Litigating Policy Drift: Frozen Categories and Thresholds in Court

Ursula Hackett

The combination of rigid policy rules with shifting political, economic, and social environments can produce drift: policy change without formal modification. We know much about the political origins and consequences of drift but little about the legal battles that accelerate or impede it. I identify two distinct forms of policy rigidity that generate drift: interval freezing and categorical freezing. Drawing from recent and historical cases encompassing voting rights, racial discrimination, religious conscience protections, and other hot-button issues, I argue that drifting policies possess several sources of legal resilience: injuries are difficult to identify; judges can be persuaded of the merits of restraint, textual formalism, and bright-line rules; and policy makers plausibly deny any intentional action in pursuit of controversial outcomes. Drift is not an automatic and unremarkable process of continual policy change but rather the outcome of high-stakes political and legal contestation over how rigid policy thresholds and categories should be adapted to meet shifting conditions.

Drift is a subtle mode of policy change. The meaning, coverage, and distributive consequences of policies can change when policy makers do not alter them in light of shifting external circumstances (Hacker 2005; Hacker and Pierson 2010). For example, minimum wages or taxes specified in fixed dollar amounts decline in value during periods of inflation unless those policies are amended to reflect changes in the cost of living. We know that policy drift is widespread but difficult to study because of its gradual nature and low visibility; it originates in veto-prone political systems and produces downstream consequences for group competition (Béland, Rocco, and Waddan 2016; Galvin and Hacker 2020; Hacker and Pierson 2014; Rocco and Thurston 2014). The Supreme Court acts as an agent of policy drift when it strips provisions of ambiguity, curtails bureaucratic discretion, and forecloses other venues of policy innovation (Snead 2022). But we still know little about the scope of policy drift, its legal implications, and how it fares in court. This article addresses these questions.

I identify two distinct forms of policy rigidity that produce drift—*interval freezing* and *categorical freezing*—and demonstrate how thinking of drift in these terms helps us establish its empirical and conceptual boundaries, identify both liberal and conservative forms of drift, understand the legal implications of drift and how judicial action facilitates or alleviates it, and address lingering questions about policy maker intention, the "neutrality" of standards of statutory modification, and what is at stake when a policy drifts.

Welfare benefits drift when inflation or demographic change erodes their real value. But there is a wider class of policies—beyond the welfare state—that can and do drift given social, economic, and technological change, thereby invoking *legal* questions about voting, privacy, equal protection, public safety, and the right to bear arms. This article explores the neglected dimension of judicial action in the study of public policy drift. In so doing, it unites the fields of public policy making and public law, which typically do not speak to each other (Barnes 2007).

Drawing from a range of policy areas encompassing voting rights, racial discrimination, religious conscience protections, abortion, and many other hot-button issues, I argue that drift is not an automatic and unremarkable process of continual policy change but rather is the outcome of high-stakes contestation over how rigid policy thresholds and categories should be adapted to meet shifting conditions. Legal action is crucial in these contests because Congress remains gridlocked on regulatory questions. Strategic policy makers on both the Left and Right have incentives to rigidify policy boundaries and thresholds when they fear legal challenges, because drifting policies possess several sources of legal resilience: it is

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difficult to identify injuries and build a case; judges are often persuaded by the merits of restraint, textual formalism, and bright-line rules; and defendants plausibly deny any intentional action in pursuit of controversial outcomes. Judicial action can accelerate policy drift in the United States' polarized, sclerotic political system.

Interval and Categorical Freezing

Drift occurs where policies are rigid but the economic, social, and political environment changes. Less ambiguous institutions and policies containing "plainer, less malleable language" elicit change through drift (Rocco and Thurston 2014). Scholars examining the rigidity that produces drift have typically focused on rigid numerical formulas, such as the federal minimum wage ($7.25 since 2009, which is worth 27.4% less in 2022 after adjusting for inflation [Cooper, Martinez Hickey, and Zipperer 2022]). However, there are several ways in which policies rigidify; in effect, freezing a policy at a particular level or rigidifying boundaries around specific activities or groups of people. I identify two main types of policy rigidity: *interval freezing* and *categorical freezing* (Table 1). Interval freezing is a rigid numerical formula, whereas categorical freezing is a fixed rule imposed on a specific category, with clear and stable rules about what counts as part of that category.

Interval freezing is the rigidification of a numerical threshold, either when a policy is first passed or at some later time. The amount of money expended or taxes collected is fixed and not changed to reflect inflation; for example, the value of Temporary Assistance to Needy Families (TANF) benefits, the federal minimum wage, or the $200 firearms tax imposed in 1934 under the National Firearms Act (NFA). Drift is the reduction in the real value of these benefits and taxes. If income thresholds for overtime eligibility remain static despite inflation, fewer workers are eligible to collect premium pay (Galvin 2016). Hence, overtime regulations with fixed numerical thresholds undermine employee protections over time (Koenig 2018). Interval freezing might also result in a fixed budget for staff or a predetermined number of full-time-equivalent employees charged with administering certain rules despite increasing coverage or population needs; for example, the regulatory agency created to enforce the Fair Labor Standards Act (FLSA),

Table 1
Interval and Categorical Freezing

Name	Description	Policies	Drift
Interval Freezing *Rigidification of a numerical scale or formula*	Rigid numerical formulas: dollars spent, costs awarded, number of workers hired	• Federal minimum wage • Overtime regulations with fixed numerical thresholds • Taxes specified in dollar amounts (e.g., NFA firearms tax) • Fee limits specified in dollar amounts (e.g., attorney fees in veterans' benefits claims) • Quotas (e.g., hiring quotas) • Fixed number of full-time hires (e.g., Wage and Hour Division staffing)	• Declining purchasing value of wages • Declining value of taxes • Increasingly restrictive fee ceilings • Growing racial disparities • Declining enforcement capacity of bureaucratic agencies
Categorical Freezing *Rigidification of category boundaries*	A fixed rule imposed on a specific category, with clear rules about what counts as part of that category	• Taxes imposed on a specified category (e.g., sales taxes based on physical presence) • Ban on specified categories of people engaging in certain activities (e.g., felon disenfranchisement) • Location-specific rules (e.g., residential zoning ordinances) • Enumeration of prohibited activities (e.g., benchmarking of voter-suppression standards) • Benefits offered to a specific category (e.g., religious conscience protections for Catholic hospitals)	• Declining state tax collection capacity • Disenfranchisement of larger groups of people • Growing racial disparities • Intensifying segregation • Increasing challenges of meeting citizen needs

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today has the same number of investigators as it did in 1948 but six times the caseload (Galvin 2016). Drift entails a reduction in the enforcement capacity of bureaucratic agencies.

Categorical freezing is the rigidification of category boundaries: fixed rules are imposed on a specific category of activity or persons, enumerating certain benefits or penalties without regard for changing group membership and other social, technological, or political changes that alter a particular standard and may impose unprecedented burdens; for instance, the requirement that states may collect sales taxes only from companies with a physical presence in that state (rendered obsolete by the rapid growth of e-commerce); the need to update highways and other infrastructure to accommodate driverless cars (Mettler 2016); residential zoning ordinances that do not account for population shifts (Quinn 1975); felon disenfranchisement laws imposed long before modern mass incarceration (Liles 2006; Mauer 1999); and the granting of conscience exemptions to religious hospitals in reproductive healthcare, with the rapid recent expansion of the Catholic hospital system through mergers and acquisitions effectively denying reproductive healthcare options in certain jurisdictions (Fountain 2018; Solomon et al. 2020).

Conceptualizing the distinction between these two forms of policy rigidity—interval and categorical freezing—helps clarify the boundaries of the slippery concept of drift. Although many scholarly treatments of drift focus on what I term interval freezing—perhaps because it is easier to quantify the precise degree of drift that occurs through lack of change in numerical formulas or because many scholars working on policy drift are welfare state specialists concerned with un-indexed benefits—*both* interval and categorical freezing cause drift. There are more cases of drift than we have hitherto appreciated, and they invoke a much wider range of policy changes than the archetypal examples of welfare state retrenchment and declining bureaucratic capacity.

Welfare state retrenchment is a function not only of interval freezing—such as declining real minimum wages—but also of categorical freezing: rigid rules imposed on specific categories of persons. For example, independent contractors are not entitled to unemployment benefits, so the rapid rise of the gig economy has decreased the effective size of the welfare safety net. Recent surveys find that independent contractors represent as much as 15% of all workers, with Black and Hispanic workers more likely than white workers to be classified as independent contractors (Abraham et al. 2023). Federal administrators have struggled to keep up with the speed of economic change, particularly the growth of ride-share companies.[1] In October 2022 the Department of Labor proposed a new rule to reclassify more workers as employees, but efforts to change the rules face litigation and lobbying from organizations that would become newly responsible for worker benefits. Drift occurs when the frozen "employee" category confronts changing patterns of work.

Drift caused by interval freezing is mostly (though not exclusively) a function of inflation and population growth. Because these factors are more easily anticipated—at least in ordinary times, barring supply chain shocks, pandemic, and war—we might be more willing to attribute intentional strategic action to policy makers who write interval-frozen laws than we are to those promulgating categorical-frozen laws. But the relative ease with which intentional action can be discerned in relation to interval-frozen laws does not mean that drift produced by categorical-frozen laws is innocent of strategic policy maker action.

Drift caused by categorical freezing is a function of a much wider range of social, cultural, economic, technological, and environmental changes, including population movements, the growth of the knowledge economy, declining marriage rates, economic crises, the digital revolution, partisan polarization, and mass incarceration. Some changes might be predicted at the outset, and others present a clear agenda for policy updates that policy makers might deliberately fail to heed. When a policy is categorically frozen, any change in circumstances exogenous to that policy (whether foreseen or not) that alters the nature or size of a particular category of activities or persons can produce drift. By broadening our focus from interval to categorical freezing, we can more easily discern the range of ways in which drift occurs and with what consequences.

The interval–categorical distinction incorporates not only liberal concerns about the declining value of welfare benefits but also conservative concerns about the categorical freezing of civil rights era measures in a changing society. There is no neutral standard of policy modification. Rigid categories and thresholds could be seen as "stable" and "firm of purpose" or "inflexible" and "outdated" (Bardach 1976); responsive policy updating or "drift reversal" (Shpaizman 2017) could also be described as "unstable," "volatile," or "arbitrary" (Wiseman and Wright 2022). While liberals criticize conservatives' failure to update interval-frozen benefit levels or bureaucratic capacity, conservatives in turn condemn the rigidity of affirmative action quotas or elections preclearance rules for specific geographical locations (Gorsuch 2023; Roberts 2013; Thomas 2023).

Drift does tend to suit conservatives' preferences because interval freezing involves erosion of benefit levels, transfer of risk to the individual, and declining bureaucratic enforcement capacity. Conservatives are more likely to celebrate the declining government tax-collection ability, wider disenfranchisement, and location-specific rules of categorical freezing. Yet although drift is generally characterized as a conservative device that reinforces social inequality, incremental change is not always conservative in nature (Béland, Campbell, and Weaver 2022).

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Conservatives might be fearful of drift caused by the failure to "delist" benefits once covered by public programs or the difficulty of excluding previously covered populations (Hacker 2004b). Snead's (2022) examination of labor law suggests that the Supreme Court became an "agent of drift" long before Republicans came to dominate judicial selection.

These disputes about drift take place in multiple arenas of contestation, including not only Congress and state legislatures, executive agencies, and the media but also the courts. Both interval and categorical forms of freezing invoke legal questions, and we cannot understand the legal implications of policy drift without considering categorical and interval freezing, because legal questions are typically couched in categorical terms.

Policy Drift and Legal Disputes

Drift has repercussions for many important legal disputes, including such basic questions as whether people can vote, get an abortion, own a gun, obtain legal representation, and exercise their right to speak and engage in political campaigns. For example, felon disenfranchisement laws passed in the nineteenth century took on new significance at the dawn of the age of mass incarceration in the latter part of the twentieth century. This categorical freezing—withdrawal of voting rights from those classed as having committed a felony—eventually resulted in the denial of voting rights to a vast swathe of the population: up from 1.17 million in 1976 to 6.1 million by 2016 (Chung 2021), of which more than one-third are African American, a population excluded at more than four times the rate of any other racial group. In this case, drift has implications for voting rights and equal protection. Despite recent efforts by some states to reverse this drift by expanding voting access, today the disenfranchised population remains five times larger than it was at the middle of the twentieth century, with a severe racial skew (Uggen et al. 2020).

Federal Statutory Health Care Provider Conscience Protections passed in the 1970s were designed to protect the conscience rights of individuals and entities that object to performing, or assisting in the performance of, abortion or sterilization procedures. Fifty years later, mergers and acquisitions by Catholic hospitals have greatly increased the number of Catholic institutions—by 28.5% between 2001 and 2020—and Catholic hospitals are the sole community provider in many jurisdictions (Solomon et al. 2020). In 10 states, more than 30% of hospitals are Catholic. The consequences of granting religious protections to this category of institutions (categorical freezing) have increased substantially over time: in states with high proportions of Catholic hospitals such as Colorado, Washington, Illinois, and Oregon—all with Democratic unified government in 2023—family planning services are restricted or even denied for those served solely or mostly by Catholic institutions ("Catholic Hospitals' Growth" 2022; Hochberg 1996), a fact that may not be immediately obvious to patients because the names of merged entities do not always sound religious (Solomon et al. 2020; Wascher et al. 2018).

In these cases of drift caused by categorically frozen laws, shifting circumstances have transformed the nature, scope, and meaning of a rigid category, even though the textual specifics of categorically frozen laws do not change: a burden is imposed (disenfranchisement) or a benefit granted (conscience exceptions) to a clearly enumerated category. Subsequently, if the social, economic, or political environment shifts enough, categorical freezing can produce drift. The policy transformations wrought by drift not only involve increases in policy scope (more people brought within a particular category) but also fundamental changes to the nature and meaning of a policy. The fact that there has been rapid growth in the disenfranchised felon population or of the number of people served by Catholic hospitals is important. But even more interesting are the unequal (racialized, gendered) distribution of burdens and benefits; the way multiple categories interact to produce unprecedented effects and compounded disadvantage; lifelong spillovers; and, in many cases, basic constitutional rights claims. These categories have an entirely different meaning today than they did when first passed into law, even as (indeed, because) their boundaries remain formally unchanged.

Any policy that specifies the boundaries of a category and makes a blanket rule with respect to that category is susceptible to drift caused by categorical freezing. Similarly, any policy that specifies a threshold in absolute numerical terms is liable to drift due to interval freezing. Hardship results when inflation consumes the real value of welfare benefits specified in fixed dollar amounts, but interval freezing drift also invokes a variety of legal questions. For instance, in 1864 Congress established a $10 limit on attorney fees in veterans' benefits claims, a law designed to protect Civil War veterans from overcharging by greedy lawyers. The law is still in effect, but the $10 limit is worth less than 5% of its original value—in effect, denying legal representation to those seeking to obtain disability benefits from the Veterans Administration. Here drift implicates due process and the right to counsel. Between 1976 and 2002, before the Bipartisan Campaign Reform Act indexed them to inflation, individual election campaign contributions limits were interval frozen at $1,000 per candidate. Inflation reduced the value of this hard limit by more than two-thirds during that 26-year period, raising questions about the limit's impact on freedom of speech, particularly given the soaring cost of increasingly professionalized campaigns (Engle, DiLorenzo, and Spies 1998).

Inflation reduces the value of numerical thresholds specified in absolute dollar amounts, sometimes

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transforming the nature of the policy entirely. A threshold that seemed generous at the time of passage becomes so small that it renders a policy completely unworkable or even reverses the original stated intentions of the creators, as in the case of the limits on attorney fees. Protection becomes a cage. Interval-frozen policies are transformed not only by inflation but also by shifting social, political, and technological circumstances that imbue a particular numerical threshold with meaning, as the case of campaign contribution limits demonstrates. It is not just that $1,000 bought less airtime in 2000 than it did in 1976, but also that changes in campaigning, voter habits, and technologies altered the meaning of the limit in ways that affect First Amendment rights.

Legal questions arise with respect to both the diminution and expansion of individual freedom through drift. Drifting policies can sometimes expand rather than contract individuals' freedom of action and reduce rather than increase hurdles to the exercise of certain prerogatives. For example, the interval freezing of the National Firearms Act (NFA)'s 1934 tax on all registered NFA firearms—$200, a sum held constant for 89 years and counting—has effectively eliminated its original function. When President Roosevelt signed the NFA into law, $200 was worth more than $4,000 in today's dollars, a prohibitively expensive amount that effectively prevented most people from owning a machine gun or short-barreled shotgun, some of the NFA-regulated items. Today the tax is worth 5% of its original value. Hence this hurdle to the exercise of Second Amendment rights is far lower with respect to the NFA's taxation element (though other regulatory hurdles to gun ownership remain and have indeed expanded at the federal level and in many states).

Spousal and parental consent laws are another example of drift that has reduced rather than increased constraints on individuals. Parental consent laws (which exist in many states today) require minors to obtain parental consent before proceeding with an abortion. Spousal consent laws (which existed in many states up until the 1992 *Planned Parenthood v. Casey*[2] decision rendered them unconstitutional) required wives to obtain the consent of their husband before proceeding with an abortion. The categorical freezing of these consent laws, many of which were passed in the immediate aftermath of the Supreme Court's landmark 1973 *Roe v. Wade*[3] decision, means these pieces of legislation came to have more limited scope to restrict abortion than they did when first passed—even as other restrictions on abortion proliferated in the periods immediately preceding and following the Supreme Court's seminal *Dobbs v. Jackson Women's Health*[4] decision in 2022.

The reason the scope of these laws became more limited is that the social environment changed. Both pregnancy and abortion rates have declined over the past two decades among women under the age of 24. In 1973 the pregnancy rate per 1,000 girls under 15 was 13.5, and for girls 15–17, it was 65.1. By 2016, the rates were 2.5 and 15.0, respectively (Maddow-Zimet, Kost, and Finn 2020). Marriage rates have also changed dramatically. In 1970, there were 76.5 marriages for every 1,000 unmarried women aged 15 and older in the United States; by 2008 the rate was 34.8 (Lee and Payne 2010). Declining teenage pregnancies, declining marriage rates, increased cohabitation, and increased divorce rates over time drew fewer people within the ambit of parental and spousal consent laws.

In the case of the NFA tax, and spousal and parental consent laws, legal questions concern the capacity of a limit specified in absolute numerical or categorical terms to constrain behaviors under radically altered circumstances. In these cases—as with all instances of drift—economic, social, and political changes transform the scope and meaning of policies, although their language remains fixed. Table 2 details policies and their original scope and purpose, changes in environmental circumstances that produced drift, the nature of the drift, and its legal implications.

Table 2 identifies interval- and categorical-frozen policies that provoke legal questions through drift (outlined in the final column). This nonexhaustive list illustrates the variety and importance of the legal issues at stake when a frozen category or threshold drifts. Many of these policies have been taken to court; some have not. Of those that have been litigated, some complaints concern the intrinsic value of a policy (the allegation that the policy was unconstitutional from the moment it was promulgated); others the claim that the policy has drifted, although "drift" is not explicitly named of course (the policy was constitutional at the outset, but environmental changes rendered it unconstitutional). Cases concerning physical presence rules for state sales taxes in the internet era are quintessential "drift-based" cases: litigants argue that the internet revolution makes frozen taxation categories obsolete.[10] Cases concerning affirmative action quotas, campaign contribution limits, or religious conscience protections often involve intrinsic rather than drift claims (the policy has always been unconstitutional rather than having merely *become* so), but disputes might still invoke —and in several cases have turned on—the problems produced by drift specifically, as outlined in Table 2.

With a few notable exceptions (Barnes 2008; Snead 2022), scholarship on policy drift has focused on the *political* causes and consequences of drift, rather than *legal* imperatives (Béland 2007; Carpenter 2010; Hacker 2004a; Hacker, Pierson, and Thelen 2015; Koenig 2018; Rocco 2017). Separated, veto-prone systems with super-majoritarian thresholds for legislating are prone to drift because determined legislative minorities can easily block efforts to update policies or enact new ones (Hacker and Pierson 2014). Blocking often benefits political actors who want to stay out of the limelight or pursue unpopular aims because it is not as "visible or traceable to particular

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Table 2
Policy Drift and Legal Disputes

Policy	Initial Purpose	Type of Freezing	Exogenous Changes	Policy Drift	Legal Implications
Federal Statutory Health Care Provider Conscience Protections (1970s).	Protect the conscience rights of individuals and entities that object to performing or assisting in the performance of abortion or sterilization procedures	Categorical	22% increase in number of Catholic hospitals, 2001–16; mergers and acquisitions; rising demand for family planning services	Restrictions on reproductive health services, especially in states where more than one-third of hospitals are Catholic	Privacy; abortion or sterilization; women's rights
National Firearms Act (NFA) 1934 - $200 tax on all registered NFA firearms.	Severely curtail or effectively prohibit possession of NFA firearms	Interval	Inflation; tax is now worth 5% of its original value	Much lower financial barrier to owning certain firearms	Public safety; right to bear arms
Congress sets maximum $10 fee for attorneys in veterans' benefits claims (1864).	1864 law aims to regularize process for adjudicating benefits claims and protect veterans (see *Walters v. National Association of Radiation Survivors*, 1985)[5]	Interval	Inflation; cap is set at 5% of original value today	Effectively denies veterans legal assistance in obtaining disability benefits from the Veterans Administration	Due Process Clause of Fifth Amendment and First Amendment right to counsel
Felon disenfranchisement laws.	Suspension or withdrawal of voting rights for convicted felons	Categorical	500% increase in prison population over past 40 years	Disenfranchisement of larger numbers of people, especially people of color	Right to vote
Affirmative action policies involving categorizations and quotas.	Remedy material racial disadvantage for African Americans	Categorical	Nation diversifies; growth in and diversification of Latinx, Asian American, and multiracial population	Racial categorizations and quotas no longer fit wider set of racial groups (see *Students for Fair Admissions v. Harvard*, 2023)[6]	Equal protection
"Minimal change maps" crafted by state legislatures.	Create just enough majority-minority districts to abide by federal court rulings and enable representation	Categorical	Further growth in communities of color; population shifts	Insufficient opportunities for racial minorities to elect representatives of their choice (see *Allen v. Milligan*, 2023)[7]	Right to vote

(*Continued*)

TABLE 2 (*Continued*)

Policy	Initial Purpose	Type of Freezing	Exogenous Changes	Policy Drift	Legal Implications
Physical presence rule established by *Quill Corp. v. North Dakota* (1992).[8]	States may not impose sales taxes on businesses that have no physical presence in the state	Categorical	Internet revolution	Revenue shortfall for states (see *South Dakota v. Wayfair,* 2018)[9]	State sovereign power; Commerce Clause
Local residential zoning ordinances.	Safeguard property values and preserve segregation	Categorical	Population movements; growing neighborhood segregation	Intensifying segregation and increasing disparities in living standards	Equal protection
Spousal and parental consent laws.	Prevent minors/wives from obtaining abortion without parental/husband consent	Categorical	Reduced number of teenage pregnancies; increase in rates of cohabitation and divorce	Laws have less coverage; fewer people affected by these abortion restrictions	Privacy; women's rights; healthcare; abortion
Federal campaign contributions limits (1976–2002).	Avoid corruption while permitting individual contributions to election campaigns	Interval	Inflation; growing professionalization and rising cost of modern election campaigns	Individual contributions limits cut by two-thirds in real terms over 20 years; harder to raise hard money for campaigns; growth of soft money	Freedom of speech and association

groups as authoritative revision" (Galvin and Hacker 2020, 219).

But when policy makers pursue unpopular, controversial, or even potentially illegal and unconstitutional aims, policy drift also has advantages for them beyond the political realm. Drift protects policies in court, in at least four ways: (1) judicial restraint, (2) low-salience injuries and slow-moving environmental change, (3) traditional expectations and the benefits of bright-line rules, and (4) plausible deniability for lawmakers and executive agencies.

Judicial restraint. Courts are institutionally predisposed to respect precedent and avoid (at least the appearance of) "legislating from the bench." Opportunities for judicial action are most likely when lawmakers and executive agencies craft ambiguous laws with wide latitude for legal interpretation, rather than the clear, fixed, and rigid thresholds or categorizations characteristic of drifting policies. Whether because they are intellectually persuaded by the merits of judicial restraint or because they are strategically concerned with institutional maintenance at a time when public approval of the Supreme Court is at historic lows (Jones 2022), judges and justices do not see themselves as responsible for updating specific pieces of legislation—even when frozen thresholds and categories confront rapidly changing environments, and policies drift.[11]

Low-salience injuries and slow-moving environmental change. Some of the drifting policies in Table 2 have never been litigated. Those injured by a particular form of drift might not be able to identify the specific policy that caused it because the policy passed long before the injury. The impact of interval or categorical freezing may also not be obvious. For instance, women denied access to sterilization, contraception, or abortion procedures in Catholic hospital systems today may not be familiar with the Church Amendments of the 1970s or be able to identify Catholic institutions when mergers and acquisitions typically take place quietly and without fanfare. In a recent survey, more than one-third of women whose primary hospital for reproductive care is Catholic were unaware of this fact (Wascher et al. 2018). The subtle nature of drift reduces the likelihood of legal challenge taking place because changes are slow to accrue and typically fly under the radar.

To bring a lawsuit against a drifting policy, plaintiffs must establish standing to sue. But the length of time over which drift unfolds makes it particularly difficult to demonstrate an "injury in fact," to show that the injury in fact was caused by the defendant's actions, and that it would be redressed by a favorable judgment from the court (Bertagna 2006). Slower-moving and subtler exogenous changes, such as changing societal mores and economic circumstances, make it harder to build a case against a policy because the changes wrought by drift might not easily be discernible.

Traditional expectations and the benefits of bright-line rules. If drifting policies do reach the courtroom, defendants might fall back on "traditional expectations" of what a policy means, discounting ways in which environmental changes have altered the nature and scope of that policy. Textualist forms of originalism facilitate drift by freezing the meaning of a statute in the conditions present at the time of enactment, whether understood as founder intent or public meaning and use (Colby and Smith 2009; Gillman 1997; Griffin 2008). At least four members of the current Supreme Court are self-identified "originalists," although they do not agree about the content of the doctrine. Originalists bring a formal regard for textual specifics and an emphasis on history and tradition to the task of adjudicating cases. Insofar as the Court follows this jurisprudential philosophy, it is harder for litigants to argue in favor of updating drifting policies whose meaning is understood to be clear and fixed at the time of enactment.

Courts have also relied on the purported benefits of bright-line rules to uphold interval- and categorical-frozen laws. According to the Supreme Court in *Quill v. North Dakota* (Stevens 1992),[12] a clear rule "firmly establishes the boundaries of legitimate state authority," reduces litigation, "encourages settled expectations and, in so doing, fosters investment by businesses and individuals." Categorically frozen "minimal-change maps"—drifting without new majority-minority districts as the minority population expands—are justified as the restrained exercise of neutral, traditional mapmaking principles such as district core retention (Bradley 2021; Edwards et al. 2017). Proponents of interval- and categorical-frozen laws highlight their clarity and stability.

The *Quill* Court entrenched a categorically frozen "physical presence rule" for state sales and use taxes that prevented states from imposing such taxes on companies that were not physically located within state boundaries. Over the ensuing 26 years, the internet revolution transformed the relative advantages of out-of-state sellers and ravaged state revenues. The physical presence rule drifted. In 2018, as this drift became apparent, the Court took the opposite line, arguing against "the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow" (Kennedy 2018). In *South Dakota v. Wayfair* (2018),[13] the Court allowed South Dakota to dispense with the physical presence rule at last and collect sales taxes from out-of-state sellers. *Wayfair* remedied drift caused by the categorically frozen presence rule.

Yet in *Wayfair*'s wake, a different form of drift continued. New laws passed in all states with a sales tax specified absolute thresholds for determining whether a seller was engaged in business in a state; they were typically $100,000 of in-state sales or more than 200 in-state transactions. Over the next five years these interval-frozen laws

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began to drift again as further growth in the size and complexity of e-commerce rendered the limits increasingly burdensome for small businesses.[14] South Dakota repealed its transaction threshold in 2023, but most of these interval-frozen rules endured. *Quill* shows how bright-line rules become entrenched through court action and produce drift. The aftermath of the belated *Wayfair* remedy demonstrates that drift can persist through interval, as well as categorical freezing, even when courts and legislatures attempt to respond to its damaging effects.

Plausible deniability. If a policy is challenged in court, judges and justices often consider not only the nature of the policy but also the intentions of its creators when deciding on its constitutionality (James 2011). One advantage that drifting policies have over newly imposed laws is that policy makers can argue in court that they are not responsible for any injuries that claimants allege. For instance, in *Harris v. McRae* (1980)[15] the Supreme Court upheld the constitutionality of strict limitations on the use of federal funds to cover the cost of abortions (categorical freezing), reasoning that—even as abortion has become increasingly concentrated among low-income women (Boonstra 2016)—the obstacles to the exercise of that constitutional right were not of the government's making: "Although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation, and indigency falls within the latter category" (Stewart 1980).

Drift offers legal cushioning because it obscures the *government's* role in producing a controversial outcome. When a policy has drifted, policy makers plausibly deny any intention to produce unconstitutional outcomes: they are merely the distal rather than proximate cause of any alleged injury, even if they might reasonably have foreseen certain environmental changes.

Because we cannot observe policy maker intentions directly, there is no way to assess precisely how strategic and intentional drift is. But we can consider policy maker actions and stated intentions, and what changes they might reasonably have anticipated when crafting a policy—the same factors courts consider when called on to adjudicate the intentions underpinning a policy. Intentional action could occur at two key stages: (1) when a law is first written and (2) when rules are enforced, subsequent updates are blocked, or opportunities to alter a rule are foregone within legislatures or executive agencies.

Some changes are more easily predicted than others. Policy makers might be expected to forecast at least some level of future inflation and population growth, even if forecasters find it difficult to predict specifics during periods of volatility, economic crisis, pandemic, and war. But, challenging as it might be to anticipate the precise level of inflation or migration flows, it is even harder to predict future technological advances and changes in societal mores. Hence, we are more willing to attribute intentional action to policy decisions that result in drift due to (relatively) predictable changes in circumstances than to unpredictable ones.

If policy makers explicitly block policy updates, say by voting down cost-of-living adjustments or quashing new legislation, they also facilitate drift. We are more willing to attribute intentional action to policy makers who *actively* marshal their legislative forces to defeat policy updates explicitly than we are to those who merely fail to act. There are many demands on policy makers' time, so their failure to update a policy is not necessarily an indicator of hostile intent. Because stage 2 is temporally spread out over the entire lifespan of a policy, and it is impossible to count the number of times that a policy update was defeated before even receiving a committee hearing, we might be most confident attributing strategic action at stage 1: the language of the policy as written (and the associated statements of policy maker intent). Judges often attempt to discern policy makers' intentions, but it is extremely difficult to identify them when a policy drifts.

All these features of legal disputes over drifting policies —the importance of precedent and textual formalism for courts, the problem of standing, the role of traditional expectations, the purported benefits of clear bright-line rules, and the difficulty of discerning intentional action— make it challenging for plaintiffs to build a successful legal case. Drift helps insulate policy outputs and outcomes that would provoke immediate opposition if they had been imposed through new legislation.

Conclusion

In an increasingly polarized, sclerotic political system with narrow partisan majorities at the federal level, drift has become a crucial mode of policy change. It has critical implications for governance and downstream consequences for the contours of political contestation, and it invokes a wide range of hot-button legal issues, including racial discrimination, voting rights, abortion, and gun control (Galvin and Hacker 2020; Lee 2015).

Policy makers rigidify policies through clear numerical formulas (interval freezing) and imposing fixed rules on specific categories (categorical freezing). Particularly for interval-frozen policies such as tax rates, fee caps, or benefit levels frozen in nominal dollar terms, policy makers might reasonably anticipate future changes in circumstances that cause those policies to drift. Yet although it is often easier to attribute intentional policy maker action to interval-frozen policies, drift caused by categorically frozen policies can also constitute a deliberate strategic maneuver. For example, when Republican senators filibustered the For the People Act in 2021, they blocked an effort to restore voting rights to felons and facilitated further drift from categorically frozen felon disenfranchisement laws.

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Courts are called on to adjudicate the constitutionality of drifting policies. In so doing, they sometimes consider not only the *effect* of policies but also the *intentions* of a policy's creators. The slow-moving, under-the-radar nature of drift insulates these policies from legal and political challenges by obscuring intentional action and helping policy makers avoid blame for policy outcomes—such as severe racial segregation, disenfranchisement, and curtailment of access to reproductive healthcare—that would attract immediate challenge if imposed through fresh legislation.

The implications for democratic accountability and representation are stark. Shifting circumstances transform the nature, scope, and meaning of frozen categories and thresholds, sometimes distorting or even inverting the intentions of their originators. These frozen rules, imposed in the past, constrain and shape politics long after their creation. Policy makers seeking to pursue unpopular aims strategically avoid updating drifting policies and plausibly deny their role in court, relying on judicial reluctance to "update" legislation and the low salience of drift to protect them from successful legal challenge.

In addition to these substantive contributions to the neglected confluence between policy drift and judicial politics, this article extends our theoretical and methodological understanding of drift. Drift is notoriously difficult to study empirically because of its gradual and subterranean character (Béland et al. 2016; Rocco and Thurston 2014). Typologizing categorical and interval freezing helps us grasp the boundaries and empirical instances of this concept. Drawing on legal cases not only sharpens our understanding of what is at stake when policy drift occurs but also offers a way to recover instances of drift for analysis.

Absent major changes to the size and role of the court, reforms of legislative procedure, and amelioration of deepening partisan polarization, the Supreme Court will stay in conservative hands for many decades, federal majorities will remain wafer thin, and the filibuster will enable blocking minorities to prevent action to alter policies—all conditions that facilitate and accelerate drift. This article sets the agenda for the next phase of research on this mode of policy change, exploring several different forms of policy rigidity that produce drift and the strategic value of drift in court.

Notes

1 An additional problem for state revenue and worker protection is the *mis*classification of workers as independent contractors when they should in fact be classified as employees. This is not the same issue as drift given categorically frozen laws where the rule is clear and rigid but instead arises from ambiguity as to the application of a rule. The IRS has long attempted to police the classification of employees but is stymied by resource constraints (Government Accountability Office 2009).
2 *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
3 *Roe v. Wade,* 410 U.S. 113 (1973)
4 *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).
5 *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985).
6 *Students for Fair Admissions v. Harvard*, 600 U.S. _ (2023).
7 *Allen v. Milligan,* 599 U.S. _ (2023).
8 *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).
9 *South Dakota v. Wayfair*, 585 U.S. _ (2018).
10 *South Dakota v. Wayfair.*
11 In *Johnson v. Wisconsin Elections Commission* (2021), a redistricting case, the Supreme Court of Wisconsin endorsed a "least-change approach" explicitly: "A least-change approach safeguards the long-term institutional legitimacy of this court by removing us from the political fray and ensuring we act as judges rather than political actors" (Bradley 2021). The judges reasoned that categorically freezing the map (making the fewest changes possible to existing districts in the 2020 redistricting cycle) was a "neutral criterion," even if it perpetuated the 2010 Republican gerrymander.
12 *Quill Corp. v. North Dakota.*
13 *South Dakota v. Wayfair.*
14 Even though South Dakota was the first to impose an interval-frozen transaction threshold for sales taxes (known as tax-nexus thresholds), the state repealed it in 2023 because of the burdens it imposed on businesses. One problem with such thresholds is their tendency to drift: as consumer behavior changes and e-commerce becomes more complex and extensive, more businesses reach the 200-transaction limits and even small businesses with low turnover become liable. But the drift problem is not the only issue here. Lack of uniformity between states is another problem, as is confusion about what counts as a transaction. The transactions thresholds thus present an interesting combination of clarity (200 transactions) and ambiguity (but what is a transaction?). Businesses that seek to comply with the limit bear the burdens of drift, while noncompliance presents yet another problem for state revenue departments.
15 *Harris v. McRae, 448 U.S. 297 (1980).*

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