

2013

Free Speech, Fair Election, and Campaign Finance Laws: Can They Co-Exist?

Joel Gora

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [First Amendment Commons](#), and the [Other Law Commons](#)

Recommended Citation

56 Howard L. J. 763 (2013)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

Business Information

SUBSCRIPTIONS: The *Howard Law Journal*, ISSN 0018-6813, is published three times per year. One year's domestic subscription rate is \$34, with a per-issue price of \$12. Symposium issues are \$15. International subscriptions are \$44. These rates are competitive with those of other journals and reviews.

SUBMISSIONS: The Editorial Board of the *Howard Law Journal* invites the submission of articles of substantial legal merit. The *Howard Law Journal* does not publish submissions by current students of other institutions. Authors seeking publication in the *Howard Law Journal* should submit one copy of a double-spaced manuscript. All manuscripts should be submitted in Microsoft Word format. The *Journal* assumes no responsibility for the return of any material unless accompanied by a self-addressed stamped envelope.

Although the *Journal* generally gives great deference to an author's work, the *Journal* retains the right to determine the final published form of every article. As a rule, footnotes should follow the form mandated by *The Bluebook: A Uniform System of Citation* (19th Edition).

When submitting an article, please include pertinent biographical data, business and home addresses, email address, and business and home phone numbers. Please submit electronic submissions (including curriculum vitae) to: hljsubmissions@law.howard.edu. Electronic submissions can also be submitted via ExpressO, an online delivery service available at <http://law.bepress.com/expresso/>. Please submit hardcopy manuscripts to:

Howard Law Journal
Jacqueline Young, Manager
2900 Van Ness Street, NW
Washington, DC 20008
Phone: (202) 806-8084
Fax: (202) 806-8417

VOLUME 56

•

ISSUE 3

•

SPRING 2013

HOWARD LAW JOURNAL

EDITORIAL BOARD 2012-2013

ANGELA M. PORTER
Editor-in-Chief

ROSELLE N. OBERSTEIN
Managing Editor

NADINE F. MOMPREMIER
*Executive Solicitations &
Submissions Editor*

ALYSSIA J. BRYANT
*Executive Publications
Editor*

SHARAYA L. CABANSAG
*Executive Notes &
Comments Editor*

MATTHEW C. CELESTIN
Senior Articles Editor

LAFAYETTE M. GREENFIELD II
Senior Articles Editor

JOSEPH P. HOANG
Senior Articles Editor

VARNITHA SIVA
Senior Articles Editor

ALEXANDRA S. THOMPSON
Senior Articles Editor

THURSTON JAMES HAMLETTE
Senior Notes & Comments Editor

AMBER N. MELTON
Senior Notes & Comments Editor

LAUREN D. SHUMAN
Senior Notes & Comments Editor

JASMINE A. WILLIAMS
Senior Notes & Comments Editor

HAKEEM S. RIZK
Senior Solicitations & Submissions Editor

OKIANER CHRISTIAN DARK
Interim Dean

ANDREW I. GAVIL
CYNTHIA R. MABRY
MARIELA OLIVARES
PATRICE L. SIMMS
Faculty Advisors

JACQUELINE C. YOUNG, M.S.
Manager

VOLUME 56

•

ISSUE 3

•

SPRING 2013

HOWARD LAW JOURNAL

MEMBERS 2012-2013

CHRISTY J. AGUIRRE*

CRINESHA BROOKS**

BLAIR B. BURNETT**

ANDREW B. BUTLER

RICHARD T. CARLTON III

JANELLE CHRISTIAN***

AUBREY CUNNINGHAM*

DWIGHT J. DRAUGHON JR.

KAREN AGOM EGBUNA

MEKDES FANTA*

TABITHA FERRER

JOSEPH ALLEN GARMON

CHRISTEN B'ANCA GLENN***

LESLIE GRAHAM

TRISHA GRANT

NOELLE GREEN**

SAMIR MOHAMMED ISLAM

MARTINIS M. JACKSON*

ERIKA A. JAMES

ASHLEY J. JOHNS*

DAYNE JOHNSON

TIFFANY MCCLEAVE

SALOMON T. MENYENG*

HANNAH J. NEWKIRK

DIEGO A. ORTEGA

SEAN G. PRESTON*

ASHLEY C. REECE*

VANESSA S. TABLER***

CINDY UNEGBU

Member, National Conference of Law Reviews

* Senior Staff Editor

** Associate Publications Editor

*** Associate Solicitations Editor

ADMINISTRATIVE OFFICERS 2012-2013

Okianer Christian Dark, *Interim Dean, J.D., Rutgers University*
Lisa A. Crooms-Robinson, *Associate Dean of Academic Affairs, J.D., University of Michigan*
Dione Traci Duckett, *Associate Dean for Student Affairs and Records, J.D., Howard University*
Reginald McGahee, *Assistant Dean of Admissions, J.D., Howard University*
Jo Ann Haynes Fax, *Assistant Dean for Administration & Operations, MBA, Howard University*

FULL-TIME FACULTY

Rhea Ballard-Thrower, *Associate Professor of Law and Director of Law Library, J.D., University of Kentucky, MILS, University of Michigan*
Jasbir Bawa, *Assistant Professor of Lawyering Skills, J.D., Howard University*
Spencer H. Boyer, *Professor of Law, LL.B., George Washington University, LL.M., Harvard University*
Alice Gresham Bullock, *Professor of Law, J.D., Howard University*
Sha-Shana N.L. Crichton, *Assistant Professor of Lawyering Skills, J.D., Howard University*
e. christi cunningham, *Professor of Law, J.D., Yale Law School*
Morris Davis, *Assistant Professor of Lawyering Skills, J.D., North Carolina Central University School of Law, LL.M., U.S. Army JAG School*
Marsha A. Echols, *Professor of Law and Director of Graduate Program, J.D., Georgetown University, LL.M., Free University of Brussels, S.J.D., Columbia University*
Olivia M. Farrar, *Assistant Professor of Lawyering Skills, J.D., Georgetown University*
Aderson B. Francois, *Associate Professor of Law, J.D., New York University*
Andrew I. Gavil, *Professor of Law, J.D., Northwestern University*
Steven D. Jamar, *Professor of Law, J.D., Hamline University, LL.M., Georgetown University*
Adam H. Kurland, *Professor of Law, J.D., University of California, Los Angeles*
Homer C. LaRue, *Professor of Law, J.D., Cornell University*
Warner Lawson Jr., *Professor of Law, J.D., Howard University*
Cynthia R. Mabry, *Professor of Law, J.D., Howard University, LL.M., New York University*
Harold A. McDougall, *Professor of Law, J.D., Yale Law School*
Tamar M. Meekins, *Associate Professor of Law and Director of Clinical Law Center, J.D., University of Virginia*
Ziyad Motala, *Professor of Law, LL.B., University of Natal, S.J.D., LL.M., Northwestern University*
Lateef Mtima, *Professor of Law, J.D., Harvard University*
Cheryl C. Nichols, *Associate Professor, J.D., Georgia State University*
Mariela Olivares, *Assistant Professor of Law, J.D., University of Michigan Law School, LL.M., Georgetown University Law Center*
Reginald L. Robinson, *Professor of Law, J.D., University of Pennsylvania*
W. Sherman Rogers, *Professor of Law, J.D., Howard University, LL.M., George Washington University*
Josephine Ross, *Associate Professor of Law, J.D., Boston University*
Valerie Schneider, *Assistant Professor of Law, J.D., George Washington University*
Patrice L. Simms, *Assistant Professor of Law, J.D., Howard University*
Mark R. Strickland, *Assistant Professor of Lawyering Skills, J.D., Rutgers University*
H. Patrick Swygert, *Professor of Law, J.D., Howard University*
Alice M. Thomas, *Associate Professor of Law, J.D., Howard University, M.B.A., Howard University*
Patricia M. Worthy, *Professor of Law, J.D., Howard University*

EMERITI FACULTY

Loretta Argrett, *Professor of Law, J.D., Howard University*
Henry H. Jones, *Professor of Law, LL.B., Howard University*
Oliver Morse, *Professor of Law, LL.B., Brooklyn College, S.J.D.*
Michael D. Newsom, *Professor of Law, LL.B., Harvard University*
Jeanus B. Parks, Jr., *Professor of Law, LL.B., Howard University, LL.M., Columbia University*
J. Clay Smith, *Professor of Law, J.D., Howard University*
Richard P. Thornell, *Professor of Law, J.D., Yale Law School*

HOWARD LAW JOURNAL

TABLE OF CONTENTS

**NINTH ANNUAL
WILEY A. BRANTON/HOWARD LAW JOURNAL SYMPOSIUM
Protest & Polarization: Law and Debate
in America 2012**

LETTER FROM THE EDITOR-IN-CHIEF

FROM THE EDITOR-IN-CHIEF	<i>By Angela M. Porter</i>	vii
--------------------------------	----------------------------	-----

ARTICLES

THE COMING CONSTITUTIONAL YO-YO? ELITE OPINION, POLARIZATION, AND THE DIRECTION OF JUDICIAL DECISION MAKING	<i>By Mark A. Graber</i>	661
DOES PROTEST WORK?	<i>By Tomiko Brown-Nagin</i>	721
FREE SPEECH, FAIR ELECTIONS AND CAMPAIGN FINANCE LAWS: CAN THEY CO-EXIST?	<i>By Joel M. Gora</i>	763
SOCIAL CHANGE REQUIRES CIVIC INFRASTRUCTURE	<i>By Harold A. McDougall</i>	801
GROWING INEQUALITY AND RACIAL ECONOMIC GAPS	<i>By Thomas W. Mitchell</i>	849
BOYCOTTS, BLACK NATIONALISM, AND ASYMMETRICAL MARKET FAILURES RELATING TO RACE	<i>By Andre L. Smith</i>	891

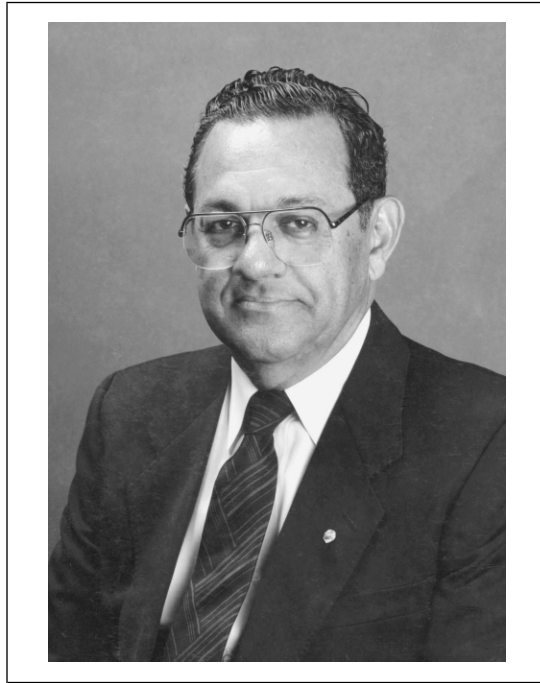
NOTES & COMMENTS

DEATH, SPERM HEISTS, AND TEST TUBE BABIES: SUPPORT FOR MEASURES TO PREVENT SOCIAL SECURITY ABUSE, CONSERVE GOVERNMENT FUNDS, AND PROTECT FAMILIES	<i>By Alyssia J. Bryant</i>	917
--	-----------------------------	-----

FUNDAMENTAL RIGHT OR LIBERTY?:
ONLINE PRIVACY'S THEORY FOR
CO-EXISTENCE WITH SOCIAL MEDIA*By Hakeem Rizk* 951

PULLING THE TRIGGER: SHOOTING
DOWN MANDATORY MINIMUM
SENTENCING FOR VICTIMS
WHO KILL THEIR ABUSER*By Lauren Danice Shuman* 983

**About the Wiley A. Branton/
Howard Law Journal Symposium:**



WILEY AUSTIN BRANTON

Each year, Howard University School of Law and the *Howard Law Journal* pay tribute to the life and legacy of our former dean, Wiley A. Branton. What began as a scholarship award ceremony for the first-year student who completed the year with the highest grade point average has grown into a day-long program that focuses on an area of legal significance inspired by Branton's career as a prominent civil rights activist and exceptional litigator. The Symposium is then memorialized in the *Journal's* spring issue following the Symposium. The expansive nature of Branton's work has allowed the *Journal* to span a wide range of topics throughout the years, and the *Journal* is honored to present this issue in honor of the great Wiley A. Branton. Past Symposium issues include:

BROWN@50

The Value of the Vote: The 1965 Voting Rights Act and Beyond

***"What Is Black?": Perspectives on Coalition Building
in the Modern Civil Rights Movement***

Katrina and the Rule of Law in the Time of Crisis

Thurgood Marshall: His Life, His Work, His Legacy

From Reconstruction to the White House:

The Past and Future of Black Lawyers in America

***Health Care Reform and Vulnerable Communities:
Can We Afford It? Can We Afford to Live Without It?***

Letter from the Editor-in-Chief

On November 1, 2012, the *Howard Law Journal* hosted its ninth annual Wiley A. Branton Symposium. Each year, we honor our former Dean and civil rights pioneer, Wiley A. Branton, by reflecting on what he did during his lifetime and—in that spirit—by taking up the challenge to analyze key legal issues of the day. Our goal is to initiate a dialogue that may set us on the path to confront those issues, knock them down, and provide for posterity, just as Branton did.

In this special year, our Symposium theme was *Protest & Polarization: Law and Debate in America 2012*. Amid colors of red, white, and blue, the air in the Moot Court Room was charged with anticipation as we assessed political unrest in America on the eve of its high stakes presidential election. Our speakers and contributing authors led poignant discussions that emphasized economic inequality, the efficacy of modern protest, and increasingly polarized politics.

The editors of the *Howard Law Journal* would like to thank the speakers and panelists who led an invigorating discussion that day: Professor Tomiko Brown-Nagin, Associate Dean Lisa Crooms-Robinson, Professor Joel M. Gora, Professor Mark A. Graber, Professor Lenese C. Herbert, Washington, D.C. Congresswoman Eleanor Holmes Norton, Professor Harold A. McDougall, Professor Thomas W. Mitchell, Maryland State Senator Jamin Raskin, Professor Jeffrey Rosen, Professor Andre L. Smith, Professor Guy Uriel-Charles, and Professor Timothy Zick. We'd also like to thank our gracious sponsors Sidley Austin LLP, Debevoise & Plimpton LLP, and the National Bar Association.

From the live Symposium, we are proud to present the written work of six of our speakers. Their works memorialize the exciting discourse that we collectively began last November. In our first article, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, Mark A. Graber explores judicial polarization and conducts a critical analysis of judicial theories surrounding elite status, life tenure, and election returns.

Next, our Keynote Speaker, Tomiko Brown-Nagin, gives us *Does Protest Work?* Her article distills the lessons that can be learned from critical moments in protest history, examines whether modern protest movements

have learned and employed those lessons, and prescribes a plan for modern social engineers to use in developing today's effective protest strategies.

Joel M. Gora's *Free Speech, Fair Elections and Campaign Finance Laws: Can They Co-Exist?* provides an in-depth discussion about the *Citizens United* case and campaign finance regulations; in the article, Gora diverges with popular opinion and makes a compelling argument as to why the Supreme Court made the right decision.

Our own Professor Harold A. McDougall then leads us on an exploration of social movements in *Social Change Requires Civic Infrastructure*. In the article, he analyzes how movements like Occupy and Arab Spring affect civil society and how social effects can be made more longstanding through strategies that emphasize "civic infrastructure."

Former *Howard Law Journal* Editor Thomas W. Mitchell then gives us *Growing Inequality and Racial Economic Gaps*, which explains how current forms of protest—including the Occupy Movement—have done very little to affect change in the growing wealth inequalities and questions whether any form of modern mass protest can address economic inequality and poverty.

In *Boycotts, Black Nationalism, and Asymmetrical Market Failures Relating to Race*, Professor Andre L. Smith concludes the discussion by examining the comparative efficacy of boycotts as a black nationalist project over traditional public legal responses to racist phenomena. Smith ultimately proposes the creation of an organization dedicated strictly to the efficient execution of boycotts for racial justice.

We are pleased to publish three student-written comments. In *Death, Sperm Heists, and Test Tube Babies: Support for Measures to Prevent Social Security Abuse, Conserve Government Funds, and Protect Families*, our Executive Publications Editor Alyssia J. Bryant provides a unique look into social security fraud and argues that, to prevent abuse of the Social Security Act, posthumously conceived children should not be allowed to receive survivorship benefits unless permitted by statute.

In *Fundamental Right or Liberty?: Online Privacy's Theory for Co-Existence with Social Media Websites*, our Senior Solicitations & Submissions Editor Hakeem Rizk explores social media and privacy by comparing the current state of American online privacy law to the European Union's online privacy directive, particularly in regards to social media outlets.

Senior Staff Editor Lauren Danice Shuman then closes the issue with *Pulling the Trigger: Shooting Down Mandatory Minimum Sentencing for*

Victims Who Kill Their Abuser, which addresses the common plight of domestic violence victims turned defendants who too often take unnecessary plea agreements. She praises the proposed Domestic Violence Survivors Justice Act as a measure that should be taken to better protect these victims.

This is my final letter as Editor-in-Chief of the *Howard Law Journal*. I've been humbled and honored to spend the past year in its service. As our volume concludes, I'd like to thank our amazing Executive Editorial Board: Alyssia Bryant, Sharaya Cabansag, Nadine Mompremier, and Roselle Oberstein; you ladies have been such an exceptional and dedicated team. I am excited to be joined by the world in beholding your passion, your drive, and your inevitable achievements. I'd also like to express my deep and sincere appreciation to the Editorial Board and the rest of the Volume Fifty-Six staff; thank you for your hard work, your enthusiasm, and many wonderful memories.

To the new Executive Board, in sending you off to a successful Volume Fifty-Seven, I'll refer to an African tradition—which is completely appropriate seeing as though Howard University, Howard University School of Law, and, thus, the *Howard Law Journal* are all founded in the African tradition. In that tradition, it is necessary for a person to obtain permission from an elder before speaking. As one of the members of Volume Fifty-Six, I will assume that I'm in the position of the elder as a member of the outgoing Executive Editorial Board. In that position, before you all “speak” in Volume Fifty-Seven, I could not be more proud to “grant permission” as a mark of approval and a message of confidence in the next group; I have no doubt that you will elevate this *Journal* to a higher level of excellence.

Finally, I will leave you all with the charge to keep the standard high and prize the words published on these pages. Ensure that the words you publish are “beautiful words,” and search until you find them: remember, “good speech is a hidden as the emerald, but can be found among maids at the grindstone.” – Instructions of Ptah-Hotep, 3580 bc

To close, on behalf of the *Howard Law Journal*, I would like to address our readers and contributors: you are who we work for, and we will never forget that you are the pulse of our publication. From the bottom of our hearts, thank you.

ANGELA M. PORTER
Editor-in-Chief
2012-2013

The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making

MARK A. GRABER*

I. LIFE TENURE, ELITE STATUS, AND ELECTORAL RETURNS IN ISOLATION	669
II. LIFE TENURE, ELITE STATUS, AND ELECTORAL RETURNS IN COMBINATION	681
III. ELITE CONSENSUS AND THE WARREN COURT	684
IV. ELITE POLARIZATION AND THE LATE REHNQUIST/ROBERTS COURT	693
V. THE COMING CONSTITUTIONAL YO-YO	704
VI. TOO UNSETTLING?	713

Students of constitutional law provide two kinds of explanations for judicial decisions. Law professors traditionally emphasize the internal or constitutional law foundations for judicial rulings. These include the constitutional text, past precedent, the original understanding of the persons responsible for constitutional language and fundamental constitutional values.¹ Political scientists more commonly focus on the external and institutional foundations for judicial decisions. These include life tenure, the structure of partisan composition, the behavior of those persons responsible for staffing the federal judiciary, and broader cultural forces.²

* Professor of Law, University of Maryland Francis King Carey School of Law. I am very, very grateful to everyone at the *Howard Law Journal* for their editing and forbearance.

1. For one account of the different forms of constitutional arguments, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1992).

2. For the variety of institutional and external forces that political scientists claim influence judicial decision making, see HOWARD GILLMAN ET AL., *AMERICAN CONSTITUTIONALISM: VOLUME I: STRUCTURES OF GOVERNMENT* 14-18 (2013).

Internal and external explanations for judicial decision-making as much complement as conflict with each other. Black letter law matters.³ Scholars have identified various “jurisprudential regimes,” accepted modes of analysis in particular areas of constitutional law, which limit the influence of judicial policy preferences and political pressures on judicial decision-making.⁴ Howard Gillman, in his acclaimed *The Constitution Besieged*, documents how late nineteenth century judges who favored laissez-faire sometimes sustained what they thought were misguided state regulations when such laws could be justified within the dominant constitutional ethos of the Republican Era, which regarded as constitutional any state law that was designed to promote the public welfare and was based on real differences between the social class being regulated and the social class that remained unregulated.⁵ Judicial values matter as well. Jurisprudential regimes structure but do not compel most judicial decisions. All the Justices in *Muller v. Oregon*, regardless of their beliefs about the merits of laws limiting the hours women worked, agreed that real differences between men and women provided a sufficient constitutional foundation for such regulations.⁶ The Justices on the Fuller Court, however, disputed whether real differences between bakers and other workers provided a sufficient foundation for laws limiting the hours that bakers worked.⁷ Most Americans before the Civil War acknowledged that Congress could not prohibit slavery within a state,⁸ but attitudes about the morality of slavery influenced constitutional decisions on whether Congress could prohibit slavery in American territories.⁹

Scholars have proposed three different theories about what values influence judicial decision making. Some theories claim that Justices with life tenure are better positioned than elected officials to champion constitutional protections for powerless minorities. Frank

3. For a general discussion on this point, see Mark A. Graber, *Looking off the Ball: Constitutional Law and American Politics*, in THE OXFORD HANDBOOK OF LAW AND POLITICS (2010).

4. Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases*, 37 LAW & SOC'Y REV. 827 (2003); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305 (2002).

5. HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 61-62 (1993).

6. See generally *Muller v. Oregon*, 208 U.S. 412 (1908).

7. *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting).

8. See ABRAHAM LINCOLN, *FIRST INAUGURAL ADDRESS—FINAL TEXT*, 4 COLLECTED WORKS OF ABRAHAM LINCOLN 263 (Roy P. Basler ed., 1953).

9. See *Scott v. Sandford*, 60 U.S. 393, 529-633 (1856) (McLean, J., dissenting).

Michelman maintains, “[j]udges perhaps enjoy a situational advantage over the people at large in listening for voices from the margins.”¹⁰ A second family of theories suggests that Justices are more sensitive to the concerns of the most fortunate American citizens. Robert Dahl thinks, “it would appear, on political grounds, somewhat unrealistic to suppose that a Court whose members are recruiting in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite.”¹¹ The third family of theories emphasizes how judicial values align with those of most elected officials. Finley Peter Dunne’s Mr. Dooley articulated the most famous expression of this view when, commenting on the *Insular Cases*,¹² he wrote, “no matter whether th’ constitution follows th’ flag or not, th’ supreme coort follows th’ iliction returns.”¹³

Elite polarization, conflict extension and electoral volatility confound these theories about the values underlying most judicial decisions and the probable direction of judicial decision making. Claims that Supreme Court Justices are unlikely to be “substantially at odds with the rest of the political elite” border on the trivial or absurd during periods of elite polarization and conflict extension, when the political elite is divided between those persons who hold the most liberal and those persons who hold the most conservative positions on almost all constitutional issues of the day. Judicial decisions in these circumstances either side with some elites against others or take positions between the contending elite voices. Justices when elites are polarized bitterly dispute what constitutes “listening for voices from the margins.” Liberal elites presently claim that the Supreme Court’s decision in *Romer v. Evans* striking down a state constitutional amendment prohibiting any official measure banning discrimination against gays and lesbians¹⁴ protected a powerless minority by preventing the state of Colorado from “singling out a certain class of citizens for disfavored legal status or general hardships,”¹⁵ or so Justice Kennedy claimed in his majority opinion. Conservative elites complain that the decision in *Romer* sided with “the knights rather than the villeins”¹⁶ of

10. Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1537 (1988).

11. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 291 (1957).

12. See generally *Downes v. Bidwell*, 182 U.S. 244 (1901); BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006).

13. FINLEY PETER DUNNE, MR. DOOLEY’S OPINIONS 26 (1901).

14. *Romer v. Evans*, 517 U.S. 620 (1996).

15. *Id.* at 633.

16. *Id.* at 652 (Scalia, J., dissenting).

American constitutional politics, or so Justice Scalia claimed in his dissent. Common claims that the Supreme Court follows the election returns are unhelpful during periods of electoral volatility and divided government. Justices who follow the 2000, 2002, 2004, and 2010 elections make conservative decisions. Justices who follow the 2006, 2008, and 2012 elections make liberal decisions. Whether Justices who follow all election returns in the twenty-first century should make a mix of liberal and conservative decisions or more often split the difference between Republicans and Democrats is unclear. Common claims that the Supreme Court is a “majoritarian institution”¹⁷ rarely specify whether the majority in question consists of the voters in the most recent presidential election,¹⁸ voters in the most recent Senate election, voters in the most recent House election, voters in the most recent state elections, or American citizens as measured by some public opinion poll. Different answers to the “which election” and “when” questions, for the last several decades, yield very different predictions about what judicial values will determine the direction of future judicial decision making.

This Article offers a more sophisticated account of elite theory that incorporates the crucial insights underlying claims that Justices with life tenure will protect minority rights and claims that the Supreme Court follows the election returns. Justices tend to act on elite values because Justices are almost always selected from the most affluent and highly educated stratum of Americans. During times when American elites support the rights of a particular unpopular minority, a Supreme Court staffed by elites is likely to be more supportive of those rights than elected officials more dependent on popular majorities for their office. Elections have the most impact on judicial decision making during periods when politically polarized elites dispute what minorities and minority rights merit constitutional protection. Put simply, the direction of judicial decision making at a given time reflects the views of the most affluent and highly educated members of the dominant national coalition.

The values that animate the elite members of the dominant national coalition help explain the direction of judicial decision making for the last eighty years. During the mid-twentieth century, most Re-

17. See, e.g., LUCAS A. POWE, *THE SUPREME COURT AND THE AMERICAN ELITE*, 1789-2008, at ix (2009).

18. Assuming, of course, popular majorities and electoral majorities did not differ (similar qualifications can be made of the other majorities noted in this sentence).

The Coming Constitutional Yo-Yo?

publican and Democratic elites held more liberal positions on most constitutional issues than less fortunate and less affluent Democrats or Republicans. This elite consensus minimized the impact of partisan control of the White House and the partisan composition of the Court on most matters of constitutional law. Such Republican appointees as William Brennan and Earl Warren frequently joined such Democratic appointees as William O. Douglas and Thurgood Marshall in advancing such causes as racial equality and free speech. At times, grumbles about judicial activism emanated from the Democrat Felix Frankfurter and the Republican John Harlan. By the turn of the twenty-first century, that consensus had dissipated. Most Republican elites presently take far more conservative positions on most constitutional issues than the average Republican. Most Democratic elites take far more liberal positions on most constitutional issues than the average Democrat. One consequence of this elite polarization is that partisan control of the White House and the partisan composition of the Court have extraordinary influence on most matters of constitutional law. At present, the four most liberal members of the Roberts Court are the four Justices appointed by a Democrat. The five most conservative Justices on that Court were appointed by a Republican. The Supreme Court has often made fairly centrist decisions on the constitutional issues of the day for the past twenty years only because Justices O'Connor and Justice Kennedy more resemble a common type of Republican party elite that roamed the political jungles during the 1980s but is now largely extinct. Should elites remain polarized and either Justice Kennedy retire or a President of one party have the opportunity to replace a Justice appointed by a President of the other party, the result is likely to be either a court that is more liberal on most constitutional issues than the average Democrat voter or a court that is more conservative on most constitutional issues than the average Republican voter.

A closely divided bench composed of polarized elites is vulnerable to what might be called constitutional yo-yos, dramatic swings in judicial policy making on numerous policy issues. Assume electoral politics remains fairly volatile for the near future, with Presidents of one party frequently replacing Presidents of the other party. If we also assume that Justices leave the bench at regular intervals, albeit

longer intervals than had previous been the norm,¹⁹ the median justice on the Supreme Court may well flip each decade between a Democrat more liberal than the average Democrat and a Republican more liberal than the average Republican. The result will be a Supreme Court that lurches back and forth between making relatively extreme liberal and relatively extreme conservative decisions on the most important constitutional issues of the day. Judicial majorities in odd numbered decades might strike down all restrictions on abortion, sustain all affirmative action policies, and insist on a strong separation between church and state, while a change of one justice in even numbered decades will lead to a tribunal that might sustain all restrictions (and bans) on abortion, strike down any use of race in admissions or employment processes, and insist that government accommodate religion.

These potential constitutional yo-yos threaten both the majoritarian and the constitutional values that traditionally enjoy a precarious balance in the American constitutional regime.²⁰ Elite polarization undermines majoritarianism by grossly exaggerating the impact of elections and public opinion on judicial decisions. Small fluctuations in public opinion and in voting behavior may induce judicial decisions that lurch back and forth between relatively extreme liberal and relatively extreme conservative opinions, even when most citizens prefer centrist positions on issues ranging from the constitutional status of abortion to the constitutional status of capital punishment. This volatility undermines constitutionalism by inhibiting such constitutional purposes as providing credible commitments to crucial stakeholders, maintaining the rule of law, and developing a national commitment to a set of fundamental constitutional aspirations.²¹ For these reasons, judicial minimalism during times of elite polarization and electoral volatility has particular merit, even if such an approach to the judicial function may disserve constitutional values during other political periods.

19. See generally Justin Crowe & Christopher F. Karpowitz, *Where Have You Gone, Sherman Minton? The Decline of the Short-Term Supreme Court Justice*, 5 PERSP. ON POL. 425 (2007).

20. See ROBERT McCLOSKEY, *THE AMERICAN SUPREME COURT 6-8* (5th ed. 2010) (noting the tension between “the will of the people and the rule of law”); WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONALISM INTERPRETATION* 45-78 (4th ed. 1960).

21. For a general discussion of constitutional purposes, see GILLMAN ET AL., *supra* note 2, at 7-10.

The Coming Constitutional Yo-Yo?

The following pages document how elite opinion structures the path of judicial decision making and how the present structure threatens both majoritarianism and constitutionalism. Part I examines scholarly and popular claims that the Supreme Court has special capacities to protect minorities, is tethered to elite opinion, or religiously follows the election returns. Each theory explains some important judicial decisions, but fails to explain other equally important judicial decisions. All are often elaborated so as to be almost unfalsifiable. Supreme Court Justices, no matter how they decide most cases, protect some minorities, advance values held by some elite faction, and support the constitutional vision of some recent electoral winners. Part II proposes that Supreme Court commentary pay special attention to those elites most likely to gain federal judicial appointments. This approach combines insights from elite theory (Justices are elites who hold elite values), electoral theory (elections determine what elites are appointed to the federal bench), and minority rights theory (whose voices from the margins do those particular elites hear). Unlike conventional elite theory, the theory outlined in this paper explains which elite values the Supreme Court articulates during times of elite polarization, namely those elite factions that most influence the judicial selection process. Part III details how this version of elite theory explains the pattern of judicial decision making during the mid-twentieth century. Warren Court activism took place during a time of elite consensus. Such judicial decisions as *Brown v. Board of Education*²² and *Engle v. Vitale*²³ reflected the tendency of both Republican and Democrat legal elites to hold more liberal values on racial and religious issues than less affluent and less well-educated Republicans and Democrats. Part IV details how the changes in the structure of elite opinion that began to occur during the last decades of the twentieth century changed voting patterns on the Supreme Court. The present polarization on the Supreme Court reflects the present polarization of elite opinion. Most Justices hold either the relatively extreme liberal opinions typical of highly educated, affluent Democrats or the relatively extreme conservative opinions typical of highly educated, affluent Republicans. The extremist tendencies of most American elites have nevertheless been held in check only be-

22. See generally 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson* holding that separate facilities for blacks and whites are inherently unequal).

23. See generally 370 U.S. 421 (1962) (holding voluntary non-denominational school prayer to violate the Establishment Clause).

cause a representative of a rapidly becoming extinct species of elite moderate has held the median position on the Supreme Court for the past twenty years. As a result, that tribunal has often announced centrist solutions to political and constitutional controversies that polarized elected politicians cannot achieve. Whether that center can hold is doubtful. The median justice of the near future is likely to be a more typical contemporary Republican elite or a more typical Democrat elite. So staffed, the Supreme Court will either hand down relatively extreme opinions on almost all constitutional questions or, should Americans continue to experience electoral volatility, oscillate between relatively extreme liberal and relatively conservative positions on the constitutional issues of the day. Part V discusses how a court composed of an unstable group of polarized elites undermines popular sovereignty and the rule of law. Judicial decisions in these circumstances neither reflect the more centrist commitments of the voting public nor articulate durable constitutional values. Judges can mitigate the baneful combination of elite polarization and electoral volatility, the Article concludes, only by practicing strong forms of judicial minimalism. Even if judicial activism is often justified in light of a judicial obligation to articulate fundamental constitutional truths, Justices considering whether to hand down broad constitutional rulings should have a greater degree of confidence than they can have at present that their decisions will not be overruled within the decade.

“Extreme” or “relatively extreme” in this Article refers only to sociological facts about where a particular belief belongs on the spectrum of public opinion at a given time, not to the normative merits of either extreme or moderate views. Persons who hold such views as “abortion ought never be regulated” or “abortion ought never be legal” are “relative extremists” at present only because most contemporary Americans hold the more centrist opinion that abortion ought to be legal but heavily regulated. Such relatively extreme pro-life or pro-choice opinions may be sound morality or constitutional law. History may vindicate one side to the debate over abortion just as history has vindicated the relative extremists of past eras who thought slavery ought to be abolished, women ought to have the same rights as men, government should not mandate the one true religion, and criminal defendants should have rights to an attorney.

Nevertheless, the sociological status of particular constitutional beliefs has normatively relevant consequences. Judicial decisions that articulate what some Justices and their elite supporters regard as nor-

matively desirable constitutional values may have less normatively desirable consequences. Backlash is one such unfortunate possibility. Many commentators insist that some Supreme Court decisions promoting what the commentator agrees are fundamental human and constitutional rights have inspired a contrary political mobilization that resulted in what the commentator claims is a less just status quo.²⁴ This paper suggests that severe constitutional instability may be another untoward consequence of commitments to judicial activism in the wrong time and place. Advocates of same-sex marriage and the right to bear arms may well be championing compelling constitutional values. Whether those and other constitutional values are best served by aggressive judicial decisions that may not survive the next series of elections is a question that may haunt Americans if we continue to live in a regime structured by elite polarization, conflict extension and electoral volatility.

I. LIFE TENURE, ELITE STATUS, AND ELECTORAL RETURNS IN ISOLATION

A general consensus exists that judicial values have at least some influence on judicial decision making some of the time. Leading political scientists write as if voting on the Supreme Court is determined almost entirely by values and policy preferences. Jeffrey Segal and Harold Spaeth, the most prominent proponents of the attitudinal model of Supreme Court decision making, bluntly state, “Justices make decisions by considering the facts of the case in light of their ideological attitudes and values.”²⁵ Those law professors and judges who scorn social science efforts to discount the influence of law on judges nevertheless recognize that an empirical theory of judicial decision making cannot altogether ignore judicial values. Herbert Wechsler in his famous “Neutral Principles” lecture recognized that constitutional decisions “involve a choice among competing values”²⁶ in those numerous cases in which “the language of the Constitution, of

24. See generally MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013) (discussing the backlash surrounding gay marriage). For an argument against backlash, see generally Robert Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

25. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 110 (2002).

26. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

history and precedent . . . do not combine to make an answer clear.”²⁷ Even Justice Scalia thinks that one virtue of originalism is that “the inevitable tendency of judges to think the law is what they would like it to be will . . . cause most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values.”²⁸

Questions about what judicial values influence judicial decisions have received far less scholarly attention than questions about whether values in general influence judicial decisions. Political scientists debate the extent to which Justices base constitutional decisions on the same balance of policy preferences and values as do other official decision makers, but do not consider whether Justices as a group have the same policy preferences and values as other official decision makers or a specific group of official decision makers.²⁹ Law professors debate the extent to which law mandates that Justices make certain decisions on their best understanding of such values as equality and liberty.³⁰ They rarely explore whether judicial understandings of such values as equality and liberty resemble those of other governing officials or some group of citizens. One consequence of these debates is we know a good deal more about how beliefs about free speech influence Supreme Court decisions in First Amendment cases than why some Justices value speech more than others and why, at least in the twentieth century, most Justices valued speech more than the average citizen and elected official.

Three theories about judicial values are nevertheless fairly explicit in the literature on Supreme Court decision making. The first maintains that Justices who have life tenure are more likely than average citizens and elected officials to protect minorities. The second maintains that Justices, who are almost always well-educated affluent lawyers, are likely to hold those values widely held by other well-educated affluent lawyers. The third suggests that Justices will follow the electoral returns, either because they are appointed by electoral winners or, if they are appointed by officials who have since become elec-

27. *Id.* at 17.

28. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

29. See generally Post & Segal, *supra* note 24; Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465 (2001).

30. See RONALD DWORKIN, *TAKINGS RIGHTS SERIOUSLY* 149 (1978) (calling for a “fusion of constitutional law and moral theory”). See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

toral losers, because they fear the consequences of challenging electoral winners.

A Life-Tenured Supreme Court Protects Minorities. One popular theory of Supreme Court decision making claims that Justices recognize a special judicial responsibility to protect minority rights. Chief Justice Harlan Fiske Stone in *United States v. Carolene Products Co.* called for “more search judicial inquiry” when official actions were motivated by “prejudice against discrete and insular minorities.”³¹ Subsequent commentary maintained that this famous footnote four asserted both a normative theory about the values that should motivate Justices and an empirical theory about the values that actually did motivate Justices. “The great and modern charter for ordering the relation between judges and other agencies of government,” Owen Fiss writes, “is footnote four of *Carolene Products*.”³² Judges and scholars agree. “Under our constitutional system,” Hugo Black stated in *Chambers v. State of Florida*, “courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.”³³ Professor Geoffrey Hazzard expressed much conventional wisdom when he stated, “The institution of judicial review protects minority ‘rights’ against ‘faction.’”³⁴

Life tenure provides two good reasons for thinking that Supreme Court Justices will act on different values than elected officials and that these differences will often lead courts to be sensitive to the needs of politically vulnerable populations. Justices who do not have to seek reelection are far freer to protect unpopular persons and groups than persons who depend on popular support for their offices. American Justices who have made unpopular decisions have never lost their jobs or lives. At worst, such decisions have not been implemented. Moreover, Justices who have served for decades are likely to have different values than recently elected officials. For this reason, the Supreme Court is likely to protect former members of a majority coalition should they become politically vulnerable minorities.³⁵

31. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

32. Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979).

33. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

34. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1277 n.200 (1991).

35. See generally TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003) (discussing the insurance function of judicial review).

Many important Supreme Court decisions have protected politically vulnerable minorities. Such cases as *Brown v. Board of Education*³⁶ and *Loving v. Virginia*³⁷ ruled that racial majorities could not establish a racial caste system in the United States. “Measures designed to maintain White Supremacy,” Chief Justice Warren stated in *Loving*, constitute the “invidious racial discrimination” prohibited by the equal protection clause of the Fourteenth Amendment.³⁸ Constitutional criminal procedure provides even clearer instances of courts listening to the politically powerless. Elected officials have almost no incentive to adopt policies protecting the rights of ordinary criminals. Even during the decade when successful candidates for the presidency asserted that “some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country,”³⁹ the Supreme Court of the United States first declared and then refused to overrule decisions forbidding prosecutors from introducing in criminal trials illegally obtained evidence⁴⁰ and requiring that police warn all persons they arrested that they have a right to keep silent and a right to an attorney.⁴¹ While Richard Nixon was president, the Justices declared unconstitutional every state statute authorizing capital punishment.⁴² As Amy Lerman notes, during the 1960s and 1970s, “the Supreme Court bolstered the due process rights of the accused, even as the public by and large preferred to strengthen prosecutorial power.”⁴³

The primary problem with claims that Justices protect minority rights or have “special capacities to listen to voices from the margins” is that such capacities seem to have lain dormant throughout much of American constitutional history. More often than not, federal and state courts have sided with employers rather than employees.⁴⁴ Victoria Hattam and William Forbath detail how judicial resistance to legislation aimed at improving working conditions led mainstream un-

36. See generally 347 U.S. 483 (1954).

37. See generally 388 U.S. 1 (1967).

38. *Id.* at 11.

39. See President Richard Nixon, Address Accepting the Presidential Nomination at the Republican National Convention in Miami Beach, Florida (Aug. 8, 1968).

40. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

41. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

42. *Furman v. Georgia*, 408 U.S. 238 (1972).

43. Amy E. Lerman, *The Rights of the Accused*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 41 (Nathaniel Persily, Jack Citrin, & Patrick J. Egan eds., 2008).

44. See Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil Rico Claim*, 75 ALB. L. REV. 559, 582-84 (2012).

ions at the turn of the twentieth century to eschew political action, preferring to secure gains through collective bargaining consistent with the common law of contract.⁴⁵ With rare exceptions, nineteenth century courts were far more attentive to the concerns of slaveholders and white supremacists than the plight of slaves and free African Americans. The antebellum Supreme Court declared unconstitutional federal laws banning human bondage in the territories.⁴⁶ The postbellum court imposed sharp constitutional limitations on federal power to promote racial equality in the south⁴⁷ and blessed the rise of Jim Crow segregation in *Plessy v. Ferguson*.⁴⁸ *Bolling v. Sharpe*⁴⁹ is the first instance when the Supreme Court declared a federal policy unconstitutional that championed the rights of the sort of “discrete and insular minority” that much progressive theory suggests courts are institutionally designed to protect.

Claims that the Supreme Court protects minorities also suffer from a falsification problem. All parties to constitutional debates throughout American history have claimed to be members of the sort of politically disadvantaged group that needs judicial protection. Slaveholders and antebellum southerners claimed to be powerless minorities.⁵⁰ When Supreme Court Justices in the nineteenth century complained about the tyranny of the majority, their concern was with laws passed by the less affluent many that took property from the more fortunate few.⁵¹ Justice O'Connor in *City of Richmond v. J.A. Croson* insisted that white contractors disadvantaged by affirmative

45. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 128-76 (1991); VICTORIA HATTAM, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* 3-30 (1993).

46. See *Scott v. Sandford*, 60 U.S. 393 (1856).

47. *The Civil Rights Cases*, 109 U.S. 3 (1893).

48. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that based on the Fourteenth Amendment, a Louisiana-based law mandating that African Americans can only sit in separate but equal railway cars was constitutional).

49. See generally *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that African American children are deprived of equal protection found in the Fifth Amendment when segregated in public schools).

50. See generally JESSE T. CARPENTER, *THE SOUTH AS A CONSCIOUS MINORITY, 1789-1861: A STUDY IN POLITICAL THOUGHT* (1930) (examining the “minority philosophy” in the South during the antebellum period).

51. The Supreme Court referenced that in strong examples like in the taxation of railroads there are rights beyond the control of the state and that if the government “recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all time to the absolute disposition and unlimited control of even the most democratic depository of power” The Court then says that “[t]he theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere.” See *Citizens’ Sav. & Loan Ass’n v. City of Topeka*, 87 U.S. 655, 662 (1874).

action were powerless victims of a local African American majority.⁵² Other contemporary minorities arguably include Christian parents who object to certain materials in the public school curriculum, Muslims who are victims of ethnic profiling, atheists who object to references to “God” in the Pledge of Allegiance, and billionaires who wish to make large campaign contributions. No Supreme Court Justice supports all these persons, all of whom claim to be minority victims of the majoritarian processes.

The Supreme Court and Elites. Robert Dahl and others suggest that the Supreme Court is more responsive to elites than to powerless minorities, that “a Court whose members are recruited in the fashion of Supreme Court justices would [not] long hold to norms of Right or Justice substantially at odds with the rest of the political elite.”⁵³ Lucas Powe observes, “justices are . . . subject to the same economic, social, and intellectual currents as other upper-middle-class professional elites.”⁵⁴ Lawrence Baum maintains that Supreme Court Justices make those decisions that they believe will be approved by elite lawyers, journalists, and interest group leaders. Baum and Neil Devins speak of the “Greenhouse effect, whereby Justices shift their views to reflect the left-leaning values of media and academic elites.”⁵⁵ Most Justices, understandably, do not claim that they represent the most fortunate Americans, but such criticisms are often heard in judicial dissents. The Court, Justice Scalia complains, “has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected.”⁵⁶

Common sense and scholarly analysis provide good reason for thinking that judicial decisions often reflect elite sentiment. Virtually every judge who has ever sat on the Supreme Court in American history has had more education and more wealth than the average American at the time.⁵⁷ The materials Supreme Court Justices read when deciding cases are almost exclusively prepared by other educated, af-

52. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989).

53. Dahl, *supra* note 11, at 291.

54. Powe, *supra* note 17, at ix.

55. Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1543 (2010); see LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 142 (2006) (discussing the Greenhouse effect).

56. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting); see *Lawrence v. Texas*, 539 U.S. 558, 601-02 (2003) (Scalia, J., dissenting).

57. See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 48-49 (5th ed. 2008).

fluent elites.⁵⁸ Supreme Court Justices tend to socialize almost exclusively with their highly educated, affluent peers.⁵⁹ Baum and Devins, who have looked at elite influence on Supreme Court decisions at great length, conclude that

Because the individuals and groups most salient to the Justices are overwhelmingly from elite segments of American society, it is the values and opinions of elites that have the greatest impact on the Justices. This is one important reason why Court decisions typically accord with the views of the most educated people better than they do with the views of the public as a whole. More to the point, the Justices advance their personal preferences by attending both to their preferred vision of legal policy and to the reference groups that matter most to them. Consequently, although the Justices will not diverge sharply from policy positions they strongly favor, the departures they do make are more likely to reflect their personal reference groups than the popular will.⁶⁰

Many important Supreme Court decisions reflect the influence of elite attitudes. Such Marshall Court decisions as *McCulloch v. Maryland*⁶¹ and *Gibbons v. Ogden*⁶² expressed the Federalist/National Republican vision of federal power to promote commercial prosperity held by most early nineteenth century commercial elites.⁶³ During the late nineteenth century, when most American elites favored reconciliation with the South, the Supreme Court was generally hostile to racial equality.⁶⁴ As American elites began to reject theories of

58. See Baum & Devins, *supra* note 55, at 1566-68.

59. See BAUM, *supra* note 55, at 89-90.

60. See Baum & Devins, *supra* note 55, at 1580-81.

61. See generally *McCulloch v. Maryland*, 17 U.S. 316 (1819) (holding that Maryland cannot tax a branch of the Bank of United States because the Bank is a means employed by the government, which is executing its constitutional powers).

62. See generally *Gibbons v. Ogden*, 22 U.S. 1 (1824) (holding that when affecting commerce, conflicting state claims of sovereignty over bodies of navigable water are subordinate to the legislation of Congress and that any concurrent power is limited power vested in the sovereignty of Congress).

63. See GILLMAN ET AL., *supra* note 2, at 96-97.

64. See Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 1003-05 (2005) (reviewing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)). See generally *Williams v. Mississippi*, 170 U.S. 213 (1898) (holding that as the Fourteenth Amendment of the Constitution prohibits the discrimination of citizens by the government based on race, the constitution and laws of Mississippi setting requirements for voter registration including poll taxes and literacy and a grandfather clause to bypass strict requirements for whites were constitutional as they did not discriminate against races); *Plessey v. Ferguson*, 163 U.S. 537 (1896) (upholding Louisiana laws requiring blacks and whites to sit in separate but equal cars during intrastate travel because the legislation is reasonable); DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2002).

scientific racism, the Supreme Court became more supportive of racial equality.⁶⁵ Baum and Devins point to numerous contemporary judicial decisions on constitutional issues ranging from flag burning to affirmative action, where persons with post-graduate degrees are far more likely to prefer the policy made by the Justices than less educated Americans.⁶⁶

The data Baum and Devins use to support claims that Justices advance elite values nevertheless raises questions about their thesis. While elites showed greater tendencies to support contemporary Supreme Court decisions than other Americans, on no issue for which Baum and Devins presented data did a clear majority of persons with post-graduate degrees support a decision that was opposed by a majority of persons who lacked a post-graduate degree.⁶⁷ More than half of all persons with and without post-graduate degrees opposed the Supreme Court's decisions on school prayer, affirmative action and flag burning. Judicial decisions on homosexual relations and juvenile death penalty are favored by majorities with and without post-graduate degrees. In short, claims that Justices promote elite values do not explain why the Justices frequently disagree with elite majorities and why, when they do agree with elite majorities, they typically agree with (smaller) popular majorities.

The claim that the Supreme Court champions elite values suffers from the same lack of specificity that weakens claims that the Supreme Court protects minorities. Most constitutional struggles feature American aristocrats on all sides. Slaveholders were part of the American elite, but so were the Boston Brahmins who provided support for John Brown.⁶⁸ Abraham Lincoln and Stephen Douglas were elite members of the Illinois bar. The Civil Rights movement pitted

65. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 210-11 (2004). See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that segregation of children based on race, even when physical location and facilities may be equal, is unconstitutional based on the Equal Protection Clause of the Fourteenth Amendment); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that the Equal Protection Clause of the Fourteenth Amendment was violated when an African American applicant was denied admissions to the University of Texas Law School based solely on race because a newly opened school only for blacks was not an adequate comparable level of education); *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that because the United States is a constitutional democracy, law grants the rights of citizens to participate in elections without state restriction of race).

66. See Baum & Devins, *supra* note 55, at 1573.

67. *Boumediene v. Bush* was supported by exactly half of persons with a post-graduate degree and opposed by two-thirds of persons who lacked such a degree. See Baum & Devins, *supra* note 55, at 1573.

68. See BRIAN MCGINTY, JOHN BROWN'S TRIAL 44 (2009).

northern elites against southern elites. Robert Dahl, who penned the seminal statement of elite theory,⁶⁹ also published an exceptionally influential study in political science maintaining that the United States is governed by different elite factions, each of which holds sway over some but not all policy arenas. *Who Governs* contended, “individuals who are influential in one sector of public activity tend not to be influential in another sector; and, what is probably more significant, the social strata from which individuals in one sector tend to come are different from the social strata from which individuals in other sectors are drawn.”⁷⁰ To the extent American politics is structured by what Dahl characterized as “dispersed inequalities,”⁷¹ the most important question for thinking about judicial review is not whether the Court advances elite values, but which elite values does the Court advance. Little research has been done on that precise question.

The Supreme Court and Election Returns/Public Opinion. Much commentary asserts that Supreme Court Justices hold and act on the same values that motivate elected officials and the general public. The strong version of regime theory in political science maintains that Justices carry out the policy agenda of the dominant national coalition. Bradley Joondeph states, “the Court tends to function more as a policy-making partner of the ascendant political majority—or at least an influential segment of that majority—than as an independent check on the political process.”⁷² Terri Peretti endorses a regime politics approach that focuses on how “elected officials enlist the Court as a partner in their electoral and policy aims.”⁷³ Prominent law professors insist that Justices work within parameters marked out by public opinion. Michael Klarman declares, “the Court identifies and protects minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection.”⁷⁴ Barry Friedman’s history of judicial power chronicles how “the Supreme

69. Dahl, *supra* note 11, at 291.

70. ROBERT A. DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* 169 (1961).

71. *Id.* at 228.

72. Bradley W. Joondeph, *Judging and Self-Presentation: Towards a More Realistic Conception of the Human (Judicial) Animal*, 48 SANTA CLARA L. REV. 523, 553 (2008).

73. Terri Peretti, *Constructing the State Action Doctrine, 1940-1990*, 35 L. & SOC. INQUIRY 273, 275 (2010) (“[R]ather than a check on majority power, the federal courts often function as arenas for extending, legitimizing, harmonizing, or protecting the policy agenda of political elites or groups within the dominant governing coalition.”).

74. Michael Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 17-18 (1996).

Court went from being an institution intended to check the popular will to one that frequently confirms it.”⁷⁵

Good reasons exist for thinking that judges are likely to hold or at least articulate the values of political winners and popular majorities. Both social science evidence and common sense provide overwhelming support for the notion that elected officials seek to appoint persons to the bench they believe share their constitutional vision. Henry Abraham declares,

Whatever the merits of the other criteria attending presidential motivations in appointments may be, what must be of overriding concern to any nominator is his perception of the candidate’s *real* politics. The chief executive’s crucial predictive judgment concerns itself with the nominee’s likely future voting pattern on the bench, based on his or her past stance and commitment on matters of public policy insofar as they are reliably discernible. All presidents have tried, thus, to pack the bench to a greater or lesser extent. They will indubitably continue to do so.⁷⁶

Judicial majorities pull punches rather than risk reprisal on matters on which the judges disagree with popular sentiment. “I am not fond of butting against a wall in sport,” John Marshall told Joseph Story when explaining why he refused as a circuit court judge to strike down a Virginia law forbidding African American seamen from entering the state.⁷⁷ The forces that influence popular opinion also influence Justices. Benjamin Cardozo observed, the “great tides and currents which engulf the rest of men do not turn aside in their course and pass judges by.”⁷⁸

Many important Supreme Court decisions are best explained, at least in part, by election returns or popular opinion. Shortly after President Grant appointed two Republican Justices to the Supreme Court, the 5-3 judicial majority that declared unconstitutional the Legal Tender Acts passed during the Civil War⁷⁹ became a 5-4 majority that claimed Article I authorized the United States to make paper money legal payment for all debts.⁸⁰ John Marshall in *Marbury v. Madison*⁸¹ would have almost certainly ordered the Jefferson Admin-

75. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 4 (2009).

76. ABRAHAM, *supra* note 57, at 53.

77. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 86 (1922).

78. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

79. *See generally* *Hepburn v. Griswold*, 75 U.S. 603 (1869).

80. *Knox v. Lee*, 79 U.S. 457, 501(1871).

81. 5 U.S. 137 (1803).

istration to give Marbury his judicial commission had the Federalist Party retained strong control over both houses of Congress in the 1800 national election.⁸² The unanimous Supreme Court decision in *United States v. Nixon*⁸³ was no doubt influenced by the strong popular tide against Richard Nixon during his last months in office.

The main problem with drawing too tight connections between Supreme Court decisions and election returns or popular opinion is that both approaches to judicial decision making predict far less judicial activism than has historically been the case. If the Supreme Court religiously followed election returns, we might expect the Justices to declare federal laws unconstitutional only when the coalition that passed those laws has been electorally deposed. This is not the case. Tom Keck's study of judicial decision making at the turn of the twenty-first century observed that, "Though this Court never included more than two Democratic appointees, more than 70% of its judicial review decisions were issued by bipartisan coalitions, and more than 80% invalidated statutes that had been enacted with substantial Republican legislative support."⁸⁴ The Religious Freedom Restoration Act (RFRA) and the American Disabilities Act (ADA) are two good examples of statutes whose fate was not forecast by strong regime politics models of constitutional politics. Both were passed by overwhelming bipartisan legislative majorities. A unanimous Supreme Court declared RFRA unconstitutional.⁸⁵ The five most conservative Justices on the Rehnquist Court struck down crucial provisions of the ADA,⁸⁶ a statute that President Bush declared to be an "historic act" that "made the United States the international leader on this human rights issue."⁸⁷ Public opinion polls are similarly weak predictors of judicial decision making. Although nearly two-thirds of all Rehnquist Court decisions were consistent with the trend of public opinion (where such a trend could be determined), only two-fifths of that tribunal's decisions declaring federal laws unconstitutional and less than three-fifths of decisions declaring state laws unconstitutional reflected

82. McCLOSKEY, *supra* note 20, at 25-28.

83. 418 U.S. 683 (1974).

84. Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321, 336 (2007).

85. *Boerne v. Flores*, 521 U.S. 507, 534-35 (1997).

86. *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

87. President George Bush, Remarks on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=18711&st=disabilities&st1=>.

public opinion.⁸⁸ Among the important decisions that bucked public opinion were those prohibiting prayer exercises in public schools⁸⁹ and striking down laws banning flag-burning.⁹⁰

Claims that the Supreme Court follows election returns or public opinion either suffer falsifiability problems or are simply not helpful when the election returns or public opinion are not moving in clear directions. Americans for nearly fifty years have experienced this relative political instability. Thirteen of the seventeen national elections held between 1980 and 2012 resulted in divided government. The period between 1936 and 1948 is the last in which a party won more than three consecutive presidential elections. Even when one party controlled all branches of the national government, the ruling majority in Congress often had a quite different ideological bent than the President of the United States. Conservative Southern Democrats during the New Deal Era controlled crucial Congressional committees even as liberals exercised greater power in the White House.⁹¹ Under these conditions, commentators will almost always be able to find some election returns consistent with particular Supreme Court decisions and some election returns inconsistent with those decisions. Americans in 1984 elected a President who ran on a strong pro-life platform but in 1986 returned control of the Senate to the party committed to keeping abortion legal. Depending on which election return one selected, persons attempting to forecast the Supreme Court's decisions in *Webster v. Reproductive Health Services*⁹² and *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁹³ would have predicted that the Supreme Court would overrule *Roe v. Wade*,⁹⁴ overrule decisions permitting states not to fund abortion,⁹⁵ or find some middle ground on abortion that was escaping both political parties. Should the Roberts Court declare unconstitutional recent state laws requiring women seeking abortion to have ultrasounds before undergoing that procedure,⁹⁶ the Justices can be said to be following the 2012 presidential

88. See THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 44 (2008).

89. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992).

90. See, e.g., *United States v. Eichmann*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989); MARSHALL, *supra* note 88, at 24.

91. See NICOL RAE, SOUTHERN DEMOCRATS 12-13 (1994).

92. 492 U.S. 490 (1989).

93. 505 U.S. 833 (1992).

94. 410 U.S. 113 (1973).

95. See, e.g., *Harris v. McCrae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

96. See *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 578 (5th Cir. 2012).

election. Should those laws be sustained, the Justices can be said to be following the 2012 House of Representatives election.

II. LIFE TENURE, ELITE STATUS, AND ELECTORAL RETURNS IN COMBINATION

Common claims that life-tenured judges protect powerless minorities, promote elite values, or follow the election returns often sound better in theory than they work in practice. Good reason exists for thinking that life tenured Justices will be more inclined than elected officials to protect the unpopular, that Justices who hail from Ivy law schools and earn six-digit salaries in bad years will be more inclined than less educated or affluent Americans to act as an American aristocracy, or that Justices appointed by elected officials will follow the election returns. The problem is that for every instance that supports one of these theories, an equally prominent counterexample exists. Worse, each common claim about judicial values suffers from falsification problems. Most cases before the Supreme Court pit one minority against another, one elite against another, and the winner of some recent elections against the winner of other recent elections. Commentary on judicial review, for this reason, must be more specific. Scholars must detail which minorities Justices protect, which elites they represent, and what election returns they follow.

The most basic problem with the three above explanations for judicial decision making is that each fails to take the insights of the others into account. Elite theorists explore how affluent well-educated judges make decisions, not how those decisions are made by affluent well-educated judges who, after being appointed by electoral winners, enjoy life tenure. This myopic approach is mistaken and not just because not all factors are considered as discrete influences on the Supreme Court. Students of intersectionality point out that the experiences of a lesbian black woman cannot be broken down into discrete race, gender, and sexuality components.⁹⁷ For similar reasons, theories of judicial making should focus on how life tenured Justices who are appointed to office by political winners interpret the Constitution in light of their elite values. Rather than engage in a contest to determine which variable explains the most judicial decisions, scholars will

97. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139 (1989).

be better off detailing how life tenure, elite status, and election returns combine to structure the direction of constitutional law.

Life tenure, elite status, and election returns in combination help explain some problems that plagued each factor in isolation as an explanation for judicial decision making. Consider the ways in which judicial decision making during the nineteenth century seems inconsistent with common claims that courts are structured to protect powerless minorities.⁹⁸ That difficulty vanishes when changing conceptions of elite understandings of powerlessness are taken into account. Most elites during the nineteenth century thought affluent property holders were the paradigmatic politically vulnerable minority. James Madison in 1829 declared,

[P]ersons now and property are the two great subjects on which Governments are to act; and that the rights of persons, and the rights of property, are the objects, for the protection of which Government was instituted. These rights cannot well be separated. The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right. The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse. . . . In republics, the great danger is, that the majority may not sufficiently respect the rights of the minority.⁹⁹

These elite attitudes explain why the affluent, well-educated Justices who sat on the Supreme Court during the nineteenth century concluded that corporations were citizens,¹⁰⁰ adopted a railroad friendly interpretation of the commerce clause,¹⁰¹ and tended to prefer the rights of slaveholders to the rights of alleged slaves.¹⁰² The course of Supreme Court decision making changed, unsurprisingly, when in the minds of most elites the poor person of color replaced the successful capitalist as the “discrete and insular minorit[y]”¹⁰³ most vulnerable to the prejudices of popular majorities.

Greater attention to the structure of elite competition helps alleviate other difficulties with common single-factor theories of judicial policymaking. The elites who contested the constitutionality and mo-

98. See *supra* notes 44-48 and accompanying text.

99. 9 JAMES MADISON, *Speech in the Virginia Constitutional Convention*, in THE WRITINGS OF JAMES MADISON 360-61 (Gaillard Hunt ed. 1910).

100. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886).

101. Wabash, St. Louis Pac. Ry. Co. v. Illinois, 118 U.S. 557, 589-93 (1886).

102. See generally *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (holding a Pennsylvania statute granting procedural protections to escaped slaves to violate the Constitution).

103. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

The Coming Constitutional Yo-Yo?

rality of human bondage were not equally situated politically. Jacksonian presidents routinely appointed southerners and northern doughfaces to the federal bench.¹⁰⁴ Abolitionists did not win elections and, as a result, were underrepresented on the federal bench. John McLean was the only antislavery advocate who served on the Supreme Court before the Civil War and his antislavery tendencies developed only after he was appointed in 1830.¹⁰⁵ Such decisions as *Prigg v. Pennsylvania* and *Dred Scott v. Sandford*¹⁰⁶ reflected elite Jacksonian beliefs that slaveholders were a politically vulnerable minority that required special judicial protection.¹⁰⁷ When the elites who staffed the Supreme Court changed, the course of judicial decision-making changed. Five of the nine Justices on the court that decided *Dred Scott* hailed from slave states. Seven of the nine Justices on the court that decided *Brown v. Board of Education* hailed from states that had no slaves before the Civil War. Just as *Dred Scott* reflected the southern tilt of the Jacksonian elite, so did *Brown* reflect the liberal racial sentiments of northern elites during the mid-twentieth century.¹⁰⁸

The Supreme Court is most likely to protect the rights of those minorities whose voices are heard by the most elite members of the dominant national coalition, but the nature of that elite changes in ways that are important for the course of judicial decision making. During some political eras, elections make little difference because elites from both parties are more likely to agree with each other on major constitutional issues than they are to agree with the average member of their political coalitions. The Warren Court, as we shall see, was a product of the elite consensus that developed during the 1950s and 1960s. During other periods, elections made a big difference because the disagreements between the elite members of the two major parties were far greater than the disagreements between the more plebian members of the two major parties. The contemporary Rob-

104. See ABRAHAM, *supra* note 57, at 77-93; Frank Otto Gatell, *Samuel Nelson*, in THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 817, 817-19 (Leon Friedman & Fred L. Israel eds., vol. 2 1969); Frank Otto Gatell, *Robert C. Grier*, in THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 873, 873 (Leon Friedman & Fred L. Israel eds., vol. 2 1969).

105. ABRAHAM, *supra* note 57, at 78-79.

106. 60 U.S. 393 (1856).

107. See *supra* note 49 and accompanying text.

108. See Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 443-44 (2005).

erts Court, as we shall see, is a product of the elite polarization that structures contemporary American constitutional politics.

III. ELITE CONSENSUS AND THE WARREN COURT

The Warren Court is Exhibit A for every prominent theory of judicial decision making discussed in this paper. The Justices made numerous decisions, from *Brown v. Board of Education* to *Gideon v. Wainwright*¹⁰⁹ that apparently demonstrated how life tenured Justices had special capacities “to listen to voices from the margins.”¹¹⁰ Owen Fiss declares,

In the 1950's, America was not a pretty sight. Jim Crow reigned supreme. Blacks were systematically disenfranchised and excluded from juries. State fostered religious practices, like school prayers, were pervasive. Legislatures were grossly gerrymandered and malapportioned. McCarthyism stifled radical dissent, and the jurisdiction of the censor over matters considered obscene or libelous had no constitutional limits. . . . Trials often proceeded without counsel or jury. Convictions were allowed to stand even though they turned on illegally seized evidence or on statements extracted from the accused under coercive circumstances. There were no rules limiting the imposition of the death penalty. These practices victimized the poor and disadvantaged, as did the welfare system, which was administered in an arbitrary and oppressive manner. The capacity of the poor to participate in civic activities was also limited by the imposition of poll taxes, court filing fees, and the like.

These were the challenges that the Warren Court took up and spoke to in a forceful manner. The result was a program of constitutional reform almost revolutionary in its aspiration and, now and then, in its achievements.¹¹¹

The Warren Court also consistently sided with elite opinion on such matters as the place of religion in public life when most affluent, well-educated citizens disagreed with their less fortunate fellow citizens. John Jeffries and James Ryan point out,

[T]he controversy over school prayer revealed a huge gap between the cultural elite and the rest of America. People generally may have supported school prayer and Bible reading, but the leadership class did not. Elite support for the Supreme Court's secularization

109. 372 U.S. 335 (1963).

110. Michelman, *supra* note 10, at 1537.

111. Owen Fiss, *A Life lived Twice*, 100 YALE L. J. 1117, 1118 (1991).

The Coming Constitutional Yo-Yo?

project was clearly visible in the activities of law professors and deans, in the prominent newspaper editorials endorsing Engel and Schempp, and most importantly in the views of mainline Protestant leaders, who overwhelmingly supported the prayer decisions and opposed efforts to overturn them. The contrary opinions of many of the Protestant faithful, especially conservative evangelicals, were less visible and less influential than the announced positions of religious organizations and leaders.¹¹²

Finally, the Warren Court followed the national election returns. Lucas Powe writes,

[T]he Court was a functioning part of the Kennedy-Johnson liberalism of the mid and late 1960s. . . . The Warren Court demanded national liberal values be adopted in outlying areas of the United States In the criminal procedure area, it took the lead as the branch of government most familiar with the problems and most capable of supervising the solutions. The Court's belated welfare decisions were an assault on both national and local bureaucracies, but in moving toward constitutionalization, the Court was several years behind the Great Society in creating new rights.¹¹³

A broad elite consensus on civil rights and civil liberties helps explain why life tenure, elite status, and election returns in isolation each accounts for the path of Warren Court decision making. During the 1950s and 1960s, American elites in both the Republican and Democratic parties tended to support racial equality, limiting the influence of religion in public life, broad free speech rights, and providing greater protections for poor persons and persons of color suspected of crimes.¹¹⁴ Theories that the Court follows elite opinion and theories that courts respond to elections reached similarly accurate conclusions about mid-century constitutional politics because the Republican and Democratic elites empowered by election returns had reached similar conclusions on civil liberties and rights issues. Moreover, because Democratic and Republican elites agreed on the powerless minorities that need judicial protection, theories that courts protect powerless minorities reached the same accurate conclusions about judicial behavior during the 1950s and 1960s as theories that emphasized elite status or election returns.

112. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 325 (2001).

113. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 494 (2000).

114. See *infra* notes 120-34 and accompanying text.

The Elite Consensus. Political science during the New Deal/Great Society Era made sharp distinctions between elite and mass political behavior. Such classics as *The American Voter* concluded that educated Americans knew more about politics than average citizens, participated more, and were more effective participants.¹¹⁵ Mainstream commentators maintained that American politics were pluralistic, characterized by a wide variety of interest groups competing for power.¹¹⁶ Nevertheless, as E.E. Schattschneider noted, “in the pluralist heaven . . . the heavenly chorus sings with a strong upper-class accent.”¹¹⁷ Unlike less fortunate citizens, affluent, well-educated Americans had the capacities necessary to be good democratic citizens. “The resources of time, money, and civic skills,” disproportionately possessed by elites, the leading study of political participation in the United States concluded, “make it easier for the individual who is predisposed to take part to do so.”¹¹⁸

Many prominent commentators did not worry about class differences in political knowledge and political participation. They believed that mass political participation threatened the American democratic order. Leading social scientists worried that the average American did not know enough about American politics to participate effectively and, worse, that many less fortunate citizens harbored attitudes antithetical to democracy. Ordinary Americans, studies found, were far less likely than elites to be committed to such democratic values as free speech and equal protection.¹¹⁹ Other studies suggested that ordinary citizens had authoritarian personalities and were obedient to authorities in ways that made Americans particular susceptible to dictatorial appeals.¹²⁰ After finding that one-third of American voters had “totalitarian” attitudes, Herbert McClosky fretted that “a large proportion of the electorate has failed to grasp certain of the underlying ideas and principles on which the American political system

115. ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER: AN ABRIDGMENT* 251-54 (1964).

116. DAHL, *supra* note 70, at 5; *see also* DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION*, at vii (1951).

117. E.E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE* 35 (1960).

118. SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 334 (1995).

119. HERBERT MCCLOSKEY & ALIDA BRILL, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES* 243-44 (1983).

120. *See* T.W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* 759-62 (1950) (demonstrating the connection between the success of social control and subordinates taking pleasure in obedience); STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974) (studying the tendencies of human nature to obey).

rests.”¹²¹ What kept American democracy afloat was elite commitment to democratic values. *It Can[] Happen Here*¹²² was the implicit theme of much scholarship.

Herbert McCloskey and Alida Brill’s *Dimensions of Tolerance* was a particularly influential statement of the gap between elite and mass commitments to democratic rights and other civil liberties. The work proclaimed, “Social learning, insofar as it affects support for civil liberties is likely to be greater among the influentials (that, is political elites) of the society than among the mass public.”¹²³ McCloskey and Brill based this conclusion on a survey of ordinary citizens, community leaders, and legal elites that asked numerous questions about constitutional principles. They discovered that leaders were far more likely to be libertarian on rights issues than ordinary citizens and that legal elites were far more likely to be libertarian than community leaders. The latter conclusion was particularly important. They stated:

It can be safely presumed, we believe, that the legal elite is closer to other elites, and surely closer to than the mass public, to the implicit norms of the political culture; that they are more intensely involved with them; and that they respond to those norms with greater consistency. If civil liberties values, as we have argued, are difficult to learn, the legal elite has more occasion to encounter them than other samples, has greater knowledge of them, and is more often compelled to reflect upon their merits and shortcomings. By the very nature of their vocation and activities, the members of the legal elite would also be in the best position to understand the reciprocal obligations that a belief in civil liberties imposes upon the individuals who claim them for themselves.¹²⁴

Studies of the new civil liberties issues that emerged in the 1970s initially reached similar conclusions. Attitudes on such issues as abortion and the Equal Rights Amendment (ERA) were more rooted in class than gender. Kristin Luker’s study of abortion politics depicted battles over reproductive choice as being fought between women who sought to be political and economic elites and women who preferred a traditional homemaker role.¹²⁵ “Abortion,” studies concluded, “is part

121. Herbert McClosky, *Consensus and Ideology in American Politics*, 58 AM. POL. SCI. REV. 361, 364-65 (1964).

122. See generally SINCLAIR LEWIS, *IT CAN’T HAPPEN HERE* (1935) (describing how Americans voted for a fascist, who eventually establishes a dictatorship in the United States).

123. McCLOSKEY & BRILL, *supra* note 119, at 233.

124. *Id.* at 247.

125. See generally KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984) (examining the issues, people, and beliefs on both sides of the abortion conflict).

of a larger cultural conflict between certain strata of the upper-middle class—the highly educated professionals, scientists, and intellectuals—and the mass of Americans who comprise the working and lower-middle classes.”¹²⁶ One study of abortion found abnormally high levels of pro-choice support among almost all American elites.¹²⁷ Jane Mansbridge’s study of the politics of the ERA similarly described a battle between different women’s groups composed of women from different classes.¹²⁸ Women in the labor force and women who had homemaker roles, she detailed, differed far more among themselves on gender issues than women as a whole and men.¹²⁹

Elite status trumped ideology and partisanship. Affluent, highly educated Republicans on many civil rights and liberties issues had more opinions in common with affluent, highly educated Democrats, than either shared with less fortunate fellow partisans. In many instances, education and social class were more important factors than whether a respondent identified as a conservative or liberal. A particularly influential article in the 1964 *American Political Science Review* concluded,

If American ideology is defined as that cluster of axioms, values and beliefs which have given form and substance to American democracy and the Constitution, the political influentials manifest by comparison with ordinary voters a more developed sense of ideology and a firmer grasp of its essentials. This is evidenced in their stronger approval of democratic ideas, their greater tolerance and regard for proper procedures and citizen rights, their superior understanding and acceptance of the “rules of the game,” and their more affirmative attitudes toward the political system in general.¹³⁰

The author, Herbert McClosky, found that, regardless of partisan predisposition, elites were more likely than ordinary voters to express basic commitments to democratic principles, less likely to express racist attitudes, far more likely to support the rights of persons suspected of crime and less likely to want to restrict speech rights. Speech rights were a particular matter on which elites differed from ordinary voters. “Not only do [elites] exhibit stronger support for democratic values

126. Peter Skerry, *The Class Conflict over Abortion*, 52 PUB. INT. 69, 70 (1978); see MARK A. GRABER, *RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS* 144-45 (1996).

127. Robert Lerner et al., *Abortion and Social Change in America*, 27 SOC’Y 8 (1990).

128. See generally JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986) (arguing that the ERA failed because it did not result in substantive changes in the position of women).

129. *Id.* at 216-17.

130. McClosky, *supra* note 121, at 373.

than does the electorate,” McClosky noted, “but they are also more consistent in applying the general principle to the specific instance. The average citizen has greater difficulty appreciating the importance of certain procedural or juridical rights, especially when he believes the country’s internal security is at stake.”¹³¹

Judicial Decision Making and the Elite Consensus. The conclusions social scientists reached during the 1950s and 1960s help explain the direction of judicial decision making through much of the middle to late twentieth century, even though owing to the balkanization of the political science discipline, almost all of the scholars doing the research exhibited little interest in public law. The Justices Democratic and Republican Presidents appointed to the Supreme Court from 1930 to 1980 were drawn from the affluent, educated elite that were the most liberal segment of American society at that time. In virtually every area of law in which the Justices declared significant federal or (more often) state measures unconstitutional, public opinion surveys demonstrated that elites were more likely than average citizens to favor the policy made by the Supreme Court and legal elites were more likely than other elites to favor the direction of judicial policy making.

Consider several questions that McCloskey and Brill asked respondents during the survey research they conducted for *Dimensions of Tolerance*.¹³² One concerned attitudes on free speech. “Should demonstrators be allowed to hold a mass protest march for some unpopular cause?” Three-fifths of ordinary citizens maintained that the demonstration should be banned “if the majority is against it.” More than nine-tenths of all legal elites surveyed responded that the demonstration should take place, “even if most people in the community don’t want it.” The Supreme Court in such cases as *Cox v. Louisiana*¹³³ and *Shuttlesworth v. Birmingham*¹³⁴ sided with the legal elite, holding that civil rights protestors had constitutional rights to hold demonstrations promoting unpopular causes in the south. McClosky and Brill asked about “forcing people to testify against themselves in court.” Three-fifths of ordinary citizens thought compelled testimony “may be necessary when [people] are accused of very brutal crimes.”

131. *Id.* at 366.

132. McCLOSKEY & BRILL, *supra* note 119, at 246.

133. *See generally* 379 U.S. 536 (1965) (reversing appellant’s conviction of violating a local regulation prohibiting public demonstrations).

134. *See generally* 394 U.S. 147 (1969) (permitting a demonstration that the local ordinance prohibited).

Almost nine-tenths of the legal elite asserted that compelled testimony “is never justified, no matter how terrible the crime.” The Supreme Court in *Escobedo v. Illinois*¹³⁵ and *Miranda v. Arizona*¹³⁶ sided with the legal elite, insisting on strong constitutional safeguards against compelled testimony. The same stark differences appeared with McCloskey and Brill asked about religion. Three quarters of all average citizens declared that “the freedom of atheists to make fun of God and religion should not be allowed in a public place where religious groups gather.” Three quarters of the legal elite insisted that such speech “should be legally protected no matter who might be offended.” Supreme Court decisions on school prayer championed the secular values held by twentieth century American elites rather than the more religious worldview of ordinary citizens.¹³⁷

This elite consensus also marked the boundaries of liberal Supreme Court activism during the Warren and early Burger years. In sharp contrast to the structure of public opinion on almost every other civil liberties issue, surveys found that affluent, educated Americans were somewhat less likely than ordinary citizens to favor economic equality.¹³⁸ George Lovell’s study of the Civil Liberties Bureau of the Justice Department documents a similarly sharp division between what most elites and average citizens in the 1930s and 1940s thought were civil liberties.¹³⁹ Elite notions resembled those asserted in the famous footnote four of the *Carolene Products*, which called for heightened judicial scrutiny when a law “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” or reflects “prejudice against discrete and insular minorities.”¹⁴⁰ Civil liberties were free speech, freedom of religion, racial equality, and constitutional criminal procedure. Lovell found that ordinary people had far more capacious theories, many of

135. See generally 378 U.S. 478 (1964) (holding that the Sixth Amendment is violated when the accused is not permitted to consult an attorney at the point a police investigation process shifts from investigatory to accusatory).

136. See generally 384 U.S. 436 (1966) (holding that no rule or legislation can abrogate a right secured by the Constitution).

137. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225-26 (1963) (holding daily mandatory Bible reading in school was unconstitutional); *Engle v. Vitale*, 370 U.S. 421, 433 (1962) (holding New York’s laws officially prescribing the Regents’ prayer are inconsistent with the Establishment Clause).

138. See McClosky, *supra* note 121, at 367.

139. See generally GEORGE LOVELL, *THIS IS NOT CIVIL RIGHTS: DISCOVERING RIGHTS TALK IN 1939 AMERICA* (2012) (discussing the practice of using civil rights language when expressing dissatisfaction with political and social conditions).

140. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

which centered on jobs and economic rights.¹⁴¹ The Supreme Court during the New Deal/Great Society Era promoted the elite conception of civil liberties, protecting free speech, freedom of religion, racial equality, and the rights of persons suspected of crime, but rarely announcing rights to economic equality.¹⁴² When the Justices did turn to rights to basic necessities during the late 1960s,¹⁴³ partisan differences among the Justices quickly emerged¹⁴⁴ and the effort to promote economic equality was soon abandoned.¹⁴⁵

The pattern of liberal judicial decisions during the middle to late twentieth century was partly a consequence of liberal elites in government preferring federal Justices who shared their elite values. One consequence of the elite consensus that formed during the New Deal/Great Society Era was that Republicans and Democrats in the executive branch of the national government often employed similar criteria when making judicial nominations. Kevin McMahon details how racial liberals in the Roosevelt, Truman, and Eisenhower administrations sought to pack the federal judiciary with Justices they believed were committed to declaring Jim Crow institutions unconstitutional.¹⁴⁶ Wiley Rutledge and Robert Jackson, two Democratic appointees, were appointed in part because they had criticized the Supreme Court's decision in *Minersville School District v. Gobitis*,¹⁴⁷ which sustained a state law requiring public school children to salute

141. See generally LOVELL, *supra* note 139, at 70-106.

142. See generally ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997) (critiquing the Warren Court's rulings on welfare in the context of twentieth-century politics); Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731 (1997) (questioning liberal constitutional theorists' failure to promote equality in welfare).

143. See *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (holding that termination of welfare benefits prior to a fair hearing adversely affected a recipient's ability to seek redress); *Shapiro v. Thompson*, 394 U.S. 618, 621 (1969) (holding unconstitutional a state statutory provision that denies welfare assistance to residents of the state who have not resided within their jurisdiction for at least one year).

144. See *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (reversing judgment in favor of welfare recipients on grounds that it is not the Court's place to "second guess" the difficult responsibility of state officials to allocate resources).

145. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-56 (1973) (holding that where wealth was involved, the Equal Protection Clause did not require absolute equality or precisely equal advantages).

146. See generally KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN (2004) (arguing that Roosevelt's administration played a crucial role in the Supreme Court's increasing commitment to racial equality).

147. 310 U.S. 586, 598 (1940) (deciding the courtroom is not the area for debating issues of educational policy).

the flag.¹⁴⁸ William Brennan, a Republican appointee, had given several speeches attacking McCarthyism before being appointed to the bench.¹⁴⁹ Justices who had known liberal attitudes on some civil liberties issues, unsurprisingly, often had liberal attitudes on many other civil liberties issues.

More important, the elite consensus of the New Deal/Great Society Era meant that the Supreme Court was likely to be dominated by constitutional liberals as long as presidents did not make self-conscious efforts to pack the court with constitutional conservatives. With the exception of Truman's tendency to nominate Justices he thought would sustain anti-Communist legislation,¹⁵⁰ no Justice from 1932 to 1968 was nominated to the Supreme Court because either the President or crucial members of the Justice Department believed that person had narrow conceptions of free speech, religious freedom, racial equality, or constitutional criminal procedure.¹⁵¹ Eisenhower, in particular, had few if any substantive litmus tests for federal judges.¹⁵² More often than not, he and other Presidents of the time period looked to appoint a distinguished jurist, whose opinion on one or two issues might be ascertained with some reasonable degree of certainty. The public opinion surveys of the times suggest, however, that as long as Presidents fished in a pond in which only legal elites swam, they were likely to have a far more liberal catch than if they picked people randomly out of the phone book. In particular, if a potential judge's opinion on free speech, race, religion, or constitutional criminal procedure could not be determined on the basis of previous statements, the odds were high that the jurist shared the same liberal sentiments as did the vast majority of affluent, educated legal elites.

148. Mark A. Graber, *False Modesty: Felix Frankfurter and the Tradition of Judicial Restraint*, 47 WASHBURN L.J. 23, 29-30 (2007).

149. See Ruth Bader Ginsburg, *Closing Remarks for Symposium on "Justice Brennan and the Living Constitution,"* 95 CALIF. L. REV. 2217, 2217-18 (2007).

150. See generally DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* (1999) (discussing what happens before the Senate hearings to show how Presidents go about deciding who will sit on the Supreme Court).

151. See generally ABRAHAM, *supra* note 57, at 163-231 (describing the relationship between the President and the selection of Justices to the Supreme Court); YALOF, *supra* note 150, at 20-96 (analyzing the selection criteria and political pressures affecting the decisions made by the Presidents, from Truman to Reagan).

152. See YALOF, *supra* note 150, at 42-44.

IV. ELITE POLARIZATION AND THE LATE REHNQUIST/ROBERTS COURT

The late Rehnquist and early Roberts Court seem prominent counterexamples to claims that life tenured Justices protect powerless minorities, promote elite values or follow the election returns. Recent judicial decisions supporting the National Rifle Association's interpretation of the Second Amendment¹⁵³ and striking down limits on corporate expenditures¹⁵⁴ hardly demonstrate a judicial capacity "to listen to voices from the margins." A Supreme Court majority became sensitive to gay and lesbian voices only after gays and lesbians achieved substantial success in electoral politics.¹⁵⁵ Several studies demonstrate both Republican and Democratic judicial appointees are willing to declare laws unconstitutional that were passed by bipartisan majorities.¹⁵⁶ No political party or elite faction champions the mix of liberal and conservative policies presently championed by the Supreme Court, a mix that includes constitutional protections for gun owners, persons sentenced to death or detained during the war against terrorism,¹⁵⁷ evangelical Christians,¹⁵⁸ gays and lesbians, and white college

153. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (holding that the Second Amendment right is fully applicable to the states); *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008) (holding the Second Amendment protects an individual's right to keep and bear arms).

154. *Citizens United v. Fed. Elections Comm'n*, 130 S. Ct. 876, 883 (2010).

155. Compare *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding the Texas statute that criminalized intimate sexual conduct between same-sex persons was a violation of the Due Process Clause), and *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that a law making it more difficult for one group to seek aid from the government is a denial of equal protection), with *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986) (holding that the act of consensual sodomy is not protected under the fundamental right to privacy or any right protected under the Constitution). See generally KLARMAN, *supra* note 24 (discussing the strength of the backlash against gay marriage in spite of its growing support).

156. See Matthew E. K. Hall, *Rethinking Regime Politics*, 37 LAW & SOC. INQUIRY 878, 885-86 (2012); Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321, 321 (2007) (examining when ideologically mixed coalitions invalidate bipartisan statutes).

157. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim); *Boumediene v. Bush*, 553 U.S. 723, 732-33 (2008) (holding that aliens detained at Guantanamo have the habeas corpus privilege, and declaring Section 7 of the Military Commissions Act of 2006 an unconstitutional suspension of the writ of habeas corpus); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding the Eighth Amendment prohibits imposition of the death penalty on juvenile offenders under the age of eighteen); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker).

158. See generally *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding the University's denial of financial support to a student organization's publication pro-

applicants who claim to be victims of affirmative action.¹⁵⁹ In sharp contrast to the Court during the New Deal/Great Society Era, which was divided between liberals who wished to exercise judicial power on behalf of liberal causes and liberals who believed in judicial restraint,¹⁶⁰ the late Rehnquist/early Roberts Court is divided between a bloc of Justices who hold more liberal opinions on most constitutional issues than most Democrats, a bloc of Justices who hold more conservative opinions on most constitutional issues than most Republicans, and one or two Justices who hold more idiosyncratic opinions on the constitutional issues of the day.¹⁶¹ The result is the first court in American history that consistently engages in both liberal and conservative activism.¹⁶² Neither life tenure, nor elite status, nor the election returns in isolation can explain this development.

Life tenure, elite status, and election returns in combination provide a clearer window into the path of contemporary constitutional law. American politics for the past decades has been structured by increased elite polarization on almost all salient issues of the day. One consequence of this polarization is that the legal elites that Democrats appoint to the federal bench are highly likely to be more liberal on most constitutional issues than the average Democratic and the legal elites that Republicans appoint to the federal bench are highly likely to be more conservative on most constitutional issues than the average Republican. Justice Anthony Kennedy is the only justice presently on the Supreme Court who does not fit this mould. Kennedy's voting pattern resembles that of a country-club Republican, an elite type that flourished during the 1980s when Kennedy was appointed, but is rapidly vanishing from the political scene.

Elite Polarization. The structure of elite opinion has changed sharply over the past fifty years. Surveys taken in the mid to late twentieth century suggested that Republican and Democratic elites on many issues had more in common with each other than with other

moting religious views was a denial of their right of free speech guaranteed by the First Amendment).

159. See generally *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding use of racial preferences in undergraduate admissions violates the Equal Protection Clause of the Fourteenth Amendment).

160. See HOWARD GILLMAN ET AL., *RIGHTS AND LIBERTIES* 482 (2012).

161. See *id.* at 864. See generally MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 11-12 (2005) (describing the political makeup of the Rehnquist and Roberts Courts).

162. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 548-49 (1997).

members of their party. Contemporary surveys find that Republican and Democratic elites now have less in common with each other than do ordinary Democrats and Republicans. Much to the frustration of many ordinary citizens, American politics seems stalemated on many issues because fewer and fewer elites either hold moderate opinions or are willing to compromise.

Contemporary public opinion is structured by two phenomena. The first is elite polarization. Affluent, educated Americans are disproportionately represented among both strong liberals and strong conservatives, while less affluent and educated citizens are more inclined to be political moderates. Morris Fiorina and Matthew Levendusky write,

[W]hile systematic evidence indicates that American politics as conducted by the political class is increasingly polarized, the evidence also suggests that this development is not simply a reflection of an increasingly polarized electorate. The result is a disconnect between the American people and those who purport to represent them Contrary to a half-century of theory and research on the centrist tendencies of two-party politics, American politics today finds a polarized political class competing for the support of a much less polarized electorate.¹⁶³

The second phenomenon is conflict extension. Geoffrey Layman and Thomas Carey describe “conflict extension” as “a growth in mass party polarization on multiple distinct issue dimensions.” Party elites, they point out, are not simply more liberal or conservative in general than ordinary citizens, they are “more polarized on social welfare, racial, and cultural issues.”¹⁶⁴ An affluent, educated Democrat is likely to be more liberal than the average Democrat on health care, affirmative action, and same-sex marriage. An affluent, educated Republican is likely to be more conservative than the average Republican on each of these issues. On almost all issues, elite Democrats take the liberal position and elite Republicans take the conservative position.

Two studies done by the Pew Research Group highlight the presence of elite polarization and conflict extension in American politics.

163. Morris P. Fiorina & Matthew S. Levendusky, *Disconnected: The Political Class Versus the People*, in RED AND BLUE NATION? CHARACTERISTICS AND CAUSES OF AMERICA'S POLARIZED POLITICS 49, 51-52 (Pietro S. Nivola & David W. Brady eds., 2002).

164. Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and “Conflict Extension” in the American Electorate*, 46 AM. J. POL. SCI. 786, 789 (2002).

The first survey was published in 2005.¹⁶⁵ The second was published in 2011.¹⁶⁶ Each survey offered a typology of American voters. Each survey detailed how, over time, strong conservatives had become more conservative on more issues and strong liberals had become more liberal on more issues. The most extreme typologies, both studies found, were disproportionately composed of affluent, educated Americans.

The Pew Research Group in 2005 observed that previous differences among strong political conservatives had largely vanished. Surveys in 1987 and 1994 documented the existence of two distinctive conservative groups: “Enterprisers,” who held strong conservative views on economic issues, and “Moralists,” who held strong conservative views on cultural issues.¹⁶⁷ By 2005, “Enterprisers” had adopted the cultural positions of “Moralists.” The group Pew now labeled as “Enterprisers” was characterized by strong conservative values across the political spectrum. The Pew study declared,

[T]his extremely partisan Republican group’s politics are driven by a belief in the free enterprise system and social values that reflect a conservative agenda. Enterprisers are also the strongest backers of an assertive foreign policy, which includes nearly unanimous support for the war in Iraq and strong support for such anti-terrorism efforts as the Patriot Act.¹⁶⁸

The defining values of Enterprisers were “anti-regulation and pro-business; very little support for government help to the poor; strong belief that individuals are responsible for their own well being[,]” and “[c]onservative on social issues such as gay marriage”¹⁶⁹

Liberals were the exact opposite of Enterprisers. Pew found, “[liberals] are the most opposed to an assertive foreign policy, the most secular, and take the most liberal views on social issues such as homosexuality, abortion, and censorship. They differ from other Democratic groups in that they are strongly pro-environmental and

165. *The 2005 Political Typology*, PEW RES. CENTER, 1 (May 10, 2005), <http://www.people-press.org/files/legacy-pdf/242.pdf> [hereinafter PEW 2005].

166. *Beyond Red vs. Blue: Political Typology*, PEW RES. CENTER, 1, 4 (May 4, 2011), <http://www.people-press.org/files/legacy-pdf/Beyond-Red-vs-Blue-The-Political-Typology.pdf> [hereinafter PEW 2011].

167. See PEW 2005, *supra* note 165, at 8.

168. *Id.* at 53.

169. *Id.*

pro-immigration.”¹⁷⁰ Liberals were “pro-choice,” “supportive of gay marriage,” and “most opposed to the anti-terrorism Patriot Act.”¹⁷¹

Enterprisers and Liberals were by a significant margin the most educated and most affluent of the nine typologies Pew identified in 2005.¹⁷² Twenty-seven percent of the persons Pew surveyed had graduated college, but 46% of all Enterprisers and 49% of all Liberals had a college degree.¹⁷³ Only one other typology (Upbeats—37%) was composed of more than one-third college graduates and only one other typology (Social Conservatives—28%) was composed of more than one-quarter college graduates.¹⁷⁴ The pattern was almost as stark with respect to income.¹⁷⁵ Twenty-four percent of the persons Pew surveyed had family incomes above \$75,000, but 41% of both Enterprisers and Liberals earned that income.¹⁷⁶ Upbeats (39%) were almost as affluent as Enterprisers and Liberals.¹⁷⁷ Outside of Social Conservatives (30%), no other group identified had as many as one-sixth of all persons surveyed earning \$75,000.¹⁷⁸

On almost every issue surveyed, the greatest percentage of respondents taking the most conservative position were from the most affluent and highly educated group of Republicans and the greatest percentage of respondents taking the most liberal position were from the most affluent and highly educated group of Democrats.¹⁷⁹ This was particularly the case with issues that were being litigated. Enterprisers were far more likely to oppose (63%) and liberals most likely to support (82%) “programs designed to help blacks, women and other minorities get better jobs and education.”¹⁸⁰ Liberals were the group most likely to support legal abortion (88%) and same-sex marriage (80%).¹⁸¹ Enterprisers were the group most likely to oppose both (54% on abortion; 90% on same-sex marriage).¹⁸² Enterprisers (and Pro-Government Conservatives) were most likely to support teaching creationism in public schools. Liberals were the group most

170. *Id.* at 58.

171. *Id.*

172. See *id.* at 64-65.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 70-71.

180. *Id.* at 70.

181. *Id.*

182. *Id.*

opposed.¹⁸³ Enterprisers and Disaffecteds were the group that most favored torturing terrorists for information.¹⁸⁴ Liberals were the group most opposed.¹⁸⁵

The 2011 Pew survey complicated this story a bit (in part by not asking the same questions that were asked in 2005). The divides between different groups that tended to support Democrats remained the same. Members of the most affluent well educated group of Democrats tended to be far more liberal on all issues than members of other Democratic groups. Most Republicans, elite or otherwise, had become conservative across the board, at least on the issues most likely to come before the Supreme Court. Two new groups of highly educated, affluent Americans emerged: Post-Moderns and Libertarians. While Pew placed these groups in the center of their political typology, because members weaker tendencies to vote for either Democrats (Post-Moderns) or Republicans (Upbeats) than members of more partisan groups. Post-Moderns and Libertarians tended to take more extreme positions on the sorts of issues likely to come before federal courts than both members of less affluent and less well educated groups and members of other, more centrist groups.

Solid Liberals were the most highly educated group that Pew surveyed in 2011 and the most affluent of any group that had any tendency to support Democrats.¹⁸⁶ With very rare exception, Solid Liberals were more liberal on every issue likely to come before federal courts than any other Democratic group or Democrat leaning group.¹⁸⁷ Eighty-five percent of Solid Liberals supported gay marriage, as compared to 32% of Hard Pressed Democrats and 34% of New Coalition Democrats.¹⁸⁸ The difference between Solid Liberals and these other Democratic groups was only slightly less with respect to legal abortion.¹⁸⁹ Solid Liberals were more likely than any other group to favor liberal immigration laws, support health care reform, maintain that racial discrimination is the main barrier to Afro-American progress, and insist that government must do more to “give blacks equal rights with whites.”¹⁹⁰ They and New Coalition Democrats

183. *Id.* at 71.

184. *Id.*

185. *Id.*

186. PEW 2011, *supra* note 166, at 105.

187. See *id.* at 99-100, 111.

188. *Id.* at 111.

189. *Id.*

190. *Id.* at 99-100, 111.

were far more likely than Hard-Pressed Democrats to support gun control.¹⁹¹ Solid Liberals closely resemble other Democratic groups only in their view of labor unions. Members of all three Democratic groups had by a three-to-one margin of favorable views of that institution.¹⁹²

Matters were less clear on the Republican side. The most conservative group, Staunch Conservatives, were only slightly better educated and affluent than the other solidly Republican group, Main Street Republicans.¹⁹³ One reason for this change from 2005 was that, unlike Democrats, who remain divided into distinctive ideological groups, most Republicans have become conservative on all important issues. The Pew researchers noted, “the classic division between economic and social conservatives is blurred,” as members of the previously more affluent and less affluent groups “have coalesced into a single highly activated group of Staunch Conservatives.”¹⁹⁴ Nevertheless, the slightly more educated and slightly more affluent Republican group remains the most conservative of the two solidly Republican groups in the country on all issues likely to come before courts.¹⁹⁵ Staunch Conservatives are more likely than Main Street Republicans to oppose the Obama health care plan (80%-47%), oppose gay marriage (85% – 72%), oppose legal abortion (72% – 64%) and favor gun rights (86% – 64%).¹⁹⁶ With the exception of abortion, only a miniscule number of Staunch Conservatives actually favor liberal policies on any of these issues (none of the Staunch Conservatives Pew surveyed thought health care reform had “mostly good effects”).¹⁹⁷ Interestingly, Staunch Conservatives are moderates on First Amendment issues.¹⁹⁸ This may reflect the increasing tendency of government officials to restrict campaign finance, commercial speech, and hate speech, measures that limit conservative advocacy, rather than more traditional restrictions on communism and obscenity.¹⁹⁹

The years between 2005 and 2011 witnessed the emergence of two relatively affluent and educated groups of independents. Post-

191. *Id.* at 111.

192. *Id.* at 108.

193. *Id.* at 1, 105.

194. *Id.* at 20.

195. *See id.* at 109, 111.

196. *Id.* at 111.

197. *Id.*

198. *Id.* at 88.

199. *See* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 396 (1990).

Moderns, who leaned Democratic, were the second most educated group surveyed and almost as affluent as Solid Liberals. Libertarians, who leaned Republican, were the most affluent group surveyed and slightly more educated than Staunch Conservatives.²⁰⁰ Post-Moderns and Libertarians also resembled Solid Liberals and Staunch Conservatives because members of these groups are more united than members of other groups on virtually all civil liberties issues.²⁰¹ On some issues, most notably those associated with racial politics, Libertarians and Post-Moderns, by comparison, were far more united in favor of conservative positions, than any group other than Staunch Conservatives.²⁰² On other matters, Libertarians and Post-Moderns were only less liberal than Staunch Liberals. Post-Moderns were the second most liberal group on censorship, gay marriage, abortion, and environmental issues.²⁰³ Libertarians were the third most liberal group on these issues.²⁰⁴ Libertarians were the second most conservative group on gun rights, labor unions, the merits of big versus small government, and the environment.²⁰⁵ Post-Moderns were the only group composed of a substantially number of affluent, well educated citizens who had any tendency to be one of the three (of nine) centrist groups on any number of issues that Pew surveyed.²⁰⁶

Members of the most affluent and highly educated of the groups Pew surveyed were also the most united on the proper method of constitutional interpretation.²⁰⁷ Solid Liberals (81%) and Post-Moderns (70%) were the only two groups whose members by substantial margins endorsed a living Constitution.²⁰⁸ Staunch Conservatives (88%) and Libertarians (70%) were the two groups that most strongly favored originalism.²⁰⁹ With the exception of Main Street Republicans (64% favored originalism), members of other groups were far more divided on questions of constitutional interpretation.²¹⁰ This finding

200. PEW 2011, *supra* note 166, at 105.

201. *Id.* at 108-11.

202. *Id.*

203. *Id.* at 111.

204. *Id.* at 108-09, 111.

205. *Id.* Similar differences appeared on foreign policy issues unlikely to come before courts. Post-Moderns were the second most liberal group when asked if peace was better achieved through diplomacy or military strength. Libertarians were the second most conservative. *See id.* at 100.

206. *Id.* at 108-11.

207. PEW 2011, *supra* note 166, at 109.

208. *Id.*

209. *Id.*

210. *Id.*

The Coming Constitutional Yo-Yo?

suggests that, a President who nominated a Democrat with a law degree for a federal judgeship was highly likely to place on the bench a Justice who shared William Brennan's approach to constitutional adjudication.²¹¹ Similarly, a President who nominated a Republican with a law degree was highly likely to place on the bench a Justice who shared Justice Antonin Scalia's approach to constitutional adjudication.²¹²

The Late Rehnquist/Early Roberts Courts. The changes in the structure of elite opinion over the past fifty years help explain the different divisions on the Warren Court and the late Rehnquist/early Roberts Courts. During the mid-twentieth century, Democratic and Republican legal elites both tended to have liberal opinions on the major constitutional issues being adjudicated before federal courts. Hence, the major divide on the court in that time period was between liberal proponents of judicial activism and liberal proponents of judicial restraint. During the early twenty-first century, most Democratic legal elites are Solid Liberals who take very liberal positions on almost every issue being adjudicated by federal courts and most Republican legal elites are Staunch Conservatives who take very conservative positions on almost every issue being adjudicated by federal courts. Hence, the major divide on the contemporary court is between Democratic appointees who are more liberal than the average Democrat and Republican appointees who are more conservative than the average Republican.

The contentious politics of judicial confirmation²¹³ may contribute to polarization on the Supreme Court. Contemporary Presidents often search for "stealth nominees," whose opinions on many constitutional issues are not well known, in order to avoid confirmation battles in the Senate.²¹⁴ Republican Presidents who adopt that strategy can be expected to select Enterprisers or Staunch Conservatives, given most affluent, educated Republican legal elites fall into those political typologies. Such judges are likely to be originalists who take

211. See William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 43 GUILD PRAC. 1, 2-3 (1986) (describing Brennan's approach to interpreting the Constitution).

212. See Scalia, *supra* note 28, at 856-57.

213. See generally MARK SILVERSTEIN, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS (1994) (describing the evolving politics of judicial confirmations).

214. See Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, SUP. CT. REV., 2010, at 381, 438.

conservative views on almost all issues coming before the court, with the possible exception of some free speech matters. Democratic Presidents who adopt this strategy can be expected to select Liberals or Solid Liberals, given that most affluent, educated Democratic legal elites fall into those political typologies. Such judges are likely to be living constitutionalists who take liberal views on almost all issues coming before the court, with the possible exception of matters concerning labor unions. Republican “mistakes” are likely to be Libertarians, the other affluent, educated group whose members tend to vote Republican. Such judges will likely turn out to be originalists who vote with the conservatives on the bench except on matters of morality, immigration, and some issues of religion. Democratic “mistakes” are likely to be Post-Moderns, the other affluent educated group whose members tend to vote democratic. Such a judge will likely turn out to be a living constitutionalist who votes with the liberals on the bench, except on some racial issues and questions of national power.

The voting patterns on the late Rehnquist and early Roberts Courts are consistent with the patterns that would probably have resulted had Presidents, instead of vetting judicial appointees at great length, simply selected almost at random an elite lawyer who was a member of their party. Chief Justice Roberts, Chief Justice Rehnquist, Justice Scalia, Justice Thomas, and Justice Alito vote as Enterprisers/Staunch Conservatives. They are originalists who consistently take conservative positions on matters ranging from the role of religion in public life to the scope of national power. When these Justices cast liberal votes, the case before the court is likely to concern matters such as immigration on which Libertarians tend to have more liberal opinions than Enterprisers/Staunch Conservatives.²¹⁵ Justice Ginsburg, Justice Sotomayor, Justice Kagan, and Justice Breyer vote as Liberals/Solid Liberals. They are living constitutionalists who consistently take liberal positions on matters ranging from capital punishment to the war against terror. When these Justices cast conservative votes, the case before the court is likely to concern matters such as race and national power, on which Post-Moderns have more conservative opinions than Liberals/Solid Liberals.²¹⁶

215. See generally *Arizona v. United States*, 132 S. Ct. 2492, 2497, 2510 (2012) (striking down crucial state restrictions in Arizona on illegal immigrants).

216. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602, 2609 (2012) (declaring that part of the Affordable Care Act violated the Spending Clause).

The Coming Constitutional Yo-Yo?

Justice Kennedy might be characterized as a libertarian, given his tendency to vote with liberals on some First Amendment issues²¹⁷ and privacy matters, but he and Justice O'Connor are better placed in a previously existing category of Republican elites.²¹⁸ Kennedy and O'Connor were appointed at a time when many Republican elites were best described as "country-club conservatives." Mark Tushnet points out that such affluent, educated Republicans were "sympathetic to claims about reproductive and gay rights and are opposed to what they see as the intrusion of religion into the public schools."²¹⁹ Country-club Republicans were also not as hostile to national power as those contemporary Staunch Republicans who often support the Tea Party.²²⁰

The divisions on the contemporary Supreme Court mirror these divisions among contemporary American elites. Public opinion surveys find that educated, affluent Democrats are far more likely than other Democrats to take liberal positions on all the major constitutional issues of the day and that educated, affluent Republicans are far more likely than other Republicans to take conservative positions on all the major constitutional issues of the day. Whether the issue concerns state sovereign immunity or school vouchers, on all matters in which the late Rehnquist and early Roberts Courts were divided, the most recent Democratic appointees took the more liberal position (joined by two liberal Republicans) and the most recent Republican appointees took the more conservative position. Moreover, the liberal and conservative blocs on the present Court seem more liberal and conservative than the average Democrat and average Republican. Consider abortion. Most Americans believe that abortion should be legal, but heavily regulated.²²¹ The political elites who control the Republican Party believe that abortion should be banned, while the elites who control the Democratic Party oppose almost all common restrictions on abortion.²²² Following in this vein, the Staunch Conservative on the contemporary court have never voted to strike down a restric-

217. See *Lee v. Weisman*, 505 U.S. 577, 579-80, 599 (1992); *Texas v. Johnson*, 491 U.S. 397, 398-99 (1989).

218. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

219. Mark Tushnet, *Understanding the Rehnquist Court*, 31 Ohio N.U. L. Rev. 197, 198 (2005).

220. See PEW 2011, *supra* note 166, at 10.

221. See H.W. Perry, Jr., & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMMENT. 641, 675 (2009).

222. *Id.* at 670-78.

tion on abortion and the Solid Liberals have never voted to sustain a restriction.²²³ Justice Kennedy is the only member of the present Supreme Court who has voted to sustain and voting to strike down different abortion regulations.²²⁴

Electoral returns provide a less helpful guide to the direction of Supreme Court decision making during times of elite polarization, conflict extension and electoral volatility. Most Supreme Court Justices in these circumstances are likely to be relatively extreme liberal Democrats or relatively extreme conservative Republicans. When Republicans and Democrats alternate in power, the precise balance of power on the federal judiciary depends on the accidents of death, whether Justices retire strategically, and the voting pattern of the increasingly rare justice who is neither a Solid Liberal nor a Staunch Conservative. Consider the very different pattern of decisions that might have resulted had Justice Marshall retired during the Carter presidency and that liberal Democrat judicial appointee left office during President Obama's first term of office. The only prediction that can be made with some certainty is, if Americans continue to live in times of elite polarization, conflict extension, and electoral volatility, constitutional law is likely to become less stable than at any previous point in American history.

V. THE COMING CONSTITUTIONAL YO-YO

Elite polarization, conflict extension, and electoral volatility threaten several enduring stabilities in American constitutional law. American constitutional law for more than two-hundred years has been structured by incremental change, relative issue autonomy, and the relative endurance of landmark decisions. These stabilities, in turn, are consequences of either relative electoral stability or, during periods of electoral volatility, elite consensus. Americans have never experienced an extended period when elites are polarized and parties alternate in control of the national government. Should these trends continue, the likely result is an erratic constitutional law that swings from one relative extreme on many issues to the other.

American constitutional law has historically tended to change incrementally. While Supreme Court decisions inevitably make at least some changes to the existing body of constitutional law, most deci-

223. *See generally* *Gonzales v. Carhart*, 550 U.S. 124 (2007).

224. *See generally* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

sions do little more than slightly extend or modify existing doctrine. The constitutional law landscape is littered with far more decisions resembling *United States v. Jones*,²²⁵ which relied heavily on the common law of trespass when declaring that police need a warrant when attaching a GPS system to a private car, than *Mapp v. Ohio*,²²⁶ which upset longstanding prosecutorial practices when holding that the Fourth Amendment as incorporated by the Due Process Clause of the Fourteenth Amendment required states to exclude unconstitutionally obtained evidence from criminal trials. Judicial decisions overruling past cases are rare. Judicial decisions overruling landmark cases are rarer still.²²⁷

Different areas of constitutional law are often relatively autonomous from each other, characterized by what Karen Orren and Stephen Skowronek describe as “intercurrence.”²²⁸ Orren and Skowronek maintain that “the normal condition of the policy [is] that of multiple incongruous authorities operating simultaneously.”²²⁹ Constitutional doctrine on different subject matters, like “the institutions of a polity . . . are created . . . at different times, in the light of different experiences, and often for quite contrary purposes.”²³⁰ Instabilities in one area of constitutional law often have limited impact on other areas of constitutional law. The 1930s and 1940s witnessed dramatic changes in the constitutional law of national powers²³¹ and property rights,²³² but no changes in the constitutional law of capital punishment²³³ or the right to bear arms.²³⁴ The “revolutionary” Warren Court did not challenge previous understandings of property

225. 132 S. Ct. 945 (2012).

226. 367 U.S. 643 (1961).

227. See generally LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS* (5th ed. 2011) (providing a comprehensive collection of data and information on the U.S. Supreme Court).

228. KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 108 (2004).

229. *Id.*

230. *Id.* at 112.

231. See generally *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the federal government can regulate economic activity); *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941) (holding that the federal government can regulate employment conditions).

232. See generally *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding the constitutionality of a state’s minimum wage legislation).

233. See generally *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (holding that capital punishment does not violate the Constitution).

234. See generally *Miller v. United States*, 294 U.S. 435 (1935) (holding that a provision of the National Firearms Act of 1934 violated the Second Amendment of the United States Constitution).

rights²³⁵ or gender equality²³⁶ and had almost nothing to say on the constitutional law of separation of powers.²³⁷

Both secular trends in constitutional law doctrine and landmark judicial decisions tend to have fairly long staying power. Once the Justices begin to expand or narrow particular constitutional rights, the course of judicial decisions tends to go in the same direction for several generations. The Supreme Court from the end of Reconstruction until the early twentieth century repeatedly chipped away at the constitutional foundations of racial equality.²³⁸ After *Guinn v. United States*,²³⁹ the Justices for the next fifty years consistently made decisions that expanded constitutional protections for people of color.²⁴⁰ With the notable exception of *Hepburn v. Griswold*,²⁴¹ which was overruled almost immediately,²⁴² the relatively rare judicial decision that dramatically alters existing doctrine proves relatively enduring. Landmark constitutional law cases are often modified or narrowed, but rarely overruled. Liberals regularly accuse conservatives of undermining the spirit of such decisions as *Mapp v. Ohio*,²⁴³ *Miranda v. Arizona*,²⁴⁴ and *Roe v. Wade*,²⁴⁵ but those decisions, as well as every other landmark liberal decision of the 1950s, 1960s, and 1970s, remain standing today.²⁴⁶

The dynamics of partisan competition in the United States throughout much of American history supported these stabilities. Political scientists point out that American politics has historically been

235. See generally *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (upholding a statute criminalizing “debt adjusting”).

236. See generally *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding a jury selection statute that mandated men, and not women, to serve as jurors).

237. Leading textbooks in law and political science include no case on separation of powers decided when Earl Warren was Chief Justice. See, e.g., GILLMAN ET AL., *supra* note 2, at 490-512; KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 249-347 (17th ed. 2010).

238. See, e.g., *Giles v. Harris*, 189 U.S. 475 (1903); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *United States v. Reese*, 92 U.S. 214 (1876).

239. 238 U.S. 347 (1915).

240. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

241. 75 U.S. 603 (1870).

242. See *Knox v. Lee*, 79 U.S. 457 (1871).

243. 367 U.S. 643 (1961). But see *Leon v. United States*, 468 U.S. 897 (1984) (creating a “good faith” exception to the exclusionary rule for violations of the Fourth Amendment).

244. 384 U.S. 436 (1966). But see *Michigan v. Tucker*, 417 U.S. 433 (1974) (holding that *Miranda* warnings are not constitutionally protected).

245. 410 U.S. 113 (1972). But see *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (upholding a state statute that restricted various types of assistance to receiving an abortion).

246. For an admittedly outdated work on this point, see generally *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Vincent Blasi ed., 1983).

characterized by long periods of relative partisan stability during which one party, Jeffersonian Republicans, Jacksonian Democrats, Reconstruction Republicans, or New Deal Democrats, controls most national institutions most of the time.²⁴⁷ Either judicial doctrine is stable during those time periods or the course of judicial decisions is consistent because most Justices share whatever constitutional vision animates the dominant party. Constitutional doctrine from Reconstruction until the Civil War reflected the pro-business orientation of the dominant Republican Party.²⁴⁸ The Supreme Court after the New Deal provided increasing support for persons of color at the same time that liberals in other national institutions provided increased support for persons of color.²⁴⁹

The structure of elite opinion throughout much of American history has also supported the incremental nature of most changes in constitutional law, the relative autonomy of different issue areas, and the relative durability of landmark cases. Elite consensus has often been the norm in American constitutional politics. From the very beginning of the Republic, elites often had more in common with each other than they did with the mass base of their parties, and this elite consensus provided foundations for a more stable constitutional law. Thomas Jefferson when seeking to make his first judicial appointment found that all qualified Jeffersonian lawyers in the deep south had strong ties to commercial establishments. Jefferson and Madison tended to appoint moderate national Republicans to the Supreme Court because educated affluent Jeffersonian lawyers were far more likely to be moderates who were supportive of the general trends of the Marshall Court than the average Jeffersonian voter.²⁵⁰ For this reason, the transition from Federalist to Jeffersonian rule had less influence on the Supreme Court than other governing institutions.²⁵¹ When elite polarization occurred, the lack of conflict extension preserved the relative autonomy of most matters of constitutional law. During the years before the Civil War, Southern affluent educated lawyers held very different opinions on slavery than Northern affluent

247. See generally JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* (1983).

248. See GILLMAN ET AL., *supra* note 2, at 319-326.

249. See KLARMAN, *supra* note 65, at 173-96.

250. See generally RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* (1971).

251. See generally Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 *STUD. AM. POL. DEV.* 229, 242 (1998).

educated lawyers. *Dred Scott*,²⁵² which held that Congress could not ban slavery in American territories, was one consequence of these sectional differences. Nevertheless, elite polarization on slavery was contained. The judicial majority in *Dred Scott* included Peter Daniel, the Justice who held the narrowest conception of national power to regulate the economy,²⁵³ and James Wayne, the Justice who held the broadest conception of national power to regulate the economy.²⁵⁴ Antebellum judicial alignments in slavery cases were different from judicial alignments in Contract Clause and dormant Commerce Clause cases, the two other constitutional issues frequently litigated before the Supreme Court in Jacksonian America. The Justices in the *Dred Scott* majority, for example, divided 3-2 when considering the state power to tax passengers on ships arriving from out of state.²⁵⁵ The absence of conflict extension helps explain why a court that took southern positions on slavery issues adopted fairly centrist positions on the other constitutional issues of the day and did not break dramatically from previous precedent on these matters.²⁵⁶

Elite consensus explains the stability of American constitutional law during the late nineteenth century, the most electorally volatile period in American history. From 1880 to 1900, the parties rotated control over national executive and more than one-hundred seat swings in Congress were common. Nevertheless, most areas of constitutional law remained either unchanged or moved in a steady conservative direction.²⁵⁷ Constitutional law exhibited almost none of the instabilities of electoral politics because the elite wings of both the Democratic and Republican Parties was located in the northeast and was committed to a pro-business constitutional vision.²⁵⁸ The conservative Democrats that Grover Cleveland appointed to the Supreme Court differed little from the conservative Republicans that James Garfield, Chester Arthur, and Benjamin Harrison appointed to the

252. *Scott v. Sandford*, 60 U.S. 393 (1857).

253. *See, e.g., Seawright v. Stokes*, 44 U.S. 151, 180-81 (1845) (Daniel, J., dissenting) (denying national power to build roads).

254. *See, e.g., Smith v. Turner*, 48 U.S. 283, 410-11 (1849) ("The commerce power is] exclusively vested in Congress, [and] that no part of it can be exercised by a State.").

255. Justices Wayne, Catron, and Grieg thought the state tax unconstitutional. Chief Justice Taney and Justice Daniel disagreed. *See Smith v. Turner*, 48 U.S. 283 (1849).

256. *See Cooley v. Bd. of Wardens*, 53 U.S. 299 (1952); *Piqua Branch of State Bank of Ohio v. Knoop*, 57 U.S. 369 (1853). *See generally McCloskey, supra* note 20, at 56-59.

257. *See McCloskey, supra* note 20, at 80-90.

258. *See Gillman et al., supra* note 2, at 322.

The Coming Constitutional Yo-Yo?

Supreme Court.²⁵⁹ In *Pollock v. Farmer's Loan & Trust Co.*,²⁶⁰ the only major constitutional case in that era in which the Justices divided 5-4, the majority in favor of striking down the national income tax was composed of three Republican appointees and two Democrat appointees. Three Republican appointees and one Democratic appointee dissented.

The Reagan Era provides another illustration of the structure of elite opinion stabilizing constitutional law. Reagan and his conservative allies sought to push American constitutional law sharply to the right.²⁶¹ Democrats after 1986, however, had the necessary votes to prevent Reagan from placing on the Supreme Court any Justice on record as favoring a substantial conservative judicial turn. Stymied by failed efforts to place such conservatives as Robert Bork on the bench, Republicans in the executive branch turned to “stealth” nominees, affluent, educated Republican lawyers who had not expressed firm opinions on most constitutional issues of the day.²⁶² During the late twentieth century, an affluent, educated Republican lawyer whose constitutional opinions were not yet public was at least as likely to fit the mold of a “country-club Republican,” as what the Pew Foundation presently considers a Staunch Conservative. Thus, the end result of the stealth nominee strategy was a moderate with little interest in moving constitutional law to the right (Souter), a libertarian/moderate conservative interested in moving only some constitutional doctrines to the right (Kennedy), and a more doctrinaire conservative (Thomas). The Reagan judicial strategy failed in large part because the structure of elite opinion combined with the politics of judicial confirmation privileged the selection of Republicans more interested in stable constitutional law than a significantly more conservative constitutional law.

These foundations for a stable constitutional law have crumbled. Electoral volatility destabilizes constitutional law because Justices, when control of the institutions responsible for staffing the federal judiciary alternates, are frequently unlikely to share a common partisan constitutional vision. Elite polarization destabilizes constitutional law

259. See ABRAHAM, *supra* note 57, at 109-21.

260. 157 U.S. 429 (1895).

261. See generally YALOF, *supra* note 150, at 133 (“Reagan’s Pursuit of Conservative Ideologies”).

262. See Richard S. Myers, Reviews, 42 J. LEGAL EDUC. 619, 619 (1992) (reviewing MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NOMINATION TO THE SUPREME COURT (1992)).

because Justices, when the affluent educated lawyers most likely to staff the federal bench are either more conservative than the average member of the more conservative party or more liberal than the average member of the more liberal party, are unlikely to share a common elite constitutional vision. The combination of electoral volatility and elite polarization, we have seen, is a recipe for a Supreme Court whose two largest blocs are Staunch Conservatives whose opinions are to the right of the average Republican and Solid Liberals whose opinions are to the left of the average Democrat.

Conflict extension further destabilizes American constitutional law. For much of the twentieth century, the relative autonomy of constitutional issues insulated most constitutional doctrines from substantial changes in other constitutional doctrines. Roosevelt's judicial appointees were as united as other New Deal liberals on the principle that Justices should not interfere with economic legislation,²⁶³ but the Supreme Court until 1954 did not move dramatically to the left on civil rights and civil liberties issues because the liberals Roosevelt appointed to the Court were as divided on the merits of judicial protection for free speech rights and the rights of persons suspected of crime as other New Deal liberals.²⁶⁴ While on the Court, for example, Justice Frankfurter destabilized Commerce Clause doctrine, but helped temporarily stabilize doctrine on the incorporation of the Bill of Rights.²⁶⁵ By comparison, should President Obama appoint a liberal to the supreme bench solely for the purpose of providing greater support for health care legislation, he is highly likely to appoint a Solid Liberal who also favors the liberal position on same-sex marriage, affirmative action, and government power to regulate guns. Similarly, should the next Republican President appoint a conservative to the bench solely for the purpose of maintaining the right to bear arms, he or she is likely to appoint a Staunch Conservative who favors the conservative position on federal health care legislation, same-sex marriage and affirmative action. In short, unlike New Deal Justices and other jurists appointed to the Supreme Court during times of conflict

263. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

264. *See, e.g.*, *Dennis v. United States*, 341 U.S. 494 (1951); *Adamson v. California*, 332 U.S. 46 (1947). For a general discussion of liberal divisions on free speech and other civil liberties issues, see generally MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* (1991); JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* (1989).

265. *See* cases cited *supra* note 231.

The Coming Constitutional Yo-Yo?

diffusion, judicial appointments in times of conflict extension are likely to want to move almost all of constitutional law in the same ideological direction.

Should Americans continue to live in a political environment structured by electoral volatility, elite polarization, and conflict extension, constitutional precedents are likely to be overturned at unprecedented rates. Consider the numerous areas of constitutional law that a liberal Justice appointed by President Obama to replace a conservative Justice would destabilize. Among the decisions that the new 5-4 liberal majority on the Supreme Court would likely consider ripe for reversal are past rulings finding regulatory takings, permitting ostensible neutral state aid to flow to parochial schools,²⁶⁶ finding an individual right to bear arms protected by the Second and Fourteenth Amendments,²⁶⁷ striking down campaign finance regulations,²⁶⁸ imposing Commerce Clause and state sovereign immunity restrictions against the federal government,²⁶⁹ and declaring unconstitutional some self-conscious uses of race for purposes of diversity when assigning pupils to public schools.²⁷⁰ The replacement of a liberal Justice with a conservative would be as destabilizing. Should a Republican President have the opportunity to replace one of the four members of the liberal bloc on the Roberts Court, the decisions ripe for reversal include past rulings finding a public use when government transfers property from one private owner to another private owner,²⁷¹ declaring unconstitutional school prayer exercises,²⁷² striking down state restrictions on abortion and gay rights,²⁷³ protecting detainees in Guantanamo Bay,²⁷⁴ limiting state capacity to inflict capital punishment,²⁷⁵ justifying the Affordable Care Act as a legitimate exercise of the federal taxing power,²⁷⁶ and sustaining affirmative action policies.²⁷⁷ Seventeen of the twenty-two Supreme Court cases de-

266. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

267. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

268. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

269. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995); *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743 (2002).

270. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

271. *Kelo v. City of New London*, 545 U.S. 469 (2005).

272. *Lee v. Weisman*, 505 U.S. 577 (1992).

273. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

274. *Boumediene v. Bush*, 553 U.S. 723 (2008).

275. *Roper v. Simmons*, 543 U.S. 551 (2005).

276. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. ____ (2012).

277. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

cided on constitutional grounds that were included in the chapter on the contemporary era in our casebook dedicated to civil liberties are highly vulnerable to reversal in the immediate future.²⁷⁸

Given the precarious balance on the federal bench and in electoral politics, the following constitutional yo-yo is not an unrealistic prediction. President Obama replaces Justice Kennedy with a Solid Liberal, whose voting pattern on the Court is similar to that of Justices Kagan and Sotomayor. The result is huge swaths of constitutional doctrine turn left. Public opinion, however, shifts a bit. The result is that a Republican wins the 2016 presidential election and, a year later, replaces Justice Breyer with a Staunch Conservative. The new 5-4 conservative majority turns huge swaths of constitutional doctrine rightward. Public opinion, however, shifts a bit to the left, and you can see how the rest of this story is going. The course of constitutional law becomes erratic, with minor changes in public opinion resulting in substantial shifts in constitutional doctrine.

Changes in elite opinion make less likely the appointment of a “stealth justice” who turns out either to have more centrist opinions or less ideological consistency across issues than either Solid Liberals or Staunch Conservatives. As recently as thirty years ago, many elite Republican lawyers were either traditionalists who held moderate/center-right views on many constitutional issues or libertarians who leaned to the left on some constitutional issues and to the right on others. Hence, when Democrats had the political power in the Senate to defeat such known Staunch Conservatives as Robert Bork, the Republican strategy of appointing an elite Republican lawyer was as likely to result in the moderate David Souter or libertarian Anthony Kennedy as the very conservative Clarence Thomas. The vast majority of elite lawyers in both parties now consistently hold more liberal or more conservative views on almost all issues than the average Democrat or Republican. Hence, stealth candidates in the future are more likely to be Solid Liberals or Staunch Conservatives who kept their proclivities private than Justices who might moderate the impending constitutional yo-yo.

278. See generally 2 HOWARD GILLMAN, MARK A. GRABER, KEITH E. WHITTINGTON, *AMERICAN CONSTITUTIONALISM: RIGHTS & LIBERTIES* 881-1053 (2012).

VI. TOO UNSETTLING?

If the above analysis is correct, American constitutional politics in conditions of electoral volatility, elite polarization, and conflict extension will witness severe and destabilizing doctrinal swings. This likely erratic course of constitutional law undermines values championed by proponents of constitutional settlements and constitutional unsettlements. Neither majoritarian nor distinctively constitutional values are promoted by constitutional doctrine that swings from extreme conservatism to extreme liberalism in short periods of time. Americans are likely to avert these constitutional yo-yos only if they enter a new period of electoral stability, elite consensus, or conflict diffusion. Alternatively, Supreme Court Justices might discover the temporary virtues of judicial minimalism. These saving alternatives require much strong sociological, jurisprudential, and normative foundations for the constitutional center than presently exist in the United States.

The Disease. The constitutional yo-yos threatened by the lethal combination of electoral volatility, elite polarization, and conflict extension will destabilize constitutional law more than even opponents of constitutional settlements stomach. These constitutional commentators insist that constitutional authority and judicial power be exercised in ways that keep certain fundamental regime questions unsettled.²⁷⁹ Keeping constitutional question open, in their view, facilitates constitutional adjustments in light of changing public opinion, political trends, or social conditions. Constitutional yo-yos, however, are far more sensitive to small, transient changes in public opinion, political trends, or social conditions than any unsettlement theorist thinks advisable. Americans living in a regime where constitutional law swings wildly in different ideological directions enjoy neither the benefits promised by proponents nor opponents of constitutional settlements.²⁸⁰

American constitutional commentators are engaging in a vigorous debate over the merits of a stable constitutional law. Larry Alexander and Frederick Schauer urge their fellow citizens to adopt institutional arrangements that minimize substantial changes in consti-

279. See generally LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001).

280. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359 (1997); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002).

tutional doctrine. They maintain that “the settlement of contested issues is a crucial component of constitutionalism” and that “this goal can be achieved only by having an authoritative interpreter whose interpretations bind all others, and [that] the Supreme Court can best serve this role.”²⁸¹ Louis Seidman is the leading champion of practices that keep constitutional doctrine unsettled. “An unsettled constitution,” he writes, “helps build a community founded on consent by enticing losers into a continuing conversation.”²⁸²

Electoral volatility, elite polarization, and conflict extension destabilize the constitutional regime, but do so in ways that do not promote the claimed virtues of an unsettled constitutional law. Seidman champions a flexible Constitution that responds appropriately to political and social developments. He asserts that “stability and predictability are best served by gradual shifts in constitutional obligation rather than by either rigid entrenchment or its inevitable partner, convulsive regime change.”²⁸³ An unsettled constitutional law when public opinion on capital punishment moves slightly to the left would also shift slightly to the left, perhaps as a consequence of judicial rulings requiring better legal representation for capital sentenced prisoners and slightly increasing the categories of crimes and criminals not eligible for execution. Such relatively precise adjustments do not occur when constitutional politics is more polarized than the political community. In a constitutional universe divided between liberal Justices who believe capital punishment is always unconstitutional and conservative Justices who believe capital punishment is no different than any other sanction, small changes in public opinion either have no effect or an effect far beyond their scope. If a slight swing in public opinion causes no change in the ideological composition of the federal judiciary, capital punishment law remains the same. If a slight swing in public opinion causes a slight change in the ideological composition of the federal judiciary, then either the federal judiciary with a new 5-4 Solid Liberal majority declares capital punishment unconstitutional or the federal judiciary with a new 5-4 Staunch Conservative majority overrules almost every case imposing constitutional limits on state and federal efforts to impose the death penalty.

Small shifts in voting behavior in a society wracked by elite polarization and conflict extension cause dramatic shifts in almost every

281. Alexander & Schauer, *supra* note 280, at 1359.

282. Seidman, *supra* note 279, at 8-9.

283. *Id.* at 47.

The Coming Constitutional Yo-Yo?

constitutional doctrine, even when no change in public opinion has taken place on the vast majority of constitutional issues. Imagine the Obama Administration is blamed by some segment of the country for mishandling a foreign policy crisis and the Republican candidate rides these international concerns to the presidency in the 2016 national election. In 2017, that newly elected President replaces Justice Kennedy with a Justice who votes more similarly to Justice Alito. The resulting 5-4 Staunch Conservative majority in the next four years will shift the constitutional law of abortion, same-sex marriage, property rights, federal commerce power, school prayer, affirmative action, and other matters substantially to the right, even though public opinion has remained unchanged on these matters. Should that Republican President be caught with his or her hand in the till, Democrats gain control of the White House in 2020, and that Democratic President replaces Justice Antonin Scalia with a Justice who votes more similarly to Justice Kagan, the resulting 5-4 Solid Liberal majority will initiate a sharp constitutional swing of similar magnitude to the left. These swings are entirely unrelated to any change in public opinion or social conditions with respect to any constitutional issue. In conditions of elite polarization and conflict extension, any change in voting behavior for any reason is likely to result in dramatic changes in the constitutional law of almost every constitutional issue.

Perhaps nothing is particularly wrong with such sharp swings in American constitutional law. Such swings are possible in a country without a judicially enforceable constitution. If most elections are close contests between a committed liberal party and a committed conservative party, the legality of same-sex marriage and affirmative action, as well as the government's willingness to adopt certain health care programs and immigration policies, will swing as wildly as the election returns. If the point of constitutionalism is to mediate such public mood swings, so much the worse for constitutionalism. The people can always decide to mediate electoral mood swings on their own by voting for the status quo or building a party committed to more centrist policies.

This erratic course of fundamental rights and regime principles may nevertheless undermine constitutionalism. Constitutionalism normally requires some rule by the dead in order to empower officials and organize politics, establish the rule of law and make credible commitments, prevent self-dealing by governing officials, promote the public interest, assert national aspirations, and entrench those consti-

tutional compromises that preserve national unity.²⁸⁴ Constitutional yo-yos threaten many of these constitutional purposes. Constitutions are poor means for asserting national aspirations when the constitutional status of same-sex marriage, federal regulatory power, and property rights changes substantially by the decade. Rule of law and credible commitment values are jeopardized when no one can be assured that basic constitutional norms will last past the next election.

Strong majoritarians have fair responses to these dire predictions. Democracies give the public the right to decide the weight of various constitutional purposes. Popular majorities, democrats think, are best positioned to determine whether a change in regime outweighs needs for credible commitments or an enduring policy on same-sex marriage. Moreover, the threat to constitutional values is not quite as dire as the above paragraphs may have suggested. Constitutional law deals exclusively with what Sandy Levinson has called the “constitution of conversation” and not with what he declares to be the “constitution of settlement.”²⁸⁵ The constitution of conversation consists of those clauses, such as the due process clause of the Fourteenth Amendment, whose meaning is disputable. By comparison, the constitution of settlement consists of those clauses, such as the inauguration day clause, whose meaning is indisputable. Thus, even if all of the constitutional law found in the traditional constitutional casebook is up for grabs in the next series of elections, most of the Constitution remains stable. The Supreme Court is not being asked to reconsider bicameralism, the four year presidential term, the basic processes by which a bill becomes law and the existence of a federal court system. To this we might add the enormous amount of constitutional law that does not seem to be the subject of dispute between liberals and democrats. This would include such cases as *Marbury v. Madison*,²⁸⁶ *Brown v. Board of Education*,²⁸⁷ *Gibbons v. Ogden*,²⁸⁸ and *Gideon v. Wainwright*.²⁸⁹ These stabilities in themselves are probably sufficient to preserve most vital constitutional purposes.

284. See 1 HOWARD GILLMAN, MARK A. GRABER, & KEITH E. WHITTINGTON, *AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT* 7-10 (2013).

285. See SANFORD LEVINSON, *FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 17-27 (2012).

286. 5 U.S. 137 (1803).

287. 347 U.S. 483 (1954).

288. 22 U.S. 1 (1824).

289. 372 U.S. 335 (1963).

The Coming Constitutional Yo-Yo?

The problem with this democratic majoritarian justification for constitutional yo-yos is that the impending destabilization of constitutional law is a consequence of the less majoritarian features of the American constitutional regime and not of a public that erratically shifts from relatively extreme conservative to relatively extreme liberal views on all issues of the day. The American public is not as polarized as the American elite.²⁹⁰ The more centrist majority of Americans (or at least the more centrist median voter in the United States) is having increased difficulty maintaining relative centrist policies on most constitutional issues for two reasons. First, a constitutional system in which most national officials are selected in local elections has a tendency to generate Presidents and members of Congress more polarized than the general electorate.²⁹¹ Second, the practice of appointing highly educated, affluent, partisan lawyers to the Supreme Court in the present circumstances of elite polarization practically guarantees a court divided between Solid Liberals and Staunch Conservatives, even though less than a third of the public fit into either of those relative extreme categories. For both these reasons, the course of American constitutional law is unlikely to reflect consistently either the sentiments of the largely centrist median American voter or the ideals championed by any particular elite constitutional thinker.

The Cure. The best cure for constitutional yo-yos is a return to electoral stability, elite consensus, and conflict diffusion. History suggests that American constitutional law will avoid lurching from right to left only if one of these three foundations for constitutional stability is restored. Electoral stability assures that constitutional law consistently reflects the constitutional vision of a relatively enduring dominant national coalition. Elite consensus assures that constitutional law consistently reflects the common constitutional vision of highly educated, affluent Republican and Democratic lawyers. Conflict diffusion prevents polarization on particular issues from having a disproportionate impact on the entire corpus of constitutional law.

Judicial minimalism is the best preventative for constitutional yo-yos. Cass Sunstein, the leading proponent of that approach to the judicial function in constitutional cases, asserts, “[a] court that leaves

290. See sources cited *supra* notes 159, 217.

291. See MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 35-36 (2012); Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 732-33 (2009).

things open will not foreclose options in a way that may do a great deal of harm.”²⁹² Narrow judicial rulings also promote further democratic deliberation on complex constitutional issues. Sunstein writes, “minimalist rulings increase the space for further reflection and debate at the local, state, and national levels, simply because they do not foreclose subsequent decisions.” Justices committed to judicial minimalism do not declare capital punishment unconstitutional, insist that Congress has no right to regulate independent expenditures, rule that states may never use race in the admissions process, or defer anytime the federal government whispers the phrase “commerce clause” in oral argument. Instead, they support rulings limited to either the particular manifestation of a broader constitutional issue before the court or a fairly small subset of the broader constitutional problems. By deciding only, for example, that Congress may not pass this particular ban on independent expenditures, the Justices leave open the possibility that other bans might be sustained in light of more mature public deliberation, changes in social conditions or, frankly, changes in the composition of the court.

Judicial minimalism is particularly appropriate during times of electoral volatility, elite polarization, and conflict extension. Justices may justifiably issue broader rulings when either there is a general consensus among the voting public, measured by consistent support for a particular political coalition, or among persons who seriously reflect about legal matters, measured by a consensus among legal elite, that a particular constitutional direction best achieves American constitutional aspirations. Courts may be leading public opinion in these circumstances, but they are leading an opinion at least prone to follow the Justices. Justices who initiate or continue constitutional yo-yos realize none of the benefits of judicial activism while bringing about many of the defects. Constitutional decisions that are likely to be reversed or severely modified within a decade do not give the United States a distinctive constitutional character and they do not enable the court to play the role of “republican schoolmaster.”²⁹³ All such decisions are likely to do is move the Court further from the more centrist public and provide further irritation for an already over-irritated constitutional polity.

292. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 4 (1999).

293. See generally Ralph Lerner, *The Supreme Court as Republican Schoolmasters*, 1967 SUP. CT. REV., 1967, at 127, 127.

The Coming Constitutional Yo-Yo?

For better or worse, Justices are unlikely to act consistently with minimalist principles in the near future. Mark Tushnet has noted that “natter(ing) at justices” in law reviews has almost no effect.²⁹⁴ Most Justices, one expects, enter office with the confidence that the most recent election is a harbinger of the future success of their preferred political coalition. If so, perhaps the best advice this Article can offer is that all of us who teach constitutional law ought to be prepared to rewrite our lectures on a regular basis.

294. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 155 (1999).

Does Protest Work?

TOMIKO BROWN-NAGIN*

I. THE SOCIO-LEGAL FRAMEWORK OF PROTEST	726
A. “Be True to What You Said on Paper”	726
II. DR. MARTIN LUTHER KING, JR., AND WEALTH INEQUALITY, 1956-1968	728
A. King’s Critiques of Economic Inequality	728
B. Policy Proposals and Government Response, 1964..	729
C. Lessons	731
III. THE STUDENT NONVIOLENT COORDINATING COMMITTEE’S ANTIPOVERTY WORK, 1966-1970 .	734
A. Community Organizing as a Political Tool	735
B. Single-Issue Advocacy: The Attack on “Slum Lords” Inside the Courtroom and Outside.....	736
1. Political Mobilization and Rent Strikes, 1966 ...	736
2. The Constitutional Challenge to Summary Eviction, 1966-1970	739
C. Lessons	741
IV. SCHOOL DESEGREGATION AS AN ENGINE OF SOCIOECONOMIC MOBILITY, 1972-1979	743
A. The Voice of the Forgotten Poor	743
B. Education Litigation	744
C. Lessons	745
V. PROTEST TODAY: OCCUPY WALL STREET	747
A. Back Story	748
B. Philosophy, Structure, and Tactics	750
C. Analysis	754
1. Socio-Legal Framework and Rhetoric	754
2. Relationship to the State and Influential Elites .	756

* Professor of Law and Professor of History, Harvard University. Thanks to Lani Guinier, Daniel Nagin, Connie Sung and Samuel Weiss for reading prior drafts of this Article.

3. Tactics	758
D. Achievements.....	759
CONCLUSION	760

Wiley Branton, the former dean of Howard University School of Law, is best known for his legal skill and for his courage in the face of white resistance to *Brown v. Board of Education*. In 1956, two years after the U.S. Supreme Court decreed Jim Crow schools a violation of the Equal Protection Clause,¹ and just three years after his law school graduation, Branton filed suit on behalf of thirty-three black students who sought admission to Little Rock, Arkansas schools, still all-white, *Brown* notwithstanding. The young lawyer's suit, *Cooper v. Aaron*,² escalated into a monumental constitutional conflict—a battle between federal and state power, between the rule of law and mob rule.³ *Cooper* became the vehicle for a resounding declaration by the Supreme Court of the supremacy of *Brown* and all federal law over contrary state law and defiant authorities in all branches of state government—executive, legislative, and judicial.⁴ For his decisive role in a critically important constitutional case, we remember and celebrate Wiley Branton.

Branton's legacy and the significance of *Cooper* surpass the realms of courts and law, however. The protest did not begin and would not end with Branton; an entire community—a movement for equality under law—instigated and sustained the lawsuit.⁵ Large numbers of ordinary people, organized by non-lawyers in the local NAACP chapter, supported Branton's court-based challenge to segregation in the Little Rock schools. Both the feats of Branton and his allies in the political community provide a fitting context in which to consider questions relevant to *this* historical moment. Does protest really work? Can citizen participation in informal politics—demonstrations, boycotts and other forms of mass participatory action—help to address issues of our time? If so, how might lawyers advance the goals of such protest movements?

1. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
 2. *Cooper v. Aaron*, 358 U.S. 1 (1958).
 3. See David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065 (2008) (analyzing *Cooper* as a keystone case testing and defining *Brown's* civil rights legacy); see also JUDITH KILPATRICK, *THERE WHEN WE NEEDED HIM: WILEY AUSTIN BRANTON, CIVIL RIGHTS WARRIOR* 64 (2007).
 4. See *Cooper*, 358 U.S. at 1.
 5. See ELIZABETH JACOWAY, *TURN AWAY THY SON: LITTLE ROCK, THE CRISIS THAT SHOOK THE NATION* (2007).

The most celebrated episodes of the civil rights era can crowd out these questions and obscure answers to them. In legal literature, the constitutional dimensions of *Cooper v. Aaron* overshadow examination of the protest movement that gave rise to the legal action.⁶ Even when scholars specifically recall the non-lawyers who animated legal changes, they often discuss change agents in hagiographic terms. The Little Rock Nine are now iconic symbols of the hardship that blacks endured in the struggle against Jim Crow.⁷ Few have analyzed the story behind the lawsuit—the ideas, planning, groundwork, and protest—that provided the context in which the great constitutional case unfolded.

It is this context—rather than the landmark lawsuits—that should command more of our attention. For a truer picture of how social change can occur, scholars must study social movements in detail rather than skim the surface of history in search of icons and moments to celebrate. If civil rights-era protests are to provide useful lessons today, when economic inequality is one of the most pressing issues of our times, we must examine the movement’s evolution and its depth and breadth.

Long before the Little Rock Nine’s struggle for school desegregation, and then again years after it, the movement made full and fair employment and an end to poverty its chief quests.⁸ During the 1930s and 1940s, A. Phillip Randolph and other labor leaders demanded both racial equality and fair labor practices.⁹ In 1963, activists affiliated with multiple civil rights organizations demanded “jobs and freedom” during the March on Washington.¹⁰ And in 1967, Dr. Martin Luther King, Jr. insisted: “The time has come for us to civilize our-

6. See generally Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (defending *Cooper* and judicial supremacy in constitutional interpretation without qualification); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say what the Law Is*, 83 GEO. L.J. 217 (1994) (asserting that *Cooper* is wrong while defending a conception of the President’s broad interpretive powers).

7. See, e.g., Robbie Brown, *Jefferson Thomas, Who Helped Integrate Little Rock School, Dies at 67*, N.Y. TIMES, Sept. 7, 2010, at A18; Larry Luxner, *Arkansas’ ‘Little Rock Nine’—55 Years Later*, BALT. POST-EXAMINER, Dec. 20, 2012, available at <http://baltimorepostexaminer.com/arkansas-little-rock-nine-55-years-later/2012/12/20>.

8. See, e.g., Jacqueline Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005) (discussing dimensions of the labor and civil rights struggle that focused on economic inequality).

9. See William P. Jones, *The Unknown Origins of the March on Washington: Civil Rights Politics and the Black Working Class*, 7 LABOR: STUDIES IN WORKING-CLASS HISTORY OF THE AMERICAS 33 (2010).

10. *Id.* at 34.

selves by the total, direct and immediate abolition of poverty.”¹¹ After King’s assassination one year later, the demand for an “all-out world war on poverty” became the unfinished business of the civil rights movement.¹²

The “Occupy” Movement’s challenge to wealth inequality, the domination by the “1 percent” of the “99 percent,” has brought new urgency to what is, for students of the long civil rights movement’s struggle for economic justice, an old issue.¹³ Like movement veterans in the Student Nonviolent Coordinating Committee (SNCC), the Occupy movement focused attention on unequal distributions of wealth that relegate millions to society’s margins.¹⁴ Using the playbook of the Southern Christian Leadership Conference (SCLC)—which formed a multiracial Poor People’s Campaign that in 1968 camped in a Washington park to highlight citizens’ hunger and deprivation in an otherwise prosperous nation—Occupy camped in parks across the nation to highlight one of the twenty-first century’s most vexing problems.¹⁵ Critics of Occupy have dismissed it as ineffective, just as skeptics lambasted civil rights-era antipoverty activists.¹⁶ Whatever its flaws—and many are evident—Occupy has prompted a public conversation about economic inequality not witnessed since the 1960s,¹⁷ and it has created an opportunity for conversation about the past and future of protest, policy, and legal change.

This Article considers why, and how, protests mattered yesterday, and how protest might still matter today, using the civil rights movement and Occupy as points of departure. It historicizes the issue of wealth inequality and then compares and contrasts Occupy’s activism to past efforts.

The historical dimension of the analysis considers several *key moments* in the long history of the civil rights movement’s fight for a

11. MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? (1967).

12. THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING JR. AND THE STRUGGLE FOR ECONOMIC JUSTICE 326 (2007).

13. See generally Hall, *supra* note 8; Jones *supra* note 9; JACKSON *supra* note 12.

14. See Michelle Singletary, *Rage Against the Financial Sector Fuels Protest*, WASH. POST, Oct. 8, 2011, at G01 (discussing Occupy and its aims). See generally JOSEPH STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012) (discussing wealth inequality).

15. See JACKSON, *supra* note 12, at 353-58 (discussing the SCLC and King).

16. See, e.g., *Occupy Movement (Occupy Wall Street)*, N.Y. TIMES (Sept. 17, 2012), http://topics.nytimes.com/top/reference/timestopics/organizations/o/occupy_wall_street/index.html.

17. See STIGLITZ, *supra* note 14; see also David Carr, *A Movement, A Question: What Now?*, N.Y. TIMES, Nov. 20, 2011, at B1; *Protestors Against Wall Street*, N.Y. TIMES, Oct. 8, 2011, at 10.

fairer distribution of economic resources. It focuses on Dr. King's contributions and on collaborations between antipoverty activists and lawyers who, building on the legacies of Thurgood Marshall and Wiley Branton, broadened and deepened the movement's struggles beyond formal equality. The discussion of lawyers' antipoverty activism centers on the work of Howard Moore, Jr., the general counsel of SNCC, and of Margie Pitts Hames, a lawyer for the welfare rights movement. These attorneys sought access to healthcare, affordable housing, quality jobs, and quality schools, all in close collaboration with local communities. These lesser-known historical figures illustrate the depth, breadth, and creativity of the movement's economic justice theories and practices.¹⁸ Their work is relevant to a present that requires an array of approaches to multidimensional problems—inequalities embedded not in law but in culture, politics, and social structures—rather than one-dimensional, courtroom-based advocacy.

The Article's discussion of protest, the law, and wealth inequality proceeds as follows. Part I considers, in brief, the socio-legal foundation of civil rights-era activists' attack on Jim Crow. Part II begins the discussion of civil rights-era activists' engagement of economic inequality by examining the antipoverty activities of Martin Luther King, Jr., a principled agent of change who also embraced compromise when necessary to achieve legislative goals. Part III turns to the antipoverty activism of students, deep skeptics of King's brand of pragmatic politics who favored confrontation to compromise. The students and their crusading lawyer, Howard Moore Jr., used tools of community organizing and litigation to attack economic injustice. Part IV considers a quixotic campaign by a group of impoverished women activists, along with their lawyer Margie Pitts Hames, to gain

18. These figures challenge some legal scholars' claim that the civil rights movement lacked an economic agenda, in part because of its turn to litigation as a tool of reform. In emphasizing school desegregation, the argument goes, Thurgood Marshall and the NAACP—and affiliated lawyers such as Wiley Branton—chose a strategy that, perversely, mobilized *opponents* of black equality, narrowed the movement's conception of civil rights to a single issue, crowded out economic conceptions of equality, and deemphasized protest action outside the courtroom. For these arguments, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2006); GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008). For an economic critique of civil rights lawyering, see RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2010); Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786 (1988). Other works emphasize the movement's labor agenda or argue that other factors limited its ability to focus on economic theories of equality. See, e.g., PAUL FRYMER, *BLACK AND BLUE: AFRICAN-AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* (2007); NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* (2006).

social mobility for their children through a school desegregation campaign. The women's campaign highlights the limits of antipoverty organizing in the civil rights movement. Part V moves to the present. It discusses how the movement's legacy has found expression in nascent efforts to ameliorate economic inequality. This part, which centers on the Occupy protests, examines the extent to which this fledgling movement has taken advantage of the lessons that civil rights-era protests can teach.

I. THE SOCIO-LEGAL FRAMEWORK OF PROTEST

A. "Be True to What You Said on Paper"¹⁹

The long arc of this nation's history reveals the importance of protest movements to the country's evolution. When civil rights-era activists sought equality in the streets and in the courts, they joined a long list of citizens who forged monumental changes through expressions of dissent and acts of protest.²⁰

After all, this is a nation born in dissent.²¹ "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness,"²² states the Declaration of Independence. An eloquent petition of protest, the Declaration enumerated abuses that animated the colonists' struggle for freedom from England. It also articulated Enlightenment-inspired philosophical and political principles that justified the colonists' struggle for liberty.²³ These same principles found expression in the nation's charter, the U.S. Constitution.

Over time that Constitution proved to be an engine of democracy and equality.²⁴ The document's transformation during Reconstruction

19. Martin Luther King Jr., *I've Been to the Mountaintop, Speech in Support of the Striking Sanitation Workers at Mason Temple in Memphis*, in *A TESTAMENT OF HOPE, THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 282, 282 (James Melvin Washington ed., 1990).

20. See generally TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011) (providing a discussion of how dissent yielded progress during the civil rights era).

21. See generally PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776* (2d ed. 1992).

22. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

23. See PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 83-89 (1998).

24. See generally GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1984); Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989).

and reinterpretation by civil rights advocates enabled full citizenship rights.²⁵ Justice Thurgood Marshall, who as director-counsel of the NAACP Legal Defense Fund successfully argued *Brown v. Board of Education*, explained during a celebration of the Constitution's bicentennial: the Founding Fathers did not "forever fix" the Constitution's meaning in Philadelphia in 1787.²⁶ It took "several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and . . . respect for individual freedoms . . . we hold as fundamental today."²⁷ In the hands of talented lawyers and clever activists, the promise of liberty—from which black Americans had been excluded—became the foundation of a successful argument for equal citizenship rights.

Dr. King eloquently summarized how both the legal and direct action wings of the movement reinterpreted these documents to justify demonstrations, picketing, boycotts, and ultimately, antidiscrimination and voting rights legislation.²⁸ When the movement petitioned for redress, it did so with the goal of persuading authorities to: "Be True to What You Said on Paper." King uttered these words during his final public address, at Memphis in 1968:

All we say to America is, 'Be true to what you said on paper.' If I lived in China or even Russia, or any totalitarian country, maybe I could understand the denial of certain basic First Amendment privileges, because they hadn't committed themselves to that over there. But somewhere I read of the freedom of assembly. Somewhere I read of the freedom of speech. Somewhere I read of the freedom of the press. Somewhere I read that the greatness of America is the right to protest for right.²⁹

The movement appropriated the nation's founding ideals to brilliant effect. The master's own tools had been used to dismantle the foundation of the master's house—if not the structure itself.³⁰

25. See Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 4-5 (1987).

26. *Id.* at 5.

27. *Id.* at 5.

28. The lawyers of the NAACP, too, cited the right to assemble and petition for redress when it sought to protect its members from retaliation in Southern states hostile to the association's very existence and bent on destroying its activism. See *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958).

29. KING JR., *supra* note 11, at 282.

30. The reference is a play on Audre Lorde's assertion that the "master's tool will never dismantle the master's house." Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 110-113 (1984).

II. DR. MARTIN LUTHER KING, JR., AND WEALTH INEQUALITY, 1956-1968

Dr. Martin Luther King Jr.'s clarion call for a colorblind society in his 1963 speech at the March on Washington for Jobs and Freedom is perhaps his best known and most often celebrated address. However, the minister's vision of equality, like that of many others in the movement, extended beyond civil rights to human rights—including economic justice.³¹

Dr. Martin Luther King's final campaign in Memphis—where he marched alongside sanitation workers who sought higher wages and better working conditions—underscored King's belief that economic justice was an integral component of a racial just society.³² In his final hour, King fought against the economic exploitation of laborers who worked long, hard hours but still lived in poverty.

A. King's Critiques of Economic Inequality

Long before 1968, Dr. King had deployed carefully-crafted rhetoric to explain how race and class intersected to maintain oppression. As early as the Montgomery Bus Boycott of 1955 and 1956, King had lamented the “‘triple evils’ of racism, economic exploitation, and militarism” during the mid-1960s; his economic critique focused on the conditions of the ghetto poor in Harlem, Chicago, and Atlanta.³³ Soon after the enactment of the Civil Rights Act of 1964, King explained to audiences still acclimating to the new law barring race-based discrimination in all areas of public life that formal equality was inadequate to achieve substantive justice. The Civil Rights Act had not, and could not, fully resolve the nation's racial dilemmas. Even if the Civil Rights Act ended all discrimination, King argued, “black poverty, ‘the historic and institutionalized consequences of color,’ would continue”³⁴

King reminded America of the devastating material impact of Jim Crow with these words. Not merely an oppressive social hierarchy that relegated blacks to society's bottom, Jim Crow involved an exploitative labor system. Segregation had left African Americans overwhelmingly impoverished. It had confined blacks to the dirtiest,

31. See JACKSON, *supra* note 12, at 353.

32. See *id.*

33. See *id.* at 2-3, 21, 33, 209, 350.

34. See *id.* at 204.

lowest-paying types of employment.³⁵ It had prevented blacks from attaining the education and skills that yielded better jobs and facilitated the accumulation of wealth.³⁶ Even those blacks who managed to attain higher levels of education found themselves relegated to employment incommensurate with their skills.³⁷ Given Jim Crow's expansive reach and devastating results, vastly greater effort would be required to eradicate its vestiges.

B. Policy Proposals and Government Response, 1964

King did not only criticize economic inequality; he proposed solutions to it. Most notably, in 1964, King called for a "massive assault upon slums, inferior education, [and] inadequate medical care."³⁸ He advocated a variation of the "Marshall Plan for the Negro" proposed by Whitney Young, the President of the National Urban League President; the plan would address the "historic and institutionalized consequences of color" that had deprived blacks of wealth and provided a guaranteed income for all Americans to place the poor (regardless of race) on a path toward wealth accumulation.³⁹

During the summer of 1964, President Lyndon Baines Johnson responded to King's plea for policies, in addition to the Civil Rights Act, to ameliorate the poverty that kept equality of opportunity out of reach of many Americans. Johnson declared an "unconditional war on poverty."⁴⁰ Its centerpiece of the war on poverty, the Economic Opportunity Act (EOA), established a federal job corps, work training, community action, pre-school, community health, legal services programs, and many other signature social welfare programs still with us today.⁴¹ Dr. King, who from his teen years had recognized that the

35. See generally GOLUBOFF, *supra* note 18; MICHAEL HONEY, *BLACK WORKERS REMEMBER: AN ORAL HISTORY OF SEGREGATION, UNIONISM, AND THE FREEDOM STRUGGLE* (1999); MACLEAN, *supra* note 18.

36. See JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935*, at 1-3, 79-237 (1988); ADAM FAIRCLOUGH, *A CLASS OF THEIR OWN: BLACK TEACHERS IN THE SEGREGATED SOUTH* 4, 9, 10, 108-09, 116, 131, 190, 367-68 (2007).

37. See KAREN FERGUSON, *BLACK POLITICS IN NEW DEAL ATLANTA* 21-23 (2002); E. FRANKLIN FRAZIER, *BLACK BOURGEOISIE: THE BOOK THAT BROUGHT THE SHOCK OF SELF-REVELATION TO MIDDLE-CLASS BLACKS IN AMERICA* 43-59 (1957).

38. See JACKSON, *supra* note 12, at 204.

39. See *id.* at 199.

40. *Id.* at 191.

41. 42 U.S.C. § 2711; NICK KOTZ, *JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING JR. AND THE LAWS THAT CHANGED AMERICA* 182-84 (2005).

“inseparable twin of racial injustice was economic injustice,”⁴² hailed the dual approach to civil rights and antipoverty legislation.⁴³

However, King’s rhetoric about the EOA can be deceiving. In private he questioned the government’s commitment to fulfill its anti-poverty promises and called the movement’s alliance with the federal government a “malignant kinship.”⁴⁴ The legislation fell short of King’s highest policy aspirations. King’s broad antipoverty agenda included fair and full employment, a guaranteed income for all, trade unionism, equal education and much more—a “democratic socialist” agenda.⁴⁵ The EOA did include jobs training, but did not constitute the “massive” public works project that King had hoped for, and it did not address other facets of King’s agenda at all.

Moreover, the EOA had materialized long after King made anti-poverty legislation a priority, and then only after the sociopolitical circumstances conspired to create an opportunity for legislative action. King had begun publicly advocating greater attention to the ills of the poor in 1956, after he had achieved fame in the bus boycott.⁴⁶ Congress did not act until 1964, in the wake of a complex, and in many ways unpredictable, series of events. Congress had passed the law amid social cataclysm, including riots in Harlem⁴⁷ and violent reactions to civil rights protests⁴⁸ that they could not ignore. The widespread crisis demanded a legislative response. President Johnson’s embrace of an antipoverty agenda had been critical. Yet, his own impoverished background in rural Texas and the values it inculcated had propelled his interest in a war on poverty as much as had King’s lobbying.⁴⁹ Johnson had been elected to office in 1964 and attained political currency to support civil rights and antipoverty initiatives in the shadow of the assassination of President Kennedy.⁵⁰

All told, the EOA had been a partial victory at best. The priority that King placed on Memphis sanitation workers’ strike for increased wages in 1968 highlighted the limited reach of the antipoverty legisla-

42. JACKSON, *supra* note 12, at 25.

43. *See id.* at 193-95.

44. *Id.* at 200.

45. *Id.* at 8.

46. *Id.* at 2.

47. *Id.* at 208, 168-69.

48. *Id.* at 184-85.

49. KOTZ, *supra* note 41, at 30-31.

50. *Id.* at 33-34.

tion. The EOA had not addressed at all the dire economic position of the large numbers of unskilled, low-wage workers among the poor.

C. Lessons

The story behind the EOA teaches important lessons about how a protest movement may achieve its objectives. First, King's activism teaches that *protests with purpose* can be instrumental to making change. The King-led direct action wing of the civil rights movement saw aspects of its agenda codified in law because it sought and successfully wielded influence on formal and informal political processes. It shaped political dynamics at the local and national level through protest tactics and influenced officeholders by voting or through the threat of bloc voting and by lobbying decision makers for concrete initiatives.

To be sure, social movements for progressive causes sometimes have spurned the state and shown little interest in rights discourses and policy change. Elements of the radical wing of the student-led civil rights movement, members of the nuclear freeze movement, radicals in the women's movement, and anti-war activists all adopted oppositional stances toward the state and to policy formation.⁵¹ It strikes me as valuable for change movement to embrace dissenting voices and differentiated roles:⁵² the entire movement need not entangle itself in "malignant kinships" with the state.

As a general proposition, however, it is infeasible and unwise for a movement that hopes to shape the world in which we live, as opposed to a Utopia that might be ideal, to reject the state and spurn the hard work of developing alternatives to inequitable policies. Move-

51. See ZILLAH R. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* 4-5, 220-53 (1993) (noting that the "very notion of citizen is male supremacist" and rejecting "narrow legalistic 'rights' interpretation of feminism employed by government and the 'state[s]' manipulat[ion] [of] feminist demands for its purposes"); David S. Meyer, *The 'Smothering' Allies of the Nuclear Freeze Movement*, in *THE SOCIAL MOVEMENTS READER* 261-267 (Jeff Goodwin & James M. Jasper eds., 2003) (criticizing Congressional supporters' appropriation of movement's language and symbolism and moderation of demands and arguing that entanglement with government demobilized and co-opted movement); Anne N. Costain, *Women Lobby Congress*, in *SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS* 172 (Anne N. Costain & Andrew S. McFarland eds., 1998) (discussing reluctance of some social movements to engage in lobbying); CLAYBORNE CARSON, IN *STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960s* 1-2, 154, 175-76, 191-92, 215-16, 229-30, 265-86 (1981) (discussing radicalization of SNCC).

52. See BROWN-NAGIN, *supra* note 20, at 439-441.

ments can simultaneously critique the state and make policy demands upon it, fusing outsider and insider tactics.⁵³

Proponents of change for socioeconomically marginalized groups not only should dedicate energy to the legislative process, but must do so—just the same as interest groups who represent corporations, industry, and labor.⁵⁴ Precisely because of the outsized influence of monied interests in the legislative process, it is incumbent upon the disadvantaged and their representatives to seek influence in the halls where policy is made. If the truly disadvantaged and their agents choose not to seek policy changes consistent with their interests, studies show, no one else will.⁵⁵

Second and related, *pragmatic political conditions* can be instrumental to achieving change. The King-led civil rights movement's "malignant" alliance with influential people, with the federal government, and with competing organizations proved key to its evolution, proliferation, and victories. Even if a movement's interests do not neatly align with the interests of those in positions of power, this moment teaches, it may be necessary to act strategically and form pragmatic political coalitions.

53. See Douglas R. Imig, *American Social Movements and Presidential Administrations*, in SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS, *supra* note 51 at 159, 159-70 (discussing influence of social movement actors and organizations on policy); Anne N. Costain, *Women Lobby Congress*, in SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS, *supra* note 51 at 171, 173-84 (discussing circumstances under which Congress responds to citizen mobilization and success of women's groups' lobbying efforts); FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLES' MOVEMENTS 324 (1979) (discussing welfare rights movement's involvement in lobbying).

54. For an argument that social movements, interest groups, and political parties are indistinguishable, see Paul Burstein, *Interest Organizations, Political Parties, and the Study of Democratic Politics*, in SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS, *supra* note 51 at 39, 39-56. See also Jeffrey M. Berry & Deborah Schildkraut, *Citizen Groups, Political Parties and Electoral Coalitions*, in SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS, *supra* note 51 at 136, 136-56 (discussing the ability of citizen groups to influence electoral dynamics and policy).

55. Kay Lehman Schlozman et al., *The People With No Lobby in Washington*, BOSTON GLOBE, Aug. 26, 2012, at 1 (data shows that business-oriented groups dominate lobbying). The study concluded:

In analyzing our results, the most sweeping conclusion we could draw about the thousands of organizations active in Washington is that, in the aggregate, their interests tilt strongly in the direction of the haves. More than half represent the interests of business in one way or another. Only 5 percent represent broad public interests (whether conservative or liberal or neither) such as wilderness preservation, auto safety, national security, human rights abroad, lower taxes, reproductive rights, and citizen education. Only 4 percent represent people on the basis of such identities as race, ethnicity, nationality, religion, age, sexual orientation, or gender. A mere 1 percent are unions. And less than 1 percent advocate on behalf of, or provide social services to, the economically needy.

Id.

Third, movements may be unable to achieve any of their goals without *willingness to compromise* on some of them. King moderated his agenda to accommodate the legislative process; he hoped for race-conscious initiatives but advocated race-neutral policies both to appease whites and because he cared deeply about inequality across racial lines.

Fourth, *compromise need not involve capitulation*, however. King's antipoverty mobilization shows that victories occurred amid *crisis rather than consensus*. Movements today, like those yesterday, must seize opportunities presented by social upheaval and be capable of accommodating changing political dynamics.

Fifth, contrary to a conventional wisdom that developed against the backdrop of successful legal challenges to race-conscious public policies, *class-oriented campaigns for equity are not necessarily easier to wage than race-based campaigns for social justice*.⁵⁶ Each has engendered and can expect to precipitate significant opposition. King's class-based critiques of the social order encountered deep resistance from many quarters—including within the movement itself.⁵⁷ Discussion that focused on disparities of wealth and criticized materialism threatened erstwhile allies who always had viewed equality in terms of black versus white. Many lacked King's core conviction that a class analysis and tactics that attacked wealth-based inequities advanced a civil rights agenda; they perceived an integrated, race- and class-analysis of inequality as divisive or superfluous.⁵⁸ Other, self-interested members of the middle class, saw little reason to spend precious political capital on the "lower" classes as opposed to those already ensconced in the middle class and therefore better positioned to take advantage of reform efforts.⁵⁹ Many Americans, regardless of race, self-consciously held themselves above members of the working class who find themselves unable to advance in society.⁶⁰ Character deficits

56. For arguments that class-based remedies for inequality in education are more politically and legally viable than race-based remedies, see generally RICHARD KAHLENBERG, *THE FUTURE OF SCHOOL INTEGRATION: SOCIOECONOMIC DIVERSITY AS AN EDUCATION REFORM STRATEGY* (2012); RICHARD KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996).

57. JACKSON, *supra* note 12, at 237-38.

58. *Id.*; see also BROWN-NAGIN, *supra* note 20, at 271.

59. See PIVEN & CLOWARD, *supra* note 53, at 320 (noting that "powerful and prestigious figures, whether black or white," did not join demonstrations for poor relief or give money or lend support to welfare rights movement and it remained a "movement of paupers, of a pariah class").

60. See *id.* at 321, 348-49 (discussing negative views of poor); MARTIN GILENS, *WHY AMERICANS HATE WELFARE* (1999); Heather Bullock, *Attributions for Poverty: A Comparison of Mid-*

and intellectual deficits, much more than structural inequality, limit upward mobility.⁶¹ Many of these same convictions still make it difficult for class-oriented critiques of American society to gain traction.

Sixth, *success is relative*. It is unnecessary to prevail on every agenda item to make significant advances for a cause. The War on Poverty never addressed the full constellation of social, economic, and cultural problems that plagued those left behind as a result of the “historic and institutionalized consequences of color.” Movements should not expect to achieve all, or even most, of their goals. Relative success should not be regarded as failure.

Those unresolved dilemmas of race and class about which King and others had raised consciousness remained unsettled after 1965, when the movement faced new circumstances, opportunities, and constraints.

III. THE STUDENT NONVIOLENT COORDINATING COMMITTEE’S ANTIPOVERTY WORK, 1966-1970

Enter the Student Nonviolent Coordinating Committee (SNCC), the “new abolitionists” and “shock troops” of the movement.⁶² SNCC adds two elements to this consideration of whether and how protest works. The college-aged activists’ arsenal of tactics varied from those favored by King. SNCC disdained the strategic political alliances critical to King’s success; the youthful activists believed in confronting authority, including over economic injustice, an issue SNCC had prioritized since the 1963 March on Washington.⁶³ The group also preferred community organizing to community mobilizing.⁶⁴ That is, SNCC’s signature campaigns featured longer-term, community-based initiatives designed to empower marginalized groups from within, as opposed to shorter-term, highly-publicized, violent clashes between

dle-Class and Welfare Recipient Attitudes, 29 J. APPLIED SOC. PSYCHOL. 2059 (1999); Lauren D. Appelbaum, *The Influence of Perceived Deservingness on Policy Decisions Regarding Aid to the Poor*, 22 POL. PSYCHOL. 419 (2001); Heather E. Bullock, Wendy R. Williams & Wendy M. Limbert, *Predicting Support for Welfare Policies: The Impact of Attributions and Beliefs about Inequality*, 7 J. POVERTY 35 (2003).

61. See PIVEN & CLOWARD, *supra* note 53 at 338-39 (discussing pathology of the poor); *id.* at 48-49 (discussing rising crime rates, drunkenness, and promiscuity among unemployed); FELICIA KORNBLUH, *THE BATTLE FOR WELFARE RIGHTS* 88-90, 129-30, 145-46 (2007) (discussing criticism of lack of work ethic among poor).

62. See generally HOWARD ZINN, *SNCC: THE NEW ABOLITIONISTS* (photo. reprint 2011) (1964) (detailing the social movement led by young people known as the Student Nonviolent Coordinating Committee).

63. BROWN-NAGIN, *supra* note 20, at 137-38.

64. *Id.* at 266.

practitioners of civil disobedience and segregationists aimed at swaying white public opinion.⁶⁵ SNCC also turned to litigation, often coupling lawsuits with community organizing campaigns. This approach distinguished the lawyers of SNCC from the better-known attorneys of the NAACP Legal Defense Fund (LDF), which focused primarily on the courts.⁶⁶ This examination of SNCC and its innovations permits us to reflect on the rewards and risks of its unique combination of frontal assaults on the socio-legal order and court-based advocacy.

A. Community Organizing as a Political Tool

SNCC distinguished itself from the NAACP, the lawyers of LDF and even SCLC with its assumption that ordinary people—the grassroots—rather than an educated, professional, or clerical class, should lead their own communities in the struggle against injustice.⁶⁷ The students sought to build political and social capital among the grassroots through community organizing.⁶⁸

Organizing involved several interlocking steps. Workers listened to everyday people discuss their lives and problems; they educated people about their citizenship rights; and they persuaded them to cast off mental chains imposed by Jim Crow that undermined activism. As I wrote in my book-length analysis of the legal and social history of the civil rights movement, “the most effective organizers possessed emotional and interpersonal intelligence in abundance and embraced a range of roles and personas.”⁶⁹

Through community organizing SNCC sought to plant “seeds of change.” As they built relationships with the poor, volunteers nurtured citizens’ . . . leadership abilities. . . . SNCC expected that impoverished and poorly educated blacks, if given encouragement and taught the necessary skills, would move from the margins of society and become energetic stakeholders in the democratic process Ultimately, organized communities would pursue concrete forms of equality, including a bundle of property and personal enti-

65. See generally CHARLES PAYNE, *I’VE GOT THE LIGHT OF FREEDOM* 236-64 (1995) (discussing the difference between organizing and mobilizing).

66. BROWN-NAGIN, *supra* note 20, at 266.

67. *Id.* at 266.

68. *Id.* at 264-65.

69. *Id.* at 266.

tlements: decent jobs, income supports, housing, and education, as well as political representation and participation.⁷⁰

SNCC tested its community organizing tactic in rural and urban areas. This analysis focuses on SNCC's work in Atlanta, where the group established a community organizing operation in 1966. SNCC first organized a project to demand "economic justice" in an urban area in 1966. It chose Atlanta's Vine City neighborhood, an area beset by filth, squalor, and misery, for its initial foray into urban organizing.⁷¹ On a typical day, SNCC's staff canvassed the unpaved streets of Vine City, where it met local people and learned about their priorities. The staff not only listened to peoples' problems, but also found numerous ways to be of assistance. SNCC conducted workshops about picketing, sit-ins, rent strikes, boycotts, and electoral politics as tools to address the community's problems.⁷² Workers also offered practical solutions to specific problems that plagued the neighborhood, among them poor healthcare, education, housing, and lack of employment opportunity. Workers informed the residents about federal work and educational resources, including War on Poverty programs.⁷³

B. Single-Issue Advocacy: The Attack on "Slum Lords" Inside the Courtroom and Outside

The search for safe and affordable housing dominated the lives of residents in Atlanta's Vine City, and therefore, it also consumed much of the project's energies. The project pursued its housing initiative through a range of political tactics, including demonstrations and boycotts, and repeated invocations of the rule of law and the legal process.⁷⁴

1. Political Mobilization and Rent Strikes, 1966

In January of 1966, SNCC began a sustained campaign against inadequate housing in Vine City—a "war on Atlanta's slums."⁷⁵ Julian Bond, a founding member of SNCC and the newly-elected state representative of the area's residents, demanded attention to the

70. *Id.*

71. *Id.* at 267.

72. *Id.* at 266-68.

73. *Id.* at 268.

74. See GERALD LOPEZ, REBELLIOUS LAWYERING 38-44 (1992) (explaining the classic text on the concept of lay lawyering or informal peer to peer problem solving).

75. BROWN-NAGIN, *supra* note 20, at 269.

plight of his cold and hungry constituents.⁷⁶ He wired Atlanta's mayor with a request that the city fulfill its responsibility to ensure adequate housing for every citizen.⁷⁷ Treating the Markham Street crisis like a natural disaster, Bond also called on the American Red Cross to supply emergency provisions such as blankets, food, and generators.⁷⁸ SNCC workers crafted billboards that lambasted the conditions in the neighborhood and continually issued press releases criticizing the city's slow and inadequate response.⁷⁹

In the middle of SNCC's campaign, Dr. Martin Luther King, Jr., visited the area, raising the profile of SNCC's campaign.⁸⁰ Only recently, King had visited Chicago; there he had decried the "economic exploitation" that trapped the poor in urban ghettos. Now, touring the ghettos in his own hometown, King commented that the appalling conditions surpassed even those in Chicago's worst areas.⁸¹

In the wake of King's visit, the project launched a rent strike: aggrieved tenants withheld rental payments until landlords made needed repairs to address substandard housing conditions.⁸² With this tactic, SNCC exposed the exorbitant profits that the landlords made from dilapidated housing, groceries, and sundry items sold to tenants. The system was no more than a modern version of a "plantation" economy.

The tactic allowed SNCC to achieve three interlocking goals: it sought to empower the poor to seek concrete changes in their everyday lives, to dramatize the injustices of life in the ghetto, and to pressure both private parties and local government to address the need for safe, affordable housing for low-income citizens.⁸³

The daring rent strike tactic entailed serious risks. The law provided limited relief, and remedies could be counterproductive. As a rule, renters did not enjoy a contractual right to major repairs. "Tenants took the premises of rental properties as they were unless a statute imposed enforceable obligations on landlords to maintain property."⁸⁴ In the mid-1960s, few jurisdictions imposed such obligations. "Atlanta's building code mostly covered building defects. It *did*

76. *Id.*

77. *Id.*

78. *Id.*

79. *See id.* at 260.

80. *Id.* at 269.

81. *Id.* at 269-70.

82. *Id.* at 270.

83. *Id.*

84. *Id.* at 271.

set minimum standards for occupancy: a supply of running water, watertight roofs, plumbing and general ‘cleanliness.’”⁸⁵ Tenants also enjoyed a legal right to property fit for habitation. But the municipality seldom enforced these code requirements. When it did, a different problem arose: housing code enforcement could leave the poor homeless. Tenants could be compelled to vacate property declared unfit for human habitation—an unsatisfactory “solution” for residents with few resources and housing options. SNCC could only hope for the best: that the strike would embarrass public officials and thereby increase access to existing public housing, or stimulate the construction of new private developments that included housing affordable for the poor. In the meantime, the decision to engage in a rent strike could be counterproductive to the intended beneficiaries.⁸⁶

And, in fact, SNCC’s rent strike produced mixed results. Landlords retaliated by threatening to evict any tenants who participated in the campaign.⁸⁷ In many cases, the threats worked, undercutting SNCC’s effort to mobilize the community.⁸⁸ Moreover, SNCC’s campaign attracted little support, if any, from other civil rights and civic groups. Many considered rent strikes “radical” and a violation of landlords’ property rights.⁸⁹ The campaign also alienated the mayor, a white liberal whose advocacy of the Civil Rights Act of 1964 had been critical to the law’s passage.⁹⁰ After SNCC began attacking economic inequality, the mayor accused the organization of attempting to undermine the “American way.”⁹¹ With the mayor’s help, police launched investigations and prosecutions of alleged “disorderly conduct” and other minor infractions by SNCC protesters—a tactic that threatened to decimate the movement by jailing its most active members.⁹² Newspapers, radio, and television filled with negative stories about SNCC.⁹³ The organization, repeatedly tagged as “un-American,” lost influence because of its aggressive critiques of authority figures, government, and the economic order.⁹⁴

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *Id.* at 279-80, 285-87.

93. *Id.* at 276-77.

94. *Id.*

2. The Constitutional Challenge to Summary Eviction, 1966-1970

In addition to staging demonstrations and rent strikes, SNCC turned to affirmative constitutional litigation in its war against slums. SNCC's general counsel, Howard Moore, Jr., led the legal efforts.⁹⁵ Moore challenged a summary eviction statute that enabled a speedy summary eviction proceeding when landlords claimed non-payment of rent.⁹⁶ The tenant could only halt the proceeding by posting a bond that covered the sum in dispute at trial, an insurmountable obstacle for Moore's poor clients.⁹⁷ Without the requisite payment, the court would not even accept a counter-affidavit from the tenant, stating his version of the facts. The landlord could simply seek the eviction of a tenant who could not pay.⁹⁸

Moore hoped to make the eviction process fairer for citizens who lived on society's margins by arguing that the summary eviction process stacked the deck in favor of landlords. The statute's bond requirement violated the U.S. Constitution's Fourteenth Amendment, Moore argued.⁹⁹ Georgia's law compelled a poor person to pay for access to the courts: one could only challenge an unlawful eviction if one were wealthy enough to do so—an outlandish proposition for indigent tenants in neighborhoods such as Vine City. The Constitution plainly barred such outright discrimination against the poor, SNCC's counsel claimed.¹⁰⁰

Moore's argument failed spectacularly in the Georgia courts. The resource barrier to judicial review of eviction proceedings did not violate due process, and the statute did not otherwise discriminate between poorer and wealthier citizens on constitutionally forbidden grounds.¹⁰¹ The Georgia Supreme Court affirmed on grounds that Moore's clients had already been evicted from the properties in question—making the issue they had raised moot.¹⁰² “All that was sought to be enjoined,” the court reasoned, “has been done”¹⁰³ Williams

95. *See id.* at 272.

96. *See id.*

97. *See id.*

98. *See Williams v. Shaffer*, 149 S.E.2d 668, 669 (Ga. 1966); *see also Williams v. Shaffer*, 385 U.S. 1037, 1039 (1967). The statute was GA. CODE ANN. § 61-301 (1966).

99. *See BROWN-NAGIN, supra* note 20, at 272.

100. *Id.*

101. *See Williams*, 149 S.E.2d at 670.

102. *See id.*

103. *See id.*

and Martin were too poor to make poverty an issue before the court.¹⁰⁴

Moore appealed the case, *Williams v. Shaffer*, to the United States Supreme Court. Again, he struck out. The High Court refused to hear the case.¹⁰⁵ Moore and his clients nevertheless made a strong impression at the Court. Justice William O. Douglas disagreed with his colleagues' decision. He wrote a powerful dissenting opinion explaining why the Court should have heard the case.¹⁰⁶ Douglas framed the case as indicative of a "larger problem" that "vividly demonstrates the disparity between the access of the affluent to the judicial machinery and that of the poor in violation of the Equal Protection Clause."¹⁰⁷ Douglas asserted that the Justices should review the Georgia Supreme Court's mootness holding because it would perpetually preclude review of the underlying statute. For every impoverished tenant would be unable to post the requisite bond, would be evicted, and the eviction, by Georgia's logic, would moot every challenge to the statute.¹⁰⁸ "The ability to obtain a hearing is thus made to turn upon the tenant's wealth," Douglas concluded.¹⁰⁹ Several of the Court's precedents had held such discrimination constitutionally proscribed. These precedents all pertained to deprivations of the judicial process in criminal cases, however, perhaps explaining the Court's denial of the appeal.¹¹⁰

Moore did not prevail in this particular 1966 case, but his legal activism and SNCC's political mobilization against Atlanta's slum housing effected change. In 1970, just four years after the campaign had begun, and after additional litigation and political work by the Georgia Legal Aid Bureau and other public interest organizations,¹¹¹ the state reformed the statutory scheme that Moore challenged in *Williams v. Shaffer*.¹¹² The new law no longer required tenants to post a bond to contest an eviction proceeding.¹¹³ A tenant who contested a

104. *See id.* at 668-70 (citing numerous precedents of the Georgia courts in support of its conclusion).

105. *See Williams*, 385 U.S. at 1037.

106. *See id.*

107. *Id.*

108. *See id.* at 1039.

109. *Id.*

110. *See id.*

111. *See generally* KRIS SHEPARD, *RATIONING JUSTICE: POVERTY LAWYERS AND POOR PEOPLE IN THE DEEP SOUTH* 37-67 (2007) (describing litigation efforts by several civil rights organizations).

112. *See BROWN-NAGIN, supra* note 20, at 385.

113. GA. CODE ANN. § 44-7-50 (2010).

landlord's non-payment allegation in court retained his shelter while the legal process ran its course.¹¹⁴

C. Lessons

Like Dr. King's antipoverty work, SNCC's political and legal interventions against poverty offer invaluable insights about how movements can make change and cautions about the consequence of frontal attacks on the social order.

The first lesson that SNCC's work teaches is that a massive social problem can be made manageable by limiting advocacy to a single, compelling aspect of the broad issue—or *scaling down*. SNCC gained advantage in its fight against poverty by developing a single-issue campaign, focused on the most obvious need of community members, adequate and affordable housing. Whereas many reform organizations puzzle over how to scale up promising pilot programs to achieve greater impact,¹¹⁵ a scaled down approach can be an invaluable tool when reformers confront a social problem of tremendous scope.

Second, SNCC's work shows that *community organizing can be an effective, if deliberate and laborious, tactic*.¹¹⁶ SNCC garnered new or improved legislation through community organizing. It mentored new leaders, and raised public awareness of inequities. It even helped to bring about statutory change. However, these gains occurred after long hours of work in communities alongside citizens who faced profound barriers to political participation. The success of community organizing efforts will turn in part on the extent to which organizers with requisite interpersonal and cross-cultural intelligence commit time and resources to building relationships, to engaging in community education, and to developing and implementing concrete agendas for change.

Third, SNCC *used litigation to inspire political consciousness and mobilize political action*. Some scholars consider the inability of pro-

114. See *Sanks v. Georgia*, 401 U.S. 144, 147 (1971) (finding challenge to Georgia summary eviction statute moot because of legislative reforms).

115. See, e.g., MICHAEL EDWARDS, *THE OXFORD HANDBOOK OF CIVIL SOCIETY* 61-62 (2011) (discussing advantages and disadvantages of social change organizations "scaling up" influence by connecting to national organizations); THOMAS J. MARCHIONE, *SCALING UP, SCALING DOWN: OVERCOMING MALNUTRITION IN DEVELOPING COUNTRIES* 72-74 (1999) (discussing need to connect grassroots and local communities to national governments and organizations with resources to ameliorate hunger).

116. For a theoretical overview, see ROSS GITTELL & AVIS VIDAL, *COMMUNITY ORGANIZING: BUILDING SOCIAL CAPITAL AS A DEVELOPMENT STRATEGY* (1998).

gressive social movements to prevail in court a serious, if not fatal, problem; however, SNCC effectively used the courts to promote its political agenda even when it did not prevail. Being on defense—the underdog—created a political mindset that SNCC leveraged to generate change outside of court.¹¹⁷ SNCC sometimes mobilized its constituencies by engaging in losing battles with authorities, including judges, governmental officials, and police officers.¹¹⁸ On other occasions, SNCC's litigation did not succeed on the merits, but nevertheless highlighted inequities and set the stage for legislative action years later. SNCC employed litigation to *inspire* political action as often as it relied on courts to *define* affirmative rights.¹¹⁹ This distinction between the *inspirational* and *definitional* uses of lawsuits¹²⁰ is crucial if social reform movements are to effectively employ litigation as a tool of protest.

SNCC also effectively employed *lawyers as mediators* with power structures. Students formed critical alliances with sympathetic lawyers whose use of legal expertise kept students out of legal jeopardy, and thus the student movement alive, at critical stages. Such mediators are crucial to reform movements.

Fourth, because of *unyielding dogmatism* SNCC eventually disengaged from center-left of politics in the U.S. and its disengagement made it less effective. SNCC alienated allies when it began coupling attacks on economic inequality with credible threats of rebellion and militant rhetoric critiquing the social order. Its turn to the language of revolution, as opposed to a demand for reform, undermined its credibility.¹²¹ Once-sympathetic governmental officials parted ways with

117. The abortion rights movement, among other movements, also has effectively leveraged court losses to mobilize participants. See Suzanne Staggenburg, *The Survival of the Pro-Choice Movement*, in *THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE* 164, 164-171 (Donald T. Crithlow ed., 1996).

118. See generally BROWN-NAGIN, *supra* note 20, ch. 6, at 133; *id.* ch. 9, at 253.

119. For an excellent scholarly treatment of litigation as a social change tactic, see Michael McCann, *Social Movements and the Mobilization of Law*, in *SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS*, *supra* note 51 at 201, 201-215.

120. See Tomiko Brown-Nagin, *Elites, Social Movements and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005). In this Article I argue that: "Social movements may profitably use rights talk to inspire political mobilization, although with less success than legal mobilization theorists assume. But social movements that make law definitional risk undermining their insurgent role in the political process and thus losing their agenda-setting ability." *Id.*

121. Here, revolution implies a break with a prevailing ideology and institutions, including by violent overthrow of the government or oppressors. For a general description of revolutionary tactics and outcomes, see Lawrence Stone, *Theories of Revolution*, 18 WORLD POL. 159 (1966).

the organization. Its opponents also grew to include other civil rights groups, as well as civic organizations dominated by white liberals.

While it is important for reformers to articulate principles and objectives, dogmatism is rarely an asset for progressives who hope to make a lasting impact on the American body politic.¹²² Movements profit from the kind of ideological heterogeneity and role differentiation that enables some parts of the whole to maintain productive relationships with decision makers and opinion makers.

IV. SCHOOL DESEGREGATION AS AN ENGINE OF SOCIOECONOMIC MOBILITY, 1972-1979

The experiences of Margie Pitts Hames and her clients, mostly black single mothers who sought a pathway out of poverty for their children, make another important point: the stigma of low socioeconomic status, not merely the condition of poverty, impedes efforts by the poor themselves to ameliorate wealth inequality.

A. The Voice of the Forgotten Poor

Ethel Mae Mathews, founder and president of Atlanta chapter of the National Welfare Rights Organization,¹²³ served as the public face of the school desegregation litigation that Margie Hames filed in 1972.¹²⁴ By the time she met Hames, Mathews had long been active in local politics and made a compelling advocate for her cause. After moving to Atlanta from sharecropping in rural Alabama, Hames, a single mother who worked as a housekeeper and lived in public housing, had become a hard-charging veteran of direct-action protests.¹²⁵ Mathews organized protests against the legislature, at welfare offices, and at courthouses against budget cuts that punished low-income people like herself.¹²⁶ Together with her neighbors, Mathews lodged searing critiques of the still unequal world that existed despite passage of landmark civil rights and voting rights legislation. The new laws, they

122. See WILLIAM GAMSON, *THE STRATEGY OF SOCIAL PROTEST* (1975). On the role of violence and rebellion in recent American history, see also *VIOLENCE IN AMERICA: PROTEST, REBELLION AND REFORM* 12-13 (Ted Robert Gurr ed., 1989) (noting that in recent American history “recurring waves of mass violence” have coexisted with “democratic values and stable institutions”).

123. See BROWN-NAGIN, *supra* note 20, at 438.

124. *Id.* at 386, 409.

125. See *id.* at 438.

126. See *id.* at 409-10.

argued, had not actually changed the lives of the urban poor.¹²⁷ Even when they worked on bettering themselves, single mothers faced a profound stigma. “We didn’t trust nobody,” Mathews once explained. “We were just a bunch of welfare mothers, desolated.”¹²⁸ No one, black or white, viewed them as fully human.¹²⁹

Because of these experiences, Mathews and other single mothers fought hard for better lives for their children. The children of the black poor languished in the city’s worst schools, apart from whites, and even from much of the black middle class. The poor women could not know what a racially mixed educational experience might hold for their children, but the women reasoned that it could not be much worse than what they already had—nothing. If their children could attend school with whites, they might be able to work themselves out of poverty.

B. Education Litigation

By the time Margie Hames filed a suit on Mathews’s behalf seeking metropolitan-wide school desegregation, Atlanta’s schools had been officially desegregated for a decade.¹³⁰ Desegregation had only occurred on a token basis, however, for three reasons: 1) white political and legal resistance, which resulted in 2) rapid demographic turnover in the cities, and 3) black middle class indifference to racially mixed schools. Local blacks who had reached the middle class could cite good reasons to prefer increased resources to black schools over school desegregation. Within the segregated system, the children of the black middle class attended the highest quality schools and had little incentive to alter the system. Black teachers, the greatest proportion of the black professional class, feared for their jobs and proved especially resistant to racial change in the school system. Black administrators, also concerned about employment discrimination, sought affirmative action policies to ensure job security.¹³¹ They resented the idea that blacks could not successfully manage their own schools, particularly when some of the nation’s most successful blacks—including Thurgood Marshall—had graduated from precisely such institutions. Hence prominent blacks—including Atlanta’s first

127. *See id.* at 321-22.

128. *Id.*

129. *Id.*

130. *Id.* at 145, 385, 409.

131. *See id.* at 4-6.

African-American mayor, Maynard Jackson; Lonnie King, the president of the local NAACP chapter; and Rev. Andrew Young, Georgia's first black Congressman since Reconstruction—repudiated school desegregation. Instead these luminaries preferred black control of the school system.¹³²

Hence, Hames and her clients fought against the political and legal winds when they sued for metropolitan-wide school desegregation in Atlanta. Hames had mustered evidence of combined housing and school segregation that she thought would permit her to prevail against area school boards.¹³³

Instead, the case precipitated backlash. In court, the men who represented the state made clear their contempt for the plaintiffs. The lawyers focused as much on the status of the women as on the law that controlled the case.¹³⁴ The state's lawyers implied that the women's (single) marital status, large families, lack of education, menial jobs, and meager employment prospects made their children unattractive candidates for integrated schooling.¹³⁵ Dr. Benjamin Mays, president of Morehouse College, a mentor to Dr. King, and one of the most respected black men in America, testified against the women and sealed the lawsuit's fate.¹³⁶

In the end, the courts in a series of decisions issued during the period spanning 1972 through 1979, rejected the women's legal claims. The courts turned to extralegal considerations, in part, to explain why the women would not prevail.¹³⁷ Black control of city government implied adequate representation for all blacks, the court concluded—*notwithstanding the women's claims that middle class blacks did not well represent them.*¹³⁸ The women's bid for intergenerational social mobility failed miserably.

C. Lessons

This unhappy story reveals truths about the status of the poor in our society that few wish to hear. First, these events underscore that *identity mattered*, and therefore, that reform *movements must be adept at managing negative stereotypes*. Lawyers for the state undermined

132. *See id.* at 406.

133. *See id.* at 409-410.

134. *Id.* at 413-417.

135. *Id.* at 413-14.

136. *Id.* at 422-23.

137. *Id.* at 395, 424-26.

138. *Id.* at 407-08, 426.

Hames's legal advocacy by tagging Mathews and her allies "undeserving poor."¹³⁹ Continuing public skepticism and suspicion of the poor continues to impede the ability of low-status groups to gain institutional leverage, including in courts.¹⁴⁰ The choice to use the courtroom as an arena of struggle must be well conceived and well implemented.

Second, *the pariah status of impoverished women also undermined* their ability to garner *effective representation through the political process*. In many ways, Ethel Mae Mathews, a politically active leader in her community, modeled good citizenship. In the wake of the Voting Rights Act passage she expected to wield influence through electoral politics. Mathews and her neighbors found that the vote had not conferred substantive representation, or an ability to achieve policy outcomes consistent with their interest.¹⁴¹ Black members of the school board and other same-race government officials did not support the women's cause. To the contrary, most of these newly elected officials and members of the black middle class shunned these women and pursued their own interests. This lack of social and political capital among the poor is of long standing and continues to limit their ability to vindicate their interests.¹⁴²

Third, the limitations that low-status groups face in the courtroom and through the formal political process show why *protest is critical for socially and politically marginalized groups*. Precisely because they cannot acquire effective representation through the formal political process, they must seek advantage outside of the system. Today, as much as ever, those poorly served through politics must apply pressure tactics that give them voice and the possibility of influence.

139. See MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 1-12 (1989).

140. See Kristina Cooke et al., *The Undeserving Poor*, ATLANTIC, Dec. 20, 2012, available at <http://www.theatlantic.com/business/archive/2012/12/the-undeserving-poor/266507/> (documenting "widespread ambivalence" about government assistance to able-bodied poor); see also Marc Galanter, *Why The "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (classic account describing barriers that prevent the overwhelming majority of the poor from making successful legal claims). For a nuanced recent account that documents anti-poor bias in courts but also argues that this bias is not inevitable, see Daniel Brinks & Varun Gauri, *The Law's Majestic Equality: The Distributive Impact of Litigation Social and Economic Rights* (World Bank Dev. Research Grp., Working Paper No. 5999, 2012).

141. On the disconnect between descriptive and substantive representation of outsider groups in formal politics, see Lani Guinier, "No Two Seats": *The Elusive Quest for Political Equality*, 77 VA. L. REV. 1414 (1991).

142. See Imig, *supra* note 53 at 162 ("The poor lack critical resources that would advance their tendency to act collectively, participate in electoral campaigns, or contribute to political organizations.").

Now that the many lessons that civil rights-era protest can teach, the question then becomes whether modern protest movements have learned them.

V. PROTEST TODAY: OCCUPY WALL STREET

Today, protest movements of varied political orientations and relationships to struggles for racial equality tether themselves to the civil rights movement. In bids for acceptance and political leverage, movements for gay marriage¹⁴³ and for immigration reform,¹⁴⁴ against mass incarceration¹⁴⁵ and affirmative action, invoke the civil rights movement to justify their causes. Most recently, the Arab Spring¹⁴⁶ and the Occupy movement turned to the legacy of the black freedom struggle to gain credibility, visibility, and direction.

The effort of these social causes to tether themselves to the civil rights movement for political advantage makes perfect sense. The storied mid-century struggle for black freedom constitutes perhaps the most impressive example in recent history of citizens successfully achieving wide-scale social change through protest. The history of the movement is inspiring. And, as I have explained above, it offers invaluable lessons about how to organize effectively.

Modern causes logically seek to portray themselves as successors to the civil rights movement, but do they truly appreciate that move-

143. The movement for marriage equality compares the state's requirement of opposite sex marriage to bans on interracial marriage. See generally R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839 (2008); James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93 (1993).

144. Proponents of the Dream Act, legislation that would provide a path to citizenship for undocumented youths who grew up in the United States, gathered in Memphis in 2011 to learn lessons from the civil rights movement. See Daniel Altschuler, *Immigrant Youth Movement Takes a Civil Rights Lesson*, DISSENT MAG. (Jan. 31, 2013, 10:40 AM), <http://www.dissentmagazine.org/blog/immigrant-youth-movement-takes-a-civil-rights-lesson>.

145. The movement against mass incarceration, led by the Stop Mass Incarceration Network, counts the civil disobedience tactics of the movement as its primary tactical weapon. See STOP MASS INCARCERATION NETWORK, <http://www.stopmassincarceration.org/about-us.html> (last visited Jan. 31, 2013) ("It took dramatic mass resistance to rivet the attention of society on the old Jim Crow—racial segregation and the lynch mob terror that enforced it. And it will take the same kind of determined mass resistance to stop the New Jim Crow!").

146. The Arab Spring movements for democracy and against dictatorship in Africa and the Middle East, which began in Tunisia in 2011 and spread to a dozen nations including Egypt, Libya, and Syria invoked the black freedom struggle in its literature. Activists invoked Dr. King's "Montgomery Method" and disseminated via the internet an Arabic language version of a 1958 brochure by the Fellowship of Reconciliation that explained the theory of civil disobedience and outlined practical steps that practitioners of it must take. See Michael Cavanaugh, *Amid Revolution, Arab Cartoonists Draw Attention to Their Cause*, WASH. POST, Mar. 7, 2011, at C01, available at http://voices.washingtonpost.com/comic-riffs/2011/03/arab_cartoons.html.

ment's complexities? And have they really learned some of the many lessons about effective organizing for change outlined in the Article's previous sections?

This part analyzes these questions. It does so by examining the philosophy, structure, and tactics of the Occupy movement. More than any other recent effort, Occupy has taken up the mantle of wealth inequality—the question that emerged as the civil rights movement's most pressing priority during the late 1960s—and that today remains the movement's unfinished business.

A. Back Story

The first step in analyzing Occupy is to determine precisely what Occupy is and whom and what it represents. The Occupy movement began in September 2011 when protesters inspired by the Arab Spring created an encampment in New York.¹⁴⁷ The encampment later settled in New York's Zuccotti Park to bring attention to issues of corporate corruption of government and wealth inequality.¹⁴⁸ Before long, the movement had proliferated across the country and throughout the world. Protesters set up encampments in one hundred cities, including Oakland, Washington, D.C., Denver, and Honolulu.¹⁴⁹ Occupy's encampments could hardly be ignored, and their advent garnered significant reportage in print, electronic, and broadcast media.¹⁵⁰

More recently, media attention to the movement has plummeted. The evaporation of interest in Occupy occurred after police raided its New York encampment on orders from Mayor Michael Bloomberg;¹⁵¹ just two months after its inception, the New York Police Department evicted Occupy from Zuccotti Park.¹⁵² The eviction occurred after authorities raised concerns about filth and congestion in and around the camps, after scattered reports of violence and injuries, and following investigations by federal, state, and local government, including the Federal Bureau of Investigation and the Department of Homeland Se-

147. See *About, OCCUPY WALL STREET*, <http://occupywallst.org/about/> (last visited Feb. 8, 2013).

148. *Id.*

149. See *OCCUPY WALL STREET*, <http://occupywallst.org/> (last visited Feb. 8, 2013).

150. See Colin Moynihan, *Wall Street Protests Continue, With at Least 6 Arrested*, N.Y. TIMES, Sept. 19, 2011, <http://cityroom.blogs.nytimes.com/2011/09/19/wall-street-protests-continue-with-at-least-5-arrested/?ref=occupywallstreet>.

151. *Id.*

152. Andrew Grossman et al., *Wall Street Protesters Evicted from Camp*, WALL. ST. J., Nov. 16, 2011, at A1, available at <http://online.wsj.com/article/SB10001424052970204190504577040563377026378.html>.

curity.¹⁵³ Officials determined that Occupy posed a threat to public safety and might be linked to terrorism.¹⁵⁴ Similar public health and safety concerns precipitated the eviction of Occupy Oakland, Occupy Boston, Occupy Philadelphia, Occupy San Francisco, Occupy D.C., and many other encampments.¹⁵⁵ Evictions occurred, notwithstanding lawyers' filing of restraining orders arguing that the evictions violated Occupy's right to assembly.¹⁵⁶ Following the evictions, most media outlets labeled Occupy moribund and a failure.¹⁵⁷

In reality, Occupy lives on. The movement remains active in several cities and retains a vibrant presence on the internet.¹⁵⁸

And some of its claims of unlawful government harassment and repression may yet be confirmed. In tribunals around the world, lawyers are contesting police officers' treatment of the movement. Last summer a consortium of legal clinics based at Harvard, New York University, Fordham, Stanford, and several other institutions issued a report documenting human rights violations in the government's response to Occupy.¹⁵⁹ Police allegedly violated the protesters' rights of assembly, speech, and petition, engaged in violent raids under cover of night, and conducted pervasive, unjustified surveillance of the over-

153. See Dominique Debucquoy-Dodley, *FBI Considered Occupy Movement Potential Threat, Documents Say*, CNN (Dec. 27, 2012, 5:34 AM), <http://www.cnn.com/2012/12/26/us/fbi-occupy/index.html>.

154. See *id.*; Grossman et al., *supra* note 152.

155. See Grossman et al., *supra* note 152; Jay Lindsay, *Police Clear Occupy Boston Encampment*, WASH. POST, Dec. 10, 2011, at A10, available at http://www.boston.com/news/local/massachusetts/articles/2011/12/10/police_begin_evicting_occupy_boston_protesters_1323515291/; Maggie Fazeli Fard, *Occupy DC Eviction*, WASH. POST (Jan. 30, 2012, 7:09 AM), http://www.washingtonpost.com/blogs/the-buzz/post/occupy-dc-eviction-body-found-in-well-identified-am-buzz/2012/01/30/gIQA5TB7bQ_blog.html; Frederick Kunkle, *One Protester Tazed, Arrested at Occupy D.C.*, WASH. POST (Jan. 29, 2012, 1:30 PM), http://www.washingtonpost.com/blogs/crime-scene/post/one-protester-tazed-arrested-at-occupy-dc/2012/01/29/gIQAxqRKaQ_blog.html.

156. See Grossman et al., *supra* note 152; Chad Bray et al., *Judge Rules Against Occupy Protesters*, WALL ST. J. (Nov. 16, 2011, 6:36 AM), <http://online.wsj.com/article/SB10001424052970204190504577039253668863814.html>.

157. Andrew Ross Sorkin, *Occupy Wall Street: A Frenzy That Fizzled*, N.Y. TIMES, Sept. 18, 2012, at B1, available at <http://dealbook.nytimes.com/2012/09/17/occupy-wall-street-a-frenzy-that-fizzled/>; Jennifer Rubin, Op-Ed., *Occupy Movement Deteriorates*, WASH. POST (Nov. 15, 2011, 8:00 AM), http://www.washingtonpost.com/blogs/right-turn/post/the-left-occupy-what/2011/11/14/gIQAngZHON_blog.html.

158. See OCCUPY WALL STREET, <http://occupywallstreet.net/> (last visited Jan. 15, 2013); See PROTEST & ASSEMBLY RIGHTS PROJECT, SUPPRESSING PROTEST: HUMAN RIGHTS VIOLATIONS IN THE U.S. RESPONSE TO OCCUPY WALL STREET 12 (2012), available at <http://cdn.theatlantic.com/static/mt/assets/politics/Suppressing%20Protest.pdf>. See generally OCCUPY WALL STREET, *supra*.

159. See PROTEST & ASSEMBLY RIGHTS PROJECT, *supra* note 158, at vi.

whelmingly peaceful protesters.¹⁶⁰ Hoping to redress these violations of protesters' rights, the consortium filed complaints about the alleged governmental overreach with the U.S. Department of Justice, the United Nations, and state and local authorities.¹⁶¹ In addition, the New York Civil Liberties Union, the National Lawyers Guild, and several private attorneys filed lawsuits challenging the legality of the police response to Occupy.¹⁶² The presiding judge in one such suit, filed in a U.S. District Court in New York, recently ruled that the plaintiffs had mustered sufficient evidence to keep alive their lawsuit against NYPD officers who arrested 700 protesters during a protest on the Brooklyn Bridge.¹⁶³

The Occupy saga continues, even if the movement at present is relatively quiescent, and this pause in its pace permits some analysis of its nature, functions, and limits.

B. Philosophy, Structure, and Tactics

Some commentators initially characterized the Occupy movement as a modern equivalent of American revolutionaries. One scholar called Occupy's populist attack on corporate greed an: "American tradition since 1776."¹⁶⁴ "Every exchange in the debate would have made good sense—with a little idiomatic translation—to the propertied men who drafted the United States Constitution in Philadelphia in 1787," wrote another.¹⁶⁵

Occupy itself claims decidedly different sources of inspiration and affiliation. The movement does not cite the rhetoric of America's revolutionary generation as foundational texts. Occupy instead counts the Arab Spring as its most immediate progenitor. Like participants in the Arab Spring, those involved in Occupy aspire to build democracy.¹⁶⁶ Occupy's emphasis on democracy does not, in its view, tether

160. *See id.*

161. *See Legal Experts File Complaints About Widespread Rights Violations in Policy of Occupy Movement*, OCCUPY WALL STREET (July 26, 2012, 10:25 AM), <http://occupywallst.org/article/legal-experts-file-complaints-about-widespread-rig/>.

162. *Id.*

163. *See NY Judge Lets Occupy Lawsuit Proceed Against Cops*, ASSOCIATED PRESS, June 7, 2012, 8:05 PM, available at http://www.cbsnews.com/8301-201_162-57449334/ny-judge-lets-occupy-lawsuit-proceed-against-cops/.

164. *See* Jonathan Zimmerman, Op-Ed., *Occupy Wall Street: An American Tradition Since 1776*, CHRISTIAN SCI. MONITOR (Oct. 5, 2011), <http://www.csmonitor.com/Commentary/Opinion/2011/1005/Occupy-Wall-Street-an-American-tradition-since-1776>.

165. Jedediah Purdy, *Observations from Occupy Wall Street*, FIELDWORK (Oct. 23, 2011, 8:44 AM), <http://jedfieldwork.blogspot.com/2011/10/observations-from-occupy-wall-street.html>.

166. *See generally* OCCUPY WALL STREET, *supra* note 158.

it to America's foundational creed or lend legitimacy to the present American socio-political order. Contrary to the nation's creation myth, America's Founding Fathers did not conceive this country as a democracy, insists David Graeber, Occupy's intellectual father; this country began as a republic, a political formation meant to tame the perceived excesses of direct democracy.¹⁶⁷ Later generations of Americans embraced the rhetoric and practices of true (direct) democracy, asserts Graeber.¹⁶⁸ Over time even the weak commitment to direct democracy that developed in the United States has been corrupted.¹⁶⁹

Occupy's roots lie not in American-style democracy but in anarchism. The movement embraces the absolute freedom of individual and decentralized decision making, and it is opposed to statism and government rule.¹⁷⁰ Occupy does not appear to advocate all of the teachings of anarchism, as classically understood, however, including the one for which anarchists are best known: violent overthrow of government.¹⁷¹ Anarchism's heyday occurred in the late nineteenth and early twentieth century, during revolutions in Russia and Spain, and in the United States, all places where anarchists overthrew or attempted to overthrow governments.¹⁷² Occupy also cites more recent historical antecedents. The New Left movements of the 1960s, including the counter-culture, the peace, and the Green movements, all embraced anarchist principles, Graeber approvingly notes.¹⁷³ He also associates Occupy's form of anarchism with the "global justice movement" of the 1990s, designed to impede the World Trade Organization.¹⁷⁴ While Occupy's roots lie in these 1960s and 1990s movements, Graeber counts a particular anarchist society as its closest and most authentic model. The Betafo community in Madagascar, admired for

167. David Graeber, *Occupy Wall Street's Anarchist Roots*, OCCUPY WALL STREET (Apr. 30, 2012, 6:28 AM), <http://occupywallst.org/article/occupy-wall-streets-anarchist-roots/> ("The result [of the American founding] was a republic—modelled not on Athens, but on Rome. It only came to be redefined as a 'democracy' in the early 19th century because ordinary Americans had very different views, and persistently tended to vote—those who were allowed to vote—for candidates who called themselves 'democrats'").

168. *Id.*

169. *Id.*

170. See PETER MARSHALL, DEMANDING THE IMPOSSIBLE: A HISTORY OF ANARCHISM 3 (2010).

171. *Id.* at ix.

172. *Id.* at 5-8.

173. *Id.* at 5-6.

174. See Graeber, *supra* note 167.

its practice of “consensus-based” and non-hierarchical decision making, created what is, for Graeber, an ideal society.¹⁷⁵

The Betafo example suggests that Graeber’s understanding of anarchism is different from—and much more benign than—anarchism as historically practiced and understood. Graeber defines anarchism loosely—those who “wish to see human relations that would not have to be backed up by armies, prisons and police.”¹⁷⁶ He also connects the political philosophy with notions of equality. “Anarchism envisions a society based on equality and solidarity, which could exist solely on the free consent of participants,” Graeber insists.¹⁷⁷ And anarchists do not necessarily view violence as an effective tactic.¹⁷⁸ In short, Occupy seeks to make anarchism more relevant to our current time and place.

In practice, Occupy’s anarchism coalesced into a leaderless resistance movement.¹⁷⁹ Decisions are made through “peoples’ assemblies,” mediums for direct and participatory democracy.¹⁸⁰ In these assemblies participants engage in sustained dialogue to find solutions to issues presented.¹⁸¹

Even within this informal structure, some local Occupy affiliates took a commanding role in the movement, articulating guiding principles. The Declaration of the Occupation of New York City declares that the highly diverse group is united as the “99%” and in objection to the greed and corruption of the 1%.¹⁸² The Declaration also enumerates the movement’s grievances¹⁸³ and explains that the foremost

175. See Dan Berrett, *Intellectual Roots of Wall St. Protest Lie in Academe*, CHRON. HIGHER EDUC., Oct. 16, 2011, available at <http://chronicle.com/article/Intellectual-Roots-of-Wall/129428/>. In November of 2011, a self-proclaimed “anarchist” and anti-authoritarian element in Occupy called on others to join it in solidarity. See Alison Barnwell, *About 100 People Meet for ‘Anarchist General Assembly’ in Preparation for Occupy Portland Eviction*, OREGONIAN (Nov. 12, 2011, 10:04 PM), http://www.oregonlive.com/portland/index.ssf/2011/11/about_100_people_meet_for_anar.html.

176. *Id.*

177. *Id.*

178. *See id.*

179. See NYC GEN. ASSEMBLY, *Declaration of the Occupation of New York City*, OCCUPY WALL STREET, <http://occupywallstreet.net/learn> (last visited Jan. 15, 2013) [hereinafter Occupy Wall Street Declaration] (“Occupy Wall Street is a peoples movement. It is leaderless and partyless by design. It is not a business, a political party, an advertising campaign or a brand. It is not for sale.”).

180. *See About*, <http://occupywallst.org/about/> (last visited Feb. 14, 2013).

181. *See id.*

182. *See* OCCUPY WALL STREET, *supra* note 158.

183. *See* NYC GEN. ASSEMBLY, *DECLARATION OF THE OCCUPATION OF NEW YORK CITY* (2011), available at <http://www.nycga.net/resources/documents/declaration/> [hereinafter Occupy Wall Street Declaration].

objection of the 99% is to corporations' prioritizing of "profit over people, self-interest over justice, and oppression over equality"¹⁸⁴ The chief aim of Occupy is to establish a sustainable and equitable economy that works for the 99% of Americans.¹⁸⁵ It also believes that everyone has the right to "occupy space safely."¹⁸⁶

However, with one exception, the movement has not developed any plan or policy proposals to achieve these aims. To do so would be inimical to Occupy's anarchist philosophy and its claim that America is an illegitimate, corrupt state¹⁸⁷ (the exception occurred when "Occupy the SEC" produced a 325-page letter to the Securities and Exchange Commission in support of the Volcker Rule, legislation that would prevent consumer banks from engaging in risky trades of the type that animated the subprime mortgage crisis).¹⁸⁸

Nevertheless, Occupy has identified key concerns that might be addressed through policy: mortgage fraud, illegal foreclosures, rule of government by monied interests, taxpayer bailouts of banks, crushing student loan debt, and the proliferation of weapons of mass destruction.¹⁸⁹

Occupy's main tactical innovation has been as its name suggests, the occupation of public space—a kind of taking of property. As explained above, Occupy established living quarters in encampments throughout the country. Until they faced eviction, members of Occupy ate, slept, conducted meetings, and engaged all other life activities in these open encampments. The occupations all operated autonomously.¹⁹⁰

In addition, Occupy harnessed the power of social media to attract attention, to disseminate information, and to encourage organizing and "direct action."¹⁹¹ Protesters affiliated with Occupy staged numerous marches and "flash" demonstrations to air their griev-

184. *Id.*

185. *See id.*

186. *Id.*

187. *See* OCCUPY WALL STREET, *supra* note 158 ("We do not have one or two simple demands, though many demand them of us. Why? Because we believe that making demands of a corrupt system makes our success contingent on the will of others. It legitimizes the corrupted, it disempowers us.").

188. *See* PROTEST & ASSEMBLY RIGHTS PROJECT, *supra* note 158, at 13.

189. *See* Occupy Wall Street Declaration, *supra* note 183.

190. *See What is the Difference Between Occupy Wall Street and the occupiers in other cities?*, OCCUPY WALL STREET, <http://occupywallstreet.net/learn> (last visited Jan. 15, 2013).

191. *See What are you protesting?*, OCCUPY WALL STREET, <http://occupywallstreet.net/learn> (last visited Jan. 15, 2013) ("Get your city to transfer its money out of corrupting banks. Sing at the auctioneer until they cancel the illegal foreclosures. Join groups writing letters to the SEC

ances.¹⁹² The U.S. Supreme Court's *Citizens United*¹⁹³ decision has served as a rallying point at some of these demonstrations; the case permitted unlimited corporate funding of elections,¹⁹⁴ and, for Occupy, facilitates the corruption of American institutions.¹⁹⁵ Rather than protecting the interests of the average American citizen, our vaunted institutions instead promote the perversion of the democracy.

C. Analysis

In addition to the inspirations described above, Occupy's David Graeber links the current protest against economic injustice to civil rights-era protest movements. In his view, Occupy's anarchist teachings and tactics are similar to, if not precisely the same as, the methods employed by 1960s civil rights activists.¹⁹⁷ Occupy's emphasis on participatory democracy, its decision making through consensus, and its use of direct action and alternative media to advance its cause, are all consistent with civil rights era protests.¹⁹⁸ So is Occupy's attack on wealth inequality.

But there are numerous ways in which Occupy and the civil rights-era protests diverge. The following analysis discusses some of those differences and associated costs.

1. Socio-Legal Framework and Rhetoric

Occupy's anarchist leanings distinguish it from civil rights-era protestors. Contrary to Graeber's assertion, the civil rights movement's embrace of participatory democracy and direct action never amounted to an endorsement of anarchism.¹⁹⁹ The movement as-

exposing the Corporations' lies they use to beg for mercy for their crimes. Teach shareholders the power of shareholder activism. Don't just protest. Take action. Direct action.").

192. See Michael Greenberg, *What Future for Occupy Wall Street?*, N.Y. REV. BOOKS (Feb. 9, 2012), available at <http://www.nybooks.com/articles/archives/2012/feb/09/what-future-occupy-wall-street/?pagination=false>; see also PROTEST & ASSEMBLY RIGHTS PROJECT, *supra* note 158, at 8-11 (stating that Occupy participants held frequent demonstrations and marches in the weeks following the start of the protests).

193. *Citizens United v. Fed. Elections Comm'n*, 130 S. Ct. 876 (2010).

194. *Id.* at 913. For a discussion of the decision and its implications, see Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243 (2010).

195. PROTEST & ASSEMBLY RIGHTS PROJECT, *supra* note 158, at 12.

196. See, e.g., *id.* (mentioning a targeted protest gathering that was held to mark the anniversary of the *Citizens United* decision).

197. See Graeber, *supra* note 167.

198. See generally BROWN-NAGIN, *supra* note 20 (chronicling the history of the civil rights movement in Atlanta from the end of World War II to 1980).

199. This claim is made in Michael Kazin, *Anarchism Now: Occupy Wall Street Revives an Ideology*, NEW REPUBLIC, Nov. 7, 2011, available at <http://www.newrepublic.com/article/politics/>

serted itself using collective action, but most of its demands could be met within the framework of liberal individualism. Activists sought to reform the American state by exploiting the gap between America's ideals and its reality: the movement demanded that the country practice its own ideals. Major movement actors clothed themselves in the flag and in patriotism; they articulated the movement's guiding principles in ways that cohered with America's core principles, as enunciated in founding legal texts.²⁰⁰ Precisely because the movement's pleas for equality tracked familiar elements of the national creed, its quest for rights prevailed.

To be sure, some elements of the civil rights movement, including some concerned with wealth disparities, found inspiration in global ideologies, including Marxism.²⁰¹ Notably, however, the movement lost credibility and encountered repression when adherents attacked inequality by turning to Marxist theories and rhetoric.²⁰² SNCC, which had been the leading edge of the movement—its shock troops—rapidly declined under the weight of the backlash.

Occupy's embrace of anarchism also occurs at a cost to its credibility, and, as we have seen, encouraged the perception that Occupy posed a threat to law and order, and invited and resulted in repression. Occupy may mean merely to embrace self-governance and freedom by aligning itself with anarchy. But the word "anarchism" includes much darker connotations. Therein is the problem for Occupy: anarchism, legitimately or not, invokes deeply negative, even terrifying, associations. Anarchy implies violence, and anarchists summon images of bomb throwers who induce fear and seek to destroy society, including innocents. It is not surprising, given these associations, that Occupy's quest for equality using this rhetoric has subjected it to ridicule and de-legitimization.

In embracing such a threatening ideology, Occupy violates a cardinal rule: the socio-legal framework of a reform movement's protest must be accessible to the public, and people must be able to relate to

97114/anarchy-occupy-wall-street-throwback. Authorities on the era locate the movement's socio-legal foundations elsewhere, including in Judeo-Christian teachings, liberal-legal individualism, and traditions of self-help. *See, e.g.,* CARSON, *supra* note 51, at 21. *See generally* BROWN-NAGIN, *supra* note 20 (exploring the different ideologies that spurred activists during Atlanta's civil rights movement).

200. This strategy worked particularly well in a Cold War context; advocates argued that America's failure to live up to its creed of equality made it no better than its enemies, the Communists. *See* MARY DUDZIAK, *COLD WAR CIVIL RIGHTS* 1 (2000).

201. *See* CARSON, *supra* note 51, at 16, 94, 101, 265-86, 276-78.

202. *Id.* at 276-78.

it. Symbols and rhetoric should be calibrated to the historical moment and to the prevailing political economy. In this moment, concerns about domestic and international terrorism and civic unrest, animated by real geopolitical dangers, have fueled push back against all sorts of non-conformist individuals and groups. Occupy is no exception.²⁰³

This is not to suggest that Occupy has, or is, engaging in actions that, in reality, are outside of the American experience. The point here is that the rhetoric with which Occupy (or any other movement) associates itself is significant. Framing is, if not everything, critically important.²⁰⁴ It can give a movement momentum, or, as in Occupy's case, inhibit political traction.

Therefore, the negative associations that Occupy's anarchist leanings invoke logically must be balanced against the benefits associated with anarchism. The advantages of the anarchist association are not, in this case, entirely clear. For the definition of anarchism to which Occupy subscribes is not especially rigorous. Occupy could adopt virtually the same structure, tactics and aims without declaring itself "anarchist." Its brilliant slogan—"We are the 99%"—its grievance against corporate greed and perverted government, its direct action tactics and creative use of social media, could stand more effectively on their own. Or Occupy could simply assert its commitment to "civil disobedience," an association that would engender positive associations in the lion's share of the population.

2. Relationship to the State and Influential Elites

To be sure, for Occupy, the allegiance to anarchism is significant; it conveys something unique about the group. The terminology bespeaks Occupy's renunciation of the state, its disavowal of a corrupt government. The value of such an absolute position is obvious.

Nevertheless, Occupy's absolutism not only separates it from the civil rights movement but also limits its ability to directly participate in the process of change making through policy and law, as distinguished from cultural or social change. As indicated above, *alliances across differences*—including with government officials and other elites—can be profitable if thoughtfully engaged.

203. See, e.g., Debucquoy-Dodley, *supra* note 153 (stating that the FBI extensively monitored the Occupy Wall Street movement fearing that a rogue citizen would exploit the movement to air general dissatisfaction with the government).

204. See THE SOCIAL MOVEMENTS READER, *supra* note 51, at 52.

One solution to this conundrum might be for the movement to consider compromise: it need not embrace an all-or-nothing position. Occupy might profit if at least some components of the movement adopted a less absolutist position or at least highlighted continuities with, rather than cleavages in its relationship to the American creation myth.

The advantage of this proposition is clear if we again consider dynamics in the black freedom struggle and lessons that it can teach. Within the civil rights movement some embraced the “malignant kinship” that I have argued was critical to Dr. King’s ability to achieve some of his goals. At the same time that King embraced the politics of pragmatism, other elements of the movement tacked far left; they turned to the language of revolution and socialism to make a case for a more just society. Still, other elements in the movement tacked right; they disavowed the need for federal intervention to redress black inequality. These individuals preferred self-help and community building as means of achieving and sustaining change to the interference of outsiders. Heterogeneity in the movement created the opportunity structure in which the movement as a whole achieved change through policy and law.²⁰⁵ Given discord in the movement, decision makers at the national and state level sought a compromise solution, one at the midpoint of the right and left flanks of the movement. Congress enacted the landmark civil rights legislation of the 1960s—which not only benefited blacks but also advanced the interests of women and ethnic and religious minorities—within precisely such a socio-political environment.

Should elements of Occupy embrace a less absolutist position on government, the movement might also usefully form alliances with influential elites who can advance its cause without undermining its goals.²⁰⁶ During the civil rights era, even the most radical activists found that lawyers are indispensable to protest movements. Counsel can provide representation to individuals who find themselves en-

205. See BROWN-NAGIN, *supra* note 20 at 135-36 (arguing that disagreements within the civil rights movement over tactics and strategy facilitated evolutions that brought about policy objectives shared by all).

206. See, e.g., Verta Taylor, *The Continuity of the American Women’s Movement: An Elite-Sustained Stage*, in WOMEN AND SOCIAL PROTEST 277, 277-78 (Guida West & Rhoda Lois Blumberg eds., 1990) (contradicting claims that the women’s movement occurred in two waves by focusing on ways that elite women sustained struggle during the 1940s and 1950s).

snared by the apparatus of the state because of their activism.²⁰⁷ Similarly, alliances with journalists, who can provide a balanced account of developments and spread the movement's narrative, are crucial. Lawyers also can serve as investigators who aid social movements by providing neutral accounts of contested developments and by filing complaints that dispute official versions of events adverse to the movement.²⁰⁸

To the extent that Occupy gains interest in policy proposals or in making change through law, alliances with attorneys will also be critical, as the movement's most radical elements learned. Because a lawyer who undertakes representation of a client pledges to represent the client zealously, to maintain his secrets, and to advocate his client even against state authority, collaboration with a lawyer does not necessarily undermine a movement's criticisms of the government. In fact, the beauty of legal advocacy is that an attorney can at once participate in official proceedings of government and function as an antagonist of the state and its laws.

3. Tactics

Another observation about convergences and divergences between Occupy and civil rights era protesters relates to tactics. Occupy has employed an impressive array of tactics to highlight its agenda. Many replicate some of the most effective tactics of civil rights-era protests. However, Occupy's most prominent tactic, its formation of encampments, did not reflect an effective social movement choice, as history might have foretold.

The encampment tactic violated another important rule: by their nature, protest movements are spontaneous, unpredictable, and must be dynamic rather than immobile. Literally and figuratively, social movements *move*.

Several examples underscore the point. In 1968, after Dr. King's death, SCLC set up an encampment of "poor people" in Washington, D.C.²⁰⁹ The encampment suffered for much the same reasons that Occupy precipitated criticism and eventually faced eviction: concerns

207. See generally BROWN-NAGIN, *supra* note 20 (discussing the integral role lawyers played in Atlanta's civil rights movement).

208. Several legal clinics served in this capacity by investigating the police response to Occupy. See, e.g., PROTEST & ASSEMBLY RIGHTS PROJECT, *supra* note 158, at i ("[T]he *Protest and Assembly Rights Project* . . . investigated the United States response to Occupy Wall Street in light of the government's international legal obligations.").

209. See JACKSON, *supra* note 12, at 354.

about public health and safety and a perception that the Poor People's Campaign lacked direction. The encampment departed Washington after it did not achieve concessions from President Johnson.²¹⁰ Activists came to deeply regret the encampment.²¹¹ More than four decades earlier, in 1932, a "Bonus Army," an assemblage of destitute veterans, thousands strong and from all over the country, established an encampment in Washington, D.C. to demand payment for services or jobs.²¹² Governmental authorities—led by Douglas McArthur, George S. Patton, and Dwight D. Eisenhower, men remembered today as great generals—used tanks to evict the veterans.²¹³

Encampments proved so ineffective in part because the groupings triggered negative stereotypes about the poor. The immobility and takeover of property by these encampments reinforced the social marginalization and stigmatization of the groups that participated in the efforts. Members of encampments highly visible as they sat around in tents or milled about in search of food and water appeared socially irresponsible and unproductive.²¹⁴ Unfair as this viewpoint about the poor or their advocates is, it remains a perspective about the disadvantaged that is widespread. If protest movements are to be effective, negative stereotypes must be managed; as SNCC and the women of the welfare rights movement learned through defeat, images matter almost as much as substance.

D. Achievements

These observations notwithstanding, I disagree with the hurried journalist conclusion that Occupy "failed." However Occupy ultimately is judged by history, it deserves credit for bringing citizens together and for inciting public debate about economic inequality and economic exploitation, including by banks and lenders. After Occupy's advent, public opinion polls showed broad support for the movement and deep concern about the problem of stifled economic opportunity that it highlighted.²¹⁵ In a Gallup poll conducted two

210. *See id.* at 355-56.

211. *Id.* at 354.

212. *See* PAUL DICKSON & THOMAS B. ALLEN, *THE BONUS ARMY: AN AMERICAN EPIC* 1 (2004).

213. *See id.* at 6.

214. *See, e.g., id.* at 5 ("Some people saw them simply as men of the Great Depression, homeless, hopeless, and looking for cash."); *see also* JACKSON, *supra* note 12, at 355 (noting that government officials characterized the marchers as a "mob"); *id.*, at 354 (stating that the media viewed the communities as "slums").

215. *See* PROTEST & ASSEMBLY RIGHTS PROJECT, *supra* note 158, at 14.

weeks after the movement began, 44 percent of Americans reported feeling that the economic system is personally unfair, and 54 percent of Americans viewed the protests favorably.²¹⁶ Journalists published appreciably more stories about wealth inequality.²¹⁷ Even the President of the United States seemed to endorse Occupy's critique of the system. He called the "breathtaking greed of a few" unacceptable and argued that "fairness" to the economic system was the "defining issue of our time."²¹⁸

These developments and others indicated that Occupy raised *social consciousness*²¹⁹ about inequality and stimulated *cultural change*.²²⁰ Such socio-cultural changes lay the groundwork for changes in policy and law. In this, Occupy has managed a significant feat: in just a few months impassioned individuals organized and, in so doing, altered perspectives and created a foundation upon which others can build.

CONCLUSION

Class-based critiques of the social order are not, as some claim,²²¹ aberrant in United States history. This Article has refuted that claim, first, by examining challenges to wealth inequality in the civil rights movement. During that era, this Article has shown, figures ranging from Dr. King, to student activists, to lawyers Howard Moore, Jr., and Margie Pitts Hames, all addressed economic injustice. The collaborations between lawyers and communities are especially significant. They belie the categorical assertion in some scholarship that civil rights lawyering depoliticized the movement and crowded out economic conceptions of equality. These examples also teach that critics of wealth inequality need not disavow the state and avoid the courts to advance their agendas. Movements that effectively organize can

216. See Greenberg, *supra* note 192.

217. See PROTEST & ASSEMBLY RIGHTS PROJECT, *supra* note 158, at 14.

218. See Greenberg, *supra* note 192.

219. On consciousness raising in social movements and as an element of social change, see FRANCESCA POLLETTA, FREEDOM IS AN ENDLESS MEETING 114, 160, 164, 166, 168, 171, 188, 222-23 (2002).

220. On the importance of cultural change in movements, see generally JAMES M. JASPER, THE ART OF MORAL PROTEST 69-99 (1997).

221. See, e.g., Corbett B. Daly, *Santorum Says There Are No Classes in the United States*, CBS NEWS (Jan. 8, 2012, 12:14 AM), http://www.cbsnews.com/8301-503544_162-57354598-503544/santorum-says-there-are-no-classes-in-the-united-states/ ("Former Pennsylvania Sen. says the United States does not have any classes and Republicans should stop using the term 'middle class' because it only helps President Obama drive a wedge among the Republicans looking to unseat him.").

gain advantage in the courts, through the legislature, and through political protest.

This foregoing Article outlined many lessons current and future protest efforts that seek to leverage the civil rights movement for change may wish to consider. Protest movements can gain by embracing: a socio-legal narrative framework that is accessible and attractive to the public; protests with purpose; pragmatic political coalitions compromise; and scaling down. In addition, I observed that reform can be achieved through strategic management of crisis. Community organizing can be effective if reformers deploy the human capital and resources necessary to make the time-consuming endeavor worthwhile. Litigation can be effective, too, and not because courts can define and confer affirmative rights upon those who seek change. Legal constructs—equality, liberty, due process—can serve as sources of inspiration to movements; legal setbacks can aid political mobilization. Identity always matters in court; stereotypes, which inevitably will be deployed against the poor, must be managed, especially if reformers hope to avenge rights in court. Sympathetic lawyers are critical to defending a movement under assault and helping devise creative arguments about law and organizing tactics.

Breaking with current wisdom, this Article also cautioned that class-oriented campaigns for equity are not necessarily easier to wage than race-based campaigns for social justice. Each approach is limited in its own way, and each has advantages. Whatever mode of advocacy a reform movement adopts, it is unlikely to be well-served by dogmatism that alienates potential allies. Collaboration is essential. And success is relative.

The most critical insight that both civil-rights era activism and the short history of Occupy teaches is that protest is necessary, and, if well-conceived and thoughtfully-executed, it *can* work. For women and men who cannot otherwise garner influence in the political process and those whose interests are not effectively represented, advocacy outside of formal channels is essential.

Today, as ever, John Lewis's statement at the 1963 March on Washington is relevant. Americans who seek change, he said, must "[g]et in and stay in the streets of every city, every village and every

hamlet of this nation until true freedom comes, until the revolution of 1776 is complete.”²²²

222. John Lewis, Speech at the March on Washington (Aug. 28, 1963), *available at* <http://voicesofdemocracy.umd.edu/lewis-speech-at-the-march-on-washington-speech-text/>.

Free Speech, Fair Elections, and Campaign Finance Laws: Can They Co-Exist?

JOEL M. GORA*

I. TWO GREAT LAWYERS	763
II. OLD WINE IN NEW BOTTLES	767
III. ARE FREE SPEECH AND FAIR ELECTIONS AT ODDS?	769
IV. A WORD ABOUT SUPER PACS	774
V. ELECTORAL SPEECH MUST BE “UNINHIBITED, ROBUST, AND WIDE-OPEN”	780
VI. “ANOTHER SUCH VICTORY AND I AM UNDONE.”	787
VII. WHAT IS TO BE DONE?	790
A. Limits	795
B. Disclosure	797
C. Public Financing	798
CONCLUSION	800

I. TWO GREAT LAWYERS

As a constitutional law professor, it is a privilege to have an article appear in the Wiley A. Branton Symposium at an institution that has played such a central role in the development of constitutional law and the advancement of civil rights in America.

Participating in this Symposium is also special to me for personal reasons. My first legal boss was one of the most distinguished graduates of Howard University School of Law and a key player in the

* Professor of Law, Brooklyn Law School. I want to thank Dean Nick Allard, Associate Dean Michael Cahill, and the Brooklyn Law School Dean’s Summer Research Stipend Program for supporting the work on this Article. I should also note that as an ACLU lawyer I helped challenge the campaign finance restrictions and requirements at issue in many of the cases discussed in this article, most notably, *Buckley v. Valeo*, 424 U.S. 1 (1976).

constitutional revolution that so many of its professors and graduates helped to bring about. His name was Robert L. Carter, and he was the General Counsel of the National Association for the Advancement of Colored People (NAACP). My second legal boss is a key participant in this Symposium, Congresswoman Eleanor Holmes Norton, for whom I had the pleasure and privilege of working at the American Civil Liberties Union (ACLU). From both of those great lawyers and leaders, I learned important lessons about principles that bear on the issues of free speech, fair elections, and campaign finance law.

I worked for Robert Carter when I was a first year summer law student intern at the NAACP. He was one of the legal masterminds for the *Brown v. Board of Education*¹ desegregation revolution and was also a key lawyer who protected the NAACP's rights to organize and lead that revolution. He went on to a long and distinguished career on the federal bench in New York after serving the cause of civil rights so ably at the NAACP.²

In researching this article, I came across a tribute to Judge Carter at the time of his death a year ago. It is from the First Amendment Center. Here's what they said about his career:

Many will mourn this week's passing of Robert L. Carter, a former U.S. district judge in New York and a pioneering attorney who fought for the cause of racial equality during his long career. Carter, 94, also made great contributions to First Amendment jurisprudence, arguing numerous cases before the U.S. Supreme Court while an attorney for the National Association for the Advancement of Colored People.

Carter cared deeply about the First Amendment and saw it as an essential tool for the advancement of equality. Carter noted in his book, *A Matter of Law: A Memoir of Struggle in the Cause of Equal Rights*, that he wrote his thesis at Columbia Law School (where he earned a master's in law in 1941) "on the essentiality of the First Amendment for the preservation of a democratic society."

Carter later used this thesis when developing arguments before the Supreme Court, including *N.A.A.C.P. v. Alabama* (1958), in which

1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

2. Judge Carter served on the United States District Court for the Southern District of New York from 1972 until his death in 2012, serving in senior status from 1986. See Roy Reed, *Robert L. Carter, an Architect of School Desegregation, Dies at 94*, N.Y. TIMES, Jan. 3, 2012, http://www.nytimes.com/2012/01/04/nyregion/robert-l-carter-judge-and-desegregation-strategist-dies-at-94.html?pagewanted=all&_r=0.

he successfully argued that the First Amendment protected the free-association rights of rank-and-file members of the NAACP from having their names disclosed to Alabama state officials bent on using that information for negative purposes.

Carter's thesis became his life's work as an attorney. [As one scholar put it:] "In the eight First Amendment cases he argued before the Court between 1958 and 1965, Robert Carter had constructed a bridge between the liberty principle of the First Amendment and the equality principle of the Fourteenth Amendment."

The First Amendment served as an essential tool during the civil rights movement. The late, great Robert L. Carter should be praised and remembered for his mastery in using that tool to carve out a better society.³

And that, in a nutshell, is one of the key points of my article: free speech and equal rights are allies, not adversaries. Civil liberties and civil rights are inextricably intertwined. You cannot have one without the other. The values they serve are not in tension, but in harmony. Sometimes with all of the scary headlines during the 2012 elections about high-spending so-called "super pacs," and secretive non-profits who used so-called "dark money" to "pollute" our politics and "steal" our elections, it is easy to forget the lessons that Judge Carter devoted his life to helping us learn. Many today insist that the *quantity* of our political speech is too high and the *quality* of it is too low, and that the government should step in and fix both problems by limiting the amount of money that people and groups can spend on politics. The less that can be spent the less that will be spent on bad "negative" speech, or so the argument goes. My main point is that the invitation to have government control the quantity and quality of our political

3. David L. Hudson, Jr., *Remembering Civil Rights Legal Pioneer, Friend of the First Amendment*, FIRST AMENDMENT CENTER (Jan. 5, 2012), <http://www.firstamendmentcenter.org/remembering-civil-rights-legal-pioneer-friend-of-the-first-amendment>. Among the landmark First Amendment cases that Judge Carter handled while an NAACP lawyer were, most significantly, *NAACP v. Alabama*, 357 U.S. 449 (1958), which was the magna carta for the right of associational privacy and of controversial cause organizations—in that case a non-profit corporation—to shield the identity of their members and protect them from harm and harassment for their affiliation; *Shelton v. Tucker*, 364 U.S. 479 (1960), which recognized a First Amendment right of public employees not to have to reveal indiscriminately all groups to which they belonged; *NAACP v. Button*, 371 U.S. 415 (1963), which upheld the right of organizations to use litigation as an advocacy tool and solicit lawsuits for that end and *Gibson v. Florida Legislative Investigating Committee*, 372 U.S. 539 (1963), which protected the NAACP and other advocacy groups from indiscriminate investigations into their activities in the claimed search for subversive influence in civil rights groups.

speech is a grave threat to liberty *and* equality and, therefore to democracy. And I would hope that Judge Carter would have agreed.

I learned another vital principle about the relationship of free speech and civil rights from Congresswoman Eleanor Holmes Norton. The principle is that First Amendment rights have to be *indivisible* and *universal*. If they are allowed to be taken away from one person or group, then the government is invited to take them away from other persons and groups until there are no rights left.⁴ During her service as a top lawyer for the ACLU, her career famously embodied that wisdom. Although she handled a wide variety of civil rights and free speech cases and was a champion in the cause of equal rights, she received a good deal of notoriety when she represented individuals and groups with whose ideas about civil rights she was in total disagreement, but whose rights to express those ideas she supported in full. So, she represented the segregationist Alabama Governor, George C. Wallace, when, in 1968, while running for President, he was denied the right to hold a campaign rally at Shea Stadium in New York City.⁵ And she represented a Maryland white supremacist group when they were denied a permit to hold a parade by defending their rights all the way to the Supreme Court of the United States.⁶ In both cases the government was concerned that the controversial ideas would cause trouble, perhaps violence. But Eleanor Norton understood that the gravest danger to law and order was allowing the government to suppress controversial groups and views that it found threatening. She so well understood, as the late Justice Oliver Wendell Holmes famously put it, “if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”⁷ In protecting freedom

4. That philosophy was exemplified in ACLU literature of the time by the following quote attributed to Pastor Martin Niemoller, a German anti-Nazi theologian:

First they came for the socialists, and I did not speak out because I was not a socialist.

Then they came for the trade unionists, and I did not speak out because I was not a trade unionist.

Then they came for the Jews, and I did not speak out because I was not a Jew.

Then they came for me, and there was no one left to speak for me.

Militia Movement Controversy Affords Baldwin Opportunity to Teach Important History Lesson, BOBMcCARTY.COM (Mar. 20, 2009), <http://bobmccarty.com/tag/martin-niemoller-foundation/>.

5. See *A Conversation with Eleanor Holmes Norton*, D.C. BAR (1997), http://www.dcbar.org/for_lawyers/resources/legends_in_the_law/norton.cfm.

6. See *Carroll v. President of Princess Anne Cnty.*, 393 U.S. 175, 176-77 (1968).

7. *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J. dissenting).

for thoughts that she personally may have hated, she established protection for the thoughts, speech, and actions in which she believed. By defending the free speech rights of those who would take away civil rights, she safeguarded the rights of civil rights activists to exercise their own free speech rights.

II. OLD WINE IN NEW BOTTLES

Turning to how these principles impact today's election issues, it is helpful to recall that the prominent politician, former House Democratic Majority Leader, Richard Gephardt, once observed that, "[w]hat we have is two important values in conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. You can't have both."⁸ In my opinion, based on the teachings of Robert Carter and Eleanor Norton, Richard Gephardt had it precisely backwards. In fact, you cannot have one without the other.

Over forty years ago, the ACLU realized that there was a clash between campaign finance laws and First Amendment rights when the government used those laws against a handful of dissenters who ran an ad in the *New York Times* criticizing the President of the United States, Richard Nixon.⁹ No view of the First Amendment or democratic values or equality could possibly justify sending someone to jail for running that ad, regardless of who sponsored it, or when it ran, or how much it cost, or how it was funded. In more recent years, the government passed the McCain-Feingold Law, which made it a crime for the ACLU or the NAACP to broadcast an ad criticizing the President of the United States during an election season.¹⁰ In the *Citizens United* case,¹¹ a right-wing group that funded an anti-Hillary Clinton movie—a movie—ran afoul of the campaign finance laws.¹² Why

8. Nancy Gibbs, *The Wake Up Call: Clinton Makes Serious Noises About Campaign Reform, but that May Not Be Enough to Change a Cozy System that Loves Special-Interest Money*, TIME, Feb. 3, 1997, at 25, available at <http://www.cnn.com/ALLPOLITICS/1996/analysis/time/9702/03/gibbs.html>.

9. See *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); see also *ACLU v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), vacated as moot *sub nom.*, *Staats v. ACLU*, 422 U.S. 1030 (1975).

10. The statute is the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 166 Stat. 81, the key provisions of which were upheld in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 188-89 (2003), over the objection of some of the major organizations in America, such as the U.S. Chamber of Commerce, the AFL-CIO, the NRA, and the ACLU.

11. See generally *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (holding that the First Amendment prohibited the government from restricting independent political expenditures by corporations and unions).

12. *Id.*

would we want to put government in charge of political speech in that manner?

When I first started working on these issues, we were only trying to protect the free speech rights of groups like the ACLU and the NAACP to run ads criticizing the President of the United States in an election year despite the campaign finance laws. That was classic, old-fashioned civil liberties: protecting the First Amendment right of people and groups to criticize the government. But then, after Watergate, the government passed much more sweeping restrictions on campaign funding, which would clearly protect incumbents and the status quo and make it harder to criticize or challenge the government.¹³ And so, we at the ACLU came to see campaign finance restrictions as classic examples of the establishment protecting itself against challenge. Contribution limits did not hurt the powerful and the well-heeled who would always find another way to get their messages out. The limits hurt dissenting voices, such as minority voices who needed to be able to rely on supporters for seed money to get started and to get their message across. We pointed to Senator Eugene McCarthy whose 1968 challenge to the Vietnam War was funded by a few wealthy contributors, which would now be illegal. We pointed to black politicians like Georgia's Julian Bond and Los Angeles Mayor Tom Bradley whose early political careers depended on a handful of large contributors to get started. With contribution limits, they would have gotten nowhere. We pointed to the early founding of groups like the ACLU and the NAACP who were dependent on the generosity and political support of a few well-heeled financial angels to get them started and to get their ideas circulating.

We saw campaign finance limitations as undermining First Amendment rights and democracy by limiting criticism of the government, protecting incumbents, shortchanging new candidates and new movements, and generally putting the government in charge of political speech by controlling its funding.

We rejected the idea that you can enhance democracy by limiting speech or that you can have more democracy through less speech. The First Amendment is based on exactly the *opposite* premise, namely, that the *more* discussion and free flow of information we have, the *better* democracy we will have. The discussion of govern-

13. The law was the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 3 and was at issue in the landmark case of *Buckley v. Valeo*, 424 U.S. 1 (1976).

ment and politics must be robust and uninhibited, not restrained and controlled. Unlimited political speech is not the enemy of democracy, it is the engine of democracy and the foe of the status quo and the established order. As a judge recently said in a case protecting pro-choice campaign funding by *Emily's List*: "The government has unlimited resources, public and private, for touting its policy agenda. Those on the outside, whether voices of opposition, encouragement, or innovation must rely on private wealth to make their voices heard."¹⁴

In the famous 1976 case of *Buckley v. Valeo*,¹⁵ the United States Supreme Court recognized these principles, though in a partial and incomplete manner. The Court, soundly and properly, ruled that limitations on political campaign *expenditures* were direct limitations on political speech and could not be justified, especially not on theories that the government could "level the playing field" by limiting and rationing the amount of political speech that each person or group could be allotted or decide how much political speech was "enough" in our elections.¹⁶ But the Court also ruled that limitations on campaign *contributions* were acceptable because the latter was a form of second-hand speech and posed problems of corruption.¹⁷ And that dual decision has set the stage for many of the campaign finance difficulties we have experienced ever since.

So, my submission is that our civil liberties and our civil rights traditions both (1) require that we try to keep the government from regulating political speech and undermining democracy; and (2) we not invite government control of political speech in what would be a futile and self-defeating way to improve democracy.

III. ARE FREE SPEECH AND FAIR ELECTIONS AT ODDS?

Of course, the power of speech is often badly imbalanced today, because power and wealth in our society are badly imbalanced. We only have to look at my own New York City Mayor Michael Bloomberg's campaign spending to know that. But, you cannot level the playing field without leveling the First Amendment in the process, because every legislated restriction on political speech funding creates loopholes that require additional restrictions and more government

14. *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 40 (D.C. Cir. 2009) (Brown, J. concurring).

15. 424 U.S. 1 (1976).

16. *Id.* at 38-59.

17. *Id.*

controls. If we limit Mayor Bloomberg from spending his *own* money to speak out on his *own* candidacy, then what about people who want to spend money to support Bloomberg independently? That would be more imbalance, would it not? So should we limit those people also? The law we challenged successfully in *Buckley* did precisely that, and it sharply limited all independent citizens and groups from spending to speak.¹⁸ In 2004, two of the ACLU's biggest contributors—George Soros and Peter Lewis—spent about \$75 million dollars to try to defeat George Bush for re-election.¹⁹ Are we prepared to declare *that* illegal? What about letting contributors give the money to the ACLU or the NAACP to attack George Bush's policies on civil liberties or civil rights during an election year on a daily basis? In more recent years, wealthy individuals on the right funded speech designed to prevent Barack Obama from being elected and re-elected.²⁰ Should we restrain that also, in order to level the playing field? And it does not take too much imagination to see where this is going. If George Soros or Peter Lewis or Sheldon Adelson or David Koch want to buy a newspaper or a television network and support or attack the President of the United States every day, should we let the government limit that in order to level all electoral speech to make sure it is, shall we say, fair and balanced? This is exactly the path that the arguments for campaign finance controls take you down, and I think it would be a disaster for the First Amendment as well as for democracy if they were to gain more of a purchase.

In a similar vein, in last year's elections, Mayor Bloomberg was reported to have donated \$250,000 to support the same-sex proposal on the ballot in nearby Maryland.²¹ If I were a Maryland citizen who

18. *Id.* at 39-51.

19. Ryan Grim, *Peter Lewis Leaves Democracy Alliance, The Liberal Donor Network*, HUFFINGTON POST (Mar. 21, 2012), http://huffingtonpost.com/2012/03/21/peter-lewis-democracy-alliance_n_1368551.html.

20. Tim Dickinson, *Right-Wing Billionaires Behind Mitt Romney*, ROLLING STONES, May 24, 2012, <http://www.rollingstone.com/politics/news/right-wing-billionaires-behind-mitt-romney-20120524>.

21. John Wagner, *New York Mayor Michael Bloomberg Gives \$250,000 to Maryland Same-Sex Marriage Efforts*, WASH. POST BLOG (Oct. 10, 2012, 8:12 AM), http://www.washingtonpost.com/blogs/maryland-politics/post/ny-mayor-michael-bloomberg-gives-250000-to-maryland-same-sex-marriage-effort/2012/10/12/e870cb16-145e-11e2-ba83-a7a396e6b2a7_blog.html; see also Erik Eckholm, *Supporters of Same-Sex Marriage See Room for Victories*, N.Y. TIMES, Oct. 30, 2012, http://www.nytimes.com/2012/10/31/us/politics/gay-marriage-supporters-hope-to-win-in-4-states.html?ref=erikeckholm&_r=0 (reporting that Amazon chief Jeff Bezos had donated \$2.5 million to support a same-sex marriage referendum in Washington State, where supporters outspent opponents by a 5 to 1 margin) The referendum passed and Washington became one of the first States to adopt same-sex marriage by popular vote. *Id.*

opposed same-sex marriage, I might ask “Where’s *my* megaphone?” Why should we let billionaires like Mayor Bloomberg have so much free speech when I am unable to afford anything like that? Should we, instead, level the playing field, by denying him the right to have so much more influence than the average citizen? Should we limit to \$1,000 per year the amount of money that anyone can contribute to influence the public on a referendum campaign? After all, if one is serious about leveling the playing field, that would seem to be the right thing to do. These are precisely the kinds of rhetoric you hear from the campaign finance control groups.²² Bring out the bulldozers and flatten the First Amendment. These are the kinds of concerns that motivated the Supreme Court in *Buckley* to rule that limits on campaign expenditures made to inform the public during an election season when they most need the information violated the First Amendment.²³ Not to mention the excruciating problem of deciding exactly what content will be subject to these limits: express advocacy of the election or defeat of an identified candidate; or a mere mention of an identified political candidate raising an issue that might help one side or the other. This is precisely the path that the arguments for campaign finance controls take you down, and I think, it would be a severe setback for the First Amendment as well as for democracy to give them full sway.

When the Supreme Court heard the government’s argument in *Citizens United* that the First Amendment did not prevent the government from banning the publication of a book that criticized a Presidential candidate, the Court understood that individuals and groups of individuals will inevitably try to find ways to avoid the laws and get their messages out and it saw how our campaign finance laws had become loaded with rules, regulations, exceptions, safe harbors, and qualifications.²⁴ Much like an internal revenue code operating in the First Amendment area, it is understandable that the Court saw the need for reform and simplification of these laws and renewed enforcement of the commands of the First Amendment.²⁵

22. Derek Crissman, *A Constitutional Amendment Should Establish a Level Playing Field*, COMMON BLOG (Apr. 26, 2012), <http://www.commonblog.com/2012/04/26/a-constitutional-amendment-should-establish-a-level—playing-field>.

23. *Buckley*, 424 U.S. at 38-59.

24. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 884-85 (2010).

25. Indeed, the Court explicitly referenced the complexity of the laws as an ongoing threat to First Amendment freedoms observing, “[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research,

As a result, in the highly controversial *Citizens United* decision three years ago, the Court reinforced and expanded the speech-protective theories of the *Buckley* decision by dismantling the system of censorship “vast in its reach” that our campaign finance controls embody.²⁶ The Court held that where campaign expenditures are concerned, all speakers and groups have equal rights to use their resources to get out their messages by speaking about candidates and politics and government.²⁷ And the beneficiaries of this expanded and clarified freedom of political speech are all of us who can hear what the voices of different groups and individuals have to say. For those who contend that the *Citizens United* ruling was a radical right-wing departure from normal constitutional rules, I would ask you to remember what the law said and what the government argued. The law made it a crime for a non-profit advocacy corporation, Citizens United, to spend one dollar on broadcast advertising of a movie harshly critical of then Senator Hillary Clinton, who was running for President, near to the time of the election. The group had to take the Federal Election Commission (FEC) to court to see if there was some way around the restriction. It still amazes me that after thirty-five years we accept so blandly the concept that people and groups that want to engage in the most fundamental political speech imaginable have to get the permission of a government agency or a court in order to do so free from the fear of punishment. The lower courts, however, said no, there was no loophole or way out.²⁸ And then, for the Supreme Court to justify this remarkable restraint, the government argued that even a book saying the same critical things about Senator Clinton might be banned, because the publisher was a corporation. Now *that* seems to be a breathtakingly radical proposition that would effectively put the government in charge of both broadcasting and publishing. Where was the outrage, especially from the media community that the government would actually make that argument? Where was the gratitude from the media community that the Supreme Court wanted to be sure the media were fully protected by the First Amendment from government censorship?²⁹ Yet, outside of the edito-

or seek declaratory rulings before discussing the most salient political issues of our day.” *Id.* at 889.

26. *Id.* at 907.

27. *Id.* at 899.

28. They were right in this regard. *See id.* at 888–92.

29. More recently, Supreme Court Justice Samuel Alito commented at a conference that if the Court in *Citizens United* had not interpreted the First Amendment to protect corporations,

rial pages of the *Wall Street Journal* and a few other pockets of First Amendment universalism, the media outcry *against* the decision was thunderous.³⁰ And it was critical in inciting broad popular contempt and revulsion for the Court and its ruling.³¹ In some quarters that is thought of as biting the hand that feeds you. I guess it is indeed true that no good deed goes unpunished.

Of course, many have bemoaned the *Citizens United* decision and contended that it has led to a perversion of our politics, a buying of our elections or a selling of our democracy to the highest bidder.³² In fact, the hyperventilated and doleful predictions to this effect have not been borne out in any significant way.³³ But, even if there had been a sharp increase in campaign spending and political speech by business corporations, non-profit groups, and labor unions as a result of the *Citizens United* decision, that is a good thing, not a bad thing. As the

generally, it could not be used to protect media corporations from government control either. See Editorial, *Justice Alito, Citizens United and the Press*, N.Y. TIMES, Nov. 19, 2012, § A, at 26. Predictably, he was editorially attacked by the *New York Times*, which insisted that its constitutional rights flowed from its function and status as the press, not its rights as a corporation. *Id.* The trouble with that theory is that the Court itself has not ruled that the Freedom of the Press Clause gives the media greater First Amendment rights than the Freedom of Speech Clause gives the rest of us. Instead, the Court has protected *all* speakers, media and non-media, equally, an important First Amendment safeguard in my view.

30. Sean Higgins, *Citizens United: The Dog that Never Barked*, WASH. EXAMINER, Nov. 13, 2012, <http://washingtonexaminer.com/citizens-united-the-dog-that-never-barked/article/2513358#> (“The howls of outrage began almost immediately after the Supreme Court ruled on *Citizens United v. Federal Elections Commission* in January 2010. It continued for months afterward.”).

31. Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST, Feb. 16, 2010, <http://articles.washingtonpost.com/2010-02-16/politics/36773318-1-corporations-unions-new-limits>.

32. Paul Abrams, *Supreme Court to Hand government to Republicans, Again: This Time, Forever*, HUFFINGTON POST (Dec. 19, 2010), http://www.huffingtonpost.com/paul-abrams/supreme-court-to-hand-gov_b_395239.html; Bob Edgar, *Supreme Court's Campaign Ruling: A Bad Day for Democracy*, CHRISTIAN SCI. MONITOR, Jan. 22, 2010, <http://www.csmonitor.com/opinion/2010/0122/supreme-court-s-campaign-ruling-a-bad-day-for-democracy>; Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30 (“With a single, disastrous 5-to-4 ruling, the Supreme Court has thrust politics back to the rubber-baron era of the 19th century. Disingenuously waiving the flag of the first First Amendment, the court’s conservative majority has paved the way for corporations to use their vast treasures to overwhelm elections and intimidate elected officials into doing their bidding.”); Patrik Jonsson, *‘Fighting’ Obama Hits Supreme Court Over Campaign Finance*, CHRISTIAN SCI. MONITOR, Jan. 23, 2010, <http://www.csmonitor.com/USA/Politics/2010/0123/Fighting-Obama-Hits-Supreme-Court-Over-Campaign-Finance>; Jeffery Toobin, *Bad Judgment*, NEW YORKER, Jan. 22, 2010, <http://www.newyorker.com/online/blogs/newsdesk/2010/01/campaign-finance.html>.

33. See Matt Bai, *How Much Has Citizens United Changed the Political Game*, N.Y. TIMES MAG., July 17, 2012, available at http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?pagewanted=all&_r=0; Tarini Parti & Dave Levinthal, *5 Money Takeways From 2012*, POLITICO (Nov. 17, 2012, 4:00 PM), <http://www.politico.com/news/stories/1112/83655.html> (explaining how only about ten percent of super PAC funding came from corporations, and that figure was estimated by an aggressively anti-corporate group).

Supreme Court has observed, “that the air may at times seem filled with verbal cacophony is . . . not a sign of weakness but of strength.”³⁴

This is all a reflection of the fact that people and groups are going to use their resources, financial and otherwise, to get their messages out about who should run the government and how they should run the government, which increasingly influences more and more of our lives. The actions of the government have legitimacy only where the political processes for choosing, checking, and controlling the government remain free and unrestrained.

That is why the wrong lesson is being drawn about the campaign spending in the 2012 elections. The cries are out to roll-back and repeal the First Amendment protections for campaign funding and roll-in the restrictions from the past. Indeed, there are serious proposals to even amend the Constitution itself to give Congress and the state legislatures plenary power to impose broad regulation of campaign finances.³⁵ That is precisely the wrong idea: putting government in charge of the funding of political speech and association in America.

IV. A WORD ABOUT SUPER PACS

So much of the hysteria is focused on the super pacs. In the end, it turned out that super pacs swayed almost no significant elections.³⁶ But in the meantime, super pacs, like the *Citizens United* decision that supposedly spawned them, were treated like some kind of electoral Frankenstein’s monster with citizens almost being urged to get their torches and pitchforks and hunt these evil creatures down. So, it is important to understand what super pacs are and to support them and the First Amendment principles which they embody and realize.

34. *Cohen v. California*, 403 U.S. 15, 27 (1971).

35. One prominent version of a proposed constitutional amendment, supported by key Democratic Senators like my own Charles Schumer, would provide as follows:

Section 1. Congress shall have power to regulate the raising and spending of money and in kind equivalents with respect to Federal elections, including through setting limits on-

(1) the amount of contributions to candidates for nomination for election to, or for election to, Federal office; and

(2) the amount of expenditures that may be made by, in support of, or in opposition to such candidates.

S.J. Res. 29, 112th Cong. (2011).

36. Editorial, *A Landslide Loss for Big Money*, N.Y. TIMES, Nov. 10, 2012, at SR 12. See generally Joe Trotter, *Media Watch Surprise! “Secret Money” Didn’t Buy Elections*, CENTER FOR COMPETITIVE POL. (Nov. 8, 2012), <http://www.campaignfreedom.org/2012/11/08/media-watch-surprise-that-secret-money-didnt-buy-election/> (collecting similar stories on campaign finance).

First, what are super pacs? They are political committees organized by individuals and/or groups that are only engaged in raising and spending funds for “independent expenditures” (i.e. speech endorsing politicians but independent of and not coordinated with any politician or campaign). Because they are not contributing directly to any candidate or campaign or working with a campaign, the money that supports them can come from corporations, unions, non-profits, as well as from individuals; it can also come in unlimited amounts. So, in their essence, super pacs trace their origins back to the landmark case of *Buckley v. Valeo*, which held that there can be no limitations on campaign expenditures, especially independent expenditures that represent citizen advocacy and criticism of government—one of the most precious protections of the First Amendment.³⁷

The right of independent groups and individuals to use their funds to speak out about politicians during an election year was front and center in the *Buckley* case. The new law, enacted supposedly to cure the campaign finance ills associated with “Watergate,” severely limited what any person or group could spend independently on speech about politicians.³⁸ The limit was \$1,000 in an entire year, which silences anyone once they run a small political advertisement in a newspaper. Spend a dollar more and risk going to prison for the felony of illegal campaign spending under the law. That is a pretty frightening prospect in a democracy. The justification for this Draconian law was that because the law also limited to \$1,000 how much a person or group could contribute to a candidate, it would create a “loophole” to allow such individuals or groups to go out independently and spend more to support that candidate or oppose his opponent.³⁹ Of course, that “loophole” was the heart of the First Amendment.

37. *Buckley v. Valeo*, 424 U.S. 1, 21–23 (1976). Actually, the first modern “super PAC” may have been the small group of anti-war liberals who gathered a significant amount of money to run a newspaper advertisement in 1972 accusing President Richard Nixon of being a war criminal because of his conduct regarding the war in Vietnam. See *United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135, 1136–37 (2d Cir. 1972). The government sued the group claiming that the advertisement was a campaign message against the re-election of the President, and therefore subject to all of the limits and restrictions of the new Federal Election Campaign Act passed earlier that year. *Id.* at 1136–37. The lower courts quickly ruled that it would be wrong and a violation of the First Amendment to limit the funding of independent, issue-oriented criticism of public officials including candidates for election or re-election, in that fashion. See *id.* at 1140–42; see also *ACLU v. Jennings*, 366 F. Supp. 1041, 1054 (D.D.C. 1973) (three-judge court), vacated as moot *sub nom.* *Staats v. ACLU*, 422 U.S. 1030 (1975).

38. *Buckley*, 424 U.S. at 39–51.

39. See *id.* at 44–45.

That is, indeed, precisely how the Supreme Court saw it, with only one Justice dissenting on this point. First, the Court ruled that the law had to be narrowed so that it only reached “express advocacy” of the election or defeat of a candidate.⁴⁰ To give it any broader reading would impermissibly silence issue advocacy and criticism of the stand of public officials on political issues, and it would unwisely limit the activity of groups like the ACLU and the NAACP.⁴¹ Second, but even narrowed in that fashion, the law and its limits on independent spending cut to the core of the First Amendment by limiting criticism of the government and the officials who run it. In the process of reaching that conclusion, the Court rejected the many arguments that the government put forward to try to justify the law. In the Court’s view, the values of independent political speech substantially outweighed any dangers it might pose.⁴²

First, the Court rejected the idea that independent spending could corrupt the politicians benefitted by it. Because the spending was independent and could not in any way be coordinated with the candidate, there was no danger of a quid pro quo corruption or exchange of favors for funds.⁴³ Indeed, they might sometimes be harmful to a candidate. Second, since the Court had determined that only “express advocacy” by independent groups and individuals could be regulated at all, people could criticize candidates extensively without even urging their election or defeat.⁴⁴ So, what was the point in preventing them from doing so. Third, the Court rejected the idea that you could limit the speech of some in order relatively to enhance the speech of others.⁴⁵ This is basically the idea of so-called “leveling the playing field,” and the Court said that the First Amendment cannot tolerate such a steamrolling of the right to criticize government.⁴⁶ As the Court put it:

The concept that government may regulate the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the “widest possible dissemination of information from diverse and antagonistic sources” and to assure the “unfettered ex-

40. *See id.* at 40-44.

41. *See id.* at 42-44.

42. *See id.* at 44-51.

43. *Id.* at 45-48.

44. *Id.* at 45.

45. *Id.* at 48-51.

46. *Id.* at 48-49.

change of ideas for the bringing about of political and social changes desired by the people.”⁴⁷

Finally, the Court also rejected the government’s claim that excessive spending will lead to excessive or worthless speech.⁴⁸ That is the equivalent of today’s concern that too much campaign spending, particularly in the hands of super pacs, will lead to extremely “negative” campaigns which will turn off voters. Here’s how the Court answered that argument:

The First Amendment denies government the power to determine that spending to promote one’s views is wasteful, excessive or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.⁴⁹

So, in *Buckley*, the Court gave constitutional validation to what the super pacs are doing to circulate views on government and politics, to advocate for those candidates who share those views, and to amplify the voices of those of like mind.⁵⁰

The one issue that *Buckley* did not explicitly resolve was whether corporations in general, and labor unions as well, had the same right as individuals and groups to engage in independent political advocacy concerning government and politics and politicians, or could they be silenced because they had too much wealth and potential power (i.e., the capacity for too much speech).

That, of course, was the issue in the famous *Citizens United* case.⁵¹ There, the Court ruled that organizations, corporate and union, as well as individuals, had the First Amendment right to use

47. *Id.*

48. *Id.* at 57-58.

49. *Id.* at 57.

50. Since *Buckley*, the Court has reaffirmed that independent campaign expenditures lie at the core of the First Amendment and has applied this principle. See *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, 614 (1996) (protecting independent expenditures by political parties to support their candidates); *Fed. Election Comm’n v. Mass. Citizens for Life*, 479 U.S. 238, 251 (1986) (protecting a non-profit ideological corporation funded only by individuals); *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985) (protecting a small donor PAC’s independent advertisements); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978) (protecting corporate speech about a referendum election). The deviation from this principle, reflected in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668 (1990) and applied in *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 221–22 (2003) was at last, in my view, properly repudiated and corrected in *Citizens United*.

51. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 130 S. Ct. 876 (2010).

their resources to engage in free speech about the government, politics, and politicians during elections.⁵² In reaching that conclusion, the Court swept away all of the pointless distinctions and limitations on expenditures for independent political speech.⁵³ Individuals and groups—corporations, unions, non-profits, any individual or group—all have the same rights to use their resources to get out their messages about the government and the officials and politicians who run it. In that case the Court upheld the right of a conservative non-profit advocacy group to make, distribute, and advertise a movie criticizing a leading candidate for President of the United States.⁵⁴ But that ruling protected all corporate and union groups of any kind. It is difficult to imagine a stronger blow for freedom of speech and association and press than that decision. It was based on the principles of the *Buckley* case that where independent political speech was concerned, there can be no limits on the amount or source because the free flow of information to the public from as many sources as possible is mandated by the First Amendment and necessary for our democracy.⁵⁵

Are these super pacs evil? Should we support measures to dismantle them? Two arguments are made against super pacs, but, to my mind, they do not support overturning the principles of the First Amendment. First is the equality argument, the same one rejected in *Buckley*. Namely, no one person or groups should have too much free speech.⁵⁶ One person should not have a bigger megaphone than anyone else, especially since we believe in “one person, one vote.”⁵⁷ But to think that this requires some sort of principle of “one person, one picket sign” is to reject the core purpose of the First Amendment: to get as much information to the public from as many different sources as possible so that the public will be able to exercise its democratic

52. See *id.* at 866.

53. See *id.* at 916-17.

54. See *id.* at 886-88.

55. Based on the principles of both *Buckley* and *Citizens United*, a lower court unanimously held that since one individual or group could spend unlimited amounts on independent political speech, such individuals or groups could join together and support a political committee that did the same thing. See *SpeechNow.Org. v. Fed. Election Comm’n*, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc); see also *Emily’s List v. Fed. Election Comm’n*, 581 F.3d 1, 11 (D.C. Cir. 2009). So, the freedom of speech and the freedom of association helped to create what we call Super PACs. See generally Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644 (2012) (analyzing the development of Super PACs since the Supreme Court’s decision in *Citizens United*).

56. See *Buckley v. Valeo*, 424 U.S. 1, 48-51 (1976).

57. The phrase comes from the Supreme Court decision in *Reynolds v. Sims*, 377 U.S. 533, 558 (1964), where the Court ruled for the first time that malapportioned legislative districts violated the Equal Protection Clause.

choices most effectively. It ignores the fact that the views put out by super pacs and its supporters are shared by millions of Americans and are thereby amplified. Finally, it is often new, insurgent, and dissident voices and viewpoints that need to be able to get their message of change out in a way that leveling the playing field will frustrate.

Likewise, the corruption argument falls short as well. This is the argument that the backers of super pacs will have the same access to and influence on the politicians they support as if they made contributions directly.⁵⁸ But that does not strike me as a valid concern but as an appropriate element of democracy. People and groups support politicians because of their stands on issues that affect those people and groups. If their support results in electing their favored candidates, such people and groups rightly expect those candidates to be responsive through policy and action to their concerns. That is called democracy, not corruption.

Finally, despite all of the *sturm und drang* about the super pacs, super pacs wound up influencing almost no significant election in a decisive way. Of all the money raised and spent by super pacs – the vast majority of it fully disclosed—many of the candidates supported, particularly on the Republican side, did not win, and many of the candidates opposed, often on the Democratic side, did not lose.⁵⁹ President Obama was re-elected handily and the Republicans spectacularly lost their seemingly strong bid to take over the Senate. Though the House remained in Republican hands, there is little evidence that super pac spending was decisive in many of those races. Because most of the claims that super pacs, like corporations, were going to steal the election and buy up our democracy were coming from the Democratic side of the ledger, the election results did much to undermine those claims and make them seem more like political assertions than real dangers.

58. Richard Hasen, Opinion, *Of Super Pacs and Corruption*, POLITICO (Mar. 22, 2010), <http://www.politico.com/news/stories/0312/74336.html>.

59. There was a good deal of election-related spending by non-profits that are not organized as super pacs and do not have to publicly disclose their donors. But because there is no disclosure, claims as to how much election-related spending occurred are mostly estimations, usually by groups critical of such activity, and not based on hard government mandated data. See, e.g., Paul Blumenthal, “*Dark Money*” in 2012 Elections Tops \$400 Million, HUFFINGTON POST (Nov. 2, 2012), http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million_n_2065689.html. While it can be argued that some of these groups are really thinly-disguised campaign groups that should have to disclose, traditional non-profits, like the ACLU, NAACP, and many of the major non-profit cause organizations in America, have been using their funds to put out arguably “political” messages for decades without publicly disclosing their sources of funding.

What the super pacs did do is generate a great deal of campaign speech, heighten interest in the issues in the election, and increase electoral competition.⁶⁰ And in some races they did help even the odds, a bit, and “level the playing field,” without the use of a government steamroller over the First Amendment. That strikes me as a pretty good accomplishment, one that should be praised, not bemoaned.

Finally, the one valid concern raised by the super pacs as well as the high-spending non-profits is that two of the most important actors in the political process—the candidates and the parties—are much more limited in their campaign funding rights than all of these outside groups and individuals. Parties and candidates can only raise money in limited amounts and from people, while all around them are groups and individuals, including the mass media that can use unlimited funds to support or oppose those candidates and parties. Surely those kinds of disparities warrant revisiting those restrictions.

V. ELECTORAL SPEECH MUST BE “UNINHIBITED, ROBUST, AND WIDE-OPEN”⁶¹

My view of the principles that should guide us in thinking about these issues is based on the touchstone that campaign and electoral speech should be “uninhibited, robust and wide-open” both in amount and content. I have long been involved in opposing governmental limitations on the amount of money that individuals or groups can spend to voice and amplify their political views, as well as any official restraints on the content of that speech on the theory that it is too “negative” and not fruitful for political discourse. On the contrary, our First Amendment and our democracy require that, in the words of the Supreme Court’s landmark decision in *New York Times Co. v.*

60. See Editorial, *Super Democracy: Why Super PACs Are Good for Our Political System*, CHI. TRIB., Feb. 9, 2012, http://articles.chicagotribune.com/2012-02-09/news/ct-edit-superpacs-20120209_1_romney-super-pac-gop-groups-priorities-usa-action; Bradley A. Smith, *Why Super PACs Are Good For Democracy*, U.S. NEWS & WORLD REP., Feb. 17, 2012, <http://www.usnews.com/opinion/articles/2012/02/17/why-super-pacs-are-good-for-democracy>; Ross Douthat, *The Virtues of the Super PAC*, N.Y. TIMES, Apr. 3, 2012, <http://campaignstops.blogs.nytimes.com/2012/04/03/the-virtues-of-the-super-pac/>; Manu Raju & John Bresnahan, *Outspent Democratic Super PAC Made Dollars Count*, POLITICO, Nov. 11, 2012, <http://www.politico.com/news/stories/1112/83699.html>; Paul Blumenthal, *Democratic Super PACs Trim Conservative Advantage in Congressional Races*, HUFFINGTON POST (Nov. 10, 2012), http://www.huffingtonpost.com/2012/11/10/democratic-super-pacs-red_n_2104668.html.

61. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Sullivan,⁶² “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁶³ There should be few limits in the First Amendment market place of ideas, and, to my mind, “negative” campaign speech really may be properly sharp criticism of government and those who run or seek to run it.

So, when I look back on the 2012 elections, I see a great deal of campaign spending that produced a great deal of campaign speech with dozens of hotly-contested campaigns all across the country, which raised a host of critical public issues topped by a presidential race that was very competitive and hard-fought.

Whether all of the campaign spending is a *cause* or an *effect* of the increased interest in and competitiveness of the elections is anybody’s guess. But the closeness of the election is not surprising given the magnitude of the stakes. As one conservative pundit put it, “Every four years we are told that the coming election is the most important of one’s life. This time it might actually be true. At stake is the relation between citizen and state, the very nature of the social contract.”⁶⁴ To his supporters, President Obama’s accomplishments rivaled those of Lyndon B. Johnson and Franklin Delano Roosevelt. To his detractors, the key elements of his program, such as “Obamacare,” were shoved through and passed without a single vote from the “loyal opposition,” hardly an homage to bi-partisanship, compromise or finding common ground.⁶⁵ And, most observers would agree, the Obama campaign was overwhelmingly a summer long attack on Governor Romney in an effort to demonize him and his candidacy, which is a classic example of “negative” campaigning.⁶⁶ So it should not be surprising that President Obama’s opponents would try to raise and

62. *Id.*

63. *Id.* at 270.

64. Charles Krauthammer, *The Choice*, WASH. POST, Nov. 1, 2012, http://articles.washingtonpost.com/2012-11-01/opinions/35504507_1_health-care-conservative-ascendancy-affirmative-action.

65. *E.g., Background on Obamacare: Why We Fight*, FREEDOM WORKS (2013), <http://www.freedomworks.org/repeal-obamacare-background> (charging that among the reasons the law is “Bad Medicine” is that it was “rammed through Congress . . . without garnering a single Republican vote.”).

66. See Jeff Zeleny, *Obama’s Team Taking Gamble Going Negative*, N.Y. TIMES, July 28, 2012, at A1, available at http://www.nytimes.com/2012/07/29/us/politics/obama-campaign-takes-gamble-in-going-negative.html?pagewanted=all&_r=0; see also Tarini Parti & Dave Levinthal, *5 Money Takeaways From 2012*, POLITICO, Nov. 17, 2012, <http://www.politico.com/news/stories/1112/83655.html>.

spend as much as they could to counter these attacks and oppose his re-election.

But, despite all of this high spending and frequently negative campaigning, the demonizing of much of it by much of the media has been exaggerated and unjustified. First, the total spent on federal elections last year, perhaps \$6 billion, will only be about 15% or 20% more than in 2008, and still less than we, as a nation, spend annually on potato chips.⁶⁷ More importantly, this spending helped to fuel a great deal of electoral competition, which is all to the good in a democracy. The two main parties seemed to be about evenly matched in their financial resources.⁶⁸ President Obama's campaign raised and spent somewhat more than Governor Romney's and the independent spending on the Republican side matched and probably exceeded the independent and labor campaign spending on the Democratic side.⁶⁹ Unlike 2008, when President Obama raised and spent *seven times* what Senator McCain did and, indeed, raised more money than any candidate in American political history—and won by almost ten million votes—this time we were closer to the proverbial level playing field by letting the major parties and their candidates and supporters raise and spend as much as they could to get their respective electoral messages out to the American people.⁷⁰ All told, each side spent about \$1 billion on the Presidential election.⁷¹ And encouraging a healthy electoral competition can be an antidote to the rigidity of one-party rule and an encouragement to political compromise and conciliation.

Moreover, the vast majority of the money being spent was fully disclosed, down to the \$200+ contributors, including spending by super pacs.⁷² And a very small proportion of it came from corpora-

67. See Nicholas Confessore & Jess Bidgood, *Little to Show for Cash Flood by Big Donors*, N.Y. TIMES, Nov. 7, 2012, <http://www.nytimes.com/2012/11/08/us/politics/little-to-show-for-cash-flood-by-big-donors.html>; see also Janet Raloff, *Potato Chips: A Symptom of the U.S. R & D Problem*, SCI. NEWS (Jan. 23, 2013), http://www.sciencenews.org/view/generic/id/63647/description/Potato_chips_A_symptom_of_the_US_R+D_problem.

68. See *infra* note 71.

69. Jeremy Ashkenas et al., *The 2012 Money Race: Compare the Candidates*, N.Y. TIMES (2012), <http://elections.nytimes.com/2012/campaign-finance>.

70. See *infra* note 71.

71. The non-partisan Campaign Finance Institute reported that the two sides spent \$1.0 and \$1.1 billion dollars respectively. See Press Release, Campaign Fin. Inst., *Money vs. Money-Plus: Post-Election Reports Reveal Two Different Campaign Strategies* (Jan. 11, 2013), available at http://cfinst.org/Press/PReleases/13-01-11/Money_vs_Money-Plus_Post-Election_Reports_Reveal_Two_Different_Campaign_Strategies.aspx.

72. Under the Federal Election Campaign Act, campaigns, parties, and political committees must disclose the name, address, business occupation, and business address of every person or

tions.⁷³ The baleful media predictions that the *Citizens United* decision would lead to a tsunami of corporate money swamping our political shores and drowning our democracy never materialized.⁷⁴ Ironically, *unions* seem to have taken far more advantage of *Citizens United* than corporations have, by being able to use union treasury funds for general political advocacy for the first time ever at the federal level, thereby freeing up member-contributed funds for more targeted political action.⁷⁵ To be sure, there was a good deal of spending on ads that criticized or supported candidates sponsored by non-profits that are not organized as super pacs, but it is not the new “dark money” that some journalists claim. Non-profits have engaged in such public advocacy for some time without having to publicly disclose their contributors. This applies to the ACLU and the NAACP, as well as the Karl Rove groups. And all groups, including those, are subject to regular Federal Election Campaign Act of 1971 (FECA) disclosure when they engage in the kinds of independent, candidate-related speech subject to FECA.⁷⁶ Run an ad on television that even whispers the name of a federal candidate and you have to file a report with the FEC within twenty-four hours identifying who you are and how much was spent on the ad. You may not have to disclose your individual contributors because of a long-standing FEC interpretive ruling, recently upheld by an appellate court.⁷⁷ But the ACLU and the NAACP have never had to publicly disclose their contributors in similar circumstances.

entity that contributes in excess of \$200 in any election cycle (as well as recipients of expenditures of more than \$200). Likewise, anyone who makes more than \$250 in “independent expenditures” (i.e., for communications “expressly advocating” the election or defeat of a federal candidate) must file reports identifying \$200+ contributors. Every person or organization that makes “electioneering communications” (i.e., broadcast and similar media mention of a federal candidate during the periods near an election) must file reports once they spend in excess of \$10,000 in a calendar year and disclose everyone or group that contributes \$1,000 or more toward those communications. These various disclosure provisions are contained in 2 U.S.C. § 434 (2012).

73. See *supra* note 33.

74. See *supra* note 33.

75. T.W. Farnam, *Unions Outspending Corporations on Campaign Ads Despite Court Ruling*, WASH. POST (July 7, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/06/AR2010070602133.html>; Melanie Trottman & Brody Mullins, *Union is Top Spender for Democrats*, WALL STREET J. (Nov. 1, 2012), <http://online.wsj.com/article/SB10001424052970204707104578091030386721670.html>, (SEIU spent almost \$70 million supporting President Obama and Democratic candidates; almost as much as some of the conservative groups on the opposite side).

76. See *supra* note 72.

77. See *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 109 (D.C. Cir. 2012).

So, why demonize the campaign financing of this election with the common refrain that billionaires spending “dark money” through “outside groups” were buying the election and stealing our democracy? First, the whole concept of “outside groups” or “outside” spending strikes me as contrary to the idea of citizen criticism of government. “Outside” of what? The candidates? Is that our view of democracy, that only the politicians can speak and that speech by any other individual or group about the politicians is illicit or alien or wrong or “outside” of democratic norms? If parties run ads supporting their candidates or attacking the opponents, is that “outside” spending? How about ads by labor unions, environmental groups, abortion rights groups criticizing or praising the candidate’s record on issues of concern to those groups, is that also “outside” spending by “outside” groups? Finally, of course, what about the Press? Is its daily editorializing and often partisan news coverage also “outside” speech? In my day, the phrase “outside agitators” was the ugly epithet that die-hard segregationists used to try to tar civil rights advocates who traveled to the South to fight for equal rights.⁷⁸ To my mind, the persistent use of the term “outside groups” in the campaign finance area to disparage and demean individuals and groups who use their resources to raise their voices about politics and government is just as offensive and just as much an effort at de-legitimization.

In fact, one of the main reasons we are witnessing the super pac and related developments is precisely because we have imposed limits on the ability of individuals and groups to contribute directly to candidates and parties. As a result, supporters have no option but to use their resources to get their messages out independently. It might be far better for accountability and transparency in our political system to think about raising or even eliminating those contribution limits so that the funding would be back inside the tents of the parties and the candidates, and they would be responsible for its use. We might have less “negative” campaigning under those circumstances.

The criticism of unlimited campaign spending has always been with us, ever since the *Buckley* case decided that limits on spending for political speech were effectively limits on the political speech itself. But it intensified dramatically in 2010 with the *Citizens United* decision. Why then? Well, one possible explanation, as one journalist

78. See DR. MARTIN LUTHER KING, JR., LETTER FROM A BIRMINGHAM JAIL (April 15, 1963), available at http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

suggested, is that “outside spending tilted left in every year from 2000 to 2008, but that in 2010—in the aftermath of deregulation – the balance skewed decisively to the right. In the current 2011-12 election, it shifted overwhelmingly to the right.”⁷⁹ The extent to which this is attributable to the *Citizens United* decision in January 2010 is debatable, though some supporters of the decision have suggested that the increase in spending is proof that the law before that decision did indeed impose the “vast” censorship that the Court found to be a violation of the First Amendment, which needed to be ended.⁸⁰ Also, the statistics do not take account of the hundreds of millions of dollars of union expenditures the vast majority of which favor Democrats, from President Obama on down, or to the perhaps billions of dollars worth of “expenditures” resulting from favorable news media coverage of President Obama.⁸¹ But it is clear that in 2010 the Republicans and their allies swept the congressional elections, and this past year they came closer to leveling the playing field than in previous elections.

Perhaps, as a result, the media coverage of campaign financing is usually heavily tilted toward opposing, condemning, and demonizing “excessive” “outside” “dark money funded” campaign spending. Charles Koch and Sheldon Adelson and other big donors on the right have become scorned household names in ways that George Soros, Peter Lewis, and Jeffrey Katzenberg on the left never have been, even though the latter have spent tens of millions of dollars trying to elect

79. Thomas B. Edsall, *Campaign Stops: Billionaires Going Rogue*, N.Y. TIMES BLOG (Oct. 28, 2012, 10:53 PM), <http://campaignstops.blogs.nytimes.com/2012/10/28/billionaires-going-rogue/>.

80. During the 2010 election, in responding to claims that independent spending following *Citizens United* was unduly influencing the election, Bradley Smith pointed out that, in fact, the Democrats were largely outspending the Republicans, and the independent spending was only helping to level the playing field and make the elections more competitive—as they turned out to be: “This independent spending is serving as an equalizer. The *Citizens United* decision has done just what it was intended to do—increased competition, assisted challengers, and allowed more voices to be heard.” Brad Smith, *AP News Flash: Citizens United Equalizes Playing Field; Independent Groups Add to Competition*, CTR. FOR COMPETITIVE POL. (Sept. 28, 2010), <http://www.campaignfreedom.org/2010/09/28/ap-news-flash-citizens-united-equalizes-playing-field-independent-groups-add-to-competition/>. And in an email exchange about whether independent spending had increased dramatically and was overwhelming the 2012 elections, William Maurer replied: “What a fantastic result! It is marvelous to see such an outpouring of political speech and associational freedom. Alternatively, what a clear demonstration of how McCain-Feingold suppressed speech and deprived the American people of information about who should represent them. This proves Justice Kennedy’s assertion that that law was censorship vast in scope.” ELECTION LAW LISTSERVE (July 9, 2012).

81. See Matthew Continetti, *See No Evil*, THE WASH. FREE BEACON (Nov. 30, 2012, 5:00 AM), <http://freebeacon.com/see-no-evil/>.

Democrats and defeat Republicans or otherwise use their wealth and financial clout to advance electoral causes they support⁸² This disparity and one-sided coverage have always been the case because campaign financing is very much a partisan issue. The Democrats are for regulation, because they think the Republicans benefit without it. The Republicans see campaign financing restrictions in precisely the same way: efforts by Democrats and their media allies to silence Republicans and their speech funding.⁸³

Some of the media and the campaign finance “reform” groups they favor envision an electoral model where private campaign funding will be banned or severely limited; candidates will rely for most of their campaign funding on public or government funding with severe limits on how much they will be allowed; “outside” groups will be severely curtailed in what they can spend to inform the public on politics, and, as a result, the media—who are exempted by the politicians from the campaign finance control laws—will have a clear field to dominate the debate and tell us who to vote for.⁸⁴

I reject that view of political and electoral speech. Fortunately, so too does the Supreme Court in its interpretation of the First Amendment. Ever since the modern First Amendment doctrine was born in the stirring dissents of Justices Holmes and Brandeis almost a century ago, one of its central themes has been that speech about the government, politics, public officials, and politicians has to be as *unfettered*

82. See *id.*; Kenneth P. Vogel & Tarini Parti, *Democratic Super PACs Get Jump on 2014, 2016*, POLITICO (Nov. 27, 2012, 12:25 AM), <http://www.politico.com/news/stories/1112/84205.html> (showing information for the original report of the meeting); see also John Hinderaker, *Bad Money Rising*, POWERLINEBLOG (Jan. 12, 2013), <http://www.powerlineblog.com/archives/2013/01/bad-money-rising.php?> (reporting on the virtual press blackout of the secret meeting of well-heeled, left-wing groups and prominent Democratic politicians pledging, ironically, if not hypocritically, to spend excessive amounts of money on a campaign to get the “big money” out of politics.).

83. See Joseph E. Cantor, *Campaign Finance*, ALMANAC OF POL’Y ISSUES (Oct. 23, 2002), http://www.policyalmanac.org/government/archive/crs_campaign_finance.shtml; Thomas B. Esdall, *Billionaires Going Rogue*, N.Y. TIMES, Oct. 28, 2012, <http://campaignstops.blogs.nytimes.com/2012/10/28/billionaires-going-rogue/>; David E. Rosenbaum, *Campaign Finance Reform Fails Again*, N.Y. TIMES, Oct. 2, 1994, <http://www.nytimes.com/1994/10/02/weekinreview/sept.25-oct.1-campaign-finance-reform-fails-again.html>; Cleta Mitchell, *Campaign Finance Reform and its Casualties*, WALL STREET J., Aug. 30, 2012, <http://online.wsj.com/article/SB10000872396390444327204577617133260342296.html>. See generally Amy Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 578-79 (2012).

84. The primary, pro-regulation campaign finance groups are the Brennan Center of New York University, Common Cause, the Campaign Legal Center and Democracy 21. Except for Common Cause, these groups are not membership organizations, and they receive extensive funding from foundations, corporations, law firms or wealthy individuals. More irony, if not hypocrisy.

and *unrestrained* as possible.⁸⁵ And that constitutional message has so often been delivered on behalf of speakers whose own message was militant and “negative.”⁸⁶ Those are the voices we most need to hear to tell us that the emperor of the day has no clothes. And those principles of unfettered political speech are just as applicable to campaign finance restrictions as they are to any other efforts by the government to censor what we the people want to say and how we want to say it. That is why restrictions on the quantity and quality of political speech, through controls of its funding, are antithetical to the purposes and principles of the First Amendment and subversive of open political debate in a free society. Elections are therapy for our democracy, where we air our grievances and our differences on political issues, and they cannot function properly if we repress that conversation.

VI. “ANOTHER SUCH VICTORY AND I AM UNDONE.”⁸⁷

Finally, the same is true of the frequent cries that our campaigns are “too negative” and too filled with vicious “attack ads.”⁸⁸ But as much as we may bemoan the “negativity” that some say has been the hallmark of this past election season—though many historians have pointed out that political campaigns, cartoons and slogans of yesteryear make our current attack ads seem like Disney productions⁸⁹—we must realize that the First Amendment welcomes and encourages such free-wheeling, as well as free-spending political speech. Indeed, the Court has made clear starting almost fifty years ago that limitations on speech about government, politics, politicians, political candidates, and public officials run directly contrary to our “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open and that it may well include vehe-

85. See *Abrams v. United States*, 250 U.S. 616, 630 (1919); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 934 (1982) (upholding provocative speech by civil rights boycott leaders); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964) (upholding challenging speech by civil rights leaders criticizing official wrongdoing); *Whitney v. California*, 274 U.S. 357, 375 (1927); *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925).

86. See *Texas v. Johnson*, 491 U.S. 397 (1989) (speaker burned American flag to express contempt for the country); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (speaker threatened “revenge” against racial and religious minority groups).

87. *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (dissenting opinion).

88. Devin Dwyer, *Too Negative: Voters Blast Obama, Romney Ads*, ABC NEWS (Aug. 22, 2012, 6:00 AM), <http://abcnews.go.com/blogs/politics/2012/08/too-negative-voters-blast-romney-ads> (recounting voter reactions to the 2012 presidential race).

89. See generally DAVID MARK, *GOING DIRTY: THE ART OF NEGATIVE CAMPAIGNING* (2009) (surveying campaigns from Thomas Jefferson’s through George W. Bush).

ment, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁹⁰

The landmark case that fashioned that principle, *New York Times Co. v. Sullivan*⁹¹ was a civil rights case, as well as a corporate speech case involving legal threats against a media corporation.⁹² The case involved a “negative” newspaper advocacy ad attacking southern segregationist officials for police brutality against civil rights demonstrators. The civil rights leaders who paid to run the ad and the newspaper that carried it were socked with enormous libel damage judgments in state court, which threatened to stop harsh criticism of such officials in its tracks.⁹³ That is why the Supreme Court pushed back hard and established strong First Amendment protections for such “negative” speech. In doing so, the Court recognized what true civil rights and civil liberties advocates have long understood: it is the outsider groups, the insurgents, and those who would change the existing order the most who need free speech the most to get their dissident message of change out to the people.⁹⁴ And it is the established order that seeks to use the laws to stifle such advocacy. Without the strong protections for “negative” political speech that the Court fashioned during the tumultuous struggles for civil rights in the 1960’s, the Civil Rights Movement would have been stifled, and later anti-war, feminist and gay rights movements would have had a harder time getting frequently “negative” messages out, as well. Indeed these crucial First Amendment principles do their most important work when they afford protection not just for the ideas we like or which are embraced by the powers-that-be or reflect the conventional wisdom, but when they provide immunity from restraint and “freedom for the thought that we hate.”⁹⁵

The true defenders of civil rights understand that so well. In a 1950’s case, the Supreme Court majority upheld an Illinois law which

90. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

91. *See id.* at 292 (explaining the importance of free speech in a democratic form of government).

92. *See id.* at 256.

93. *See generally* ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

94. *See id.* at 269.

95. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting); *see also* *Texas v. Johnson*, 491 U.S. 397, 418 (1989) (right to burn an American flag in protest, the Court’s observing that under the First Amendment “concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive [will not go unquestioned in the market place of ideas].”); *Collin v. Smith*, 578 F.2d 1197, 1210 (7th Cir. 1978) (holding that Nazi march in Jewish community cannot be prevented).

punished making derogatory remarks about any racial religious or ethnic groups.⁹⁶ We now call that a “hate speech” law. The Court back then, in an era when First Amendment rights were not very special or protected in the Supreme Court, said that such a law was necessary to insure social order and harmony.⁹⁷ But the dissenters, among the strongest civil rights champions on the Court, saw it differently. They understood that outside groups and minority groups needed the most free speech protection to advance their causes and that cheering on a ruling that lets the government control controversial or hateful speech was a short-sided view.⁹⁸ As the dissenting opinion put it, invoking the historic metaphor of a Pyrrhic victory (i.e. a victory that is really a loss) “another such victory and I am undone.”⁹⁹ In the years since then the Court has invigorated First Amendment protection, secured it for even the most hateful and hurtful political speech and effectively overruled the Illinois decision.¹⁰⁰ The Court has now made it clear that our tolerance of the most hateful ideas, is a strength of our democracy and not a weakness.¹⁰¹ And some of the most civil rights friendly Justices, like William Brennan and Thurgood Marshall, have understood that laws against ugly, hurtful, hateful, or negative speech, if upheld, most threaten minority groups and outsiders.¹⁰²

Indeed, in October 2012, President Obama himself took the same stand in a United Nations speech discussing the anti-Islam video that caused riots in the middle east,

96. *Beauharnais v. Ill.*, 343 U.S. 250, 251 (1951) (“[The Illinois statute made it a crime to communicate publicly any message] which . . . portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion, which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.”).

97. *See id.* at 261-62.

98. *See id.* at 274-75.

99. *Id.* at 275.

100. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 396 (1992) (invalidating a hate speech ordinance).

101. *See generally* *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (ruling that the First Amendment protected anti-gay hate speech); *Texas v. Johnson*, 491 U.S. 397 (1989) (ruling that burning the American flag is free speech protected by the First Amendment); *Cohen v. California*, 403 U.S. 15 (1971) (prohibiting California from making the public display of an expletive a criminal offense); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (ruling that an Ohio statute that punished advocacy of violence was unconstitutional).

102. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 775 (1978) (Brennan, J. & Marshall, J., dissenting) (“[I]n our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share [the majority Justices’] fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications based solely because of the words they contain.”).

Here in the United States, countless publications provoke offense. Like me, the majority of Americans are Christian, and yet we do not ban blasphemy against our most sacred beliefs. As president of our country, and commander in chief of our military, I accept that people are going to call me awful things every day, and I will always defend their right to do so. Americans have fought and died around the globe to protect the right of all people to express their views—even views that we profoundly disagree with. We do so not because we support hateful speech, but because our founders understood that without such protections, the capacity of each individual to express their own views and practice their own faith may be threatened.

We do so because in a diverse society, efforts to restrict speech can quickly become a tool to silence critics and oppress minorities. We do so because, given the power of faith in our lives, and the passion that religious differences can inflame, the strongest weapon against hateful speech is not repression, it is more speech—the voices of tolerance that rally against bigotry and blasphemy, and lift up the values of understanding and mutual respect.¹⁰³

Unfortunately, around the world, free speech is on the decline and governments are rushing in to outlaw “hate speech.”¹⁰⁴ Even in America, the “anti-bullying” movement raises many of the same censorship concerns.¹⁰⁵ There seems to never to be a paucity of arguments against free speech and in favor of its limitations. Even more reason to celebrate the sentiments expressed by the President and the principles of the First Amendment they reflect. Robert Carter understood these principles so well, and so does Eleanor Holmes Norton.

VII. WHAT IS TO BE DONE?

One who has labored in the field of campaign finance law for quite some time, starting even before the *Buckley* case and including

103. *Obama's Speech to the United Nations—Text*, N.Y. TIMES, Sept. 25, 2012, <http://www.nytimes.com/2012/09/26/world/obamas-speech-to-the-united-nations>. The current Supreme Court shares the President's expressed opposition to censorship and has invalidated almost all of the speech restrictions to come before it in recent years. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010); *United States v. Stevens*, 130 S. Ct. 1577 (2010).

104. See Jonathan Turley, *Shut Up and Play Nice: How the Western World is Limiting Free Speech*, WASH. POST, Oct. 12, 2012, http://articles.washingtonpost.com/2012-10-12/opinions/35499274_1_free-speech-defeat-jihad-muslim-man.

105. See William Creeley, *New Anti-Bullying Initiatives Threaten Protected Speech, Infantilize College Students*, FIRE (Nov. 10, 2010), <http://thefire.org/article/12454.html>.

the *Citizens United* case, as well, must be thoroughly aware of the excruciatingly difficult issues of trying to reconcile campaign finance concerns with First Amendment principles and protections. My own position should be clear by now. Government limitations on contributions and expenditures made for the purpose of advocating candidates and causes in the public arena violate core First Amendment principles and should be opposed. That approach is most consistent with those principles and with the unrestrained flow of political information so vital to our democracy. Now let me suggest five fundamental reasons why this is so.

First, remember who is writing the campaign finance rules. The people in power. Do not be shocked if they write those rules in ways most guaranteed to perpetuate their power. When we, at the ACLU, confronted and challenged the brand new FECA in the *Buckley* case, we called it not “reform,” but an Incumbent Protection Act that in the process cut to the heart of the First Amendment’s protections of the freedoms of speech, press, association, assembly, and petition. It imposed very low overall campaign limits designed to handicap challengers and protect incumbents whose franking privilege and other perks of office did not even count against the limits. It set very low contribution limits to make it harder for challengers to rely on the help of wealthy supporters, while incumbents could easily raise money in \$1,000 chunks by holding one \$1,000 per plate dinner with lobbyists and special interests. It limited how much a candidate could spend of his or her own money, even though one cannot corrupt oneself, so incumbents would not have to worry about some guy named Bloomberg coming along with a healthy self-funded campaign. And to insulate themselves even more, incumbents placed a limit of \$1,000 per year on independent expenditures, which would buy you one 1/8 page ad in *The New York Times*. Then, if you spent a dollar more to speak out about politics you committed a federal crime. To be sure that people would be afraid to donate funds to challengers, incumbents imposed deep disclosure and burdensome disclosure requirements on people who gave as little as \$100 to a candidate, thus guaranteeing a ready-made enemies list of people who buck the incumbent.¹⁰⁶ The

106. The Supreme Court upheld the disclosure in the *Buckley* case, through carving out a constitutional exemption for controversial causes and parties. See *Buckley v. Valeo*, 424 U.S. 1, 60-84 (1976). In a later case, the Court applied the exemption to spare the Socialist Workers Party from having to disclose contributions or expenditures. See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 102 (1982). Many States have even lower disclosure thresholds than \$100, with some States having disclosure thresholds as low as zero. At the federal level,

law also tried to control those pesky “outside” issue-oriented groups like the ACLU or the Sierra Club who published box scores criticizing the voting records of the members of Congress.¹⁰⁷ This was all done, of course, in the name of reform and casting sunlight on the process. Finally, to be sure these rules would not come back to bite them, the incumbents gave themselves control over the members of the brand new FEC which would enforce all these new and burdensome rules and thereby monitor and regulate the raising and spending of every dollar used for political and electoral speech in federal elections. Again, all claimed to be reform. Although the Supreme Court in *Buckley* knocked out the worst of these excesses, under the parts of the law that remain it is little wonder that the incumbency rate has remained extremely high and incumbents outraise challengers by four to one under this regime.¹⁰⁸ Yet, even though it is claimed that these incumbents can be corrupted so easily that we have to have all these rules and regulations, we now trust them to write them fairly and even-handedly. In fact, incumbent-protective campaign finance rules are just another form of corruption, like grossly gerrymandered districts.

Second, independent speech, or “outside” speech as it is derivatively called, is the Achilles Heel of campaign finance regulation. Limit that speech, and you cut to the quick of the First Amendment’s core protections of the right of citizens and the groups to criticize the people in power and to urge that the rascals be thrown out. Remove the limits, as we have and as we should, and you have an end run around the contribution limits, as the recent super pacs’ phenomenon proves. It is good and vital that we protect independent speech and allow it to flourish. But if we do, what is the point of continuing to limit the money that can be given to candidates? Rather, we should bring all of that money into the tent by allowing it to be contributed directly to candidates and then holding them accountable for its use. As we have seen with super pacs, limits simply will not work. People

Congress raised the disclosure threshold to \$200, which is still *lower* than the \$100 figure in 1976 when adjusted for inflation. And, the level is not indexed for inflation and will remain at \$200 until Congress—or a court—says otherwise.

107. Section 308 of the Act, codified at 2 U.S.C. § 437(a), was unanimously invalidated by the lower court in *Buckley*, a tribunal which upheld every other feature of the Act. See *Buckley v. Valeo*, 519 F.2d 821, 869-78 (D.C. Cir. 1975) (en banc), *aff’d in part, rev’d in part on other grounds*, 424 U.S. 1 (1976).

108. See Committee Hearing on “Free Speech and Campaign Finance Reform” Before Subcomm. On the Constitution of the H. Comm. on the Judiciary, 105th Cong. (1997) (statement of Bradley Smith, Adjunct Scholar, CATO Institute).

and groups who want to get their message out will find ways around them. That has been the history ever since *Buckley* allowed expenditures to be unlimited but kept the cap on contributions.

Third, keep it simple. One of the reasons that the Court in the *Citizens United* case threw out all the restrictions on expenditures by unions, non-profits and corporations was that the campaign finance law had become so complicated that you needed to hire a lawyer to figure out how to navigate the byzantine rules and regulations in order to engage in political campaign speech.¹⁰⁹ After all, the Citizens United non-profit group only wanted to make and distribute a movie criticizing a leading Presidential candidate. What could be more protected under the First Amendment than that? Yet, they could not do it because of the campaign finance rules and the ban on corporate expenditures. I tell my students that before *Citizens United*, you had to be like a reporter or maybe a tax accountant to answer the following simple question: can I run an ad criticizing the president of the United States? In a country with the First Amendment, the elegantly simple answer should be: of course you can, and more power to you. In a country with the FECA and the FEC and thousands of pages of rules and regulations, the answer requires a set of interrogatories asking: who, what, when, where and why. *Who* are you? A person? A group of persons? A committee? A corporation? *What* kind of corporation? If you are a non-profit corporation, do you receive any money from a business corporation or a union? *What* are you going to say? Are you going to engage in Express Advocacy? Are you going to mention the name of a candidate? *When* are you going to say it? In the sixty to thirty days leading up to an election? During an election year? *Where* are you going to say it? In what location? Through what media? Broadcasting, newspapers, billboards? The answer will affect your right to criticize the President of the United States. Finally, *Why* are you doing this? Is it for the purpose of influencing the outcome of an election? Is it for the purpose of raising an issue, not supporting a candidate? All of this, because you want to run an ad criticizing the President of the United States!

The beauty of *Citizens United* is that it swept away all of the encrusted and convoluted distinctions underlying all of these questions and came up with one united theme: any person or any group of persons can use their resources to speak out on any issue or candidate

109. See *Buckley*, 424 U.S. at 39-51.

so that the people can hear the views of all of these individuals and groups so that our democratic debate can be fully informed. In one fell swoop, the Court eliminated regulatory complexity, undermined incumbent protection, and dismantled the “vast system of censorship” that our campaign finance laws had become.¹¹⁰ Of course, the case has gotten a bad rap from the outset. President Obama launched an unprecedented and unwarranted attack on the Court and its ruling in his State of the Union Address a few days later,¹¹¹ the kind I have never seen in my lifetime. For almost three years we have been subjected to a constant unrelenting barrage of media and special interest groups commentary about how evil and demonic and anti-democratic the decision was from a radical right-wing Court. To my mind, however, the extremism in the case was the government’s contention that it could censor a movie or even a book about a presidential candidate because it was sponsored by a corporation, and the fact that four Justices of the Supreme Court accepted that argument that the government could control publishing and broadcasting and political speech in that fashion.

Fourth, money matters, but it does not buy elections. We have all if the proof of that during the 2012 elections. Despite a drumbeat of fear-mongering that billionaires and corporations using “dark money” were going to buy the election and steal our democracy, none of that happened. Even *The New York Times* admitted that all of the super pac spending did not achieve the results that some desired and others feared.¹¹² And the avalanche of corporate money that was predicted the day *Citizens United* was decided has yet to materialize. So, you can put your pitchforks away. But whatever increase in campaign spending there was did give us much more competitive elections, and a real level playing field between the two major parties and their candidates. The lack of limits works for our First Amendment and our democracy.

Fifth, consider the alternatives. Do we really want to roll back the protections of *Citizens United* and re-impose a vast system of censorship on all of the corporations, non-profits, and labor unions in

110. That’s why I wrote a law review article entitled, *The First Amendment . . . United*, in support of the Court’s decision. See generally Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935 (2011) (providing a summary of the *Citizens United* ruling by the Supreme Court).

111. See Adam Liptak, *Supreme Court Gets a Rare Rebuke, In Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), <http://www.nytimes.com/2010/01/29/us/politics/29scotus.html>.

112. See *supra* note 36.

America to silence their collective voices during the campaigns? Do we really want to bring back a \$1,000 annual limit on political speech for any individual to kill off the super pacs? And, do we give the corporate media and its rich owners a pass from these new rules? More broadly, do we really want to pass a constitutional amendment to repeal the First Amendment and give Congress the unrestrained power to regulate campaign funding in any way a Congress full of *incumbents* sees fit, so that we are allowed only as much political speech as they see fit to give us. Why would we want to install such a neo-Orwellian system?

Our campaign finance system does need serious attention. All of the unlimited independent spending does pose problems for our candidates and our political parties, which still have to rely on limited contributions and funding sources. Maybe we should ease some of these limits to help level that playing field up and assist all candidates and parties to keep pace with the other players. We certainly should not go back to the days of limits, limits, and more limits.

Here is a sixth idea for free: Trust the good judgment and common sense of the American people to get all the information, to separate the wheat from the chaff, and to make-up their own minds. That approach is the only one in keeping with the letter and the spirit of the First Amendment.

Finally, how do these principles and precepts translate into proper reform and restructuring of our campaign finance laws? A three-fold First Amendment-friendly response should be considered.¹¹³

A. Limits

First, there should be no limits on contributions and expenditures used by individuals or groups in order to advocate candidates or causes in the public arena. This approach reflects the principles that limits on political funding are limits on political speech and will directly restrain and suppress speech at the heart of the First Amendment. Such limits benefit the political status quo, entrench the powers-that-be, and privilege those political speakers whose speech are not subject to the limits, most notably, the organized news media.

113. I also made these suggestions on the Corporate Political Activity Law Blog. See Joel Gora, *Guest Blogger Series: Five Ideas for Campaign Finance Reform*, CORPORATE POLITICAL ACTIVITY LAW BLOG (Oct. 3, 2012), <http://www.corporatepoliticalactivitylaw.com/index.php/2012/10/guest-blogger-series-five-ideas-for-campaign-finance-reform-ii/>.

The Court has rejected expenditure limits, but upheld contribution limits.¹¹⁴ Contribution limits should be reconsidered, either as a constitutional matter or as a legislative policy determination. Ever since the Court in *Buckley* mistakenly upheld limits on the amount of contributions that individuals could give to candidates, we have seen constant and understandable efforts to get around those limits: greater reliance on Political Action Committees (an incumbents-favoring device), use of soft money by parties and independent groups and individuals, and, highlighted in the most recent electoral season, independent spending “super pacs” and non-profits. So, much of this activity is attributable to the limits on direct contributions to candidates. People and groups are going to try to use their resources to get their message out, especially in an election year, whether by direct or independent support of the candidates and causes they espouse.

In this regard, strong political funding may have been a pivotal factor in securing the passage of same-sex marriage equality in my own home state of New York. As it became well-known, key politicians who supported same-sex marriage were given generous campaign finance support for taking such a stand.¹¹⁵ Few claimed that this phenomenon reflected “corruption,” and it resulted in a major legislative victory for an important minority group of people. By the same token, though much more ironically, a major push for state-wide public funding of political campaigns is currently being lavishly financed by, among others, an internet multi-millionaire whose group will be giving campaign finance support in an effort to persuade key Republican state senators to vote for public funding of political campaigns.¹¹⁶ This is the very same kind of campaign finance stratagem which was successful with marriage equality. Again, there have been few complaints of “corruption” from the usual suspects. Perhaps “big money” in politics does not seem so bad if it is supporting political outcomes

114. *Buckley v. Valeo*, 424 U.S. 1 (1976).

115. See The Associated Press, *Gay-Rights Groups Give Cuomo \$60,000 As He Pushed Marriage Bill, Records Show*, N.Y. TIMES, July 15, 2011, <http://www.nytimes.com/2011/07/16/nyregion/gay-rights-group-donated-60000-to-cuomo-campaign.html>; Editorial, *Campaign Speech and Gay Marriage*, WALL ST. J., June 29, 2011, <http://online.wsj.com/article/SB10001424052702304447804576413914228779664.html>; Frank Bruni, *The GOP'S Gay Trajectory*, N.Y. TIMES, June 9, 2012, <http://www.nytimes.com/2012/06/10/opinion/sunday/the-gops-gay-trajectory.html?pagewanted=all>.

116. See Laura M. Holson, *A Powerful Combination*, N.Y. TIMES, May 6, 2012, http://www.nytimes.com/2012/05/06/fashion/chris-hughes-and-sean-eldridge-are-the-new-power-brokers.html?pagewanted=all&_r=0; Thomas Kaplan, *Groups Push To Highlight Campaign Finance Reform*, N.Y. TIMES, Oct. 21, 2012, <http://www.nytimes.com/2012/10/22/nyregion/groups-push-to-highlight-campaign-finance-reform-in-new-york.html>.

you approve. To my mind, campaigns like this are good examples of free speech and democracy in action and a strong argument for raising or eliminating contribution limits.

Party contribution limits should be raised or eliminated as well. We should resist efforts to weaken the funding of our political parties. Strong parties are essential to a strong democracy and a balance of power in governance. In sum, let the people decide for themselves—individually and in groups—how much speech is necessary and proper in an election campaign and not cede to government the power to control political speech.

B. Disclosure

The benefits and value of disclosure to the electorate are overrated and the harm to freedom of association and political privacy from disclosure underappreciated.¹¹⁷ To be sure, some kinds of disclosure can be an antidote to governance concerns, which may flow from campaign finance patterns, by allowing people to decide who has too much access or influence to politicians or office holders. But make it what we might call today “smart” disclosure: focus only on large contributions to major party candidates. Disclosure any broader or deeper than that (e.g., on minor parties, on issue organizations, on small contributors even to major party candidates) needlessly sacrifices cherished protections for the rights of political association, political privacy and political anonymity. It is outrageous that at the federal level, the public disclosure threshold—\$200.01—the amount that will get your name, address, employer and employer address on the FEC website and open to surveillance and scrutiny by everyone in the world—is much lower, in 1976 dollars—than the \$100.01 threshold upheld by the Supreme Court in *Buckley*, despite the fact that it was “indeed, low.”¹¹⁸ Other than satisfying the political prurient interests of campaign finance control groups searching for “bundled” \$200 contributions from employees of the same company, for example, little

117. See Dick Carpenter et al., *Campaign Finance Disclosure Has Costs*, ROLL CALL (Nov. 26, 2012), http://www.rollcall.com/news/carpenter_primo_tendetnik_and_ho_campaign_finance_disclosure_has_costs-219370-1.html; Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2168343; Symposium, *Disclosure, Anonymity and the First Amendment*, 27 J. L. AND P. NO. 4 (2012).

118. *Buckley v. Valeo*, 424 U.S. 1, 83 (1976).

purpose in preventing serious corruption is served by these low limits and a great deal of harm to political privacy is visited.¹¹⁹

Just as the depth of disclosure should be “smarter” than that, the breadth of disclosure should be limited to groups that engage in express advocacy of electoral outcomes. Any broader scope of disclosure, encompassing issue advocacy, poses a serious threat to such advocacy and should be resisted. One of the reasons the ACLU got into the campaign finance debate in the first place was to protect the right of itself and all other non-profits like the NAACP and other similar issue groups to criticize politicians and public officials without having to disclose the identities of their supporters in order to do so. That should be the proper approach now as well.¹²⁰

C. Public Financing

Finally, address the imbalances and disparities that might result from no limits on giving or spending by significant public funding to expand political opportunity, without restricting political speech. The public funding should be generous and equally available to all qualified candidates, not just to those representing the two major parties. And that public funding should not be limits-based, but rather should provide “floors, without ceilings,” platforms to facilitate speech, rather than roofs to restrain it. To impose spending or similar limits as

119. The \$99.00 disclosure threshold in my home state of New York is also an outrageously low figure. Give a penny more than that to a candidate or committee in a year and your name, address and other identifying information have to be supplied. The amount is not even adjusted or varied or indexed with the level of office in the way that certain contribution limits are. Whatever claimed value there is in knowing who gave that paltry sum to a politician is greatly outweighed by the harm to freedom of association and political privacy. Even the most ardent campaign finance reformers believe that low-level disclosure thresholds like that do much more harm than good. In many other States, the disclosure threshold is even lower, sacrificing associational privacy and political anonymity for an almost prurient desire to disclose contributions, thereby violating the spirit, if not the letter, of the protections safeguarded in *NAACP v. Alabama*. See generally *NAACP v. Alabama*, 357 U.S. 449 (1958) (prohibiting Alabama from scrutinizing the membership list of the NAACP because of the right of the members to associate freely).

120. Unfortunately, the Supreme Court recently has been much too receptive to the government's claims, touting the benefits of disclosure and minimizing its burdens. The one exception, Justice Clarence Thomas, has been the sole dissenter, insisting on the need for strict scrutiny of all political disclosure requirements in order to protect political anonymity and associational privacy. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 979-82 (2010) (Thomas, J., dissenting in part); *Doe v. Reed*, 130 S. Ct. 2811, 2837-47 (2010) (Thomas, J., dissenting); *McConnell v. FEC*, 540 U.S. 93, 275-77 (2003) (Thomas, J., concurring in part and dissenting in part); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358-71 (1995) (Thomas, J., concurring). At the very least, there should be legislative efforts to raise disclosure thresholds to more realistic and less invasive levels.

the condition of receiving public benefits would be a back door way to restrain political speech.

Unlike the late, great liberal Senator Eugene McCarthy, who compared public financing of politics with the American Revolutionists' asking King George to fund their revolution, and unlike many contemporary politicians who characterize public financing as "food stamps for politicians," I think public funding and subsidies for politics can serve positive First Amendment purposes. But not if the scheme is limits-based as are many, if not most, of the public funding schemes extant in America today. You can summarize the most effective argument against limits-based public financing in just two words: Barack Obama. In 2008, candidate Obama had no intention of letting his reputation as a campaign finance reformer encumber him with the spending limits that went with accepting presidential public financing, even though they were almost \$100,000,000. So he rejected the "clean" public money, raised and spent more than \$750,000,000 in private funds—becoming the biggest spender in American political history—and won an historic presidential election, and in 2012 he exceeded that level and may have become our first political Billion Dollar Man.¹²¹

That's why we need to rethink the limits-based model of public financing, rather than replicate it at the national level. Models such as New York City's public financing program or others like it, despite being much ballyhooed in the press, have not been sufficiently successful in either enhancing electoral competition or deterring official corruption as to justify automatic implementation without further review.¹²² In addition, in its recent decision in the Arizona public funding case,¹²³ the Supreme Court, for the first time, entertained serious constitutional concerns about some of the more popular campaign finance mechanisms—such as "trigger" matches for high spending opponents or independent groups—and struck them down. Arrangements should be developed which provide floors to facilitate electoral speech not ceilings to limit it.

121. In fact, the President raised about the same amount as in 2008, roughly \$750 million, but his party and allies took his cause over the \$1 billion mark. *See supra* note 37.

122. *SEE* Peter J. Wallison & Joel M. Gora, *Better Parties, Better Government: A Realistic Program for Campaign Finance Reform* 62-64 (2009).

123. *See also* Joel M. Gora, *Don't Feed the Alligators: Government Funding of Political Speech and the Unyielding Vigilance of the First Amendment*, 2010-11 *CATO SUP. CT. REV.* 81 (2011). *See generally* *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (finding the Arizona law requiring a matching of public funds to be unconstitutional).

CONCLUSION

Our elections would be more free and more fair if our campaign finance system embodied the wisdom of those three principles: (1) no limits; (2) smart disclosure; and (3) “floors without ceilings” public funding. Applying these principles would lead to the following five proposals. First, contribution limits should be as high as possible, if not eliminated completely, and certainly not reduced. Second, public funding needs to be seriously rethought, be as simple and straightforward as possible, and not be limits-based. Third, disclosure requirements should be as focused and smart as possible. Fourth, likewise, they should be limited to express political advocacy expenditures. Finally, all of this should be guided by the realization that the best election reform provision ever enacted is the First Amendment’s injunction that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” The more we follow its letter and spirit, the better off we will be.

Social Change Requires Civic Infrastructure

HAROLD A. McDUGALL*

ABSTRACT	802
INTRODUCTION	802
I. THE RELATIVE DECLINE OF COMMUNITY POWER	804
II. THE FAILURE OF AMERICAN INSTITUTIONS ...	807
III. IS SOCIAL MEDIA AN ANSWER?	810
IV. THE LESSONS OF ARAB SPRING AND OCCUPY WALL STREET (OWS).....	814
A. Arab Spring	815
B. Occupy Wall Street (OWS)	818
V. TOWARDS A NEW CIVIC INFRASTRUCTURE	821
A. Using Social Media	827
B. Social Media and Community Ties.....	829
CONCLUSION	830
VI. POST-SCRIPT: COMMUNITY REENGAGEMENT THROUGH THE REFORMATION OF ADVISORY NEIGHBORHOOD COMMISSIONS (<i>WITH CRINESHA</i> <i>BROOKS</i>).....	833
A. Reviewing the Decline in Citizen Engagement	833
B. The Importance of Civic Education.....	835
C. Previous Efforts to Redress Civic Disengagement ..	836
D. Proposal: ANCs Functioning as Ward Republics....	837
E. Reforming Commissioner Elections.....	839

* Professor of Law, Howard University School of Law; B.A. *magna cum laude*, Harvard College 1967, J.D. Yale Law School. My thanks to the Institute for Intellectual Property and Social Justice of the Howard University School of Law, that funded early parts of this research. Thanks also to my research assistant Sharaya Cabansag, J.D. Candidate, Howard University School of Law, Class of 2013, who worked diligently and creatively on the project from start to finish. Thanks also, to Crinesha Brooks, Shannon McNeal, and Christen Glenn, of the Howard University School of Law graduating Class of 2014, who assisted with the final product.

F. Extending ANCs to Public Education	840
CONCLUSION	842
RECOMMENDED READING LIST	844

ABSTRACT

Civil society is a potentially powerful “third force,” which can balance the excesses of business and government. To date, civil society has only been convened episodically, through demonstrations, protests, and other forms of mobilization to press general or specific grievances. Once grievances have been addressed, or the movement co-opted, activity tends to subside. How might civil society be organized to maintain continuous oversight over government, beyond periodic elections, and over business, beyond individual consumer choice? This article explores these questions, in light of historic and current social movement trends.

“*We must be organized*”—Stokely Carmichael (a.k.a. Kwame Ture)

INTRODUCTION

Time Magazine identified “The Protester” as its 2011 Person of the Year because massive street protests have become the “defining trope of our times” and the protester a maker of history.¹ Protest leaders are overwhelmingly young, middle class, and educated, adept at using social media,² and operate outside the political establishment.³ They are frustrated with a dysfunctional and corrupt political and economic system rigged to favor the rich and powerful and prevent significant change.⁴ They don’t want communism,⁵ but they

1. Kurt Anderson, *The Protester*, TIME (Dec. 14, 2011), http://www.time.com/time/specials/packages/article/0,28804,2101745_2102132_2102373-1,00.html.

2. *See id.* (“[S]ocial media and smart phones did not replace face-to-face social bonds and confrontation but helped energize and turbo charge them, allowing protesters to mobilize nimbly and communicate with one another and the wider world more effectively than ever before.”).

3. *See id.*

4. *Id.*; *see* Robin Rogers, *The Hidden Costs of Million-Dollar Donations*, WASH. POST (Dec. 30, 2011), www.washingtonpost.com/opinions/the-hidden-costs-of-million-dollar-donations/2011/12/20/gIQAzpC1QP_story_2.html (finding that even when the rich engage in philanthropy, their inordinate wealth and power can unbalance community stability).

5. *See* Anderson, *supra* note 1.

don't want "hell-bent megascaled crony hypercapitalism" either.⁶ They search for a third way, a "new social contract."⁷

Can they succeed?⁸ And if they do, what would the new social contract look like? According to *Time Magazine*, the "vanguard" youth of Arab Spring have been "subordinated, if not sidelined, by better-disciplined political organizations."⁹ Can protest movements such as "Occupy Wall Street"¹⁰ learn from this example? And if so, what's the lesson? Is it to focus their energies on the mainstream political process?¹¹ Or is it to develop some entirely different machinery?¹² Maybe they have learned from Einstein, who defined insanity as doing things the way they have always been done, and expecting to get different results.¹³

The weakness of government and the indifference of corporations prompt the need for some new machinery, which I call "civic infrastructure."¹⁴ In Part I, I discuss the decline of community in the United States since the days of de Tocqueville and the corresponding

6. *Id.*

We live in a winner-take-all world. The top 1 percent controls 40 percent of the planet's wealth. In cities throughout the United States, people are still camped in public parks, holding signs that say "We are the 99%." Unemployment hovers around 9 percent, state budgets have been slashed and social programs cut. Food pantries report growing demand. The very rich, in the meantime, have never been richer.

Rogers, *supra* note 4.

7. Anderson, *supra* note 1.

8. *See id.*

9. *Id.*

10. *See* Anderson, *supra* note 1; *see also* Dan Gillmor, *Time Magazine's Protester Cover Reminds Us of the Value of Big Media*, *GUARDIAN* (Dec. 14, 2011, 6:05 PM), www.guardian.co.uk/commentisfree/cifamerica/2011/dec/14/time-magazine-protester-dan-gillmor.

11. *See* Anderson, *supra* note 1.

12. *See id.*

13. Quotation #26032 from Michael Moncur's (*Cynical*) Quotations, QUOTATIONS PAGE, http://www.quotationspage.com/quotes/Albert_Einstein/31 (last visited Feb. 2, 2013) ("Insanity: doing the same thing over and over and expecting different results.").

14. The Deliberative Democracy Consortium has begun using the term, picked up by its Executive Director Matt Leighninger, after reviewing a chapter of my book *AFRICAN CIVIL RIGHTS IN THE AGE OF OBAMA: A HISTORY AND A HANDBOOK*, in which I first used the term. *See infra* note 17. In June of 2012, the Consortium held a conference called "Building Civic Infrastructure." Their promotional material states:

Communities would do well to take a closer look at their "civic infrastructure" the opportunities, activities, and arenas that allow people to connect with each other, solve problems, make decisions, and celebrate community. These are the fundamental building blocks of strong local democracy, and they include physical and online spaces for citizens, civic skills and capacities, and participatory processes for policymaking.

Matt Leighninger, *What Is Civic Infrastructure and Why Does It Matter? Join Us for Next Week's Conference Call*, *CMTY. MATTERS* (June 21, 2012), <http://communitymatters.posterous.com/building-civic-infrastructure-join-us-for-nex>. We differ here. What they are calling "civic infrastructure," I would call "civic capital," as it is not knit together. Knitting civic capital into civic infrastructure is the topic of this article.

increase in government and corporate power. Part II considers the failure of American institutions to respond to the imbalance. Part III looks at both the promise and the limitations of social media as a remedy. In Part IV, I consider the lessons of Arab Spring and the Occupy Wall Street movement. Part V sketches the contours of the proposed civic infrastructure, and Part VI looks at its possible operation. A conclusion follows.

I. THE RELATIVE DECLINE OF COMMUNITY POWER

Revolution is a powerful and attractive idea. It is an even more attractive and exhilarating experience. Many of us in the United States see our politics and our economy as systems that are broken. Weighted down by centuries of corruption, the spirit of the American revolution as well as its great and resounding principles of a democratic and open society have been crushed under generations of indifference and decades of selfishness and greed.

From that perspective, it was a great privilege to participate in the frontier days of the grass-roots civil rights movement as a college student and as a law student. It was also a breath of fresh air to see the Occupy Movement burst on the scene, after so many years have passed since I have breathed a revolutionary atmosphere. I was so taken with their example that I brought my Civil Rights Planning class to Freedom Plaza in Washington, D.C.'s McPherson Square to observe the Occupiers, meet, and talk with them. That was October 2011.

While there, I got into a deep conversation with David Swanson, Press Secretary for Dennis Kucinich's 2004 presidential campaign, and an Occupy leader. I told him about a concept I had for a "civic infrastructure" to be built from the ground up to hold government and business accountable.¹⁵ I told him I would send him a short memo on it and asked that he share it with whomever he thought would benefit. I asked specifically not to be named, because I didn't want to slow down its absorption with a focus on who I was—an outsider. I asked that he use my *nom de plume*, "Prof," a nickname my Howard students call me. We emailed and talked a bit after that, but then I lost contact with him. It wasn't until the editors of the *Howard Law Jour-*

15. I had begun working with these concepts in an article for the *Howard Law Journal* on ways to organize communities struck by Hurricane Katrina. See generally Harold McDougall, *Hurricane Katrina: A Story of Race, Poverty, and Environmental Injustice*, 51 *How. L.J.* 533 (2008).

nal went Googling that they found David's website, where my analysis is lodged, where all Occupiers—and their colleagues in social movements around the world—could see it.¹⁶

In a separate conversation, my friend Matt Lehninger, who I met while working with the Study Circles Resource Center's governing Board, told me that my term "civic infrastructure," which I first used in a book chapter in 2009, was "in the water."¹⁷ He said everyone he knew who was in the movement for democratic, grass-roots participation and social change was using it. We both tried to figure out how that had happened, because the book was used only at Howard. Now, thanks to the *Journal* editors, I know.

To quickly summarize, I quote Senator Bill Bradley's analogy that compares U.S. society to a three-legged stool.¹⁸ It has a government leg, a business leg, and a community leg.¹⁹ Because the business and government legs are so long, and the community leg so short, the whole stool—the society—is unstable.²⁰ How to grow the community leg of American society that so impressed de Tocqueville?²¹ How to make it long enough to balance the other two, hold them accountable?

The basic idea is to build a latticework of small, regularly meeting groups, of about ten people each, connected to one another by delegates.²² The delegates meet in groups of ten each, select their own delegates, and create a cascading system that grows to a scale of more than 100,000 people, meeting in groups of ten.²³ The system is accessible, face-to-face accountable, and small-"d" democratic.²⁴ I supplied David with a graphic model,²⁵ created for me by my research assistant Gabrielle Sims in 2010. (Gabrielle was also the *Howard Law Journal* Executive Publications Editor 2011-2012).

16. "Prof.," *Study Circle, Citizen's Assemblies, and Social Media: A Civic Infrastructure for "Occupy Wall Street,"* WAR IS A CRIME (Nov. 8, 2011), <http://warisacrime.org/content/including-non-occupiers-and-strengthening-movement>.

17. Harold McDougall, *African American Civil Rights in the Age of Obama: A History and a Handbook* 186 (2010).

18. *Id.*; see "Prof.," *supra* note 16.

19. *Id.*

20. *Id.*

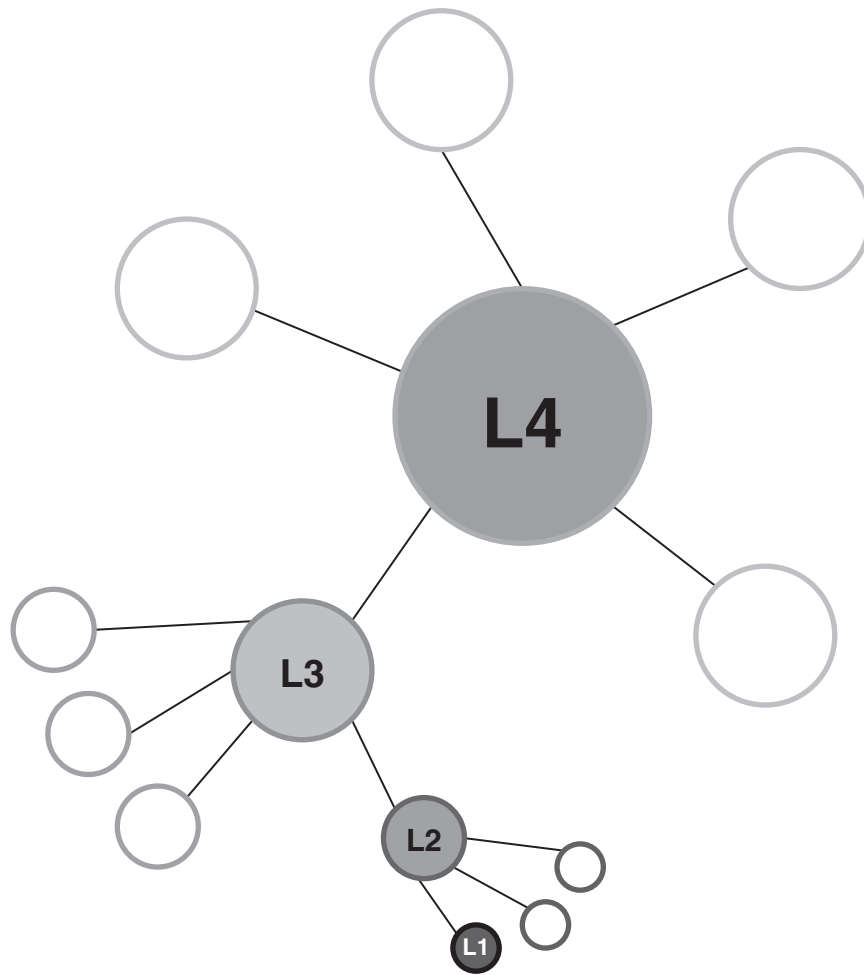
21. See *id.* ("[America is a society] with a rich community life and a vibrant civil society.").

22. *Id.*

23. Harold McDougall, *The Citizen's Assembly: A Civic Infrastructure for Progressive Social Change*, HUFFINGTON POST (June 29, 2012, 10:49AM), http://www.huffingtonpost.com/Harold-a-mcdougall/civic-engagement_b_1637398.html.

24. *Id.*

25. "Prof.," *supra* note 16.



26

The groups would meet periodically, processing community issues, considering how the support of government and business could be enlisted, or coerced.²⁷ How could the interests of citizens and consumers be protected day by day and over the long haul?

26. Level One groups are “study circles,” bringing ten people together. Each study circle picks a delegate who represents them at a committee of ten Level One groups (this is Level Two). Each committee picks a delegate who represents them at a council of ten Level Two groups (this is Level Three). Each council picks a delegate who represents them at an Assembly of ten Level Three groups (this is Level Four). Continue that process to Level Five and 100,000 people are involved.

27. See “Prof”, *supra* note 16.

Social Change Requires Civic Infrastructure

I built on the short memo that you can find on David's website²⁸ with a slightly longer essay that appeared on my blog for the *Huffington Post* almost a year later, in summer 2012.²⁹ Here, in the *Howard Law Journal*, I can expand on the concepts a bit and give scholars the benefit of the research that underlies my ideas.

My Article for the Branton Symposium expands on the practical workings of this theoretical construct, "civic infrastructure." I will also provide a bibliography of the books, articles, and web resources that have informed my work.

II. THE FAILURE OF AMERICAN INSTITUTIONS

Today, "[g]lobetrotting businesses and banks increasingly see their customers as commodities rather than as members of a shared community."³⁰ "Government has become increasingly less responsive to 'ordinary' people and their concerns."³¹ On the community side, television, and virtual reality increasingly substitute for human contact and exchange.³²

Robert Putnam saw television eroding the sense of community in America. Membership in clubs and associations has been declining ever since television viewing became popular in the 1950s. Values are now transmitted to children by television, which has consequently replaced the family as the essential transmitter of moral education.³³ The more television a child or adult watches, Putnam adds, the less they trust other people, the less they vote, and the less likely they are to take part in organized activities outside the home.³⁴

America has become a "mediated culture" in which mass media's "talking heads, flashing images, and concocted drama" deliver "pre-packaged . . . experiences" that replace the reality generated by our own lives.³⁵ Televised political advertising keeps people distracted, molding and shaping public opinion with sound bites and visual

28. *Id.*

29. See generally McDougall, *supra* note 23.

30. "Prof.", *supra* note 16.

31. *Id.*

32. See Bradley A. Harsch, *Consumerism and Environmental Policy: Moving Past Consumer Culture*, 26 *ECOLOGY L.Q.* 543, 561 (1999).

33. See E.J. DIONNE, *COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA* 111 (2000).

34. See Eric M. Uslaner, *Social Capital, Television, and the "Mean World": Trust, Optimism, and Civic Participation*, 19 *POL. PSYCHOL.* 441, 441-42 (1998).

35. LANGDON MORRIS, *THE WAR FOR AMERICA: MORALITY, IDEOLOGY, AND THE BIG LIES OF AMERICAN POLITICS* 103 (2004).

images. Public affairs shows are little more than shouting matches between liberals and conservatives.³⁶ The citizenry has become more and more polarized and disconnected from the process.³⁷ Public cynicism and alienation have reached record highs.³⁸

The role of big money,³⁹ campaign consultants, and television attack ads has steadily increased.⁴⁰ Corporate opinion-makers use the mass media—especially television—to manage elections and social crises, using spectacle to shape political life, set the policy agenda, and control public opinion.⁴¹ Television has its greatest impact on those least politically aware.⁴²

In the midst of the current economic downturn, the right wing mobilizes support by demonizing immigrants and minorities as cultural threats and competitors for jobs.⁴³ Their vision of America resembles the Old South in disturbing ways: political institutions “dominated by and run for the benefit of a white elite,” poorer whites and minorities set against one another, high levels of distrust, high levels of income inequality, and low levels of support for education and social services.⁴⁴ Indeed, conservative Republican electoral success is linked to a “Southern Strategy,” introduced by Richard Nixon⁴⁵ and expanded by Ronald Reagan.⁴⁶ The social movements that might otherwise respond⁴⁷—civil rights,⁴⁸ women’s liberation⁴⁹—have come

36. *Id.*

37. See GLENN W. RICHARDSON, PULP POLITICS: HOW POLITICAL ADVERTISING TELLS THE STORIES OF AMERICAN POLITICS 62 (2d ed. 2008).

38. See STEPHEN ANSOLABEHRE & SHANTO IYENGAR, GOING NEGATIVE: HOW POLITICAL ADVERTISEMENTS SHRINK AND POLARIZE THE ELECTORATE 2 (1997).

39. See generally LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011) (describing how fundamentally good people, with good intentions, have allowed our democracy to be co-opted by outside interests, and how this exploitation has become entrenched in the system).

40. JEROLD M. STARR, AIR WARS: THE FIGHT TO RECLAIM PUBLIC BROADCASTING 94 (2001).

41. See INFORMATION SOCIETY AND CIVIL SOCIETY: CONTEMPORARY PERSPECTIVES ON THE CHANGING WORLD ORDER 123 (Slavko Splichal et al. eds., 1994).

42. See JEFFREY MCCALL, VIEWER DISCRETION ADVISED: TAKING CONTROL OF MASS MEDIA INFLUENCES 90-91 (2007).

43. See GREGORY W. STREICH, JUSTICE BEYOND “JUST US”: DILEMMAS OF TIME, PLACE, AND DIFFERENCE IN AMERICAN POLITICS 39 (2011).

44. STEPHEN J. KUNITZ, THE HEALTH OF POPULATIONS: GENERAL THEORIES AND PARTICULAR REALITIES 134 (2007).

45. See KENNETH O'REILLY, NIXON'S PIANO: PRESIDENTS AND RACIAL POLITICS FROM WASHINGTON TO CLINTON 6 (1995).

46. See *id.* at 360.

47. See DOUG MCADAM ET AL., DYNAMICS OF CONTENTION 14 (2001).

48. See DENNIS CHONG, COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT 194 (1991).

to focus more on inclusion in corporate society than on challenging it.⁵⁰

Manning Marrable describes the collapse of the civil rights movement as proceeding from the co-optation of its reformist wing and the marginalization of its more radical wing.⁵¹ The reformists were co-opted into mainstream institutions (directorships of major corporations, membership in exclusive white clubs). They shifted their focus from group advancement to individual self-preservation, claiming that their inclusion in the “citadels of power” was the ultimate aim of the movement itself.⁵² The radical wing was hit full force while the reformers ducked for cover. The black power movement in the early 1970s was crushed by “government destabilization and repression,” for example, lessening participation by poor blacks.⁵³ “The remnants of the movement [began] to subdivide while losing touch with their mass base.”⁵⁴

Professionalization has greatly narrowed the number of people actually involved in social movements. Social activists of the 1960s and 1970s movements retired from the field after the big battles were won, leaving implementation to conventional associations and parties.⁵⁵ For example, the major funding for the environmental justice movement has gone to professional organizations that lack a grassroots network.⁵⁶

The decline of grassroots organizational structures and participation has also greatly weakened the progressive sector. The collaboration and participation of grassroots groups strengthens social movements; lacking such energy, social movements “silo,” reducing their opportunities to establish common cause among one another.⁵⁷

49. See RUTH CLIFFORD ENGS, *CLEAN LIVING MOVEMENTS: AMERICAN CYCLES OF HEALTH REFORM* 229 (2001).

50. See JOHN FOBANJONG, *UNDERSTANDING THE BACKLASH AGAINST AFFIRMATIVE ACTION* 64 (2001).

51. See SEAN DENNIS CASHMAN, *AFRICAN-AMERICANS AND THE QUEST FOR CIVIL RIGHTS 1900-1990*, at 99 (1991).

52. See *id.*

53. JOY JAMES, *TRANSCENDING THE TALENTED TENTH: BLACK LEADERS AND AMERICAN INTELLECTUALS* 118 (1997).

54. CASHMAN, *supra* note 51, at 99.

55. *SOCIAL MOVEMENTS AND DEMOCRACY* 93 (Pedro Ibarra ed., 2003).

56. See DANIEL FABER, *CAPITALIZING ON ENVIRONMENTAL INJUSTICE: THE POLLUTER-INDUSTRIAL COMPLEX IN THE AGE OF GLOBALIZATION* 244 (2008). *But see* *PHILANTHROPY IN AMERICA: A COMPREHENSIVE HISTORICAL ENCYCLOPEDIA* 136 (Dwight F. Burlingame ed., 2004).

57. See *THE WORLD AND US SOCIAL FORUMS: A BETTER WORLD IS POSSIBLE AND NECESSARY* 25, 28 (Judith Blau & Marina Karides eds., 2008).

These social movements then have a tendency to fragment, eroding their communication networks, their levels of cohesion, their ability to mobilize, and ultimately their ability to influence policy.⁵⁸

Ironically, right-wing movements in the U.S. have become very successful in aggressive mobilizing at the grass roots. The Pro-Life movement has a network of thousands of church-based grassroots organizations.⁵⁹ The Pro-Choice movement, in contrast, depends on professionalized national advocacy organizations that lack a grass roots base.⁶⁰

The Tea Party was prompted by CNBC correspondent Rick Santelli's 2009 negative comments on bailing out distressed homeowners with taxpayer funds and by blogs such as Keli Carender's "Liberty Bell."⁶¹ The Tea Party also used the Internet and social networks to turn out protests ranging from a handful of individuals to a half a million people. They began to take off when they attracted the attention of the ultra- conservative and extremely wealthy Koch Brothers.⁶² Their focus has been almost exclusively on the electoral process and political candidates.

III. IS SOCIAL MEDIA⁶³ AN ANSWER?

Internet appeals can create a loose constituency around broadly held grievances. As *New York Times* reporter Matt Bai describes:

58. See SARAH MAXWELL, SUCCESS AND SOLITUDE: FEMINISTS ORGANIZATIONS FIFTY YEARS AFTER THE FEMININE MYSTIQUE 8-9 (2009).

59. See ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 154 (2001).

60. See *id.*; SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN ABORTION CONFLICT 93 (1991).

61. See Chike Chijioke, Social Upheaval-Occupy Wall Street Movement (Nov. 28, 2011) (unpublished term paper, Howard University School of Law) (on file with the *Howard Law Journal*) (citing Beth Rowen, *History of the Tea Party Movement*, INFOPLEASE (Nov. 23, 2011), <http://www.infoplease.com/us/government/tea-party-history.html> (discussing the history of the Tea Party and how diverse populations gathered under a general and unified message against "big government, bailouts, and electorate positions gained" and referencing the tea party's shifts in focus since their beginning)).

62. See Peter Finn, *Tea Party Funding Koch Brothers emerge from Anonymity*, U.S. NEWS (Feb. 2, 2011), <http://www.usnews.com/opinion/blogs/Peter-Fenn/2011/02/02/tea-party-funding-koch-brothers-emerge-from-anonymity> (speaking on how the Koch brothers are emerging from their previous anonymity status and now coming into the forefront of American politics through the Tea Party).

63. Damien S. Pfister & Getachew Dinku Godana, *Deliberation Technology*, 8 J. PUB. DELIBERATION (2012) ("[A] reframing of Larry Diamond's (2010) program of 'liberation technology' around the idea of 'deliberation technology.' Although the liberation technology program has been useful in supplying dissidents with a basic communication infrastructure during the various revolutions of the 2011 Arab Spring . . . [in] the cases of Tunisia and Egypt . . . deliberative vacuums have arisen after regime change.").

“The internet has transformed grassroots politics. It has allowed new groups of angry people—the most reliable footsoldiers of any political campaign—to find and talk to each other.”⁶⁴ Such new-found allies might undertake “lowest threshold” actions like donating money, on-line petitions, or even selective buying campaigns.⁶⁵ Under the right conditions, little-known groups can quickly become central organizing hubs for more focused and sophisticated campaigns, such as mass mobilizations,⁶⁶ sit-in occupations, and “hacktivism.”⁶⁷

Internet activism dates back to the early 1990s by the indigenous EZLN Zapatista movement in the Chiapas region of Mexico.⁶⁸ This movement dramatized how new media and grassroots progressivism might synergize, excite the world, and challenge the status quo.⁶⁹ Activists emerging in other contexts began to use the internet as well, particularly to stage events against transnational corporate capitalism and its instrumentalities.⁷⁰ First came the “Carnival Against Capital,” then the “Battle for Seattle” disrupting a World Trade Organization meeting, as an international protest movement surfaced to resist corporate globalization,⁷¹ filling the void left by the domesticated movements of the 1960s and 70s.

Since then, as *Time Magazine* observed, broad-based, populist political spectacles have become more and more commonplace.⁷² A growing planetary citizenry now uses a whole new set of internet-

64. *The Day of Netroots; Internet Grassroots Politics*, *ECONOMIST* (Oct. 13, 2007), <http://www.economist.com/node/9941786>.

65. JEROEN VAN LAER & PETER VAN AELST, *Cyber-Protest and Civil Society: The Internet and Action Repertoires in Social Movements*, in *HANDBOOK OF INTERNET CRIME: CYBER-PROTEST AND CIVIL SOCIETY* 230, 236-44 (Yvonne Jewkis & Majid Yar eds., 2009).

66. See W. Lance Bennett, *Communicating Global Activism: Strengths and Vulnerabilities of Networked Politics*, 6 *INFO., COMM. & SOC'Y* 143, 163 (2003), available at <http://depts.washington.edu/gcp/pdf/communicatingglobalactivism.pdf>.

67. See VAN LAER & VAN AELST, *supra* note 65, at 241-42, 244. For a brief discussion on the Zapatista Movement and Hacktivists in general, see Matthew Eagleton-Pierce, *The Internet and the Seattle WTO Protests*, 13 *PEACE REV.* 331, 334-36 (2001). Hacktivists are computer-savvy individuals who work to counter threats to privacy posed by government monitoring agencies. They have created open-source software that allows members of oppositional groups to exchange communications undetected by government monitoring software.

68. See Richard Kahn & Douglas Kellner, *Internet Subcultures and Oppositional Politics*, *UCLA.EDU* (2003), [http://gseis.ucla.edu/faculty/kellner/essays/InternetSubcultures oppositionalpolitics.pdf](http://gseis.ucla.edu/faculty/kellner/essays/InternetSubcultures%20OppositionalPolitics.pdf) (discussing the use of the Internet in the Zapatista Movement and Seattle World Trade Organization Meeting in 1999).

69. See Richard Kahn and Douglas Kellner, *New Media and Internet Activism: From the Battle of Seattle to Blogging*, 6 *NEW MEDIA & SOC'Y* 87, 87 (2004).

70. See *id.*

71. See *id.*

72. See Anderson, *supra* note 1.

based tools to become informed, to inform others, and to propose new economic and political relations.⁷³

Facebook, the “world’s most popular social network,” with 900 million users in 2012,⁷⁴ functions like an open personal diary. YouTube permits amateur videographers to share content with an inner circle as well as provides a wide showcase for emerging professionals.⁷⁵ A user-generated trove of information, Wikipedia today contains more than three million articles in more than 250 languages on every conceivable subject, written and edited by hundreds of thousands of contributors.⁷⁶ Twitter, created by Obvious, a small San Francisco company, encourages users to be “always on.”⁷⁷

These new “social media” formats enable masses of independent individuals to act in concert, disrupting and upending the status quo.⁷⁸ YouTube emerges as a major venue for politics and protest.⁷⁹ Twitter brings “microblogging” to the equation.⁸⁰

The new formats have created volatile, highly-informed, autonomous communities that coalesce around everything from local lifestyle choices to global political and economic demands.⁸¹ They can transform uneducated and unconnected people into “smart mobs” of socially active citizens, linked by notebook computers, PDAs, and smartphones.⁸² They also help transcend silos, connecting people from diverse communities such as labor, feminist, ecological, peace,

73. See *id.*

74. See David Goldman, *Facebook Tops 900 Million Users*, CNN MONEY (Apr. 23, 2012, 4:31 PM), <http://money.cnn.com/2012/04/23/technology/facebook-q1/index.htm>.

75. See *Definition of: YouTube*, PCMAG.COM (2011), http://www.pcmag.com/encyclopedia_term/0,2542,t=YouTube&i=57119,00.asp#fbid=XGyFNTyQT1q (last visited Feb. 2, 2012).

76. See *Definition of: Wikipedia*, PCMAG.COM (2011), http://www.pcmag.com/encyclopedia_term/0,2542,t=Wikipedia&i=54463,00.asp#fbid=XGyFNTyQT1q (last visited Feb. 2, 2012).

77. *Twitter*, N.Y. TIMES, <http://topics.nytimes.com/top/news/business/companies/twitter/index.html> (last updated Oct. 18, 2012).

78. CHRIS C. DEMCHAK, *WARS OF DISRUPTION AND RESILIENCE: CYBERED CONFLICT, POWER, AND NATIONAL SECURITY* 281 (2011).

79. *Definition of: YouTube*, *supra* note 75.

80. *Twitter*, *supra* note 77.

81. Howard Rheingold, *Political Texting: SMS and Elections*, THEFEATURE.COM (Apr. 12, 2004, 3:00PM), http://thefeaturearchives.com/topic/Culture/Political_Texting_SMS_and_Elections.html.

82. See *id.*; see also Kirkus Review, KIRKUS (Mar. 18, 2012), <https://www.kirkusreviews.com/book-reviews/van-jones/rebuild-dream/#review> (reviewing VAN JONES, *REBUILD THE DREAM* (2012)) (“[T]he idea that decentralized, self-organized groups harness a sort of collective intelligence that renders them more resilient than vertical hierarchies.”).

and various anti-capitalist groups, promising a new politics of alliance and solidarity.⁸³

There are limitations, however. Internet-based campaigns often struggle to focus. Without this focus, such campaigns may be reduced to broad appeals to basic justice or fairness, relying heavily on “lifestyle symbols” such as using celebrities to promote debt relief.⁸⁴ Ironically, lifestyle symbols are also the stuff of most mass advertising, directing one’s attention towards the consumption of products, which symbolizes the American lifestyle.⁸⁵ Businesses seem to find social media a more useful tool, precisely because of these factors.⁸⁶

Like businesses, Internet-based campaigners approach their audience as potential consumers rather than as compatriots. Their campaigns promote associations between their product (their particular cause) and their target’s “social identity claims, personal and professional networks, neighborhood relations, social trends, work and family schedules, health care needs, sexual preferences, fashion statements, travel venues, entertainment, [or] celebrity cues”⁸⁷ Thus, Internet campaigns can easily blur the boundaries between politics, cultural values, and identity processes such as “expressive and performance” activities, which focus on self-development rather than collective action.⁸⁸

Moreover, people are embedded in various social contexts, not just the Internet,⁸⁹ and people move in and out of social contexts constantly, making it difficult for such campaigns to achieve a stable

83. Mobilize.org will be investing over \$25,000 in projects led by Millennials that increase civic engagement, community participation, and voter awareness. *Millennial Civic Engagement Summit 2012*, MOBILIZE.ORG, <http://mobilize.org/get-involved/mcesummit/>. See generally LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).

84. See Bennett, *supra* note 66, at 151.

85. See BENJAMIN R. BARBER, *CONSUMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE* 114 (2007); HERBERT W. SIMONS ET AL., *PERSUASION IN SOCIETY* 64 (2001).

86. Cf. EILEEN BROWN, *WORKING THE CROWD: SOCIAL MEDIA MARKETING FOR BUSINESS* 1 (2010) (discussing how social media can help businesses connect with customers); SUSAN M. WEINSCHENK, *100 THINGS EVERY DESIGNER NEEDS TO KNOW ABOUT PEOPLE* § 61 (2011) (discussing how the “weak ties” of social networking can be quickly formed and exploited).

87. Jackie Smith, *Social Movements for Global Democracy: Themes in Global Social Change* 126 (2008).

88. See Peter Dahlgren, *Forward to CYBERPROTEST: NEW MEDIA, CITIZENS AND SOCIAL MOVEMENTS* xii (Wim van de Donk et al. eds., 2004).

89. See Sabine U. O’Hara & Sigrid Stagl, *Global Food Markets and Their Local Alternatives: A Socio-Ecological Economic Perspective*, 22 *POPULATION & ENV’T* 533, 540, 542, 549 (2001).

base.⁹⁰ Thus, the organizational levels of “networked campaigns” are often low, increasing the prospects for “unstable coalitions, greater communication noise, lack of clarity about goals, and poor movement idea-framing.”⁹¹

Internet-based networks can greatly reduce the cost of attracting diverse players to issue and protest campaigns, but they might also gloss over important differences in approach, setting up any movement which emerges for real problems of ideology and focus.⁹² Their functions thus tend to degenerate quickly into “pragmatic information exchanges and mobilization systems.”⁹³

Other limitations of the Internet include the “digital divide” or inequality in Internet access⁹⁴ and the easily broken “weak ties” that Malcolm Gladwell cautions the Internet creates.⁹⁵ Gladwell is very much in favor of social change,⁹⁶ but urges potential activists to bring their intuition to a project,⁹⁷ and use it to create a dynamic group effort.⁹⁸ He does not believe that the trust (i.e., social capital) needed to make a group project a success can be supplied by Internet-based, virtual relationships alone.⁹⁹

IV. THE LESSONS OF ARAB SPRING AND OCCUPY WALL STREET (OWS)

The Occupy Movement took its inspiration from another movement, Arab Spring. Both movements involved large mobilizations to make a point, with considerable assistance from social media.

90. See Bennett, *supra* note 66.

91. Bennett, *supra* note at 66, at 152.

92. See *id.* at 160.

93. See *id.*

94. See Jeroen van Laer & Peter van Aelst, *Internet and Social Movement Action Repertoires Opportunities and Limitations*, 13 INFO., COMM., & SOC'Y 1, 15 (2010).

95. See *id.* at 18.

96. See *What Is the Tipping Point About?*, GLADWELL.COM, <http://www.gladwell.com/tippingpoint/index.html> (last visited Feb. 11, 2013).

97. See *What Is Blink About?*, GLADWELL.COM, <http://www.gladwell.com/blink/index.html> (last visited Feb. 11, 2013) (describing when a person first encounters a new person, product, or the like and hoping that people take the concept of “rapid cognition” seriously in the book, *Blink*).

98. See *What Is Outliers?*, GLADWELL.COM, <http://www.gladwell.com/outliers/index.html> (last visited Feb. 11, 2013). (“My wish with *Outliers* is that it makes us understand how much of a group project success is. When outliers become outliers it is not just because of their own efforts. It's because of the contributions of lots of different people and lots of different circumstances . . .”).

99. See Malcolm Gladwell, *Small Change: Why the Revolution Will Not Be Tweeted*, NEW YORKER, Oct. 4, 2010, available at http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwell.

A. Arab Spring

Nearly one in five people living in the Middle East and North Africa (MENA) region today is a “youth” between the ages of fifteen and twenty-four, producing an unprecedented ninety-five million people by 2005.¹⁰⁰ These powerful demographic changes created a large working class as well as middle class people, educated youth, and publicly active women. Their futures as healthy and productive members of their societies depended on how well their government invested in the social, economic, and political institutions required to meet their needs.¹⁰¹ The absence of such investment, and of formal channels for them to express their concerns, led to public confrontations.¹⁰²

The then Secretary of State Hillary Clinton’s technology advisor stated that social media played an essential role as an “accelerant” in the social protests of the Middle East that emerged as a result.¹⁰³ Commentators agreed, pointing out that Internet access networked like-minded groups of people and permitted real-time coordination in movement building, shortening a “years-long process” into one that took just weeks or months.¹⁰⁴

Although the Egyptian revolution was not completely planned online, the idea first surfaced on Facebook in 2008 as a group named the “April 6 Youth Movement,” which openly criticized the Mubarak government’s responses to striking textile workers in the northern city of El-Mahalla El-Kubra.¹⁰⁵ The majority of the group members had never been actively involved with politics before joining, yet the group’s discussion pages carried heated and informed debate.¹⁰⁶ One such discussion evaluated Muslim Brotherhood¹⁰⁷ street protests in

100. Ragui Assaad & Farzaneh Roudi Fahimi, *Youth in the Middle East and North Africa: Demographic Opportunity or Challenge?*, POPULATION REFERENCE BUREAU, 2007, at 1,1.

101. *See id.* at 3-4.

102. *See* Asef Bayat, *Social Movements, Activism and Social Development in the Middle East*, UNITED NATIONS RES. INST. SOC. DEV., Nov. 1, 2000 at 1, 2.

103. *See* Ben Barrack, *Is Hillary Clinton’s Senior Adviser Running Interference for the Muslim Brotherhood?*, BIG PEACE (June 26, 2011), <http://www.breitbart.com/Big-Peace/2011/06/26/Is-Hillary-Clintons-Senior-Adviser-Running-Interference-For-The-Muslim-Brotherhood>.

104. *See* Alex Chitty, *Social Media and the 2011 Egyptian Revolution*, WORDPRESS (May 9, 2011), <http://alexchitty.wordpress.com/2011/05/09/247/>; Alec Ross & Ben Scott, *Social Media: Power to the People?*, NATO REV. (Sept. 8, 2011), http://www.nato.int/docu/review/2011/Social_Medias/21st-century-statecraft/EN/index.htm.

105. *See* Chitty, *supra* note 104.

106. *See* Samantha M. Shapiro, *Revolution, Facebook-Style*, N.Y. TIMES MAGAZINE, Jan. 25, 2009, at MM34.

107. *See generally* Sameh Naguib, *The Muslim Brotherhood: Contradictions and Transformations*, 29 CAIRO PAPERS IN SOC. SCI.: POL. & SOC. PROTEST EGYPT 157-58 (2009) (discussing the growth of studies exploring Islamism in the context of social movements).

Alexandria: “Something like this should happen in Cairo,” wrote one user.¹⁰⁸ Another called for more effective measures: “We need strong actions, not protests like the brotherhoods where they sing religious songs and go home.”¹⁰⁹ Such exchanges foreshadowed the sentiments expressed in 2011’s Tehrir Square.

Platforms like Twitter accelerated the pace of protest movements causing the “rapid coalescence” of Tunisian and Egyptian demonstrations.¹¹⁰ The incumbent regimes attempted to shut down mobile and Internet networks to cripple the resistance;¹¹¹ the Obama Administration urged restraint.¹¹² The State Department began almost immediately on \$30 million worth of Internet freedom projects, including software enabling activists to manipulate firewalls imposed by oppressive governments.¹¹³

Yet Egyptian protestors understood from the beginning that social media outlets could not substitute for face-to-face gathering and organization. They built an extensive organizational structure before using social media to encourage people to leave their homes and join them in Tehrir Square.¹¹⁴ The Egyptians used an “interdisciplinary” approach: they held physical meetings to build solidarity, created small satellite organizations to maintain face-to-face contact, yet utilized social media to publicize these efforts as well. They laid the groundwork for their revolution by researching and mastering nonviolent resistance and nonviolent organization.¹¹⁵ They studied the work of Gene Sharp and worked with leaders from *Otpor!* regarding non-violent revolution.¹¹⁶

108. See Shapiro, *supra* note 106, at MM34. .

109. *Id.*

110. Mary Beth Sheridan, *U.S. Warns Against Blocking Social Media, Elevates Internet Freedom Policies*, WASH. POST, Jan. 28, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/01/28/AR2011012804554_pf.html.

111. Mahlet Ayalew, Facebook and Twitter: They Accelerate Revolutions, But Do They Create the Types of Change that Necessitate Revolutions (2011) (unpublished term paper, Howard University School of Law) (on file with *Howard Law Journal*) (citing Garry Blight et al., *Arab Spring: An Interactive Timeline of Middle East Protests*, GUARDIAN (Jan. 5, 2012, 10:45 PM), <http://www.guardian.co.uk/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline>).

112. Mary Beth Sheridan, *Social Media Curbs Pose Hurdle for U.S.*, WASH. POST, Jan. 29, 2011, at A09.

113. *Id.*

114. *2011 Egyptian Revolution*, WIKIPEDIA, http://en.wikipedia.org/wiki/2011_Egyptian_revolution#Lead-up_to_the_protests (last visited Jan. 30, 2013).

115. *Id.*

116. *Id.*

Social Change Requires Civic Infrastructure

The Egyptian April 6 group may have had only 75,000 Facebook “friends,” but without organization and strategies in the street, they could not have built a movement.¹¹⁷ Social media in Egypt created domestic and foreign pressure by bringing awareness to the efforts, but in isolation, it was not sufficient to bring about the intended revolution.¹¹⁸

Libyan dissidents did not have such preparation and perhaps thought that social media alone could do the job. They were mistaken. Where the Egyptian uprising showcased the people’s technological ingenuity and adaptability,¹¹⁹ the Libyan experience showed the limitations that can be imposed by a country’s online culture, state limits on access, and the level of organization of groups using social media.¹²⁰

In Libya, traditional fear of the Gaddafi regime, mixed with a kind of authoritarian populism, hindered the development of secular youth and professionals like those in Egypt and Tunisia.¹²¹ Few Libyans were Internet users, and even fewer used Facebook. However, as protest escalated, the “number of Facebook and Twitter users in Libya rose dramatically” including expatriate Libyans and sympathizers around the world.¹²²

Despite their head start, Egyptian protesters have not yet created an organization capable of operating the government, however. As a consequence, more organized forces have taken over. Soon after Mubarak resigned, the military stepped forward and took power, suspending constitutional provisions unpopular with the protesters but at the same time moving to limit demonstrations. They have stifled the Movement, re-engaging members of the old regime and adopting many of its tactics.¹²³

117. Bryan Farrell, *How Peer Pressure Creates Social Change*, WAGING NONVIOLENCE (June 3, 2011), <http://wagingnonviolence.org/2011/06/how-peer-pressure-creates-social-change/>.

118. Ayalew, *supra* note 111.

119. *Id.*

120. See Peter Beaumont, *Can Social Networking Overthrow a Government?* SYDNEY MORNING HERALD (Feb. 25, 2011), <http://www.smh.com.au/technology/technology-news/can-social-networking-outhrow-a-government-20110225-1b7u6.html#ixzz1ZI0LvBBK> (comparing Libya’s experience of Internet disruption to be worse than the time when Egypt’s government stopped the country’s Internet service).

121. Bayat, *supra* note 102, at 2.

122. BARRY LIBERT, THE REVOLUTION WILL BE TWEETED 5 (2011).

123. Ayalew, *supra* note 111 (citing *Egyptians Grow Distrustful of Ruling Junta*, ONISLAM (Sept. 29, 2011), <http://www.onislam.net/english/news/africa/454113-egyptians-grow-distrustful-of-ruling-junta.html>; *7 Months After Revolution Ousted Mubarak, Egyptian Military Maintains Control, Suppressing Dissent*, DEMOCRACY NOW! (Oct. 4, 2011), http://www.democracynow.org/2011/10/4/7_months_after_revolution_ousted_mubarak).

The protest movement, meanwhile, has begun to fragment and lose momentum, its former “unity of purpose has given way to a multiplicity of demands, mirroring the divides that beset Egypt’s political life.”¹²⁴ Many protestors expected rapid success and did not plan the next steps. Their considerable skills as protest organizers did not carry over to create a social movement capable of operating in post-Mubarak Egypt. Without an action plan—goals, strategies, tactics—suited to the new conditions, they began to lose hope and burn out as the movement lost momentum.¹²⁵

B. Occupy Wall Street (OWS)

The Occupy Wall Street Movement grew from a small band of activists protesting reduced social services in New York, to turnouts of sixty to 100 participants protesting near Wall Street, and eventually to mass demonstrations of more than 15,000 people across the nation.¹²⁶ Arab Spring inspired them; they tailored Egyptian and Tunisian approaches to their own concerns—that the richest one percent of Americans writes the rules of an unfair global economy that controls the future of the other ninety-nine.¹²⁷ OWS in turn inspired “Occupy” demonstrations in seventy United States cities, 600 United States communities, and 900 cities worldwide.¹²⁸

OWS dramatized America’s increasing economic polarization and obsession with wealth, and struck a nerve.¹²⁹ They gave a voice to citizens increasingly dissatisfied with the lethargy of the American political process and the boundless greed of the rich.¹³⁰ The broad base of the population has come to believe their government works only

124. *Egypt News — Revolution and Aftermath*, N.Y. TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/egypt/index.html> (last updated Sept. 26, 2011).

125. Ayalew, *supra* note 111.

126. Chijioke, *supra* note 60 (citing Nathan Schneider, *The Nation: From Wall Street to Everywhere*, NAT’L PUB. RADIO (Oct. 19, 2011), <http://www.npr.org/2011/10/19/141501013/the-nation-from-wall-street-to-everywhere>).

127. See also NATHANIEL J. HIGGINS, THE REVOLUTION WILL BE TELEvised 15 (2011) (citing *Occupy Wall Street*, OCCUPY TOGETHER (Jan 15, 2012, 5:15 PM), <http://www.occupytogether.org/occupy-wall-st/>).

128. *About*, OCCUPY PROTEST, <http://occupyprotest.net/about> (last visited Feb. 10, 2013).

129. See Paul Rogat Loeb, *From Occupy Wall Street to Occupy the Neighborhoods*, HUFFINGTON POST (Nov. 9, 2011), http://www.huffingtonpost.com/paul-loeb/from-occupy-wall-street-t_b_1085255.html.

130. Chijioke, *supra* note 61.

for “large wealthy special interests”¹³¹ and that the democratic process itself has been corrupted.¹³²

Social media afforded OWS a forum to present new and improved ideas about how to achieve their goals and spark conversations as to how the movement can be strengthened.¹³³ The Occupy movement also used physical space, so people could come together to “plan creative tactics, handle donations of food, address medical needs, reach out to the media, create innovative art projects, clean the occupation grounds, and ensure physical security.”¹³⁴ Also, “[c]ommon meals became a form of communion.”¹³⁵ In these “free” spaces,¹³⁶ participants found their voices and their problem-solving instincts. They began to “talk, brainstorm ideas, make posters and banners, [and] draw in the curious, including those just passing by.”¹³⁷

OWS was initiated by “Adbusters,” a self-styled “culture jammer” group.¹³⁸ Such groups resist consumer culture¹³⁹ with the goal of “‘toppl[ing] existing power structures and forg[ing] major adjustments to the way we will live in the twenty-first century,’” by changing “the way we interact with the mass media and the way in which meaning is produced in our society.”¹⁴⁰ Benjamin Barber describes culture jammers as imaginative activists who engage in creative “demarketing” campaigns.¹⁴¹

131. 107 CONG. REC. 183 (daily ed. Feb. 13, 2002) (statement of Rep. Luther) (discussing the Bipartisan Campaign Reform Act of 2001); see WE ARE THE 99 PERCENT (Nov. 6, 2012), <http://wearthe99percent.tumblr.com/>. This blog provides real quotes and stories from members of the Occupy Wall Street movement. The members tell how they, and other members of the 99% are essentially being denied the American dream.

132. See EDWARD SIDLOW & BETH HENSCHEN, GOVT 217 (2d ed. 2011) (discussing the constitutional challenges of the Bipartisan Campaign Reform Act of 2002); WE ARE THE 99 PERCENT, *supra* note 131.

133. Jennifer Preston, *Protesters Look for Ways to Feed the Web*, N.Y. TIMES, Nov. 25, 2011, at A28.

134. Loeb, *supra* note 129.

135. *Id.*

136. See SARA M. EVANS & HARRY C. BOYTE, FREE SPACES: THE SOURCES OF DEMOCRATIC CHANGE IN AMERICA, at ix (1992).

[W]e define free spaces as “public places in the community . . . in which people are able to learn a new self-respect, a deeper and more assertive group identity, public skills, and values of cooperation and civic virtue . . . setting between private lives and large-scale institutions . . . with a relatively open and participatory character.”

Id.

137. Loeb, *supra* note 129.

138. Rod Mickleburgh, *Anti-Wall Street Protests Take Off Thanks to a Canadian Idea*, GLOBE & MAIL, Sept. 6, 2012, at A16.

139. BARBER, *supra* note 85, at 281.

140. *Id.* at 282.

141. *Id.* at 283-85.

During the height of the OWS demonstrations, CNN aired a misleading news program attempting to portray OWS as a group of anarchists led by the hacker group “Anonymous.”¹⁴² Culture jammers are not hackers or anarchists, though both became OWS fellow travelers.¹⁴³

Instead, culture jammers work to change or subvert the symbolic meanings of marketing symbols and “consumerism’s most seductive features.”¹⁴⁴ For instance, in response to post-holiday shopping days, culture jammers started “Buy Nothing” days and attempted to counter television marketing with a “TV Turnoff” week.¹⁴⁵ Other efforts at combating consumer culture include painting their “own bike lanes, reclaim[ing] streets, ‘skull[ing]’ Calvin Klein ads, and past[ing] GREASE stickers on tables and trays at McDonald’s restaurants.” They also “organize swap meets, rearrange items on supermarket shelves,” and make their software available free on the Net.¹⁴⁶

The most fundamental limitation for culture jammers is that by using counter-marketing techniques, the jammers simultaneously promote the very marketing they try to lampoon.¹⁴⁷ In Barber’s words, “[t]aking over capitalism with ‘good commodities’ is not the same thing as subverting commoditization After all, the Blackspot shoe may pretend to be an anticommodity, but an anticommodity is just another commodity—at least when it’s a shoe.”¹⁴⁸

Culture jammers are up against the wealthiest giants in marketing—“master jammers”—who, through irony, use negative marketing to reinforce their products.¹⁴⁹ As Barber describes, “[t]here has not

142. *CNN Presents: Amber Lyon Profiles ‘Anonymous’*, CNN PRESS ROOM BLOGS (Jan. 13, 2012, 9:40 AM), <http://cnnpressroom.blogs.cnn.com/2012/01/13/cnn-presents-amber-lyon-profiles-anonymous/>.

143. See DMOZ, http://www.dmoz.org/desc/Society/Activism/Media/Culture_Jamming (last updated Feb. 12, 2013) (describing the function of culture jammers as “media hackers”); J.J. Jackson, *Return of the Summer Socialists and Sunshine Terrorists*, LIBERTY REBORN (May 4, 2012), <http://www.libertyreborn.com/2012/05/04/return-of-the-summer-socialists-and-sunshine-terrorists/> (last visited Feb. 12, 2013), and Nathan Schneider, *Thank You, Anarchists*, NATION (Dec. 19, 2011), <http://www.thenation.com/article/165240/thank-you-anarchists#> (last visited Feb. 12, 2013) (describing how anarchists’ ideologies influenced the Occupy Movement, to get a better understanding of how culture jammers or “media hackers” and anarchists are similar as it relates to government).

144. BARBER, *supra* note 85, at 284.

145. *Id.*

146. *Id.* at 282.

147. See *id.* at 286 (“[T]he underlying question remains whether anticonsumerist activists can actually harness the entrepreneurial spirit . . . without playing the game whose rules they want to subvert.”).

148. *Id.*

149. *Id.* at 288.

yet been a symbol of resistance and transgression that has not been effectively assimilated and reengineered as a marketing slogan or sales logo.”¹⁵⁰ Barber provides several examples of this reengineering including: the 1970 Buick promise to “light your fire,” GM’s Oldsmobile division’s sale of “Youngmobiles,” and the sale of Mao Tse-tung jackets and Che Guevara T-shirts.¹⁵¹ Additionally, Barber sees the movement’s forays into politics¹⁵² as diverting attention away from the primary evil of consumerism and trivializing the aims of the culture jammers.¹⁵³

V. TOWARDS A NEW CIVIC INFRASTRUCTURE

The embers of Arab Spring and OWS are still warm. To regain their fire, Arab Spring needs to go beyond protest, and OWS needs to go beyond culture jamming. Most importantly, each needs a “civic infrastructure” that is “sufficiently strong and well-organized to balance the shortcomings of both business and government.”¹⁵⁴ This civic infrastructure has several distinguishing characteristics.

First, this civic infrastructure should be community-based, attracting the social capital of informal as well as formal leadership.¹⁵⁵ Formal leaders include local elected officials, ministers, and heads of traditional civil society organizations. Digging deeper for informal leadership,¹⁵⁶ we find “go to” people (informal consultants and men-

150. *Id.*

151. *Id.*

152. *See id.* at 284 (“As an eclectic movement . . . the jammers have unavoidably adopted an eclectic politics. . . . But calling President Bush or former Israeli Prime Minister Sharon terrorists probably does not help critics of consumerism focus on the jammers’ primary issue.”).

153. *Id.*

154. “Prof.” *supra* note 15.

155. *See* Loeb, *supra* note 129, for a brief discussion of the SNOW Coalition, a coalition of Anti-Iraq war activists in Seattle who divided themselves up by neighborhoods and acted in communities where people were “more likely to know them as neighbors, coworkers, or friends.” *See Sound Nonviolent Opponents of War (SNOW Coalition)*, WASH. STATE ACTION NETWORK, [http://wanet.org/organizations/Sound-Nonviolent-Opponents-of-War-\(SNOW-Coalition\)](http://wanet.org/organizations/Sound-Nonviolent-Opponents-of-War-(SNOW-Coalition)).

156. *See* RICHARD C. HARWOOD, *TAPPING CIVIC LIFE: HOW TO REPORT FIRST, AND BEST, WHAT’S HAPPENING IN YOUR COMMUNITY* (2d ed. 1996), <http://www.pewcenter.org/doingcj/pubs/tcl>. In relevant part:

Indeed, journalists tend to spend a lot of time in just two layers of civic life: the official layer and the private layer. They cover the official layer routinely. . . . “Think of them as a pyramid with city officials at the top. The deeper we probe into a community - past the bureaucrats and then through the civic activists - the broader the pyramid gets.”

Id. (listing and describing the types of community leaders; the “Official Leaders,” “Civic Leaders,” “Connectors,” “Catalysts,” and “Experts”).

tors), “networkers” (people who are good at making connections),¹⁵⁷ and “boundary crossers” (people fluent in diverse cultures and accepted in many).¹⁵⁸

Second, this civic infrastructure should avoid bureaucracy, hierarchy, or top-down control—organizational and decision-making models that emerged in the Industrial Age. The military, as the only decision-making model for a large organization at the time of the industrial revolution, became the organizational model for engineering and manufacturing in the United States.¹⁵⁹ By the early twentieth-century, the “Fordist” assembly-line model emerged—those at the bottom performed highly specialized, repetitive tasks, with little room for judgment or discretion, and instead, rules, procedures, and standards set from above governed their work.¹⁶⁰ From the mid-19th century, top-down models supplanted more democratic and cooperative approaches in the United States, in civil society and government as well as industry.

Top-down models are particularly unsuited for the knowledge-based Information Age, however.¹⁶¹ The models worked in the “slower, simpler, more predictable” Industrial Age, but they do not work now.¹⁶² Such models exalt routinized procedure; internal communications proceed at a snail’s pace. “Not used to thinking for themselves, employees [in top-down models] wait for direction[,]” not trusting their supervisors, let alone their own judgment.¹⁶³ Organizational success in the fast-paced Information Age depends not merely upon the commands of those at the top, but on deploying, coordinating, and improving the intellectual abilities of the whole workforce.¹⁶⁴ Top-down models are too slow and inefficient for this task.

157. Scott London, *Informal Networks: The Power of Organic Community Groups*, 2010 HARWOOD INST. http://newpossibilitiesassociates.com/uploads/LSF_Informal_Networks_Final.pdf.

158. See generally Neal Peirce & Curtis Johnson, *Boundary Crossers: Community Leadership for a Global Age* (1997).

159. See generally JOHN X. WANG, *WHAT EVERY ENGINEER SHOULD KNOW ABOUT DECISION MAKING UNDER UNCERTAINTY* (2002) (discussing engineering decision-making).

160. TOM BENTLEY, *LEARNING BEYOND THE CLASSROOM: EDUCATION FOR A CHANGING WORLD* 102 (1998).

161. DAVID K. BANNER & T. ELAINE GAGNÉ, *DESIGNING EFFECTIVE ORGANIZATIONS: TRADITIONAL & TRANSFORMATIONAL VIEWS* 312 (1995).

162. MICHAEL H. HUGOS, *BUSINESS AGILITY: SUSTAINABLE PROSPERITY IN A RELENTLESSLY COMPETITIVE WORLD* 41 (2009).

163. THOMAS J. CARTIN, *PRINCIPLES AND PRACTICES OF ORGANIZATIONAL PERFORMANCE EXCELLENCE* 32 (1999).

164. NELARINE CORNELIUS, *HUMAN RESOURCE MANAGEMENT: A MANAGERIAL PERSPECTIVE* 245-46 (2d ed. 2001).

Social Change Requires Civic Infrastructure

Finally, this civic infrastructure should move us toward a form of “strong democracy.”¹⁶⁵ Benjamin Barber, originator of the term, insists that strong democracy can only emerge from a substantive consensus of “common beliefs, values, and ends that precede government” and constitute a community “in and through which individuals can realize themselves”¹⁶⁶ How can such a consensus be created in today’s context? It must arise out of “common talk, common decision, and common work” carried on in a participatory context, using conflict and transforming it to “common consciousness and political judgment.”¹⁶⁷

For a movement to succeed, it must build a strong social base and formulate a coherent, “well-planned and organized agenda for change.”¹⁶⁸ At present, the windows of opportunity created by the forces of democracy are quickly filled by more organized forces, usually in the form of new oligarchic elites or even holdovers from previous regimes.¹⁶⁹

Mancur Olson argued in *The Logic of Collective Action* that rational, self-interested individuals would not act to achieve their common interests in large groups unless they receive financial incentives (i.e., the market or “business” leg)¹⁷⁰ or are coerced to do so (i.e., law and enforcement—the “government” leg).¹⁷¹ Olson also predicts that working for the common interest is too costly in terms of time and

165. Benjamin Barber, *Making Democracy Strong: A Conversation with Benjamin Barber*, CIVIC ARTS REV., Summer-Fall 1996, at 2, available at <http://car.owu.edu/pdfs/1996-9-3.pdf>. (“[A fuller democracy] would rely much more heavily on citizen participation. A fuller democracy does not mean participation of all the citizens all the time in all forms of public life. But it has to mean government by all of the people some of the time”).

166. BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 224 (2d ed. 2003).

167. *Id.*

168. ALI REZA ABOOTALEBI, *ISLAM AND DEMOCRACY: STATE-SOCIETY RELATIONS IN DEVELOPING COUNTRIES 1980-1994*, at 116 (2000).

169. See Ayalew, *supra* note 111. Ayalew proposes that Egypt is categorized at Stage Five of the Movement – the phase where an “active democracy is created.” *Id.* At this phase, citizens must address grievances prior to the Revolution, i.e., the neoliberal economic policies that created wealth for a selected number of people. *Id.* (citing Sameh Naguib, *Egypt’s Unfinished Revolution*, INT’L SOCIALIST REV. (Sept.-Oct. 2011), available at <http://www.isreview.org/issues/79/feature-egyptianrevolution.shtml>).

170. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2, 26 (1965) (“Only when the elasticity of demand for the industry is less than or equal to the fraction of the industry’s output supplied by a particular firm will that firm have any incentive to restrict its output”).

171. *Id.* at 1-2.

money for groups like labor unions, farm organizations, cartels, and corporations.¹⁷²

However, Olson conceded that small groups might be able to act without being forced *or* paid, because “each member gets a substantial proportion of the total gain simply because there are few others in the group”¹⁷³ Thus, small groups might achieve a collective good through “voluntary, self-interested action.”¹⁷⁴ To achieve larger ends, however, they might need professional organizers.¹⁷⁵

Neither Arab Spring nor the Occupy movements developed organizational structures permitting activities beyond mobilization. The Muslim Brotherhood, in contrast, is very well organized, with an extensive “network of social service and religious organizations at the local level” including “hundreds of schools, medical clinics, private mosques, day-care centers, and job-training centers.”¹⁷⁶

OWS, during an April 2012 national conference, discussed some ways to take their issues back to their own neighborhoods, communities, workplaces, and campuses.¹⁷⁷ Several models are available to accomplish these objectives, but I favor Swedish-style study circles¹⁷⁸ and the citizen’s assembly model pioneered by Thomas Jefferson.¹⁷⁹ The Occupy Movement, should they attempt to regroup, might consider using them, as I suggest in my memo to David Swanson and in my Huffington Post blog entry.¹⁸⁰

In the Huffington Post piece, I argue that the Citizen’s Assemblies, aggregated to scale in Congressional districts, could model themselves on the Opposition in British Parliament, which primarily “seeks to expose the deficiencies of Her Majesty’s Government, and ultimately to replace it.”¹⁸¹ The Citizen’s Assemblies, however, would

172. *Id.* at 6-7, 11.

173. *Id.* at 34, 48.

174. *Id.* at 34.

175. *Id.* at 10-11.

176. BRUCE K. RUTHERFORD, EGYPT AFTER MUBARAK: LIBERALISM, ISLAM, AND DEMOCRACY IN THE ARAB WORLD 94 (2008).

177. Observation by Prof. McDougall, attending the OWS conference as an observer.

178. “Prof.”, *supra* note 16.

179. *Id.*

180. See McDougall, *supra* note 23.

181. R.M. PUNNETT, FRONT BENCH OPPOSITION: THE ROLE OF THE LEADER OF THE OPPOSITION, THE SHADOW CABINET AND SHADOW GOVERNMENT IN BRITISH POLITICS 4, 10 (1973) (“The Opposition is office-seeking in that its role is not merely to criticize those who are in power, but is also to seek to replace them.”). In contrast, The Assemblies could operate parallel to government, providing services such as community mediation. See “Prof.” *supra* note 17. In 2000, the largest congressional district held 905,316 people. The smallest district had 495,304. The average size of a congressional district is 646,952 people. *Congressional Apportionment*,

focus on deficiencies for the sake of accountability rather than to seek formal political power for themselves.

How does a shadow government work? Since 1955, in the U.K. there has been a formal¹⁸² “Shadow Government” mirroring the structure of the formal Cabinet and Ministerial organization.¹⁸³ Specifically, there is a leader of the opposition and a “front bench team” of ministers¹⁸⁴ including senior, deputy, and junior spokesmen, temporary assistant spokesmen (for some debates), and secretary and assistant opposition whips.¹⁸⁵

The Opposition chooses the subjects for debate¹⁸⁶ and directly faces and debates with the Prime Minister during Question Time.¹⁸⁷ The ruling party, the press, and the public are made aware of the Shadow Cabinet at the beginning of each session.¹⁸⁸ With respect to how much media coverage the Opposition front benchers receive, “[w]hile Ministers receive some attention through their departmental work . . . the Leader of the Opposition is almost alone among Opposition figures in receiving regular coverage by the news media.”¹⁸⁹

The “shadow cabinet” refers to the opposition party representatives who concern themselves “with the tactical political considerations of the Opposition and the affairs of the Opposition party.”¹⁹⁰ The Shadow Cabinet decides “who will speak for the opposition in the week’s debates, and who will lead the attack in Question Time.”¹⁹¹ In addition to these responsibilities, the Shadow Cabinet determines “the policy attitudes of the Opposition towards immediate issues,”¹⁹² manages administrative affairs, and “concerns itself with long term party policy, producing policy statements and manifestos, and planning policies in anticipation of future office.”¹⁹³ Meetings of the cabinet are

NAT’L ATLAS (Feb. 28, 2011), http://www.nationalatlas.gov/articles/boundaries/a_conApport.html#two.

182. See PUNNETT, *supra* note 181, at 10 (“[T]he presence of Her Majesty’s Opposition is formally recognized within the machinery of Government: the Opposition recognizes the Government’s right to govern, and in turn the Government officially recognizes the Opposition and provides opportunities for the Opposition to function.”).

183. See *id.* at 5.

184. See *id.*

185. See *id.* at 75 fig.E.

186. See *id.* at 9.

187. See *id.* at 5.

188. See *id.*

189. *Id.* at 100.

190. *Id.* at 216.

191. *Id.* at 217.

192. *Id.* at 218.

193. *Id.*

not called with any regularity.¹⁹⁴ The Shadow Cabinet also utilizes committees and small group arrangements that are generally ad hoc and informal.¹⁹⁵

The effect of the Opposition (which includes former ministers) to debate and call into question the decisions of the prime minister and ruling party¹⁹⁶ provides a template for the civic infrastructure I describe. The one Leader of the Opposition “acts as a public watchdog by keeping the actions of the Government under scrutiny, and secondly he provides an element of choice for the electorate by posing as an alternative Prime Minister at the head of the alternative government.”¹⁹⁷

Citizen’s Assemblies, representing many consumers and bank depositors, would have sufficient economic power to check business as well.¹⁹⁸ Past examples include the boycotts and selective buying campaigns of the civil rights movement, and labor’s boycotts and public “shaming” campaigns.¹⁹⁹ During the Civil Rights Era, the NAACP boycotted retailers, restaurants, and merchants that adhered to Jim Crow practices, as well as engaged in selective buying campaigns in cities that segregated public transportation services.²⁰⁰ Spelman College students successfully picketed supermarkets with discriminatory hiring practices.²⁰¹ In *NAACP v. Claiborne Hardware*, businesses in Claiborne County, Mississippi that lost customers as a result of a civil rights boycott, sued for damages.²⁰² The Supreme Court dismissed the suit, concluding that the boycott activities, including speeches and non-violent picketing, were constitutionally protected by the First Amendment.²⁰³

194. *See id.* at 221.

195. *See id.* at 247.

196. *See id.* at 28 (“The presence in Parliament of ambitious critics, many of whom will be former Ministers, and thus familiar with the workings of government, means that Ministers of the Crown have to perform their duties in an atmosphere that is considerably more hostile than that surrounding almost any other occupation.”).

197. *Id.* at 77. The Assemblies could also perform some functions “parallel” to government, such as community mediation. *See Community Mediation: Resolving Conflicts Quickly*, SAFE HORIZON, http://www.blue-iceberg.net/www.safehorizon.org/Resources/Mediation_Brochure_Eng.pdf (last visited Jan. 27, 2012).

198. McDougall, *supra* note 23.

199. *Id.*

200. GILBERT JONAS, *FREEDOM’S SWORD: THE NAACP AND THE STRUGGLE AGAINST RACISM IN AMERICA 1909-1969*, at 175 (2005).

201. *See* HARRY G. LEFEVER, *UNDAUNTED BY THE FIGHT: SPELMAN COLLEGE AND THE CIVIL RIGHTS MOVEMENT 1957/1967*, at 45 (2005).

202. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 886 (1986).

203. *See* GARY MINDA, *BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND* 122-23 (1999).

Social Change Requires Civic Infrastructure

In the 1970s, Cesar Chavez led migrant farm workers in a strike against California grape growers triggering a nationwide grape boycott, pressuring the growers to sign “equitable contracts with the workers,” demonstrating the “power of moral passion, commitment, and solidarity to bring about change in a democratic society.”²⁰⁴ Labor unions in the early 1980s pioneered “corporate” campaigns that threatened the images of corporations in the eyes of consumers, investors, journalists, social interest groups, and other publics.²⁰⁵

A. Using Social Media

The Assemblies and their study circle components would no doubt use social media such as Twitter, Facebook and YouTube to speed communication and Wikipedia to aggregate their insights and goals. These are all excellent tools, but I argue they must be put to use by a human community existing in real time.

My research assistant, Sharaya Cabansag, commented in rejoinder that using social media to do this can soften the embarrassment and “otherness” that is sometimes associated with public political display.²⁰⁶ She agrees with me that social media should not replace face-to-face civic participation, but insists that social media allows the recipient of the information the freedom to accept or ignore the call to action.²⁰⁷ Just as a text message is read, sinks into the consciousness, and then the receiver can either text back or ignore the message, social media puts the ball in the reader’s court.²⁰⁸ This relative anonymity leaves the recipient with more wiggle room for inaction, but also relieves them from feeling coerced in a face-to-face encounter.²⁰⁹

Sharaya’s concerns might best be met by a mixture of virtual and face-to-face deliberation. The “eLIDA CAMEL” and “Meet-Up” ap-

204. ALAN AXELROD & CHARLES PHILLIPS, WHAT EVERY AMERICAN SHOULD KNOW ABOUT AMERICAN HISTORY: 225 EVENTS THAT SHAPED THE NATION 310 (3d ed. 2008).

205. See Bennett, *supra* note 66, at 10. Functions “parallel” to business the Assemblies could perform include “social” businesses such as food and energy co-ops. See Jeremy Rifkin, *The Third Industrial Revolution: How Lateral Power Will Transform Society*, HUFFINGTON POST (Sept. 28, 2011), http://www.huffingtonpost.com/jeremy-rifkin/the-third-industrial-revo_b_981168.html.

206. See Memorandum from Sharaya Cabansag Commentary on *Soul of a Citizen in Light of the Social Media Research* 1, 2 (2011) (on file with author).

207. See *id.* at 2.

208. See *id.*

209. See *id.*

proaches blend these two modalities.²¹⁰ Meet-Up enables users to organize their own face-to-face meeting group or join one of thousands already established. There are more than 2,000 Meet-Up groups operating in local communities each day.²¹¹

E-Learning Independent Design Activities (eLIDA) for Collaborative Approaches to the Management of e-Learning (CAMEL) arose as a way for British academics using e-learning techniques to share perspectives and approaches, not only online, but also in a series of “round robin” meetings at each of their home universities.²¹² In this way, participants got to appreciate the context in which their colleague’s ideas had emerged, and got to meet with students and administration, increasing their understanding.²¹³ They also bonded more closely through face-to-face interaction.²¹⁴

Platforms such as “IMeet” and “Gotomeeting” provide even more flexibility. IMeet is a video conferencing option for purchase.²¹⁵ Participants are placed in “cubes” through which they access the software’s audio and video options.²¹⁶ The platform can support fifteen people at a time, making the “meeting” seminar size, or about the size of a large real-time study circle.²¹⁷ Additional options include posting documents, attachments, links to web pages, and YouTube videos.²¹⁸ Gotomeeting provides similar options.²¹⁹

Electronic communications of all sorts can “accelerate” Assembly processes.²²⁰ Feedback loops built into the Assembly’s Internet platforms could facilitate the distribution of information and problem

210. See *RunObama.com Enlists 6,500 Obama Supporters in First Two Weeks; Calls on Obama Supporters to Gather 10,000 Signatures by Sunday*, PR NEWswire ASS’N (Dec. 7, 2006), <http://www.prnewswire.com>.

211. *About Meetup*, MEETUP.COM, <http://www.meetup.com/about> (last visited Jan. 31, 2013).

212. Interview with Prof. Mandla Makhanya, Pro-Vice Chancellor of the University of Southern Africa (UNISA), South Africa’s ‘on-line’ University. Dr. Makhanya first alerted me to the existence of the eLIDA CAMEL approach, which he planned to implement at UNISA. Pretoria, South Africa, July 2008.

213. *Id.*

214. See *Project Details: Project Outcomes*, ELIDACAMEL, <http://elidacamel.cms.gre.ac.uk/outcomes.html> (last visited Jan. 27, 2012); see also Jill Jameson, *The eLIDA CAMEL Nomadic Model of Collaborative Partnership for a Community of Practice in Design for Learning*, 6 *ELECTRONIC J. OF E-LEARNING* 197, 197 (2008), available at www.ejel.org.

215. Matt Smolinger, *IMeet Reviewed*, SMALLNET-BUILDER (Mar. 31, 2011, 3:06PM), <http://smallnetbuilder.com/cloud/cloud-services-apps/321-imeet-reviewed>.

216. *Id.*

217. See *id.*

218. *Id.*

219. See *GoToMEETING*, <http://www.gotomeeting.com/fec/> (last visited Jan. 27, 2012).

220. See VAN LAER & VAN AELST, *supra* note 65, at 230, 245-47; McDougall, *supra* note 23.

solving techniques with the potential of becoming as commonplace as “following one’s favorite TV shows, sports teams, or news stories.”²²¹

“Teledemocracy,” a tool used to improve communication between citizens and their government representatives, might be used internally by the Assembly, stripped of its “VIP” implications. Teledemocracy experiments such as the Public Electronic Network (PEN) have been set up to create a channel of communication between city governments and their constituents.²²² Thus far, using information and computer technologies (ICTs) in this way has served to distance officials from citizens rather than bringing them closer together. There is a tendency to refer to people as “users” or “customers” rather than citizens, seeking feedback rather than discourse and deliberation.²²³

B. Social Media and Community Ties

The Assembly, with its face-to-face dimension, can “ground” what would otherwise be purely virtual encounters. Its face-to-face meeting features would build empathic connections—“strong ties” rather than weak ones.²²⁴ We are *physiologically programmed* for community.²²⁵ When two people engage, each of their brains are being “sculpted and changed” by their impressions of one another.²²⁶ MRIs performed on both show a “mutual firing and mutual growth in the social centers of the brain.”²²⁷

From infancy, our neurological circuits—“mirror neurons”—go to work, internalizing what we see and hear of others’ feelings.²²⁸ These circuits are increasingly activated as we experience more such “social exercise.”²²⁹ Parent and community nurturing of an infant, for

221. RICHARD HALSTEAD-NUSSLOCH, *DESIGNING PERSONALIZED USER EXPERIENCES IN ECOMMERCE* 182 (Clare-Marie Karat, et al. eds., 2004).

222. See Patrick B. O’Sullivan, *Computer Networks and Political Participation: Santa Monica’s Teledemocracy Project*, 23 J. APPLIED COMM’N RES. 93, 94-95, 103-06 (1995).

223. See BARRY N. HAGUE & BRIAN LOADER, *DIGITAL DEMOCRACY: DISCOURSE AND DECISION MAKING IN THE INFORMATION AGE* 13 (1999).

224. See Gladwell, *supra* note 99.

225. See JEREMY RIFKIN, *THE EMPATHIC CIVILIZATION: THE RACE TO GLOBAL CONSCIOUSNESS IN A WORLD IN CRISIS* 14-15, 109, 125-127 (2009).

226. DANA CROWLEY JACK & ALISHA ALI, *SILENCING THE SELF ACROSS CULTURES: DEPRESSION AND GENDER IN THE SOCIAL WORLD* 103 (2010).

227. *Id.* at 103.

228. See PETER A. LEVINE & MAGGIE KLINE, *TRAUMA THROUGH A CHILD’S EYES: AWAKENING THE ORDINARY MIRACLE OF HEALING* 302 (2007).

229. See RIFKIN, *supra* note 225, at 83-90 (discussing the relation between biology and culture).

example, triggers its “mirror neurons,” establishing “empathic pathways in the brain.”²³⁰ Human connection is thus a primary ingredient in psychological,²³¹ cultural,²³² and intellectual development.²³³

Empathic face-to-face connection builds trust, the social capital needed to make Gladwell’s “group projects” work. A high level of social capital—“strong ties”—are also associated with cooperation, reciprocity, civic engagement, and collective health.²³⁴ They are not built on the Internet, but rather grow and endure through contact, which is more intimate and frequent than that which characterizes casual acquaintance.²³⁵

Douglas North, a Nobel Prize winner in economics, makes a complementary point. North examined the “transaction costs” accruing when two or more individuals must agree to cooperate in an endeavor—purchase goods and services, cast their votes, or agree to work together in some community enterprise.²³⁶ North showed that social capital—built in community²³⁷—also facilitates human communication in the market and in government because it broadens the norms of honesty, integrity, and reliability.²³⁸ The greater the fund of social capital in any society, the more efficiently it works.²³⁹

CONCLUSION

The early history of Arab Spring and the Occupy Movements reveals the fault lines of the twenty-first century’s defining struggle. It is a struggle between the forces of democracy and freedom on the one

230. *Id.*

231. See JACK & ALI, *supra* note 226, at 103.

232. See Harold McDougall, *Reconstructing African-American Cultural DNA: An Action Research Agenda for Howard University*, 55 *How. L.J.* 63, 69 (2011).

233. Leon Neyfakh, *Are We Asking the Right Questions?*, *BOSTON GLOBE* (May 20, 2012), <http://www.bostonglobe.com/ideas/2012/05/19/justask/k9PATXFdpL6ZmkreSiRYGP/story.html?camp=pm> (“Wielded with purpose and care, a question can become a sophisticated and potent tool to expand minds, inspire new ideas, and give us surprising power at moments when we might not believe we have any.”).

234. See JULIA HÄUBERER, *SOCIAL CAPITAL THEORY* 56-57 (2010).

235. See *id.*; see also SANDRA C. DUHE, *NEW MEDIA AND PUBLIC RELATIONS* 96 (Sandra C. Duhe ed., 2007) (discussing how “weak ties” or social networking with acquaintances requires “very little time and interaction”).

236. See generally DOUGLASS C. NORTH, *UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE* (2005).

237. See JONG S. JUN, *THE SOCIAL CONSTRUCTION OF PUBLIC ADMINISTRATION: INTERPRETIVE AND CRITICAL PERSPECTIVES* 219 (2006).

238. See *id.*

239. See *id.* at 58.

hand, and the forces of elite and oligarchic control on the other.²⁴⁰ The Occupy Movements showed that this struggle will be carried on in developed countries as well as those that are less developed. Protesters in Egypt and throughout the Arab world will fight against traditionalist, self-aggrandizing elites,²⁴¹ but protesters in the United States and other developed countries will struggle against corporate elites.²⁴²

Traditional elites have been able to hold on to power by filling the minds of the people with an ideology based on traditional values, which Benjamin Barber collects under the symbol “jihad.”²⁴³ Corporate elites have been able to hold on to power by filling the minds of the people with an ideology based on consumerism and individualism, which Benjamin Barber collects under the symbol “McWorld.”²⁴⁴ Governing elites reacting to the emergence of Arab Spring and OWS disruptions were quick to exploit the people’s allegiance to either of the two ideologies Barber identifies.²⁴⁵

In order for the forces of freedom and democracy to prevail, they will have to break free of both these ideologies.²⁴⁶ Revolutionary movements’ new problem-solving approaches must become a matrix from which new norms and values may spring, as well as new patterns of interaction and organization.²⁴⁷ Paul Loeb observed a sense of festival at Occupy gatherings, “with puppets, colorful banners, drum cir-

240. See Josh Halliday, *Hillary Clinton Adviser Compares Internet to Che Guevara*, GUARDIAN.UK (June 22, 2011, 5:53PM), <http://www.guardian.co.uk/media/2011/jun/22/hillary-clinton-adviser-alec-ross> (“Alec Ross said ‘dictatorships are now more vulnerable than ever’ as disaffected citizens organise influential protest movements on Facebook and Twitter.”).

241. See CHRIS C. DEMCHAK, *WARS OF DISRUPTION AND RESILIENCE: CYBERED CONFLICT, POWER, AND NATIONAL SECURITY* 281 (2011).

242. See Lee Fang, *As Tea Party Koch Brothers Earned an Extra 11 Billion in Recent Years, They Laid Off Thousands*, THINK PROGRESS ECON. (Feb. 11, 2011, 2:46PM), <http://thinkprogress.org/economy/2011/02/01/141767/david-charles-koch-jobs/>; Sarah van Gelder & Brooke Jarvis, *Wisconsin Awakens a Sleeping Giant*, YESMAGAZINE.ORG (Mar. 15, 2011), <http://www.yesmagazine.org/people-power/from-wisconsin-a-sleeping-giant-awakes>; Paul Street, *Report from North America: The Wisconsin Rebellion and Its Limits in a Global Context*, NEWLEFT-PROJECT.ORG (Jan. 5, 2011), <http://www.newleftproject.org/index.php/mayday/article/6285>.

243. See generally BENJAMIN BARBER, *JIHAD VS. MCWORLD: TERRORISM’S CHALLENGE TO DEMOCRACY* (1996) (discussing how Jihads focus on traditional notions of community and how religion, generally, has become intertwined with the political landscape).

244. *Id.* at Part I (discussing consumerism as an ideology deriving from advertising); see also BETTY MALEN, *BALANCING LOCAL CONTROL AND STATE RESPONSIBILITY FOR K-12 EDUCATION* 139 (2000) (discussing the social and political forces unleashed by globalization and how the growth of multinational corporations encourages the development of a homogeneous world culture).

245. See Ayalew, *supra* note 111.

246. Cory Siemaszko, *Pakistani Teen Who Survived Taliban Shooting Flown to British Hospital*, N.Y. DAILY NEWS (Oct. 15, 2012, 12:55PM), <http://www.nydailynews.com/newsworld/pakistani-teen-survive-taliban-shooting-flown-british-hospital-article-1.1183885>.

247. See PIOTR SZTOMPKA, *THE SOCIOLOGY OF SOCIAL CHANGE* 295 (1993).

cles, radical marching bands, signs saying ‘I’ll believe corporations are people when Texas executes one,’ and people dressed up as predatory billionaires, Lady Liberty and dollar-spewing zombies who chant ‘I smell money, I smell money.’”²⁴⁸ The “spirit of play echoes the defiant folk and hip hop music of Tehrir Square and the Gandhi meets Monty Python approaches of the Serbian youth movement Otpur, who helped train the initial Tehrir Square occupiers.”²⁴⁹

Such movements, even if ephemeral, create new cultural patterns in their wake, leavening both traditional and modern ideas. Thus, they might enhance and deepen traditional culture, but avoid extreme notions of jihad that are really “opportunistic attempts at self-aggrandizement, rather than the preservation of . . . community.”²⁵⁰ At the same time, they might root modern notions of autonomy and individuality²⁵¹ in practices and approaches, which do not serve the alienated consumerist individualism of McWorld.²⁵²

New values alone will not suffice, however. As these movements appear, they must be urged to develop an organizational structure, supple as well as sophisticated, that does not repeat the mistakes of the past. Social media has a role to play,²⁵³ as does public protest, but small-group organizing and coalition-building, to create a progressive civic infrastructure, is essential if the 21st century struggle for political and economic democracy is to survive and flourish.

248. Loeb, *supra* note 129.

249. *See id.*

250. *See also* Richard Kahn & Douglas Kellner, *Internet Subcultures and Oppositional Politics*, UCLA.EDU (2003), <http://gseis.ucla.edu/faculty/kellner/essays/Internetsubculturesoppositionalpolitics.pdf> (discussing use of the Internet by terrorist groups). *But see* OLIVER LEAMAN, *ISLAMIC PHILOSOPHY: AN INTRODUCTION* 136-37 (2009).

251. This is possible because of “communication independence from the mass media.” *See* Bennett, *supra* note 66, at 9.

252. *See generally* McDougall, *supra* note 232.

253. *Cf.* Katherine Kendrick, *Activism 2.0*, YALE GLOBALIST (Feb. 28, 2007, 8:33PM), <http://tyglobalist.org/focus/activism-2-0/> (describing the role of Moveon.org in changing the manner of participation in American Politics); Howard Rheingold, *supra* note 81 (examining the correlation between SMS text messaging and political activism around the world including: toppling the Estrada Regime in the Philippines; changing election results in South Korea; turning an obscure candidate into a frontrunner in the United States; using texting to organize mass demonstrations despite a ban in Madrid; and having a fair election with the highest number of voters experiencing easily accessible election results as a result of the mobile phone).

VI. POST-SCRIPT: COMMUNITY REENGAGEMENT
THROUGH THE REFORMATION OF ADVISORY
NEIGHBORHOOD COMMISSIONS
(with Crinesha Brooks)

The Occupy movement has faded.²⁵⁴ Arab Spring is in chaos.²⁵⁵ Yet the grand ideas that spurred them still give hope. How might their concepts of radical civic engagement be applied in a setting familiar to us at Howard?

Inspired by this Symposium, and by the desire of *Howard Law Journal* students to produce a “legal” result, I thought about the Advisory Neighborhood Commissions (ANCs) of the District of Columbia, formed to liaise with Congress before the advent of Home Rule in the District. I asked my research assistant, Crinesha Brooks, to look into the ANCs as a possible vehicle by which to implement some of my civic infrastructure ideas. She wrote the following under my direction.

A. Reviewing the Decline in Citizen Engagement

Direct civic participation in local government is the most effective means to ensure that policies of public concern are being implemented.²⁵⁶ This is, in large part, due to local governments’ size and accessibility. However, since the 1960s Civil Rights Movement, citizen engagement has dramatically declined.²⁵⁷ Robert Putnam attributes civic disengagement to the current family structure—referencing the two-career household—increase in television consumption, and generational shifts.²⁵⁸ Citizens have become less engaged in modern

254. See Star-Ledger Editorial Board, *Occupy Wall Street Movement Has Faded, but the Frustration Lives On*, STAR LEDGER (Sept. 17, 2012, 8:20 PM), http://blog.nj.com/njv_editorial_page/2012/09/occupy_wall_street_movement_ha.html.

255. See *Syria Uprising: Assad Says Arab Spring Brought Chaos*, BBC NEWS, <http://www.bbc.co.uk/news/world-middle-east-19671635> (last updated Sept. 12, 2012, 1:44 PM).

256. Matthew Parlow, *Civic Republicanism, Public Choice Theory and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 144 (2008).

257. See Nicole Turner Lee, *The Challenge of Increasing Civic Engagement in the Digital Age*, 63 FED. COMM. L.J. 19, 22 (2010). During the Civil Rights Movement, citizens gathered in church basements to plan and organize how to challenge the racially motivated policies. That generation of people was concerned with how local, state, and federal policies affected their lives and their communities. During this historic movement, and those of others, individuals canvassed, met publicly, knocked on doors, made telephone calls, and all other such things requiring personal collective action. Today, collective action is more passive such as blogging, retweeting, or posting a status on Facebook.

258. *Id.* at 22; Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 FORDHAM L. REV. 1573, 1580 (2001); see also Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 1 (“Echoing de Tocqueville, Putnam argues that the vitality and efficacy of democratic political institutions

politics and government, which has led to an uninformed public.²⁵⁹ This lack of citizenry is apparent in low voter turnouts in local, state, and federal elections.²⁶⁰ The belief is that when individuals lack civic engagement, they lack the requisite knowledge that they would otherwise have as it pertains to political and governmental issues relevant to them.²⁶¹ American political participation has been described as a mix of long periods of “uninformed and apathetic disengagement” followed by brief periods of “popular ferment and participation.”²⁶² However, engaging in these brief periods of “popular ferment and participation” interferes with the effectiveness of policy and our political systems lack consistency.²⁶³

Many believe that we have entered into an era of personal democracy, where citizens are no longer interested in collective mobilization.²⁶⁴ Instead, citizens’ engagement with the government has become more privatized leading to less policy influence because of a disinterest in policy-making.²⁶⁵ The collective community identity that is essential in a democratic republic, such as ours, that would allow policy-makers the opportunity to become aware of issues more relevant to respective communities has declined.²⁶⁶

Although Putnam attributes civic disengagement to the two-career family structure,²⁶⁷ increase in television consumption, and generational shifts,²⁶⁸ the focus here is briefly on two aspects of the

depends crucially upon the society’s store of ‘social capital’— ‘networks, norms, and trust . . . that enable participants to act together more effectively to pursue shared objectives.’ And it is largely through their participation in voluntary clubs, associations such as the PTA, fraternal and professional organizations, and even bowling leagues that citizens develop these social ties. Putnam contends further that, as Americans devote progressively less time and energy to these civic associations, the store of social capital in American society is eroding.”).

259. Parlow, *supra* note 256, at 138.

260. *Id.* This is with the exception of the 2008 and 2012 Presidential elections, which showed a huge increase in voter turnout. Josh Lederman, *Voter Turnout Shaping Up to Be Less than 2008*, HUFFINGTON POST (Nov. 7, 2012, 5:22 PM), http://www.huffingtonpost.com/2012/11/07/voter-turnout_n_2088810.html (explaining that in 2008, 131 million people voted in the election and about 126 million in 2012).

261. Parlow *supra* note 256, at 138.

262. Carlos E. González, *Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution?*, 80 WASH. U. L.Q. 127, 215 (2002).

263. See Parlow, *supra* note 256, at 143 (“[The] communal experience, can, in turn, increase the likelihood that citizens will participate in their government, enhance its effectiveness, and give more credence to the policies adopted through their involvement.”).

264. Parlow, *supra* note 256, at 140-141.

265. *Id.*

266. *Id.*

267. See Estlund, *supra* note 258, at 1.

268. See Lee, *supra* note 257, at 22; Macedo, *supra* note 258.

Social Change Requires Civic Infrastructure

generational shift. Two concerns due to the generational shift that may be attributed to civic disengagement are the decline in civic education and a Digital Age that replaces real with virtual contact. With the former, as Alexis de Tocqueville puts it, “In democratic countries knowledge of how to combine is the mother of all other forms of knowledge; on its progress depends that of all the others.”²⁶⁹ If citizens are unaware of how to participate in society, they will not do so. With the latter, as this new phenomenon increases, the chances of increasing participation in the local town halls, church basements, and community centers will continue to decrease.²⁷⁰

B. The Importance of Civic Education

Because the concept of democracy is not a given, it is something that must be taught repeatedly.²⁷¹ Civic education provides students with the ability and understanding of what it truly means to be a citizen.²⁷² It sets the tone for understanding policy-making, mock trials, self-governance, and various forms of dispute resolution.²⁷³ However, civic education has decreased throughout schools in the United States.²⁷⁴ Today, if the course in civics does exist or is part of a curriculum, it is limited to the formation and organization of American government.²⁷⁵ Under this setting, civic virtues, duties and engagement are overlooked, and students are not exposed to the many ways that they may become involved in the political processes. In 2009 Justice Souter issued a call to action during an American Bar Association (ABA) meeting in Chicago stating, “[W]e have to take on the job of making American civic education real again . . . [w]hat more important work can you do?”²⁷⁶ As a result of the decline in civic education, disengagement runs prevalent within the younger community and has increased.²⁷⁷

269. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 288 (Scott A. Sandage ed., George Lawrence trans., Harper & Row 1969) (1840).

270. MATTHEW A. CRENSON & BENJAMIN GINSBERG, *DOWNSIZING DEMOCRACY: HOW AMERICA SIDELINED ITS CITIZENS AND PRIVATIZED ITS PUBLIC* 10-11 (2002).

271. Michael Palmer, *Civic Education Through Civic Engagement*, 31 VT. B.J. 30, 31 (2005).

272. *Id.*

273. *Id.*

274. Kevin Ryan, *Lost in the Cave: Citizenship and the Decline of Public Education*, 29 VT. B.J. 7, 9 (2003-04).

275. *See id.*

276. Leo I. Brisbois, *Civics: To Save a Village, Teach a Child*, 66 BENCH & B. MINN. 7, 7 (2009).

277. Ryan, *supra* note 274, at 10 (“Far from being concerned about the public good, nearly three-quarters of today’s youth set financial success as their highest priority in life. Powerfully

Before the Internet Age, citizens met in local coffee shops and community town halls.²⁷⁸ Today, citizens engage in passive political discussions on the Internet.²⁷⁹ The issue with this is that online access is limited.²⁸⁰ Although there have been many positive changes due to social networking and the Internet,²⁸¹ the Digital Age has created a form of social isolation.²⁸² Barriers have been created for those who are less educated, low-income, disabled, and elderly.²⁸³ Because the Internet is far less accessible than our traditional public forums, it excludes segments of society that would serve to gain from civic engagement.²⁸⁴

C. Previous Efforts to Redress Civic Disengagement

Federal, state, and local governments have created programs designed to reengage the public in issues that are central to their communities. As will be discussed, the limitations experienced by those programs were primarily due to the top-down approach. Because the federal and state governments lack the experience and connectedness of the communities, it was more difficult to establish programs designed to bridge the gap of community solidarity and policy-making.

Beginning with the War on Poverty, the government has made several failed attempts at reengaging the public.²⁸⁵ Although the focal point of many of these programs was to target a distinct and marginalized group, the poor, the efforts still proved to be unsuccessful.²⁸⁶ Examples of such programs are the Community Action Program, the Community Development Corporations, and various planning move-

illustrating their cynicism about working with others for public ends, trust for other people has fallen dramatically among those between the ages of 15 and 25.”).

278. See Lee, *supra* note 257, at 20.

279. See *id.* at 22-23. Frank Rusciano describes citizen engagement on the Internet as passive discourse. However, sociologist Barry Wellman views the Internet as a new forum for social interaction and describes social networking sites as the new “vanguards” for public discourse. *Id.*

280. See *id.* at 21, 25, 28-29.

281. Haiti and the 2008 Presidential election are examples. *Id.* at 20-21, 23. KONY 2012, Occupy Wall Street, and the shooting of Trayvon Martin are examples of how the Internet brought these issues of public concern to the forefront. Matt Masticova, ‘Kony’ a Milestone in Social Media, TARTAN (Mar. 26, 2012), <http://thetartan.org/2012/3/26/forum/socialmedia>.

282. Lee, *supra* note 257, at 25. People with low-income are often unable to afford Internet access; elders and the less-educated are not able to utilize these tools. The disabled are also unable to utilize the Internet without assistance, which places them in social isolation.

283. *Id.*

284. See *id.*

285. See Parlow, *supra* note 256, at 157-58.

286. See *id.* at 158.

ments initiated throughout cities in the United States, which were created as pathways for indigent citizens to become more directly involved in redevelopment efforts in urban communities.²⁸⁷

However, these programs failed due to the program administrators', (usually federal and state officials) lacking experience in areas of community planning and engagement; the belief that these programs would be unsuccessful at the outset and essentially a "waste of time"; unrealistic expectations; and inadequate funding.²⁸⁸ All of these reasons were primarily due to the top-down approach.²⁸⁹ Rather than these programs originating from local government and working their way up, they originated at the top, federal and state governments, making it even more difficult to obtain civic buy-in and engagement.²⁹⁰

D. Proposal: ANC's Functioning as Ward Republics

As mentioned, programs for collaborative neighborhood organizations have been a phenomenon in a number of cities and/or states.²⁹¹ One such is the ANC for the District of Columbia, which is tasked with representing neighborhoods in the eight wards throughout the District, each of which comprises about 2000 residents.²⁹² By statute, they are given the authority to make recommendations to the City Council, the mayor, or other agencies as it relates to matters affecting their prospective wards such as, traffic, parking, zoning, recreation, street improvements, liquor licensing, economic development,

287. See *id.*; Peter W. Salsich, Jr., *Grassroots Consensus Building and Collaborative Planning*, 3 WASH. U. J.L. & POL'Y 709, 712-13 (2000).

288. Parlow, *supra* note 256, at 158-159; Salsich, *supra* note 287, at 713.

289. Salsich, *supra* note 287, at 713.

290. See generally *id.* at 714. (discussing the decentralization of federal programs and its implications for neighborhood collaborative planning).

291. Salsich, *supra* note 287, at 716-24; see ATLANTA CITY CODE §§ 6-3011-6-3019 (2012) (establishing Neighborhood Planning Units within the City of Atlanta); see also CONN. GEN. STAT. ANN. § 7-600 (2012) (requiring neighborhood planning commission to be limited to areas with a "significant number of deteriorated property"); D.C. CODE § 1-207.38 (2012) (establishing Advisory Neighborhood Commissions); DRAFT UNIFIED LOS ANGELES CITY CHARTER, art. IX, § 901 (2012) (creating the Office of Neighborhood Empowerment to assist with creating citywide neighborhood councils); MINN. STAT. ANN. § 469.1831 (West 2012) (authorizing Minneapolis and Saint Paul to establish neighborhood revitalization programs); MO. ANN. STAT. § 208.335 (West 2012). The Missouri statute was created to alleviate property, however; this bill has since been repealed. *Id.* Washington also has a similar statute. WASH. REV. CODE ANN. § 36.70A.050 (LexisNexis 2012) (creating indirect neighborhood planning commissions).

292. ADVISORY NEIGHBORHOOD COMMISSIONS, <http://anc.dc.gov/page/about-anc> (last visited Nov. 30, 2012) [hereinafter ANC]; James Wright, *ANCs Hold Elections*, WASH. INFORMER (Nov. 14, 2012, 1:47 PM), <http://washingtoninformer.com/index.php/local/item/12339-ancs-hold-elections>.

police protection, sanitation, trash collection, and the District's annual budget.²⁹³

Although ANCs were created to serve as a liaison between the community and the federal government, ANCs have been under the microscope for a host of issues surrounding corruption.²⁹⁴ The issue with the ANCs is the lack of oversight, which in turn leads to local corruption.²⁹⁵ The ANCs are given access to public funds to use for public purposes, and too many times those funds have been misappropriated.²⁹⁶ One of the issues with local government today is the lack of transparency in policy-making and resultant self-interested corruption. The ANCs are no exception.²⁹⁷

Gary Hart describes America as a "procedurally deficient republic" as it pertains to resistance to corruption, civic duties, and civic participation and civic engagement.²⁹⁸ Hart emphasizes the restoration of the ward republic, which is described as "direct, personal and collective action of citizens" in local governance.²⁹⁹

Professor McDougall and I propose that the Advisory Neighborhood Commissions should look and function more like ward republics. Functioning as a ward republic, ANCs would engage in more activities requiring community engagement and direct citizen participation, which in turn, decreases local corruption.³⁰⁰

Participating in the political process is an obligation of citizenship.³⁰¹ Thomas Jefferson believed that the elementary ward republic was the most appropriate forum to engage citizens in the political, so-

293. D.C. CODE § 1-309.10 (2012); ANC, *supra* note 292.

294. See Delia Gonçalves, *Vice Chair Steps Down Two Weeks After Allegations Against Chair*, 9 NEWS NOW (June 27, 2011, 1:09 PM), <http://www.wusa9.com/news/local/story.aspx?storyid=155311>; see also Policy Fellow, *DC's ANCs Should Put Their Financial Reports Online*, SUNLIGHT FOUND. (Apr. 17, 2012, 11:28 AM), <http://sunlightfoundation.com/blog/taxonomy/term/Local-Corruption/> (discussing the chairman of one of the ANCs who stole about \$30,000 from his ANC); Luke Rosiak, *DC ANC Members Break the Rules Without Redress*, WASH. TIMES (Sept. 29, 2011), <http://www.washingtontimes.com/news/2011/sep/29/dc-anc-members-break-the-rules-without-redress/?page=all> (discussing Regina James, who allowed taxpayers' funds to disappear under her watch, punished individuals who requested accountability, closed meetings to the public, and refused to give elected officials access to records).

295. See Policy Fellow, *supra* note 294; Gonçalves, *supra* note 294; Rosiak, *supra* note 294.

296. See Policy Fellow, *supra* note 294; Gonçalves, *supra* note 294; Rosiak, *supra* note 294; Salsich, *supra* note 287, at 719.

297. Parlow, *supra* note 256, at 139.

298. GARY HART, *RESTORATION OF THE REPUBLIC: THE JEFFERSONIAN IDEAL IN 21ST CENTURY AMERICA* 3 (2002).

299. *Id.* at 81.

300. See *id.* at 12-13.

301. *Id.*

cial, and economic processes.³⁰² He believed that the more dependent citizens became on their elected officials, the less republican the government, which ultimately leads to corruption.³⁰³ However, under Jefferson's ward republic, there are restrictions on size and space. Jefferson understood the difficulty of establishing "pure republics" across the United States, especially in areas with a higher concentration of people.³⁰⁴ According to Jefferson "[r]epresentation could be used to create a large republic so there would be small, pure republics and a large, less pure republic based on representation."³⁰⁵ The restoration of the republic is to restore the reengagement, empowerment, and accountability of citizens in concerns that are relevant to the community and nation.³⁰⁶ Ward republics would restore integrity to the government and instill in future generations the conviction that the only way to secure democratic rights is through exercising civic duties.³⁰⁷

E. Reforming Commissioner Elections

The best way to address the issues of lack of transparency and corruption with ANCs is to first reform the way they become commissioners. ANCs are chosen in nonpartisan elections in each ward, ad-

302. *Id.* at 8.

303. *Id.* at 12-13.

304. *Community Involvement and the Ward Republic*, PER-FIDEM, <http://www.per-fidem.org/codex/wardrepublic.html> (last visited Oct. 31, 2012).

305. *See id.* To get a better idea of what Jefferson had in mind in terms of size and number of wards, Jefferson proposed an education bill in 1779, as well as an education plan for William and Mary. *See* Frank Shuffelton, *Thomas Jefferson and the People's Government*, JEFFERSON LEGACY FOUND., <http://www.jeffersonlegacy.org/Winter2003.htm> (last visited Oct. 31, 2012).

The 1779 bill proposed a three-tiered system of public education from primary schools, through what we would know as high schools, and finally to college. Because the College of William and Mary already existed, the Bill focused on the primary and secondary levels. Jefferson's Bill proposed that each county would be divided into "hundreds . . . so as that they may contain a convenient number of children to make up a school, and be of such convenient size that all the children within each hundred may daily attend the school to be established therein." Jefferson's deliberate use of the term "hundreds" echoes the Anglo-Saxon term for such a political sub-division because he along with many of his contemporaries believed that English liberties —and by extension American liberties — were rooted in Anglo-Saxon political life. Moreover, in these "hundreds" we see the origins of Jefferson's later conception of "ward republics," political units so small that "every citizen, can attend, when called on, and act in person." (Political Writings, 212) Just as the schools were envisioned as a tiered system, so the ward republics were the smallest, most intimate scenes of political life and the basis for state republics and the national republic.

Id.

306. HART, *supra* note 298, at 10.

307. *Id.*

ministered by the D.C. Board of Election and Ethics.³⁰⁸ Often, elected officials are more prone to lean towards their own self-interest, so to remedy this, the ANC elections could take the form of a caucus. Caucuses, like that of Iowa,³⁰⁹ are more community-oriented.³¹⁰ This communal political experience allows for a platform where the community can engage and discuss issues of concern before casting a vote.³¹¹

Unlike ANCs current system of write-ins, those interested in the position would have to attend these caucuses being held in their respective single-member districts and discuss issues.³¹² If commissioner elections for ANCs were done in this manner, more responsible and trustworthy officials would be in office, and when issues such as local corruption arise, there would be opportunities for accountability. The idea is that when small groups of people come together to share a common interest, it is easier to hold one another accountable. This format assists potential candidates in becoming familiar with the issues that are relevant to the community, and the community can feel engaged and involved in policy-making.

F. Extending ANCs to Public Education

Once the ANC elections are reformed, one way to imagine how ANCs would function as a ward republic is with public education. The public school system is linked to community solidarity: “School reform initiatives that encourage kids to attend smaller, more communal schools may have the unintended result of increasing both student

308. See Salsich, *supra* note 287, at 719. The only qualifications to have your name on the ballot for commissioner are that you must live in a single-member district for at least sixty days prior to the election, be a registered voter for the District of Columbia, and file an “Affirmation of Write-In Candidacy” if you decide to run as a write-in. ADVISORY NEIGHBORHOOD COMMISSIONS, <http://anc.dc.gov/page/anc-elections> (last visited Nov. 23, 2012).

309. Iowa has 1,774 districts, which all either meet at local churches, schools, or other public venues to discuss issues before voting. Only those who are registered party members may attend the caucus, so those who are not registered are not allowed to attend the caucus. David Sessions, *How the Iowa Caucuses Work: Delegates, Secret Ballots, More Details*, DAILY BEAST (Jan. 1, 2012, 11:13 PM), <http://www.thedailybeast.com/articles/2012/01/01/how-the-iowa-caucuses-work-delegates-secret-ballots-more-details.html>. On its face, it may seem absurd that people are excluded because they are not registered party members, but this could potentially provide encouragement to others. If the issues are that important, then more than likely you will register and attend the caucus.

310. Dean Praetorius, *What Is a Caucus? How the Iowa Caucus Works*, HUFFINGTON POST (Jan. 30, 2012, 12:39 PM), http://www.huffingtonpost.com/2012/01/03/what-is-a-caucus-iowa-2012_n_1181069.html.

311. *Id.*

312. See *id.*

and parental involvement in clubs, classroom activities, governing bodies, and education lobbying groups. In this way, such education reform could be an engine of civic reengagement.”³¹³ A current local issue in D.C. is its public school system. Recently, D.C. Public School Chancellor (DCPS) Kaya Henderson announced that she will be consolidating twenty schools across six wards for the 2013-14 school year.³¹⁴ The reason for the consolidation is due, in large part, to underenrollment and funding.³¹⁵ DCPS Chancellor Henderson has asked for community engagement in determining how to execute the consolidation plan.³¹⁶ This is the perfect opportunity for the Advisory Neighborhood Commission to step up and either assist or advocate on behalf of the parents so that we can be sure that they are a part of this call to action.³¹⁷

Although the rights revolution emphasized the role of education and the need for social equalization, over time schools have lost their local identities.³¹⁸ Since 1940, the number of local school districts has contracted by eighty-seven percent primarily due to consolidation.³¹⁹ This phenomenon provides good reason as to why D.C. residents should answer the Chancellor’s call and become proactive in this new consolidation plan. The role of education must be put back into our communities. As Hart correctly puts it, “[A] central purpose of republican government [is] to empower the citizen to participate in the affairs of the local *polis* both as a forum for constructive service and as a forum for conflict resolution.”³²⁰ It is the citizen’s duty to assist in resolving this consolidation issue. Many parents view the federal government’s control in education as the reason for the decline in the

313. HART, *supra* note 298, at 188.

314. See D.C. PUB. SCHS. *DCPS Invites Community Feedback on Proposed List of School Consolidations*, (Nov. 13, 2012), <http://dcps.dc.gov/DCPS/About+DCPS/Press+Releases+and+Announcements/Press+Releases/DCPS+Invites+Community+Feedback+on+Proposed+List+of+School+Consolidations> [hereinafter DCPS].

The portfolio of schools in DCPS will shift dramatically after these consolidations. The average school enrollment will increase to 432 students, up from 376. Overall building utilization rate will be 84 percent, an increase from 72 percent. Only 26 elementary schools will have fewer than 350 students, instead of 41. 1,700 additional students will have the opportunity to attend school in a modernized building.

Id.

315. *Id.* DCPS allocates funds based on enrollment. Schools that are under-enrolled do not receive adequate funds to sustain a quality education.

316. *Id.*

317. See Salsich, *supra* note 287, at 732-33 (discussing the two main types of participation alternatives).

318. HART, *supra* note 298, at 189-90.

319. See *id.* at 190.

320. *Id.* at 191.

quality of public education.³²¹ Because of this control, the middle- and upper-middle-class families favored the privatization of education through charter and private schools, and home schooling.³²² If this trend is to continue, the quality of public schools will continue to decrease.³²³ Because public education is central to our communities, civic engagement in education would help restore the local identities of our communities.³²⁴

Currently, D.C. ANC's may be described as passive recommenders, in that they make recommendations without pushing for more direct civic engagement. This approach taken by ANC's would have to be reformed so that they are targeting community members to be actively engaged and responsive. Two potential participation alternatives are the advocacy/confrontation approach and the collaborative/consensus building approach. Under the advocacy/confrontation approach, the ANC commissioner would serve as an activist tasked with uniting the community around a particular issue and advocating on their behalf to the government.³²⁵ Under the collaborative/consensus building approach, commissioners would focus on neighborhood organization so that eventually these groups of people may function on their own.³²⁶ Regardless of the approach taken by ANC's, it must be one that focuses on how to best engage citizens. However, this is not to say that the two approaches may not be executed together.³²⁷ We need more parents at these meetings led by DCPS officials and other civic organizations pertinent to the vitality of the community.

CONCLUSION

The purpose of local government is to provide a forum for individuals to gather within their prospective communities and deliberate about issues of common concern.³²⁸ Today, local governments have become less transparent and less accountable for their actions. The best way for individuals to protect their rights is through civic engagement and participation in their local government. By reforming orga-

321. *See id.* at 192.

322. *Id.*

323. *Id.*

324. *See id.*

325. *See Salsich, supra* note 287, at 732 (noting that this model was popularized in the 1950s and 1960s in Chicago).

326. *Id.* at 733.

327. *Id.* at 736 ("One of the lessons of the confrontation models of the 1960s is that confrontation before consensus building is not likely to produce lasting improvements.").

328. *See Parlow, supra* note 256, at 144-45, 153.

nizations such as the District of Columbia's Advisory Neighborhood Commissions, and by shifting their focus to the engagement of the citizens, we can hold each other accountable. Due to the decline of civic education in our school systems, our potential future leaders have not been exposed to the importance of civic engagement and its effect on democracy. Also, the Digital Age does not have to hinder our public discourse. As we have seen, and as has been discussed, a number of movements have been led by interactions on the Internet. Although we may not be in a time where we can meet in coffee shops or at the local community center, there are still open forums at our disposal that we may use to reengage the public.

Education is where we start.³²⁹ In order for our citizens to participate in the political processes, they must be educated. As has been discussed, DCPS is struggling to provide quality education to all of its students.³³⁰ This is the perfect time for citizens in the D.C. area to become involved in this issue. The public education system is the core of the community. It is essential that those who live in these communities who are facing consolidation step up and become active participants in the political processes rather than passive bystanders.

In 1840, de Tocqueville described America as the following: "In towns it is impossible to prevent men from assembling, getting excited together and forming sudden passionate resolves. Towns are like great meetinghouses with all the inhabitants as members. In them the people wield immense influence over their magistrates and often carry their desires into execution without intermediaries."³³¹ This communal identity that de Tocqueville described is no longer present within our communities. The most effective protection of individual rights is widespread participation in governmental affairs, and remote centralized government and citizen detachment is the greatest danger.³³²

329. See Ryan, *supra* note 274, at 7-8 ("A long tradition of political thought, running from Plato, Xenophon, and Aristotle through Locke, Rousseau, and the American Founders, has seen a properly designed and delivered education as the prerequisite of a stable polity.").

330. DCPS, *supra* note 314.

331. *In Search of Tocqueville's Democracy in America*, ALEXIS DE TOCQUEVILLE TOUR EXPLORING DEMOCRACY IN AMERICA, <http://www.tocqueville.org/chap5.htm> (last visited Nov. 30, 2012).

332. HART, *supra* note 298, at 12; see Parlow, *supra* note 256, at 187. ("It is important to remember that '[s]ince the earliest days of the Republic, the maintenance of political participation by its citizens has been viewed as essential to the preservation of free government.'").

RECOMMENDED READING LIST
A Civic Infrastructure Bibliography

- A. “Prof.”, *Study Circles, Citizen’s Assemblies, and Social Media: A Civic Infrastructure for “Occupy Wall Street,”* WAR IS A CRIME (Nov. 8, 2011), <http://warisacrime.org/content/including-non-occupiers-and-strengthening-movement>.
- B. Matt Leighninger & Bill Bradley, THE NEXT FORM OF DEMOCRACY: HOW EXPERT RULE IS GIVING WAY TO SHARED GOVERNANCE—AND WHY POLITICS WILL NEVER BE THE SAME xiv (2006).
- C. Theda Skocpol, *The Tocqueville Problem: Civic Engagement in American Democracy*, 21 SOC. SCI. HISTORY 455, 457 (1997).
- D. AARON SHEEHAN-DEAN, CONCISE HISTORICAL ATLAS OF THE U.S. CIVIL WAR 102 (2008).
- E. KEVIN SCHULTZ, AMERICA UNBOUND VOL. 2: A U. S. HISTORY PRIMER 271-72 (2009).
- F. Richard O’Connor, THE OIL BARONS: MEN OF GREED AND GRANDEUR 44, 229 (1971).
- G. SEAN DENNIS CASHMAN, AMERICA IN THE GILDED AGE: FROM THE DEATH OF LINCOLN TO THE RISE OF THEODORE ROOSEVELT 30 (1993).
- H. EDWIN CHARLES ROZWENC, ROOSEVELT, WILSON AND THE TRUSTS vi-vii (1950).
- I. Kenneth Liles & John Skilling, *Tax Notes*, Vol. 46 A,B.A. J. 459, 560 (1960).
- J. RANDALL G. HOLCOMBE, FROM LIBERTY TO DEMOCRACY: THE TRANSFORMATION OF AMERICAN GOVERNMENT 188-89 (2002).
- K. JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 91, 118 (2011).
- L. NORALV VEGGELAND, TAMING THE REGULATORY STATE: POLITICS AND ETHICS 17 (2009).
- M. PATRICK J. MANEY, THE ROOSEVELT PRESENCE: THE LIFE AND LEGACY OF FDR 47 (1998).
- N. MICHAEL PARENTI, DEMOCRACY FOR THE FEW 23 (2010).
- O. JOHN ATLAS, *The Conservative Origins of the Sub-Prime Mortgage Crisis*, AM. PROSPECT (Dec. 17, 2007), <http://prospect.org/article/conservative-origins-sub-prime-mortgage-crisis-0>.
- P. MARK ALAN SMITH, AMERICAN BUSINESS AND POLITICAL POWER: PUBLIC OPINION, ELECTIONS, AND DEMOCRACY 48 (2000).

Social Change Requires Civic Infrastructure

- Q. MIRJAM BULT-SPIERING & GEERT DEWULF, STRATEGIC ISSUES IN PUBLIC-PRIVATE PARTNERSHIPS: AN INTERNATIONAL PERSPECTIVE 8 (2006).
- R. STEPHEN E. FRANTZICH & HOWARD R. ERNST, THE POLITICAL SCIENCE TOOLBOX: A RESEARCH COMPANION TO AMERICAN GOVERNMENT 272 (2008).
- S. ALYSSA BATTISTONI, *5 Anti-Environment Policies Republicans Don't Want You To Notice*, MOTHER JONES (Dec 12, 2011, 1:50 PM), <http://motherjones.com/blue-marble/2011/12/republican-anti-environment-riders>.
- T. DON E. EBERLY, AMERICA'S PROMISE: CIVIL SOCIETY AND THE RENEWAL OF AMERICAN CULTURE 71 (1998).
- U. ETHNIC F.: BULL. ETHNIC STUD. & ETHNIC BIBLIOGRAPHY 124 (1990).
- V. PETER CALTHORPE, URBANISM IN THE AGE OF CLIMATE CHANGE 35 (2011).
- W. MARY ANN LAMANNA, ET AL., MARRIAGES AND FAMILIES: MAKING CHOICES IN ADVERSE SOCIETY 242 (2006).
- X. JOHN R. DEW, EMPOWERMENT AND DEMOCRACY IN THE WORKPLACE: APPLYING ADULT EDUCATION THEORY 166 (1997).
- Y. ROBERT E. BALDWIN, THE DECLINE OF US LABOR UNIONS AND THE ROLE OF TRADE 1 (2003).
- Z. HANDBOOK OF RESEARCH IN THE SOCIAL FOUNDATIONS OF EDUCATION 298 (Steven Tozer et al. eds., 2011).
- AA. WILLIAM FLANAGAN, URBAN SOCIOLOGY: IMAGES AND STRUCTURE 283 (2010).
- BB. Staffan Larsson & Henrik Nordvall, *Study Circles in Sweden*, 5 STUD. ADULT, POPULAR & HIGHER EDUC. at i, 9-10 (2010), *available at* <http://urn.kb.se/resolve?urn=urn:nbn:se:liu:diva-57887>.
- CC. BARBARA BARSKI-CARROW, WHEN TRAUMA SURVIVORS RETURN TO WORK: UNDERSTANDING EMOTIONAL RECOVERY (2010).
- DD. AGNIESZKA BRON & MICHAEL SCHEMMANN, CIVIL SOCIETY, CITIZENSHIP AND LEARNING 139 (2001).
- EE. EVERYDAY DEMOCRACY, <http://www.everyday-democracy.org/en/index.aspx> (last visited Jan. 27, 2012).
- FF. SENATOR JOHN EDWARDS, ADDRESS ON RESTORING OUR DEMOCRACY, JOHN EDWARDS 08 (Oct. 13, 2007), <http://2008.election.procon.org/sourcefiles/Edwards20071013.pdf>

- GG. Harold A. McDougall, *The Citizen's Assembly: A Civic Infrastructure for Progressive Social Change*, HUFFINGTON POST (June 29, 2012, 10:49 AM), http://www.huffingtonpost.com/harold-a-mcdougall/civic-engagment_b_1637398.html.
- HH. KETTERING FOUND., NAMING AND FRAMING DIFFICULT ISSUES TO MAKE SOUND DECISIONS 2-3 (2011).
- II. Christopher Kelley, *Issue Framing: Issue Books and Implications for Community Action* DELIBERATIVE-DEMOCRACY (May 23, 2008, 3:50 PM), http://www.deliberative-democracy.net/index.php?option=com_content&view=article&id=47:issue-framing&catid=47:contributions&Itemid=89.
- JJ. DAVID MATHEWS, RECLAIMING OUR EDUCATION BY RECLAIMING OUR DEMOCRACY 85-106 (2006).
- KK. Ruth Ann Bramson, *Cultivating Productive Public Conversations*, INT'L ECON. DEV. COUNCIL (June 2002), http://www.iedconline.org/Downloads/Journal_Sample.pdf.
- LL. John Dedrick, *Public Engagement with Government Agencies*, 14 CONNECTIONS (July 2003) at 27, 27.
- MM. Donald L. Anderson, *Address at the Sixteenth Annual E.F. Schumacher Lecture: The Assembly: A Tool for Transforming Communities* NEW ECONOMICS INSTITUTE (1996), <http://neweconomicsinstitute.org/publications/lectures/anderson/donald/the-assembly>. Jefferson's peers rejected the idea, perhaps as *too* democratic.
- NN. David Holzel, *The Assembly Man*, MICHIGAN TODAY (2002), <http://michigantoday.umich.edu/03/Fal03/assembly.html>.
- OO. Elliott D. Lee, *Power Begins Down Home*, 13 BLACK ENTER., Sept. 1982, at 43, 46.
- PP. ALVIN TOFFLER, FUTURE SHOCK 264 (1970).
- QQ. Eric Liu, *Democracy Is for Amateurs: Why We Need More Citizen Citizens*, ATLANTIC (May 11 2012).
- RR. Eric Liu, *Why Civics Class Should Be Sexy*, THE ATLANTIC (Apr 13 2012), <http://www.theatlantic.com/national/archive/2012/04/why-civics-class-should-be-sexy/255858/>.
- SS. HARRISON OWEN, EXPANDING OUR NOW: THE STORY OF OPEN SPACE TECHNOLOGY 1 (1997).
- TT. OPEN SPACE, <http://www.openspaceworld.org/> (last visited Jan. 27, 2012).

Social Change Requires Civic Infrastructure

- UU. *Taking Charge . . . Making Change: The Transition of County Executive-Elect Ike Leggett* (2006), http://www.montgomerycountymd.gov/content/home/pdf/transition_report.pdf.
- VV. Michael Herman, *What Is Open Space Technology?*, OPEN SPACE WORLD <http://www.openspaceworld.org/cgi/wiki.cgi?AboutOpenSpace> (last visited Mar. 17, 2008).
- WW. R. M. Punnett, FRONT BENCH OPPOSITION: THE ROLE OF THE LEADER OF THE OPPOSITION, THE SHADOW CABINET AND SHADOW GOVERNMENT IN BRITISH POLITICS xvii, 500 (1973).
- XX. Felicia Sonmez, *Van Jones: Liberals Feel ‘Crushed’ by Obama*, WASH. POST, June 9, 2012, http://www.washingtonpost.com/blogs/post-politics/post/van-jones-liberals-feel-crushed-by-obama/2012/06/09/gJQARB40QV_blog.html.
- YY. MARCEL HÉNAFF & TRACY B. STRONG, PUBLIC SPACE AND DEMOCRACY 221 (Marcel Hénaff & Tracy B. Strong eds., 2001).
- ZZ. DONLEY T. STUDLAR, GREAT BRITAIN: DECLINE OR RENEWAL? 55 (1996).

Growing Inequality and Racial Economic Gaps

THOMAS W. MITCHELL*

INTRODUCTION	850
I. OVERALL TRENDS IN INCOME AND WEALTH INEQUALITIES	852
A. Trends in Income Inequality	853
B. Trends in Wealth Inequality	856
C. Racial Income and Wealth Gaps	857
1. Racial Income Gaps	857
2. Racial Wealth Gaps	857
II. AS INEQUALITY HAS RISEN, ECONOMIC MOBILITY HAS DECLINED	861
A. Trends in Economic Mobility in the United States ..	861
B. Assessing Claims of American Exceptionalism in Terms of Mobility	866
C. Intergenerational Income Mobility for African Americans	867
III. WHY ISN'T THERE A MORE SUBSTANTIAL SOCIAL MOVEMENT FOR GREATER ECONOMIC EQUALITY?	868
A. Americans' Perceptions and Misperceptions about Economic Inequality and the Economy	869
B. The Role Low-Income People and the Working Class Play in Creating Self-Reinforcing Inequality ..	872
C. Examples of Internal Divisions Among Working- Class People	874

* Professor, University of Wisconsin Law School. I would like to acknowledge Lauren Powell for her excellent research assistance throughout the development of this Article and Monica Mark for the editorial assistance she provided as this Article was being finalized. In addition, I would like to thank Julia Issacs and others affiliated with the Institute for Research on Poverty at the University of Wisconsin-Madison who I consulted with as I began work on this Article.

1. Protests and Labor Strife in Wisconsin: A Cautionary Tale on the Limits of Large-Scale Protests to Affect Political Change in a Time of Polarization	875
2. Government Officials and Politicians Have Felt Constrained to Deal with Racial Disparities Including in Times of General Economic Crisis.	878
IV. THE LEGAL PROFESSION CAN DO MORE TO PROMOTE GREATER ECONOMIC EQUALITY ...	879
A. A Multifaceted Strategy Is Needed to Reduce Economic Inequality	879
B. Legal Organizations Should Develop Detailed Strategic Plans Setting Forth Legal Strategies to Promote Greater Economic Equality	882
C. Examples of How the Law Could Be More Effectively Utilized to Promote Equality	883
1. Lawyers Should Play a More Active Role in Developing Strategies to Increase Minority Homeownership and to Make Such Ownership More Secure	883
2. Developing National Model State Statutes to Promote Greater Economic Equality in Certain Areas of the Law	886
CONCLUSION	889

INTRODUCTION

Over the course of the past several decades, economic inequality in the United States has grown rapidly. Not only is economic inequality in this country at its highest level since the years before the Great Depression,¹ but the United States also continues to be among the most economically unequal countries in the industrialized world. While the very affluent in this country continue to increase their share of the country's income and wealth, the middle class has been squeezed, and record numbers of Americans find themselves in poverty.²

1. JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* 5 (2012).

2. Kevin Fagan, *Federal Funding Cut Hurts S.F. Food Bank*, S.F. CHRON. (Oct. 9, 2012), <http://www.sfgate.com/bayarea/article/Federal-funding-cut-hurts-S-F-Food-Bank-3929513.php> (indicating that 49.1 million Americans are now in poverty).

Not only is there dramatic economic inequality in the United States at this time, but there has also been reduced intergenerational economic mobility in the United States. This increasingly has resulted in what social scientists refer to as stickiness, at the top and bottom of the income distribution, which means that it is increasingly likely that children born to very affluent and very poor families will replicate their parents' economic status when they become adults. Furthermore, though measuring economic mobility is an inherently backwards-looking type of analysis as one must compare the economic status of people who have been adults for a long period of time to the economic status of their parents during a similarly long period of their adult years, there are many reasons to believe that children in our society today will experience less economic mobility than their parents did.

Without question, millions of Americans of all races have suffered economically over the course of the past several years. Nevertheless, by one measure, African Americans and Hispanics as a whole were downwardly mobile and net losers in terms of their income status during the period of 2001-2011, while whites were net winners.³ Not only has the Great Recession hit African Americans and Hispanics particularly hard economically but also the economic decline for these groups started several years before the official beginning of this recession.⁴ A review of any number of economic measures including wealth,⁵ unemployment,⁶ and poverty⁷ yields evidence of this down-

3. *Fewer, Poorer, Gloomier: The Lost Decade of the Middle Class*, PEW RESEARCH CTR. 12 (Aug. 22, 2012), <http://www.pewsocialtrends.org/files/2012/08/pew-social-trends-lost-decade-of-the-middle-class.pdf> (determining net winners and losers in terms of changes in income status since 2001 by analyzing the difference in a group's percentage in the upper-income category from the change in a group's percentage in the lower-income category).

4. See, e.g., Kitty Calavita, *The Struggle for Racial Justice: The Personal, the Political, and . . . the Economic*, 44 LAW & SOC'Y REV. 495, 498 (2010); Richard Lempert, *A Personal Odyssey Toward a Theme: Race and Equality in the United States: 1948-2009*, 44 LAW & SOC'Y REV. 431, 442-44 (2010).

5. See *infra* notes 39 to 47 and accompanying text.

6. In 2011, the white unemployment rate was 7.9 percent; the black unemployment rate was 15.8 percent; and the Hispanic unemployment rate was 11.5 percent. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2011, at 41 (2012), available at <http://www.bls.gov/cps/cpsrace2011.pdf>. In contrast, in 2001, the white unemployment rate was 4.2%, the black unemployment rate was 8.6%, and the Hispanic unemployment rate was 6.6 percent. *Id.*

7. In 2011, 12.8% of whites lived in poverty; 27.6% of blacks lived in poverty; and 25.3% of Hispanics lived in poverty. *People in Poverty by Selected Characteristics: 2010 and 2011*, U.S. CENSUS BUREAU (2011), <http://www.census.gov/hhes/www/poverty/data/incpovhlth/2011/table3.pdf> (last visited Mar. 1, 2013).

ward mobility for African Americans and Hispanics relative to white Americans.

Part I presents a summary of the overall trends in income and wealth inequalities in the United States. This section also establishes that the United States is more economically unequal than most other industrialized countries. Part II establishes that as economic inequality in the United States has increased dramatically, intergenerational economic mobility has fallen. As a result, the likelihood that those born to the more affluent will be affluent themselves as adults and that those born into poverty will remain in poverty when they become adults has increased considerably over the course of the past few decades. Part III establishes the fact, notwithstanding the Occupy Wall Street movement, that there has been very little sustained, broad-based protest in the United States in recent decades pertaining to issues of economic fairness and equality. This section identifies some of the factors, which suggest that it is unlikely that a mass social movement will emerge and endure over a long period of time to address economic inequality and poverty. Part IV claims that greater economic equality in the United States is achievable only if policymakers make fundamental changes in certain key areas of public policy. Although it is unlikely that the legal system can serve as a primary tool to reduce economic inequality in any substantial way, there are a number of legal strategies and initiatives that lawyers and legal organizations, including law schools, could pursue in an effort to increase economic equality and security for many Americans, including for many persons of color.

I. OVERALL TRENDS IN INCOME AND WEALTH INEQUALITIES

Since the mid-1970s, income inequality in the United States has grown dramatically. Growth in income inequality has been particularly pronounced at the very top of the income distribution. Though the distribution of income has become more and more unequal, at present, wealth is even more highly concentrated among those at the top of the wealth distribution than income is among the highest income earners. Further, in our country there are persistent and dramatic racial income and wealth gaps, though the racial wealth gap is particularly galling. Furthermore, the economic developments in our country over the past several decades that have resulted in dramatic income and wealth inequalities appear to have resulted in much less

intergenerational economic mobility in the past quarter century than was the case in the aftermath of World War II through the 1970s. This decreased mobility calls into question a fundamental underpinning of the notion of the American dream.

A. Trends in Income Inequality

Between the end of World War II and the mid-1970s, family income roughly doubled in inflation-adjusted terms for families, whether these families were at the top, middle, or bottom of the income distribution.⁸ To this end, according to the United States Census Bureau (Census Bureau), between 1947 and 1975, family income in the bottom four quintiles of the income distribution increased between 90.3% and 99.2%, while family income for those in the top five percent of the income distribution increased by 85.5%.⁹ As will be discussed below, this general pattern of equitable income accumulation during this period masks significant income earning gaps along racial and gender lines.

The period of general shared prosperity for the majority of American families came to an end beginning in the early- to mid-1970s.¹⁰ By the end of the 1970s, a pattern began to emerge in which those in the lower to middle rungs of the income ladder experienced only modest income growth while those at the top of the income distribution experienced much more rapid income growth.¹¹ This pattern has not only persisted over the course of the past three decades but also has intensified quite dramatically, with only very limited exceptions.¹²

Between 1975 and 2010, according to the Census Bureau, those families in the bottom two quintiles of the income distribution experienced a 3.7% and 13.2% increase in family income, respectively.¹³ In

8. Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET AND POLICY PRIORITIES, 7–8, <http://www.cbpp.org/files/11-28-11pov.pdf> (last modified Oct. 23, 2012).

9. *Percentage Change in Family Income 1947-1975 and 1975-2010*, RUSSELL SAGE FOUND., [hereinafter *Percentage Change*] <http://www.russellsage.org/sites/all/files/chartbook/real-median-individual-income-by-race-large.jpg> (last visited Mar. 1, 2013).

10. *Id.*

11. *Trends in the Distribution of Household Income Between 1979 and 2007*, CONG. BUDGET OFF. 2-3 (Oct. 2011), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/10-25-HouseholdIncome.pdf>.

12. *U.S. Cong., Trends in the Distribution of Household Income Between 1979 and 2007*, CONG. BUDGET OFFICE, 17 (2011), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/10-25-HouseholdIncome.pdf>.

13. *Percentage Change*, *supra* note 9.

contrast, families in the second highest quintile of the income distribution experienced a 39.3% increase in their incomes, while families in the top five percent of the income distribution experienced a 56.7% increase in their incomes.¹⁴ Using more comprehensive and sophisticated measures of income,¹⁵ the Congressional Budget Office's (CBO) analysis of after-tax household income growth between 1979 and 2007 is consistent with the Census Bureau's analysis of income growth for the period between 1975 and 2010 in terms of demonstrating that income inequality in this country grew sharply during this period. However, the CBO's analysis provides some finer grain analysis.

Although the CBO report indicates that income for households in the lowest quintile grew somewhat more than the Census Bureau report indicates, the CBO report demonstrates that income at the very top of the income distribution grew at an incredible rate. To this end, the CBO report indicates that after-tax income growth for the lowest quintile was 18%, which is almost 15% higher than the Census Bureau's analysis of income growth—using a different methodology to calculate income—for the lowest quintile.¹⁶ Further, the CBO report demonstrates that after-tax income for those households in the 81st through 99th percentiles grew by 65% between 1979 and 2007. Much more dramatically, after-tax income for those households in the top 1% of the income distribution grew by 275%, which means that household income for these extremely high income earners nearly quadrupled between 1975 and 2007.¹⁷

Furthermore, although federal taxes and government transfer payments are progressive in the United States, in the past several years they have had only a very small impact on reducing the concentration of income. For example, in 2007, the top 1% of households in terms of income received 21% of overall income before federal taxes and transfer payments; these households received 17% of overall income after federal taxes and transfers. Similarly, the top 81 to 99% of households in terms of income received 39% of overall income before federal taxes and transfer payments; these households received 35% of overall income after federal taxes and transfers. Furthermore, due

14. *Id.*

15. Stone et al., *supra* note 8, at 8.

16. CONG. BUDGET OFFICE, *supra* note 12, at 3.

17. *Id.* The CBO is able to provide a better analysis of income at the top of the income distribution in part because the Census Bureau's information is more limited information with respect to income at the top of the income distribution for both methodological and policy reasons. Stone et al., *supra* note 8, at 3.

to changes in federal tax law and in government transfer programs over the course of the past several years, federal taxes and federal transfer programs now have less of a redistributive effect on market income¹⁸ than federal taxes and transfers had on redistributing market income in 1979. These developments have resulted in increased income inequality.¹⁹

As compared to other major industrialized countries, the United States has one of the highest levels of income inequality after accounting for the redistributive effect of federal taxes and government transfers.²⁰ In fact, though a couple of industrialized countries, such as Belgium and France, have a higher degree of pretax income inequality than the United States, after-tax income inequality in the United States is much higher than it is in most other industrialized countries including Belgium and France because taxation in this country redistributes far less income than it does in most other industrialized countries.²¹ Furthermore, a cross-country study of income inequality from the mid-1970s to 2000 revealed that in the United States income inequality continued to rise from the mid-1970s through 2000.²² In contrast, in most other industrialized countries, levels of inequality rose for a number of years but then slowed in the latter years of the period under study.²³ Furthermore, the United States ranks amongst the developed countries with the most unequal distributions of income in part because the federal government in the United States provides far less government support to its citizens with respect to public services, higher education, pensions, and other forms of support than do governments in other developed countries.²⁴

18. Market income includes income earned from labor, business income, capital gains, capital income, and other sources of income including any income an individual receives in retirement in consideration of past services. See CONG. BUDGET OFFICE, *supra* note 12, at II.

19. See *id.*

20. Linda Levine, *The U.S. Income Distribution and Mobility: Trends and International Comparisons*, CONG. RESEARCH SERV. 9-10 (Nov. 29, 2012), <http://www.fas.org/sgp/crs/misc/R42400.pdf>.

21. DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* 257-58 (2007).

22. Levine, *supra* note 20, at 9.

23. *Id.*

24. Tami Luhby, *Global Income Inequality: Where the U.S. Ranks*, CNN MONEY (Nov. 8, 2011, 3:24 PM), http://money.cnn.com/2011/11/08/news/economy/global_income_inequality/index.htm. Other reasons that account for the exceptionally high level of income inequality in the United States than in other developed countries are the comparatively steeper decline in union membership in the United States and the greater restrictions that countries in Europe place upon executive compensation which results in lower levels of executive compensation in Europe than in the United States. *Id.*

B. Trends in Wealth Inequality

Family wealth, also known as net worth, is the gross assets a family owns minus the financial liabilities the family has incurred.²⁵ Assets fall into two categories: consumable assets, which include equity in homes and vehicles; and financial assets, such as stocks, bonds, mutual funds, 401(k) accounts, rental property, the equity in a business, and assets one owns that are held by a bank or other financial institution.²⁶ Liabilities may be secured, such as is the case with mortgages on real estate one owns or vehicle loans, or unsecured, such as credit card debt or student loans.²⁷

The discourse about economic inequality in our society tends to predominately focus upon income inequality. Nevertheless, wealth inequality in the United States is substantially more concentrated than income inequality.²⁸ Given that there is substantial overlap between those at the top of the income and wealth distributions, overall economic inequality as measured by the economic resources under the control of the very well-off is greater than one might glean from analyzing income or wealth inequality in isolation.

In 2007, those in the top 1% of the income distribution received 21% of all income; however, the top 1% of the wealth distribution held 35% of wealth in this country.²⁹ More broadly, though the top 10% of the income distribution received 47% of income in 2007, the top 10% of the wealth distribution in 2007 held 74% of our country's wealth.³⁰ Although these data clearly demonstrate that the distribution of wealth is much more skewed in favor of the very wealthy than income is skewed in favor of those at the top of the income distribution, income inequality in this country has been increasing much more rapidly than wealth inequality.³¹

25. Stone et al., *supra* note 8, at 10.

26. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 106 (1997).

27. *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics*, PEW RESEARCH CTR. 7 (July 26, 2011), http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf.

28. Stone et al., *supra* note 8, at 10.

29. *Id.* at 12.

30. *Id.*

31. *Id.* at 10.

C. Racial Income and Wealth Gaps

1. Racial Income Gaps

In addition to substantial income and wealth inequalities among those differentially situated on the income and wealth distributions, significant gaps exist in terms of both distributions when one compares median non-Hispanic white income with median African American and Hispanic incomes. These gaps have been longstanding, though the income gap between white households and African American households has remained constant since the early 1970s, while the income gap between non-Hispanic whites and Hispanic households has increased slightly during this same time period. In 2011, the ratio of black to non-Hispanic white household income was 0.58, a ratio which has stayed constant in terms of statistical relevancy for the past four decades.³² In comparison, the ratio in 2011 for Hispanic to non-Hispanic white household income was 0.70, which represents a statistically significant decline from the 1972 ratio of 0.74.³³ For 2011, black real median individual income was 79% of white real median individual income, and Hispanic real median individual income was 72% of white real median individual income.³⁴

Non-Hispanic white households, African American households, and Hispanic households each had lower household incomes in 2011 than each of these groups had just before the 2001 recession. Even so, the 7% decline in non-Hispanic white household income during this period was lower than the decline was for the other groups. In contrast, African American households have experienced a 16.8% decline in household income during this period, which was by far the largest decline for any racial or ethnic group during this period.³⁵

2. Racial Wealth Gaps

More than fifteen years ago, Melvin Oliver and Thomas Shapiro published a groundbreaking book that attempted to reframe an important aspect of the economic debate on racial inequality by shining the light on the vast racial wealth gap between African Americans and

32. Carmen DeNavas-Walt et al., *Poverty, and Health Insurance Coverage in the United States: 2011*, U.S. CENSUS BUREAU, 9 (Sept. 2, 2011), <http://www.census.gov/prod/2012pubs/p60-243.pdf>.

33. *Id.*

34. *Percentage Change*, *supra* note 9.

35. DeNavas-Walt et al., *supra* note 32, at 8.

white Americans.³⁶ Using one measure of wealth, Oliver and Shapiro demonstrated that the median white household in 1988 had approximately twelve times the net worth of the median black household.³⁷ Given that most academic study and policy analysis about economic inequality previously had tended to focus on the significant and persistent income inequality between African Americans and whites, it appeared that Oliver and Shapiro's book could serve as a catalyst in fundamentally transforming the academic study of and public policy responses to racial economic inequality. In fact, the book received a very positive reception from a diverse group of readers, including from some people and groups in important positions of power in certain sectors. For example, the Ford Foundation has provided support to a number of individuals and organizations that have been working to address the racial wealth gap in one way or another. Among these organizations is the Insight Center for Community and Economic Development, which has developed an ongoing initiative called the *Closing the Racial Wealth Gap Initiative*.³⁸

In spite of all of the efforts that academics, foundations, nonprofit organizations, government, and others have made over the past fifteen years or so to narrow the racial wealth gap, a gap that was already quite alarming fifteen years ago, the racial wealth gap has become dramatically larger during this period. By one measure, the white-to-black median wealth ratio increased from eleven to one in 2005 to twenty to one in 2009.³⁹ By this same measure, the white-to-Hispanic median wealth ratio increased from seven to one in 2005 to eighteen to one in 2009.⁴⁰

The black-white and Hispanic-white racial and ethnic wealth gaps have been increasing in large part as a result of the different experiences these different racial and ethnic groups have had with respect to homeownership over the course of the past several years. Over the course of the past several years, the black homeownership rate has declined sharply (and likely will continue to decline in the next few years). By 2011, the gap in the black-white homeownership rate increased by 2.3% over what it was in 2001 when the white homeowner-

36. OLIVER & SHAPIRO, *supra* note 26, at 106.

37. *Id.* at 86.

38. See *Closing the Racial Wealth Gap Initiative*, INSIGHT CTR. FOR CMTY. ECON. DEV., <http://www.insightcced.org/communities/Closing-RWG.html> (last visited Mar. 1, 2013).

39. PEW RESEARCH CTR., *supra* note 27, at 14.

40. *Id.*

ship rate was 26.6% higher than the black homeownership rate.⁴¹ The Hispanic homeownership rate has also declined steadily since 2005 when it reached 49.5% (a record high), and the current Hispanic-white gap in homeownership rates stands at 26.9%, which is virtually unchanged from 2001.⁴² Though steeply declining values for owner-occupied homes account for the greatest erosion in household wealth for all racial and ethnic groups over the course of the past several years, Hispanics have experienced the greatest loss in home equity. From 2005 to 2009, Hispanic homeowners lost 51% of their home equity, as measured by the median value of home equity for Hispanic homeowners during this period.⁴³ In contrast, African Americans lost 23% of their home equity, and white Americans lost 18% as measured by the median value of home equity for these groups during this period.⁴⁴

More broadly, wealth gaps between the median white household and the median African American and Hispanic households increased dramatically between 2005 and 2009, despite the fact that the median white household lost nearly \$22,000 in net worth during this period, which represented a 16% drop in white household wealth.⁴⁵ The wealth gaps increased because African American and Hispanic households experienced a far greater percentage reduction in their net worth. African American households lost more than \$6,400 in net worth between 2005 and 2009, and this loss represented a 53% decline in net worth for these households during this period.⁴⁶ Hispanic households lost more than \$12,000 in net worth between 2005 and 2009, and this loss represented a 66% decline in net worth for these households during this period.⁴⁷

41. In terms of homeownership, the black homeownership rate was 44.9% in 2011, which represented nearly a three percentage point drop from the 47.7% black homeownership rate in 2001. *Homeownership Rates by Race and Ethnicity of Householder: 1994 to 2011*, U.S. CENSUS BUREAU, www.census.gov/housing/hvs/files/annual11/ann11t_22.xls tbl.22 (last modified Sept. 21, 2012, 4:00 PM). The black homeownership rate has been declining steadily from the 2004, 49.1% black homeownership rate, which represented the high-water mark for black homeownership in this country's history. *See id.* In addition, the last time the black homeownership rate was below 45% was in 1997 when it was 44.8%. *See id.* By contrast, the white homeownership rate was 73.8% in 2011 and in 2001 it was 74.3%. *Id.* In addition, the white homeownership rate in 2011 was 23.4% higher than the 46.9% Hispanic homeownership rate. *See id.*

42. *See id.*

43. PEW RESEARCH CTR., *supra* note 27, at 2.

44. *See id.* at 4.

45. *Id.* at 14–15.

46. *Id.* at 15.

47. *Id.*

A significant reason black and Hispanic households lost substantially more wealth in percentage terms between 2005 and 2009 is due to the fact that both black and Hispanic families derived much more of their net worth from home equity in 2005 than did white families. In 2005, black households derived 59% of their net worth from home equity, and Hispanic households drew 65% of their net worth from home equity.⁴⁸ In contrast, though home equity was the largest asset by far for white households, it accounted for 44% of net worth for white households. In short, in analyzing comparative data on mean net worth for households, black and Hispanic households had asset portfolios that had a much higher percentage of home equity from ownership of a primary residence and were much less diversified in terms of financial assets such as stocks, mutual funds, IRAs, and Keogh accounts.⁴⁹ As a result, the sharp decline in real estate values in this country from 2005 to 2009 had an especially large and negative impact on the net worth of black and Hispanic households. The fact that many other types of assets fared much better than real estate did during this period did not cushion the loss black and Hispanic households experienced in their real estate holdings as much as it did for white households given that white households had much more diversified asset portfolios than either black or Hispanic households.

In analyzing the data that the government first began collecting on household wealth in the early 1980s, it becomes apparent that, through 2009, white households and African American and Hispanic households have had very different experiences in terms of being able to build and maintain wealth, despite the fact each group lost wealth between 2005 and 2009. Although, as discussed above, white households experienced a significant decline in their wealth between 2005 and 2009, white household wealth in 2009 was substantially higher than it was for many if not most years between 1984 and 2009.⁵⁰ In contrast, black and Hispanic households possessed less wealth in 2009 than in any year since the Census Bureau began publishing data on household wealth in 1984.⁵¹ Further, not only were the 2009 ratios of white household wealth to black and Hispanic household wealth respectively higher than they ever had been based upon the data the Census Bureau began collecting on household wealth in the early

48. *Id.* at 24.

49. *Id.* at 25.

50. *Id.* at 29.

51. *Id.*

1980s, but they were also about double the ratios for the pre-2009 years the Pew Research Center used in its 1984-2009 time series analysis.⁵²

II. AS INEQUALITY HAS RISEN, ECONOMIC MOBILITY HAS DECLINED

A. Trends in Economic Mobility in the United States

Academics—mostly in the fields of sociology and economics—have long studied intergenerational mobility. Sociologists have tended to focus upon mobility in terms of status as measured by comparing the occupations (or some other similar indicator of status) of parents with the occupations of their children.⁵³ Economists, on the other hand, have primarily measured mobility in terms of income by using a statistic known as intergenerational elasticity in earnings, “which is the percentage difference in earnings in the child’s generation associated with the percentage difference in the parental generation.”⁵⁴ In terms of this statistic, there is more economic mobility in countries with lower measures of intergenerational elasticity. Nevertheless, the academic literature on the relationship between economic inequality and intergenerational mobility is somewhat underdeveloped, although there appears to be growing academic interest in studying this relationship.⁵⁵

Despite high levels of income inequality in this country, Americans do not support the redistribution of market income by the government to the degree that citizens in other Western democracies support such governmental redistribution.⁵⁶ In fact, in a twenty-seven-country study on social attitudes, only 33% of Americans agreed with the view that the government has a responsibility to help reduce income inequalities, which resulted in the United States being the country in the study with the lowest percentage of its citizens hold-

52. *See id.*

53. Miles Corak, *Inequality from Generation to Generation: The United States in Comparison*, in *THE ECONOMICS OF INEQUALITY, POVERTY, AND DISCRIMINATION IN THE 21ST CENTURY* 109 (Robert S. Rycroft ed., forthcoming Mar. 2013).

54. *Id.*

55. *See, e.g.*, Dan Andrews & Andrew Leigh, *More Inequality, Less Social Mobility*, 16 *APPLIED ECON. LETTERS* 1489, 1489 (2008), <http://econpapers.repec.org/article/tafapec/tafapec16.htm>.

56. Isabel Sawhill & Sara McLanahan, *OPPORTUNITY IN AM.*, at 3 (2006).

ing this view.⁵⁷ Such aversion to more robust redistribution can be explained in part by a long-held conviction among most Americans that nearly everyone in this country has the opportunity to achieve upward economic mobility based upon their intelligence and skills irrespective of the economic circumstances into which they are born.⁵⁸ Of course, throughout American history there have been many examples of people such as Benjamin Franklin, Henry Ford, and Oprah Winfrey, to name just a few, who have achieved remarkable upward mobility despite starting life in relatively humble or even impoverished circumstances.⁵⁹ Moreover, there is strong evidence that economic mobility in the United States in the nineteenth century and in the early part of the twentieth century was exceptional as compared to many other countries.⁶⁰

In the years before the onset of the Great Recession, there was little popular discussion about whether people in the United States were as economically mobile as they had been in the decades after World War II or whether people in the United States in fact have greater opportunities for upward mobility than people in other comparable countries.⁶¹ Further, despite growing economic inequality in the United States, many Americans believe that the overall economic system in the United States is fair because they believe that economic mobility in the United States is especially high as compared to other countries.⁶² Nevertheless, there is fairly strong evidence that some-

57. Julia B. Isaacs, *International Comparisons of Economic Mobility*, in *GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA* 37–38 (Julie Clover & Ianna Kachoris eds., 2008), available at http://www.brookings.edu/~media/research/files/reports/2008/2/economic%20mobility%20sawhill/02_economic_mobility_sawhill.pdf. The percentage of Americans who held this view was significantly lower than the percentage of respondents who held this view in any other country in the study as between 46% and 89% of respondents in all of the other countries held this view. *Id.* at 38.

58. See Sawhill & McLanahan, *supra* note 56. In a twenty-seven-country study of social attitudes, the United States had the highest percentage of respondents (69%) who agreed with the statement that “people are rewarded for intelligence and skill” and one of the lowest percentage of its people (19%) who consider it essential or very important to be born into a wealthy family in order to get ahead economically. Isaacs, *supra* note 57, at 37.

59. See Trina Jones, *Race and Socioeconomic Class: Examining an Increasingly Complex Tapestry: Article: Race, Economic Class, and Employment Opportunity*, 72 L. & CONTEMP. PROBS. 57, 58 n.7 (2009); Jason DeParle, *Harder for Americans to Rise from Economy’s Lower Rungs*, N.Y. TIMES, Jan. 5, 2012, at A1; Sawhill & McLanahan, *supra* note 56 at 3.

60. Joseph P. Ferrie, *HISTORY LESSONS: THE END OF AMERICAN EXCEPTIONALISM? MOBILITY IN THE UNITED STATES SINCE 1850*, 19 J. ECON. PERSPECTIVES 199, 214 (2005).

61. *But cf.* DeParle, *supra* note 59 (showing how the discussion of American economic mobility has recently moved towards center stage).

62. See Isabel Sawhill, *Trends in Intergenerational Mobility*, in *GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA* 27–29 (Julie Clover & Ianna Kachoris eds., 2008), available at <http://www.brookings.edu/~media/research/files/reports/2008/2/economic%20mobility>

time between 1980 and 1990, intergenerational mobility in the United States declined sharply from the rates of intergenerational mobility that had prevailed in this country from 1950 to 1980.⁶³

It also appears that the decline in intergenerational economic mobility is not evenly distributed. Although many Americans continue to experience significant upward and downward mobility, economic opportunity for many others is very sticky, which means it may depend to a significant degree upon the economic status of the family into which one is born. Very well-off families and poor families have transferred their respective privileged and impoverished economic statuses to their children over the course of the past few decades at a much higher rate than is the case for middle-income families in which there has not been a strong link between parents' income and the earnings of their children.⁶⁴ To this end, a 2008 study concluded that 42% of children born into families in the bottom fifth of the income distribution remained in the bottom fifth as adults, and that 39% of children born into the top fifth of the income distribution remained in the top fifth as adults.⁶⁵

Although traditional measures of economic mobility are backwards-looking, which means they cannot be used to predict the economic mobility for today's generation of children,⁶⁶ there is great cause for concern for the prospects of economic mobility for today's generation of children in the United States. To this end, some researchers have demonstrated that there is significantly less intergenerational economic mobility in countries that have comparatively greater economic inequality than countries that have less economic

ity%20sawhill/02_economic_mobility_sawhill.pdf; DeParle, *supra* note 59. In fact, there are some economists who argue that countries throughout the world depend economically upon so-called cutthroat capitalist countries such as the United States that tolerate great economic inequality. They argue that the form of capitalism found in the United States provides the proper incentives for innovation and technological breakthroughs, and that in turn, such innovation and technological breakthroughs fuel global economic growth that in turns benefits other countries including countries that have a more so-called cuddly form of capitalism. Daron Acemoglu et al., CAN'T WE ALL BE MORE LIKE SCANDINAVIANS? ASYMMETRIC GROWTH AND INSTITUTIONS IN AN INTERDEPENDENT WORLD 1-4 (2012), available at <http://economics.mit.edu/faculty/acemoglu/paper>.

63. Bhashkar Mazumder, *Is Intergenerational Economic Mobility Lower Now Than in the Past?*, CHI. FED. LETTER (2012).

64. Corak, *supra* note 53, at 116; DeParle, *supra* note 59.

65. ISABEL SAWHILL, OVERVIEW, IN GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 4 (Julie Clover & Ianna Kachoris eds., 2008), available at http://www.brookings.edu/~media/research/files/reports/2008/2/economic%20mobility%20sawhill/02_economic_mobility_sawhill.pdf.

66. Mazumder, *supra* note 63.

inequality.⁶⁷ One reason that there may be less economic mobility in countries with high income and wealth inequalities is that parents who are better off economically are often able to make investments of money and time to improve their children's development of forms of human capital that the market values than are parents who are less well-off.

An exceptionally important form of human capital is education. Despite the great potential that education can have in terms of promoting social and economic mobility, in the United States, "the average effect of education at all levels is to reinforce rather than compensate for the differences associated with family background and the many home-based advantages and disadvantages that children and adolescents bring with them into the classroom."⁶⁸ The public K-12 school systems in the United States provide at best "only a modest boost to poor and minority children's chances of moving up the economic ladder."⁶⁹

In addition, the way the labor market in a given country rewards people based upon their educational attainment can have a significant impact upon economic mobility. Therefore, to the extent that labor market returns increase in a particular country for those with more or better education than for others with less or inferior education, parents will have an incentive to invest more in their children's education.⁷⁰ If there is significant economic inequality in a given country, the parents with both the incentive and the wherewithal to make greater investments in their children's education inevitably will be the wealthier parents.⁷¹ Further, if the wealthier parents do increase their investments as one rationally would expect, economic mobility is likely to decline in that country unless public policies with respect to education sufficiently counteract market forces by providing a net benefit to the economically disadvantaged as opposed to those who are not so disadvantaged.⁷²

In the United States, wealthier parents have in fact been increasing their investments of time and money into their children's educa-

67. Corak, *supra* note 53, at 114–15; Andrews & Leigh, *supra* note 55, at 8–10.

68. Sawhill, *supra* note 65, at 6.

69. *Id.* at 98.

70. Gary Solon, *A Model of Intergenerational Mobility Variation Over Time and Place*, in *GENERATIONAL INCOME MOBILITY IN NORTH AMERICA AND EUROPE* 37, 41 (Miles Corak ed., 2004).

71. CORAK, *supra* note 53, at 114.

72. *Id.*

tion over the course of the past number of decades.⁷³ As of yet, public policies in the area of education have not benefited disadvantaged families in any substantial way to counteract the increased investments that wealthier parents have made in their children's education. In fact, there has been a reduction in the commitment to provide resources to poor and minority students in public kindergarten through 12th grade school systems over the course of the past three decades or so.⁷⁴ Further, over the course of the past several years, the share of financial aid benefitting low-income undergraduate and graduate students has been falling "as needs-based assistance has been increasingly replaced by merit-based aid."⁷⁵

Not only has the education system in the United States done little to improve economic mobility in the country over the course of the past few decades, it appears that the education system may well be contributing to growing income and wealth inequalities. Without significant reforms, this pattern may persist for generations. A few examples make this point. At a time in this country's history in which a person's ability to attain economic security depends more and more upon the extent to which one has high levels of educational achievement, a wide achievement gap has opened between the rich and the poor. To this end, the gap in test scores sorted by family income has

73. Robert Haveman & Timothy Smeeding, *The Role of Higher Education in Social Mobility*, OPPORTUNITY IN AM., 125, 128 (2006); see also Jason DeParle, *Leap to College Often Ends in a Hard Fall*, N.Y. TIMES, Dec. 22, 2012, at A1.

Certainly as the payoff to education has grown . . . affluent families have invested more in it. They have tripled the amount by which they outspend low-income families on enrichment activities like sports, music lessons and summer camps . . . [and] upper-income parents, especially fathers, have increased their child-rearing time, while the presence of fathers in low-income homes has declined.

DeParle, *supra* note 73, at A1.

74. See THE EDUCATION TRUST, *The Funding Gap 2005: Low-Income and Minority Students Shortchanged by Most States 2* (2005) ("Across the country, \$907 less is spent per student in the highest-poverty districts than in the most affluent districts. . . . Across the country, \$614 less is spent on students in the districts educating the most students of color as compared to the districts educating the fewest students of color."); William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat From Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 571 (2006); *New Data from U.S. Department of Education Highlights Educational Inequities Around Teacher Experience, Discipline and High School Rigor*, U.S. DEPT. EDUC. (Mar. 6, 2012), <http://www.ed.gov/news/press-releases/new-data-us-department-education-highlights-educational-inequities-around-teachers>. The data on the funding gaps between rich and poor students actually understate the amount by which poor students are being short-changed relative to wealthier students given that those who work on education policy commonly employ a forty percent adjustment in calculating the financial resources students who grow up in poverty need to achieve the same outcomes as wealthier students. THE EDUCATION TRUST, *supra* at 74.

75. Haveman & Smeeding, *supra* note 73, at 137.

grown by thirty to forty percent for children who were born in 2001, as compared to children who were born in 1976.⁷⁶

There are also huge gaps in educational attainment by socioeconomic status that make achieving greater economic mobility in this country much more unlikely. Based upon one measure of family income to family needs, 71% of youth from families in the top quartile of the “family permanent income-to-needs” distribution attended college as compared to just 22% of youth from families in the bottom quartile.⁷⁷ Further, there was a 35 point gap in college graduation rates between families in the top and bottom quartiles of the distribution with only 6-9% of youth from families at the bottom of the distribution managing to graduate from college.⁷⁸ Additionally, one study divided all four-year colleges and universities in the United States into four tiers. The study revealed that 74% of students in the entering classes for the 146 colleges and universities in the top tier were from families in the highest socioeconomic quartile and that just 3% of students in the entering classes for these colleges and universities were from the lowest quartile.⁷⁹

B. Assessing Claims of American Exceptionalism in Terms of Mobility

Over the course of the past two decades, a significant number of academic studies have undermined the conventional wisdom that people in the United States enjoy a particularly high degree of economic mobility as compared to people in many countries that are otherwise significantly comparable to the United States.⁸⁰ These studies come to similar conclusions, regardless of whether they measure intergenerational mobility in terms of income or in terms of occupation.⁸¹ Though studies appear to demonstrate that Americans enjoy a reason-

76. Sean Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* 91, 91 (Greg J. Duncan & Richard J. Murnane eds., 2011).

77. Haveman & Smeeding, *supra* note 73, at 131.

78. *Id.*; see also DeParle, *supra* note 73 (noting that while a greater percentage of rich and poor Americans alike have completed college over the course of the past thirty years, there is now a forty-five point gap between the percentage of wealthy Americans who earn a bachelor's degree and poor Americans who earn a bachelor's degree and that the gap thirty years ago was thirty-one percent).

79. Haveman & Smeeding, *supra* note 73, at 130.

80. DeParle, *supra* note 59.

81. Emily Beller & Michael Hout, *Intergenerational Social Mobility: The United States in Comparative Perspective*, *OPPORTUNITY IN AM.*, 19, (2006).

ably high degree of occupational mobility, the United States is just average in terms of occupational mobility when compared to other industrialized countries.⁸²

In addition, among many rich countries, the United States ranks below average in terms of income mobility.⁸³ In fact, in a study that measured intergenerational elasticity of earnings in twenty-two countries, Italy, the United Kingdom, and the United States each had intergenerational elasticity estimates of approximately 0.5, which resulted in these countries being ranked as the least economically mobile countries of the wealthy countries in the study.⁸⁴ Not only did the United States rank significantly below countries such as Germany, Japan, and Australia in terms of mobility, but the United States also had an elasticity measure that was two to three times as large as the wealthy countries with the greatest degree of mobility.⁸⁵ To this end, the estimate of intergenerational mobility in the United States was approximately two-and-a-half times larger than the estimate for intergenerational mobility in Canada. Given how similar the two countries are otherwise in many respects, the difference in economic mobility between the countries suggests that Canada and the United States have among other differences some key public policies that are very different and that the labor market in Canada operates somewhat differently from the labor market in the United States.⁸⁶ These apparent differences in public policy and in how the labor market operates in the two countries appear to make Canadians significantly more economically mobile than Americans.

C. Intergenerational Income Mobility for African Americans

Without question, there has been significant intergenerational economic mobility within the African American community over the course of the past several decades. In 1940, 90% of African American men and women lived in poverty; full-time working black men earned just 43% of what comparable white men earned on average; and just 2% of African Americans who were aged twenty-five to twenty-nine

82. *Id.* at 30. Occupational mobility is higher in Canada, Sweden, and Norway than it is in the United States. *Id.* In contrast, occupational mobility is lower in West Germany, Ireland, and Portugal than it is in the United States. *Id.*

83. *Id.*

84. Corak, *supra* note 53, at 111,

85. *Id.*

86. *Id.* at 120.

were college graduates.⁸⁷ By 2000, the poverty rate for African Americans was 30%; full-time working black men earned 73% of what comparable white men earned on average; and 15% of African Americans who were aged twenty-five to twenty-nine were college graduates.⁸⁸

Despite the fact that economic conditions have improved dramatically for African Americans over the course of the past several decades, African Americans remain much less upwardly mobile and much more downwardly mobile than white Americans when one considers the overall distribution of income. In terms of cycles of poverty, 42% of black children born in the bottom tenth of the income distribution remain in the bottom decile of income as adults, as compared to 17% of comparable white children.⁸⁹ African Americans also have been unable to move up from the bottom rungs of the income distribution to the top nearly as frequently as white Americans. Fewer than 4% of African American children born into families in the lowest quartile of the income distribution have ended up in the top quartile as adults, as compared to 14% of comparable white children.⁹⁰ Conversely, black children born in the top quartile of the income distribution have just a 15% chance of remaining there as adults while comparable white children have a 45% chance of remaining in the top quartile in their adult years.⁹¹

III. WHY ISN'T THERE A MORE SUBSTANTIAL SOCIAL MOVEMENT FOR GREATER ECONOMIC EQUALITY?

At first blush, one might think that the socioeconomic conditions that millions of Americans have endured over the course of the past few years would create the conditions for a broad-based social movement and that those in such a movement would relentlessly press both decision-makers in both the public and private sectors to take actions that would promote greater equality.⁹² With the growing concentrations of income and wealth, many more people in this country should be similarly situated economically, given that the middle class has

87. Melissa S. Kearney, *Intergenerational Mobility for Women and Minorities in the United States*, OPPORTUNITY IN AM., 37, 38 (2006).

88. *Id.*

89. *Id.* at 48.

90. *Id.*

91. *Id.* at 49.

92. See Bekad Mandell, *Putting Theory into Practice: Using a Human Rights Framework and Grassroots Organizing to Build a National Revolutionary Movement*, 1 COLUM. J. RACE & L. 402, 408 (2012).

struggled considerably as the affluent have become much more affluent, which in turn has resulted in greater polarization among those in different economic classes.⁹³ Nevertheless, consistent with what occurred during some other periods of economic crisis in this country's history, the overwhelming majority of Americans—including the overwhelming majority of the disadvantaged or those who have recently experienced significant downward mobility—have not taken to the streets or otherwise participated in any social movement.⁹⁴

Why do Americans appear to have little appetite for building any mass social movement to address inequality or for challenging in some other ways those who may be in positions to alleviate the economic suffering millions are enduring? Obviously, the reasons are complex. However, this phenomenon can be explained in part by how Americans misperceive their individual economic circumstances and how they improperly estimate the overall distribution of income and wealth in this country, by longstanding internal divisions within those otherwise similarly situated in terms of class status, and by the manner in which some with substantial economic and political power have been able to foster conflict among middle and working class people.

A. Americans' Perceptions and Misperceptions about Economic Inequality and the Economy

Americans' perception of their own economic status, as well as the overall distribution of wealth in this country, undercuts the effort to challenge the United States' actual (and very high) degree of economic inequality. In terms of wealth distribution, professors from Harvard Business School and Duke University's Department of Psychology have demonstrated that Americans severely underestimate the degree of wealth inequality in this country.⁹⁵ The nationally representative group of more than 5,500 Americans who responded to the survey that Norton and Ariely developed estimated that the wealthiest 20% of Americans held approximately 59% of the wealth, though the actual percentage these Americans held at the time of the survey was approximately 84%.⁹⁶ Further, in response to the question asking these respondents for their ideal distribution of wealth, the re-

93. *Id.* at 408–09.

94. *Id.* at 409.

95. Michael I. Norton & Dan Ariely, *Building a Better America – One Wealth Quintile at a Time*, 6 PERSP. ON PSYCHOL. SCI. 9, 9 (2011).

96. *Id.* at 10.

spondents indicated that they preferred the top 20% to hold 32% of wealth and for those in the bottom three quintiles to receive a substantially larger share of the overall wealth than they (incorrectly) believed these groups held at the time of the survey.⁹⁷

Though there were small differences between some of the different demographic groups of respondents in terms of perceptions of the actual distribution of wealth and construction of an ideal distribution of wealth, there was much more consensus. No group, whether comprised of those by income status, party affiliation, or gender, believed that the wealthiest 20% of Americans held more than approximately 60% of the wealth in this country.⁹⁸ Perhaps unexpectedly, there was general consensus among the different groups of respondents that the wealthiest 20% of Americans should hold somewhere between approximately 30% and 40% of the country's wealth and that the bottom four quintiles in the wealth distribution should hold a substantially higher percentage of the country's wealth than is presently the case.

Many Americans also appear to have a significant misperception about their place in the income distribution. A recent Gallup poll indicates that 55% of Americans consider themselves to be middle class or upper-middle class and that this percentage has remained stable over the course of the past several years, though it was slightly higher before the onset of the Great Recession.⁹⁹ In addition, 31% of Americans identify themselves as working class, a percentage that has remained almost unchanged over the course of the past eleven years.¹⁰⁰ Though Gallup reports that the percentage of Americans who perceive themselves as lower class has grown over the course of the past decade from 3% to 10%, there is some evidence that low-income Americans overestimate their standing in the income distribution¹⁰¹ and that wealthy Americans underestimate their position in the income distribution.¹⁰²

97. *Id.*

98. *Id.* at 11.

99. Andrew Dugan, *Americans Most Likely to Say They Belong to the Middle Class*, GALLUP (Nov. 30, 2012), <http://www.gallup.com/poll/159029/americans-likely-say-belong-middle-class.aspx>.

100. *Id.*

101. Catherine Rampell, *Everyone Is "Middle Class," Right?*, N.Y. TIMES, Apr. 27, 2011, 9:30 AM, <http://economix.blogs.nytimes.com/2011/04/27/everyone-is-middle-class-right/>.

102. *Id.*

The misperceptions Americans have about their relative economic standing likely negatively impact support for redistributive policies. This may be the case because many lower-income people who overestimate their earnings incorrectly believe they would benefit by supporting regressive tax and other governmental policies favoring wealthier Americans, and many wealthy Americans believe their taxes are far too high based upon an incorrect belief that they are not in fact upper income (and despite the fact that many of these wealthy Americans believe that the wealthy as a group pay too little in taxes).¹⁰³ Even to the extent that low-income Americans properly estimate their position in the income distribution, studies indicate that many such Americans are overly optimistic about the opportunity for upward social and economic mobility in this country, which may explain why many of these people do not support greater redistributive policies.¹⁰⁴

Whether or not black and Hispanic Americans severely misperceive their current economic circumstances or are overly optimistic about their future economic opportunities, they feel more optimistic about the national economy at this time and their economic prospects for the future than whites. This is the case despite the fact that the Great Recession had a particularly devastating impact upon African Americans and Hispanics, and despite the fact that they otherwise have been unable over the past few decades to close in any substantial way some of the more longstanding economic gaps that have separated them from whites.¹⁰⁵ Despite these facts, a substantially higher percentage of blacks and Hispanics believes that their economic condition will be better in the next several years than is the case for white Americans, and three times as many blacks and Hispanics aged eighteen to thirty-four as compared to similarly situated whites believe they will be better off economically than their parents during the course of their lives as adults.¹⁰⁶ Substantially higher percentages of middle-class African Americans and Hispanics than white Americans indicate that they are now financially better off than they were before

103. See *id.*; Catherine Rampell, *Rich People Still Don't Realize They're Rich*, N.Y. TIMES Apr. 19, 2011, 1:41 PM, <http://economix.blogs.nytimes.com/2011/04/19/rich-people-still-dont-realize-theyre-rich/>.

104. Norton & Ariely, *supra* note 95, at 12.

105. See Luke Reidenbach & Christian Weller, *The State of Minorities in 2010: Minorities Are Suffering Disproportionately in the Recession*, CTR. FOR AM. PROGRESS 1 (Jan. 15, 2010), http://www.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/state_of_minorities.pdf.

106. See Yolanda Young, *Blacks, Hispanics Find Reasons for Optimism*, USA TODAY, Dec. 15, 2011, 5:36 PM, <http://usatoday30.usatoday.com/news/opinion/forum/story/2011-12-15/blacks-hispanics-white-economy-optimism/51980916/1>.

the onset of the Great Recession¹⁰⁷ although substantially more middle-class African Americans and Hispanics than middle-class whites report that they endured two or more negative economic experiences in the past year or so.¹⁰⁸

In terms of political activism, it seems clear that blacks and Hispanics have not been engaged in mass protests in the past several years in any substantial way, and they show no signs of preparing to engage in any mass protests in which they would demand greater economic opportunities or greater economic equality in terms of class and race.¹⁰⁹ Given the fact that blacks and Hispanics first passed whites in expressing greater levels of satisfaction with the national economy in 2008 and 2009 around the time of President Barack Obama's historic election and during the early months of his presidency,¹¹⁰ it will be interesting to track whether this racial trend in reported satisfaction with the national economy will continue after President Obama's second term ends, especially if our country's next President is not a person of color who receives widespread support from racial and ethnic minorities.

B. The Role Low-Income People and the Working Class Play in Creating Self-Reinforcing Inequality

Throughout the history of the United States, it has often been a challenge for those in similar social or economic classes to work together in a collective way in an effort to achieve greater economic equality for all. Oftentimes, certain groups of working or middle-class people have taken actions which have disadvantaged others in the working class or middle-class. Though one might think that during periods of economic crisis and growing economic inequality, working and middle-class people would be more inclined to work in solidarity with one another to improve their collective economic circumstances, oftentimes just the opposite has happened. Instead of working together in solidarity during these times, many in the working and mid-

107. PEW RESEARCH CTR., *supra* note 3, at 3 (reporting that just 28 percent of middle-class whites claim they are better off now than they were before the recession while 49 percent of middle-class blacks and 43 percent of middle-class Hispanics report that they are better off).

108. *Id.* at 3.

109. See Paul Taylor, *Losing Wealth, Not Faith*, WASH. POST, July 29, 2011, at A17.

110. See *id.*

dle-class have competed against each other based upon the notion that economic opportunities overall represent a zero sum game.¹¹¹

There have been many reasons that Americans who are considered working or middle-class, in terms of their income or wealth, have not worked together in greater numbers to achieve greater economic equality in this country or have not supported public policies that would provide particular benefits to those in the working or middle-class. I will highlight three of these reasons. First, many people who are working class or middle-class by economic status form a greater sense of themselves along identity axes of race, gender, religion, geography, sexual orientation, or culture, for example, as opposed to along economic lines.¹¹² Second, the working class is segmented in important ways, which often creates economic incentives for different groups of people in the working class to be in conflict with other groups of working-class people.¹¹³ Third, and consistent with the second reason just noted, racial and ethnic conflict often has resulted in many working-class people of one race or ethnic group failing to support or even actively working against working-class people of another race or ethnicity for economic and non-economic reasons.¹¹⁴ Not only have there been conflicts or divisions between whites and minorities in the working class, but there often have also been inter-minority conflicts among working-class people.¹¹⁵

Many political scientists, economists, and others worry that economic inequality may become self-reinforcing because the more affluent may be able to use their wealth to gain more political influence that they use in turn to enhance their wealth, while those who are poorer lose political influence and as a result the ability to secure for themselves vital governmental resources that are often needed for up-

111. Sherry Linkon, *The Changing Working Class*, in WORKING-CLASS PERSPECTIVES: COMMENTARY ON WORKING-CLASS CULTURE, EDUCATION, AND POLITICS (Nov. 19, 2012), <http://workingclassstudies.wordpress.com/category/issues/understanding-class/> (“[Claiming that contemporary] workplaces no longer provide as many opportunities for workers to come together or recognize their shared interests, and in a tight economy, working-class people sometimes see each other as the competition.”).

112. See Marion Crain & Ken Matheny, *Labor’s Identity Crisis*, 89 CAL. L. REV. 1767, 1783 (2011).

113. See Thomas Kleven, *Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in the United States*, 8 CONN. PUB. INT. L.J. 207, 216 (2009).

114. See *id.* at 245, 249.

115. See *id.* at 249 n.171.

ward mobility.¹¹⁶ Nevertheless, two political scientists have recently concluded that during periods in which economic inequality increases, the rich and the poor alike both become more conservative and express decreased support for government policies that would reduce economic inequality.¹¹⁷ Though this conclusion may seem counterintuitive to many, a recent Pew Research Center report that in part evaluated the percentage of Americans who support a government social safety net offers some support. According to the report, in 1987, 71% of Americans supported the view that the government is responsible for taking care of people who cannot take care of themselves; however, in 2012, just 59% of Americans agreed with this view.¹¹⁸ While public support for a government safety net has decreased over the course of the past twenty-five years or so, inequality has increased.¹¹⁹

C. Examples of Internal Divisions Among Working-Class People

The following paragraphs will present two examples of how divisions among working-class and middle-class Americans have made it more difficult to address economic inequality. The first example, and a very contemporary example, describes the political battles and mass protests in Wisconsin that began in February 2011 after Governor Scott Walker announced his intention to eliminate, for all intents and purposes, collective bargaining for most public employees who were members of public sector unions. This example highlights the manner in which many working-class and middle-class Americans are bitterly divided along political lines with respect to important economic issues and the fact that there are limits to the efficacy of mass protests given the level of partisan division among the electorate.

116. See JACOB S. HACKER ET AL., *INEQUALITY AND PUBLIC POLICY*, in *INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN* 156, 197–200 (Lawrence R. Jacobs & Theda Skocpol eds., 2005); see also Stiglitz, *supra* note 1, at 39–52.

117. Nathan T. Kelly & Peter K. Enns., *Inequality and the Dynamics of Public Opinion: The Self-Reinforcing Link Between Economic Inequality and Mass Preferences*, 54 AM. J. POL. SCI. 855, 867–69 (2010).

118. See *Partisan Polarization Surges in Bush, Obama Years: Trends in American Values: 1987-2012*, PEW RESEARCH CTR. 55 (2012), available at <http://www.people-press.org/files/legacy-pdf/06-04-12%20Values%20Release.pdf>.

119. It should be noted, however, that the Pew Research Center's study does indicate that there was some downward and upward fluctuation in levels of support of a government safety net between 1987 and 2012. Even so, the overall trend has been downward over this period of time and public support for a government safety net fell steadily from the onset of the Great Recession through 2012. *Id.*

The second example is an example from the New Deal. Though the New Deal era is widely considered a very progressive period in American history, New Deal policy and the general public's response to government efforts to address the dire economic circumstances millions of Americans experienced during this period were highly racialized. Though the New Deal example is obviously from a prior period in this country's history, some of the dynamics that contributed to government officials in the New Deal providing many minorities with much less support than they needed based upon their economic circumstances have also informed the way that government officials today have responded to the economic conditions many minorities face.

1. Protests and Labor Strife in Wisconsin: A Cautionary Tale on the Limits of Large-Scale Protests to Affect Political Change in a Time of Polarization

Without question, there is an incredibly high level of polarization and divisiveness in the body politic in the United States today.¹²⁰ Although significant gaps in values persist between different demographic groups of Americans sorted in terms of their race and ethnicity, educational attainment, economic class, religiosity, and gender, these divisions have neither increased nor decreased appreciably over the course of the past quarter century.¹²¹ In contrast, the gap in values between those who identify as Democrats or as Republicans has almost doubled in the past twenty-five years, and this partisan gap now represents the largest gap among all other demographic divisions.¹²² Not only has the partisan gap overtaken the racial and educational gaps, it is now fifty percent larger than the racial values gap, which represents the second largest values gap.¹²³

In terms of political polarization, many now believe that the state of Wisconsin, a state previously long known for civility in its politics,¹²⁴ is the most politically divisive state in America.¹²⁵ In 2011, polls

120. See PEW RESEARCH CTR., *supra* note 3, at 2 (explaining the high level of polarization in American politics).

121. *Id.*

122. *Id.*

123. *Id.*

124. Dan Kaufman, *Land of Cheese and Rancor*, N.Y. TIMES, May 27, 2012, <http://query.nytimes.com/gst/fullpage.html?res=9804E6DA1E3CF934A15756C0A9649D8B63&pagewanted=all>

125. Dan Kaufman, *How Did Wisconsin Become the Most Politically Divisive Place in America?*, N.Y. TIMES, May 24, 2012, http://www.nytimes.com/2012/05/27/magazine/how-did-wisconsin-become-the-most-politically-divisive-place-in-america.html?pagewanted=all&_r=0; see

showed that the gap between Democrats and Republicans in terms of whether they approved or disapproved of Governor Scott Walker made Governor Walker one of the most, if not the most, polarizing governors in the United States, given that the so-called partisan gap in approval ratings for Governor Walker was 78%.¹²⁶ Governor Walker's announcement of his decision to seek to end collective bargaining rights for most public employees who were members of public sector unions¹²⁷—rights which Wisconsin public employees gained in 1959, making them the first public employees in any state to be granted collective bargaining rights¹²⁸—sparked massive protests in February and early March of 2011.¹²⁹ During this period, tens of thousands of people participated in protests against Governor Walker and the Republicans who controlled the state legislature, with 100,000 or more people joining one of the protests on February 26, 2011.¹³⁰ Many believe that the massive protests in Wisconsin provided some significant inspiration for the Occupy Wall Street movement.¹³¹

After the Republican-controlled legislature passed the bill stripping most public employees of their collective bargaining rights, Governor Walker signed the bill into law on March 11, 2011.¹³² Those who opposed Governor Walker next turned their attention to seeking to recall certain Republican lawmakers, including Governor

also Bob Sexter, *Bruised-Purple Wisconsin Takes Political Beating State's Near-Even Red-Blue Split Fuels Barrage of Attack Ads in Tight Races for Senate, President*, CHI. TRIBUNE, Nov. 2, 2012, http://articles.chicagotribune.com/2012-11-02/news/ct-nw-wisconsin-wrap-20121102_1_wisconsin-dells-republican-party-chairman-scott-walker.

126. See Craig Gilbert, *Scott Walker Could Be the Most Polarizing Governor?*, MILWAUKEE J. SENTINEL Mar. 8, 2011, at A1.

127. Michael A. Fletcher, *Thousands Turn Out for Latest Protest Against Wis. Governor's Budget Plan*, WASH. POST, Mar. 6, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/05/AR2011030503728.html>; see also Barbara Rodriguez, *Madison, Wis.: Protests Mark Year Since Gov. Scott Walker's Collective Bargaining Law*, TWINCITIES.COM (Mar. 10, 2012, 8:37 PM), http://www.twincities.com/wisconsin/ci_20148202/madison-wis-protests-mark-year-since-collective-bargaining.

128. *WLHS Primer on Wisconsin Labor History*, WIS. LABOR HISTORY SOC'Y, http://www.wisconsinlaborhistory.org/?page_id=34 (last visited Jan. 18, 2013).

129. See Fletcher, *supra* note 127; Rodriguez, *supra* note 127.

130. See Abby Sewell, *Protesters Out in Force Nationwide to Oppose Wisconsin's Anti-Union Bill*, L.A. TIMES, Feb. 26, 2011, <http://articles.latimes.com/2011/feb/26/nation/la-na-wisconsin-protests-20110227>.

131. Kira Zalan, *The Wisconsin Protests' Widespread Influence – From Obama to Occupy Wall Street*, U.S. NEWS & WORLD REPORT (Mar. 2, 2012), <http://www.usnews.com/opinion/articles/2012/03/02/the-wisconsin-protests-widespread-influence-from-obama-to-occupy-wall-street>.

132. Stephanie Condon, *Wisconsin Gov. Scott Walker Signs Anti-union Bill — But Democrats Say They're the Political Victors*, CBS NEWS (Mar. 11, 2011, 11:19 AM), http://www.cbsnews.com/8301-503544_162-20042122-503544.html.

Walker.¹³³ After those who opposed the governor filed more than one million signatures of people seeking to recall and remove him from office, many in Wisconsin and in the country assumed that Governor Walker would have a very difficult time becoming the first governor in United States history to survive a recall election.¹³⁴

However, in spite of the massive protests and the huge number of Wisconsinites who signed the recall petition, Governor Walker convincingly won the recall election by more than seven points.¹³⁵ In an election that featured the issue of collective bargaining for union members, the exit polls provided evidence of the substantial polarization of the Wisconsin electorate, even among those in the working and middle classes.¹³⁶ Fifty-six percent of middle-class voters, as well as 56% of those without a college degree, voted for Governor Walker.¹³⁷ What may be particularly surprising to many is the fact that of the one-third of the voters who either belonged to a union or who had someone in their household who belonged to a union, 38% voted for Governor Walker.¹³⁸ Though it is likely that many of these voters were in households that had people who were members of the police, firefighters, and State patrol unions—public sector unions exempted from the collective bargaining bill¹³⁹—it is also apparent that many other people from union households supported Governor Walker.¹⁴⁰

133. See Rachel Weiner, *Wisconsin Recall Petition Gets Over 1 Million Signatures; Democratic Challenger Falk Steps Forward*, WASH. POST, Jan. 18, 2012, http://www.washingtonpost.com/politics/wisconsin-recall-petition-gets-over-1-million-signatures-democratic-challenger-falk-steps-forward/2012/01/18/gIQAD4sr8P_story.html.

134. See *id.*

135. Clay Barbour et al., *Re-Affirmed: After More Than a Year of Fierce Partisan Battles, Gov. Scott Walker and His Fellow Republican Lawmakers Dominate the Polls on Tuesday*, WIS. STATE J., June 6, 2012, at A1.

136. *Wisconsin Recall Exit Polls: How Different Groups Voted*, N.Y. TIMES, June 5, 2012, <http://www.nytimes.com/interactive/2012/06/05/us/politics/wisconsin-recall-exit-polls.html>.

137. *Id.*

138. *Id.*

139. See Steven Verburg, *Special Collective Bargaining Status for Police and Fire Unions Causing Problems*, WIS. STATE J., Jan. 7, 2012, 6:50 AM, http://host.madison.com/news/local/govt-and-politics/special-collective-bargaining-status-for-police-and-fire-unions-causing/article_c8900f50-38c7-11e1-a949-0019bb2963f4.html.

140. Sarah Dutton & Jennifer De Pinto, *How Scott Walker Won the Wisconsin Recall Election*, CBS NEWS (June 6, 2012, 1:07 AM), http://www.cbsnews.com/8301-503544_162-57447980-503544/how-scott-walker-won-the-wisconsin-recall-election/.

2. Government Officials and Politicians Have Felt Constrained to Deal with Racial Disparities Including in Times of General Economic Crisis

Just as they are today, African Americans were significantly over-represented among the poor in the early 1930s. Further, for most African Americans, the Great Depression simply worsened their longstanding economic plight and oppression.¹⁴¹ If Congress and the Roosevelt Administration had designed many New Deal programs in a universal way to benefit Americans largely on the basis of demonstrated need, and if they had implemented such programs in a nondiscriminatory way, the New Deal would have dramatically improved the socioeconomic status of African Americans, as well as the socioeconomic status of other people of color. Nevertheless, the government designed or administered many New Deal programs in a racially discriminatory way in part to appease certain powerful economic interests and many white Americans.

Racial discrimination in these programs took many forms.¹⁴² In a particularly damaging manifestation of racism, certain New Deal programs excluded an extremely large percentage of impoverished African Americans. For example, three major New Deal legislative acts explicitly excluded agricultural laborers and those who worked in the domestic service sector. These acts included the Social Security Act, the National Labor Relations Act, and the Fair Labor Standards Act.¹⁴³ The exclusion of these occupational categories, which accounted for two-thirds of black employment in the United States and between seventy and eighty percent of black employment in many parts of the South¹⁴⁴ helped solidify racial divisions within the labor market.¹⁴⁵

While our country is still recovering from the worst economic crisis Americans have experienced since the Great Depression, many politicians and government officials still feel constrained to address

141. Robert C. Weaver, *The New Deal and the Negro: A Look at the Facts*, 13 OPPORTUNITY: J. OF NEGRO LIFE 200, 200 (1935).

142. See Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1353–71 (1987). Over time, most of the discriminatory provisions included in different pieces of New Deal legislation were stricken. *Id.* at 1336.

143. Juan F. Perea, *Destined for Servitude*, 44 U.S.F. L. REV. 245, 250 (2009).

144. IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 43 (2005). By amendment to the original Social Security Act, domestic laborers were added in 1950 and agricultural laborers were added in 1954. *Id.*

145. Mandell, *supra* note 92, at 407.

the range of economic issues particularly facing minorities because they often worry that focusing on these type of issues would generate backlash from white Americans. To be clear, few people claim that the federal programs that were designed to heal the economy in the wake of the Great Recession and that were enacted into law after President Barack Obama took office have been racialized to the detriment of minorities in the way that many New Deal programs were racialized. Nevertheless, there are many who believe that President Barack Obama and others in his administration have shied away from developing policies to specifically address severe racial issues in our society out of a concern that addressing issues of racial injustice would erode the support he has received from white Americans and would prevent him from building upon this support.¹⁴⁶ These purported concerns are not unfounded, as President Obama has experienced political setbacks when he has addressed certain racial issues in an open way no matter how sensitively he has sought to address them.¹⁴⁷ Nevertheless, one commentator claims that severe racial economic gaps together with other serious racial gaps “are becoming unremarkable features of the post-racial world” in which critical and unresolved racial issues are not framed, for pragmatic political reasons, as arising from racial discrimination or injustice.¹⁴⁸

IV. THE LEGAL PROFESSION CAN DO MORE TO PROMOTE GREATER ECONOMIC EQUALITY

A. A Multifaceted Strategy Is Needed to Reduce Economic Inequality

The effort to reduce economic inequality and to increase intergenerational economic mobility in this country must draw upon the expertise of many different types of people and organizations from a broad spectrum of backgrounds. In terms of such an overall strategy, law will not play the largest role or perhaps even a central role in efforts to promote more economic equality, including in the effort to reduce the substantial racial economic gaps that now exist in our

146. Kimberle Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1336 (2011).

147. Paul Glastris, *Introduction: Race, History, and Obama's Second Term*, WASH. MONTHLY, Jan./Feb. 2013, available at http://www.washingtonmonthly.com/magazine/january_february_2013/features/introduction_race_history_and042044.php?page=1.

148. Crenshaw, *supra* note 146, at 1336–40.

country.¹⁴⁹ Nevertheless, there is an important role for lawyers and legal institutions of one kind or another to play in the effort to increase economic opportunities for millions of Americans, so that the American dream can become more of a reality for a broader swath of the American public.

To create greater income equality and economic mobility in the United States, there is broad consensus among academics, policymakers, and others that we, as a country, must dramatically improve the educational system and educational opportunities for poor and low- to moderate-income Americans.¹⁵⁰ Many others believe that to reduce income inequality, our tax system also needs to be changed to make it much more progressive and more like tax systems in many other industrialized countries that do much more to redistribute pretax income.¹⁵¹ Others suggest that to reduce economic inequality in the United States, we must reform our criminal justice system, given that the United States incarcerates more people per capita than any other country in the world.¹⁵² Still others argue that major reforms are needed with respect to our country's policies impacting family structure and the capacity of parents to make important financial and non-financial investments in their children, among other relevant areas of policy.¹⁵³ Although reforming policies in any of the aforementioned policy areas would help promote greater equality in this country, for inequality to be addressed in a substantial way, significant reforms would need to be made in a number of different policy areas, whether in areas implicating education, tax, the criminal justice system, health care and nutrition, family life, housing, etc.

149. See, e.g., Calavita, *supra* note 4, at 499; Jones, *supra* note 59, at 87.

150. See, e.g., Ron Haskins, *Education and Economic Mobility*, in *GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA* 101 (Julie Clover & Ianna Kachoris eds., 2008), available at http://www.brookings.edu/~media/research/files/reports/2008/2/economic%20mobility%20sawhill/02_economic_mobility_sawhill.pdf; Dan Ariely, *Americans Want to Live in a Much More Equal Country (They Just Don't Realize It)*, ATLANTIC (Aug. 2, 2012, 12:41 PM), <http://www.theatlantic.com/business/archive/2012/08/americans-want-to-live-in-a-much-more-equal-country-they-just-dont-realize-it/260639/>; Beller & Hout, *supra* note 81, at 31; Haveman & Smeeding, *supra* note 73, at 143; Jones, *supra* note 59, at 87; Sawhill, *supra* note 62, at 4–5.

151. See, e.g., STIGLITZ, *supra* note 1, at 273–74; Calavita, *supra* note 4, at 500; Ariely, *supra* note 150.

152. See Eduardo Porter, *At the Polls, Choose Your Capitalism*, N.Y. TIMES, Oct. 31, 2012, at B1.

153. See, e.g., Beller & Hout, *supra* note 81, at 31; Corak, *supra* note 53, at 120. However, there is not universal agreement on the extent to which changes in family structure in the United States alone have contributed to increased economic inequality. Hacker et al., *supra* note 116, at 163.

In terms of promoting greater wealth equality, a number of organizations that are not primarily legal organizations have developed detailed policy agendas setting forth policies that would enable low- to moderate-income individuals and households to build wealth. One such leading organization is the Corporation for Enterprise Development (CFED). CFED's policy agenda addresses the following five issue areas: financial assets and income, businesses and jobs, housing and homeownership, education, and health.¹⁵⁴ Within these five issue areas, a limited number of CFED's proposals do have an explicitly legal component, such as proposals encouraging states to adopt more robust laws designed to prevent foreclosure or to protect some of the assets of those who have their property foreclosed.¹⁵⁵

In terms of efforts to address racial economic gaps, those working on behalf of the Insight Center for Community Economic Development's *Closing the Racial Wealth Gap Initiative* have developed policy briefs and papers to address strategies to close racial wealth gaps.¹⁵⁶ Just like CFED's policy proposals, some of the policy proposals that are part of the package of proposals that those (including this author) working on behalf of the *Closing the Racial Wealth Gap Initiative* have developed have an explicit legal component.¹⁵⁷ Further, over the course of the past four years, a few organizations have sponsored an annual African American economic summit to address the many severe economic challenges currently facing the black community. Howard University hosted this year's fourth annual summit on February 1, 2013,¹⁵⁸ and a number of the university's departments and centers, as well as the Joint Center for Political and Economic Studies and Duke University's Research Network on Racial and Ethnic Inequality, sponsored the summit.¹⁵⁹ It is somewhat striking that no legal or-

154. See *Policy Agenda*, CORP. FOR ENTERPRISE DEV., http://cfed.org/policy/policy_agenda/ (last visited Feb. 26, 2013).

155. See *Policy Brief: Foreclosure Prevention and Protections*, CORP. FOR ENTERPRISE DEV., (2012), available at http://cfed.org/assets/scorecard/2013/pb_Foreclosure_Prevention_2013.pdf.

156. See *Publications and Materials*, INSIGHT CENTER FOR COMTY. ECON. DEV., <http://www.insightccd.org/index.php?page=Policy> (last visited Feb. 26, 2013).

157. See *The Racial Gap in Land Retention, Acquisition, and Development*, INSIGHT CTR. FOR COMTY. ECON. DEV., (2009), available at <http://www.insightccd.org/uploads/CRWG/Racial-Gap-Land-Retention-6-09.pdf>.

158. See Michael A. Fletcher, *Financial Picture for Black Americans Bleak, Scholars Say*, WASH. POST, Feb. 2, 2013, at A10; *Fourth Annual Economic Summit*, HOW. U. DEP'T. ECON., http://www.coas.howard.edu/economics/news&events_livestream.html (last visited March 1, 2013).

159. See *Fourth Annual Economic Summit*, *supra* note 158.

ganization took part in the summit and that no practicing attorneys participated as speakers.

B. Legal Organizations Should Develop Detailed Strategic Plans
Setting Forth Legal Strategies to Promote Greater
Economic Equality

Irrespective of whether it is in a leading or supporting way, there is a very important role for lawyers and legal organizations to play in the broader effort to promote greater economic equality in this country. Just as some primarily non-legal organizations have developed detailed policy proposals designed to promote economic equality in general or to address economic challenges that various communities of color are experiencing, more legal organizations can also develop such comprehensive policy agendas or legal strategies. In some instances, legal organizations that would develop these types of agendas or legal strategies could help complement the initiatives that many non-legal organizations have pursued. In other instances, legal organizations that would develop such policy agendas or legal strategies to promote greater economic equality could play a leading role in addressing certain relevant stand-alone legal issues, given that many if not most non-legal organizations lack a comparative advantage to address these types of legal issues in a sophisticated way.

Though there are many legal and non-legal organizations that promote social justice or civil rights that have made promoting economic justice a central part of their work,¹⁶⁰ there is still much room for other legal institutions committed to social justice to promote greater economic equality in a more robust way. To this end, there are important roles for lawyers with expertise in many different substantive areas of the law to play, including those with expertise in business and transactional areas of the law. In terms of developing this generation's social engineers in the field of law, law schools with a commitment to promoting social justice and civil rights should make an intentional effort to make sure that their law students appreciate the fact that many different types of lawyers can play a meaningful

160. See, e.g., Letter from Marc H. Morial, President and Chief Exec. Officer, Nat'l Urban League, to Barack Obama, President of the U.S., Nancy Pelosi, Minority Leader of the U.S. House of Representatives & John Boehner, Speaker of the U.S. House of Representatives, *available at* <http://nul.iamempowered.com/content/national-urban-league-calls-president-obama-congressional-leaders-make-economic-opportunity>; *Economic Equality*, LAW. COMM. FOR CIV. RTS. S. F. BAY AREA, <http://www.lccr.com/economic-equality.php> (last visited Mar. 1, 2013).

role in helping to promote economic justice and equality. Finally, given that the goal of reducing economic inequality in our society represents an enormous, long-term challenge, lawyers and legal organizations committed to addressing the issue should utilize every legal tool and resource that they can deploy in the struggle to promote greater equality, including some that public interest and civil rights lawyers have underutilized in some significant ways to date.

C. Examples of How the Law Could Be More Effectively Utilized to Promote Equality

Based upon the work I have done in the area of real property and real estate law, I will offer two concrete examples of ways in which lawyers and legal institutions could play a more significant role in promoting economic equality. These examples serve as examples of what can be done in other areas of law as well. Though these particular examples address the role lawyers can play in addressing certain racial economic issues, the examples also offer insight into the role lawyers can play in addressing the overall issue of reducing economic inequality in this country.

1. Lawyers Should Play a More Active Role in Developing Strategies to Increase Minority Homeownership and to Make Such Ownership More Secure

Given that equity in a primary residence represents the largest asset most Americans of any race or ethnicity possess in their asset portfolios, lawyers should undertake efforts to increase homeownership within the African American and Latino communities, particularly given the current substantial racial homeownership gaps between these groups and white Americans. As indicated earlier, 28.9% fewer African Americans own their own homes as compared to white Americans, and this gap is larger than it was in any year between 1994 and 2009.¹⁶¹ This means that all the progress that had been made in narrowing the black-white homeownership gap in the mid to late 1990s and early 2000s has been reversed. Similarly, the progress made during the late 1990s and early 2000s in narrowing the Hispanic-white homeownership gap has been set back as the Hispanic-white home-

161. *Homeownership Rates by Race and Ethnicity of Householder: 1994 to 2011*, *supra* note 41.

ownership gap has been growing in recent years and is now approximately as large as it was in 2001.

Nevertheless, those who advocate for a renewed push to increase minority homeownership must learn important lessons from the drive to increase minority homeownership during the 1990s and 2000s. Many who began advocating for increased minority homeownership approximately two decades ago had all the best intentions and did in fact develop detailed strategies to accomplish their goal.¹⁶² However, the progress that was made in increasing minority homeownership in the 1990s and early 2000s masked a number of troubling issues that in the end contributed to washing away all of the gains that African Americans and Latinos made in increasing their homeownership rates. Not only have many African Americans and Latinos lost their homes, they have also lost tens of billions of dollars in home equity over the course of the past several years.

In terms of lessons that should be learned, it has become clear, for example, that a number of troubling aspects of the way in which lenders made subprime loans resulted in homeownership resting on a foundation of sand for far too many. For many, terms in many subprime loans that did not allow for prepayment of the loan or that required balloon payments many times the size of the normal monthly payment, for example, were factors that contributed to driving homeowners into foreclosure.¹⁶³ In other instances, there is evidence that lenders steered minorities into taking out subprime loans, though they may have qualified for prime loans that had much lower interest rates and more favorable terms for the borrower.¹⁶⁴ Some of those who advocated for increased minority homeownership in the 1990s now realize that the efforts to increase minority homeownership in the past couple of decades did not place enough emphasis on the role that the law could play in making homeownership for minorities more viable and sustainable. One of these advocates now claims that legal reform in the areas of foreclosure law and fair lending practices, among other areas, must “become central to public policy debates” about minority homeownership.¹⁶⁵

162. Taylor, *supra* note 109.

163. Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL’Y 53, 69–70 (2006).

164. See, e.g., Thomas W. Mitchell et al., *Forced Sale Risk: Class, Race, and the “Double Discount”*, 37 FLA. ST. U. L. REV. 589, 654–55 (2010); Shapiro, *supra* note 163, at 72.

165. Shapiro, *supra* note 163, at 71–72.

To this end, more legal organizations committed to promoting civil rights and social justice should consider how they can play a meaningful role in helping minorities become homeowners in a financially sustainable way and in helping those who are homeowners maintain their homes. At the national level, more civil rights and public interest legal organizations should seek to participate in a proactive way in developing and championing policy agendas that include the legal reforms necessary to address critical housing issues impacting minorities. Law schools that have a commitment to promoting civil rights and social justice should consider undertaking initiatives to enhance in a substantial way the real estate offerings that are available to their students, including by developing real estate certificate or concentration programs.¹⁶⁶

Students who would take advantage of these enhanced real estate offerings would be able, once in practice, to provide effective counsel to prospective minority homeowners considering various options they may have to finance a purchase of a home, including financing options with complex legal terms. Many of these students also would be better positioned once in practice than many other law graduates who did not take many real estate-related courses in law school to advise minorities who already own homes who may be experiencing financial problems about the legal options they may have to retain their homes—or at least, the wealth associated with such homes. Still others who pursued a real estate concentration in law school would be well positioned once in practice to advise developers interested in building affordable housing or, in some cases, could even become affordable housing developers themselves. In addition, some of these students would be in a better position than students who lack such training in real estate law and finance to work within a few years of graduating from law school with others on developing public policy in the areas of housing and real estate.

166. A few years ago at the University of Wisconsin Law School, I worked with a number of other professors, administrators, and members of the practicing bar to develop a real estate concentration and certificate program. See *Real Estate Law Concentration*, U. WIS. L. SCH., <http://law.wisc.edu/academics/courses/concentrations/realestate.html> (last updated Nov. 10, 2011). Students interested in obtaining a real estate law certificate in our program must take a number of real estate and business law courses, as well as a course at our business school that reviews the business fundamentals of a real estate transaction. *Id.*

2. Developing National Model State Statutes to Promote Greater Economic Equality in Certain Areas of the Law

Over the course of the past several decades, thousands of minority landowners have lost their land as a result of court-ordered partition sales of property owned under the tenancy in common form of ownership.¹⁶⁷ These partition sales have been a major source of black land loss. Over the course of the past forty to fifty years, in an effort to stem black land loss, law professors and public interest attorneys have proposed many legal reforms including legal reforms to the law governing partition of property that people own under the tenancy in common form of ownership. However, those reform proposals as a whole got little, if any, traction, and the legislative reform proposals more specifically did not fare any better in state legislatures across the country. Nevertheless, significant progress has been made on partition law reform in the past few years. Progress began to be made after a group of lawyers was able to convince the National Conference of Commissioners on Uniform State Laws (NCCUSL) to form a drafting committee in 2007 to develop a uniform act designed to reform partition law in many important ways.

In terms of law reform, NCCUSL, which is commonly known as the Uniform Law Commission, has developed national model statutes for possible enactment at the state level over the course of the past 121 years, making it the most prominent organization that has developed model state statutes during this period.¹⁶⁸ The Uniform Law Commission has promulgated more than 300 uniform acts—the terminology it uses for its model state statutes that it advocates should be adopted in their entirety without significant revision by various jurisdictions—since its establishment.¹⁶⁹ It is best known for promulgating the Uniform Commercial Code, which it developed in conjunction with the American Law Institute.¹⁷⁰ NCCUSL also promulgated the Uniform Partnership Act, the Uniform Probate Code, the Uniform Conservation Easement Act, the Uniform Declaratory Judgments

167. See Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 Nw. U. L. Rev. 505, 579 (2001).

168. ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 12–13 (1969).

169. See *Frequently Asked Questions*, Unif. Law Comm'n, <http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions> (last visited Mar. 16, 2013).

170. Fred H. Miller & William B. Davenport, *Introduction to the Special Issue on the Uniform Commercial Code*, 45 Bus. Law. 1389, 1389 (1990).

Act, and the Uniform Trade Secrets Act, among its many other uniform acts.¹⁷¹

Notwithstanding the critical role NCCUSL has played in reforming many state laws around the country, very few civil rights or public interest law organizations have developed proposals requesting the Uniform Law Commission to establish drafting committees to develop uniform laws that would benefit low- to moderate-income and minority individuals and communities. Civil rights and public interest law organizations have done so little to develop uniform acts through the Uniform Law Commission because most of these organizations are unfamiliar with the Uniform Law Commission, the procedures it uses in considering proposals to develop a uniform act, and the procedures it uses once it does establish a drafting committee to develop a uniform act. In contrast, those who represent the interests of powerful interest groups are quite familiar with the process that is used to develop uniform acts, and these representatives repeatedly play a role in the development (or sometimes in the stymieing to one degree or another) of uniform acts from the proposal phase to the drafting phase to the enactment phase.¹⁷²

Nevertheless, a group of law professors and lawyers, including civil rights and public interest lawyers, did work with the Section of Real Property, Trust and Estate Law of the American Bar Association (ABA) to develop a proposal to submit to the Uniform Law Commission in 2006 requesting the Uniform Law Commission to develop a uniform act reforming the law of partition as that law applies to tenancy-in-common property that families have owned for a long period of time.¹⁷³ The Uniform Law Commission accepted this proposal in

171. ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (forthcoming June 2013) (manuscript at app. F at 1-10, on file with author).

172. See, e.g., Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Universal Commercial Code*, 78 MINN. L. REV. 83, 120 (1993).

173. Letter from David J. Dietrich, Co-Chair Property Preservation Task Force to Shannon Skinner, ABA Rep. to NCCUSL Joint Editorial Board for Uniform Real Property Acts (Nov. 27, 2006) (on file with author). The Property Preservation Task Force was a task force of the ABA's Section of Real Property, Trust & Estate Law. See *Section of Real Property, Probate & Trust Law: 2006-2007 Leadership Directory*, 2006 A.B.A. SEC. OF REAL PROP., PROB. & TR. 26. The author served as one of the members of the Property Preservation Task Force and was able to convince the co-chairs of the task force to consult with certain civil rights and public interest lawyers who had significant experience working with poor and minority landowners in preparing the proposal that the ABA's Section of Real Property, Trust & Estate Law sent to NCCUSL.

2007.¹⁷⁴ After the drafting committee spent three years working on developing a uniform act to reform the law of partition, NCCUSL promulgated the Uniform Partition of Heirs Property Act (UPHPA) in 2010.¹⁷⁵ The ABA approved UPHPA in 2011 as a uniform act that was appropriate for states to consider enacting into law.¹⁷⁶ So far, Georgia, Montana, and Nevada have enacted UPHPA into law, while legislatures in Connecticut, the District of Columbia, Hawaii and South Carolina are currently considering it as well.¹⁷⁷

The development of UPHPA was quite unusual in several important ways from how most other uniform acts have been developed by NCCUSL. As mentioned, it was quite unusual that civil rights and public interest legal organizations—most of which were local and regional as opposed to national organizations—played an important role in developing the proposal that was sent to NCCUSL in the first instance requesting NCCUSL to establish a drafting committee to develop a uniform act that could be used to reform partition law. Second, I served as the Reporter, the person tasked with the primary responsibility for drafting a uniform act, for UPHPA, and became just the second African American ever to serve as a Reporter on a uniform act project for the Uniform Law Commission. I was selected not just because of my national reputation for being an expert scholar on partition law and black landownership but also because of the extensive outreach work I had done with, among others, the ABA and a large number of public interest law and community-based organizations that work on property matters impacting poor and minority communities. Third, a large part of the success we have had so far with the act is attributable to the decision of many civil rights and public interest legal organizations together with some community-based organizations—organizations that for the most part had not had

174. NAT'L CONF. OF COMM'R ON UNIF. ST. LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS 116TH YEAR 191 (2007).

175. See *Uniform Partition of Heirs Property Act*, NAT'L CONF. OF COMM'R ON UNIF. ST. LAWS (2010), available at http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa_final_10.pdf.

176. See *Approval for the Uniform Partition of Heirs Property Act*, ABA NOW, <http://www.abanow.org/2011/01/109a/> (last visited Mar. 16, 2013).

177. See *Partition of Heirs Property Act*, NAT'L CONF. OF COMM'R ON UNIF. ST. LAWS, <http://www.uniformlaws.org/Act.aspx?title=Partition%20of%20Heirs%20Property%20Act> (last visited Mar. 16, 2013).

any history of working together in a collective way—to form an organization called the Heirs' Property Retention Coalition (HPRC).¹⁷⁸

This coalition actively participated in the drafting of UHPHA and has played a very important role in working to enact UHPHA into law, complementing the excellent enactment work NCCUSL has done. In addition to HPRC's letter endorsing UHPHA, some individual HPRC members have submitted letters to NCCUSL endorsing UHPHA, including the Lawyers' Committee for Civil Rights Under Law and the Federation of Southern Cooperatives.¹⁷⁹ Finally, HPRC made a very important decision to seek a partner at one of the country's largest law firms who had expertise in real estate law who would serve as HPRC's pro bono legal representative during the drafting of UHPHA. The partner who agreed to serve as HPRC's pro bono counsel played an indispensable role in helping HPRC advocate for reforms that would improve the ability of those who own heirs' property to retain their property or at least their heirs' property-related wealth.

Those of us who have worked with the American Bar Association and the Uniform Law Commission to develop UHPHA and to get it enacted into law hope that our example will inspire other civil rights and public interest legal organizations to consider developing strategies to pursue law reform initiatives through institutions such as the Uniform Law Commission and other prominent institutions that work (at least in part) on law reform, such as the various state law revision commissions across the country and the American Law Institute. Given the magnitude of the challenges civil rights and public interest organizations face in addressing vital issues such as economic inequality, lawyers within these organizations should use every legal tool at their disposal in their effort to promote social justice including tools that have been underutilized to date.

CONCLUSION

Though reversing the trends in economic equality and intergenerational mobility in this country will require fundamental changes in public policy as it relates to our tax system and educational system, among other areas, lawyers and law schools can play an important role in promoting greater economic equality and security for many in

178. See, e.g., *HPRC News*, HEIRS' PROP. RETENTION COAL., <http://www.southerncoalition.org/hprc/> (last visited Mar. 16, 2013).

179. See *Partition of Heirs Property Act*, *supra* note 177.

this country. Law schools committed to promoting social justice should consider whether there is more they could be doing to promote civil rights and reduce economic inequality, including by enhancing the range of business and transactional courses and programs offered at their schools. Efforts should be made to involve a greater number of lawyers, whether these lawyers are public interest lawyers or lawyers in private practice, and whether these lawyers are litigators or transactional attorneys, in legal efforts to reduce economic inequality. Civil rights and public interest law organizations should consider whether there are legal strategies and tools that they have underutilized to date that would help them better promote their social justice agendas. If lawyers and legal organizations make more of an effort to coordinate their work in addressing economic inequality with others who are working on this issue, and if more legal tools are used in the effort to address economic inequality, law can play a more substantial role in promoting economic justice.

Boycotts, Black Nationalism, and Asymmetrical Market Failures Relating to Race

ANDRE L. SMITH*

INTRODUCTION	892
I. BLACK NATIONALISM?	893
II. BLACK NATIONALISM AND PUBLIC CHOICE THEORY	897
III. BLACK BOYCOTT ORGANIZATION	902
IV. CHOOSING WISELY: ASYMMETRICAL MARKET FAILURES AND INTEREST DIVERGENCE	906
CONCLUSION	915

Boycotts, Black Nationalism, and Asymmetrical Market Failures Relating to Race seeks to defend black nationalism in 21st century legal discourse, and examines the comparative efficacy of boycotts as a black nationalist project over traditional public legal responses to racist phenomena. It deploys the concept of racism as asymmetrical market failures to identify serious affronts to racial economic equality and deploys the concept of interest convergence/divergence to distinguish those situations amenable to legal responses from those best addressed by effective private protests like boycotts. It ultimately proposes the creation of an organization dedicated strictly to the efficient execution of boycotts for racial justice, economic and otherwise, and concludes that asymmetrical imperfections relating to race and information—e.g., media stereotyping, mis-education, under-education—are least susceptible to legal re-

* Associate Professor, Widener Law School, Wilmington, Delaware; J.D. Howard University School of Law; LL.M., Georgetown University Law Center. Thanks to Dean Lisa A. Crooms-Robinson, Carlton Waterhouse, Stacey Holmes Hawkins, Reginald Mombrun, Donald Tibbs, Todd Clark, Joseph Grant, Neil Williams and countless others who have helped me think through these issues. I am also grateful for the research assistance of Ms. Jade Morrison, Widener School of Law, Class of 2013.

sponses and, thus, ripest for black boycotts and other types of “refusals to deal.”

INTRODUCTION

In 1858, after a series of newly-enacted laws disenfranchised a burgeoning black community in California from their civil, political, and economic rights, a group of approximately 800 blacks from around the San Francisco area—led by activist, entrepreneur, abolitionist and newspaper publisher, Mifflin Wistar Gibbs—emigrated from the United States to Vancouver Island, British Columbia. The California legislature had passed laws stripping blacks of the right to vote, to own property, to attend public schools, and to testify against whites in courts of law. Perhaps most galling, all colored people in California were required to wear distinctive badges. Rather than face *de jure* second-class status, hundreds of black miners boycotted the state of California. In the annals of African-American history, this “refusal to deal” ought to be placed on a level with the Montgomery Bus Boycott, a century later.¹

Blacks decided to boycott the state of California because the market freedom that enticed them to migrate to California in the first place closed rapidly in front of their eyes. A free market is supposed to be a progenitor of wealth and, perhaps more importantly, meritocracy. But when the market is open for some and closed for others, those who succeed cannot confidently claim that their wealth is entirely deserved. Racism is and perhaps always has been less about hatred and animus and more about an economic ordering or caste system petrifying whites in the aggregate at the top of the economic ladder and blacks in the aggregate at the bottom. The means for accomplishing this end is a marketplace whose structures are asymmetrical as they relate to race. The California legislature closed the market for blacks and expanded it for whites. Recognizing the inevitable consequence of this market structure, the blacks of San Francisco refused to play the game.

Economists tend to agree that a free market, one that efficiently and meritocratically distributes goods and services, requires that everyone be a rational thinker and vigorous profit maximize; that each person can compete in whatever industry they choose or leave which-

1. See generally MIFFLIN W. GIBBS, *SHADOW AND LIGHT: AN AUTOBIOGRAPHY WITH REMINISCENCES OF THE LAST AND PRESENT CENTURY* (1995).

ever industry does not profit them; everyone has perfect information about goods, services, and each other; and that there are neither transaction costs nor externalities or that externalities that exist are evenly or equitably distributed. But when the free market is not free, when individuals because of their race are discouraged from pursuing their wealth and/or happiness, when blacks are prohibited from competing in the marketplace either because of discrimination or the withholding of capital, when information about blacks is designed to promote inferiority and information available to blacks is less abundant and reliable than information available to whites, when a lack of political rights vested in the black community leads to the disproportionate zoning of externalities such as environmental hazards, crime, and vice into black communities, when the structures that uphold the free market are designed to subordinate blacks . . . it is time to protest. It is time to boycott.

I. BLACK NATIONALISM?

In calling for the creation of an organization designed to implement boycotts towards reducing economic inequality relating to race, I reject the notion that we are currently in a post-racial era. I agree that, in some respects, individual blacks have more opportunity to advance economically than ever before. I would even concede that racism as a global system of white economic and political supremacy has been in slow decline for about one hundred years. But I disagree that its complete disintegration is inevitable. Its decline has been due to the strident efforts and sacrifice of justice-minded people, and no less is required to finish the job.

To the extent post-racialism is based on the idea that racism and racial inequality ended with de jure discrimination, it is simply wrong.

Consider a game of Monopoly where one of the players is not allowed to go around the board for a significant number of dice rolls, meanwhile all of the other players are not so restricted and are able to earn money and invest in property. The game is not fair once the restricted player is allowed to participate on equal terms, because the other players have accumulated more wealth and property to use to their advantage. Not only will the disadvantaged player find it hard to stay afloat, he or she will likely be put out of the game. A truly absurd consequence, known to all who have played Monopoly, is that when a player is unlikely to earn enough money to pay for the expenses they

are likely to incur going around the game board, they roll the dice often hoping to land in jail. Moreover, the game cannot be considered fair by pointing to the fact that once every so often a once-disadvantaged player who with cunning, skill, and a few lucky rolls of the dice will overcome the initial circumstance and win the game. It is to that person's credit that she succeeded against enormous obstacles. It does not discredit others who were unable to fight through the disadvantage. In shorter words, neutral rules and principles alone do not necessarily produce equal opportunity.

Daria Roithmayr's work shows how segregation and other racial phenomena of the past "lock in" inequality.² For example in the early twentieth century, whites used several tactics to prevent blacks from moving in their neighborhoods, including homeowners associations with restrictive covenants, real estate boards that created ethical standards requiring the steering of blacks away from white neighborhoods, lending discrimination in private and federal mortgage programs, etc. Combined with public school financing and other demographic phenomena, the benefits of homeownership multiplied, as did the burdens of exclusion.

That early neighborhood advantage has now become locked-in via certain self-reinforcing neighborhood effects, namely through public school finance and neighborhood job referral networks. Because the (white) "rich get richer" in neighborhoods with good schools and good job networks, non-whites are relatively less able to move into more expensive white neighborhoods.³ Housing discrimination is but one example.

But since race is not real, it should be disavowed entirely, say the postracialists.⁴ Race cannot be boiled down to a phenotypical, biolog-

2. See generally Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197 (2004); Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31 (2003); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727 (2000).

3. See Roithmayr, *Locked In Segregation*, *supra* note 2, at 197.

4. TOMMIE SHELBY, *WE WHO ARE DARK: THE PHILOSOPHICAL FOUNDATIONS OF BLACK SOLIDARITY* 2 (2005) ("In recent years, the concept of 'race' has come under attack from a number of academic quarters, including the biological sciences, the social sciences, philosophy, history, legal studies, literary theory, and cultural studies . . . '[R]ace' is not a sound basis for social identities, cultural affiliations, membership in associations, public policy, or political movements. Some argue that racial identities and the forms of solidarity that they (allegedly) sustain are irrational, incoherent, rooted in illusions, or morally problematic. Others contend that in light of increasing interracial antagonism and the need for multiracial cooperation, any form of racial particularism is invidious and needlessly divisive. Still others maintain that race-based solidarity is incompatible with widely cherished ideals such as racial integration, the affirmation of a shared American identity, and a color-blind society.").

ical, or cultural essence. Race is constricting and stands in the way of one's personal autonomy. It is divisive. And yet, it is merely an ideological construct. Naomi Zack asks, if race has no consistent basis in biology, genetics, phenology, why acknowledge it at all?⁵

While it is true that race is a "mere" ideological construct, so is the line between the United States and Mexico, and pretending that it does not exist invites certain consequences.

As Cheryl Harris once stated, whiteness is property; there are privileges in society assigned to those perceived as white and demerits for those perceived as black.⁶ Steven Garcia and his colleagues at the University of Michigan's Center of the Study of Group Dynamics recently confirmed as much.⁷ Although whiteness does not have the value it once had,⁸ it would be foolhardy for black people to disavow racial solidarity when others have not.⁹ Embracing blackness is, then an act of self-defense, for the political and economic fates of blacks have improved in times before only to be retarded by those who would enjoy the benefits of greater white cohesion. The remarkable life of the Honorable Mifflin Wistar Gibbs (1823-1915) is testimony towards this.¹⁰

Postracialism fails to recognize or address the historical redistribution of wealth from blacks to whites along with the foreclosure of many lucrative markets to blacks. Postracialism refuses to recognize or address imperfections in the market relating to race, including and especially those least susceptible to public, legal interference. Postracialism refuses to recognize that race relations and civil rights for blacks improved in the past only to be viciously and violently taken away, consider that the gains of Reconstruction were taken away, and slavery re-instituted under the convict leasing-sharecropping system.¹¹

5. See generally NAOMI ZACK, *RACE AND MIXED RACE* (1993).

6. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

7. Stephen M. Garcia et al., *Profit Maximization Versus Disadvantageous Inequality: The Impact of Self-Categorization*, J. BEHAV. DECISION MAKING, 18, 187-198 (2005). This study surveyed many challenges to the rational choice model assumption that everyone is a profit maximizer, and found that self-categorizing individuals will forego profit for the sake of protecting the relative position of their group.

8. Harris, *supra* note 6, at 1758 ("Even as the capacity of whiteness to deliver is arguably diminished by the elimination of rigid racial stratifications, whiteness continues to be perceived as materially significant.").

9. CHARLES W. MILLS, *BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* 41 (1998) ("That race should be irrelevant is certainly an attractive ideal, but when it has not been irrelevant, it is absurd to proceed as if it had been.").

10. See generally GIBBS, *supra* note 1.

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

Postracialism refuses to recognize that the absence of black solidarity contributed to the African slave trade in the first place. Ultimately, postracialism allows for a racial caste socio-political-economic system.

Against the want for postracialism, Harvard philosopher Tommy Shelby defends the concept of Black Nationalism. He recognizes a black solidarity “that urges a joint commitment to defeating racism, to eliminating unjust racial inequalities, and to improving the material life prospects of those racialized as ‘black,’ especially the most disadvantaged.”¹² His affection for individual autonomy is great, however, and he is quite cautious about conceptions of blackness that he believes trends towards fascism. He seeks “one that is compatible with what John Rawls calls political liberalism.”¹³ Ultimately, blackness, for Shelby, not only is justified by self-defense, but should be defined and limited as such.¹⁴ Adherents to Shelby’s “thin” blackness are likely to support the NAACP but are unlikely to wear a kufi or celebrate Kwanzaa.¹⁵

Professor Charles Mills, for one, promotes a stronger form of black nationalism. He recognizes the systematized discrimination and disadvantage of dark people globally and that the systemization of the disadvantaged is designed towards a color caste system.¹⁶ For Professor Shelby, the shared experience of blacks while in the United States should lead towards a willingness to defend each other against acts of racism, but not towards any distinct cultural identity. For Professor Mills, on the other hand, the shared experience of blacks under global white supremacy necessarily promotes an alternative epistemology, or black consciousness, which black people do not have to create intentionally.

I tend to agree with Professor Mills, but regardless of which of these conceptions of blackness is right or most useful, Professor Shelby is certainly correct that political, economic, and social solidarity should be deployed strategically, morally, and pragmatically. Strategically, in the sense that one need not and cannot be 100% black all day, every day. Blackness should neither subsume the autonomy of the individual, nor should it remove Black people from the human

12. SHELBY, *supra* note 4, at 3-4.

13. *Id.* at 6-7.

14. *Id.* at 11-12 (“I defend a conception of solidarity based strictly on the shared experience of racial oppression and a joint commitment to resist it.”).

15. *Id.* at 11 (“[A] collective identity . . . is a legacy of black nationalist thought that African Americans do better to abandon.”).

16. See generally MILLS, *supra* note 9.

family. Morally, in the sense that its internal means and structures should guard against promoting sexism, homophobia, essentialism, and other non-liberal values, that alienation of those within the group weakens its purpose and effectiveness. Pragmatically, in the sense that the need for black solidarity is greater in times of strife and open oppression but less in times of increased racial harmony.¹⁷

The question I pose here is, then, under what circumstances, if ever, will Professor Shelby's "thin blackness" support a boycott? What mechanism might thin blackness accept as an appropriate tool for determining when boycotts are appropriate and when they are not? Is a standing organization dedicated to organizing boycotts towards economic and political justice too thick?

I contend that a standing organization dedicated to boycotts for racial equality can do the work needed to fight racism as Professor Mills conceives it, yet stay within Professor Shelby's moral confines. I intend to demonstrate that by deploying the concept of racism as asymmetrical market failures, a boycott organization dedicated to racial justice can identify situations where black solidarity is more effective than a multi-racial coalition, while also standing on guard against sexism, homophobia, etc.

II. BLACK NATIONALISM AND PUBLIC CHOICE THEORY

The legal system of the United States has been trending away from so-called civic republicanism—where legal rules are supposed to be the product of reasoned deliberation over what is best for the body politic as a whole—and towards public choice theory, where myriad interest groups compete and negotiate over the existence, content, and application of legal rules.¹⁸ In this public choice environment, African-Americans should see themselves as black, organize around that principle, and compete vigorously for a proper share of all benefits inuring from the protections of the United States of America.

17. SHELBY, *supra* note 4, at 30 ("In speaking here of pragmatic nationalism, my use of the term *pragmatic* is not meant to be philosophically loaded. . . . August Meier . . . has proposed that 'nationalist tendencies tended to be salient during periods when conditions were becoming worse and white public opinion more hostile, while the integrationist became salient when the blacks' status was improving and white public opinion becoming more tolerant.' I suspect that Meier's hypothesis is correct, and my account of the relationship between classical and pragmatic strands in black nationalist theory is, I believe, perfectly compatible with it.").

18. For a discussion of public choice theory, see generally William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988).

Consider an example from my colleague, Professor Carlton Waterhouse, who is concerned with environmental racism. Blacks, particularly those in impoverished communities, endure disproportionate exposure to toxic waste, with the effects on black children and their educational success and thus their future economic prospects being astoundingly depressing. Community activists who complain typically have bare resources. According to Professor Waterhouse, the federal Environmental Protection Agency tends to respond primarily to “big business” and “big green,”—“big green” being the large national and international environmental coalitions like GreenPeace and the National Resource Defense Council—neither of which has much of an established coalition with black organizations, national or otherwise. Environmental hazards in the inner city tend to be ignored.¹⁹

There was hope upon the election of President Obama that the EPA would take it upon itself to give greater attention to the long-standing environmental concerns of poor black communities. But rather than generate and institute a program that would signal a commitment on behalf the nation as a whole to address the disproportionate toxicity of urban environments, the EPA proposed to institute educational and training programs designed to increase the capacity of poor communities to fight for themselves. The point here is not to demean the Obama Administration generally or the EPA’s efforts specifically, as they have indeed committed significant resources to these programs. The point here is to show that the legal environment of the United States is not in a civic-minded mood, but a public choice, one where the community is expected to fight for itself.²⁰ And if this is true, black political solidarity is not merely a desire but an indispensable means towards the fulfillment of this nation’s claims of fairness and equal opportunity.

Supreme Court jurisprudence accepts and promotes blackness and black nationalism. The Court has decided a litany of cases involving race without questioning whether it in fact exists. Supreme Court Justice Clarence Thomas stated in *Adarand Constructors v. Peña*, “Government cannot make us equal; it can only recognize, respect,

19. See, e.g., Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENVTL. L. REV. 51, 53 (2009).

20. A counterpoint to this would be the Obama Administration’s creation of an Office of African American Education.

and protect us as equal before the law.”²¹ In *Grutter v. Bollinger*, the Court made clear that neither will it permit governmental entities to affirmatively act against institutionalized white supremacy, nor will it soon permit affirmative action to remedy specific prior acts of racist behavior.²² The task of effecting racial equality then is left to the people and their social institutions. But, as Stephen Garcia’s experiment demonstrated, black people ought not expect non-black people and non-black institutions to dedicate themselves to racial equality.

Moreover, social institutions are legally obligated to their chartered purposes, which rarely include racial equality as an objective. Thus, social institutions are legally restricted from affirmatively acting for racial equality unless their commercial or charitable interests converge with the interests of black people.²³ When the interests of blacks and the rest of society diverge, the responsibility to correct the maldistribution of wealth and privilege lie with blacks themselves. If it is true that this historic maldistribution remains not through the vestiges of slavery or discrimination, but instead because of black people’s embrace of sloth, violence, and prurience—as some black conservatives contend—then it is even more clear that blacks themselves must correct it through solidarity and organization.²⁴

As his quote attests, Justice Thomas favors the idea of law as an impartial referee over a fair competition between any and all interest groups, including race-based ones. But some have accused Justice Thomas as being a sell-out, or one who is not racially black or who rejects his black identity. The criticism stems from his conservative views on affirmative action, as well as regarding state power in the criminal context. He is aware of these critics and the fact that some people say he is not black.²⁵ If blackness is defined by one’s commit-

21. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in judgment).

22. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003).

23. Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

24. SHELBY, *supra* note 4, at 5 (“Conservatives who believe that the fight for racial justice has already been won naturally reject black nationalism. They see calls for black political solidarity as symptomatic of a pathological ‘victim’s mentality’ and generally urge African Americans to stop complaining about their situation and instead to take advantage of the many opportunities that America offers. As they see it, the color line is not a serious problem in the twenty-first century. Indeed, some conservatives insist that the roots of black America’s problems lie in the self-defeating attitudes and dysfunctional behavior of blacks themselves.”).

25. Robert Barnes, *Thomas Concedes That ‘We the People’ Didn’t Include Blacks*, WASH. POST, (Sept. 16, 2012), http://articles.washingtonpost.com/2012-09-16/politics/35497087_1_public-library-justice-clarence-thomas-black-kids.

ment to opposing racism, then one can choose to be black or not, and Justice Thomas's critics contend that he has chosen not to be. However, instead of not being black, Justice Thomas should perhaps be understood as one of Professor Shelby's thin black nationalists, whose commitment to blackness is rooted solely in the shared experience of discrimination and disadvantage and does not extend to a cultural identity. Proof that he accepts blackness as a shared experience and commitment to combating racism is in *Missouri v. Jenkins*, 515 U.S. 70 (1995).

In *Missouri v. Jenkins*, Thomas criticized the federal courts for accepting and promoting the notion of black inferiority.²⁶ There, the lower courts required the school district to address segregated schools by instituting a magnet program to prevent or reverse "white flight" from the city to the suburbs. The mere fact that the school district had become overwhelmingly black (over 90%) meant to the lower courts that the black students were stigmatized and psychologically harmed by the absence of white children. Thomas seized the opportunity to chastise his fellow judges, "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."²⁷

Thomas continues, "[T]he court has read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority."²⁸ His black critics should concede that very few have had and seized the opportunity to scold learned, presumably 'nonracist' federal judges about their tendency to accept black inferiority and the ensuing cycle of paternalism and dependency it promotes.

Perhaps Thomas refuses to sanction legal and governmental activity in the realm of race because there is little reason for a student of history to trust a predominately white male judiciary to consider race in a way that benefits blacks, or, if they attempted such, to do it well,

26. See *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

27. *Id.* at 114-116. ("The District Court also concluded that because of the KCMSD's failure to 'become integrated on a system wide basis,' the dual system still exerted 'lingering effects' upon KCMSD black students, whose 'general attitude of inferiority' produced 'low achievement . . . which ultimately limits employment opportunities and causes poverty. . . . Without more, the District Court's findings could not have supported a finding of liability against the state.'").

28. *Id.*

i.e., in a way that does not accept and promote black inferiority and dependence.²⁹ Perhaps Justice Thomas remembers “when affirmative action was white,” when white majorities enacted legislation specifically and explicitly for the benefit of whites.³⁰ For example, in 18th century South Carolina, the legislature required planters who used slaves to sell their products at market to hire a white male for every five slaves deployed as vendors.³¹

Perhaps Thomas absolutely rejects the government’s use of race because it provides an opportunity for whites to invoke race for their own benefit. After slave insurrections, South Carolina also took affirmative steps towards attracting white men to the “lo country” to provide protection for white life and property. After a violent revolt by the likes of Denmark Vesey or Nat Turner, I think it quite likely that a white federal district judge in 18th or 19th century South Carolina would find race-based legislation, like lowering or eliminating the poll tax for white men, a narrowly tailored program to further a compelling government interest.

The point here is not to analyze affirmative action or Thomas’s constitutional jurisprudence for its propriety or utility, but to defend Justice Thomas’s blackness, however “thin.” Justice Thomas’s blackness comports with Professor Shelby’s description of a thin, pragmatic black nationalist. Shelby distinguishes between classic black nationalists who tend to promote a black cultural or religious identity as well as economic or political separation as goals in themselves, versus pragmatic black nationalists who adopt these strategies only to the extent they are useful towards resisting oppression.³² Shelby’s pragmatic nationalist increases his or her solidarity with other blacks in hard times, but embraces more of his or her own individual autonomy in good times. For Shelby, these times are good, and by stating that white racism is “not incorrigible” he can envision things getting better.³³

29. See generally ROY L. BROOKS, *STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY* 109-110 (2d ed. 2005).

30. See generally IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2006).

31. George Ruble Woolfolk, *Taxes and Slavery in the Antebellum South*, 26 J.S. HIST. 180, 186 (1960). See generally ROBIN EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* (2006).

32. SHELBY, *supra* note 4, at 5 (“Yet there are conservative forms of black nationalism. These typically eschew political programs aimed at structural transformation, opting instead for group self-help strategies that emphasize the need for in group responsibility They believe . . . that African Americans should form self-reliant black communities without making further demands on the state for racial reform.”).

33. But see Derrick Bell, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

Unfortunately, Shelby does not develop a framework for determining whether times are ripe for greater solidarity, organization and protest. So here again we return to the question of boycotts. When might a “conservative” black person, when might a thin nationalist, when might a black person of Justice Thomas’s ilk and stature join a boycott? Consider also that Shelby warns against uninformed and haphazard protests, as well as those that focus on “less serious” racial phenomena. Consider also that Shelby warns against the kind of black solidarity that leads to black fascism. How might a boycott organization or any 21st century civil rights organization properly operate under these prescriptions?

III. BLACK BOYCOTT ORGANIZATION

In *Consumer Boycotts Versus Civil Litigation: A Rudimentary Efficiency Analysis*, I contend that “boycotts . . . ought to have a special role in today’s society because litigation strategies to combat racism have been severely curtailed by Supreme Court decisions, and there are numerous discriminatory practices existing entirely outside the reach of the legal system that affect the prosperity of Black people.”³⁴ Not only do I maintain that position, I also reiterate that “[t]o further facilitate the advantages of consumer boycotts, an organization (newly created or an arm of an existing civil rights organization) should be established and dedicated to the specific task of effecting economic justice using the market power of black consumers.”³⁵

A boycott organization can overcome certain obstacles and hindrances, like minimizing the costs to boycott participants by identifying substitute and alternative goods, gathering reliable information, countering misinformation, and distinguishing lawful protestors from the unlawful and the overzealous. To be effective, a boycott organization should identify discriminators and their practices; coordinate decisions on which entities to boycott, the amount of resources to dedicate, and whether to accompany a refusal to deal with picketing and other forms of persuasion; as well as publicize the target, reasons for the boycott, and demands. Once a boycott has started, a sponsoring organization ought to assume accountability for the boycott, develop appropriate strategies for influencing would-be patrons of

34. Andre L. Smith, *Consumer Boycotts v. Civil Litigation: A Rudimentary Efficiency Analysis*, 43 How. L.J. 213, 213 (2000).

35. *Id.* at 241.

discriminators, and provide or identify alternative goods and services for boycotters. As part of the end game, an organization must demonstrate resolve, negotiate the terms of ending the boycott, and defend against empty promises by monitoring the targeted entity for compliance with the negotiated terms.³⁶

From 1966 to 1972, the NAACP sponsored a boycott of Port Gibson, Mississippi. Merchants sued the NAACP for tortious interference with business practices. But the Supreme Court held that boycotts for basic dignities and governmental and economic justice are considered speech and protected by the First Amendment. The Court found that the merchants lost business due to speech, rather than from intimidation by “the black hats,” a group of black men who monitored the stores to determine whether other blacks were adhering to the boycott.³⁷ Therefore, an organization must ensure that monitors do not use violent or intimidating tactics that destroy or overwhelm the speech aspect of the boycott. In realist or critical fashion, Gary Minda reminds us that whether a boycott is protected by the First Amendment depends in part on the imagery the boycott invokes.³⁸

Moreover, an organization must ensure that the boycott is dedicated to economic racial justice for black people as a whole, and not primarily for the benefit of any particular entity or individual. In Superior Court Trial Lawyers Association (SCTLA), Wiley Branton, then Dean of Howard University School of Law (to whom this symposium piece is dedicated) advised the SCTLA that it should take bold actions to send a message to the public regarding the inadequate compensation of public defenders, but the resulting boycott of cases by those public defenders was held to be an illegal price-fixing scheme because the benefits of their successful boycott inured directly to each individual boycott participant: the public defenders. By extension, a boycott organization totally funded by competitors of a targeted business may discredit the speech characteristics of the boycott.³⁹

Boycotting the Washington, D.C. court system, as the Superior Court Trial Lawyers did, is an example of how boycotts can be deployed outside of the consumer context. The essence of a boycott is

36. *Id.* at 237.

37. *See generally* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

38. GARY MINDA, *BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND* 83-84 (1999).

39. Smith, *supra* note 34, at 240.

simply a “refusal to deal.” Therefore, where and whenever black people determine that it is not to our aggregate benefit to maintain a particular association or relationship, the withdrawal from that association or relationship can be considered a boycott. Recall that the international boycott of South Africa had such a profound effect because it combined a consumer/tourism boycott with a divestment campaign. The divestment campaign was an organized refusal to invest in companies who invested or did significant business with the apartheid regime. It too was a boycott. Similarly, by leaving en masse for British Columbia, Mifflin Wistar Gibbs and the black miners of California staged a boycott against the state of California.⁴⁰

Expatriation is not typically viewed as a boycott or protest tactic. But this is a mistake. As Professor Shelby points out, yes, there are some black nationalists, Rastafarians for example, who still view repatriation to Africa as a duty, as a necessary fulfillment of destiny for black people.⁴¹ But Shelby also points out that most of the black leaders who have advocated for expatriation throughout U.S. history are typically “pragmatic” black nationalists, who evaluated all protest tactics in terms of their costs and benefits (however accounted).⁴² From Martin Delaney to Marcus Garvey and W.E.B. Du Bois to Bob Marley, each advocated expatriation not necessarily as a means of fulfilling destiny but as a means of countering racism and oppression. Black nationalists like Shelby do not care to leave one form of oppression to endure another simply because it is “black.” Ultimately, the decision to expatriate, like the decision to boycott in all circumstances, should be made based largely on long-term utility.⁴³

Now, if we are to inject the concept of utility and cost/benefit analysis into the boycott equation, then perhaps we should deal with the warnings of Nobel Prize winner Gary Becker, who in his seminal work, *The Economics of Discrimination*, argued some years ago that black expatriation would harm black workers economically.⁴⁴ He refers specifically to Marcus Garvey’s UNIA movement.⁴⁵ Becker presents mathematical equations purporting to demonstrate how a

40. GIBBS, *supra* note 1, at 63.

41. See SHELBY, *supra* note 4, at 28.

42. See SHELBY, *supra* note 4, at 87.

43. See *id.*

44. GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 24 (2d ed., 1971).

45. *Id.* at 24 n.7.

complete boycott of trade with whites will lessen the incomes of black workers.⁴⁶

[T]his analysis demonstrates that complete segregation reduces the absolute and relative income of the minority and therefore increases, rather than decreases, the market discrimination against it. Effective discrimination occurs against a minority partly because it gains so much by “trading” with the majority; accordingly, complete segregation does not avoid the bad economic effects of discrimination but only multiplies them.⁴⁷

Becker also compares the economic position of blacks favorably with that of Native Americans. “If, when the Negro slaves were freed, their per capita resources were no greater than the Indians’ per capita resources, one can reasonably attribute some of the present difference between per capita Negro and Indian incomes to differences in their contact with whites.”⁴⁸ It would seem that for Becker it is better for blacks to have a subordinate relationship with whites than no relationship at all.

Becker’s analysis is a fantastic example of how economic analysis is an incredibly useful tool, but far too myopic or reductionist to deal with real world problems by itself. Becker’s model takes no account of non-economic values such as dignity, solidarity, heritage, and culture. It is not unreasonable to argue that Native American nations, because of their refusals to deal, forced or otherwise, have held on to their dignity, solidarity, heritage, and culture more so than blacks. To some, dignity and heritage and culture are priceless. Consider the Amish or priests in other religious orders who consciously and strategically forego economic benefits for the preservation of their personal dignity or collective personality. Examples abound why fully rational people do not always commit to profit maximization.

Another blindspot in Becker’s analysis is his singular focus on black labor and the lack of analysis regarding the potential benefits of expatriation to black capital. One might expect that if self-segregation by blacks were harmful to black capital, Becker would make this point as well, but he does not. So, while it may be “dangerous” to extract any conclusions about black capital from Becker’s work, *The Economics of Discrimination* leaves the impression that black capital might benefit from what Becker calls “complete segregation.” Anec-

46. *Id.* at 22 n.6.

47. *Id.* at 24.

48. *Id.*

dotally, the experiences of Mifflin Wistar Gibbs and the flight of black miners to British Columbia suggest that short- and long-term opportunities for black entrepreneurs may exceed the short-term losses in employment income.

Becker's model also ignores alternative opportunities and alternative trading partners. There is nothing about expatriation that prevents blacks from selling labor to non-white entrepreneurs, be they black, Asian, Latino, or otherwise. Becker's model does not account for this. Plus, the identification of alternatives would be one of the primary responsibilities of a standing boycott organization. Thus, after considering the price of dignity, solidarity, heritage, and culture, the long-term benefits of a successful boycott, the potential positive effect on black capital, and the possibility of alternatives, one can accept Becker's claim that boycotts tend to place burdens upon black workers and consumers economically, and yet still advocate for boycotts because the long-term benefits of a successful boycott exceed the short-term costs.

This paper is not about expatriation. Instead, expatriation, as perhaps the ultimate protest tactic, is deployed here simply as an example of how broad the concept of boycott can be and how a standing organization might make boycotting more efficient and effective. At this first stage of the 21st century, there is very little political energy behind black expatriation. Unlike the Wistar Gibbs's black miners of California, blacks today enjoy at least *de jure* legal equality, nationally. And black enthusiasm towards the election of Barack Obama suggests that black people today seek to engage more with the federal, state, and local government rather than boycott and refuse to deal with it. Therefore, the following section considers a framework for an organization to determine when a boycott would be useful in today's racial climate.

IV. CHOOSING WISELY: ASYMMETRICAL MARKET FAILURES AND INTEREST DIVERGENCE

After seriously considering how broad a concept "boycott" can be, the usefulness of an organization dedicated to organizing boycotts should become apparent. Because of the short-term burdens boycotts tend to place on black workers and consumers, a publicized group boycott should be deployed only against serious instances of racial injustice, and perhaps only when lawsuits or changes in the law are ei-

ther not forthcoming or likely to be ineffective even if garnered. Individuals are always free to reject, disassociate, and generally refuse to deal with entities and phenomena that intentionally or unintentionally maintain or exacerbate racial inequality. But an organization dedicated to boycotts for racial justice should deploy some framework for determining first, whether a racial circumstance warrants protest at all and second, whether an appeal to the public at large would be insufficient.

An organization should determine whether the aims of the boycott are worthy. Consider calls to boycott certain aspects of the justice system, like jury nullification,⁴⁹ where juries were encouraged to forego convictions of non-violent drug dealers because of the disproportionate nature of the punishment, or “stop snitching” campaigns,⁵⁰ where some in the streets of urban cities promote a campaign of non-cooperation with law enforcement. What complicates the call for jury nullification and non-cooperation with law enforcement is the fact that just as much as the benefits of the protest are intended for poor, misguided youths, there is also no denying that the benefits of nullification and non-cooperation inure also and perhaps more greatly to malevolent drug dealers who care nothing about the communities they are destroying through drug trafficking and violence. A boycott organization may determine that a refusal to deal with law enforcement produces no net benefit at all.

Similarly, an organization dedicated to boycotts for racial justice must determine whether the call to boycott in a particular circumstance is not otherwise a distraction from more meaningful protest. This is a question of opportunity costs. Black boycotts should have a grander objective than merely keeping a single, popular television show with a predominately black cast on network television, for example; recognizing, of course, that the unwarranted canceling of a single popular show could under the right circumstances represent and illustrate a much deeper inequity. And so here is also where an organization might improve the efficacy and efficiency of a boycott by identifying and stating precisely the grander goals of the protest.

The framework I offer to an organization for determining when to sponsor a boycott involves two constructs: one, racism as asymmet-

49. See generally Paul D. Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677 (1995).

50. See generally Bret D. Asbury, *Anti-Snitching Norms and Community Loyalty*, 89 OR. L. REV. 1257 (2011).

racial market imperfections relating to race and, two, interest convergence theory. Racism as asymmetrical market imperfections is designed to help identify those instances of racial subordination seriously impacting aggregate racial economic inequality.⁵¹ Then, Derrick Bell's interest convergence theory is meant to determine which of these instances is likely to be addressed publicly because the interests of whites and blacks relating to the matter tend to converge, versus instances in need of private protest by blacks because the interests of most whites and blacks relating to the matter tend to diverge.

Describing racism as asymmetrical market imperfections is a means for distinguishing between phenomena which is susceptible to governmental interference of a legislative, judicial, or executive character versus that which must be confronted if at all through private protest tactics. A racially asymmetrical market imperfection exists where the supposedly-free market is manipulated to favor a dominant group over a subordinate group, e.g., whites over blacks, males over females, heterosexuals over homosexuals. In neoclassical economic theory, a free market distributes goods and services and ideas to individuals based on merit. This theoretical free market can perform its equitable distribution function only upon the existence of four precepts—profit maximization, perfect competition, perfect information, and zero transaction costs. However, even some neoclassical economists acknowledge that none of these conditions exist perfectly, not even substantially in some cases.⁵² In fact, law is most easily justified to the extent it is designed to repair structural flaws in the market for goods, services, and ideas.⁵³

Racism then can be described as those structural flaws in the free market that maintain or exacerbate white supremacy in the market for goods, services, and ideas. Specifically, racist phenomena include legal and cultural phenomena that prevent or discourage blacks from maximizing profits or personal utility (asymmetrically imperfect profit maximization), that prevents or discourages blacks from competing in segments of the market (asymmetrically imperfect competition), that

51. Andre L. Smith, *Race, Law, and the Free Market: A Critical Law and Economics Conception of Racism as Asymmetrical Market Failure*, 4 GEO. J. L. & MOD. CRITICAL RACE PERSP. 39, 49 (2012).

52. See, e.g., RICHARD KOZUL-WRIGHT & PAUL RAYMNET, *THE RESISTIBLE RISE OF MARKET FUNDAMENTALISM: RETHINKING DEVELOPMENT POLICY IN AN UNBALANCED WORLD* (2008).

53. STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: 2009-2010 SUPPLEMENT* 4 (2009).

provides less useful information to or skews information about black people (asymmetrically imperfect information), and that burdens blacks with costs greater than that endured by similarly situated whites (asymmetrically distributed transaction costs).

An organization dedicated to sponsoring boycotts for racial justice might promote or defend a boycott based on the prevalence of asymmetrically distributed transaction costs. “Asymmetrically distributed transaction costs” describes how harmful byproducts of otherwise useful transactions are designed to burden black communities more than whites. Environmental racism—the placement of harmful substances in predominately black neighborhoods—is a prime example of asymmetrically distributed transaction costs. Toxic waste and other harmful pollutants are a byproduct of an otherwise useful transaction and are far too often dumped in predominately black neighborhoods. Unequal voting rights, along with lack of voter engagement, education, and mobilization are primary mechanisms for producing asymmetrical transaction costs (as well as other asymmetries).

Examples of asymmetrically distributed transaction costs abound. The costs associated with the War on Drugs are borne in greater proportions by predominately black neighborhoods.⁵⁴ Disproportionate law enforcement relates to asymmetrical transaction costs in several ways: disproportionate protection of predominantly white neighborhoods, lack of protection in predominately black neighborhoods, racial profiling, disproportionate application of prosecutorial discretion, disparate sentencing, etc.⁵⁵ Even the disparate treatment of blacks in tort law fits within the rubric of asymmetrically distributed transaction costs.⁵⁶ Taxes are perhaps the quintessential transactions costs, and critical tax theorists discuss how the benefits and burdens of federal taxation are asymmetrically distributed.⁵⁷

Asymmetrically distributed transaction costs are on the one hand an example of disparate treatment based on race. But more importantly, they demonstrate how the free market does not operate in the

54. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks”*, 6 IOWA J. GENDER, RACE & JUST. 381 (2002).

55. See generally Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998); Tracy Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998).

56. DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS* 98-138 (Dorothy Brown ed., 2003).

57. See generally BRIDGET J. CRAWFORD, *CRITICAL TAX THEORY: AN INTRODUCTION* (Anthony C. Infanti ed., 2009).

glorious way its proponents suggest and that asymmetrical imperfections in the free market will likely generate greater economic inequality in the future. Entities (commercial, government, or other) that seek to produce, allow, or maintain asymmetrically distributed transactions costs should be subject to protest actions, including boycotts. Mifflin Wistar Gibbs's black miners proved that a boycott could be launched against an entire state, and the international boycott of South Africa showed that a boycott can influence a whole nation. The same goes for entities that contribute to asymmetrically imperfect competition, asymmetrically imperfect information, and asymmetrically imperfect commitments to profit maximization.

An organization dedicated to sponsoring boycotts for racial justice might promote or defend a boycott based on the prevalence of asymmetrically imperfect competition. "Asymmetrically imperfect competition" relates to phenomena that disproportionately prevent blacks from entering markets they wish to enter or leaving markets they wish to leave. Slavery was the ultimate restriction on competition. Slaves could not choose markets that were lucrative to them, and could not exit markets assigned to them. After Reconstruction, whites in the Jim Crow South reinstituted slavery by combining a system of sharecropping and convict leasing to practically eliminate competition for black labor and agricultural produce.⁵⁸ In the North, blacks were excluded by social institutions such as labor unions and trade associations, etc.⁵⁹

Historically, boycotts for racial justice have typically been justified on the grounds of asymmetrical competition. The Montgomery Bus Boycott dealt with segregation, which at its heart prevents black competition over goods and services deemed "white" and restricts blacks to markets deemed "black" or "colored." That whites were similarly restricted in terms of competition was important towards the defeat of Jim Crow laws. The NAACP boycott of Port Gibson, Mississippi was based on the inability of blacks to compete for jobs. Even the Superior Court Trial Lawyers Association boycotted for the purpose of receiving compensation sufficient enough to compete fairly in halls of justice. While all restrictions on competition do not necessarily justify a boycott, it seems most boycotts are justified in part as a response to anti-competitive behavior.

58. See generally Blackmon, *supra* note 11.

59. See generally Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45 (2010).

An organization dedicated to sponsoring boycotts for racial justice might promote or defend a boycott based on the prevalence of asymmetrically distributed information. “Asymmetrically imperfect information” relates to disproportionate availability of information to black people as well as stereotypes and other misinformation about black people within and without the educational system.⁶⁰ Primary and secondary school desegregation and affirmative action in collegiate admissions have become the normal means for addressing the lack of educational opportunities available to black people, the typical means by which society as a whole was willing to address asymmetrically distributed information. But many commentators criticize desegregation efforts as half-hearted and ineffective. And, as far as affirmative action is concerned, the Supreme Court has indicated that, whatever its actual worth, its days are numbered. Black folks have taken to boycotting the public schools by dropping out, advocating for private school vouchers, resorting to home schooling, etc.

Stereotypes and other misinformation about black people can be summed up in one word: inferiority. Institutions, from those in the educational system to corporate media outlets, continue to describe black people as naturally or inherently inferior to whites (and others). In the late 19th and early 20th centuries, those who would maintain white economic, political, and cultural supremacy could indiscreetly advance the notion of black inferiority. Today, it is taboo to openly question the legal equality of blacks. According to some conservative black scholars, black people are not inherently inferior but adhere to an inferior culture of sloth, prurience, and irresponsibility.⁶¹ What is left unexplained by these critics of black culture is how this immoral black culture has come to be. If black people created this inferior culture autonomously and, moreover, are blindly attached to it, this suggests that black people just cannot think straight and that their inferiority is inherent.

On the other hand, those who believe that black adherence to a degraded culture is promoted by educational and media institutions that sell black inferiority to their main constituents (whites) are more apt to boycott the school system and corporate media offerings, and

60. Smith, *supra* note 51, at 44.

61. Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379 (1988) (presenting some of the claims of conservative black economist Thomas Sowell).

more apt to promote Afrocentric education and black-owned or produced media. No less than Albert Einstein declared that:

It seems to be a universal fact that minorities, especially when their individuals are recognizable because of physical differences, are treated by majorities among whom they live as an inferior class. The tragic part of such a fate, however, lies not only in the automatically realized disadvantage suffered by these minorities in economic and social relations, but also in the fact that those who meet such treatment themselves for the most part acquiesce in the prejudiced estimate because of the suggestive influence of the majority, and come to regard people like themselves as inferior. This second and more important aspect of the evil can be met through closer union and conscious educational enlightenment among the minority, and so an emancipation of the soul of the minority can be attained. The determined effort of the American Negroes in this direction deserves every recognition and assistance.⁶²

Einstein understood that the most pernicious vestige of slavery and institutionalized white supremacy is the frequency with which black people see themselves as inferior. Terms like “slave mentality” and “self-hatred” are often used to describe this condition. I do not mean to include here those blacks who have chosen for religious or political reasons to withdraw from or boycott the entire American political-economic system and who fully dedicate themselves towards pursuing non-commercial utility functions. However, under a law and economics conception of racism, we can describe a collective lack of vigor as an asymmetrical commitment to profit maximization or rationality. Thus, “asymmetrically imperfect profit maximization” relates to phenomena which disproportionately discourage blacks from seeking to maximize economic returns for personal effort.

Of course, the primary responsibility for shedding a destructive collective personality falls within the group itself. However, there have historically been several kinds of offenses against black people designed to reduce the collective desire to participate in our national economic system, including the assassination and pre-textual prosecution of black civil rights leaders, whippings, beatings, rapes, lynchings, and other murders, the destruction of successful black towns like Black Wall Street in Oklahoma and Rosewood in Florida, etc. Less obviously, media stereotyping and systemic mis-education have the effect of convincing some that black people ought to not participate vig-

62. FRED JEROME & RODGER TAYLOR, EINSTEIN ON RACE AND RACISM 9-10 (2005).

orously in commerce for reason of their likely failure.⁶³ It is in this sense that segregated schools are ‘stigmatizing.’ Moreover, racial insults and hate crimes are also designed to discourage blacks from vigorously pursuing happiness in whatever form. Thus, an organization dedicated to sponsoring boycotts for racial justice might promote or defend a boycott against entities that seek to discourage black profit maximization.

If a public response or less costly protest tactic will adequately address the issue, an organizational boycott should be forestalled until such time as it is determined that a public response is not forthcoming or that an alternative protest tactic is not working. Boycotts consume resources, and those who participate in the boycott will have to consume alternative and sometimes inferior goods. Also, boycotts may lose some expressive character if deployed too often. Therefore, over some of these issues—explicit prohibitions on black competition, for example—the interests of whites and blacks converge, and a public response may be likely.

To determine when a boycott may be appropriate, a boycott organization might deploy a framework around asymmetrical market failure. White people, or at least those with wealth, benefit from the notion (real or imagined) that America operates a free market because a free market is a guarantor of meritocracy.⁶⁴ If this is true, that America is a meritocracy, then the wealth they have is deserved because it is due to effort and successful competition. But to the extent and degree America does not operate a free market, black claims regarding inequitable distributions of wealth become more salient and persuasive. Thus, whites have an interest, nominally, at least, in correcting market failures generally and market failures relating to race specifically. “To bring a fundamental challenge to the way things are, whites would have to question . . . the economic and the racial myths that justify the status quo.”⁶⁵

The degree of interest convergence over the structure of the free market, and thus the likelihood that a public response can be counted upon to address racist phenomena, depends first on the ease with

63. RICHARD H. SANDER & STUART TAYLOR JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* 4 (2012).

64. Crenshaw, *supra* note 61, at 1380 (“Race consciousness also reinforces whites’ sense that American society is really meritocratic and thus helps prevent them from questioning the basic legitimacy of the free market.”).

65. *Id.* at 1380.

which the phenomenon can be described either as asymmetrical profit maximization, competition, information, or transaction costs. Second, the degree of interest convergence is greater when the phenomenon produces, maintains, or exacerbates a number of asymmetries. For example, slavery and the system that supported it represented asymmetrical profit maximization in that it conceived blacks as less than people, asymmetrical competition in that it almost completely prevented blacks from entering or leaving markets, asymmetrical information in that it was based on and perpetuated a false notion of black inferiority, and asymmetrally distributed transaction costs in that whites attempted to pass as much of the burdens of society on black as they could. Similarly, re-enslavement under Jim Crow-style sharecropping and convict leasing could be easily described as an affront to the concept of a free market. Moreover, all *de jure* discrimination can be degrading (asymmetrical profit maximization), stigmatizing (asymmetrical information), anti-competitive (asymmetrical competition), and burdensome (asymmetrally distributed transaction costs). There is little wonder, then, why public institutions defend the notion of a free market by prohibiting explicit or indiscreet racist conduct of the explicit and indiscreet kind.

But the interests of whites and blacks do not always converge; sometimes they are divergent. Consider that slavery was beneficial to white property owners, but slave labor crowded out Yeomen white farmers and skilled laborers, all the while reducing labor competition in the North. Yeomen white farmers, Northern capitalists, and skilled laborers who should have rejected slavery as against their economic interests were compensated with cultural superiority over blacks.⁶⁶ Thus, cultural superiority, which most often takes the form of false notions of Black inferiority, is where the interests of whites in the aggregate and blacks in the aggregate tend to diverge.

The false notion of black inferiority is maintained by media and the educational system. While, according to Gary Becker, the wealth of a nation is truly in the human capital of all its citizens, and thus it is against the interest of the United States of America as a collective to inadequately and improperly educate black children and to promote their inferiority through media; the benefits to whites (and others)

66. *Id.* at 1374 (“[R]acial privilege could and does serve as a compensation for class disadvantage.”).

from the notion of black inferiority are subtle yet ubiquitous.⁶⁷ The notion of black inferiority is indispensable to a socio-economic political caste system. Thus, the recalcitrance of this interest divergence suggests a proper opportunity to boycott.

Black parents of various social classes, religious beliefs and political leanings are increasingly turning towards private school vouchers, charter schools, home schooling, and Afrocentric education as ways to counteract the tribulations of our nation's public schools in terms of both under-education and mis-education. The inadequacy of public education has been a progenitor of racial inequality since its beginnings in the United States. At first, it was not provided to blacks at all, where all resources towards education were dedicated to white children. Then only in a de jure segregated manner, where the lion's share of public funds for education was dedicated to whites-only schools. And now primarily in a de facto segregated manner, where the lion's share of public funds for education are dedicated to schools in neighborhoods where the residents just happen to be primarily white.⁶⁸ While many are still fighting for equal education for all children, some black people are refusing to deal with the public school systems as we know it. Vouchers, charter schools, home schooling, and Afrocentric education are becoming ordinary and prevalent ways to protest a government-run system that does not respond to the needs of blacks as a discrete and identifiable group and, to some, is nothing more than a way station or pipeline to prisons for poor black youths.

CONCLUSION

Blackness is neither my skin tone, nor my place of origin, nor the culture I embrace. Indeed, there is little useful purpose in being black unless it is against institutionalized white supremacy in education, entertainment, economics, labor, law, politics, sex, religion and war; unless it is against what Charles Mills calls a Herrenvolk Ethic; unless it is against the institution of a loose racial caste system. I believe this conception of blackness and racism is consistent with the ideas expressed in Derrick Bell's *Faces at the Bottom of the Well*, subtitled the *Permanence of Racism*.

67. Gary S. Becker, *The Age of Human Capital*, in EDWARD P. LAZEAR, *EDUCATION IN THE TWENTY-FIRST CENTURY* 3 (2002).

68. See generally *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

Professor Bell demonstrated how the need for America to appear meritocratic was the true catalyst for *Brown v. Board of Education* and the dismantling of legal American apartheid. At this time in history, nations must compete vigorously over those with the intellectual capacities to solve the worsening energy puzzle. Success in recruiting intellectuals is crucial since American education in math and science continues to lag. Just as Martin Luther King surmised that America could not claim the moral high ground in the Cold War while it practiced apartheid, blacks and whites in America today should realize that maintaining white supremacy hinders America's efforts to win the hearts and minds of non-white peoples in the time of the so-called War on Terror. Thus, incorporating asymmetrical market imperfections within American legal theory is a public means to foster greater meritocracy and greater standing for America in the world.

But sometimes the benefits derived from the appearance or myth of merit will not exceed the benefits of white privilege and cultural supremacy. This interest divergence seems to present itself most often in the context of asymmetrical information, where whites (and others) tend to benefit from the false notion of black inferiority. To the extent the notion of black inferiority is produced externally, blacks should boycott those media outlets and educational institutions that promote or maintain it. An organization dedicated to boycotts for racial justice, utilizing the framework of asymmetrical market failures as a proxy for racism and economic injustice, should be created as a means for making such protests meaningful, effective, and efficient.

COMMENT

Death, Sperm Heists, and Test Tube Babies: Support for Measures to Prevent Social Security Abuse, Conserve Government Funds, and Protect Families

ALYSSIA J. BRYANT*

INTRODUCTION	920
I. A BRIEF HISTORY OF THE SOCIAL SECURITY ACT AND THE SURVIVORSHIP PROVISION AT ISSUE	922
A. The History and Purpose of the Social Security Act	922
B. The Social Security Act Survivorship Benefits Process	923
II. REPRODUCTIVE TECHNOLOGY ADVANCEMENTS AND STATE PROPERTY LAWS	925
A. An Overview of Advancement in Reproductive Technology	925
B. An Overview of States' Property Laws	929

* J.D. Candidate, Howard University School of Law, Class of 2013; Executive Publications Editor, *Howard Law Journal*, Vol. 56; B.A., *magna cum laude*, Howard University, 2009. I would like to sincerely thank God for the continuous shower of blessings, love, and direction; Robert & Jeanette Williams; Yvette Gentry—because of you, I will never give up—and my entire wealth of family. I would also like to thank Cindy Lou and my close friends—the old and the new—for always making me laugh. I must thank my faculty advisor, Professor Ballard-Thrower, my legal writing instructor, Professor Bawa, and the hard-working editors of the *Howard Law Journal*. Finally, blame my mind but not my heart to those who I may have forgotten.

1. States with Laws Expressly Permitting Posthumously Conceived Children to Receive Intestate Property	930
2. States with Laws Prohibiting Posthumously Conceived Children to Receive Intestate Property or Requiring a Showing of Certain Prerequisites	931
III. COURT RULINGS: POSTHUMOUSLY CONCEIVED CHILDREN ELIGIBLE TO RECEIVE SURVIVORSHIP BENEFITS	933
A. A Ninth Circuit Court Decision: <i>Gillett-Netting v. Barnhart</i>	933
B. A Third Circuit Decision: <i>Capato v. Astrue</i>	936
IV. COURT FINDINGS: POSTHUMOUSLY CONCEIVED CHILDREN NOT ELIGIBLE TO RECEIVE SURVIVORSHIP BENEFITS	938
A. A Fourth Circuit Decision: <i>Schafer v. Astrue</i>	938
B. An Eighth Circuit Decision	941
V. EXAMINING THE CIRCUIT SPLIT AND THE SUPREME COURT'S RESOLUTION IN <i>ASTRUE V. CAPATO</i>	941
A. Sperm Heists: Acting Without the Consent of the Decedent Spouse	942
B. The Inevitable Risk of Abuse.....	943
CONCLUSION	947

"Social Security has served this nation well. As a vital symbol of the compact between present generations and those yet to come, it deserves the utmost intellectual and political effort to preserve it from obsolescence or even extinction."¹

Meet Jack and Jill.² More than a decade ago, the couple fell in love and had dreams of one day having a family. Arguably, Jack and Jill had it all: successful careers, loving families and friends, and a large home in suburbia complete with the white picket fence. One thing was missing from their cookie-cutter Pleasantville existence, however: children. Their dreams of having a family were stalled when

1. ANDREW ACHENBAUM, SOCIAL SECURITY VISIONS AND REVISIONS 9 (1986).

2. This introductory story is fictional. The story will depict facts typical of a case on appeal regarding a denial of survivorship benefits to a posthumously conceived applicant.

Death, Sperm Heists, and Test Tube Babies

Jack was diagnosed with cancer. In an effort to preserve the possibility of Jill conceiving his biological child, Jack underwent sperm cryopreservation prior to commencing chemotherapy. His doctors feared that any chemotherapy treatments might render him sterile. Jack did not want to take any chances.

His genetic material was frozen and preserved to—possibly—be used later. Because of the conservation process, Jill could later be artificially inseminated with Jack's sperm and the couple's dreams of a family could turn into reality. However, the couple never discussed *when* Jill would be artificially inseminated, in the event that Jack became sterile. The couple never discussed whether Jill could use the sperm in the unfortunate event of Jack's death. In fact, the couple had very few substantive discussions regarding Jack's frozen genetics. Sadly, after only a brief bout with cancer and multiple futile chemotherapy treatments, Jack lost his battle with cancer. Jack died intestate and without expressly consenting to Jill's use of his sperm during his life or after his death.

Jill, stricken with grief, decided to find some sense of absolution by having a child—Jack's child. Shortly after burying her husband, Jill was artificially inseminated with Jack's sperm—the sperm that she obtained without Jack's consent. Nine months later, she gave birth to Jack's biological twins. Jack never had the chance or opportunity to acknowledge the children in writing. Jack was never judicially decreed to be the father of the children. Jack never lived with the children, supported the children, or contributed to the upbringing and welfare of the children. Nevertheless, Jill applied on behalf of her children to receive Jack's Social Security survivorship benefits. However, the Social Security Administration determined that Jill's children were ineligible for Jack's benefits. Jill was shocked and surprised when she was subsequently denied receipt of survivorship benefits for her children who did not *survive* Jack but were born *after* his death. Accordingly, the Social Security Administration determined that Jill's children were not eligible for survivorship benefits.

According to the Social Security Administration Commissioner, an administrative law judge, and a federal district court, Jill could not receive survivorship benefits on behalf of her twins, because Jill's children were not considered "children" under the meaning of the statute. Her next resort was an appeal to a federal circuit court. However, she was to learn that the outcome of her appeal, would not depend entirely upon the language of the Social Security Act or any federal case

law. The outcome of her case would be dependent on intestacy property laws of the state in which her husband was domiciled prior to his death.

INTRODUCTION

President Roosevelt signed the Social Security Act (“Act”) into law in 1935 during one of America’s worst economic times.³ Many considered the law as a way to protect individuals who could no longer help themselves.⁴ Individuals began receiving their benefits monthly in 1940.⁵ Although the Act was originally enacted to protect individuals from becoming poverty stricken, Congress enacted several amendments in the 1960s to provide protection to individuals who were dependent upon the wage earner.⁶ These amendments provided survivorship benefits and included definitions of individuals who would and could be considered survivors. Whether an individual fell under the definition of a “child” is provided, expressly.⁷ However, whether an individual that was conceived posthumously is a “child” under the statute is not clear.⁸

The statute provides that the way to determine whether a posthumously conceived child is a “child” under the Act depends on the

3. *Historical Background and Development of Social Security*, SSA, <http://www.ssa.gov/history/briefhistory3.html> (last modified Nov. 28, 2012) [hereinafter *Historical Background*].

4. *Id.* For example,

A woman in South Carolina scrawls a note to a man in Washington whom she addresses as “Dear Mr. President.” “I’m 72 years old and have no one to take care of me.” Another letter comes to the White House from Virginia. “I’m a 60 year-old widow greatly in need of medical aid, food and fuel, I pray that you would have pity on me.” Letters such as these came by the thousands from old folks across the country to the President, to Mrs. Roosevelt, to almost everyone in Washington whose name was familiar to them.

Id.

5. *FAQ*, SSA, <http://www.ssa.gov/history/hfaq.html> (last modified Nov. 14, 2012). The monthly benefit payments were designed to help surviving family members of a deceased age earner and the benefit payments “are among the Act’s family-protective measures.” *See, e.g., Astrue v. Capato*, 132 S. Ct. 2021, 2027 (2012).

6. *FAQ* *supra* note 5; *see also* Edmund L. Andrews & Eduardo Porter, *Social Security: Help for the Poor or Help for All?*, N.Y. TIMES, May 1, 2005, at 1 (discussing that the Social Security Act has now become a way in which people who have worked hard may retire with the money that they paid into and earned).

7. 42 U.S.C. § 416(e) (2006). Child means “the child or legally adopted child of an individual” *Id.*

8. *Id.* The legal status of a posthumously conceived child in the context of the Act and survivorship benefits will depend upon state property laws. *See id.* at § 416(h)(2)(A). Further, it is safe to say that “the technology that made [posthumous conception] and birth possible . . . was not contemplated by Congress in 1939 and 1965 when those provisions were enacted” Adam Liptak, *Children Not Entitled to Dead Father’s Benefits, Justices Rule*, N.Y. TIMES, May 21, 2012, at A1 (internal quotations omitted).

Death, Sperm Heists, and Test Tube Babies

Commissioner of Social Security's application of state intestacy laws "of the state in which the insured was domiciled upon his death"⁹ Understandably, when the amendments to the Act were enacted, reproductive technology was not what it is today.¹⁰ Now, reproductive technology enables families to procreate in a number of ways, including artificial insemination; in vitro fertilization; donor eggs; and surrogate wombs.¹¹ Because these technologies did not exist in the 1940s, there are no express provisions regarding the status of posthumously conceived children.

Posthumously conceived children should not be permitted to receive survivorship benefits unless they are considered children under the plain meaning of the Social Security Act to prevent inevitable abuse and/or Social Security abuse. Further, Congress is the appropriate body to change the meaning of "child" under the Act, not the judiciary. This Comment discusses the circuit split regarding the issue of whether a posthumously conceived child is eligible for survivorship benefits, and analyzes why the recent Supreme Court decision, which resolved the circuit split, in *Astrue v. Capato*¹² is correct. Although the laws are well behind the advancement in reproductive technology (and technology in general), any changes to the Social Security Act, as the Justices unanimously agreed,¹³ should be made by the legislature, not the courts. Though a man may freeze his semen and have it stored in a sperm bank, this action does not give his surviving wife free reign to use his sperm—to *heist* his sperm, specifically—and conceive children after he dies.¹⁴ Thus, support for a posthumously conceived

9. § 416(h)(2)(A).

10. See Liptak, *supra* note 8.

11. See *What Is Assisted Reproductive Technology?*, CDC, <http://www.cdc.gov/art/> (last updated Feb. 12, 2013) (explaining that the most common procedures to help women conceive include the transfer of fertilized human eggs into a woman's uterus, which is known as in vitro fertilization). Since 1981, Assisted Reproductive Technology (ART) has been used across the United States to help women have children. *Id.* Although a seemingly low percentage, "over 1% of all infants born in the United States every year are conceived using ART." The use of ART procedures has doubled over the years. *Id.* See generally CDC, 2010 ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT (2010) [hereinafter CDC, 2010 REPORT] (discussing the current trends regarding ART and data on the outcomes of ART).

12. *Astrue v. Capato*, 132 S. Ct. 2021, 2029 (2012) (holding that posthumously conceived twins are not entitled to Social Security benefits). See generally Robert Barnes, *Supreme Court Rules Twins Conceived Posthumously Can't Get Social Security Benefits*, WASH. POST, May 21, 2012, http://articles.washingtonpost.com/2012-05-21/politics/35457880_1_karen-capato-robert-capato-social-security-survivor-benefits (discussing the Supreme Court's decision in *Astrue v. Capato*).

13. *Astrue*, 132 S. Ct. at 2026.

14. See Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91, 93-95 (2004).

child should be provided for in a testamentary document to prevent abuse and ensure acknowledgement and consent.

Part I briefly explores the social context and history surrounding the enactment of the Social Security Act. Part II examines the definition of “child,” discusses individual state property laws concerning intestacy and posthumously conceived children, and the advancements in reproductive technology. Part III examines the first federal appellate case that held that posthumously conceived children are children under the Social Security Act and should receive survivorship benefits. Part IV discusses the decision in *Schafer v. Astrue*¹⁵ that created a circuit split by holding that a posthumously conceived child cannot receive survivorship benefits,¹⁶ and this Part also discusses the subsequent Eighth Circuit decision, which held similarly. Part V explores briefly the recent Supreme Court decision, *Astrue v. Capato*, that resolved the circuit split by holding that posthumously conceived children should only be permitted to receive survivorship benefits if they are expressly authorized pursuant to their respective state property laws; any changes to this approach should be made by Congress and not the Court.

I. A BRIEF HISTORY OF THE SOCIAL SECURITY ACT AND THE SURVIVORSHIP PROVISION AT ISSUE¹⁷

A. The History and Purpose of the Social Security Act

A 1984 *New York Times* editorial piece provided that the purpose of the Social Security program was to provide fiscal security to those who failed to have the foresight to set aside enough money for their own retirement, or were insolvent and did not have the means to provide for their own retirement.¹⁸ However, this view is hardly per-

15. *Schafer v. Astrue*, 641 F.3d 49 (4th Cir. 2011).

16. *Id.* at 63.

17. See 42 U.S.C. § 416(h)(2)(A) (2006).

18. *Whom Social Security Was Created to Protect*, N.Y. TIMES, May 31, 1984, at A22 [hereinafter *Created to Protect*]. Jonathon L. Gifford conjectured that the purpose of Social Security “‘was to provide income security for those too shortsighted or too poor to provide for their own retirement.’ He evidently believe[d] that the main and mistaken objective of the program was to alleviate the condition of such people. Referring to them, he asks, ‘Ought they to be stigmatized?’ He answers: ‘I say yes. The Government ought not to be neutral about shortsightedness.’” *Id.* In fact, the purpose of the social security legislation (H.R. 2260) provides: An act to provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes. Social Security Act of 1935, 42 U.S.C. § 401 (2006).

suasive considering the context and fluctuating state of the economy when the Act was created in the 1920s and the notorious economic fall in 1929.¹⁹

Additionally at this time, retirement plans and pensions were fruitless or non-existent, banks were failing, and millions of Americans were unemployed.²⁰ Thus, as the editorial notes, these conditions could hardly be ignored and those who “failed to have the foresight to put money away” did not deserve to be stigmatized.²¹ Thus, Social Security was not created to help those who failed to help themselves, but it was created to prevent individuals from “falling into abject poverty” at a time when the likelihood of this occurrence was certain.²² This purpose leads to several questions, one of which must be addressed here: if the purpose of the Social Security Act was to protect individuals and families in failing economic times from falling into abject poverty, should Social Security benefits extend to children conceived without the knowledge or consent of a decedent individual? No.

B. The Social Security Act Survivorship Benefits Process

The Social Security Act contains a number of provisions to limit problems associated with unemployment, poverty, old age, and “the burdens of widows and fatherless children.”²³ The process to limit “the burdens of . . . fatherless children” is facially, simple. If a child wishes to receive benefits, he must file an application or have his guardian apply on his behalf.²⁴ Next, the applicant must meet certain

19. See generally Gene Smiley, *The U.S. Economy in the 1920s*, ECONOMIC HISTORY ASSOCIATION (Feb. 1, 2010, 5:21 PM), <http://eh.net/encyclopedia/article/smiley.1920s.final> (discussing the state of the U.S. economy during the 1920s). In 1929, the vast majority of American homes earned an annual income below \$2000 and the income for a single person at the time was \$1000. *Created to Protect*, *supra* note 18, at A22.

20. *Created to Protect*, *supra* note 18, at A22.

21. *Id.* “In a period when industrial pensions were rare and grossly inadequate and with bank failures, the lack of unemployment insurance and catastrophic illness often wiped out one’s life savings, were these the shortsighted who deserve to be stigmatized? Or is Mr. Gifford thinking of the 15 million or 20 million unemployed who from 1930 to 1941 were so busy looking for work and raising families that they neglected to save for their retirement years?” *Id.*

22. Andrews & Porter, *supra* note 6, at 1. Accordingly, “Social Security is not a poverty program, it is a *retirement system* . . .” *Id.* (emphasis added). Justice Ginsburg also notes that the Social Security Act included a “child insurance benefit” that was a “family protective measure” to assist surviving family members after the death of a wage earner. *Astrue v. Capato*, 132 S. Ct. 2021, 2027 (2012) (citing 42 U.S.C. § 402(d) (2012)).

23. ACHENBAUM, *supra* note 1, at 25-26.

24. 42 U.S.C. § 402(d)(1)(A) (2006). Specifically, a parent may receive insurance benefits for a child so long as they meet the eligibility requirements of § 416(e) and “(A) . . . [file an] application on behalf of the child for child’s insurance benefits.” *Id.*

eligibility requirements.²⁵ Equally important, the applicant must have been dependent upon the wage earner—the decedent—at the time of the wage earner’s death.²⁶

However, there are certain requirements that must be made prior to commencing this process. In regards to that process, Congress made several amendments to the Social Security Act to protect family members who had been dependent upon the wage earning during his or her lifetime.²⁷ One of those provisions includes a test to determine whether a child was in fact a “child” of the decedent wage earner.²⁸ This test is codified in the United States Code at title 42, § 416(e)(1). It includes many ways in which one can be deemed a child under the Act.²⁹ An individual may be considered a child if the child is “a legally adopted child of [the wage earner],” a step-child, or a grandchild of the wage earner.³⁰

If an individual does not satisfy the definitional requirements of a child, then the next “gateway”³¹ to be deemed eligible to receive benefits is whether the individual would be able to take intestate personal property from the deceased wage earner in the state that the wage earner “was domiciled at the time of his death.”³² The provision provides in part:

In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was

25. *Id.* § 402(d)(1)(B). These requirements include being under a certain age or being unmarried, for example. *Id.*

26. *Id.* § 402(d)(1)(C)(ii).

27. Social Security Act of 1939, ch. 666, 53 Stat. 1362 (amended 1965).

28. § 416(h)(2)(A).

29. *Id.* § 416(e). An individual can be deemed a child by being “(1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child’s insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, [or] (3) a person who is the grandchild or stepgrandchild of an individual or his spouse” *Id.*

30. *Id.*

31. “Section 416(h) is a gateway through which all applicants for insurance benefits as a child must pass.” *Astrue v. Capato*, 132 S. Ct. 2021, 2029 (2012) (citing *Beeler v. Astrue*, 651 F.3d 954, 960 (8th Cir. 2011)); see *Schafer v. Astrue*, 641 F.3d 49 (4th Cir. 2011).

32. § 416(h)(2)(A).

not so domiciled in any State, by the courts of the District of Columbia.³³

The Social Security Administration has acknowledged, however, the advancements in reproductive technology and posthumous reproduction.³⁴ Posthumously conceived children may meet the definition of a “child” under the Act, if they are “able to inherit under state law.”³⁵ Therefore, the test appears to be quite simple: if the posthumously conceived child applicant would not be able to inherit the wage earner’s intestate property under the appropriate state law, then the applicant is not eligible for benefits.³⁶

II. REPRODUCTIVE TECHNOLOGY ADVANCEMENTS AND STATE PROPERTY LAWS

The advancements in reproductive technology made it possible for Jack and Jill to initially conceive the idea to proceed with the cryopreservation process after learning of Jack’s illness. By taking prophylactic measures and having Jack’s sperm frozen, *before* his cancerous tumors were treated, the couple could continue with their plans of having a family. However, those advancements in reproductive technology made it possible for Jill to conceive *after* Jack’s death—*not during his life*—by posthumously conceiving twins.

A. An Overview of Advancement in Reproductive Technology

What exactly is a child: a boy or girl? Not surprisingly, as with all legal answers, the answer to that question is: it depends. A child is “a person under the age of majority; a boy or girl; a young person; a son or daughter.”³⁷ However, the plain meaning of the word is insuffi-

33. *Id.*

34. See discussion *infra* Part II.A.

35. See § 416(h). But see Social Security Acquiescence Ruling 05-1(9), 70 Fed. Reg. 55,656 (Sept. 22, 2005) (explaining how the Ninth Circuit established “child” statutes under the Act solely because the children were “the biological children of the insured”). The Ninth Circuit determined that state intestacy laws were irrelevant in determining whether an individual was a “child” under the statute if “parentage was not in dispute.” *Id.*; see discussion *infra* Part III.A.

36. See Barnes, *supra* note 12 (“[T]he Social Security Administration’s decision to look to state inheritance laws is more in tune with the act’s design to ‘benefit primarily those supported by the deceased wage earner in her or her lifetime’”). But see Social Security Acquiescence Ruling 05-1(9), *supra* note 35.

37. BLACK’S LAW DICTIONARY (9th ed. 2009). A child is also defined as “[a] person between birth and puberty. A human fetus. An infant; a baby. One who is childish or immature. A son or daughter; and offspring. A member of a tribe; descendant.” AMERICAN HERITAGE COLLEGE DICTIONARY 243 (3d ed. 1997).

cient under the Social Security Act.³⁸ Under the Act, a “child” may be a “legally adopted child of an individual,” a “step-child who has been such for not less than a year,” or a “grandchild,” but to determine whether an applicant is a child under the Act, state intestate personal property laws of the state in which the insured lives or lived are controlling.³⁹

However, there are other ways in which an individual may be considered a child.⁴⁰ Thus, the term “child” under the Act is much broader than the denotations, above, and whether a person is deemed a child under the Act is determinative in whether a posthumously conceived applicant may receive survivorship benefits.⁴¹ The Social Security Administration’s website provides a rudimentary description of survivor benefits for children.⁴² The webpage explains that a worker’s biological children, stepchildren, grandchildren, and adopted children may be able to receive survivorship benefits.⁴³ There is no mention of posthumously conceived children whatsoever. Thus, with the advancements in reproductive technology, the definition of a “child” is not so clear.

There have been several advances in reproductive technology, which are not only changing “the practice of medicine” but also the law.⁴⁴ These reproductive advancements fall into the general category as forms of Assisted Reproductive Technology (ART).⁴⁵ “ART includes in vitro fertilization . . . (IVF) . . . sperm injection . . . and

38. See § 416(e).

39. § 416(h)(2)(A). This provision permits persons who would be permitted to receive intestate personal property under state laws to be deemed a “child.” *Id.*

40. § 416(h)(2)(B); Social Security Acquiescence Ruling 05-1(9), *supra* note 35.

41. See discussion *infra* Part III.V.

42. See *If You’re the Worker’s Minor or Disabled Child*, SOCIAL SECURITY ONLINE, <http://www.ssa.gov/survivorplan/onyourown4.htm> (last modified Oct. 19, 2012) (follow “Survivors” hyperlink; follow “how your family members are protected if you die” hyperlink; follow “You as a Survivor” hyperlink; follow “If You’re the Worker’s Minor or Disabled Child” hyperlink).

43. *Id.* “If you are an unmarried child under 18 of a worker who dies, you . . . can be eligible to receive Social Security survivor benefits.” *Id.*; see also SOCIAL SECURITY ADMINISTRATION, BENEFITS FOR CHILDREN (2011) [hereinafter BENEFITS] (explaining that “[your] child can get benefits if he or she is your biological child, adopted child or dependant stepchild”).

44. See, e.g., *The Ethics of Reproductive Technology Debated*, MEDICALNEWS TODAY (May 6, 2008), <http://www.medicalnewstoday.com/releases/106429.php> (last visited Oct. 18, 2011) (explaining the ethical concerns that have emerged as a result of the advancements in reproductive technology). Note, however, that “[t]he first recorded case of artificial insemination took place in 1790.” PETER N. SWISHER ET. AL. FAMILY LAW: CASES, MATERIALS AND PROBLEMS 315 (2d ed. 1998) (quoting *Moshetta v. Moschetta*, 25 Cal. App. 4th 1218 (1994) (explaining that a turkey-baster could be used to artificially inseminate a woman in 1790)). Advancements in reproductive technology have come a long way since the use of a mere turkey-baster.

45. *What Is Assisted Reproductive Technology?*, *supra* note 11.

Death, Sperm Heists, and Test Tube Babies

gamete (GIFT) and zygote intrafallopian transfer (ZIFT).”⁴⁶ More simply, ART is a process in which sperm and eggs are combined in a laboratory and then placed in a woman’s womb.⁴⁷ By 2010, ART was responsible for more than 47,000 live births (deliveries of living infants) and nearly 62,000 infants.⁴⁸ Cryopreservation has many benefits according to Cryogenic Laboratories who boast as the first sperm bank in the United States.⁴⁹ People are amassing their own sperm to “preserve fertility . . . prior to cancer treatment, military deployment, a vasectomy, or other circumstance[s,] which may result in sterility.”⁵⁰ ART has led to more women and men fulfilling dreams of having children, but there are social implications, which result from such advancements;⁵¹ medical experts, donors, and parents are growing concerned.⁵²

46. *Id.* “ART does not include intrauterine (artificial) insemination only or use of ovarian stimulation medications without egg retrieval.” *Id.*; see CDC, 2010 REPORT, *supra* note 11, at 73-75.

47. *What is Assisted Reproductive Technology?*, *supra* note 11.

48. CDC, 2010 REPORT, *supra* note 11, at 3; see also Ann-Patton Nelson, *A New Era of Dead-Beat Dads: Determining Social Security Benefits for Children Who Are Posthumously Conceived*, 56 MERCER L. REV. 759, 762 (2005) [hereinafter Nelson, *Dead-Beat Dads*] (explaining the prior decade’s ART birth rates in the U.S.). These figures are likely larger due to a number of clinics that do no report ART data. See CDC, 2010 REPORT, *supra* note 11, at 3.

49. Cryopreservation is a process in which organic matter is frozen. See Jenna M. F. Suppon, Note, *Life After Death: The Need to Address the Legal Status of Posthumously Conceived Children*, 48 FAM. CT. REV. 228, 230 (2010) [hereinafter Suppon, *Life After Death*]; CRYOGENIC LABORATORIES (2012), http://www.cryolab.com/?_kk=sperm%20banks&_kt=5b7da77f-980d-498e-a1df-0c6e63a366ee&gclid=CPO6_7qPhq4CFYXd4AodUWY3Q. The lab boasts as being founded forty years ago offering “superior donor sperm and sperm banking services, including sperm storage and embryo storage.” CRYOGENIC LABORATORIES, *supra*.

50. DONOR SPERM STORAGE: CHOOSE NOW, USE LATER, CRYOGENIC LABORATORIES (2012), http://www.cryolab.com/choosenow_uselater.shtml.

51. See generally Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N. Y. TIMES, Sept. 5, 2011, available at http://www.nytimes.com/2011/09/06/health/06donor.html?_r=1&ref=artificialinsemination (explaining the social implications that may emerge when one sperm donor is used by hundreds of different donor recipients).

52. *Id.* These people have grown concerned after learning of stories in which one sperm donor lead to more than a hundred offspring. *Id.* Further concerns include the use of genetic material as a million dollar business in which some sperm banks sell sperm and embryos in the same manner as a pair of jeans. See, e.g., *The Ethics of Reproductive Technology Debated*, *supra* note 44 (explaining the ethical concerns that vary from country to country as physicians select the technique that either fights infertility to gender preference).

Instead of keeping your fingers crossed for potential availability in the future, buy doses now and store them. This is the only way to guarantee the availability of your donor, since it is already put aside for you. With this decision, you won’t find yourself disappointed if he sells out at a later time. A donor’s availability is always subject to change and he can sell out at any time; being prepared makes sense You may return any unused specimens that were purchased at regular prices and have never left our facility and receive half the original purchase price back. This includes ANY specimen purchased at ANY time. There are also NO limits to the number of vials you can return for this partial refund. There are NO RESTRICTIONS regarding the status of a client’s account. Please note that our Vial Buy Back program is not offered on specimens that have been transferred by the original owner.

The most important result of advancements in reproductive technology—as it relates to this Comment—is posthumous conception. Posthumous conception occurs when a child is conceived after the death of a biological parent.⁵³ Through cryopreservation of sperm and eggs, posthumous reproduction is possible.⁵⁴ Cryopreservation allows organic material—like reproductive tissue—to be preserved and stored for years, often more than a decade.⁵⁵ Healthy sperm can also be extracted and preserved within a day after the man’s death and frozen for years and years.⁵⁶

Some other concerns that arise with cryopreservation are parentage and property rights.⁵⁷ The result of cryopreservation may be a child born months or even years after one of his or her parents have died. Additionally, “[because] reproductive material may be successfully preserved for over a decade, many children have been conceived a number of years after the death of one of their biological parents. A child that has been born under such circumstances is classified as a posthumously conceived child.”⁵⁸ Even more determinative of receipt of survivorship benefits are the state intestacy property laws; the Supreme Court has found that although a child “[is] to some extent . . . a purely physical relationship, [the word child] also describes a legal status which requires a reference to the law of the state which [created] those legal relationships.”⁵⁹ Therefore, each state’s respective intestacy property laws should be examined to have a complete understanding of the meaning of a “child” under the context of the Social Security Act and rights to survivorship benefits.

DONOR SPERM STORAGE, *supra* note 50.

53. See John A. Roberson, *Posthumous Reproduction*, 69 Ind. L.J. 1027, 1027 (1994); Suppon, *Life After Death*, *supra* note 49, at 230.

54. See Roberson, *supra* note 53.

55. Suppon, *Life After Death*, *supra* note 49, at 230.

56. Robert Salladay, *The Nation: Dead Dads Bill Takes on Difficult Legal Question; The Proposed State Law Gives Inheritance Rights to Children Born From Frozen Embryos, Sperm*, L.A. TIMES, May 17, 2004, at A1.

57. See discussion *infra* Part II.B; Nelson, *Dead-Beat Dads*, *supra* note 48, at 773 (explaining that “[q]uestions remain concerning the property rights of reproductive materials (i.e., frozen sperm), the legality of paid surrogacy, intestacy rights for posthumous children conceived or implanted after the genetic parent’s death, and the determination of parentage and custody of such children.”). See generally Ginsberg, Note, *FDA Approved? A Critique of the Artificial Insemination Industry in the United States*, 30 U. MICH. J.L. REFORM 823 (1997).

58. Suppon, *Life After Death*, *supra* note 49, at 230.

59. Petition for Writ of Certiorari at 15, *Astrue v. Capato*, No. 11-159, 2011 WL 3511023 (citing *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956)).

B. An Overview of States' Property Laws

Less than half of the fifty states recognize the familial relationships of parents and their posthumously conceived children.⁶⁰ These states vary by region.⁶¹ However, whether states recognize posthumous familial relationships is not determinative of whether a posthumously conceived child applicant will receive survivorship benefits—the determining factor turns on the state's property laws.⁶² Many state inheritance laws require the child to be born prior to one of the parents' death to be considered an heir or heir-apparent and entitled to the receipt of personal property.⁶³ Some states require even more evidentiary support to prove that a posthumously conceived child is the “lawful heir” of a deceased parent.⁶⁴ The remainder of this section will examine several of the states' laws regarding intestacy as it relates to the issue of whether posthumously conceived children are heirs of a deceased parent.

60. See Stephen Clark, *Children Conceived After Death of Parent Face Uphill Battle for Inheritance Rights*, FOXNEWS.COM (Mar. 26, 2011), <http://www.foxnews.com/politics/2011/03/26/children-conceived-death-parent-face-uphill-battle-inheritance-rights> (“[O]nly 11 states recognize the biological relationships of children conceived posthumously[.]”). Twenty-eight states do not address posthumous conception as it relates to property laws at all. See Kristine Knaplund, *Opinion Analysis: Genetic Link not enough for Social Security survivor benefits*, SCOTUSBLOG (May 22, 2012, 4:27 PM), <http://www.scotusblog.com/2012/05/opinion-analysis-genetic-link-not-enough-for-social-security-survivors-benefits/>.

61. See Clark, *supra* note 60. The states are: California, Colorado, Delaware, Florida, Louisiana, North Dakota, Texas, Utah, Virginia, Washington and Wyoming. *Id.*

62. 42 U.S.C. § 416 (H)(2)(A) (2006). *Contra* Social Security Acquiescence Ruling 05-1(9), *supra* note 35.

63. See Nelson, *Dead-Beat Dads*, *supra* note 48, at 774 (discussing that the instances in which a man and a woman naturally conceive and a man subsequently dies are addressed by most states in their intestacy property laws, but because technology is light-years ahead of the laws, whether a posthumously conceived child may take intestate property varies greatly from state to state).

64. Lisa Medford, Note, *Family Law and Estate Law—Reproductive Technology—Use of Artificial Re-Productive Technologies After the Death of a Parent*, 33 U. ARK. LITTLE ROCK L. REV. 91, 94 (2010).

1. States with Laws Expressly Permitting Posthumously Conceived Children to Receive Intestate Property

State	Code & Explanation
Alabama	Alabama property laws provide legal recognition of posthumously conceived children. ⁶⁵ Posthumously conceived children are placed on the same footing as any child born to parents still living with respect to “property [to be] devised and . . . property coming by descent as other children of the same parent.” ⁶⁶
Delaware	Section 505 of the Delaware code explicitly provides that posthumously conceived children are considered to be living at the time of death of their parent. ⁶⁷
District of Columbia	The District of Columbia code does not treat children born during the life of a person any differently than a child born after the death of a person. ⁶⁸
Hawaii	Similar to Delaware, Hawaii’s code regarding posthumously conceived children’s inheritance rights states that: “Posthumous children shall . . . inherit in the same [manner] as if they had been born during their father’s lifetime.” ⁶⁹
Idaho	In Idaho, property laws recognize posthumous children and permit posthumous children to inherit in the same manner as if living at the time of death of their parent. ⁷⁰
Missouri	Missouri recognizes intestate property rights of children not born prior to the death of a parent. The state of Missouri permits posthumous children to inherit intestate in the same manner as any child born prior to the death of a parent. ⁷¹
New York	New York Law provides that “[a] decedent’s posthumous child is one of his next of kin entitled to distribution of intestate personal property.” ⁷²

65. ALA. CODE § 35-4-8 (2011). Posthumously conceived children are entitled to “take the estate in the same manner as if born before the death of the parent.” *Id.*

66. *Id.*; see also *Barnett v. Pinkston*, 191 So. 371, 374 (Ala. 1939).

67. DEL. CODE ANN. tit. 12, § 505 (West 2011) (“Posthumous children, born alive, shall be considered as though living at the death of their parent.”).

68. D.C. CODE § 19-314 (2001) (“A child born after the death of the intestate has the same right of inheritance as if born before his death.”).

69. HAW. REV. STAT. § 532-9 (West 2011) (“Posthumous children shall, in all cases, inherit the same as if they had been born during their father’s lifetime.”).

70. IDAHO CODE ANN. § 55-108 (2011) (“When a future interest is limited to successors, heirs, issue or children, posthumous children are entitled to take in the same manner as if living at the death of their parent.”).

71. MO. ANN. STAT. § 474.050 (West 2011) (“All posthumous children, or descendants, of the intestate shall inherit in like manner, as if born in the lifetime of the intestate; but no right of inheritance accrues to any person other than the children or descendants of the intestate, unless they are born and capable in law to take as heirs at the time of the intestate’s death.”).

72. N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (Consol. 2011).

Death, Sperm Heists, and Test Tube Babies

2. States with Laws Prohibiting Posthumously Conceived Children to Receive Intestate Property or Requiring a Showing of Certain Prerequisites

State	Code & Explanation
Arkansas	In Arkansas, a child cannot inherit from a deceased parent unless the child was conceived and born prior to the death of the property owner. ⁷³ Posthumously conceived children have no entitlement to any property rights.
California	California requires a showing of dependency. ⁷⁴ A showing of dependency in California may be satisfied when: (1) dependency is established at the time of the death of the parent; (2) legitimacy like that in <i>Gillett-Netting</i> ⁷⁵ is established; or (3) intestacy is established from California property laws.
Colorado	Pursuant to Colorado intestacy laws, a parent-child relationship between a child conceived through ART and the individual who is not the mother depends on intent and consent. ⁷⁶ Further, if that individual is the parent of a child conceived with the help of ART and that individual dies, the child is considered to be in gestation at the time of the individual's death if the child is: "[1] in utero not later than thirty-six months after the individual's death; or [2] [born] not later than forty-five months after the individual's death." ⁷⁷ Whether a child conceived through ART is in gestation at the time of the individual's death determines intestate succession. ⁷⁸ Thus to determine intestate succession, whether a parent-child relationship exists must be determined, first.
Florida	In Florida, a 1993 statute was drafted and enacted, which prohibited all posthumously conceived children from receiving inheritance rights. ⁷⁹

73. See generally *Finley v. Astrue*, 372 Ark. 103 (2008).

74. CAL. FAM. CODE § 7613(b) (West Supp. 2011) (explaining that in situations where a woman uses donated sperm from a source other than her husband for the purposes of assisted reproduction, the sperm donor is not treated as the natural father under law unless he has consented in writing prior to conception); see also *Vernoff v. Astrue*, 568 F.3d 1102, 1005 (9th Cir. 2009).

75. *Gillett-Netting v. Barnhart*, 371 F.3d 593, 595 (9th Cir. 2004) (explaining that legitimate children are considered to be dependent upon the wage earner). However, legitimacy does not necessarily affect intestacy rights. Intestate rights are statutorily determined by the states. See discussion *infra* Part III.A.

76. COLO. REV. STAT. ANN. § 15-11-120(6) (West 2011). The individual who is not the mother must consent to the assisted reproduction and have the intent to be treated as the other parent of the child. *Id.* The aforementioned provision is not applicable if the birth mother is married to the other individual. *Id.* at § 15-11-120(48). So long as the husband provided the sperm and the sperm is used within his lifetime, a parent-child relationship is presumed to exist. § 15-11-120(4).

77. § 15-11-120(11).

78. *Id.*; see also COLO. REV. STAT. ANN. § 15-11-104(b)(1) (West 2011) (stating that § 15-11-104(b)(1) will not be applicable if the result would lead in the state of Colorado taking the intestate estate).

79. FLA. STAT. ANN. § 742.17 (West 2012); see also *Medford*, *supra* note 64, at 102.

Iowa	Iowa passed a law after a case arose regarding the Social Security Administration's decision to deny survivor benefits to a posthumously conceived applicant. ⁸⁰ The Iowa statute provides three situations in which a posthumously conceived child is the legal child of the decedent: (1) the child was born no more than two years after the death of the decedent parent; (2) the decedent parent has consented to his spouse using his genetic material after his death in a signed document; and (3) a genetic relationship exists. ⁸¹
Maine	Maine laws do not address posthumously conceived children. The code only addressed children conceived during the life but born after the death of the decedent parent. ⁸²
Massachusetts	Unlike Arkansas and Florida, Massachusetts does not completely bar posthumously conceived children from having inheritance rights. ⁸³ If a posthumously conceived applicant wishes to receive the survivorship benefits of his or her deceased parent, the burden rests with the surviving parent to show three elements. ⁸⁴
Minnesota	In Minnesota, posthumously conceived children are not afforded the same property benefits as children born prior to the death of an individual, adopted children, or step-children. ⁸⁵ Thus a parent-child relationship does not exist "between a child of assisted reproduction and another person unless the child of assisted reproduction is in gestation prior to the death of such person." ⁸⁶
Nevada	In Nevada, although the rights of a posthumously <i>conceived</i> child are not expressly addressed in the state code, the Nevada code does express that a posthumous child is considered to have been born prior to the death of the parent. ⁸⁷

80. See *Beeler v. Astrue*, 651 F.3d 954, 956 (8th Cir. 2011). Because the law was not retroactive, it did not apply to Patti Beeler's case. See IOWA CODE § 633.220A (stating that the statute's effective date begins on July 1, 2011); see also discussion *infra* Part IV.B.

81. IOWA CODE § 633.220A.

82. ME. REV. STAT. ANN. tit. 18-A, § 2-108 (1981) ("Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.").

83. See *Woodward v. Comm'r of Soc. Sec.*, 760 N.E. 2d 257, 272 (Mass. 2002); Medford, *supra* note 64, at 97.

84. The surviving parent must show: "(1) a genetic relationship between the child and the deceased parent; and (2) that the deceased parent 'affirmatively consented to posthumous conception.'" *Woodward*, 760 N.E. 2d at 272.

85. MINN. STAT. ANN. § 524.2-120 (West 2010). "Notwithstanding any other provision of this section . . . a parent-child relationship does not exist between a child of assisted reproduction and another person unless the child of assisted reproduction is in gestation prior to the death of such person." *Id.*

86. *Id.* § 524.2-120(10).

87. NEV. REV. STAT. ANN. § 132.290 (West 2010) ("A posthumous child is deemed living at the death of his or her parent.").

Death, Sperm Heists, and Test Tube Babies

Ohio	Ohio does not recognize inheritance rights for posthumously conceived children. ⁸⁸ Children conceived prior to death but born after death do have rights of intestacy of the deceased parent, but all other children cannot inherit unless they were in fact living prior to the death of the parent—thus prohibiting posthumously conceived children from receiving survivorship benefits. ⁸⁹ However, this statutory provision is on file to be amended. ⁹⁰
South Dakota	Along with many of the previous states codes such as Maine, a child is permitted intestacy rights so long as the child was conceived prior to the death of the parent. ⁹¹
West Virginia	West Virginia is another state that does not recognize the rights of posthumously conceived children—at least not expressly. In West Virginia, a child that was not in gestation prior to the death of the deceased parent may not inherit pursuant to West Virginia intestacy laws. ⁹²

III. COURT RULINGS: POSTHUMOUSLY CONCEIVED CHILDREN ELIGIBLE TO RECEIVE SURVIVORSHIP BENEFITS

Jill's story is similar to the women in both decisions discussed below. Their husbands died intestate and the widows decided—without prior consent—to conceive children using their husbands' stored semen. This section discusses cases in which the courts permitted survivorship benefits to posthumously conceived applicants.

A. A Ninth Circuit Court Decision: *Gillett-Netting v. Barnhart*

The Ninth Circuit was the first federal appellate court to decide a case regarding posthumous conception and survivorship benefits. The court held that the posthumously conceived child was entitled to receive survivorship benefits.⁹³ Similar to the introductory story, in *Gillett-Netting v. Barnhart*, Gillett-Netting and her husband wanted to

88. OHIO REV. CODE ANN. § 2105.14 (2011) (“Descendants of an intestate begotten before the intestate’s death, but born after the intestate’s death, in all cases will inherit as if born in the lifetime of the intestate and surviving the intestate; but in no other case can a person inherit unless living at the time of the death of the intestate.”).

89. *Id.*

90. *Id.*

91. S.D. CODIFIED LAWS § 43-3-16 (2011) (“A future interest, depending on the contingency of the death of any person without successors, heirs, issue, or children, is defeated by the birth of a posthumous child of such person, capable of taking by succession, if the posthumous child was conceived prior to the decedent’s death, was born within ten months of the decedent’s death, and survived one hundred twenty hours or more after birth.”).

92. W. VA. CODE ANN. § 42-1-8 (West 2011) (“Any child in the womb of its mother at, and which may be born after, the death of the intestate, shall be capable of taking by inheritance in the same manner as if such child were in being at the time of such death.”).

93. *Gillett-Netting v. Barnhart*, 371 F.3d 593, 599 (9th Cir. 2004).

conceive.⁹⁴ However, Netting was diagnosed with cancer and chemotherapy treatments were certain to make him sterile.⁹⁵ Netting decided to have his sperm frozen so his wife could be artificially inseminated later.⁹⁶ Netting subsequently died and months later Gillett-Netting was artificially inseminated with Netting's sperm.⁹⁷ Nine months later, Gillett-Netting gave birth to twins and filed an application for Social Security Benefits based on Netting's earnings.⁹⁸

The Social Security Administration (SSA) denied her application, as did an Administrative Law Judge, after a hearing for reconsideration.⁹⁹ Next, Gillett-Netting filed a complaint in district court, claiming that the SSA was in violation of the Equal Protection Clause.¹⁰⁰ Similarly, the district court held that SSA did not violate the children's equal protection under the law.¹⁰¹ Further, the court found that the children did not qualify for the benefits because the children were not Netting's "children" under the Act,¹⁰² they were not dependent on Netting prior to his death.¹⁰³

On appeal, the Ninth Circuit acknowledged that "reproductive technology has outpaced federal and state laws, which currently do not directly address the legal issues created by posthumous conception."¹⁰⁴ In reaching its decision, the Ninth Circuit observed the issues regarding dependency and that the children were Netting's natural and biological children. The court found that the children were Netting's legitimate children and thus dependent upon Netting under the Act and entitled to his benefits, despite the fact that the children were conceived posthumously.¹⁰⁵ The court addressed the issue of whether

94. *Id.* at 594-95.

95. *Id.* at 594.

96. *Id.* "Netting confirmed that he wanted Gillett-Netting to have their child after his death using his frozen sperm." *Id.* at 595.

97. *Id.* at 594. Through the ART process of in vitro fertilization (in vitro fertilization is a type of assisted reproductive technology in which an egg is fertilized outside a woman's body and after fertilization the egg is placed into a woman's womb), Gillett-Netting's egg that had been fertilized with Netting's sperm was placed in her womb ten months after Netting's death. *Id.* at 595.

98. *Gillett-Netting*, 371 F.3d at 595.

99. *Id.* The ALJ denied Gillett-Netting's claim because the children were not dependent on Netting's wages because they were born after his death. *Id.*

100. *Id.*

101. *Id.* (citation omitted).

102. *Id.* Gillett-Netting filed an appeal to the Ninth Circuit, which reviewed the district court's decision *de novo*. *Id.*

103. *Id.*

104. *Id.* at 595-96.

105. *Id.* at 596-97, 599. The court found that under 42 U.S.C. § 416(e) (2006), if the child is unmarried or a minor at the time of the application to receive benefits, then the child is deemed

the children were statutorily dependent upon Netting under the Act.¹⁰⁶ However, case law suggests, “it is well-settled that all legitimate children automatically are considered to have been dependent on the insured individual, absent narrow circumstances.”¹⁰⁷ The Ninth Circuit did not find any narrow circumstances in the case that would render the children non-dependent on Netting.¹⁰⁸ The SSA Commissioner, argued however, that under 42 U.S.C. § 402(d)(3) (2006), the children cannot be deemed to be dependent because they did not meet state inheritance requirements.¹⁰⁹ The Ninth Circuit found this argument unpersuasive. Specifically, the court reasoned that because children are able to prove dependency based on legitimacy; “nothing in the Act suggests that a child who is legitimate under state law separately must prove legitimacy under the Act.”¹¹⁰ The court refused to use Arizona property laws to reach its decision, but it reasoned that the children were recognized as legitimate in Arizona based on Arizona parentage laws.¹¹¹ After finding that the children were Netting’s legitimate children under Arizona laws and thus dependent on Netting, the court concluded that the children were entitled to Netting’s benefits.¹¹²

to be dependent on the wage earner; the court did not find any facts which would dispute that the children were not Netting’s biological children and thus, dependent on Netting under the Act and entitled to benefits. *Id.* at 598-99. The SSA Commissioner conceded that the children were Netting’s biological children. *Id.* at 597. The Ninth Circuit interpreted 42 U.S.C. § 416(h) as only applying when an applicant’s parentage is disputed. *Id.* Thus, if the applicant is found to be the biological child of the decedent than the applicant is deemed a child under the Act and eligible for benefits. *Gillett-Netting*, 371 F.3d at 597.

106. *Gillett-Netting*, 371 F.3d at 597-98.

107. *Id.* at 598 (citing *Mathews v. Lucas*, 427 U.S. 495, 502 (1976)). Legitimate children, regardless of dependency under statute are entitled to survivorship benefits. *Smith v. Heckler*, 820 F.2d 1093, 1094 (9th Cir. 1987).

108. *Gillett-Netting*, 371 F.3d at 598-99. Further, the children were considered legitimate under Arizona state laws as well because Arizona has done away with the status of illegitimacy. *See* ARIZ. REV. STAT. § 8-601. “Every child in Arizona . . . is the legitimate child of her or his natural parents.” *Gillett-Netting*, 371 F.3d at 599.

109. *Id.* 42 U.S.C. § 402(d)(3) (2006) provides that “[if] they also are able to inherit from [the insured parent] under state intestacy laws[,] they may be deemed dependent. *Gillett-Netting*, 371 F.3d at 598. *But see* ARIZ. REV. STAT. ANN. § 33-237(A) (2013) (“When a future estate is limited to heirs, issue or children, posthumous children shall take as if born before the death of the parent.”).

110. *Gillett-Netting*, 371 F.3d at 599.

111. *Id.* at 599 n.8.

112. *Id.* at 599.

B. A Third Circuit Decision: *Capato v. Astrue*

The Third Circuit held similarly to the Ninth Court's decision regarding posthumously conceived children and survivorship benefits.¹¹³ In *Capato*, after being diagnosed with cancer, Robert Capato deposited his sperm in a sperm bank in hopes that he and his wife could one day have children, in the likely event that chemotherapy treatments sterilized him.¹¹⁴ Nonetheless, the couple conceived, naturally.¹¹⁵ However, they wanted their son to have siblings and discussed having more children.¹¹⁶ Unfortunately, Robert Capato died before the couple could have any additional children.¹¹⁷ The decedent had executed a will, which listed his beneficiaries as his son, his wife, and his two children from a prior marriage.¹¹⁸ The will did not contain any provisions that bequeathed any property to any unborn children. Prior to his death, the couple had discussed providing for their unborn children in his will, but no such provision was incorporated into the will.¹¹⁹ A year later, with the help of in vitro fertilization, plaintiff gave birth to twins and subsequently applied for survivorship benefits on behalf of the twins.¹²⁰

The Third Circuit found that “[this] is a case where medical-scientific technology has advanced faster than the regulatory process.”¹²¹ Pursuant to the Act, whether an applicant is a child under the Act is dependent upon state intestacy laws.¹²² However, the Third Circuit

113. See *Capato v. Comm’r of Soc. Sec.*, 631 F.3d 626, 632 (3d Cir. 2011), *rev’d sub nom. Astrue v. Capato*, 132 S. Ct. 2021 (2012). Although the Third Circuit agreed with the Ninth Circuit’s use of § 416(e), the court applied the § 412(h)(2)(A) definition of a child, which turns on whether the state intestacy laws permit the individual to take property. *Id.* at 630. The Third Circuit based its decision on state familial legitimacy laws and not state intestacy laws. *Id.* at 629, 631. Ultimately, the Ninth Circuit’s ruling in *Gillett-Netting* was determined by the SSA to only be applicable to the Ninth Circuit. Social Security Acquiescence Ruling 05-1(9), 70 Fed. Reg. 55,656 (Sept. 22, 2005).

114. *Capato*, 631 F.3d at 627.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 627-28.

119. *Id.* at 628 (“Although Ms. Capato claims that she and her husband spoke to their attorney about including ‘unborn children’ in the will, ‘so that it would be understood that . . . they’d have the rights and be supported in the same way that [their natural born son] was already privileged to,’ the will did not contain any such provision.”).

120. *Id.*

121. *Id.* The ALJ found similarly on this issue that the regulatory process lagged behind technological advancements. Whereas it appeared intuitive to provide Social Security benefits in a sad case such as this one, the ALJ could not extend benefits to an applicant that was not recognized under the Act’s regulation as one entitled to such benefits. *Id.*

122. See *id.* at 629.

agreed with the Ninth Circuit in finding that there is no rational reason why an applicant's determination of whether he or she is a child should not be determined under state intestacy laws.¹²³ This is especially true, the court found, when parentage is not an issue—it is clear that the twins are the decedent's biological children.¹²⁴

Additionally, the court noted that there are concerns that will need to be addressed in the future.¹²⁵ Those concerns surround the ever-changing reproductive technology such as donor eggs,¹²⁶ in vitro fertilization, artificial insemination, and surrogate wombs, which could lead to “at least five potential parents.”¹²⁷ However, the court noted that the aforementioned issues are not ripe. Ultimately, the Third Circuit sided with the Ninth Circuit, defying seventy-years of traditional interpretation of the Act,¹²⁸ by vacating the district court's order and remanding the case for a determination that the children were deemed dependent on Robert Capato prior to his death.¹²⁹

Arguably, there are policy reasons that support the Ninth and Third Circuit decisions. It is undisputed that the law is behind the technology.¹³⁰ The courts, as well as other legal scholars and reproductive doctors, believe that advancements in reproduction technology mean that posthumous conception will become more common.¹³¹ Although there is very little statistical data concerning the various aspects of posthumously conceived children, there is a strong likelihood of increased cases of posthumous conception.¹³² Therefore, Social Se-

123. *Id.* at 631.

124. *Id.* Further, the purpose of federal benefits is to ensure that the child receives the support that the child would have received had their parent not died—it is *not* a general welfare provision. *Id.* at 629 (emphasis added).

125. *Id.* at 632.

126. *Id.* Donor eggs—this is a process similar to sperm donation in which women donate their eggs and women with diminished egg quality or quantity receive donor eggs to increase chances of conception. See *Donor Egg IVF*, GENETICS & IVF INST., <http://www.givf.com/donoreggivf> (last visited Feb. 28, 2013).

127. *Capato*, 631 F.3d at 632.

128. Petition for Writ of Certiorari at 20, *Astrue v. Capato*, 631 F.3d 626 (3d Cir. 2011) (No. 11-159), 2011 WL 3511023.

129. *Capato*, 631 F.3d at 632. The Third Circuit agreed with the Ninth Circuit in finding that there is no rational reason why an applicant's determination of whether he or she is a child should be determined under state intestacy laws. *Id.* at 630.

130. *Id.* at 628. It further found that technology was advancing “faster than the regulatory process.” *Id.*

131. See Julianne Wojay, *Posthumously Conceived Child Isn't Eligible for Survivorship Benefits*, 79 U.S.L.W. 2407 (2011) [hereinafter Wojay, *Posthumously Conceived Child*]. “Posthumous reproduction is here to stay.” *Id.*

132. See Christopher A. Scharman, Note, *Not Without My Father: The Legal Status of the Posthumously Conceived Child*, 55 VAND. L. REV. 1001, 1006-07 (2002).

curity laws and other laws will need to change to address new realities.¹³³ Nonetheless the law—the Social Security Act, specifically—has not yet changed and is subject to varying interpretations.¹³⁴

IV. COURT FINDINGS: POSTHUMOUSLY CONCEIVED CHILDREN NOT ELIGIBLE TO RECEIVE SURVIVORSHIP BENEFITS

Applying the arguments that the courts in the following section found to be persuasive would prohibit Jill from receiving survivorship benefits for her children. This section discusses cases in which the courts did not permit survivorship benefits to posthumously conceived applicants, showing that some posthumously conceived children are not successful in being eligible to receive survivorship benefits like the Gillett-Netting children.¹³⁵

In a 2011 decision, the Fourth Circuit split with the Ninth and Third Circuits, which did not surprise many legal professionals because of the “schizophrenic” nature and reasons for the prior courts’ decisions.¹³⁶ “[State] laws in [the area of posthumously conceived children and survivorship benefits] vary widely, leading to dramatically different results [from state to state].”¹³⁷

A. A Fourth Circuit Decision: *Schafer v. Astrue*

In *Schafer v. Astrue*,¹³⁸ seven years after her husband’s death, plaintiff gave birth to her late husband’s child with the help of in vitro fertilization.¹³⁹ Four months after the husband was diagnosed with

133. See, e.g., Wojay, *Posthumously Conceived Child supra*, note 131 (“The Social Security laws, as is the law in general, are woefully behind the medical technology with which such babies are born after one of their parents’ death.”).

134. See Morgan Kirkland Wood, Note, *It Takes a Village: Considering the Other Interests at Stake When Extending Inheritance Rights to Posthumously Conceived Children*, 44 GA. L. REV. 873, 911 (2010).

135. *Id.* (“[Not] all posthumously conceived children share the Gillett-Netting children’s success . . .”).

136. John T. Brooks, et al., *Posthumously Conceived Children and Their Survivor Benefit*, WEALTH MGMT. FOR EST. PLAN. (Oct. 21, 2009, 9:30 AM), <http://wealthmanagement.com/financial-planning/posthumously-conceived-childrenand-their-survivor-benefit>.

137. *Id.*

138. *Schafer v. Astrue*, 641 F.3d 49 (4th Cir. 2011).

139. *Id.* at 50 (“There is significant evidence that [the minor child] is Don Schafer’s biological child, born almost seven years after Don’s death. There is also evidence that Don intended for Janice to use the stored semen to conceive a child after his anticipated death, though he never expressed consent in writing to be the legal father of a child resulting from posthumous in vitro fertilization. In 2001 a Texas court purported to declare Don Schafer [as the minor child’s] father.”).

cancer, he deposited sperm samples in a long-term storage facility before he was scheduled to have chemotherapy.¹⁴⁰ The husband died three months later. Plaintiff applied, but was subsequently rejected for survivorship benefits for her child. The child's claim was rejected because he was not considered a "natural child."¹⁴¹ Because the child was conceived posthumously via assisted reproductive technology, the child was not eligible to "inherit from the decedent under state intestacy law or satisfy certain exceptions . . . in order to count as [a child] under the [Social Security] Act."¹⁴² A child that seeks to receive survivorship benefits must meet certain eligibility requirements.¹⁴³

For example, the child must have been dependent upon the individual prior to the individual's death.¹⁴⁴ However, before the court would make a finding as to whether the child met the aforementioned requirements, it first had to determine if the child was in fact a "child" under the meaning of the statute.¹⁴⁵ To determine whether an applicant is a child of the decedent, state property law must be examined.¹⁴⁶ If the applicant would be able to lawfully take intestate personal property as a child, then the applicant would fit under the definition of a "child."¹⁴⁷ Accordingly, in Virginia, a child born ten months after a parent's death was not recognized as the parent's child for property inheritance purposes.¹⁴⁸

140. *Id.*

141. *Id.* The court addressed that the term "child" meant either child or the "legally adopted child of an individual," but the court recognized that the term did not necessarily shed light on the meaning of "natural child" and thus "this definitional tautology . . . does not provide much guidance as how the SSA should go about making that child status determination." *Id.* at 52, 54.

142. *Id.* at 50-51 (citing 42 U.S.C. §§ 416(h)(2), (h)(3)(C) (2006)).

143. 42 U.S.C. § 402 (d)(1)(A) (2006). These eligibility requirements include the "child" being unmarried, not attaining the age of eighteen or still in primary or secondary school prior to the age of nineteen or under a legally recognized disability with formed prior to the child reaching the age of twenty-two. § 402(d)(1)(B).

144. § 402(d)(1)(C).

145. *Schafer*, 641 F.3d at 52; *see* 42 U.S.C. § 416(h)(2)(A) (2006).

In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this [the Act] the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

Id.

146. *Schafer*, 641 F.3d at 52.

147. *Id.*

148. *Id.* at 53.

After using two forms of legal argument (text and intent), the court concluded that Congress intended the Social Security Act to use state property laws, contrary to plaintiff's argument.¹⁴⁹ Plaintiff claimed that her posthumously conceived child was entitled to benefits because the requirements for 42 U.S.C. § 416(e)(1) were met, which is similar to the argument made by the Petitioner in *Gillett-Netting*.¹⁵⁰ The court distinguished this case from the *Gillett-Netting* court's interpretation of the Social Security benefits provision by looking to *Chevron USA, Inc. v. Resources Defense Council, Inc.*¹⁵¹ The *Chevron* case provided a two-part test concerning an agency's interpretation of a statute.¹⁵² First, if Congress expressly interpreted a provision within a statute, then an agency cannot interpret the statute in a manner contrary to Congress.¹⁵³ Second, if the first requirement is not met and/or Congress is silent or ambiguous in regard to a provision of a statute, then the agency's answer must be based on a reasonable interpretation of the statute.¹⁵⁴ Applying *Chevron* to the *Schafer* case, the Fourth Circuit affirmed the decision of the lower court and expressed that the "[agency's—the Social Security Administration—] view best reflects the statute's . . . aim of providing benefits *primarily to those who unexpectedly lose a wage earner's support*."¹⁵⁵

The Court found that, although the facts of this case are disheartening, it could not deviate from the plain language of the statute and Congress's intent.¹⁵⁶ Therefore, because plaintiff's posthumously conceived child was not considered the decedent's child under Virginia's state property laws, the child could not be considered a child under the Social Security Act; the child was ineligible for survivorship benefits.¹⁵⁷

149. *Id.* at 59.

150. *Id.* at 53.

151. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

152. *Id.*

153. *Id.* at 842.

154. *Id.* at 843.

155. *Schafer*, 641 F.3d at 51 (emphasis added).

156. *Id.* at 63.

157. *Id.* The Court found that although the facts of this case are disheartening, it cannot deviate from the plain language of the statute and Congress's intent. *Id.*

B. An Eighth Circuit Decision

In the same year that the Ninth Circuit created a split by holding that a posthumously conceived child was not entitled to survivorship benefits, the Eighth Circuit reached a similar conclusion.¹⁵⁸

As with the other cases before it, the facts in this case were like the others. Here, Bruce and Patti Beeler's dreams of conceiving a child were deterred after Bruce was diagnosed with acute leukemia.¹⁵⁹ Nearly a year after Bruce died from the cancer, Patti conceived a child using Bruce's sperm, which had been preserved prior to his chemotherapy treatments.¹⁶⁰ Additionally, it is undisputed that Bruce is the child's father.¹⁶¹ Patti filed an application on behalf of her posthumously conceived child to receive benefits.¹⁶² Patti's application was denied—like the many widows who have filed on behalf of their posthumously conceived children.¹⁶³ The SSA found that the child was not a child of the wage earner within the meaning of the Act.¹⁶⁴

V. EXAMINING THE CIRCUIT SPLIT AND THE SUPREME COURT'S RESOLUTION IN *ASTRUE V. CAPATO*

According to the SSA, the number of survivorship applicants that were conceived posthumously is increasing.¹⁶⁵ Although the actual number of applications may appear insignificant—there are over 100—it is the increasing rate of these applications that show that this trend is here to stay.¹⁶⁶ This, combined with the number of cases regarding survivorship benefits and posthumously conceived children that are pending before the courts,¹⁶⁷ serves as a strong reason why this circuit split needed to be addressed by the Supreme Court.

158. *Beeler v. Astrue*, 651 F.3d 954 (8th Cir. 2011).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*; see discussion *supra* Part III.

164. *Id.*

165. Petition for Writ of Certiorari at 19, *Astrue v. Capato*, 631 F.3d 626 (3d Cir. 2011) (No. 11-159), 2011 WL 3511023.

166. *Id.*

167. See *id.*

A. Sperm Heists: Acting Without the Consent of the Decedent Spouse

Early in 2002, a Massachusetts attorney coined, the “test tube trailblazer,” was allegedly told by a Social Security representative that if he was successful in his client’s case to receive benefits for posthumously conceived grandchildren, that he “should go down to the sperm bank with [his] business card.”¹⁶⁸ Although the alleged remarks are hostile, at best, there is a message behind the statement. Widows who act without the consent of her decedent spouse and use his sperm to conceive posthumously are committing a heist of the sperm bank. The risk of abuse is substantial.¹⁶⁹ A widow has the possibility to heist sperm, again and again and again, which could result in multiple children conceived decades and scores after the decedent’s death.¹⁷⁰ This would result in the widow applying for benefits on behalf of several posthumously conceived children further depleting already *emaciated* governmental funds.

Additionally, a requirement that only a genetic tie is sufficient for a posthumously conceived child to attain inheritance rights would leave the decedent parent’s estate “at the mercy of the unilateral choices of his or her surviving partner to conceive a posthumous child” who could—in good faith or not—take a large portion of the estate.¹⁷¹ Further, a man or woman that has decided to undergo the cryopreservation process does not necessarily intend for his or her wife or husband to use the genetic material after death.¹⁷²

[G]ranting inheritance rights to posthumously conceived babies may complicate life for earlier-born heirs. “In an era in which serial marriages, serial families, and blended families are not uncommon, according succession rights under our intestacy laws to posthumously conceived children may, in a given case, have the potential

168. Elisabeth Preis, *Test-tube Trailblazer*, *Bar Talk*, AM. LAWYER, Apr. 2002, at 141.

169. See Knaplund, *supra* note 14, at 93 (“Once frozen, sperm may be viable almost indefinitely . . .”).

170. *Id.* at 92-94.

171. Wood, *supra* note 134, at 903.

Likewise, when an individual participates in an attempt to conceive through artificial means and intends to be the parent of any resulting child, he knows he is taking on the associated responsibilities of support. But when an individual is deceased before conception occurs, he often makes no such active decision. If he preserved his gametes during his lifetime, it is quite possible that he did not even consider the possibility that they might be used to conceive a child after his death -a child who would never know him and would not be raised by him, a child whom he would never have the opportunity to love.

Id.

172. Knaplund, *supra* note 14, at 93.

to pit child against child and family against family,” she said, since the later child’s share of the inheritance would reduce the amount available to any older children.¹⁷³

B. The Inevitable Risk of Abuse

The “[Social Security Administration’s] . . . aim of providing [survivorship] benefits is *primarily to those who unexpectedly lose a wage earner’s support*.”¹⁷⁴ The Legislature foresaw many problems that could and would arise without defining the word “child” in the Social Security Act and created the eligibility rules as a prophylactic of governmental funds “while helping qualified children.”¹⁷⁵ “In addition to protecting the Social Security trust fund, the eligibility requirements are substantially related to the important governmental objective of using reasonable presumptions to limit benefits to those children who lost a parent’s support.”¹⁷⁶

As discussed in Part I, the purpose of the Social Security Act was to provide for the general welfare of American citizens and protect individuals from falling into abject poverty.¹⁷⁷ Also discussed in that same Part was whether the purpose of the Act could be realized by extending benefits to children conceived after the death and without the knowledge or consent of an individual.¹⁷⁸ It must be reiterated, that these benefits should not be extended to posthumously conceived children unless expressly authorized by the statute.¹⁷⁹

As discussed in *Schafer v. Astrue*, the Social Security Act is not a general welfare program “benefitting needy persons,” but it was created as a means of protection from hardship in the event that a dependent’s wage earner was no longer able to support the family.¹⁸⁰ Therefore, it is difficult to defend arguments that a posthumously con-

173. Tamar Lewin, *The Nation: Taking After Father; A Frozen Sperm Riddle*, N.Y. TIMES, Jan. 13, 2002, at 3.

174. *Schafer*, 641 F.3d at 51 (emphasis added).

175. MaryClaire Dale, *NJ Mom seeks survivor benefits for twins conceived in vitro after husband’s cancer death*, STARTRIBUNE (Jan. 6, 2011), http://www.startribune.com/templates/Print_This_Story?sid=113022274. As of June 2011, 4.4 million children receive over \$2 billion per month in survivorship benefits. Although these “dollars help to provide the necessities of life for family members and help . . . to stabilize the family’s financial future,” \$24 billion dollars a year is a substantial amount of money and protection of these funds is not only important, but should be addressed by those elected by American tax-payers—the legislature and not the courts. BENEFITS, *supra* note 43.

176. Dale, *supra* note 175.

177. Andrews & Porter, *supra* note 6, at 1.

178. See discussion *supra* Part I.

179. See discussion *supra* Part I.

180. *Schafer v. Astrue*, 641 F.3d 49, 58 (4th Cir. 2011).

ceived child—especially a child conceived several years later—could be dependent on a decedent’s wages. How can survivorship benefits be extended to persons that did not exist, let alone *survive*¹⁸¹ the wage earner? Social Security survivorship benefits are a part of a national program, which provides support to the child who has lost his or her parent.¹⁸² Because the posthumously conceived child never met his or her decedent parent, logically, the child was never dependent upon the decedent parent.

The Fourth Circuit went even further and discussed that in addition to a posthumously conceived child not being dependent upon the wage earner, because the posthumously conceived child comes into being after death, “survivorship benefits would serve a purpose more akin to a subsidy.”¹⁸³ This subsidy would merely provide aid to future reproductive plans.¹⁸⁴ Therefore, *Congress* drafted amendments to the Act, which protected natural born children and provided child status to children whose parentage was not in dispute¹⁸⁵ by including a state’s intestacy laws as a gatekeeper to benefits for children who do not meet the Act’s statutory provisions to receive survivorship benefits.¹⁸⁶

Of course, if state intestacy laws permit a posthumously conceived child to receive property of their decedent parent then, according to the Act,¹⁸⁷ the posthumously conceived child is a child within the meaning of the statute and should be permitted to receive benefits. However, state intestacy laws must be analyzed carefully. Facially, many of the state statutes address the issue at hand in relation to the taking of intestate property; however, these laws speak to

181. A survivor is a person that outlives another. BLACK’S LAW DICTIONARY (9th ed. 2009). If the literal meaning of a survivor is one who has outlived another, and an individual did not outlive another because that individual did not exist at the time of the “other’s” death, is that individual truly a survivor? No.

182. Schafer v. Astrue, 641 F.3d at 58.

183. *Id.* at 59. The court discussed that posthumously conceived children differ from the “core beneficiary class.” *Id.* The first difference was that a posthumously conceived child could not have been dependent upon the wage earner and the second difference is the effect that because posthumously conceived children come into being after the death of one of the parents, permitting the child to receive benefits has the effect of creating a subsidy for continuing reproductive plans. *Id.*

184. *Id.*

185. *Id.* at 58 (citing *McMillian v. Heckler*, 759 F.2d 1147, 1149-59 (4th Cir. 1985)).

186. See *Mathews v. Lucas*, 427 U.S. 495 (1976). “Where state intestacy law provides that a child may take personal property from a father’s estate, it may reasonably be thought that the child will more likely be dependent during the parent’s life and at his death.” *Id.* at 514; see 42 U.S.C. § 416(h)(2)(A) (2006).

187. 42 U.S.C. § 416(h)(2)(A).

posthumous children, not necessarily posthumously *conceived* children.¹⁸⁸ This argument does not suggest that all posthumously conceived children should not receive survivorship benefits. But, this is an argument that the judiciary is not the appropriate body to determine who should and should not receive benefits and should practice judicial restraint in reviewing such administrative decisions.¹⁸⁹ Federal and state legislatures are the appropriate bodies to determine who should receive benefits, especially in this context of reproductive health, property law, and family law, which “constantly requir[es] adjustments . . . to account for Wchanging technological and social realities.”¹⁹⁰

Further, with the advent of advancements in reproductive technology that allows for genetic material to be preserved and subsequently used for artificial conception nearly a decade after the death of an individual,¹⁹¹ the legislature is the appropriate body to guard against the risk of abuse. For example, some cryopreservation clinics allow widows and widowers access to her or his deceased spouse’s reproductive material without consent.¹⁹² “A 1998 survey of 324 [ART] clinic found that 45% of the responding clinics prohibited the use of [cryopreserved sperm and eggs] by a widow or girlfriend [or widower or boyfriend] after . . . death while 355 of clinics allowed such use.”¹⁹³

According to recent data, posthumously conceived children are rare, although nearly half a million frozen embryos are stored across the nation.¹⁹⁴ This further supports the premise that the judiciary is not the proper body to address any changes in the Social Security Act—posthumously conceived children are rare—thus, the legislature is the proper body to address any and all changes. The Legislature is the more appropriate body because of their proximity and understanding of the needs of their constituents.

188. See discussion *supra* Part II.B.

189. See generally *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936) (explaining that the Court will pass on a constitutional question regardless if it is properly presented to the Court and if there is another way in which redress or an answer can be provided (e.g., state law)). The Court should only deal with a constitutional issue if it is absolutely necessary to resolve the matter. *Id.*

190. *Schafer*, 641 F.3d at 62.

191. Suppon, *Life After Death*, *supra* note 49, at 230.

192. Knaplund, *supra* note 14, at 93 (citing Stern, et al., *Access to Services at Assisted Reproductive Technology Clinics: A Survey of Policies and Practices*, 184 AM. J. OBSTETRICS & GYNECOLOGY 591, 595 (2001)).

193. *Id.*

194. Nelson, *Dead-Beat Dads*, *supra* note 48.

Additionally, granting survivorship benefits to persons who are not survivors also appears to be antithetical to the purpose and legislative intent of the Social Security Act. A survivor is an individual who outlives a person that he or she had a legal or recognized relationship with prior to the person's death.¹⁹⁵ Under the legal definition of a survivor, a posthumously conceived child cannot survive his or her decedent parent's death. The posthumously conceived child was not in existence prior to the parent's death. The child has not survived the parent. The child was never depended upon the parent. Thus, granting survivorship benefits to non-survivors—posthumously conceived children—is similar to granting equivalent disability benefits to a fully capacitated person.

There are other statutes that have addressed the issue of the legal relationship between individuals and their posthumously conceived children.¹⁹⁶ The Uniform Parentage Act does not recognize a parent child relationship between a posthumously conceived child and a deceased parent unless the parent “consented in record” that it was his or her express will that the posthumous reproduction occur after his or her death.¹⁹⁷ Thus, it follows that if Congress can draft the aforementioned legislation to include an express provision regarding posthumously conceived children, Congress may certainly draft similar amendments to the Social Security Act. Again, this is a matter for the Legislature, not the courts. “But in light of the many complexities arising from rapid technological changes in this area, Congress has chosen, so far to leave the matter to [the] states.”¹⁹⁸

All arguments aside, however, the Supreme Court recently resolved the circuit split.¹⁹⁹ Writing for a unanimous court, Justice Ginsburg wrote that to determine whether an individual is eligible to receive survivorship benefits, attention must be to state intestacy

195. BLACKS LAW DICTIONARY (9th ed. 2009); see also Knaplund, *supra* note 14, at 93 (“Once frozen, sperm may be viable almost indefinitely; scientists are unsure how long it will last, but are confident that sperm can be stored for at least ten years. Freezing one's sperm, however, does not necessarily mean that one wants children postmortem.”).

196. See Uniform Parentage Act § 707 (amended 2002), available at <http://www.aals.org/profdev/family/sampson.pdf/>.

197. *Id.*

198. Petition for Writ of Certiorari at 16-17, *Astrue v. Capato*, 631 F.3d 626 (3d Cir. 2011) (No. 11-159), 2011 WL 3511023.

199. *Astrue v. Capato*, 132 S. Ct. 2021, 2022 (2012) (holding that the Social Security Administration's longstanding interpretation was reasonable and permissible under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*).

laws.²⁰⁰ Should a posthumously conceived individual not be eligible to take under state property laws, the individual was not eligible to receive benefits. This interpretation, according to the Court, was found to be reasonable, and thus “entitled to deference under *Chevron*.”²⁰¹ Thus, the Capato children were not entitled to Social Security benefits because they could not inherit under Florida’s property law.²⁰²

CONCLUSION

Although hindsight is always 20/20, let us return to the story of Jack and Jill and what *should* have been done to adhere to the statutory requirements of the Social Security Act to receive survivorship benefits. More than a decade ago, the couple fell in love and had dreams of one day having a family. They had it all, except children. After being diagnosed with cancer, Jack had his sperm preserved in case the chemotherapy rendered him sterile.

Because of this cryopreservation, Jill could later be artificially inseminated (or conceive through another means of reproductive technology) with Jack’s sperm and the couple’s dreams of a family could turn into reality. As a precaution, however, the couple discussed *when and how* Jill would be artificially inseminated. Additionally, the

200. *Id.* at 2025 (“[R]eliance on state intestacy law to determine who is a ‘child’ serves the Act’s driving objective, which is to ‘provide . . . dependent members of [a wage earner’s] family with protection against the hardship occasioned by [the] loss of [the insured’s] earnings.’”).

201. *Id.*; see also *Chevron*, 467 U.S. at 842-44.

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute. ‘The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.’ If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. (internal quotations omitted).

202. See discussion *supra* Part III.B and accompanying notes. See generally *Capato*, 132 S. Ct. 2021. This decision abrogated the *Gillett-Netting v. Barnhart*, 371 F.3d. 593 (2004) decision.

Id.

couple discussed what would happen in the unfortunate event that Jack did not survive his disease. Jack provided for protection of his assets in his will for his wife and for any children born after his death. Further, Jack consented in writing to the use of his sperm by Jill. The consent document also included the number of children that the couple wished to conceive using his frozen sperm unless multiple children are conceived through the artificial reproductive process (which is common). In the event that Jill conceived more than the number of children consented to during one pregnancy, then she would not use his sperm to conceive any additional children. And unfortunately, after a brief bout with cancer, and multiple futile chemotherapy treatments, Jack lost his battle with cancer.

Jill, stricken with grief, decided to find some relief by having a child—Jack’s child. Shortly after burying her husband, Jill was artificially inseminated with Jack’s sperm—in a manner consistent with the terms the couple had agreed to prior to Jack’s death. Nine months later, she gave birth to not one, but two children—Jack’s biological children. Jill applied on behalf of her children to receive Jack’s Social Security survivorship benefits and after completing the process mandated by the Social Security Administration, Jill was able to receive benefits on behalf of her posthumously conceived children. No administrative or court action was necessary. Although hindsight is indeed 20/20, the aforementioned story should be the standard that every couple takes to ensure that survivorship benefits are received, sperm is not heisted, and the Social Security system is not abused.

Finally, posthumously conceived children should not be permitted to receive survivorship benefits beyond the scope of the plain meaning of the text of the Social Security Act. If state property laws permit a posthumously conceived child to take intestate personal property, then a parent-child relationship should be recognized between the posthumously conceived child and deceased parent. Any additional interpretation should not be made by the court. A testamentary document would better serve the needs of, and benefit, the child. Further, Congress is the appropriate body to interpret and give meaning to “child” under the Act, not the courts. The courts should not be the body to interpret what a “child” means under the Social Security Act. Allowing posthumously conceived children to receive survivorship benefits will likely result in a slippery slope of abuse to the already emaciated social security program. Permitting posthumously conceived children to receive survivorship benefits should be

Death, Sperm Heists, and Test Tube Babies

permissible only under the language of the statute. Any changes are a matter for the lawmaker—the legislature—not the courts!

“Posthumous conception is a difficult process and an emotional one. On top of trying to get benefits for your child, you’re going through the mourning of your husband.”²⁰³ However, “if sad facts make hard cases, we cannot allow hard cases to make bad law.”²⁰⁴

203. Clark, *supra* note 60.

204. Schafer v. Astrue, 641 F.3d 49, 63 (4th Cir. 2011). *But see id.* at 70 (Davis, J., dissenting) (“[T]hat truism has never defined a ‘hard case.’ What must be recalled is that judicial opinions, like the statutes they interpret, are not merely words arranged on paper. They have real effects on people.”).

COMMENT

Fundamental Right or Liberty?: Online Privacy's Theory for Co-Existence with Social Media

HAKEEM RIZK*

INTRODUCTION	952
I. PRIVACY'S FIGHT TO CO-EXIST WITH SOCIAL MEDIA WEBSITES	956
A. How Social Media Websites Operate	956
B. Privacy Implications	958
C. Solutions Leading to Different Approaches.....	961
II. COMMON PURSUIT, SEPARATE METHODS, CONTRASTING RESULTS	961
A. The European Union's Mission to Protect Online Privacy.....	961
1. Current European Union Privacy Laws Concerning Data Protection	962
2. Impact, Interpretation, and Implementation of European Union Privacy Law	963
B. Is Liberty Enough? The United States's Quest for Online Privacy Reform	966

* J.D. Candidate, Howard University School of Law, Class of 2013; Senior Solicitations Editor, *Howard Law Journal*, Vol. 56; B.A., University of North Carolina at Chapel Hill, 2010. First and foremost, I would like to sincerely thank God for constantly providing for me and allowing me to accomplish my goals and dreams. In addition, I would like to thank my parents and my family for always supporting me and encouraging me to never give up. I would also like to thank my close friends for always being there for me and making me laugh through the good and the challenging times. Finally, I must thank my faculty advisor, Professor Steven Jamar; my legal writing instructor, Professor Sha-Shana Crichton; and the hard-working editors of the *Howard Law Journal*. To everyone that I have failed to mention, know that I could not have made it through the last three years without you.

1. Current State of Privacy Laws Within the United States	966
2. Unfulfilling Impact Sparking the Proposed Privacy Bill of Rights	969
III. THE EUROPEAN UNION AND UNITED STATES'S UNDERLYING FOUNDATION FOR ONLINE PRIVACY PROTECTION	972
A. Protecting Privacy as a Fundamental Human Right: The European Union's Approach to Online Privacy Protection.....	972
B. Commercial Exploitation: The United States's Attempt to Maintain the Co-existence of Online Privacy and Economic Innovation	975
IV. THE UNITED STATES SHOULD NOT ADOPT THE EUROPEAN UNION'S PRIVACY LAWS.....	977
A. Liberty Promotes the Respect for Autonomy	978
B. The Preservation of Continual Economic Innovation and Growth.....	979
C. Accountability Remains Key to the Success of Online Privacy Reform	981
CONCLUSION	981

“[P]rivacy is dead, get over it.”¹

INTRODUCTION

While speaking to a live audience, Mark Zuckerberg, Chief Executive Officer and co-founder of Facebook, mentioned that if he had the opportunity to “create Facebook again today, user information would by default be public, not private”² Even though Mark Zuckerberg recently experienced a privacy breach that led to the public disclosure of his privately marked photos,³ Mark Zuckerberg will

1. *Internet Privacy: The Impact and Burden of EU Regulation: Hearing Before the Subcomm. on Commerce, Mfg., & Trade of the H. Comm. on Energy & Commerce*, 112th Cong. 1 (2011) [hereinafter *Internet Privacy Hearing*] (statement of Rep. Mary Bono Mack, Chairman, Subcomm. on Commerce, Mfg., & Trade) (“I do not subscribe to the theory that privacy is dead, get over it.”).

2. Marshall Kirkpatrick, *Facebook's Zuckerberg Says the Age of Privacy is Over*, READWRITEWEB (Jan. 9, 2010, 9:25 PM), http://www.readwriteweb.com/archives/facebooks_zuckerberg_says_the_age_of_privacy_is_ov.php.

3. Kashmir Hill, *Mark Zuckerberg's Private Photos Exposed Thanks to Facebook Flaw*, FORBES (Dec. 6, 2011, 2:22 PM), <http://www.forbes.com/sites/kashmirhill/2011/12/06/mark-zuckerbergs-private-photos-exposed-thanks-to-facebook-flaw/> (discussing how an individual used

unlikely change his belief that the “rise of social networking online means that people no longer have an expectation of privacy.”⁴

Today, we live in an age of online sharing. People feel more comfortable each day sharing personal information over the Internet. In 2011, Facebook executives reported that each day 4 billion “things” were publicly shared on Facebook, a figure that they project to steadily increase.⁵ Twitter executives announced that in 2011, users tweeted 200 million times a day, voicing their opinions on various trending topics.⁶ These websites’ vast popularity is quite explainable. Social media websites not only provide individuals with the opportunity to connect with friends, family, and acquaintances across the world, but also a platform that projects the individuals “voice,” which otherwise might not be recognized. Through their immense popularity and unique services, there is no doubt that social media websites have established the sharing of information as a social norm.

As users continue to publicly share personal information at such a high rate over the Internet, the focus becomes on whether “sharing” has truly replaced “privacy” as the overarching social expectation. As already stated, Mark Zuckerberg, along with other chief executives of social networking websites, believes that it has.⁷

Social media websites paint the sharing of information as a positive, social interaction, but they strategically disguise a lucrative business model that centers upon the concept of online behavioral advertising.⁸ Although attempting to “‘make the world a more open place,’”⁹ and help people “understand the world” around them,¹⁰

Facebook’s pornographic material self-reporting mechanism to expose Zuckerberg’s private photos).

4. Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, GUARDIAN (Jan. 10, 2010, 8:58 PM), <http://www.guardian.co.uk/technology/2010/jan/11/facebook-privacy> (highlighting Zuckerberg’s opinions on individuals’ level of privacy expectations in the online social media world).

5. See Alexia Tsotsis, *Mark Zuckerberg Explains His Law of Social Sharing [Video]*, TECHCRUNCH (July 6, 2011), <http://techcrunch.com/2011/07/06/mark-zuckerberg-explains-his-law-of-social-sharing-video/> (explaining the formula, “ $Y = C * 2^X$,” used to demonstrate how the amount of materials that people share today is doubled from a year ago and will double a year from now).

6. *200 Million Tweets Per Day*, TWITTER BLOG (June 30, 2011, 1:03PM), <http://blog.twitter.com/2011/06/200-million-tweets-per-day.html>.

7. See Johnson, *supra* note 4.

8. See Jose Antonio Vargas, *The Face of Facebook: Mark Zuckerberg Opens Up*, THE NEW YORKER (Sept. 20, 2010), http://www.newyorker.com/reporting/2010/09/20/100920fa_fact_vargas.

9. *Id.*

10. Mark Zuckerberg, *200 Million Strong*, THE FACEBOOK BLOG (Apr. 8, 2009, 9:27 AM), <http://blog.facebook.com/blog.php?post=72353897130>.

Facebook and other social media websites engage in transactions where they exchange relatively free services for the ability to monitor and market online behavior. When each individual uses the websites' services, technological devices monitor the individual's behavior and collect information such as the individual's interest, likes and dislikes. The accumulated information is stored in a personally identifiable online folder. Then social media websites sell the online folder, typically to online advertising agencies that pay big money for the ability to selectively market products according to the individual's identified interest.¹¹

While the presence of social media websites and the consistent rise of online advertising revenue in the United States may appear economically sound,¹² the profitable business model negatively impacts online privacy and consumer trust, which appear to be gradually fading away. Online privacy includes the individual right of personal privacy and protection over the storing, repurposing, selling, and displaying of personally identifiable and non-identifiable information over the Internet.¹³ It forms the underlying basis of consumer trust, where individuals confidently trust that as they engage in online transactions, their personal information will be used appropriately and accessed by only authorized individuals.

With the prevalence of identify theft and fraud within society, it has become an international agenda to ensure adequate online privacy protections and to secure consumer trust. More importantly, without a national privacy law, the United States has recently conducted Congressional hearings in order to determine how to balance the consumer trust with the success of online businesses through online behavioral advertising, seeking uniformity and low regulatory burden. In an opening statement, Representative Mary Bono Mack, then Chairman of the Subcommittee on Commerce, Manufacturing, and

11. See Vargas, *supra* note 8 (discussing the increase in revenue generated as online users continue to upload vast amounts of information onto Facebook).

12. See Press Release, IAB, Internet Advertising Revenues Hit \$7.3 Billion in Q1 '11 Highest First-Quarter Revenue Level on Record According to IAB and PwC (May 26, 2011), *available at* http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-052611 (explaining how \$7.3 billion in advertising revenue in the first quarter alone in 2011, a 23% increase from the prior year, displays the relevance of digital marketing and advertising); see also *Internet Privacy Hearing*, *supra* note 1, at 18 (statement of Rep. Pete Olson, Member, Subcomm. on Commerce, Mfg., & Trade) (referencing the 23% increase from the first quarter of 2010).

13. See "Internet Privacy" Definition, GEARDOWNLOAD.COM, <http://www.geardownload.com/tags/internet-privacy.html> (last visited Mar. 21, 2013).

Trade, stated that while “e-commerce in the United States will top \$200 billion this year for the first time, there is still a Wild, Wild West feel to cyberspace, leaving many consumers wondering if there is a sheriff in town or whether they are completely on their own when it comes to protecting themselves and their families.”¹⁴

The European Union, recognized as a leader of online privacy protection, has taken the role of “sheriff,” implementing stringent laws that place the user in control over their personal data. While agreeing that online privacy is slowly fading away and arguably does not exist, the debate among United States legislatures centers upon the question of whether the United States should follow in the steps of the European Union. Particularly, should the United States enact similar privacy regulations that establish a barrier of online privacy by placing users in control over their personal data while potentially stifling businesses that rely on the free flow or exchange of personally identifiable data?

This Note argues against the implementation of European Union privacy laws in the United States. Instead, I argue that the United States should enact a national privacy law that incorporates a “baseline set of principles”¹⁵ that will foster economic growth while ensuring adequate privacy protections for online users by limiting the online tracking of users without the user’s express consent. Part I will discuss how social media networking sites operate, particularly focusing on how privacy is implicated. Part II will highlight the European Union’s and the United States’ approaches to online privacy, including their underlying theories. Part III will address the interpretation and implication of these different online privacy perspectives. Part IV will argue why the United States should not implement the European Union privacy regime but, instead, enact a “baseline set of principles” similar to the Consumer Privacy Bill of Rights that gives the user adequate online privacy protection, stimulates continuous economic growth, and holds both users and businesses accountable for decisions made under personal autonomy.

14. *Internet Privacy Hearing*, *supra* note 1, at 2 (statement of Rep. Mary Bono Mack, Chairman, Subcomm. on Commerce, Mfg., & Trade).

15. Press Release, The White House, Fact Sheet: Plan to Protect Privacy in the Internet Age by Adopting a Consumer Privacy Bill of Rights (Feb. 23, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/02/23/fact-sheet-plan-protect-privacy-internet-age-adopting-consumer-privacy-b>.

I. PRIVACY'S FIGHT TO CO-EXIST WITH SOCIAL MEDIA WEBSITES

Accessing the Internet has arguably become one of the most useful tools of modern day society as it has been estimated that as of 2011, nearly 2.1 billion people, one-third of the Earth's population, utilize Internet services.¹⁶ Among these services are social media websites, which have evolved from simple networking circles to convenient pit stops that allow users to actively participate in online commerce. Almost 62% of adults worldwide regularly access social media websites, accounting for 22% of Internet usage.¹⁷ However, while attempting to harness the variety of services and benefits these integral websites offer, individuals place their online privacy in jeopardy as they are typically unaware of the constant monitoring and trading of their personal information. Without any doubt, the commercialization and social networking face of the Internet have introduced a reality where "privacy harms are no longer short-lived and innocuous."¹⁸ As technology continues to permeate and dominate societal functions, numerous privacy advocates are urgently pushing for privacy reform to eradicate the growing mentality and fear that "online, 'you have zero privacy.'"¹⁹ The European Union and the United States seek to extinguish this fear through online privacy reform. However, before determining which approach is the most effective, it is critical to understand how social media websites restrict privacy.

A. How Social Media Websites Operate

All social-networking websites operate around one common purpose: to connect people with others regardless of location.²⁰ Primarily

16. *Internet Usage Statistics: The Internet Big Picture*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last visited Mar. 2, 2012).

17. Cara Pring, *99 New Social Media Stats for 2012*, THE SOCIAL SKINNY (May 10, 2012), <http://thesocialskinny.com/99-new-social-media-stats-for-2012/>.

18. Patricia Sanchez Abril, *A (My)Space of One's Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 75 (2007).

19. *Id.* at 87.

20. *See About*, FACEBOOK, <http://www.facebook.com/facebook?v=info> (last visited Mar. 2, 2013) ("Facebook's mission is to give people the power to share and make the world more open and connected."); Mark Evans, *Twitter's New Mission Statement*, TWITTERATI (Jan. 11, 2011), <http://www.twiterrati.com/2011/01/11/twitters-new-mission-statement/> ("Twitter . . . has a new mission statement: '[t]o instantly connect people everywhere to what's most important to them.'"); *Company Overview*, GOOGLE, <http://www.google.com/about/company/> (last visited Mar. 2, 2013) ("Google's mission is to organize the world's information and make it universally accessible and useful."); *see also* Interview by Kara Swisher with Dick Costolo, CEO, Twitter, at

designed to map out the relationships between people,²¹ social media networks enable “people [to] communicate more efficiently with their friends, family and coworkers.”²² As users remain active and utilize the website’s services, social media websites are able to accomplish this objective and more.

Facebook, Twitter, Google +, and LinkedIn—all are considered the prominent leaders within the vast social media market.²³ Each social media website allows members to create an online account where they are given the opportunity to depict who they are to the online world. Users begin developing a personalized profile by providing basic information such as “name, sex, age, location, [and] hobbies/interests.”²⁴ They are able to enhance their online profile by answering surveys and questionnaires about themselves and their interests. Then, they are given the tools to upload pictures and media files that include personally made videos. Once they complete their profiles, individuals are able to fully maximize the services offered by the particular social media website. Users can download applications, establish contacts, and keep up with the latest events, trends, and actions of their friends. Through the users’ uploaded personal information and online activity, social media networking websites now have the ability to target and connect a user with others of similar interests and backgrounds. Typically, these websites have technology that mimics social graphing by drawing smaller, concrete networks that intimately identify the user to a larger network.

One of the most attractive aspects of social media websites is the low economic cost for membership. Individuals are able to become members, create an online profile, and utilize basic services without providing any monetary compensation. However, while some have an estimated value in the billions, social media networks generate their revenue through online advertising and purchases. Social media web-

CES 2011 (Jan. 7, 2011), *available at* <http://allthingsd.com/20110117/full-dces-interview-video-twitter-ceo-dick-costolo/>.

21. Dave Roos, *How Networking Works*, HOWSTUFFWORKS, <http://money.howstuffworks.com/business-communications/how-social-networks-work.htm> (last visited Mar. 2, 2013).

22. *About Facebook*, FACEBOOK, <https://www.facebook.com/peering/> (last visited Mar. 2 2013); *cf.* Facebook in Education, *The Social Environment of Facebook Communication*, FACEBOOK (Feb. 15, 2011, 8:23 AM), http://www.facebook.com/note.php?note_id=10150413682665570 (discussing that communication through online social networks mainly consists of “small talk,” which is important for developing close, interpersonal relationships) (citations omitted).

23. *See* Roos, *supra* note 21.

24. Dave Roos, *Setting Up Social Networking Accounts*, HOWSTUFFWORKS, <http://money.howstuffworks.com/business-communications/how-social-networks-work4.htm> (last visited Mar. 2, 2013).

sites exploit the users' online activity and shared information as a means to increase revenue through online behavioral advertising. The social graph and the sharing of personal information provide companies and engineers with "the opportunity to build a business" by "deeply integrat[ing] with the . . . website and gain[ing] access to millions of users."²⁵ Online businesses solicit the information gathered from the website by actively monitoring the users' behavior. Then, they purchase the collected information along with advertising space as they vigorously pursue avenues to effectively and selectively advertise products considered relevant to particular users. Thus, social-networking websites maximize profits by selling the shared information while businesses reduce operational costs by only advertising pertinent products related to the user's recorded interest.

B. Privacy Implications

Social media websites such as Facebook and LinkedIn operate behind a corporate philosophy where they allow users to "control . . . their experiences so [that] they can express themselves freely while knowing that their information is being shared in the way they intend."²⁶ As part of the granted control, users can install privacy settings that either permit or prevent access to their personal profiles. Through selected privacy settings, users can dictate who views their profiles and what specifics parts of their profiles are viewable. Yet, even with fairly strict privacy settings, individuals remain vulnerable and open to third parties obtaining their personal information.

Although appearing to provide users adequate privacy protection, privacy settings constantly change and, at times, become difficult to manage. Most social-networking websites do not install default privacy settings. Therefore, the user's profile remains accessible to the public unless the user opts-out by selecting privacy settings for their profile.²⁷ This opt-out method presents two main challenges. First, privacy policies and settings typically consume a large amount of time and effort to decipher.²⁸ It is estimated that the average privacy pol-

25. One Young Kashmir, *Facebook Factsheet*, FACEBOOK (Oct. 26, 2010, 12:31 PM), http://www.facebook.com/note.php?note_id=164122353611720 (addressing Facebook's platform).

26. *Id.* (speaking on Facebook's privacy, safety, and security guidelines).

27. *See, e.g., Privacy Policy*, GOOGLE, <http://www.google.com/policies/privacy/> (last modified July 27, 2012).

28. *See, e.g., Alexis Madrigal, Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days*, THE ATLANTIC (Mar. 1, 2012, 2:25 PM), <http://www.theatlantic.com/techno>

icy contains 2,514 words and takes 10 minutes to read.²⁹ In a fast-paced society, it is not uncommon for users to refrain from reading a website's privacy policy and, ultimately, for them to inadvertently fail to place pertinent privacy settings. In addition, new innovative features present another challenge as websites enhance their services. For example, Facebook added a new timeline and open graph applications. Allegedly created to enhance users' activity, these new features "allowed" the users' profile to revert back to public access.³⁰ The presence of long and challenging privacy policies coupled with new features and updates make it difficult for users to manage their privacy settings.

Additionally, privacy settings alone are not fully capable of restricting Internet "cookies." More than a sweet taste, these technological cookies "scan in real time what people are doing on a Web page, then instantly assess location, income, shopping interests and even medical conditions."³¹ They give the website the ability to easily track the user's online behavior and collect for storage all uploaded personal information and observed content.³² Internet cookies continue to work even after a user leaves the website and can automatically identify the individual and his associated information when the user returns to the website.³³ Furthermore, users can delete Internet cookies within their history tab. However, Internet cookies are encrypted with the power to "surreptitiously re-spawn themselves even after users try to delete them."³⁴ This capability practically makes it nearly impossible for a user to opt-out of being tracked.³⁵ In fact, occasionally referred to as "frictionless sharing," Internet cookies allow websites to continue to track the individual's online behavior and

logy/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851/.

29. *Id.*

30. See *Consumer Groups Ask FTC to Investigate Facebook-Datalogix Data-Matching Arrangement*, *Facebook Privacy: Latest News/Events*, EPIC.ORG, <http://epic.org/privacy/facebook/> (last visited Mar. 2, 2013) (speaking on the comments that EPIC submitted concerning the proposed settlement agreement between the FTC and Facebook).

31. *Behavioral Targeting*, *Privacy Today: A Review of Current Issues*, PRIVACY RTS. CLEARINGHOUSE, <http://www.privacyrights.org/ar/Privacy-IssuesList.htm> (last revised Jan. 2013).

32. See *id.*

33. *What is a Cookie?*, *Cookies: Frequently Asked Questions*, ABOUTCOOKIES.ORG, <http://aboutcookies.org/Default.aspx?page=5> (last visited Mar. 2, 2013).

34. Rretta, *I'll Be Watching You!*, FRANKLIN COUNTY VA. PATRIOTS (June 27, 2011), <http://www.franklincountyvapatriots.com/2011/06/27/ill-be-watching-you>.

35. Slade Cutter, *The 7 "Creep Factors" of Online Behavioral Advertising*, VENTUREBEAT (Feb. 22, 2012, 5:53 PM), <http://venturebeat.com/2012/02/22/the-7-creep-factors-of-online-behavioral-advertising/>.

activity even after the user has logged out of the website, not necessarily leaving momentarily as previously described.³⁶ Ultimately, social-media websites activate Internet cookies to facilitate the sale and exchange of personal data to online businesses and advertising agencies, generally without any notice given to the user.³⁷

At times, the impact of cookies can be unascertainable. This year, privacy advocates petitioned the FTC and European regulators to investigate the activity of Google, which has been accused of using a code that enabled cookies to bypass established privacy settings.³⁸ While stating that they utilize cookies “to improve [the] user[’s] experience and . . . quality of [their] services,” Google, in an effort to revamp their privacy policy, now employs cookies and anonymous identifiers designed to collect all information whenever one interacts with any of its services.³⁹ Google combines all the collected information found from the different services for processing typically outside the user’s national residence. However, Google enables the user to update or delete that information unless Google must “keep that information for legitimate business or legal purposes.”⁴⁰ Although Google shares the collected information with their affiliates, Google explicitly mentions that the new privacy policy does not cover the information practices utilized by companies or organizations who advertise on its website.⁴¹

In light of the technology and operational means used by social networking websites, users consistently face the possibility that their personal information is treated improperly and may come in contact with the wrong person. Online privacy should protect the user’s personally identifiable and non-identifiable information on the Internet. But, society lives in an age where identity theft, fraud, and exposure of personal items that can potentially humiliate an individual are preva-

36. See Emil Protalinski, *Facebook Tracks You Online Even After You Log Out*, ZDNET (Sept. 25, 2011, 7:59 AM), <http://www.zdnet.com/blog/facebook/facebook-tracks-you-online-even-after-you-log-out/4034>; see also Christopher Williams, *Facebook Criticised for “Tracking” Logged-Out Users*, THE TELEGRAPH (Sept. 26, 2011, 4:04 PM) <http://www.telegraph.co.uk/technology/facebook/8789942/Facebook-criticised-for-tracking-logged-out-users.html> (reporting on an incident where an Australian entrepreneur discovered that Facebook cookies were tracking him after he was logged out of the social network).

37. Cutter, *supra* note 35.

38. See Jon Brodtkin, *US, Europe Investigate Google’s Bypass of Safari Privacy Settings*, ARS TECHNICA (Mar. 16, 2012, 9:17 AM), <http://arstechnica.com/tech-policy/news/2012/03/us-europe-investigate-googles-bypass-of-safari-privacy-settings.ars>.

39. See *Privacy Policy*, *supra* note 27.

40. *Id.*

41. *Id.*

lent. With the presence of these serious privacy concerns, some solutions have developed.

C. Solutions Leading to Different Approaches

Although few in number, privacy solutions have been made to give users a sense of confidence and trust while roaming and using services on the Internet. In an effort to protect privacy from a successful business scheme, various companies and organizations have formulated privacy programs that provide privacy security. These programs range from privacy seals to software products whereby consumers pay for privacy protections. But, as previously mentioned, these programs may garner some protection but will leave the individual subject to privacy breaches.

III. COMMON PURSUIT, SEPARATE METHODS, CONTRASTING RESULTS

Both the European Union and the United States pursue a common mission: to protect its respective citizens from harm. Both nations realize the need of protecting fundamental rights; yet, the manners in which they protect fundamental rights differ. Under the concept of human dignity, the European Union stands firm by their belief that one's fundamental rights require keen protection. On the other hand, the United States uses the broad scope of liberty to guard one's fundamental rights while harmonizing the demands of an organized free society.⁴² Both nations identify privacy as a fundamental right; but, with different outlooks, different results have occurred.

A. The European Union's Mission to Protect Online Privacy

It is a prevailing fact that today's society encompasses a growing digital age where the collection of personal information presents a valuable economic asset.⁴³ Nonetheless, the European Union persists

42. See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

43. See Press Release, European Commission, Commission Proposes a Comprehensive Reform of Data Protection Rules to Increase Users' Control of Their Data and to Cut Costs for Businesses (Jan. 25, 2012), available at http://europa.eu/rapid/press-release_IP-12-46_en.htm ("In the digital age, the collection and storage of personal information are essential. Data is used by all businesses – from insurance firms and banks to social media sites and search engines.").

upon protecting the individuals whose information is being consistently tracked, collected, and transferred from one party to another.⁴⁴

1. Current European Union Privacy Laws Concerning Data Protection

In 1995, the European Union constructed a Privacy Directive on Data Protection behind two foundational principles: (1) the protection of information privacy and (2) the prevention of restrictions of the free flow of personal information, for reasons of privacy protection.⁴⁵

Although this Directive originally provided adequate privacy protection, European Union leaders such as Viviane Reding sought to renovate this Directive in light of the continual increase of vast technological advances.⁴⁶ Focused on “the necessity of enhancing individuals’ control over their own data,”⁴⁷ legislatures erected the following “pillars” of online privacy protection: (1) the right to be forgotten; (2) transparency; (3) privacy by default; and (4) protection regardless of data location.⁴⁸ These pillars of protection promote a multifaceted “opt-in” framework, where the online user has control through exercising and retrieving his consent.⁴⁹ The individual no longer bears the burden of demonstrating that the collection of their personal data is not necessary. Instead, data controllers bear a heavier burden that requires them to prove that keeping the accumulated personal information is a necessity.⁵⁰ Transparency presents online users with the capability of being informed, particularly about what personal data is

44. See *id.* (explaining that the fundamental right to the protection of personal data is expressly supported and acknowledged by Article 8 of the EU Charter of Fundamental Human Rights and the Lisbon Treaty).

45. Graham Greenleaf, *The European Privacy Directive – Completed*, 2 PRIVACY L. & POL’Y REP. 81 (1995), available at <http://www.austlii.edu.au/au/journals/PLPR/1995/52.html>; see also Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, 34 [hereinafter *EU Directive*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1995:281:FULL:EN:PDF>.

46. See Viviane Reding, Vice President, European Comm’n, Privacy in the Cloud: Data Protection and Security in Cloud Computing (Dec. 7, 2011), available at http://europa.eu/rapid/press-release_SPEECH-11-859_en.htm (speaking on how new technology such as cloud computing has presented the need to update the current EU privacy laws).

47. Viviane Reding, Vice President, European Comm’n, Your Data, Your Rights: Safeguarding Your Privacy in a Connected World (Mar. 16, 2011), available at http://europa.eu/rapid/press-release_SPEECH-11-183_en.htm.

48. *Id.*

49. See *id.* (“[P]eople shall have the right – and not only the ‘possibility’ – to withdraw their consent to data processing.”).

50. *Id.*

being tracked and gathered and how that data is being used.⁵¹ The objective is to implement a nationwide standard where privacy is afforded at the very beginning and without any “considerable operational effort.”⁵² The desired outcome is for personal data to be collected only for purposes designated by the specified user.⁵³

While realizing that the first three pillars may not be enough, the European Union solidified its desire for complete online privacy reform through the last pillar. As an enforcement measure, the last pillar places all organizations across the world on notice that European Union Privacy laws apply regardless of data location.⁵⁴ If an organization or company operates within the European Union’s market or targets European Union citizens as consumers, then the European Union’s privacy laws apply even if the organization is not located in the geographic parameters of the European Union.⁵⁵ Although there are no formalized means of ensuring compliance of outside companies with European Union privacy laws, the Commissioner has delegated broad discretion and power to privacy watchdogs.⁵⁶ Therefore, with the addition of the four pillars to the adequacy standard premised within the original privacy directive, social media websites such as Facebook, Twitter, and Google will have to take reasonable precautions while operating in the European Union and targeting European Union consumers.⁵⁷ Irrespective of the impact, regulations will be enforced by the European Union to protect the fundamental right of privacy.

2. Impact, Interpretation, and Implementation of European Union Privacy Law

The European Union is guided by a political and economic mission to standardize the laws of all member countries in an effort to function as one unified market where people, goods, services, and cap-

51. *Id.*

52. *Id.*

53. *See id.*

54. *Id.* (“[H]omogeneous privacy standards for European citizens should apply independently of the area of the world in which their data is being processed.”).

55. *Id.*

56. *Id.* (“To enforce the EU law, national privacy watchdogs shall be endowed with powers to investigate and engage in legal proceedings against non-EU data controllers whose services target EU consumers.”).

57. *See id.*

ital are able to move freely among member states.⁵⁸ Part of a unique political framework, each member state retains its status as an independent sovereign nation while delegating some of its decision-making authority to the law-making triangle embodied within the European Union.⁵⁹ Consisting of the European Parliament, the Council of the European Union, and the European Commission, this law-making triangle possess the power to enact directives, which require member states to achieve a particular result without imposing the manner in which member states achieve the desired outcome.⁶⁰ Accordingly, the 1995 Data Protection Directive, along with its proposed renovations, seeks to strengthen online privacy rights but appears to have undesired results as each member state implements corresponding legislation.

As usual, for every action, there is a reaction, and for every regulation, there is a cost to be paid.⁶¹ The stricter privacy guidelines are intended to increase consumer trust with the objective of facilitating the acquisition of cheaper goods and services.⁶² Granting greater protection to users has enlarged the cost to online businesses both in efficiency and equity.⁶³ Obligated by law, online businesses must maintain a detailed record of the user's data and quickly respond to

58. *How the EU Works*, EUROPEAN UNION, http://europa.eu/about-eu/basic-information/index_en.htm (last visited Mar. 22, 2013) (explaining that the objective of the European Union is to allow citizens to secure a maximized benefit from the European Union acting as one united resource).

59. EUROPEAN UNION, *HOW THE EUROPEAN UNION WORKS: A CITIZEN'S GUIDE TO THE EU INSTITUTIONS* 3 (June 2003), available at http://eeas.europa.eu/delegations/georgia/documents/virtual_library/08_euro_en.pdf.

60. *Id.* at 3–4. Directives are typically used in order to align different national laws that usually affect the operation of the single market. *Application of EU Law*, EUROPEAN UNION, http://ec.europa.eu/eu_law/introduction/what_directive_en.htm (last visited Mar. 22, 2013).

61. Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Data Protection Standards*, 25 YALE J. INT'L L. 1, 17 (2000).

62. Viviane Reding, Vice President, European Comm'n, *The Reform of the EU Data Protection Directive: The Impact on Businesses* (May 18, 2011), available at http://europa.eu/rapid/press-release_SPEECH-11-349_en.htm ("Trust in the treatment of personally identifiable information collected on and off the Internet is essential for *businesses to succeed*." (emphasis in original) (citation omitted); EUROPEAN UNION, *HOW WILL THE EU'S DATA PROTECTION REFORM BENEFIT EUROPEAN BUSINESSES?*, available at http://ec.europa.eu/justice/data-protection/document/review2012/factsheets/7_en.pdf; see also *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, at 1–2, SEC (2012) 72–73 final (Jan. 1, 2012), available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf.

63. Shaffer, *supra* note 61, at 17–20 (explaining the increase of transactional cost on businesses as a direct result of complying with the mandates of the privacy directive).

any inquiries concerning the data's particular use.⁶⁴ Against the notion of efficiency, this alone will require more operational and manpower hours, increasing total operational cost.⁶⁵ In terms of equity, online businesses encounter the possibility that consumers will deny consent.⁶⁶ As a result, both the online businesses and the direct marketing companies forego potential revenue generated from the exchange of personal data.⁶⁷ In essence, the sovereignty of private business decision-making becomes constrained through compliance.

For businesses outside the European Union, additional costs arise from attempting to “adequately” comply.⁶⁸ To adequately comply, a set of criteria must be satisfied. The criteria provides that these organizations must: (1) process data for a limited specific purpose which will be made known to the affected individual; (2) provide information to ensure fair processing must be given to the affected individual; and (3) the third party transfers may only occur in countries that afford the same levels of protection.⁶⁹ This heavy burden of compliance poses a major risk to foreign jobs, exports, and businesses.

Furthermore, member states decide the manner of implementation.⁷⁰ Through this inherent power, various interpretations of key provisions within the Directive have expanded cost to the European Union and businesses. An example revolves around the consent provision.⁷¹ Some member states have interpreted this provision to mean

64. *Id.* at 17; see also Ben Beeson, *Data Protection Rules Impact EU Businesses*, LOCKTON MARKET UPDATE (Jan. 27, 2012), <http://www.locktonmarketupdateblog.com/lmu/2012/01/data-protection-rules-impact-eu-businesses/> (describing other requirements of EU privacy laws).

65. See Shaffer, *supra* note 61, at 20.

66. *Id.* at 17.

67. *Id.* at 18.

68. *Internet Privacy Hearing*, *supra* note 1, at 68 (written statement of Peter Swire, Professor, Moritz College of Law of the Ohio State University).

69. See *U.S.-EU Safe Harbor Overview*, EXPORT.GOV, http://export.gov/safeharbor/eu/eg_main_018476.asp (last updated Apr. 26, 2012) (explaining the importance behind the safe harbor program, which allows non-European Union businesses to comply with the stringent privacy laws enacted by the European Union).

70. See *Proposal for a Directive of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and the Free Movement of Such Data*, at 2 SEC (2012) 73 final (Jan. 25, 2012), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012PC0010:en:NOT> (“Moreover, because of its nature and content, the Framework Decision leaves a large room for manoeuvre to Member States’ national laws in implementing its provisions.”).

71. See generally Article 29 Data Protection Working Party, *Opinion 15/2011 On the Definition of Consent*, 01197/EN, WP 187 (July 13, 2011), available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp187_en.pdf (providing analysis of the concept of consent as used in the Data Protection Directive and e-Privacy Directive).

expressly given and at times requiring the consent be given in writing.⁷² Alternatively, other member states interpret this provision to encompass implied consent.⁷³ With various interpretations, online businesses face increasing transactional and operating costs as they attempt to comply with the Directive and the various laws in member states.⁷⁴ Administratively, European Union authorities face an increased cost in enforcement due to non-compliant member states and differing interpretations.⁷⁵ With a declining European economy, such costs can only add to the decline.

B. Is Liberty Enough? The United States's Quest for Online Privacy Reform

With only a sector-by-sector privacy regime and no over-arching privacy law, the United States seeks to implement a national privacy law that will remain consistent with American jurisprudence while balancing the needs for e-commerce with the need for online privacy protection. Liberty includes one's privacy interest and respects autonomy.⁷⁶ However, with the recent Obama Privacy Bill of Rights, it has not been conclusive whether liberty will protect consumers over businesses or vice versa.

1. Current State of Privacy Laws Within the United States

American jurisprudence has identified privacy rights in connection with an improper or unwarranted intrusion.⁷⁷ Focused on the idea of an "unjustifiable intrusion," the challenges typically involve intrusion by the government or by the press that "affect[s] the very

72. *See id.* at 5.

73. *See id.* at 9 n.13 (explaining the privacy directive implemented by Germany).

74. Shaffer, *supra* note 61, at 20.

75. NEIL ROBINSON ET AL., RAND EUROPE, REVIEW OF THE EUROPEAN DATA PROTECTION DIRECTIVE 35, 37 (2009), available at http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/review_of_eu_dp_directive.pdf.

76. Jeffrey M. Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L.J. 971, 972-73 (2006).

77. *See Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.") (emphasis omitted); *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . .").

essence of constitutional liberty and security.”⁷⁸ It is through these challenges that the Supreme Court has been able to craft the essence of privacy conceived by liberty as used in the U.S. Constitution.

Under the Fourth Amendment, the Court endorses a two-step analysis in determining an improper search or seizure by government actors.⁷⁹ The Court begins by evaluating whether the victim exhibited an actual or subjective expectation of privacy.⁸⁰ If affirmative, the Court concludes by exploring whether that expectation is one that society is prepared to recognize as reasonable.⁸¹ This legal framework permits the Court to defend its belief that the right to privacy is “the right most valued by civilized men.”⁸² But, at the same time, the Court acknowledges the value of personal autonomy, holding citizens accountable for their decisions and corresponding actions.

Operating through this mindset, the Court prohibits the improper intrusion within the sanctity of one’s home.⁸³ From the Court’s perspective, the sanctity of one’s home embraces the “most intimate and personal choices a person may make in a lifetime.”⁸⁴ These choices stem from the inherent dignity and autonomy within each person, which mandates proper safekeeping under the scope of the Fourteenth Amendment.⁸⁵ Central to the core of liberty, these choices include the right of a woman to have an abortion,⁸⁶ the right of same-sex couples to engage in sexual conduct,⁸⁷ and the right to control the upbringing of one’s child.⁸⁸ This jurisprudence demonstrates the

78. *Boyd*, 116 U.S. at 630 (explaining the principles established in privacy cases “apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life.”).

79. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (interpreting the protections of privacy within the realm of the Fourteenth Amendment).

80. Matthew L. Hodge, Comment, *The Fourth Amendment and Privacy Issues on the “New” Internet: Facebook.com and MySpace.com*, 31 S. ILL. U. L.J. 95, 100 (2006).

81. *Id.*

82. *See Olmstead*, 277 U.S. at 477.

83. *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a state law that prohibited sodomy between two consenting partners within the sanctity of their home.).

84. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

85. *See id.*

86. *See generally* *Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. at 833 (reaffirming the constitutional protected right to have an abortion); *Doe v. Bolton*, 410 U.S. 179 (1973) (overruling the Georgia law against abortions); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman possesses a right to have an abortion that is balanced against the state’s legitimate interest in both protecting prenatal life and the health of the mother).

87. *See Lawrence*, 539 U.S. at 578 (“The petitioners are entitled to respect for their private lives. . . . ‘It is a promise of the Constitution that there is a realm of personal liberty that the government may not enter.’”) (citations omitted).

88. *See Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (ruling that the challenged law impeded “the liberty of parents and guardians to direct the upbringing and education of chil-

Court's unwillingness to undermine the worth of autonomy and how it defines who we are as a people.⁸⁹

More appropriately, advocates for many years argued that privacy encompasses the protection from the press.⁹⁰ Samuel D. Warren and Louis D. Brandeis questioned whether American laws would protect privacy when the press overstepped the threshold of propriety and decency.⁹¹ These prominent legal figures recognized the capabilities of current devices and their potential technological advances and argued for greater protection from the evil lying within the power of the press.⁹² After decades passed, the Court indirectly accepted their argument, holding that privacy includes the protection from the press.⁹³

While privacy advocates lobbied early on for privacy protection from the press, no consideration was given to the idea that eventually innovation would develop social media websites that both benefit people and implicate grave privacy concerns. As the Internet began to take a stronghold in the lives of American citizens, legislatures passed laws that grant privacy security to particular individuals in particular sectors. For example, the Children's Online Privacy Act of 1988 prohibits websites that market to children from collecting a child's personal information.⁹⁴ The Privacy Act of 1974 established a code of fair information practices that govern how federal agencies collect, maintain, use, and disseminate personally identifiable information stored in their systems of records.⁹⁵ The Fair Credit Reporting Act promotes the fairness, accuracy, and privacy of personal information

dren."); *Meyers v. Nebraska*, 262 U.S. 390, 400 (1923) (invalidating state law that unreasonably interfered with the parent's inherent right "to give [their] children education suitable to their station in life.").

89. See *Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of life.").

90. See generally Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy", 4 HARV. L. REV. 193 (1890) (arguing that the law of privacy should follow the trend that common law evolves to satisfy societal demands).

91. *Id.* at 196-97.

92. See *Id.* at 195 ("Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'").

93. See *Paul v. Davis*, 424 U.S. 693, 722-23 (1976) (Brennan, J., dissenting) ("[T]he enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal 'liberty' [contemplated by the due process clause]."); *supra* notes 82-88.

94. 15 U.S.C. §§ 6501-6506 (2006).

95. 5 U.S.C. § 552(a) (2006).

gathered by credit reporting agencies.⁹⁶ Even though these laws speak to some of the privacy concerns, there remains absent a general privacy law that targets both private businesses and addresses their abilities to track and disseminate personal identifiable information.

2. Unfulfilling Impact Sparking the Proposed Privacy Bill of Rights

With no general privacy law that speaks to the tracking and collection of personal data by private businesses such as Facebook and Google, American legislatures have felt the heat from American constituents to enact such legislation. This heat sings from recent privacy breaches that leaked personal information to the hands of undesired people.

In an effort to cool off this heat, the Federal Trade Commission has taken an active role in holding social networking websites accountable for their actions. In 2009, Facebook decided to alter user's privacy settings by making users' personal information that included their friend lists and application usage data accessible by the public and business affiliates.⁹⁷ After investigating and filing an eight-count complaint against Facebook, the Federal Trade Commission negotiated a settlement, in which Facebook agreed not to change privacy settings in the future without affirmative consent.⁹⁸ In 2011, Twitter faced allegations by the Federal Trade Commission when hackers gained administrative access over the website and caused multiple security breaches.⁹⁹ Again reaching a settlement, Twitter agreed to take stronger security measures.¹⁰⁰ Although active, the Federal Trade Commission remains an independent agency that promotes consumer protection, focusing on anti-competitive business practices.¹⁰¹ While

96. 15 U.S.C. § 1681 (2006).

97. Press Release, Fed. Trade Comm'n, Facebook Settles FTC Charges That It Deceived Consumers by Failing to Keep Privacy Promises (Nov. 29, 2011), <http://ftc.gov/opa/2011/11/privacysettlement.shtm>.

98. *See id.*; *see also* Facebook, Inc., Docket No. C-4365, File No. 092-31843-4 (F.T.C. July 27, 2012), available at <http://www.ftc.gov/os/caselist/0923184/120810facebookdo.pdf>.

99. *See* Twitter, Inc., 151 F.T.C. 162, 167-69 (2011).

100. *See* Press Release, Fed. Trade Comm'n, FTC Accepts Final Settlement with Twitter for Failure to Safeguard Personal Information (Mar. 11, 2011), <http://www.ftc.gov/opa/2011/03/twitter.shtm>.

101. *Our Mission*, ABOUT FED. TRADE COMMISSION, <http://www.ftc.gov/ftc/about.shtm> (last visited Mar. 2, 2013) (“[explaining the need t]o prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.”).

fostering change, the Federal Trade Commission typically acts after action or damage occurs.

Accordingly, legislatures have conducted several congressional hearings within the last year to discuss what avenues to take in implementing privacy reform.¹⁰² Congressional members have proposed various legislations such as the Do Not Track Bill.¹⁰³ While these legislations are not appearing to pass muster, the Obama Administration proposed the Consumer Privacy Bill of Rights in an effort to combat the sophisticated means of online companies in tracking and collecting personal data.¹⁰⁴ The belief is that this bill of rights will serve as a “blueprint guid[ing] efforts to protect privacy and assure continued innovation in the Internet economy.”¹⁰⁵

Through extensive consultation, the Consumer Privacy Bill of Rights seeks to outline principles that “should be reflected in a privacy law” by fostering a relationship where Internet industry leaders and Congress work together to enhance privacy protection.¹⁰⁶ The proposal refrains from hampering innovation but desires to implement flexible codes of conduct that will guarantee the future success of the Internet economy, which directly contributes to the U.S. economy.¹⁰⁷ It delegates strong authority to the Federal Trade Commission to enforce a company’s public promise to abide by a code of conduct as part of the design to increase interoperability between the United States and its trading partners.¹⁰⁸ The end result will balance privacy interests and continue economic growth.¹⁰⁹

102. See *Internet Privacy Hearing*, *supra* note 1; *Privacy and Data Security: Protecting Consumers in the Modern World: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 112th Cong. (2011).

103. See Cecilia Kang, *Sen. Rockefeller Introduces ‘Do Not Track’ Bill for Internet*, WASH. POST (May 9, 2011, 4:23 PM), http://www.washingtonpost.com/blogs/post-tech/post/sen-rockefeller-introduces-do-not-track-bill-for-internet/2011/05/09/AF0ymjaG_blog.html (mentioning the proposed bill would allow Internet users to block online companies from tracking their Internet activity); Sarah Kessler, *Do Not Track Bill Introduced in Congress*, MASHABLE (Feb. 11, 2011), <http://mashable.com/2011/02/11/do-not-track-bill/> (addressing the proposed bill that would allow online users to “opt-out” that was introduced in the House of Representatives by California Democrat Jackie Speier).

104. See Press Release, *supra* note 15.

105. *Id.*

106. See *id.*

107. See *id.*

108. See *id.*

109. See *id.* (“These approaches will provide consistent protections for consumers, reduce compliance costs for companies, guide U.S. efforts to clarify data protections globally, and ensure the flexibility that is critical to innovation in the commercial world.”).

Under this framework, the Consumer Privacy Bill of Rights presents seven building blocks to a national privacy law: (1) individual control; (2) transparency; (3) respect for context; (4) security; (5) access and accuracy; (6) focused collection; and (7) accountability. With these building blocks in place, companies have to abide by “reasonable” restrictions and limitations upon their personal data practices.¹¹⁰ Companies must assess privacy risks cultivated by their business habits and install “reasonable safeguards.”¹¹¹ They must take into consideration the age and sophistication of the consumers they built a relationship with, limiting the use and disclosure of personal information to purposes consistent with the creation of that relationship and the context for which that information was supplied.¹¹² Companies must collect no more than the necessary amount of personal information and provide consumers “reasonable measures” to access and correct the collected personal information.¹¹³ The consumers possess the right to control the collection, use, and dissemination of their personal information.¹¹⁴ This right requires companies to be transparent in their privacy risk and data collection practices.¹¹⁵ However, the key ingredient behind the success of this proposal lies with accountability, where companies should be held accountable by enforcement authorities to ensure compliance with these principles.¹¹⁶

While appearing to mimic the European Union’s privacy directive and its recent proposed amendments, the Consumer Bill of Rights proposed by the Obama Administration presents a “reasonable” approach to online privacy reform. Although not law, it serves as a blueprint for legislatures to follow upon enacting a national privacy law.¹¹⁷ While appearing to favor businesses and economic growth, this proposal embodies the American jurisprudence involving liberty, balancing privacy interests with the demands of an organized free society.¹¹⁸ The concern is whether this blueprint is the necessary guideline to online privacy reform.

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

III. THE EUROPEAN UNION AND UNITED STATES'S UNDERLYING FOUNDATION FOR ONLINE PRIVACY PROTECTION

"[C]onsumer trust is essential for the continued growth of the digital economy. . . . For businesses to succeed online, consumers must feel secure."¹¹⁹ International leaders, including President Obama, have recognized that technological innovation such as online behavioral advertising not only enhances the growth and prosperity of online businesses but also the national economy. More importantly, these leaders have identified consumer trust as the core ingredient that enables online businesses to achieve such profitable outcomes. While acknowledging the value of consumer trust, online businesses remain active in their strategic pursuit to make a greater profit by lowering cost. They can lower operational costs by selectively marketing only products likely to be purchased by the user and operating behind an uniform privacy system., As social media websites make a profit and online business reduce operational costs, online privacy fades away as user's personal data is consistently tracked and processed by third parties. Therefore, with the lack of effective privacy laws that provide adequate privacy protection for online users, legislatures have pushed for privacy laws or a privacy bill of rights that will provide the missing protections. While the European Union and the United States agree that online privacy reform is necessary, they have pursued different avenues. The distinct methodologies behind the chosen avenues have outlined current and proposed laws regarding online privacy protection.

A. Protecting Privacy as a Fundamental Human Right: The European Union's Approach to Online Privacy Protection

Taking an active role in preventing the exploitation of personally identifiable information, the European Union remains steadfast in protecting user's online privacy as an essential fundamental human right.¹²⁰ Through this perspective, the European Union enacted pri-

119. Press Release, White House, We Can't Wait: Obama Administration Unveils Blueprint for a "Privacy Bill of Rights" to Protect Consumers Online (Feb. 23, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/02/23/we-can-t-wait-obama-administration-unveils-blueprint-privacy-bill-rights>.

120. See Chuan Sun, Perspective, *The European Union Privacy Directive and Its Impact on the U.S. Privacy Protection Policy: A Year 2003 Perspective*, 2 NW. J. TECH. & INTELL. PROP. 5, 6 (2003); *EU Directive*, *supra* note 45, at 38.

vacy laws that give individuals greater control over their personal data. For instance, users have the right to delete any personal identifiable information as they chose.¹²¹ Following an “opt-in” concept, the European Union places users’ online privacy over online businesses’ economic objectives. With such a strong stance, wonder where this perspective derives from. The obvious, on its face answer comes from the European Union’s governing documents, but the truth lies in the history that sparked the formation of the European Union.

“[Human] [d]ignity is a social concept”¹²² that began at the heart of the European Union as several independent countries united for the advancement “of civilization, progress and prosperity, for the good of all its inhabitants.”¹²³ With the lingering effects of two world wars, a holocaust, and a societal infrastructure of class divisions, the European Union believed that protecting this social norm would mitigate and possibly eliminate the potential of any future bloodshed, disgrace, and humiliation.¹²⁴

Until the 21st century, the continent of Europe has been plagued with an institutionalize system of class division.¹²⁵ This system of perceived hierarchy began early with vast economic disparities that triggered unequal political power.¹²⁶ Political and judicial officials designed and enforced laws in a manner that sheltered the elites, leaving the working and middle class in a constant struggle for equality.¹²⁷ Through this economic and political fight, a “slow-maturing revolt against . . . status privilege” developed.¹²⁸ Sparking several historical events such as the French Revolution, this revolt reached its pinnacle during World War II with the emergence of the Nazi and Fascist re-

121. See Reding, *supra* note 47.

122. Avner Levin & Mary Jo Nicholson, *Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground*, 2 U. OTTAWA L. & TECH. J. 357, 388 (2005).

123. Treaty Establishing a Constitution for Europe pmbl., 2004 O.J. (C 310) 3 [hereinafter European Const.], available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML>.

124. See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1166 (2004).

125. *Id.* at 1165-66 (discussing the European history of social status and hierarchy and focusing on the effects that these social class divisions had on the implementation and need for increase protection of human dignity).

126. *Id.* (explaining the exercise of political power from one’s social status).

127. *Id.* (“In earlier centuries, though, only persons of high social status could expect their right to respect to be protected in court.”).

128. *Id.* at 1166. Professor Whitman describes a European revolution where people of lower status began to fight back in an attempt to enjoy the same legal protections given to the elites. *Id.*

gimes.¹²⁹ Behind ideals of restoring political order, reviving patriotism, and replenishing work and bread for the lower classes, Hitler and Mussolini gained political control within Germany and Italy respectively.¹³⁰ Although established with socially driven principles, these regimes evolved into dictatorships that produced the most heinous acts mankind has witnessed. Most notably, Hitler initiated an onslaught attack against the Jews in an effort to annihilate the entire race, deeming anything less than the Arian race as inferior.¹³¹ These horrifying indignities left the continent of Europe in a state of humiliation and in need of social transformation.¹³²

At its conception, the European Union instituted principles of human rights, democracy, and the rule of law as its primary values.¹³³ By establishing these values, the European Union adhered to the framework constructed by the General Assembly of the United Nations.¹³⁴ The Assembly, in 1948, composed the Universal Declaration of Human Rights which illustrated the Assembly's belief that the protection of "the inherent dignity and . . . inalienable rights of all members of the human family [lays] the foundation of freedom, justice and peace in the world."¹³⁵ In 1999, various European political leaders held a convention to draft a fundamental rights document entitled the European Charter of Fundamental Rights.¹³⁶ This document defined human dignity as an inviolable right that must be respected and pro-

129. See John Mangion, *The Rise of Fascism in Italy*, SCHOOLNET.GOV, <http://schoolnet.gov.mt/history/Options/Italy/RiseFascism.htm> (last visited Mar. 29, 2013); Third World Traveler, *The Rise of Nazism in Germany*, http://www.thirdworldtraveler.com/Fascism/Rise_Nazism_Germany.html (last visited Mar. 29, 2013).

130. See *supra* note 129 and accompanying text.

131. See *Introduction to the Holocaust*, HOLOCAUST ENCYCLOPEDIA, <http://www.ushmm.org/wlc/en/?ModuleId=10005143> (last visited, Mar. 2, 2013). See generally RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (2003) (explaining the attempt for racial annihilation).

132. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement> ("[The] disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.").

133. European Const., *supra* note 123, at 3; COUNCIL OF EUROPE, *Council of Europe's Relations with European Union*, http://www.coe.int/t/der/eu_EN.asp.

134. See Universal Declaration of Human Rights, *supra* note 132 ("Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.").

135. *Id.*

136. *The Charter of Fundamental Rights of the European Union*, EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/charter/default_en.htm (last visited Mar. 29, 2013).

tected.¹³⁷ The European Union, favoring the ideals and principles embodied in this Charter, incorporated this Charter into its constitution.¹³⁸ Leaving no room for error, the drafters of the European Union Constitution explicitly wrote, “[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.”¹³⁹ After a history of constant disregard for human rights, it became facially evident that the European Union is going to protect human dignity of its citizens at all cost.

B. Commercial Exploitation: The United States’s Attempt to Maintain the Co-Existence of Online Privacy and Economic Innovation

With no over-arching privacy law, the United States seeks to re-vamp its approach by finding the “sweet spot” between excessive regulation that creates a regulatory burden and a lack of regulation, which fails to protect one’s liberty interest.¹⁴⁰ This “sweet spot” will serve as a guide that will provide uniformity and ensure that industries protect American consumers while prohibiting government from succumbing to its usual pattern of overreaching in the marketplace.¹⁴¹ In other words, the “sweet spot” allows the United States to secure “smart ways to protect consumers . . . [while permitting] . . . e-commerce to continue to flourish.”¹⁴² What motivates the United States to grasp a privacy regime that neither favors online businesses nor

137. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 9, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:364:0001:0022:EN:PDF> (“Human dignity is inviolable. It must be respected and protected.”).

138. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 2007 O.J. (C 306) 13 (“The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg . . . which shall have the same legal value as the Treaties.”).

139. *Id.* at 11.

140. *Internet Privacy Hearing*, *supra* note 1, at 2. While the U.S. has not implemented a general privacy law, legislators believe that a general privacy law should be enacted and have been working hard to determine how to find the “sweet spot” that can properly balance the competing needs. *See id.*

141. *See Internet Privacy Hearing*, *supra* note 1, at 2. As the subcommittee chair, Representative Mary Bono Mack wanted to clarify the concerns that the subcommittee believes could cause potential consequences if not enough legislation or too much legislation was enacted. *Id.*

142. *Internet Privacy Hearing*, *supra* note 1, at 2. Throughout the subcommittee hearing, expert witnesses were questioned on the benefits and consequences of implementing privacy laws that are similar to the European Union; while admitting that the U.S. needs to implement better privacy laws, the consensus of the experts believed that there should be a better way to ensure adequate consumer protections and at the same time allow businesses and ultimately the economy to flourish. *See generally id.* at 7-90 (discussing the subcommittee hearings).

online users but seeks to satisfy all parties? Similar to the European Union, the answer lies within the underlying principle upon which the United States was founded.

Liberty sparked not only the Revolutionary War but also ignited individuals to establish a nation where all were free from tyranny.¹⁴³ The Founding Fathers of this great nation sought to establish “a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.”¹⁴⁴ Although originally focused on governmental oppression and individual liberty, they understood that liberty from all forms of oppression and for all would foster national prosperity. Thus, they drafted the United States Constitution with a purpose to “establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty. . . .”¹⁴⁵ Since acquiring national independence from the political tyranny of England, the United States has allowed the essence of liberty to direct its steps future steps.

Consequently, “[l]iberty” is a political value¹⁴⁶ that has been fully integrated into American jurisprudence where one’s liberty interest cannot be violated or infringed upon without due process of the law.¹⁴⁷ Although not fully defined by the United States Supreme Court, the term “liberty” encompasses a “rational continuum” and “a conception that sometimes gains content from the emanations of other specific guarantees . . . or from experience with the requirements of a free society.”¹⁴⁸ Through this broad definition, the Court maintains its strong mindset that constitutionally protected rights are those that are vital to the underlying functions of liberty.¹⁴⁹ Yet, the Court appreciates and acknowledges that the demands of an organized free society constantly reshape the overall scheme of liberty, fur-

143. See *Liberty! The American Revolution: “Blows Must Decide” 1774-1776* (PBS broadcast Nov. 23, 1997) (discussing the influence of liberty beginning with the American Revolution to the current government struggles).

144. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

145. U.S. CONST. pmbl.

146. Avner & Nicholson, *supra* note 122, at 388.

147. See U.S. CONST. amend. XIV, § 1.

148. *Ullman*, 367 U.S. at 517, 543 (Harlan, J., dissenting) (describing liberty to encompass a “rational continuum”); see also *Nebbia v. New York*, 291 U.S. 502, 532 (1934); *Holden v. Hardy*, 169 U.S. 366, 389 (1898); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

149. See *Taylor v. Louisiana*, 419 U.S. 522, 540 (1975) (citations omitted); *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (explaining that constitutional protected rights are those that are “fundamental [to the] principles of liberty and justice which lie at the base of all our civil and political institutions”) (citation omitted); *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (citations omitted); *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (citations omitted).

nishing the Court with the aptitude to balance the Founding Fathers' original intent with the societal needs of an evolving society.¹⁵⁰

Among the current societal needs is online privacy protection. While American history incorporates liberty from improper governmental intrusion, little has been done to deal with liberty in the private sector, including online business tracking.

IV. THE UNITED STATES SHOULD NOT ADOPT THE EUROPEAN UNION'S PRIVACY LAWS

In an effort to combat serious privacy risks that pose a risk of grave harm to each individual, how does the United States simultaneously foster economic innovation and extinguish privacy threats? The answer lies in the principle that served as the foundational tool to build this prominent nation, liberty.

As the history of American jurisprudence denotes, liberty has consistently saved the day, solving threats to individual rights created by societal demands and changes. As it did in the past, the concept of liberty and its interpretation will allow congressional and judicial members to respectively enact and enforce a privacy law that will promote autonomy, facilitate economic growth, and maintain accountability.

While containing flaws, the Obama Administration's Consumer Privacy Bill of Rights serves as a resource that illustrates how liberty can ensure proper online privacy reform. Although congressional members may be "skeptical of the need for legislation,"¹⁵¹ Congress should enact a privacy law that replicates the principles embodied in the Consumer Privacy Bill of Rights. The fear that governmental legislation will harm the Internet by not being able to keep pace with the vast technological advances is evident.¹⁵² However, through support from industry leaders, a privacy law can be enacted that guarantees flexibility coupled with practical data collection principles.

150. See *Ullman*, 367 U.S. at 542 (interpreting liberty broadly as "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society").

151. *Balancing Privacy and Innovation: Does the President's Proposal Tip the Scale? Before the Subcomm. on Commerce, Manufacturing, and Trade of the H. Comm. on Energy and Commerce*, 112th Cong. (2012) [hereinafter *Balancing Privacy and Innovation*], available at <http://energycommerce.house.gov/hearing/balancing-privacy-and-innovation-does-presidents-proposal-tip-scale> (statements of Mike Zaneis, Senior Vice President and General Counsel for Interactive Advertising Bureau and Jonathan Zuck, President of the Association for Competitive Technology).

152. *Id.*

A. Liberty Promotes the Respect for Autonomy

Each day, online consumers make the decision to directly or indirectly upload personally identifiable information. As they use the services offered by social media websites, they make available personal information containing personal interests, activities, residence, employment, thoughts, and other information that they might not necessarily want the public to see. These decisions to make a profile in an effort to connect with others can be considered a part of the decisions central to liberty and autonomy. In essence, these decisions cultivate the opportunity for these individuals to continue to define their own existence.

However, as online consumers exercise their autonomy right, online users must recognize an inherent privacy risk through Internet activity. Through continual public reports of privacy breaches, users are on constant notice that they remain vulnerable to any potential privacy breach at any given moment; yet, they continue to make use of these valuable services. Does that truly mean that users do not have a reasonable expectation of privacy? Are online users accepting an assumption of potential risks by continuing to use these Internet services and thus precluded from alleging privacy claims? While it seems that online consumers do not have a reasonable expectation of privacy, the reality is far from it. Consumers' reasonable expectation of privacy is connected to the relationship developed when a user becomes a member or utilizes these companies' services. The expectation of privacy lies in the concept of consumer trust. Even industry leaders admit that without consumer trust their online businesses will fail.

Industry leaders believe that self-regulation will better allow businesses to foster consumer trust.¹⁵³ The European Union decided alternatively and enacted stringent laws that give users complete control of their personal data, enforcing an "opt-in" approach and granting the individual the right to be forgotten.¹⁵⁴ The Obama Administration's Consumer Privacy Bill of Rights, while still favoring individual control, focuses on the relationship between the user and the online business.¹⁵⁵ With this focus, the Obama Administration recognizes the value of autonomy to economic prosperity and presents flexibility

153. *Id.*

154. See Reding, *supra* note 47.

155. THE WHITE HOUSE, *supra* note 119.

that will allow autonomy to not only co-exist but also promote further economic growth. Companies providing users with “appropriate control,” including the “means to withdraw or limit consent,” accomplish this objective.¹⁵⁶ This flexibility balances the autonomy of the individual as they upload personal information and the contractual arrangement, in which businesses seek to provide effective services.

Through flexibility, autonomy will be respected, and the economy will continue to flourish. By granting individual control through “appropriate control,” individuals will feel more comfortable utilizing social media services, and businesses will not be as restricted by an “opt-in” framework that requires increase operational costs.

B. The Preservation of Continual Economic Innovation and Growth

“Too much is at stake for us to get this wrong.”¹⁵⁷ Representative Mary Bono Mack’s statement accurately depicts the economic situation. The facts are self-evident. Per year, online retail sales total \$145 billion in the United States.¹⁵⁸ The Internet supplies \$175 billion to the U.S. economy through direct economic value.¹⁵⁹ This includes \$85 billion in online retail transactions, \$70 billion to Internet service providers, and \$20 billion in advertising services.¹⁶⁰ This economic success branches from the consistent technological advances that include efficient online behavioral advertising through personal data tracking. With such a vast economic impact that heavily relies on continual technological updates, it is understandable why congressional members are “skeptical of Congress’ or a government regulator’s ability to keep up with the innovative and vibrant pace of the Internet without breaking it.”¹⁶¹ However, preserving consumer trust will ultimately preserve the economic pace of the Internet.

Valuing the importance of consumer trust, the European Union addresses its privacy concerns primarily through the “opt-in” framework. Their privacy laws mandate that companies receive explicit consent from the user, individuals have the ability to delete their data,

156. *Id.*

157. See *Balancing Privacy and Innovation*, *supra* note 151 (statement of Rep. Mary Bono Mack, Chairman, Subcomm. on Commerce, Mfg., & Trade).

158. THE WHITE HOUSE, *supra* note 119.

159. *Id.*

160. *Id.*

161. See *Balancing Privacy and Innovation*, *supra* note 151 (statement of Rep. Fred Upton, Chairman, Energy & Commerce Comm.).

and companies uphold a high level of transparency. Companies are required to maintain detailed records and answer any inquiries made by consumers. The problem with such privacy legislation is that it hampers the Internet's economic innovation by increasing operational and efficiency costs to online businesses. Online businesses make greater profits from the ability to use personal data to efficiently advertise. Consumers benefit from possessing the capability of seeing only goods that matter to them, lowering time allocated on the Internet. The effects of such privacy legislation are seen through its implementation. Businesses are faced with compliance costs across the board, posing a threat to the economy and jobs.

Alternatively, the proposed Consumer Privacy Bill of Rights seeks to implement a flexible guideline that promotes, not stifles, economic growth. It focuses on the essence of the contractual relationship formed by the user and the companies. Under such proposed legislation, companies will be obligated to only collect and use personal data that is required to fulfill its purposes behind the formation of the relationship. If businesses desire to use the data for other purposes, they must use heightened transparency and disclose the other purpose in an easily actionable manner to the consumer. Thus, businesses will be able to still effectively advertise through the use of personal data without severe restrictions.

By not placing finite, harsh restrictions on businesses, the Consumer Privacy Bill of Rights fosters economic innovation. Internet industry leaders believe that it is better equipped to answer concerns from an 'evolving Internet ecosystem.'¹⁶² However, the proposed bill of rights only seeks to implement a baseline set of principles that should guide industry leaders and congressional members. It promotes an open line of communication between industry leaders and governmental authorities. While regulation is most likely not desired, the fact remains that companies still manipulate personal data for economic purposes. Legislation similar to the proposed Consumer Privacy Bill of Rights will only ensure that the industry adheres to fair business practices.

162. Press Release, House Comm. on Energy & Commerce, Manufacturing, and Trade Subcommittee Discusses President's Privacy Proposal (May 29, 2012), <http://energycommerce.house.gov/press-release/commerce-manufacturing-and-trade-subcommittee-discusses-presidents-privacy-proposal> (quoting Mike Zaneis, Senior Vice President and General Counsel for Interactive Advertising Bureau).

C. Accountability Remains Key to the Success of Online Privacy Reform

At times, the Internet can be deceptive, and users may not know how their personal information is being used. This feeling of the unknown presents the possibility that third parties will exploit users for economic gain. Accountability helps alleviate this concern.

The European Union fails to present accountability as a key pillar of its privacy regime.¹⁶³ Instead, the European Union speaks to enforcement regardless of data location.¹⁶⁴ In other words, all businesses operating in the European Union market or targeting European Union citizens must comply with the European Union privacy laws. To guarantee enforcement, privacy watchdogs are set in place, but not necessarily ascertained.

On the other hand, the Consumer Privacy Bill of Rights seeks to hold companies accountable to their public commitments to safeguard privacy. It delegates strong authority to the Federal Trade Commission to ensure that companies remain true to their promises. This component of accountability again focuses on the contractual relationship formed by the consumer and the online company. Companies will have an incentive not to cheat or bypass privacy settings to gain a profit. Additionally, consumer trust increases as consumers feel more comfortable with the idea that online companies are acting as they say they are. Also, this method of accountability facilitates the international exchange of goods and services between the United States and its trading partners. As companies adhere to the privacy legislation similar to the Consumer Privacy Bill of Rights, foreign countries will trust that their citizens' privacy will not be exploited.

With an additional focus of accountability, the Consumer Privacy Bill of Rights adds security to consumer trust. Such value will only assist in the free flow of information and economic growth.

CONCLUSION

Although the congressional leaders may not be hearing the public outcry for privacy legislation, the need for online privacy reform is apparent.¹⁶⁵ The question is what should this online privacy reform

163. See Reding, *supra* note 47.

164. *Id.*

165. See *Balancing Privacy and Innovation*, *supra* note 151 (statement of Rep. Mary Bono Mack, Chairman, Subcomm. on Commerce, Mfg., & Trade).

look like in the United States? The Internet provides an economic boost as websites, such as Google and Facebook, track personal data in order to sell that data to businesses desiring to effectively market their products. The obvious goal is not to stifle economic innovation; however, consumers must feel safe and able to trust companies if companies want users to continue to use their services. Consumer trust is a requisite for this business scheme to continue reaping success. Legislation that mimics the principles within the Consumer Privacy Bill of Rights will enhance consumer trust by flexibly balancing the need for economic innovation and the societal need for privacy protection.

COMMENT

Pulling the Trigger: Shooting Down Mandatory Minimum Sentencing for Victims Who Kill Their Abuser

LAUREN DANICE SHUMAN*

INTRODUCTION	984
I. HISTORY AND BACKGROUND OF DOMESTIC VIOLENCE AND MANDATORY MINIMUM SENTENCING	989
A. Domestic Violence Defined and Alarming Statistics	989
B. Mandatory Minimum Sentencing History	992
C. State Mandatory Minimum Sentencing: New York and Jenna's Law	995
D. Policy Arguments Supporting and Discrediting Mandatory Minimum Sentencing	1000
E. The Failure of the Self-Defense Argument in Domestic Violence Cases	1003
F. The Shortfalls to the Battered Woman's Syndrome .	1005
II. STATE EXAMINATION: NEW YORK AND THE PROPOSED DVSJA	1006
A. Background and Purpose of the DVSJA	1006
B. Mandatory Minimum Sentence State Comparison: Minnesota and Virginia	1008

* J.D. Candidate, Howard University School of Law, Class of 2013; Senior Notes & Comments Editor, *Howard Law Journal*, Vol. 56, 2012-2013; B.A., Sociology, University of Wisconsin, Madison, 2007. I would like to thank my faculty advisor, Professor Cynthia Mabry, for her guidance; the entire *Howard Law Journal*; and my family and friends for their continued support. To any survivor of domestic violence, and to the less fortunate victims who were failed by the criminal justice system, this piece is for you.

III. PROPOSAL TO ADOPT TO DVJSA AND IMPLEMENT ADDITIONAL STEPS	1010
A. New York Should Adopt the Proposed DVSJA	1010
B. Additional Steps	1013
CONCLUSION	1017

INTRODUCTION

“I was a victim before I was a defendant.”¹

That night we got into an argument with each other and he came after me with a gun. During the course of the struggle, I was able to get the gun away from him. He [eventually] went into the bedroom and fell asleep. During the course of when he actually did fall asleep, I took the gun back and I shot him.

I just felt so strongly at that point [in the] evening [that] it was going to be a matter of his life or my life. That was the second time that he had tried to use a gun on me[,] and it was also two weeks before [that] he had actually tried to commit suicide. . . .

I clearly felt that if he was going to take his own life, that he would take my life first and then take his life.²

The scenario described above is just one instance of an abused woman who survived after years of living in fear of her abusive partner. Unfortunately, not every woman is provided with the opportunity to safely regain control of her life. “In the United States, women are more likely to be attacked, injured, raped, or killed by a current or former male partner than by all other types of assailants combined.”³

Domestic violence occurs between members of a household when one member uses a pattern of coercive tactics in order to establish and maintain power and control.⁴ Many battered women who do survive

1. *Coalition for Women Prisoners Memo in Support of the Domestic Violence Survivors Justice Act* (A.7874/S.5436), DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT, <http://www.dv-survivorsjusticeact.org/wp-content/uploads/2011/07/DV-SJA-CWP-Spt-Memo-5-24-11-FINAL.pdf> (last visited Jan. 30, 2013) [hereinafter *Coalition Memo*] (quoting Kate, who was sentenced to eight and one-third to twenty-five years incarceration for killing her abuser with a gun. She was denied parole four times and served seventeen years before her release in 2008).

2. *Id.*

3. ELIZABETH ANN DERMODY LEONARD, CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL 1 (2002), available at <http://www.freebatteredwomen.org/pdfs/convsurv.pdf>.

4. BLACK’S LAW DICTIONARY 1564 (7th ed. 1999); see also TAMAR KRAFT-STOLAR ET AL., AVON GLOBAL CTR. FOR WOMEN & JUST. & DOROTHEA S. CLARKE PROGRAM IN FEMINIST JURISPRUDENCE, FROM PROTECTION TO PUNISHMENT: POST-CONVICTION BARRIERS TO JUSTICE FOR DOMESTIC VIOLENCE SURVIVOR-DEFENDANTS IN NEW YORK STATE 3, n.4 (2011), available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1001&context=avon_clarke

often face a secondary restraint when they fight back to protect themselves: imprisonment.⁵ Believing there is only one remedy for ending the abuse and ensuring survival, battered women kill their abuser.⁶ As a result, these survivors are charged with murder and are incarcerated for lengthy periods of time. Without a “get out of jail free card”⁷ or room for judicial discretion, these survivors are sent to jail as a direct result of mandatory minimum sentencing policies.

Mandatory minimum sentencing provisions refer to “statutory provisions requiring the imposition of a sentence of at least a specified minimum term of imprisonment when criteria set forth in the relevant statute have been met.”⁸ Today, mandatory minimum sentences are used at both the federal and state levels in an effort “to provide tough, uniform, fair, and economically efficient punishment for criminals in America.”⁹ Nearly all states have passed “determinate sentencing schemes” and mandatory minimum laws similar to the federal sentencing guidelines for violent felonies.¹⁰ Mandatory minimum sentencing results in zero possibility of early release, as it ensures that a defendant will serve the designated mandatory minimum of his or her sentence in prison.¹¹

Inflexible mandatory minimum sentencing results in unfair punishment, perpetuates gender stereotypes, inadequately deters future domestic violence, and creates an undue financial burden on the community.¹² For some women, home is a place of greater danger than public places—more dangerous than the workplace, more dangerous than the highway, more dangerous than city streets.¹³ Yet, too often,

(“[D]omestic violence [is] ‘a pattern of coercive tactics that can include physical, psychological, sexual, economic, and emotional abuse perpetrated by one person against an adult intimate partner, with the goal of establishing and maintaining power and control.’”) [hereinafter REPORT].

5. See LEONARD, *supra* note 3, at 31.

6. See *id.* at 25 (“Some women perceive that every possible escape route away from the terror is closed off from them and the only apparent avenue to end the ongoing violence is through suicide or homicide.”). More than 90% of women in prison for killing an intimate partner were battered by an intimate partner in the past. See *Coalition Memo*, *supra* note 1, at 3.

7. This is a term of art coined by the popular game “Monopoly.”

8. UNITED STATES SENTENCING COMMISSION, OVERVIEW OF STATUTORY MANDATORY MINIMUM SENTENCING 1 n.1 (2009), available at http://www.ussc.gov/LegislativeandPublicAffairs/CongressionalTestimonyand_Reports/Submissions/20090710StCMandatoryMinimum.pdf (last accessed Mar. 2 2013).

9. Christopher M. Alexander, *Crushing Equality: Gender Equal Sentencing In America*, 6 AM. U. J. GENDER & L. 199, 200 (1997).

10. *Id.* at 202.

11. See BLACK’S LAW DICTIONARY, *supra* note 4, at 1368; see also *infra* Part I.B.

12. See *infra* Part I.B-D.

13. LEONARD, *supra* note 3, at 1 (“Male intimates inflict more injuries on women than auto accidents, muggings, and rape combined (McLeer and Anwar 1989).”). While domestic violence

these victims of abuse become defendants facing mandatory minimum incarceration for killing their abuser.¹⁴ Mandatory sentencing produces gender disparities in the criminal justice system, as “[b]attered women who kill often receive harsher sentences than men who murder their wives or lovers.”¹⁵ The average sentence for a man who kills his wife or girlfriend is two to six years.¹⁶ In comparison, women receive sentences of fifteen years.¹⁷ The difference in sentence lengths occurs because battered women use a gun or weapon to protect themselves from abuse more frequently than men, who more often use their bare hands.¹⁸ Thus, women face longer jail sentences than men because the weapon involved in the crime raises the offense to a violent felony.¹⁹

Trials often end in convictions of first-degree murder for women accused of killing their abusive partners.²⁰ Abused women are often

affects all genders and types of relationships, this Comment discusses domestic violence issues in view of a man abusing a woman, as this is the most common type of domestic abuse. See *id.* at 2 (“[A]buse of women by intimate male partners occurs more often than any other type of family violence (Levinson 1989).”).

14. Correctional Association of New York, *Women in Prison Project, Survivors of Abuse in Prison Fact Sheet*, 1 (Apr. 2009), available at <http://www.correctionalassociation.org/resource/women-in-prison-fact-sheet> (noting that ninety-three percent of women convicted of killing intimate partners (husbands, boyfriends or girlfriends) have been physically or sexually abused by their partner) [hereinafter *Fact Sheet*].

15. Christine Noelle Becker, *Clemency for Killers? Pardoning Battered Women who Strike Back*, 29 LOY. L.A. L. REV. 297, 330 (1995).

16. MICHIGAN WOMEN’S JUSTICE & CLEMENCY PROJECT, CLEMENCY FOR BATTERED WOMEN IN MICHIGAN: A MANUAL FOR ATTORNEYS, LAW STUDENTS AND SOCIAL WORKERS 4 (Michigan ACLU, Oct. 1998), available at <http://www.umich.edu/~clemency/clemencymnl/printable.html> (“The average prison sentence for men who kill their intimate partners is [two] to [six] years. Women who kill their partners are sentenced, on average, to [fifteen] years.”).

17. *Id.*

18. See LEONARD, *supra* note 3, at 9 (“[M]ale offenders commit beating or strangulation homicides; women, on the other hand, are more likely to stab or shoot their victims once.”).

19. See *id.* at 31 (“[A] woman is penalized more harshly because she used a weapon. Research shows that a batterer’s primary weapons are his hands, fists, and feet, and that typical battering episodes involve slaps, punches, kicking, stomping, and choking (Gillespie 1989). As noted earlier, only male offenders commit beating or strangulation homicides (Casenave and Zahn 1992). Eisenberg and Dillon (1989) suggest that since a woman is merely equalizing the relative strength of females versus males when she uses a weapon, it does not constitute ‘excessive force,’ thus, the law should include an ‘equalizer principle.’”); see also *id.* at 28 (“[G]ender inequities [persist] in the indictment, prosecution, and sentence determination of women who kill their abusers. . . . [W]omen have received longer determinate sentences”); *id.* at 29 (noting the system may be growing tougher toward these women); *id.* at 31 (“Frequently, a woman is penalized more harshly because she used a weapon.”); *id.* (citing to Eisenberg and Dillon, Leonard notes that the law should include an “equalizer principle” because “a woman is merely equalizing the relative strength of females versus males when she uses a weapon”).

20. “The law divides criminal homicide into two classes of offense, murder and manslaughter, each of which is further differentiated based on the person’s state of mind at the time of killing.” *Id.* at 109. Leonard goes on to note that “[m]ost women accused of killing their abusive male intimates are charged with first-degree murder.” *Id.* at 109-10 (citation omitted).

convicted because the circumstances surrounding their homicidal acts do not meet the requirements of current self-defense laws.²¹ The elements to prove self-defense are: the use of equal or lesser force against someone when the person apprehends imminent and unlawful deadly force.²² In addition, the non-aggressor, and a reasonable person, must believe the deadly force was necessary, with no ability to retreat.²³ It is difficult for domestically abused defendants to prove self-defense because the women often kill their abusers when it is “safe.”²⁴ For instance, many battered women kill their abuser while he is sleeping; thus, they fail to meet the element of “imminent” harm.²⁵ Unfortunately, current self-defense laws do not reflect the real circumstances that most battered women experience, and the defendants are thus unable to meet the elements of self-defense.²⁶

Understanding the unlikeliness of winning a claim of self-defense, many abused women facing conviction will opt for a plea bargain, reasoning that it is a less risky option than going to trial.²⁷ A plea ar-

21. *Id.* at 28 (“Despite generally abundant evidence that they were severely abused by the men they killed, many if not most of these women are convicted because the circumstances surrounding their homicidal acts do not meet the requirements of current self-defense law . . .”).

22. MYRON MOSKOVITZ, *CASES AND PROBLEMS IN CRIMINAL LAW* 375 (5th ed. 2003).

23. *Id.*

24. See, e.g., Lisa S. Scheff, *People v. Humphrey: Justice for Battered Women or a License to Kill?* 32 U.S.F. L. REV. 225, 225-27 (1997) (Judy Norman was beaten, had glass broken against her face, had cigarettes burned into her, was forced to prostitute herself, and compelled to eat dog food off the floor on her hands and knees. Denied by local law enforcement and battered women’s shelters, Judy shot her sleeping husband in an act of desperation. Unable to claim self-defense because she killed her abuser while he was asleep, Judy was then convicted of manslaughter).

25. See, e.g., *id.*; see also LEONARD, *supra* note 3, at 32 (“The requirements of immediate danger, necessary force, reasonable belief and the duty to retreat present almost insurmountable barriers to a self-defense claim in the wife-battery situation.”) (citation omitted).

26. See Scheff, *supra* note 24, at 226 (“[B]attered women have encountered unique difficulties because the definition of self-defense does not encompass the concept of domestic violence.”).

27. LEONARD, *supra* note 3, at 29 (“Osthoff (1991) reports that the vast majority of women accused of killing their abusive partners (72 percent to 80 percent) are convicted or accept a plea, and many receive long, harsh sentences. In her analysis of domestic homicide offenders, Mann suggests that the system may be growing tougher toward these women . . .”). Leonard also discusses how “[t]he requirements of immediate danger, necessary force, reasonable belief and the duty to retreat present almost insurmountable barriers to a self-defense claim in the wife-battery situation.” *Id.* at 32 (citation omitted). Thus, many battered women will opt for a plea bargain, resulting in a long jail sentence. Leonard notes that, “Some accused women accept plea bargains to protect their children, to spare their families the humiliation of a trial, to avoid the death penalty threatened by prosecutors, or to speed up what they see as the inevitable, negative outcome. Others refuse plea bargains because they are confident in the fairness of the system . . . they are ready to fight for themselves . . . they feel they have nothing to lose, or . . . they follow the instructions of their attorneys. *Id.* at 122; see also Linda L. Ammons, *Why Do You Do the Things You Do? Clemency for Battered Incarcerated Women, A Decade’s Review*, 11

rangement is likely to result in a voluntary manslaughter plea with a reduced jail sentence.²⁸

The prevalence, severity, and unique circumstances of domestic violence warrant that cases involving such a delicate matter should be treated in a special light in the criminal justice system. New York's proposed Domestic Violence Survivors Justice Act (DVSJA)²⁹ would help remedy the criminal justice system's failure to protect abused women and the system's unfair punishment of these survivors. The DVSJA would permit judicial discretion and alternatives to incarceration; thus, bypassing mandatory minimum regulations and creating more protection for abused women.³⁰

This Comment proposes that New York, and all states with mandatory minimum sentencing and no exception for domestic violence cases, should adopt the Domestic Violence Survivors Justice Act because it will protect abused women from harsh punishments and release those who have been unfairly punished for protecting themselves and their families. Part I of this Comment discusses the history and background of mandatory minimum sentencing, and focuses on policy arguments supporting and discrediting determinate punishment. In addition, background information and statistics relating to domestic violence and the consequences of such violence are reviewed in Part I. Part II analyzes current mandatory minimum sentencing policies in New York, and discusses and analyzes the DVSJA in detail. Part II then compares relevant laws in New York to laws in three other states, each with a different sentencing system. The comparison includes the states of Minnesota, Michigan, and Virginia in order to assess fairness in sentencing. Part III proposes that all states, including New York, should adopt the DVSJA. Part III advances that additional measures, such as judicial training, alternatives to incarceration,

AM. U. J. GENDER SOC. POL'Y & L. 533, 549 (2003) ("Women were also . . . coerced into plea bargains because they knew and/or were advised that juries would not believe them, and it would be hard, if not impossible to get jury instructions on self-defense. The criminal justice process for these women was fatally flawed.").

28. See LEONARD, *supra* note 3, at 29. Through narratives, Leonard cites to one case where the "attorney for a Native American woman advised her to turn down a plea bargain, which would have resulted in a much lower sentence than the final [seventeen] years to life she received." *Id.* at 111.

29. Domestic Violence Survivors Justice Act, 2011 N.Y. Sess. Laws 5436 (proposed May 20, 2011) [hereinafter DVSJA].

30. *Id.* ("[The goal of the Act is to] expand upon the existing provisions of alternative sentencing for domestic violence cases; [and] second, to allow judges the opportunity to resentence currently incarcerated persons for offenses in which certain domestic violence criteria was a significant element of the offense.").

and increased clemency be implemented along with the Act to protect abused women and remedy unfair punishment.

I. HISTORY AND BACKGROUND OF DOMESTIC VIOLENCE AND MANDATORY MINIMUM SENTENCING

A. Domestic Violence Defined and Alarming Statistics

Domestic violence is “violence between members of a household, [usually] spouses; an assault or other violent act committed by one member of a household against another.”³¹ Some state statutes define domestic violence, as “a pattern of coercive tactics that can include physical, psychological, sexual, economic, and emotional abuse perpetrated by one person against an adult intimate partner, with the goal of establishing and maintaining power and control.”³²

The term battered woman is a generally accepted phrase; however, other commonly used terms include “abused woman,” “victim,” and more recently, “survivor.”³³ A battered woman is “a woman who is repeatedly subjected to any forceful physical or psychological behavior . . . in order to coerce her to do something . . . without any concern for her rights.”³⁴

Domestic abuse crosses all socioeconomic strata, racial, ethnic, religious and age groups; however, abuse of women by intimate male partners occurs more often than any other type of family violence.³⁵ Since battering is the number one cause of injury to women in the United States,³⁶ it is not difficult to conceive that ninety-three percent of women convicted of killing intimate partners (husbands, boyfriends, or girlfriends) have been physically or sexually abused by their partner.³⁷ Crimes for which women are incarcerated are often

31. BLACK’S LAW DICTIONARY 1564 (7th ed. 1999).

32. REPORT, *supra* note 4, at 3 n.4 (citing The New York State Office for the Prevention of Domestic Violence (OPDV)).

33. MICHIGAN WOMEN’S JUSTICE & CLEMENCY PROJECT, *supra* note 16, at 2 (“The victim of this [domestic] abuse is referred to as the ‘survivor,’ because she in fact engages in many strategies that help her survive the abuse.”). Note that this Comment uses all four phrases interchangeably.

34. LEONARD, *supra* note 3, at 4.

35. *Id.* at 2. In addition, “[e]ach year in America, up to 4,000 women are killed by their husbands, boyfriends, or former partners, many of whom had looked to the courts for help.” LEONARD, *supra* note 4, at 24 (citing National Clearinghouse for the Defense of Battered Women 1994).

36. *Fact Sheet*, *supra* note 14, at 2.

37. *Id.* at 1.

directly related to domestic abuse.³⁸ In 1988, women committed only 6.8% of nonfamily homicides, but were responsible for 40.7% of spousal homicides.³⁹

The exorbitant number of women incarcerated for murdering an abuser will continue to rise until effective measures are implemented to protect abused women and a just punishment system is established. Judges and juries often lack understanding of domestic violence issues.⁴⁰ Rather than empathize with the defendant, the trier-of-fact has difficulty understanding why the abused victim did not leave the relationship or report an abusive incident.⁴¹ The question: “Why does a woman stay in an abusive relationship?” is often posed.⁴² In truth, women never “stay” in battering marriages.⁴³ The word “stay” inappropriately implies a static condition because the women in abusive marriages are never static: “they are always in flux, always coping, hoping, and looking for an end to the abuse.”⁴⁴

Instead, the more appropriate question to ask is: “What prevents her from leaving?”⁴⁵ Domestic violence often goes unreported for fear of arrest or further abuse by the intimate partner.⁴⁶ Reports estimate that only one in seven domestic assaults come to the attention of

38. See, e.g., REPORT, *supra* note 4, at 3 (“The New York State Department of Correctional Services, for example, found that [sixty-seven percent] of women sent to prison in 2005 for killing someone close to them were abused by the victim of their crime. A 1996 study by the State Division of Criminal Justice Services report that [ninety-three percent] of women convicted of killing intimate partners had been physically and sexually abused by an intimate partner during adulthood.”).

39. LEONARD, *supra* note 3, at 8.

40. See *infra* Part III.

41. *Id.*

42. Alix Kates Shulman, *Foreword* to WOMEN IN THE TREES, U.S. WOMEN’S SHORT STORIES ABOUT BATTERING AND RESISTANCE, 1839-2000 xxi (Susan Koppelman ed., First Feminist Press 2004).

43. *Id.*

44. *Id.*

45. *Id.*

46. LEONARD, *supra* note 3, at 18 (“[W]hile [sixty] percent of the [three-hundred] battered women in their study asked to have their spouses arrested, police arrested the abusers only [twenty-eight] percent of the time. . . . Victims not only face the reluctance of some officers to arrest abusers, they also contend with a growing possibility of their own arrests.”); see *id.* at 92-93 (recounting one woman’s story who got her “ass kicked in” by her abuser after the police left); see also *id.* at 17-18 (“A study of police response to spousal assault found that police officers, like the public at large, hold stereotypical views about battered women and family fights that undermine their effectiveness in dealing with the batterer and the victim [T]he tendency persists for officers to view women claiming to have been abused as non-credible and unworthy of police time.”). In addition, people with children do not want to have a parent locked away with no one to watch the children or fear the children will be taken away by child protective services. *Id.* at 5.

the police.⁴⁷ Women offer numerous reasons for not calling police, but as a general consensus, battered women purport that police response does not resolve the issue.⁴⁸ In fact, calling the police frequently generates more violence from the abuser.⁴⁹ In Leonard's article, one victim recounts calling the police and regrets placing her abuser under citizen's arrest.⁵⁰ This victim notes that upon her husband's return home from police custody she was severely beaten.⁵¹ Notifying the police not only results in more abuse; but, police response can actually lead to the arrest of the abused victim because the police cannot tell who is the initial batterer.⁵²

A study of police responses to spousal assault found that police officers, like the public at large, hold stereotypical views about battered women and family fights.⁵³ Common stereotypes include: battered women voluntarily stay in abusive relationships; women provoke the beating and probably deserve to be hit; domestic violence is a private rather than criminal issue and is not that serious; the man is the sole head of the household and the wife should obey him.⁵⁴

These stereotypes, and other adverse perceptions, plague the criminal justice system and negatively impact abused women. Downplaying the seriousness of domestic violence or labeling the battered woman as deserving of the abuse causes society to view the batterer's death as unjustifiable.⁵⁵ This typecast of domestic violence results in a

47. *Fact Sheet*, *supra* note 14, at 2.

48. See LEONARD, *supra* note 3, at 27 ("Before the deadly event, many women make repeated but failed attempts to enlist the help of law enforcement for their abusive situations. One study of domestic homicides found that in 85 percent of the cases, the police had been summoned at least one time before the final incident, and in half the cases, the police were called five or more times before the killing occurred (Marcus 1981). Research shows that police are likely to respond more quickly if the attacker is a stranger than if he is known to the victim.") (citation omitted); *id.* at 17, 88.

49. See, e.g., *infra* note 50.

50. LEONARD, *supra* note 3, at 92-93

When he was violent with me, the police were called and they said they could not arrest him because they didn't see him hit me. One time I had to place him under citizen's arrest because he had hit me in the head with a bottle. He was drinking a beer. He had hit me in the head with it. The cops pulled up and he was laughing. He was laughing right when the cops pulled up and there was blood squirting out of my head. The cops got out and stated, "We didn't see him do it so we can't arrest him. The only way we could take him is if you place him under citizen's arrest." I go, "Do you know what he's going to do with me?" They said that's the only way. So I did it. Wrong thing to do. He didn't even get down to the police station. They took him down to his mom's house and dropped him off. Then I really got the ass kicked in.

51. *Id.*

52. See *id.* at 90.

53. *Id.* at 17-18.

54. *Id.* at 17-18 n.1.

55. See *id.* at 27-28, 45.

conviction for the battered woman.⁵⁶ This conviction entails a long determinate sentence as established by mandatory minimum sentencing statutes. Proponents of mandatory minimum statutes are satisfied, as they opine the mandatory minimum sentence will prevent criminals from being placed back into society.⁵⁷

In reality, abused women who are incarcerated for defending themselves against abusers are more victims than criminals, and they pose little threat to public safety.⁵⁸ Killing an abuser in self-defense occurs when the abuse becomes too violent and the abused woman believes she has no alternative safe outlets.⁵⁹ While the abused woman may retaliate in a violent manner, statistics show that survivor-defendants are not a danger to society.⁶⁰ In 2008, eighty-four percent of women sent to prison for violent felony offenses were first-time felony offenders.⁶¹ Such survivors-turned-defendants have extremely low rates of recidivism, no criminal records, and no history of violence other than the offense for which they are in prison.⁶² Not a single woman of the thirty-eight women convicted of murder and released between 1985 and 2003, for example, returned to prison for a new crime within a three-year follow-up period.⁶³

B. Mandatory Minimum Sentencing History

A mandatory sentence is “a sentence set by law with no discretion for the judge to individualize punishment.”⁶⁴ A minimum sentence is “the least amount of time that a [defendant] must serve in

56. *Id.* at 23-24.

57. *See supra* Part I.D.

58. *Fact Sheet, supra* note 14.

59. *See, e.g.,* LEONARD, *supra* note 3, at 124 (“In the beginning, women believe in and call upon diverse social systems—police, family, medical and mental health professionals, schools, clergy, family courts— systems that would fail them and their children. Their collective voice describes a series of events and interactions that produces in each woman a firm belief that the unavoidable conclusion to the violent relationship is death—hers, his, or the death of both partners.”).

60. Catherine Epstein, *Fairness for Defendants Who Survive Domestic Violence*, WOMEN’S MEDIA CTR. (June 21, 2011), <http://www.womensmediacenter.com/feature/entry/fairness-for-defendants-who-survive-domestic-violence>.

61. *Fact Sheet, supra* note 14; *see also* LEONARD, *supra* note 3, at 27 (noting that the criminal justice system vigorously prosecutes battered woman who kill, even though most women offenders of domestic homicide have no history of criminal or violent behavior).

62. *Fact Sheet, supra* note 14; *see also Coalition Memo, supra* note 1, at 3 (“Of the [thirty-eight] women convicted of murder and released between 1985 and 2003, not a single one returned to prison for a new crime within [three] years of release[.]”).

63. Epstein, *supra* note 60.

64. BLACK’S LAW DICTIONARY 1368 (7th ed. 1999).

prison before becoming eligible for parole.”⁶⁵ The use of mandatory minimum sentencing arose in 1951 with the enactment of the Boggs Act, which imposed federal mandatory minimum sentencing for drug offenses.⁶⁶ A few years later, the Narcotics Control Act of 1956 increased mandatory minimum sentencing for violations of drug laws.⁶⁷ Until 1984, mandatory minimum sentencing largely corresponded to drug offenses; however, in 1984, the Comprehensive Crime Control Act established the United States Sentencing Commission and expanded mandatory sentencing to include crimes with guns.⁶⁸ Two years later, in 1986, the Anti-Drug Abuse Act assigned mandatory prison terms to persons in possession of various amounts of drugs.⁶⁹ Not long after determinate sentencing for drug convictions, the United States Sentencing Commission, in 1987, established the United States Sentencing Guidelines to provide a framework for sentencing all federal offenders.⁷⁰

While federal mandatory minimums for designated offenses continued, society moved away from such strict punishment when prisons quickly became overcrowded and the laws were proven much less effective than planned.⁷¹ In response to the poor reception of

65. *Id.*

66. Boggs Act of 1951, Pub. L. No. 82-235, 65 Stat. 767 (repealed 1970) (“[The convicted] shall be . . . imprisoned not less than two or more than five years. . . .”); *see also History of Mandatory Sentences*, FAMM FOUND. (2005), <http://www.famm.org/Repository/Files/Updated%20short%20HISTORY.pdf> (stating that the Boggs Act imposed federal mandatory minimum penalties for drug offenses in 1951) [hereinafter *History Timeline*].

67. Narcotics Control Act of 1956, Pub. L. No. 84-728, § 7237(a), 70 Stat. 568 (repealed 1970); *see also* NAT’L ALLIANCE OF ADVOCATES FOR BUPRENORPHINE TREATMENT, *Laws: A History of Opiate Laws in the United States*, NABBT.ORG, <http://www.naabt.org/laws.cfm> (last modified Dec. 12, 2012) (“Narcotics Control Act increased Boggs Act penalties and mandatory prison sentence minimums for violations of existing drug laws.”).

68. *History Timeline*, *supra* note 66.

69. *Id.*; *see also* Darryl K. Brown, *Anti-Drug Abuse Act (1986)*, ENOTES, <http://www.enotes.com/anti-drug-abuse-act-1986-reference/anti-drug-abuse-act-1986> (last visited Apr. 16, 2012).

70. 28 U.S.C. § 991(a) (1994). The purpose of the United States Sentencing Commission is to establish sentencing policies and practices for the Federal criminal justice system that “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices” *Id.* § 991(b)(1)(B); *see also* Alexander, *supra* note 9, at 201 (citing 28 U.S.C. § 994(c)-(d)) (“The Guidelines provide a sentencing range calculated by considering the criminal conduct for which the offender has been convicted and the criminal history of the offender.”); *History Timeline*, *supra* note 66 (“U.S. Sentencing Commission establishes U.S. Sentencing Guidelines to provide framework for sentencing all federal offenders.”).

71. *See, e.g.*, WOMEN IN PRISON PROJECT OF THE CORRECTIONAL ASSOCIATION OF N.Y., MANDATORY INJUSTICE: CASE HISTORIES OF WOMEN CONVICTED UNDER NEW YORK’S ROCKEFELLER DRUG LAWS iii (1999), available at <http://www.correctionalassociation.org/publications/>

mandatory minimum sentencing, Congress enacted two provisions in 1994 that allowed federal judges more discretion by exempting certain non-violent, first-time drug offenders from mandatory minimum penalties.⁷² Furthermore, in 2005, the United States Supreme Court found federal sentencing guidelines unconstitutional, declaring them advisory rather than mandatory.⁷³ However, mandatory *minimum* laws were not affected by the ruling.⁷⁴ Today, mandatory minimum sentences exist at the federal and state level in an effort to provide tough, uniform, fair, and economically efficient punishment for criminals.⁷⁵ Nearly all states have passed “determinate sentencing schemes” and mandatory minimum laws similar to the federal sentencing guidelines for violent crimes.⁷⁶

download/wipp/reports/Mandatory%20Injustice.pdf (“It costs \$32,000 to keep one inmate in a New York State prison for a year. In the past fifteen years, the annual operating budget for state prisons has climbed from \$450 million to \$1.8 billion. Despite the cost, it is widely agreed among criminal justice professionals and government officials that the Rockefeller Drug Laws have failed to curb the drug trade.”); *see also id.* at 23 (“[T]he Rockefeller Drug Laws have ‘hand-cuffed our judges, filled our prisons to dangerously overcrowded conditions and denied sufficient drug treatment alternatives to nonviolent addicted offenders who need help.’”).

72. *History Timeline*, *supra* note 66. The two mechanisms to bypass mandatory minimum sentencing at the federal level include 18 USC § 3553(e) (“the substantial assistance provision”) and 18 USC § 3553(f) (“the safety valve provision”). Provision (e) authorizes the court to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. 18 U.S.C. § 3553(e) (2006). It may be applied to any qualifying offender, regardless of the type of offense involved. U.S. SENTENCING COMMISSION, *supra* note 8, at 5. Provision (f) provides an additional mechanism by which certain drug offenders may be sentenced without regard to the otherwise applicable drug mandatory minimum provisions. It essentially acts as a “safety valve” from operation of penalties because it permits offenders “‘who are the least culpable participants in drug trafficking offenses, to receive strictly regulated reductions in prison sentences for mitigating factors’ recognized in the federal sentencing guidelines.” *Id.* at 6.

73. *See* United States v. Booker, 543 U.S. 220, 222 (2005) (holding federal sentencing guidelines to be advisory rather than mandatory). Delivering the opinion of the Court in part, Justice Breyer notes in *Booker* that 18 U.S.C. § 3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, is incompatible with the Sixth Amendment’s “jury trial” holding and must be severed from the Sentencing Reform Act of 1984 in order to make the Guidelines advisory. *Id.*; *see also History Timeline*, *supra* note 66 (“In two cases, *Booker* and *Fanfan*, the U.S. Supreme Court finds federal sentencing guidelines unconstitutional, declaring them advisory, not mandatory. Mandatory minimum laws, however, are NOT affected by the ruling.”).

74. *History Timeline*, *supra* note 66 (emphasis added).

75. Alexander, *supra* note 9, at 200 (“Sentencing guidelines, mandatory minimum sentences, and ‘three-strikes-and-you’re-out’ laws were enacted to provide tough, uniform, fair, and economically efficient punishment for criminals in America regardless of race, ethnicity, class, or gender.”).

76. *Id.* at 202; *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 25 (5th ed. 2009) (“Nearly all states have abandoned indeterminate sentencing systems for a determinate one.”); Caroline Forell, *Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia*, 14 AM. U. J. GENDER SOC. POL’Y & L. 27, 43 (2006) (“Currently, for violent crimes such as manslaughter and murder, all fifty American states have some form of determinate sentencing, most frequently mandatory minimum sentences and sentencing guide-

C. State Mandatory Minimum Sentencing: New York and Jenna's Law

Sentencing systems vary from state-to-state, resulting in inconsistent sentencing and the raising of questions of fairness. Many states have strict mandatory minimum sentencing policies while other states have a variation of structured sentencing guidelines.⁷⁷ At least twenty states and the District of Columbia have implemented sentencing guidelines to “encourage judges to take specific legally relevant elements into account in a fair and consistent way when deciding whether a convicted offender should be imprisoned, and if so, for what length of time.”⁷⁸ Of the twenty states with guideline systems, some are harsher than others because they involve longer determinate incarceration periods.⁷⁹ A mandatory guideline system may entail “stricter departure policies, tighter sentencing ranges, and more vigorous ap-

lines. This often gives American trial judges substantially less room to factor in circumstances using their own discretion . . .”).

77. See BRIAN J. OSTROM ET AL., NAT'L CTR. FOR STATE COURTS, ASSESSING CONSISTENCY AND FAIRNESS IN SENTENCING: A COMPARATIVE STUDY IN THREE STATES 1 (2006), available at <http://www.pewcenteronthestates.org/uploadedFiles/PEWExecutiveSummaryv10.pdf> (noting that guideline systems vary from state to state and comparisons are often based in the language of one system being more or less “mandatory” or “voluntary” than another) [hereinafter COMPARATIVE STUDY]; Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 937 (2001) (“Not all jurisdictions have embraced mandatory minimum sentences to the same degree. The federal government and certain states, including Michigan, New York, and California, have historically been cited as examples of criminal justice systems with overly harsh mandatory sentencing structures.”); *Mandatory Minimums In A Nutshell*, FAMM FOUND., <http://www.famm.org/Repository/Files/041410%20MMs%20in%20a%20Nutshell.pdf> (noting that sentencing guidelines are the alternative to mandatory minimums). FAMM’s factsheet goes on to explain that, “[M]any states have sentencing guidelines, in addition to their mandatory minimums. Guidelines can be either mandatory . . . or advisory Advisory guidelines are fairer and more flexible than mandatory minimums.” *Id. Compare, e.g.*, N.Y. PENAL LAW § 70.02(3)(a) (McKinney 2009) (imposing a mandatory minimum of at least five years imprisonment if convicted of a class B felony, such as an attempt to commit a class A-I felony of murder in the second degree; and, a mandatory minimum of at least ten years for manslaughter in the first degree), with VA. CODE ANN. § 17.1-801 (West 1998) (establishing the development, implementation and revision of discretionary sentencing guidelines).

78. COMPARATIVE STUDY, *supra* note 77, at 1. See, e.g., D.C. Code § 22-2104(a) (2001) (“The punishment for murder in the first degree shall not be less than thirty years”); N.Y. PENAL LAW § 70.02(2)(a) (McKinney 2013) (“[The] sentence imposed upon a person who stands convicted of a class B or class C violent felony offense must be a determinate sentence of imprisonment which shall be in whole or half years. The term of such sentence must be in accordance with the provisions of subdivision three of this section.”). The term of a determinate sentence for a class B violent felony offense must be at least five years, unless the sentence is for a crime of aggravated manslaughter in the first degree, which requires at least a ten year sentence. *Id.* § 70.02(3)(a).

79. See, e.g., COMPARATIVE STUDY, *supra* note 77, at 1 (noting that sentencing disparities under indeterminate sentencing laws is a common concern for policymakers).

pellate review[.]”⁸⁰ In contrast, a voluntary or advisory guideline system does not require a judge to follow a particular sentencing recommendation.⁸¹ Instead, judges are allowed to depart from the sentencing guidelines, provided they state a reason for not following the recommendation.⁸²

New York is one state that uses mandatory minimum sentencing policies, rather than sentencing guidelines.⁸³ In 1973, New York enacted the Rockefeller Drug Laws, which introduced mandatory minimum sentences of fifteen years to life imprisonment for possession of more than four ounces (112 grams) of a hard drug.⁸⁴ The purpose of this legislation was to deter crime; however, concerns with the increasing amount of criminal justice resources and jail space created skepticism of such sentencing policies.⁸⁵ Strong criticism amounted to a change in the laws in 1979, and the legislature amended the Rockefeller Laws to increase the amount of drugs needed to trigger the fifteen-year mandatory minimum sentence.⁸⁶

New York’s mandatory minimum sentencing expanded beyond drug cases into other areas of law. In 1995, the Governor of New York ended indeterminate sentencing for second-time violent felony offenders, and only considered early release for prisoners who served

80. *Id.* See, for example, Minnesota, where the guidelines establish “presumptive, fixed sentence for offenders The guidelines shall provide for an increase of [twenty] percent and a decrease of [fifteen] percent in the presumptive, fixed sentence.” MINN. STAT. ANN. § 244.09, subd. 5(2) (West 2012). In addition, the court must “follow the procedures of the guidelines when it pronounces sentence in a proceeding to which the guidelines apply by operation of statute.” *Id.* The Minnesota statute notes that the guidelines serve to “maintain uniformity, proportionality, rationality, and predictability in sentencing.” *Id.*

81. COMPARATIVE STUDY, *supra* note 77, at 1. For example, the Virginia statute specifically states that the guidelines are discretionary. VA. CODE ANN. § 17.1-801 (West 2012) (“The Commission shall develop discretionary sentencing guidelines to achieve the goals of certainty, consistency, and adequacy of punishment”).

82. See COMPARATIVE STUDY, *supra* note 77, at 1.

83. N.Y. PENAL LAW § 70.00 (McKinney 2009) (“[A] sentence of imprisonment for a felony . . . shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.”); see also COMPARATIVE STUDY, *supra* note 77, at 6.

84. Rockefeller Drug Law, 1973 N.Y. Laws 1040-65; see also *History Timeline*, *supra* note 66.

85. See, e.g., WOMEN IN PRISON PROJECT OF THE CORRECTIONAL ASSOCIATION OF N.Y., *supra* note 71, at ii-iii (“These mandatory drug laws have contributed to New York’s skyrocketing prison population over the past twenty-five years, which has climbed from 12,500 in 1973 to over 70,000 in 1998. . . . It costs \$32,000 to keep one inmate in a New York State prison for a year. In the past fifteen years, the annual operating budget for state prisons has climbed from \$450 million to \$1.8 billion. . . . [I]t is widely agreed among criminal justice professionals and government officials that the Rockefeller Drugs Laws have failed to curb the drug trade.”).

86. Aaron D. Wilson, *Rockefeller Drug Laws Information Sheet*, P’SHIP FOR RESPONSIBLE DRUG INFO., <http://www.prdr.org/rocklawfact.html> (revised Aug. 7, 2000).

eighty-five percent of their original prison term and maintained a good disciplinary record.⁸⁷ Under this law, the judge established a minimum and maximum term within allowable ranges.⁸⁸ The offender was eligible to first be considered for parole at the minimum term and if granted, would continue on parole until the expiration of the maximum term.⁸⁹

The requirement that individuals convicted of violent offenses serve eighty-five percent of their sentence in prison was expanded to first-time violent felony offenders with the enactment of the 1998 Sentencing Reform Act, better known as “Jenna’s Law.”⁹⁰ This amendment also reads that if a sentence of imprisonment is to be imposed it is to be a determinate sentence, and inmates must serve a period of post release supervision following release from their sentence.⁹¹

While Jenna’s Law establishes determinate sentences for certain violent felons,⁹² it also includes a domestic violence exception that permits judges to grant an indeterminate sentence in cases where the defendant is a first-time violent felony offender convicted of a crime against his or her abuser.⁹³ More specifically, after a hearing, the court may impose an indeterminate sentence if it concludes that: (a) the defendant was the victim of physical, sexual, or psychological abuse by the victim or intended victim of the instant offense; (b) such abuse was a factor in causing the defendant to commit the instant of-

87. *Overview of Key Provisions of Chapter 1 of the Laws of 1998 – Jenna’s Law*, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., <http://www.criminaljustice.ny.gov/pio/jenna.htm> (last updated July 14, 2003).

88. *Id.*

89. *Id.*

90. The Sentencing Reform Act of 1998, N.Y. PENAL LAW §§ 70.00, 70.45 (McKinney 2009) [hereinafter “Jenna’s Law”]; see also *Overview of Key Provisions of Chapter 1 of the Laws of 1998 – Jenna’s Law*, *supra* note 87 (noting that Jenna’s Law applies the requirement that individuals convicted of violent offenses serve eighty-five percent of their sentence in prison to first-time violent felony offenders); *infra* Part II (discussing the shortcomings of Jenna’s Law).

91. Jenna’s Law § 70.00.

92. *Id.* § 70.02, amended by establishing determinate sentencing for first-time violent felony offenders. The prison term is to be set by the judge in whole or half years within the following ranges:

- B felony - between 5 and 25 years
- C felony - between 3½ and 15 years
- D felony - between 2 and 7 years
- E felony - between 1½ and 4 years

However, Jenna’s Law does not remove any existing alternative sentencing option applicable to first-time D and E violent felony offenders. *Id.*; see also *Overview of Key Provisions of Chapter 1 of the Laws of 1998 – Jenna’s Law*, *supra* note 87 (outlining the sentencing ranges for class B, C, D, and E felonies).

93. Jenna’s Law, *supra* note 90, § 60.12; see also REPORT, *supra* note 4, at 11 (discussing the domestic violence exception that Jenna’s Law provides in cases where the defendant is a first-time violent felony offender convicted of a crime against his or her abuser).

fense; and (c) the victim or intended victim was a member of the same family or household as the defendant.⁹⁴

Unfortunately, Jenna's Law fails to reduce the "unduly harsh" punishment that it sought to remedy for domestic violence cases.⁹⁵ Harsh sentences for survivor-defendants continue because Jenna's Law does not provide a domestic violence exception for murder convictions.⁹⁶ Similar to the opening quote of this paper, Victoria recounts how her once happy marriage turned frightening when her husband began physically, sexually, emotionally, and financially abusing her.⁹⁷ One night, an argument ensued and he came after her with a gun.⁹⁸ Victoria was able to tear the gun away from her husband during the struggle.⁹⁹ The fight soon ended and her husband went to sleep.¹⁰⁰ Victoria was so fearful that her abusive husband would kill her or her child, she proceeded into the bedroom that evening and shot him.¹⁰¹ At trial, Victoria accepted a plea of first-degree manslaughter.¹⁰² With no previous criminal record, not even a speeding ticket, Victoria was sentenced to the maximum term of eight and one-third to twenty-five years.¹⁰³

In addition to excluding murder convictions, Jenna's Law's domestic violence exception does not protect against robbery, burglary, or other property offenses where the abuse was a significant factor

94. Jenna's Law § 60.12. In such cases, the indeterminate sentencing ranges are as follows:

- B felony - maximum term between 6 and 25 years
- C felony - maximum term between 4½ and 15 years
- D felony - maximum term between 3 and 7 years
- E felony - maximum term between 3 and 4 years
- The minimum term must be one-half the maximum

Id.

95. REPORT, *supra* note 4, at 11 ("At the time, the Legislature reasoned that retaining indeterminate sentencing and parole would lead to less punitive sentencing for survivors. . . . Though intended to be more compassionate than the general sentencing statute, the Jenna's Law exception retains a sentencing structure that is too harsh.").

96. *See id.* Murder convictions are designated as A-1 offenses under N.Y. Penal Law and carry life as the maximum term. *Id.*

97. *See Coalition Memo, supra* note 1; *see also* REPORT, *supra* note 4, at 12 (chronicling the experience of Victoria, a similarly situated victim of domestic violence).

98. REPORT, *supra* note 4, at 13.

99. *Id.*

100. *Id.*

101. *See id.* Like many abused women, Victoria notes the ineffectiveness of calling the police. In prior instances, Victoria "[c]alled the police a few times but [it] only made matters worse, especially because [her husband] was a police officer himself." *Id.* at 12. Victoria also notes that when detectives asked if she had been battered, she did not reveal much about the abuse because, "[b]elieve it or not, in my own sick way I was still trying to protect my husband." *Id.* at 13.

102. *Id.* Victoria served a total of seventeen years in prison. *Id.*

103. *Id.*

causing the defendant's actions.¹⁰⁴ Most survivors engage in such illegal activity because of abuse or fear of increased violence if they do not comply.¹⁰⁵ If, for example, a battered woman is coerced into aiding her abuser commit a robbery, or any other act where domestic violence is a significant factor, the abused and manipulated woman is not eligible for less punitive sentencing.¹⁰⁶ In the case of Debbie Peagler, Debbie was wooed by the father of her child.¹⁰⁷ Soon after giving birth to their daughter, Debbie's boyfriend asked Debbie to help him earn some extra cash.¹⁰⁸ Subsequently, Debbie was placed in a room with a "john" and realized that her boyfriend was trying to pimp her.¹⁰⁹ When she refused, her boyfriend beat her until she complied to prostitute for his financial gain.¹¹⁰ As the years passed, the abuse escalated.¹¹¹ Fearing for her life, Debbie cooperated with two gang members, who then murdered her abuser.¹¹² Debbie was charged with first-degree murder and pleaded guilty to avoid the potential death penalty sentence in the State of California.¹¹³ Similar to Debbie, the criminal behavior of other survivor-defendants is a direct result of abuse;¹¹⁴ however, they are not protected by domestic violence exceptions to punishment. If Debbie's scenario occurred in New York, she would not be able to invoke the domestic violence exception under Jenna's Law because the Act does not protect against offenses where the abuse was a significant factor in the defendant's actions.¹¹⁵

Moreover, Jenna's Law does not permit judges to dispense alternatives to incarceration for violent offenses.¹¹⁶ Instead, the current Jenna's Law exception permits only mandatory sentencing for lengths slightly lower than the standard mandatory minimum sentencing for

104. *Id.* at 11 (noting that the overly narrow provision disregards the powerful role that domestic violence plays in a survivor's experiences and actions).

105. *Coalition Memo*, *supra* note 1, at 3.

106. *REPORT*, *supra* note 4, at 11.

107. *People v. Peagler*, No. B208543, 2009 WL 1059003, at *2 (Cal. Ct. App. Apr. 21, 2009); see also *The Battle to Free Debbie Peagler*, CRIMEAFTERCRIME.COM, <http://crimeaftercrime.com/the-case/interactive-timeline/> (last visited June 10, 2012) [hereinafter CRIME AFTER CRIME].

108. See CRIME AFTER CRIME, *supra* note 107.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Peagler*, 2009 WL 1059003, at *3; CRIME AFTER CRIME, *supra* note 107.

113. *Peagler*, 2009 WL 1059003, at *3; CRIME AFTER CRIME, *supra* note 107.

114. *Coalition Memo*, *supra* note 1, at 3.

115. See *REPORT*, *supra* note 4, at 11.

116. *Id.* ("Under current law, non-incarcerative sentences are permitted mainly for certain non-violent offenses.").

the same crime.¹¹⁷ For instance, an abused woman charged with a Class B felony in New York, such as murder in the second degree, will face an indeterminate sentence with a maximum term between six and twenty-five years¹¹⁸ under the Jenna's Law exception, as opposed to the determinate mandatory minimum sentencing range between five and twenty-five years.¹¹⁹ This indeterminate structure may result in a defendant serving more time in prison than they would under a non-exception determinate sentence.¹²⁰ Regrettably, the effect of the Jenna's Law exception undermines its intent to offer more compassionate and lower sentences for survivors.¹²¹ Consequently, the exception is rarely used.¹²²

D. Policy Arguments Supporting and Discrediting Mandatory Minimum Sentencing

New York's proposed DVSJA is currently under debate, as opponents of the bill assert that the Act will eliminate the current mandatory minimum sentencing policies, which they opine are effective and just.¹²³ The most common moral theories used to justify punishment on any defender include retributivism, utilitarianism, and denunciation.¹²⁴ In the first theory, retributivists believe punishment is justified when the wrongdoer freely chooses to violate society's rules, regardless of whether the punishment will result in a reduction

117. *Id.* ("Notwithstanding the significant benefits associated with ATIs, the current Jenna's Law exception permits only mandatory prison penalties.").

118. The minimum term must be one-half the maximum. *See Overview of Key Provisions of Chapter 1 of the Laws of 1998 – Jenna's Law*, *supra* note 87.

119. N.Y. PENAL LAW § 70.02 (McKinney 2009).

120. REPORT, *supra* note 4, at 11 ("[U]nder the exception, defendants can actually receive longer sentences than those permitted under the general sentencing statute. . . . [O]ne person serving a sentence under the exception in 2007, for example, was given an indeterminate sentence of [six] to [twelve] years – longer than the minimum five-year term allowed under the law's general provisions.").

121. *Id.* at 12 ("Such sentence lengths and structure undermine the intent of the exception to offer more compassionate and lower sentences for survivors.").

122. Other possible reasons for exception's lack of invocation include:

(1) lack of awareness among defense attorneys and judges about the exception's existence; (2) defendant's reluctance to forgo a determinate sentence with a known release date and accept an indeterminate sentence with a release date contingent upon parole board approval; (3) the exclusion of murder charges; and (4) the law's exclusion until recently of intimate relationships where survivors and abusers do not live or share children together and possible continuing lack of awareness among attorneys and judges about the law's expansion to include these intimate partners.

Id. at 12.

123. *See New York Bill Could Reduce Sentences for Domestic Violence Victims*, FINDLAW (May 10, 2012), <http://knowledgebase.findlaw.com/kb/2012/May/638747.html>.

124. DRESSLER, *supra* note 76, at 17-19.

in crime.¹²⁵ Utilitarianists, on the other hand, purport that punishment should be implemented to effectuate general or specific deterrence.¹²⁶ Specific deterrence punishment is meant to deter future misconduct by that same defendant; whereas, general deterrence aims to “punish the defendant in order to convince the general community to forgo criminal conduct in the future.”¹²⁷ Under the denunciation or expressive theory, punishment is justified as a means of expressing society’s condemnation of the wrongdoer’s conduct.¹²⁸ These theories of punishment are used to strengthen arguments and discredit opposing arguments.

Accordingly, proponents of mandatory minimum sentencing assert that such determinative laws reduce crime, establish uniformed sentencing, and provide economic efficiency.¹²⁹ Arguing that potential criminals and repeat offenders will avoid crime because they can be certain of their sentence if caught, enthusiasts of mandatory minimum sentencing contend that such laws serve as an effective deterrent.¹³⁰ This line of reasoning is on par with the utilitarianism theory of general deterrence, which reasons that the defendant’s punishment serves as a lesson to the rest of the community.¹³¹ Furthermore, advocates of mandatory minimums claim that society pays a lower cost with that type of sentencing in effect, due to the laws high deterrence rate.¹³²

125. *Id.* at 16.

126. *Id.* at 14-15.

127. *Id.* at 15.

128. *Id.* at 18-19.

129. See Steven E. Landsburg, *Does Crime Pay? Yes, for Those who Don’t Wince at the Small Chance of a Big Punishment*, SLATE (Dec. 9, 1999), <http://www.slate.com/id/57573/>; see also Alexander, *supra* note 9, at 203-06 (discussing arguments in support of mandatory minimum sentencing). In addition, retributivists who view punishment as a means to secure moral balance in society or punish to even the score may “focus on the view that humans generally possess free will or free choice and, therefore, may justly be blamed when they choose to violate society’s mores.” DRESSLER, *supra* note 76, at 16-17. Retributivist may also support mandatory minimum sentencing because wrongdoers’ punishment is justly deserved, regardless of whether or not it will result in a reduction in crime. *Id.* at 16.

130. See Alexander, *supra* note 9, at 204 (“The general population is deterred by having knowledge of the punishment that current laws could impose”); see also Mascharka, *supra* note 77, at 947-48 (“The theory behind these laws was that if potential felons knew in advance that the penalty for certain crimes was a long prison sentence or death, they would think carefully and refrain from violating the law.”).

131. DRESSLER, *supra* note 76, at 15.

132. See Alexander, *supra* note 9, at 206 (“[When an aggregate of factors such as] property loss, pain and suffering, lost wages, police, security, medical, and insurance costs are weighed against prison costs, the current determinate sentencing laws will save resources”).

Supporters also maintain that mandatory minimum sentences create a uniform system of punishment by removing varied judicial discretion and potential biases.¹³³ Creating a sentencing system that predetermines an appropriate sentence ensures the certainty and just punishment that Congress intended, and eliminates unwanted sentences that are perceived as too “soft.”¹³⁴ It can be argued that allowing judicial discretion, rather than mandatory minimum sentencing, violates the Eighth Amendment, which states “cruel and unusual punishment” shall not be inflicted.¹³⁵ The Eighth Amendment prohibits punishment that is “barbarous in its infliction or grossly disproportional to the offense committed.”¹³⁶ Thus, proponents of mandatory minimum sentencing argue that eliminating a predictable and universal system of punishment would lead to judicial sentencing that is too lenient or grossly disproportional to the homicide.¹³⁷

As an alternative perspective, opponents of mandatory minimum penalties declare this type of punishment system fails to deter potential criminals, leaves no room for judicial discretion, and comes with high societal and economic costs.¹³⁸ Studies show that increasing the chances of conviction deters criminals more effectively than increasing the length of the sentence.¹³⁹ In addition, current mandatory minimum laws reduce judicial discretion and consequently provide more power to prosecutors.¹⁴⁰ Prosecutors then serve as gatekeepers to the court system and decide what charges to bring against a defendant.¹⁴¹

Challengers opine that the elimination of judicial discretion may constitute a violation of the Due Process Clause of the Fourteenth Amendment,¹⁴² which guarantees procedural fairness to criminal de-

133. *Id.* at 205.

134. Mascharka, *supra* note 77, at 942-43.

135. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

136. DRESSLER, *supra* note 76, at 34.

137. *See* Mascharka, *supra* note 77, at 942-43.

138. *See* Alexander, *supra* note 9, at 206-22 (discussing arguments against mandatory minimum sentencing).

139. *Id.* at 207-08.

140. OREGON CRIMINAL JUSTICE COMMISSION, LONGITUDINAL STUDY OF THE APPLICATION OF MEASURE 11 AND MANDATORY MINIMUMS IN OREGON vi (2011), available at <http://www.oregon.gov/CJC/docs/Measure11AnalysisFinal.pdf?ga=t>; *see also* Alexander, *supra* note 9, at 223-24; Mascharka, *supra* note 77, at 943.

141. *See* LEONARD, *supra* note 3, at 20.

142. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

fendants.¹⁴³ Moreover, challengers assert that the constitutional guarantee of separation of powers is violated when mandatory minimum sentencing removes judicial discretion and allots too much power to the legislative branch.¹⁴⁴ Mandatory minimum sentencing actually raises the likelihood of conviction because defendants are more likely to plead to a charge rather than face prosecution and risk the harsh mandatory sentence.¹⁴⁵ Challengers to mandatory minimum sentencing assert that the stereotypes about abused women in existence before sentencing reforms continue in the criminal justice system and perpetuate gender discrepancies in prison rates.¹⁴⁶ Opponents also argue that alternatives to incarceration would be a more cost-effective penalty than mandatory minimum sentencing, as overcrowding in prisons will create costs “beyond what the public is willing to pay.”¹⁴⁷

E. The Failure of the Self-Defense Argument in Domestic Violence Cases

In addition to the failures of Jenna’s Law, the hardship abused women face in proving the elements of self-defense also warrants a need for new initiatives for abused women.

Abused women are often convicted because the circumstances surrounding their homicidal acts do not meet the requirements of current self-defense law.¹⁴⁸ The elements to prove self-defense include the use of equal or lesser force against someone when the person apprehends imminent and unlawful deadly force.¹⁴⁹ In addition, the non-aggressor, and a reasonable person, must believe the deadly force was necessary, with no ability to retreat.¹⁵⁰ Domestically abused de-

143. DRESSLER, *supra* note 76, at 34.

144. Kieran Riley, *Trial By Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine*, 19 B.U. PUB. INT. L.J. 285, 286 (2010).

145. Mascharka, *supra* note 77, at 945-46; *see also* Ammons, *supra* note 27, at 549.

146. Alexander, *supra* note 9, at 207.

147. *See also* Alexander, *supra* note 9, at 221-22; WOMEN IN PRISON PROJECT OF THE CORRECTIONAL ASSOCIATION OF NEW YORK, MANDATORY INJUSTICE: CASE HISTORIES OF WOMEN CONVICTED UNDER NEW YORK’S ROCKEFELLER DRUG LAWS 28 (1999), available at <http://www.correctionalassociation.org/wp-content/uploads/2012/05/Mandatory-Injustice.pdf> (“[T]he cost of lengthy sentences is far too great, not only because of the money squandered, but also because long prison terms detract from a woman’s ability to make a successful transition back to her family and community.”). *See generally* FAMILIES AGAINST MANDATORY MINIMUMS, www.FAMM.org (last visited Mar. 23, 2013) (advancing arguments by Families Against Mandatory Minimums).

148. LEONARD, *supra* note 3, at 28.

149. *See generally* MOSKOVITZ, *supra* note 22, at 375-408 (describing self-defense in the context of criminal law).

150. *Id.*

fendants have difficulty proving self-defense because they often kill their abuser when it is “safe” for the defendants.¹⁵¹ For instance, many charged battered women kill their abuser while he is sleeping; thus, the battered women fail to meet the element of apprehending “imminent” harm.¹⁵² Unfortunately, current self-defense laws do not reflect the reality that most battered women experience, and the defendants are thus unable to meet the elements of self-defense.¹⁵³

Understanding the unlikelihood of winning a claim of self-defense, many abused women facing conviction will opt for a plea bargain, reasoning that it is a less risky option than going to trial.¹⁵⁴ A plea arrangement is likely to result in voluntary manslaughter with a reduced jail sentence, while taking the case to trial often ends in a conviction of first-degree murder for women accused of killing their abusive partners.¹⁵⁵

151. “Safe” may be interpreted as either a confrontational or non-confrontational situation, depending on the circumstances. Scheff, *supra* note 24, at 226 n.14. In her article, Scheff gives case examples of non-confrontational situations when the woman felt it was most safe to kill her husband, namely while he was sleeping. For instance, Scheff notes, “Not only was [Norman] unable to get help from the police, but once she acted to protect herself, the court rejected her claim of self-defense. Because Norman killed her abuser while he was asleep, the traditional definition of self-defense did not apply. Therefore, the judge refused to instruct the jury that it might acquit if it believed Norman had acted in self-defense, and the North Carolina Supreme Court upheld that result.” *Id.* at 226.

152. *Id.* at 226; *see, e.g., id.* at 237-38 (“Aris claimed she was acting in self-defense. She explained: ‘I felt when he woke up that he was then going to hurt me very badly or even kill me.’ Aris’s claim did not look like classic self-defense, primarily because the threat was not imminent as the court defined that term. The trial court clarified that the defendant’s belief need not be reasonable for a claim of imperfect self-defense, but used their definition of ‘imminent’ to defeat Aris’s claim of perfect self-defense[.]”).

153. *See* LEONARD, *supra* note 3, at 29 (“Osthoff (1991) reports that the vast majority of women accused of killing their abusive partners (72 percent to 80 percent) are convicted or accept a plea, and many receive long, harsh sentences. In her analysis of domestic homicide offenders, Mann suggests that the system may be growing tougher toward these women . . .”). Leonard also discusses how “[t]he requirements of immediate danger, necessary force, reasonable belief and the duty to retreat present almost insurmountable barriers to a self-defense claim in the wife-battery situation (1993, p. 50).” *Id.* at 32 (quoting Wilson). Thus, many battered women will opt for a plea bargain, resulting in a long jail sentence. Leonard notes that, “Some accused women accept plea bargains to protect their children, to spare their families the humiliation of a trial, to avoid the death penalty threatened by prosecutors, or to speed up what they see as the inevitable, negative outcome. Others refuse plea bargains because they are confident in the fairness of the system, because they are ready to fight for themselves, because they feel they have nothing to lose, or because they follow the instructions of their attorneys.” *Id.* at 122; *see also* Ammons, *supra* note 27, at 549 (“Women were also . . . coerced into plea bargains because they knew and/or were advised that juries would not believe them, and it would be hard, if not impossible to get jury instructions on self-defense. The criminal justice process for these women was fatally flawed.”).

154. LEONARD, *supra* note 3, at 122.

155. *See* LEONARD, *supra* note 3, at 29, 109-10.

F. The Shortfalls to the Battered Woman's Syndrome

Due to the difficulty of proving self-defense, some states allow a battered defendant to show that she was suffering from battered person syndrome.¹⁵⁶ Although the syndrome is not a legal defense *per se*, it may constitute self-defense, provocation, insanity, or diminished capacity.¹⁵⁷ The term "Battered Woman Syndrome" was first introduced by Dr. Lenore Walker in 1979.¹⁵⁸ Battered Woman Syndrome (BWS) is a sub-category of post-traumatic stress disorder and is used to describe the combined symptoms that result from a pattern of physical and psychological abuse in an intimate relationship with an abuser.¹⁵⁹ BWS may be used in court at a battered woman's trial in order to "enhance the defendant's credibility because the average lay jury is not familiar with the effects of domestic violence on the abused partner"¹⁶⁰ Thus, under the theory, expert witness testimony is allowed in the trial courts to attest to the dynamics of a battering relationship.¹⁶¹ Relevant to self-defense, a statute recognizing BWS and admitting expert witness testimony¹⁶² would change the legal standard from what a reasonable person would perceive as danger to how a battered woman would perceive the situation.

The problem, however, is that such testimony may only be admitted under certain circumstances. Evidence of BWS will be denied admission by courts where "there is [1] insufficient evidence to raise the issue of self-defense, [2] where the defendant has not established herself to be a battered woman, and [3] where the threat of harm is not imminent or the degree of force used is excessive in light of the threat

156. *Battered Person Syndrome*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Batteredpersonsyndrome> (last visited Dec. 19, 2012) ("Battered person syndrome is a physical and psychological condition that is classified as ICD-9 code 995.81 . . . The condition is the basis for the battered woman defense that has been used in cases of physically and psychologically abused women who have killed their abusers.").

157. *Battered Woman Defense*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Batteredwomandefense> (last visited Dec. 19, 2012).

158. See generally LENORE E. WALKER, *THE BATTERED WOMAN* (1979) (identifying the essential elements of what has become known as the "battered woman syndrome (BWS)").

159. Erin M. Masson, Annotation, *Admissibility of Expert or Opinion Evidence of Battered-Woman Syndrome on Issue of Self-Defense*, 58 A.L.R.5th 749 (1998).

160. *Id.*

161. Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 322 (1992).

162. "Expert on battered woman's syndrome may testify only as to general behavior of victims of domestic abuse; expert may not give opinion as to whether the particular victim told the truth or whether the particular victim in fact suffered from domestic abuse, as those questions are solely within province of the jury." Masson, *supra* note 159.

posed.”¹⁶³ Accordingly, if Kate in the opening story went to trial, she would not satisfy the elements of a traditional self-defense claim, namely what a reasonable person would perceive as danger, threat of *imminent* harm,¹⁶⁴ and use of equal or lesser force.¹⁶⁵ Therefore, expert witness testimony as to general behavior of victims of domestic abuse would not be admissible.¹⁶⁶ Ultimately, Kate’s attempt to use the BWS defense would fail and she would risk conviction.

Due to the lack of understanding of domestic violence issues, ineffective police response, inefficient policies, lack of prior felony convictions, and low recidivism rates for convicted battered women, measures need to be implemented to remedy unfair mandatory minimum punishment for victims of abuse. New York’s proposed legislation, the Domestic Violence Survivors Justice Act, is one legislative measure addressing these concerns.

II. STATE EXAMINATION: NEW YORK AND THE PROPOSED DVSJA

A. Background and Purpose of the DVSJA

To eliminate unfair punishment faced by survivors-turned-defendants in the State of New York, Senator Ruth Hassell-Thompson and Assembly member Jeffrion Aubry introduced the Domestic Violence Survivors Justice Act (DVSJA) on May 20, 2011.¹⁶⁷ The purpose of the Act is “to amend the penal law and the criminal procedure law in relation to sentencing and resentencing in domestic violence cases.”¹⁶⁸ The goal of the Act is to “expand upon the existing provisions of alternative sentencing for domestic violence cases; [and] second, to allow judges the opportunity to resentence currently incarcerated persons for offenses in which certain domestic violence criteria was a significant element of the offense.”¹⁶⁹ If enacted, the proposed legislation would amend New York’s penal and criminal

163. *Id.*

164. Emphasis added. A threat of harm at some future date is insufficient to justify immediate deadly force, because it fails to meet the “imminence” requirement. *Id.*

165. *See id.*; *see also infra* note 1; *see generally* MOSKOVITZ, *supra* note 22, at 375-408 (describing the elements of self-defense).

166. Walker, *supra* note 161, at 323.

167. DVSJA, *supra* note 29.

168. *Id.*; *see also* NEW YORK CITY BAR, REPORT ON LEGISLATION BY THE DOMESTIC VIOLENCE COMMITTEE (2011), available at <http://www2.nycbar.org/pdf/report/uploads/DVSurvivorsJusticeDVRreportFINAL6.16.11.pdf>.

169. DVSJA, *supra* note 29.

procedure law by giving discretion to judges when sentencing defendants who are survivors of domestic violence, including the opportunity for shorter, determinate terms, and community-based alternatives to incarceration programs.¹⁷⁰ Under the Act, a judge would be allowed to impose an alternative sentence if he or she finds that: (1) the defendant was, at the time of the offense, a victim of domestic violence; (2) the abuse was a “significant contributing factor” to the crime; and (3) a sentence under current law would be “unduly harsh.”¹⁷¹

The proposed legislation has stirred debate, as proponents of mandatory minimum sentencing feel the current laws are fair and just.¹⁷² Thus, supporters of the status quo assert that the defendant murdered another human and should be adequately punished.¹⁷³ Stereotypes and false assumptions such as: the accused woman was not in an abusive relationship because she had a job, she never reported the incidence to law enforcement officials, or she failed to leave the relationship when she had alternative options, plague the courtroom and warrant the need for new initiatives.¹⁷⁴

The current legislative debate is especially important because prior attempts to make exceptions to the mandatory minimum penalties for crimes involving domestic violence in New York have failed.¹⁷⁵ Most notably, Jenna’s Law fails to reduce “unduly harsh” punishment, does not address murder convictions, and does not permit judges to

170. See *id.*; see also NEW YORK CITY BAR, REPORT ON LEGISLATION BY THE DOMESTIC VIOLENCE COMMITTEE (2011), available at <http://www2.nycbar.org/pdf/report/uploads/DV-SurvivorsJusticeDVReportFINAL6.16.11.pdf> (noting that the Act would allow courts to take domestic violence into consideration when determining sentencing).

171. DVSJA, *supra* note 29.

172. See *New York Bill Could Reduce Sentences for Domestic Violence Victims*, *supra* note 123.

173. See LEONARD, *supra* note 3, at 27-28 (“Though women kill far less frequently than do men, their actions are less likely to be construed as justifiable by the American legal system, and most probably by the general public. We see this tendency most clearly in two situations: spousal homicide in response to wife battery, and abortion.”).

174. See *Coalition Memo*, *supra* note 1 (For Kate, the prosecutor refused to lower his plea offer of eight years because Kate didn’t “fit the profile of a battered woman because [she] had a job.” Kate refused to plead and instead went to trial, where documents attesting to the abuse were never entered into the record. Kate was convicted of manslaughter in the first degree and sentenced to eight and one-third to twenty-five years); see also LEONARD, *supra* note 3, at 23 (“The California Committee on Gender Bias in the Courts surveyed 425 judges and found that nearly half believed that allegations of domestic violence are often exaggerated, and some expressed active hostility towards victims or domestic violence.”); *id.* (“The committee’s conclusions include: Some judges and court personnel approach domestic violence cases, whether consciously or unconsciously, with assumptions based not upon personal experience or the facts of a particular case but upon . . . stereotypes and biases[.]”).

175. See *Jenna’s Law*, *supra* note 90.

dispense non-prison sentences.¹⁷⁶ Unfortunately, the Jenna's Law domestic violence exception is rarely invoked by defendants, most likely due to lack of awareness of the provision, defendant's reluctance, and the exclusion of murder charges.¹⁷⁷

In addition, as noted above, it is difficult for abused women to argue self-defense in domestic violence cases where they are charged with killing their abusers.¹⁷⁸ While recognition of BWS was an attempt to the remedy this problem, the conditions on which expert testimony may be admitted, and the breadth of such testimony, is far too limited. These prior attempts to eliminate unfair punishment reflect the criminal justice system's failure to protect abused women. The proposed DVSJA would help remedy the failed attempts in New York, and if implemented in other states, it could protect battered women across the nation.

B. Mandatory Minimum Sentence State Comparison: Minnesota and Virginia

Many states have mandatory minimum sentencing; however, alternative sentencing guidelines that encourage judicial discretion have become more widespread in recent years.¹⁷⁹ To date, at least twenty states and the District of Columbia have introduced sentencing guidelines to achieve non-discriminatory, predictable, and proportional sentencing.¹⁸⁰ Despite broad similarities in their intended purpose, sentencing guidelines can take numerous forms.¹⁸¹ The State of Minnesota, for instance, has a relatively strict sentencing guideline system.¹⁸² Minnesota imposes mandatory minimum sentencing for select cases involving weapons or second offenses, and offers narrow ranges of prison terms for other offenses.¹⁸³ For instance, a person found guilty of murder in the first degree must be sentenced to life in prison,

176. *Id.*; REPORT, *supra* note 4, at 11; *see also infra* Part I.

177. DVSJA, *supra* note 29; *see also* REPORT, *supra* note 4, at 12.

178. *See infra* Part I.E.

179. COMPARATIVE STUDY, *supra* note 77, at 1.

180. *Id.* at 1, 5 (citing, for example, Ohio and Wisconsin as states with more voluntary sentencing guideline systems, while Oregon, Kansas, Washington, Minnesota, and North Carolina have more mandatory guidelines).

181. *Id.* at 5.

182. *Id.* at 2.

183. *See id.* at 8.

and a person found guilty of murder in the second degree may be sentenced to imprisonment between fifteen and forty years.¹⁸⁴

Under Minnesota law, the defendant will be sentenced to the range specified in the sentencing guidelines because that state's policies make it difficult for a judge to depart from the guidelines.¹⁸⁵ Also, should defendants choose to appeal their sentence, they face a vigorous appeal process.¹⁸⁶ Relative to other states, Minnesota's narrow sentence ranges, along with a low level of judicial discretion, create sentences that are slightly more predictable.¹⁸⁷

In comparison, Virginia's voluntary system is based on detailed calculation of sentences with wider ranges that allow more opportunities for the exercise of discretion.¹⁸⁸ For example, a person convicted of first degree murder can be imprisoned between twenty years and life, with eligibility for parole; and, persons convicted of second degree murder can be sentenced anywhere between five and forty years.¹⁸⁹ The more voluntary system means judges are free to depart without justifying their reasons, and appellate review of guideline sentences is prohibited by statute.¹⁹⁰ Consequently, relatively lower predictability transpires.¹⁹¹ Lack of predictability means that one abused woman may be sentenced for life if she is found guilty of murder, while another similarly situated abused woman may be sentenced to three years.¹⁹² The inconsistent sentences are troublesome for the battered women who receive longer sentences. The discrepancy amongst the courtrooms can lead to injustice.

184. MINN. STAT. § 609.185(a) (2012) ("Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life[.]"); *Id.* § 609.19 (2012); see also *List of Punishments for Murder in the United States*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_punishments_for_murder_in_the_United_States (last updated Dec. 18, 2012).

185. See COMPARATIVE STUDY, *supra* note 77 at 1, 6 ("Judges are required to give the sentence within the presumptive range. Judges can depart from the presumptive sentence if 'there exist identifiable, substantial, and compelling circumstances The judge 'must disclose in writing or on the record the particular substantial and compelling circumstances'").

186. *Id.*

187. *Id.* at 2.

188. *Id.*

189. VA. CODE ANN. § 18.2-32 (2006) ("All murder other than capital murder and murder in the first degree is murder of the second degree and is punishable by confinement in a state correctional facility for not less than five nor more than forty years."); see also *List of Punishments for Murder in the United States*, *supra* note 184.

190. See COMPARATIVE STUDY, *supra* note 77, at 5.

191. *Id.* at 2, 9 ("Sentences are predictable to the extent similar offenders receive similar sentences.").

192. See *id.* at 12.

While there is tension between the desire for consistent sentencing and accurate discretion, the most important matter is whether the defendant is receiving an appropriate sentence. Battered women, who are most often first time offenders and have a low recidivism rate, do not receive fair sentencing under mandatory minimum statutes. By allowing room for judicial discretion, the narrowly-tailored category of battered women who are unfairly sentenced would be protected.¹⁹³ Moreover, studies show that “discretion afforded judges under more voluntary guidelines does not result in discriminatory sentences.”¹⁹⁴

III. PROPOSAL TO ADOPT THE DVJSA AND IMPLEMENT ADDITIONAL STEPS

A. New York Should Adopt the Proposed DVSJA

The DVSJA has been endorsed by more than ninety-one supporters, including thirteen New York state senators and thirteen assembly members.¹⁹⁵ The proposed bill has the potential to be enacted when legislative sessions resume in January 2012.¹⁹⁶ The DVSJA has already been approved by the House and Senate, and at the start of the calendar year 2012, the Correctional Association will hold a hearing where domestic violence survivors who are formerly or presently incarcerated will submit testimony about their experiences.¹⁹⁷

New York should adopt the proposed DVSJA because it will help protect abused women, remedy unfair punishment, and be economically beneficial for the state. First, “[b]y establishing a more compassionate sentencing structure for survivors and enhancing recognition of the impact of [domestic violence] on survivor-defendants, the [DVSJA] makes it less likely that survivors will be victimized by the very system [meant to] protect them.”¹⁹⁸ In New York alone, sixty-seven percent of women in state prison for killing a close acquaintance were reportedly abused by the victim of their crime.¹⁹⁹ In 2007, women

193. See DVSJA, *supra* note 29.

194. COMPARATIVE STUDY, *supra* note 77, at 3 (concluding based on Pew Center data for the state of Virginia and the National Center for State Courts comparative study results).

195. DVSJA, *supra* note 29; see also *Legislative Sponsors*, DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT, <http://www.dvsurvivorsjusticeact.org/dvsja/legislative-sponsors/>.

196. Catherine Epstein, *Exclusive: Fairness for Defendants Who Survive Domestic Violence*, WOMEN'S MEDIA CENTER BLOG (June 21, 2011, 9:26 AM), <http://womensmediacenter.com/blog/2011/06/exclusive-fairness-for-defendants-who-survive-domestic-violence/>.

197. *Legislative Sponsors*, *supra* note 195.

198. *Coalition Memo*, *supra* note 1, at 2.

199. REPORT, *supra* note 4, at 3.

comprised eighty-one percent of intimate partner homicide victims in New York State.²⁰⁰ Abused women report a sense of failure from the criminal justice system to protect them, from law enforcement officers to the judges in the courtroom.²⁰¹ As discussed in Part I(A), abused women choose not to call the police for numerous reasons, explaining that the police fail to respond in an effective manner or that the batterer will beat them more severely after the police leave.²⁰² Killing an abuser in self-defense occurs when the abuse becomes too violent and the abused woman believes she has no alternative safe outlet.²⁰³ While the abused woman may retaliate in a violent manner, statistics show that survivor-defendants are not a danger to society.²⁰⁴ Eighty percent of women sent to New York's prisons for a violent felony in 2008 had no prior felony convictions.²⁰⁵ In addition, recidivism rates of battered women who kill are extremely low.²⁰⁶ Not a single woman of the thirty-eight women convicted of murder and released between 1985 and 2003 returned to prison for a new crime within a three-year follow-up period.²⁰⁷ The combination of a low recidivism rate, lack of prior felony convictions, and failure by law officials to effectively respond, indicate the need to amend mandatory minimum sentencing policies and implement changes to protect abused women.

Enactment of the DVSJA would allow New York to take critical steps toward addressing years of injustice faced by survivor-defendants whose lives have been shattered by abuse.²⁰⁸ Yet, as with any bill that deals with criminal justice reform and sentencing reform, particularly for people convicted of violent offenses, opponents of the proposed legislation fear it is too "soft on crime."²⁰⁹ This resistance and "'tough on crime' rhetoric" overshadows the critical issue and reality of women's lives and experiences.²¹⁰ Resistance to the Act can be

200. *Fact Sheet*, *supra* note 14, at 2 (citing ADRIANA FERNANDEZ-LANIER & JAMES A. GILMER, DOMESTIC HOMICIDE IN NEW YORK STATE, 2007, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVICES, OFFICE OF JUSTICE RESEARCH 4 (Dec. 2008)).

201. See LEONARD, *supra* note 3, at 17, 27, 88; see also *supra* Part I.A.

202. See LEONARD, *supra* note 3, at 17, 27, 88-89; see also *supra* Part I.A.

203. LEONARD, *supra* note 3, at 25.

204. Epstein, *supra* note 60.

205. *Id.*

206. *Id.*

207. *Id.*

208. See *Coalition Memo*, *supra* note 1, at 2.

209. Epstein, *supra* note 60 ("[A]dvocates must overcome a potential perception of the bill as soft on crime.") (quoting Tamar Kraft-Stolar, director of the Women in Prison Project at the Correctional Association of New York).

210. See *id.* ("'People think that if a woman is a survivor of abuse, that's a get-out-of-jail-free card, and it's not,' said Jesenia Santana, legal services coordinator for STEPS to End Family

subsidized by educating opponents about the Act's narrowly tailored provisions that extend protection only to abused persons in need.²¹¹ Not all survivors of domestic abuse would be eligible for alternative sentencing under the legislation, as provisions are included to help Judges adhere to the purpose of the bill.²¹² For instance, a judge must find the abuse was a "significant contributing factor."²¹³ In other words, it must be shown that the defendant was, at the time of the offense, subjected to substantial physical, sexual, or psychological abuse inflicted by a spouse, intimate partner, or relative by blood or marriage.²¹⁴ In addition, the judge must find that a sentence under the general law would be "unduly harsh."²¹⁵ By applying only to abused persons who need protection, these provisions ensure the Act is narrowly tailored to reduce any potential "soft on crime" effect.²¹⁶

The Act would further remedy unfair punishment by including a retroactivity provision that would provide currently incarcerated survivors the opportunity to apply for resentencing.²¹⁷ Retroactivity of the amendment is another positive step towards addressing years of injustice faced by survivor-defendants whose lives have been shattered by abuse.

In addition, the DVSJA should be enacted and used as a model for other states because the proposed sentencing methods are more cost-effective than mandatory minimums.²¹⁸ Permitting judicial discretion shifts some sentences from mandatory minimum incarceration to alternatives-to-incarceration (ATI) programs, which would "substantially reduce government spending."²¹⁹

Violence. 'Many women do a lot of time, and if we don't acknowledge it and attempt to remedy this injustice, we as a society are violating these women's fundamental human rights.'").

211. *See id.*

212. *See id.*

213. DVSJA, *supra* note 29; *see also* Epstein, *supra* note 60 ("In addition to a finding that the abuse was a 'significant contributing factor,' the judge must find that a sentence under the law's general provisions would be 'unduly harsh.'").

214. *See* Epstein, *supra* note 60.

215. DVSJA, *supra* note 29; *see also* Epstein, *supra* note 60.

216. *See* Epstein, *supra* note 60.

217. DVSJA, *supra* note 29; *see also* Epstein, *supra* note 60.

218. *See Coalition Memo*, *supra* note 1, at 4 (allowing for reduced sentences and ATIs results in less inmates in prison and in turn, it is more cost-effective.).

219. *See* Epstein, *supra* note 60 ("Shifting some sentences from incarcerations to ATI programs could also substantially reduce government spending, said Jaya Vasandani, associate director of the Women in Prison Project of the Correctional Association of New York."); *see also* Mascharka, *supra* note 77, at 949-50 (There are obvious costs such as construction of the facility, as well as the general annual incarceration costs. On average, it costs about "\$20,000 a year to confine a state inmate and \$24,000 to confine a federal inmate." In addition, "[h]idden costs, such as health care and contracted services, may raise these figures as well[.]" especially with the

In short, bypassing mandatory minimum sentencing and allowing for judicial discretion will create more just, fair, and appropriate sentencing measures.²²⁰ If passed, the legislation would be the first of its kind in the country; yet, it should not be the last.²²¹ All states should adopt similar legislation to protect battered women accused of killing their abuser.

B. Additional Steps

In addition to enacting legislation such as the proposed DVSJA in New York, other measures need to be simultaneously implemented. More specifically, if domestic violence cases are to obtain an exception to the mandatory minimum penalties, there needs to be sufficient judicial training in light of the increased discretion that judges will incur. Far too often, court rulings are influenced by gender bias and the trier of fact does not understand the dynamics of intimate partner violence.²²² A law school professor once told me about a domestic violence case she worked on, where during the hearing, the judge remarked to the defendant, “Oh, you’re one of those.”²²³ What the judge meant was, “One who never left.”²²⁴ A judge questioning the ability of an individual to tolerate such severe acts of violence for so long may result in a judge questioning the actual level of violence or the victim’s motives for remaining in the abusive relationship.²²⁵ The trier of fact’s bias, lack of actual knowledge, or understanding about domestic violence issues could be damaging to the survivor-turned-

older prison populations created from mandatory minimum sentencing that result in an increase in the cost of health care in the prison system.).

220. See, e.g., Epstein, *supra* note 60 (“[Kim Dadou, an advocate for the bill and a survivor herself, explained that, ‘[i]f the legislation had been enacted 20 years ago. . . [i]t would have given me back probably 10 years of my life . . . and I would have been able to have a child and a family of my own. Coming home from prison [seventeen] years later, it’s too late to start a family now, with nothing to offer them.’”).

221. See *id.*

222. See Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL’Y & L. 163, 167, 176 (2009).

223. This was a case that stood trial in Massachusetts. The name has not been disclosed for privacy concerns.

224. See Shulman, *supra* note 42, at xxi (discussing women who do not “stay” in abusive relationships, but are trapped).

225. See Conner, *supra* note 222, at 177; see also *Coalition Memo*, *supra* note 1, at 3 (“Abusers control their victims through violence, coercion, intimidation, threats, isolation, and economic deprivation. Survivors are often unable to leave abusive relationships for a multitude of reasons, including fear of retaliation against themselves or their children, and lack of social supports and financial resources. In fact, the likelihood that a victim and her children will be harmed or killed by an abuser increases if the victim leaves or attempts to leave.”).

defendant.²²⁶ To prevent this potential disaster in the courtroom, judges exercising their discretion must be properly trained on domestic violence issues to ensure the defendant has a fair proceeding and the needs of battered women are met.²²⁷ For instance, in 2008, Barbara Sheehan was charged with killing her husband after suffering from years of abuse.²²⁸ Prosecutors in New York tried to blame Sheehan, arguing that she was not a battered wife and had shot her husband because she was angry over his infidelities and bizarre sexual preferences.²²⁹ Prosecutors also argued that she stood to benefit from his two life insurance policies.²³⁰ These misleading and false claims regarding motive almost landed Sheehan in jail for murder, but she was found not guilty in October 2011.²³¹

If judges are to obtain more discretion in each case, they should be able to award the most effective penalty. Thus, alternatives-to-incarceration (ATI) should be considered when sentencing a defendant. Alternatives-to-incarceration would provide significant benefits, such as allowing individuals to serve their sentence while seeking any necessary treatment, reconnecting with family, and contributing to society.²³² According to a recent report, at nearly one-fifth the cost, alternatives-to-incarceration are significantly less expensive than imprisonment.²³³ Currently, one non-profit organization, STEPS to End Family Violence (STEPS), manages the only alternatives-to-incarceration program in New York State designed for victims of abuse who kill their abuser.²³⁴ The program works with courts to advocate for a reduction or complete dismissal of charges, or an agreement to later dis-

226. See MICHIGAN WOMEN'S JUSTICE & CLEMENCY PROJECT, *supra* note 16, at 4 ("Prosecutors typically point out that instead of killing her partner, a battered woman could have stayed with family, filed a complaint, gone to a shelter, or called the police. These arguments demonstrate a lack of understanding of the reality of a battered woman's situation.").

227. Cf. Conner, *supra* note 222, at 167 ("The trial judge. . . must have clear definition of what constitutes domestic violence and understand how domestic violence affects all family members and why this information is highly relevant . . . Moreover, the trial judge must be equipped with unambiguous recommendations regarding the weight to be given to evidence of intimate partner violence when making the ultimate . . . determination.").

228. See *Barbara Sheehan Acquitted of Murder; Guilty of Weapons Charge*, CBS N.Y. (Oct. 6, 2011, 11:57 pm), <http://newyork.cbslocal.com/2011/10/06/barbara-sheehan-acquitted-of-murder-guilty-of-weapons-charge/>.

229. See *id.*

230. See *id.*

231. See *id.* Although Ms. Sheehan was acquitted of murder, she was convicted of gun possession and sentenced for five years; see also Dan Bilefsky, *5-year Term for Woman Who Killed Her Husband*, N.Y. TIMES, Nov. 10, 2011, at A26.

232. REPORT, *supra* note 4, at 11, 14.

233. See *id.* at 14.

234. See *id.* at 15.

miss the charges after the defendant remains out of trouble for a fixed time period.²³⁵ Alternatives-to-incarceration programs, such as STEPS, lower recidivism rates, enhance community safety, and are more effective than prison in helping individuals heal from an abusive relationship.²³⁶ Programs like STEPS and other ATIs should be implemented across the United States.

Not only would the survivor-defendant directly benefit from ATI, but taxpayers would as well. In general, “[i]ncreased use of alternative programs and shorter sentences mean less tax payer dollars spent on incarceration.”²³⁷ Increased alternatives-to-incarceration resulting from the DVSJA would result in a one-fifth reduction in cost per person each year.²³⁸

In addition, the community benefits from ATI when persons are effectively rehabilitated back into society.²³⁹ Although the programs are designed to work independently, many of the programs require participants to attend counseling, classes, and treatment for a period of six to twelve months.²⁴⁰ By offering a chance to improve the skills of the participants and an opportunity to change the circumstances surrounding the survivor-defendant’s life, ATIs reduce the likelihood that one will commit crimes again.²⁴¹ In turn, this improves the community.²⁴²

Lastly, there should be an increase in clemency in order to remedy injustice for abused victims and gender-based sentencing disparities.²⁴³ Clemency is an official act by an executive that removes all or

235. *Id.*

236. *Id.*

237. *Coalition Memo*, *supra* note 1, at 4.

238. *See id.* (“Cost per year to incarcerate a person in New York State prison: \$55,000. Cost per year to send a person to an alternative to incarceration program in New York City: \$11,000.”).

239. *See id.* (“Allowing mothers to live in the community while serving sentences enables them to maintain ties to children and lessen the trauma of separation – thereby increasing the likelihood that children will receive the support they need to become healthy, productive adults.”). In essence, this is a “trickle-down” theory because it allows women out of prison to aid their children; thus, resulting in a better community and future as the children will grow up to be “good” adults.

240. *See* DOUGLAS YOUNG ET AL., *ALTERNATIVE TO INCARCERATION PROGRAMS FOR FELONY OFFENDERS IN NEW YORK CITY 2* (VERA INSTITUTE OF JUSTICE, 1999), *available at* <http://www.vera.org/pubs/alternative-incarceration-programs-felony-offenders-new-york-city>.

241. *Coalition Memo*, *supra* note 1, at 4.

242. *See id.*

243. *See* Becker, *supra* note 15, at 311 (“[T]he trend in today’s criminal justice system toward inflexible sentencing guidelines and stricter enforcement of criminal sentences creates an increasing necessity for clemency in order to ensure that battered women are treated fairly by the criminal justice system. It is against this backdrop of the current state of pardoning in the

some of a sentence arising from a criminal act.²⁴⁴ While governors have the power to grant clemency through state constitutions, the type and processes they choose can vary greatly.²⁴⁵ Clemency may be granted in the form of “commutation” or a “pardon,” although, commutation is much more common.²⁴⁶ Commutation is better known as a reduction in time to be served.²⁴⁷ Pardons restore all the rights and privileges one had prior to being incarcerated; however, they are rarely granted.²⁴⁸ When deciding whether to grant clemency, a governor may obtain information and counsel from a variety of sources, including the parole and pardons boards, as well as in-house staff.²⁴⁹

Too often, political considerations outweigh concerns of justice and exercising the power to pardon falls short at the “whim of the executive.”²⁵⁰ However, in two recent events, the governors of Ohio and Maryland granted clemency to a number of battered incarcerated women.²⁵¹ During his term of service in the 1990s, Governor Richard F. Celeste granted clemency to twenty-eight incarcerated women who were in prison because they killed their abuser.²⁵² Around the same time period, Governor Schaefer of Maryland granted clemency to eight imprisoned women convicted of killing their abuser.²⁵³ The pardons stirred much debate, as they were the highest number of pardons granted to abused women in such a short period of time.²⁵⁴ While the

United States that battered women who have killed their abusers are considered for clemency today.”); *see also id.* at 330-31 (“Battered women who kill often receive harsher sentences than men who murder their wives or lovers. This demonstrates that the sentences that battered women who kill their abusers receive are not always based on just deserts, but may instead be based on factors such as their gender. Such unrelated sentences justify the exercise of executive clemency.”).

244. *Id.* at 307.

245. *See id.* at 309; *see also* Ammons, *supra* note 27, at 550.

246. *See* Becker, *supra* note 15, at 307.

247. Ammons, *supra* note 27, at 550.

248. *Id.*

249. *Id.*

250. Becker, *supra* note 15, at 299 (“[T]he current structure of executive clemency is flawed, largely because pardoning is exercised at the whim of the executive, with political considerations often outweighing concerns of justice.”).

251. Ammons, *supra* note 27, at 563.

252. Ammons, *supra* note 27, at 544.

253. Thomas W. Waldron, *Eight Women Who Killed to go Free*, BALT. SUN (Feb. 19, 1991), <http://articles.baltimoresun.com/1991-02-19/news/19910501361battered-spouse-syndrome-schaefer-clemency>.

254. Critics also asserted that the decision to grant clemency would encourage other battered woman to kill their abusers. *See* MICHIGAN WOMEN’S JUSTICE & CLEMENCY PROJECT, *supra* note 16, at II(C)(1). In addition, critics alleged the grant of clemency to battered woman would lead to an implicit approval on a battered woman’s right to impose the death penalty on her abuser, while others accused the governor as usurping the role of the jury, being insensitive to the victims’ family members, and undermining the structure of the criminal justice system. *Id.*

pardons from Governor Schaefer and Governor Celeste are helpful, they address only a handful of wrongly convicted abused women and do not resolve the issue at hand. Clemency is a necessary remedy that will continue to be used “as long as individuals are denied rights to present an adequate defense at trial and until society responds adequately to the problem of woman abuse.”²⁵⁵

CONCLUSION

Women who kill their abuser are being locked away at alarming rates.²⁵⁶ Once victims of domestic violence, these women are now victims of an unfair criminal justice system. Statistics show that women are sentenced to prison for longer periods of time than male counterparts because a weapon is usually involved in their offense.²⁵⁷ States that have mandatory minimum sentencing prohibit the opportunity for judicial discretion and more appropriate sentencing. In the state of New York, the Domestic Violence Survivors Justice Act would help remedy the criminal justice system that fails to protect abused women and allows for unfair punishment. The DVSJA would permit judicial discretion and alternatives to incarceration; thus, bypassing mandatory minimum regulations and protecting abused women. New York should adopt the DVSJA because it will protect abused women and remedy unfair punishment. New York’s proposed DVSJA serves as a model provision that all states should adopt. In addition to enacting the legislation, sufficient judicial training, alternative to incarceration, and increased clemency should be implemented across all states.

“The battering and murdering of women by people with whom they are in intimate relationships happens only because the society in which we all live lets them get away with everything else that leads up to it.”²⁵⁸ We can no longer let the survivors of domestic abuse be punished for what society allows abusers get away with. It is time to take legal action and put an end to mandatory minimum sentencing for victims who kill their abusers.

255. Ammons, *supra* note 27, at 535 (citing ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000)).

256. *See, e.g.*, REPORT, *supra* note 4, at 3 (“The New York State Department of Correctional Services . . . found that 67% of women sent to prison in 2005 for killing someone close to them were abused by the victim of their crime.”).

257. *See* LEONARD, *supra* note 3, at 31.

258. Susan Koppelman, *Introduction* to *WOMEN IN THE TREES: U.S. WOMEN’S SHORT STORIES ABOUT BATTERING AND RESISTANCE, 1839-2000*, at xxi, xxv (Susan Koppelman ed., 2004).

Save the Date

Thursday, October 24, 2013

***Tenth Annual
Wiley A. Branton/
Howard Law Journal Symposium***

**Civil Rights at a Critical Juncture:
*Old Conflicts, New Challenges***

Sponsored by

Howard University School of Law

Lawyers' Committee on
Civil Rights Under Law

Sidley Austin LLP

Debevoise & Plimpton LLP

National Bar Association



DEBEVOISE & PLIMPTON LLP



