

CRACK COCAINE, CONGRESSIONAL INACTION, AND EQUAL PROTECTION

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Criminal justice policy, drug policy, and racial policy are three of the most contentious subjects in contemporary American society.¹ For the past thirty years, they have intersected because of the Anti-Drug Abuse Act of 1986.² Enacted in the midst of a panic over the emergence of a new form of cocaine

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1. For discussions of these subjects, see, for example, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012); STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997); GLENN C. LOURY, *RACE, INCARCERATION, AND AMERICAN VALUES* (2008); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

2. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841 (2006)) (amended 2010).

colloquially known as “crack,”³ the act imposed severe mandatory minimum sentences on drug dealers.⁴ Of particular importance was the penalty for selling crack cocaine, as the amount that triggered the mandatory minimum sentence was 100 times less than the predicate amount for the powdered version of the same drug.⁵ The result is that the statute mandated equally serious punishment for both small-scale crack dealers and large-scale powdered cocaine traffickers.⁶

Defendants convicted of distributing crack cocaine have challenged the Anti-Drug Abuse Act of 1986 on the ground that its sentencing provisions violate equal protection principles applied to the federal government by virtue of the Fifth Amendment Due Process Clause.⁷ The federal courts have almost uniformly rejected that argument,⁸ even though most of the academy has found it persuasive.⁹ The debate has grown quiet

3. For an explanation of the pharmacological differences between crack and powdered cocaine, as well as the different penalty structures assigned to each form of that drug, see U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2–3, 62–71 (2007) [hereinafter 2007 SENTENCING COMM’N REPORT]. The slang term “crack” comes from the sound that cocaine base makes when it is smoked. DUKE & GROSS, *supra* note 1, at 68.

4. Pub. L. No. 99-570, Tit. I, § 1002, 100 Stat. 3207, 3207–20.

5. *Id.*

6. See 2007 SENTENCING COMM’N REPORT, *supra* note 3, at 2–3, 30.

7. The Fourteenth Amendment Equal Protection Clause applies only to the states, not the federal government. The Supreme Court, however, has construed the Fifth Amendment Due Process Clause to incorporate antidiscrimination principles. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). In the sentencing context, equal protection principles forbid arbitrary distinctions in legislation. See, e.g., *Chapman v. United States*, 500 U.S. 453, 465 (1991); *Jones v. United States*, 463 U.S. 354, 362 n.10 (1983). For convenience, I will use the phrase “equal protection principles” instead of “the Due Process Clause” throughout this Article when referring to the federal government unless the context dictates otherwise.

8. See, e.g., *United States v. Singleterry*, 29 F.3d 733, 739–41 (1st Cir. 1994); *United States v. Thompson*, 27 F.3d 671, 678 & n.3 (D.C. Cir. 1994) (collecting cases); *United States v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993). The circuits have ruled that the disparity is not attributable to racial bias and that the 100:1 ratio is rational because Congress reasonably could have believed that crack is more addictive than powdered cocaine and that crack is easier and less expensive to conceal and distribute, making it available and attractive to a new range of users. See, e.g., *Thompson*, 27 F.3d at 678 n.3; *Haynes*, 985 F.2d at 70.

9. See, e.g., ALEXANDER, *supra* note 1, at 112–14; MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA (2011); WESTERN, *supra* note 1; David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995). But there

over the last decade, principally because of the uniformity of the circuit court rulings and Congress's decision in 2010 to reduce the crack-to-powder ratio from 100:1 to 18:1.¹⁰

Recently, however, a panel of the U.S. Court of Appeals for the Sixth Circuit revived the debate. In *United States v. Blewett*,¹¹ the court, by a divided vote,¹² set aside ten-year mandatory minimum sentences imposed on two defendants convicted in 2005 of possessing crack cocaine and sentenced under the mandatory minimum provisions of the Anti-Drug Abuse Act of 1986. According to the majority, equal protection principles dictated that the Fair Sentencing Act of 2010 be read to apply to every defendant sentenced under the 1986 Act.¹³ The court believed that refusing to apply the 2010 statute retroactively would render the courts a party to the continuation of the unlawful discriminatory effects of the 1986 law.¹⁴

The Sixth Circuit's ruling in *Blewett* is the first circuit court decision upholding an equal protection challenge to the federal drug sentencing laws.¹⁵ The decision is important not only for its novelty, but also because it revives a controversy that all three branches of the federal government hoped had disappeared. The *Blewett* decision forces each branch of the federal government to revisit the legality and wisdom of the nation's drug sentencing laws as well as the contentious debate over what is the greater

are powerful dissenting voices, too. See KENNEDY, *supra* note 1; Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1256 (1994); cf. Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It, Anyway?*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 137, 158 (Stephen E. Gottlieb ed., 1993) (advocating greater deference to government interests in certain circumstances when evaluating the constitutionality of criminal laws).

10. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

11. 719 F.3d 482 (6th Cir. 2013).

12. Judges Merritt and Martin were in the majority. *Id.* at 483. Judge Gilman dissented. *Id.* at 483, 494.

13. *Id.* at 492.

14. *Id.* at 494.

15. *Blewett* also is the only circuit court decision to rule that the Fair Sentencing Act of 2010 applies to offenders sentenced before the effective date of the Act. Every other federal court of appeals that has examined the issue has rejected that claim. See, e.g., *United States v. Kelly*, 716 F.3d 180, 181–82 (5th Cir. 2013); *United States v. Lucero*, 713 F.3d 1024, 1026 (10th Cir. 2013); *United States v. Augustine*, 712 F.3d 1290, 1293–95 (9th Cir. 2013) (collecting cases).

scourge of the nation's urban black communities: crack cocaine or the federal law punishing its possession and sale.¹⁶

I. THE HISTORY OF FEDERAL DRUG POLICY

Cocaine is not the nation's drug of choice; either alcohol or tobacco holds that distinction.¹⁷ By and large, the nation has reacted differently to the use of alcohol and tobacco than to other mood-altering substances. Western society has used alcohol widely for millennia,¹⁸ and our nation's response to that practice has varied widely over time.¹⁹ Today, the law largely leaves to the States the authority to decide whether and how to

16. The Justice Department filed a petition for rehearing and a suggestion for rehearing en banc in *Blewett*. United States Petition for Rehearing En Banc, *Blewett*, 719 F.3d 482, Nos. 12-5226, 12-5582 (2013). On July 11, 2013, the Sixth Circuit voted to rehear the case en banc. Order Granting Rehearing En Banc, Nos. 12-5226, 12-5582, 2013 BL 006111750076 (6th Cir. July 11, 2013). On December 3, 2013, while this article was in press, the en banc Sixth Circuit, by a 10-7 vote, ruled that the Fair Sentencing Act of 2010 does not apply retroactively to offenders sentenced before the Act went into effect and therefore does not require that the appellants be resentenced under its more favorable terms. The en banc majority also concluded that this result does not violate the Due Process Clause. *United States v. Blewett*, Nos. 12-5226/5582, slip op. at 2 (6th Cir. Dec. 3, 2013).

17. For a synopsis of America's regulation of alcohol, tobacco, and other drugs, see DUKE & GROSS, *supra* note 1, at 1-11, 22-42, 78-102. For detailed histories of regulation of particular controlled substances, see generally RICHARD J. BONNIE & CHARLES H. WHITBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* (1999).

18. See *Genesis* 9:20-21 (Noah's drunkenness led to the Curse of Ham); *John* 2:1-11 (Jesus changed water into wine at the marriage at Cana).

19. In the late nineteenth and early twentieth centuries, the nation enacted a variety of laws prohibiting or regulating conduct deemed a "vice." See STUNTZ, *supra* note 1, at 158-59. As part of that reform effort, the United States outlawed the production, transportation, and sale—but not the possession—of alcohol throughout the nation by virtue of the Eighteenth Amendment, U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI, and the Volstead Act (also known as the National Prohibition Act and as the Act of Oct. 28, 1919), ch. 85, 41 Stat. 305 (1919) (codified at 27 U.S.C.A. § 40 (1919)) (nullified 1933, repealed 1935). Federal law sought to make the nation "dry" during the period from 1920 to 1933, known as "Prohibition." In that latter year, however, the nation did an about-face. Congress proposed, and the States ratified, the Twenty-First Amendment, U.S. CONST. amend. XXI, which repealed the Eighteenth Amendment, nullified the Volstead Act, and decentralized regulatory power over alcohol by vesting it in the States. See, e.g., *United States v. Chambers*, 291 U.S. 217, 222-23 (1934) (finding that the Twenty-First Amendment rendered the Volstead Act inoperative). Once again, federal law left it to the States to decide whether to remain "dry" or become "wet."

regulate the use and distribution of alcohol.²⁰ Tobacco use is likewise deeply rooted in American culture. Natives in the New World introduced European explorers to tobacco, and it soon became a cash crop in colonies like Virginia.²¹ Current regulation of tobacco is generally left to the States,²² but the federal government plays a role by requiring warning labels on cigarette packs and cartons and by forbidding the use of television and radio media to advertise tobacco.²³

Society treats other drugs differently. For a century, Congress has principally regulated opiates and other controlled substances by taxing their sale, by requiring a physician to prescribe them, and by outlawing any distribution of some particular drugs deemed medically unnecessary and especially dangerous.²⁴ Individual attitudes toward drug use, however, vary

20. See U.S. CONST. amend. XXI, § 2. The Twenty-First Amendment, however, does not give the States free rein to adopt whatever types of regulations they may desire. See, e.g., *Granholm v. Heald*, 544 U.S. 460, 466 (2005) (states may not regulate alcohol use on grounds that violate the dormant Commerce Clause); *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (states may not regulate alcohol use on grounds that violate the First Amendment Free Speech Clause); *Craig v. Boren*, 429 U.S. 190, 204–5 (1976) (states may not regulate alcohol use on grounds that violate the Fourteenth Amendment Equal Protection Clause); cf. *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (holding that Congress may condition the receipt of a portion of federal highways funds on a state's enactment of a minimum drinking age).

21. See DUKE & GROSS, *supra* note 1, at 22–32.

22. *Id.*

23. In 1962, the U.S. Surgeon General convened an advisory committee to study potential hazards resulting from smoking. Two years later, the committee issued its report, which concluded that “[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.” U.S. SURGEON GENERAL’S ADVISORY COMM., SMOKING AND HEALTH 33 (1964). Thereafter, Congress began to regulate tobacco use. See, e.g., Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984); Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970); Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (all codified as amended at 15 U.S.C. §§ 1331–40 (2006)); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 513–15 (1992) (discussing history of federal tobacco regulation); cf. *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971), *aff’d*, 405 U.S. 1000 (1972) (rejecting First Amendment challenge to 15 U.S.C. § 1335).

24. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 10–15 (2005) (summarizing the history of federal drug regulation); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236; Marijuana Tax Act of 1937, ch. 553, 50 Stat. 551 (repealed 1970); Harrison Narcotics Tax Act of 1914, ch. 1, 38 Stat. 785. The 1970 statute created a list of regulated

considerably. Although some would punish drug use as being intrinsically immoral, inherently dangerous, and socially corrosive, others deem the use of drugs such as marijuana as a relatively harmless diversion.²⁵

The landscape changed in the 1980s. The decade witnessed an unprecedented increase in cocaine use, as well as the emergence of a new form of cocaine, colloquially known as “crack.”²⁶ The media played up stories on the proliferation of cocaine use, which finally reached a fever pitch in 1986 with the death of two professional athletes from its use—Don Rodgers of the Cleveland Browns and Len Bias, the first-round draft choice of the Boston Celtics.²⁷ Concerned that the nation was succumbing to a dangerous new drug and fearful that its lower price might attract new, younger, first-time drug users, Congress decided it could not wait for the recently chartered United States Sentencing Commission to devise appropriate penalties for cocaine.²⁸ Instead, Congress preempted the Commission by enacting the Anti-Drug Abuse Act of 1986.²⁹ Through this statute, Congress imposed lengthy, mandatory penalties for any violation of fed-

and outlawed substances that the Attorney General must update regularly. *See* *Touby v. United States*, 500 U.S. 160, 166 (1991).

25. *See, e.g.*, Sklansky, *supra* note 9, at 1286. Recent state initiatives to legalize or decriminalize recreational use of marijuana are an example of the latter view. *See generally* TODD GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., R43034, STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECTED LEGAL ISSUES (2013), available at <http://www.fas.org/sgp/crs/misc/R43034.pdf>.

26. *See, e.g.*, MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 295–96 (1992) (“In 1978, cocaine was something between a curiosity and a menace By 1988, cocaine had become the drug problem par excellence, with a retail market nearly equal to those for heroin and marijuana combined. . . . How did a minor drug become so major, a seemingly benign drug so horrible? In a word, crack happened.”).

27. *See* ALEXANDER, *supra* note 1, at 52. Ironically, the U.S. Sentencing Commission later concluded that there was no evidence that Bias had used crack. *See* MARC MAUER, RACE TO INCARCERATE 61–62, 77–78 (2d ed. 2006).

28. Congress chartered the Sentencing Commission in 1984 to devise federal sentencing policy. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

29. Pub. L. No. 99-570, 100 Stat. 3207. The Sentencing Guidelines, however, must comply with acts of Congress. *See, e.g.*, *Dorsey v. United States*, 132 S. Ct. 2321, 2326 (2012); *Neal v. United States*, 516 U.S. 284, 289–90 (1996). One result of the 1986 statute was to tie the hands of the Sentencing Commission regarding the minimum sentences that could be imposed for trafficking in crack. *See* MAUER, *supra* note 27, at 62.

eral drug laws.³⁰ Of particular importance is the way that Congress sought to deter crack cocaine trafficking: The amount that triggers the minimum sentence for crack offenses is 100 times less than the amount required for the powdered form.³¹

The Anti-Drug Abuse Act of 1986 has proved quite controversial due to the disparate results that its application has had on black and white drug traffickers.³² Critics of the Act have quarreled with it for three reasons. First, law enforcement officials have scrupulously enforced the crack laws against black dealers working in the open-air markets often found in predominantly urban black communities, but law enforcement has not pursued similarly intensive investigations of more discreet powdered cocaine distribution and use in the predominantly white suburbs.³³ Second, the 100:1 ratio produces a prison population with an exponentially larger number of black than white cocaine trafficking convicts, because the sentences imposed on mostly black defendants convicted for selling crack are far longer than the sentences imposed on mostly white defendants for selling powdered cocaine.³⁴ Third, although these aggressive law enforcement efforts take advantage of poor, urban blacks marginalized by society, denied the economic opportunities available to suburban whites, and shunted off into America's urban ghettos,

30. See, e.g., *Chapman v. United States*, 500 U.S. 453, 455–56, 468 (1991) (holding that the sale of 50 milligrams of lysergic acid diethylamide in a mixture weighing 5.7 grams required the imposition of a mandatory five-year minimum sentence).

31. See, e.g., *Dorsey*, 132 S. Ct. at 2325–26; 2007 SENTENCING COMM'N REPORT, *supra* note 3, at 2–3.

32. See, e.g., 2007 SENTENCING COMM'N REPORT, *supra* note 3, at B-8; U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2–3 (2002); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (1997); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 7 (1995); Sklansky, *supra* note 9, at 1289.

33. See KENNEDY, *supra* note 1, at 364–65; MAUER, *supra* note 27, at 214–15; 2007 SENTENCING COMM'N REPORT, *supra* note 3, at 15 (“Historically, the majority of crack cocaine offenders are black. Powder cocaine offenders are now predominately Hispanic.”); U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 34 (2010), available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table34.pdf.SBtoc10.htm.

34. See, e.g., MAUER, *supra* note 27, at 165–67; 2007 SENTENCING COMM'N REPORT, *supra* note 3, at 12 (“Federal crack cocaine offenders consistently have received substantially longer sentences than powder cocaine offenders, and the difference in sentence length between these two groups of offenders has widened since 1992.”).

the enforcement efforts do not make a dent in the crack trade. There always will be another dealer willing to step into the shoes of anyone arrested for selling crack because the remote prospect of future long-term imprisonment is not a deterrent to someone with no other option.³⁵ The bottom line of the critics' arguments is that America's "war on drugs" has become indistinguishable from a "war on blacks."³⁶

Congress had been aware of this disparity for some time when it revisited the issue in 2010. Congress unanimously adopted, and President Obama signed into law, the Fair Sentencing Act of 2010,³⁷ which sought to remedy this problem, at least in part. Although Congress elected not to place the penalties for crack cocaine trafficking on a par with the sentences for powdered cocaine, it did reduce the crack-to-powder disparity from 100:1 to 18:1.³⁸ Congress, however, chose not to apply that reduction retroactively to every defendant convicted of violating the Anti-Drug Abuse Act of 1986. Instead, Congress limited application of the Fair Sentencing Act of 2010 to prisoners sentenced on or after the date that the statute became law.³⁹ It was this limitation that troubled the Sixth Circuit in *Blewett*.

35. See, e.g., DUKE & GROSS, *supra* note 1, at 212 ("Street-level dealers in America have little to lose by selling drugs. They have no legitimate job, no stable home, no marketable skills, bleak future prospects. Many are in daily jeopardy from another's knife or gun whether or not they are involved in drugs or other crimes. Their lives are disposable to society and cheap to themselves. Prison is not a prospect that engenders great fear."); TONRY, *supra* note 9, at 20 ("[D]rug markets provide sufficient incentives to wannabes that filling an open street corner is seldom difficult."); Jonathan P. Caulkins & Philip B. Heymann, *How Should Low-Level Drug Dealers Be Punished?*, in DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE 206, 208 (Philip B. Heymann & William N. Brownsberger eds., 2001) (noting that, due to "the replacement effect," new street-level drug dealers will replace those who are imprisoned).

36. See, e.g., ALEXANDER, *supra* note 1, at 223 ("Few Americans today recognize mass incarceration for what it is: a new caste system thinly veiled by the cloak of colorblindness."); DUKE & GROSS, *supra* note 1, at 161 ("Maybe no one planned it, maybe no one wanted it and certainly few saw it coming, but around the country, politicians, public officials and even many police officers and judges say, the nation's war on drugs has in effect become a war on black people." (quoting Ron Harris, *Blacks Feel Brunt of Drug War*, L.A. TIMES, Apr. 22, 1990, at A1)); MAUER, *supra* note 27, at 157-74.

37. Pub. L. No. 111-220, 124 Stat. 2372 (2010).

38. *Id.*

39. See *Dorsey v. United States*, 132 S. Ct. 2321, 2325 (2012); cases cited *supra* note 15.

II. CRACK COCAINE, RACE, AND EQUAL PROTECTION LAW

The Sixth Circuit did not suggest that reliance on the principal tools of textual interpretation—reading terms in light of their dictionary meaning, context, purpose, history, tradition, precedent, and the problem that Congress sought to address⁴⁰—required that the Fair Sentencing Act of 2010 be applied to defendants who were sentenced before it went into effect.⁴¹ Instead, the court resorted to the “constitutional avoidance” doctrine, the principle that, if possible, courts should construe a law in a manner that will not render it unconstitutional.⁴² Relying on this doctrine, the court decided that the Act must be applied retroactively to defendants convicted under the Anti-Drug Abuse Act of 1986, because any other result would offend equal protection principles. The court’s ruling, accordingly, rested on its interpretation of the Constitution.⁴³

40. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 7–8 (2005); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 33 (2012).

41. Three sizeable obstacles foreclose that route. The first is the general federal saving statute, which provides that new laws do not modify existing ones unless the later legislation applies retroactively. See 1 U.S.C. § 109 (2006). That is not the case here, because the Fair Sentencing Act of 2010 is silent on the issue of retroactivity. The second barrier is 18 U.S.C. § 3582(c) (2006), which provides that a “court may not modify a term of imprisonment once it has been imposed” unless the Director of the Federal Bureau of Prisons moves the district court to reduce the sentence for “extraordinary and compelling reasons” or the U.S. Sentencing Commission retroactively lowers the relevant Guidelines range. Neither event occurred in *Blewett*. The last obstacle is the Supreme Court’s decision in *Dorsey*, in which a closely divided Supreme Court concluded that the Fair Sentencing Act of 2010 should be applied to defendants sentenced after that law went into effect, even if they committed their crimes before the effective date of the Act. See 132 S. Ct. at 2335. The Court held that the 2010 act would not apply to defendants already sentenced because 18 U.S.C. § 3582(c) forecloses that option. The four Justices in dissent would not even have gone that far. They would have applied the Act only to defendants who committed their crimes after its effective date. See *id.* at 2339 (Scalia, J., joined by Roberts, C.J., Thomas & Alito, JJ., dissenting). Accordingly, it is dubious that a majority of the Court would read The Fair Sentencing Act of 2010 in a more generous manner when applied to cocaine traffickers than the majority in *Dorsey* did. See also cases cited *supra* note 15.

42. See *United States v. Blewett*, 719 F.3d 482, 487 (6th Cir. 2013) (citing SCALIA & GARNER, *supra* note 40, at 247).

43. The Sixth Circuit majority also wrote that the Sentencing Guidelines required the same result. See *id.* at 491–94. The Guidelines, however, must be consistent with all acts of Congress. See *Dorsey*, 132 S. Ct. at 2327; *Neal v. United States*, 516 U.S. 284, 289–90 (1996). Because the Anti-Drug Abuse Act of 1986 required the *Blewetts* to

A. *Legislation and Equal Protection Law*

A federal statute can run afoul of equal protection principles in two ways: It can discriminate on its face based on an invidious characteristic such as race, or it can be the product of discriminatory animus.⁴⁴ A third option—an effects test—is not available. As the Supreme Court has held repeatedly, a facially neutral statute is not unconstitutional simply because it has a disparate impact on a minority group unless the decisionmaker acted at least in part to achieve that result.⁴⁵ Moreover, the discriminatory purpose necessary to establish a constitutional violation requires more than “volition” or “awareness of consequences”—a state of mind often called “general intent.”⁴⁶ Instead, a party challenging the application of a facially neutral law must prove a decisionmaker’s “specific intent” to discriminate: that the decisionmaker “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”⁴⁷ Accordingly, the appellants in *Blewett* could prevail only by proving that Congress intended to discriminate against African-Americans, either by enacting the Anti-Drug Abuse Act of 1986 or by refusing to make the Fair Sentencing Act of 2010 retroactive.

The Sixth Circuit did not hold that the Anti-Drug Abuse Act of 1986 facially discriminated against blacks, and no such argument could prevail. The text of the act applies equally to all

receive a mandatory minimum sentence under the Act’s 100:1 ratio, the Guidelines could not permit them to be resentenced under an 18:1 ratio.

44. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Hunter v. Underwood*, 471 U.S. 222 (1985). A facially neutral statute also could be applied in a racially discriminatory manner. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

45. See, e.g., *Armstrong*, 517 U.S. at 463–67; *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976). No one suggested, however, that the district court in *Blewett* acted with such a purpose.

46. *Feeney*, 442 U.S. at 279; see also *United States v. Bailey*, 444 U.S. 394, 403 (1980) (noting that the “venerable distinction” between general and specific intent has caused “a good deal of confusion”); WAYNE R. LAFAVE, *CRIMINAL LAW* § 5.2(e) (5th ed. 2010) (discussing the multiple meanings of “general intent” in criminal law).

47. *Feeney*, 442 U.S. at 279; see also, e.g., *Armstrong*, 517 U.S. at 463–67; *McCleskey*, 481 U.S. at 292–93; *Arlington Heights*, 429 U.S. at 266; *Davis*, 426 U.S. at 242.

offenders who deal in the powdered or crack form of cocaine.⁴⁸ Nor did the Sixth Circuit conclude that Congress adopted the 100:1 ratio in the Anti-Drug Abuse Act of 1986 for a racially discriminatory purpose.⁴⁹ That conclusion also would be difficult to justify, for several reasons. The lower price for crack, as compared to powdered cocaine, made it available to a previously untapped market, which justified punishing crack dealers more severely.⁵⁰ Most of the black members of the House of Representatives, concerned about the risk that crack would ravage black inner-city neighborhoods, voted in favor of the Anti-Drug Abuse Act of 1986, and none of them claimed that the 100:1 ratio was motivated by bigotry.⁵¹ Even the best argument that the Anti-Drug Abuse Act of 1986 was motivated by and has been applied with “an evil eye and an unequal hand”⁵² rests on a questionable foundation. Many assert that the law is discriminatory because more blacks than whites are convicted of crack trafficking. Yet, the explanation for the disparity rests on demographic and neutral law enforcement practices, rather than inherent racism: More blacks than whites sell crack cocaine, and the sales typically involve strangers in “open-air” markets in predominantly black, inner-city neighborhoods. These factors make observation, infiltration, and arrest by the police relatively easy to accomplish. Like it or not, law enforcement officers are evaluated and rewarded according to the number of arrests they make. Thus, they have an incentive to crack down on the easy targets.⁵³

48. See KENNEDY, *supra* note 1, at 375–76.

49. The Sixth Circuit, however, did not wholly absolve the 1986 Congress of any racial animus. See *United States v. Blewett*, 719 F.3d 482, 488 (6th Cir. 2013) (“When the old 100-to-1 crack cocaine statute was adopted, it *presumably* did not violate the Equal Protection Clause because there was no intent or design to discriminate on a racial basis. Its adoption was simply a mistake.” (emphasis added)).

50. See, e.g., *United States v. Thompson*, 27 F.3d 671, 678 n.3 (D.C. Cir. 1994); KENNEDY, *supra* note 1, at 373–74 (“Crack democratized the cocaine high.”).

51. See KENNEDY, *supra* note 1, at 301, 371–72.

52. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

53. See, e.g., KENNEDY, *supra* note 1, at 365 (“Everyone concedes that there exists a striking and racially identifiable pattern in the demographics of the drug trade.”); TONRY, *supra* note 9, at 49–54, 63–70, 98; Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL’Y 1, 29 (2013).

Instead of faulting the Anti-Drug Abuse Act of 1986, the Sixth Circuit focused on the Fair Sentencing Act of 2010.⁵⁴ The Fair Sentencing Act of 2010, however, also does not use race as a criterion for application of the new 18:1 ratio. The Act creates two categories of crack trafficking offenders, one on each side of the effective date of the statute, and the offender's race is not a defining criterion for either class.⁵⁵ The Sixth Circuit also did not conclude that Congress limited the application of the Act for a racially discriminatory reason. Instead, the court mixed together an assortment of equal protection principles and found that these principles demanded that all crack offenders be resentenced under that Act's new 18:1 ratio.⁵⁶

The Sixth Circuit started its decision by noting that, as of 2011, there were approximately 30,000 federal prisoners serving prison terms for trafficking in crack cocaine.⁵⁷ The court further noted that Congress adopted the Fair Sentencing Act of 2010 to lower the 100:1 ratio to 18:1 out of concern for the racially disparate crack cocaine sentencing produced by the Anti-Drug Abuse Act of 1986.⁵⁸ The result was to shorten the sentences of thousands of those inmates. But the limited retroactivity of that law recognized in *Dorsey* still left more than 17,000 of those offenders subject to long periods of imprisonment.⁵⁹ The Sixth Circuit concluded that Congress's failure to remedy completely the racially disparate impact caused by the Anti-Drug Abuse Act of 1986—its failure to make the Fair Sentencing Act of 2010 fully retroactive—was tantamount to “intentional subjugation” akin to the resurrection of “slavery and Jim Crow laws.”⁶⁰

54. *Blewett*, 719 F.3d at 487–89.

55. See 21 U.S.C. § 841 (2012).

56. *Blewett*, 719 F.3d at 490.

57. *Id.* at 485 (citing U.S. SENTENCING COMM'N, ANALYSIS OF THE IMPACT OF GUIDELINE IMPLEMENTATION OF THE FAIR SENTENCING ACT OF 2010 IF THE AMENDMENT WERE APPLIED RETROACTIVELY 12 (2011) [hereinafter U.S. SENTENCING COMM'N RETROACTIVITY ANALYSIS]).

58. *Id.* at 489 n.7 (noting that Congress passed the Fair Sentencing Act of 2010 “because the public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race-based differences” (quoting *Dorsey v. United States*, 132 S. Ct. 2321, 2328 (2012))); *id.* at 485 & n.5 (citing statements of members of Congress).

59. *Id.* at 486 (citing U.S. SENTENCING COMM'N RETROACTIVITY ANALYSIS, *supra* note 57, at 12).

60. As the Sixth Circuit stated:

The Sixth Circuit's equal protection theory rests on an entirely novel concept of legislative intent. Traditionally, courts inquiring into legislative intent attempt to divine the rationale that a multiperson body like a legislature had in mind for a particular statute. The practice of ascribing intent to a legislature, however, always has been at least somewhat artificial. Public choice theory holds that the apparent rationale for legislative decisions does not necessarily align with the preferences of legislators, let alone their constituents.⁶¹ This theory underlies the view of some judges that it is nonsensical to ascribe "intent" to a legislature.⁶² Nonetheless, the practice of treating a collegial body as if it were one decision-maker is a familiar one, and it does not invariably do violence to the process of statutory construction.

The Sixth Circuit, however, took that practice to a new level in *Blewett*. According to the majority, if a legislature is aware that continued application of a facially race-neutral law has produced a racially discriminatory outcome, the legislature will be deemed to endorse that discriminatory result if the legislature fails to revise the law.⁶³ In other words, even if Congress did not enact the Anti-Drug Abuse Act of 1986 for a racially discriminatory purpose, Congress knew by 2010 that the

The Fair Sentencing Act was a step forward, but it did not finish the job. The racial discrimination continues by virtue of a web of statutes, sentencing guidelines, and court cases that maintain the harsh provisions for those defendants sentenced before the Fair Sentencing Act. If we continue now with a construction of the statute that perpetuates the discrimination, there is no longer any defense that the discrimination is unintentional. The discriminatory nature of the old sentencing regime is so obvious that it cannot seriously be argued that race does not play a role in the failure to retroactively apply the Fair Sentencing Act. A "disparate impact" case now becomes an intentional subjugation or discriminatory purpose case. Like slavery and Jim Crow laws, the intentional maintenance of discriminatory sentences is a denial of equal protection.

Id. at 488.

61. *Cf.* *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. . . ."). *See generally* KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (3d ed. 2012) (developing modern social choice theory).

62. *See, e.g.,* *Conroy v. Aniskoff*, 507 U.S. 511, 519, 520 n.2 (1993) (Scalia, J., concurring).

63. *See Blewett*, 719 F.3d at 488 ("If we continue now with a construction of the statute that perpetuates the discrimination, there is no longer any defense that the discrimination is unintentional.").

1986 law had produced a racially discriminatory outcome. A decision to maintain that disparity by declining to make the Fair Sentencing Act of 2010 retroactive would perpetuate exactly the same result that would have occurred if Congress had acted with a racially discriminatory intent twenty-four years earlier. Congress's "malign neglect"⁶⁴ in 2010 therefore must be treated in the same manner as if Congress had acted with a discriminatory purpose in the first instance. Moreover, any court that refuses to apply the 2010 law retroactively would be deemed complicit in Congress's discrimination. Judges may no more enforce the "web of statutes, sentencing guidelines, and court cases that maintain the harsh provisions for those defendants sentenced before the Fair Sentencing Act"⁶⁵ than the bench may enforce racially restrictive real estate covenants like the ones held invalid in *Shelley v. Kraemer*.⁶⁶ The only way to avoid a constitutional violation, the Sixth Circuit concluded, was to apply the 2010 statute retroactively.⁶⁷

The Sixth Circuit's opinion brings to mind a joke attributed to Judge Henry Friendly when he was a partner at a Wall Street law firm. After reviewing an associate's legal memorandum, Judge Friendly remarked that the work was both good and novel—with two qualifications. The parts that were good were not novel, and the parts that were novel were not good.⁶⁸ As it turns out, the Sixth Circuit's decision is subject to the same criticisms.

The Sixth Circuit majority was correct in two respects. In 2010, Congress knew that the Anti-Drug Abuse Act of 1986 had led to racially disparate sentencing outcomes. Congress also knew that failing to make the Fair Sentencing Act of 2010 retroactive would leave the disparity in place. These facts, however, do not complete the analysis. Attributing racially discriminatory intent to a legislature simply because the assembly did not altogether elim-

64. The term was coined by Michael Tonry. See MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* 3 (1995).

65. *Blewett*, 719 F.3d at 488.

66. *Id.* at 490 (citing *Shelley v. Kraemer*, 334 U.S. 1, 19–20 (1948)).

67. *Id.* at 490, 494.

68. I am indebted to a former Judge Friendly law clerk for that anecdote.

inate a disparate impact problem, to borrow a phrase from John Hart Ely, “seems to mistake a definition for a syllogism.”⁶⁹

The Sixth Circuit majority never stopped to ask itself the critical question of why Congress would reduce the sentences imposed on *some* black crack cocaine offenders, but not *all* of them. The Fair Sentencing Act of 2010 intentionally creates this divide. Defendants sentenced after the effective date of the statute receive the benefit of the lower 18:1 ratio, while defendants sentenced before the Act went into effect do not. Both categories of offenders have two features in common: (1) they are largely black, and (2) they distributed crack cocaine. There is no obvious reason why Congress would favor one group over the other or would discriminate against either category because its sentencing fell before or after the effective date of the Fair Sentencing Act of 2010. The *Blewett* majority’s conclusion that Congress acted with a racially discriminatory purpose makes sense, however, only if there were some reason why Congress would have wanted to discriminate against black crack dealers who committed their crimes *before* the 2010 law went into effect, but did not intend to discriminate against offenders who were lucky enough to have been sentenced at a *later* date. Of course, the appellants in *Blewett* need not prove that Congress had a sensible reason for discrimination. Still, the Sixth Circuit’s failure to explore Congress’s rationale for “partial” or “selective” discrimination—for discriminating against some, but not all, crack dealers—undercuts its conclusion that Congress acted for a discriminatory purpose.

Equal protection analysis, after all, works both ways. It discovers racially discriminatory actions by showing why the government’s stated justification does not hold water, and it forces a party alleging discriminatory animus to explain why such an inference of discrimination is appropriate. Ordinarily, the explanation may be that the legislature was afflicted with bigotry, but that justification does not apply to the 2010 statute. In passing the Fair Sentencing Act of 2010, Congress acted with the obvious intent to benefit some African-Americans by lowering the penalty for crack distribution. That fact is undenia-

69. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924 (1973).

ble—the text of the 2010 statute proves it. As such, there is no reason to presume that Congress intended to discriminate *against* black crack dealers to whom Congress did not extend the benefit of the 2010 law. The Sixth Circuit needed to do more than assert that Congress acted with racial animus because it was uncomfortable with what it saw as the shorter-than-ideal reach of the Fair Sentencing Act of 2010. Rather, the court needed to ask why Congress would want to benefit some black crack dealers while penalizing others, and the court needed to discern if Congress's facially nondiscriminatory statute masked a hidden form of bigotry.

Although the Sixth Circuit sought to find proof in statements made on the floor of Congress during debates over the Fair Sentencing Act of 2010,⁷⁰ the proof identified by the court is woefully inadequate. The effort presents a good illustration of the quip that a court's decision to cite legislative history favorable to its conclusion resembles a person's decision to look out over a crowd and pick out his friends.⁷¹ The statements cited by the Sixth Circuit explain how the 100:1 ratio came into being, criticize how it works, and explain why the Fair Sentencing Act was necessary to reduce that ratio. Those statements do not, however, support the inference that Congress refused to make that statute retroactive because it wanted to discriminate against black crack offenders sentenced before the effective date of the new law.

There are a host of entirely neutral reasons why Congress may not enact particular legislation or may be willing to pass only a compromise version of proposed legislation. Individual legislators may dispute the need for any remedial legislation or disagree with one or more features of a proposed statute. Members may believe that a bill extends too far or not far enough. They might find that the time is not yet right for a particular remedy and that they must persuade the public of the necessity of the bill before bringing it to a vote. They may decide to wait until litigation over the subject has run its course. They may support a different version of a bill or a similar one

70. See *Blewett*, 719 F.3d at 485 & n.5.

71. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (attributing the remark to Judge Harold Leventhal).

offered by a different colleague. They may support the original bill but dislike features added later. They may withhold their support for a particular bill in the hope of making a deal on an entirely different subject. They may oppose including substantive legislation in an appropriations bill while supporting the substantive proposal itself. They may decline to support a bill as a means of retaliating against a betrayal or insult by a colleague, the President, or someone in his or her administration. They may use their votes as leverage in exchange for the President's appointment of a financial supporter, family member, friend, or staffer to a position in the administration or on the bench. They may believe, standing on principle, that no loaf is better than a half and refuse to compromise. The laundry list of possibilities could extend even further.

The Fair Sentencing Act of 2010 is a classic example of a legislative compromise.⁷² The reduction of the crack-powder sentencing ratio from 100:1 to 18:1 makes little sense as a matter of sentencing policy—18:1 is a peculiar ratio, indeed—but this reduction makes a great deal of sense if viewed as a compromise. A majority of each house of Congress may have sympathized with the plight of offenders facing the stiff penalties imposed by the Anti-Drug Abuse Act, but the majority may not have been fully convinced that the judgment Congress made in 1986 was completely wrong. Some members may have thought that a 25:1 ratio adequately expressed the greater harms posed by crack than powdered cocaine,⁷³ while others may have favored a 10:1 ratio. To pass *some* remedial legislation, the two groups could have split the difference, settling on a ratio of 18:1.

Some of those explanations for the votes of individual members may be trivial, others may be venal, but none of them is racist. This distinction matters.⁷⁴ The entire legislative process may look ugly and produce a result that no one finds completely satisfactory, but compromise legislation rarely does. This reality also matters.⁷⁵ The possibility that the 2010 law was a

72. See TONRY, *supra* note 9, at 175 n.1 (characterizing the 2010 Act as a legislative compromise).

73. See KENNEDY, *supra* note 1, at 384.

74. See *id.* at 386.

75. See George F. Will, Op-Ed., *Obama's never-mind presidency*, WASH. POST, July 5, 2013, [http://articles.washingtonpost.com/2013-07-05/opinions/40390063_1_senate-](http://articles.washingtonpost.com/2013-07-05/opinions/40390063_1_senate)

compromise should have led the Sixth Circuit to address the competing policy rationales for the Anti-Drug Abuse Act of 1986. The Sixth Circuit, however, largely ignored that subject, or at least a major element of it. As explained below, the Sixth Circuit's decision is even more flawed when viewed not as an issue of equal protection but as a dispute over federal drug policy. Before turning to that analysis, however, it is worthwhile to identify another major flaw in the Sixth Circuit's legal analysis.

B. *Legislative Inaction and Equal Protection Law*

The question raised by the *Blewett* decision goes far beyond the narrow issue of whether the Fair Sentencing Act of 2010 should be read to apply to crack offenders sentenced before that statute became law. That greater question is this: Would Congress have violated equal protection principles if it had declined to enact the Fair Sentencing Act of 2010 *at all*? Put more broadly, did Congress act unconstitutionally from 1986 until 2010 by *not* remedying the racial disparity that the Anti-Drug Abuse Act of 1986 had produced? Or, reified even further, did Congress violate equal protection principles by doing nothing at all in the face of a statute creating a known racial disparity?

The answer is no. Congress's failure to pass, inability to pass, or refusal to pass a law cannot violate the Constitution, including the equal protection principles incorporated by the Fifth Amendment Due Process Clause. None of those three scenarios involves the type of action that the Constitution seeks to restrain. Said differently, with a few limited exceptions not relevant here, the Constitution does not dictate that Congress do anything, and thus Congress's inaction cannot be unconstitutional. To explain why that it so, it is necessary to start with first principles.

republicans-house-republicans-border-security (last visited Dec. 3, 2013) ("Such provisions [i.e. an immigration bill section deeming Nevada a "border" state] reflect an imperative of legislating in a continental nation. Because durable, principle-based congressional majorities are rare, legislation often becomes large and complex through the process of cobbling together a coalition of legislators more attuned to parochial interests than philosophical arguments. Logrolling is necessary to this process, but it necessarily reduces the moral momentum of the final product.").

1. *The Article I Lawmaking Process*

The Framers drafted the Constitution as a substitute for the Articles of Confederation because the latter had failed to unite the States into one nation.⁷⁶ Congress was to serve in the same role played by Parliament or the colonial state assemblies. To set that entity in motion, Article I performed several functions: It created the Congress as a bicameral legislature consisting of a Senate and House of Representatives;⁷⁷ it specified who may serve in Congress;⁷⁸ it gave each chamber the authority to govern itself;⁷⁹ and it vested Congress with authority to enact legislation on certain discrete subjects.⁸⁰ Because the Constitution rests on the premise that “[t]hat government is best which governs least,”⁸¹ the drafters of the Constitution sought to make it difficult for the federal government to engage in lawmaking. One such hurdle is the requirement that candidates for the House, Presidency, or Senate win elections every two, four, or six years, respectively, to hold federal office.⁸² Other restraints focus on the specific role that each branch plays. The President may execute the laws,⁸³ and the courts may interpret them,⁸⁴

76. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 16 (2005); THE FEDERALIST No. 22, at 143–45 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

77. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

78. See *id.* art. I, § 2; *id.* amend. XVII.

79. See U.S. CONST. art. I, § 5, cl. 1 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.”); *id.* art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

80. See U.S. CONST. art. I, § 8.

81. See HENRY D. THOREAU, RESISTANCE TO CIVIL GOVERNMENT 1 (1849).

82. See U.S. CONST. art. I, § 2, cl. 1 (House members hold office for two years); U.S. CONST. art. I, § 3, cl. 1 (Senators hold office for six years); *id.* art. II, § 1, cl. 1 (the President holds office for four years); *id.* amend. XXII, § 1 (limiting the number of years that a person may hold office as President).

83. See U.S. CONST. art. II, § 3 (the President “shall take Care that the Laws be faithfully executed”).

84. See *id.* art. III, § 1 (“The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); *id.* art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States, and . . . to Controversies to which the United States shall be a Party”).

but neither one can enact a law; enactment is the prerogative of Congress alone.⁸⁵ Congress can enact laws, but it cannot administer them,⁸⁶ appoint the people who do,⁸⁷ or adjudicate disputes arising under them.⁸⁸

Despite Congress's limited set of powers, the federal legislation it passes obviously has a powerful effect on the public and on the States.⁸⁹ To address this situation, the Framers paid particular attention to the need to regulate Congress's lawmaking power. Article I defines a rigorous process for the House and Senate to enact legislation. For a "Bill" (and "[e]very Order, Resolution, or Vote" requiring the approval of both chambers)⁹⁰ to become a "Law," Article I requires that the House and Senate pass the same text, that they transmit it to the President for review, and that the President sign it (or return it to the Congress for an opportunity to override the veto).⁹¹ To complete the circle, Article I imposes the identical bicameralism and pre-

85. *See supra* note 77.

86. *See* U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

87. *See id.* art. II, § 2, cl. 2 (expressly grants the Senate alone the privilege of offering "Advice and Consent" to the President's appointments and implicitly prohibits members of either chamber from selecting executive branch officials); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986); *Buckley v. Valeo*, 424 U.S. 1, 138-39 (1976); *Myers v. United States*, 272 U.S. 52, 161 (1926).

88. *See* *INS v. Chadha*, 462 U.S. 919, 960-67 (1983) (Powell, J., concurring in the judgment); sources cited *supra* note 84.

89. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

90. *See id.* art. I, § 7, cls. 2 & 3. The Congress need not present every proposal to the President. The most common example is a joint agreement to adjourn for more than three days, *see id.* art. I, § 5, cl. 4, but the most important example is the submission to the States of a proposed amendment to the Constitution, *see id.* art. V; *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). The Constitution also vests certain powers in one chamber. The House alone has the power to initiate impeachment. U.S. CONST. art. I, § 2, cl. 5. The Senate alone has the power to try impeachments, to approve or reject presidential appointments, and to ratify treaties. *Id.* art. I, § 3, cl. 6; *id.* art. II, § 2, cl. 2. *See generally* *Chadha*, 462 U.S. at 955-56 n.21 (collecting authorities).

91. *See* U.S. CONST. art. I, § 7, cls. 2 & 3; *Chadha*, 462 U.S. at 944-51. If the President vetoes the bill, Congress has the opportunity to override that veto. *See id.* at 951.

sentment requirements on Congress and the President to repeal or modify previously enacted legislation.⁹²

Those requirements are not mindless bureaucratic obstacles to effective governance—they are “integral parts of the constitutional design for the separation of powers.”⁹³ Especially when considered along with the opportunity for judicial review implied by Article III,⁹⁴ the bicameralism and presentment requirements “serve essential constitutional functions.”⁹⁵ They protect the public against the imprudent, self-serving, or venal decisions of actors in the political process by making it difficult for Congress to turn a wish into a command.⁹⁶

Yet, just as it can be noteworthy when a watchdog does not bark in the night,⁹⁷ what the Constitution does *not* say about the lawmaking process is important, too. Article I vests legislative power in the *Congress*, *not* in individual members. Although the Constitution grants each member the right to vote on proposed legislation,⁹⁸ the action of the chamber is necessary to create a law.⁹⁹ Article I does refer to certain individual members in Congress, but it does not give them the power to pass legislation in lieu of a vote by the Senate and House of Representatives.¹⁰⁰ Ac-

92. See *Clinton v. City of New York*, 524 U.S. 417, 438–39 (1998).

93. *Chadha*, 462 U.S. at 945–46.

94. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

95. *Chadha*, 462 U.S. at 951.

96. The bicameralism provision offered two separate opportunities for independent debate over the wisdom of a law. The presentment provision gave the President, as the only federal official elected by the entire nation, the ability to halt the creation of a law he deemed unconstitutional or unwise. And the veto provision gave the full Congress the ability to overrule the potentially arbitrary decision of one person. *Id.* The Framers also took care to ensure that neither Congress nor the President could circumvent those requirements. The Framers added a proviso ensuring that neither party could end run the lawmaking process by labeling a “Bill” as an “Order” or a “Resolution.” The same bicameralism and presentment requirements apply to all three instruments. See U.S. CONST. art. I, § 7, cl. 3.

97. See Arthur Conan Doyle, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 335, 347 (1930).

98. See U.S. CONST. art. I, § 3, cl. 1 (“[E]ach Senator shall have one Vote.”).

99. See *id.* art. I, § 7, cls. 2 & 3.

100. See *id.* art. I, § 2, cl. 5 (“The House of Representatives shall chuse their Speaker and other Officers”); *id.* art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”); *id.* art. I, § 3, cl. 5 (“The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States.”).

cordingly, unless the supporters of a bill can cobble together a majority in each chamber to vote in its favor and then persuade the President to sign it, there is nothing that the Congress can do legally to force anyone else to do its bidding. Congress can achieve that goal only via legislation, and each chamber as a whole must play its part to enact a law.¹⁰¹

Moreover, with at most a few exceptions, none of which is relevant here—namely, the requirements to authorize a decennial census,¹⁰² to enumerate the number of representatives,¹⁰³ to maintain a journal of proceedings,¹⁰⁴ and to pay the President and federal judges¹⁰⁵—the Constitution does not *require* Congress to enact legislation of any type. Congress satisfies its Article I duties so long as members make an annual trek to Washington, D.C.,¹⁰⁶ and each chamber gavels itself into existence for

101. It also is highly dubious that either or both chambers could delegate to one person—say, the Speaker of the House—the power to pass legislation based entirely on his or her vote or to cast votes for every other member. Congress may delegate rulemaking authority to federal agencies, but that delegation is not an exercise of “legislative” power.” *Chadha*, 462 U.S. at 953 n.16. It is, instead, an exercise of the President’s Article II authority to enforce the law. *See id.* Giving one person the power to pass legislation is an abdication of responsibility, not a delegation of authority, and conflicts with the essence of a collegial decisionmaking body—namely, that each member must vote his or her own ballot as part of a collective enterprise consisting of separately elected lawmakers. The delegation doctrine would not justify a decision to alter the structure of the legislative process itself.

102. *See* U.S. CONST. art. I, § 2, cl. 3 (“The actual Enumeration [of Representatives] shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”). Congress could prospectively fulfill that duty once and for all, however, simply by enacting a law directing the President to conduct a census every ten years, and letting him or her work out the details.

103. *See id.* (“The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . .”).

104. *Id.* art. I, § 5, cl. 3.

105. Congress may not reduce the salary of the President and federal judges. *Id.* art. II, § 1, cl. 7; *id.* art. III, § 1. Even those requirements, however, impose at most a one-time obligation, because Congress could satisfy them by enacting a permanent, self-executing appropriations law. *But cf. id.* art. I, § 8, cl. 12 (requiring that Congress must renew appropriations for the army every two years). The “United States” also has several obligations: It “shall guarantee to every State in this Union a Republican Form of Government,” and it must protect each state against “Invasion” and “domestic Violence.” *Id.* art. IV, § 4.

106. *See* U.S. CONST. art. I, § 4, cl. 2 (“The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.”).

some period, however brief.¹⁰⁷ Otherwise, their inaction, like the behavior of private parties, is untouched by Article I.¹⁰⁸

Thus, the Constitution assumes that the default position is the *absence* of federal intrusion into the lives of the public. This assumes that private contractual ordering, judicial common law decisionmaking, or state legislation will accomplish societal regulation. Federal or state legislatures may direct government officials or the public to take or refrain from taking particular action, and the common law may render government officers or private parties liable for their failure to perform their duties. The Constitution, in contrast, takes a *laissez-faire* or “no news is good news” approach to federal legislation. In sum, the Constitution regulates only Congress’s efforts to govern through the passage of positive law. Congress’s failure to enact new legislation, for whatever reason, cannot violate Article I.

2. *The Due Process Clause*

Adding equal protection principles into the mix—which apply to the federal government under the aegis of the Fifth Amendment Due Process Clause¹⁰⁹—does not change the outcome. Unlike Article I, the Due Process Clause does not impose any channels, hurdles, or restrictions on the legislative process. Justice Holmes, writing for the Court in *Bi-Metallic Investment Co. v. State Board of Equalization*,¹¹⁰ expressly rejected the argument that the Due Process Clause guarantees parties a right to be heard by the legislature before it enacts a law affecting their property interests.¹¹¹ “Their rights are protected in the only way that they can be in a complex society, by their power, im-

107. A session can be quite short. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (discussing the significance for Article I and II purposes of brief, pro forma Senate sessions), *cert. granted*, 133 S. Ct. 2861 (2013) (No. 12-1281).

108. See, e.g., *United States v. Morrison*, 529 U.S. 598, 621–22 (2000) (holding that the Constitution requires governmental action for its provisions to come into play); *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (same); *United States v. Harris*, 106 U.S. 629, 639 (1883) (same). The Thirteenth Amendment, which prohibits slavery and involuntary servitude, is the only provision of the Constitution that speaks to private, not government conduct. It authorizes Congress to enforce that ban, but it does not order Congress to pass legislation doing so. See U.S. CONST. amend. XIII.

109. See *supra* note 7.

110. 239 U.S. 441 (1915).

111. *Id.* at 444–46.

mediate or remote, over those who make the rule.”¹¹² Any supervision or any corrective action is political, not legal.

To be sure, acts of Congress are subject to review under the Constitution, including the Due Process Clause, which imposes substantive restraints on the type of laws that Congress may pass.¹¹³ *Marbury v. Madison*¹¹⁴ made clear that “the constitution is superior to any ordinary act of the legislature,”¹¹⁵ and that, in the event of a conflict between them, “the constitution, and not such ordinary act, must govern the case to which they both apply.”¹¹⁶ Still, due process is a so-called “negative” guarantee. It comes into play only when the government “deprives” someone of life, liberty, or property¹¹⁷ (and even then, only when that deprivation is arbitrary).¹¹⁸ Said differently, the Due Pro-

112. *Id.* at 445.

113. *See, e.g.,* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (imposing strict scrutiny for discrimination based on race); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (holding unconstitutional discrimination based on sex). Scholars have vigorously debated the issue whether, as a matter of principle, due process imposes only procedural restraints on executive and judicial action or also limits the legislature’s substantive lawmaking power. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672, 1676–77 nn.5–7 (2012) (collecting authorities). The debate often focuses on the Supreme Court’s privacy decisions, such as *Roe v. Wade*, 410 U.S. 113 (1973), and *Lawrence v. Texas*, 539 U.S. 558 (2003). But as long as the Supreme Court incorporates equal protection principles against the federal government through the Due Process Clause, there always will be substantive due process.

114. 5 U.S. (1 Cranch) 137 (1803).

115. *Id.* at 178.

116. *Id.*

117. *See, e.g.,* *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (“[T]he Fourteenth Amendment does not require a remedy when there has been no ‘deprivation’ of a protected interest.”).

118. As the Supreme Court explained:

[T]he Due Process Clause, like its forebear in the Magna Carta, . . . was intended to secure the individual from the arbitrary exercise of the powers of government[.] . . . By requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, it serves to prevent governmental power from being used for purposes of oppression[.]

Daniels v. Williams, 474 U.S. 327, 331 (1986) (citations omitted) (internal quotation marks omitted); *see also, e.g.,* *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (“The touchstone of due process is protection of the individual against arbitrary action of government.”); *Hurtado v. California*, 110 U.S. 516, 527 (1884) (the Due Process Clause was “intended to secure the individual from the arbitrary exercise of the

cess Clause does not impose affirmative obligations on the government.¹¹⁹ For the purposes under discussion, that distinction is critical. Congress's decision not to pass a new statute or not to change existing law leaves the status quo in place. Because due process does not impose affirmative duties on the government, legislative inaction cannot be the type of "deprivation" that due process was designed to remedy. Accordingly, Congress's decision not to enact legislation, remedial or otherwise, cannot violate the Due Process Clause any more than it could violate Article I.

The constitutional history of the Due Process Clause reaffirms this point. The phrase "due process of law" comes from a fourteenth century act of Parliament, stating that "[n]o Man of what Estate or Condition that he be, shall be put out of Land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law."¹²⁰ That provision, in turn, traces its lineage to the Magna Carta of 1215, perhaps the most venerated document in Anglo-American legal history aside from our own Constitution.¹²¹

powers of government'" (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)).

119. See *Town of Castle Rock v. Gonzalez*, 545 U.S. 748 (2005) (the Due Process Clause does not create a right to government protection from crime committed by private parties); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (the Due Process Clause does not create a private right to be protected against parental child abuse); *Daniels v. Williams*, 474 U.S. 327 (1986) (the Due Process Clause does not regulate negligent governmental actions); *Harris v. McRae*, 448 U.S. 297, 317–18 (1980) (the Due Process Clause does not require public funding of abortion or other medical services).

120. 28 Edw. III, c. 3 (1354), reprinted in *THE STATUTES OF THE REALM* 345 (Dawsons of Pall Mall 1963) (1810); see also A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 15 (rev. ed. 1998) ("[A]s early as 1354 the words 'due process' were used in an English statute interpreting Magna Carta, and by the end of the fourteenth century 'due process of law' and 'law of the land' were interchangeable."); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 *HARV. L. REV.* 366, 368 (1911). The English Petition of Right of 1628 reaffirmed the 1354 act and again used the term "due process of law," instead of "the law of the land." See LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 4 (1999).

121. For a discussion of the background to, provenance of, and importance of the Magna Carta in England and America, see, for example, DANNY DANZIGER & JOHN GILLINGHAM, *1215: THE YEAR OF MAGNA CARTA 245–74* (2003); J.C. HOLT, *MAGNA CARTA* (2d ed. 1992); A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (1968); THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 22–25 (5th ed. 1956).

The immediate purpose of Magna Carta was to end a civil war between King John and the English barons.¹²² Drafted by the rebellious barons and other opponents of the crown and forced on a politically weakened king,¹²³ Magna Carta was an intensely practical document, unlike the philosophical statement of principle found in our Declaration of Independence.¹²⁴ Indeed, Magna Carta was originally thought to be a failure because the crown and barons resumed their civil war almost be-

122. The period from 1189, when John's predecessor and brother Richard I died, until 1215, when Magna Carta came into being, was a tumultuous time in English political and legal history. The barons had made a tradition of opposing the crown, rebelling against every king since William I. Historically, the barons had rallied around a rival to the throne. In 1215, however, there was no obvious alternative ruler. This time, the barons united behind a collection of rules seeking to correct failures of the feudal system and to prevent abuses of royal power. Their timing was opportune. King John had pursued a disastrous war with King Philip of France and lost much of the crown's holdings in that country. Those military defeats led John to raise additional armies and taxes, which further angered the barons. Moreover, King John unsuccessfully engaged in a rancorous dispute with Pope Innocent III over the right to appoint the Archbishop of Canterbury, a fight that King John completely lost. The combination of those failures undermined King John's influence with the barons and spurred them to revolt against his authority. To end the rebellion, King John signed Magna Carta in a meadow known as Runnymede on June 15, 1215. *See, e.g.,* DANZIGER & GILLINGHAM, *supra* note 121, at 255–61; HOLT, *supra* note 121, at 24, 188–89; HOWARD, *supra* note 121, at 2, 6; PLUCKNETT, *supra* note 121, at 20–25; JAMES K. WHEATON, *THE HISTORY OF THE MAGNA CARTA* 4–8 (2011).

123. The barons and other opponents of the crown drafted Magna Carta to force the king to submit to the rule of law. (Ironically, King John and Pope Innocent III, not the barons, may have authored the famous Chapter 39. *See* HOLT, *supra* note 121, at 6.) The draftsmen drew inspiration from the "Coronation Charter" issued by Henry I in 1100 to win support away from his brother, a rival for the crown. That charter served as an "election manifesto," criticizing his predecessor's unpopular practices and promising to jettison them. *See* DANZIGER & GILLINGHAM, *supra* note 121, at 257–58; HOLT, *supra* note 121, at 36–38; *id.* app. 4, at 418–28. For intellectual support, Magna Carta drew on the views of Hubert Walter, Archbishop of Canterbury under Richard I, and Stephen Langton, Walter's successor. They believed in a system of natural law that was superior to the crown's authority, that "loyalty was devotion, not to a man, but to a system of law and order" which they believed to be "a reflection of the law and order of the universe." PLUCKNETT, *supra* note 121, at 21 (citation omitted).

124. *See* HOLT, *supra* note 121, at 6 (noting that Magna Carta was "a political document produced in a crisis"); HOWARD, *supra* note 121, at 8–9, 22; FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, *A SKETCH OF ENGLISH LEGAL HISTORY* 78–79 (1915); PLUCKNETT, *supra* note 121, at 24–25.

fore the ink was dry.¹²⁵ But history has proved the charter's importance long after the death of its signatories.

Because Magna Carta was a written charter bearing King John's seal and committing him and his successors "publicly for all time" to observe its requirements,¹²⁶ the charter's "immediate result, apart from the reforms contained in it, was to familiari[z]e people with the idea that by means of a written document it was possible to make notable changes in the law,"¹²⁷ a proposition that foreshadowed our written Constitution. Another "decisive achievement[]" of 1215" was the "shift" from "individual" to "communal" or "corporate privilege," which laid the framework for our Bill of Rights.¹²⁸ In 1297, King Edward I placed Magna Carta on the Statute Books of England,¹²⁹ and in 1368 Parliament effectively bestowed on Magna Carta the status of a constitution,¹³⁰ by providing that it would nullify the terms of any inconsistent law.¹³¹ Over the ensuing

125. See HOLT, *supra* note 121, at 1. King John found Chapter 61 particularly irritating because it established a council of barons that could overrule the king for violating the charter's guarantees. King John entreated the papacy for support, and Pope Innocent III sided with King John because the pope saw the council of barons as a challenge to the papal authority over the king. A new insurrection broke out, known as the First Baron's War, which ended in 1216 with John's death. To placate the barons, John's son and successor Henry III reissued a shortened, revised version of Magna Carta as the Charter of Liberties of 1216. Issuance of the new charter quelled any thoughts of further revolt, and Henry III was able to remain on the throne. See, e.g., DANZIGER & GILLINGHAM, *supra* note 121, at 253–61; WHEATON, *supra* note 122, at 8–10, 52–53. The crown repromulgated Magna Carta in 1216, 1217, and 1225. See HOWARD, *supra* note 120, at 8–9. In that last reissuance the charter acquired the name "Magna Carta" to distinguish it from charters dealing with use of the forests for game and wood. See DANZIGER & GILLINGHAM, *supra* note 121, at 269. Successors to Henry III reaffirmed Magna Carta on dozens of occasions before the close of the Middle Ages. See WHEATON, *supra* note 122, at 23.

126. HOLT, *supra* note 121, at 259.

127. PLUCKNETT, *supra* note 121, at 25–26; see also HOLT, *supra* note 121, at 18–19 ("Approached as political theory [Magna Carta] sought to establish the rights of subjects against authority and maintained the principle that authority was subject to law.").

128. See HOLT, *supra* note 121, at 55.

129. See HOWARD, *supra* note 121, at 298.

130. See *id.* at 299.

131. See 42 Edward III, c. 1 (1368) ("[Magna Carta shall be] holden and kept in all points; and if any Statute be made to the contrary that shall be holden for none."), reprinted in HOWARD, *supra* note 121, at 9. The Framers incorporated that principle into the Supremacy Clause of Article VI of the Constitution. See U.S. CONST. art. VI, cl. 2.

800 years, Magna Carta has become one of the foundational laws of Anglo-American legal history.¹³²

The critical section in Magna Carta is Chapter 39, a provision that “stands out above all others,”¹³³ perhaps to the point of being “a sacred text, the nearest approach to an irrepealable ‘fundamental statute’ that England has ever had.”¹³⁴ It provided that “[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go send against him, except by the lawful judgement of his peers or by the law of the land.”¹³⁵ By stating that even the king was subject to the rule of law, Chapter 39 imposed substantive and procedural restraints on the crown to prevent King John from abusing royal power.¹³⁶ It sought to protect parties against arbitrary detention and punishment by prohibiting such action “except by the lawful judgement of his peers or by the law of the land,”¹³⁷ a term that Coke construed to refer to “the Common Law, Statute Law, or Custome of England.”¹³⁸

The colonists brought English law, including Magna Carta and Coke’s treatise, with them to the New World.¹³⁹ The guar-

132. “In 1770 William Pitt the Elder called it ‘the Bible of the English Constitution’ . . . In 1956 the English judge, Lord Denning, described it as ‘the greatest constitutional document of all times—the foundation of the freedom of the individual against the arbitrary authority of the despot.’” HOLT, *supra* note 121, at 277–78; *see also, e.g., id.* at 21; HOWARD, *supra* note 121, at 24; WHEATON, *supra* note 122, at 28–32.

133. HOWARD, *supra* note 120, at 14.

134. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 173 (2d ed. 1898).

135. HOLT, *supra* note 121, app. 6, at 461.

136. *See, e.g., id.* at 35, 45, 81–83; HOWARD, *supra* note 121, at 7; 1 POLLOCK & MAITLAND, *supra* note 134, at 182–83.

137. HOLT, *supra* note 121, app. 6, at 461.

138. Ellis Sandoz, *Introduction* to *THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW* 16–17 (Ellis Sandoz ed., 1993); *see also* Chapman & McConnell, *supra* note 113, at 1679 (“Fundamentally, ‘due process’ meant that the government may not interfere with established rights without legal authorization and according to law, with ‘law’ meaning the common law as customarily applied by courts and retrospectively declared by Parliament, or as modified prospectively by general acts of Parliament.”). Coke thought that the terms “due process of law” and “the law of the land” were interchangeable. *See* EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 50 (E. & R. Brooke 1797) (1642).

139. *See* DANZIGER & GILLINGHAM, *supra* note 121, at 272 (“Magna Carta was headline news at the time that the American colonies were being settled.”); HOWARD, *supra* note 121, at xi, 15, 19, app. B, at 397 (listing charters). Coke and Blackstone

antee of “the law of the land” or “due process of law” appeared in the charters of the colonies, in statutes passed by the colonial assemblies, in resolutions of the Continental Congress, in the Declaration of Independence, and in state constitutions.¹⁴⁰ Chapter 39 is the direct historical antecedent to the “cornerstone” principle carried forward into contemporary English law¹⁴¹ and the Fifth and Fourteenth Amendment Due Process Clauses:¹⁴² No one may be “deprived of life, liberty, or property without due process of law.”¹⁴³

had an important influence on early American law. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30–31 (1967); HOWARD, *supra* note 121, at 128; PLUCKNETT, *supra* note 121, at 25; Chapman & McConnell, *supra* note 113, at 1684. For discussions of the development of law in the colonies and new nation, see, for example, MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004); PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* (rev. ed. 1998); LAW AND AUTHORITY IN COLONIAL AMERICA (George Athan Billias ed., 1967); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830* (1994).

140. See, e.g., HOLT, *supra* note 121, at 17–18; HOWARD, *supra* note 121, at 15–16, 211–15; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 269 (2d ed. 1998); Chapman & McConnell, *supra* note 113, at 1705; Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408, 435–40 & nn.106–30 (2010).

141. See DANZIGER & GILLINGHAM, *supra* note 121, at xiii (“The eloquence of [Chapters 39 and 40 of Magna Carta], the nobility and idealism they express, has elevated this piece of legislation to eternal iconic status.”); HOWARD, *supra* note 121, at 23 (“Since Magna Carta the Common Law has been the cornerstone of individual liberties . . .”); SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 17 (Richard L. Perry & John C. Cooper eds., 1959).

142. See, e.g., *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856) (“The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, ‘but by the judgment of his peers, or the law of the land.’ The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words.”); see also, e.g., *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Hovey v. Elliott*, 167 U.S. 409, 415–17 (1897); *Hurtado v. California*, 110 U.S. 516, 543 (1884) (Harlan, J., dissenting); *Davidson v. New Orleans*, 96 U.S. 97, 101 (1878) (“The equivalent of the phrase ‘due process of law,’ according to Lord Coke, is found in the words ‘law of the land,’ in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown.”); *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 342–43

Chapter 39 of Magna Carta was a historic guarantee in Western civilization, and it has served as a font of liberty in England and America. Yet, Chapter 39 did not impose any duty on the king to rule, make decisions, or issue edicts of any type.¹⁴⁴ On the contrary, the barons who forced Magna Carta on King John sought to weaken his ability to rule, and they likely would have been perfectly happy if he had left them alone and done nothing. Over time, English law recognized that Magna Carta also limited the authority of Parliament, which cannot enact legislation that conflicts with Magna Carta. But the Great Charter does not require Parliament to legislate at all.¹⁴⁵ The same principle took

(Mass. 1857) (Shaw, J.); HOWARD, *supra* note 121, at 14–15, 23, 300 & n.6 (collecting state court cases to that effect).

143. James Madison was the principal drafter of the Fifth Amendment, and he chose the phrase “due process of law,” not “the law of the land.” No one knows precisely why he made that choice. See, e.g., Williams, *supra* note 140, at 445–46. Some speculate that he used the former to avoid implying that, given the text of the Article VI Supremacy Clause, the term “the law of the land” could permit Congress to escape being subject to the clause because federal legislation would be deemed “the supreme Law of the Land.” See Chapman & McConnell, *supra* note 113, at 1723–24.

144. Early judicial decisions and treatises addressed questions such as whether state or local ordinances violated state constitution due process provisions. None suggested that due process imposes affirmative duties on a legislature. See, e.g., *Murray's Lessee*, 59 U.S. (18 How.) 272; *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 241 (1819); *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1 (1833); *Mayo v. Wilson*, 1 N.H. 53 (1817); *Trs. of the Univ. of N.C. v. Foy*, 3 N.C. (2 Hayw.) 310, 320–24 (1804); *Lindsay v. Comm'rs.*, 2 S.C.L. (2 Bay) 38 (Ct. App. 1796); *Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382 (Ct. Com. Pl. 1794); *Bank of the State v. Cooper*, 10 Tenn. 599 (1831); *Townsend v. Townsend*, 7 Tenn. (1 Peck) 1 (1821); Chapman & McConnell, *supra* note 113, at 1707–13, 1720 (Due Process Clause applies only to legislation tantamount to a “quasi-judicial” act that deprives someone of “life, liberty, or property”); Williams, *supra* note 140, at 452 (“[F]our prominent legal commentators—Judge Henry St. George Tucker, Chancellor James Kent, William Rawle, and Justice Joseph Story— . . . were remarkably uniform in attributing to the Due Process Clause an exclusively procedural meaning, most commonly by reference to Coke’s equation of ‘due process of law’ with ‘presentment and indictment.’”).

145. See, e.g., HOWARD, *supra* note 121, at 303–05 (due process applies to acts of the legislature); Williams, *supra* note 140, at 434 (“[A]n eighteenth-century reader well-versed in English law would likely have understood both the law of the land and due process of law to require only compliance with duly enacted positive law, with the latter concept having a somewhat more limited connotation relating specifically to judicial proceedings.”); Chapman & McConnell, *supra* note 113, at 1679 (“By the time the Fifth Amendment was enacted, everyone agreed that due process applied to executive officials and courts. It meant that the executive could not deprive anyone of a right except as authorized by law, and that to be legitimate, a deprivation of

root in this nation. Early American judicial decisions and treatises regarded due process as a protection *against* government, including the legislature, not as a guarantee of action *by* government.¹⁴⁶ Contemporary Supreme Court decisions agree.¹⁴⁷ The bottom line is this: The English barons and American Framers intended that the guarantees afforded by “the law of the land” and “due process of law” would serve as entirely negative protections against the government, and they have been construed to afford only such protection ever since. Congressional inaction therefore cannot violate the Due Process Clause.¹⁴⁸

3. Equal Protection Principles

Equal protection law demands that the government justify the distinctions it draws.¹⁴⁹ That rule applies to courts as well as

rights had to be preceded by certain procedural protections characteristic of judicial process: generally, presentment, indictment, and trial by jury.”).

146. *See, e.g.*, *Dent v. West Virginia*, 129 U.S. 114, 124 (1889); *Loan Ass’n v. Topeka*, 87 U.S. (20 Wall.) 655, 662 (1874); HOWARD, *supra* note 121, at 303–07; Williams, *supra* note 140, at 446–54.

147. *See Davidson v. Cannon*, 474 U.S. 344, 348 (1986); cases cited *supra* note 119.

148. *See, e.g.*, William Howard Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 3 (1905) (“Run through the Magna Charta of 1215, the Petition of Right of 1625, and the Bill of Rights of 1688, the great charters of English liberty, and find in them an insistence not on general principles, but on procedure. Take the most comprehensive—‘No man shall be deprived of life, liberty, or property without due process of law’—this does not attempt to define the cases in which a man shall be entitled to life, liberty and property, but points to, and insists upon the necessity for a legal procedure by which it shall be done.”). That proposition has even more force in the United States than in England, given the unique role our Constitution plays. “In America a constitution had become, as Madison pointed out, a charter of power granted by liberty rather than, as in Europe, a charter of liberty granted by power.” WOOD, *supra* note 140, at 601; *see also City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 672 (1976) (“Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create.”).

149. Most distinctions need only be minimally rational, *see, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 465–70 (1981), just enough to show that the legislative process was not “out to get” some disfavored group, *see, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (striking down a statute that denied federal recognition of state-recognized same-sex marriages); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (holding irrational a federal law targeted at “hippies” and “hippie communes,” which rendered ineligible for food stamps a household containing a person unrelated by blood or marriage to the others). But some distinctions are lawful if (and only if) there is a compelling justification for them. The classic example is a distinction based on race. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224–27 (1995).

to legislatures and executive officials.¹⁵⁰ The argument therefore could be made that it would be irrational, so irrational as to be unconstitutional, for a court to construe the Due Process Clause in a manner that distinguishes congressional *inaction* from congressional *action*, or distinguishes *congressional inaction* from *state legislative inaction*. After all, it is possible for Congress to pass legislation with a benign intent that becomes malignant as time goes by, legislation that a majority of each chamber of Congress cannot or refuses to modify. Leaving in place a law that has a racially offensive effect, the argument continues, is not materially different from enacting such a law today. Finally, it also makes little sense for due process to have one meaning for purposes of the Fifth Amendment and a different one for the Fourteenth Amendment.

Is the premise of that argument possible? People certainly could act in a group for illicit reasons that no individual would endorse. Yet, the political world today is not dead set on discriminating against African-Americans, who occupy important positions in the federal, state, and local governments and other policymaking arenas.¹⁵¹ Civil rights laws such as the Voting Rights Act of 1965 have outlawed the racially discriminatory practices that previously resulted in widespread disenfranchisement of African-Americans.¹⁵² Congress is not chock full of legislators whose judgments could be deemed presumptively racist.¹⁵³ Arguably, that outcome is far less likely to happen

150. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that courts cannot consider race in child-custody disputes); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (finding that judicial enforcement of racially restrictive covenants violated the Equal Protection Clause); *Ex parte Virginia*, 100 U.S. 339, 346–47 (1879) (noting that state executives and judges are bound by the Fourteenth Amendment); *Virginia v. Rives*, 100 U.S. 313, 318 (1879) (same).

151. See KENNEDY, *supra* note 1, at 27–28.

152. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (2006)); see also *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2620 (2013).

153. See, e.g., *Shelby Cnty.*, 133 S. Ct. at 2625 (“Nearly 50 years later [than 1965, when the Voting Rights Act was first adopted], things have changed dramatically.”); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (“Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”). Professor Randall Kennedy made that same point in the context of the federal crack cocaine sentencing laws:

Those who adopt [a] stance [of hostility toward American law enforcement] frequently proceed as if there existed no dramatic

on Capitol Hill than elsewhere. The national media focuses their attention on Capitol Hill, making it highly unlikely that the actions of a bigoted Congress could go unnoticed. If a Senator or Representative were shown to have intended to discriminate against African-Americans, the media would pillory him, and the electorate would exact retribution at the next election. Unfortunately, it nonetheless is the case that there will be politicians who may act with discriminatory purposes or who may delight in seeing discriminatory outcomes—just as there will be politicians who commit crimes.¹⁵⁴ Still, unless that discriminatory intent becomes positive law, it does not violate the Constitution any more than an “evil intent” constitutes a crime before it accompanies a criminal act.¹⁵⁵

Subjecting congressional inaction to equal protection review also poses a raft of decisional problems for the courts. For example, courts would have to define a time period past which they would deem unreasonable Congress’s failure to pass remedial legislation. Any period chosen by the courts would be entirely arbitrary, however, because neither Article I nor the Due Process Clause supplies a yardstick for fixing its length. Some courts might select a two-year period because that is the term held by a member of the House of Representatives; others might select a six-year period because that is the tenure for a Senator; and a third group might split the difference and use a four-year span, which also coincides with the term of the President. Alternatively, courts might calculate the mean period that it takes for Congress to pass legislation and use it as the standard. But even this approach

discontinuities in American history, as if there existed little difference between the practices and sentiments that characterized the eras of slavery and de jure segregation and those prevalent today, as if African-Americans had completely failed in their efforts to reform and participate in the creation and implementation of government policy, and as if black mayors, chiefs of police, and legislators did not exist.

See Kennedy, *supra* note 9, at 1258–59.

154. See, e.g., Michael S. Schmidt, *Jesse Jackson Jr. Pleads Guilty: ‘I Lived Off My Campaign,’* N.Y. TIMES, Feb. 21, 2013, at A18; Susan Schmidt & James V. Grimaldi, *Ney Sentenced to 30 Months In Prison for Abramoff Deals,* WASH. POST, Jan. 20, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/19/AR2007011900162.html>.

155. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *21 (noting that a crime consists of “a vicious will” and “an unlawful act consequent upon such vicious will”); *Morissette v. United States*, 342 U.S. 246, 251 (1952).

would lead to an arbitrary result. Unless every bill were treated the same as every other, courts would be forced to define categories of legislation—appropriations bills versus substantive bills, environmental bills versus criminal bills, civil rights bills versus tax bills, and so forth—to use for comparison without being able to draw upon any textual guidance from the Constitution regarding how long a particular bill should take to become law. Trying to decide how to treat bills negotiated by a conference committee after passage by each chamber or negotiated between the Congress and the President before a bill is introduced in either chamber further exacerbates the complexity of the undertaking. Thus, there is no objective way for the courts to define the amount of time Congress may have to address a particular problem before the courts would find its inaction unconstitutional.¹⁵⁶

An additional factor that the courts would need to evaluate is the reason why each chamber did not remedy the identified racially discriminatory law. But that inquiry would force courts to decide why each member voted as he or she did, to gauge the seriousness of each of the manifold issues facing Congress, and to rank problems by their severity, immediacy, or irreparability. For example, who can answer objectively which concern is more important, more urgent, or more demanding of legislators' immediate attention than the others—remediating the radioactive waste generated at nuclear power plants and nuclear weapons facilities, identifying the precise combination of tax benefits and spending cuts that will best reduce the federal deficit without stalling the economy, choosing between greater federal spending for medical or scientific research, or deciding whether the federal crack cocaine sentencing laws unfairly burden African-Americans—without measurably deterring use of that drug? Again, there is no objective metric that courts can use to define those cardinal values or to establish ordinal relationships ranking those problems, and reasonable people acting in good faith can differ in opinion over the priority that different problems should receive.

156. Speedy consideration of legislation is not always beneficial. One of the criticisms leveled against the Anti-Drug Abuse Act of 1986 is that Congress acted with undue haste in passing that law. See KENNEDY, *supra* note 1, at 368, 374 (noting but disagreeing with that criticism).

Still, this analysis leaves open the question whether a state or local government's inaction must be treated the same as inaction by the federal government. For two reasons, the answer may be no.

First, the federal government and the States are part of the same union, but they enjoy separate sovereign status.¹⁵⁷ Articles I, II, and III of the Constitution establish a three-part structure for the federal government and define the powers of each branch. States may structure their governments in a different manner because federal separation-of-powers law and principles do not apply to them.¹⁵⁸ The Constitution also expressly forbids states from performing various specified activities that are reserved to the federal government, such as entering into treaties with foreign nations,¹⁵⁹ while implicitly denying the federal government some authority that the States possess, such as a general police power.¹⁶⁰ The Bill of Rights, of course, originally applied only to the federal government.¹⁶¹ Given these differences, there is nothing inherently unusual about different features of the Constitution applying differently to the

157. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress may not conscript state officials to enforce federal law); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (ruling that Congress cannot abrogate a state's Eleventh Amendment immunity by invoking its Article I powers); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may not direct the States to adopt a regulatory program); *Coyle v. Smith*, 221 U.S. 559 (1911) (ruling that Congress cannot select for a state the site of its capital).

158. *See, e.g.*, *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (plurality opinion); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

159. *See* U.S. CONST. art I, § 10, cl. 1:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

The Article VI Supremacy Clause makes it clear that federal law supersedes state law when the two conflict. *See id.* art. VI, cl. 2; *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012).

160. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (holding unconstitutional a federal statute making rape an actionable civil claim); *United States v. Lopez*, 514 U.S. 549 (1995) (holding unconstitutional, as exceeding Congress's commerce power, a federal law that made it a crime to possess a firearm in the vicinity of a school).

161. *See* *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 247 (1833).

federal government and to the States. As relevant here, while congressional inaction is no concern of Article I or the Due Process Clause, state legislative inaction is not necessarily immune from review under the Equal Protection Clause.

Second, the Due Process and Equal Protection Clauses are materially different from each other in the following ways. The origin of each clause is different: The Due Process Clause stems from Chapter 39 of Magna Carta, whereas the Equal Protection Clause descends from Chapter 40.¹⁶² Similarly, the text of each clause is different: The Due Process Clause applies to the federal and state governments, whereas the Equal Protection Clause applies only to the States. Finally, the purpose of each clause is different: The Due Process Clause protects against arbitrary governmental conduct, whereas the Equal Protection Clause forbids discriminatory state action.¹⁶³

That last point is particularly important. Like the civil rights statutes that Congress passed during Reconstruction,¹⁶⁴ the Equal Protection Clause limits state sovereignty,¹⁶⁵ which includes the discretion to decide how and when to enforce state

162. See HOWARD, *supra* note 121, at 37–38. Magna Carta Chapter 40 read as follows: “To no one will We sell, to none will We deny or delay, right or justice.” *Id.* at 38. Over time, as the crown reissued Magna Carta, Chapters 39 and 40 merged into a renumbered Chapter 29. *Id.* at 315.

163. Compare, e.g., *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (construing the Due Process Clause), with, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417, 2419–21 (2013) (construing the Equal Protection Clause).

164. See, e.g., Freedmen’s Bureau Act, ch. 90, 13 Stat. 507 (1865); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 28 U.S.C. § 1443 (2006), 42 U.S.C. §§ 1981–1982 (2006)); Enforcement Act of 1870, ch. 114, 16 Stat. 140 (codified as amended at 18 U.S.C. §§ 241–42 (2006)); Enforcement Act of 1871, ch. 99, 16 Stat. 433 (codified as amended at 42 U.S.C. §§ 1981, 1983 (2006)); Ku Klux Act of 1871, ch. 22, 17 Stat. 13 (codified at 18 U.S.C. § 241 (2006), 42 U.S.C. §§ 1983, 1985(3) (2006)); Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *held unconstitutional* in *Civil Rights Cases*, 109 U.S. 3 (1883); *United Bhd. of Carpenters & Joiners of Am., Local 160 v. Scott*, 463 U.S. 825 (1983); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 665–90 (1978); *Griffin v. Breckenridge*, 403 U.S. 88, 99–101 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Georgia v. Rachel*, 384 U.S. 780 (1966).

165. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451–56 (1976) (holding that Congress may abrogate a state’s Eleventh Amendment immunity when legislating pursuant to the authority granted Congress by Section 5 of the Fourteenth Amendment); *South Carolina v. Katzenbach*, 383 U.S. 301, 308–25 (1966) (holding that Congress may limit state sovereignty over voting by virtue of its enforcement authority under Section 2 of the Fifteenth Amendment); *Ex parte Virginia*, 100 U.S. 339, 345–48 (1879) (noting that the Fourteenth Amendment limits state sovereignty).

law. The history underlying the Equal Protection Clause reflects not only the nation's unfortunate pre-Reconstruction history of legalized slavery, but also an acknowledged post-Reconstruction failure by state and local law enforcement authorities to take affirmative steps to protect southern blacks from becoming victims of crime by enforcing the criminal law against disgruntled, predatory whites.¹⁶⁶ One goal of the Clause was to eliminate any doubt as to the constitutionality of the Reconstruction Era civil rights laws that Congress had enacted to prevent states and localities from effectively reinstituting a racial caste system by denying African-Americans the same legal protections afforded whites.¹⁶⁷ That problem had been part-and-parcel of statutory law and entrenched custom in slave-owning states before Reconstruction, and it remained a serious problem in those states even after the abolition of slavery. The Ku Klux Klan and its sympathizers preyed on newly freed slaves via threatened and actual use of arson, assault, and lynching.¹⁶⁸ In a manner reminiscent of the days when African-Americans were at the mercy of white slaveholders, state and local officials were either unable or unwilling to use the criminal law to protect blacks from the Klan and the violence that it caused or inspired.¹⁶⁹ Rendering unlawful such discriminatory state and local inaction was a central purpose of the Equal Protection Clause.¹⁷⁰ State inaction, therefore, may be a greater concern for purposes of the Equal Protection Clause than is federal inaction for purposes of the Due Process Clause.

Thus, even though federal legislative inaction is not subject to review under due process principles, equal protection principles may govern state legislative inaction. If so, that is not an irrational result by any means. In fact, the converse is true. The text and history of the Equal Protection Clause make clear that it aims at the States, not at the federal government, and that a principal reason for inclusion of the Equal Protection Clause in

166. See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 342-43, 425-59 (1988).

167. See, e.g., *Alfred H. Mayer Co.*, 392 U.S. at 436.

168. See, e.g., FONER, *supra* note 166, at 342-43, 425-59.

169. See, e.g., *Collins v. Hardyman*, 341 U.S. 651, 662 (1951); FONER, *supra* note 166, at 434-35, 438; KENNEDY, *supra* note 1, at 29-49, 87.

170. See KENNEDY, *supra* note 1, at 29-49, 87.

the Fourteenth Amendment was to remedy the southern states' failure to enforce the criminal laws against whites terrorizing blacks. It would hardly be reasonable to demand that the Due Process Clause impose identical limits on the national government for offenses that only the States committed.¹⁷¹

In truth, it is the Sixth Circuit's foray into the equal protection principles governing federal crack cocaine sentencing law that has produced anomalies. The Fair Sentencing Act of 2010 prospectively ameliorated the harsh effects of the Anti-Drug Abuse Act of 1986 on black crack dealers. Congress surely reckoned that its decision to reduce the racial disparities produced by the 1986 statute could be attacked from the right as being "soft on crime," but Congress likely did not anticipate that it could be challenged from the left as harboring a bigoted mindset. That, however, is exactly what the Sixth Circuit found. In a second anomaly, the Sixth Circuit relied on a provision in the Constitution, the Due Process Clause, which can be violated only if the government "deprives" someone of a liberty interest. Yet, if Congress had done nothing in 2010 to reduce the crack-to-powder sentencing ratio in the Anti-Drug Abuse Act of 1986—that is, if Congress had passed no law that year to amend the 1986 statute, just as it had done (or had not done) for the previous twenty-three years—Congress could not have violated the Due Process Clause because it would not have "deprived" anyone of anything.

III. CRACK COCAINE, RACE, AND FEDERAL DRUG POLICY

Reasonable people disagree about how best to deal with drug use. The two bookend positions are (1) across-the-board criminalization and vigorous enforcement, and (2) decriminalization and medical treatment of addicts, with sundry alternatives in between.¹⁷² Any point on that spectrum could be defen-

171. For the parallel argument that substantive due process principles may not apply to the federal government through the Fifth Amendment, but may apply to the states via the Fourteenth Amendment, see, for example, Williams, *supra* note 140, at 485–86, 489, 507.

172. The literature on drug policy is immense. For a sample of different views, see, for example, WILLIAM J. BENNETT ET AL., *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS* (1996); DUKE & GROSS,

sible assuming the decisionmaker weighs all of the relevant costs and benefits to all affected parties before hitching drug policy to a particular star. But a complete and balanced assessment is indispensable to rational policymaking. It would be unreasonable to focus shortsightedly on the effect that any particular drug policy would have on the parties trafficking in controlled substances to the exclusion of the adverse effects that this business and our laws will have on others in the community. Ignoring the very real plight suffered by the residents of communities infected by drug trafficking will only guarantee an entirely one-sided analysis of this problem.¹⁷³ The Sixth Circuit, however, committed that mortal sin, and it is one of the ultimate flaws in its decision.

The Anti-Drug Abuse Act of 1986 has led to the imprisonment of large numbers of African-Americans convicted of trafficking crack cocaine.¹⁷⁴ The numbers are undeniable, and this consequence should give us pause. Even well-intentioned policy judgments can go awry when enacted into positive law. Prescience is not built into our DNA. There is no shame—on the contrary, there is much to be applauded—in admitting a mistake. Congress acted prudently in reexamining the Anti-Drug Abuse Act of 1986 in light of its results.

Numerous options were available to Congress to address the crack-to-powder cocaine sentencing disparities. Perhaps Con-

supra note 1; SALLY L. SATEL, DRUG TREATMENT: THE CASE FOR COERCION (1999); James Q. Wilson, *Against the Legalization of Drugs*, 89 COMMENT. 21, 26 (1990).

173. See Kennedy, *supra* note 9, at 1260–61 (“Consider, for instance, the stifling of intelligent debate over drug policy by the rhetoric of paranoia. On the one hand, some condemn as ‘genocide’ the punitive ‘war on drugs’ because a disproportionate number of those subjected to arrest, prosecution, and incarceration for drug use are black. At the same time, others, including Representative Charles Rangel and Director of the Office of National Drug Control Policy Lee Brown, condemn proposals for decriminalizing drug use on the grounds that such policies would amount to genocide because racial minorities would constitute a disproportionate number of those allowed to pursue their drug habits without deterrent intervention by the state. No one in either of these camps has come forward with credible evidence to suggest that American drug policy is truly genocidal—that is, *deliberately* designed to eradicate a people. Yet the rhetoric of racial genocide clearly influences the public debate about this aspect of criminal law enforcement policy.” (footnotes omitted)).

174. See, e.g., *United States v. Then*, 56 F.3d 464, 467 (2d Cir. 1995) (Calabresi, J., concurring) (“[T]he statistical evidence demonstrating the discriminatory impact of the current sentencing differential is now ‘irresistible.’”); MAUER, *supra* note 27, at 158–216, 221; 2007 SENTENCING COMM’N REPORT, *supra* note 3, at 15–17.

gress could have made the new 18:1 ratio retroactive and allowed prisoners sentenced under the 1986 Act to seek a reduction in their sentences. Alternately, Congress could have eliminated any difference between the sentences imposed for trafficking in crack and powdered cocaine by making the same quantities trigger minimum sentences for both offenses or by sentencing both crimes under the rules currently used for powdered cocaine. Third, Congress could have eliminated the mandatory minimum provisions of the 1986 Act and allowed district courts to select a sentence under the now-discretionary Federal Sentencing Guidelines.¹⁷⁵ Fourth, Congress could have left the ratios and mandatory sentencing features of the 1986 Act in place but afforded trial courts discretion to sentence below the mandatory minimum if they found a lesser sentence appropriate in a specific case.¹⁷⁶ There are many options that Congress could have chosen, or could now enact into law if it

175. In the mid-1980s, in response to a concern with sentencing disparities in the federal system, Congress enacted the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551 (2006), 28 U.S.C. §§ 991-98 (2006)). This law established the United States Sentencing Commission and directed it to create, and revise as necessary, determinate sentencing rules, labeled Sentencing Guidelines, for federal criminal cases. In *Mistretta v. United States*, 488 U.S. 361 (1989), the Supreme Court upheld the constitutionality of the Act and determinate sentencing guidelines against various challenges resting on separation of powers theories. *Id.* at 412. Sixteen years later, however, the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005), that the mandatory nature of the Sentencing Guidelines violated a defendant's right under the Sixth Amendment to have the jury find every fact necessary to impose an enhanced punishment. *Id.* at 244. The result of the *Booker* decision is that the once-mandatory Sentencing Guidelines are now merely advisory. For a discussion of *Mistretta* and *Booker* and where they leave federal correctional law today, see Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 320-35 (2013).

176. In 1994, Congress enacted a "safety valve" provision granting district courts discretion to impose a sentence below the mandatory minimum in limited circumstances. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985 (codified at 18 U.S.C. § 3553 (2006)). A defendant is eligible only if he has a limited criminal history, he did not use violence or weapons in the offense, he was not an organizer or leader of the enterprise, he did not engage in a continuing criminal enterprise, he provided information about the offense to the government in a timely manner, and the offense did not result in death or serious bodily injury. U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2013). Senators Pat Leahy and Rand Paul recently introduced legislation that would expand the safety valve to all defendants regardless of the circumstances of the offense. See Justice Safety Valve Act of 2013, S. 619, 113th Cong. § 2 (2013).

were willing to revisit this issue, rather than leave it to the courts.

In addition to the effect of sentencing policy on offenders, a critical factor for any decisionmaker to consider—one that the Sixth Circuit failed even to acknowledge existed—is the effect that the policy would have on the residents of urban black communities *not* involved in the crack trade. Indeed, the most bewildering aspect of the Sixth Circuit's *Blewett* decision is the court's utter failure to recognize that the government and defendants, including black defendants, are not the only interested parties in sentencing policy decisions. Such exclusive focus might be warranted if the only rationale for sentencing were retribution. Retribution justifies criminal punishment on the theory that the defendant, simply by breaking the law, deserves punishment, regardless of the effect that the punishment will have on his behavior or that of others in the community. But retribution is not the only theoretical justification for punishment—indeed, at one time retribution had a backwater status in penology¹⁷⁷—and the criminal law has never felt beholden to that theory or any other.¹⁷⁸ Specific and general deterrence, incapacitation, rehabilitation, education, and others have competed for the primary role in sentencing policy for some time now, with one theory passing the others at various points in our history.¹⁷⁹ Today, incapacitation and deterrence

177. See, e.g., *Williams v. New York*, 337 U.S. 241, 248 (1949) (“Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.” (footnote omitted)); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 34–35 (2001); DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 54–58 (1980).

178. See, e.g., *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion) (“[T]he Constitution does not mandate adoption of any one penological theory. A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. Some or all of these justifications may play a role in a State’s sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.” (citations omitted) (internal quotation marks omitted)); *Powell v. Texas*, 392 U.S. 514, 530 (1968) (plurality opinion) (noting that the Court “has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects”).

179. For discussions of the theories of deterrence, retribution, incapacitation, education, and rehabilitation as justifications for punishment, efforts to implement practices consistent with those theories, and the (sometimes intermittent, sometimes repeated) failures of those efforts, see, for example *Mistretta*, 488 U.S. at 363–71;

have become the principal rationales for punishment, especially for long-term sentences, on the ground that lengthy prison terms quarantine offenders from the communities they pilaged.¹⁸⁰

Those rationales must be considered when evaluating drug control policy options. Crack dealers largely sell their wares in urban communities. Given contemporary housing patterns, the residents in those communities, like the dealers themselves, are predominantly black.¹⁸¹ Residents who are victims of crime will far outnumber those who are perpetrators.¹⁸² Those victims suffer the effects of violence brought on by drug trafficking,¹⁸³ and they endure the fear consequent upon living in a community haunted by outlaws.¹⁸⁴ Punishments, even severe ones, may be necessary to protect innocent third parties in the communities

FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981); JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 326 (C. K. Ogden ed., 1931); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 231–35 (1968); IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 198 (W. Hastie trans., Edinburgh, T & T Clark 1887) (1797); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35–70 (1968).

180. See, e.g., Larkin, *supra* note 53, at 11–24.

181. See, e.g., MAUER, *supra* note 27, at 164 (noting “residential racial segregation patterns”); Jeffrey Fagan, *Crime, Law, and the Community: Dynamics of Incarceration in New York City*, in *THE FUTURE OF IMPRISONMENT* 27, 35 (Michael Tonry ed., 2004).

182. See, e.g., WESTERN, *supra* note 1, at 11–12 (“Even at the height of the prison boom, in the early 2000s, less than 1 percent of the U.S. population was behind bars. These tiny incarceration rates should not be surprising: Prisons and jails are criminal justice institutions. Their constituents are the small number of criminals who break the law, not the vast majority of law-abiding citizens.”).

183. Newspaper headlines reveal that drug dealers are extremely violent and terrorize local communities. See, e.g., Tom Hays & Howard Campbell, *Jamaican drug lord sentenced in NY to 23 years*, ASSOCIATED PRESS, June 8, 2012, <http://bigstory.ap.org/article/jamaican-drug-lord-sentenced-ny-23-years> (“Most startling was his account of how Coke ordered his men to kill a deadbeat drug dealer nicknamed ‘Tall Mar’ by tying him up and dismembering him with a chain saw.”); Larkin, *supra* note 53, at 27 (collecting newspaper stories). The threat and fact of violence associated with crack trafficking seems to have dipped, but not disappeared. See 2007 U.S. SENTENCING COMM’N REPORT, *supra* note 3, at 36, 38, 86.

184. See ALEXANDER, *supra* note 1, at 51 (“No one should ever attempt to minimize the harm caused by crack cocaine and the related violence. As David Kennedy correctly observes, ‘[c]rack blew through America’s poor black neighborhoods like the Four Horsemen of the Apocalypse,’ leaving behind unspeakable devastation and suffering.” (footnote omitted) (quoting DAVID M. KENNEDY, *DON’T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA* 10 (2011))).

where crack trafficking flourishes. By deterring crime and imprisoning offenders, the system reduces the harms that innocent residents suffer and, over time, makes the community a less frightening place.¹⁸⁵ The benefits for residents, particularly those who have nowhere else to go, are immeasurable.¹⁸⁶ As Professor Randall Kennedy explains:

Although the administration of criminal justice has, at times, been used as an instrument of racial oppression, the principal problem facing African-Americans in the context of criminal justice today is not over-enforcement but *under-enforcement* of the laws. The most lethal danger facing African-Americans in their day-to-day lives is not white, racist officials of the state, but private, violent criminals (typically black) who attack those most vulnerable to them without regard to racial identity.¹⁸⁷

No debate over the appropriate policy for dealing with crack cocaine could attempt to be complete or impartial without considering the interests of the innocent victims of drug violence. At one time, it was standard operating procedure to focus only on the interests of the prosecution and the defense, to the exclusion of the discrete set of parties having the most personal interest in the work of the system—the victims of crime. Throughout its

185. The “Broken Windows” theory of policing—the theory that aggressive police enforcement against low-level street crimes both reduces the crime rate and enhances public safety—rests on the importance to a community of both the fact and perception of physical safety. See, e.g., GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996); George L. Kelling & James Q. Wilson, *Broken Windows: The police and neighborhood safety*, *THE ATLANTIC*, Mar. 1982, at 29, available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/>.

186. Consider this story:

In the face of community disruptions, some families isolate themselves from neighbours. In a series of interviews in the South Bronx, Andres Rengifo (2006) has observed that many residents seek to withdraw from their impoverished surroundings. One housing project resident, a single mother with four children (one of whom was attending Yale University and two of whom were in the prestigious Bronx High School of Science public school) said that although she had lived in the projects for seven years, “this place is a dump. I don’t talk to anyone, I don’t know anyone. That’s how we made it here.”

TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* 103 (2007).

187. Kennedy, *supra* note 9, at 1259 (footnotes omitted).

history, the criminal justice system has often shunted victims of crime aside, relegating them to the status of complainants, witnesses, or Victorian Age children—people who should be seen, but not heard.¹⁸⁸ That status started to change in the 1980s as victims successfully began to assert a right to be involved in a process that begins with their misfortune.¹⁸⁹ The criminal justice system now has abandoned its blinders toward victims.¹⁹⁰ The effect on victims of legal and policy decisions made by actors in the criminal justice system has become such an accepted factor in the calculus that it would be a clear mistake for decisionmakers to ignore their voice.¹⁹¹

Yet, the Sixth Circuit fell into the trap of ignoring victims in its *Blewett* analysis. The Sixth Circuit mistakenly subtracted from its analysis of the relevant interests a critical set—victims’ interests—that is an integral part of any approach based on effects. By treating defendants charged with crack trafficking as the only private parties with an interest in the proper use of the criminal law, the court treated Congress’s failure to apply the 2010 Act retroactively as tantamount to the resurrection of the Jim Crow laws. In so doing, the court gave no thought to the potential effect of the crack sentencing laws on ninety-nine per-

188. See, e.g., DOUGLAS BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE xxxv (3d ed. 2010).

189. See, e.g., PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT ii (1982); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 649–50 (1976).

190. In *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), the Supreme Court held that the Eighth Amendment Cruel and Unusual Punishment Clause forbids introduction of victim impact statements at the sentencing stage of capital cases. In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Court rejected any such per se rule and overruled *Booth* and *Gathers*.

191. See *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (“[I]n the administration of criminal justice, courts may not ignore the concerns of victims.”). Duke and Gross argue that the current drug prohibition laws inflict considerable harm on innocent third parties, a harm that is greater than drug use alone would cause. Their explanation of those harms also applies in this context:

Under prohibition, the innocent suffer at every turn. The users of illegal drugs do not bear even a fraction of the economic and social costs of their drug use; the nonuser bears a large portion: in unsafe streets, overcrowded, expensive prisons, diluted law-enforcement resources, hospital emergency rooms filled beyond capacity and inner cities becoming unlivable.

DUKE & GROSS, *supra* note 1, at 11.

cent of the black residents of the affected communities. The circuit court failed to recognize that the overwhelming number of African-Americans affected by the 1986 and 2010 drug laws are not part of the crack trade and that they have an undeniably legitimate and immediate interest in the street-level effect of any crack sentencing policy that Congress adopts. If stringent enforcement of the federal crack laws would improve communal life in urban neighborhoods otherwise ravaged by violence, fear, and despair, the best law enforcement policy for innocent black victims, and the best way to pay those residents the respect that they deserve, is to aggressively enforce current laws forbidding the sale of crack.¹⁹²

Legislators might reasonably believe that strict enforcement of the federal drug laws may be the best—and sometimes only—available federal vehicle to rid communities of drug-related violence. Congress cannot make ordinary street crimes a federal offense because the federal government lacks the expansive “police power” that the States enjoy.¹⁹³ As such, Congress must tie a federal law to a grant of authority in Article I. Over the last century, Congress has relied on the Commerce Clause as the jurisdictional “hook” to extend the criminal law to areas historically

192. As Randall Kennedy has argued:

Many have observed that, all too frequently, politicians, newspaper editors, and police officials express concern about crime only if they perceive that it inflicts injury upon whites. The more crime affects whites, the more likely officials are to respond. The less whites are harmed, the less likely officials are to respond. This critique suggests a very different approach to the crack cocaine-powdered cocaine distinction from that taken by the Minnesota Supreme Court. It suggests that we ought to commend rather than condemn the legislature’s distinction between crack and powdered cocaine. If it is true that blacks as a class are disproportionately *victimized* by the conduct punished by the statute at issue, then it follows that blacks as a class may be *helped* by measures reasonably thought to discourage such conduct.

Kennedy, *supra* note 9, at 1268–69 (footnotes omitted).

193. See *United States v. Lopez*, 514 U.S. 549, 566 (1995) (“The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”). Congress may regulate use of the channels or instrumentalities of interstate commerce, such as waterways and air travel, as well as features of intrastate commerce that affect interstate commerce when considered on a nationwide basis. See, e.g., *United States v. Morrison*, 529 U.S. 598, 608–09 (2000); *Lopez*, 514 U.S. at 558–59; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964); *Wickard v. Filburn*, 317 U.S. 111, 124 (1942); Larkin, *supra* note 175, at 337–38.

handled by the States,¹⁹⁴ but the Supreme Court has recently halted Congress's progress in that regard.¹⁹⁵ As a result, Congress likely cannot regulate ordinary violent crimes, such as murder, unless they are tied to drug trafficking,¹⁹⁶ or result from application of tools that travelled in interstate commerce.¹⁹⁷

Moreover, as all criminal justice professionals know, the offense of conviction can obscure the conduct that brought the defendant to the attention of law enforcement at the outset. More than ninety percent of convictions result from plea bargains,¹⁹⁸ so the charge to which a defendant pleads guilty may not represent the full spectrum of his criminal activities. If one wants to learn what a defendant has actually done, the critical document is not the indictment, but rather the presentence report, which details the defendant's "history and characteristics,"¹⁹⁹ as well as any other information relevant to sentencing.²⁰⁰ Critics of federal crack cocaine enforcement policy highlight the dichotomy between aggressive enforcement of the laws regarding crack and the lax enforcement of the laws dealing with violent crime.²⁰¹ Yet, it could be that aggressive enforcement of the federal drug laws by the FBI, the DEA, and Organized Crime Drug Enforcement Task Forces²⁰² can do

194. See Larkin, *supra* note 175, at 338.

195. See *supra* note 160.

196. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (holding that Congress can regulate home-grown cannabis).

197. See, e.g., *Scarborough v. United States*, 431 U.S. 563, 566–67 (1977) (finding proof that firearm used in crime travelled in interstate commerce was sufficient to establish federal nexus).

198. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

199. See FED. R. CRIM. P. 32(d)(2)(A).

200. See, e.g., 18 U.S.C. § 3661 (2006) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); *Williams v. New York*, 337 U.S. 241, 247 (1949) (stating that trial judge should impose sentence that fits crime and offender).

201. See, e.g., STUNTZ, *supra* note 1, at 2 ("[D]iscrimination against both black suspects and black crime victims grew steadily worse [over the last 60 years]—oddly, in an age of rising legal protection for civil rights. Today, black drug offenders are punished in great numbers, even as white drug offenders are usually ignored At the same time, blacks victimized by violent felonies regularly see violence go unpunished; the story is different in most white neighborhoods.").

202. An Organized Crime Drug Enforcement Task Force is a coordinated effort between federal law enforcement agencies and their state and local counterparts to

more to address the violence in black communities than state and local police can hope to achieve by investigating violent street crimes on their own.²⁰³ After all, the federal government only convicted Al Capone of tax evasion,²⁰⁴ but everyone knew what crimes he truly committed.²⁰⁵

One of the many ironies of the Sixth Circuit's analysis is its failure to consider that aggressive enforcement of the drug laws, rather than resurrecting the Jim Crow laws of old, would undertake the exact *opposite* of what southern states did during and after Reconstruction. Then, the southern states sought to leave newly freed blacks with freedom in name only as local governments refused to enforce the criminal laws against villains terrorizing black communities.²⁰⁶ Now, the source of that terror, ironically, may be other African-Americans who rule urban streets through the same violence and threats that blacks witnessed more than a century ago from night riders wearing white hoods. Yet, it would be insulting in the extreme to all Americans to assume that innocent black urban residents suffer the trauma and pain caused by crime only when the perpetrators are white. Indeed, one of the most powerful criticisms levied against the criminal justice system today is the one voiced by scholars such as Professor Randall Kennedy, that the principal threat posed to blacks by the criminal justice system is not a draconian drug sentencing scheme, but acute underenforcement of criminal law in communities where African-Americans are the victims of crime.²⁰⁷ The Sixth Circuit majority hinted

combat organized drug trafficking. See *Organized Crime Drug Enforcement Task Forces*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/taskforces/ocdetf.html> (last visited Dec. 3, 2013). The federal government uses task forces because no single government agency is "in a position to disrupt and dismantle sophisticated drug and money laundering organizations alone." U.S. DEP'T OF JUSTICE, PRIVACY IMPACT ASSESSMENT FOR THE ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCE FUSION CENTER AND INTERNATIONAL ORGANIZED CRIME INTELLIGENCE AND OPERATIONS CENTER SYSTEM 2 (June 1, 2009), <http://www.justice.gov/opcl/crime-taskforce.pdf>.

203. See Larkin, *supra* note 53, at 42–44.

204. See *United States v. Capone*, 93 F.2d 840, 840 (7th Cir. 1937); *Capone v. United States*, 56 F.2d 927, 928 (7th Cir. 1932).

205. See, e.g., Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 583–85 (2005).

206. See FONER, *supra* note 166, at 425; KENNEDY, *supra* note 1, at 29–49, 87.

207. See KENNEDY, *supra* note 1, at 19–20, 76–135; Kennedy, *supra* note 9, at 1272–74 ("Characteristically, in the absence of discriminatory purpose or discriminatory

that it adopted its new equal protection test to ensure that the complex latticework of federal statutes and Sentencing Guidelines governing crack cocaine sentencing did not leave blacks in the same dire straits that they suffered for decades after Reconstruction, after they supposedly won the right to be treated as morally equal to whites.²⁰⁸ By ignoring the effect of those laws on African-Americans not guilty of trafficking in crack, however, the Sixth Circuit flunked the very test that it created for this inquiry.

Could it be that an aggressive enforcement of the Anti-Drug Abuse Act of 1986 was and is mistaken? Of course.²⁰⁹ Should we change course? Maybe. Congress revisited this subject three years ago, but perhaps Congress should revisit it again. After all, if the 100:1 crack-to-powder ratio reflects an unwise federal drug sentencing policy, it seems fair to say that it also is a mistake to continue to apply that ratio to offenders serving prison terms under it. But not every mistaken policy judgment is irrational, let alone unconstitutional, even when race is at issue.²¹⁰ Perhaps the answer is not as easy as it seems to be.

administration, a facially race neutral state policy will advantage some African-Americans and disadvantage others, which precludes the conclusion that such a policy discriminates against African-Americans *as a class*. This point is relevant to a wide range of controversies in which it is claimed that a facially neutral state policy disproportionately burdens blacks or some other racial minority. Upon closer examination, it becomes clear that what is *really* at stake in such controversies is not simply an inter-racial dispute but an actual or incipient intra-racial conflict. Although blacks subject to relatively heavy punishment for crack possession are burdened by it, their black law-abiding neighbors are presumably helped by it (insofar as the statute deters and punishes drug trafficking that typically takes place in their midst). . . . These actual or potential intra-racial conflicts over what policies are good or bad for a given racial minority group suggest why courts, in the absence of a finding of discriminatory purpose, should refrain from condemning a state criminal policy as violative of the Equal Protection Clause. It is only the presence of such a finding that can justifiably give the judiciary confidence that a challenged policy fails to meet the minimal demands of constitutional decency.”)

208. See *United States v. Blewett*, 719 F.3d 482, 488 (6th Cir. 2013).

209. See, e.g., STUNTZ, *supra* note 1, at 267–74.

210. See Kennedy, *supra* note 9, at 1278 (“[T]o an increasing extent, across the political spectrum and within black communities, priority of sympathetic identification is flowing to victims as opposed to perpetrators of crime. Sometimes people with these sentiments become inhibited when they confront the paradox that increasing the extent and severity of state crime control policy to protect law-abiding blacks will result in higher rates of incarceration and heavier punishments for black perpetrators, as most of those who commit crimes against blacks are themselves black. Perhaps, however, they will come to accept that disparities like those in *Russell* may

It is important to realize that an honest analysis of the effect that the crack sentencing laws have on urban black communities could well reveal that, despite being victimized by the crack trade, the residents of those communities have mixed feelings about the eradication of crack through long-term imprisonment of neighborhood dealers.²¹¹ Residents might sympathize with the career choice made by drug dealers, even though they repudiate the violent methods that dealers use. Urban African-Americans may see their neighborhoods, already suffocating in poverty and hopelessness, being depleted of family members or friends who turned to the drug trade as the only economic opportunity available to them. Residents could feel sympathy for the plight of neighbors who believed that they had no choice other than to enter that line of work. In other words, residents may hate the sin but love the sinner.

There also could be another consideration at work in that regard. The criminal justice system has pursued a strict, incapacitation-based approach to punishment for the last forty years as legislatures have amped up the penalties imposed on crime, including drug trafficking.²¹² Criminologists agree that this policy has reduced the crime rate to some extent, although they disagree over precisely how much.²¹³ There is, however, another consensus, one positing that, because incarceration has diminishing returns,²¹⁴ we inevitably will reach the point (if we are not there already) when greater use of imprisonment not only squanders limited financial and criminal justice resources,

be the mark, not of a white-dominated state apparatus 'discriminating' against blacks, but instead, of a state apparatus responding sensibly to the desires of law-abiding people—including the great mass of black communities—for protection against criminals preying upon them. This response may be wrong. Perhaps lowering the punishment for possession of crack would be a better policy. Perhaps decriminalizing the use of cocaine and other illicit drugs would be a better policy. But being wrong is different from being racist, and the difference is one that matters greatly." (footnotes omitted)).

211. See ALEXANDER, *supra* note 1, at 178–80.

212. See, e.g., Alfred Blumstein, *Restoring Rationality in Punishment Policy*, in THE FUTURE OF IMPRISONMENT, *supra* note 181, at 61, 61–77; Larkin, *supra* note 53, at 10.

213. See, e.g., Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 764–65 (2013).

214. See *id.*

but also *increases* the crime rate.²¹⁵ By leaving a community bereft of siblings, husbands, and fathers, as well as potential spouses, economically-contributing actors, and role models, long-term incarceration of large numbers of principally male adults erodes a community's ability to maintain the informal social controls serving as the first line of defense against crime and discord.²¹⁶ It is difficult to know precisely when that tipping point occurs, but we proceed at our peril in acting as if it does not exist.²¹⁷

The opinions of community residents, who must live with the consequences of the judgments we make about whether continued, long-term imprisonment of crack dealers is a game still worth the candle, could surprise advocates and critics of strict enforcement of those laws. It may turn out that the very communities that might be presumed to demand the continuation of our current policy find that they are conflicted about the risks of changing our current strategy, but are willing to take a chance on trying something new because the current strategy is producing more harm than good.

Finally, at some point a majority of residents in urban black communities may come to doubt—or to condemn—the integrity of the criminal justice system. Black residents in poor urban

215. See, e.g., FRANCIS T. CULLEN & CHERYL LERO JONSON, CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES 125–26 (2012); FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 51 (1995); Larkin, *supra* note 213, at 764–65 & n.213.

216. See, e.g., Fagan, *supra* note 181, at 42–47; Larkin, *supra* note 53, at 22–24 & nn.138–40 (collecting authorities).

217. See, e.g., SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., R41177, ECONOMIC ASPECTS OF PRISON GROWTH 1 (2010) (“There is growing concern among policy-makers across the political spectrum that corrections policy may have reached a point of diminishing returns.”); Larkin, *supra* note 213, at 764–65. As University of Chicago economist Steven Levitt put it:

We know that harsher punishments lead to less crime, but we also know that the millionth prisoner we lock up is a lot less dangerous to society than the first guy we lock up In the mid-1990s I concluded that the social benefits approximately equaled the costs of incarceration. Today, my guess is that the costs outweigh the benefits at the margins. I think we should be shrinking the prison population by at least one-third.

John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES, Dec. 11, 2012, at A1, available at http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=2&tntemail1=y&_r=3&emc=tnt&pagewanted=all&

neighborhoods might believe that, because each separate feature of the criminal justice system has a harsher effect on blacks than on whites, the system in its entirety has it out for them, even if each separate feature could be justified as race-neutral. If that is true, if black crack cocaine traffickers *and* the black victims of crack cocaine trafficking *both* question the integrity of the federal crack sentencing laws, we seem to have reached the point where there is little left to justify continuing the harsh punishments the Anti-Drug Abuse Act of 1986 imposed on crack dealing. The racial tensions and distrust generated by refusing to reduce further or eliminate the racial disparities generated by that law might not be worth whatever deterrent effect its severe penalties might have.

By now, if not long ago, we clearly have reached the point at which the question has transformed from whether we have a just federal crack cocaine policy to whether we have a just system of punishment, and maybe even to whether we have a just sociopolitical system.²¹⁸ As Professors Loury and Shelby have noted, the latter two questions are ones that no one case and no one court could hope to answer.²¹⁹ The underlying philosophical questions are too large and too basic for any one fact pattern or any single panel of judges. Only society can decide how far we should go in using offenders for the benefit of others, a question that implicates the purposes and morality of the criminal justice system. Among other reasons, society grants to itself the authority to punish offenders for crime to deter them or others from committing the same conduct, to educate the community as to the consequences of violating social norms, or to quarantine for the protection of the whole those members who have proved themselves dangerous. At some point, a society may—perhaps, should—decide that individually reasonable penalties collectively exceed the punishment that any category of offenders should be forced to bear. The problem is most sensitive when the category of offenders most acutely affected is defined by a characteristic—such as religion, sex, or race—that society has placed out of bounds as a basis for government action. “Assessing the pro-

218. See LOURY, *supra* note 1, at 24–27; Tommie Shelby, *Remarks*, in LOURY, *supra* note 1, at 73, 76.

219. Sources cited *supra* note 218.

priety of creating a racially defined pariah class in the middle of our great cities at the start of the twenty-first century presents us with just such a case.”²²⁰ We only fool ourselves if we believe that we are better off avoiding the contentious debate and difficult decisions that such a policy choice would force us to make by leaving the matter to the courts.

The ultimate irony of the *Blewett* decision is that the Sixth Circuit was so intent on voiding the 100:1 ratio that it failed to consider whether the new 18:1 ratio suffered from the same defects that it identified in the 100:1 ratio. Each ratio, after all, treats crack cocaine trafficking more harshly than business in the powdered form. The difference is just marginal, not categorical. If the problem is that drug laws impose mandatory minimum penalties for cocaine distribution, the flaw in the system applies to both crack and powdered cocaine. Each offense carries a mandatory minimum prison term; only the length differs. If the problem is a matter of principle, not arithmetic—that is, if the crack laws offend our commitment to equal justice under law because they mandate the imprisonment of an unduly large number of blacks for an exceptionally long period of time—it is difficult to understand why the equally mandatory imprisonment of the same number of blacks for a somewhat shorter period of time is not equally objectionable. If the promise of equal protection policy (though not equal protection law) or the demand for sound drug policy urges us to consider not merely the decisionmaker’s intent, but also the results of his or her decisions, we must explain how we have done any more than kick the can down the road to the day when the numbers resulting from the 18:1 ratio also haunt our conscience.²²¹

220. LOURY, *supra* note 1, at 27.

221. Of course, there is no nonarbitrary way to decide exactly when a disparity becomes sufficiently dramatic that simple consideration of evidence of the decisionmaker’s subjective intent would no longer be sufficient to answer an equal protection inquiry. The result of starting down that path would be simply to shift the inquiry from the actions of Congress to those of the federal judiciary. Given that there are hundreds of federal judges, that choice would become an inquiry that is even less amenable to even-handed analysis. The remedy of voiding uses of mandatory minimum statutes, ironically, is likely to result in a different type of arbitrariness, rather than eliminate that defect altogether. After all, concern for arbitrariness was the reason Congress gave for adopting the mandatory Sentencing Guidelines system that the Constitution now prohibits district courts from using. *See supra* note 175.

At the end of the day, the *Blewett* opinion is yet another example of a court seeking to resolve a policy dispute that courts are not fit to referee. Part of the reason is that law schools and legal training do not educate judges in how to conduct the empirical or statistical analyses sometimes critical to resolve a policy dispute.²²² But even a judge schooled in the social sciences cannot satisfactorily resolve a dispute that can be answered only by weighing the benefits and burdens suffered by competing parties such as criminal defendants and the actual or potential victims of their crimes. Even if a judge somehow could quantify the benefits and costs for each party—the prosecution, the defendant, and the public, including crime victims—measured for every different policy option that the judge legally could select (an undertaking as likely to succeed as trying to calculate the last digit in pi), he cannot honestly claim that the weight afforded to the moral interests of each party is a simple question of fact (“Whose name is on the title to Blackacre?”) or that balancing competing ethical concerns is an ordinary matter of cost-benefit analysis (“Whose widget is more profitable to manufacture?”).²²³ Acting as if that were true, acting as if there

222. The historical debate over the deterrent effect of capital punishment is instructive in this regard. The opposing parties initially relied on competing psychological theories and anecdotes. In the 1970s, scholars examined state homicide and execution statistics to determine empirically whether capital punishment had a deterrent effect. Scholars disagreed over the results and never reached a consensus. Researchers have renewed the debate over the last decade, but they have not moved it far from the point where they found it. See, e.g., Paul J. Larkin, Jr., *John Kingdon’s “Three Streams” Theory and the Antiterrorism and Effective Death Penalty Act of 1996*, 28 J.L. & POL. 25, 33 n.47 (2012) (collecting studies). It is implausible to believe that courts could do a better job of resolving the issue than those scholars could. The Supreme Court has decided that the matter is better left to legislatures than courts to resolve. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 186 (1976) (lead opinion) (“The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.”).

223. Professor Glenn Loury put it well:

Deciding on the weight to give to a “thug’s” well being—or to that of his wife or daughter or son—is a question of social morality, not social science. Nor can social science tell us how much additional cost borne by the offending class is justified in order to obtain a given increment of security or property or peace of mind for the rest of us. These are questions about the nature of the American state and its relationship to its people that transcend the categories of benefits and costs.

is no material difference between issues of law and policy, and acting as if a judge could make a legislator's decision while still remaining a judge, is just that—acting, not judging.

IV. CONCLUSION

Alexander Bickel once said, "No answer is what the wrong question begets."²²⁴ Any debate over the legality and wisdom of crack cocaine sentencing must address the interests of the parties whom Congress has sought to protect by punishing anyone who traffics in that product: namely, the predominantly black residents of urban communities who are innocent of any involvement in this illegal activity and who bear the brunt of the interpersonal violence and neighborhood unrest caused by drug dealing. Of the three branches of the federal government now forced to revisit this subject, the courts may be best equipped to articulate an honest assessment of the difficulties that this policy exercise demands (although the Sixth Circuit's decision does stand to the contrary), because they must offer reasoned explanations for whatever judgments they impose. But they occupy the worst position to collect and analyze the evidence necessary to understand the facts and, even more importantly, to make a reasoned tradeoff between the perhaps competing, but perhaps aligned, moral demands of the guilty and innocent parties. Until recently, the courts have left that tradeoff to the political branches, not because politicians are good at it, but because judges are worse. The best hope for a reasonable resolution of this problem is that they will maintain that course.

LOURY, *supra* note 1, at 24.

Capital punishment again offers an instructive example. The decision whether to authorize the death penalty for particular crimes, or to impose that punishment in a particular case, is heavily freighted with moral considerations. *See, e.g., Gregg*, 428 U.S. at 184 (lead opinion) ("[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.").

224. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 103 (2d ed. 1986).