

ADMINISTRABLE OMISSIONS LIABILITY IN PUBLIC LAW

NIKA D. SABASTEANSKI*

*Public law, specifically constitutional due process law and administrative law, operates against a background presumption of no liability for omissions. To state the inverse, the majority rule is that liability applies only in the case of affirmative government actions. While this was not always the case, following *DeShaney v. Winnebago County Department of Social Services* and *Heckler v. Chaney* in the 1980s, the Court has generally closed off plaintiffs from litigating government failures-to-act. Scholars have pointed at the philosophical absurdity of delineating government acts and omissions, given that in a state as regulated as ours, everything is, at bottom, an affirmative choice. But the federal judiciary has remained fairly unmoved. Against this overriding presumption of no omissions liability, however, the courts have eked out several exceptions in which they are willing to find liability for inaction. While scholars have pointed to reasons why the judiciary has been reluctant to find liability for omissions, this Note looks at why the judiciary has been willing to find liability in certain cases. It identifies the overarching reason to be administrability, motivated by two characteristics that the court either creates or constructs. First, when the court identifies or constructs an affirmative component of an omission, it is more willing to find liability. Second, when there is an *ex ante* regulation or statute limiting government discretion, the court is similarly persuadable. This Note identifies seven categories across public law that fall into these two areas and in which omissions liability (at least in some way) exists: state-created danger doctrine, special relationships, Monell liability, a blurred line between procedural and substantive due process, abdication of agency statutory duties, failure to perform ministerial duties, and a refusal to initiate rulemaking. As its final contribution, this Note argues that scholars, litigants, and courts should seek to broaden public omissions liability, given that society is plagued with protracted crises resulting from government inaction. Relying on the proxies for administrability that the courts are already comfortable with, the final Part marries administrability with accountability and creates broader categories for each exception to tackle contemporary ills.*

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* Copyright © 2023 by Nika D. Sabasteanski. J.D. Candidate, 2023, New York University School of Law; M.P.H., 2020, Columbia University; B.A., 2017, Barnard College. This Note is dedicated to my grandfather, Richard di Liberto, who died of COVID-19 on April 1, 2020 in the first wave of the virus in New York City. This is my small reckoning with his limitless absence, the absence of over 45,000 of my fellow New Yorkers, and over 1,000,000 Americans. I am incredibly grateful for the doctrinal inspiration from Daryl Levinson, for the workshopping from Barry Friedman, Emma Kaufman, and the Furman Seminar at large, and for the unyielding moral support from Ricky Revesz. Thank you, as well, to Adam Burton and Eliza Hopkins for shepherding this Note for the better part of a year and to the other editors of the *New York University Law Review* for their hard work and thoughtful suggestions.

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INTRODUCTION

In the early months of 2020, hushed talk of a novel virus laying waste to Wuhan, China and the Lombardy region in Italy grew louder. By early March, the United States began bracing for impact. Leadership in New York City and the Bay Area shared data and suggestions, confronted by the ultimate unknown—a plague, the likes of which had not been seen on North American soil in a century. The two coasts had opposite instincts. San Francisco’s Mayor London Breed shuttered the city on March 16 with just under forty confirmed cases.¹ Governor Gavin Newsom of California followed suit three

¹ Kate Eby, *Coronavirus Timeline: Tracking Major Moments of COVID-19 Pandemic in San Francisco Bay Area*, ABC 7 (Jan. 30, 2023), <https://abc7news.com/timeline-of-coronavirus-us-covid-19-bay-area-sf/6047519> [<https://perma.cc/QT9M-97KK>]; Joe Sexton & Joaquin Sapien, *Two Coasts. One Virus. How New York Suffered Nearly 10 Times the Number of Deaths as California.*, PROPUBLICA (May 16, 2020, 5:00 AM), <https://>

days later, ordering a lockdown for 40 million Californians² when the state had 675 cases.³ Three thousand miles away, New York waited six more days⁴ after San Francisco shut down to announce a stay-at-home order at more than fifteen thousand confirmed cases.⁵ Leaders across the world faced countless unknowns and unenviable decisions. Systemic racism,⁶ gilded age wealth gaps,⁷ and crowded city living⁸ would ensure some casualties. However, the decision *not* to shut down until the evening of March 22 is credited with New York's staggeringly grim early death toll.⁹ It was New York's *inaction*—not in the face of scientific certainty, but equipped with straightforward public health guidance¹⁰—that cost some fraction of thirty thousand New Yorkers

www.propublica.org/article/two-coasts-one-virus-how-new-york-suffered-nearly-10-times-the-number-of-deaths-as-california?fbclid=IWAR0BjswVqanyt1imRlvzF3p5WYr0btVOSKVJA8KdbnuTmFYsXVK1dalAWY [https://perma.cc/6QVY-B4TG].

² See Tim Arango & Jill Cowan, *Gov. Gavin Newsom of California Orders Californians to Stay at Home*, N.Y. TIMES (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/us/california-stay-at-home-order-virus.html> [https://perma.cc/S2HS-BJ85].

³ See J. David Goodman, *How Delays and Unheeded Warnings Hindered New York's Virus Fight*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/04/08/nyregion/new-york-coronavirus-response-delays.html> [https://perma.cc/TCU3-V2QC].

⁴ See Sexton & Sapien, *supra* note 1.

⁵ See Jesse McKinley, *New York City Region Is Now an Epicenter of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 22, 2020), <https://www.nytimes.com/2020/03/22/nyregion/coronavirus-new-york-epicenter.html> [https://perma.cc/2MTS-UQSK].

⁶ See generally Clarence C. Gravlee, *Systemic Racism, Chronic Health Inequities, and COVID-19: A Syndemic in the Making?*, 32 AM. J. HUM. BIOLOGY 1 (2020) (charting the connections between systemic racism—which causes residential, school, and occupational segregation, poverty, intergenerational wealth gaps, mass incarceration, and an inadequate social safety net—and COVID-19, as well as the role of systemic racism in contributing to pre-existing conditions like diabetes and hypertension).

⁷ See generally ESTELLE SOMMEILLER & MARK PRICE, *THE INCREASINGLY UNEQUAL STATES OF AMERICA: INCOME INEQUALITY BY STATE, 1917 TO 2011* (Feb. 19, 2014), <https://www.epi.org/publication/unequal-states> [https://perma.cc/PTK6-XJXG].

⁸ See Jennifer Medina & Robert Gebeloff, *The Coronavirus Is Deadliest Where Democrats Live*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/25/us/politics/coronavirus-red-blue-states.html> [https://perma.cc/899K-578M].

⁹ New York City, as of October 8, 2021, suffered 34,326 deaths and 1,076,498 cases. See Ann Choi, Josefa Velasquez, Yoav Gonen & Suhail Bhat, *Coronavirus in New York City*, THE CITY (Oct. 8, 2021, 6:36 PM), https://web.archive.org/web/20211009162156/https://projects.thecity.nyc/2020_03_covid-19-tracker [https://perma.cc/VK8V-MLWN?type=image]; see also Sen Pei, Sasikiran Kandula & Jeffrey Shaman, *Differential Effects of Intervention Timing on COVID-19 Spread in the United States*, 6 SCI. ADVANCES 1, 1–3 (2020) (quantifying the effects of earlier interventions on COVID-19 cases and deaths).

¹⁰ See, e.g., Sexton & Sapien, *supra* note 1 (“The clear need, as early as late February, was to move to an all-out effort at not being overrun by the disease [P]lans were discussed to undertake a formal ‘resistance’ . . . , the mayor’s directives be damned.”). ProPublica further discovered that Mayor Breed emailed New York City Mayor Bill DeBlasio urging New York to follow her lead. *Id.*

their lives and, in many ways, fueled the early stages of the American pandemic.¹¹

Some version of the question—whether anyone could be held accountable—is one that courts and scholars alike have grappled with for ages. When, if ever, is it acceptable to hold the government responsible for its omissions? It is considered a maxim that the government can be held accountable only for affirmative actions. To state the inverse: The government is conventionally not liable for a failure to act. This distinction between liability for the government's actions and none for its omissions arose as a result of a deep-seated fear that if the government were liable for any of its failures that contributed to harm, it would be open season on the government.¹² Opening the door to a more full-throated conception of omissions liability has seemed, if not impossible, undesirable to the courts.

Public law—constrained here to constitutional and administrative law—has a strong presumption against omissions liability.¹³ Both the U.S. Constitution and the Administrative Procedure Act (APA) serve to restrain government activities,¹⁴ with the Constitution famously heralded as a charter of negative liberties.¹⁵ However, the APA and the organic acts that provide charters for executive agencies include both restrictions and affirmative obligations. Yet despite this distinction between the APA and the Constitution, the judiciary has still

¹¹ *Tracking Coronavirus in New York City, N.Y.: Latest Map and Case Count*, N.Y. TIMES (Mar. 23, 2023), <https://www.nytimes.com/interactive/2021/us/new-york-city-new-york-covid-cases.html> [<https://perma.cc/JE74-N924>]; see Hannah Kuchler & Andrew Edgecliffe-Johnson, *How New York's Missteps Let Covid-19 Overwhelm the US*, FINANCIAL TIMES (Oct. 22, 2020), <https://www.ft.com/content/a52198f6-0d20-4607-b12a-05110bc48723> [<https://perma.cc/T7RN-3R27>]; see also Pei et al., *supra* note 9, at 3 (noting that had New York City implemented non-pharmaceutical interventions just one week earlier, between 16,607 and 19,682 lives would have been spared).

¹² See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2326–30 (1990) (discussing the floodgates argument as it applies to affirmative governmental duties and failures to act).

¹³ To clarify, equivalent points could be made in other areas of public law. This Note chooses to focus on the Due Process Clause of the Constitution and the APA for three reasons: both are areas where much ink on inaction versus action has been spilled, both are areas of law that seek to restrain the government as it relates to individuals, and both have met similar judicial fates as they relate to omissions. Putting constitutional due process law and administrative law in conversation with each other demonstrates the government's fear of being held accountable for its failures-to-act, but also provides a coherent framework for identifying situations in which the courts are willing to find liability. With that framework in hand, scholars can build out the expansions identified in Part III.

¹⁴ See Administrative Procedure Act of 1946, Pub. L. No. 79–404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–706).

¹⁵ See *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (“The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services . . .”).

sought to restrict government liability for inaction under the APA, just as it has under the Constitution.¹⁶ Courts are reluctant to find that an agency is on the hook for failures-to-act, even when it is clear from its governing statute that there was a duty to have acted. The rationale courts have given for this narrowing of liability is similar in both fields of public law—namely, a concern for administrability.

While public law operates against a background presumption of no omissions liability, courts have carved out a patchwork quilt of exceptions. Some of these exceptions have been parsed in the literature individually, but this Note is the first piece of scholarship that provides a full compendium of omissions in constitutional due process and administrative law and sets the stage for a new field: omissions liability in public law. These exceptions, while perhaps not as far-reaching as some might wish, have manageable boundaries that have not opened the floodgates to endless liability. Across constitutional and administrative law, courts entertain omissions liability (1) when there is either a real or fictional affirmative act connected to the omission or (2) when there is an external statute limiting government discretion *ex ante*. Part I will explore the origin of the presumption that there is no liability for omissions in public law. It will discuss the standard scholarly criticisms of cases that put government omissions out of plaintiffs' reach: primarily that in a world as regulated as ours, there is no meaningful distinction between action and inaction. Finally, it posits that the judiciary has resisted expansions of this type of liability due to a fear of lack of administrability.

Part II will, for the first time in legal scholarship, define a field of omissions liability in public law by identifying exceptions to the presumption that there is no liability for said omissions. This Part will introduce a novel ordering principle to help with the task of parsing why the courts were more comfortable with liability in these situations. It will detail how the courts find, or are willing to construct, situations in which the government's background discretion was limited—either by pairing it with an affirmative government action or by identifying an *ex ante* regulation that sharply restricted the government's duties.

Finally, having put constitutional and administrative law in conversation with each other to define the field of public omissions liability, Part III will more modestly gesture towards expansions for each category. These suggested expansions are not dramatic departures

¹⁶ See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“We of course only list the above concerns to facilitate understanding of our conclusion that an agency’s decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2).”).

from the status quo; rather, each one expands the moth-eaten holes that exist in the now-shaky presumption of no omissions liability. This Part will demonstrate that, at least in some instances, these expansions have already implicitly occurred. The proposed expansions remain fundamentally administrable since they remain faithful to the affirmative and external ordering principles introduced in Part II, but they are undergirded by a competing judicial philosophy: accountability.

The policy reasons why the conversation on omissions liability has stagnated are clear and sympathetic to some degree, but the number of problems fueled by omissions that contemporary American society faces is too great to settle for the status quo. One need only look to the pandemic, the climate crisis, the opioid epidemic, the lack of universal healthcare, and the housing crisis to agree that the government, at every level, should be held accountable for its failures that injure people in much the same way as its overt violations of their rights do. Couple a lack of equitable and legal remedies with a lack of expressive relief, and it becomes clear that American society deserves more when it comes to government omissions. This Note is not a practitioner's handbook, since the field of public omissions liability is nascent at best and many of the widenings suggested would be uphill battles, but it attempts to offer a pragmatic guide to what has long been considered a philosophical problem.

I

NO COUNTRY FOR OMISSIONS

This Part analyzes the parallel evolution of constitutional and administrative law as the Supreme Court whittled down the possibility of putting forth claims for government inaction. It begins with a brief detour to a time before the pivotal cases of the 1980s, when government omissions were not entirely off limits from litigation. This Part then introduces the two watershed cases, *DeShaney v. Winnebago County Department of Social Services*¹⁷ and *Heckler v. Chaney*,¹⁸ exploring the current majority rule that there is essentially no public omissions liability. Finally, it discusses the scholarly imploration that the law should recognize that there is no moral or conceptual difference between the government's acts and its omissions and why courts have been unpersuaded by the scholarly focus on this distinction, given the burdens of administrability.

¹⁷ 489 U.S. 189 (1989).

¹⁸ 470 U.S. 821 (1985).

A. *The Genesis Story*

It did not used to be this way. Particularly in the administrative law context, but also to a limited extent in constitutional law, government omissions were not entirely off limits from liability.¹⁹ Acting on the presumption that the Fourteenth Amendment applied to state omissions (failures to prevent private harms),²⁰ Congress, eager to rein in de facto discrimination in restaurants and inns, relied on section 5 authority²¹ to pass the Civil Rights Act of 1875.²² In a rebuke to this interpretation, the Supreme Court decided the *Civil Rights Cases*, holding that the Constitution protects the rights of citizens from unjust state actions but does not give Congress the power to regulate how individuals invade other individuals' civil rights.²³ In other words, Congress lacked the authority to affirmatively require states to police private discrimination.

The *Civil Rights Cases* drew two lines. The first, conventionally referred to as state action doctrine, separated state action and private action—distinguishing between de jure state discrimination and de facto private discrimination.²⁴ The second and more subtle line the Court drew was between state action and state inaction, something one might call “the *DeShaney* problem”—in other words, the state legislature's affirmative discriminatory statute and the state's failure to prevent an innkeeper from discriminating on his own accord.²⁵ It can be confusing to differentiate between the two. Much of the discussion surrounding the *DeShaney* problem is cloaked in terms of state action doctrine. State action doctrine differentiates between affirmative state actions (government acts) and private actions (government omissions).²⁶ This more common conceptualization de-emphasizes the

¹⁹ See, e.g., *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (“It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked.”).

²⁰ See, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 NW. L. REV. 503, 508 (1985) (“These holdings remain undisturbed: the Constitution does not prohibit private deprivations of constitutional rights.”).

²¹ U.S. CONST. amend. XIV, § 5.

²² Civil Rights Act of 1875, 18 Stat. 335–37; Louis Michael Seidman, *State Action and the Constitution's Middle Band*, 117 MICH. L. REV. 1, 13 (2018) (“Similarly, the Civil Rights Act of 1875, enacted pursuant to Congress's Fourteenth Amendment powers, banned private discrimination in public accommodations, thereby once again requiring affirmative public action that countered private conduct.”).

²³ *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

²⁴ *Id.* (“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”).

²⁵ See Bandes, *supra* note 12, at 2285 (“This limitation is phrased in the language of state action, but it is the familiar governmental action/inaction distinction in slightly different linguistic clothing.”).

²⁶ See *id.* at 2323.

government's agency over omissions by pointing to a third-party bad actor who caused the harm while the government sat back and watched. This Note instead relies on the distinction between government acts and omissions without focusing on private actors.²⁷

Written over a hundred years later, *DeShaney* in many ways culminated the Court's refinement of the distinction between state action and inaction, a process that had become increasingly prevalent in the lower courts.²⁸ In 1989, the Court held that the Due Process Clause,²⁹ which protects against government deprivations of life, liberty, and property, does not create any affirmative state obligations to ensure that individual interests are not privately invaded,³⁰ harkening back to the holding in the *Civil Rights Cases*.³¹ In *DeShaney*, that meant that the Winnebago County, Wisconsin Department of Social Services (DSS) was not liable for the profound beating that Joshua DeShaney sustained at the hands of his father, Randy DeShaney, when, knowing full well of the abuse, DSS failed to remove the child from his abuser's charge. Instead, the Court held that the state's failure to protect Joshua from his father was not a Due Process Clause violation.³²

In his dissent, Justice Brennan made a critical distinction, noting that there is a difference between holding the state liable for its failure to protect a child and obligating the state to provide an affirmative right to safety.³³ In other words, Brennan took the Court to be shying away from the more radical exercise of establishing positive liberties. Instead, he argued that the majority should have recognized that inaction could be just as injurious as action,³⁴ and Justice Blackmun, also dissenting, acknowledged that the line between the two was blurry at

²⁷ The question of whether the Constitution can regulate the behavior of private actors is distracting for two reasons. First, it is much harder to justify how a document written for the benefit of constraining the state should apply to private actors (and so this move avoids that difficult and much-hashed out discussion). Second, it obscures the situations in which the state's omission was the protagonist (even if there was a private intermediary), which gets more at the types of systemic neglect case studies that the Note focuses on.

²⁸ See, e.g., *Ponce v. Basketball Fed'n of P.R.*, 760 F.2d 375 (1st Cir. 1985) (concerning whether state action included the ability for a basketball league to suspend a player); see also *Jensen v. Conrad*, 747 F.2d 185, 190–94 (4th Cir. 1984) (summarizing relevant case law to determine if the state had a duty to protect children from abuse from their guardians).

²⁹ U.S. CONST. amend. XIV, § 1.

³⁰ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

³¹ See *The Civil Rights Cases*, 109 U.S. 3, 13 (1883).

³² *DeShaney*, 489 U.S. at 197 (“As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”).

³³ *Id.* at 204 (Brennan, J., dissenting).

³⁴ *Id.* at 212.

best.³⁵ Despite both dissents insisting that DSS's inaction violated Joshua's due process rights, it was Randy DeShaney, not DSS, that permanently disabled Joshua.³⁶ There was no liability for constitutional nonfeasance.

Elsewhere in public law, an even more dramatic shift was brewing. In administrative law, there had been a far stronger presumption of reviewability for agency *inaction* than in constitutional law, but that changed in 1985. Section 551 of the APA provides for review of agency action, defined to include failures-to-act.³⁷ The courts regularly interpreted that definitional proviso to include wholesale omissions.³⁸ However, in 1984, several incarcerated individuals sentenced to death by lethal injection petitioned the Food and Drug Administration (FDA) that the use of the drugs for execution violated the Food, Drug & Cosmetic Act (FDCA) and requested that the FDA take enforcement actions to prevent their impending executions.³⁹ The FDCA covered situations in which there was a serious danger to the public health or a blatant scheme to defraud, and finding that neither situation applied, the Commissioner declined to initiate an enforcement proceeding.⁴⁰ The incarcerated individuals sought an appeal of the FDA's order in district court, which granted summary judgment to the Secretary.⁴¹ The D.C. Circuit then reversed, remanding to the FDA to fulfill its statutory obligations.⁴²

³⁵ *Id.* at 212 (Blackmun, J., dissenting).

³⁶ *Id.* at 203 (majority opinion) (“[I]t is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua’s father.”).

³⁷ 5 U.S.C. § 551(13).

³⁸ See generally William W. Templeton, Note, *Heckler v. Chaney: The New Presumption of Nonreviewability of Agency Enforcement Decisions*, 35 CATH. U. L. REV. 1099, 1107 (1986) (“In contrast to the established presumption of reviewability of all agency *action*, the Court fashioned a new presumption exempting agency enforcement decisions from judicial review.” (emphasis added)). Up until *Chaney*, “action” was understood to include “inaction,” given the plain text of the APA. *Id.* at 1107, 1112–13. This did not mean that federal courts routinely forced agencies to act following judicial review, but it did mean that actions and failures-to-act were both given the presumption of review. See, e.g., *Gamradt v. Block*, 581 F. Supp. 122, 129 (D. Minn. 1983) (“The court finds, based on the language of the statute and its history, that Congress intended § 1981a be implemented. Accordingly, the agency’s failure to act is unlawful in violation of 5 U.S.C. § 706(1)”); see also *Env’t Def. Fund, Inc. v. Costle*, 657 F.2d 275, 298 (D.C. Cir. 1981) (“[T]he applicable standard of review only permits a reviewing court to compel agency action unlawfully withheld by an agency’s failure to act. Since EDF has been unsuccessful in its effort to establish that either EPA, Interior, or Reclamation have failed to act, we must affirm the decision rendered below.” (citation omitted)).

³⁹ *Heckler v. Chaney*, 470 U.S. 821, 823 (1985).

⁴⁰ *Id.* at 824.

⁴¹ *Id.* at 825.

⁴² *Id.*

On certiorari, the Court held that agency non-enforcement decisions (declining to initiate an enforcement proceeding) were presumptively committed to agency discretion.⁴³ Until *Chaney*, the only agency decisions not entitled to automatic review were those rare occurrences in which the statute explicitly precluded review or where the action was committed to agency discretion.⁴⁴ The rationale for *Chaney*'s holding centered on administrability: Non-enforcement decisions are the pinnacle of delegated discretion; they promote liberty as opposed to restricting rights; the courts are inept at assessing discretionary agency decisions; and although agencies must provide reasons for their actions, they are not required to provide reasons for choosing not to act.⁴⁵ As opposed to the Supreme Court's move in *DeShaney* to restrict plaintiffs' causes of action for government omissions, which it had been inching towards since the late nineteenth century, the decision to do much of the same in *Chaney* came more abruptly.⁴⁶ By 1985, there was a presumption of unreviewability for agency inaction, even against a backdrop of affirmative statutory obligations.

B. *The Standard Criticisms and Judicial Resistance to Expansion*

In the years following *DeShaney* and *Chaney*, jurists have reckoned with the Court's pronouncement that state *action* is fundamental to both constitutional and administrative law. In the context of public law, most scholars agree that in a highly regulated world such as ours, a decision to leave something unregulated is "as much a choice as the decision to develop any particular regulation."⁴⁷ To that end, the modal response among scholars has been simply to advocate for the abolition of state action doctrine. The result would eliminate the distinction between situations where the state acts and where it fails to protect people from private acts.⁴⁸ Other scholars have argued for the

⁴³ *Id.* at 837–38.

⁴⁴ See 5 U.S.C. § 701(a)(2) ("This chapter applies, according to the provisions thereof, except to the extent that . . . agency action is committed to agency discretion by law.").

⁴⁵ See *Chaney*, 470 U.S. at 831–32.

⁴⁶ See Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 654 (1985) (discussing how the Supreme Court only a decade earlier in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), had found a decision of inaction by the Secretary of Labor was subject to judicial review).

⁴⁷ MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 179 (2008); cf. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 707–08 (2005) (extrapolating outward from the premise that mandating capital punishment would save lives statistically, and arguing that when it comes to the government, omissions and actions are equivalent).

⁴⁸ See generally Chemerinsky, *supra* note 20 (proposing the elimination of state action doctrine and instead focusing on *what* rights were infringed upon, not *who* infringed upon

wholesale repeal of the action and inaction distinction by refocusing the conversation on the establishment of affirmative duties or positive rights under the Constitution.⁴⁹

The judiciary, however, has remained unmoved, actively shying away from expanding omissions liability. The reasons seem to have little to do with the philosophical contradictions legal scholars have identified and more to do with the pragmatism of treating omissions equally to actions. While scholars have attempted to put their finger on the reason, this Note characterizes the judicial rationale for not expanding liability as an overarching “administrability concern,” which includes several more specific fears. First, the courts are reluctant to second-guess executive discretion.⁵⁰ This can be as simple as a choice about how to use a finite resource or a more nuanced choice surrounding what policies the executive branch wants to prioritize. This Note will focus primarily on this concern since it is a leitmotif throughout the seminal cases.⁵¹ Additional rationales underpinning the administrability concern include: the typical floodgates fear—the fear that once omissions are fair game, the number of claims available would be staggering;⁵² the worry that the political branches would be

them); Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 73 (1967) (arguing that a California constitutional amendment, which repealed a fair housing statute, should be viewed in the same light as if the state had passed a housing segregation ordinance itself, and more broadly that state action and inaction should be seen as equivalent).

⁴⁹ See generally Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991) (arguing that a central purpose of the Fourteenth Amendment was to establish a federal constitutional right to protection); Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1403 (2006) (arguing that the framers of the Fourteenth Amendment believed that Americans owed a duty of allegiance to the government in exchange for protection); Frank I. Michelman, *Poverty in Liberalism: A Comment on the Constitutional Essentials*, 60 DRAKE L. REV. 1001, 1010–13 (2012) (arguing that the state is obligated to affirmatively address poverty and guarantee the social minimum to families based on a Rawlsian conception of the social contract); Frank I. Michelman, *Antipoverty in Constitutional Law: Some Recent Developments*, 67 ARK. L. REV. 213 (2014) (arguing for a new understanding of the role of poverty within the Constitution).

⁵⁰ The judiciary is in the business of evaluating decisions made by agencies, state and municipal governments, and other political actors. For simplicity, this is referred to as the executive branch throughout the Note.

⁵¹ See, e.g., Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149 (1998). Professor Krent argues that this instinct falls in line with the discretionary function exception in the Federal Tort Claims Act, which excludes from waivers of immunity claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government.” *Id.* at 1165 (quoting 28 U.S.C. § 2680(a)).

⁵² Following an earlier expansion of the state action doctrine in the *White Primary Cases* and *Marsh v. Alabama*, the Court experienced an influx of so-called public function cases. Hoping to stem the tide, the Court did not expand state action doctrine further. See

held responsible for problems that they are ill-equipped to handle;⁵³ and the sense that there is actually a functional difference between action and inaction that deserves to stay fixed.⁵⁴ The administrability concern in both administrative and constitutional law has led courts to insist that state *action* must remain a threshold question.

The broader focus on administrability also explains why even if such an expansion of liability were logistically possible, courts might still find it undesirable to intrude on the polycentric problems faced by the political branches.⁵⁵ While Justice Rehnquist did not explicitly mention fears of infringing on DSS's discretion, this was an implicit concern driving much of the decision in *DeShaney*.⁵⁶ Municipal discretion is more explicitly addressed in *Collins v. City of Harker Heights*,⁵⁷ in which a city employee's widow sued the city for failing to keep her husband's workplace free from unreasonable hazards in violation of the Due Process Clause, which led to her husband's asphyxiation while attending to subterranean sewer lines. There the Court held that:

Decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.⁵⁸

generally Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Marsh v. Alabama, 326 U.S. 501 (1946).

⁵³ This fear is exemplified in *Washington v. Davis*, 426 U.S. 229 (1976), in which the Court held that evidence of disparate impact alone was insufficient to uphold a violation under the Equal Protection Clause. Discriminatory intent—the affirmative component—was a necessary element of the claim. The Court's decision demonstrates the judiciary's reluctance to be held accountable for the government's systemic failures that led to an environment rife with institutionalized racism, manifesting as an outward harm. *Cf.* Seidman, *supra* note 22, at 4 (“[T]here is a public, outer band where there is *too much* state action for the Constitution to apply.”).

⁵⁴ See Heckler v. Chaney, 470 U.S. 821, 831 (1985) (“[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.”); see also Bandes, *supra* note 12, at 2333 (discussing the judiciary's desire to avoid a “parade of horrors”).

⁵⁵ See Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 1003–04 (1996) (describing polycentricity as a characteristic of complex problems that have related sub-problems with interdependent solutions).

⁵⁶ Professor Harold Krent argues that “*DeShaney* . . . rests not on interpretation of the Due Process Clause, but on the Court's perception of its institutional limits and . . . consequent decision not to enforce the Due Process Clause fully. Federal courts should not secondguess [sic] municipal agency resource allocation decisions in the absence of a congressional directive.” Krent, *supra* note 51, at 1168. Rather, *DeShaney* “may not turn solely on the merits of the due process claim presented.” *Id.* at 1169.

⁵⁷ 503 U.S. 115 (1992).

⁵⁸ *Id.* at 128–29.

Rather than jump at the chance to influence policy, courts have made clear that at least in the area of omissions liability, legislatures are better suited to make these decisions given that they are democratically elected, have enhanced access to information, and have superior deliberative methodologies for evaluating public will.⁵⁹ Though Part I has focused on why the judiciary has closed the door to most public omissions liability—this is not the entire story.

II

BOUNDED LIABILITY FOR OMISSIONS IN PUBLIC LAW

This Part will examine the avenues the judiciary has left open, which exist precisely because courts are able to identify characteristics that make these situations more administrable than ones it finds intractable. This Note contributes a novel guiding framework, trans-substantive across public law, that elucidates the judiciary’s rationale when it finds liability. Cases in which courts find public omissions liability fall into two categories. In the first category, hereinafter the “affirmative category,” the court locates, constructs, or amplifies an affirmative government action tied to the omission. Courts find reviewing *actions* more administrable than reviewing *inactions*. Identifying an affirmative action tied to the omission is thus a step towards administrability, allowing the court to review what actually occurred as opposed to the daunting task of judging the roads not taken. In the second category, hereinafter the “external category,” the court identifies an exogenous, non-discretionary statute, ordinance, or regulation that governs the behavior in question. This external statute provides the law to apply—narrowing the executive branch’s discretion and making the evaluation of the inaction more administrable. This Part will proceed in two main Sections: The first will catalog the existing exceptions for omissions liability in constitutional law, and the second will do the same for administrative law.

A. *Constitutional Omissions Liability*

This Section will discuss the exceptions that lower courts have exploited to hold the government liable for omissions under the Due Process Clause. The first two exceptions, state-created danger doctrine—created in *DeShaney*’s dicta⁶⁰—and the special relationship

⁵⁹ See Armacost, *supra* note 55, at 1003.

⁶⁰ See, e.g., *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201 (1989) (“While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.”); see also *Johnson v. City of Philadelphia*, 975 F.3d 394, 398 (3d Cir. 2020) (“From those simple words . . . sprang a considerable expansion of the law. While

exception—created in two formative cases⁶¹—rely on state officials’ actual or constructive affirmative actions and thus fall into the affirmative category.⁶² By shifting the analysis from the state’s inaction to its action, courts attach the omission to the action. Corraling municipal discretion has always been unattractive to courts, so this conceptual switch provides welcome relief.⁶³

The third route, municipal liability under the *Monell* doctrine,⁶⁴ emerges as another way to hold localities accountable for due process violations under 42 U.S.C. § 1983. One type of successful *Monell* claim ties an affirmative due process violation to an underlying omission characterized as a “policy of inaction.” In these claims, a pattern of omissions increases the probability of the affirmative constitutional violation.⁶⁵ This exception also falls into the affirmative category: tying an affirmative due process violation by an individual actor employed by the municipality to a pattern of omissions at the municipal level that, alone, a court might find too discretionary to condemn.⁶⁶

This Section concludes with a discussion of a subset of cases that bridge the gap between procedural and substantive due process. Much like in administrative law, the petitioners in these cases—which fall squarely in the external category—look to an external statute or practice to define the non-discretionary duty the state has failed to perform.

1. State-Created Danger Doctrine

Functionally, the state-created danger doctrine allows litigants to hold the government liable for failing to protect them from private due process violations. Courts have interpreted the exception nar-

seemingly not part of *DeShaney*’s holding, lower courts seized on those words to create a new remedy that would, it was thought, aid the next “[p]oor Joshua.” (alteration in original)).

⁶¹ See *Estelle v. Gamble*, 429 U.S. 97 (1976); *Youngberg v. Romeo*, 457 U.S. 307 (1982).

⁶² See *DeShaney*, 489 U.S. at 201 (referring explicitly to the special relationship doctrine and impliedly to the state-created danger doctrine by stating that “it placed [Joshua] in no worse position than that in which he would have been had [the State] not acted at all”).

⁶³ See *Bandes*, *supra* note 12, at 2328 (“The stated rationale . . . is that the question of how a government will allocate its resources is political, and must be left to the discretion of elected officials.”).

⁶⁴ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978); see *infra* Section II.A.3.

⁶⁵ See *J.K.J. v. Polk County*, 960 F.3d 367, 381 (7th Cir. 2020) (discussing how a pattern of past similar violations is usually needed to demonstrate municipal liability under *Monell*).

⁶⁶ See *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012) (noting the requirement that an official policy or pattern of the municipality be the cause of the injury for a successful constitutional claim).

rowly—requiring the state to cross the line between pure *inaction* and *action*, to affirmatively put someone in jeopardy rather than passively standing by while a private actor harms them.⁶⁷ In *K.H. v. Morgan*, Judge Posner identified the dispositive difference between *DeShaney*-style claims and successful state-created danger exceptions: Sometimes the state becomes a “doer of harm rather than merely an inept rescuer, just as the Roman state was a doer of harm when it threw Christians to lions.”⁶⁸ In *DeShaney*, the majority held that DSS was an inept rescuer, not leaving Joshua worse off than had the state never been involved.⁶⁹ It is worth noting Justice Brennan’s dissent, which argued that the monopolistic existence of DSS (as a central hub through which all information regarding Joshua’s abuse passed) made Joshua more dependent on its actions or inactions than if that government resource had never existed.⁷⁰ That monopoly over social services certainly could be framed as an affirmative action putting Joshua at greater risk than he would have been otherwise. But the courts have never adopted Justice Brennan’s approach.

By requiring the state to cross the line between “inept rescuer” and “doer of harm,” courts escape the undesirable task of evaluating omissions. Instead, courts focus on a subset of omissions claims where the government did act, though it did not deal the final blow.⁷¹ In *Johnson v. City of Philadelphia*, a family of three perished in a house fire after the 911 dispatcher told them to shelter in place until the fire department arrived and then failed to inform the fire department (which had incidentally been delayed because they drove to the wrong address) that there were survivors in need of rescue.⁷² The Third Circuit held that the dispatcher, through her failure to communicate that there were survivors, did not affirmatively use her authority to

⁶⁷ See Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 *TOURO L. REV.* 1, 8 (2007) (discussing the requirement that the state actively put a person in danger). Additionally, the Supreme Court has never announced a formal test for the state-created danger doctrine exception, though most circuits have their own version. See, e.g., *Johnson v. City of Philadelphia*, 975 F.3d 394, 399 n.6 (3d Cir. 2020) (discussing the various tests for the state-created danger doctrine established by different circuits).

⁶⁸ *K.H. v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990).

⁶⁹ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201 (1989).

⁷⁰ See *id.* at 210 (Brennan, J., dissenting) (“Conceivably, then, children . . . are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs.”).

⁷¹ See generally *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 751 (2005) (holding that the Town of Castle Rock did not affirmatively put Jessica Gonzales or her daughters in danger by failing to arrest her estranged husband, who ultimately killed the couple’s children, in compliance with a mandatory arrest statute for those who violate restraining orders).

⁷² 975 F.3d at 396–97.

create danger for the Johnsons.⁷³ Her omission left the family in their status quo—huddled in a burning building minutes away from dying of smoke inhalation.⁷⁴ Left just with state inaction, the court deferred to municipal discretion.⁷⁵

Even a hint of affirmative government conduct changes the story. In *L.R. v. School District of Philadelphia*, the defendant school teacher asked a woman who had come to pick up a student, pseudonymously named “Jane,” for her identification and verification that she had permission to leave with Jane.⁷⁶ She failed to provide the teacher with either, but he let her leave with Jane, whom she subsequently sexually assaulted.⁷⁷ Here the Third Circuit had little trouble holding the teacher liable under the state-created danger doctrine. The teacher attempted to frame his actions as omissions—“*failure* to follow School District policy . . . and *failure* to obtain proper verification”—but the court was unmoved.⁷⁸ Acknowledging the existential difficulty in delineating between actions and omissions, the Third Circuit’s approach is to evaluate what the status quo was prior to the action or omission and then establish whether the “state actor’s exercise of authority resulted in a departure from that status quo.”⁷⁹ The status quo in this kindergarten classroom was that children remained in the room, under the teacher’s supervision, without the ability to go to the bathroom without permission.⁸⁰ Jane was safe, the court found, until her teacher let her leave with a stranger.⁸¹ This was in direct opposition to the situation in *DeShaney*, in which the state left Joshua undisturbed in his status quo—in the hands of an abusive parent.⁸²

⁷³ *Id.* at 400.

⁷⁴ *Id.* at 401. It is true that the dispatcher acted affirmatively in instructing the family to remain in the building. However, the appellant did not raise this theory. Instead, she argued that “the Dispatcher failed to communicate the Johnson Family’s location to the firefighters. . . . [A] classic allegation of omission, a failure to do something—in short, a claim of inaction and not action.” *Id.* The Third Circuit indicated that it would not have been sympathetic to a claim of affirmative action since “[s]heltering in place rather than risking a perilous descent through a raging fire mirrors standard practices.” *Id.*

⁷⁵ Similarly, in *Town of Castle Rock*, the Supreme Court held that Jessica Gonzales had not suffered a due process violation since there was a “well established tradition of police discretion [which had] long coexisted with apparently mandatory arrest statutes.” 545 U.S. at 760. Without any affirmative action to hang its hat on, the Court relied heavily on the expansive police discretion that exists even within mandatory arrest statutes to avoid judgment. *See id.* at 761.

⁷⁶ 836 F.3d 235, 239–40 (3d Cir. 2016).

⁷⁷ *Id.* at 240.

⁷⁸ *Id.* at 243.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² The Ninth Circuit made a tenuous differentiation between state omission and action in *Wood v. Ostrander*, in which Trooper Ostrander stopped a car driven by Robert Bell,

This of course raises the question as to what counts as the status quo, reminiscent of the *Lochner*-era characterization of the natural state.⁸³ One could argue that in many cases the government contributes to what the courts are calling the status quo,⁸⁴ such that it should count as the affirmative ingredient needed to find liability. Again, the Court has never seemed convinced by this scholarly point, likely given the magnitude of claims that would be permissible in the wake of that acknowledgement.

Despite the care dedicated to arguing for and defending it, the Third Circuit's razor thin distinction between *Johnson* and *L.R.* may still feel unsatisfactory. Courts are making flimsy distinctions between situations in which they find action and those in which they do not. The guiding principle driving when courts are willing to re-scope by inventing a fiction or re-framing behavior as action is whether the defendant's behavior altered the status quo. In *DeShaney* and *Johnson*, even if you think of DSS's and the 911 operator's behaviors as actions, Joshua and the Johnsons remained in the situations they were in at time zero, prior to the government's involvement. Contrast this with *L.R.*, in which the teacher's behavior altered Jane's situation at time zero. As a result of the intervention, she was transported from a classroom to a stranger's control. If you do not agree that these are

who was intoxicated. 879 F.2d 583, 586 (9th Cir. 1989). The trooper had the car towed and impounded, leaving Bell's passenger, Linda Wood, unable to get home. *Id.* Trooper Ostrander drove away in his patrol car with Bell, leaving Wood near a military reservation in a high crime area. *Id.* Wood accepted a ride home from a stranger who raped her. *Id.* The Ninth Circuit found a viable state-created danger claim (without using that language explicitly) given that Trooper Ostrander's behavior crossed the line from omission to action. The court characterized Ostrander's conduct as "affirmatively plac[ing] the plaintiff in a position of danger." *See id.* at 589–90 (quoting *Ketchum v. County of Alameda*, 811 F.2d 1243, 1247 (9th Cir. 1987)); *see also* Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL OF RTS. J. 1165, 1175 (2005) (crediting *Wood v. Ostrander* with the Ninth Circuit's state-created danger doctrine, which requires a state actor to affirmatively place the plaintiff in danger); Chemerinsky, *supra* note 67, at 9 (discussing the same).

⁸³ *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 879 (1987) ("The status of the common law as a part of nature undergirded the view that the common law should form the baseline from which to measure deviations from neutrality . . .").

⁸⁴ *See, e.g., DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 208 (1989) (Brennan, J., dissenting) ("Wisconsin has established a child-welfare system specifically designed to help children like Joshua. . . . In this way, Wisconsin law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse."); *see also* Bandes, *supra* note 12, at 2292 (describing the difficulty of measuring what the appropriate baseline status quo is in these situations).

valid distinctions, then you are in good company, but nonetheless it's an administrable distinction that courts have drawn.⁸⁵

The state-created danger doctrine emerges as a narrow exception to the presumption of no liability for omissions. Left entirely in a world of state inaction, a court would be tasked with evaluating the roads not taken and potentially even making a value judgment on which road would be best to take. So instead, courts anchor claims to affirmative actions, no matter how small. While it may be unsatisfying, this move provides courts with a more administrable task—evaluating whether the state affirmatively created the danger that led to a due process violation. This requires the court to assess only one pathway—the road taken.

2. *Special Relationships*

The second exception—dismissed by Justice Rehnquist as a path to state liability in *DeShaney*—exists when the state “by the affirmative exercise of its power” in a custodial setting—either carceral or institutional—restricts the person’s ability to protect themselves and thus assumes the duty to provide for their basic needs.⁸⁶ In *A.M. ex rel. Youngers v. New Mexico Department of Health*, the guardian ad litem of a sixty-six year old woman, A.M., who had been involuntarily institutionalized fifty years earlier, brought a substantive due process claim under the Fourteenth Amendment, invoking the special relationship doctrine.⁸⁷ The New Mexico Department of Health transferred hundreds of institutionalized residents to third-party programs and after doing so “abandoned” them, failing to protect them from “abuse, neglect, or exploitation.”⁸⁸ No employee at the Homestead House where the state transferred A.M. had the necessary experience to care for someone with her disability.⁸⁹ Compounding this, she was deprived of medical and social services.⁹⁰ Applying the standard formulation Justice Rehnquist described in *DeShaney* as the *Estelle-Youngberg* analysis, named for its two progenitor cases,⁹¹ the court

⁸⁵ See Chemerinsky, *supra* note 67, at 25 (“Yet, it is important to remember that this is an area where an incredibly fine line is drawn in many [] cases, despite the tragic circumstances presented.”).

⁸⁶ *DeShaney*, 489 U.S. at 200.

⁸⁷ 65 F. Supp. 3d 1206, 1252 (D.N.M. 2014) (discussing the application of the special-relationship doctrine to A.M.’s situation), *rev’d on other grounds*, 108 F. Supp. 3d 963 (D.N.M. 2015), *modified on other grounds*, No. CIV 13-0692 JB/WPL, 2016 U.S. Dist. LEXIS 38290 (D.N.M. Feb. 29, 2016).

⁸⁸ *Id.* at 1215.

⁸⁹ *Id.* at 1219.

⁹⁰ *Id.*

⁹¹ See generally *Estelle v. Gamble*, 429 U.S. 97 (1976); *Youngberg v. Romeo*, 457 U.S. 307 (1982); Sarah J. Hefley, Note, *State’s Failure to Protect Child from Known Abuse Does*

held that when the state commits an individual, they owe that person affirmative protection from harm. To state the inverse, the state becomes responsible for omissions that lead to due process violations because of the custodial nature of the relationship.⁹²

To justify this exception, courts again rely on a construct of state *action* squarely in the affirmative category. The action in these cases is always the involuntary institutionalization of the individual, leaving that person vulnerable to abuse, though rarely constituting the final blow—much like the state-created danger exception.⁹³ The state becomes responsible for its failure to protect the individual from abusive caretakers or violent fellow patients—in a way that it did not in *DeShaney*—because of this initial affirmative stripping of liberty. As Justice Rehnquist explained in *DeShaney*, “[I]t is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf . . . which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.”⁹⁴ As we have seen throughout, the judiciary is wary of holding the government liable for its failure to protect individuals without some hook—here an affirmative hook.⁹⁵

Not Trigger Liability Under Section 1983, 12 U. ARK. LITTLE ROCK L. REV. 777, 788 (1989–90) (describing Justice Brennan’s view of *Estelle* and *Youngberg* as standing collectively for the proposition that “once the state has cut off an individual’s private sources of aid, it has a positive duty to care for the individual”).

⁹² See *A.M.*, 65 F. Supp. at 1252–53; see also, e.g., *Youngberg*, 457 U.S. at 324 (holding that the state’s failure to protect Nicholas Romeo, a committed individual with cognitive disabilities, from injuries from other residents as well as from himself, was a due process violation); *Estelle*, 429 U.S. at 103–04, 106 (holding that deliberate indifference to an incarcerated individual’s serious medical needs, but not mere negligence in diagnosing or treating a medical condition, can constitute cruel and unusual punishment).

⁹³ See *supra* Section II.A.1.

⁹⁴ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989).

⁹⁵ See *id.* (“The affirmative duty to protect arises . . . from the limitation which [the State] has imposed on [an individual’s] freedom to act on his own behalf . . . through imprisonment, institutionalization, or other similar restraint of personal liberty.”). Professor Barbara Armacost further speculates that the courts are open to the special relationship exception because these situations frequently have limited resource allocation concerns that might arise in a non-custodial setting. The state has placed the individual in a controlled setting with their basic needs theoretically provided for, making it less likely that the courts reviewing a failure-to-act claim would be reviewing resource allocation decisions. See Armacost, *supra* note 55, at 1015 & n.145 (“[W]here a municipality voluntarily undertakes to act on behalf of a particular citizen who detrimentally relies on an illusory promise of protection offered by the municipality, we have permitted liability because . . . the municipality has . . . determined how its resources are to be allocated . . .” (first alteration in original) (quoting *Kircher v. City of Jamestown*, 543 N.E.2d 443, 446 (N.Y. 1989))).

3. Monell Liability

The third exception arises in the setting of *Monell* liability—a doctrine, under-discussed in the scholarship on government inaction and state action doctrine, that allows litigants to sue municipalities under § 1983 for constitutional violations proximately caused by a municipal policy or custom.⁹⁶ The doctrine originated in *Monell v. Department of Social Services*, in which a group of city employees brought a § 1983 action against the city for forcing them to take unpaid maternity leaves.⁹⁷

The relevant circumstance here is when there is a “policy of municipal inaction” that makes an affirmative due process violation likely to occur, though *Monell* liability is also available for affirmative policies.⁹⁸ In addition to showing a policy of inaction like a failure to implement procedural safeguards, one must also demonstrate that the policy caused the constitutional violation, putting it in the affirmative category.⁹⁹ Typically, the policy of inaction is limited to inadequate training regarding a specific skill,¹⁰⁰ inadequate supervision,¹⁰¹ or poor hiring decisions,¹⁰² that amount to “deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.”¹⁰³ The municipality also has to be on notice that its omission could lead to constitutional violations and must have ignored the burgeoning pattern of consequences.¹⁰⁴

⁹⁶ See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding that local governing bodies can be sued directly under § 1983 under certain conditions).

⁹⁷ See *id.* at 660–61.

⁹⁸ See, e.g., *Cash v. County of Erie*, 654 F.3d 324, 334 (2d Cir. 2011) (“[M]unicipal polic[ies] may be pronounced or tacit and reflected in either action or inaction. In the latter respect, a ‘city’s policy of inaction in light of notice that its program will cause constitutional violations is the functional equivalent of a decision by the city . . . to violate the Constitution.’” (quoting *Connick v. Thompson*, 563 U.S. 51, 61–62 (2011))).

⁹⁹ See *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012) (explaining that a policy must have caused a constitutional violation “in the sense that the [municipality] could have prevented the violation with an appropriate policy” (alteration in original) (quoting *Gibson v. County of Washoe*, 290 F.3d 1175, 1194 (9th Cir. 2002), *overruled by* *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc))).

¹⁰⁰ See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 390 (1989) (“In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.”).

¹⁰¹ See Michael L. Wells, *The Role of Fault in § 1983 Municipal Liability*, 71 S.C. L. REV. 293, 310 (2019) (“Lower courts have upheld *Monell* recovery in cases involving a failure to supervise or to discipline employees, rather than a lack of training.”).

¹⁰² See *id.* at 309–10 (describing the Court’s standard for determining when hiring decisions may produce municipal liability).

¹⁰³ *Connick*, 563 U.S. at 61 (alteration in original) (quoting *City of Canton*, 489 U.S. at 388).

¹⁰⁴ See *Tsao*, 698 F.3d at 1145 (discussing the requirement that actual or constructive notice is required to show deliberate indifference sufficient for a constitutional violation).

In *Oviatt v. Pearce*, Kim Clay Oviatt was incarcerated for 114 days as a result of a discrepancy on the court clerk’s docket sheet.¹⁰⁵ The Ninth Circuit held that Multnomah County violated Oviatt’s Fourteenth Amendment right to due process; that the sheriff and Multnomah County Jail had a policy that failed to detect missed arraignments and instead relied on family members to notify them when incarcerated individuals did not appear in court; and that the sheriff was aware of the issue and “decided not to create any procedure to remedy the problem.”¹⁰⁶ *Monell* liability also requires that the municipality display a policy of deliberate indifference, which was satisfied here because the sheriff was aware that individuals had no independent means to communicate with the outside world to alert them to the situation and was aware of nineteen incidents spanning a decade in which individuals missed arraignments and remained incarcerated without a hearing.¹⁰⁷ The municipality’s policy of inaction increased the likelihood of a constitutional violation—as evidenced by the counterfactual scenarios that might have decreased the likelihood of a due process violation that the court enumerated, including installing a computer program or manually comparing the docket to the booking sheet.¹⁰⁸

Like the first two exceptions discussed in Sections II.A.1 and II.A.2, *Monell* liability is housed within the affirmative category, attaching only when a pattern of municipal omissions has led to an affirmative constitutional violation. However, there is a difference between how the affirmative component plays out in the *Monell* doctrine as compared to the state-created danger doctrine. In the latter, the courts were looking for an *initial* affirmative action at time zero that gave rise to a third-party due process violation. In *Monell* doctrine cases, we begin with the policy of inaction at time zero.

Regardless, there are two reasons the affirmative category label is a useful heuristic in *Monell* doctrine cases. First, the municipality is liable only if its policy of inaction gives rise to an *affirmative* third-party due process violation, meaning that without that affirmative component, the policy of inaction would never be litigable.¹⁰⁹ Second, the *policy* of inaction can be understood as a proxy for action. Courts

¹⁰⁵ *Oviatt v. Pearce*, 954 F.2d 1470, 1472 (9th Cir. 1992).

¹⁰⁶ *Id.* at 1477.

¹⁰⁷ *Id.* at 1478. A policy of inaction rises to the threshold deliberate indifference standard if a municipality failed to act despite a pattern of repeated constitutional violations or where there was evidence that the plaintiff notified the municipality and no action was taken. See *Tsao*, 698 F.3d at 1143.

¹⁰⁸ *Oviatt*, 954 F.2d at 1478.

¹⁰⁹ See *City of Oklahoma v. Tuttle*, 471 U.S. 808, 823 (1985) (“[T]here must be an affirmative link between the policy and the particular constitutional violation alleged.”).

generally do not allow *Monell* liability for a “single isolated incident.”¹¹⁰ That the municipality repeatedly fails to correct course despite notice of the injury wrought amounts, in essence, to an affirmative choice.¹¹¹

4. *Blurring the Line Between Substantive and Procedural Due Process Claims*

This final category grapples with a subset of cases that blur the line between procedural and substantive due process violations. Unlike the first three exceptions discussed thus far—state action doctrine, special relationships, and *Monell* liability—the procedural due process framework does not rely on an affirmative government action, but instead falls into the external category. In these cases, the courts look to an external statute or policy that independently limits government discretion. When the government makes a policy that requires it to act but fails to do so, courts may hold the government liable for that failure to act akin to enforcing a writ of mandamus.

In a series of cases related to building permit applications, state courts found that federal substantive due process violations occurred when municipalities failed to issue nondiscretionary permits. In *Mission Springs, Inc. v. City of Spokane*, after the city council failed to issue permits to a developer, the Supreme Court of Washington found that a statute established a non-discretionary framework for granting permits.¹¹² The court held that “neither a grading permit, building permit, nor any other ministerial permit may be withheld at the *discre-*

¹¹⁰ *Id.* at 821; *see also, e.g.*, *Spencer v. City of Boston*, No. 15-cv-10634-IT, 2018 U.S. Dist. LEXIS 46315, at *10–11 (D. Mass. Mar. 2, 2018) (holding that a failure-to-train claim failed because the incident in question was isolated); *Hyman v. County of Albany*, 9:13-CV-770, 2016 U.S. Dist. LEXIS 116777, at *48–49 (N.D.N.Y. Mar. 31, 2016) (holding that a single inadequate investigation did not amount to a policy or custom).

¹¹¹ Part of the judiciary’s comfort may be derived from how hard it is for plaintiffs to succeed on a failure-to-train claim. *See Connick v. Thompson*, 563 U.S. 51, 61 (2011) (“A municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on failure to train.”). A successful litigant would need to show that the municipality’s failure to train rose to the level of deliberate indifference, which is a “stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” *Id.* (quoting *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 410 (1997)).

¹¹² *See Mission Springs, Inc. v. City of Spokane*, 954 P.2d 250, 256 (Wash. 1998) (finding that applicants for grading permits are entitled to immediate issuance upon the satisfaction of relevant statutory criteria); *see also Bateson v. Geisse*, 857 F.2d 1300, 1303–04 (9th Cir. 1988) (holding that the denial of a nondiscretionary building permit constitutes a constitutional violation); *Bello v. Walker*, 840 F.2d 1124, 1126, 1129 (3d Cir. 1988) (holding that the arbitrary denial of a building permit can violate substantive due process), *overruled on other grounds by United Artists Theatre Cir. v. Twp. of Warrington*, 316 F.3d 392 (3d Cir. 2003).

tion of a local official.”¹¹³ The Court found that under the Fourteenth Amendment, Mission Springs had been deprived of a property right without due process.¹¹⁴ Much like the administrative law cases discussed in Section II.B, the language in these cases reflects the judiciary’s willingness to evaluate government omissions when they are externally circumscribed, making that analysis administrable by decreasing the hypothetical alternative paths the municipality could have taken.¹¹⁵ Even if the original ordinances were born of discretionary policy decisions, at the time parties are applying for permits, “authorities are . . . concerned with questions of compliance . . . not with [the policy’s] wisdom.”¹¹⁶

B. Administrative Omissions Liability

Section II.A focused on exceptions to the presumption of no omissions liability in the constitutional due process context. This Section analyzes the exceptions in administrative law. Justice Brennan’s concurrence in *Chaney* teed up several hypothetical categories that he thought could survive the presumption of non-reviewability for non-enforcement decisions established by the majority in that case.¹¹⁷ In practice, not all of these exceptions have been generative. Additionally, subsequent case law, notably *Norton v. Southern Utah Wilderness Alliance (SUWA)*,¹¹⁸ added a hurdle for failure-to-act claims but left intact plaintiffs’ ability to exploit the pre-existing exceptions.

This Section will focus on the three routes that have been most generative in terms of the frequency of suits brought and plaintiffs’ success. Similar to exceptions in the constitutional context, these appear to have prevailed because they focus on seemingly administrable agency choices. They allow courts to “review the exercise of discretion without usurping the executive function.”¹¹⁹ While some of the administrative exceptions could fit into the affirmative category, most fall within the external category. In these situations, a statute or agency practice has restricted the agency’s discretion *ex ante*, making

¹¹³ *Mission Springs*, 954 P.2d at 256 (emphasis added).

¹¹⁴ *See id.* at 261 (“Arbitrary or irrational refusal or interference with processing a land use permit violates substantive due process.”).

¹¹⁵ *See* discussion *infra* Section II.B.2.

¹¹⁶ *Mission Springs*, 954 P.2d at 256 (quoting State *ex rel.* Ogden v. City of Bellevue, 275 P.2d 899, 902 (Wash. 1954)).

¹¹⁷ *See* Heckler v. Chaney, 470 U.S. 821, 839 (1985) (Brennan, J., concurring) (discussing five potential categories that could comprise exceptions to the presumption of non-reviewability).

¹¹⁸ *Norton v. S. Utah Wilderness All. (SUWA)*, 542 U.S. 55 (2004).

¹¹⁹ Sunstein, *supra* note 46, at 671.

it clear to the court what the agency should have done but failed to do.¹²⁰ The exceptions include abdication of statutory obligations, refusal to initiate rulemaking, and finally, failure to perform a discrete, non-discretionary duty.

1. *Abdication of Statutory Duties*

The abdication exception, plucked from Justice Brennan's concurrence in *Chaney*, allows for judicial review of government omissions when agencies have "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities.¹²¹ While individual actions may be left to the agency's discretion, the choice not to fulfill the statutory mandate delegated by Congress is not. In cases where agencies have abdicated their overarching duty, the judiciary has been more comfortable compelling compliance with the broad goal of the organic statute, even if it would be less at ease reviewing individual non-enforcement actions.

In these rare situations of total abdication, unlike many single non-enforcement actions, there *is* law to apply.¹²² The abdication exception straddles both mechanisms for curbing agency discretion and thus increasing judicial administrability. First, the court can look to an external directive, found in the agency's organic statute. Second, the court sometimes looks to a pattern of discrete, affirmative agency actions that, when aggregated, result in severe underenforcement tantamount to total abdication.¹²³

While examples of total abdication where plaintiffs prevail are rare, this exception has found some success in the lower courts.¹²⁴ In *Adams v. Richardson*, the D.C. Circuit, sitting en banc, found total

¹²⁰ See *id.* ("Because courts lacked methods to review discretion without usurping it, review of inaction threatened to transform courts into prosecutors."). Sunstein is sympathetic to the role the courts take on when they review agency inaction, which while morally similar to action, is pragmatically different. He argues, though, that the problem of limited resources "does not justify a broad rule immunizing inaction from judicial review." *Id.* at 675.

¹²¹ *Chaney*, 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)).

¹²² See Sunstein, *supra* note 46, at 678 (discussing the differences between a total abdication of statutory duty and an isolated decision not to act).

¹²³ See Jentry Lanza, Note, *Agency Underenforcement as Reviewable Abdication*, 112 Nw. L. REV. 1171, 1188–90 (2018) (discussing *WildEarth Guardians v. United States Department of Justice*, in which an environmental group alleged that an adopted agency policy, the McKittrick Policy, led to chronic underenforcement of the Endangered Species Act) (citing *WildEarth Guardians v. U.S. Dep't of Just.*, 181 F. Supp. 3d 651, 668 (D. Ariz. 2015)).

¹²⁴ See, e.g., *WildEarth Guardians*, 181 F. Supp. at 666 ("[T]he presumption can be rebutted where the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibility.").

abdication when the Secretary of Health, Education and Welfare (HEW) was derelict in his duty to enforce Title VI of the Civil Rights Act of 1964 by failing to end segregation in public educational institutions in receipt of federal funds.¹²⁵ HEW argued that the enforcement of the Civil Rights Act was within the agency's discretion, but the D.C. Circuit found a clear failure to respond within the reasonable time allotted, holding that the agency's persistent failure to desegregate was reviewable.¹²⁶ The court ultimately ordered HEW to demand desegregation plans from the states within 120 days.¹²⁷ A decade later, the First Circuit also found that a pattern of non-enforcement exceeded the "fairly broad range of discretionary choice" granted by the statute.¹²⁸ While an individual agency omission would be off limits, a *pattern* of omissions was fair game if it thwarted the agency's charter.¹²⁹ In *NAACP v. Secretary of HUD*, the Boston chapter of the NAACP sought review of Housing and Urban Development's (HUD) abdication to implement the Fair Housing Act.¹³⁰ The First Circuit held that while HUD possessed broad discretionary power over administering grants under the Fair Housing Act, its actions were not immune from review.¹³¹ HUD demonstrated a pattern of behavior of failing to further Title VIII's fair housing policy with full knowledge that Boston suffered from an affordable housing crisis.¹³² Again, HUD's argument that its Title VIII duties were discretionary failed.¹³³

The abdication exception has also seen recent invocations. In *WildEarth Guardians v. United States Department of Justice*, an Arizona district court found judicial review appropriate under the abdication exception.¹³⁴ However, rather than finding a pattern of omissions that resulted in the abdication of the organic statute's mandate, the court in *WildEarth Guardians* took an alternate approach. It

¹²⁵ 480 F.2d 1159, 1164 (D.C. Cir. 1973) (en banc); see also *Chaney*, 470 U.S. at 833 n.4 (discussing *Adams*).

¹²⁶ See *Adams*, 480 F.2d at 1164.

¹²⁷ See *id.*

¹²⁸ *NAACP v. Sec'y of Hous. & Urb. Dev.*, 817 F.2d 149, 157 (1st Cir. 1987), superseded on other grounds by statute, Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, as recognized in *Lihosit v. Jackson*, 2006 U.S. Dist. LEXIS 94835 (S.D. Cal. Aug. 11, 2006). The remedial decree declared that HUD must include Section Eight Housing in metropolitan area relief and clarified what assisted housing and affordable housing meant and in which areas of the statute it had discretion. See *id.* at 156–57.

¹²⁹ *Id.* at 158.

¹³⁰ *Id.* at 151.

¹³¹ *Id.* at 160.

¹³² *Id.* at 151–52.

¹³³ *Id.*

¹³⁴ See *WildEarth Guardians v. U.S. Dep't of Just.*, 181 F. Supp. 3d 651, 667–68 (D. Ariz. 2015), vacated and remanded, 752 F. App'x 421 (9th Cir. 2018) (holding that plaintiff lacked standing to bring a challenge under the APA).

held that enforcement of an affirmative agency policy—here the McKittrick Policy, which directed the Department of Justice prosecuting cases under the Endangered Species Act (ESA) to request jury instructions requiring proof *beyond a reasonable doubt* that the defendant was aware of the species of the animal taken—amounted to abdication of the ESA.¹³⁵ The court was explicit about labeling the underlying agency activities as actions rather than omissions, stating, “Defendant argues that . . . here, the Plaintiffs only allege inaction: DOJ’s alleged unexercised enforcement authority, or alternatively stated, DOJ’s decision not to enforce. Defendant is wrong. The Plaintiffs challenge the DOJ’s *actions* of adopting and ‘carrying out’ the McKittrick Policy.”¹³⁶

A district court in Maryland took a similar approach in *American Academy of Pediatrics v. FDA*, in which the FDA adopted an express policy not to enforce the Family Smoking Prevention and Tobacco Control Act’s premarket review provisions.¹³⁷ While the court acknowledged that such a decision was within the FDA’s discretion, per *Chaney*, to abstain from enforcing certain provisions of the Tobacco Control Act, the agency could not decide “not to enforce the premarket review provisions *at all* for five years or longer.”¹³⁸

The court discussed Congress’s *ex ante* limitation of the FDA’s enforcement discretion, limited by the Act itself: “[T]o hold that the FDA’s discretion was not circumscribed by the Tobacco Control Act’s mandatory language would ‘violat[e] a cardinal rule of statutory construction.’”¹³⁹ In both cases, agencies affirmatively adopted a policy that led to omissions so great they amounted to wholesale abdications. These affirmative policies were more administrable for the reviewing courts than open-ended agency omissions. Through this approach, the exception falls into the affirmative category as well and is perhaps more faithful to the abdication exception itself, which called for the agency to adopt a policy that amounted to abdication.¹⁴⁰

¹³⁵ See *id.* at 657.

¹³⁶ See *id.* at 668 (emphasis added) (citations omitted).

¹³⁷ 379 F. Supp. 3d 461, 492–93 (D. Md. 2019).

¹³⁸ *Id.* at 493.

¹³⁹ *Id.* at 487 (second alteration in original) (quoting *United States v. Simms*, 914 F.3d 229, 242 (4th Cir. 2019)).

¹⁴⁰ See *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (“Nor do we have a situation where it could justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.” (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc))).

2. *Failure to Perform a Discrete, Non-Discretionary Duty*

When an agency fails to perform a discrete, non-discretionary duty, courts have found these omissions reviewable and sometimes impose remedies. That this exception exists at all may seem unremarkable. It is typically applied when trying to enforce uncontroversial and banal statutory provisions like deadlines. But it survived the Supreme Court's holding in *Norton v. Southern Utah Wilderness Alliance (SUWA)*, in which Justice Scalia seemed eager to preclude judicial review for agency omissions once and for all.¹⁴¹ In *SUWA*'s wake, only the most ministerial failures-to-act would qualify for review.¹⁴²

In *SUWA*, Plaintiffs argued that the Bureau of Land Management (BLM) failed to comply with managing wilderness study areas dedicated for nature preservation by allowing off-road vehicles.¹⁴³ While the Tenth Circuit agreed with the plaintiffs, the Supreme Court reversed, drawing a line in the sand precluding claims regarding any discretionary agency omissions.¹⁴⁴ Claims like the one in *SUWA* got too close to second-guessing the agency's agenda. While many of the cases that survived *SUWA* are predictably as ministerial as the *SUWA* Court itself had intended (ranging from missed deadlines to perfunctory clerical duties), some have toed the line between what the *SUWA* Court may have found acceptable and what lower courts have found tolerable.

Vietnam Veterans of America v. CIA is a hallmark of how far lower courts have been willing to push *SUWA*.¹⁴⁵ The Ninth Circuit held that the U.S. Army had failed to provide information to former subjects of military experimentation about newly discovered adverse health effects and had failed to provide medical care for conditions proximately caused by those exposures.¹⁴⁶ The court acknowledged that there was some discretion as to how the Army could execute these tasks but interpreted the regulation at issue—which included a duty to warn research volunteers about risks involved with prior and current participation and mandated a provision of “new medical and scientific information . . . as it [became] available”—as creating a non-

¹⁴¹ See *SUWA*, 542 U.S. 55, 64, 66–67 (2004).

¹⁴² See *id.* at 66 (discussing the principal purpose of the APA, which the Court claimed was based on mandamus—the object being to “protect agencies from undue judicial interference with the agencies’ lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve”).

¹⁴³ *Id.* at 59–60.

¹⁴⁴ See *id.* at 64.

¹⁴⁵ See *Viet. Veterans of Am. v. CIA*, 811 F.3d 1068, 1076–78 (9th Cir. 2016).

¹⁴⁶ *Id.* at 1082–83.

discretionary duty.¹⁴⁷ Here too, the district court ordered and the Ninth Circuit affirmed relief, requiring the Army to provide relevant information and care to the affected class.¹⁴⁸ The discussion of the preservation of discretion is paramount throughout the case. The court stated that the Army would still have discretion to develop the specific policies to carry out these mandates.¹⁴⁹ But Judge Wallace, concurring in part and dissenting in part, quibbled that this was *not* the non-discretionary activity that the *SUWA* Court envisioned given the use of the word “authorized,” which to him implied choice.¹⁵⁰ To Wallace, and the casual observer, the regulation lacked the character of the unequivocal statutory mandates typical of writs of mandamus.¹⁵¹ Overall, the discrete, non-discretionary exception is justified under the external category, with courts looking to the organic statute or agency regulations to find statutory mandates, but this exception also straddles the affirmative category.¹⁵²

3. *Refusal to Initiate Rulemaking*

The final exception to *Chaney* that has proven productive for plaintiffs is *refusal* to initiate rulemaking. Nowhere in the APA are denials to initiate rulemaking separately protected. As a result, the ability to subject these discretionary decisions to judicial review—which are at first glance indistinguishable from non-enforcement decisions at issue in *Chaney*—was vulnerable following *Chaney*.¹⁵³ Scholars have grappled with how to distinguish this category from the unreviewable non-enforcement decision in *Chaney*. The majority in *Massachusetts v. EPA* proposed several rationales to justify the different treatment: Refusals to initiate rulemaking arise less frequently and tend to involve issues of law as opposed to fact.¹⁵⁴ Decisions based on law tend to be less discretionary than ones based on fact,¹⁵⁵

¹⁴⁷ See *id.* at 1071, 1079.

¹⁴⁸ *Id.* at 1082–83.

¹⁴⁹ See *id.* at 1080.

¹⁵⁰ See *id.* at 1085 (Wallace, J., concurring in part and dissenting in part).

¹⁵¹ See *id.* at 1085–86.

¹⁵² See *Or. Nat. Res. Council Fund v. Brong*, No. 04-693, 2004 U.S. Dist. LEXIS 23251, at *15–16 (D. Or. Nov. 8, 2004), *aff'd* 492 F.3d 1120 (9th Cir. 2007) (rejecting defendant’s urge to characterize BLM’s failure to preserve land from salvage logging as an omission and reframing as an affirmative timber sale).

¹⁵³ See Sunstein, *supra* note 46, at 680–81 (“These decisions are thrown into question by *Chaney*. Many of the considerations that justify refusal to review in that case are applicable in cases involving a refusal to issue a rule or to initiate rulemaking proceedings.”).

¹⁵⁴ See *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007).

¹⁵⁵ See, e.g., Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 8 (1922) (“[T]hey have held the question of whether a particular thing constituted a nuisance to be a mere question of fact or . . . discretion where they refused to entertain any review, and

and the infrequency of denials to rule-make in contrast with non-enforcement decisions indicates that judicial review in the former context will not undermine the agency's discretionary resource allocations as much. In other words, these rationales underscore the courts' understanding that non-enforcement decisions are more discretionary than the more straightforward denials of petitions to make rules.¹⁵⁶ Much of Justice Stevens's opinion in *Massachusetts v. EPA* centers on how non-enforcement decisions are the height of agency discretion and how agencies have far less baseline discretion when it comes to decisions regarding rulemaking.¹⁵⁷ All this to say, reviewing denials to initiate rulemaking is a more administrable task than reviewing an agency's non-enforcement decision.

III

WIDENING MOTH-EATEN HOLES

Affirmative bad acts are easy to condemn. When we identify a bad actor, there is little conceptual confusion about the path towards accountability. Omissions muddy the waters, and understandably so. But the government should not be able to use omissions as a per se shield to escape liability. The problems facing contemporary society are too grave for the cloak of non-justiciability. This Part is meant to interrogate liability pathways for protracted crises—ones that tend to drop out of the news cycle when a more acute catastrophe consumes public attention. So much damage comes from this type of neglect, but because there are often no remedies available and few alternative routes to seek justice, a strain of fatalism can arise: This is what it is and how it will always be. The housing crisis,¹⁵⁸ the climate crisis,¹⁵⁹

. . . have insisted that it was primarily a question of law where they felt that review was proper.”).

¹⁵⁶ See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 96–97 (2007) (discussing that the rationales given in *Massachusetts v. EPA* are “both implicit responses to the worry that agencies must have discretion to allocate resources on cost-benefit grounds, as they do with respect to nonenforcement”).

¹⁵⁷ *Massachusetts*, 549 U.S. at 527 (“As we have repeated . . . an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. That discretion is at its height when the agency decides not to bring an enforcement action.” (citation omitted)).

¹⁵⁸ See, e.g., LA All. for Hum. Rts. v. City of Los Angeles, No. CV 20-02291-DOC-(KESx), 2021 U.S. Dist. LEXIS 76053, at *53 (C.D. Cal. Apr. 20, 2021) (“As a direct result of local government inaction and inertia in the face of a rapidly escalating crisis, 165 homeless people died in January 2021 alone—a 75.5% increase compared to January 2020.”), *vacated*, 14 F.4th 947 (9th Cir. 2021).

¹⁵⁹ Consider that the U.S. government has known since at least 1965 about the deleterious effects of carbon dioxide on global warming and repeatedly failed to course correct over seven consecutive presidential administrations. See generally JAMES GUSTAVE

the opioid epidemic,¹⁶⁰ the pandemic, and our lack of universal healthcare.¹⁶¹ Name it. Even if problems of this magnitude remain out of litigants' grasp, expanding the current pathways to omissions liability is necessary to accommodate the direct harm that omissions can have. Part II challenged the notion, laid out in Part I, that there is no liability for government omissions. Marrying administrability with accountability, this final Part will revisit the doctrinal exceptions laid out in Part II and discuss modest widenings of the moth-eaten holes in the fabric of the presumption of no omissions liability.

Constitutional and administrative law are riddled with exceptions that courts have carved out. These exceptions have persisted despite the majority sentiment that omissions are too un-administrable to pin down. To justify deviations from the purported norm, courts often go out of their way to identify an affirmative state action or an external statute or regulation. Both moves increase the administrability of judicial review. When the executive branch has less flexibility, the judiciary is emboldened to hold it liable for failures to act. While these exceptions do exist, they do not go far enough to expand omissions liability, especially given the academic debates about the distance between government actions and omissions in a regulatory state as complex as ours.¹⁶² Part III gestures at the implications of taking the field of public omissions liability developed in Part II seriously. Further work needs to be done on the widening of each hole, but this Part lays the foundation for this future scholarship. For some categories, courts have already implicitly adopted an expansion, providing

SPETH, THEY KNEW: THE US FEDERAL GOVERNMENT'S FIFTY-YEAR ROLE IN CAUSING THE CLIMATE CRISIS 152 (2021) ("Notwithstanding these understandings, the defendants have acted routinely and consistently . . . to promote fossil fuels and thus to cause irreversible climate danger, a pattern that can only reflect a deliberate indifference to the severe impacts that will follow—impacts to be endured predominantly by youth plaintiffs and future generations.").

¹⁶⁰ See Andrew Kolodny, *How FDA Failures Contributed to the Opioid Crisis*, 22 *AMA J. ETHICS* 743, 744–45 (2020); *The Drug Overdose Epidemic: Behind the Numbers*, *CTRS. FOR DISEASE CONTROL & PREVENTION* (June 1, 2022), <https://www.cdc.gov/opioids/data/index.html> [<https://perma.cc/FAJ2-HZZ2>] (discussing the FDA's regulatory failures that contributed to the opioid epidemic and the 932,000 ensuing deaths).

¹⁶¹ See Alison P. Galvani et al., *Universal Healthcare as Pandemic Preparedness: The Lives and Costs that Could Have Been Saved During the COVID-19 Pandemic*, 119 *PROC. NAT'L ACAD. SCIS.* e2200536119, at 1 (attributing 212,000 U.S. COVID-19 deaths in 2020 to the lack of universal healthcare). Having universal coverage would improve access to primary care and preventative medicine, thus reducing comorbidities and increasing early diagnosis and interventions. It would also facilitate preventative measures like vaccination campaigns if more individuals had prior relationships with primary health providers, and it would have lowered the burden on hospitals during COVID-19 surges. *Id.* at 3–4. Removing the pandemic from the equation, the same study found that universal healthcare would have saved 76,064 lives in 2019. *Id.* at 3.

¹⁶² See, e.g., *supra* note 47 and accompanying text.

proof of concept that formalizing such a category is in the cards. In each case, the judiciary can rest assured that administrability is preserved given that these expansions still rely on the affirmative and external categories.

A. Constitutional Omissions Liability Expansions

1. State-Created Danger Doctrine

The state-created danger doctrine¹⁶³ is invoked in situations where the government played an active role in creating vulnerability for people. While the state rarely strikes the fatal blow, through antecedent affirmative actions, it throws the victim into the lion's pit and sits back while the lion feasts on its prey. Claims brought under this exception focus on discrete, particular injuries suffered by individuals.¹⁶⁴ The proposed widening would expand the imagined applications of the doctrine—allowing claims against widespread government policies and perhaps even as aggregate litigation, but still relying on the affirmative ingredient.

A case in point is the COVID-19 pandemic. A few months into the pandemic, New York Governor Andrew Cuomo issued a directive requiring nursing homes to accept residents who had recently recovered from COVID-19.¹⁶⁵ Much of the ensuing scandal focused on Cuomo's fraudulent cover up of the total number of deaths,¹⁶⁶ but there has been less focus on the decision itself. Part of the state's policy was refusing to allow nursing homes to test residents for COVID-19; the only admission criterion was that they were medically stable.¹⁶⁷ As of August 2021, New York State led the nation in nursing home deaths.¹⁶⁸

¹⁶³ See *supra* Section II.A.1.

¹⁶⁴ See, e.g., *Wood v. Ostrander*, 879 F.2d 583, 586 (9th Cir. 1989) (explaining that a state trooper had placed the appellant in danger by abandoning her in a high crime area where, unable to get home, she accepted a ride from a stranger who then raped her). For a lengthier discussion of *Wood*, see *supra* note 82.

¹⁶⁵ Michael Gold & Ed Shanahan, *What We Know About Cuomo's Nursing Home Scandal*, N.Y. TIMES (Aug. 4 2021), <https://www.nytimes.com/article/andrew-cuomo-nursing-home-deaths.html> [<https://perma.cc/53GC-D4UH>].

¹⁶⁶ J. David Goodman & Danny Hakim, *Cuomo Aides Rewrote Nursing Home Report to Hide Higher Death Toll*, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/2021/03/04/nyregion/cuomo-nursing-home-deaths.html> [<https://perma.cc/FU4D-A26S>] (discussing how Governor Cuomo's aides redacted the public figures of nursing home deaths from COVID-19).

¹⁶⁷ See Luis Ferré-Sadurní & Amy Julia Harris, *Does Cuomo Share Blame for 6,200 Virus Deaths in N.Y. Nursing Homes?*, N.Y. TIMES (Jan. 28, 2021), <https://www.nytimes.com/2020/07/08/nyregion/nursing-homes-deaths-coronavirus.html> [<https://perma.cc/8J2R-VSSS>].

¹⁶⁸ See Gold & Shanahan, *supra* note 165.

Could aggrieved parties rely on the state-created danger doctrine in court? Using the Third Circuit's test for the state-created danger doctrine, a potential plaintiff suing the government over New York's nursing home failures would have to plead four elements: (1) a "foreseeable and fairly direct harm"; (2) an action that shocks the conscience; (3) a "relationship with the state" because the plaintiff was a foreseeable victim; and (4) an "affirmative use of state authority in a way that created a danger or made others more vulnerable than had the state not acted at all."¹⁶⁹ Introducing potentially positive patients with no testing into an at-risk population like nursing home residents is a foreseeable and fairly direct harm, especially given what we know about respiratory viral transmission. Whether or not this action shocks the conscience is a harder case to make given the exigencies of the pandemic. However, it is arguable that outside of a high-speed police chase (a situation where courts require intent given the immediacy of the decision-making process), conscience-shocking behavior can include more than negligence but less than intent—something akin to deliberate indifference.¹⁷⁰ While the pandemic was certainly a crisis, it was a protracted one, allowing for "actual deliberation" and "unhurried judgements."¹⁷¹ The third element appears to be rather pro forma in the Third Circuit.¹⁷² Finally, the issuance of an executive directive is unequivocally affirmative. This expansion thus remains comfortably under the original conception of state-created danger doctrine but rethinks its utility in a more impactful context. Given the broader reach and the possible encroachment into policymaking, the courts might find a justiciability issue or at the very least worry that they would become involved in the polycentric decisions faced by the legislature and executive. However, the proposal is still remedying an actual dispute between adversarial parties, even if the remedy might have wide-reaching policy implications.

2. *Special Relationships*

Although the Court has consistently refused to expand the special relationship exception¹⁷³ outside of instances in which the state has

¹⁶⁹ *Johnson v. City of Philadelphia*, 975 F.3d 394, 400 (3d Cir. 2020). Most circuits have their own version of the state-created danger doctrine. The prongs vary slightly, see Chemerinsky, *supra* note 67, at 15–18, but this Note focuses on the Third Circuit's for its clarity.

¹⁷⁰ *Sanford v. Stiles*, 456 F.3d 298, 305–06 (3d Cir. 2006).

¹⁷¹ *Id.* at 306.

¹⁷² See, e.g., *Johnson*, 975 F.3d at 400 (contrasting a foreseeable victim who has a relationship with the state to a member of the general public).

¹⁷³ See *supra* Section II.A.2.

involuntarily placed an individual in custody,¹⁷⁴ there is room for expansion here too. Currently, claims brought under the special relationship exception are available only to institutionalized and incarcerated people. The doctrine should be expanded to include discrete and insular minorities, while still requiring an *ex ante* affirmative deprivation of political rights.

Political process theory can help guide the quest for an expansion. In *United States v. Carolene Products Company*, the Court included a now-famous footnote, inquiring as to “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”¹⁷⁵ Our system of government, the laws and policies that create the semblance of an American social safety net, and the representatives that advocate for our interests, all at heart reflect majoritarian values.¹⁷⁶ Thus, when constituencies are not reflected in the political process—because laws restrict their participation and fail to serve their interests—they are considered discrete and insular minorities deserving of the courts’ protection.¹⁷⁷ Only in these cases would the judiciary be justified to intervene, balanced against the risk of entangling itself in what otherwise would be a political decision.

The same logic should apply here. When a claim is brought by someone who is a member of a discrete and insular minority—someone whom a majoritarian legislature or agency reflecting the administration’s views has affirmatively excluded from its statutory or regulatory protections—the courts should consider state omission claims under the special relationship exception when their claim arises from a condition of their status as a political minority. The rationale would remain the same as the broader version of political process theory: Having been affirmatively deprived of their right to protect themselves through the political process, they are now suffering the consequences of state omissions that they have no alternative route of remedying, since they are systematically excluded or minimized in the democratic process.

One potential application of this expanded special relationship exception could be for U.S. citizens living in Puerto Rico. While

¹⁷⁴ See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (holding that Nicholas Romeo had substantive due process rights under the Due Process Clause to safe conditions while institutionalized since he could not protect himself).

¹⁷⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁷⁶ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 78 (1980).

¹⁷⁷ See generally *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

Congress passed the Jones Act of Puerto Rico in 1917 granting residents of Puerto Rico U.S. citizenship, that grant has never amounted to full representation.¹⁷⁸ Residents of Puerto Rico lack representation in Congress and voting rights in U.S. presidential elections and are thus functionally disenfranchised.¹⁷⁹ In a 1955 speech, then-Governor Luis Muñoz Marín stated that “[o]ne thing that is basically lacking . . . is the very important principle of participation by the people of Puerto Rico in federal legislation that applies to them.”¹⁸⁰ Now, Puerto Rico is on the frontlines of the climate crisis; in the wake of Hurricanes Maria and Fiona, residents in Puerto Rico were left without electricity, basic health infrastructure, and clean drinking water.¹⁸¹ Myriad factors contributed and continue to contribute to this complex emergency, but much of it had to do with delays in FEMA funding due to congressional disagreements that some have argued could be mitigated if Puerto Rico had representation in Congress.¹⁸² Applying political process theory to individuals in Puerto Rico has been sporadically suggested in the literature for precisely this reason.¹⁸³ Under the proposed expansion in this Section, which fuses the special relationship exception with political process theory, courts could feel more comfortable finding liability in cases involving omissions affecting residents of Puerto Rico.

The Court may be reticent to expand due process claims in this manner, but to some degree it has already done so in the equal protection context, occasionally auditioning groups for heightened scrutiny.¹⁸⁴ Given the similar stakes here, it should feel comfortable that

¹⁷⁸ Jones-Shafroth Act, Pub. L. No. 64-368, § 5, 39 Stat. 951, 953.

¹⁷⁹ Cf. David C. Indiano, Note, *Federal District Court in Puerto Rico: A Brief Look at the Court and Federal Handling of Commonwealth Civil Law in Diversity Cases*, 13 CASE W. RES. J. INT’L L. 231, 231 (1981) (describing the strained political status of Puerto Rico).

¹⁸⁰ Luis Muñoz Marín, Governor of Puerto Rico, Speech at University of Kansas 6–8 (Apr. 23, 1955), <https://docplayer.net/495294-Speech-delivered-by-governor-luis-munoz-marin-at-the-university-of-kansas-city-april-23-1955.html> [<https://perma.cc/Z9RS-48XS>].

¹⁸¹ See Samantha Rivera Joseph, Caroline Voyles, Kimberly D. Williams, Erica Smith & Mariana Chilton, *Colonial Neglect and the Right to Health in Puerto Rico After Hurricane Maria*, 110 AM. J. PUB. HEALTH 1512, 1512 (2020); Raymond Zhong, *Three Reasons Puerto Rico Is in the Dark*, N.Y. TIMES (Sept. 19, 2022), <https://www.nytimes.com/2022/09/19/climate/puerto-rico-hurricane-fiona.html> [<https://perma.cc/MU57-3PVA>].

¹⁸² See Zhong, *supra* note 181.

¹⁸³ See, e.g., Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico’s Political Process Failure*, 110 COLUM. L. REV. 797, 827 (2010) (“[T]he appropriate stance for courts to take in the face of unequal treatment challenges brought by U.S. citizens residing in Puerto Rico is the application of heightened scrutiny . . .”).

¹⁸⁴ See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a Colorado constitutional amendment, which had undone protections for the queer community). Even though the LGBTQ+ community is not a suspect class under the Equal Protection Clause, this case is heralded as *auditioning* the group for strict scrutiny out of an understanding that they are

this would not snowball into providing everyone with a right to sue the government for its failings. That said, there is no doubt that this would be a large expansion of eligible classes for the special relationship exception, the size of which the judiciary might resist.

3. Monell Liability

Monell doctrine¹⁸⁵ is also ripe for expansion. Currently, litigants invoke *Monell* primarily in the law enforcement context, relying on failures to train or supervise, which may explain its limited reach.¹⁸⁶ Courts are wary of treading on police discretion given judicial sympathies to the temporal exigencies that law enforcement faces. There is nothing intrinsic about *Monell* liability—its origins or application—that necessitates a restriction to the realm of law enforcement or to such a meager conception of policies of inaction. *Monell* claims should be expanded to include additional contexts in which claims can be brought and what types of policies of inactions can be litigated, still invoking the two affirmative components of *Monell*: the consequential due process violation and the pattern of omissions.

There have been some attempts, with mixed success rates, to apply *Monell* liability to a wider range of constitutional violations outside of the law enforcement context. In the educational context, in *Martin v. Hermiston School District 8R*, a student, who played on the high school football team, suffered a traumatic brain injury as a result of repeated concussions.¹⁸⁷ The parents, putting forth a *Monell* claim, argued that the school district's policy of inaction was failing "to implement a procedure for tracking head injuries and ensuring that a player who sustained a concussion or suspected concussion did not return to practice or play without proper medical clearance."¹⁸⁸ The

in need of protection from a "bare . . . desire to harm a politically unpopular group." See *id.* at 634 (alteration in original) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

¹⁸⁵ See *supra* Section II.A.3.

¹⁸⁶ In a LEXIS search using the key words "*Monell* liability" & "policy of inaction" without any additional restrictions, 363 cases are found. However, only three cases remain when law enforcement cases are removed (by excluding terms: police, correctional, jail, prison, officer, and arrest). In each case, plaintiffs' claims failed. See *McCoy v. Bd. of Educ.*, 515 F. App'x 387 (6th Cir. 2013) (holding that a student's sexual abuse at school was not due to the school's policy of inaction); *Crumble v. Kettle Moraine Sch. Dist.*, No. 20-CV-1585, 2021 U.S. Dist. LEXIS 124014 (E.D. Wis. July 2, 2021) (holding that the school district did not engage in a policy of inaction that accepted racial harassment); *Ricketts v. Wake Cnty. Pub. Sch. Sys.*, No. 5:21-CV-49-FL, 2022 U.S. Dist. LEXIS 462, at *41 (E.D.N.C. Jan. 3, 2022) (holding that *Monell* liability was unavailable for the Wake County Board of Education for systematically ignoring racial discrimination claims from Black students).

¹⁸⁷ 499 F. Supp. 3d 813, 823–28 (D. Or. 2020).

¹⁸⁸ *Id.* at 847.

district court found this persuasive and denied the school district's motion for summary judgment.¹⁸⁹ Cases like *Martin* serve as proof of concept that litigants could effectively establish *Monell* liability in a wider variety of municipal contexts.

In addition to expanding the contexts in which claims are brought, there is room to identify novel policies of inaction, which have not grown much beyond failure to train and failure to supervise.¹⁹⁰ In carceral contexts where COVID-19 was allowed to flourish as a result of scant policies to restrict spread, *Monell* liability seems plausible. As of December 2020, incarcerated people in state and federal prisons had a COVID-19 positivity rate more than four times that of the general population.¹⁹¹ Some incarcerated plaintiffs have begun to bring *Monell* claims against county jails for their policies of inaction during the pandemic.¹⁹²

Prisons also offer a unique environment to suggest expansion to *Monell* doctrine since the causal pathway—often a barrier for plaintiffs—is clearer. As discussed above, the causation standard is quite high for a policy of inaction claim to succeed since the policy must be the proximate cause of the affirmative constitutional violation.¹⁹³ Incarcerated people are largely at the mercy of prison policy and thus do not make choices or have experiences related to the virus beyond the prison environment. This might make establishing causation in the carceral context more straightforward. As of April 12, 2023, 2,932 incarcerated people have died of COVID-19, along with 293 staff members.¹⁹⁴ The COVID Prison Project has documented at least two states, Louisiana and Maine, as having zero quarantine policies in

¹⁸⁹ *Id.* at 854.

¹⁹⁰ See *supra* Section II.A.3.

¹⁹¹ See Beth Schwartzapfel, Katie Park & Andrew Demillo, *1 in 5 Prisoners in the U.S. Has Had COVID-19*, MARSHALL PROJECT (Dec. 18, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19> [<https://perma.cc/JU3J-3LAS>].

¹⁹² See, e.g., *Williams v. Dirkse*, No. 1:21-cv-00047-BAM (PC), 2021 U.S. Dist. LEXIS 103673, at *18–19 (E.D. Cal. June 2, 2021) (McAuliffe, Mag. J.) (holding that the incarcerated plaintiff was unable to show that the jail's COVID-19 practices were representative of an official policy), *adopted by* No. 1:21-cv-00047-NONE-BAM (PC), 2021 U.S. Dist. LEXIS 197775 (E.D. Cal. Oct. 12, 2021); *Carpenter v. Thurston County*, No. 3:21-cv-05859-BJR-JRC, 2022 U.S. Dist. LEXIS 87806, at *5–7 (W.D. Wash. Feb. 7, 2022) (holding that the incarcerated plaintiff's *Monell* claim against the Thurston County Jail for failure to implement COVID-19 policies was insufficient because the defendant was not on notice that lack of policies would result in constitutional violations, or that the inaction was a deliberate choice).

¹⁹³ See *supra* Section II.A.3.

¹⁹⁴ See COVID PRISON PROJECT, <https://covidprisonproject.com> [<https://perma.cc/MEL3-VCES8>].

place in their prison systems.¹⁹⁵ Additionally, both states lack policies for resident and staff masking,¹⁹⁶ policies which are clearly linked to decreased positivity rates,¹⁹⁷ especially in a confined indoor setting like a prison facility.¹⁹⁸ Given this causal pathway, there is a strong argument that the Bureau of Prisons as well as state and county facilities were on notice that their policies of inaction were likely to lead to infections and death. This novel policy of inaction (failure to contain a known virus over a long period of time) allowed the “bad actor” to flourish, leading to illness and death.

The only question then would be if the failure to enact infection control policies amounted to deliberate indifference to the constitutional rights of persons under control of the state.¹⁹⁹ Deliberate indifference requires that prison officials “disregarded a known or obvious consequence of [their] action[s].”²⁰⁰ Again, as discussed earlier, actual or constructive notice that the program will cause constitutional violations is the same as if the state deliberately infected incarcerated people with the virus themselves.²⁰¹ This type of expansion of *Monell*-style omissions liability would lend credence to claims outside of a direct policing context and for novel policies of inaction. Using *Monell* claims to litigate prison COVID-19 policies is only alternative context for *Monell* liability, but the doctrine is flexible enough to be applied to myriad circumstances.²⁰²

¹⁹⁵ See *Policy Data*, COVID PRISON PROJECT, <https://covidprisonproject.com/policy-data> [<https://perma.cc/H95Z-M8HH>].

¹⁹⁶ *Id.*

¹⁹⁷ See, e.g., Angelique E. Boutzoukas et al., *School Masking Policies and Secondary SARS-CoV-2 Transmission*, 149 PEDIATRICS, No. 6, June 2022, at 42 (2022), <https://publications.aap.org/pediatrics/article/doi/10.1542/peds.2022-056687/185379/School-Masking-Policies-and-Secondary-SARS-CoV-2> [<https://perma.cc/UP7U-PE98>].

¹⁹⁸ See, e.g., Meg Anderson & Huo Jingnan, *As COVID Spread in Federal Prisons, Many At-Risk Inmates Tried and Failed to Get Out*, NPR (Mar. 7, 2022, 5:00 AM), <https://www.npr.org/2022/03/07/1083983516/as-covid-spread-in-federal-prisons-many-at-risk-inmates-tried-and-failed-to-get> [<https://perma.cc/TTB9-29SQ>].

¹⁹⁹ See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 388–89 (1989) (applying the deliberate indifference standard to assess whether a city can be liable for inadequate training of its employees).

²⁰⁰ *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 410 (1997).

²⁰¹ See *Connick v. Thompson*, 563 U.S. 51, 61–62 (2011) (stating that a policy of inaction in light of notice that the inaction will cause constitutional violations “is the functional equivalent of a decision by the city itself to violate the Constitution” (quoting *City of Canton*, 489 U.S. at 395 (O’Connor, J., concurring in part and dissenting in part))).

²⁰² For example, the New York City Housing Authority (NYCHA) has been on notice that many units in public housing projects contain lead paint and that children have sustained lead poisoning as a result. Rather than remediate apartments, NYCHA routinely wages successful counterattacks on families claiming that their children have been exposed to lead, resulting in the Health Department dropping orders to fix the issue. See J. David Goodman, Al Baker & James Glanz, *Tests Showed Children Were Exposed to Lead. The Official Response: Challenge the Tests*, N.Y. TIMES (Nov. 18, 2018), <https://>

4. *Procedural Due Process*

Section II.A.4 discussed successful claims brought under a blurry version of the Due Process Clause that did not clearly delineate between procedural and substantive due process.²⁰³ Classically, relief for procedural due process claims exists only when the provision of a property entitlement—the denied benefit that the plaintiff is seeking—is non-discretionary.²⁰⁴ While this was the case in *Mission Springs*, where non-discretionary building permits were denied to eligible applicants,²⁰⁵ it falls short in most instances where the statute preserves some government discretion. A modification to how courts conceptualize entitlements would allow plaintiffs to bring procedural due process claims for failure to comply with mandatory process delineated in external statutes and regulations even if the substantive outcome is left to the government’s discretion.

Adding credibility to this tack, the *DeShaney* Court “left open the possibility that persons in Joshua’s position might recover under the procedural component [of the Due Process Clause] if they could show that state law created ‘an “entitlement” to receive protective services in accordance with the terms of [a] statute.’”²⁰⁶ However, *Town of Castle Rock v. Gonzales* appeared to throw a wrench in the viability of such an expansion.²⁰⁷ The Supreme Court held that Jessica Gonzales’s procedural due process claim—that a mandatory Colorado arrest statute dictated an unequivocal enforcement of her restraining order—failed.²⁰⁸ The police department retained discretion even

www.nytimes.com/2018/11/18/nyregion/nycha-lead-paint.html [<https://perma.cc/5LNV-FP6L>]. One can imagine a *Monell* claim brought by families in this context for NYCHA’s policy of inaction.

²⁰³ See *supra* Section II.A.4.

²⁰⁴ See, e.g., *Bd. of Regents v. Roth*, 408 U.S. 564, 567 (1972) (discussing a state law that “clearly leaves the decision whether to rehire a nontenured teacher . . . to the unfettered discretion of university officials,” and thus does not constitute a property entitlement).

²⁰⁵ *Mission Springs, Inc. v. City of Spokane*, 954 P.2d 250, 256 (Wash. 1998).

²⁰⁶ David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53, 55–56 (second alteration in original) (quoting *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989)). Petitioners argued that the child protection statutes in Wisconsin established an entitlement to receive protective services that would enjoy due process protection against state deprivation.

²⁰⁷ 545 U.S. 748 (2005); see Chemerinsky, *supra* note 67, at 6–7 (“Essentially, after *Gonzales* it does not matter if the plaintiff characterizes the claim as substantive due process or procedural due process. It is irrelevant as to whether the law is written in mandatory or discretionary terms. Generally, the government has no duty to protect people from privately inflicted harms.”).

²⁰⁸ See *Town of Castle Rock*, 545 U.S. at 768–69.

within the confines of mandatory statutory text.²⁰⁹ It is arguable, however, that *Gonzales's* reach is limited to law enforcement situations and has not wholly barred these kinds of procedural due process claims. Still, lower courts have not seemed interested in expanding this option when the substantive outcome remains discretionary.²¹⁰

However, there is a limited expansion that could offer some solace to plaintiffs and courts alike. In *Jones v. Nickens*, plaintiffs sued a public hospital that had become aware of ongoing child abuse and failed to act, resulting in the child's death.²¹¹ When the substantive due process claim failed, as it was indistinguishable from *DeShaney*, the court also denied the procedural due process claim. It held that while the New York State Social Services Law created a non-discretionary duty to report cases of suspected child abuse, it left the substantive outcome—whether to remove the child or not—up to the discretion of the welfare officers.²¹² The court held that the process itself—the reporting of child abuse—did not constitute an entitlement protected by the Due Process Clause.²¹³ Enter the proposed expansion: While the substantive outcome can remain discretionary, if a statute or ordinance includes mandatory process, and the relevant government agents fail to go through the required steps as they did in *Jones* by failing to report signs of physical abuse—a mandatory duty that New York State burdens physicians and other caregivers with—plaintiffs should be able to win a procedural due process claim, even if that relief is merely compensatory.²¹⁴

²⁰⁹ See Chemerinsky, *supra* note 67, at 5–6 (explaining that according to *Town of Castle Rock*, even if a law is written in mandatory terms, there is no property right because law enforcement officers still have discretion as to how to enforce any law).

²¹⁰ See, e.g., *Jones v. Nickens*, 961 F. Supp. 2d 475, 492 (E.D.N.Y. 2013) (“[T]he State’s child welfare legislation contains procedural requirements and mandates that a particular process be followed in the case of suspected child abuse, but it does not command a particular substantive outcome. Instead, under New York’s statute, the provision of preventive services is predicated on discretionary determinations.” (citing *Hilbert S. v. County of Tioga*, No. 3:03-CV-193, 2005 U.S. Dist. LEXIS 29423, at *38–39 (N.D.N.Y. June 21, 2005))), *dismissed sub. nom. Jones v. County of Suffolk*, 236 F. Supp. 3d 688 (E.D.N.Y. 2017).

²¹¹ See *id.* at 480 n.3.

²¹² See *id.* at 492 (“The act of filing certain case management reports, or even reporting information about child abuse . . . , even if mandated by the statute, does not yield a substantive outcome entitled to due process protection.” (alteration in original) (quoting *Hilbert S.*, 2005 U.S. Dist. LEXIS 29423, at *38–39)).

²¹³ *Id.* at 493.

²¹⁴ A version of finding an entitlement in non-discretionary process even if the substantive outcome remains discretionary already exists in administrative law. Under 5 U.S.C. § 706, “when an agency is compelled by law to act within a certain time period, but the manner of the agency’s action is left to the agency’s discretion, a court can compel the agency to act, but has no power to specify what the action must be.” *Norton v. S. Utah Wilderness All. (SUWA)*, 542 U.S. 55, 65 (2004); see also *Viet. Veterans of Am. v. CIA*,

If an external statute provided mandatory process—though left the substantive outcome up to the state—much like in administrative law, the court should be able to compel that mandatory process under a procedural due process claim or allow for ex post financial compensation. If a claim is brought early enough, it could allow for equitable relief.²¹⁵ If brought posthumously, these suits could provide expressive and financial relief to families and incentivize institutions to let fewer children slip through the cracks in the future.²¹⁶ To make the expansion even more administrable, it could exclude law enforcement, given the premium courts place on their judgment,²¹⁷ as opposed to other agencies like social services, where legislatures have already attempted to restrict discretion through mandatory reporting statutes.²¹⁸

B. *Administrative Law Omissions Liability Expansions*

1. *Expanding the Abdication Exception and Initiation of Rulemaking Denials*

The current bar has been set high for what counts as abdication, with courts, at least explicitly, requiring *wholesale abdication* of a statutory duty.²¹⁹ Currently, it is far from clear when an agency crosses the line from *underenforcement* to *total abdication*. But the abdication exception could be expanded to evaluate underenforcement,²²⁰ delays, and repeated denials to initiate rulemaking. These “deaths by

811 F.3d 1068, 1079 (2016) (holding that while how the Army went about informing veterans and establishing when information was novel and thus had to be shared remained within the Army’s discretion, the duty to inform soldiers about new adverse health effects was non-discretionary and enforceable).

²¹⁵ For a child being abused by all caregivers, it is possible that this would be a fruitless solution. However, in cases like *DeShaney*, where the mother brought suit on behalf of her son, whose father was abusing him, it could provide the concerned caregiver a path to relief. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 193 (1989).

²¹⁶ See Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871, 876 (2000) (“All anyone suing [sic] for damages is ever seeking is some remedy after the loss . . .”).

²¹⁷ See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005) (“A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.”).

²¹⁸ In *Jones*, for example, the court focused on a state law that required “certain persons and officials . . . to report cases of suspected child abuse or maltreatment.” *Jones v. Nickens*, 961 F. Supp. 2d 475, 491 (E.D.N.Y. 2013) (citing N.Y. SOC. SERVS. LAW § 413(1)(a)). However, by focusing on whether the removal itself was discretionary or non-discretionary (spoiler alert, it was discretionary), the court missed the significance of the non-discretionary reporting section.

²¹⁹ See *supra* Section II.B.1.

²²⁰ See generally *Lanza*, *supra* note 123 (arguing that underenforcement normatively should be included as reviewable abdication).

a thousand cuts” can have the same deregulatory effect as wholesale abdication done in one fell swoop and should be treated as such.²²¹ This expansion, much like the original exception, spans the affirmative and external categories by looking primarily to the agency’s charter to reduce discretion but also to affirmative policies it enacts that lead to underenforcement.

Agencies rarely consciously adopt policies that evince total abdication, though litigants’ intuitions are often that abdication is occurring even in the absence of this extreme. Some suggest that one indicium courts should look to is underenforcement, capturing situations where an agency has either adopted an affirmative policy that undermines but does not abandon its statutory mandate or has enforced a provision infrequently.²²² Underenforcement is surely one metric of abdication that courts could look to, but not the only one.

This Note proposes looking to two additional indicia: patterns of denials to initiate rulemaking and patterns to delay fulfillment of statutory duties. Denials to initiate rulemaking are often judicially reviewable, as discussed in Part II.²²³ Agency delays to fulfill obligations are also reviewable.²²⁴ These two indicia are useful because courts have already established frameworks for reviewing these types of omissions, whereas underenforcement alone will likely be an unreviewable non-enforcement decision.²²⁵ Furthermore, delays and denials are accurate proxies for abdication given that these are two of the mechanisms that agencies routinely deploy to circumvent adopting regula-

²²¹ See, e.g., Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805, 1806 (2019) (“Presidents can pursue deregulation using three strategies: the revocation of rules, the modification of them, or rulemaking inaction. Inaction involves refusing to start any new rules to protect the public or the environment or to delay regulatory rules already started to the point of a crawl.”).

²²² See Lanza, *supra* note 123, at 1185 (“The Court in *Chaney* did not, however, mean to preclude review when there is severe underenforcement.”).

²²³ See *supra* Section II.B.3.

²²⁴ The current framework to evaluate agency delays is derived from *Telecommunications Research and Action Center v. FCC (TRAC)* and asks if the agency delay is so egregious as to warrant mandamus. 750 F.2d 70, 79 (D.C. Cir. 1984). The *TRAC* balancing test includes five functional prongs: (1) The time it takes agencies to make a decision must be governed by a “rule of reason” which could include a congressional timetable; (2) delays that could be reasonable in economic regulations are less tolerable when human health and welfare are at stake; (3) the court should consider the effect of expediting delayed action on competing agency priorities; (4) the court should take into account the nature of the interests prejudiced by the delay; and (5) the court need not find impropriety lurking behind agency lassitude to hold that agency action is unreasonably delayed. See *id.* at 80.

²²⁵ See, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985) (concerning the extent to which the Food and Drug Administration could exercise its discretion not to take enforcement action to prevent the use of certain drugs for capital punishment).

tions.²²⁶ Additionally, a common refrain from courts is that inaction is logistically hard to capture because it often goes undocumented. However, given that these two indicia are judicially reviewable, and assuming that at least some instances of inaction are individually litigated prior to an abdication claim, there would be a trail of failure-to-act breadcrumbs along the way.²²⁷ One can imagine applications to the opioid epidemic, which is attributed in part to a series of oversight failures on the part of the FDA related to long-term use.²²⁸

If these individual claims are already litigable, then one may ask: Why drag them under the abdication umbrella? While the current system of judicial review may capture specific (and unconnected) instances of failures and denials and order limited corrections, the scope and remedies available under the abdication exception are broader given the gravity of the claim.²²⁹ At some point, what began as discretionary agency priority-setting evolved into failing to protect legislative commitments.²³⁰

2. *Expanding the Discrete, Non-Discretionary Duty Exception*

This Note's final proposal is to expand the narrowest category outlined by the Court in *SUWA*, which held that judicial review was available only for agency actions (including failures-to-act) if that action resembled one subject to a writ of mandamus.²³¹ While this expansion envisions judicial review for omissions beyond wholly non-discretionary choices, it remains faithful to the external category, relying on statutes and regulations that still substantially limit discretion.

At first glance, the holding in *SUWA* appears to be a death knell for anything but truly non-discretionary omissions.²³² But courts have

²²⁶ See Shapiro, *supra* note 221, at 1829–30 (“Congress has obligated an agency to act to protect the public. . . . When an agency fails to regulate, it is defying its legislative mandate, and that act is properly considered deregulatory unless the agency can establish that it has higher priorities in terms of protecting people and the environment.”).

²²⁷ See Sunstein, *supra* note 46, at 679 (“Of course, it will not always be easy to tell whether a particular case falls in the category of ‘abdication’ or of isolated refusal to act.”).

²²⁸ See Kolodny, *supra* note 160, at 744–45 (discussing the FDA’s regulatory failures overall, and in particular, its failure to enforce marketing regulations or obtain evidence of long-term safety of opioids).

²²⁹ See *supra* Section II.B.1.

²³⁰ See Shapiro, *supra* note 221, at 1807 (arguing that rulemaking inaction may be a matter of agency priority, but can also be a “deregulation game”).

²³¹ See *Norton v. S. Utah Wilderness All. (SUWA)*, 542 U.S. 55, 63 (2004).

²³² See *id.* at 64 (“[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* action that it is *required to take*. . . . The limitation to discrete agency action precludes the kind of broad programmatic attack we rejected in *Lujan v. National Wildlife Federation*.” (citing *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990))).

inched beyond this narrow framing and have held agencies responsible for omissions that are, at least intuitively, more discretionary than a mandate. Discussed throughout this Note, *Vietnam Veterans of America v. CIA*, decided over a decade after *SUWA*, held that the Army was obligated under § 706(1) to provide former subjects of experiments new information regarding their health as well as medical care.²³³ Judge Wallace’s opinion regarding the latter provision—that the Army was required to provide medical care—is instructive in unpacking why this case is an aberration. He noted that the *SUWA* Court limited claims under § 706(1) to areas “about which an official has ‘no discretion whatever.’”²³⁴ The relevant regulatory text states: “Volunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research.”²³⁵ Judge Wallace observed that this was not a discrete and unequivocal command to provide care but a mere authorization that the Army could have provided it—presumably at its discretion.²³⁶ While it may seem like a quibble to find a difference between this textual language and a true unequivocal command, this is precisely what the *SUWA* Court spilled a great deal of ink over. All this to say: Courts have shown some appetite to, if not bypass *SUWA*, at least tread somewhat over the line the Supreme Court carefully drew, albeit while couching their opinions in its language.

On the opposite ideological side of environmental regulation, the 2021 case *Louisiana v. Biden* also invoked § 706 of the APA to compel affirmative action for President Biden’s pause on natural gas leasing.²³⁷ Here the court found that this omission was reviewable despite the Supreme Court’s opposite position for non-enforcement decisions.²³⁸ While the Mineral Leasing Act of 1920 (MLA) and the Outer Continental Shelf Lands Act (OCSLA) both grant the Department of the Interior (DOI) large amounts of discretion to stop or pause lease sales,²³⁹ the court held that DOI could do so only if the

²³³ See *Viet. Veterans of Am. v. CIA*, 811 F.3d 1068, 1071 (9th Cir. 2016).

²³⁴ *Id.* at 1083 (Wallace, J., concurring in part and dissenting in part) (quoting *SUWA*, 542 U.S. at 63).

²³⁵ *Id.* at 1085 (quoting DEP’T OF THE ARMY, ARMY REG. 70-25, CH. 3-1(κ), USE OF VOLUNTEERS AS SUBJECTS OF RESEARCH (1990)).

²³⁶ See *id.* at 1083.

²³⁷ 543 F. Supp. 3d 388, 396 (W.D. La. 2021), *vacated*, 45 F.4th 841 (5th Cir. 2022).

²³⁸ *Id.* at 409–10.

²³⁹ See 43 U.S.C. § 1334(a)(2)(A)(iii) (permitting the “cancellation of any lease or permit” if “the advantages of cancellation outweigh the advantages of continuing such lease or permit in force”); 30 U.S.C. § 226(a) (“All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may* be leased by the Secretary.” (emphasis added)).

public land became ineligible for sale.²⁴⁰ While the MLA and OCSLA restrict the Department's discretion, there is no resemblance to the straightjacket prescribed in *SUWA*. Despite its apparent overreach, the court held: "The discretion to pause a lease sale to eligible lands is not within the discretion of the agencies by law under either OSCLA or MLA."²⁴¹ The court seemed to recognize the discretion underpinning the statutes, however, stating: "The fact that a statute grants broad discretion to an agency does not render the agency's decisions completely unreviewable unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance to how that discretion is to be exercised."²⁴² The district court in *Louisiana v. Biden* searched for any limitations on the Department's underlying discretion and, finding sufficient limitation, enjoined the Biden Administration's "pause."²⁴³ Both cases reveal more judicial comfort with policing non-ministerial inaction than one might expect in a post-*SUWA* landscape.

CONCLUSION

There is a strong preference in public law to avoid litigating government omissions. What emerges in both constitutional due process and administrative law is a picture of courts uneasy with second-guessing executive discretion. But what also emerges is a picture of courts willing—although maybe not eager—to create tools and fictions that enhance the administrability and thus the viability of omissions liability. While at times the courts are formalistic in their approaches to judicial review of government omissions, there are surprisingly generative inlets that form a network of omissions liability. Despite scholars pointing out the lack of a philosophical distinction between government actions and omissions, courts have remained unmoved given their concerns that, on the ground, there is actually quite a lot of difference between the two. However, out of a desire for pragmatism, they have countered their own narrative established in *Chaney* and *DeShaney* and have found or created indicators of enhanced administrability. Given the ad hoc origins of these exceptions, there has never been a fully developed field of public omissions liability.

This Note has sought to fill this void, drawing parallels and distinctions between the varied routes for how the government can be

²⁴⁰ *Louisiana*, 543 F. Supp. 3d at 409.

²⁴¹ *Id.*

²⁴² *Id.* at 409–10.

²⁴³ *Id.* at 419.

held liable for omissions throughout public law. It also acknowledges that the existing toolkit is hardly satisfactory from a normative standpoint and seeks to widen the holes already chewed into the affirmative liability framework. Underpinning much of this discussion are the chronic ills that face modern American society and the meager menu of remedies available to aggrieved individuals. Part II made clear that a number of pathways exist despite the persistent narrative that the government can be held liable only for actions. Part III tried to nudge courts to consider modestly expanding approaches to accommodate litigants in cases we might not otherwise imagine as having judicial remedies. While the existing doctrinal exceptions are readily available for practitioners, this Note still sits heavily in a theoretical realm, given the judiciary's overriding administrability concerns.

In the midst or wake of these chronic problems, many want tools to hold governments accountable for their failures, not just for overt violations of individuals' rights and dignity. Many complex modern threats flourish on systematic inaction cloaked as administrative priority-setting. This discussion is just the beginning, but it takes steps to demonstrate that the doctrinal foundations for omissions liability already exist and a more capacious version of such liability is within reach.