysis. In 2019, Victor Ray articulated a Theory of Racialized Organizations that offers an analytic lens.[70] Viewed through this paradigm, the harms in *Pigford* were predictably patterned, as the USDA continued to reproduce racial stratification even as the legal and political landscapes

[66] Timothy Pigford, et al., v. Dan Glickman, Secretary, United States Department of Agriculture, 182 F.R.D. 341, 342-44 (D.D.C. 1998).
[67] *Id*.
[68] Kali Holloway, How Thousands of Black Farmers Were Forced Off Their Land, NATION (Nov. 1, 2021) https://www.thenation.com/article/society/black-farmers-pigford-debt/ ("In 1920, the number of Black farmers peaked at nearly 1 million, constituting 14 percent of all farmers. But between 1910 and 1997, they lost 90 percent of their property. (White farmers lost only 2 percent in the same period.) As of 2017, there were just 35,470 Black-owned farms, representing 1.7 percent of all farms. The land Black farmers lost, some 16 million acres, is conservatively estimated to be worth $250 billion to $350 billion today.").
[69] Tadlock Cowan & Jody Feder, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, CONGRESSIONAL RESEARCH SERVICE (May 29, 2013), https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf.
[70] Victor Ray, *A Theory of Racialized Organizations*, 84 AM. SOCIO. REV. 26 (2019) (contending that organizational theory considers "organizational formation, hierarchies, and processes as race-neutral" and "race as a personal identity"); Victor Ray, *Why So Many Organizations Stay White*, HARVARD BUS. REV. (2019). For additional commentary on racialized organizations, *see* Wooten, *supra* note 63, at 193 ("We have unnecessarily conceptualized race as a construct that operates only on the individual, that is, individuals have race and this influences their careers, or firms must employ individuals of a certain race"); Alexandra Kalev, *How You Downsize is Who You Downsize: Biased Formalization, Accountability and Managerial Diversity*, 79 AM. SOCIO. REV. 109, 113 (2014); Roscigno, *supra* note 41; Adia Harvey Wingfield & Renée Skeete Alston, *Maintaining Hierarchies in Predominantly White Organizations: A Theory of Racial Tasks*, 58 AM. BEHAV. SCIENTIST 274 (2014); Melissa E. Wooten and Lucius Couloute, *The Production of Racial Inequality Within and Among Organizations*, 11 SOCIO. COMPASS 1 (2017); Taylor Cox & Stella M. Nkomo, *Invisible Men and Women: A Status Report on Race as a Variable in Organization Behavior Research*, 11 J. ORG. BEHAVIOR 419, 423 (1990). However, much of the early research on race and organizations focused on how one's personal racial identity impacted their employment or roles in the workplace. *See, e.g.*, James N. Baron, & Andrew E. Newman, *For What It's Worth: Organizations, Occupations, and the Value of Work Done by Women and Nonwhites*, 55 AM. SOCIO. REV. 155, 162 (1990) (exploring pay gaps in the California state civil service); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOCIO. 1531, 1532 (1992) (finding that employers enacted visible changes to comply with civil rights laws).

evolved over time.[71] At its core, Ray's theory contends that race is not incidental to organizational functioning but is constitutive of it—a central axis along which power, resources, and opportunities are distributed.[72] He elaborates his claim through four core tenets: (1) racialized organizations enhance or diminish the agency of racial groups; (2) racialized organizations legitimate the unequal distribution of resources; (3) whiteness is a credential; and (4) the decoupling of formal rules from organizational practice is often racialized.[73] If we accept as true Ray's argument that race is formative for organizations, then racialized patterns persist as outcomes through ordinary organizational functioning.

Applying each of Ray's four tenets to the USDA's treatment of Black farmers in *Pigford* reveals how institutional dynamics structured the program's outcomes. To begin, the USDA offices delayed or denied Black farmers' applications for credit, an essential input for large-scale agricultural production, thereby diminishing economic agency. In practical terms, these delays routinely left the loans moot. The district court recounted, "[b]y the time Mr. Brown finally received his loan in May or June 1984, the planting season was over, and the loan was virtually useless to him."[74] Second, compounding these delays, the program rules vested discretion in field-level decision-making by allowing local loan officers to control the distribution of federal funds, legitimizing unequal resource allocation. The court described how local officials used their authority on the ground to mock applicants and foreclose access to the lending program: "When [Mr. Brown] inquired later that month about the status of his loan application, a [Farmers Home Administration] county supervisor told him that the application was being processed. The next month, the same [Farmers Home Administration] county supervisor told him that there was no record of his application ever having been filed and that Mr. Brown had to reapply."[75] Third, the consequences of this discretionary system were reflected in the program's outcomes. The lenders effectively provided timely loan disbursement and support for white farmers, elevating whiteness as the differentiating credential for complete participation in the program. The court quantified this disparity, noting that "[i]n several southeastern states, for instance, it took three times as long on average to process the application of an African American farmer as it did to process the application of a white farmer."[76] Fourth, even when the farmers attempted to challenge these practices, the

[71] *See generally*, Eduardo Bonilla-Silva, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (2010).
[72] Circuit courts have also grappled with the notion of organizations having a racial identity, particularly in determining standing for discrimination claims. Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 473 n.1 (2006) ("We note, however, that the Courts of Appeals to have considered the issue have concluded that corporations may raise § 1981 claims."); *cf.* Sheba Ethiopian Rest., Inc. v. DeKalb Cnty., Georgia, No. 21-13077, 2023 WL 3750710, at *9 (11th Cir. June 1, 2023) ("In sum, we do not address whether corporations can—or cannot—state a race discrimination claim under section 1981. We hold only that there was no clearly established law in our circuit determining that officials are liable under section 1981 for discriminating against a corporation.").
[73] Ray, *A Theory of Racialized Organizations*, *supra* note 70, at 27.
[74] Pigford v. Glickman, CV No. 97-1978, 185 F.R.D. 82, 87 (D.D.C. Apr. 14, 1999).
[75] *Id*.
[76] *Id.*

civil rights review processes were fraught with delays, non-responsiveness, and internal cover-ups, leaving the protections on paper inaccessible—a true decoupling of formal rules from reality in a racialized manner. The court portrayed the collapse of the enforcement apparatus starkly: the civil rights office "was dismantled and complaints that were filed were never processed, investigated or forwarded to the appropriate agencies for conciliation . . . In some cases, [the Office of Civil Rights Enforcement and Adjudication] staff simply threw discrimination complaints in the trash without ever responding to or investigating them."[77] These dynamics, documented in the *Pigford* record, expose the intersection of Ray's and Weber's work. While Weber described bureaucratic authority as a rule-bound, impersonal, and neutral form of administration, the *Pigford* litigation uncovers a grim reality: racialized patterns can still emerge without a departure from formal logics. In this sense, *Pigford* extends beyond the Weberian 'cogs in the machine' and toward Ray's framework, where organizations are racialized actors that distribute resources and shape the external environment.

Just a*s Pigford* offers an example of how federal agencies function as racialized organizations, empirical studies across workplace settings show similar dynamics at play. For example, in their analysis of over 100 workplace discrimination cases in New York and Illinois, sociologists Reginald A. Byron and Vincent J. Roscigno show how bureaucratic institutions reproduced racialized hierarchies through routine employment practices.[78] First, they found that bureaucratic systems diminish the agency of minorities by rewarding the "ideal worker," a racialized, gendered, and class-specific prototype that aligns with Eurocentric standards of professionalism.[79] This ideal type positioned whiteness as the primary credential, so employees of color who did not conform to these norms—whether in dress, speech, or demeanor—were disproportionately categorized as unfit, unprofessional, or difficult, creating disparities in hiring, promotion, and retention.[80]

Second, their study confirmed that protocols around discretion likewise shaped how resources and opportunities were distributed.[81] Because discretion was treated as the exercise of professional judgment, any disparities that followed were considered as unintended outcomes than problems requiring intervention.[82] Lastly, Byron and Roscigno found that bureaucracies protect racial hierarchy by permitting and normalizing hostility in organizational culture despite rules to the contrary.[83] In the workplaces they studied, overt harassment—such as the use of epithets—was frequently dismissed as interpersonal conflict instead of organizational failure.[84] The recurrence of discriminatory outcomes across agencies, across

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[77] *Id.*

[78] Byron & Roscigno, *supra* note 41, at 157.

[79] *Id.* at 160-161 (giving the example of an employer offering a Black woman applicant a stocking position instead of a customer-facing sales position despite her prior experience).

[80] *Id.*

[81] *Id.* at 161–162.

[82] *Id.*

[83] *Id.* at 162–163.

[84] *Id*. at 162–164.

sectors, and across individual cases suggests that a greater phenomenon is at work.

Ray's Theory of Racialized Organizations, *Pigford*, and Byron and Roscigno's findings represent how bureaucratic institutions operate within and in response to the nation's racial history. Although the persistence of this connection is quite clear, the mechanism through which it is immortalized is not. Part II(C) looks to "racialized administrative burdens" for the answer.

C. Dissecting Racialized Administrative Burdens

1. Conceptualizing Racialized Administrative Burdens

If Victor Ray's Racialized Organizations Theory explains why organizations reproduce racial hierarchy, Administrative Burden Theory helps explain how that reproduction is carried out in practice through three key categories of costs to entrants: learning costs, compliance costs, and psychological costs.[85] Public administration scholars Donald Moynihan and Pamela Herd describe administrative burdens as the tangible and intangible costs incurred by individuals seeking to access government programs and regulatory approvals.[86] Distinguishing among these costs clarifies how administrative processes facilitate sorting along already-stratified lines. The first category, *learning costs,* refers to the cognitive and time-intensive efforts required to understand eligibility criteria and application processes.[87] For example, low-income families seeking housing assistance or federal student aid experience the application as abstruse, making the program inaccessible without external assistance. Beyond understanding the system, individuals must also navigate its technical requirements. *Compliance costs* involve the procedural, financial, and logistical obligations required to fulfill administrative demands, such as extensive documentation, fees, and verification.[88] Compliance costs fall most heavily on individuals with fewer resources and those who face inherent barriers, such as individuals with disabilities or undocumented immigrants. For instance, the digital divide places technological novices at a disadvantage in accessing online-only public services.[89] Even when these hurdles are overcome, contending with

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[85] PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS (2018).

[86] Denisa Gándara, Rosa Acevedo, Diana Cervantes, & Marco Antonio Quiroz, *Advancing a Framework of Racialized Administrative Burdens in Higher Education Policy*, 95 J. OF HIGHER ED. 718, 721 (2024). A single administrative program can impose compounded learning, compliance, and psychological costs—creating nearly insurmountable barriers for marginalized communities. For example, though the Free Application for Federal Student Aid (FAFSA) is designed to expand access to postsecondary education, the FAFSA has stringent documentation and income verification requirements that preclude program access for low-income students of color. Despite the program's intentions, racialized administrative burdens exacerbate existing gaps in postsecondary educational attainment.

[87] Ray, Herd, and Moynihan *supra* note 17, at 141.

[88] *Id*.

[89] Donald P. Moynihan, Pamela Herd, & Hope Harvey, *Administrative Burden: Learning, Compliance, and Psychological Costs in Citizen-State Interactions*, 25 J. PUB. RES. & ADMIN. THEORY 43, 65 (2015) (discussing types of burdens and mechanisms for alleviating them); Theresa Rocha Beardall, Collin

the system can still carry its own consequences. *Psychological costs* encompass the stress and stigma individuals experience when interacting with impervious bureaucratic systems.[90] In practical terms, individuals experience intangible stressors such as microaggressions and feelings of futility. They may express their disillusionment by refusing to engage with state systems at all, ultimately eroding trust in the public infrastructure and compounding the seemingly insurmountable barriers associated with life on the margins of society.[91]

Building on this framework, Moynihan, Herd, and Ray merge Administrative Burden Theory and Racialized Organizations Theory to explain how day-to-day office work can take on racial meaning.[92] Their concept of "racialized administrative burdens" provides a tangible point of structural harm, locating it in mundane administrative encounters. This explains why a processing delay can mean something different for a Black farmer whose loan application sits unreviewed at the end of planting season compared to a white farmer whose application is reviewed in a third of the time. In their words:

> What racialized organization theory contributes to existing research is the capacity to unpack the mechanisms by which administrative practices are racialized. Racialized organizations theory adds a structural lens, which makes such an analysis more feasible, helping to document and explain why marginalized racial groups face more significant frictions when interacting with the state.[93]

In essence, administrative acts acquire racial meaning based on the organizational context in which they occur. Transactions between individuals and state institutions are already filled with assumptions about credibility and trust, or the lack thereof. Race, they argue, is the socially constructed mechanism through which these relationships are defined, creating power dynamics that determine how resources, opportunities, and burdens are distributed. Although racial identity is typically attributed to individuals, it extends to organizations, too. As mentioned above, Historically Black Colleges and Universities (HBCUs) are an obvious example of institutions with a racial identity because the conditions of their founding positioned them as such. The same is true for other organizations where race plays an explicit or implicit role in their conception, from predominantly white institutions (PWIs) to Black-led businesses and nonprofits. Consequently, race is not only a demographic characteristic but also a "constitutive feature of organizational structures," one that tends

Mueller, & Tony Cheng, *Intersectional Burdens: How Social Location Shapes Interactions with the Administrative State*, 10 RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCIS. 84, 87 (2024) (noting that administrative burdens are intersectional, varying based on 'social locations' such as race, age, immigration status, or criminal legal system contact.).

[90] Ray, Herd, and Moynihan *supra* note 17.

[91] Herd and Moynihan, *supra* note 85.

[92] Ray, Herd, and Moynihan, *supra* note 17, at 140.

[93] *Id*.

toward invisibility within the polity because of the legitimacy conferred by the appearance of neutrality.[94] In this context, racial meanings are ascribed to people, objects, and institutional practices alike. These assignments are not limited to non-white individuals or organizations.[95] White-dominated organizations are just as racialized as non-white organizations because "whiteness" functions as the default against which all other racialized identities are compared.[96] For professional organizations like bar associations or medical societies, whiteness is merely unmarked, meaning that the racial character is assumed or stipulated without a need to label it. The same is not true for their affinity organization counterparts.

That race structures organizations is a tale as old as organizations themselves, but the increased reliance on administrative burdens is a relatively recent response to changing legal constraints. Administrative burdens are—to use Ray, Herd, and Moynihan's metaphor—"the handmaiden of the racialized state," conducting the discrete tasks that maintain racial stratification.[97] They are successors of post-Civil War exclusionary devices such as Black codes, vagrancy laws, grandfather clauses, and literacy tests, inheriting and modernizing their underlying sorting function.[98] As mid-twentieth-century civil rights reforms deemed overt racial classifications indefensible as a matter of law, the means of reproducing a stratified society shifted from *de jure* exclusion to 'impartial' administrative claims. Ray and colleagues explain that this critical reorientation was invoked to circumvent the new legal order committed to nondiscrimination:

> In the formally egalitarian environment, many policies and practices that create racial inequality are facially neutral. . . . Following the Civil Rights movement, which delegitimated direct racial appeals in favor of coded racial language, hiding racist intent became a legal necessity, as open discrimination in public accommodations, voting rights, and schools was outlawed (and sometimes enforced). That is, the mechanisms producing racial inequality adjusted to a new historical context.[99]

For example, amidst resistance to court-ordered school desegregation, opponents rooted their concerns in neighborhood schools, local control, or mandatory busing as dog whistles to avoid explicit racial language. This shift is integral to understanding how administrative burdens escape detection. Racial hierarchies did not disappear—the mechanisms sustaining

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[94] *Id*.
[95] *Id*.
[96] *Id*. ("Importantly, racialization is not a synonym for non-White. All White or White-dominated organizations are also racialized; White is also a race.")
[97] *Id*. at 139.
[98] Ray, Herd, and Moynihan, *supra* note 17, at141; *See also* Michele Goodwin, *Law and Anti-Blackness*, 26 MICH. J. RACE & L. 261, 282 (2021) (asserting that the racial caste system "never ceased at abolition's dawn" and the stratification that characterized chattel slavery "endures and evolves").
[99] Ray, Herd, and Moynihan, *supra* note 17, at 142 (citations omitted).

them changed. With the emergent need for new tools to achieve the same exclusionary outcomes, administrative burdens became an apparatus of choice (an effective apparatus, at that). Unfathomably discrete, racialized administrative burdens operate through a "nominally neutral targeting of cumbersome, routine, bureaucratic minutiae" like paperwork, processing times, compliance requirements, and endless back-and-forth.[100] As a result, racial disparities persist through a confluence of administrative procedures that are race-neutral in form but racialized in function.

Racialized administrative burdens provide the theoretical and empirical language to explain disparate outcomes that extend beyond individual bias or abstract structural racism. From a bird's-eye view, governments are organizational collectives that are "imbued with racial meanings."[101] On the ground, however, those meanings do not announce themselves, and identifying racialized administrative burdens requires a much more discerning eye.

2. Identifying Racialized Administrative Burdens

Racialized administrative burdens are difficult to detect because they are concealed by presumptions of legitimacy. More troubling is that even well-meaning bureaucrats can inflict burdens by faithfully executing prescribed rules—or, just doing their job.[102] As mentioned in Part II(A), bureaucratic systems are presumed legitimate because they appear neutral, and that appearance of neutrality discourages investigation unless disrupted by evidence of non-neutrality, or bias. At the level of state and local administration, where decisions are rarely tracked or reviewed, such instances of non-neutrality remain unaccounted for unless otherwise exposed in costly judicial proceedings.

What might otherwise be dismissed as ordinary "red tape" in fact defines the key characteristics of racialized administrative burdens: (1) the depletion of time through delay, (2) presumptions that marginalized applicants are undeserving, and (3) conditioning benefits on proof of moral or financial worth.[103] However, these burdens are distinct from the ubiquitous experience of "jumping through hoops." Administrative burdens become racialized when they fall disproportionately on minority groups, and the criteria become unpredictable. Once compliance requirements shift

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[100] *Id*.
[101] *Id*. at 140.
[102] *Id*. at 140 ("[R]acialized burdens co-opt bureaucrats who are personally supportive of racial equality but faithfully apply onerous administrative practices into the machinery of structural racism. In such ways, structural racism influences the behavior of even those who reject overt White supremacist ideology.").
[103] *See* Gándara et al., *supra* note 86; Christine Jang-Trettien & Daniel Bolger, *Racialized Administrative Burden in Disability Assistance Programs in Two Rural Counties*, 9 Soc. Service Rev. 446, 467-71 (2024) (sharing findings from an empirical study and detailing the amount of time and money applicants expended while attempting to access healthcare); Andrene J. Castro & Taryn Goodwin Traylor, *Navigating Racialized Administrative Burdens in Teacher Licensure and Certification*, 126 TEACHERS COLLEGE RECORD 114 (2024) (commenting on the influence of this phenomenon in teacher licensure and certification); Elizabeth Bell, James E. Wright, II, & Jeongmin Oh, *Does Administrative Burden Create Racialized Policy Feedback? How Losing Access to Public Benefits Impacts Beliefs about Government Get Access Arrow,* 34 J. PUB. ADMIN. RES. & THEORY 432 (2024).

unexpectedly, timelines extend without justification, and the procedural and financial barriers compound, attempts to simply adhere to the rules are detrimental. Technically, these dynamics can be identified through internal audits of processing times or approval rates, but in reality, agencies are unlikely to collect or disaggregate such data by race. Perhaps, the clearest indicator is when the process's overly demanding features effectively foreclose access altogether.[104]

For some applicants, racialized administrative burdens first appear as a delay. By design, racialized administrative burdens paralyze marginalized groups through deliberate depletion, as they exhaust applicants' time, energy, money, and resources in a labyrinth—often before any formal decision is ever made. Wasting one's time is an especially egregious form of harm. Time cannot be recovered, banked, or borrowed. The time conceded to administrative delay—whether weeks, months, or years—has immense consequences for those affected. This was the issue in *Rosemere Neighborhood Association v. U.S. Environmental Protection Agency*, where the Environmental Protection Agency's (EPA) Office of Civil Rights failed to process a single environmental justice complaint in a timely manner over a multi-year period.[105] The plaintiffs, residents of a predominantly Black and Latino neighborhood in Vancouver, Washington, alleged that their complaints regarding discriminatory provision of public services were met with inaction.[106] Despite the EPA's regulatory obligation to accept or reject a complaint within 20 days and issue preliminary findings within 180 days of the investigation, the Office of Civil Rights took more than 540 days to accept the complaint and an additional 600 days to complete the investigation.[107] The Ninth Circuit identified it as a "consistent pattern of delay" for the very office charged with adjudicating civil rights complaints, with the consequences borne entirely by the complainants waiting for relief.[108]

The EPA used a nearly identical strategy in *Padres Hacia Una Vida Mejor v. McCarthy*, where Latino farmworkers in California's San Joaquin Valley waited *seventeen years* for the EPA to respond to their Title VI civil rights complaint.[109] During this time, the plaintiffs, residents of a majority Latino community, were subjected to pollution and hazardous waste. While stuck in administrative doldrums, the EPA flaunted the realm of protection as the farmworkers continued to be subjected to a dangerous level of

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[104] Couloute & Snyder, *supra* note 37, at 30 (arguing that housing inequality for justice-involved individuals is "the product of distinctly relational and organizational processes that reflect broader cultural schemas").

[105] *Rosemere Neighborhood Ass'n v. United States EPA*, 581 F.3d 1169, 1175 (9th Cir. 2009) ("Finally, we note that Rosemere's experience before the EPA appears, sadly and unfortunately, typical of those who appeal to OCR to remedy civil rights violations. As indicated earlier, discovery has shown that the EPA failed to process a single complaint from 2006 or 2007 in accordance with its regulatory deadlines.").

[106] Rosemere Neighborhood Ass'n v. United States EPA, No. C07-5080BHS, 2007 U.S. Dist. LEXIS 55938 at *1 (W.D. Wash. Aug. 1, 2007) ("The Rosemere neighborhood is populated by low-income racial minorities and is characterized by high rates of crime and unemployment.").

[107] Rosemere Neighborhood Ass'n v. United States EPA, 581 F.3d 1169, 1171-72 (9th Cir. 2009)

[108] *Id.* at 1171.

[109] Padres Hacia Una Vida Mejor v. Jackson, 922 F. Supp. 2d 1057 (E.D. Cal. 2013); aff'd by Padres Hacia Una Vida Mejor v. McCarthy, 614 F. App'x 895 (9th Cir. 2015).

environmental degradation. The extended waiting period imposed excessive compliance costs, including the costs associated with (1) plaintiffs' filing a Title VI discrimination complaint with the EPA's Office of Civil Rights, (2) sending a letter to the EPA Administrator, (3) submitting comments on the EPA's Draft Revised Guidance for Investigating Title VI Administrative Complaints, and (4) filing a federal lawsuit.[110] Moreover, the psychological toll—living under constant threat of harm while navigating an unresponsive system—reinforced their marginalization. Although the district court found the EPA's delay "deplorable," the court did not declare the 17-year delay unlawful.[111]

If time-wasting is one telltale sign of racialized administrative burdens, the presumption of undeservingness is another. Racialized administrative burdens facilitate the unequal distribution of resources by portraying nonwhite groups as fraudulent, undeserving, or dangerous.[112] As implemented, suspicion becomes both the default *modus operandi* and a psychological cost, with applicants then responsible for proving their worth and trustworthiness. Sociologists Blair Sackett and Annette Lareau document this phenomenon in *We Thought It Would Be Heaven: Refugees in an Unequal America,* an ethnographic study of Congolese families navigating public assistance in the United States.[113] They note that race, gender, and socioeconomic status determine the degree of scrutiny, surveillance, and burden applicants must endure:

> These systems are not a level playing field. The 'rules of the game' are fundamentally unequal according to social class, race, and gender. For working-class and poor families, scrutiny and surveillance are often tied to services. These standards are also deeply racialized in the ways that the rules are constructed and implemented. . . . Indeed, in the United States these burdens for proof of deservingness disproportionately demand time and resources from people of color.[114]

For marginalized populations, measures of deservingness deputize official processes into moral pundits who opine on questions of character and consequential resources.

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[110] *Id.* at 1060.
[111] *Id*. at 1070.
[112] Ray, Herd, and Moynihan, *supra* note 17, at 142-43., at 142–43. For additional commentary on deservingness in the law, see Blair Hendricks, *Small Business Relief in the Time of Covid-19: Deservingness Judgments Lead the PPP to Failure,* 36 J. CIV. RTS. & ECON. DEV. 1, 5 (2022) ("Deservingness judgments are value judgments based on cultural and sociological factors (such as history, politics, or psychology) that influence decisions about who *deserves* resources and assistance"); Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 596-97 (2020); Noah D. Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/ Undeserving Distinction*, 59 UCLA L. REV. 550, 556-63 (2012).
[113] Blair Sackett & Annette Lareau, WE THOUGHT IT WOULD BE HEAVEN: REFUGEES IN AN UNEQUAL AMERICA (2023).
[114] *Id*. at 11.

Conditional access—where benefits are contingent on proving one's moral and cultural worth—also informs state-level programs like Oklahoma's Promise, a statewide program providing college tuition to students whose families make under $50,000. Whereas the program was designed to expand educational opportunity, it instead imposed hurdles that disproportionately screened out students of color.[115] Two-thirds of eligible students never received the aid—not because they failed to meet academic standards, but because they were unable to comply with the program's certification requirements.[116] To access the tuition benefit, students needed to complete the Free Application for Federal Student Aid (FAFSA) form, submit parental tax returns, provide citizenship documentation, maintain compliance with conduct requirements, complete a 17-unit core curriculum, and meet GPA requirements.[117] Each certification checkpoint operated as a filter, shrinking the number of students able to successfully navigate the process. Without substantial support from guidance counselors, these requirements proved to be arduous. Beyond the administrative toll, the burdens shaped students' broader perceptions of government legitimacy and fairness. Compared to students who participated in the program, students who lost access to Oklahoma's Promise trusted the state government 9.6% less and trusted the federal government 7.4% less.[118] Administrative barriers failed the program's goals of inclusion and, like the farmworkers in *Padres Hacia Una Vida Mejor*, perpetuated the students' experiences of exclusion and marginalization.

Racially administrative burdens are frustratingly elusive, lacking the precise doctrinal boundaries that once led Supreme Court Justice Potter Stewart to famously observe, "I know it when I see it."[119] Yet indeterminacy does not shield communities of color from experiencing tangible, costly harms. Instead, the difficulty in identifying racially administrative burdens exacerbates the harms because invisibility breeds deniability, distorting the lived experiences of many.

III. Navigating Bureaucratic Blocks to Economic Access: Liquor Licensing Focused Case Narratives

Part III turns to extended examples of racialized administrative burdens and their impacts on three Black-owned establishments. Without sustained attention to the experiences of those who have dealt with these formidable barriers, the narrative remains incomplete. We know this to be true because administrative law is especially starved of this human element.[120] As Professor Bijal Shah put it, "projects that focus on how administrative law touches on the human experience are often deemed 'exceptional,' (that is, marginal to administrative law), and their relevance devalued on these

[115] Bell et al., *supra* note 103, at 436.
[116] *Id*.
[117] *Id*.
[118] *Id*. at 438.
[119] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).
[120] Shah, *infra* note 45.

grounds."[121] The focused case narratives expose entrepreneurs' struggles in light of regulatory pitfalls that dispossess them of critical, finite resources and impose substantial consequences on the communities they serve. By conceptualizing these patterns of administrative inconsistency, Part III substantiates the additional demands, delays, and denials that immobilize Black enterprises all over the nation. Further, by synthesizing these narratives, I materialize abstract accounts of racial harm.[122] In the words of Professor Rebecca Bratspies, "ignoring the racial backstory to key cases often masquerades as even-handed legal neutrality. But editing out the lived reality of the parties and the context in which their dispute arose is actually a highly political choice, one that normalizes [mainstream perspectives] as value-free, objective and neutral."[123] Rather than reproduce that erasure, I use in-depth interviews, litigation case files, newspaper archives, public records, and administrative filings to investigate the experiences of entrepreneurs who brought civil rights lawsuits against agencies denying the licenses necessary to operate their businesses. Focused case narratives serve as legal evidence and methodological innovation. As evidence, each reveals how administrative burdens operate through formal processes and discretionary acts. As a method, they reframe what counts as legible harm and position those impacted as critical observers and producers of legal knowledge.

Though not exhaustive, these cases represent a range of locations, time periods, and strategies. The three case narratives that follow illustrate how administrative burdens operate at both the individual and organizational level. While the cases of Mr. Quarterman and Mr. Williams center the experiences of business owners as regulatory subjects, the Sheba Ethiopian Restaurant case reveals how race attaches to physical establishments themselves—turning Black spaces into presumed sites of illegitimacy, irrespective of the identities of individual actors.

In compiling these narratives, I exhibit how agencies weaponize the appearance of neutrality, [in]visibility, and compliance to deny Black business owners economic agency. These conceptualizations build on Professor William Y. Chin's analysis of how anonymous bureaucratic processes can be weaponized against communities of color.[124] Professor Chin focuses on the erasure of accountability in anonymous complaints, and Part III extends the 'weaponization' framing to assess how racialized administrative burdens operate.

A. Weaponizing the Appearance of Neutrality

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[121] *Id.*

[122] Rebecca Bratspies, *Decolonizing Chadha, Notice & Comment*, YALE J. ON REG. (2020), https://www.yalejreg.com/nc/decolonizing-chadha-by-rebecca-bratspies/.

[123] *Id.*

[124] William Y. Chin, *Weaponized Anonymity: The Continuing Marginalization of Communities of Color through Racially-Biased Anonymous Processes in U.S. Society*, 22 CONN. PUB. INT. L. J. 1 (2022); William Y. Chin, *Proxy Discrimination: The Misuse of Government Actors as Proxies to Racially Discriminate Against People of Color,* 9 TENN. J. RACE, GENDER & SOC. JUST. 2 (2020).

Facial neutrality is a defining characteristic of racialized administrative burdens. Discretion is both a sword and a shield; on one hand it allows authorities to depart from organizational rules and norms, and on the other hand, it insulates authorities from accountability for those departures. As the discussion of *Quarterman v. City of Springfield* demonstrates below, officials weaponize the appearance of neutrality by disguising extraordinary scrutiny as routine review, although it is anything but.

In *Quarterman v. City of Springfield*, the city's Board of License Commissioners denied Will Quarterman's request to transfer his liquor license.[125] Mr. Quarterman, the biracial owner of Logan's Lounge in Springfield, Massachusetts, applied to sell alcoholic beverages in a new establishment that catered to predominantly Hispanic and Black clientele.[126] His application should have followed standard procedures. Instead, the board scrutinized Mr. Quarterman's application with an extraordinary investigation. Plagued with procedural irregularities and acrimonious commentary, the Board's review reflected their hesitation to approve a nightclub that would attract minority patrons.

The Board hired two private investigators to dig deeper into Mr. Quarterman's background—seeking information far beyond the scope of the liquor license application. The private investigators flagged concerns about Mr. Quarterman's tax returns, an undisclosed interest in his company, and his "posted" status with the Alcoholic Beverages Control Commission (a confidential designation indicating delinquency in payments to liquor distributors).[127] Under normal circumstances, these issues would be immaterial and easily resolved by amending the application or by providing additional documentation.[128] However, in Mr. Quarterman's case, the Board chair sought additional justifications to deny the transfer, urging colleagues to bypass formal channels in search of more damaging information. "We tried the front door," the Board chair wrote in an email. "Let's try the back." [129]

The Board's 'backdoor' investigation raised concerns, particularly due to additional comments made by the Board chair. In one instance, the Board chair suggested that Mr. Quarterman refrain from playing hip-hop music as a safety precaution—relying on tropes that associate Black entertainment with criminality.[130] In another instance, Mr. Quarterman shared his letters of support during an administrative hearing, to which the Board chair quipped,

[125] Quarterman v. City of Springfield, 716 F. Supp. 2d 67, 70 (D. Mass. 2009). Quarterman did business through State Street Entertainment, Inc., an entity of which he was the President, Treasurer, Director, and Clerk. *Id*.; Peter Goonan, "Springfield City Council approves $918K to settle Asylum nightclub liquor license dispute and 18 other legal claims," MassLive.com (Feb. 6, 2018, 6:20pm) https://www.masslive.com/news/2018/02/10-year_legal_battle_springfie.html.

[126] Joint Pretrial Memorandum, Quarterman v. City of Springfield, 3:07-cv-30185-MAP Dkt. 52 at p. 1 (D. Mass. Feb. 23, 2010).

[127] Quarterman v. City of Springfield, 716 F. Supp. 2d 67, 70–71 (D. Mass. 2009) (noting that the Springfield mayor and the Board chair met with the investigators before the hearing for Quarterman's transfer request, but "[t]he record is silent as to who hired the investigators.") *Id*. at 70.

[128] *Id*. at 71–72. The board later admitted that tax records and posted status had never previously been used to evaluate liquor license applications, and that other applicants who failed to disclose financial interests had been allowed to amend their filings without penalty.

[129] *Id*. at 72.

[130] *Id*. at 71.

"Are you finished, or do you have another letter from anyone else, like the Urban League or NAACP?"[131] Beyond tone-deaf and condescending, these comments reflected the board chair's conclusory take: Mr. Quarterman's establishment was 'undeserving' of a liquor license.

In his federal civil rights lawsuit, Mr. Quarterman alleged that the City of Springfield violated the Fourteenth Amendment. He raised both substantive due process and equal protection claims, but this case was a textbook example of the difficulty in using civil rights litigation to challenge administrative burdens.[132] The district court dismissed Mr. Quarterman's substantive due process challenge on summary judgment, finding that the conduct, while "reprehensible," was not "sufficiently egregious" and thus fell short of the necessary 'shock the conscience' standard.[133] This threshold, which courts have historically reserved for extreme government misconduct, insulates racialized burdens from federal civil liability.[134] The First Circuit reinforced this deference to administrative discretion:

> We have held, *with a regularity bordering on the monotonous*, that the substantive due process doctrine may not, in the ordinary course, be invoked to challenge discretionary permitting or licensing determinations of state or local decisionmakers, whether those decisions are *right or wrong*. While we have 'left the door slightly ajar for . . . truly horrendous situations,' any permit or license denial, no matter how unattractive, that falls short of being *'truly horrendous'* is unlikely to qualify as conscience-shocking.[135]

The monotony to which the court refers is its refusal to second-guess discretionary administrative decisions. Short of "truly horrendous" and "conscious-shocking" denials, the chances of court intervention are practically zero. Because racialized administrative burdens accumulate through facially neutral, minute, even nitpicky actions, the response to plaintiffs seeking to challenge them is simply 'no.' Justifiably so, for courts are constrained by a civil rights framework that prioritizes overtly explicit discrimination and are ill-suited to redress even the most exclusionary administrative decisions—"right or wrong," as the First Circuit declared. Thus, the court's position explains why administrative burdens that weaponize the appearance of neutrality are so effective: it secures judicial deference and allows discrimination to evade the parameters of antidiscrimination law.

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[131] *Id*. at 72.
[132] *Id*. at 74.
[133] *Id*. (quoting Pagan v. Calderon, 448 F.3d 16, 33 (1st Cir. 2006).
[134] *Id*. at 74 ("The challenged conduct in this case involves a discretionary licensing determination and hence is not subject to due process challenge absent allegations of 'truly horrendous' behavior.")
[135] Pagan v. Calderon, 448 F.3d 16, 33 (1st Cir. 2006) (citations omitted) (emphasis added).

Though Mr. Quarterman's equal protection claim survived summary judgment,[136] at trial, he did not have enough evidence to show that the Board intentionally discriminated against him.[137] His attorney struggled to articulate the broader structural forces at play, and—perhaps ahead of his time to a fault—he attempted to describe how racialized administrative burdens function. However, Mr. Kesten, Mr. Quarterman's attorney, lacked the precise tools to explain how these burdens operated as meso-level barriers rather than individual acts of bias, though individual bias is required for a successful claim:

MR. KESTEN: Your Honor, I'm not suggesting Williams is a racist. I'm not suggesting these people are racist. The thrust of this case is there was things done with regard to this license that had never been done to anyone else before, and the real concern that people had, the real reason there was a delay and there were no hearing—forget the delay.

The real reason, the real concerns were that there were people who were afraid of hip hop music because when you look at the rationale of the people, I understand you're locked into this issue, but this was a big thing that caused them not to get a license.

THE COURT: Well, I don't know whether it's a big thing or a small thing or a zero thing, but it's a thing.

MR. KESTEN: It's a thing.[138]

The court acknowledged that "a thing" had happened—rules had been applied selectively, and maybe fears about the proposed hip-hop music shaped the licensing decision. But ultimately, the court rejected Mr. Quarterman's argument that hip-hop was a proxy for race.[139] The court's estimation that hip-hop is a neutral art form is contradicted by the consideration of hip-hop in the deliberation process. If truly neutral, the mention of the genre would have no place in the discussion at all. Rather, the board raised questions about hip-hop precisely to convey unspoken meanings about the clientele the establishment is expected to attract, converting hip-hop music into a dog whistle that concealed racialized perceptions. Even so, the court dismissed the argument with a reference to hip-hop that, given the important sociocultural moment at the time of this writing, simply cannot be ignored:

THE COURT: We all know that white Caucasian, young people enjoy hip hop.

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[136] To succeed on an equal protection claim, a plaintiff must show that "(1) he was treated differently than other similarly situated supplicants," and (2) "the differential treatment resulted from a gross abuse of power, invidious discrimination, or some other fundamental procedural unfairness." Id.

[137] The court held that "Plaintiffs have failed to show, by a preponderance of the evidence, that any element of racial discrimination—based either upon the race of the Plaintiff Quarterman, or upon the race of his proposed clientele—played a part in the decision of Defendants to deny Plaintiffs' application to transfer their liquor license." Quarterman v. City of Springfield, 3:07-cv-30185-MAP Dkt. 81 at p. 1 (D. Mass. June 16, 2010).

[138] Transcript of Non-Jury Trial Day Nine, Quarterman v. City of Springfield, 3:07-cv-30185-MAP Dkt. 90 at p. 73 (D. Mass. July 9, 2010).

[139] Quarterman v. City of Springfield, 3:07-cv-30185-MAP Dkt. 97 at p. 94 (D. Mass. Aug. 3, 2010) ("First, I do have to say that the theory that there was prejudice demonstrated against Mr. Quarterman based on the possibility that he was going to play hip hop music and that hip hop is a code or proxy for race . . . has been entirely unconvincing to me . . .").

> It is a very popular musical mode. It is, as I think has come out during the trial, no more offensive or no more attractive of criminal elements than many, many other types of musical modes going right back to rock and roll and all those types of music that have evolved since then.
>
> It is practiced by some white artists, although primarily minority artists. It was featured on the front page of the *New York Times* Sunday paper—not the front page of the main section but the art section. We have a new hip hop king coming out of Canada who's half black, half Jewish who is the new star of hip hop. It's a very dominate mode enjoyed by very many, many people.[140]

At this point in the trial transcript, the discussion shifted to pop culture, where the court invoked the widespread popularity of hip-hop among white audiences as testament to its neutrality. By referencing Drake, a Jewish-Canadian artist who had, at the time, ascended to global superstardom, the court implied that hip-hop's diverse commercial appeal undermined Mr. Quarterman's claim that discrimination against the genre was inherently race-based.

In 2025, this exact dynamic between race and hip-hop played out in a high-profile conflict between Drake and Kendrick Lamar, a Pulitzer Prize-winning rapper who is generally considered to be a voice of political and cultural consciousness. As much as Kendrick Lamar's critique of Drake is about music, it is also about authenticity, cultural ownership, and the industry forces that allow some to profit while others face exclusion. In "Not Like Us," Kendrick Lamar raps that Drake's success has been manufactured by the very structures that have historically marginalized Black artists and Black cultural spaces.[141] As journalist Ime Ekpo observes:

> The importance of understanding both the history and the ongoing challenges faced by the Black community cannot be overstated . . . Kendrick Lamar's critique in [Lamar's] diss track . . . suggests that [Drake's] collaborations with Black artists from Atlanta are calculated strategies rather than authentic connections.[142]

Kendrick Lamar's cultural critique and Mr. Quarterman's legal battle are analogous. Both conflicts comment on the social meaning of hip-hop, differing in their conclusions. Lamar's critique centers on Black authenticity, turning on the claim that hip-hop music carries a cultural lineage that cannot be divorced from Black identity. Opposite of that, the

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[140] *Id*. at p. 95.

[141] Kendrick Lamar, "Not Like Us." This song, performed at Super Bowl 59, also won record of the year and song of the year at the 2025 Grammy Awards. Taijuan Moorman, "Kendrick Lamar, Drake Beef Explained After the Super Bowl Halftime Show," USA TODAY (Feb. 10, 2025), https://www.usatoday.com/story/entertainment/music/2025/02/10/super-bowl-kendrick-lamar-drake-beef-explained/78381830007/ (last accessed Mar. 6, 2025). 10, 2025), https://www.usatoday.com/story/entertainment/music/2025/02/10/super-bowl-kendrick-lamar-drake-beef-explained/78381830007/ (last accessed Mar. 6, 2025).

[142] Ime Ekpo, "How Kendrick Lamar Challenged Drake's Cultural Identity in 'Not Like Us'," FORBES (May 7, 2024, 6:42pm EDT), last accessed at https://www.forbes.com/sites/imeekpo/2024/05/07/how-kendrick-lamar-challenged-drakes-cultural-identity-in-not-like-us/ (Mar. 6, 2025).

court points to Drake to suggest that such a tight connection does not exist—hip-hop's artists and audiences are too racially diffuse to serve as a proxy for Blackness. In the court's theoretical view, authenticity is not a meaningful category with sufficient social force as to be generalizable to all mentions of "hip-hop" and, therefore, to carry legal meaning. However, as a normative matter, the invocation of hip-hop in Mr. Quarterman's deliberations suggests that the association is certainly material enough to shape administrative decisions.

Even if the court had fully embraced the hip-hop-is-a-proxy-for-race argument, it is unclear whether it could have ruled in favor of Mr. Quarterman on that recognition. Given the track record of cases like Mr. Quarterman's, the Fourteenth Amendment is an improper vehicle for addressing racialized administrative burdens. Officials are granted discretion that permits them to impose procedural roadblocks without explicitly invoking race, thereby sidestepping traditional constitutional scrutiny.[143] In deferring to administrators, courts cannot surgically dissect decisions and comb for inferences of racial discrimination. That the administrative process itself is the mechanism of exclusion further complicates the analysis,[144] and Fourteenth Amendment doctrine remains unresponsive. Equal protection claims require evidence of intentional discrimination, and substantive due process claims must meet the threshold of conscience-shocking government misconduct.[145] Racialized administrative burdens meet the criteria for neither, and thus, remain invisible to the law.

B. Weaponizing [In]visibility

Administrative burdens can emerge from the law's refusal to acknowledge race at all. I refer to this dynamic as [in]visibility, a double *entendre* describing how Black-owned businesses are simultaneously hypervisible as targets for discrimination and yet invisible when they seek protections under antidiscrimination statutes.[146]

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[143] *See, e.g.,* Dewalt v. City of Brooklyn Park, 2017 U.S. Dist. LEXIS 75453, *15 (D. Minn. May 17, 2017) (granting city's motion for summary judgement on equal protection claim because, inter alia, "the only circumstantial evidence of discrimination is DeWalt's testimony that City staff members gave him a bad look when he told them that 85% of Gossip's clientele would be black.").

[144] Dewalt v. City of Brooklyn Park, 2017 U.S. Dist. LEXIS 75453, *20 (arguing that city's compatibility metric for evaluating conditional use permit applications was "a euphemism for racial discrimination and conceals the City's view that black people are noisy, messy, disruptive, and violent.").

[145] Cnty of Sacramento v. Lewis, 523 U.S. 833, 836 (1998).

[146] Racial [in]visibility, as developed in this Article, refers to the paradox by which Black-owned businesses are targeted for regulation but not for protection. This concept draws from—but is distinct from—Nell Irvin Painter's use of "racial invisibility" to critique the notion that white people often enjoy the comfort of appearing raceless. Nell Irvin Painter, Opinion, *Why 'White' Should Be Capitalized, Too,* WASH. POST (July 22, 2020), https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized/. As conceptualized in this Article, racial [in]visibility means that Black-owned businesses, too, experience racelessness—but only when it does not serve them. Similarly, racial [in]visibility invokes Kimberlé Crenshaw's observations in her foundational work on intersectionality, where legal frameworks designed around singular categories make Black women's harms invisible. *See, e.g.*, Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL R. 139 (1989).

Racial [in]visibility functions as a type of administrative burden that allows institutions to engage in preferential treatment while denying a discriminatory motive when called to account. Racial [in]visibility builds on existing theories of racialized organizations and colorblind governance by expanding their insights into the bureaucratic domain, describing spaces where race is alternatively prescriptive and disavowed depending on organizational posture.[147] Racial [in]visibility captures the modern iterations of control through administrative abuses that originated in the precolonial era: policing Black communities through surveillance, containment, and exclusion.

The case of *Sheba Ethiopian Restaurant v. DeKalb County* exemplifies the hypervisible-for-punishment-yet-hypovisible-for-protection dichotomy. Founded in 1998, Sheba Ethiopian Restaurant was a Black, Ethiopian American-owned restaurant and late-night venue that served as an anchor for Atlanta, Georgia's East African community.[148] For its predominantly Black immigrant clientele, Sheba functioned as a third space for dining, music, and gathering until 4:00 am.[149] Unfortunately for Sheba, this prominence made the establishment hypervisible to a neighborhood resident who sought to 'clean up' the district. In 2015, the neighbor—who is also a real estate professional—spearheaded a campaign to rid the area of hookah bars and restaurants owned and patronized by residents of Ethiopian descent, establishments she described as "noxious uses."[150] The resident made her concerns known on Nextdoor (a neighborhood-based social media platform), sharing that she was working with the County Commissioner's office to "determine if there is anything we can LEGALLY do to rid this intersection of these noxious uses."[151] To advance this goal, she submitted formal complaints to the DeKalb County Commission, which then directed multiple city agencies to investigate.

What followed was a wave of punitive actions from the DeKalb County Fire Marshal's office and the Code Enforcement Division of the Department of Planning and Sustainability. Between December 2016 and March 2017, county officials engaged in behavior that Sheba experienced as menacing: surprise inspections, citations for minor code violations, and repeated threats

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[147] *See, e.g.,* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA, (5th ed. 2017); Daanika Gordon, *The Police as Place-Consolidators: The Organizational Amplification of Urban Inequality*, 45 LAW & SOC. INQUIRY 1, 24 (2020); Marissa Jackson, *Neo-Colonialism, Same Old Racism: A Critical Analysis of the United States' Shift toward Colorblindness as a Tool for the Protection of the American Colonial Empire and White Supremacy*, 11 BERKELEY J. AFR.-AM. L. & POL'Y 156, 183-84 (2009).

[148] Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 1 at 2 (N.D. Ga. Nov. 3, 2017).

[149] The late-night hours reflect East African tradition and culture. As Sheba's attorney expressed during a hearing: "We have always operated after 12:30. All of the permits that have been issued since 1998 – we were operating after 12:30, yes. That's – that's the nature of the business. The Ethiopian community is a late-night community. That's kind of a cultural thing. So it would not be of much assistance to have them close at 12:30." Transcript of DeKalb County Department of Planning and Sustainability, Zoning Board of Appeals Hearing, June 14, 2017, Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt 27-1 at 82 (N.D. Ga. June 1, 2018).

[150] First Amended Complaint, Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 80 at 19 (N.D. Ga. Sept. 21, 2020).

[151] *Id.*

of closure. In a three-week span, inspectors cited Sheba on January 27th,[152] February 4th,[153] and February 11th[154] –resulting in seven infractions ranging from "sparklers in champagne bottles" to "failure to comply."[155] When Sheba could not produce an occupancy certificate issued nineteen years prior, the fire marshal cut Sheba's occupancy in half—from 199 to 99 patrons permitted in the building at once.[156] Sheba's attorney admonished the gesture. "I understand that you conducted a general inspection and found no violations, but issued a temporary load capacity number of 99 persons," the attorney began.[157] He continued:

> The owner advised that his capacity is 199 persons and has been for the entire 19 years he has been in business at this location, but he is under the impression that you rejected this number based upon his failure to produce a certificate from the DeKalb County Fire Department. I also understand that you warned that you will be visiting the establishment this weekend and if you find that there are more than 99 persons inside you will be taking action against the restaurant.
>
> Notwithstanding the obvious impact of such a dramatic action taken to reduce the capacity of this restaurant by 100 persons, the owner is interested in being in complete and total compliance.
>
> . . .
>
> Confirm that you have been unable to locate proof of the 199 person load capacity that was provided to this business 19 years ago. While the business should have this documentation, it seems unsconscionable[sic] that your department would have no record itself. . . If in fact it has been lost by DeKalb County, it also seems unfair that the business would be punished in the interim, as it has been by your action to provide a random capacity load that severely restricts this business.[158]

For any business, reducing occupancy by 50% overnight has the effect of cutting revenue potential in half. In the food and beverage industry, where

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[152] Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 26-2 at 127-29 (N.D. Ga. June 1, 2018) (three citations for "failure to permit construction," "failure to remove or provide fire/flame propagation preformance [sic] certification," and "occupant load over limit").
[153] *Id*. at 125,134 (two citations for "operating outside of the letter of entertainment," one of which is for operating at 4am, five minutes past the 3:55am closing time disclosed on the letter of entertainment).
[154] *Id*. at 130-131 (two citations).
[155] Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 1 at 18 (N.D. Ga. Nov. 3, 2017).
[156] *Id*.
[157] Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 26-2 at 137-38 (N.D. Ga. June 1, 2018).
[158] *Id*.

margins are razor-thin, this kind of maneuver can turn a viable operation into a failing one. In dealing with the circumstance of a missing occupancy certificate, the fire marshal had multiple options. Rather than grant a temporary variance while the document was located or allow a reasonable timeframe for compliance, the marshal treated discretion as an opportunity for constraint instead of collaboration.[159] These decisions—subtle, objectively defensible, and consequential—are how administrative burdens perpetuate harm even when businesses appear to be 'in the wrong' and cannot quite name the injury. The fire marshal's prophetic words from December 2016 would eventually ring true: "We're going to close you down. That's why we're here."[160]

Despite Sheba's attempts to cooperate with the authorities, the county issued a "cease use" order and, in April 2017, revoked Sheba's business license, liquor license, and certificate of occupancy.[161] Sheba fought tooth-and-nail to stay open, filing administrative appeals and spending almost $100,000 to comply with the county's escalating demands.[162] Throughout the entire ordeal, county officials remained in close communication with the neighbor who initiated the campaign. At one juncture, the neighbor had compiled a 17-point list of grounds for ending Sheba's operations, pleading with county officials to "do what you can to stop that issuance of a business license."[163] She submitted a proposal to the County requesting more citizen involvement in the special land use permitting process: "The county would not be responsible for investigating these matters, but if residents were to provide evidence of such lawbreaking, that would provide objective evidence that should help the County win in an appeal," she offered. Upon Sheba's closure, the neighbor circulated a celebratory email: "At our immediate intersection, we shut down 6 [late night establishments] (talk about proliferation!)."[164] Sheba joined the ranks of nine other Ethiopian restaurants in the district that closed permanently, relocated, lost their lease,

[159] Notably, the county's land use code recognizes a more inclusive purpose: to "afford protection to residential uses and other uses so as to protect the public health, safety and welfare while respecting and providing adequate opportunities for nightlife in the county." DeKalb County Ordinance § 27-746, "Late night establishments," (2008).
[160] Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 27-1 at 12 (N.D. Ga. June 1, 2018).
[161] Defendants' Motion to Strike and Motion to Dismiss Amended Complaint, and Brief in Support at 6, Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, No. 1:17-cv-04400-WMR, (N.D. Ga. Oct. 8, 2020) Dkt. No. 82.
[162] First Amended Complaint, Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 80 at 30 (N.D. Ga. Sept. 21, 2020). ("Sheba, at great expense (close to $100,000) hired engineers and other contractors to complete those changes demanded by the County"). This includes a Sheba soliciting a contractor for a sprinkler mandated by the fire marshal. The contractor submitted a quote of $15,700. Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 1 at 20 (N.D. Ga. Nov. 3, 2017); Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 26-2 at 136 (N.D. Ga. June 1, 2018) (showing proposal dated February 16, 2017 for sprinkler coverage, permitting, and equipment rental and deposit of $7,850 received on Mar. 2, 2017).
[163] First Amended Complaint, Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 80 at 27-28 (N.D. Ga. Sept. 21, 2020).
[164] Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, No. 1:17-cv-04400-WMR, 2021 U.S. Dist. LEXIS 17692, at 35 (N.D. Ga. Aug. 25, 2021) Dkt. No. 96. (LNEs refers to "late night establishments").

or struggled to stay afloat after being denied necessary approvals for operation.[165]

Officials justified Sheba's closure by arguing that when the establishment added more tables, hookahs, and a DJ booth, Sheba unlawfully changed its permitted use from a late-night restaurant to a nightclub.[166] Sheba contested this technical determination, arguing that updated décor for the nearly 20-year-old restaurant was merely cosmetic and did not constitute a material change in use. At the hearing, one witness for the county offered an aesthetic judgment: "There are also pictures here that show Queen of Sheba as it looked before when it was a nice, respectable Ethiopian restaurant . . . I also have pictures from inside that show it's clearly a nightclub with pyrotechnics—and I don't see any food on the table. It's all Grey Goose and hookahs."[167]

The comparison of "respectable" with "Grey Goose" is ripe with undertones, with a backstory suggesting that the association is intentionally so. Grey Goose, a popular vodka brand, was manufactured to function in American cultural discourse as a metonym for Black leisure and hip-hop affluence. In the late 1990s, spirits producer Sidney Frank Importing Co. (SFIC) set out to create a superpremium vodka brand—an ambitious endeavor given that vodka, by definition, is an odorless and tasteless neutral grain spirit.[168] To overcome this indistinctiveness, SFIC priced Grey Goose twice as high as competitors, packaged it in an elegant, frosted bottle, and located its production in France to capitalize on that nation's association with luxury goods.[169] In further pursuit of a reputation for refinement, the brand sought to seed the liquor in the aspects of Black entertainment culture that transmit markers of nightlife affluence: VIP tables, hip-hop music videos, and rap lyrics. SFIC punctured this space by sponsoring tours with hip-hop artists such as Bone Thugs-N-Harmony and Lil Jon and the Eastside Boyz, using Black rappers as influencers two decades before the term

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[165] Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 1 at 22-23 (N.D. Ga. Nov. 3, 2017) (naming Day & Night, Ledet Restaurant doing business as Aroma Lounge, Arif Lounge, Meskerem Ethiopian Restaurant doing business as Luv Lounge, Mint Ultra Lounge, Therapy Lounge, Food Therapy, and Pure. In a letter on behalf of Sheba, the restaurant's attorney mentioned the simultaneous targets: "Parenthetically, I also represent Desta Restaurant, another Ethiopian Restaurant you inspected today, and we wil lbe[sic] meeting with building officials regarding that establishment on Friday morning. Perhaps you can be a part of that meeting and we can resolve both of these issues simultaneously."). Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 26-2 at 138 (N.D. Ga. June 1, 2018).

[166] According to the Letter of Entertainment completed by Sheba, having a designated space for dancing seems to be the primary distinction. Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 26-2 at 122 (N.D. Ga. June 1, 2018).

A late night establishment is "any establishment licensed to dispense alcoholic beverages for consumption on premises where such establishment is open for use by patrons beyond 12:30 a.m." On the other hand, a nightclub is defined as "a commercial establishment dispensing alcoholic beverages for consumption on the premises and in which dancing and musical entertainment is allowed." Sheba indicated that it was a late night establishment and that it was not a nightclub. *Id*.

[167] Transcript of DeKalb County Department of Planning and Sustainability, Zoning Board of Appeals Hearing, June 14, 2017, Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt 27-1 at 31-32 (N.D. Ga. June 1, 2018).

[168] Seth Stevenson, *The Cocktail Creationist*, NEW YORK MAGAZINE (Dec. 30, 2004), last accessed on Mar. 13, 2026 at https://nymag.com/nymetro/news/bizfinance/biz/features/10816/.

[169] *Id*.

became mainstream marketing parlance.[170] The transformation was successful, for Black artists such as Jay-Z, Young Jeezy, Ying Yang Twins, and Nicki Minaj have all referenced the spirit in lyrics celebrating success, pleasure, and autonomy.[171] Like the Adidas sneakers and Kangol hats before it, Grey Goose vodka morphed into generalized cultural perception as a premium "Black" product, despite any connection to ownership.[172]

Referencing the vodka brand in administrative proceedings reinforces the notion that Black people are routinely subject to respectability politics, a survival strategy that mandates conformity and assimilation.[173] Whereas Blackness coded as respectable is tolerable, expressions of Blackness coded as loud or nocturnal become criminal. By drawing on the presence of Grey Goose bottles as support for claims of a material change in use—and more importantly, moral decline to be juxtaposed with a "respectable" establishment—the county's witness relied on cultural expression as an indicator of deviance and noncompliance with the land use code.

Sheba sued the county in federal court, alleging unlawful racial discrimination under 42 U.S.C. § 1981.[174] To succeed on a § 1981 claim, a plaintiff must demonstrate that they are (1) a member of a racial minority, (2) the defendant intentionally discriminated against them, and (3) the defendant interfered with contractual rights, or other rights stipulated in the statute.[175] The county argued that Sheba lacked prudential standing because it, as a corporation, does not have a race, and thus cannot be considered a racial minority.[176] The Eleventh Circuit agreed because the circuit courts

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[170] Billboard Staff, *Rappers Flock to Grey Goose Tour*, BILLBOARD (Aug. 16, 2002), last accessed on Mar. 13, 2026 at https://www.billboard.com/music/music-news/rappers-flock-to-grey-goose-tour-74531/.

[171] "Grey Goose" by Young Jeezy (2003); "Grey Goose" by Ying Yang Twins (2003); "Primetime" by Jay-Z & Kanye West (2011); "Bom Bidi Bom" by Nick Jonas & Nicki Minaj.

[172] Steve Stout, THE TANNING OF AMERICA: HOW HIP-HOP CREATED A CULTURE THAT REWROTE THE RULES OF THE NEW ECONOMY 43–44 (2011).

[173] For a thorough discussion of how respectability politics influences the treatment of Black people in America under the law, see Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541 (2016) (describing how community leaders sought to resist racial subordination by countering "negative views of blackness by aggressively adopting the manners and morality that the dominant culture deems 'respectable'"). Opponents of respectability politics argue that Black people deserve humane and just treatment, regardless of actual or perceived conformity to dominant culture.

[174] 42 U.S.C. § 1981(a): "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." As a statutory device intended to promote equity in contracting, Section 1981 has had a pernicious history of implementation and enforcement. *See* Carliss Chatman, *1981*, 82 WASH. & LEE L. REV. _ (forthcoming 2025).

[175] Jimenez v. Wellstar Health Sys., 596 F.3d 1304, 1308 (11th Cir. 2010).

[176] Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263 (1977) ("As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination"); Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 87 (1938) (Black, J., dissenting) ("Corporations have neither race nor color."); Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 473 n. 1 (2006) ("Since JWM settled its claims and is not involved in this case, we have no occasion to determine whether, as a corporation, it could have brought suit under § 1981. We note, however, that the Courts of Appeals to have considered the issue have concluded that corporations may raise § 1981 claims."); *but see* Hudson Valley Freedom Theater v. Heimbach, 671 F.2d 702, 704-707 (1982) (distinguishing *Arlington Heights*

were split on this issue, meaning that courts had not "clearly established" that a corporation could have a race. Since the county officials had not infringed upon a clearly established right, they were entitled to qualified immunity. Once again, Sheba's racial identity—or in this instance, lack thereof—deemed it enough to punish but not enough to protect. In the administrative context, Sheba was cast as a racially and ethnically legible site of disorder that threatened neighborhood status. Yet, in federal court, Sheba's Blackness vanished. The county argued that as a corporate entity, Sheba had no race, making it incapable of claiming racial harm under federal civil rights statutes.

By happenstance, Sheba was located in an unincorporated area of DeKalb County. Three years later, in 2020, the city of Brookhaven, Georgia annexed Sheba's intersection, making it no longer in the jurisdiction of DeKalb County.[177] Subject to a different land use code, Sheba reopened due to sheer luck.

Still, Sheba's closure resulted in economic, cultural, and social loss.[178] Though some may consider reopening an ultimate victory, Sheba experienced firsthand how administrative burdens combine stereotypes and tropes with access to resources in ways that inflict harm. What originated as a disingenuous concern from a neighbor concluded with substantial deprivations for Sheba. In an interview, Sheba's counsel explained that litigation of this sort can exceed $150,000 in attorneys' fees and related legal expenses, and that would be in addition to the $100,000 Sheba expended for compliance attempts. As Ray, Herd, and Moynihan argue, such harms reveal the compounded nature of the tremendous costs:

> These racialized burdens then add labor, or the frustrations that come from dealing with bureaucracy, all disproportionately stealing time from marginalized groups. . . The daily interruptions and delays caused by racialized burdens make it harder for people of color to exercise personal agency and reflect the state's ability to impose differential restraints on people's use of time.[179]

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and reversing district court's decision that denied standing for a nonprofit organization that served Black and Hispanic communities and sought to bring racial discrimination claims under §§1981, 1983, and 1985), Comcast Corp. v. Nat'l Ass'n of African American-owned Media, 140 S. Ct. 1009, 1013 (2020) (not questioning the standing of a Black-owned corporation to bring a § 1981 claim).

[177] *State Panel Issues Findings on Brookhaven Annexation*, THE CHAMPION (Sept. 4, 2020), https://thechampionnewspaper.com/state-panel-issues-findings-on-brookhaven-annexation/.

[178] During an administrative hearing, one of Sheba's customers attested to the establishment's role as a third space in the community: "My name is Fazil. I used to live in Dekalb County; but right now I live in Gwinnett County. I mean, Sheba is not only the restaurant; it's not only the club. It just a social company. People come from all races; that's where we meet. That's where we make connections. So that's why we do the business. Not only a club. We just a social gathering place. We need your help." Transcript of DeKalb County Department of Planning and Sustainability, Zoning Board of Appeals Hearing, June 14, 2017, Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt 27-1 at 20—21 (N.D. Ga. June 1, 2018).

[179] Ray, Herd, & Moynihan, *supra* note 17, at 141.

Moreover, like *Quarterman*, the *Sheba* decision also exposes the ontological limits of federal civil rights statutes, as racial harm is more difficult to detect when the injury operates through 'raceless' businesses, organizations, or institutions.[180] The *Sheba* case further illustrates how treating federal litigation as a panacea for racialized administrative burdens is an exercise in futility.

C. Weaponizing Compliance

When regulators exploit applicants' cooperation to the point of economic or psychological exhaustion, compliance is an administrative burden. What distinguishes the burden of compliance is its shifting sands nature. Processes demand cooperation but advance just far enough to incentivize continued investment and perpetually dangle a carrot of fairness. The applicant adjusts and—critically—incurs additional costs only to confront a new barrier. The unattainable target guarantees defeat. It insulates decision-makers from claims of racial discrimination because compliance leaves a paper trail of 'reasonable' requests. Whereas compliance is often portrayed as a survival strategy for Black Americans,[181] racialized administrative burdens weaponize compliance to extract resources and instead *punish* trust in the system.

Take *Volcano Enterprises, Inc. vs. City of Huntsville*, for example.[182] When the owners of The Silver Dollar, a 30-year-old gentleman's club in Huntsville, Alabama, invited Daryl Williams to purchase their business in 2010, it was the opportunity of a lifetime[183]. Mr. Williams was a veteran in the entertainment industry, having opened his first club in 2000. His premiere venue, Club Volcano, was a popular establishment in Birmingham's nightlife scene. Building on his success, Mr. Williams was poised to expand north, rebranding the Silver Dollar as Volcano 256—a nod to Huntsville's area code. He anticipated that the transition would be seamless. The Silver Dollar was well-known in Huntsville, and some of its permits were grandfathered in. He would operate with the same type of liquor license, at the same location, under nearly identical conditions. The only meaningful difference was that the Silver Dollar was white-owned and catered to a predominantly white clientele, while Volcano 256's ownership

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[180] Ultimax Transp., Inc. v. British Airways, Inc., 231 F. Supp. 2d 1329, 1338 (N.D. Ga. 2002) ("The plaintiff in this action, however, is not a 'person' but a corporation, and discerning the racial identity of a corporation could be quite daunting in many circumstances. . . [T]he Court concludes that the plaintiff, a corporation owned by an African-American and staffed primarily with African-American employees, does have standing to assert a claim under Section 1981 based on racial discrimination directed at its owner and employees. Further, the racial identity that the parties and the Court assign to that corporation is an African-American or black racial identity."). Howard Sec. Services, Inc. v. Johns Hopkins Hospital, 516 F. Supp. 508, 513 n.11 (D. Md. June 8, 1981) ("Defendant raises the problem of how one would define a corporation as black. The statute is directed solely at racial discrimination, not equal protection in a broader sense, as are the Fourteenth Amendment and § 1983. This is the clearest case for a 'black' corporation 100% owned by blacks and a close corporation.").

[181] F. Lee Francis, *The History of Policing and the Impact on Minority Communities: The Case Against Police Abolition*, 42 MISS. C. L. REV. 18, 33 (2024) ("In the end, the deciding factor of life and death for a black person during an encounter with police is compliance.").

[182] Volcano Enterprises v. City of Huntsville, Case No. CV-13-S-505-NE (N.D. Ala. Sept. 29, 2014).

[183] Telephone interview with Darryl Williams, Volcano 256 business owner in Huntsville, Ala. (Oct. 16, 2025).

and target audience were Black. That distinction, observers suggest, triggered a process that beguiled Mr. Williams with the assurance of approval.

Mr. Williams applied for a liquor license three times: first in September 2011, it was denied due to code violations;[184] after hiring contractors to address the concerns, he reapplied in April 2012, only to face another denial for improper zoning.[185] After resolving the zoning issues and obtaining a certificate of occupancy, he reapplied five months later, but the liquor license was denied again—this time due to the potential impact on the surrounding neighborhood, a concern derived from data from the Silver Dollar.[186] By the time Volcano Enterprises filed a federal lawsuit alleging discrimination in the liquor licensing process, Mr. Williams was out $80,000 and counting.

When Volcano appealed the liquor license denial, the Huntsville City Council meeting offered insights into public officials' and community members' perceptions of the conundrum. One speaker, Wiley Nunn, a friend of Mr. Williams, captured the absurdity of the process. As the minutes reflect, Mr. Nunn asked "why, if there was going to be opposition to this, the City would let Mr. Williams spend all this money?"[187] Mr. Nunn continued, articulating what many Black entrepreneurs intuit but rarely see validated in the public record:

> Sgt. Roberts had talked about the permits and stated that after the permits had been issued, they had told Mr. Williams that all he had to do was get things done and it would be good. He stated that he did not believe it was fair to wait until Mr. Williams got to the one yard line and then call a time out and build a wall, not move the goal post but build a wall on the goal line.[188]

Mr. Nunn's metaphor captures the emotional and procedural toll of weaponized compliance. The "goal post" is not merely moved—presumably, still attainable—it is obstructed entirely. Cooperation and investment were, to use a colloquialism, a 'fool's errand,' one both solicited and punished. Upon review, even members of the City Council appeared uneasy. The meeting minutes captured how one sitting councilmember flagged the inherent procedural unfairness—disturbed by the prospect of luring Mr. Williams in without the intent to grant him a license:

> [Councilman] stated that he was very concerned about what he felt was fundamental due process. He stated that he had

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[184] Volcano Enterprises, Inc. v. City of Huntsville, Case No. 5:13-cv-00505-CLS, Dkt. 21-2 at 13 (Oct. 25, 2013).
[185] *Id.*
[186] *Id.*
[187] Volcano Enterprises, Inc. v. City of Huntsville, Case No. 5:13-cv-00505-CLS, Dkt. 21-2 at 18 (Oct. 25, 2013).
[188] Volcano Enterprises, Inc. v. City of Huntsville, Case No. 5:13-cv-00505-CLS, Dkt. 21-2 at 18 (Oct. 25, 2013).

> an issue with Mr. Williams having expended a large sum of money and now they had discovered that they did not want him to operate this club. He asked if there would have been any way along the way that the City could have informed him that this was not going to happen, before he expended a lot of money trying to get the place up to par.[189]

Like the councilmember, Mr. Williams, too, suspects that the city never intended to grant the license in the first place.[190] As he recounted in an interview, the entertainment industry remains racially segregated. Ownership and control are largely reserved for white men, while Black entrepreneurs face overt and covert resistance when attempting to enter the market. Even in cities with sizable Black populations, the most profitable entertainment venues tend to be white-owned and white-patronized, sustained by an informal, deeply entrenched boundary in the industry.[191] This dynamic intensifies the stakes for Black business owners. Gentlemen's clubs are particularly lucrative because, unlike traditional clubs where traffic is limited to weekends, many of these venues operate seven nights a week.[192] For Mr. Williams, the liquor license denial was a barrier to entrepreneurial expansion.[193] Yet, his experience did not differ much from that of those who came before him. From literacy tests administered to would-be Black voters under the guise of 'educational fitness' to calculations of actuarial risk that justify redlining, bureaucratic practices have shaped access and opportunity for generations. Today, administrative burdens occur regardless of the race of the bureaucratic actors.[194] In this contemporary iteration of stratification, weaponized compliance relies on technocratic legitimacy to perpetuate inherited anti-Black sentiments, including values rooted in respectability politics and puritan moral governance that are also held by Black bureaucratic actors.[195]

Volcano's encounter particularly embodies how and why racialized burdens are so difficult to detect. As Ray, Herd, and Moynihan foreground,

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[189] Volcano Enterprises, Inc. v. City of Huntsville, Case No. 5:13-cv-00505-CLS, Dkt. 21-2 at 23 (Oct. 25, 2013); Steve Doyle, "Denied a liquor license, strip club owner sues Huntsville for racial discrimination," AL.com (Feb. 20, 2013, 3:59pm), last accessed on Oct. 20, 2025 at https://www.al.com/breaking/2013/02/denied_a_liquor_license_strip.html.

[190] Telephone interview with Darryl Williams, *supra* note 183.

[191] *See generally* Siobhan Brooks, UNEQUAL DESIRES: RACE AND EROTIC CAPITAL IN THE STRIPPING INDUSTRY (2010).

[192] Telephone interview with Darryl Williams, *supra* note 183.

[193] Mr. Williams stated that this was not the only instance that threatened his business. *See, e.g.,* Kent Faulk, "$37 million verdict against Club Volcano thrown out by Alabama Supreme Court," AL.COM (May 10, 2014, 2:05pm), last accessed on Oct. 20, 2025 at https://www.al.com/spot-news/2014/05/37_million_verdict_against_clu.html (describing an overturned default judgment where defendant failed to properly serve notice of the lawsuit).

[194] *See, e.g.*, Kenneth Meier, *Theoretical Frontiers in Representative Bureaucracy: New Directions for Research*, 2 PERSPECTIVES ON PUBLIC MANAGEMENT AND GOVERNANCE 1, 47 (2019); Celeste Watkins-Hayes, *Race, Respect, and Red Tape: Inside the Black Box of Racially Representative Bureaucracies*, 21 J. OF PUB. ADMIN. RSCH. & THEORY i233, i246 (2011); Carolyn Y. Barnes & Julia R. Henly, *They are Underpaid and Understaffed: How Clients Interpret Encounters with Street-level Bureaucrats*, 28 J. OF PUB. RSCH. & THEORY 165, 166-69 (2018).

[195] Ray, Herd, & Moynihan, *supra* note 17, at 140 ("[W]hile shared racial identity between bureaucrats and clients encourage individual workers to use discretion in ways that resist or undermine rules to reduce burdens, policies, and organizations ultimately set the boundaries for discretion.")

"policymakers and organizations launder racially disproportionate burdens through facially neutral rules and via claims that burdens are necessary for reasons unrelated to race. This may be true even if racism is central to public or policymaker views about those justifications."[196] In other words, as long as a discriminatory motive is concealed by a plausibly valid justification, the neutral rationale supplants the racial harm, and no legal injury has occurred.

Just as with *Quarterman* and *Sheba*, the federal civil rights claims brought in *Volcano* failed. To succeed on a racial discrimination claim under § 1981, a plaintiff must, *inter alia*, compare their treatment to that of someone "similarly situated in all relevant respects besides race."[197] The court determined that none of the comparators met the 'similarly situated' criterion because the white-owned businesses cited as examples were not new applicants under identical timing and regulatory conditions.[198] The requirement for near-perfect comparators presumes a level of uniformity that, by design, racialized administrative burdens disrupt. It is because applicants are treated so differently that similarly situated actors often do not exist. Because courts demand symmetry where agencies create asymmetry, Section 1981 claims are likely incapable of addressing the whimsical maneuvering that characterizes racialized administrative burdens.

Federal civil rights claims treat administrative decisions as neutral baselines, without much consideration of how and for whom rules depart. Instead, to better serve the public, administrative processes must proffer a forward-looking and participatory process that addresses embedded legacies of exclusion.

IV. A CALL FOR HISTORICALLY INFORMED RULEMAKING

Civil rights litigation is not, nor should it be, a singular strategy for redressing racial discrimination.[199] *Quarterman*, *Sheba*, and *Volcano* represent the notion that racialized administrative burdens cause substantial injuries, even if those injuries do not rise to the level of unconstitutional conduct under prevailing Fourteenth Amendment jurisprudence. Still, harmful processes that escape constitutional liability do not mean that these harms are legally insignificant. To the contrary, the persistence of injurious administrative processes that are beyond constitutional reach demands alternative modes of legal intervention. Fortunately, agencies can design their own protocols that mitigate racial harm and better comport with the underlying rationale for bureaucratic governance: fairness and consistency.[200] Part IV proposes that administrative agencies adopt *historically informed rulemaking*, an evaluative framework that

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[196] *Id.* at 141.
[197] Jackson v. BellSouth Telecommunications, 372 F.3d 1250, 1273-74 (11th Cir. 2004).
[198] Volcano Enterprises v. City of Huntsville, Case No. CV-13-S-505-NE at p. 29 (N.D. Ala. Sept. 29, 2014).
[199] Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 26 (2022) (arguing that the Roberts Court fails to remedy racial injuries that do not look like overt, pre-Civil Rights era discrimination).
[200] Thomas Ward Frampton, *The End of Batson? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1 (2024); Avital Fried, *Equal Standards for Equal Protection: Revisiting Race Discrimination in Jury Selection After SFFA*, 134 YALE L. J. F. 709 (2025).

acknowledges the past while preserving procedural integrity. Historically informed rulemaking takes advantage of administrative agencies' disposition toward routine and procedure. Because the rules, standards, and structure are defined and implemented at the agency level, agencies are uniquely positioned to engage in internal reform. This framework relies on two claims: (1) administrative neutrality is neither historically nor empirically sustainable; and (2) accounting for racialized histories is necessary to fulfill values of fairness and consistency in bureaucratic governance.

If, as Parts I and II argue, racialized administrative burdens may be influenced by micro-level individual prejudice and macro-level systems of exclusion, then the operation of these influences is translated into practice at the meso-level, within organizations. Essentially, organizations convert historical inequities into disparate outcomes, thereby institutionalizing patterns of harm. Thus, an effective intervention must target the meso-level for reform.[201] In the bureaucratic system where individuality is condemned, the lack of individual accountability is especially pertinent. Because there is no 'self,' there is no 'self-scrutiny,'—a dangerous grey area that allows racialized administrative burdens to flourish. Therefore, what is needed is a constructive examination of organizational rules and rulemaking through a framework that does not solely rely upon presumptions of neutrality.[202] Beyond formal changes to procedures, historically informed rulemaking offers guidance on how memory and disparate impact shape institutional accountability.

Though historically informed rulemaking is presented here as a novel conceptual framework, its premise is captured in existing applications.[203] In Washington State, for example, the judiciary adopted General Rule 37 (GR 37) in 2018 to address the limitations of *Batson v. Kentucky*.[204] *Batson* sought to eradicate racial discrimination in jury strikes, but its requirement that defendants show proof of purposeful discrimination proved difficult.[205] GR 37 enabled Washington courts to consider historical patterns of racial bias in jury selection, notwithstanding whether attorneys could offer a race-

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[201] Brooke Harrington & Camilo Arturo Leslie, *Toward a Multilevel Sociology of Fraud*, 118 NW. U. L. REV. 139, 165 (2023) (advocating for the defamiliarization of normalized activities at the meso-level).
[202] Some state presumptions are unreliable because they may "maintain systemic and institutional biases, while justifying them under the guise of empirical neutrality and objectivity." Ngozi Okidegbe, *How Not to Democratize Algorithms*, 2025 WIS. L. REV. 895, 917 (2025); Ngozi Okidegbe, *To Democratize Algorithms*, 69 UCLA L. REV. 1688, 1727 (2024) (describing information produced by the state "an allure of neutrality"); *see also* Daniel A. Farber, *Inequality and Regulation: Designing Rules to Address Race, Poverty, and Environmental Justice*, 3 AM. J. OF L. AND EQUITY 2, 3043 (2023).
[203] *See, e.g.*, Washington State's adoption of General Rule 37, *infra* note 197, Cannabis equity programs are a part of these early applications as well. In fact, there are several lessons from standing up cannabis regulation that would benefit liquor regulation—potentially addressing the harms presented in this Article. Those recommendations are beyond the scope of this Article and will be presented in future scholarship.
[204] Batson v. Kentucky, 476 U.S. 79 (1986); WASH. CT. GEN. R. 37 [hereinafter GR 37]; State v. Jefferson, 429 P.3d 467 (Wash. 2018) (en banc).
[205] Batson, 476 U.S. at 95; David B. Owens, *The Objective Observer: The Washington State Supreme Court's Remedial Aspirations and Experience on the Ground*, 100 WASH. L. REV. 325 (2025).

neutral justification.[206] Though GR 37 has shortcomings,[207] the process that led to its formation exemplifies historically informed rulemaking and models value-aligned reform. To better understand how historically informed rulemaking might operate in governance, I proffer GR 37 as an example in Part IV(B).

A. What is Historically Informed Rulemaking?

Historically informed rulemaking serves as a framework that counters presumptions of bureaucratic objectivity. It anticipates racial harm as the expected outcome of administrative contexts derived from legacies of slavery, segregation, and second-class citizenship. Historically informed rulemaking encourages agencies to review internal policies from a reparative posture to mitigate harm from administrative burdens and other forms. Drawing on Ray, Herd, and Moynihan's guidance that administrative practices "must be supported by macro-level policy design and cultural understandings, and meso-level implementation choices"[208] to be effective, historically informed rulemaking requires three interrelated processes: memory, mapping, and modification.

First, memory plays a critical role in how exclusion is embedded in the public domain.[209] As Professor Khiara M. Bridges observes, even in the pre-Civil Rights era, "racial hierarchy was also sustained through facially race-neutral laws and policies that neither had an underlying discriminatory intent nor were discriminatorily applied."[210] The erasure of this historical memory is necessary to the exercise of exclusion.[211] Yet, the effects of over four hundred years of racial subjugation endure, and no industry is exempt. At a minimum, this requires an assessment of origins of statutory authority, enforcement rationales, or antebellum categories of regulation that might indicate institutional disposition. In practice, memory functions as an internal diagnostic to help agencies understand how regulatory discretion was justified and against whom it was deployed. Drawing on earlier examples, state housing agencies are intimately familiar with how actuarial risk mapping, or redlining, was used to segregate communities of color,[212] but business licensing agencies may be less cognizant of how operating

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[206] GR 37(h). The list of pretexts includes: (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii)not being a native English speaker.

[207] Finley Riordon, *The Objective Observer Strikes Out: A Comparative Analysis of Batson Reform in Washington State*, 13 WAKE FOREST J. L. & POL'Y 103, 115–-26 (2023) (discussing how GR 37 challenges have been received by courts and on de novo review).

[208] Ray, Herd, & Moynihan, *supra* note 17, at 140.

[209] Dorothy E. Roberts, *Racism, Abolition, and Historical Resemblance*, 136 HARV. L. REV. 37, 46—49 (2022); JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024); Reva B. Siegal, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19 (2022); Serena Mayeri, *Reproductive Injustice, Feminist Resistance, and the Uses of History in Constitutional Interpretation*, 33 WM. & MARY BILL OF RTS. J. 519 (2024).

[210] Bridges, *supra* note 199.

[211] Cara McClellan, *Challenging Legacy Discrimination: The Persistence of School Pushout as Racial Subordination*, 105 B.U. L. REV. 641, 688-89 (2025).

[212] Adams, *supra* note 27 at 1226-27.

permits were historically denied to immigrant entrepreneurs.[213] Ray, Herd, and Moynihan emphasize the importance of this type of historical accounting in the pursuit of administrative reform, cautioning that "[u]nderstanding relationships between public organizations and race requires a deeper historical understanding of the roots of burdens, and the racialized soil from which those roots emerge."[214] Apart from merely acknowledging a painful past, the memory process counters narratives of neutrality. The agency and its agents are placed within—as opposed to external to—a lineage that governs and informs their operations.

Second, against the historical backdrop, agencies must map their institutional record in the contemporary context. This mapping step aligns with Ray, Herd, and Moynihan's guidance that "[s]tudying racialized burdens therefore requires both retracing the history and origins of particular rules, practices, procedures, policies, or memos that give rise to burdens, while connecting those administrative actions to the historical context in which they emerged."[215] Mapping, in this sense, might require an audit of existing procedures, disparate outcomes, or incongruent data.[216] In this process, agencies evaluate decisions that rely on vague justifications, such as "seemingly neutral administrative values such as efficiency," assumptions of "fraud or illegality," or "lack of deservingness," based on racial stereotypes and tropes.[217] For instance, a careful mapping exercise in a land use department might reveal that noise ordinance enforcement is disproportionately deployed in gentrifying neighborhoods—once again exposing the modern-day expansion of an exclusionary foundation and reproducing the stereotype that people of color are 'loud.'[218] Beyond quantitative disparities, mapping includes the qualitative assessment of process. Where race-disaggregated data is unavailable, agencies may rely on alternative indicators such as processing times, frequency of supplemental requests, or deviations from protocol. By tracing multiple vantage points, mapping creates a throughline from procedural deviations to enduring exclusions.

Third, the modification process offers an opportunity to revisit internal rules for which neutrality was previously taken for granted. The modification process need not necessarily result in rules that consider race on its face. However, the racial history—and the agency's role within it—informs governance in a manner that minimizes harm. Further detailed in Part IV(B), GR 37 is a prime example of such modifications. Depending on

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[213] Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[214] Ray, Herd, & Moynihan, *supra* note 17, at 147.
[215] *Id*.
[216] This practice is analogous to racial equity audits in the corporate governance context. *See* Alicia E. Plerhoples, *ESG & Anti-Black Racism*, 24 U. PA. J. BUS. L. 909, 911–12 (2022) ("'Race audits' were first proposed in 2011 in the context of municipalities seeking to 'map the specific impacts of racial disadvantage within a jurisdiction.' The focus of the audit is not to seek out intentional wrongdoers but to track laws, policies, and procedures that contribute to racial disparities within the municipality."); Alvin Velazquez, *Making Racial Equity Audits Effective*, 99 CHI.-KENT L. REV. 123, 144—51 (2024); *See also* Robin A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527 (2011).
[217] Ray, Herd, & Moynihan, *supra* note 17, at 148.
[218] Angela E. Addae, *The Perils of Urban Redevelopment for Black Business Districts*, 57 TULSA L. REV. 171, 194 (2021).

the institution, modification may adopt a range of forms: intervention vis-à-vis modification includes narrowing vague standards or limiting the use of factors that have enabled differential treatment. Because discretion is a necessary tool for administrative officers, protocols for disciplining discretion through defined parameters protect both the agent and constituents. Though modification is an important step, periodic reassessment and evaluation are critical to administrative legitimacy.[219]

One concern about historically informed rulemaking is the inherently subjective nature of 'history'—who should be entrusted with incorporating historical narratives into administrative procedure? Would unelected agents be more likely to invite politicized interpretations of past wrongs or encourage administrative overreach? However, administrative practices are already driven by unexamined historical assumptions. For liquor licensing regulation, these assumptions originate in geographical and moral frameworks derived from racialized associations between temperance, alcohol, and vice.[220] At the turn of the twentieth century, debates surrounding the Prohibition movement were plagued with depictions of Black Americans as puerile, bestial, and liquor-crazed, vulgarities that now drive alcohol regulation as a sentinel of public order and virtue.[221] Similarly historied are other regulatory sectors, such as zoning, where cities first devised single-family districts to encode residential segregation in the language of lot size, layout, and density.[222] In Berkeley, California, community builders imagined large, costly lots that only permitted one home as race-neutral alternatives to circumvent the limitations of racially restrictive covenants.[223] The racially restrictive covenants became unenforceable, but the single-family districts remained. Historically informed rulemaking makes explicit *and contestable* these forgotten origins, challenging the false presumption that today's administrative frameworks are neutral, and it empowers agencies and their representatives to discontinue inequitable practices that may result.

Additionally, historically informed rulemaking operates within existing constraints, conforming to current protocols for notice, records, and review. Put differently, a historically informed posture does not exempt regulated parties of color from scrutiny, nor does it demand leniency that is not generally applied. To the contrary, it reinforces the notion that agencies apply regulatory actions to purported concerns of public safety, morals, and welfare.[224] Acknowledging historical influence better serves these societal values because it helps agents distinguish between discriminatory enforcement and legitimate enforcement. In the absence of these considerations, the same language is used to justify both genuine and

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[219] Rachel E. Barkow, *Bureaucracy and Democracy as Complements*, 105 B. U. L. REV. 1203, 1205 (2025) ("Indeed, attention to institutional design can further democracy by helping to achieve public goals and avoid political pathologies that might undermine them.")
[220] Brittany Arsiniega, Teresa Cosby, Spencer Richardson, & Kylie Berube, *Race and Prohibition Movements*, 11 TENN. J. RACE GENDER & SOC. JUST. 16, 47-53 (2022).
[221] *Id.*
[222] Adams, *supra* note 27 *at* 1230.
[223] *Id.* at 1265.
[224] *Id.* at 1214.

insidious regulation. In liquor licensing, the examinations that turn on the "moral character" of an applicant provide an example.[225] Under an 1858 Maryland statute, free Black persons could only obtain a liquor license if three "respectable freeholders" (in other words, white property owners) attested to their "good and temperate habits" and "moral character.[226] Good 'moral character' remains a term of art for liquor licensing, but the assessments of today avoid explicit racial qualifiers while still being informed by historical frameworks. A seemingly straightforward criterion such as 'prior legal violations' can allow a decades-old traffic violation or minor infraction to be weighed against an applicant, and how much depends on who is doing the weighing and through what lens. A historically informed reviewer is, at least, better equipped to differentiate between genuine and exclusionary assessment. Absent a historically informed framework, both determinations rely on the same statutory language and generate identical administrative records, resulting in facially indistinguishable pretextual and legitimate denials.

Similarly, historically informed rulemaking filters the decision patterns that perceptions of specific groups produce, including the less detectable intraracial dynamics. This refers to instances in which agency officials engage in the differential treatment of those who share the same racial identity, perpetuating respectability-based hierarchies that also originate from exclusionary logics rather than public safety concerns. One can imagine an instance in which a jazz lounge, associated with quiet dining and genteel audiences, might receive preferential treatment compared to a youth-oriented reggae club. Even if both establishments are Black-owned and cater to Black patrons, administrative judgments may privilege forms of Black expression that better align with dominant culture norms of decorum.

As discussed in Part IV(B), Washington State's General Rule 37 offers a window into how an institution—the state court, in this instance—incorporated memory, mapping, and modification into procedural reform.

B. Learning from Washington's General Rule 37

General Rule 37 came about after growing discontent with standards that the U.S. Supreme Court articulated *in Batson v. Kentucky*.[227] In theory, *Batson* prohibits racially motivated peremptory strikes during jury selection. It required defendants to demonstrate that the prosecution exercised a peremptory challenge based on race, after which the prosecutor could offer a race-neutral explanation, and the court would then determine whether purposeful discrimination had occurred. In application, however, *Batson* largely failed to prevent the exclusion of jurors of color. Because of the plethora of race-neutral justifications a prosecutor could draw

[225] Addae, *supra* note 15 at 1924. See also Benjamin J. Kweskin, *Investigating "Good Moral Character" for Liquor License Applications*, 8 BUS. ENTREPRENEURSHIP & TAX L. REV. 152, 153-57 (2024).
[226] 1858 Md. 55.
[227] Batson, 476 U.S. at 95.

from—such as demeanor, communication style, facial hair, physical posture, or criminal history—*Batson* lacked teeth.[228]

In lamenting *Batson*'s shortcomings,[229] the Washington Supreme Court in *State vs. Saintcalle* performed an institutional memory exercise. "Since 1879, the United States Supreme Court has recognized that race discrimination in the selection of jurors violates the Fourteenth Amendment's guaranty of equal protection," the court reflected. [230] The Washington Supreme Court reached back 134 years to *Strauder v. West Virginia*,[231] a U.S. Supreme Court case that struck down a state law that barred Black men from jury service. *Strauder* held that such exclusion violated the Equal Protection Clause because it denied Black defendants the right to a jury drawn from a representative cross-section and it stereotyped Black citizens as unfit for civic participation.[232] Though this may appear to be a mere historical footnote, the *Strauder* reference is doing much, much more: it activated memory as a method of rule assessment.[233] By invoking *Strauder*, the court diagnosed *Batson*'s deficiencies by situating them within a longer genealogy of juror exclusion by race.[234] In this moment of self-reflection, the court acknowledged its own complicity in reproducing the status quo.[235] This subtle move transitioned the court from ahistorical adjudication toward historically informed rulemaking.

In addition to drawing on *Strauder* in *Saintcalle*, the Washington Supreme Court engaged in an evaluative mapping process that examined internal practices in relationship to histories of exclusion.[236] For the court, the empirical evidence of its own patterns was "rather shocking":

> In over 40 cases since *Batson*, Washington appellate courts have *never* reversed a conviction based on a trial court's erroneous denial of a *Batson* challenge. . . . And while this

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[228] *See, e.g.,* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001) (showing discrepancies between the percentage of Black jurors and non-Black jurors struck in Philadelphia trials); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 L. AND HUM. BEHAV. 695, 698–699 (1999); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 462-464 (1996); Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 583-589 (1994); Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (Aug. 2010) (available at https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf).

[229] State v. Saintcalle, 309 P.3d 326, 332 (Wash. 2013). In Saintcalle, the court also called out the broader impact of racial discrimination in procedure, noting that it "raises serious questions of fairness" and "undermines public confidence" in state institutions. *Id.* at 332–33 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991)).

[230] Saintcalle, 309 P.3d. at 334.

[231] Strauder v. West Virginia,100 U.S. (10 Otto) 303, 309–10 (1880) ("And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?").

[232] *Id.* at 312.

[233] Using memory in this way requires institutions to examine the racial genealogies in their own procedural tools (compliance, codes, etc.), over treating those tools as objective or neutral.

[234] Saintcalle, *supra* note 230.

[235] *Id.*

[236] *Id.*

> alone does not prove that *Batson* is failing, it is highly suggestive in light of all the other evidence that race discrimination persists in the exercise of peremptories.[237]

By using national and local studies to 'map' the contemporary landscape of discrimination in jury selection, the court redefined its role as inheritor and reproducer of the harms that *Batson* was supposed to, but did not, prevent.[238] The court's reflexivity made this mapping transformative, for it recognized that *Batson*'s flaws were operationalized locally. Notably, this kind of evaluative mapping was only possible because the relevant data existed and the patterns were trackable. Unfortunately, this is an exception, not the rule. In most contexts of administrative harm at the state and local levels, data is neither collected nor disaggregated by race. *Saintcalle* highlights the utility of mapping in historically informed rulemaking and the precondition of data transparency for such mapping to take root.

The court's engagement in memory and mapping exercises laid the groundwork for the third step, modification. Following *Saintcalle*, the Washington judiciary invited a workgroup to propose revisions to the rules governing peremptory challenges.[239] As a result, the court adopted GR 37, which, *inter alia*, rejected the narrow purposeful discrimination requirement and introduced a broader, historically informed rule. At the heart of GR 37 is the "objective observer" test.[240] A Washington court may now deny a peremptory challenge if "an objective observer could view race or ethnicity as a factor in [its] use."[241] Moreover, the rule defines this observer as one who is "aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."[242] Indeed, this addition holds space for unintentional or undetectable discrimination—the hallmark of racialized administrative burdens and a significant departure from *Batson*. GR 37 also responds directly to the empirical findings that surfaced during the mapping process.[243] The rule anticipates and places conditions on race-neutral justifications that have been historically weaponized to exclude jurors of color, such as a lack of eye contact. The rule goes on to catalog familiar proxies for discriminatory juror exclusion, "[t]he following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers."[244]

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[237] Saintcalle, 309 P.3d at 334–35 (emphasis in original).
[238] Of note, this mapping was only possible because the data on juror exclusion was readily available. Where data aggregated by race is not collected, quantitative mapping is significantly more difficult. Lack of relevant data also contributes to the invisibility described in Part III.
[239] Riordon, *supra* note 207, at 110—17.
[240] *Id.*
[241] Wash. GR 37(e).
[242] Wash. GR 37(f).
[243] Riordon, *supra* note 207, at 117-18.
[244] Wash. GR 37(i). This established notice of racial proxies would have been informative for the court in *Quarterman*.

Although GR 37 was enacted through judicial reform, its logic extends naturally to administrative agencies.[245] The court tapped into its power as an institution to determine its own procedures, modeling the vast potential of administrative agencies to internally enact reform using mechanisms already within their control. In contrast to legislation and litigation, which are inherently vulnerable to political oscillations, rulemaking permits jurisdictions to engage in justice-oriented interventions that rely on empirical data and offer opportunities to reflect on institutional identity. Historically informed rulemaking positions organizations to recalibrate the momentum of entrenched systems via internal policies without the need to arrive at a legislatively partisan consensus.

CONCLUSION

Over the past century, the nation has had to confront the influence of a past that relied on skin color to order society. Though progress has been made in many areas, in other sectors, that confrontation is yet to begin. Administrative bodies offer one such frontier for reform. This Article demonstrates how racialized administrative burdens dismantle economic infrastructures and deplete marginalized communities by foreclosing entrepreneurial opportunity altogether.[246] The focused case narratives reveal a strategy of attrition: Mr. Quarterman spent years navigating a board that was willing to go through the back door to avoid licensing a hip-hop venue; Mr. Williams spent $80,000 chasing a license the city likely never intended to grant; and the owners of Sheba Ethiopian Restaurant spent close to $250,000 to resolve mounting demands orchestrated by an aggrieved neighbor. Yet, these harms persist because they operate through a recurring paradox. Black-owned businesses are highly visible for regulation and enforcement, but they are invisible when seeking legal protections. Unfortunately, existing legal tools insufficiently address the entrepreneurs' dilemma. The same Black-owned establishment that attracted weekly inspections and halved occupancy limits became raceless once it filed a grievance under federal civil rights law. With public perceptions of legitimacy and court deference, bureaucracies that perpetuate these harms are, frankly, inviolable. And, with layers of objectivity and faceless bureaucrats, administrative agencies exercise an authority that preserves racial harm with impunity.

Historically informed rulemaking offers a possible path forward. Administrators may adopt this framework as a diagnostic tool that bypasses facial neutrality and instead looks to neutrality in origin. Constituents interfacing with administrative agencies may also find in it the unrealized potential of bureaucratic governance. A heavier burden falls on legal scholars, who are uniquely positioned to excavate and make legible the idiosyncrasies of bureaucratic bias and abuse. Certainly, the impulse in legal

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[245] *Cf.* Cal. Assemb. B. 3070, 2019-2020 Reg. Sess. (Cal.2020) (taking a legislative route to Batson reform).

[246] Imagine the consequences of, as occurred in *Sheba*; ten businesses shutting down in a single community.

scholarship is to look upward toward Supreme Court doctrine and constitutional or legislative text. However, the machinery of exclusion operates in the spaces where constituents' encounters with the state shape access to economic life—seemingly inconsequential processes like licensing or public benefits allocations. Here, we draw on a liquor license denial in Springfield, Massachusetts (weaponizing the appearance of neutrality), a fire marshal's visit in DeKalb County, Georgia (weaponizing [in]visibility), and a zoning dispute in Huntsville, Alabama (weaponizing compliance). These encounters look too small to theorize and too local to generalize, which is why they have thus far remained unexamined. Yet, it is at this scale where the distance between the promise of the American Dream and its practice is greatest.

Without frameworks like historically informed rulemaking, agencies will continue to directly and indirectly administer foreseeable, longstanding structural inequities. With them, however, agencies assume responsibility for the systems they steward. The task ahead is to make bureaucracy more accountable to the histories it carries and the communities it serves.