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Volume 15, Number 2 **Summer 2021**

HARVARD LAW & POLICY REVIEW

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TABLE OF CONTENTS

ECONOMIC JUSTICE

ALSO FEATURING

Occupy Justice: Introducing the Injustice Framework

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"As we gather together in solidarity to express a feeling of mass injustice, we must not lose sight of what brought us together. We write so that all people who feel wronged by the corporate forces of the world can know that we are your allies."
~ Introduction to the Declaration of the Occupation of New York City[1]

"[W]e will not be satisfied until justice rolls down like waters."
~ Rev. Martin Luther King Jr.[2]

"If we do not now dare everything, the fulfillment of that prophecy, re-created from the Bible in the song by a slave, is upon us: God gave Noah the rainbow sign, No more water, the fire next time."
~ James Baldwin.[3]

INTRODUCTION

A. The Occupation: Ten Years After Occupy

This issue of *Harvard Law & Policy Review* is framed as a commemoration of Occupy Wall Street, the protest that, ten years ago, sparked a global movement that unsettled how we understood the economic inequalities[4] and "mass injustice" that had grown salient at that time.[5] In the roughly six months that Occupy Wall Street lasted, the movement also tested a theory of change for those hoping to reimagine and remake our systems.[6]

The injustices that catalyzed the Occupy movement still burn. Today, the world may be even more fraught with the conflagrations of injustice, wealth inequality, environmental destruction, political dysfunction, and long-overdue reckonings than it was a decade ago. The grip of corporate interests over institutions and structures may be tighter than it was then. And any social-justice-centered alliances forged in that heat are increasingly

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[1] Occupy Wall Street, *Declaration of the Occupation of New York City*, LATERAL (2013), https://csalateral.org/issue/2/manifestos-occupy-wall-street/ [https://perma.cc/P3Z6-RDCK].

[2] Martin Luther King, Jr., I Have a Dream Speech at the March on Washington (Aug. 28, 1963), https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety [https://perma.cc/F2N7-5A6P].

[3] JAMES BALDWIN, THE FIRE NEXT TIME 4 (1963); *see also* Jerome Weeks, '*O Mary Don't You Weep*' *From Gospel to Protest Song to Rockin Stomp* (https://artandseek.org/2021/02/15/o-mary-dont-you-weep-from-gospel-to-protest-song-to-rockin-stomp/ [https://perma.cc/X62U-DSCG]) (explaining that Baldwin's title is taken from a 1960s version of an African American spiritual with roots in a slave song titled "O Mary Don't You Weep").

[4] *See infra* text accompanying notes 560560–603.

[5] *See infra* text accompanying notes 604–618.

[6] *See infra* Part II(G) (describing some of the context, strategies, and effects of the Occupy movement).

met with energized, organized, and sometimes violent backlash. It can be discouraging.

The articles in this issue speak to some of the sources and manifestations of the inequalities and injustices that motivated Occupy Wall Street. We will return to those articles in the last section of this foreword, but we have some work to do first.

Our initial goal is to use this occasion to sketch some of the deeper causal forces shaping how the very concept of justice is understood and how that understanding shapes political and legal responses to exigent systemic problems. In the process, we hope to place Occupy Wall Street and the movement it catalyzed into a broader context. That goal is motivated by our belief that the hope and demands for justice cannot be fulfilled without a better understanding of the psychological, social, political, cultural, and economic forces behind that yearning and behind how justice itself is understood.

We hope the body of this Article is of interest and use to some readers, but, for those eager for an overview of the outstanding articles in this collection, please jump ahead to Part V(B).

B. What the Hell Is Justice?

In 2014, we co-founded the Systemic Justice Project at Harvard Law School,[7] and got busy designing several courses around the theme.[8] We spent the following six years teaching, researching, and writing about systemic justice. In the process, we developed a framework for understanding what justice is and why it matters. This Article, among other things, provides a basic overview of that framework.

"Justice" is a term that is notoriously difficult to define. Even dictionaries offer little more than useless tautology, defining justice as, for instance, "the quality of being just."[9] Judges and legal scholars commonly reject justice as a viable norm for assessing policy in part because of its lack of shared meaning. For example, Oliver Wendell Holmes, Jr. confessed to "hat[ing]

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[7] *See* THE SYSTEMIC JUST. PROJECT, https://systemicjustice.org/ [https://perma.cc/TG7S-68VH]; Dick Dahl, *Systemic Justice: At a Harvard Law School Conference, Students Reimagine the Role of Lawyers in Addressing Societal Problems*, HARVARD LAW TODAY (Apr. 22, 2015), https://today.law.harvard.edu/systemic-justice-at-a-harvard-law-school-conference-students-reimagine-the-role-of-lawyers-in-addressing-societal-problems/ [https://perma.cc/H62M-XRFH].

[8] *See About Us*, https://systemicjustice.org/about-us/ [https://perma.cc/D7KM-BBE5].

[9] *Justice*, DICTIONARY.COM, https://www.dictionary.com/browse/justice [https://perma.cc/ZLE6-7937]; *see also Justice,* MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/justice [https://perma.cc/XP2K-WJEC] (offering definitions such as "the maintenance or administration of what is just" and "the quality of being just, impartial, or fair"); *Justice*, BLACK'S LAW DICTIONARY 995 (10th ed. 2014) (providing definitions such as "[t]he fair treatment of people," "[t]he quality of being fair and reasonable," and "[t]he fair and proper administration of laws").

justice" for that reason.[10] Richard Posner similarly complained that terms "like fairness and justice. . .'have no content.'"[11] The prevailing view, particularly in law,[12] has been to pay lip service to the value of justice as the law's ultimate normative goal, but to ignore the value of justice when deciding cases or discussing larger policy ends.[13] Strikingly, though, the assertion that justice is undefined is usually unaccompanied by any effort to provide the term with meaning.

Particularly in light of the legal system's trumpeted commitment to justice,[14] we concluded that justice as a norm was being too cavalierly dismissed. In our view, those behind the law's curtain have an obligation to employ or search for a workable definition of the norm, whether by adopting one of the many philosophical conceptions of justice, or, as we shall propose, utilizing a framework for parsing, debating, and contemplating the norm. So we set out to examine whether the mystery of meaning was more superable than supposed. With modest exertion, we discovered that there was plenty to learn and say about justice, its meaning, and its actual and potential significance in law and society. In our view, those who have abandoned justice as meaningless have done so in part because they have approached the topic from the wrong perspective—a mistake, as we'll see, that Wall Street's "Occupants" did not make.

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[10] Letter from Oliver Wendell Holmes to John C.H. Wu (July 1, 1929), *in* JUSTICE HOLMES TO DR. WU: AN INTIMATE CORRESPONDENCE, 1921–1932, 53 (1935) ("I have said to my brethren many times that I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms.").

[11] Paul M. Barrett, *Influential Ideas: A Movement Called "Law and Economics" Sways Legal Circles*, WALL ST. J., Aug. 4, 1986, at 1, col. 1 ("Judge Richard A. Posner has little use for words like fairness and justice. 'Terms which have no content,' he calls them. What America's lawyers and judges need . . . is a healthy dose of free-market thinking.").

[12] Philosopher Tommie Shelby, in writing about social justice and Ghetto poverty, notes the "common tendency to treat the answers" regarding questions of justice "as obvious or to regard disagreements about the answers as products of irresolvable 'ideological' differences." TOMMIE SHELBY, DARK GHETTOS 4 (2016). Shelby indicates that some are skeptical of the very idea of social justice and later asserts that there is "profound disagreement, among philosophers and citizens alike, about what justice requires," leading some to focus on empirical questions in order to evade the "messy disputes over what justice requires." *Id.* Traveling on such contested terrain, those skeptics maintain, is "unnecessary, unfruitful, or pointless, at best a mere academic exercise." *Id.* Shelby rejects those claims, arguing that "[j]ustice questions should . . . be a focal point of public policy, political activism, and civic discourse concerning the future of our cities and their most disadvantaged inhabitants." *Id.*

[13] *See* ROBIN L. WEST, TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM (2013).

[14] That commitment is reflected in the prevalence of the term "justice" engraved on court buildings, *see e.g. The Court and Constitutional Interpretation*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/constitutional.aspx [https://perma.cc/BEA2-94YW], in law school mission statements, *see* Irene Scharf & Vanessa Merton, *Table of Law School Mission Statements* (2016), http://scholarship.law.umassd.edu/fac_pubs/175/ [https://perma.cc/L35A-MC8Z], in bar association logos, *see e.g.* AMERICAN BAR ASSOCIATION, L*ogo,* https://commons.wikimedia.org/wiki/File:American_Bar_Association.svg [https://perma.cc/SB3R-QBRF] ("Defending Liberty: Pursuing Justice), in the title of the highest judges, the name of the Department of Justice, and the use of the phrase "the justice system" to describe the part of the legal system that exerts the greatest direct force over individuals. *See also* WEST, *supra* note 13, at 60, 92.

To understand the common misapprehension, consider the famous, if hackneyed,[15] David Foster Wallace parable:

> There are these two young fish swimming along[,] and they happen to meet an older fish swimming the other way, who nods at them and says, "Morning, boys. How's the water?" And the two young fish swim on for a bit, and then eventually one of them looks over at the other and goes[,] "What the hell is water?"[16]

In Wallace's telling, the fish swim and eat and breathe, clueless about the very environs upon which their lives and all its dimensions depend.[17] "What the hell is water?"[18] Although the jolt of the older fish's query lifted the young swimmers' liquid world into their consciousness for a moment, their sustaining surroundings were likely to seep quickly back into the oblivion of everywhere.[19] Such mindlessness, Wallace explains, is the "default setting."[20]

Now imagine a twist in the story. Suppose the pair of young fish ventured into an inlet rich in food before being beached by a fast-retreating tide. Those fish would quickly understand what water is and its life-or-death significance.

Justice, in that sense, is like water: viscerally perceptible in its absence. Our systems and collective survival depend upon its existence and purity—and its preservation and vitalizing effects depend upon our being attentive to it. And, like water to fish, the significance and meaning of justice are clarified through scarcity and deprivation. The experience and feeling of its absence—the stuff of "injustice"— serve as the baseline from which justice is readily appreciated. In other words, for those who seek a definition of "justice," the response is simple: it's the elimination of "injustice."

In distorting the Wallace parable, our point is not to suggest that our society has been swimming in an ocean of justice. Quite the opposite: the point is that some things that are profoundly important for our survival can be best understood and appreciated in their absence. And the last decade or two represent what, to many, feels like a fast-retreating tide, leaving growing numbers of people literally and figuratively suffocating and calling out for justice.[21]

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[15] *See* Emily Harnett, *How the Best Commencement Speech of All Time Was Bad for Literature*, LITERARY HUB (May 17, 2016), https://lithub.com/how-the-best-commencement-speech-of-all-time-was-bad-for-literature [https://perma.cc/NJ6N-TX6T].

[16] David Foster Wallace, 'This Is Water' Speech at Kenyon College Commencement (May 21, 2005) https://fs.blog/2012/04/david-foster-wallace-this-is-water/ [https://perma.cc/V97E-F6QF].

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Our point is not that systems have uniformly grown more unjust but that, regardless, systemic injustices have become more conspicuous to a wider public. As described below, the perceptions of justice and injustice may be illusory. *See infra* Part I (describing the factors that can, when perceived, contribute to a injustice dissonance and the problem of invisible injustice).

C. Preview

This Article introduces a framework for understanding and debating justice and its potential role in law and the legal system. Such a framework is, in our view, long overdue and responds to a fundamental hypocrisy in the law. An institution that wields immense state power and gains legitimacy by expressly promising justice—even branding itself with justice-related statuary and symbols—should not be permitted to disregard the norm, much less dismiss it as meaningless. Of all institutions, the law should be true to its promise. The legal profession, the judiciary, and the legal academy, among others, either should make a good-faith effort to render the norm functional and meaningful or they should abjure it altogether. This Article represents our attempt to advance the former option.

Part I begins by introducing our framework, which follows in a tradition of viewing justice as the absence, or elimination, of *in*justice and identifying some of the elements that arouse a sense of injustice. The Part further explores the connection between feelings of injustice and the meaning of justice, the persistence of injustice in our system, and the strategies available to those challenging injustice. In the process, Part I introduces our "injustice framework," which highlights common factors that produce a sense of injustice and that encourage individuals and groups to mobilize for change. Although the injustice framework does not itself resolve questions of justice, it does have implications for how and where injustice might thrive and how it might be challenged by advocates, activists, organizers, and policy entrepreneurs seeking to advance justice.

Part II surveys seven iconic texts associated with movements for justice, analyzing how their rhetorical (and associated direct-action) strategies accord with our injustice framework. Ranging from the Declaration of Independence to the Declaration of the Occupation of New York City, the texts and their authors take on many of this nation's longstanding systemic injustices, around race, gender, class, and more. That part argues that the consistency of approaches across such widely hailed texts supports our claim that the injustice framework captures a basic consensus regarding the meaning of injustice and helps illustrate what amounts to a nationally or culturally shared conception of justice.

Part III revisits those same texts to explore briefly what they reveal about the relationship between justice and two other fundamental cultural values: freedom (or liberty) and democracy. That part suggests that the texts give those terms discernible meanings that cohere and overlap with justice, thus forming a network of related definitions.

Part IV examines key texts in some of the prominent social justice movements that have arisen in the decade since Occupy Wall Street. That section illustrates how those texts similarly employ the elements and associated strategies of the injustice framework and reflect the interrelated meanings of justice, freedom, and democracy.

Finally, Part V sets up and introduces the four superb articles in this symposium and calls for greater attention to, and study of, justice within the legal system.

I. Occupying Justice: Introduction to the Injustice Framework

A. The Sense of Injustice and its Effects

As Pip observes in Charles Dickens's *Great Expectations*, "there is nothing so finely perceived and finely felt, as injustice."[22] We agree. This Part argues that perceived injustice is the wellspring of powerful emotions and that those feelings, more than syllogisms, are key to understanding the sense of justice. The urge for justice is, by that account, the desire to eliminate perceived injustice. Insofar as such perceptions are veridical, justice can indeed be advanced by preventing, removing, or repairing that which produces injustice.

We are hardly the first to call for the centering of injustice as a means to understanding justice. In noting the lack of a shared definition of justice, sociologist Morris Ginsberg observed that "it is easier to recognize injustice than to define justice."[23] John Stuart Mill wrote that "justice . . . is best defined by its opposite."[24] Thomas Hobbes argued that "whatsoever is not unjust, is just."[25] Philosopher and lawyer Edmond Cahn also defined justice by way of contrast: "Justice," he wrote, "means the active process of remedying or preventing what would arouse the sense of injustice."[26] Political philosopher Tommie Shelby points out "that systematic attempts to explain what justice requires are as old as Plato's *Republic*," without a consensus emerging, but that "[r]eflecting on modes of *injustice* . . . can help us better understand the meaning and urgency of this perennial philosophical question."[27] Legal scholar Martha Minow notes that "it is easier to know what injustice is" than to define justice.[28] Social psychologists Tom Tyler and Heather Smith explain that "people are seldom at a loss when asked to make judgments about injustice—'they know it when they see it!'"[29] Theologian Richard Hughes similarly "define[s] justice as an act of protesting, prevent-

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[22] 1 Charles Dickens, Great Expectations 131 (Chapman & Hall 1861).

[23] Morris Ginsberg, On Justice in Society 73 (1965).

[24] John Stuart Mill, Utilitarianism 64 (7th ed. 1879) (1863).

[25] Thomas Hobbes, Leviathan 95 (Oxford Univ. Press 1998) (1651).

[26] Edmond N. Cahn, The Sense of Injustice: An Anthropocentric View of Law 13–14 (1949).

[27] Shelby, *supra* note 12, at 14.

[28] Martha Minow, *Introduction: Seeking Justice*, *in* Outside The Law: Narratives on Justice in America 1–6 (Susan Richards Shreve & Porter Shreve eds., 1997).

[29] Tom R. Tyler and Heather J. Smith, Social Justice and Social Movements 2 (1995).

ing, and remedying situations that arouse a sense of injustice."[30] And economist Amartya Sen describes how the pursuit of justice has been less about "trying to achieve a perfectly just world (even if there were any agreement on what that would be like)" and more about attempting "to remove clear injustices."[31]

If attempts to define "justice" in abstract, analytical terms can be unsatisfying, it may be because the cognitive alarm bell of sensed injustice is largely a perception-triggered internal experience (influenced by external realities, cultural understandings, and the like). Such personal and bodily feelings can often be tasted more readily than defined. As philosopher Robert Solomon writes: "Justice, if it is to be found anywhere, must be found in us."[32]

More than just sensed, perceived injustice links closely with emotions and behavior. As part of that phenomenology of injustice, social psychologist Dale Miller explains, the "perception of injustice is frequently tied to the emotion of anger."[33] Martha Minow captures that linkage when describing her own internal experience this way: When "[a] sense of injustice rises up, . . . I feel outrage."[34] The anger and outrage linked to perceived injustice may be what Dr. Martin Luther King meant in his "I Have a Dream" speech when referring to the "the flames" and "sweltering . . . heat of injustice."[35]

The sense of injustice, paired with anger, also links with behavior, emboldening individuals and galvanizing groups. Anger, social psychologists have learned, is an "empowering emotion"[36] that "has an unusually strong ability to capture attention."[37] At the same time, the perception of injustice has a transcendent and transformative effect on how people understand and respond to a given interaction or outcome.[38] Dale Miller explains: "To label an insult an injustice transforms it from a personal matter to an impersonal matter of principle," "transforms the private into the public," and transforms a "personal insult" into a "collective harm," such that "avenging the injustice

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[30] Richard A. Hughes, Pro-Justice Ethics: From Lament to Non-Violence 10 (2009).

[31] Amartya Sen, The Idea of Justice vii (2009).

[32] Robert C. Solomon, A Passion for Justice: Emotions and the Origins of the Social Contract xv (1995).

[33] Dale Miller, *Disrespect and the Experience of Injustice*, 52 Annu. Rev. Psychol. 527, 534 (2001). In some instances, "anger acts as 'an alarm system' that triggers the perception of injustice." *Id.* In other situations, perceptions of injustice elicit the emotion of anger. *Id.* ("The perception of injustice can lead to anger . . . . [and] the arousal of anger can lead to the perception of injustice.").

[34] Minow, *supra* note 28, at 4.

[35] King, *supra* note 2.

[36] Neil Vidmar, *Retribution and Revenge*, *in* Handbook of Justice Research in Law 48 (Joseph Sanders & V. Lee Hamilton, eds., 2002) (citing Phoebe Ellsworth & Sam Gross, *Hardening the Attitudes: Americans' Views on the Death Penalty*, 50 J. Soc. Issues 19–52 (1994)).

[37] Jennifer S. Lerner & Larissa Z. Tiedens, *Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition*, 19 J. Behav. Decision Making 115, 116 (2006) (reviewing evidence regarding the effect of anger on judgment).

[38] Miller, *supra* note 33, at 534.

becomes a defense of the honor and integrity of the entire moral community."[39] Reviewing the research, Miller continues: "The arousal of moralistic anger is not confined to injustices perpetrated against one's self."[40] "Cries of injustice from one's peers are [also] difficult to resist."[41] More generally, "[w]itnessing the harming of a third party can also arouse strong feelings of anger and injustice" leading to "a greater obligation to rally around" victims of injustice and compelling "support for retaliatory actions."[42]

Numerous scholars contemplating the meaning of justice have noted the catalyzing effect of perceived injustice. "What moves us," Amartya Sen writes, is "that there are clearly remediable injustices around us which we want to eliminate."[43] Edmond Cahn, rejecting the notion of "justice" as "some ideal relation or static condition or set of perceptual standards," examines instead "what is active, vital, and experiential in the reactions of human beings . . . to a real or imagined instance of injustice."[44] Cahn's phenomenology of injustice aligns with Miller's, as he too emphasizes "the sympathetic reaction of outrage . . . and anger" associated with perceived injustice. Cahn goes further, though, in suggesting a natural explanation for the link. The behavioral quickening of injustice "equip[s] all men to regard injustice to another as personal aggression," and thus "prepare[s] the human animal to resist attack."[45]

Thus understood, injustice is an experience and "sense" that is coupled with particular emotions and concomitant behavioral urges. Perceiving injustice has a transcendent and transformative effect on how people understand and respond to a given outcome. It seizes our attention and galvanizes us, transforming the "you" and "I" into "we" and activating a selfless urge to support victims of injustice and retaliate against its perpetrators.

In sum, attending to the sense and feelings of *in*justice disarms the critique that justice is useless or lacks content and reveals how requiring a clear definition of justice, as Justice Holmes and Judge Posner did,[46] abridges the inquiry before it begins. As philosopher Robert Solomon argues, the search "for a single, neutral, rational position has been thwarted every time."[47] Through such misdirection, justice naysayers have erased a fundamental feature of experience and its significance to law and policy. Ignoring justice, by confusing the unseen for the non-existent, is like young fish mindlessly ignoring the presence and significance of water while swimming headlong toward waterless hazards. We ignore injustice at our peril.

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[39] *Id.* at 534–35 (citations omitted).
[40] *Id.* at 535.
[41] *Id.*
[42] *Id.*
[43] SEN, *supra* note 31, at vii.
[44] CAHN, *supra* note 26, at 13.
[45] *Id.* at 24.
[46] *See supra* text accompanying notes 10–13.
[47] ROBERT C. SOLOMON, A PASSION FOR JUSTICE 27 (1995).

B. Activating a Sense of Injustice

If advancing justice requires the alleviation of injustice, and injustice is understood as sensed and felt, the question remains whether there are common factors that activate that sense of injustice. This section offers a partial answer to that question that later sections of this paper (and later work) will help to validate. It does so by sketching a framework for understanding the factors that contribute to "injustice dissonance"—that is, the cognitive and emotional discomfort resulting from sensed injustice.[48]

There are, we posit, three fundamental elements that, when all are perceived, tend to trigger a sense of injustice regarding a given causal agent[49]: (1) a causal agent's *power* (ranging from conspicuous and coercive force to subtle and systemic influence) employed to (2) produce some *harm, suffering,* or *inequality* (for example, some relative privilege for the causal agent or harm to others) when (3) either the power of the causal agent or the resultant inequality lacks *legitimacy*[50] (in the form of, say, consent or a compelling authority, tradition, precedent, reason, or process). Those three elements interact such that greater amounts of perceived power or inequality require more robust levels of perceived legitimacy to maintain a sense of justice.

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[48] *See generally* Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413 (2006) (exploring the historical role of "injustice dissonance" in shaping whether, when, and how racial inequalities were rationalized or challenged).

[49] We have in mind a capacious notion of "causal agent" that includes individuals, groups, entities, institutions, and systems.

[50] In his influential work on "legitimacy and legitimation," social psychologist and legal scholar Tom Tyler studies and analyzes the factors that lead individuals "to believe that the decisions made and rules enacted by others are in some way 'right' or 'proper' and ought to be followed." *See* Tom Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANNU. REV. PSYCHOL. 375, 376 (2006) That is essentially what he means by "legitimacy"—a belief that the group-imposed allocations, regulations, strictures, and mandates are just and ought to be followed. Describing "legitimacy" as a kind of "framework through which actions are evaluated and judged to be just or unjust," *id.* at 384, he explains:

> [w]hen it exists in the thinking of people within groups, organizations, or societies, . . . leads them to feel personally obligated to defer to those authorities, institutions, and social arrangements. . . . Irrespective of whether the focus is on an individual authority or an institution, legitimacy is a property that, when it is possessed, leads people to defer voluntarily to decisions, rules, and social arrangements.

Id. at 376; *see also* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 4 (2006) (explaining that "normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behavior").

Tyler's definition of legitimacy aligns with that of other social scientists and legal philosophers. Political scientist Mark C. Suchman, for instance, describes "organizational legitimacy" as "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions." Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACADEMY MGMT. REV. 571, 574 (1995). Legal philosopher Richard Fallon describes the "legitimacy," as "measured in sociological terms," of "a constitutional regime, governmental institution, or official decision" as "a strong sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward." Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2005).

Relatedly, when mechanisms of legitimacy lose efficacy for any reason, then a previously acceptable inequality or power dynamic can be perceived as less just. "Injustice," as the noun, and "unjust" as the adjective, can thus be understood as blanket labels to describe an unacceptable imbalance among those elements: excessive power and inequality relative to legitimacy.[51]

Although "injustice," "unjust, "justice," and "just" are commonly used to summarize those perceptions and the resultant "sense," that feeling of injustice and its behavioral effects may arise even if unnamed or if named under other labels, such as "unfair," "oppressive," or "exploitative." To be sure, labels matter and are, like stories and frames, often shortcuts for producing perceptions and eliciting emotions. That is why the "*[c]ries of injustice* from one's peers are difficult to resist."[52] Still, the labels may vary and are not necessary; a perceived imbalance among power, inequality, and legitimacy is sufficient.

The three elements of our injustice framework find support in the work of other political philosophers and political scientists—although the delineated elements of our framework are often only implicit in theirs.[53] Consider a few examples over the last half century.

David Miller's overview of "justice" in the *Stanford Encyclopedia of Philosophy* provides a helpful illustration. Regarding outcomes that raise a "concern of justice," he wrote:[54]

> Suppose we have two people *A* and *B*, of whom one is significantly better off than another—has greater opportunities or a higher income, say. Why should this be a concern of justice? It seems it will not be a concern unless it can be shown that the *inequality* between A and B can be attributed to the behaviour of some *agent*, individual or collective, whose actions or omissions have resulted in A being better off than B—in which case we can ask whether the inequality between them is *justifiable*, say on grounds of their respective deserts.[55]

As the italicized terms highlight, Miller's list of factors that create a "concern of justice" maps well with our framework's elements of injustice. He pointed to an inequality between two parties, created and imposed by one over the

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[51] When we use balance or imbalance throughout this Article, we refer primarily to an imbalance in this direction. That is, the legitimacy is insufficient for a given level of power or inequality.

[52] Miller, *supra* note 33, at 535.

[53] Furthermore, as illustrated below, even when they employ similar definitional frameworks to ours, they don't always refer to the concept they're defining as "injustice."

[54] David Miller, *Justice*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://plato.stanford.edu/entries/justice/ [https://perma.cc/7KM9-7DB2].

[55] *Id.* (emphasis added).

other—where the power of the former is implied and outcome is "justifiable" or, in our terms, legitimate.[56]

John Rawls, in *A Theory of Justice*, was concerned with "social justice" by which he meant "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."[57] Rawls's "general conception of justice," applied to those powerful "social"[58] institutions, requires that "[a]ll social values . . . are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage."[59] Resembling our injustice framework, Rawls treated equality as a presumptive baseline against which the allocations of powerful actors are to be measured. To be legitimate and therefore just, Rawls argued, deviations from that baseline, must satisfy the "maximin" principle.[60] Social inequalities (inequalities brought about by power) that lack legitimacy (defined by the maximin principle) are unjust.

Some theorists employ a framework like ours while emphasizing terms other than justice. For instance, Rawls described "*[u]njust* social arrangements" as "a kind of extortion,"[61] and terms like extortion and oppression often evoke the elements of injustice—power producing suffering or inequality without legitimacy.[62] Marilyn Frye, writing about "oppression" in 1983, spoke in terms of those same elements on a systemic and structural level. Her classic description of the "double bind"— "situations in which options are reduced to a very few and all of them expose one to penalty, censure or deprivation"—was a description of the gender-based inequality and power that lacks legitimacy.[63] Frye offered the metaphor of a birdcage to capture how the collection of double binds combine, like individual bars in a cage, to immobilize women. The lives of women, by virtue of their identity in that group, are unjustly subordinated to men. They are

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[56] Miller elsewhere explains that "justice requires an agent whose will alters the circumstances of its objects . . . . So we cannot, except metaphorically, describe as unjust states of affairs that no agent has contributed to bringing about." *Id.*

[57] JOHN RAWLS, A THEORY OF JUSTICE 6 (Revised ed. 1999).

[58] *Id.* at 54.

[59] *Id.*

[60] *Id.* at 133–35.

[61] *Id.* at 302.

[62] Rawls offered a "theory of justice" that was based upon what he considered to be a legitimate process (a kind of social contract) created in a situation where participants were equals in every relevant way (the original position).

[63] Marilyn Frye, *Oppression*, in THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 2, (1983). Sukaina Hirji helpfully summarizing Frye's argument, explaining that "this network" of binds is constructed by, and in service of, the interests of some group or groups. So, for Frye, a cis man who is not a member of an oppressed group might feel frustrated that certain career paths are female-coded and difficult for him to enter: he might experience this as a barrier and restriction on his movement. But, for Frye, this barrier is itself created and maintained by men, for the benefit of men. To determine whether someone is oppressed or not, in Frye's view, it is not enough to know that there is some barrier or restriction on movement, or that some encounter is painful or frustrating. Instead, we need to understand who constructs and maintains the barrier or restriction, and whether that barrier exists in a network that serves to immobilize or reduce some group, for the benefit of some other group.
Sukaina Hirji, *Oppressive Double Binds*, 131 ETHICS 643, 648 (2021).

> confined and shaped by forces and barriers which are not accidental or occasional and hence avoidable, but are systematically related to each other in such a way as to catch one between and among them and restrict or penalize motion in any direction. It is the experience of being caged in: all avenues, in every direction, are blocked or booby trapped.[64]

In 1990, Iris Marion Young picked up those themes in her classic book, *Justice and the Politics of Difference*. She argued that "a conception of justice should begin with the concepts of domination and oppression" and defined "justice" as "the elimination of institutionalized domination and oppression"[65] Her definition of "domination and oppression" aligns with what we mean by "injustice." For instance, Young explained that oppressive "exploitation"[66] occurs

> through a steady process of the transfer of the results of the labor of one social group to benefit another. The *injustice* of class division does not consist only in the distributive fact that some people have great wealth while most people have little. Exploitation enacts a structure relation between social groups. Social rules about what work is, who does what for whom, how work is compensated, and the social process by which the results of work are appropriated operate to enact relations of power and inequality.[67]

In "Five Faces of Oppression," Young conceived "oppression" as "a systematic and unreciprocated transfer of powers from women to men" and "not merely . . . an inequality of status, power and wealth resulting from [exclusion] from privileged activities. The freedom, power, status, and self-realization of men is possible precisely because women work for them."[68] The injustice of exploitation, then, results from the fact that a powerful group reproduces its privilege by enacting, without legitimacy, structures that yield unequal allocations of who does what, who gets what, and who is considered what.[69]

In 2001, political scientist Jane Mansbridge defined group subordination as "a system of social organization in which members of one group create and reinforce inequalities between themselves and members of another

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[64] *See id.* at 4.

[65] IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 6 (2011) [hereinafter YOUNG, JUSTICE].

[66] Young explicates five aspects of oppression—exploitation, marginalization, powerlessness, cultural imperialism, and violence. We focus here only just the first, exploitation, to illustrate our point. *Id.* at 6.

[67] YOUNG, JUSTICE, *supra* note 65, at 49 (emphasis added).

[68] Iris Marion Young, *Five Faces of Oppression*, *in* RETHINKING POWER 174, 183 (Thomas Wartenberg, ed., 1992) (footnotes omitted).

[69] YOUNG, JUSTICE, *supra* note 65, at 50.

group through the exercise of power . . . ."[70] Mansbridge used "the word 'oppression'"

> to describe the unjust exercise of power by a dominant group over a subordinate group. A group is oppressed only if its position in a particular hierarchical system derives from unjust inequalities that result from the exercise of power (in the sense of threat of sanction or imposition of constraint). Injustice and power are central.[71]

Mansbridge's definition of "oppression" also coincides with our injustice framework: a particular kind of inequality—a "hierarchical system" among groups—in which a "dominant group" "exercise[ ] . . . power" "over a subordinate group," yielding a "unjust inequalities."[72]

Political philosopher Tommie Shelby, in his 2016 book *Dark Ghettos*, described the mechanisms of "systemic injustice,"[73] including the "self-reproducing exploitative relationship" between racialized classes, emphasizing the self-perpetuating inequalities caused by power:

> X and Y are in a self-reproducing exploitative social relationship if: (i) Y is regularly forced to make sacrifices that result in benefits for X; (ii) X obtains these benefits by means of a power advantage that X has over Y; and (iii) as a result of conditions (i) and (ii) X's power advantage over Y is maintained (or is increased) and Y remains in the condition of being forced to make sacrifices for X's benefit.[74]

Elsewhere Shelby makes explicit his concern with the "legitimacy" of "unjust institutions" with "power."[75] Shelby's "exploitation" is what we mean by injustice, where the more powerful X employs power, built into underlying structures, to produce or reproduce inequality without legitimacy.[76]

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[70] Jane Mansbridge, *Introduction*, *in* OPPOSITIONAL CONSCIOUSNESS: THE SUBJECTIVE ROOTS OF SOCIAL PROTEST 2 (Jane J. Mansbridge & Aldon Morris, eds. 2001).

[71] *Id.*

[72] *Id.*

[73] SHELBY, *supra* note 12, at 197. Shelby rejects simple fixes and conventional narratives, emphasizing instead the need to address the "systemic injustices" at the root of ghettos. The proper frame is neither "the dysfunctional behavior of the black poor or structural obstacles to upward mobility." *Id.* at 2. Ghettos are the predictable consequence of fundamentally unfair schemes. Any solution will involve a "fundamental reform of the basic structure of our society." And the appropriate frame should be "what justice requires and how we, individually and collectively, should respond to injustice." *Id.*

[74] *Id.* at 197.

[75] *See id.* at 58 ("Supporting unjust institutions can give them legitimacy, effectively strengthening their power over the oppressed and enhancing their staying power.").

[76] Many earlier philosophers and political theorists employ the elements of the framework we describe. While we will not take the space here for a more detailed exposition, we can offer a few prominent examples from canonical texts as illustrative.

Jean-Jacques Rousseau opened *On the Social Contract* with an implicit invocation of injustice: "Man is born free, and everywhere he is in chains. . . . What can render it legitimate?" JEAN-JACQUES ROUSSEAU, *On the Social Contract*, *in* BASIC POLITICAL WRITINGS 141 (Donald A. Cress trans. and ed., 1987). Where power produces such stark harm and inequality, questions of legitimacy—and ultimately injustice—are raised, for "force"—that is, power without legiti-

As those examples illustrate, a variety of philosophers and scholars attempting to capture the meaning of justice—or the source of injustice dissonance—have offered frameworks that parallel our injustice framework.

C. The Problem of Invisible Injustice

Having offered some support for the elements of the framework, we now turn to one potential source of ongoing injustice. If a sense of injustice is the product of perceptions, there is always the potential for a gap between such perceptions and reality. There may be situations in which actual injustice (that is, a situation in which causal agents employ power to produce harms without legitimacy) fails to elicit a sense of injustice.[77]

In fact, those who have studied power, inequality, and legitimacy from a variety of disciplinary perspectives tend to emphasize the potential for these phenomena to operate invisibly, to be missed or misattributed. While we cannot review those extensive literatures here, a few instances of theorists of

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macy—"does not bring about right" and "one is obliged to obey only legitimate powers." *Id.* at 144.

Similarly, in "Discourse on the Origins of Inequality," Rousseau defined "moral or political inequality" as the sort of inequality that implicates justice concerns precisely because it is the product, not of nature, but of power. JEAN-JACQUES ROUSSEAU, *Discourse on the Origins of Inequality*, *id. at* 38. His solution emphasized the role of equality, in a social contract in which "since each person gives himself whole and entire, the condition is equal for everyone." ROUSSEAU, *On the Social Contract*, *supra* at 148.

John Stuart Mill described a general conception of justice that also aligns with our framework, positing that "[a]ll persons are deemed to have a right to equality of treatment, except when some recognized social expediency requires the reverse." MILL, *supra* note 24, at 94 (using the term "treatment" to suggest attention to inequalities produced by some agent or source of power). For Mill, too, the baseline norm is equality, and unequal treatment is presumptively illegitimate, unless it is pursuant to such an expediency. "And hence," Mill concluded, "all social inequalities which have ceased to be considered expedient, assume the character not of simple inexpediency, but of *injustice*." *Id.* (emphasis added).

Friedrich von Hayek likewise indicated a role for all three elements of the injustice framework. In "The Mirage of Social Justice," he highlighted the starting presumption of philosophers like Mill and Rawls in favor of equality and acknowledged how "[t]he postulate of material equality would be a natural starting point" or baseline presumption in circumstances where the unequal "shares of the different individuals or groups were . . . determined by deliberate human decision." 2 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY 81 (1982). Where such power is intentionally exerted for those ends the resultant inequality would be unjust. Hayek wrote:

> In a society in which this were an unquestioned fact, justice would indeed demand that the allocation of the means for the satisfaction of human needs were effected according to some uniform principle such as merit or need (or some combination of these), and that, where the principle adopted did not justify a difference, the shares of the different individuals should be equal.

Id. In short, for Hayek, injustice is an illegitimate (or "not justif[ied]") inequality created by power (or "deliberate human decision"). This was a mere aside, and not the basis of Hayek's theory, because of his view that in market societies, distribution was not the result of "deliberate human decision." *Id.*

[77] The reverse is also true: perceived injustice might itself be illusory. And that illusion could itself be a source of injustice: this is part of what is at stake in critiques of justice as a judicial norm. *See, e.g.*, *infra* note 715. We believe that the framework has purchase on these questions in both directions, but for now our focus is on unidentified injustice.

power noting that the most effective forms of power tend to operate invisibly will illustrate.

In *The Anatomy of Power*, for instance, economist John Kenneth Galbraith explains that "[s]ome use of power depends on its being concealed,"[78] that "much exercise of power depends on a social conditioning that seeks to conceal it,"[79] that "the purposes for which power is being sought will often be extensively and thoughtfully hidden by artful misstatement,"[80] and that, indeed, "neither those exercising [power] nor those subject to it need always be aware that it is being exerted."[81] Political theorist Steven Lukes similarly describes "power" as sometimes being "at work in ways that are hidden from the view of those subject to it and even of its possessors."[82] Power is, he argues, "more effective the less perceptible its workings to agents and observers alike."[83] Social psychologists have demonstrated countless ways that power is exercised over people's behavior invisibly through "situation" and how those controlling the situation are, to that extent, invisibly powerful.[84] Philosopher Anne Cudd writes about "oppression" resulting not only through visible harms,

> such as violence against an unarmed person, but also through actions that reinforce oppressive social norms. Such actions may not be intended to oppress, and it may even be virtually impossible for the actor to avoid reinforcing the oppressive social norm.[85]

Writers from Karl Marx to John Stuart Mill agree that a society's baseline power structure operates largely behind the realm of consciousness, profoundly shaping its ideas and morality.[86] Antonio Gramsci, analyzing "the functions of social hegemony and political government," similarly distinguished between "[t]he apparatus of state coercive power" and the purportedly "'spontaneous' consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental

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[78] JOHN KENNETH GALBRAITH, THE ANATOMY OF POWER, 2 (1983).
[79] *Id.* at 12.
[80] *Id.* at 9.
[81] *Id.* at 24.
[82] Steven Lukes, *Power* in ENCYCLOPEDIA OF PHILOSOPHY AND THE SOCIAL SCIENCES 748, 749 (Byron Kaldis, ed., 2013).
[83] *Id.* at 748.
[84] As Stanley Milgram put it, "[t]he social psychology of [the twentieth] century reveals a major lesson: often it is not so much the kind of person a man is as the kind of situation in which he finds himself that determines how he will act." STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 205 (1974). For overviews of that research and its implications, see Jon D. Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture* 152 U. PA. L. REV. 129 (2003) [hereinafter Hanson & Yosifon, *The Situation*] and Jon D. Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEORGETOWN L.J. 1 (2004) [hereinafter Hanson & Yosifon, *The Situational Character*].
[85] Ann E. Cudd, *Oppression*, *in* INTERNATIONAL ENCYCLOPEDIA OF ETHICS (2013).
[86] *See* Mansbridge, *supra* note 70, at 4 (quoting Marx, "The ruling ideas of each age have ever been the ideas of the ruling class," and Mill, "Wherever there is an ascendant class, a larger portion of the morality of the country emanates from its class interests").

group."[87] Chicago-School economist George Stigler takes a similar view of the hidden power of corporate influence over administrative regulation—invisibly capturing the institution to transform it into a tool for its own ends, while allowing the uninformed polity to believe that the regulator serves the public interest.[88]

Even without adducing similar evidence regarding the psychological, interpersonal, and structural mechanisms for rendering inequality and suffering invisible and for creating false perceptions of legitimacy, those texts confirm our claim that actual injustices may not correspond with perceived injustices.[89] ?If, however, injustice involves a *felt* sense, then one might ask how there can be a gap between real and perceived injustice. Viewed through our framework, the question of *actual* injustice is a normative and empirical question regarding whether causal agents are employing power to encourage inequalities or suffering without (normative) legitimacy.[90] If no such imbalance exists—if the legitimacy is sufficient to cover the inequalities and the exercise of power that created them—then there is no actual injustice. If, however, such an imbalance among power, inequality, and legitimacy is present, whether perceived or not, then there would be actual injustice. Thus, while the perceived relationship between those three considerations contributes to whether people tend to perceive injustice, those perceptions are not necessarily veridical: the existence of injustice and its constituent elements does not depend on their perception.

Indeed, illusions of justice or injustice can thrive in the breach between the perceived and the real. For example, there may be harms for which actual injustice (that is, where power is producing the harm without legitimacy) is not sensed. By the same token, there may be instances when injustice is readily perceived—perhaps because humans are especially prone to see it. The trope of the highway robber, or soldier with a gun, or a brutalizing police officer make for obvious and prototypical examples. More generally, perceived group-based acts or threats by a dispositionalized outgroup of "them" toward a situationalized ingroup of "us"—including, their threats to our possessions, our status, our way of life, our credibility, and our worldviews—tend to catalyze injustice dissonance within the ingroup; such threats satisfy the three components of injustice more or less automatically.[91] That is another part of what Dale Miller is pointing to when he observes that "[c]ries of injustice *from one's peers* are *difficult to resist*."[92] And it is part

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[87] ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 12 (Quinton Hoare and Geoffrey N. Smith trans. and ed., 1971).

[88] *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) ("A central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.").

[89] *See supra* text accompanying notes 48–52.

[90] By "normative legitimacy" we mean to draw a contrast with perceived legitimacy, or what Richard Fallon calls "sociological" legitimacy. *See supra* note 50.

[91] For more general support for the claims made in this paragraph, see Hanson & Yosifon, *The Situation*, *supra* note 84; Adam Benforado, Jon Hanson, & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L. J. 1645 (2004); Hanson & Hanson, *supra* note 48.

[92] *See supra* text accompanying note 52.

of what Edmond Cahn is referring to when he argues that perceptions of injustice "prepare the human animal to resist attack."[93] Like all perceptions, the perception of injustice and its components is influenced by biases, motivations, ideological and cultural presumptions, and manipulation. Some perceptions of injustice are psychologically, culturally, and situationally primed and stick out while others blend in like water. As the following section describes, this all has implications for how justice tends to be pursued when the injustice itself is baked into the system.

Before turning to that, however, it may be helpful to distinguish our injustice framework from a more conventional theory of justice. Our framework is intended to help clarify key factors that contribute to a sense of injustice and thus forms the foundation of a deeper and more productive examination or conversation about justice, particularly in the legal context. With this framework, however, we neither purport fully to resolve the often-competing intuitions and perceptions about justice nor do we endeavor to generate ultimate answers to the justice questions that have long occupied moral and political philosophers or that animate advocates in today's most polarizing policy debates. Our ambition with the injustice framework, again, is rather to disaggregate the bigger, often confused, debates and assertions about justice that occur or are avoided in legal and jurisprudential discourse into a set of more precise and tractable questions about which there might be—though need not be—greater potential consensus.[94]

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[93] *See supra* text accompanying note 45.

[94] Like most legal frameworks, our injustice framework is capacious enough to incorporate conflicting views. To take one example, Supreme Court jurisprudence regarding the standard for whether a restriction on abortion is unconstitutional asks whether it imposes an "undue burden" on "a woman seeking an abortion." Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 877 (plurality opinion). Of course, judicial views differ not only on whether that is the appropriate standard, but on how it should be applied in specific cases. Just as conflicting views can be articulated within the framework of that legal doctrine, our justice framework allows articulation of conflicting views about injustice.

In the abortion debate, for instance, there are (at least) two conflicting claims of injustice, each keenly felt. The "pro-life" side highlights the inequality between the mother and her unborn fetus, in which the former exerts greater power to deprive the latter of life. For many advocates there is no legitimate justification for such an exercise of harm-causing power (or only a narrow set of possible legitimating reasons). Some on the "pro-choice" side, in contrast, see abortion as nested within a larger injustice: longstanding, deep-rooted, and illegitimate inequalities. They see the right to choose, not only as key part of a general right to bodily autonomy, but also as a partial antidote to the patriarchal power dynamics behind that injustice. The same dynamic is in play for almost all of the most spirited and polarizing policy debates; indeed, they are spirited or polarizing precisely because each side perceives injustice in the other side's position or behavior.

Our purpose here is not to produce clear answers, but to show that advocates on both sides of many legal and policy debates make injustice claims that are significantly informed by perceptions of power, inequality, and legitimacy. Still, we believe that understanding the implicit role of the injustice framework and its underlying elements in policy discourse can, by clarifying the issues, help to resolve some of those debates. It reveals how even those who are not explicitly employing the norm of justice may nonetheless be appealing to it and calls upon anyone who is appealing to that norm to interrogate its components carefully and critically. That is, a true and genuine commitment to advancing justice requires an open and concerted commitment to making veridical assessments of those elements. *See infra* text accompanying notes 771–777.

D. Advancing Justice by Highlighting Injustice

The goal of pursuing justice, as we have defined it, can be understood as that of preempting, eliminating, or lessening injustice and its consequences. To promote a just outcome then, is to ensure that no power or suffering exceeds what is legitimate given the causal agent's relative power and the inequality or suffering to which the causal agent contributes. That might be achieved, for instance, by creating a balanced relationship between power, inequality, and legitimacy and by preventing, compensating, or repairing the consequences of injustice. The pursuit of justice can occur in many ways and in many places. It might happen through interpersonal communication, a strongly worded op-ed, a social media campaign, or physical force. Of course, the legal system—the justice system—purports to wield monopoly power over who, how, when, and whether particular claims of injustice can be made and, if so, how they can be vindicated. The legal system recognizes and responds, however, only to a subset of the perceived injustices that transpire within society. Worse, as evident from history or any thorough account of our system today, there are many deep-seated injustices—systemic injustices—that the laws and legal system have facilitated, co-created, or even mandated. The focus in most of the rest of this Article will be on those sorts of deep-seated or systemic injustices. There is, in our view, a lot to learn about the cultural meaning of justice by examining how those fighting against injustice approach challenges outside of the language, categories, and processes of law.

This subsection offers a few brief observations on the strategies of prominent and influential efforts to advance justice. Justice-oriented social activism and movements typically build upon the emotional and transcendent effects of perceiving injustice and seek to promote perceptions of injustice by highlighting or exposing one or more of the three elements of the injustice framework introduced above. There are thus three characteristic "moves" available to those seeking to highlight or activate injustice dissonance, corresponding to the three elements.

The first move is to *reveal* power: that is, to render the causal agent's power (or its causal connection to a given outcome or behavior) more conspicuous.[95] This can take many forms. An activist or justice-seeker might challenge culturally dominant causal narratives, perhaps by describing an outcome from the perspective of individuals and groups who have been harmed and from whose point of view subtle power dynamics may be more evident. They might draw analogies and comparisons to other outcomes or practices where power is widely understood to play a significant causal role. They might denaturalize a common practice known to produce an inequality or harm in order to demonstrate its social contingency and, therefore, the role of choice, strategy, and design in its production. Or they might publicize

[95] Or it may be to clarify and strengthen of the causal connection between the powerful causal agent and the inequality.

a particularly salient or egregious manifestation of power, or even provoke latent power into making itself more visible.

The second move is to *highlight the inequality or harm*: that is, to heighten the salience of the inequality or suffering produced by a causal agent employing power to advantage itself relative to others. Activists employing this move might render the inequality or harm more visible through photos, videos, or art. Or they might promote an emotional connection to the inequity or suffering through storytelling, closer proximity, or direct personal experience. They might recharacterize or redefine the relevant groups or parties in a way that allows inequalities between those groups to become legible, employing oppositions of capital and labor, Black and White, oppressor and oppressed, local and outsider, us and them, Catholic and Protestant, men and women, the 99% and the 1%, and so on.[96]

The third move is to *challenge the legitimacy* of the outcome: that is, to undermine the normative basis of the inequality or suffering or the exercise of power that produced them. An inequality or harm to a group or individual, even one brought about by power, may be described as legitimate (and therefore just) if it is the product of an appropriate process, or in line with an honored tradition or controlling precedent, or justified through a particular kind of reasoning process or appeals to certain authorities, or if the parties involved have meaningfully consented to the outcome. The third move can be pursued, therefore, by interrogating and criticizing the legitimating foundation of a given outcome—by, for instance, revealing bias in the process, identifying an equally controlling, but contradictory, precedent, questioning the authority's right to govern or decide, or showing that the outcome was actually non-consensual.

Employing any of those three moves—(1) revealing power, (2) highlighting inequality, or (3) challenging legitimacy—can promote injustice dissonance. In practice, those challenging a given outcome or allocation as unjust often pursue all three strategies, arguing that a given outcome manifests a significant inequality or harm, brought about by power, without legitimacy. To illustrate and begin to validate that understanding of justice and injustice, Part II reviews a sample of historically significant texts—prominent manifestos, a legal opinion, and speeches—that are widely associated with major justice-advancing social movements.

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[96] Group categorizations also can link to the other elements in the injustice framework, as the very creation of the group classifications often facilitates automatic, motivated, and manipulable identity group biases, stereotypes, and prejudices that connect to presumptions regarding power and legitimacy. *See* Hanson & Yosifon, *The Situational Character, supra* note 84, at 54–58, 100; *see generally* Hanson & Hanson, *supra* note 48; Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory* 77 S. CAL. L. REV. 1103 (2004).

II. Justice Occupied: Seven Iconic Texts Resisting Injustice

The nominal goal of this section is to examine seven movement-making texts through the lens of the injustice framework to ascertain the extent to which each validates that model. If our conception of justice and our injustice framework have any purchase, they should be able to illuminate the goals, strategies, and effects of those iconic documents.

And they do. This section illustrates how all of the texts spotlight injustice by demonstrating an unjust imbalance among the three elements of power, inequality, and legitimacy. More specifically, the authors all employ versions of the three characteristic moves identified above: revealing power, highlighting suffering or inequality, and challenging the legitimacy of that power or its harmful outcome. In the process, each helps to overcome the problem of invisible injustice as a means to advancing justice.

This Part thus solidifies our thesis that terms like justice and injustice do indeed have meaning, not located in a dictionary but in the usage-based connotations as manifested within iconic documents known in part for their role in naming and challenging injustice and advancing justice.

To be clear, we come to this project with a more ambitious aim. This effort to make sense of justice as political and legal norm and to examine iconic justice-related movements, reflects a larger and longer-term goal of offering insight into the insidious structures that have contributed to the longevity of our society's most profound systemic injustices, notwithstanding our cultural commitment to justice.

A. "Declaration of Independence"—International Injustice

1. Context

The Declaration of Independence, drafted primarily by Thomas Jefferson, articulates some of the highest and noblest aspirations of the United States and, in the process, reflected and initiated many of the nation's deepest and darkest hypocrisies.[97]

The document is best known for declaring the thirteen colonies' independence from Great Britain and for asserting American self-sovereignty. Nearly fifty years after it was signed, John Quincy Adams described the Declaration as the document through which "[a] nation was born in a day."[98]

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[97] *See infra* notes 141–144 and accompanying text.

[98] *See* John Quincy Adams, An Address Delivered at the Request of the Committee of Arrangements for Celebrating the Anniversary of Independence at the City of Washington on the Fourth of July 1821, upon the Occasion of Reading the Declaration of Independence 23 (Cambridge, Univ. Press, 1821) (stating that "the people of North America" were "imploring justice and mercy from an inexorable master in another hemisphere" like "children appealing in vain to the sympathies of a heartless mother," up until they signed the Declaration of Independence. It was at that point that they became "a *nation*, asserting as of right, and maintaining by war, its own existence.").

However, the body of the document is not concerned with asserting nationhood as much as it is with justifying the new union's secession from Britain. By framing and enumerating the many injustices of British rule, the document is, in a sense, a declaration of international injustice. This section defends that claim by reviewing different parts of the Declaration through the lens of the injustice framework.

2. Text

The Declaration of Independence opens as follows:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.[99]

Viewed through our injustice framework, that sentence does a lot of work. It announces the general purpose of the document and establishes two groups: the colonists, described as "one people," and the British, distinguished from the colonists, as "another." Then, more subtly, the sentence insists that nothing more than "political bands" had connected the ingroup and outgroup. This binary establishes a convenient boundary upon which the balance of the argument for independence is premised.

The sentence also suggests a normative baseline of *equality* (and thus a presumption against unequal treatment) for all peoples,[100] a norm reiterated later in the Preamble.[101] Inequality is thus an indicator of injustice; the presence of unequal treatment between relevant groups, [102] that is, raises questions about the source and legitimacy of that inequality.

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[99] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[100] That is, an "equal station to which the Laws of Nature and of Nature's God entitle" all peoples. *Id.*

[101] *See* THE DECLARATION OF INDEPENDENCE, *supra* note 99, at para 2.i.

[102] To be sure, the norm of equality for all peoples did not include *all* people and, as others have detailed, shared racism among the founders and colonies was a key ingredient in galvanizing the colonists—providing them "common cause"—and making the Declaration of Independence and Revolution possible. Historian Robert Parkinson recently summarized the argument this way:

> [T]he men who orchestrated the creation of the United States justified that new nation by excluding some people they thought unworthy. The so-called "founders" might have believed that all men were created equal, but they also arranged things so the United States would not belong to everyone. Believing unity to be the highest priority, they traded away equality to secure the union. From its first inception, the exclusion of African Americans and Native peoples was what allowed the states to be and stay united. Since that new republic would be one based on citizenship—a form of political belonging that acts much like a club, where the members get to decide who's included and who's not—the argument that some people didn't belong as Americans would endure after the Revolution. Whether they intended to do so or

The last portion of the first sentence announces that the document will take the form of an argument and an explanation—a declaration of "causes which impel" the colonists to separate from the British.[103] It thus introduces the document as a reason- and reasoning-based public justification of the extraordinary dissolution between the colonists and British. Promising to detail the justifications of separation, the signers were thus claiming to be motivated by elevated ends born of Enlightenment ideals of reason and progress. They were not, as their critics might claim, moved by selfish interests, rank opportunism, ungrateful resentments, or misplaced anger.[104] By stating their case for separation persuasively, the signers also hoped to embolden their fellow colonists and appeal to other nations with whom they hoped to ally.[105]

The opening sentence also introduces a notion, implied throughout the document, that the revolution is imposed on, not chosen by, us.[106] The dissolution is "necessary." It is the inescapable result of "causes" and the sacred norms and obligations of the "Laws of Nature and of Nature's God."[107] The propellants to revolution were thus bigger than a passing moment or even an extended dispute between the colonists and their oppressors. Introducing abstract principles and claims to higher laws, the opening sentence launches an appeal to a shared sense of injustice and inevitability that would justify the radical actions and consequences—including blood, death, and trauma—that the revolutionaries were initiating.[108]

> not, through the stories they sponsored, the words they used, and the statements they made, those founders buried prejudice deep in the cornerstone of the new American republic in 1776. There it remains.

ROBERT G. PARKINSON, THIRTEEN CLOCKS: HOW RACE UNITED THE COLONIES AND MADE THE DECLARATION OF INDEPENDENCE 2–3 (2021); *see also* GERALD HORNE, THE COUNTER-REVOLUTION OF 1776 SLAVE RESISTANCE AND THE ORIGINS OF THE UNITED STATES OF AMERICA *passim* (2016) (arguing that the protection and maintenance of slavery was a fundamental cause of the American Revolution).

[103] *See supra* text accompanying note 99.

[104] *Id.; see also* DANIELLE S. ALLEN, OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY 92 (2014) (observing that "the signers indicate that they will declare the reasons for their actions: . . . a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation").

[105] *Cf. Id.* at 96 (explaining that the signers sought the approval and support of "all the colonies," "the world," and "God" or "'the Supreme Judge of the world'").

[106] Indeed, Jefferson employed the passive voice in his description of "the causes which impel them to the separation," to suggest the colonists' lack of agency in the events leading to the dissolution of ties between them and the British. *Cf.* Silvia Knobloch-Westerwick & Laramie D. Taylor, *The Blame Game: Elements of Causal Attribution and its Impact on Siding with Agents in the News*, 35 COMMC'N RSCH. 723 (2008) (suggesting that agents associated with negative events typically aim to downplay or deflect their responsibility by putting the blame for the situation on someone else).

[107] *See supra* text accompanying note 99.

[108] Danielle Allen argues, in effect, that the Declaration was premised upon the assumption that all people have an ability to recognize injustice and a desire to eliminate injustice, though she uses the term "fairness":

> Our capacity to judge how things are going includes the ability to discern whether someone is causing others harm or depriving them of liberty. In other words, all people have a sense of fairness that makes it possible for them to be reasonable

Although the Declaration's introduction never employs the labels of "injustice" or "justice," it does activate injustice dissonance by emphasizing the pertinent elements of the injustice framework—Great Britain employing its power to harm the colonists without legitimacy. Revealingly, it also echoes and draws from a previous document, co-authored by Jefferson: the introduction of the "Declaration of the Causes and Necessity of Taking Up Arms."[109] In that Declaration, the label "justice" was explicit. It stressed, for instance, that those "called to this great decision" should "be assured that their cause is approved before supreme reason; so is it of great avail that its *justice* be made known to the world."[110]

> judges of the causes of others. This is not to say that we all always act as reasonable judges but only that everyone has, at some basic level, the potential to be a reasonable judge. We have, Jefferson would say, moral sense. By nature, in the Declaration's argument, all people have an intuitive sense of fairness.
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> . . . .
>
> The colonists decided to deal with the world by presuming it to be populated with fair judges and by making their case to those fair judges. They could presume this because they believed that nature had given all human beings an innate sense of fairness, which, though it perhaps lay dormant sometimes, could nonetheless be activated by spelling out the terms on which fair judgments are made. It could be activated with explanations of principle.

ALLEN, *supra* note 104, at 141–42.

[109] *See Declaration of the Causes and Necessity of Taking Up Arms*, *in* 1 Documents of American History 92 (Henry Steele Commager ed., 9th ed. 1973) [hereinafter *Declaration of the Causes*].

The "Declaration of the Causes and Necessity of Taking Up Arms" is a shortened title for "A Declaration by the Representatives of the United Colonies of North-America, Now Met in Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking Up Arms." *Compare* ALLEN, *supra* note 104, at 51 (referring to the document by its shorthand name) with *A Declaration by the Representatives of the United Colonies of North-America, Now Met in Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking up Arms*, Yale Law School Lillian Goldman Law Library, https://avalon.law.yale.edu/18th_century/arms.asp#1 [https://perma.cc/VM9C-26CZ] (referring to the document by its full title).

[110] *Declaration of the Causes, supra* note 109, at 92 (emphasis added). That sentence was later edited, likely by Jefferson's co-author John Dickinson, to the following: "we esteem ourselves bound, by obligations of respect to the rest of the world, to make known the *justice* of our cause." ALLEN, *supra* note 104, at 51 (emphasis added) (quoting the sentence). "The Declaration of the Causes and Necessity of Taking Up Arms" was one of several statements that Congress promulgated to rationalize the need for armed resistance against the British. *Editorial Note: Declaration of the Causes and Necessity for Taking Up Arms*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-01-02-0113-0001 [https://perma.cc/9P9L-TQH2]. By the time that it was issued, the British Parliament had passed the Intolerable Acts, delegates from all thirteen colonies had drafted a formal petition outlining their grievances against King George III, the Continental Army had been created, and the American Revolutionary War had begun. *See Continental Congress, 1774-1781*, DEP'T OF STATE OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1776-1783/continental-congress [https://perma.cc/E3TF-AU9A] (outlining the work of the Continental Congress during the years 1774-1781). "The Declaration of the Causes and Necessity of Taking Up Arms," drafted in June 1775, reflected the co-authors' collective desire for reconciliation with the British, like the Olive Branch Petition that was sent to the King in July 1775. *See* ALLEN, *supra* note 104, at 50–51 (explaining how Jefferson's writing in the Declaration of the Causes and Necessity for Taking Up Arms was tamer than his prior writing) and *id.* (for the timeline of events around the Declaration of Independence). At the time of its issuance, colonists were divided on the question of independence. But, as warfare progressed, Thomas Paine laid out a convincing case for independence, and colonists started to realize that they might

The Preamble of the Declaration of Independence, certainly the most celebrated and quoted section of the document, summarizes the principled basis upon which the extreme option of revolution was selected. Without mentioning the longstanding historical relationship between the colonies and the Crown, the Preamble offers a set of purportedly general and incontrovertible principles and values:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.— That to secure these rights, Governments are instituted among Men, deriving their *just* powers from the consent of the governed,— That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . .[111]

By reiterating the norm of *equality* of "all men" and the means by which a government "instituted among Men" could wield "*just powers*," the Preamble elevates the norms of the "consent of the governed" and the advancement of "unalienable rights" as essential to the government's *legitimacy*.[112]

A government that wields its power without such consent or in ways that violate those rights is therefore committing an injustice. To the extent that "any Form of Government becomes destructive of those ends"—or unjust, meaning that the government deploys its power to produce inequalities or harms that lack legitimacy—the people's obligation to obey it is attenuated.[113] Of course, in practice, as the document acknowledges, "mankind are more disposed to suffer[ ] while evils are sufferable."[114] Or as Danielle Allen puts it, "people often do live with injustice and oppression for a long time."[115]

Still, the blurry line separating justice and sustained injustice provides the normative threshold between a people's obligation (and inclination) to either obey or overthrow their system of government. In the words of the Preamble: "[W]hen a long train of abuses and usurpations, pursuing invaria-

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need military support from France if they were to beat the British armed forces, provisional colonial governments started allowing congressional delegates to vote for independence. Months later, the Declaration of Independence was drafted, reflecting the colonists' frustrated sentiments and their unresolved grievances with King George III, the Parliament, and the British people. Harold B. Wolford, *Lead up to the Declaration of Independence*, DEL. GAZETTE, July 1, 2021, https://www.delgazette.com/opinion/columns/91025/lead-up-to-declaration-of-independence [https://perma.cc/47JT-YL8N].

[111] THE DECLARATION OF INDEPENDENCE, *supra* note 99, para. 2 (emphasis added).

[112] *See id.*

[113] To be sure, some minor and fleeting injustices must be tolerated, the Preamble acknowledges, but when a government persists in illegitimately deploying its power to produce inequalities and harm to the people, that obligation is voided. *See id.* ("Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.").

[114] *Id.*

[115] ALLEN, *supra* note 6, at 194.

bly the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security."[116] The "long train of abuses" is thus taken as evidence of an intention, or "design,"[117] of the existing governmental powers to harm the people. Such "absolute Despotism"[118] is succinctly contrasted with legitimate governmental actors whose ends must be "to secure" "unalienable Rights,"[119] and whose means must include "the consent of the governed."[120] Governments that routinely fall afoul of these substantive and procedural tests, by implication, produce injustices that trigger the people's anger and activate their right and duty to revolt and overthrow such an unjust government.

The Preamble thus begins by establishing a general standard, applicable to all governments, for identifying injustice and justifying revolutions. With that norm established, the Preamble asserts that the standard had been more than met in this case; "the necessity which constrains [these Colonies] to alter their former Systems of Government" has been produced.[121] Specifically, the conclusion of the Preamble presents the following factual claim matching the abstract norm of injustice, which the later portion of the document elaborates: "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States." This frame, again, is the injustice frame: a powerful, corrupt causal agent (King George III) is harming the States (through "repeated injuries and usurpations"[122]) without legitimacy (in the form of "an absolute Tyranny"[123]).

In the next portion of the document, sometimes known as the "indictment of George III" or the "list of grievances," the Declaration offers a list of specific complaints as "Facts [to] be submitted to a candid world."[124] Every one of the 27 complaints articulates a specific injustice; each describes how the exercise of power has been deployed to produce an inequality or harm without legitimacy. The following sample of five grievances is illustrative:

- •; "[King George III] has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."[125]
- "[He has] impos[ed] Taxes on us without our Consent:"[126]

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[116] THE DECLARATION OF INDEPENDENCE, *supra* note 99, para. 2; *see also infra* note 451 (Martin Luther King, Jr. making a similar case for direct action and civil disobedience).
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at para. 12 (the tenth grievance listed).
[126] *Id.* at para. 19 (the seventeenth grievance listed).

- "[He has] tak[en] away our Charters, abolish[ed] our most valuable Laws, and alter[ed] fundamentally the Forms of our Governments."[127]
- "[He has] suspend[ed] our own Legislatures, and declar[ed] themselves invested with power to legislate for us in all cases whatsoever."[128]
- "He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people."[129]

In short, the King has, again and again, deployed his power to harm us without legitimacy.[130]

The list of grievances—the "long train of abuses and usurpations"[131]—helps make the injustice visible, making plain the source of the colonist's anger with and disdain for the British monarch and government.

The list finishes by highlighting the apparently deliberate procedural design by which the bad and tyrannical "him" has oppressed the good and humble "us":

> In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.[132]

Pointing to repeatedly "unanswered" "Petitions for Redress" underscored the futility of available options. The two arguments taken together—that is, significant, sustained injustices plus the unavailability of alternative remedies—establish the necessity of revolution.

The Declaration's conclusion extends the accusation of injustice beyond King George III, to the British people from whom the colonies were also separating. It points out the number and content of the colonists' attempts to call upon them for support in standing up against the tyranny of the crown:

> Nor have We been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by

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[127] *Id.* at para. 23 (the twenty-first grievance listed).
[128] *Id.* at para. 24 (the twenty-second grievance listed).
[129] *Id.* at para. 26 (the twenty-fourth grievance listed).
[130] The final grievance reads: "He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions." *Id.* at para. 29 (the twenty-seventh grievance listed). Robert Parkinson argues that the document's final grievance manifested and manipulated the prejudices built into the minds of the colonists and the fabric of the founding. *See supra* note 102; *see generally* PARKINSON, *supra* note 102, *passim*. That grievance not only heightened the fear of insurrection, thus strengthening the unifying bonds among colonists, it clarified that the "we" in "we the people" excluded the enslaved (or "domestics") and native peoples. *See* THE DECLARATION OF INDEPENDENCE, *supra* note 99, at para. 29 (the twenty-seventh grievance listed).
[131] *Id.* at para. 2.
[132] *Id.* at para. 30 (conclusion of the list of grievances).

> their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native *justice* . . . , and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of *justice* and of consanguinity.[133]

Here the label of "justice" is explicit. Those who might have been allies—part of "us" as "consanguin[eous]" "brethren" and fellow subordinates to the King—have opted to be enemies.[134] The Declaration thereby frames the British people's inaction as complicity and betrayal. Even if the King was the primary enemy and cause of the injustice, the British people's indifference to that injustice legitimized the end of political kinship and ties between the two groups.

So, after detailing the injustices at the heart of their revolutionary movement, the Declaration arrives at its ultimate destination:

> We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; . . . . And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.[135]

This concluding section serves several ends. It attempts to establish the document and its signers as legitimate. The document is not simply an assertion of right by a small group of prominent power-hungry individuals. It is rather manifestation of a consent-based institution (the "Representatives" in the "General Congress") and process on behalf of the "the good People" of "the united States of America." Furthermore, echoing the introduction, the document ends by emphasizing a final time the "them" versus "us" relationship, proclaiming a robust disunion with the unjust "them," and an unbreakable union among "ourselves" in pursuit of justice.

* * *

This section has argued that the Declaration of Independence is consistent with the injustice framework and reflects an attempt to advance justice by focusing on the elimination of injustice. The Declaration confronts the challenge of justifying a rebellious exertion of power and military force, an

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[133] *Id.* at para. 32 (emphasis added).
[134] *Id.*
[135] *Id.*

act which, by definition, violates the existing government's duties and standards of justice. The declaration acknowledges this burden—the requirement to "declare the causes"[136]—and argues that the colonists' actions are, in fact, just.

As the injustice framework suggests, the primary mechanism for arguing for the justice of rebellion is to decry the *injustice* of the status quo. And that argument for injustice is made over the terrain of power, inequality, and legitimacy. The Declaration describes the revolution as a conflict between two unequal sides: the unjustly powerful King, Parliament, and British, and the unjustly powerless colonists. The Declaration eschews the more obvious groupings of King and subjects, instead including the "Brittish brethren"[137] with the King. This defines a new inequality between two groups who should be similarly situated on either side of the Atlantic. The import of this inequality is only amplified by the stirring claim that "[a]ll men are created equal."[138]

Having defined the groups, the Declaration reveals an exercise of power—the "long train of abuses and usurpations"[139]—that created the harm and inequality between them. Finally, the Declaration defines a new basis of legitimacy for governmental power, "the consent of the governed," providing a test by King George can be shown to have failed, and still standing as the most prominent articulation of this longstanding standard of legitimacy.[140]

To be clear, the point of this section is not to suggest that the Declaration of Independence succeeded in achieving its high-minded aspirations.[141] If anything, the Declaration exposes the deep hypocrisies of privileged founders "overlooking" and reifying profound injustices as they claimed to abhor all injustice.[142] Others would use Jefferson's Enlightenment-based claims

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[136] *Id.* at para. 1.
[137] *Id.* at paras. 31–32.
[138] *Id.* at para. 2.
[139] *Id.*
[140] *Id.*
[141] Even when the Declaration was written, some people were not persuaded that a government could ever achieve the lofty goals pronounced by the founders. In 1776, The English philosopher and jurist Jeremy Bentham called the theory of government at the foundation of the Declaration of Independence "absurd and visionary." JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 98 (2018).
[142] *See supra* note 102; *see also infra* text accompanying notes 202–228.

In thinking about such hypocrisies, it may be worth expounding upon one revolutionary phrase contained in the Declaration of Independence, that "all men are created equal." This proclaimed truth signals the founders' rejection of the tradition-based systems of rigid social hierarchies determined by birth.

If John Locke was right that all men are born "of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another," JOHN LOCKE, SECOND TREATISE ON GOVERNMENT ch. 2 § 4 (1690), https://www.gutenberg.org/files/7370/7370-h/7370-h.htm [https://perma.cc/MXE7-BPH5], then Aristotle's question of how rule by some over others can be justified was ripe for consideration during the Revolutionary era. A monarch ruling over subjects did not square with the growing, Lockean, notion that each (man) was "equal to the greatest, and subject to no body," *Id.*, or the broader social contractarian notion that a state's authority depends upon the consent of the governed. The irreconcilable discrepancy between the "equality of men" and monarchy drove colonists to declare their independence.

about the equality of "all men" against him, pointing out the obvious contradictions in his rhetoric.[143] Property-owning White male colonists responded to injustices they perceived by claiming independence from the producers of injustice, all while disregarding the injustices their new government was institutionalizing.[144] The signers boldly pursued justice for themselves but disregarded injustices they perpetrated on others. Put differently, they used their power to produce and maintain their advantages through laws and policies that unjustly produced group-based inequalities without legitimacy.

3. Post-Text

The notions of equality and consent raised inevitable questions about who would be equal and whose consent would count. As a preoccupation with liberation from the oppressions of arbitrary power emerged as a prime measure of justice, essentializing categories of race and sex hardened, defining who was entitled to justice and which hierarchies, inequalities, and harms counted as injustice.[145]

In his famous pamphlet, Thomas Paine insists that "mankind [proceeds] originally [as] equals in the order of creation," and that there can be "no truly natural or religious reason" to distinguish king from subjects. THOMAS PAINE, *Common Sense: On the Origin and Design of Government in General, with Concise Remarks on the English Constitution*, *in* THE WRITINGS OF THOMAS PAINE 1, 75 (Moncure D. Conway ed., New York, The Knickerbocker Press 1894). He goes so far as to describe the distinction between king and subjects as, "the most prosperous invention the Devil ever set on foot," and a "manifest *injustice*." *Id.* at 75, 79 (emphasis added). Paine describes those in the royal line of succession as, "[s]elected from the rest of mankind" without consent from those governed, having minds "early poisoned by importance," and living in a world that materially differs from others so that they are "the most ignorant and unfit of any throughout the dominions." *Id.* at 81–82. On a foundational level, Paine suggests that the monarch "makes against" peace by separating itself from the people. *Id.*

Though the founding fathers clearly rejected English tyranny, they still faced a set of predicaments as they pursued independence. They sought a means of justifying the revolution against unjust monarchical power, as well as the creation of a new government that was powerful enough to be effective but different enough from a monarchy to be just. They eagerly imbibed the social contract literature of the enlightenment, particularly in its Lockean rendition, as the key to this puzzle. And so it was that "consent of the governed" emerged as the touchstone of legitimate authority, as notions of social contract supplanted those of social status, as democratic norms emerged as a palatable substitute for feudal tyranny.

But the question remained: would the laws and structures of the new system be a means of achieving justice, insulating the vulnerable from the powerful and attenuating unjustified hierarchies, or would they reinforce injustice, enabling the advantage of the powerful over the vulnerable and enhancing unjustified hierarchies?

[143] *See supra* notes 102 and *infra* Parts II(B) & II(C).

[144] Jill Lepore, highlighting the contradictions inherent in the founders' proclamation of independence, calls the Declaration "a stunning rhetorical feat, an act of extraordinary political courage," but also a marker of "a colossal failure of political will, in holding back the tide of opposition to slavery by ignoring it, for the sake of a union that, in the end, could not and would not last." LEPORE, *supra* note 141, at 99.

[145] The contradictions inherent in the proclaimed notion of consent, the hierarchies solidified with the new nation, and the harms perpetuated by the founders were noted contemporaneously, including by Samuel Johnson, who wrote "How is it that we hear the loudest yelps for liberty among the drivers of negroes?" SAMUEL JOHNSON, TAXATION NO TYRANNY (1775), quoted in LEPORE, *supra* note 141, at 92.

Still, the Declaration of Independence, owing to its soaring rhetoric, its transcendent principles and promises, and, we would add, its normative standard of justice, has served as a tool for undermining the legitimacy of existing arrangements and exposing injustices. Indeed, many groups excluded at the time—including enslaved people, women, and indigenous peoples—have invoked the founding ideals to pursue their own freedom from oppression. As detailed below, several of the most influential movement-based writings of the next two centuries would, in some form or other, wield the Declaration of Independence as a weapon against injustice.

B. "Declaration of Rights and Sentiments"—Gender Injustice

1. Context

In 1775, shortly before Jefferson had composed his finest prose and helped to inspire a revolution in pursuit of justice on behalf of "all men,"[146] Abigail Adams penned a letter to her husband, John Adams.[147] In it, perhaps moved by the spirit of the times, she entreated John to "Remember the Ladies."[148] Their budding nation's larger ideals of justice could not be realized, Abigail warned, without reforming the laws that already gave husbands "unlimited power."[149] A "new Code of Laws" must counteract the unfortunate truth that "all Men would be tyrants if they could."[150] Her argument was a specific instantiation of a more general concern that she shared with many of her generation—the problem of power. "I am more and more convinced," she wrote on another occasion, "that Man is a dangerous creature, and that power whether vested in many or a few is ever grasping, and like the grave cries give, give."[151]

Abigail's admonitions went unheeded, but her cause would eventually gain its movement three quarters of a century later in Seneca Falls, New York, home to the first convention of the women's rights movement.[152]

Within a broader cultural zeitgeist of rebellion and revolution,[153] 1848 was a watershed year for the women's movement. That year, with sex-based

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[146] THE DECLARATION OF INDEPENDENCE, *supra* note 99, at para. 2.

[147] Letter from Abigail Adams to John Adams (Mar. 31, 1776), https://www.masshist.org/digitaladams/archive/doc?id=L17760331aa [https://perma.cc/NSD3-CGAP].

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] Letter from Abigail Adams to John Adams (Nov. 27, 1775), https://www.masshist.org/digitaladams/archive/doc?id=L17751127aa [https://perma.cc/7MUN-PQA2].

[152] *The Women's Rights Movement, 1848–1917*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Essays/No-Lady/Womens-Rights/ [https://perma.cc/JKT7-2R6C].

[153] In Europe, the year would become known as "the year of revolution" and marked widespread ferment and numerous successful attempts to subvert or oust monarchs, monarchy, and their feudal vestiges and structures, and to replace them with more democratic and liberal institutions. The changes tended to be somewhat leveling across classes, to give more voice and

power asymmetries in mind, Elizabeth Cady Stanton and a small group of like-minded women (including Lucretia Mott, the renowned minister and abolitionist[154]) planned the first woman's rights convention in Seneca Falls,

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vote to a wider swath of the population, and to build upon nationalistic, liberal political identities. The contagion of revolution would, soon enough, be met with a contagion of division, backlash, and crackdowns—a pendulum that has been swinging to and fro, at least since the French Revolution. But the successes of 1848, even if nominally short-lived, again suggested the potential for revolution to change political systems, to alter social hierarchies, and to reallocate power. Those occupying the lower echelons of society, who might otherwise have perceived their situation as fixed, were more likely to construe their status as contingent and subject to change, assuming they could find ways to unite and resist existing structures. *See generally* DAVID M. POTTER & DON E. FEHRENBACHER, THE IMPENDING CRISIS: AMERICA BEFORE THE CIVIL WAR: 1848–1861 (1976); Bonnie S. Anderson, *The Lid Comes Off: International Radical Feminism and the Revolutions of 1848*, 10 NAT'L WOMEN'S STUD. ASS'N. J. 1 (1998) (exploring the connection between revolutions in Europe with the women's movements of France, the German states, and the United States in the year 1848). The larger experiment underway in the U.S., and its revolutionary origins and partial rejection of class and tradition, qualities that had only recently been described for a western audience by Tocqueville, added to the legitimacy of such undertakings. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835).

During that time, still more radical political ideologies were taking shape—those calling for empowerment beyond national boundaries and for abandoning liberal ideals of individualism and capitalism as part of the problem. Indeed, 1848 was the year that Karl Marx and Friedrich Engels published *The Communist Manifesto*, which summarized "[t]he history of all hitherto existing society is the history of class struggles," and called for the "forcible overthrow of all existing social conditions" that produce those classes and the resultant struggles. KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 9, 46 (Samuel H. Beer ed., Appleton-Century-Crofts, Inc. 1955) (1848).

Abolitionism, which had been gaining momentum in the North and internationally during this period, probably did most to nurture and inspire the women's rights movement in the U.S. In their anti-slavery fight, many women came to perceive their own social fetters. That is where they learned to recognize and dissect the relationship of power to laws, customs, and ideologies. That is where they experienced the comfort of solidarity, developed theories of change, and witnessed the effect of collective action and agitation. Through that praxis, women would sometimes gain a public voice, a public audience, and a public role. As three of its leaders would later describe:

> [A]bove all other causes of the 'Woman Suffrage Movement,' was the Anti-Slavery struggle in this country. . . . In the early Anti-Slavery conventions, the broad principles of human rights were so exhaustively discussed, justice, liberty, and equality, so clearly taught, that the women who crowded to listen, readily learned the lesson of freedom for themselves, and early began to take part in the debates and business affairs of all associations.

THE HISTORY OF WOMAN SUFFRAGE, 1848–1861, at 52 (Susan B. Anthony et al. eds., 2d ed. 1889).

The fires of discontent were quite active in the western reaches of New York state, where numerous reform movements were underway—abolition, racial justice, educational reform, labor reform, moral reform, vegetarianism, temperance, Indian rights, women's rights and suffrage—and where the revivals of the Second Great Awakening catalyzed reformers' zeal even more. *See* JUDITH WELLMAN, THE ROAD TO SENECA FALLS: ELIZABETH CADY STANTON AND THE FIRST WOMAN'S RIGHTS CONVENTION chs. 2–5 (2004).

[154] *See generally* CAROL FAULKNER, LUCRETIA MOTT'S HERESY: ABOLITION AND WOMEN'S RIGHTS IN NINETEENTH-CENTURY AMERICA (2011) (describing Mott's important role as an abolitionist and women's rights advocate, her activism and participation in nearly every nineteenth-century reform effort, her understanding of all forms of oppression as related, and her radical and often heretical views on religion).

New York.[155] Three hundred women and men[156] attended the two-day event.[157] It was the first of many women's rights conventions and the birth of what would, waves later, be dubbed "first-wave feminism."[158]

Stanton was, by many measures, the chief visionary behind the first convention. At the convention, she made several major presentations and emerged as the movement's lead architect and most compelling orator. On the morning of the first day,[159] she presented the document, "The Declaration of Rights and Sentiments," that she had primarily authored and that she and her co-organizers hoped would establish and orient the movement. She began her remarks by confessing her nervousness and noting that she had "never before spoken in public,"[160] drawing attention to the traditional gender boundaries against which her remarks would take aim.

Stanton justified her deviation from the strictures of "true womanhood"[161] with an appeal to a sense of injustice.[162] In her opening remarks, she

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[155] Stanton and Mott first met at the World Anti-Slavery Convention in London in 1840. Nancy A. Hewitt, *From Seneca Falls to Suffrage? Reimagining a "Master" Narrative in U.S. Women's History*, *in* NO PERMANENT WAVES: RECASTING HISTORIES OF U.S. FEMINISM 15, 17 (Nancy A. Hewitt ed., 2019). They came together again in 1848 for the now famous Waterloo Tea Party, where they coordinated plans for the convention. *Id.* The other women who helped to organize the convention, Jane Hunt, Mary Ann and Elizabeth McClintock, and Martha Wright (Mott's sister), were all Quakers and had been active in the abolitionist movement with Mott. *Id.*

[156] *See* WELLMAN, *supra* note 153, at 201.

[157] The event took place on July 19–20, 1848. *See id.* at 189.

[158] *See* Frederick Douglass, Speech Before the International Council of Women (Apr. 1888), https://socialwelfare.library.vcu.edu/woman-suffrage/frederick-douglass-woman-suffrage-1888/ [https://perma.cc/7CG9-3HHF] (describing Seneca Falls convention where "organized suffrage movement was born"); *see generally* VIRGINIA BERNHARD & ELIZABETH FOX-GENOVESE, THE BIRTH OF AMERICAN FEMINISM: THE SENECA FALLS WOMAN'S CONVENTION OF 1848 (1995); MIRIAM GURKO, THE LADIES OF SENECA FALLS: THE BIRTH OF THE WOMAN'S RIGHTS MOVEMENT (1974).

[159] Originally, the first day was supposed to include only women, with men joining on the second day. Jone Johnson Lewis, *A History of the Seneca Falls 1848 Women's Rights Convention*, THOUGHTCO (Mar. 11, 2019), https://www.thoughtco.com/seneca-falls-womens-rights-convention-3530488 [https://perma.cc/X826-5PRD]. At the conference, however, the women decided to admit men on the first day, but not to allow them to speak until the second. *See id.* ("Forty of the participants at Seneca Falls were men, and the women quickly made the decision to allow them to participate fully, asking them only to be silent on the first day which had been meant to be 'exclusively' for women.").

[160] Elizabeth Cady Stanton, Introductory Address at the Seneca Falls Convention (July 19, 1848) (available at https://teachingamericanhistory.org/library/document/address-delivered-at-seneca-falls/ [https://perma.cc/H9BW-RRZX]).

[161] *See generally* Barbara Welter, *The Cult of True Womanhood: 1820-1860* 18 AMER. Q. 151 (1966).

[162] Hers had been conventional middle-class life; her father was a prominent conservative lawyer; her maternal grandfather had been a hero of the American Revolution. Ginzberg describes her childhood as follows:

> Her parents, Daniel and Margaret Livingston Cady, were devoted to family, tradition, and the Federalist Party. They were strict and stodgy, and their children were raised according to old-fashioned norms of childhood, religion, class—and, especially, gender. Church, school, and family taught only "that everlasting no! no! no!" and conspired to enforce "the constant cribbing and crippling of a child's life." It struck the young Elizabeth Cady that "everything we like to do is a sin, and . . . everything we dis-like is commanded by God or someone on earth."

called upon each woman in the audience to "understand the height, the depth, the length, and the breadth of her own degradation."[163] She emphasized that "the time had fully come for . . . woman's wrongs to be laid before the public," and, given those wrongs, Stanton believed she had both the "right and [the] duty" to speak up.[164] And so she did. In a deliberate echo of Jeffersonian rhetoric and reasoning, she read aloud her own "Declaration of Rights and Sentiments."[165]

2. Text

Stanton's strategy in drafting the Declaration was to refer back to the Declaration of Independence and highlight its principles and arguments to underscore the degree to which these promises remained unfulfilled. She affirmed the inalienable rights named by the founders, while simultaneously demonstrating how those rights were denied to most of the population.[166]

By carefully mimicking Jefferson's injustice-exposing language, Stanton managed simultaneously to endorse the founders' rhetoric and to turn its words against those who would unjustly limit their application. She led her audience through very familiar terrain, only to help them discover altogether new dimensions (and applications to new groups).[167] To appreciate those effects, it is helpful to read the document's opening paragraphs:

> When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes that impel them to such a course.
>
> We hold these truths to be self-evident; that all men and women 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; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed. Whenever any form of Government becomes destructive of

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LORI D. GINZBERG, ELIZABETH CADY STANTON: AN AMERICAN LIFE 15 (2011) (citation omitted). By 1848, she was married, with three sons, and four more children still to come. She had wanted to continue her education and go to college, but her father had prohibited it (and there were, at the time, no U.S. colleges at the time admitting women). *See id.* at 11.

[163] Stanton, *supra* note 160.

[164] *Id.*

[165] Elizabeth Cady Stanton, *Declaration of Sentiments*, U.S. National Park Service (July 19, 1848), https://www.nps.gov/wori/learn/historyculture/declaration-of-sentiments.htm [https://perma.cc/5FVX-HFUS].

[166] *See id.* She thus employed a general strategy developed by abolitionists and that, as noted below, Frederick Douglass took to new heights in his compelling 4th of July speech. *See infra* text accompanying notes 184–226.

[167] *See supra* text accompanying notes 159–165.

> these ends, it is the right of those who suffer from it to refuse allegiance to it, and to insist upon the institution of a new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness.
>
> Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly, all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves, by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their duty to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of the women under this government, and such is now the necessity which constrains them to demand the equal station to which they are entitled.
>
> The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world.[168]

Abigail Adams would have cheered.

Because the parallels with Jefferson's Declaration of Independence are evident, this section offers only a cursory and comparative re-application of the injustice model to Stanton's Declaration of Right and Sentiments.

To begin, Stanton redefines the groups between which inequalities are identified. She shifts from colonists and King to "her" and "him." While those group identities had changed and the particular inequalities and harms were different, the injustice frame was unchanged. Again, the former group had too long wielded illegitimate power over the latter, while the latter had neither meaningfully consented to the laws and customs behind its subjugation nor participated in the institutions and processes that contrived them. The unjust domination of one over the subjugated other represents, in form and function, "an absolute tyranny,"[169] producing what has been "a history of repeated injuries and usurpations."[170] The later Declaration thus appropriates—word for word—the earlier document's base of legitimacy, daring any listener who honors the one to ignore the other. Stanton's clever revisions were as rousing as her message was clear: the laws and traditions of the United States were unjust. The system hypocritically promised inalienable rights to all but limited them to a select group in power, to whom the powerless were subservient.[171]

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[168] Stanton, *supra* note 165.
[169] *Id.*
[170] *Id.*
[171] As Douglass wrote shortly after the convention:

Like Jefferson's, Stanton's declaration of injustice specifies a collection of particular grievances, each of which includes the basic components of injustice: power producing inequality or harm without legitimacy. Again, a sample of five illustrates the point.

- "He has never permitted her to exercise her inalienable right to the elective franchise."[172]
- "He has compelled her to submit to laws, in the formation of which she had no voice."[173]
- "He has made her, if married, in the eye of the law, civilly dead."[174]
- "[H]e has taxed her to support a government which recognizes her only when her property can be made profitable to it."[175]
- "He has endeavored, in every way that he could to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life."[176]

The list of grievances likely humanized the oppression, heightening her audience's emotional connection to the inequalities, highlighting how "he" has actively advantaged himself at "her" expense, and thus helping to unite and mobilize the audience against the perceived injustice.[177]

3. Post-Text

The manifesto was well received that morning and would, by the end of the day, garner one hundred signatures.[178] Despite the rhetorical force of applying an existing and accepted frame to a different inequality, Stanton was under no illusion that this "protest against . . . *unjust* laws"[179] would receive general public acclaim. Their journey, that is, would not be "strewn with the flowers of popular applause"; instead, it would pass "over the thorns of bigotry and prejudice," as they faced forceful opposition from those in power, "who have entrenched themselves behind the stormy" (and legitimat-

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> In respect to political rights, we hold woman to be justly entitled to all we claim for man. We go farther, and express our conviction that all political rights which it is expedient for man to exercise, it is equally so for women. All that distinguishes man as an intelligent and accountable being, is equally true of woman; and if that government is only just which governs by the free consent of the governed, there can be no reason in the world for denying to woman the exercise of the elective franchise, or a hand in making and administering the laws of the land. Our doctrine is, that "Right is of no sex."

Frederick Douglass, *The Rights of Women*, THE NORTH STAR, (July 28, 1848), https://www.loc.gov/exhibits/treasures/images/vc006197.jpg [https://perma.cc/2K4B-8H9K].

[172] Stanton, *supra* note 165.
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *See* WELLMAN, *supra* note 153, at 201.
[179] Stanton, *supra* note 165 (emphasis added).

ing) "bulwarks of custom and authority."[180] Put differently, Stanton understood that unjust norms and laws were themselves self-perpetuating: the powerful and privileged could and would maintain their advantages through the very legal and social mechanisms that they had illegitimately constructed. Her predictions were prescient. Indeed, after that first convention, Stanton reported:

> [S]o pronounced was the popular voice against us . . . that most of the ladies who had attended the convention and signed the declaration, one by one, withdrew their names and influence and joined our persecutors. Our friends gave us the cold shoulder and felt themselves disgraced by the whole proceeding.[181]

The document set the foundation stone upon which feminism and the fight for women's rights and gender justice have been constructed.[182] Many of the goals that Stanton helped to name, and for which she continued to battle, have since been achieved. But not all of them. Nearly 175 years and multiple waves of feminism later, sex, gender, reproductive justice, and sexual identity remain among the intersecting dimensions of our society's most stubborn injustices, "entrenched," as they are, "behind the stormy bulwarks of custom and authority."[183]

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[180] *Id.*

[181] ELIZABETH CADY STANTON, EIGHTY YEARS AND MORE: REMINISCENCES 1815–1897 149 (1898).

[182] Of the one hundred signatories, 68 were women and 32 were men. *See* WELLMAN, *supra* note 153, at 201; *see also id.* at 201–02 (explaining that historians "do not know why as many as two-thirds of the attenders did not sign."). It may be illuminating to consider a few more details regarding Stanton's remarks on that day. In the afternoon, Stanton delivered a keynote speech, which began, "We have met here today to discuss our rights and wrongs, civil and political." Elizabeth Cady Stanton, *Seneca Falls Keynote Address* (July 19, 1848), https://susanbanthonyhouse.org/blog/wp-content/uploads/2017/07/Elizabeth-Cady-Stanton-Seneca-Falls-1848.pdf [https://perma.cc/4GDX-2CV6]. She went on to sketch some of the laws that privileged men and subjugated women, an oppressive system that operates without the consent of the oppressed:

> [W]e are assembled to protest against a form of government existing without the consent of the governed—to declare our right to be free as man is free, to be represented in the government which we are taxed to support, to have such disgraceful laws as give man the power to chastise and imprison his wife, to take the wages which she earns, the property which she inherits, and, in case of separation, the children of her love; laws which make her the mere dependent on his bounty.

Id. A government that produces such injustices—guaranteeing rights to some but denying them to others—is unworthy of allegiance. "It is to protest against such *unjust* laws as these," Stanton told her audience, "that we are assembled today, and to have them, if possible, forever erased from our statute books, deeming them a shame and a disgrace to a Christian republic in the nineteenth century." *Id.* (emphasis added).

[183] *See supra* text accompanying note 180.

C. "What to the Slave Is the Fourth of July?"—Antebellum Racial Injustice

1. Context

Frederick Douglass was one of 32 men and the only African American to both attend the First Women's Rights Convention in Seneca Falls and to sign the Declaration of Sentiments.[184]

Elizabeth Cady Stanton had, in her opening speech, announced that "we [women] now demand our right to vote."[185] The approval with which that demand was first met faded when, later, she put the ninth resolution of her Declaration of Rights and Sentiments up for a vote: "Resolved, That it is the duty of the women of this country to secure to themselves their sacred right to the elective franchise."[186] Although the body had readily and unanimously ratified every other resolution that Stanton proposed, this one was too radical for even these progressive women to endorse. As Lucretia Mott had warned Stanton, the demand risked making "the convention ridiculous."[187] At that critical moment, Frederick Douglass spoke up.[188] With characteristic gravitas, he spoke in favor of women's franchise: "In this denial of the right to participate in government, not merely the degradation of woman and the perpetuation of a great *injustice* happens, but the maiming and repudiation of one-half of the moral and intellectual power for the government of the world."[189] The resolution passed.[190]

Shortly after the convention, in an issue of his abolitionist *North Star*, Douglass highlighted the main themes of the convention, which included the inherent equality of the sexes and the illegitimacy of existing power disparities that, in turn, yielded laws that reinforced those unjust disparities. He wrote:

> In respect to political rights, we hold woman to be *justly* entitled to all we claim for man. We go farther, and express our conviction that all political rights which it is expedient for man to exercise, it is equally so for women. All that distinguishes man as an intelligent and accountable being, is equally true of woman; and if that government is only *just* which governs by the free consent of the governed, there can be no reason in the world for denying to woman the exercise of the elective franchise, or a hand in making

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[184] WELLMAN, *supra* note 153, at 201, 205.
[185] Stanton, *supra* note 160.
[186] Stanton, *supra* note 165.
[187] WELLMAN, *supra* note 153, at 195.
[188] *See* SALLY MCMILLEN, SENECA FALLS AND THE ORIGINS OF THE WOMEN'S RIGHTS MOVEMENT 93 (2008); WELLMAN, *supra* note 153, at 203.
[189] FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 424 (John Lobb ed., 1882) (emphasis added).
[190] WELLMAN, *supra* note 153, at 202–03.

> and administering the laws of the land. Our doctrine is, that "Right is of no sex."[191]

At the 1888 International Council of Women, on the occasion of the 40th anniversary of the First Woman's Rights Convention and the Declaration of Sentiments, Douglass spoke again on the topic of women's rights.[192] In echoes of Jefferson and Stanton, he spoke of the self-evident truth of woman's inherent equality with man and her concomitant to inalienable rights: "Such a truth is woman's right to equal liberty with man. She was born with it. It was hers before she comprehended it. It is inscribed upon all the powers and faculties of her soul, and no custom, law or usage can ever destroy it."[193] And he recalled the importance of his Seneca Falls speech in favor of women's suffrage in his own evolution as an advocate of justice:

> There are few facts in my humble history to which I look back with more satisfaction than to the fact, recorded in the history of the woman-suffrage movement, that I was sufficiently enlightened at that early day, and when only a few years from slavery, to support your resolution for woman suffrage. I have done very little in this world in which to glory except this one act—and I certainly glory in that. When I ran away from slavery, it was for myself; when I advocated emancipation, it was for my people; but when I stood up for the rights of woman, self was out of the question, and I found a little nobility in the act.[194]

Douglass's recollection thus captured the transcendence of the selfless motivation behind, and satisfaction of, the pursuit of justice.[195]

Douglass's 1848 experience at Seneca Falls may have helped inspire what was to become his most moving, important, and celebrated speech.[196] Four years after the convention, Douglass was invited by the Ladies' Anti-Slavery Society of Rochester, New York, to speak at a July 4 celebration, commemorating the very document whose contradictions he had watched Stanton so brilliantly expose.[197] This was his turn to apply the same strategy—that is, to deploy the injustice framework—to expose an injustice.

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[191] Douglass, *supra* note 171 (emphasis added).
[192] Douglass, *supra* note 158.
[193] *Id.*
[194] *Id.*
[195] *See supra* text accompanying notes 36–45.
[196] *Cf.* 2 FREDERICK DOUGLASS, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 39 (Philip S. Foner ed., 1975) (calling a portion of this speech "probably the most moving passage in all of Douglass' speeches"); *see also Top 10 Greatest Speeches: Frederick Douglass on The Hypocrisy of American Slavery,* TIME, http://content.time.com/time/specials/packages/article/0,28804,1841228_1841749_1841739,00.html [https://perma.cc/8AYN-LMBU] (ranking this speech as one of the top 10 greatest speeches in history); Hillel Italie, *Frederick Douglass' July 4 Speeches Trace American History*, ASSOCIATED PRESS (JULY 1, 2018), https://apnews.com/393ae428732c4cc8905f3e3af01128d7 [https://perma.cc/JW5T-H95Z] (ranking this speech as "high in the canon of American oratory" and as "still widely cited as a corrective to [July 4th's] celebratory spirit").
[197] *See supra* text accompanying notes 166–178.

2. Text

On July 5th, 1852, Douglass opened his remarks by humbling himself, much as Stanton had done at Seneca Falls,[198] reminding the "ladies and gentlemen" of the "considerable" "distance between this platform and the slave plantation, from which [he] escaped."[199]

Douglass then turned to crediting the "[t]he signers of the Declaration of Independence" as "statesmen, patriots and heroes" "for the good they did" and their "principles."[200] By invoking the iconic document and the celebrated founders, Douglas was creating a commonality with his audience and a shared foundation on which to build his subversive project. In particular, Douglass highlighted the founders' sense of justice, and the priority they gave to that value:

> Your fathers staked their lives, their fortunes, and their sacred honor, on the cause of their country. In their admiration of liberty, they lost sight of all other interests.
>
> They were peace men; but they preferred revolution to peaceful submission to bondage. . . . With them, nothing was "settled" that was not right. With them, *justice*, liberty and humanity were "final"; not slavery and oppression.[201]

With justice as his theme, Douglass's first task was to redefine the group identities on which his argument would build—a project he had already implicitly begun. By referring to "your fathers, the fathers of this republic,"[202] he was already highlighting the enormous and horrific lacunae in their achievements and previewing the profound racial injustices between "you," his White audience and "I, or those I represent,"[203] a Black former

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[198] *See supra* text accompanying note 160. He began: "He who could address this audience without a quailing sensation, has stronger nerves than I have. I do not remember ever to have appeared as a speaker before any assembly more shrinkingly, nor with greater distrust of my ability, than I do this day." Frederick Douglass, *The Meaning of July Fourth for the Negro* (July 5, 1852) *in* DOUGLASS, *supra* note 196, at 181. He went on in that vein for paragraphs, referring to his "limited powers of speech," describing his "astonishment" and "gratitude" for the opportunity. *Id.*

Perhaps Douglass hoped to highlight the racialized roles against which he was resisting. Or maybe he sought to reduce his audience's defensiveness and heighten their receptivity to his criticism. Or perhaps he simply wanted to lower his audience's expectations. In any event, he ended his windup this way:

> You will not, therefore, be surprised, if in what I have to say I evince no elaborate preparation, nor grace my speech with any high sounding exordium. With little experience and with less learning, I have been able to throw my thoughts hastily and imperfectly together; and trusting to your patient and generous indulgence, I will proceed to lay them before you.

Id.

[199] *Id.*

[200] *Id.* at 186.

[201] *Id.* (emphasis added).

[202] *Id.* at 187.

[203] *Id.* at 188.

slave and his people. Douglass drove home the message by using the word "you," "your," or "yours" roughly 200 times in the speech. One of his introductory paragraphs, for example, contained the following phrases: "the birthday of *your* National Independence and of *your* political freedom," "*your* great deliverance," "*your* national life," and "*your* nation," and "*you* are . . . only in the beginning of *your* national career."[204] With each use of the term, Douglass was drawing a line and drawing out a contrast and, more quietly, an injustice.

With those pieces in place, Douglass finally allowed his indignation to show, pausing to query:

> Fellow-citizens, pardon me, allow me to ask, why am *I* called upon to speak here to-day? What have *I*, or *those I represent*, to do with *your* national independence? Are the great principles of political freedom and of natural *justice*, embodied in that Declaration of Independence, extended to *us*? and am *I*, therefore, called upon to bring our humble offering to the national altar, and to confess the benefits and express devout gratitude for the blessings resulting from *your* independence to *us*?[205]

In those lines, injustice is laid bare in its most elemental form. You and I, your people and my people, you and us, we are not equal. That disparity between our groups—between the free and the enslaved—is maintained by power rendered illegitimate by the "great principles" articulated in the very document you ask me to celebrate. So, "why," he asked, "am I . . . here?"[206]

Between groups so defined, Douglass thus brought into focus the enormous contradictions—and illegitimate inequalities—permeating the nation's founding: the legal construction of race and slavery in the face of such grand talk of freedom and justice.[207] Drawing out the hypocrisy of a celebration of justice and liberty in the face of continued injustice and slavery, Douglass highlighted how the entire experience underscored the immense inequalities between "your" circumstances and "mine." He even wondered aloud whether his hosts were mocking him. Stressing the "sad sense of the disparity between us," he explained:

> *I* am not included within the pale of this glorious anniversary! *Your* high independence only reveals the immeasurable distance *between us*. The blessings in which *you*, this day, rejoice, are not enjoyed in common.—The rich inheritance of *justice*, liberty, prosperity and independence, bequeathed by *your* fathers, is shared by *you*, *not by me*. The sunlight that brought life and healing to *you*, has brought stripes and death to *me*. This Fourth July is *yours*, not *mine*. *You*

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[204] *Id.* at 182 (emphasis added).
[205] *Id.* at 188–89 (emphasis added).
[206] *Id.* at 188.
[207] *See also supra* note 102, notes 141-144, and *infra* text accompanying notes 205–226 (describing some of the designed contradictions of the Declaration of Independence).

> may rejoice, *I* must mourn. To drag a man in fetters into the grand illuminated temple of liberty, and call upon him to join *you* in joyous anthems, were inhuman mockery and sacrilegious irony. Do *you* mean, citizens, to mock *me*, by asking *me* to speak to-day?[208]

Again, by emphasizing the persistent racial inequalities and their illegitimacy by the measure of the very document being commemorated, Douglass was highlighting the profound injustice that its celebration would only heighten. In essence, Douglass asked, "How can *I* celebrate your unjust system?"[209]

Douglass also took time to highlight the exercises of illegitimate power—such as unjust laws—that had created or exacerbated the group-based inequalities he was describing. He emphasized the barbarity of the Fugitive Slave Act, recently passed "[b]y an act of the American Congress,"[210] and requiring citizens and officials of free states to capture and return runaway slaves. "[S]lavery," he lamented, "has been nationalized in its most horrible and revolting form."[211] "For black men," therefore, "there is neither law nor *justice*."[212] Douglass then sketched some of the mechanisms by which power achieved primacy in shaping the legal system's unjust outcomes:

> The oath of any two villains is sufficient, under this hell-black enactment, to send the most pious and exemplary black man into the remorseless jaws of slavery! His own testimony is nothing. He can bring no witnesses for himself. The minister of American *jus-*

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[208] Douglass, *supra* note 198, at 189 (emphasis added).

[209] Douglass also made a clear distinction between his audience and their forefathers, telling them that

> [y]our fathers have lived, died, and have done their work, and have done much of it well. You live and must die, and you must do your work. You have no right to enjoy a child's share in the labor of your fathers, unless your children are to be blest by your labors. You have no right to wear out and waste the hard-earned fame of your fathers to cover your indolence.

Id. at 188. Instead, his audience members were participants in a parallel collection of injustices and enslavements that they so proudly honored their "fathers" for fighting and defeating, based on their "sublime faith in the great principles of *justice* and freedom." *Id.* at 187 (emphasis added).

[210] *Id.* at 195.

[211] *Id.* In greater detail, Douglass described the legal system's effects:

> By that act, . . . the *power* to hold, hunt, and sell men, women and children, as slaves, remains no longer a mere state institution, but is now an institution of the whole United States. The *power* is co-extensive with the star-spangled banner, and American Christianity. Where these go, may also go the merciless slave-hunter. . . . Your broad republican domain is hunting ground for men. Not for thieves and robbers, enemies of society, merely, but for men guilty of no crime. Your law-makers have commanded all good citizens to engage in this hellish sport. Your President, your Secretary of State, your lords, nobles, and ecclesiastics enforce, as a duty you owe to your free and glorious country, and to your God, that you do this accursed thing. . . . For black men there is neither law nor *justice*, humanity nor religion. The Fugitive Slave Law makes mercy to them a crime; and bribes the judge who tries them.

Id. at 195–96 (emphasis added).

[212] *Id.* at 196 (emphasis added and omitted).

> *tice* is bound by the law to hear but one side; and that side is the side of the oppressor. Let this damning fact be perpetually told. Let it be thundered around the world that in tyrant-killing, king-hating, people-loving, democratic, Christian America the seats of *justice* are filled with judges who hold their offices under an open and palpable bribe, and are bound, in deciding the case of a man's liberty, to hear only his accusers! In glaring *violation of justice*, in shameless disregard of the forms of administering law, in cunning arrangement to entrap the defenceless, and in diabolical intent this Fugitive Slave Law stands alone in the annals of tyrannical legislation.[213]

Those judges charged with administering "American justice" are themselves committing "glaring" injustice under law, Douglass insists, by employing their power illegitimately to reproduce oppressive inequality. Again, Douglass emphasized how power produces suffering without legitimacy, the elements of the injustice framework.

The invocation of "annals of tyrannical legislation," so closely tracking the language of the Declaration of Independence, brings us to perhaps Douglass's most effective argument: demonstrating the illegitimacy of the inequalities he was describing. He claimed for himself the declared words and deeds of the men he had been called to praise, and he used their own rhetoric against the very system they had constructed.

First, Douglass used the founding generation to demonstrate the legitimacy of challenging and overturning unjust arrangements and social hierarchies. He explained that the founders did not adopt the now "fashionable idea . . . of the infallibility of government, and the absolute character of its acts."[214] They were instead willing "to pronounce the measures of government *unjust*, unreasonable, and oppressive, and altogether such as ought not to be quietly submitted to."[215] Further, they had the courage to challenge the powerful interests who had a stake in the maintenance of the status quo, even when doing so posed a significant risk, "tried men's souls," and would stigmatize them as "plotters of mischief, agitators[,] rebels," and "dangerous men."[216] It is daring to stand up to power by calling out injustice—to, in Douglass's words, "side with the right against the wrong, with the weak against the strong, and with the oppressed against the oppressor!"[217] But those men, he explained (while drawing on gendered stereotypes), possessed the "solid manhood"[218] necessary to place larger interests above selfish interests:

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[213] *Id.* at 196 (emphasis added and omitted).
[214] *Id.* at 183.
[215] *Id.* (emphasis added).
[216] *Id.* at 184.
[217] *Id.*
[218] *Id.* at 186.

> They were peace men; but they preferred revolution to peaceful submission to bondage. They were quiet men; but they did not shrink from agitating against oppression. They showed forbearance; but that they knew its limits. They believed in order; but not in the order of tyranny. With them, nothing was "settled" that was not right. With them, *justice*, liberty and humanity were "final;" not slavery and oppression. You may well cherish the memory of such men. They were great in their day and generation.[219]

Douglass's praise helped him expose, not only the duplicity in the founding generation's revolution, but also the unfavorable contrast with his own generation, which was failing to complete the founders' unfinished project (or correct their inexcusable shortcomings).

To stir his contemporaries to action, he could now drive home the hypocrisy and activate injustice dissonance, all while relying on the very legitimating principles to which his audience declared their allegiance. In the crescendo of his speech—a high point of American oratory[220]—Douglass brought the injustice into its starkest relief by asking what July 4th, and all it commemorated, meant "to the American slave."[221] He answered:

> A day that reveals to him, more than all other days in the year, the gross *injustice* and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciations of tyrants, brass fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade and solemnity, are, to Him, mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages. There is not a nation on the earth guilty of practices more shocking and bloody than are the people of these United States, at this very hour.[222]

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[219] *Id.* (emphasis added). Douglass continued:

> Fully appreciating the hardship to be encountered, firmly believing in the right of their cause, honorably inviting the scrutiny of an on-looking world, reverently appealing to heaven to attest their sincerity, soundly comprehending the solemn responsibility they were about to assume, wisely measuring the terrible odds against them, your fathers, the fathers of this republic, did, most deliberately, under the inspiration of a glorious patriotism, and with a sublime faith in the great principles of *justice* and freedom, lay deep, the corner-stone of the national super-structure, which has risen and still rises in grandeur around you.

Id. at 187 (emphasis added).

[220] *See supra* note 196.

[221] Douglass, *supra* note 196, at 192.

[222] *Id.* (emphasis added).

To Douglass, then, the injustice woven into the tapestry of this country[223] was "glaring."[224] Neither Douglass nor the millions of slaves who still lived under the collective heel of tyrants, he pointed out, had been represented in the founding fathers' fight for "*justice*, liberty and humanity"; nor had they gained an audible voice in the echelons of government that had taken shape since.[225] "The freedom gained is yours," he underscored, "and you, therefore, may properly celebrate this anniversary."[226]

3. Post-Text

To too many in power, injustice remained seemingly obscured behind the pretext of political ideologies, Christian platitudes, philosophical bromides, sacred documents, and system-affirming ceremonies. Douglass was among the many abolitionists tugging the threads of that tapestry, which would, within a few years, be rent by civil war. Despite the early promise of Reconstruction, with underlying power and knowledge structures still largely in place, powerful "White" interests continued to invent and adjust "race" and racial stereotypes to produce and justify racial inequalities that otherwise lacked legitimacy. Racial injustices would therefore return behind the facade of a rewoven fabric composed of White supremacist laws, sciences, religious ideologies, cultural scripts, and stereotypes, all unfolding within the interconnected collection of political, judicial, social, commercial, educational, religious, and journalistic institutions.

We will return to an (inadequate) effort to address some of these reformulated systems of racial inequality almost exactly a century after Douglass's speech.[227] First, however, we turn to an effort to address economic injustice, though one much criticized for its relationship to racial inequality.[228]

D. New Deal Speeches—Economic Injustice

1. Context

The political era known as the New Deal is widely viewed as one of the two or three most transformative and egalitarian periods in U.S. history—in

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[223] *See supra* notes 102 & 141-144; *see also* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 371 (1978) ("The success of the first Revolution in no way altered the degraded status of most [Black Americans,] . . . [n]or did it free the more than half-million slaves in the colonies.").

[224] *See supra* text accompanying note 213.

[225] Douglass, *supra* note 196, at 186.

[226] *Id.* at 185.

[227] *See infra* Part II(E).

[228] To be clear, we do not consider racial injustice, gender injustice, and economic injustice (among numerous intersecting injustices) to be independent or fully separable. We also presume that attending to one while disregarding others often makes for normatively undesirable policies. Our focus on one dimension of injustice or another is simply to align with the emphasis of each text. As already illustrated, however, we attempt to highlight some of the exclusions and injustices resulting from failing to take a more systemic, holistic, intersectional perspective.

a league with the founding and the Civil War.[229] It is known as well for the more thoroughgoing changes it avoided or preempted.[230]

As it happens, there is no single text or speech associated with the immeasurable policy shifts arising from the New Deal. There is, instead, an eloquent politician, whose direct influence was spread over two tumultuous decades and whose impact still reverberates today. Franklin D. Roosevelt's oratorical prowess—which included evocative lines like "the only thing we have to fear is fear itself"[231] and "a date which will live in infamy"[232]—needs no introduction. His weekly "Fireside Chats," for instance, famously crackled over national airwaves as families huddled around their Philcos, eager to absorb Roosevelt's soothing, cohesive balm to ease the upheaval and suffering that economic depression and world war wrought.[233]

With no single iconic text to examine, this section examines three major speeches that FDR delivered over a four-year period to announce, explain, and defend his New Deal policies: (1) FDR's acceptance speech at the Democratic National Convention in 1932; (2) a complementary speech he gave a few months later, and (3) his re-nomination acceptance speech at the Democratic National Convention in 1936. Each of the speeches, as we'll see,

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[229] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 51–52 (1991) ("When modern lawyers and judges look to the deep past, they tell themselves a story that has a distinctive structure. . . . three historical eras stand out from the rest. . . .The first . . . is the Founding itself . . . A second great period occurs two generations later, with the bloody struggles that ultimately yield the Reconstruction amendments. Then there is another pause of two generations before a third great turning point. This one centers on the 1930's and the dramatic confrontation between the New Deal and the Old Court that ends in the constitutional triumph of the activist welfare state."); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 689–90 (2014) (noting the "egalitarian and anti-oligarchic features" of the New Deal); Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 642–43 (2019) (highlighting some of the egalitarian reforms).

[230] *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 18–24 (2017) (highlighting the ways in which New Deal housing programs deliberately contributed to racial segregation); IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 53–61 (2005) (noting that New Deal labor protections were crafted to exclude the Black population in order to get Southern Democrat support). *But see* ERIC SCHICKLER, RACIAL REALIGNMENT 9–10 (2016) (arguing that "New Deal liberalism . . . had racially inclusive elements that ran counter to the well-documented exclusionary aspects of Roosevelt's program" even as "top party leaders resisted" the fusion of "'class' and 'race'" by the "CIO and its allies.").

[231] Franklin D. Roosevelt, U.S. President, *First Inaugural Address* (Washington, D.C., March 4, 1933), *in* HARVEY J. KAYE, FDR ON DEMOCRACY: THE GREATEST SPEECHES AND WRITINGS OF PRESIDENT FRANKLIN DELANO ROOSEVELT 57 (2020).

[232] Franklin D. Roosevelt, U.S. President, *Speech to a Joint Session of Congress* (Washington, D.C., December 8, 1941), *in* KAYE, *supra* note 231 at 163.

[233] *Cf.* Stephen Smith, *Radio: FDR's 'Natural Gift,'* AMERICAN PUBLIC MEDIA REPORTS, (Nov. 10, 2014), https://www.apmreports.org/episode/2014/11/10/radio-fdrs-natural-gift [https://perma.cc/C9BD-3ZQS] ("President Franklin D. Roosevelt was a radio natural. He spoke in a confident, informal way, using simple words and phrases that were easy to grasp. His Fireside Chats reached record-breaking audiences. He pioneered the modern, electronic political campaign. And with a nation gripped first by the Great Depression and then World War II, Roosevelt and his administration made extensive use of radio as a tool to educate and persuade the American people.").

invoked and mirrored aspects of Jefferson's Declaration of Independence.[234] Because each of the speeches was delivered in response to different crises for particular audiences with particular purposes in mind, we will again offer some context.

The difficult circumstances of Franklin D. Roosevelt's landslide victory in the 1932 U.S. Presidency are well known. In the midst of the Great Depression, a sense of injustice was in the air, as economic inequality, business power, and political corruption were especially salient. Rampant unemployment meant that suffering and despair hit home for millions. Historian David Kennedy explains:

> By early 1932 well over ten million persons were out of work, nearly 20 percent of the labor force. In big cities like Chicago and Detroit that were home to hard-hit capital goods industries like steelmaking and automobile manufacturing, the unemployment rate approached 50 percent. Chicago authorities counted 624,000 unemployed persons in their city at the end of 1931. In Detroit, General Motors laid off 100,000 workers out of its 1929 total of some 260,000 employees. All told, 223,000 jobless workers idled in the streets of the nation's automobile capital by the winter of 1931–32. Black workers, traditionally the last hired and the first fired, suffered especially. In Chicago blacks made up 4 percent of the population but 16 percent of the unemployed; in the Pittsburgh steel districts they were 8 percent of the population but accounted for almost 40 percent of the unemployed.[235]

With the excesses of capitalism seemingly on full display, Roosevelt's Republican opponent, incumbent President Herbert Hoover, became a vulnerable target. Following the stock market crash, as the contours and lived realities of the economic abyss came into view, Hoover's refusal to initiate large-scale relief programs and his tendency to rely on modest programs of voluntarism and cooperation frustrated an ailing public.

Hoover's ideological commitments to individualism and anemic response to the widespread dislocation of millions of Americans compounded the impression that he was part of the problem or, at best, indifferent to it. Kennedy explains: Hoover "stewed in anxieties about the dole and endlessly lashed the Congress and the country with lectures about preserving the nation's moral fiber, not to mention the integrity of the federal budget, by avoiding direct federal payments for unemployment relief."[236] "No issue," writes Kennedy, "more heavily burdened Hoover in the presidential election year of 1932" than his image "as the Great Scrooge, a corrupted ideologue

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[234] Later portions of this Article will refer to this collection, taken together, as the New Deal speeches.

[235] DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945 91 (1999).

[236] *Id.* at 91.

who could swallow government relief for the banks but priggishly scrupled over government provisions for the unemployed."[237]

Fairly or not, Hoover was widely blamed for the visible ravages of the era.[238] Indeed, reflecting that attribution, the hundreds of homeless encampments springing up across the U.S. were popularly dubbed "Hoovervilles."[239] Franklin D. Roosevelt, in contrast, was neither linked to the cause of that suffering nor lacking in ambitious prescriptions. His confidence, sense of urgency, bold ideas, and fatherly reassurance played well with an impoverished and weary population.

2. Texts

a. "A New Deal for the American People"

In his 1932 speech accepting his party's nomination, Roosevelt announced "A New Deal for the American People."[240] He called upon Americans to "resume the country's interrupted march along the path of real progress, of real *justice*, of real equality for all of our citizens, great and small."[241] The national woes, he argued, were the consequence of accepting a system that had been constructed upon, not real, but illusory forms of progress, justice, and equality. They were the result of flawed ideologies that allowed large commercial interests to thrive at the expense of everyone else. Detailing that diagnosis, Roosevelt pointed to the dramatic economic expansions through the 1920s that nonetheless provided "little or no drop in the prices that the consumer had to pay" even when "the cost of production fell very greatly."[242] He continued:

> [C]orporate profit resulting from this period was enormous; at the same time little of that profit was devoted to the reduction of prices. The consumer was forgotten. Very little of it went into increased wages; the worker was forgotten, and by no means an adequate proportion was even paid out in dividends—the stockholder was forgotten. . . . What was the result? Enormous corporate surpluses piled up—the most stupendous in history.[243]

In describing the source of the problem, Roosevelt made the elements of injustice plain by tracing the key group-based dividing line along which economic security and power were asymmetrically distributed. On one side,

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[237] *Id.*

[238] *See id.* at 94 (describing Hoover at the end of his term as "the most loathed and scorned figure in the country").

[239] *Id.* at 91; *see also id.* (explaining that pulled-out empty trouser pockets were called "Hoover flags").

[240] Franklin D. Roosevelt, U.S. President, *A New Deal for the American People Speech to the Democratic National Convention* (Chi., Ill., July 2, 1932), *in* KAYE, *supra* note 231 31, at 37.

[241] *Id.* at 32 (emphasis added).

[242] *Id.* at 33.

[243] *Id.*

there were corporations, callously reaping the profits of a post-war expansion; on the other side were the many stakeholder groups whose labor and sacrifice yielded those surpluses but who shared in none of it. They were, in a word, "forgotten." That line and narrative was at the heart of the New Deal justifications and policies that would follow.

Roosevelt also drew a distinction between his story and that of his Republican rivals, who considered the economic dislocations to be the ineluctable product of markets. Hoover had treated the ups and downs of the economy, Roosevelt suggested, like the weather, and treated the depression like a hurricane. As devastating as the natural disaster may have been, it was beyond human control and therefore outside the responsibility of the federal government to address. "Our Republican leaders tell us economic laws—sacred, inviolable, unchangeable—cause panics which no one could prevent," he complained.[244] Roosevelt emphasized the suffering and framed the Depression as the product of governmental policy and therefore repairable: "[W]hile they prate of economic laws," Roosevelt observed, "men and women are starving. We must lay hold of the fact that economic laws are not made by nature. They are made by human beings."[245]

It was a powerful indictment, as FDR placed his rivals at the source of the suffering, indicating that those with the power to help had evaded their responsibility behind disingenuous denials about the catastrophes of their own making. The Republican policy makers, by that account, were not fellow innocent victims of inevitable forces, but perpetrators of injustice: deploying their power (while feigning powerlessness) to produce harm without legitimacy.[246]

Having painted corporate elites and Republican leaders as the source of the problem, Roosevelt simultaneously portrayed all those who had unjustly suffered as a single group of victims. He spoke of "men and women" "[t]hroughout the nation" who had been "forgotten in the political philosophy of the government of the last years."[247] The group definition underscored not only the gross inequality and power disparity that had existed between the few and the many but also the power that the many were now accessing by recognizing their common enemy and by coming together politically. They were on the same team, in common opposition to the shared threat. "Never in history have the interests of all the people," as Roosevelt put it, "been so united in a single economic problem."[248] That capacious group shared an interest in achieving what was rightfully theirs: a federal government that responds to injustice. That is why, in Roosevelt's words, the many "look to us here for guidance and for more equitable opportunity to

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[244] *Id.* at 36.

[245] *Id.* at 36.

[246] *Cf.* ROUSSEAU, *On the Social Contract*, *supra* note 76 (discussing the natural/political distinction).

[247] Roosevelt, *supra* note 240, at 37.

[248] *Id.* at 34. As detailed below, the Occupy Wall Street protest employed similarly broad us-them categories and similar strategies for highlighting inequalities and power. *See infra* text accompanying notes 530–626.

share in the distribution of national wealth."[249] That is why the government was obliged to alleviate the suffering for the "millions of our people who have suffered so much."[250] And that is why, to achieve that end, Roosevelt paid "tribute" to his "countrymen" experiencing "crushing want," by offering "a new chance"[251] and pledging "a new deal."[252] Anything less would not only further the injustice but heighten the resentment of a population hungry for food and justice. Anything less would "not only . . . betray their hopes but . . . misunderstand their patience."[253]

Roosevelt's emphasis on the frayed patience of his "countrymen" was a key aspect of his case. Recall Thomas Jefferson's description of the "long train of abuses" that triggered a sense of injustice and the anger that would fuel the patriots and justify revolution.[254] Such a moment of reckoning, Roosevelt intimated, was fast approaching. The anger and frustration felt by those who had been so clearly harmed by the unjust actions of the powerful profit-seeking corporations and the politicians who enabled them was reaching its tipping point.

In a related speech, delivered two weeks later, Roosevelt spelled out more explicitly his underlying goal of justice—the numerous ways of addressing injustice by promoting egalitarian and harm-reducing ends through legitimate means—and the policy presumptions that such a goal dictated. "Friends," he exhorted,

> if poverty is to be prevented, we require a broad program of social *justice*. We cannot go back to the old prisons, for example, to the old systems of mere punishment under which a man out of prison was not fitted to live in our community alongside of us. We cannot go back to the old system of asylums. We cannot go back to the old lack of hospitals, the lack of public health. We cannot go back to the sweatshops of America. We cannot go back to children working in factories. Those days are gone.
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> There are a lot of new steps to take. It is not a question of just not going back. It is a question also of not standing still.
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> For instance, the problem of unemployment in the long run . . . can be and shall be solved by the human race. Some leaders have wisely declared for a system of unemployment insurance throughout this broad land of ours; and we are going to come to it.[255]

In that speech, Roosevelt again underscored how the nation's problems—poverty, incarceration, mental health, physical health, public health, worker conditions, and unemployment—had been misdiagnosed as

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[249] *Id.* at 37.
[250] *Id.* at 32.
[251] *Id.*
[252] *Id.* at 37.
[253] *Id.* at 32.
[254] *See supra* text accompanying notes 116–130.
[255] Franklin D. Roosevelt, *Campaign Address*, (Detroit, Mich., Oct. 2, 1932), *in* KAYE, *supra* note 231 at 48, 51 (emphasis added).

individualistic. To ignore the systemic role that government played in creating those problems, Roosevelt indicated, was itself a source of injustice—a subterfuge to evade accountability for achieving justice. Speaking of his critics, Roosevelt observed:

> They maintain that these laws interfere with individualism, forgetful of the fact that the causes of poverty in the main are beyond the control of any one individual . . . . The followers of the philosophy of "social action for the prevention of poverty" maintain that if we set up a system of *justice* we shall have small need for the exercise of mere philanthropy. *Justice*, after all, is the first goal we seek. We believe that when *justice* has been done individualism will have a greater security to devote the best that individualism itself can give.[256]

Between those back-to-back speeches, Roosevelt provided an initial mapping of the injustices, the opposing sides, and pertinent battle lines. Roosevelt wound down his nomination remarks, then, by declaring war against the inequities of the status quo and promising "a new deal for the American people."[257] He closed the speech with a rousing battle cry: "This is more than a political campaign; it is a call to arms. Give me your help, not to win votes alone, but to win in this crusade to restore America to its own people."[258]

b. "An Economic Declaration of Rights"

Building upon the categories, themes, and narratives of injustice that he had sketched in his "New Deal" speech, Roosevelt delivered his next major speech two months later, calling for an economic declaration of rights.

In this later speech, Roosevelt summarized his vision of U.S. history and the bounty-to-bust economic trends unfolding at the turn of the 20th century.[259] There was the closing of the western frontier and, with it, the lost opportunities that purportedly open and arable lands had long promised. There was, he argued, the migration of labor from farms to factories and, with it, the loss of independence and self-determination. At the very time the people were growing more vulnerable, he explained, corporations were accumulating power with which to exploit that weakness.[260] The consequent

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[256] *Id.* at 51 (emphasis added).

[257] Roosevelt, *supra* note 240, at 37.

[258] *Id.*

[259] *Cf.* KENNEDY, *supra* note 235, at 123 (explaining that "the speech accurately reflected theories of history and economic principles that FDR had repeatedly heard discussed in his evenings with the Brain Trusters").

[260] *See* Franklin D. Roosevelt, *Speech to the Commonwealth Club*, (S.F., Cal., Sept. 23, 1932), *in* KAYE, *supra* note 231, 38, at 41–43 ("Our last frontier has long since been reached, and there is practically no more free land. More than half of our people do not live on the farms or on lands and cannot derive a living by cultivating their own property. There is no safety valve in the form of a Western prairie to which those thrown out of work by the Eastern economic machines can go for a new start.").

power imbalance, Roosevelt argued, produced the very sort of feudal tyranny that the founding generation fought to defeat:

> In retrospect we can now see that the turn of the tide came with the turn of the century. We were reaching our last frontier; there was no more free land and our industrial combinations had become great uncontrolled and irresponsible units of power within the state. Clear-sighted men saw with fear the danger that opportunity would no longer be equal; that the growing corporation, like the feudal baron of old, might threaten the economic freedom of individuals to earn a living. In that hour, our antitrust laws were born. The cry was raised against the great corporations. . . .[261]

While business was where great wealth was being amassed, that source of upward mobility provided little promise for the average person. The small enterprise, that is, was not a viable competitor against corporate giants. In Roosevelt's words:

> Just as freedom to farm has ceased, so also the opportunity in business has narrowed. It still is true that men can start small enterprises . . . ; but area after area has been preempted altogether by the great corporations, and even in the fields which still have no great concerns, the small man starts under a handicap. The unfeeling statistics of the past three decades show that the independent business man is running a losing race. . . . Put plainly, we are steering a steady course toward economic oligarchy, if we are not there already.[262]

Thus the opposing sides—the oppressor and the oppressed—were clear. The industrialist and the "financial titan" posed a "danger"[263] to everyone else. What we, the people, needed was the sort of "enlightened administration" that would ensure the economy and the corporations dominating it began "distributing wealth and products more equitably" and in "service of the people."[264]

The echoes of Jefferson's case against an unjust and unrepresentative monarchy were heightened when Roosevelt called for "an economic declaration of rights."[265] But instead of igniting the flames for revolution, Roosevelt's proposed declaration was meant to stave off a conflagration by dampening the tinder and controlling the burn.[266] Equalizing the allocation

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[261] *Id.* at 42.
[262] *Id.* at 43.
[263] *Id.* (using the phrase twice).
[264] *Id.*
[265] *Id.* at 44.
[266] The prospect of revolution was salient early in Roosevelt's first term. *See, e.g.*, KENNEDY, *supra* note 235, at 117 (summarizing the preliminary legislative program provided to President-elect Roosevelt from his close adviser, Adolf Berle, in which Berle warned that "it must be remembered that by March 4 next we may have anything on our hands from a recovery to a revolution. The chance is about even either way."); *id.* at 141 (noting the 1933 Senate

of power and wealth was imperative, he argued, not only to satisfy the people, but for the "safe order of things."[267] Born of perceived injustice, theirs was an understandable, if combustible, anger.[268] Responding appropriately was "not only . . . the proper policy of government," it was also

> the only line of safety for our economic structures as well. We know, now, that these economic units cannot exist unless prosperity is uniform, that is, unless purchasing power is well distributed throughout every group in the nation. That is why even the most selfish of corporations for its own interest would be glad to see wages restored and unemployment ended . . . .[269]

It was, Roosevelt claimed, that very concern regarding the implications of festering injustice that motivated wise "business men everywhere" to work to "bring the scheme of things into balance, even though it may in some measure qualify the freedom of action of individual units within the business."[270]

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While FDR's first nomination acceptance speech announced the New Deal, the candidate was at that moment "vague and inscrutable" regarding its concrete meaning.[271] This second major speech, as historian David Kennedy argues, was the closest that Roosevelt would come early on to sharing "the germ" of his "mature political thought."[272] In "emphasizing consumption more than production, the economics of distribution rather than the economics of wealth creation, issues of equity over issues of growth," FDR was highlighting the ideological foundations underlying the New Deal.[273] Still, it would not be until the second half of his first term that Roosevelt would take "up the task of translating those sentiments and generalities into a concrete political credo" and of laying out, with specificity, the terms of the New Deal.[274]

c. "A Rendezvous with Destiny"

The third speech, the most important of the three, was FDR's re-nomination acceptance speech at the 1936 Democratic National Convention. It was the keystone in what historian David Kennedy describes as "a remarkable series of addresses" that, "taken together, etched . . . the outlines of a

testimony of the president of the Farm Bureau Federation, who warned: "Unless something is done for the American farmer we will have revolution in the countryside within twelve months"). Revolutionary ferment would only intensify toward the end of that first term.

[267] Roosevelt, *supra* note 260, at 44.

[268] *See supra* text accompanying notes 33–45.

[269] Roosevelt, *Commonwealth Club*, *supra* note 260, at 44.

[270] *Id.*

[271] KENNEDY, *supra* note 235, at 245.

[272] *Id.*

[273] *Id.* at 123.

[274] *Id.* at 244–45.

structured and durable social philosophy" at "the ideological heart of the New Deal."[275]

By 1935, the New Deal was in full swing. In his annual message to Congress in January of 1935, Roosevelt proclaimed that "social *justice*, no longer a distant ideal, has become a definite goal."[276] By that time, however, opposition and backlash against his policies and his candidacy were also in full swing, with both the progressive left and the business-backed right forming new institutions.

On the left, three prominent populists, including Louisiana Senator Huey Long,[277] formed the Union Party to contest the 1936 election.[278] From the right, business interests working to undermine the New Deal formed "the American Liberty League,"[279] which, in the words of historian Kim Phillips-Fein, aimed "to rectify what its members perceived as an imbalance in the body politic: that 'business, which bears the responsibility for the paychecks of private employment, has little voice in government.'"[280] Between those political poles, FDR veered leftward, intensifying his rhetoric

[275] *Id.* at 244.

[276] *Id.* at 247 (emphasis added).

[277] The others were Dr. Francis Townsend, a California physician, and Reverend Charles Coughlin, a Catholic priest and radio host. *See id.* at ch.8.

[278] *Id.* at 283–84.

[279] *See* KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN 10 (2009).

[280] *Id.* The American Liberty League was especially opposed to the high taxes imposed on commercial interests during the New Deal. *See* KENNEDY, *supra* note 235, at 281. Roosevelt had justified those taxes by invoking Jefferson's Declaration of Independence when asserting that aggregated power and wealth of commercial entities was "as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our government." Franklin D. Roosevelt, Message to Congress on Tax Revision (June 19, 1935), *in* KAYE, *supra* note 231, at 86.

against corporate elites[281] and doubling down on his egalitarian policy objectives (though in ways that deliberately excluded African Americans).[282]

In what would be one of the most important speeches of his career,[283] often referred to as his "Rendezvous with Destiny" speech, FDR made the clearest case he ever would for the New Deal.[284] In doing so, he delivered what one historian calls "the most radical speech ever given by a serving president."[285]

Roosevelt began the speech by offering another history lesson, immediately linking his project with, and drawing authority from, the country's founding. Before 100,000 Democratic supporters in a Philadelphia football

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[281] In one 1936 speech, Roosevelt responded to the American Liberty League in all but name. Speaking about such critics, he responded by shifting the groups—powerful oppressor and vulnerable oppressed—and the alliances back into alignment with his larger narrative. He cautioned his audience, for instance, to recognize how "[w]ithin our borders . . . popular opinion is at war with a power-seeking minority," by which he meant the "numerically small but politically dominant" "financial and industrial groups." Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1936), *in* KAYE, *supra* note 231 91, at 94. He called for seeing through to the autocratic motives behind their criticisms:

> They realize that in thirty-four months we have built up new instruments of public power. In the hands of a people's government this power is wholesome and proper. But in the hands of political puppets of an economic autocracy such power would provide shackles for the liberties of the people. Give them their way and they will take the course of every autocracy of the past—power for themselves, enslavement for the public.
>
> Their weapon is the weapon of fear. I have said, "The only thing we have to fear is fear itself." That is as true today as it was in 1933. But such fear as they instill today is not a natural fear, a normal fear; it is a synthetic, manufactured, poisonous fear that is being spread subtly, expensively, and cleverly by the same people who cried in those other days, "Save us, save us, lest we perish."
>
> I am confident that the Congress of the United States well understands the facts and is ready to wage unceasing warfare against those who seek a continuation of that spirit of fear.

Id. at 97–98; *see also id.* at 91 (Kaye explaining that "[e]veryone knew he was referring on the one hand to the spread of Fascism in Europe and, on the other, to the efforts at home by many of the most powerful and wealthiest corporate figures in America, organized in a group called the Liberty League.").

[282] For example, the safety net and security provided in the Social Security Act deliberately excluded most African Americans by defining agricultural workers and household workers as ineligible for benefits. *See infra* notes 322–323; *see generally* KATZNELSON, *supra* note 230. Similarly, FDR's Federal Housing Administration systematically excluded people of color from its benefits. *See* ROTHSTEIN, *supra* note 230, at 64–65 ("Because the FHA's appraisal standards included a whites-only requirement, racial segregation now became an official requirement of the federal mortgage insurance program.").

[283] *See* Peter Canellos, *What FDR Understood About Socialism That Today's Democrats Don't*, POLITICO (Aug. 16, 2019), https://www.politico.com/magazine/story/2019/08/16/democrats-socialism-fdr-roosevelt-227622/ [https://perma.cc/WN85-VABS] ("[H]istorians rank [the speech] among the greatest of his career."); Jack Beatty, *Conventions In History*, ON POINT (Jul. 8, 2016), https://www.wbur.org/onpoint/2016/07/08/1936-democratic-convention-fdr [https://perma.cc/75T5-E9K7] (calling it "one of his greatest speeches").

[284] *See* Canellos, *supra* note 283 (stating that the "speech came far closer to revealing his inner theories and motivations" than other speeches and that "[n]ever before or after would he lay out his vision in greater clarity").

[285] KAYE, *supra* note 231, at 99.

stadium[286] and a national radio audience,[287] FDR opened his remarks by observing that

> Philadelphia is a good city in which to write American history . . . fitting ground on which to reaffirm the faith of our fathers; to pledge to ourselves to restore to the people a wider freedom; to give to 1936 as the founders gave to 1776—an American way of life.[288]

Roosevelt likened the contemporary challenge to that facing the signers of the Declaration of Independence, which, in turn, allowed him to borrow Jefferson's rhetorical blueprint. As Jefferson had, Roosevelt highlighted values of equality and freedom in exposing injustice and in encouraging mobilization around justice-advancing change. He began with a brief definition of "freedom" that would implicitly invoke injustice[289]: "[F]reedom," he proclaimed, "in itself and of necessity, suggests freedom from some restraining power."[290] Roosevelt then turned to a cursory historical account of that time, against which he could draw a series of comparisons and highlight analogous elements of the injustice frame.

In 1776 we sought freedom from the tyranny of a political autocracy—from the eighteenth century royalists who held special privileges from the crown. It was to perpetuate their privilege that they governed without the consent of the governed; that they denied the right of free assembly and free speech; that they restricted the worship of God; that they put the average man's property and the average man's life in pawn to the mercenaries of dynastic power; that they regimented the people.

And so it was to win freedom from the tyranny of political autocracy that the American Revolution was fought. That victory gave the business of governing into the hands of the average man, who won the right with his neighbors to make and order his own destiny through his own Government. Political tyranny was wiped out at Philadelphia on July 4, 1776.[291]

However incomplete and inaccurate Roosevelt's historical story may have been, it represented a fairly standard historical account. It did so by implicitly highlighting the role of the American Revolution in confronting injustice—that is, freedom-constraining "dynastic power," autocracy, monarchy, and hierarchy all operating without the "average man's" consent and, thus, without legitimacy. And then there is the happy ending in which justice is achieved—or freedom is won[292]—through revolution.

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[286] *See* Canellos, *supra* note 283.

[287] *See* KENNEDY, *supra* note 235, at 280 (describing "a memorable speech broadcast nationwide from Philadelphia's Franklin Field").

[288] Franklin D. Roosevelt, *Acceptance Speech for the Re-nomination for the Presidency*, (Phila., Pa., June 27, 1936), *in* KAYE, *supra* note 231, 99 at 100.

[289] *See infra* Part II(A) (arguing that such an understanding of freedom was the dominant view in the sort of political discourse typified by the iconic texts reviewed in this Article).

[290] Roosevelt, *supra* note 288, at 100.

[291] *Id.*

[292] *See infra* Part II(A) (discussing the relationship between justice and freedom).

As others had before him, including Stanton and Douglass, Roosevelt treated that moment of achievement as incomplete. The American Revolution and the goals ostensibly motivating it marked not a destination but a lodestar: a system of deep values to be employed as navigational cues on a journey of self-government. Where Stanton and Douglass primarily sought to widen the circle of inclusion in that governing process, Roosevelt focused primarily upon expanding notions of how power—and the power dynamics behind oppression and injustice—operated.[293]

The founders' achievement, Roosevelt emphasized, addressed only the problem of "political tyranny." Roosevelt, though, pointed to a new and different tyrant, which had taken form through the rapid technological, economic, social, and institutional changes unfolding in the years since 1776. In that time, Roosevelt explained:

> [M]an's inventive genius released new forces in our land which reordered the lives of our people. The age of machinery, of railroads; of steam and electricity; the telegraph and the radio; mass production, mass distribution—all of these combined to bring forward a new civilization and with it a new problem for those who sought to remain free.[294]

The "new problem"—the new threat to freedom, as he defined it—was no less menacing and harmful to the lives of the people than had been the old problem of monarchy. It was as if the new tyrant had gradually filled the power vacuum left by the defeated colonial power: Roosevelt argued:

> For out of this modern civilization, economic royalists carved new dynasties. New kingdoms were built upon concentration of control over material things. Through new banks and securities, new machinery of industry and agriculture, of labor and capital—all undreamed of by the fathers—the whole structure of modern life was impressed into this royal service.[295]

Roosevelt clearly demarcated the victims and the victimizers, distinguishing the large, powerful corporate and financial interests who sought to dominate others from the small, vulnerable individuals and groups whose freedom they threatened. With their wealth and power, they enlisted "mercenaries . . . to regiment the people, their labor, and their property," and they gained top-to-bottom control over the economic arena. As Jefferson and Stanton had done through their lists of grievances, Roosevelt described some of the unjust harms that large corporations were producing in the material lives of the people:

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[293] As we have described, however, all three invoked and expanded each of the three injustice elements.

[294] *Id.* at 100.

[295] *Id.*

> The hours men and women worked, the wages they received, the conditions of their labor—these had passed beyond the control of the people, and were imposed by this new industrial dictatorship. The savings of the average family, the capital of the small business man, the investments set aside for old age—other people's money—these were tools which the new economic royalty used to dig itself in.
>
> Those who tilled the soil no longer reaped the rewards which were their right. The small measure of their gains was decreed by men in distant cities.
>
> Throughout the Nation, opportunity was limited by monopoly. Individual initiative was crushed in the cogs of a great machine. The field open for free business was more and more restricted. Private enterprise, indeed, became too private. It became privileged enterprise, not free enterprise.[296]

Through their economic power, "the privileged princes of these new economic dynasties,"[297] "thirsting" for more, expanded their empire to include "control over Government itself."[298] With mutually reinforcing economic and political power, the new tyrants "created a new despotism," which they legitimized by "wrapp[ing] it in the robes of legal sanction."[299] With the same old wine repackaged in new bottles, "the average man once more confront[ed] the problem that faced the Minute Man."[300]

This new form of tyranny, though distinct from the political tyranny on which Jefferson focused, was no less unjust.[301] Moreover, the two problems,

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[296] *Id.* at 101; *see also id.* ("There was no place among this royalty for our many thousands of small business men and merchants who sought to make a worthy use of the American system of initiative and profit. They were no more free than the worker or the farmer. Even honest and progressive-minded men of wealth, aware of their obligation to their generation, could never know just where they fit[ ] into this dynastic scheme of things.").

[297] *Id.*

[298] *Id.*

[299] *Id.*

[300] *Id.* By defining the problem that way—an economic analogue to Jefferson's' political tyranny—Roosevelt lightened his burden of persuasion considerably: he could, as Stanton and Douglass had, now piggyback on the Declaration's familiar narrative.

[301] Roosevelt was challenged not only with delegitimizing "the monopol[ies]" and "privileged enterprises" that produced "this new industrial dictatorship." *Id.* He also had to undermine the legitimating narratives of law and the legal system, with all of their claims to neutral or apolitical authority. For instance, he needed a compelling counter-story for the wealth- and business-friendly premise that property rights and laissez faire notions of contract were inviolable normative principles of law and that the "consent" attributed to contracts between unequal parties—including, for instance, a giant corporation and an individual factory worker—were normatively indistinguishable from contracts between two corporate behemoths. The conventional legal assumption was that a contract, any contract, was a contract, and that all contracts manifested the consent of the parties involved and were therefore normatively worthy of enforcement. That conception connected to the broader notion of private allocations as presumptively consensual and of public allocations as coercive. Legal realists had, in a variety of ways, exposed those formalist presumptions as mistaken, and revealed the purportedly "free" aspects of the market as illusory—social constructs hiding implicit notions of justice and morality. *See, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI.

Roosevelt argued, were intertwined—overlapping, mutually reinforcing, and substitutable: "Today we stand committed to the proposition that freedom is no half-and-half affair. If the average citizen is guaranteed equal opportunity in the polling place, he must have equal opportunity in the market place."[302] Roosevelt suggested that there is no freedom or justice with one but not the other:

> The royalists of the economic order have conceded that political freedom was the business of the Government, but they have maintained that economic slavery was nobody's business. They granted that the Government could protect the citizen in his right to vote, but they denied that the Government could do anything to protect the citizen in his right to work and his right to live.[303]

And it was no less the role of a government of, by, and for the people to address this new tyranny. Indeed, Roosevelt claimed, the government was obliged to respond. "Government in a modern civilization," he declared, "has certain inescapable obligations to its citizens, among which [is] . . . the establishment of a democracy of opportunity."[304] Only the government possessed the requisite power to domesticate corporate power. And, indeed, absent a concerted governmental response, that very government would itself become the tool of corporate power. As Roosevelt put it: "Against economic tyranny such as this, the American citizen could appeal only to the organized power of Government. The collapse of 1929 showed up the despotism for

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Q. 470 (1923); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927). For fuller discussions of the criticisms and insights of legal realists, see Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 487–94 (1988).

Roosevelt, whose inner circle included several legal realists, sought to make a related criticism of laissez-faire presumptions in a way that the general public could easily grasp. He did so by highlighting the fact that wealth (that is, the stuff of property and property law) was, in effect, an instrument of power, and that consent (that is, the normative foundation of contract) was just a means of manifesting or transferring that power. From that perspective, where parties were significantly unequal to start, the contract they agreed to would reflect that significant disparity, permitting the powerful to exploit the powerless under the guise of "law" and a legitimating aura of consent. In reality, the result was unjust—power producing and reproducing inequality without legitimacy. Contract was not the equalizing, consent-paved path to justice; it was a tool of injustice inasmuch as, in the context of inequality, consent is illusory. Roosevelt captured that notion and others in this way:

> An old English judge once said: "Necessitous men are not free men." Liberty requires opportunity to make a living—a living decent according to the standard of the time, a living which gives man not only enough to live by, but something to live for.
>
> For too many of us the political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people's property, other people's money, other people's labor—other people's lives. For too many of us life was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness.

Roosevelt, *supra* note 288, at 101.

[302] *Id.* at 102.

[303] *Id.*

[304] *Id.*

what it was. The election of 1932 was the people's mandate to end it. Under that mandate it is being ended."[305]

Responding to the criticisms of New Deal policies by the American Liberty League and other spokespeople for corporate interests,[306] Roosevelt simply reframed the injustice—that is, the powerful interests producing harm without legitimacy—that those groups sought to insulate and justify:

> These economic royalists complain that we seek to overthrow the institutions of America. What they really complain of is that we seek to take away their power. Our allegiance to American institutions requires the overthrow of this kind of power. In vain they seek to hide behind the Flag and the Constitution. In their blindness they forget what the Flag and the Constitution stand for. Now, as always, they stand for democracy, not tyranny; for freedom, not subjection; and against a dictatorship by mob rule and the over-privileged alike.[307]

By Roosevelt's telling, those fighting to enhance corporate interests and corporate power were "the resolute enemy within our gates."[308] They disingenuously sought legitimating cover behind "the Flag and the Constitution."[309] This powerful and formidable enemy, he warned, would succeed unless, those committed to justice and freedom fought back "in greater courage."[310]

Like it or not, those were the options. Or, as Roosevelt concluded in his memorable peroration: "There is a mysterious cycle in human events. To some generations much is given. Of other generations much is expected. This generation of Americans has a rendezvous with destiny."[311] Ours was "a war for the survival of democracy," a "f[i]ght for freedom,"[312] and a battle "to save a great and precious form of government for ourselves and for the world."[313]

3. Post-Texts

In the end, notwithstanding the robust opposition he received from the left and the right, Roosevelt won the 1936 election in another landslide.[314] The New Deal policies his administration had begun would continue—at

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[305] *Id.*
[306] *Id.* at 101; *see also supra* text accompanying notes 277–282.
[307] Roosevelt, *supra* note 288, at 102.
[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] *Id.* at 103.
[312] *Id.* at 103–04; *see also infra* Parts III(A)(4) and III(B)(4) (discussing how Roosevelt's speeches illustrate shared meanings of "freedom" and "democracy").
[313] *Id.* at 104.
[314] Roosevelt's win reflected the power of what came to be known as the "New Deal coalition," which comprised a variety of voting constituencies, including blue collar workers, African Americans, religious minorities, and rural White Southerners. See IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 17-18 (2013).

least until the date that has "live[d] in infamy"[315] and the wars for "ourselves and for the world"[316] turned outward.

Roosevelt's speeches, particularly those he delivered when battling for a second term, did more than help him win the election. Through those speeches, as David Kennedy summarizes, Roosevelt

> elaborate[d] for his countrymen his vision of the future into which he hoped to lead them. He gave the nation a presidential civics lesson that defined nothing less than the ideology of modern liberalism. He breathed new meaning into ideas like liberty and freedom. He bestowed new legitimacy on the idea of government. He introduced new political ideas, like social security. He transformed the country's very sense of itself, and of what was politically possible, in enduring ways. Before he was finished, . . . Roosevelt had changed the nation's political mind and its institutional structure to a degree that few leaders before him had dared to dream, let alone try, and that few leaders thereafter dared to challenge.[317]

This section has argued that the deeper story behind those shifts of "ideas," "meaning," "mind," and "structure" was largely the consequence of perceived injustice, which Roosevelt effectively tapped into and amplified. He did so, as Jefferson, Stanton, and Douglass had before him, by revealing power dynamics and asymmetries, highlighting resultant inequalities and suffering, and challenging the legitimacy of the system and its allocations and outcomes.[318]

For some groups (for instance, labor and capital), the New Deal managed to flatten wealth and power disparities; for the most vulnerable groups, however, the New Deal was the same old deal. As indicated in the previous section, for instance, African Americans were left out of New Deal legislation by design.[319] Those laws were, in fact, tailored to exclude racialized sectors and thus would serve to largely reproduce the racial hierarchy in the United States. Agricultural and domestic service industries, which African Americans largely occupied, were not given social security or minimum wage protection.[320] States continued to segregate African Americans in hospitals,

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[315] Roosevelt, *supra* note 232, at 164.

[316] Roosevelt, *supra* note 288, at 104.

[317] KENNEDY, *supra* note 235, at 245.

[318] Roosevelt's commitment to advancing justice, express and implied, continued well past 1936. For instance, in a 1940 campaign address, he declared that "[t]he true measure of our strength lies deeply imbedded in the social and economic justice of the system in which we live." Franklin D. Roosevelt, Campaign Address, (Cleveland, Ohio, Nov. 2, 1940), *in* KAYE, *supra* note 231, 133, at 135.

[319] *See* ROTHSTEIN, *supra* note 230, at 155 (stating Roosevelt "could assemble the congressional majorities he needed to adopt New Deal legislation only by including southern Democrats, who were fiercely committed to white supremacy," the result of which was that African Americans were largely excluded from New Deal benefits and protections).

[320] *See id.* at 155–56 ("Social Security, minimum wage protection, and the recognition of labor unions all excluded from coverage occupations in which African Americans predominated: agriculture and domestic service.").

schools, and industries. The 1933 Federal Emergency Relief Administration gave more of its funds to unemployed White people and often gave African Americans worse jobs for lower pay.[321] Similarly, the National Labor Relations Act, Social Security Act, and Fair Labor Standards act all, while facially neutral, excluded most African American workers.[322] As V.B. Dubal summarizes (in this symposium), the New Deal "conspicuously created differential wages and wholescale legal exclusions for majority African American workforces."[323]

E. Brown v. Board of Education—Legal Injustice

It was in that context of highly selective egalitarianism—of unequal equalizing—that the watershed constitutional case, *Brown v. Board*,[324] was decided.

1. Context

The case known as *Brown v. Board* consolidated five separate cases heard by the U.S. Supreme Court involving segregation in public schools. The Court's 1954 opinion in *Brown*[325] stands as the most important and

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[321] *See id.* at 156 ("[T]he Federal Emergency Relief Administration, adopted in 1933, disproportionately spent its funds on unemployed whites, frequently refused to permit African Americans to take any but the least skilled jobs, and even in those, paid them less than the officially stipulated wage.").

[322] *See* V.B. Dubal, *The New Racial Wage Code: Reframing the 'Third Category' of Worker*, 15 HARV. L. & POL'Y REV. 511 (2021) ("The New Deal legislation that followed [the invalidation of the NIRA]—including the National Labor Relations Act (1935), Social Security Act (1935), and the Fair Labor Standards Act (FLSA, 1938)—recreated many of the racially explicit carveouts and differentials that became de facto realities for African American workers under the agency governance of the NRA."); *see also supra* note 230.

Contemporary activists and critics pointed out that the New Deal benefits were disproportionately allocated to White Americans. *See, e.g.*, *id.* ("As Charles Houston, a board member of the NAACP testified in relationship to the Social Security Acts' exclusion of agricultural and domestic workers, the more the NAACP studied the bill "the more it began to look 'like a sieve with holes just big enough for the majority of Negroes to fall through.'"); KATZNELSON, *supra* note 230, at 37–39 (describing how W.E.B. Du Bois understood the New Deal shift as an experience for Black America that was "mired in difficulty despite any bounty offered by the New Deal: Negro children are systematically denied education; when the National Education Association asks for federal aid to education it permits discrimination to be perpetuated by the present local authorities.").

[323] Dubal, *supra* note 322, at 519; *see also id.* ("While uplifting white workers and providing the most hospitable climate ever fashioned in American history for decent enforceable conditions of employment, these first wage laws entrenched the existing boundaries of racial hierarchy through the legalization of lower wages for Black workforces and wholesale work law exclusions for racialized sectors. For Black America, these carveouts were, in historian Harvard Sitkoff's terms, "an old deal, a raw deal." (footnotes omitted) (citations omitted) (quoting HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE 26 (2009)). *But see* SCHICKLER, *supra* note 230.

[324] 347 U.S. 483 (1954).

[325] *Id.*

celebrated Supreme Court decision of the 20th century, perhaps ever,[326] marking the high point of the justice spectrum on which *Dred Scott* marks the low point. Like *Dred Scott,* therefore, *Brown* occupies an uncontroversial normative position and has become the most important test of constitutional law theories.[327] As much as *Brown* has been celebrated for its outcome, it has

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[326] *See* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 74 (1990) (calling *Brown* "the defining event of modern American constitutional law"); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY xii (2004) ("Probably no case ever to come before the nation's highest tribunal affected more directly the minds, hearts, and daily lives of so many Americans."); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 13 (2004) (*Brown* "is appropriately viewed as perhaps the most significant case on race in America's history."); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 81 (1994) ("Constitutional lawyers and historians generally deem *Brown v. Board* . . . to be the most important United States Supreme Court decision of the twentieth century, and possibly of all time."); Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383 (2000) (calling *Brown* "the sacred cow of American constitutional law"); Robert Justin Lipkin, *Constitutional Revolutions: A New Look at Lower Appellate Review in American Constitutionalism*, 3 J. APP. PRAC. & PROCESS 1, 4 (2001) ("*Brown* was a quintessential constitutional revolution, creating a new constitutional paradigm of equal protection and thereby abandoning the reigning paradigm enunciated in *Plessy v. Ferguson*."); Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 547 (1995) ("The conventional view holds that *Brown* is one of the two or three most important cases in American legal history."); Michal R. Belknap, *The Real Significance of Brown v. Board of Education: The Genesis of the Warren Court's Quest for Equality*, 50 WAYNE L. REV. 863, 885–86 (2004) ("*Brown v. Board* . . . was a big case"); Constance Baker Motley, *The Historical Setting of Brown and Its Impact on the Supreme Court Decision*, 61 FORDHAM L. REV. 9, 9 (1992) (describing *Brown* as "of overriding historical, social, and political significance in the life of the nation."); Thomas B. McAffee, *The Brown Symposium—An Introduction*, 20 S. ILL. U. L.J. 1, 1 (1995) ("Brown symbolizes not only a legal and social revolution, namely the dismantling of the Jim Crow system, it also embodies the spirit of modern constitutional law.").

[327] *See* Justin Driver, *The Significance of the Frontier in American Constitutional Law,* 2011 SUP. CT. REV. 345, 358 ("Brown has become a litmus test for theories of constitutional interpretation, as any theory worth its salt must accommodate the decision"); BERNARD SCHWARTZ, THE WARREN COURT: A RETROSPECTIVE 264 (1996) ("Any analysis of the Warren Court's principal decisions should begin with Brown v. Board of Education, in many ways the watershed constitutional case of the century. When the Brown decision struck down school segregation as violative of the Equal Protection Clause, it signaled the beginning of effective civil rights enforcement in American law."); Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 999 n.4 (1986) ("For a generation, one criterion for an acceptable constitutional theory has been whether that theory explains why [*Brown v. Board*] was correct."); Pamela S. Karlan, *What Can Brown Do For You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009) ("Precisely because *Brown* has become the crown jewel of the United States Reports, every constitutional theory must claim *Brown* for itself. A constitutional theory that cannot produce the result reached in *Brown* . . . is a constitutional theory without traction."); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995) ("The supposed inconsistency between *Brown* and the original meaning of the Fourteenth Amendment has assumed enormous importance in modern debate over constitutional theory. Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that Brown was correctly decided, the theory is seriously discredited."); Ronald Turner, *A Critique of Justice Antonin Scalia's Originalist Defense of Brown v. Board of Education*, 60 UCLA L. REV. DISCOURSE 170, 175 (2014) ("Much rides on the answer to that question" regarding the fit of theories with Brown (quoting and citing McCon-

also been described, often criticized, as emblematic of the Warren Court's mode of judicial decision making—as a form of "activism" in robes.[328] As we argue below, that is true in part because "justice" served as the implicit judicial norm.

For roughly half a century, *Plessy's* "separate but equal" interpretation stood as the legal norm against which any claim of racial discrimination through segregation would be held.[329] Other courts and decisions routinely upheld the "separate but equal" decision and its underlying premises and logic.[330]

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nell, *supra* note 327); BORK, *supra* note 326, at 77 (1990) ("Brown has become the high ground of constitutional theory. Theorists of all persuasions seek to capture it, because any theory that seeks acceptance must, as a matter of psychological fact, if not logical necessity, account for the result in Brown."); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1242–43 (1993) ("No one questions *Brown*'s result (anymore). Indeed, so completely has the legal system reoriented itself after the decision that it may not even be possible to find the legal material with which to mount a serious challenge to its conclusion. . . . no theory of interpretation can survive as a theory of interpretation of this Constitution unless it can justify *Brown*."); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF JUDICIAL INTERPRETATION 280 (2006) ("Some have claimed that any respectable account of constitutional adjudication must be able to justify *Brown*. In view of such claims, theorists have gone to implausible lengths to square their accounts with *Brown*."); *but see id.* (2006) (arguing that "the view that accounts of constitutional interpretation and judicial review should be tested against any particular decision is seriously misguided").

[328] NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 373 (2010) ("At no time in the history of the United States had a judicial body stood in the vanguard of promoting progressive social change. . . . A Supreme Court ruling that segregation was unconstitutional would be the most aggressive piece of judicial activism in American history."); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 555 (2006) ("Beginning roughly in the 1980s, originalism gave conservative activists a language in which to attack the progressive case law of the Warren Court on the grounds that it had "almost nothing to do with the Constitution" and was merely an effort to enact "the political agenda of the American left." (quoting and citing Lino A. Graglia, *"Constitutional Theory": The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 TEX. L. REV. 789, 789 (1987)); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 258–60 (1992) (describing the *Brown* opinion as the paragon of judicial activism); Lino A. Graglia, *Do Judges Have a Policy-Making Role in the American System of Government?*, 17 HARV. J.L. & PUB. POL'Y 119, 124 (1994) (arguing that *Brown* transformed judicial branch into "our society's most important initiator and accelerator of change").

[329] Some cases challenged the interpretation of "equal" in *Plessy*. *See* Sweatt v. Painter, 339 U.S. 629, 634 (1950) ("Under equal protection clause of Fourteenth Amendment, qualified Negro applicant had personal and present right to a legal education equivalent to that offered by state to students of other races."); *id.* ("With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law school."); *id.* ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."); Leland B. Ware, *Setting the Stage for Brown: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930–1950*, 52 MERCER L. REV. 631, 632 (2001) (Charles Hamilton Houston led Howard students to challenge the "law that provided the basis for segregation," and that separate but equal did not actually mean equal.).

[330] *See generally* McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 160 (1914) (determining the state requirement of separate but equal accommodations for two races is not an infraction of the 14th amendment); *See generally* Carr v. Corning, 182 F.2d 14, 22 (D.C. Cir. 1950) (affirming separate but equal in; "it appears that the treatment accorded these Negro plaintiffs, of which they complain, would have been accorded them had they been white. If the separation of the races in and of itself is not constitutionally invalid, such treat-

The question for the Supreme Court in *Brown* was whether, after *Plessy* and fifty years of reinforcing legal precedent, "separate" could sometimes be equal or whether it was inherently unequal. The Court ultimately held the latter,[331] but the outcome in the case was far from obvious. Shared opposition to many Jim Crow policies did not necessarily translate to a shared belief[332] that state laws be declared "unconstitutional" and that established precedent (*Plessy* and its progeny) be overruled.[333]

Those were among the jurisprudential challenges Earl Warren faced when he joined the court as its new Chief Justice in 1954 and was presented with the first *Brown v. Board* opinion in November of that year. To understand why Warren came out as he did (choosing justice over precedent), some more context will be helpful.

Around 1954, the United States was at its height of hegemonic power internationally and was racially segregated domestically. Nearly a decade after achieving victory in World War II, the U.S. had transitioned from global power to global superpower economically, militarily, and politically, with other formerly major economies, militaries and nations still recovering from wartime devastation and depletion.

As the U.S. strengthened its political authority and significance around the world, there was also a problem. The nation's legitimacy and influence were significantly limited by the salient injustices and hypocrisies of U.S. domestic policies, particularly the human-rights-violating Jim Crow segregation. The U.S. purported to be a beacon of liberty and democracy, but the visible oppression of its own population did not square with those high-minded values.[334] The gap was spotlighted and exploited by proponents of communism domestically and abroad, and constituted a source of vulnerability in light of the emerging power and influence of the Soviet Union.[335] In

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ment, indiscriminate as to race, is not the unequal extension of privileges which violates constitutional prohibitions.").

[331] *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.").

[332] *See supra* note 329.

[333] *See* JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 54–56 (2001); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 292–302 (2004); KLUGER, *supra* note 326, at 592–618 (2004); Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education,* 91 COLUM. L. REV. 1867, 1907–08 (1991).

[334] *See* Laurie B. Green, Book Review, 20 L. & HIST. REV. 219, 219 (2002) (reviewing MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000)) ("[T]he problem of race attracted so much foreign attention in the early Cold War that it threatened to undermine U.S. claims to the superiority of democracy over communism").

[335] *See* Mary L. Dudziak, *Brown and the Idea of Progress in American Legal History: A Comment on William Nelson*, 48 ST. LOUIS U. L.J. 851, 855 (2004) ("In a world divided by the Cold War, it was frightening to see the Soviet Union capitalize on America's 'Achilles heel.' Soviet propaganda exploited U.S. racial problems, arguing that American professions of liberty and equality under democracy were a sham.").

Derrick A. Bell, Jr.'s terminology, at the time that *Brown v. Board* was decided, the "interests of the races converged."[336] To gain more respect and influence internationally, the United States needed to take visible steps toward resolving racial inequality within its own boundaries. After decades of litigation battles challenging segregation, *Brown* was finally decided at a moment when some amount of racial integration and equality benefited the U.S. on the global stage and, thus, White elite interests.[337] Chief Justice Warren and his fellow justices on the Supreme Court appear to have detected and responded to that shifting zeitgeist.

Several related factors also contributed to the *Brown* decision (and other racially progressive Warren Court opinions). For example, national and international attitudes about racial inequalities were then rapidly evolving owing in part to revelations about the holocaust and war crimes emerging in the post-war era. The unspoken national embarrassment and dissonance was perhaps heightened by the inspiration that early twentieth century U.S. race sciences, racist discourse, and Jim Crow policies gave to some of the most horrific ideas, laws, and practices of Nazi Germany.[338] Powerful interests seeking to promote American exceptionalism were eager to distance themselves and their national identity from genocidal practices of our evil enemy.[339]

In 1948, for instance, the United Nations—under the leadership of Eleanor Roosevelt—passed the non-binding Universal Declaration of Human

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[336] Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1980) (explaining that "for a brief period, the interests of the races converged to make the *Brown* decision inevitable" and arguing that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

[337] *See* William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 24 (2011) (explaining Mary Dudziak's expansion of Bell's idea by uncovering "historical documents showing that the United States government's intervention on the side of the plaintiffs in *Brown* was largely driven by geopolitical concerns: 'The international focus on U.S. racial problems [in the years following World War II] meant that the image of American democracy was tarnished. The apparent contradictions between American political ideology and practice led to particular foreign policy difficulties with countries in Asia, Africa and Latin America. U.S. government officials realized that their ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home.'").

[338] *See* Hanson & Hanson, *supra* note 48; *see generally* JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW, *passim* (2018) (drawing the connection between racial oppression in the U.S. on the Nuremberg Laws and Hitler's Germany); *see*, *e.g.*, *id.*, at 70 ("America may have been the global leader in the creation of racist law, well known and much cited long before Hitler came to power; but as the Nazis regularly observed, American law was not open about its racist goals, at least when it came to citizenship and immigration. . . . In their citizenship and immigration law, Americans had to work around the requirements of the Fourteenth Amendment, and more broadly around their announced traditions of equality; and in consequence their law was a law of covert devices and legal subterfuges.").

[339] *But see* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 7 (2010) ("Contrary to conventional assumptions, there was no widespread Holocaust consciousness in the postwar era, so human rights could not have been a response to it."). For criticisms of Moyn's dismissal of such a post-war effect, see Sarita Cargas, *Questioning Samuel Moyn's Revisionist History of Human Rights*, 38 HUM. RTS. Q. 411, 413–17 (2016).

Rights, that urged member nations to promote a variety of inextricably linked rights—human, civil, economic, and social. As the Declaration made clear in the opening line of its preamble, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[340] For that end it is "essential" the preamble stressed, "if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."[341] By this account, the legal system must ultimately serve to protect the fundamental rights that ensure "freedom, justice and peace" lest those oppressed by laws turn to rebellion.

The Declaration suggested that justice and freedom, not oppression and order, must be the priorities and ends of law. Because "[a]ll human beings are born free and equal in dignity and rights" and because all "are endowed with reason and conscience and should act towards one another in a spirit of brotherhood,"[342]

> "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. . . . [and without] distinction [based upon] the political, jurisdictional or international status of the country or territory to which a person belongs . . . ."[343]

The milestone document[344] reveals a great deal about the U.S mindset, following the horrors of two world wars, regarding norms of equality, justice, and freedom for all human beings, and both the role of, and the rule of, law in ensuring the protection of human rights.[345]

More generally, this was a time in which philosophers, social scientists, artists, and the cognoscenti would begin grappling in earnest with the racial stereotypes that had dominated prior to World War II. Specific racial stereotypes as well as the psychological tendency to stereotype were increasingly

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[340] G.A. Res. 217 (III) A, Universal Declaration of Human Rights pmbl. (Dec. 10, 1948).

[341] *Id.*

[342] *Id.* Art. 1

[343] *Id.* Art. 2. As the Declaration clarified, any limits on the exercise of those rights "shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." *Id.* Art. 29.

[344] "Drafted by representatives with different legal and cultural backgrounds from all regions of the world" the document was translated into more than 500 languages. *Universal Declaration of Human Rights*, U.N. OFF. HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/en/udhr/pages/udhrindex.aspx [https://perma.cc/Q3E8-567G].

[345] *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), was written between the international Nuremberg Trials (1946), which set the stage for the Universal Declaration of Human Rights, and the Adolf Eichmann Trial (1960), when the excesses of rigid allegiance to law, without a transcendent norm above the law—a higher law—was acute.

read as immoral and one of the origins of evil. Chief Justice Warren himself was implicated in this dramatic reevaluation of cultural understandings and attitudes: he had played a major and outspoken role in calling for and justifying the internment of tens of thousands Japanese Americans during the war, a role that he came deeply to regret.[346]

The legal system's personnel, in particular, had much to ponder in the wake of the Holocaust about the role of law. Legal scholars in that period similarly—and not coincidentally—struggled with the question of law as it "is" in contrast with law as it "ought to be"—between legal positivism, that is, and legal normativism.[347]

That is the global, cultural, and legal context in which Warren and his judicial brethren were operating.

2. Text

In his opinion for the ultimately unanimous Court,[348] Chief Justice Warren declared the unconstitutionality of "separate but equal." In explaining the outcome, Warren emphasized that it was *not* based upon the original intention of the framers of the 14th Amendment.[349] That question had come up—indeed, it was the topic of extended oral argument before the Court[350]—but the relevant historical evidence was neither clear nor help-

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[346] G. Edward White, one of Earl Warren's several biographers, describes Warren's role in the internment policy, how Warren "must have come to the realization that the Japanese evacuation, even in wartime, was offensive to America's libertarian and egalitarian traditions and conspicuously racist," how he "probably confronted the element of racial and ethnic stereotyping in his own thought," and "began to realize, with the *Brown* case, that racial segregation in public schools was based on stereotypes that were unfair, unequal, and offensive to his ideal of American life." G. Edward White, *The Unacknowledged Lesson: Earl Warren and the Japanese Relocation Controversy*, 55 VQR, Autumn 1979, https://www.vqronline.org/essay/unacknowledged-lesson-earl-warren-and-japanese-relocation-controversy [https://perma.cc/GQ9E-2RFE]. According to White, Warren "deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens," explaining in his memoirs that "[w]henever I thought of the innocent little children who were torn from home, school friends, and congenial surroundings, I was conscience stricken" and came to understand that "[i]t was wrong to react so impulsively, without positive evidence of disloyalty." *Id.* Warren's regret with his role in internment created a heightened sense that judges need to be particularly committed to seeing the big picture of justice, rather than being moved by the war-time pressures and passions of the moment. *Id.*

[347] *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); *see generally* A. H. Chroust, *The Philosophy of Law of Gustav Radbruch*, 53 PHIL. REV. 23–45 (1944) (claiming that if a judge encounters a statute that they believe to be unjust, the legal concept must be unbearably unjust or deliberately disregard human equality to choose the more just outcome. Radbruch's legal theory derives from his experience in Nazi Germany).

[348] *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

[349] The question in *Brown*, was whether state-required racial segregation of public schools violated the Fourteenth Amendment's Equal Protection Clause. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[350] Leland Ware, *Brown at 50: School Desegregation from Reconstruction to Resegregation,* 16 U. FLA. J.L. & PUB. POL'Y 267 (2005) (debating within the Supreme Court on whether

ful.[351] A truly robust originalism might even have required upholding *Plessy*'s "separate but equal" standard. "At best," Warren explained, the pertinent legislative history was "inconclusive."[352] Capitulating to the ambiguity and the inability to "turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written,"[353] the Court moved forward based upon a different sort of argument and evidence.[354]

The opinion was—like a sense of injustice is—born of intuition and emotion. From the outset, Warren's personal reaction and sense of how the case should come out had been determined by his aversion for *Plessy*'s message and the segregation that it blessed.[355] In his view, the segregation policies reflected and reinforced racial hierarchy and, as he put it, the "basic premise that the Negro race is inferior."[356]

Warren summarized some of those subtle, intangible, but powerfully unequal and "detrimental" (and therefore unjust) effects of separation and segregation.[357] They included, "qualities which are incapable of objective measurement" such as the "ability to study, to engage in discussions and exchange views with other students" as well as the "feeling of inferiority" produced by forced separation that "has the sanction of the law"—a "sense of inferiority" that "affects the motivation of a child to learn" and that can affect

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ratifiers intended for there to be segregation; John W. Davis argued that the framers of the Fourteenth Amendment were not anti-segregation because of the segregated schools in the District of Columbia when the Fourteenth Amendment was ratified); David Tatel, *Judicial Methodology, Southern Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1076–77 (2004) (criticizing desegregation decisions as flawed for departing from stare decisis).

[351] *See* McConnell, *supra* note 327, at 949 (observing that the *Brown* opinion "made no pretense that its interpretation was an authentic translation of what the Fourteenth Amendment meant to those who drafted and ratified it," and, if anything strongly implied "that in the cold, hard eye of objective historical examination, the sources point the other way"); *id.* (describing the opinion "arguably the first explicit, self-conscious departure from the traditional view that the Court may override democratic decisions only on the basis of the Constitution's text, history, and interpretive tradition—not on considerations of modern social policy.").

[352] 347 U.S. 483, 492 (1954). Some scholars have reached similar conclusions. *See* CHARLES A. LOFGREN, THE PLESSY CASE 65 (1987) ("The evidence points both ways."); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT 134–35 (1988) (pointing to "evidence that at least some members of Congress and the state legislatures may have appreciated the capacity of the Fourteenth Amendment to promote desegregation[,]" but noting further that "Congress never institutionalized this judgment in its debates on the Fourteenth Amendment"). Most, however, have concluded that the 14th Amendment was not intended to prohibit public school segregation.

[353] *Brown*, 347 U.S. at 492 (referring to Plessy v. Ferguson, 163 U.S. 537 (1896), overruled by *Brown*).

[354] The court looked to social science, which it described as the "modern authority" for such epistemic matters. *See Brown*, 347 U.S. at 494. No doubt, had the traditional legal foundation—as revealed through the advocacy process (including briefs, oral argument, pertinent scholarship, and so on)—been available, then the Court would have built its opinion upon it. But, alas, the inconvenient truth cut the other way.

[355] *See infra* notes 361–409 and accompanying text.

[356] KLARMAN, *supra* note 333, at 302.

[357] 347 U.S. at 495.

"hearts and minds" for a lifetime.[358] Furthermore, Warren continued, "[s]egregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[359]

By bringing that variety of unequal and harmful consequences into relief, Warren highlighted the imbalance among power, inequality, and legitimacy. He argued that the effect of segregation, imposed through the power of law under the authority of *Plessy*, lacked legitimacy. By that account, *Plessy v. Ferguson* had advanced and hidden injustice, which is why it had to be overturned, notwithstanding the legitimacy courts generally assign to precedent.[360]

Warren, however, employed neither "justice" nor "injustice" expressly in his canonical opinion. In fact, those words showed up only rarely in the opinions for which Warren and the jurisprudential era he helped to shape has been both celebrated and denounced.

Still, justice appears to have been his ultimate, if implicit, norm and the driving force for overturning *Plessy*. After hearing oral arguments, Warren began the Justices' conference with this observation: "I can't escape the feeling that no matter how much the court wants to avoid, it must now face the issue. The Court has finally arrived at the place where it *must* determine whether segregation is allowable in public schools."[361] Given existing precedent, he seems to have said, the injustice dissonance associated with the practice of segregation placed the court in a bind. Either the injustice or the precedent of *Plessy* had to yield. Regarding his view on the merits, Warren confessed that "the more I've read and heard and thought, the more I've come to conclude that the basis of segregation and 'separate but equal' rests upon a concept of the inherent inferiority of the colored race"; he then rejected the very notion of setting "any group apart from the rest and say[ing] that they are not entitled to exactly the same treatment as all others."[362] In terms of the injustice framework, in other words, Warren perceived the legally enforced race-based inequality of segregation as illegitimate.

Warren offered no legal-doctrinal exegesis of the matter. He did not describe the structure of the federal government or the role of the different branches. He made no mention of the historical meanings or intentions of the framers Fourteenth Amendment. Instead, in the opening moments of that first meeting, Warren shared with his colleagues his intuitions of "right and wrong" effectively appealing to "the law beyond the law" which was

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[358] *Cf.* Stanton, *supra* note 165 ("He has endeavored, in every way that he could to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.").

[359] *Id.*

[360] The injustice of the outcome trumped the apparent justice of the legitimating process of deferring to precedent. *See id.* at 495 (announcing that "[a]ny language in *Plessy v. Ferguson* contrary to this finding is rejected.").

[361] Ed Cray Chief Justice: A Biography of Earl Warren 281–82 (1997).

[362] *Id.* at 281.

accessed, initially at least, outside the words and instruments of law: "My instincts and feelings lead me to say that, in these cases, we should abolish the practice of segregation in the public schools. . . ."[363] As biographer Ed Cray describes, Warren had thus "framed the argument in moral terms rather than legal. He looked to the root issue, brushing aside as unimportant the legal questions that had ensnared the Vinson Court. . . ."[364] Warren's injustice-overturning appeal resonated with his colleagues in part because of the cultural mindset of that period,[365] in part because of Warren's personality and leadership style,[366] and in part because of the particular collection of perspectives of the justices, who had themselves confronted some form of prejudice and exclusion.[367]

Consistent with the injustice framework Warren highlighted inequality by redefining the applicable measure of inequality. Specifically, he shifted the focus from analysis of "equal facilities"[368]—"buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors,"[369]—to the inequality inherent in separation, averring that "[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[370] Employing that new point of comparison allowed Warren to explicate psychological harms that Justice Brown had brushed aside in *Plessy*'s "separate but equal" opinion.[371]

Warren also elucidated the power behind the existing state of affairs. He explained that "[t]he impact [of segregation] is greater when it has the sanction of the law,"[372] thereby shifting attention away from individual choices—through which situational, institutional, and systemic forms of power often operate obscurely—to the "group,"[373] and the "law"[374] and other situational forces that often shape or determine those "choices." [375] The *Plessy*

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[363] *Id.*

[364] CRAY, *supra* note 361, at 282.

[365] *See supra* text accompanying notes 338–347.

[366] *See* JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 9–11 (2007).

[367] *See* Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 10 (1993) (attributing the Warren Court's sensitivity to injustice and "*pursuit of justice*" in part to the fact that "[t]he Warren Court was the first, and so far, the only Court in American history that empathized with the outsider" and attributing that compassion to the fact that "[t]he core of the liberal majority responsible for most of the Warren Court's egalitarian decisions was a group of men, who although prominent figures at the time of their appointments, had risen from humble origins" and were, in a variety of ways, themselves outsiders who had themselves experienced considerable prejudice (emphasis added)).

[368] Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954).

[369] *Id.* at 492.

[370] *Id.* at 494.

[371] *See infra* text accompanying notes 376–384.

[372] *Brown*, 347 U.S. at 494.

[373] *Id.*

[374] *Id.*

[375] For a collection of articles detailing how and why situational forces obscurely shape behavior and "choices," see Hanson & Yosifon, *The Situation, supra* note 84; Hanson &

court, in contrast, had repeatedly emphasized individual choices and the converse powerlessness of the law, referring to "the act of a mere individual,"[376] claiming that "[l]egislation is powerless to eradicate racial instincts,"[377] and that if "the enforced separation of the two races stamps the colored race with a badge of inferiority . . . it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[378] Warren, in contrast, emphasized the role of the law in sanctioning segregation, and therefore "generat[ing] a feeling of inferiority,"[379] assigning agency to the law and not to the children.[380]

Warren's straightforward assertions about the effects of segregation on Black children were supported by an appeal to new forms of legitimacy: "modern [scientific] authority"[381] and "psychological knowledge."[382] Warren's citations to Kenneth B. Clark, Isidor Chein, E. Franklin Frazier, Gunnar Myrdal and others served to legitimate his own assertion of power which could not be based on precedent (and which he was overturning) or legislative history (which he had dismissed).[383] Warren grounded his justice-based analysis firmly in the present, and in the facts of "public education in the light of its full development and its present place in American life throughout the Nation."[384] The latest science, applied to contemporary facts, would determine whether legally sanctioned exertions of power to create inequalities were legitimate.

3. Warren on Justice

Looking beyond *Brown v. Board*, historians and biographers have explicated the centrality of justice in Warren's jurisprudence more generally.

Yosifon, *The Situational Character, supra* note 84; Benforado, Hanson & Yosifon, *supra* note 91; Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L. J. 311, 315 n.3 (2008); Adam Benforado & Jon Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 EMORY L.J. 1087 (2008); Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499 (2008); Hanson & Hanson, *supra* note 48.

[376] Plessy v. Ferguson, 163 U.S. 537, 542 (1896), *overruled by Brown*, 347 U.S. at 483, in the context of summarizing the Civil Rights Cases, although *Plessy* concerned Louisiana state legislation.

[377] *Id.* at 551.

[378] *Id.*; *see also* Hanson & Hanson, *supra* note 48, at 440–41 (discussing this aspect of *Plessy* opinion).

[379] *Brown,* 347 U.S. at 494.

[380] Warren also emphasized power with a stark statement that "[t]he doctrine of 'separate but equal' did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*," *id.* at 491, an implicit reminder that that was a doctrine that had been invented by courts and was therefore an instantiation of power (and one subject to being undone by the same court).

[381] *Id.* at 494.

[382] *Id.*

[383] *See id.* at 489 ("[A]lthough these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . . What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.").

[384] *Id.* at 492.

Among such authorities, the consensus is strong: Warren's judicial touchstone was his own active and empathetic sense of justice combined with a resolute willingness to act upon it. One biographer, G. Edward White, for instance, explained that "Warren's contribution . . . was not as an ideologue. . . . He did not act from the perspective of a considered system of thought, but from his instinct for what was fair, honorable, politically feasible and sensible at the time." White encapsulated the Chief Justice's jurisprudential goal as follows: "[I]n a society fraught with *injustices*, he sought to use the power of his office to promote decency and *justice*."[385] "Warren's greatest strengths," White explained, "were intangibles," including "decency" and "inner conviction" the possession of which allowed him to "function[ ] as a symbol for a large inarticulate body of the American public: he pursued Everyman's instinctive ideal of fairness and *justice*."[386]

As another biographer summarized, Warren "never forgot that people, individuals, stood behind each case."[387] Warren's judicial opinions reflected his approach, philosophy, and priorities.[388] In the words of a third biographer, Warren's opinions possessed a "simple power" which spoke "with the moral decency of a modern Micah." Still another summarized Warren's attachment to justice this way:

> [Warren] consciously conceived of the Supreme Court as a . . . residual "fountain of *justice*" to rectify individual instances of *injustice*, particularly where the victims suffer from racial, economic, or similar disabilities. He saw himself as a present-day Chancellor, who secured fairness and equity in individual cases, particularly where they involved his 'constituency' of the poor or underprivileged.[389]

The consensus on the driving force behind Chief Justice Warren's jurisprudence is similarly captured in the very titles of several biographies: D.J. Herda's 2019 profile is titled "Earl Warren: A Life of Truth and *Justice*;"[390] Paul Moke's 2015 offering is titled "Earl Warren and the Struggle for *Jus-*

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[385] G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 369 (1982) (emphasis added).

[386] *Id.* (emphasis added). Similarly, the editors' epilogue for the collection of Warren's papers described the Chief Justice's steadfast commitment to fundamental values that grew out of "his hard-working, *injustice*-hating, proletarian childhood." Anon., *Epilogue* to EARL WARREN, THE MEMOIRS OF EARL WARREN 376 (anon. eds.., 1977) (emphasis added).

[387] CRAY, *supra* note 361, at 440.

[388] Bernard Schwartz, *Chief Justice* Earl *Warren: Super Chief in Action*, 33 TULSA L.J. 477, 485, 502 (1997) (explaining that Warren's opinions tended to be brief "short" and "nontechnical," written with "direct and straightforward" language, free of unnecessary "legalisms" and "well within the grasp of the average reader.").

[389] SCHWARTZ, *supra* note 327, at 263; *see also id.* at 264 ("To the Chief Justice, the Court functioned to ensure fairness and equity in all cases where they had not been secured by other governmental processes. . . . The alternative as Warren saw it was an empty Constitution, the essential provisions of which were rendered nugatory because they could not be enforced.").

[390] D.J. HERDA, EARL WARREN: A LIFE OF TRUTH AND JUSTICE (2019) (emphasis added).

tice;[391] Jim Newton's 2006 biography is named "*Justice* for All: Earl Warren and the Nation He Made;[392] Christine Compston titled her 2001 biography "Earl Warren: *Justice* for All;"[393] and Mort Horwitz named his "The Warren Court and the Pursuit of *Justice*."[394] Warren, it seems, pursued, struggled for, and lived for justice for all.[395]

In addition to those third-party accounts, there is at least one revealing first-person account that Chief Justice Warren, while on the Court, offered of his jurisprudential philosophy. Only a few months after authoring the second *Brown v. Board* opinion, this one providing for the infamous "all deliberate speed" remedy,[396] the Chief Justice published an essay[397] in *Fortune* magazine as part of a series, titled "New Goals."[398] In his essay, Warren speculated about the likely direction and importance of law and the legal system in the next quarter century. Before reviewing the text itself, some context may help shed light upon Warren's essay, the factors contributing to *Brown v. Board*, and the subsequent jurisprudence for which *Brown* was a harbinger.

Peering into the global future, Warren speculated that "[t]he world's chief need in these next decades will be peace and order; and of all human institutions, law has the best historical claim to satisfy this need."[399] Warren was calling for "peace and order" specifically because it was the product of a just system. As he explained, "Isaiah said that peace is the work of *justice*. It was an English axiom, framed by Coke, that certainty is the mother of quiet. *Justice* and certainty are twin aims of the law."[400]

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[391] PAUL MOKE, EARL WARREN AND THE STRUGGLE FOR JUSTICE (2015) (emphasis added).

[392] JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE (2007) (emphasis added).

[393] CHRISTINE L. COMPSTON, EARL WARREN: JUSTICE FOR ALL (2001) (emphasis added).

[394] MORTON HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE (1999) (emphasis added).

[395] There may appear to be a tension between this emphasis on justice motivations, and the earlier discussion about interest convergence driving the *Brown* decision. *Supra* text accompanying notes 334–337. However, the two stories are reconcilable in the sense emphasized in Part II that justice is sensed, and those perceptions are shaped by cultural factors. *Supra* text accompanying notes 338–347. The earlier discussion is more situational, looking to the convergence of interests that shaped the culture, sense of right and wrong, and motivations of Warren (and Warren Court). Here we look to the dispositional motivations of the actors, in this case a commitment to justice. *See* Hanson & Yosifon, *The Situation*, *supra* note 84. In other words, the convergence of interests was among the factors shaping perceptions of injustice.

[396] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955) (emphasis added).

[397] Chief Justice Earl Warren took no compensation for his essay, where he speculated on the direction of law post-*Brown*. *See generally* Earl Warren, *The Law and the Future*, FORTUNE, Nov. 1955, at 106.

[398] On the influential periodical's 25th anniversary, the editors' published a series of solicited essays from ten prominent Americans who shared their opinions about national and global goals for the next 25 years.

[399] Warren, *supra* note 397, at 106.

[400] *Id.* (emphasis added).

According to Warren, a key explanation for why law should be more significant in taking on "the great mid-century challenges" was that law, properly conceived and applied, responds to and satisfies a profound human yearning, a universal craving, in "the nature of man," for justice.[401] Warren wrote:

> In all times and places he has had a sense of *justice* and a desire for *justice*. Any child expresses this fact of nature with his first judgment that this or that "isn't fair." A legal system is simply a mature and sophisticated attempt, never perfected but always capable of improvement, to institutionalize this sense of *justice* and to free men from the terror and unpredictability of arbitrary force.[402]

But, Warren cautioned, law's vigilance was necessitated by a second, conflicting human impulse: "[T]he same human nature that craves *justice* and freedom under law is too often willing to deny them to others. Thus, the struggle for law is never-ending, and our generation is inevitably engaged in it."[403] Centering "justice" as the paramount goal of law, Warren saw the tendency of the privileged classes and groups of society to deny justice to the powerless as the most urgent threat to that end. Law's purpose, in short, was to facilitate the first element of human nature (that is, the urge to provide justice to some) by preempting the second (that is, the urge to deny justice to others). To mediate that struggle for that purpose, Warren suggested, was the Supreme Court's role.

Clearly, the charge was difficult, requiring sound judgment honed by experience and a commitment to higher ends. As Warren would later put it, the pursuit of ethically sound judicial decision making requires "discernment of right from wrong" and the ability do so "in the midst of great confusion."[404] G. Edward White, one of Earl Warren's biographers, summarized Warren's approach as follows:

> There were three imperatives in Warren's calculus of judging. The judge needed to search for the "law beyond the law," to discern right from wrong "in the midst of great confusion," and to discover the ethical path. The judge needed to do these things because American society was founded on basic distinctions between right and wrong, *justice* and *injustice*, freedom and arbitrariness. The Constitution embodied those distinctions. The judge had a duty to articulate them.[405]

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[401] *Id.*

[402] *Id.* (emphasis added).

[403] *Id.*

[404] G. Edward White, *Earl Warren as Jurist*, 67 VA. L. REV. 461, 472 (1981) (quoting Chief Justice Earl Warren, Address at Louis Marshall Award Dinner at the Jewish Theological Seminary of America (Nov. 11, 1962) 1, 8–9 (transcript available in Earl Warren Papers, Manuscript Division, Library of Congress, Box 809)).

[405] *Id.* (emphasis added).

Although Chief Justice Warren's *Fortune* essay is one of the few public places in which he describes his big-picture view of the law (and, implicitly, his role and approach to judging), there is widespread agreement among scholars that a driving force behind the unanimous *Brown* decision, was Chief Justice Earl Warren's (and the entire Court's) strong justice- or morality-based approach. Warren, in fact, was calculated in producing a unanimous decision to help legitimate reversing a long-established precedent and a controversial holding.[406] He achieved that end by framing the question as a moral one,[407] building a moral consensus among the justices,[408] and altering or omitting certain doctrinal or constitutional questions.[409]

4. Post-Text

The direct effects of *Brown v. Board* were arguably a bust—or worse.[410] The principles of educational equality, however, may have helped to reset expectations and baselines, heightening the sense of injustice of African Americans and contributing to the rise of the civil rights movement.[411] Still, in other areas, the Warren Court's focus on justice as a judicial North Star arguably led to judicial advances in racial justice,[412] stimulating a wide collection of justice-oriented, egalitarian holdings,[413] and creating a potential point

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[406] *See* HORWITZ, *supra* note 394, at 23–25 ("After *Brown* was reargued in 1953 with Chief Justice Warren presiding, the Court decided unanimously to overrule *Plessy*. It was as clear to the justices then, as it continues to seem in retrospect, that only a unanimous decision could provide sufficient legitimacy for so grave and far-reaching a reversal of constitutional precedent.").

[407] *See id.* at 24 (explaining that Warren achieved an anonymous decision through a compelling opening statement "which frame[d] the question before the Court as a moral issue, in this case a moral challenge to America to fulfill its unkept promises to its black citizens" and by "balancing the competing claims of policy and principle").

[408] *See id.* at 24–25 (describing how Warren created "as extensive a legal and moral consensus as possible").

[409] *See* White, *supra* note 404, at 472 ("The precise doctrinal steps that the [Warren] Court took to justify the eradication through constitutional analysis were far less important to Warren than the Court's reaching the result of eradication unequivocally and unanimously. He did not want any justice equivocating about the result because of doctrinal technicalities; if doctrinal analysis offended, he would modify it or delete it. He himself saw no equivocation possible on the ethical issues . . . , but he did not want to present potential wafflers with a technical way out.").

[410] *See generally* KLARMAN, *supra* note 333, at 366–67.

[411] *See id.* ("Without *Brown*, Congress most likely would not have enacted civil rights legislation when it did. No such bill had been passed since 1875, and since the 1920s many proposed measures had succumbed to the threat or reality of Senate filibuster. After *Brown* raised the salience of race, many northerners—white and black—demanded civil rights legislation. Liberals in both parties endorsed the concept as the 1956 elections approached.").

[412] *See* ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 5–6 (1968) (identifying "the demand for racial justice" as "[t]he strongest force in current constitutional development"); Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 60 (2010) (arguing that the Justices' "concerns over racial injustice and regional failure to deal fairly with race exercised a gravitational pull on the evolution of constitutional doctrine").

[413] *Cf.* MARK TUSHNET, THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 3 (1993) (suggesting that justices on "the Warren Court accepted and then elabo-

of legal leverage that helped enliven and sustain a variety of social movements.[414]

While the landmark opinion eventually ended the explicit legal segregation of public schools and arguably helped to spark the civil rights movement,[415] it also prompted an inegalitarian backlash and "massive resistance" from defiant White leadership.[416] Many White people in the South mobilized to nullify the decision by intimidating Black families, abusing the system to challenge the use of public funds, and closing some public schools.[417] The ensuing conflict helped catalyze major civil rights protests and, eventually, the Civil Rights Act of 1964.[418]

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rated the proposition that in our constitutional system all Americans are entitled to the benefits of formal equality").

[414] *See* Michal R. Belknap, *The Real Significance of Brown v. Board of Education: The Genesis of the Warren Court's Quest for Equality*, 50 WAYNE L. REV. 863, 885 (2004) (describing the wide implications of *Brown v. Board* including how "[i]t launched the Warren Court's broad campaign against a variety of legal inequities and *injustices*" (emphasis added)); *see generally* MARTHA MINOW, IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK (2010) (describing the results and legal architecture of *Brown* as inspiring mass political and social movements). *But see generally* Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) (downplaying the significance of *Brown* for achieving racial justice); Ryan D. Doerfler & Samuel Moyn, Democratizing the Supreme Court, 109 CAL. L. REV 1703 (2021) (arguing for reforms that shift power away from the court and towards elected bodies); Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 202 (2021) (arguing that Supreme Court review of federal legislation does not facilitate democracy, while acknowledging that *Brown* is an example of the Court "facilitating democracy at the *state* level."); *but cf.* Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit* (May 15, 2013) https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit [https://perma.cc/R8ZX-LCDA] (quoting Justice Ginsburg remarking "My criticism of *Roe* is that it seemed to have stopped the momentum on the side of change.").

[415] *See* Klarman, *supra* note 414, at 13; *see generally* KLARMAN, *supra* note 333, at 363–442 (describing context surrounding the U.S. Supreme Court's civil rights decisions).

[416] *See* Klarman, *supra* note 414, at 11; NAACP LDF, *The Southern Manifesto And "Massive Resistance" To Brown*, https://www.naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/southern-manifesto-massive-resistance-brown/ [https://perma.cc/LL7W-627X].

[417] *See* NAACP LDF, *supra* note 416 (describing the southern White population of the United States as "mobiliz[ing] en masse to nullify the Supreme Court's decree" along with "legislative and legal efforts." In Southern states, "whites set up private academies to educate their children, at first using public funds to support the attendance of their children in these segregated facilities, until the use of public funds was successfully challenged in court. In other instances, segregationists tried to intimidate black families by threats of violence and economic reprisals against plaintiffs in local cases. . . . the most egregious violators simply closed the public schools.").

[418] *See infra* Part II(F) (highlighting the protests in Birmingham, Alabama in 1963); *see also* KLARMAN, *supra* note 333, at 366–67 ("After the epic Birmingham street demonstrations in spring of 1963 and the administration's introduction of landmark civil rights legislation the pace of school desegregation accelerated significantly."); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1501 (2004) ("The civil rights movement's efforts to enforce and expand Brown through boycotts and sit-ins elicited violent opposition in the South, which in turn began to discredit Southern resistance and build sympathy for the movement in the North.").

F. "Letter from Birmingham Jail"—Modern Racial Injustice

Roughly a century after Frederick Douglass's famous speech, Dr. Martin Luther King, Jr.—like many others had in the interim—joined a larger movement, known today as the civil rights movement, in the hope of finally realizing—or further advancing—the promise of justice. Despite their temporal distance, King and Douglass shared much in common,[419] including their strategy of exposing injustice and appealing to justice to promote change and racial equality. To illustrate, we turn to King's 1963 "Letter from Birmingham Jail."

1. Context

Again, some context may be useful. A decade after the Supreme Court's watershed decision in *Brown v. Board*,[420] the waters remained stagnant. Responding to sustained segregation, the Southern Christian Leadership Conference, the national organization King led, joined forces with the Alabama Christian Movement for Human Rights, a local Birmingham organization led by Fred Shuttlesworth. The two organizations came together in the hope of making change locally and nationally.

The potential for change in Alabama seemed especially strong, though resistance was intensifying and tending toward violence.[421] In the political realm, White supremacist George C. Wallace had just won the governor's seat in a landslide victory, following a campaign of vociferous opposition to racial integration,[422] and lawless disregard for the mandates of *Brown v. Board*.[423] If necessary, he vowed, he would "stand in the schoolhouse door" to prevent desegregation.[424] And, in his inaugural address in January of that year, Wallace forcefully articulated his policy priorities, proclaiming "segre-

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[419] David Howard-Pitney begins his longer comparison this way:

> No Afro-American leaders in American history have so successfully pressed the grievances and demands of [B]lacks on the American nation as did Frederick Douglass in the Civil War-Reconstruction era and Martin Luther King, Jr., in the decades following World War II. Although separated by 100 years, important similarities exist in their styles of moral and political leadership and in the national conditions which aided their notable success in creating a moral consensus in the United States committed to the abolition of slavery and racial segregation.

David Howard-Pitney, *Wars, White America, and The Afro-American Jeremiad: Frederick Douglass and Martin Luther King, Jr.*, 71 J. NEGRO HIS. 23, 23 (1986).

[420] 347 U.S. 483 (1954).

[421] *See, e.g.*, JOHN KYLE DAY, THE SOUTHERN MANIFESTO MASSIVE RESISTANCE AND THE FIGHT TO PRESERVE SEGREGATION (2014); *see also* MICHAEL J. KLARMAN, BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT 175–88 (2007) (describing the reasons for the resistance).

[422] *See* JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION 94 (2001).

[423] *See Brown*, 347 U.S. at 486–96.

[424] *See* Debbie Elliott, *Wallace in the Schoolhouse Door*, NPR (June 11, 2003), https://www.npr.org/2003/06/11/1294680/wallace-in-the-schoolhouse-door [https://perma.cc/D96P-EDLQ].

gation now . . . segregation tomorrow . . . segregation forever."[425] In Birmingham, the equally segregationist Theophilus Eugene "Bull" Connor was the Commissioner of Public Safety. Connor commanded Birmingham's police and fire departments,[426] inspiring admiration from some and disdain from others for his impulsive brutality.[427]

King and his fellow organizers were thus entering a highly volatile environment. In a way, as we'll see, that was an advantage. Hoping to draw national attention to Birmingham's Jim Crow policies and customs, their tactics included boycotting the city's White-owned downtown businesses during the Easter season, an otherwise bustling and profitable shopping period.[428] Under King's guidance, a growing number of locals participated in coordinated, non-violent protests—marches, sit-ins, kneel-ins at churches, and the like—leading to many arrests under Bull Connor's direction.[429]

With protests and boycotts gaining momentum, the city sought to short-circuit the process by obtaining a state court injunction against all "parading, demonstrating, boycotting, trespassing and picketing."[430] King, Shuttlesworth, and other campaign leaders decided to protest anyway.[431] As King explained: "We cannot in all good conscience obey such an injunction which is an unjust, undemocratic and unconstitutional misuse of the legal process."[432] He believed that any harsh or violent reactions to their direct action could, if captured by news media, elicit national, perhaps global, reactions, and that such negative press might move President Kennedy and the federal government to acknowledge and address the underlying racial injustices behind such violence.[433] So, despite depleted funds for cash bonds, King moved forward, understanding that he would likely be targeted, arrested, and jailed.[434]

And so he was. Police promptly arrested King for violating the injunction,[435] placing him in solitary confinement and initially depriving him of contact with his lawyers his wife.[436] It was from that cell that he composed

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[425] Governor George C. Wallace, Inaugural Address at the Capitol in Montgomery, Alabama (Jan. 14, 1963), https://digital.archives.alabama.gov/digital/collection/voices/id/2952 [https://perma.cc/3GNG-QJJZ].

[426] *See* MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 35–43 (2000).

[427] *See id;* DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 227 (1986).

[428] *Birmingham Campaign*, THE MARTIN LUTHER KING, JR. RESEARCH AND EDUCATION INSTITUTE, https://kinginstitute.stanford.edu/encyclopedia/birmingham-campaign [https://perma.cc/SG4Z-M9RL].

[429] *Id.*

[430] Walker v. City of Birmingham, 388 U.S. 307, 322 (1967).

[431] *Birmingham Campaign*, *supra* note 428.

[432] *Id.*

[433] GARROW, *supra* note 427, at 227–28 (1986); *see also supra* notes 334–339 (discussing the convergence of interests).

[434] *Id.*

[435] *Birmingham Campaign, supra* note 428.

[436] *Id.*

his famous letter, much of it by scribbling around the margins of a local newspaper.[437]

King framed his missive as a direct reply to an open letter, titled "A Call for Unity," published in that very paper and co-authored by eight of the city's most prominent ministers.[438] Their statement criticized King directly, characterized the protests as "unwise and untimely," and called for unity among all residents of Birmingham—"both our white and Negro citizenry."[439] They implored locals to unite in opposition to the protests:

> We . . . strongly urge our own Negro community to withdraw support from these demonstrations, and to unite locally in working peacefully for a better Birmingham. When rights are consistently denied, a cause should be pressed in the courts and in negotiations among local leaders, and not in the streets. We appeal to both our white and Negro citizenry to observe the principles of law and order and common sense.[440]

King was released on bail four days after being arrested, as the nation's eyes turned increasingly to the growing tensions in Birmingham.[441] Journalists captured much of what happened next: Bull Connor's aggressive deployment of the fire brigade and their high-pressure fire hoses, unmuzzled attack dogs, a billy-club-wielding police force, and the mass arrests of hundreds of (non-violent) children.[442] Through their coverage, newspapers around the world helped transform national attitudes and, eventually, segregation policies. The protests and the ruthless backlash were having the very sort of effect for which King had hoped.

2. Text

King's letter—like the texts reviewed above—squares well with the injustice framework. King was responding both to a particular text and to a cultural narrative that had rationalized White supremacy for generations. Much like the authors of the declarations, King understood that he was writing not just to his purported audience (eight members of Birmingham's clergy and the Birmingham locals) but also to the nation and beyond.[443]

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[437] Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), *in* KING, *supra* note 426, at 76 ("Begun on the margins of the newspaper in which the statement appeared while I was in jail, the letter was continued on scraps of writing paper supplied by a friendly Negro trusty, and concluded on a pad my attorneys were eventually permitted to leave me.").

[438] *A Call for Unity*, Letter from C. C. J. Carpenter et al. to Martin Luther King, Jr. (Apr. 12, 1963), https://kinginstitute.stanford.edu/sites/mlk/files/lesson-activities/clergybirmingham1963.pdf [https://perma.cc/GF9H-6P5B].

[439] *Id.*

[440] *Id.*

[441] *Birmingham Campaign, supra* note 428.

[442] *Id.*

[443] *Cf.* Bell, *supra* note 336; MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 45 (2000).

Drawing entirely from erudition, he wrote what could have been titled a "Declaration of Modern Racial Injustice." Like the other declarations, King began by explaining that his case would be an appeal to reason—expressing a respect for his audience and presuming their allegiance to, as reasonable people, such persuasion. In his words: "[S]ince I feel that you are men of genuine good will and that your criticisms are sincerely set forth, I want to try to answer your statement in what I hope will be patient and reasonable terms."[444]

King's letter is deeply concerned with justice, containing timeless reflections on the relationships between justice and law and between justice and peace. For King, law must serve justice, and justice therefore precedes law. As he put it, "law and order exist for the purpose of establishing *justice*," and "when they fail in this purpose they become the dangerously structured dams that block the flow of social progress."[445] When the law—and the violence it wields[446]—produces, enables, and camouflages systemic injustice, as was the case in Birmingham, then legal disobedience is justified. In those situations, there is no avoiding tension and violence; they are already baked into the system, even when concealed by surface-level "order" and "peace." The protests were intended to "surface the hidden tension that is already alive."[447] In *Why We Can't Wait*, King explained that the nonviolent protester was:

> willing to risk martyrdom in order to move and stir the social conscience of his community and the nation. Instead of submitting to surreptitious cruelty in thousands of dark jail cells and on countless shadowed street corners, he would force his oppressor to commit his brutality openly—in the light of day—with the rest of the world looking on.[448]

King also introduced complexity to the nature of any peace being shattered by the protests or, more accurately, the violent backlash to them. He defined a "positive peace," not by the absence of tensions or open hostilities, but by "the presence of *justice*."[449] That was the peace worth protesting for. "Negative peace," in contrast, provides the veil of social harmony, obscuring injustice beneath it.[450] Indeed, that is often where systemic injustice thrives: behind the facade of peace, quiet indifference to injustice, and the suppression of outward tension. The illusion of peace and the "order" it maintains, King explained, is especially insidious:

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[444] King, *supra* note 437, at 76.
[445] *Id.* at 85 (emphasis added).
[446] *See* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).
[447] King, *supra* note 437, at 85.; *see also* GARROW, *supra* note 427, at 228 (describing King's goal of "the surfacing of tensions already present").
[448] KING, *supra* note 426, at 37; *see also* STEPHEN B. OATES, LET THE TRUMPET SOUND: A LIFE OF MARTIN LUTHER KING, JR. 211–12 (1994).
[449] King, *supra* note 437, at 84 (emphasis added).
[450] *Id.*

> I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Counciler or the Ku Klux Klanner, but the white moderate, who is more devoted to "order" than to *justice*; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of *justice*; who constantly says: "I agree with you in the goal you seek, but I cannot agree with your methods of direct action."[451]

King specifically connected justice with the absence of injustice. Responding to the criticism that he should not be in Birmingham, he explained that he cannot "sit idly by in Atlanta and not be concerned about what happens in Birmingham. *Injustice* anywhere is a threat to *justice* everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."[452] By focusing on racial injustice in that way, King transformed himself from an interloper to an insider.[453] Completing the circle, King wrote: "Never again can we afford to live with the narrow, provincial 'outside agitator' idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds."[454]

King justified his own actions and pleaded the justice of his cause by demonstrating the injustice of the existing situation. Blaming the protestors for violent backlash is, King observed, tantamount to "condemning a robbed man because his possession of money precipitated the evil act of robbery."[455] "Society," King insisted, "must protect the robbed and punish the robber."[456] Relatedly, King emphasized how the protests were a response to, not a cause of, injustice. Responding directly to the clergy, he wrote: "You deplore the demonstrations taking place in Birmingham. But your statement . . . fails to express a similar concern for the conditions that brought about the demonstrations."[457]

King repeated the injustice theme throughout his letter. Thirteen times, King explicitly emphasized the "injustices" in Birmingham—injustices to which he and all those engaged in the direct actions were responding.[458] He

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[451] *Id.* (emphasis added); *see also* MAHATMA GANDHI, NON-VIOLENCE IN PEACE AND WAR (1948) (detailing the strategy and goals of nonviolent civil disobedience which Gandhi himself employed in his decades-long struggle for Indian Independence against British rule).

[452] King, *supra* note 437, at 77 (emphasis added). Note that our definition of justice—and the notion of advancing justice by eliminating injustice—is arguably implied in the phrase "Injustice anywhere is a threat to justice everywhere." King's beautiful aphorism implicitly aligns with the injustice framework's position that the means to justice is through the end of eliminating injustice. *See supra* Part I(A).

[453] The frame also helped him reconceptualize the pertinent groups. *See infra* notes 466–478 and accompanying text.

[454] King, *supra* note 437, at 77.

[455] *Id.* at 85.

[456] *Id.* at 86 (perhaps appealing to the traditional prioritization of property rights and the general cultural associations of African Americans).

[457] *Id.* at 77–78.

[458] *See generally id.*

described, for instance, the "racial injustice" that "engulfs this community"[459] and pointed to the "racial and economic injustice," and "blatant injustices inflicted on the Negro."[460] It was that "injustice," King stressed, that rendered urgent the need for its elimination and thereby the advancement of justice. Similarly, King used the modifier "unjust" nineteen times,[461] describing, for example, the "unjust plight"[462] of the Black members of the community, as well as the "unjust laws."[463] King noted, as well, the "grossly unjust treatment" that "Negroes have experienced . . . in the courts,"[464] implicitly rebutting the claim by the Birmingham clergy that "racial matters" should "properly be pursued in the courts."[465]

As indicated above,[466] King highlighted the injustice by first redefining the relevant groups, providing an alternative to the Birmingham clergy's invocation of the familiar ingroup-outgroup distinction between local citizens and outsiders entering Birmingham intent upon exploiting or creating division.[467] In calling upon "both our white and Negro citizenry" and "our own Negro community" to "unite locally in working peacefully,"[468] the ministers tapped into a deep-rooted southern "us" and "them" binary. The ministers expressed that ours is a community in general harmony that functions through formal and informal systems of place, order, dispute resolution, and, if necessary, reform.[469] "However, we are now confronted by a series of demonstrations by some of our Negro citizens, directed and led in part by outsiders."[470] Theirs is a group of outside agitators seeking to create problems that don't exist, to divide us, and to "incite to hatred and violence."[471]

Notably, the ministers' statement made no mention of injustice or justice—selecting instead anodyne phrases like "racial problems" and "racial matters."[472] Regarding those "matters," the appropriate response was for those local individuals who felt aggrieved to "unite locally in working peacefully for a better Birmingham," and, if need be, press their cause "in the courts and in negotiations among local leaders, and not in the streets."[473] Put differently, the letter said that there was no problem with "us" or our local institutions; the problem was with the protests, the protestors, and the out-

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[459] *Id.* at 78.
[460] *Id.*
[461] *See generally id.*
[462] *Id.* at 85.
[463] *Id.* at 84.
[464] *Id.* at 78.
[465] *A Call for Unity*, *supra* note 438.
[466] *See supra* text accompanying notes 451–454.
[467] *A Call for Unity*, *supra* note 438.
[468] *Id.*
[469] *See id.* (explaining that, when rights are denied, the "cause should be pressed in the courts and in negotiations among local leaders, and not in the streets").
[470] *Id.*
[471] *Id.*
[472] *Id.*
[473] *Id.*

siders who exaggerated problems, fomented distrust, and instigated protests "in the streets."[474]

King rejected that frame and emphasized the opposition between "the oppressor race" and "the oppressed race"[475] or "the segregator" and "the segregated."[476] Group identities were determined not by one's residency relative to Birmingham but by one's role relative to the injustice. To make the point even clearer, he opened his letter by demonstrating his institutional, and not merely racial, connection to the local Black community. He pointed out that, as president of SCLC, an organization that operated throughout the south and collaborated with "eighty-five affiliated organizations" in the region, including the Alabama Christian Movement for Human Rights in Birmingham, he had institutional connections with, and obligations to, Birmingham.[477] King continued:

> Several months ago the affiliate here in Birmingham asked us to be on call to engage in a nonviolent direct-action program if such were deemed necessary. We readily consented, and when the hour came we lived up to our promise. So I, along with several members of my staff, am here because I was invited here. I am here because I have organizational ties here.[478]

By redefining the groups, King could better enumerate the inequalities between those groups. In describing the "underlying causes"[479] of the demonstrations, for example, he sketched "the hard, brutal facts of the case"[480] regarding the inequalities and suffering. He called Birmingham "probably the most thoroughly segregated city in the United States."[481] In some of his more stirring prose, King illustrated the facts of injustice with a series of humanizing vignettes for those readers "who have never *felt* the stinging darts of segregation."[482] He urged those racially privileged readers to sense the injustice, helping them imagine themselves in the situation of the subordinate group who daily suffer the indignities of and disadvantages of racial injustice. How would it feel, he asked, to witness "vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim" or to watch "hate filled policemen [who] curse, kick and even kill your black brothers and sisters" or to know that "the vast majority of your twenty million Negro brothers [are] smothering in an airtight cage of poverty in the midst of an affluent society"?[483] What about the agony of explaining "to your six year old

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[474] *Id.*
[475] *Id.* at 89.
[476] *Id.* at 83.
[477] *Id.* at 77.
[478] *Id.* at 86.
[479] *Id.* at 78; *cf. supra* text accompanying notes 124–129 (recalling grievances in the Declaration of Independence).
[480] *A Call for Unity*, *supra* note 438, at 88.
[481] *Id.* at 87.
[482] *Id.* at 91 (emphasis added).
[483] *Id.* at 91.

daughter why she can't go to the public amusement park that has just been advertised on television?"[484] How would it feel to witness the "ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people"?[485] And what of the humiliation of taking "a cross country drive" and having to "sleep night after night in the uncomfortable corners of your automobile because no motel will accept you" or the indignity of "day in and day out" encountering "signs reading 'white' and 'colored'"?[486] How would it feel, King asks, "living constantly at tiptoe stance, never quite knowing what to expect next," and coping with the exhausting struggle of "forever fighting a degenerating sense of 'nobodiness?'"[487]

King also sought to reveal the power underlying and creating the inequalities he identified. He described the background "power structure," that is "the city's white power structure," which caused and maintained the unequal conditions that produced the urge to protest.[488] He highlighted Birmingham's "ugly record of brutality" and the fact that "[t]here have been more unsolved bombings of Negro homes and churches in Birmingham than in any other city in the nation."[489]

Similarly, he noted the "power" of one group to "compel[ ] a minority group to obey" a law which it "does not make binding on itself."[490] Echoing portions of Chief Justice Warren's *Brown* opinion, King described the power of the racial categories and of laws of segregation to generate, not only harmful segregation, but also the "false sense of superiority" that it gives to "the segregator," and "the false sense of inferiority" to the segregated, reinforcing the illegitimate subordination that leaves too many living in "the dark depths of prejudice and racism."[491]

King also explained that the protests themselves were intended to elicit the coercive power otherwise hidden behind negative peace, and, in the process, to expose as illegitimate the suffering and inequalities it produces. King wrote:

> [W]e who engage in nonviolent direct action are not the creators of tension. We merely bring to the surface the hidden tension that is already alive. We bring it out in the open, where it can be seen and dealt with. Like a boil that can never be cured so long as it is covered up but must be opened with all its ugliness to the natural

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[484] *Id.* at 91–92.
[485] *Id.* at 92.
[486] *Id.*
[487] *Id.*
[488] *Id.* at 87.
[489] *Id.* at 87–88.
[490] *Id.* at 94.
[491] *Id.* at 90–93.

> medicines of air and light, *injustice* must be exposed to the light of human conscience . . . before it can be cured.[492]

Direct action protests, in short, seek to expose injustice, "with all the tension its exposure creates."[493] Tension is not the end but the means.[494] Exposing injustice is not the end but the means. The resultant injustice dissonance, in turn, is intended to awaken and galvanize the collective will of those whose complicity had been based on ignorance or lack of urgency.[495] It must be brought into "the air of national opinion before it can be cured."[496]

Finally, King challenged the legitimacy of the legal system that exerted and reflected the background allocations of power. He noted, for instance, that African Americans had long "experienced grossly unjust treatment in

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[492] *Id.* at 96–97 (emphasis added).

[493] *Id.* at 97.

[494] The threshold step in deciding whether to engage in direct action is to carefully collect "the facts to determine whether injustices exist." *Id.* at 87.

[495] In the 1960s, the general public largely disfavored even the protests that have since been celebrated. The public often views protests as illegitimate and expresses negative views toward mass movements. *See* BENJAMIN I. PAGE AND ROBERT Y. SHAPIRO, THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES 350 (1992) ("The public tends to be uninfluenced—or negatively influenced—by the statements of certain groups, namely, those whose interests are perceived to be selfish or narrow or antisocial."); *id.* at 351–52 (same attitudes regarding rule for student demonstrations and the women's movement). In 1961, for instance, just 24% approved of the "Freedom Riders" traveling to the South and 64% disapproved. Hazel Erskine, *The Polls: Demonstrations and Race Riots*, 31 PUB. OP. Q. 655, 656 (1967). Similarly, by a roughly two-to-one margin, Americans opposed the upcoming March on Washington in August 1963 (63% to 22%) and the 1964 Freedom Summer movement (57% to 31%). *Id.* at 656–57.

The Sixties generally witnessed growing public pessimism regarding the efficacy of the protests. For example, Gallup asked if "mass demonstrations by Negroes are more likely to help or more likely to hurt the Negro's cause for racial equality." *Id.* at 660. In less than a year, between July 1963 and June 1964, attitudes shifted from 60% saying the demonstrations would hurt the cause to 74% in May 1965. *Id.* Harris asked whether previous demonstrations "have helped more or hurt more the advancement of Negro rights." *Id.* Again, the trend was clear. Roughly half of White respondents (49%) stated in June 1963 that the demonstrations had hurt the movement, but by October of 1966, that share rose to 85%. *Id.* at 659.

Federal intervention in those matters, on the other hand, were remarkably popular, which might have informed King's efforts to draw Kennedy's attention and assistance. In 1957, according to Gallup, 64% of the public approved of President Dwight Eisenhower's decision to summon federal troops to Little Rock Central High School (just 26% disapproved). *Id.* at 672. In 1961, fully 70% thought President John F. Kennedy "did the right thing" in sending U.S. marshals to Montgomery, Alabama, to protect the Freedom Riders. *Id.* Asked during 1964's Freedom Summer about a hypothetical federal intervention, 71% thought that President Lyndon Johnson should send federal troops to Mississippi if shootings broke out. *Id.* at 673.

Perhaps most relevant for King were the public attitudes toward peaceful demonstrations that were met with White Southern violence. Those encounters often tilted attitudes in favor of the protestors—we would suggest because of the salient power being employed to harm peaceful protestors. Two months after Bloody Sunday, for instance, Harris asked, "In the recent showdown in Selma, Alabama, over Negro voting rights, have you tended to side more with the civil rights groups or more with the State of Alabama?" *Id.* at 658. By a two-to-one margin, the public chose the civil rights groups.

[496] King, *supra* note 437, at 97. King's understanding of "injustice," as sensed, and, when activated, as producing an emotional and behavioral response, aligns with the injustice framework.

the courts."[497] Indeed, it was a court that had declared that even nonviolent protests were themselves illegal.[498] Regarding the failures of legislative and democratic processes, King echoed Jefferson and Stanton by defining a law as "unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law"[499] and asking:

> Who can say that the legislature of Alabama which set up the segregation laws was democratically elected? Throughout the state of Alabama all types of conniving methods are used to prevent Negroes from becoming registered voters . . . despite the fact that the Negro constitutes a majority of the population. Can any law set up in such a state be considered democratically structured?[500]

King, like Douglass and Stanton before him, also invoked the Declaration of Independence and the political axiom that a government that failed to uphold its grand promises was like a party that breached a contract—it lacked legitimacy. Promises, promises broken, and the norm of promise-keeping were a recurring theme in King's writing and speeches. As noted above, King began his Letter by highlighting his own commitment to promises made,[501] drawing an implicit contrast with the failure of Birmingham officials to keep their promise.[502] Later, again like Stanton and Douglass, King leveraged the national promise of justice by emphasizing the contradiction between what we say and what we do. He highlighted, for instance, the "majestic words" that "Jefferson etched" "across the pages of history"[503] "that all men are created equal."[504] And he called for "mak[ing] real the *promise* of democracy," and "bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of . . . the Declaration of Independence."[505]

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[497] *Id.* at 87.

[498] *See supra* text accompanying notes 430–435.

[499] King, *supra* note 437, at 94.

[500] *Id.*

[501] *See supra* text accompanying note 478; *see also* King, supra note 437, at 86 ("We . . . consented, and when the hour came we lived up to our *promise*." (emphasis added)).

[502] *See* King, *supra* note 437, at 66 ("In the course of the negotiations, certain *promises* were made by the merchants—for example, to remove the stores' humiliating racial signs. On the basis of these *promises*, the Reverend Fred Shuttlesworth and the leaders of the Alabama Christian Movement for Human Rights agreed to a moratorium on all demonstrations. As the weeks and months went by, we realized that we were the victims of a broken *promise*." (emphasis added)).

[503] *Id.* at 106.

[504] *Id.* at 101.

[505] *Id.* at 108–09. Three months later, the promise trope was even more central in his "I Have a Dream" speech, which was built around the metaphor of an unpaid "promissory note." King, *supra* note 2. Highlighting the still-burning "flames of withering injustice," King intoned, Black Americans are forced to live as if beached "on a lonely island of poverty in the midst of a vast ocean of material prosperity." *Id.* Their shared purpose, King explained, was to mobilize for racial justice by calling it out and demanding its elimination—the long overdue repayment of national debt. In his words:

> [W]e've come here today to dramatize a shameful condition. In a sense we've come to our nation's capital to cash a check. When the architects of our republic wrote the

Through his writing, his speaking, and his direct-action protests, King sought to highlight inequality and suffering, to reveal the role of power in producing and maintaining those harms, and to challenge their legitimacy. Change, he argued, required a general awareness of an underlying injustice and a public recognition of "the deep groans and passionate yearnings of the oppressed race."[506] He hoped to "arouse the conscience of the community"[507] and through his words and deeds, to persuade White moderates to sense the injustice, to render it visible in the form of Bull Connor's dogs and firehoses. Like water to fish, King encouraged readers to appreciate justice by confronting and contemplating its absence. Like Jefferson, Stanton, Douglass, and many others before and since, King moved others by tapping into the mobilizing sense of injustice.

3. Post-Text

Owing in part to its elegant composition,[508] its significance at the time, and King's historical and global legacy, the letter has been described as "a rhetorical masterpiece,"[509] "a landmark document of the civil-rights movement,"[510] "a classic work of protest literature,"[511] and "the most important written document of the Civil Rights Era."[512] The letter, which would also

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> magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men—yes, black men as well as white men—would be guaranteed the unalienable rights of life, liberty and the pursuit of happiness.
>
> It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked "insufficient funds."

Id.

[506] King, *supra* note 437, at 101.

[507] *Id.* at 95.

[508] *See, e.g.*, Edward Berry, *Doing Time: King's "Letter from Birmingham Jail,"* 8 RHET. & PUB. AFF. 109 (2005) (reviewing the letter's rhetorical lessons); Michael Leff & Ebony A. Utley, *Instrumental and Constitutive Rhetoric in Martin Luther King Jr.'s "Letter from Birmingham Jail,"* 7 RHET. & PUB. AFF. 37 (2004) (one of several articles in a symposium analyzing the power of the rhetoric in Dr. King's letter); Michael Osborn, *Rhetorical Distance in "Letter from Birmingham Jail,"* 7 RHET. & PUB. AFF. 23, 26–30 (2004) (same); John H. Patton, *A Transforming Response: Martin Luther King Jr.'s "Letter from Birmingham Jail,"* 7 RHET. & PUB. AFF. 53, 53–54 (2004) (same); Martha Solomon Watson, *The Issue Is Justice: Martin Luther King Jr.'s Response to the Birmingham Clergy*, 7 RHET. & PUB. AFF. 1, 3–17 (2004) (same).

[509] Watson, *supra* note 508, at 3.

[510] Martin Luther King Jr., *Martin Luther King Jr.'s 'Letter from Birmingham Jail,'* ATLANTIC (Aug. 1963), https://www.theatlantic.com/magazine/archive/2018/02/letter-from-a-birmingham-jail/552461/ [https://perma.cc/9ZNS-SY5J].

[511] S. Jonathan Bass, *Letter from Birmingham Jail*, ENCYCLOPEDIA OF ALABAMA (Nov. 15, 2019), http://encyclopediaofalabama.org/article/h-1389 [https://perma.cc/H8QQ-T2QP] ("The letter served as a tangible, reproducible account of the long road to freedom in a movement that was largely centered around actions and spoken words.").

[512] Jack Brymer, *MLK's 'Letter from Birmingham Jail' Called Most Important Document of Civil Rights Era*, SAMFORD UNIVERSITY (Apr. 17, 2014), https://www.samford.edu/news/2013/MLKs-Letter-from-Birmingham-Jail-Called-Most-important-Document-of-Civil-Rights-Era [https://perma.cc/Y7BM-SVNC] ("On the occasion of the 50th anniversary of Dr.

form the basis of King's book, *Why We Can't Wait*,[513] continues to shape social attitudes toward the purposes and effects of direct action protests and civil disobedience.[514]

King's iconic letter has convinced many to appreciate the role of social protests in producing change.[515] No doubt, it has also emboldened some to participate. King's letter, like the theory of change it explicates, made the water of justice more visible by portraying it's suffocating absence. The letter clarified how direct action can serve to expose the "sweltering heat of injustice."[516] As King would share that August, his "dream"—"deeply rooted in the American dream"—was to end centuries-old racial injustice and finally bring about the fulfillment of this country's promise—that "promised land," "an oasis of freedom and justice."[517]

The long-term effects of the Birmingham campaign are mixed. The movement is generally credited as having fostered changes in social attitudes and legal policies, including the passage of the Civil Rights Act of 1964.[518] For many, the sort of outspoken racial animus embodied by Bull Connor and George Wallace came to define what stereotypical racism looks like: with all of its ugliness of brash ignorance, unalloyed hatred, unsayable epithets, and brooding violence. Such explicit expressions of racist attitudes largely faded from public view in the decades that followed; indeed, the old model became a convenient shadow behind which subtler forms of racism were eclipsed and provided a system-affirming marker of seeming progress.[519]

By the late 1960s, concerted opposition, retrenchment and backlash was rapidly gaining momentum, revealing the limited and precarious nature of

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Martin Luther King's 'Letter from Birmingham Jail,' Samford University history professor Jonathan Bass called it 'the most important written document of the Civil Rights Era.'").

[513] KING, *supra* note 426, at 76 (This memoir of the Birmingham Campaign reprints the letter together with King's commentary on the text.). The letter was initially circulated in mimeograph form before being reprinted in various publications. *See, e.g.*, Martin Luther King, Jr., *A Letter from Birmingham Jail*, EBONY, Aug. 1963, at 23; Martin L. King, Jr., *From the Birmingham Jail*, 23 CHRISTIANITY & CRISIS, May 27, 1963, at 89; Martin Luther King, Jr., *Letter from Birmingham Jail*, 80 CHRISTIAN CENTURY, June 12, 1963, at 767, http://www.christiancentury.org/sites/default/files/downloads/resources/mlk-letter.pdf [https://perma.cc/NJK6-CZGB]; Martin Luther King, Jr., *The Negro Is Your Brother*, ATLANTIC, Aug. 1963, at 78, http://www.theatlantic.com/politics/archive/2013/04/martin-luther-kings-letter-from-birmingham-jail/274668/ [https://perma.cc/P4E7-SVFJ] (reprinting letter on 50th anniversary, April 16, 2013); Martin Luther King, Jr., *Letter from Birmingham City Jail,* AMERICAN FRIENDS SERVICE COMMITTEE (May 1963), https://www.afsc.org/blogs/acting-in-faith/letter-birmingham-city-jail-what-would-king-say-today [https://perma.cc/7GPE-K5UM].

[514] *See* Kathy Lohr, *50 Years Later, King's Birmingham 'Letter' Still Resonates*, NPR (APR. 15, 2013), http://www.npr.org/2013/04/16/177355381/50-years-later-kings-birmingham-letter-still-resonates [https://perma.cc/E95J-3R84].

[515] *See supra* note 495.

[516] King, *supra* note 2.

[517] *Id.*

[518] There are several detailed histories available. *See, e.g.*, DIANE MCWHORTER, CARRY ME HOME: BIRMINGHAM, ALABAMA: THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS REVOLUTION (2001); GLENN T.? ESKEW, BUT FOR BIRMINGHAM THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE (1997).

[519] *See* Hanson & Hanson, *supra* note 48, at 444–46.

those apparent gains. The updated machinery of racism took many new shapes including, for instance, the return of Jim Crow in new garb,[520] the success of dog whistle politics and the "southern strategy,"[521] the trumped up wars on crime and drugs,[522] the distortion and cooptation of Martin Luther King's message and legacy[523] (including the abuse of "colorblindness"[524]), unfounded claims of post-racialism,[525] the refinement of inequality-enhancing policy ideologies and jurisprudential theories,[526] and more recently, the mainstream re-emergence of open White supremacy, and the anti-Critical Race Theory (CRT) movement. The backlash following the late 1960s, as the civil rights (and anti-Vietnam war) protests subsided, also saw the beginning of a long era of relatively subdued activism.[527]

King himself had worried about how shallow and ephemeral the changes he helped bring about would turn out to be. Shortly before his assassination, for instance, he confided to a friend that the seeming advancements toward a more just world may have been a mirage:

> I've come upon something that disturbs me deeply. We have fought hard and long for integration . . . but I have come to believe that we are integrating into a burning house. . . . Until we commit ourselves to ensuring that the underclass is given *justice* . . . , we will continue to perpetuate the anger and violence that tears the soul of this nation.[528]

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[520] *See generally* THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[521] *See generally* IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS (2014).

[522] *See generally* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2006).

[523] *See generally* JEANNE THEOHARIS, A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY (2018).

[524] *See* NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 273 (K) (2014) ("?If the problem of the twentieth century was, in W. E. B. Du Bois's famous words, 'the problem of the color line,' then the problem of the twenty-first century is the problem of colorblindness, the refusal to acknowledge the causes and consequences of enduring racial stratification."); *see generally* KEEANGA-YAMAHTTA. TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION ch. 2 (2016).

[525] *See generally* KAREN E. FIELDS & KAREN FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE Introduction (2012).

[526] *See generally* Hanson & Yosifon, *The Situation*, *supra* note 84; Chen & Hanson, *supra* note 96; Hanson & Hanson, *supra* note 48.

[527] *See* Astra Taylor & Jonathan Smucker, *Occupy Wall Street Changed Everything*, N.Y. MAG. (Sept. 17, 2021), https://nymag.com/intelligencer/2021/09/occupy-wall-street-changed-everything.html [https://perma.cc/6LL9-LNDC] (noting that "Occupy inaugurated a new era of defiant protest."); MICHAEL LEVITIN, GENERATION OCCUPY: REAWAKENING AMERICAN DEMOCRACY 67–68 (2021).

[528] *Dr. Martin Luther King Jr: 'I fear I Am Integrating my People into a Burning House'* N.Y. AMSTERDAM NEWS (Jan. 12, 2017), https://amsterdamnews.com/news/2017/01/12/dr-martin-luther-king-jr-i-fear-i-am-integrating-m/ [https://perma.cc/F6JK-KSC4].

King's fear was prescient and his unanswered call for structural justice would yield yet another dream deferred.[529]

G. "Declaration of the Occupation of New York City"—Corporate Injustice

That, at last, brings us to the topic at the center of this volume: Occupy Wall Street, the social movement that took the country (or world) by storm for several months ten years ago.

1. Context

Occupy Wall Street began modestly on September 17, 2011.[530] That was 235 years after Thomas Jefferson called for a violent revolution to establish an independent nation.[531] It was 150 years after the war fought across the fault line of slavery began—one of the numerous failed efforts to address the racial injustices that Frederick Douglass described as the nation's "revolting barbarity and shameless hypocrisy."[532] It was nearly a century after Elizabeth Cady Stanton's too-bold demand for women's suffrage was answered in the affirmative on a national scale.[533] It was roughly eighty years after Franklin D. Roosevelt introduced his New Deal promising to place the country back on the "path of real progress, of real justice, of real equality for all of our citizens, great and small." [534] It had been six decades since the complaint in *Brown v. Board* was filed.[535] It was nearly a half-century after Martin Luther King, Jr. made his case for nonviolent protests to render nationally visible the continued racial apartheid still dividing the nation.[536] And it was just a few years after President Barack Obama instilled in many Americans an audacious hope that the wait was over and nation was at last on the verge of to fulfilling it's promise. As the new president put it in his 2009 inaugural address:

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[529] Langston Hughes, *Harlem*, POETRY FOUND. (2002), https://www.poetryfoundation.org/poems/46548/harlem [https://perma.cc/WF8Q-YMHU].

[530] Ben Brucato, *The Crisis and a Way Forward: What We Can Learn from Occupy Wall Street*, 36 HUMAN. & SOC'Y 1, 78 (2012).

[531] *See supra* Part II(A).

[532] *See supra* Part II(C).

[533] *See* Elizabeth Cady Stanton, *Suffrage: A Natural Right* in THE OPEN COURT 1–10 (The Open Court Publ'g Co. 1894) (Stanton's plea for universal suffrage); *see also* IDA HUSTED HARPER, STORY OF THE NATIONAL AMENDMENT FOR WOMAN SUFFRAGE I 1 (1919) (on June 4, 1919, the Nineteenth Amendment, which granted women the right to vote, was passed).

[534] *See supra* text accompanying note 241.

[535] *See Brown v. Board of Education*, NATIONAL ARCHIVES, https://www.archives.gov/education/lessons/brown-v-board [https://perma.cc/M5FF-QUU6].

[536] *See supra* Part II(F). It was exactly fifty years after the "Declaration of Indian Purpose" had been drafted at the American Indian Chicago Conference. The Declaration Project, *1961 Declaration of Indian Purpose*, http://declarationproject.org/?p=32 [https://perma.cc/58Q7-YFPF]. The Declaration of Indian Purpose, like the other Declarations, contained the same allegations of injustice and calls for justice that we have emphasized.

> On this day, we gather because we have chosen hope over fear, unity of purpose over conflict and discord. On this day, we come to proclaim an end to the petty grievances and false promises, the recriminations and worn-out dogmas that for far too long have strangled our politics. We remain a young nation. But in the words of Scripture, the time has come to set aside childish things. The time has come to reaffirm our enduring spirit; to choose our better history; to carry forward that precious gift, that noble idea passed on from generation to generation: the God-given promise that all are equal, all are free, and all deserve a chance to pursue their full measure of happiness.[537]

Two years after that rallying cry, disappointment and resentment eclipsed hope for change. Reaction to Obama on the right had already been stridently negative: within a month of the inauguration, TV commentator Rick Santelli, claiming to speak for the "silent majority," ranted about the Obama Administration "promoting bad behavior" by "subsidiz[ing] the losers' mortgages."[538] Santelli called on Obama to "reward people that can carry the water instead of drink the water."[539] Invoking the authority of "our Founding Fathers," Santelli asserted that "what we're doing in this country now" is making "people like Benjamin Franklin and Jefferson . . . roll over in their graves." He ended his on-air tirade by inviting "capitalists" to a "Tea Party," a suggestion that helped inspired a right-wing movement.[540]

Before long, frustrations with, and anger at, the federal government, including the Obama Administration, also characterized the left side of the political spectrum.[541] In 2010, The U.S. Supreme Court was implicated, when the conservative majority handed down the *Citizens United* opinion.[542]

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[537] Barack Obama, January 2009 Inaugural Address (Jan. 20, 2009), https://obamawhitehouse.archives.gov/blog/2009/01/21/president-Barack-obamas-inaugural-address [https://perma.cc/8TW5-V2NK].

[538] Rick Santelli, quoted in JILL LEPORE, THE WHITES OF THEIR EYES: THE TEA PARTY'S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY 3 (2010).

[539] *Id.*

[540] *See* THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM 7–10 (2016).

[541] *See* Sara Murray, *Slump Over, Pain Persists*, WALL ST. J. (Sept. 21, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052748703989304575503691644231892 [https://perma.cc/K9MS-N854] (detailing American citizens' lamentations on their personal exhaustion, deep disappointment, and feeling that the "American Dream" had died); *see also* Patti Davis, *Patti Davis: Our Disappointment with Obama*, NEWSWEEK (Sept. 9, 2010, 2:30 PM), https://www.newsweek.com/patti-davis-our-disappointment-obama-72131 [https://perma.cc/9GHV-CLFX] (describing the author's feeling of having been "betrayed" by President Obama given his delayed public response to the BP oil disaster, evoking a sense of the 1% having forgotten about the 99%); *see also* Derek Thompson, *Profiles of the Jobless: The 'Mad as Hell' Millennial Generation*, ATLANTIC (Sept. 5, 2011), https://www.theatlantic.com/business/archive/2011/09/profiles-of-the-jobless-the-mad-as-hell-millennial-generation/244552/ [https://perma.cc/AP4Q-B96C] (exposing millennials' widespread feelings of disillusionment, helplessness, and betrayal by the "stewards" of society).

[542] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 478–79, 130 S. Ct. 876, 979, 175 L. Ed. 2d 753 (2010) (5-4 decision) (Stevens, J., dissenting in part) ("Today's decision is backwards in many senses. . . . In a democratic society, the longstanding consensus on

With the transparently political decision of *Bush v. Gore*[543] still fresh,[544] the 5-4 opinion in *Citizens United* further empowered corporations to spend unbounded fortunes on elections and, in the process, further undermined the Court's claim to apolitical neutrality and legitimacy. In this new era of negative feelings and institutional delegitimation, Federal Reserve Chairman Alan Greenspan testified that he had "found a flaw in . . . [his] ideology" of trusting profit-seeking financial institutions in unregulated markets.[545] By 2011, the dramatic and still-growing income and wealth inequalities began to be clearly and credibly documented and discussed.[546] At the same time, scholars exposed how the rich were getting richer through a "winner-take-all" political system,[547] how corporate behemoths had duplicitously acted as "merchants of doubt" knowingly causing climate disaster for profit,[548] and how the criminal legal system had operated as the locus of a "new Jim Crow."[549] During the same period, as if to validate those scholars, the federal

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the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority's rejection of this principle elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests.") (internal quotations omitted) (citing First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, at 817 (1978)).

[543] *See* Bush v. Gore, 531 U.S. 98, 128–29 (2000) (7–2, 5–4 decision) (Stevens, J., dissenting) ("The endorsement of . . . the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.").

[544] Michael Levitin describes the erosion of "people's basic trust in the legitimacy of American institutions" beginning around 2000. Quoting historian Adam Hochschild, he highlights the "public anger" in response to "'an election basically decided by the Supreme Court—which . . . awakened a lot of people to the fact that the court was . . . a very political instrument, which in this case decided to hand the election to George W. Bush.'" LEVITIN, *supra* note 527, at 68.

[545] *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 11–20, https://www.govinfo.gov/content/pkg/CHRG-110hhrg55764/html/CHRG-110hhrg55764.htm [https://perma.cc/6M2D-8FM4].

[546] *See*, *e.g.*, Joseph Stiglitz, *Of the 1%, by the 1%, for the 1%,* VANITY FAIR, May 2011, https://www.vanityfair.com/news/2011/05/top-one-percent-201105 [https://perma.cc/RNW4-K7FD]; Thomas Piketty & Emmanuel Saez, *The Evolution of Top Incomes: A Historical and International Perspective*, 96 AMER. ECON. REV. (2006); *see also* Kathleen Macla*, Wall Street Protests Echo Researcher's Findings on Growing Income Gap*, BERKELEY NEWS, Oct. 7, 2011, https://news.berkeley.edu/2011/10/07/wall-street-protests-echo-researchers-findings-on-growing-income-gap/]https://perma.cc/7PWL-YW3T].

[547] *See generally* Jacob S. Hacker & Paul Pierson, Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class (2011).

[548] *See generally* NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING (2011).

[549] *See* David Remnick, *Ten Years After "The New Jim Crow,"* The New Yorker Radio (2020) (Michelle Alexander, describing the United States criminal legal system during the beginning of President Obama's presidency, stated, "Our nation has, in fact, done it again. We have birthed a system of mass incarceration unlike anything the world has ever seen. Millions of people have been relegated yet again to a permanent second-class status in which they are

government was bailing out major banks and businesses that were culpably linked to the housing crisis and economic recession,[550] while those companies' top executives received immense bonuses, enjoyed criminal immunity,[551]

stripped of basic civil and human rights, including the right to vote, the right to serve on juries, and the right to be free of legal discrimination in employment, housing, access to education, and public benefits.").

[550] Major financial institutions' actions after the passage of the Sarbanes-Oxley Act (SOA) led to the recession; those institutions were later bailed out by the government. In 2002, after the SOA was passed, President Bush urged Congress to subsidize home down payments, so low-income Americans could afford housing, and pressed banks to make homeownership more affordable. Both did so. Banks introduced interest-only, adjustable-rate mortgages that appeared risk-free, given derivative financial instruments like mortgage-backed securities and credit default swaps, which were sold by investment houses and insurance companies like American International Group (AIG). The inexpensive down payments and low rates lured people into buying homes with future payments that would likely be beyond their reach. In 2006, when the housing market reached a saturation point because there were not enough new buyers to keep house prices high, housing prices started to decline and mortgagees stopped making payments because they could not afford them, or because they realized that the housing market was rapidly losing value. In turn, financial institutions that had offered subprime loans and derivative financial instruments faced liquidity crises. Bear Stearns, one such institution, was saved from bankruptcy due to an emergency loan from the Federal Reserve. Other banks thought that the government would also find them "too big to fail." In September 2008, the government bailed out AIG for over $180 billion. In October, President Bush asked for, and received, $700 billion to buy banks' mortgage-backed securities. JAMES HOOPES, CORPORATE DREAMS: BIG BUSINESS IN AMERICAN DEMOCRACY FROM THE GREAT DEPRESSION TO THE GREAT RECESSION 194–96 (2011). Bank of America, Citigroup, JP Morgan Chase, Wells Fargo, Morgan Stanley, Goldman Sachs, Bank of New York Mellon, State Street, and Merrill Lynch, which accounted for 55 percent of U.S. Banks' assets, received a total of $125 billion dollars in federal assistance as the recession hit. Charles W. Calomiris and Urooj Khan, *An Assessment of TARP Assistance to Financial Institutions*, 29 J. ECON. PERSPS. 2, 55–56.

[551] Between 2009 and 2015, 49 financial institutions paid government entities and private plaintiffs close to $190 billion in fines and settlements for their misconduct giving rise to the recession. Only one Wall Street executive went to jail: Kareem Serageldin, a senior trader at Credit Suisse, received a 30-month sentence for inflating the value of mortgage bonds in his trading portfolio. All the while, CEOs of banks, like Jamie Dimon of JPMorgan Chase, received high raises. *See* William D. Cohan, *How Wall Street's Bankers Stayed Out of Jail*, ATLANTIC, Sept. 2015, https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/ [https://perma.cc/DZW8-84FS]. Michael Levitin, describing the sense of injustice felt by Occupy Wall Street protestors, writes:

> [T]he unforgivable sin for which history will judge Obama is clear: he let the banks off the hook. It was one thing to stuff his Treasury Department with executives and lobbyists from Citigroup and Goldman Sachs. But two months into his term, when President Obama sat down for a reckoning with the most powerful CEOs on Wall Street and issued them a slap on the wrist, he lost much of the public's trust. Instead of facing retribution for high crimes committed, the banking chiefs received hundreds of billions of dollars in taxpayer-funded bailouts, few strings attached. From that bailout, they lavished tens of billions in bonuses on themselves, board members, and traders, and repurchased company stock rather than investing it to rebuild the economy. Finally, Obama's Justice Department handed down exactly zero jail sentences against the bankers who unlawfully enriched themselves at the nation's expense.

LEVITIN, *supra* note 527, at 8–9; *see also id* at 68 (quoting historian Adam Hochschild regarding how the crisis undermined the legitimacy of the system: "it was so evident that the banking and finance industry had sold a terribly destructive bill of goods to the American people. That it had been eased by deregulation under a Democratic administration in the nineties also fed the belief that there was something wrong with the system").

and cut corporate costs by laying off workers.[552] Employed or not, many homeowners across the nation suddenly found themselves under financial water or worse.[553] In short, it was a period when many Americans perceived the system to be unjust—with powerful interests illegitimately producing inequality and suffering.

One measure of that perception of injustice can be found in the Financial Crisis Inquiry Report published in 2011.[554] The Report was authored by The Financial Crisis Inquiry Commission, charged by statute with "examin[ing] the . . . crisis that ha[d] gripped our country and explain its causes to the American people."[555] The Commission devoted over a year to studying the causes of the crisis; it held extensive public hearings, interviewed over 700 witnesses, and processed millions of pages of documents.[556]

The Report, a hefty 633 pages, was published two years after Obama's inauguration and offered the following synopsis of the economic devastation and people's emotional response to the crisis:

> [Currently,] there are more than 26 million Americans who are out of work, cannot find full-time work, or have given up looking for work. About four million families have lost their homes to foreclosure and another four and a half million have slipped into the foreclosure process or are seriously behind on their mortgage payments. Nearly $11 trillion in household wealth has vanished, with retirement accounts and life savings swept away. . . . There is much anger about what has transpired, and justifiably so. Many people who abided by all the rules now find themselves out of work and uncertain about their future prospects. The collateral damage of this crisis has been real people and real communities.

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[552] Over the course of the recession, the unemployment rate dramatically increased. In December 2007, the unemployment rate was 5.0 percent, and it had remained at or near that rate for the previous 30 months. In June 2009, the national unemployment rate was 9.5 percent. Four months later, the national unemployment rate peaked at 10.0 percent. U.S. BUREAU OF LAB. STATS., THE RECESSION OF 2007-2009 2 (2012).

[553] In 2010, at the peak of the foreclosure crisis, one in every 10 mortgages was at risk of default, and between 2008 and 2015 nearly one in every 12 households entered the foreclosure process. Emily S. Taylor Poppe, *Homeowner Representation in the Foreclosure Crisis*, 13 J. EMPIRICAL LEG. STUD. 4, 809 (2016).

[554] *See generally* THE FIN. CRISIS INQUIRY COMM'N, THE FIN. CRISIS INQUIRY REPORT (2011), https://permanent.fdlp.gov/gpo50165/fcic_final_report_full.pdf [https://perma.cc/GCN8-QHKU].

[555] *Id.* at xv; *see also id.* at xi ("The Commission was established as part of the Fraud Enforcement and Recovery Act . . . passed by Congress and signed by the President in May 2009. This independent, 10-member panel was composed of private citizens with experience in areas such as housing, economics, finance, market regulation, banking, and consumer protection. Six members of the Commission were appointed by the Democratic leadership of Congress and four members by the Republican leadership. The Commission's statutory instructions . . . called for the examination of the collapse of major financial institutions that failed or would have failed if not for exceptional assistance from the government.").

[556] *Id.* at xi–xii.

> The impacts of this crisis are likely to be felt for a generation. And the nation faces no easy path to renewed economic strength.[557]

The people's "anger," the description suggests, reflected their sense that they had done nothing to deserve their suffering. But had anyone done anything wrong to cause widespread economic devastation? The Commission said yes:

> We conclude this financial crisis was avoidable. . . . The captains of finance and the public stewards of our financial system ignored warnings and failed to question, understand, and manage evolving risks within a system essential to the well-being of the American public. Theirs was a big miss, not a stumble. . . . To paraphrase Shakespeare, the fault lies not in the stars, but in us.[558]

"The greatest tragedy," the Report later admonished, "would be to accept the refrain that no one could have seen this coming and thus nothing could have been done."[559]

With such an authoritative governmental commission concluding that catastrophic harms suffered by the American public were the consequence of intentional choices made by powerful "captains of finance" to serve their own interest, the widespread injustice dissonance was understandable. That was the fertile soil from which Occupy Wall Street would take root and bloom.

2. Protest

Despite the conditions for protest, quiescence continued into 2011. According to journalist, author, and occupier Michael Levitin,[560] by the fall of that year, even as "the suffering mounted," "[t]he silence around these *injustices* was deafening."[561] Something had to give. And so it did.

In New York City's Zuccotti Park, the Occupy Wall Street movement began with a march of just a few hundred activists.[562] Within weeks, the modest demonstration ballooned to more than 600 U.S. communities and 951 cities across 82 countries.[563] This sub-section uses Levitin's book, *Generation Occupy*, the most complete account currently available, to illustrate how

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[557] *Id.* at xv–xvi.
[558] *Id.* at xvii.
[559] *Id.* at xxviii.
[560] He participated in Occupy Wall Street as a protestor and journalist before becoming a co-founder and editor of *The Occupied Wall Street Journal* and *Occupy.com.* Levitin has extensively about the Occupy Movement including its causes and consequences. *See, e.g.*, LEVITIN, *supra* note 527; Michael Levitin, *Occupy Wall Street Did More Than You Think*, ATLANTIC (Sept. 14, 2021), https://www.theatlantic.com/ideas/archive/2021/09/how-occupy-wall-street-reshaped-america/620064/]https://perma.cc/LP3Y-Y8FR]; Michael Levitin, The Triumph of Occupy Wall Street, June 10, 2015, https://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408/]https://perma.cc/J2VB-26EA].
[561] LEVITIN, *supra* note 527, at 9 (emphasis added).
[562] Brucato, *supra* note 530, at 78.
[563] Library of Congress, Web Archive: Occupy Together, https://www.loc.gov/item/lcwaN0006224/ [https://perma.cc/3YA9-R3KT].

the injustice framework helps explain the emergence of the movement as well as its goals and effects.

Implicitly highlighting the elements of the injustice framework, Levitin opens his book describing how Occupy Wall Street both responded to and "ignited" a sense of frustration about "wealth inequality, corporate greed and the corrupting influence of money in politics."[564] Occupy Wall Street, that is, drew attention to, and further activated, a growing injustice dissonance—in this case, how the wealthiest "one percent" and the corporate entities they control illegitimately corrupted the political systems to further advantage themselves. The Occupy Wall Street movement concomitantly called for justice—that is, fundamental, systemic, egalitarian reform disempowering corporations and empowering "the people" through a vitalized democracy.

Throughout his book, Levitin returns repeatedly to those themes and others emphasized by the injustice framework, illustrating how perceptions of powerful actors reproducing inequality and suffering without legitimacy combined to yield a sense of injustice, anger, and demands for justice. To start, consider some numbers. Levitin uses the terms "justice" and "injustice" approximately 130 times,[565] "power" and "powerful" around 150 times, and "inequality" more than 160 times.[566]

In arguing that Occupy Wall Street was responding to perceived injustice he describes the period prior as one characterized by "widespread disbelief in the legitimacy of their elected governments"[567] and a "generalized anger" and "economic frustration."[568] It was a moment when, all at once, there was "a new sense of clarity" that something was amiss, "as though a fissure had opened and suddenly we could all see through the cracks of capitalism and political corruption everywhere."[569] "?Suffering, angry, fed up—the people demanded *justice*."[570] Occupy Wall Street was thus "[a] decentralized global economic *justice* movement" that "embodied the shared suffering and universal anger caused by . . . . corporate culprits [who] were never punished."[571]

Although the sense of systemic injustice was ripening, for many it remained unnamed and there was no clarity or shared narrative about its sources. That is where Occupy Wall Street came in. According to Levitin, the months-long protest produced the collective "awakening" and "crystalized the public's shared sense of injury"[572] by "reshap[ing] how Americans

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[564] LEVITIN, *supra* note 527, at 1–3.

[565] "Fairness," "fair," and "unfair" show up around 35 times.

[566] LEVITIN, *supra* note 527, *passim*. By comparison, he refers to "Occupy Wall Street" and "democracy"—both in his book's title—around 200 and 50 times, respectively. *Id.*

Although he uses the terms "legitimacy" or "legitimate" only a around a dozen times, he uses a variety of terms that indicate that an outcome or process lacks legitimacy. For example, "corrupt" and "corruption" show up roughly three dozen times. *Id.*

[567] *Id.* at 11–12.

[568] *Id.*

[569] *Id.*

[570] *Id.* at 9 (emphasis added).

[571] *Id.* at 257 (emphasis added).

[572] *Id.* at 25; *see also id.* at 30 ("It was . . . like a fog had cleared" (quoting Sarah Jaffe)).

viewed the economy, inspiring a long-overdue discussion of issues of income inequality, corporate greed, an unjust tax structure and capitalism itself."[573] In short, Occupy Wall Street "awaken[ed] America to indefensible levels of economic inequality, *injustice* and unfairness"[574] and gave them a place to "?to connect their lately realized experience of *injustice* with the corruption, oppression and resistance."[575]

Providing a first-hand account of the protest, Levitin describes the sense of shared, transcendent purpose among the protesters:

> We jumped feet first into the movement of our time and suddenly we were eating and sleeping alongside people we didn't know a week or a day or even an hour ago; people we were nonetheless ready to give to and sacrifice for and go to jail with, if necessary. Because something more powerful than ourselves—an idea, a resolve, the desire for justice—bonded us together.[576]

For a variety of reasons, the Occupy Wall Street' justice-centered message captured public attention and extended across the globe. Levitin describes the galvanizing effect of several instances of visible, coercive, violent police force deployed in response to Occupy's direct-action tactics. He highlights the moment, early in the protests, when bystanders videotaped a New York City police officer blasting a "stream of pepper spray into the faces of several unarmed White women who fell to the sidewalk shrieking in pain."[577] The visceral evidence of police brutality quickly spread on the internet and "generated an outpouring of sympathy that would catapult Occupy Wall Street onto the national stage."[578] The blatant exercise of power made visible the deeper power structures behind it and catalyzed injustice dissonance, providing energy, sympathy, and legitimacy to the nascent movement, precisely as Martin Luther King, Jr. theorized.[579] Spray cannisters on Wall Street, like fire hoses in Birmingham, manifested the latent violence girding

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[573] *Id.* at 25; *see also id.* at 19 ("inequality illuminated").

[574] *Id.* at 96–97 (emphasis added).

[575] *Id.* at 201 (emphasis added); *see generally id.* at 28–30 (providing more extensive discussion of how Occupy encouraged an awakened sense of injustice and its effects).

[576] *Id.* at 50.

[577] *Id.* at 14.

[578] *Id.* at 14; *see also id.* at 54 (describing an encounter between police and protesters that led to "seven hundred arrests . . . on the Brooklyn Bridge," captured on video and covered by media across the globe and calling it a "defining moment that made Occupy a household name" for revealing how "American law and order" would "assert[ ] itself" how, in the city anchored by Wall Street capitalism, disruptive peaceful dissent would be suppressed"); *id.* at 195 (describing how that incident yielded "compassion and outrage," and "igniting the movement"); *id.* at 116 (describing the how Occupy-inspired college campus protests gained "national support" when a "copy blasted bright orange pepper spray in to into the faces of a dozen nonviolent students seated cross-legged on the ground" at the University of California, Davis).

[579] *See supra* text accompanying notes 492–496. By implicitly exposing the underlying power dynamics and tensions inherent in unjust systems and revealing the role of the police in serving the powerful and maintaining those systems, such blatant violence unveils a deeper injustice. Michael Levitin, when describing the "the overdue debate around police reform," quotes retired police officer Ray Lewis who called cell phones "the greatest invention for justice" because [i]t brings out the truth." Levitin, *supra* note 527, at 325. Lewis explains:

the system-affirming veil of a "negative peace" that otherwise concealed injustice.[580]

A second source of the movement's success was its ability to shift narratives about the sources of inequality. The Occupy movement rejected the long-dominant neoliberal narratives depicting large corporations as subservient to lawmakers and as team players with—or obedient servants to—consumers, workers, and other stakeholders.[581] It portrayed corporate interests instead as dominating, capturing, or corrupting those lawmakers[582] and as adverse to, and exploitative of, those stakeholders.

The new narratives reframed the relevant groups. Occupy jettisoned conventional language of fluid, freeing, harmonious market identities, roles, and relationships, adopting instead stories of power asymmetries and group-based exploitation between the haves and have-nots. Levitin writes:

> We abolished terms like consumers, constituents, taxpayers, voters, buyers, spenders, customers and the electorate, reclaiming the clearest definition of all: people. We described the power structure in layman's terms because we weren't talking to the elites; we were talking to each other and to the great mass of Americans who had been cheated of their future.[583]

Where groups were identified, their boundaries related to the dynamics of oppositional economic oppression.[584] Rejecting victim-blaming ideologies of individualism and merit,[585] Occupy pointed the finger of blame at systems and the institutions and individuals who construct, maintain, and benefit from those systems.[586] Thus, Levitin writes: "Occupy posed an emphatic

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> White people before never believed Black people. They believed their own police department, their own politicians. With cell phones, white people are now saying, 'My God, I'm seeing this with my own eyes, I'm hearing it, I can't deny this anymore—I cannot deny that police are brutal, I cannot deny white privilege.' People seeing the atrocity can no longer say, 'Well, he must have deserved it.' George Floyd did not deserve it.

Id.

[580] *See supra* text accompanying notes 447–450 and 492–496.

[581] *See generally* Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004).

[582] LEVITIN, *supra* note 527, at 10 (describing the view among Occupy participants "that Wall Street was calling the shots, not our elected leaders in Washington").

[583] *Id.* at 28.

[584] Levitin himself employed the words "worker" or "workers" 250 times (or thereabouts) and the phrases "the people" and "99 percent" around 60 times each. On the other side of the us vs. them divide, he used the words "corporations" or "corporate" roughly 130 times, the phrase "1 percent" nearly 100 times, and the word "wealthy" around 25 times.

[585] LEVITIN, *supra* note 527, at 44 ("Occupy radically challenged our national economic myth of America as an egalitarian meritocracy"). For detailed descriptions of the sort of conventional ideologies that Occupy rejected, see Chen & Hanson, *supra* note 581, at 5–31 (describing the dominant economic "meta script" of legal discourse and policymaking in the late 20th and early 21st centuries); Hanson & Hanson, *supra* note 48, at 440–60 (describing the dominant attributional script or "blame frame" employed to justify racial inequality and racial injustice in the late 20th and early 21st centuries).

[586] LEVITIN, *supra* note 527, at 4 (describing how protesters "targeted Wall Street, the source of our dysfunctional democracy"); *id.* at 8 ("Everyone knew who to blame for the corpo-

challenge to the status quo, pointing a finger directly at the wealthy as the source of the problem."[587]

Levitin argues that, because of the Occupy movement, many Americans came to the realization that they were being exploited by the powerful and wealthy, "that they had stopped sharing in the rewards of the economy, and were getting the shaft at the expense of those at the very top."[588] They understood that "[o]ur problem was not simply that we were struggling, but that our struggling benefited someone else."[589] They realized "how the upper classes exploited those below them in the economic system."[590] They witnessed how "Wall Street got bailed out and Main Street was left to rot as Washington subverted instead of advanced the interests of the majority."[591] Occupy, in those ways, re-told the story "around people not having enough. The narrative of inequality—that our country is now one where the majority of people are one paycheck away from not having food and living in their cars—is the biggest gift that Occupy gave to our country."[592]

According to Levitin, "The movement didn't merely change the national conversation: it opened Americans up to the realization that our crony capitalist system was created by design to enrich only a small fraction of the wealthiest Americans."[593] Through Occupy, in short, Americans came to recognize "the economic system is rigged for those at the very top."[594]

That new taxonomy of groups and the nature of their relationship was key to the movement's success in naming, reframing, blaming, claiming.[595] Employing those categories, the inequalities and other harms were understood as symptoms of injustice. Meme-worthy phrases and "visceral rhetoric" echoed through the streets and then across the globe with refrains like "Banks got bailed out, we got sold out"[596] "99 percent vs. 1 percent," "People Over Profits," "End Corporate Rule," and "We are the 99 percent."[597] While creating a story to capture the feelings of injustice that many people already had, Occupy made the injustice framework explicit. As Levitin explains, Occupy "gave voice to the sense of outrage that millions felt but had not been

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rate greed and criminal profiteering that wrecked so many lives and destroyed the economy: Wall Street."); *id.* (because of the lack accountability among the powerful, a common "refrain" among protesters was: "Banks got bailed out, we got sold out").

[587] *Id.* at 25.

[588] *Id.* at 39.

[589] *Id.* at 30 (quoting Sarah Jaffe).

[590] *Id.* at 39–40 (quoting Marc Armstrong).

[591] *Id.* at 25.

[592] *Id.* at 26 (quoting organizer Marianne Manilov).

[593] *Id.* at 25.

[594] *Id.*

[595] We are here alluding to the classic article mapping how experiences transform into legal disputes. *See* William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & SOC'Y REV. 623 (1981) (breaking the evolution of disputes into stages of to naming, blaming, and claiming).

[596] LEVITIN, *supra* note 527, at 8; *see also supra* notes 550–552 and accompanying text.

[597] *Id.* at 28; *see also id.* at 26 (quoting historian Adam Hochschild: "I think framing it as the 99 percent and the 1 percent was tremendously important because the creation and the growth of any kind of political movement needs a vocabulary, it needs images. The rhetoric of the 99 percent was important branding and that vocabulary has stayed with us ever since.").

able to articulate. . . . The facts of economic *injustice* were plain enough to understand; people just needed to hear them spoken in clear words."[598]

In an interview with Levitin, Richard Woolf described the importance of this naming and reframing— "The 1 percent versus the 99 percent"—as follows:

> [W]ith Occupy it became possible to be articulate and noisy about economics when that was precisely what you couldn't be. One of the important things Occupy did was to crowbar back into the allowable consciousness of the left the vital term of capitalism: to name the system that is the problem. Granted, it's an abstraction, a summary term, but it's precisely because of those qualities that it is absolutely vital to name it—because it allows disparate complaints, criticisms, flaws, weaknesses and injustices to be gathered together and called a name that can become the target for what needs to be changed.[599]

As a consequence of the new "paradigm of thought,"[600] including new narratives and redefined groups, Occupy Wall Street brought attention to "'the fundamental injustice of how the system works,'"[601] and "enabled people to confront economic injustice in a way that hadn't been done during most of the preceding century,"[602] and it produced a "singular demand that was all of the demands: Justice. Fairness. Equality."[603]

As authoritative an insider's perspective as Levitin's book may be, it does not speak for the Occupy movement itself. The following section looks at a document that arguably does.

3. Text

The Declaration of the Occupation of New York City (the "Declaration of Occupation") best encapsulates the rhetoric and goals of Occupy Wall Street.[604] By this point, we suspect our readers need no assistance identifying the injustice-highlighting frames and strategies employed by the authors of the Declaration of Occupation. Nonetheless, to complete our task, the remainder of this section analyzes that text through the injustice framework.

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[598] *Id.* at 30 (emphasis added).
[599] *Id.* at 41.
[600] *Id.* at 30 (quoting Lee Camp).
[601] *Id.* at 41 (quoting Richard Woolf).
[602] *Id.* at 26.
[603] *Id.* at 4
[604] *See generally* Internet Archive, *Declaration of the Occupation of New York City*, https://archive.org/details/DeclarationOfTheOccupationOfNewYorkCity [https://perma.cc/FF7T-JJWZ]; *see also* LEVITIN, *supra* note 527, at 27 (describing how the declaration rendered explicit "[q]uestions that were on many people's minds, yet never declared in the public sphere until the balmy night of September 29, 2011, when the movement's NYC General Assembly convening in Zuccotti Park approved the Declaration of the Occupation of New York City.").

The text, composed and approved by the NYC General Assembly,[605] wasted no words getting to all the main points of the injustice framework. The preamble, for instance, read: "As we gather together in solidarity to express a feeling of mass *injustice*, we must not lose sight of what brought us together. We write so that all people who feel wronged by the corporate forces of the world can know that we are your allies."[606]

The framework is right there. The two sentences pointed, not to abstract justice but to an emotional "feeling of . . . injustice."[607] The preamble defined two groups. The first was the vast majority or "mass" of people who "feel wronged" by the second group, the powerful "corporate forces of the world."[608] The opposition between the "mass" of humanity (the 99%), who are natural allies, and the powerful corporations and corporatists exploiting them (the 1%) drives the rest of the text, which included 10 uses of "we" or "us" and 24 instances of "they" or "them."[609]

The next paragraph, constituting the heart of the Declaration of Occupation, repeated and expanded upon those themes. The "we" included "the people," "the human race," "individuals . . . their neighbors . . . and the Earth."[610] "They" were defined by selfishness and exploitation, comprised of "corporations and governments" who sought to weaponize their "economic power," "place profit over people, self-interest over *justice*, and oppression over equality," to illegitimately "corrupt[ ]" the "system," "run our governments," and "extract wealth from the people and the Earth" without "consent."[611] We, in contrast, are motivated to collectively resist that *injustice* to help save "our system," "rebuild a true democracy," and preserve "the future of the human race" through "cooperation."[612]

After generally describing those essential elements of injustice, the Declaration of Occupation listed specific grievances, each illustrating how corporate interests had used their power to pursue profit in ways that exacerbated inequality and suffering for everyone else.[613] For three reasons, we include the full list of 23 grievances below.

First, each grievance implicitly describes an injustice—the powerful causal agent oppressing a vulnerable group without legitimacy. The pattern is so unmistakable that we consider the full collection of grievances to be strong confirmation of the injustice framework, explicitly introduced as a

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[605] *See* Publisher's Note, The Declaration of the Occupation of New York City (2011), https://sparrowmedia.net/declaration/ [https://perma.cc/YR7E-CFRC] ("The declaration, within, is a reflection of every voice amplified by the people's mic at the NYC General Assembly at Liberty Square").

[606] *Id.* at 1.

[607] *Id.*

[608] *Id.*

[609] *Id.* at 1–4.

[610] *Id.* at 1.

[611] *Id.* (emphasis added).

[612] *Id.* (emphasis added).

[613] *Id.* at 1–4.

catalog of the behaviors that give rise to the "feeling of mass *injustice*" that unified the protesters.

Second, we include the full list because many of the grievances relate, in some way, to one or more of the movements reviewed above,[614] or to many of the urgent systemic injustices that plague us today,[615] including those to which the other articles in this symposium are devoted. The grievances, in other words, provide a compelling benchmark for how far we have not come toward fulfilling the promise of achieving justice in the U.S. They suggest that the "long train of abuses and usurpations" continues unabated, and that those injustices are a feature, not a bug.[616]

Third, the full list of grievances helps to round out a causal story that Franklin D. Roosevelt sketched in his New Deal Speeches regarding the role of hegemonic economic and corporate power. We agree with the argument that corporate interests play a major role in producing and enabling many of humankind's most profound and intractable systemic injustices.[617] And on this ten-year anniversary of Occupy Wall Street, we are eager to echo with high fidelity the Occupy movement's efforts to "let these facts be known":

- "They have taken our houses through an illegal foreclosure process, despite not having the original mortgage.
- They have taken bailouts from taxpayers with impunity, and continue to give Executives exorbitant bonuses.
- They have perpetuated inequality and discrimination in the workplace based on age, the color of one's skin, sex, gender identity and sexual orientation.
- They have poisoned the food supply through negligence, and undermined the farming system through monopolization.
- They have profited off of the torture, confinement, and cruel treatment of countless animals, and actively hide these practices.
- They have continuously sought to strip employees of the right to negotiate for better pay and safer working conditions.
- They have held students hostage with tens of thousands of dollars of debt on education, which is itself a human right.
- They have consistently outsourced labor and used that outsourcing as leverage to cut workers' healthcare and pay.
- They have influenced the courts to achieve the same rights as people, with none of the culpability or responsibility.
- They have spent millions of dollars on legal teams that look for ways to get them out of contracts in regards to health insurance.

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[614] *See supra* Parts II(A)–(F).

[615] *See infra* Parts III(A)–(B).

[616] They further suggest that overcoming the injustices that plague us will require more effective, unified, and perhaps new forms of resistance.

[617] *See, e.g.*, Hanson & Yosifon, *The Situation, supra* note 84; Chen & Hanson, *supra* note 581; Benforado, Hanson & Yosifon, *supra* note 91.

- They have sold our privacy as a commodity.
- They have used the military and police force to prevent freedom of the press.
- They have deliberately declined to recall faulty products endangering lives in pursuit of profit.
- They determine economic policy, despite the catastrophic failures their policies have produced and continue to produce.
- They have donated large sums of money to politicians, who are responsible for regulating them.
- They continue to block alternate forms of energy to keep us dependent on oil.
- They continue to block generic forms of medicine that could save people's lives or provide relief in order to protect investments that have already turned a substantial profit.
- They have purposely covered up oil spills, accidents, faulty bookkeeping, and inactive ingredients in pursuit of profit.
- They purposefully keep people misinformed and fearful through their control of the media.
- They have accepted private contracts to murder prisoners even when presented with serious doubts about their guilt.
- They have perpetuated colonialism at home and abroad.
- They have participated in the torture and murder of innocent civilians overseas.
- They continue to create weapons of mass destruction in order to receive government contracts.

* These grievances are not all-inclusive."[618]

4. Post-Text

On this, the tenth anniversary of Occupy Wall Street, the conventional wisdom about the movement's net effects is still taking shape. As of 2012, Alisdair Roberts argued that "[t]he Occupy movement briefly flourished and then failed." According to Roberts, it "burned itself out without moving the country substantially closer to remedies" in part because Occupy "refused to . . . issue demands directly and concretely."[619] That story has, in the meantime, only hardened. Michael Levitin, for instance, writes that, a decade on, the standard "story line":

> is that Occupy introduced the vocabulary of the 99 percent and the 1 percent, putting the crisis of inequality on the map. But that's about it. The movement created no electoral organization,

[618] Internet Archive, *supra* note 604, at 1–4.
[619] *Id.* at 758.

> achieved no legislative success and made no real impact on American political life, or so the story line went.[620]

Elsewhere, he adds that "the movement [is] broadly acknowledged to have suffered from a lack of leadership, structure, direction and goals."[621]

More informed assessments recognize that Occupy's effects were more significant than the standard account acknowledges. The bulk of Levitin's book, as indicated above,[622] is devoted to rejecting the conventional wisdom. He argues that, because of Occupy, "we are no longer the country we were."[623] The movement, by his account,

> revived the labor movement, remade the Democratic Party and reinvented activism, birthing a new culture of protest that put the fight for economic and social justice at the forefront of a generation. Far from a passing phenomenon, Occupy inaugurated an era of political change in which the demands of the majority continue to grow louder and more focused.[624]

Historian Adam Hochschild, imagining a hypothetical history he might write fifty years from now of the early part of this century, describes Occupy as a "landmark[ ] . . . battle[ ] of justice" that "would certainly be one of a number of events that signaled a real reawakening of the left in this country."[625]

In sum, injustice dissonance and the goal of advancing justice was at the core of every element of the Occupy Wall Street protest. Injustice brought protesters together. Calling attention to that injustice and its sources became the primary goal of the movement—the thing that bonded protesters together. Occupy's primary effects was and, we hope, will be to help achieve that goal. As Levitin puts it, Occupy was responsible for "birthing a new

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[620] LEVITIN, *supra* note 527, at 3; *see also id.* at 200 (quoting Adam Chadwick: "The haters like to say it was just a bunch of people in tents who had no demands and failed in their mission.").

[621] *Id.* at 127.

[622] *See supra* Part II(G)(2).

[623] LEVITIN, *supra* note 527, at 4.

[624] *Id.*; *see generally id.* at chs. 3–9; *see also* Doug Henwood, *Occupy Wall Street at 10: It Was Annoying, But It Changed the World*, JACOBIN (Sept 17, 2021), https://www.jacobinmag.com/2021/09/occupy-wall-street-ten-year-anniversary-99-percent-new-york [https://perma.cc/8T92-CTRA] (writing "Occupy . . . petered out, but two years later came Black Lives Matter. BLM . . . persisted for years, and sparked the largest demonstrations in US history in the summer of 2020," and "without Occupy, it's hard to imagine the emergence of the Bernie Sanders campaign less than four years after Zuccotti was taken over and the subsequent growth of the strongest US socialist movement since the 1960s, or maybe even the 1930s."); Taylor & Smucker, *supra* note 527 ("Occupy inaugurated a new era of defiant protest and was an early expression of the populist wave that continues to surge across the American political scene. It helped revitalize a moribund left, ushering in a social-movement renaissance across a range of issues, including racial justice, climate change, debt cancellation, and organized labor. And Occupy offered a crash course in collective action for a generation of organizers now in ascendance.").

[625] LEVITIN, *supra* note 527, 69.

culture of protest that put the fight for economic and social *justice* at the forefront of a generation."[626]

III. Justice-Based Meanings of Freedom and Democracy

Part II looked at a variety of influential and iconic cultural texts in U.S. history—manifestos, speeches, and a legal decision that have helped to inspire or advance significant, if selective, egalitarian movements. Our goal was to examine whether, in practice and usage, the authors of those texts implicitly or explicitly employed the injustice framework outlined in Part I. In analyzing those texts, we found considerable support for the model, as each text highlighted particular inequalities or group-based harms, to demonstrate the role of powerful interests or actors in producing those inequalities or harms, and to challenge the legitimacy of that power or those outcomes. Each text, that is, helped activate a sense of injustice in the reader by identifying a particular site of (group) inequality, brought about by power, without legitimacy.

One goal of our textual analysis has been to provide more content to the cultural and legal value of "justice" by examining how the term has been used in sources that enjoy significant cultural currency—even if there is a debate about the actual motives behind, and consequences of, those documents and the movements they advanced. That analysis suggests that it is possible to understand the meaning of a norm or value like justice—to have a feel for or intuition about its meaning—without being able to articulate an analytically precise definition. Such a shared understanding can be valuable, and even indispensable, for governing social and institutional relationships and interactions. We have argued further that, by attending to the factors that lead us to perceive injustice, and to the emotions and behavioral tendencies that those perceptions elicit, it is possible to gain a deeper and more useful understanding of justice as a workable norm to which our political and legal systems should be accountable.

This Part loosely examines the meaning of two other political and legal values: "freedom" (or liberty) and "democracy." These norms travel in the same circles of policy discourse with justice, and they enjoy the same sort of cultural significance. Like justice, though, the terms can also be characterized and dismissed as vacuous—mere fillers deployed to produce preferred conclusions and to evade more rigorous analysis.

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[626] *Id.* at 4 (emphasis added); *see also* Barack Obama, President, Remarks on Economic Mobility (Dec. 4, 2013) (available at *Speeches & Remarks*, Obama White House Archives.gov, https://obamawhitehouse.archives.gov/the-press-office/2013/12/04/remarks-president-economic-mobility [https://perma.cc/824R-SDD5]) ("I believe [economic inequality] is the defining challenge of our time."); *Remarks by President Barack Obama on Economic Mobility*; Pope Francis (@Pontifex), Twitter (Apr. 28, 2014, 4:28 AM), https://twitter.com/Pontifex/status/460697074585980928 [https://perma.cc/5AJK-RP2A] ("Inequality is the root of social evil.").

This Part tentatively sketches an argument that the seemingly empty values of "freedom" and "democracy" have considerable content—at least when construed through the culturally significant political-legal texts that we have sampled. We suggest further that their meanings are interconnected, interdependent, and overlapping with each other in a sort of mutually reinforcing network. From that perspective, the concepts of freedom and democracy appear to comprise a family of values whose relationship is made visible through the injustice framework and whose bonds are built upon a shared commitment to advancing justice.[627]

A. "Freedom" as Liberation from Injustice

The values of "freedom" or "liberty" and "justice" are commonly linked and have often been paired as the primary goals of the U.S. legal and political system. That has generally been true across the political spectrum. To pick two near contemporaneous examples, one year after Martin Luther King's 1963 invocation of "an oasis of freedom and justice,"[628] Barry Goldwater proclaimed: "Extremism in the defense of liberty is no vice. And moderation in the pursuit of justice is no virtue."[629] That connection seems especially evident in the sort of grand political discourse typified by the iconic documents reviewed above.[630] This section suggests that the values of freedom and justice are not, at least when used in those contexts, two sepa-

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[627] This approach contrasts with a common tendency to see liberty and equality, or liberty and democracy, or liberty and social justice, as inherently in tension. *See e.g.* RAWLS, *supra* note 57, at 54 (describing principles of "basic liberties" and "social and economic inequalities," and explaining that the "first principle [is] prior to the second."); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 163 (1974) (claiming that "no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives"); 1 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 3 (1982) (arguing that the "type of democracy" which "now prevails in the Western world" has coincided with "a moving away from that ideal of individual liberty."); 2 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 68 (1982) (denying that "it is possible to preserve a market order while imposing upon it (in the name of social justice or any other pretext) some pattern of remuneration based on the assessment of the performance or the needs of different individuals or groups by an authority possessing the power to enforce it."); MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE 148 (1980) ("A society that puts equality—in the sense of equality of outcome—ahead of freedom will end up with neither equality nor freedom."). For an ambitious effort to weave a unified conception of justice that integrates liberty and democracy, see RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 364–99 (2011). Here we attempt nothing nearly so grand, nor to address these arguments. Our goal is merely to propose that our review of the documents in this piece suggests such an integration of these values. We leave for future work or to others the task of building upon that possible relationship of meanings.

[628] King, *supra* note 2.

[629] Speech accepting nomination for president at Republican National Convention, San Francisco, Cal., 16 July 1964.

[630] *See also supra* text accompanying note 205 (quoting Douglass speaking of "the great principles of justice and freedom").

Although the philosophical debates regarding the meaning and relationship of those concepts have been epic, we refer here to the more common usages of the sort exemplified in the documents reviewed above.

rate, independent values; rather, the values have much in common and their meanings are bound together and overlapping.

Like "justice," the desire for freedom resounds throughout these documents.[631] Similarly the meaning and desire for political freedom tends to be amplified by perceptions of its actual or threatened absence, which—like perceived injustice—often triggers a strong behavioral yearning to obtain or defend it.[632] Social psychologists call that urge "reactance."[633] The invocation of "freedom" in political discourse commonly refers to liberation from injustice—the satisfaction and psychological relief of operating within a just regime and outside the grip of oppressive forces. Freedom, to put it another way, is the actual and perceived agency resulting from autonomy that is unconstrained by illegitimate power. The values of liberty and justice, so understood, are complements: promoting one involves promoting the other.

1. "Declaration of Independence"

That sense of freedom is consistent with how the term is used in all of the culturally significant texts reviewed above. It is there, for instance, in Jefferson's articulation of the "self-evident" truth "that all men are created *equal*, that they are endowed . . . with certain unalienable Rights" including "*Liberty*."[634] According to Jefferson, the frustrated yearning for freedom renders intolerable the "[o]ppressions" of a royal "[t]yrant . . . unfit to be the ruler of a *free* people."[635] That frustration is what justified the declaration that "these United Colonies are, and of Right ought to be *Free and Independent* States."[636] In short, the right to liberty and the desire for freedom can be achieved for "all men" only in a just system. The justice of the system must be fully realized for the right to liberty to be fully achieved.

2. "Declaration of Rights and Sentiments"

Elizabeth Cady Stanton's Declaration of Rights and Sentiments, which mimicked and mirrored Jefferson's frame, employed a parallel conception of

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[631] *See* Alex Gourevitch & Corey Robin, *Freedom Now*, 52 POLITY 384, 385 (2020) ("Freedom is a global principle that reaches back to the birth of the left during the French Revolution and runs through various emancipation struggles since. It also has a special resonance in the United States. According to historian Eric Foner, freedom is 'the central term in our political vocabulary.'" (quoting ERIC FONER, THE STORY OF AMERICAN FREEDOM xiii (1998))).

[632] *See supra* Part I(A). As Gourevitch and Robin argue: "The promise of freedom begins with the fact of unfreedom." Gourevitch & Robin, *supra* note 631, at 386.

[633] *See generally* Jack W. Brehm, *Responses to Loss of Freedom: A Theory of Psychological Reactance*, *in* CONTEMPORARY TOPICS IN SOCIAL PSYCHOLOGY 53, 55 (J. Thibaut et al. eds., 1976) ("[P]sychological reactance consists of pressure directed toward re-establishing whatever freedom has been threatened or eliminated."); SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL 1–10 (1981) (providing an overview of reactance theory and its relationship to freedom and control).

[634] THE DECLARATION OF INDEPENDENCE, *supra* note 99, at para. 2 (emphasis added).

[635] *Id.* at para. 30 (emphasis added).

[636] *Id.* at para. 32 (emphasis added).

freedom, emphasizing the "self-evident" truth "that all men and women are created *equal*; that they are endowed . . . with certain inalienable rights," including "*liberty*."[637] Her focus, of course, was on the liberation of women from the "*repeated injuries and usurpations* on the part of man toward woman, having in direct object the establishment of an *absolute tyranny* over her," and on the role of the law in "giving him power to deprive her of her *liberty*."[638] In the same way, for "all men and women" to enjoy the liberty to which they are entitled, the system itself must achieve justice. Put differently, the fight for freedom entails a fight for justice.

3. "What to the Slave is the Fourth of July"

Frederick Douglass, too, echoed the same general conception, emphasizing the urgent need for liberation from the oppression or injustice of slavery. Those overlapping meanings were discernible, for instance, when Douglass highlighted this hypocrisy: "You boast of your love of *liberty*, . . . while the whole political *power* of the nation . . . is solemnly pledged *to support and perpetuate* the *enslavement* of three millions of your countrymen."[639] The connection was evident, too, when Douglass, alluding to Jefferson, asked rhetorically, "Would you have me argue that man is entitled to *liberty*? that he is the rightful owner of his own body? You have already declared it. . . ."[640] In the following apophasis, when indignantly specifying some of the economic, psychological, social, and bodily impact of systemic oppression, Douglass again illustrates the interconnected meaning of freedom and justice:

> What, am I to argue that it is wrong to make men brutes, to rob them of their *liberty*, to work them without wages, to keep them ignorant of their relations to their fellow men, to beat them with sticks, to flay their flesh with the lash, to load their limbs with irons, to hunt them with dogs, to sell them at auction, to sunder their families, to knock out their teeth, to burn their flesh, to starve them into obedience and submission to their masters? Must I argue that a system thus marked with blood, and stained with pollution, is wrong? No! I will not. I have better employments for my time and strength . . . .[641]

Douglass, in the name of not arguing the point, brilliantly humanizes the suffering and oppression that activates injustice dissonance in his audience. As we have argued, the case for "liberty" and "justice" is most powerfully rooted, not in logical argument, but in a felt sense. The wrongness or injustice of a system that steals people's *liberty* is, in that way, self-evident.

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[637] Stanton, *supra* note 165, (emphasis added).
[638] *Id.* (emphasis added).
[639] Douglass, *supra* note 198 (emphasis added).
[640] *Id.* (emphasis added).
[641] *Id.* (emphasis added).

4. New Deal Speeches

That notion of freedom as liberation from unjust oppression was especially clear in Roosevelt's 1936 acceptance speech. The President began by highlighting the significance of the moment, "a time of great moment to the future of the Nation," a time "to reaffirm the faith of our fathers, to pledge ourselves to restore to the people a wider *freedom*."[642] To clarify, he defined the "very word *freedom*," which "in itself and of necessity, suggests *freedom from some restraining power*."[643] Roosevelt described how the same yearning for "*freedom from the tyranny of* . . . the eighteenth century royalists who held special privileges from the crown" was, in 1936, being felt in response to the unjust power of "economic royalists."[644] In both instances, it was incumbent upon the oppressed to fight "for democracy, not tyranny" and "for *freedom*, not *subjection*."[645] It was because of that urgent need to fight against unjust oppression and for freedom that, according to Roosevelt, that "generation of Americans ha[d] a rendezvous with destiny."[646]

5. "Letter from a Birmingham Jail"

Chief Justice Warren did not employ the term "freedom" in *Brown v. Board*. Nor did the General Assembly in The Declaration of the Occupation of New York City. So, we turn last to Martin Luther King's Birmingham letter, where the pattern was conspicuous. In fact, King uses "freedom" and overcoming "injustice" interchangeably, explaining, for example, that he had traveled to Birmingham "because *injustice* [wa]s there" and because he was "compelled to carry the gospel of *freedom* beyond his home town" and to help "reach the goal of *freedom* in Birmingham and all over the nation."[647] Similarly, he treated the quest for freedom as ultimately a quest for justice, writing, for instance, that "[t]he yearning for *freedom* eventually manifests itself, and that is what has happened to the American Negro" who is therefore "moving with a sense of great urgency toward the promised land of racial *justice*."[648]

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[642] Roosevelt, *supra* note 288, at 99–100 (emphasis added).
[643] *Id.* at 100 (emphasis added).
[644] *See id.* at 100–01 (emphasis added); *see also id.* ("It was natural and perhaps human that the privileged princes of these new economic dynasties, thirsting for power, reached out for control over government itself. They created a new despotism and wrapped it in the robes of legal sanction. . . . as a result the average man once more confronts the problem that faced the Minute Man").
[645] *Id.* at 102 (emphasis added).
[646] *Id.* at 103 (emphasis added).
[647] King, *supra* note 437 (emphasis added).
[648] *Id.* (emphasis added).

B. "Democracy" as the Primary Means to Freedom and Justice

A third value that is prominent throughout many of these texts is "democracy." We argue below that this value primarily concerns the processes that will produce the desirable or legitimate outputs of the political system. Again, however, we posit that the concepts of justice, freedom, and democracy, as defined through their use in culturally significant political discourse (including the texts we have analyzed), are all tightly intertwined.

In practice, the notion of "democracy" is generally used to refer to a process by which those subject to the mandates of a system have meaningful power to influence the system and its outcomes. Insofar as the people possess the sovereignty to govern themselves, they enjoy some ability to control or consent to the system's outcomes or, at least, the governing personnel and processes that produce those outcomes. By responding to the will of the people, democracy helps ensure that a political system advances justice, offsetting power disparities that would otherwise shape the political process and outcomes.[649] By relying on the consent of the governed, democracy helps legitimize political outcomes (including inequalities and suffering). Put differently, democracy, through the power-sharing, legitimizing effects of consent, is valued as a means to the ends of freedom and justice. To say that the democratic process is not itself the ultimate end, but a means to that end, implies that when a government fails to achieve the ultimate ends of freedom and justice, that government itself has failed and should be reformed. That, at least, is how the notions of democracy and consent were employed in the iconic texts reviewed above.[650]

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[649] W.E.B. DuBois idealized "democracy" as a method of addressing the "injustice" of "the white man . . . ruling black Africa for the white man's gain." W. E. Burghardt Du Bois, The African Roots of War, ATLANTIC (May 1915), https://www.theatlantic.com/magazine/archive/1915/05/the-african-roots-of-war/528897/ [https://perma.cc/ST9M-LGWZ]. He wrote:

> We shall not drive war from this world until we treat them as free and equal citizens in a world-democracy of all races and nations. Impossible? Democracy is a method of doing the impossible. It is the only method yet discovered of making the education and development of all men a matter of all men's desperate desire. It is putting firearms in the hands of a child with the object of compelling the child's neighbors to teach him, not only the real and legitimate uses of a dangerous tool but the uses of himself in all things. . . . [F]or a world just emerging from the rough chains of an almost universal poverty, and faced by the temptation of luxury and indulgence through the enslaving of defenseless men, there is but one adequate method of salvation—the giving of democratic weapons of self-defense to the defenseless.

Id.

[650] To be sure, there may be different versions of that argument. For example, in some instances, critics emphasize the limits of even a well-functioning democracy or of consent to produce justice or legitimate unjust outcomes. In other instances, critics challenge how effectively a nominally democratic or consent-determined process operates—whether, in fact, it is shaped by the will of the people whose voice it claims to manifest. Such limits or problems with democratic and consent-based processes relative to justice pose an inherent tension around which a great deal of legal, judicial, and policy discourse has been framed.

1. "Declaration of Independence"

Although the Declaration of Independence does not refer explicitly to "democracy," it does provide the ideological foundations of democracy, as we have defined the term. Jefferson's Preamble, for instance, centers the relationship of liberty, justice, and consent:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That *to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed*,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . .[651]

Jefferson suggests that the purpose of governments is to "to secure" the rights of "all men," and that the power afforded to those governments charged with advancing those ends is legitimated through "the consent of the governed."[652] Democracy, then, is the means to liberty (among other rights), which involves the elimination of injustice. Those ends ultimately take priority over the ostensible process of that government. As Jefferson put it, when "any Form of Government" that becomes "destructive of these ends," "the people" are rightfully entitled to "abolish" that government.[653] Claims of consent are not enough, for the system that does not yield liberty (and therefore justice) may be overthrown.

2. "Declaration of Rights and Sentiments"

In her Declaration of Rights and Sentiments, Elizabeth Cady Stanton, again, reproduces Jefferson's frame and similarly calls for democracy as a means to sharing power and legitimating its exercise to yield just outcomes.[654] Stanton's strategy, recall, is not to challenge Jefferson's values or consent-based processes, but to expand the circle of popular sovereignty to include "all men and women."[655]

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[651] THE DECLARATION OF INDEPENDENCE, *supra* note 99, para. 2 (emphasis added).
[652] *Id.*
[653] *Id.*
[654] *See* Stanton, *supra* note 165. The pertinent language is as follows:

> We hold these truths to be self-evident; that all men and women 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; that *to secure these rights governments are instituted, deriving their just powers from the consent of the governed.* Whenever any form of Government becomes destructive of these ends, it is the right of those who suffer from it to refuse allegiance to it, and to insist upon the institution of a new government . . . .

Id. (emphasis added).
[655] *Id.*

3. "What to the Slave is the Fourth of July?"

Frederick Douglass, too, appealed to the role of "democracy" and "consent" as legitimating means to freedom and justice, underscoring the failures of the U.S. political and legal system to live up to its procedural commitments and its values notwithstanding its hypocritical attacks on other systems. At one point, for instance, he pointed out how "[y]ou hurl your anathemas at the crowned headed tyrants of Russia and Austria, and pride yourselves on your *Democratic* institutions, while you yourselves consent to be the mere tools and body-guards of the tyrants of Virginia and Carolina."[656] Whatever the promise of democracy as a means to justice, Douglass argued, it is not enough to dress institutions under the cloak of "democracy" if in fact its processes serve as a tool for power, a foundation of racial enslavement, and a means to injustice.

4. New Deal Speeches

Similar themes and definitions can be found in Franklin D. Roosevelt's New Deal speeches. Roosevelt, too, understood "democracy" not simply as an empty label or formal process, but as a mechanism for equalizing power and a means to freedom and justice.[657] In his 1936 Re-Nomination Speech, he articulated the deep meaning and purposes symbolized by "the Flag and the Constitution,"[658] declaring: "they stand for *democracy*, not tyranny; for *freedom*, not subjection; and against a dictatorship by mob rule and the overprivileged alike."[659] Roosevelt's statement not only invokes the values of freedom, democracy, and justice but also suggests meanings that align with each other (and ours). "Democracy," Roosevelt suggests, stands for the freedom- and justice-enhancing sharing of power[660] among the people as a means to

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[656] Douglass, *supra* note 198.

[657] In a 1940 radio address, for instance, Roosevelt emphasized the need to prioritize and protect democracy as a means of equalizing power and advancing freedom. In his words:

> Democracy is not just a word, to be shouted at political rallies and then put back into the dictionary after election day.
>
> The service of democracy must be something much more than mere lip service.
>
> It is a living thing—a human thing—compounded of brains and muscles and heart and soul. The service of democracy is the birthright of every citizen, the white and the colored; the Protestant, the Catholic, the Jew; the sons and daughters of every country in the world, who make up the people of this land. Democracy is every man and woman who loves freedom and serves the cause of freedom.

Franklin D. Roosevelt, U.S. President, *Radio Campaign Address* (Hyde Park, N.Y., Nov. 4, 1940), https://www.presidency.ucsb.edu/documents/radio-campaign-address-hyde-park-new-york [https://perma.cc/YWG8-UQNQ].

[658] Roosevelt, *supra* note 288, at 102 (emphasis added).

[659] *Id.*

[660] Roosevelt expanded upon that theme in other speeches. In his second inaugural address, for instance, he discussed the relationship of power to democracy:

> Nearly all of us recognize that as intricacies of human relationships increase, so *power* to govern them also must increase *power* to stop evil; *power* to do good. The essential *democracy* of our nation and the safety of our people depend not upon the absence of

less suffering[661] and greater equality of opportunity[662] and of material outcomes[663]—as contrasted with the concentration of power and production of

> *power*, but upon lodging it with those whom the people can change or continue at stated intervals through an honest and free system of elections. The Constitution of 1787 did not make our *democracy* impotent. In fact, in these last four years, we have made the exercise of all *power* more *democratic*; for we have begun to bring private autocratic *powers* into their proper subordination to the public's government. The legend that they were invincible above and beyond the processes of a *democracy*—has been shattered. They have been challenged and beaten.

Franklin D. Roosevelt, U.S. President, *Second Inaugural Address* (Washington, D.C., Jan. 20, 1937), *in* KAYE, *supra* note 231, 107, at 108 [hereinafter Roosevelt, *Second Inaugural Address*].

That summer, he repeated those themes by stressing the importance of democracy to protect against concentrated power:

> My anchor is democracy—and more democracy. And, my friends, I am of the firm belief that the nation, by an overwhelming majority supports my opposition to the vesting of supreme power in the hands of any class, numerous but select. . . . Majority rule must be preserved as the safeguard of both liberty and civilization.

Franklin D. Roosevelt, U.S. President, *Address at Roanoke Island, North Carolina* (Aug. 18, 1937), https://www.presidency.ucsb.edu/documents/address-roanoke-island-nc [https://perma.cc/HDL8-3Q63]. The following year, summarizing the "truths about the liberty of a democratic people," he insisted

> that the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That, in its essence, is Fascism—ownership of government by an individual, by a group, or by any other controlling private power.

Franklin D. Roosevelt, U.S. President, *Message to Congress on Curbing Monopolies* (Apr. 29, 1938) [hereinafter Roosevelt, *Curbing Monopolies*], https://www.presidency.ucsb.edu/documents/message-congress-curbing-monopolies [https://perma.cc/HB3X-44H3].

[661] This, too, was a theme that he reiterated in other remarks. In a 1938 radio address, for instance, he observed: "Democracy in order to live must become a positive force in the daily lives of its people. It must make men and women whose devotion it seeks feel that it really cares for the security of every individual" and that it can "maintain liberty against social oppression." Franklin D. Roosevelt, U.S. President, *Radio Address in Favor of Voting for Liberals* (Hyde Park, N.Y., Nov. 4, 1938), *in* KAYE, *supra* note 231, at 126. Later he stressed the importance of "American democracy" moving "forward as a living force, seeking day and night by peaceful means to better the lot of our citizens." *Id.* at 127.

[662] He sometimes used the word "democracy" to stand for equality across groups. In his 1936 re-nomination speech, for instance, he stressed that the government "has certain inescapable obligations to its citizens, among which are . . . the establishment of a democracy of opportunity." *See* Roosevelt, *supra* note 288, at 102; *see also* Franklin D. Roosevelt, U.S. President, Campaign Address (Cleveland, Ohio, Nov. 2, 1940), in KAYE, *supra* note 231, 133, at 136 ("Democracy, to be dynamic, must provide for its citizens opportunity as well as freedom.").

[663] Roosevelt expanded upon that theme in his 1937 Second Inaugural Address in which he explained that "[t]he test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little." Roosevelt, *Second Inaugural Address*, *supra* note 660, at 107. Roosevelt then assured his audience that, through a well-functioning democracy a more equal, and generous, distribution was possible:

> I see a great nation, upon a great continent, blessed with a great wealth of natural resources. . . . I see a United States which can demonstrate that, under democratic methods of government, national wealth can be translated into a spreading volume of human comforts hitherto unknown, and the lowest standard of living can be raised far above the level of mere subsistence.

inequality through "tyranny."[664] "Freedom" refers to liberation from the burden of "subjection." And "dictatorship" by either "mob rule" or "the overprivileged," implicitly invokes our notion of injustice (and stands as a contrast to a power-sharing, justice-yielding democracy).[665]

Later Roosevelt spoke of "government" as more than just "a mechanical implement."[666] The system is to be judged ultimately not by its processes, but by the justice of its outcomes.[667] In the speech's soaring peroration, he described the "ancient hope" and long "fight" "for freedom" and called upon his audience to recognize "we are waging a great and successful war" for freedom, "a war against want and destitution and economic demoralization," and "a war for the survival of democracy."[668] For Roosevelt, the goals of government and the "form[s] of government"—freedom, justice, and democracy—were meant to operate harmoniously together, all part of the same system.[669]

Id. at 109. Roosevelt suggested, however, that the unequal distribution at the time indicated that the democratic system was dysfunctional, posing "the challenge to our democracy: In this nation I see tens of millions of its citizens—a substantial part of its whole population—who at this very moment are denied the greater part of what the very lowest standards of today call the necessities of life." *Id.* at 110; *see also* Franklin D. Roosevelt, U.S. President, *Address on Constitution Day* (Washington, D.C., Sept. 17, 1937), *in* KAYE, *supra* note 231, at 113 ("To hold to that course our constitutional democratic form of government must meet the insistence of the great mass of our people that economic and social security and the standard of American living be raised from what they are to levels which the people know our resources justify. Only by succeeding in that can we ensure against internal doubt as to the worthwhileness of our democracy."); Roosevelt, Curbing Monopolies, *supra* note 660 (explaining the "truth" "about the liberty of a democratic people" "that the liberty of a democracy is not safe if its business system does not provide employment and produce and distribute goods in such a way as to sustain an acceptable standard of living.").

[664] *See also* Roosevelt, *Constitution Day Address*, *supra* note 661, at 113 ("We have those who really fear the majority rule of democracy, who want old forms of economic and social control to remain in a few hands. They say in their hearts: "If constitutional democracy continues to threaten our control why should we be against a plutocratic dictatorship if that would perpetuate our control?").

[665] *See also id.* (making a similar distinction between "those . . . who want Utopia overnight and are not sure that some vague form of proletarian dictatorship is not the quickest road to it" and "those who really fear the majority rule of democracy, who want old forms of economic and social control to remain in a few hands" and are tempted by "a plutocratic dictatorship" for the sake of perpetuating their "control" and adding that the former "represents a reckless resolve to seize power" and the latter "represents cold-blooded resolve to hold power.").

[666] Roosevelt, *supra* note 288, at 103.

[667] *Id.*; *see also id.* (arguing that government should have "the vibrant personal character that is the very embodiment of human charity," by which he meant a "love" "that does not merely share the wealth of the giver, but in true sympathy and wisdom helps men to help themselves"); *cf.* Roosevelt, *Voting for Liberals Speech*, *supra* note 661, at 127 ("[D]emocracy will save itself with the average man and woman by proving itself worth saving. . . . Democracy should concern itself also with things as they ought to be."); Franklin D. Roosevelt, U.S. President, *Radio Address to Democratic National Convention* (July 19, 1940), https://www.presidency.ucsb.edu/documents/radio-address-the-democratic-national-convention-accepting-the-nomination [https://perma.cc/26PK-AV8W] ("Democracy can thrive only when it enlists the devotion of . . . the common people. Democracy can hold that devotion only when it adequately respects their dignity by so ordering society as to assure to the masses of men and women reasonable security and hope for themselves and for their children.").

[668] Roosevelt, *supra* note 288, at 103–04.

[669] Support for the conclusion that Roosevelt understood democracy not as a primary end in itself, but as a means to the end of other values like freedom and justice can be found in the previous footnotes in this section. Elsewhere Roosevelt made the related argument that the

5. Brown v. Board of Education

Chief Justice Earl Warren, in *Brown v. Board*, also appealed to democracy as a central value—and as the primary means to the system's ends. The case, recall, involved the question: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"[670] The justices' answer, of course, is why this case is the crown jewel of Supreme Court jurisprudence.[671]

The reasoning behind the result distilled to two considerations. First, Warren argued that the claim of equality was, even if factually correct,[672] concealing an injustice. That is, the norm of "separate but equal" elided a variety of relatively subtle (at least to the Court), but no less important, inequalities and harms produced by racial segregation and separation.[673] Second, Warren stressed the critical role that education plays, not just in the individual lives of those who receive it, but also for democratic society as a whole. As Warren emphasized, "education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."[674]

By "democracy" Warren was referring in part to the functioning of the voting process, noting the role of education on "good citizenship."[675] But he was also referring to the connection between democracy and the end of justice—the just allocation of opportunities for flourishing and for participating in the system's rewards. Detailing the significance of education on "our democratic society," he wrote:

> Today [education] is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

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struggle of democracy and a government that pushes toward justice and freedom was a constant and intergenerational struggle. *See, e.g.*, Franklin D. Roosevelt, U.S. President, *Address at Los Angeles, California* (Oct. 1, 1935), https://www.presidency.ucsb.edu/documents/address-los-angeles-california [https://perma.cc/Y5GT-R2AX] ("Democracy is not a static thing. It is an everlasting march. When our children grow up, they will still have problems to overcome. It is for us, however, manfully to set ourselves to the task of preparation for them, so that to some degree the difficulties they must overcome may weigh upon them less heavily.").

[670] *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)

[671] *See supra* note 326 and accompanying text.

[672] *Id.* It was not; beginning with *Plessy*, and since, the claim of "separate but equal" was an injustice-erasing legal fiction.

[673] *See id.* at 494; *see also supra* text accompanying notes 372–384 (summarizing Warren's attention to psychological harms).

[674] *Id.* at 493.

[675] *Id.*

> Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[676]

Such are the goals of "our democratic society." "Citizenship" is not enough. The vote is not enough. The equality of "physical facilities and other 'tangible' factors" across groups is not enough. No, the commitment to a "democratic society" includes a commitment to eliminating or preventing injustice—in this case, the illegitimate use of state power and resources to provide vital knowledge, experiences, and services unequally in ways that reinforce historical, social, and economic injustices.[677]

6. "Letter from a Birmingham Jail"

Martin Luther King also explicitly referred to democracy as a means to the ends of freedom and justice. For instance, he declared that "[n]ow is the time to make real the promise of democracy," indicating that democracy was not an end in itself but was intended to produce an end—its promise.[678] As reviewed in previous sections, that promise was justice and freedom. Elsewhere, he pointed to the non-violent protesters who were helping to "bring[ ] our nation back to" the "great wells of democracy." [679] By interrupting the racial power dynamics of Jim Crow, by highlighting the illegitimate inequalities of segregation, and by demanding to be liberated from the burden of those injustices, the protesters were advancing the ends of democracy.

7. "Declaration of the Occupation of New York City"

Finally, the Declaration of Occupation also emphasized democracy—indeed, the very production and ratification of the text was constructed by "democratic, consensus-based decision-making assemblies."[680] The commitment to direct democracy was intense. The pamphlet in which the Declaration of Occupation was originally disseminated offered the following description of that participatory democratic process:

> Those who are tasked with collecting and transcribing the Occupy narrative have a difficult job on their hands. The radically inclusive nature of Occupy's directly-democratic, horizontal, organizing model champions each individual voice accumulated into the collective. This process allows any individual to block a manifesto, a text, a proposal or a call to action if they take exception to

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[676] *Id.*

[677] *See supra* text accompanying notes 360–362 (describing how Warren also prioritized justice over precedent, which would usually be controlling).

[678] King, *supra* note 2.

[679] King, *Letter from Birmingham Jail, supra* note 437.

[680] *The Declaration of the Occupation of New York City, supra* note 604.

> the language of the document. Hence, the process is slow, deliberate, and at times, very frustrating.[681]

The commitment to direct democracy reflected a deeper commitment to justice. The body of the Declaration indicated, for instance, that the "injustice" that "brought us together" was the product of unjust corporate power and the use of that power to "run our governments."[682] Ours is therefore not a democracy, but an unjust "plutocracy," for "no true democracy is attainable when the process is determined by economic power."[683] To achieve justice, therefore, a government must respond to the people not to corporations, for "a democratic government derives its just power from the people, not from corporations."[684]

IV. Recent Movements for Justice

Since Occupy, the United States and world have witnessed several major social movements.[685] The movements, as policy analyst Sara Burke explains, all reflect a growing thirst for justice. In many ways, they are continuations and expansions of Occupy Wall in the sense that they openly and expressly call out our system as unjust—as the product of powerful actors and interests producing inequalities and harm without legitimacy. In Burke's words, what the movements all "have in common is . . . [the] sense of betrayal by the elites. It's causing a lot of anger. Today's generation . . . want[s] justice."[686]

This section loosely confirms that claim by reviewing key texts linked with several of those movements through the lens of the injustice framework. It illustrates how the movements are premised on and motivated by a shared sense of injustice and how they employ notions of freedom and democracy that align with the injustice framework.

A. #BLM–"State of the Black Union"[687]

2014 witnessed numerous police killings of Black men and women, including Michael Brown, Tamir Rice, Ezell Ford, Laquan McDonald, Yvette Smith, and Eric Garner, killings that led to extensive protests around the

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[681] *Id.* For more on the consensus model employed by Occupy, see David Graeber, The Democracy Project 210–32 (2013).

[682] *Id.* at 1.

[683] *Id.*

[684] *Id.*

[685] *See supra* note 624.

[686] Levitin, *supra* note 527, at 287 (quoting Burke). Burke continued: "I think we're going to see an era where we're forced to focus on why people are upset, and the failure, again and again, to come up with a just economic system." *Id.*

[687] *Black Lives Matter Declaration—State of the Black Union,* Declaration Project (2015) [hereinafter *State of the Black Union*], http://declarationproject.org/?p=1654 [https://perma.cc/77BX-9RMM].

country.[688] The injustice of those killings—the role of illegitimate power producing harm—was more or less self-evident while the inadequate official responses and lack of accountability only heightened the perception of injustice. In early 2015, the #BlackLivesMatter movement (BLM), frustrated with those responses, including Barack Obama's State of the Union address in January of 2015—which "only grazed over the topic of racial justice"[689]—published the State of the Black Union.

The text described the galvanizing effects of the unjust killing of Michael Brown in 2014 and the widespread "resistance" it "spark[ed]"

> against state violence that spread across the nation. For over 160 days we have been marching, shutting down streets, stopping trains and occupying police stations in pursuit of *justice*. We have stood united in demanding a new system of policing and a vision for Black lives, lived fully and with dignity.[690]

The killing of Michael Brown and the events of 2014 cast a brighter light on the endless "train of [racial] abuses and usurpations"[691] and the need for continued protest to make those oppressions visible to a nation in denial.[692] In the words of BLM's State of the Black Union, "2014 was a year that saw profound *injustice* . . . . Homicides at the hands of police sparked massive protests, meaning that America could no longer ignore bitter truths of the Black experience."[693] "This country," the text continued, "must abandon the lie that the deep psychological wounds of slavery, racism and structural oppression are figments of the Black imagination. The time to address these wounds is now."[694]

As if following Martin Luther King, Jr.'s playbook of utilizing "direct action . . . to create . . . a crisis and foster . . . a tension" and to force "a community . . . to confront the issue,"[695] BLM's State of the Black Union called for "continu[ing] . . . the task of making America uncomfortable about institutional racism" as part of the project of demanding a new "vision for Black lives" and "build[ing] a system that is designed for Blackness to thrive."[696]

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[688] *See* Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police,* L.A. TIMES (July 12, 2016), https://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html#2014 [https://perma.cc/3PWW-CTSZ].

[689] *State of the Black Union Released on Black Lives Matter*, EBONY (Jan. 21, 2015), https://www.ebony.com/news/state-of-the-black-union-released-on-black-lives-matter-999/ [https://perma.cc/Z5DQ-QMRP].

[690] *Id.* (emphasis added).

[691] *See supra* text accompanying notes 116–132.

[692] *State of the Black Union*, *supra* note 689.

[693] *Id.* (emphasis added).

[694] *Id.*

[695] *See supra* text accompanying notes 492–496; *see also supra* Part I(D) (describing the theory of change suggested by the injustice framework).

[696] *State of the Black Union*, *supra* note 689.

Also consistent with the injustice framework, the document draws on the concept of "freedom" to stand for liberation from injustice.[697] For instance, the authors stressed that, although "[g]ains have been made," "we who believe in *freedom* know we cannot rest until *justice* is won."[698] Employing a phrase reminiscent of King's description of the "inescapable network of mutuality" such that "[i]njustice anywhere is a threat to justice everywhere,"[699] the State of the Black Union committed to leaving no oppressed group behind in the pursuit of freedom: "None of us are free until all of us are free. Our collective efforts have exposed the ugly American traditions of patriarchy, classism, racism, and militarism. These combined have bred a violent culture rife with transphobia, and other forms of illogical hatred."[700] That use of the term freedom—as freedom from various intersecting forms of illegitimate oppression—implied freedom from injustice.

Finally, the text's authors conceptualize a vision of "democracy" that aligns with the injustice model,[701] by challenging the validity of "democracy" constructed upon fundamental injustices: "This *corrupt democracy* was built on Indigenous genocide and chattel slavery. And continues to thrive on the brutal *exploitation* of people of color."[702]

B. Obergefell vs. Hodges

The most culturally significant legal writing relating to LGBTQ justice was arguably the 2015 majority opinion in *Obergefell v. Hodges*.[703] The

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[697] *See supra* Part II(A).

[698] *Id.* (emphasis added).

[699] *See supra* note 452 and accompanying text.

[700] *State of the Black Union*, *supra* note 689. The text of the State of the Black Union highlighted several less publicized 2014 incidents at the interface of a brutalizing police force and black lives and at the intersection of vulnerable identities:

> Gabriella Naverez, a queer Black woman was killed at 22 years old, unarmed. 37-year-old Tanisha Anderson's family dialed 911 for medical assistance. Instead, Cleveland police officers took her life. Anyia Parker, a Black trans woman was gunned down in East Hollywood. This brutal attack was caught on camera, yet her murder, like so many murders of Black trans women, have gone unanswered.

Id.

[701] *See supra* Part II(B).

[702] *State of the Black Union*, *supra* note 689 (emphasis added).

[703] Obergefell v. Hodges, 576 U.S. 644 (2015); *see* Jeremiah A. Ho, *Once We're Done Honeymooning: Obergefell v. Hodges, Incrementalism, and Advances for Sexual Orientation Anti-Discrimination,* 104 KY. L.J. 207 (2016) (calling the *Obergefell* decision "[u]ndoubtedly . . . the watershed civil rights decision of our time"); Rachel Johnson Hammersmith, *Equality Trumps Religion: Why Indiana's Religious Freedom Restoration Act Is Inherently Promoting Discrimination Based on Sexual Orientation*, 48 U. TOL. L. REV. 109, 123 (2016) ("Perhaps the most significant case championing gay rights is *Obergefell v. Hodges*. In 2015, the Supreme Court legalized gay marriage" (footnotes omitted)); Ruben J. Garcia, *Workplace Law Cases in the Tenth Term of the Roberts Court: Between the Usual Ideological Lines,* 19 EMP. RTS. & EMP. POL'Y J. 125, 138 (2015) (calling the case "a watershed moment for the gay rights movement" and explaining that the "decision was rightfully seen as one of the more progressive decisions of the Court in recent years"). For readers interested in reviewing another replication of the Declaration of Independence and with its descriptions of injustice and appeals to justice, see Kyle Luebke, *An*

landmark decision held that same-sex couples are guaranteed the fundamental right to marry under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. We will not parse the legal-doctrinal elements of the opinion here; instead, our focus is on the crux of Kennedy's reasoning, which turned upon his recognition of a previously overlooked "injustice" or "unjustified inequality."

An essential portion in Justice Kennedy's opinion, beyond the holding itself,[704] was his observation that, although "[h]istory and tradition guide and discipline this inquiry" into fundamental rights, they "do not set its outer boundaries." Here, Kennedy explicitly recognized what had once been an unperceived injustice—an inequality maintained by the power of law without legitimacy: "The nature of *injustice* is that we may not always see it in our own times."[705]

Kennedy later drew out the elements of the injustice framework when discussing that such an injustice might be rendered visible. He explained that, "in interpreting the Equal Protection Clause," such revelations are indeed possible: "the Court has recognized that new insights and societal understandings can reveal *unjustified inequality* within our most fundamental institutions that once passed unnoticed and unchallenged."[706] In language echoing Warren's *Brown v. Board* description of the "detrimental effect" of segregation—particularly "when it has the sanction of the law" and "denot[es] . . . inferiority"[707]—Kennedy wrote:

> The limitation of marriage to opposite-sex couples may long have seemed natural and *just*, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.[708]

LGBT Declaration of Independence, LGBTQ NATION (July 4, 2012), https://tjchase.wordpress.com/2012/07/04/an-lgbt-declaration-of-independence-lgbtq-nation/ [https://perma.cc/82ND-7F4K].

[704] Of course, another key sentence in the opinion was Justice Kennedy's conclusion that—regarding whether same-sex couples are given "equal dignity in the eyes of the law"—"[t]he Constitution grants them that right." *Obergefell,* 576 U.S. at 681.

[705] *Id.* at 664 (emphasis added). One scholar calls that language among "the most profound words uttered by the Court in recent years." Elvia Rosales Arriola, *Queer, Undocumented, and Sitting in an Immigration Detention Center: A Post-Obergefell Reflection*, 84 UMKC L. REV. 617, 635 (2016).

[706] *Id.* at 673 (emphasis added); *cf.* Nan D. Hunter, *The Undetermined Legacy of 'Obergefell v. Hodges*,' NATION (June 29, 2015), http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/ [https://perma.cc/EL9X-PC26] (explaining that "[t]he single most important theme in the opinion is that the Constitution provides not merely space but also support for expanding the perimeters of human rights. Obergefell recommits the Court to an understanding that 'the nature of injustice is that we may not always see it in our own times' and that the framers 'entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.'").

[707] *See supra* text accompanying notes 357–359.

[708] *Obergefell*, 576 U.S. at 671.

Once recognized, Kennedy argued, injustice must not stand—even if that means abandoning given legal rules.[709] Consistent with the injustice framework, he called for the vindication of "freedom" as liberation from such injustices:

> The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of *freedom* in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy *liberty* as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to *liberty* must be addressed.[710]

Kennedy thus assumed that a particular kind of relationship exists between discovered "injustice" and the preservation of freedom or liberty. Addressing such an "injustice," for Kennedy, effects an extension "of freedom . . . as we learn its meaning."[711] Similarly, a claim based upon newly discovered injustice is at its core "a claim to liberty." Put differently, when the law imposes inequality upon a group without legitimacy, that is a source of injustice, and "freedom" requires liberation from that injustice.[712]

Kennedy also challenged the assumption that the process of "democracy"—even if generally reliable as a means of achieving justice and freedom—was sufficient in this situation to alleviate the injustice perpetuated by democratically enacted laws or produce the freedom promised by the democratic system of governance. He explained:

> Of course, the Constitution contemplates that *democracy* is the *appropriate process* for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette*, noting the "right of citizens to debate so they can learn and decide and then, through the political *process*, act in concert to try to shape the course of their own times." Indeed, it is most often *through democracy* that *liberty* is preserved and protected in our lives. But as *Schuette* also said, "[t]he *freedom* secured by the Constitution consists, in one of its essential dimensions, of the right of

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[709] The premise that we may not always "see" an injustice and that our vision may become clearer over time is key. *See* Elvia Rosales Arriola, *Queer, Undocumented, and Sitting in an Immigration Detention Center: A Post-Obergefell Reflection*, 84 UMKC L. Rev. 617, 635–36 (2016) (arguing that Justice "Kennedy's opinion articulated a vision of a society arriving at an understanding, through a gradual political and legal process" and adding that when, as a consequence, a law is perceived to "*unjustly* strike[ ] at the basic core of a person's right to human dignity, that law must be held as 'repugnant to the Constitution' and void" (footnote omitted)). Such a notion of an evolving appreciation for injustice was integral to (if sometimes only implicit in) the arguments made in all of the iconic texts reviewed above and the movements with which they are attached.

[710] *Obergefell*, 576 U.S. at 664 (emphasis added).

[711] *See supra* text accompanying note 710.

[712] *See supra* Parts I(B) and III(A).

> the individual not to be injured by the unlawful exercise of governmental power." Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.[713]

Again, we see an expression of the relationship between justice, freedom, and democracy that we have posited.[714] For Kennedy, "democracy" is "most often" the means to the end of justice or liberty, but when that process fails for some reason, the Court is obliged to respond. More specifically, when "governmental power" is "exercise[d]" to violate "the right of the individual not to be injured" in a way that is "unlawful," ""the Constitution requires redress by the courts."[715]

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[713] *Obergefell*, 576 U.S. at 677 (citing Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291 (2014)) (citations omitted) (emphasis added).

[714] *See supra* Part II.

[715] Kennedy was immediately lambasted by conservative critics for this turn to justice and willingness to supplant his judicial opinion for that of the democratic legislative process. In his scathing dissent, for instance, Justice Scalia argued that the process of democracy takes priority over a sense of justice regarding the outcomes of that process. In his words, "[t]he law can recognize as marriage whatever sexual attachments and living arrangements it wishes," but

> [t]oday's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

Obergefell, 576 U.S. at 713 (Scalia, J., dissenting). Chief Justice Roberts dissented, in part, on similar grounds

> Those who founded our country would not recognize the majority's conception of the judicial role. They, after all, risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. . . . As a plurality of this Court explained just last year, "It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."
>
> The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people.
>
> . . . .
>
> . . . . By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. . . . Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Obergefell, 576 U.S. at 709–11 (citing Schuette v. BAMN, 572 U.S. 291, 311–12 (2014)).

In sum, consistent with the injustice framework, Justice Kennedy's *Obergerfell* opinion appears to be motivated by his desire to address a perceived injustice and he employs the related notions of freedom and democracy in the process.[716]

It is noteworthy that Scalia made no mention of "injustice" or "justice" as a norm of relevance in this debate, but instead focused on the priority of "democracy" as the pertinent end in itself. Instead he claims agnosticism and, therefore neutrality, on the question of the justice of the outcome. Neither did he suggest any exception or limit to the efficacy of the democratic process in theory or in practice. Scalia also invoked "liberty" but without attention to the injustice of the oppressor over the oppressed. Instead, he focused on the unexamined claim that the homophobic prohibitions reflected the more important liberty of the right for the people—as won by the founders—to "govern themselves."

Similarly, Roberts appealed to founders for the same proposition. And, like Scalia, he implicitly framed the majority as operating unjustly: using their power to impose their will over the people's will illegitimately. Roberts acknowledged the possible tension between "the justice of the[ ] cause" or "proponents of same-sex marriage" and the laws that had been produced by the "democratic" system prohibiting same-sex marriage. He was undisturbed by that tension, however, because of his assurance that the legislature was on the verge of responding—and that this result would only make matters worse.

Some critics on the left have made similar observations about the court's role in a democracy. *See e.g.* Bowie, *supra* note 414, *passim*; Doerfler & Moyn, *supra* note 414, at 1720 ("It was hard to miss that conservative justices—in a series of high-profile dissents in areas like abortion rights and same-sex marriage—were allowed to associate themselves with the normative value of democratic choice, at least when they did not have enough votes on the bench.") (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part and dissenting in part) and Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting); *see also* Nikolas Bowie, Assistant Professor of L., Harvard L. Sch., Written Statement to the Presidential Commission on the Supreme Court of the United States 5–12 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf [https://perma.cc/R2KF-4G9J]; Samuel Moyn, Henry R. Luce Professor of Juris. & Professor of Hist., Yale L. Sch., Written Statement to the Presidential Commission on the Supreme Court of the United States 5–12 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf [https://perma.cc/2L5W-9QM4].

[716] The 5–4 majority opinion in *Obergefell* has been criticized from the left for producing too little justice and from the right for producing too much. From the left, for example, some point out that the decision (and the litigation strategy that led to it) reproduced dominant heteronormative hierarchies while advantaging only a subset of the LGBTQ—White and affluent, mostly "gays and lesbians"—and leaving others behind. For summaries of that criticism, s*ee* Jeremiah A. Ho, *Queer Sacrifice in Masterpiece Cakeshop*, 31 YALE J.L. & FEMINISM 249, 260–61 (2020) and Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 U.C. DAVIS L. REV. 1027, 1050–51 (2019).

From the right, some argue that the focus on "injustice" opens the door for unbridled judicial discretion in ways that contravene the Court's appropriate role. Chief Justice Roberts is among those critics. In his dissent, he wrote:

> The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of *injustice*." As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?"

Obergefell, 576 U.S. at 687 (Roberts, C.J., dissenting) (emphasis added) (internal citations omitted).

C. #Metoo

The #Metoo movement was born without a representative declaration, manifesto, speech, or legal opinion. The movement was founded by activist Tarana Burke in 2006,[717] and exploded into global prominence in 2017 with a 151-character tweet: "If all the women who have been sexually harassed or assaulted wrote 'Me too' as a status, we might give people a sense of the magnitude of the problem."[718] The tweet would trigger a social media explosion: the hashtag was "used 12 million times in the first 24 hours" as "millions of survivors across the globe" shared on social media "their own experiences of sexual harassment and violence."[719]

Like most social movements, a primary goal of #Metoo was to render visible an injustice that had been culturally unseen. It did so in part by expanding dominant schemas for sexual violence and rape[720] and highlighting the structural and institutional forms of power that facilitated and condoned ubiquitous suffering and reinforced longstanding inequalities that both reflected and reproduced that violence. Analyzing those interactions, scholars Bianca Fileborn and Rachel Loney-Howes have argued that the "flood" of social media responses and the resultant press coverage and public reaction[721] made "all too apparent" "the 'magnitude of the problem' of sexual violence in women's (and others') lives."[722] "The flood of participation in #MeToo," they continue, "reaffirmed publicly just how widespread sexual assault and harassment actually are; that most victim-survivors know the offender; and, significantly, that these experiences are routine and normalized, in short, confirming many feminist arguments about 'rape culture.'"[723] Legal scholar Jeannie Suk Gersen puts it this way: "A basic concept of #MeToo is the

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Still most agree that the decision did turn on judicial conceptions of injustice and did expand, if slightly and problematically, the Court's scope of justice.

[717] Abby Ohlheiser, *The Woman Behind 'Me Too' Knew the Power of the Phrase when She Created it—10 years ago*, WASH. POST (Oct. 19, 2017), https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/ [https://perma.cc/CSY5-YUGJ].

[718] Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 17, 2017, 4:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en [https://perma.cc/RT47-SAJ8].

[719] Bianca Fileborn & Rachel Loney-Howes, *Introduction: Mapping the Emergence of #MeToo*, *in* #METOO AND THE POLITICS OF SOCIAL CHANGE 1, 2–3 (Bianca Fileborn & Rachel Loney-Howes, eds., 2019); *see also id.* ("Some disclosed incidents and their aftermath in intimate detail; others simply marked themselves as survivors.").

[720] *Cf.* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes,* 74 S. CAL. L. REV. 747, 782 (2001) (describing the role and evolution of rape prototypes and their biasing effects on law).

[721] *See* Fileborn & Loney-Howes, *supra* note 719, at 4 ("The movement generated substantive and sustained global media coverage and public debate . . . . Months of intensive media reporting culminated in the women who spoke out . . . being named TIME's people of the year in 2017." (citation omitted)).

[722] *Id.* at 3; *see also* CARLY GIESELER, THE VOICES OF #METOO 2 (2019) 2 (Rowman & Littlefield eds., 2019) ("In using the #MeToo hashtag and Twitter as a medium of instantaneous response and public sharing, Milano sought to illustrate the scope of sexual violence and misconduct. Twitter became a megaphone for public outcry as women and men, public and private citizens alike answered the call. (footnote omitted)).

[723] Fileborn & Loney-Howes, *supra* note 719, at 2.

power of numbers across time: the difference between a single victim, whose lone account might not be believed, and the choruses of 'me too' that make each individual's account that much more believable."[724]

Speaking out en masse did more than raise awareness of the ubiquity of sexual violence; it also helped shift the norms regarding whose experiences and what experiences could be openly voiced in public.[725] Put differently, it undermined the legitimacy of what "he said" and boosted the legitimacy of what "she said," thus challenging "the ways in which public knowledge about sexual violence is constrained, contained and reinforced by political, legal, psychological, and cultural actors and institutions."[726] "[B]y individually declaring and collectively validating their experiences online, survivors were effectively challenging the institutional actors and undermining the power structures that typically function as gatekeepers for imparting recognition."[727]

In sum, the significance of #Metoo as a social movement was in uncloaking an injustice by expanding conception of illegitimate sexual violence,

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[724] Jeannie Suk Gersen, *Bill Cosby's Crimes and the Impact of #MeToo on the American Legal System*, NEW YORKER (Apr. 27, 2018), https://www.newyorker.com/news/news-desk/bill-cosbys-crimes-and-the-impact-of-metoo-on-the-american-legal-system [https://perma.cc/59Y5-DVY8].

[725] *See* Fileborn & Loney-Howes, *supra* note 719, at 29 (discussing the disruptive role of speaking out: "Its disruptive potential lies in its ability to both challenge the silencing of women's experiences of violence and redraw the boundaries that determine what is publicly permissible to say about those experiences").

[726] *Id.*; *see also id.* at 4 (noting that "#MeToo drove the development of more tangible activist movements and support for those experiencing sexual harassment and violence, particularly in the workplace").

Activist Noreen Farrell describes the "viral moment" of #Metoo as the origins of "an ongoing movement featuring demonstrations of power like never before in America." Noreen Farrell, *What does #MeToo have to do with Democracy in 2020? Everything*. EQUAL RTS. ADVOCS. (Oct. 17. 2019), https://www.equalrights.org/viewpoints/what-does-metoo-have-to-do-with-democracy-in-2020-everything/ [https://perma.cc/V8WR-S6WW]. By her account, the "collective story sharing" led to a variety of notable shifts in power, including "the toppling of highly visible bad actors . . . , the rise of Time's Up, and the growing influence of consumer pressure to exact financial consequences on the companies protecting them . . . ." According to Farrell:

> On a grassroots level, we've seen the rising power of women workers coordinating across industries: Farmworkers joining arms with Hollywood actresses. Entrepreneurs sharing headlines with janitors. Gold miners, tech executives, legislative staffers, and food service workers coming together to expose the critical connections between sexual harassment, pay discrimination, and other economic justice issues that harm women across classes, races, sexualities, and abilities.
>
> The conversation has moved far beyond whether sexual harassment happens to how do we make it stop?
>
> A #MeToo policy revolution has responded. Over the past year, growing #MeToo community pressure has resulted in an 80% increase in the number of sexual harassment bills introduced in states across the country, from 83 in 2018 to 150 this year. Many of those will become law in 2020 (including three in California), transforming workplaces nationwide.

Id.

[727] Fileborn & Loney-Howes, *supra* note 719, at 2 (citing Rachel E. Loney-Howes, *Shifting the Rape Script: "Coming Out" Online as a Rape Victim*, 39 FRONTIERS 26–52 (2018)).

making plain "the magnitude" of sexual violence, exposing the power dynamics that produced that violence, and disrupting that power.[728]

D. "How Dare You!"

One of the most significant moments in the last several years in the movement for climate justice was the short speech delivered by climate activist Greta Thunberg at the United Nations' Climate Action Summit in September of 2019.[729] Thunberg's message (in that speech and others[730]) was so influential that *Time Magazine* identified her as the 2019 Person of the Year.[731] As the magazine's Editor-in-Chief explained:

> It became one of the most unlikely and surely one of the swiftest ascents to global influence in history. Over the course of little more than a year, a 16-year-old from Stockholm went from a solitary protest on the cobblestones outside her country's Parlia-

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[728] Like most social movements, one effect of #Metoo was also to conceal and reinscribe other embedded injustices. Fileborn and Loney-Howes, for instance, describe how the social media movement, in several ways, reflected the longer history of feminism in which the voices and experiences of "white, middle-class women" were centered and "the distinctive experiences of women of color and other marginalized groups" were neglected. Fileborn & Loney-Howes, *supra* note 719, at 6. They highlighted, for instance, the fact that hashtag #Metoo was itself co-opted from the work Tarana Burke, who had worked for "decades with African American survivors in disadvantaged communities" and how, "it was only when 'me too' was uttered by a privileged white woman that her efforts were acknowledged." *Id.* In many ways, the sort of injustices that #Metoo helped expose, it simultaneously reproduced. As Fileborn and Loney-Howes put it, "#MeToo demonstrates that being seen and heard by a broader public remains determined by the parameters of socially approved scripts governing what can be said and who can say it—namely speech acts articulated by wealthy, white women with significant social capital." *Id.* at 30.

[729] Philosopher Peter Singer called Thunberg's intervention "the most powerful four-minute speech I have ever heard." Peter Singer, *Greta Thunberg's Moment*, PROJECT SYNDICATE (Oct. 7, 2019), https://www.project-syndicate.org/commentary/thunberg-speech-civil-disobedience-climate-truth-by-peter-inger-2019-10 [https://perma.cc/K6U8-AFDC]; *see also* Daniel Kraemer, *Greta Thunberg: Who Is the Climate Campaigner and What Are Her Aims?*, BBC NEWS (Jul. 28, 2021), https://www.bbc.com/news/world-europe-49918719 [https://perma.cc/LFC9-43QA] (describing the address as "probably her most famous speech").

[730] For a list and summary of Thunberg's major speeches, see *Speeches of Greta Thunberg*, WIKIPEDIA, https://en.wikipedia.org/wiki/Speeches_of_Greta_Thunberg#cite_note-29 [https://perma.cc/G5E4-HVYB].

[731] Edward Felenshal, *The Choice: TIME 2019 Person of the Year,* TIME MAG., https://time.com/person-of-the-year-2019-greta-thunberg-choice/ [https://perma.cc/X62M-TVXB].

There was widespread surprise and disappointment when she was not named the 2019 winner of the Nobel Peace Prize. *See e.g.* Alister Doyle, *Greta Thunberg Misses Nobel Prize Amid Green vs Peace Dispute,* CLIMATE HOME NEWS (Oct. 11, 2019, 10:02 AM*),* https://www.climatechangenews.com/2019/10/11/greta-thunberg-misses-nobel-amid-green-vs-peace-dispute/ [https://perma.cc/SEM4-GN83]; Karla Adam, *Why didn't Greta Thunberg win the Nobel Peace Prize?*, WASH. POST. (Oct. 11, 2019), https://www.washingtonpost.com/world/europe/why-didnt-greta-thunberg-win-the-nobel-peace-prize/2019/10/11/e84e6efc-eba4-11e9-9306-47cb0324fd44_story.html [https://perma.cc/RK5A-ETVS]; Rachel DeSantis, *Ethiopian PM Wins Nobel Peace Prize as Fans of Greta Thunberg React: The Fight Has 'Just Begun,'* PEOPLE MAG. (Oct 11. 2019, 6:15 AM), https://people.com/human-interest/greta-thunberg-2019-nobel-peace-prize/ [https://perma.cc/P5DU-KSWX]; *see also* Kraemer, *supra* note 729 (noting that she has now been nominated three times).

> ment to leading a worldwide youth movement; from a schoolkid conjugating verbs in French class to meeting with the Secretary-General of the United Nations and receiving audiences with Presidents and the Pope; from a solo demonstrator with a hand-painted slogan . . . to inspiring millions of people across more than 150 countries to take to the streets on behalf of the planet we share.[732]

When Thunberg addressed the U.N., she was only sixteen years old. To be sure, Thunberg's moral righteousness and preternatural eloquence were part of her appeal. Her teenager status, though, was also key, for she defined the harms of climate change in intergenerational terms. Thunberg emphasized how hers and the voiceless generations of the future will be forced to bear the catastrophic costs of climate change because of the current generation's irresponsible leaders who downplay clear science to enrich themselves.[733] In other words, the generation currently in power was producing harm to the relatively powerless future generations without legitimacy. She put it this way:

> You have stolen my dreams and my childhood with your empty words. And yet I'm one of the lucky ones. People are suffering. People are dying. Entire ecosystems are collapsing. We are in the beginning of a mass extinction, and all you can talk about is money and fairy tales of eternal economic growth. How dare you!
>
> For more than 30 years, the science has been crystal clear. How dare you continue to look away and come here saying that you're doing enough, when the politics and solutions needed are still nowhere in sight.
>
> The popular idea of cutting our emissions in half in 10 years only gives us a 50% chance of staying below 1.5 degrees [Celsius], and the risk of setting off irreversible chain reactions beyond human control.
>
> Fifty percent may be acceptable to you. But those numbers do not include tipping points, most feedback loops, additional warming hidden by toxic air pollution or the aspects of equity and climate justice. They also rely on my generation sucking hundreds of billions of tons of your CO2 out of the air with technologies that barely exist.
>
> So a 50% risk is simply not acceptable to us—we who have to live with the consequences.

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[732] *Id.*; *see also id.* ("But this was the year the climate crisis went from behind the curtain to center stage, from ambient political noise to squarely on the world's agenda, and no one did more to make that happen than Thunberg.").

[733] Phil Stubbs, *Greta Thunberg—the Future Speaks*, THE ENVIRONMENT SHOW (Apr. 3, 2020), https://www.environmentshow.com/greta-thunberg-speeches/ [https://perma.cc/3ELJ-53AE] (explaining that "Thunberg's speeches are grounded in the science of climate change. And her persistent message is to remind politicians, business leaders, journalists and others to listen to the science.").

> . . . .
>
> How dare you pretend that this can be solved with just "business as usual" and some technical solutions? With today's emissions levels, that remaining CO2 budget will be entirely gone within less than 8 1/2 years.
>
> There will not be any solutions or plans presented in line with these figures here today, because these numbers are too uncomfortable. And you are still not mature enough to tell it like it is.
>
> You are failing us. But the young people are starting to understand your betrayal. The eyes of all future generations are upon you. And if you choose to fail us, I say: We will never forgive you.[734]

One commentator summarized the effects of Thunberg's message this way: "Such powerful speeches from someone so young has helped the world think more clearly about the world our kids and grandkids will inherit. They have starkly reminded those with the power to make things better in the present to take responsibility for that future."[735] Thunberg's speech, that is, was a call for recognizing and ending an intergenerational injustice.[736]

V. Lessons and Looking Forward: A Foreword

A. The Water of Justice

One goal of this Article has been to explore and illustrate how the injustice framework illuminates the concepts of injustice and justice and how those concepts have been used in culturally significant and historically influential texts in ways that generally comport with our injustice framework. Our analysis suggests that, in several ways, justice is like water. We are immersed and operating in a collection of shared, if unconscious, understandings of justice. Justice, like water, is important to all of us—though its significance is often best perceived and appreciated in its absence.

As reflected in the collection of canonical texts reviewed above, when suffering or inequality are perceived to be produced by power without legitimacy, people experience a catalyzing sense of injustice. Each of the declarations, speeches, and legal opinions reviewed above is associated with a significant justice movement. And each seemed built upon a theory of change that involves highlighting an injustice dissonance by clarifying and

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[734] *Transcript: Greta Thunberg's Speech at the U.N. Climate Action Summit,* NPR (Sep. 23, 2019, 1:58 PM), https://www.npr.org/2019/09/23/763452863/transcript-greta-thunbergs-speech-at-the-u-n-climate-action-summit [https://perma.cc/5UXA-ACNL].

[735] Stubbs, *supra* note 733.

[736] By highlighting how powerful actors had engaged in a long train of abuses to oppress those without representation or remedy, Thunberg offered yet another rendition of Jefferson's injustice frame. *See supra* Part II(A)(2).

responding to imbalances in the relationship between power, inequality, and legitimacy.

Indeed, the efficacy and historical significance of those texts, we believe, is a consequence of how well they delineated that very relationship. Put differently, those documents are culturally and historically celebrated in part because they created a compelling sense of injustice and thereby promoted justice-advancing change. By intensifying injustice dissonance, the texts helped activate and justify the sort of emotional and behavioral reactions needed to propel a movement. They fueled pressure for change by illuminating harms and inequalities, by exposing the power dynamics at their root, and by challenging the sources of legitimacy—such as the authorities, arguments, procedures, or precedents—employed to legitimate the status quo. The lasting legacy of those documents reflects, in part, how successful each was in flipping the justice valence of the practice, custom, or system to which they were directed.

The language and effects of those texts help validate our assertion that there is more meaning to the norm of justice than conventionally supposed. Moreover, they make sense of the ubiquitous use and valorization of the norm in the law and legal system. Justice is the most prominent value associated with our legal system not because it is devoid of meaning but because of its meaning. There appears to have been a consensus, at least since the once-colonial states identified as the United States, that the exercise of power by one group or interest to produce harm to another without legitimacy is unjust and unacceptable. The goal of advancing justice, so understood, has remained paramount, and shared, salient, and sustained perceptions of injustice have been an engine of the nation's most significant (if often selective and short-lived) egalitarian revolutions, revolts, and reforms ever since.[737]

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[737] In many cases, those moments and movements have stood the cultural test of time reasonably well; that is, there continues to be a widely held (though not uncontroversial) sense that the changes that those texts fostered *did* promote justice. By the same token, the historical spans of injustice—when, by today's assessment, powerful interests produced harm and inequality without legitimacy—are generally viewed as eras of national shame periods and practices from which we have progressed. Culturally dominant histories of those eras are often told as if the unjust practices were performed by some unenlightened, otherized "them." We are not they. No, we identify with those who stood up for justice—our cultural heroes as currently understood.

A related dynamic—the possibility that posterity could shun "us"—seems to shape our relationship with the future as well. Indeed, a sensitivity to such intergenerational judgment is part of what activists and orators have appealed to, however problematically, when referencing the being on the "right" or "wrong" sides of history. *See* Jacob T. Levy, *The Idea of a "Wrong Side of History" Will Be Considered Unthinkable 50 Years from Now*, VOX, Apr 3, 2019, https://www.vox.com/2019/3/27/18225578/progress-morality-conservatism-wrong-side-of-history [https://perma.cc/8LG6-7A2U]; David A. Graham, *The Wrong Side of "the Right Side of History,'* ATLANTIC Dec. 21, 2015 https://www.theatlantic.com/politics/archive/2015/12/obama-right-side-of-history/420462/ [https://perma.cc/4BTC-8GY3].

Such appeals can be found in the texts reviewed above, from Thomas Jefferson's submitting facts "to a candid world" out of "a decent respect to the opinions of mankind," *See supra* text accompanying notes 99 and 124, to Greta Thunberg's beginning her message warning "that we'll be watching you." and ending it with this admonishment: "The eyes of all future genera-

B. Foreword

Occupy Wall Street and the movements since appear to be the cause and consequence of shifting public perceptions of injustice. They have, in other words, reflected and amplified the dissonance created by the perceived imbalance among power, inequality, and legitimacy. The resultant justice-oriented zeitgeist appears to have found its way into legal scholarship as well. For example, Westlaw searches suggest that the number of law review articles containing the terms "wealth inequality," "income inequality," "economic inequality," or "racial inequality" rose from 4,977 in the years 2002-2012 to 9,486 in the years 2012-2022.[738] In the same years, the number of articles mentioning "economic injustice," "social injustice," or "racial injustice" rose from 1,958 to 6,016.[739] More legal scholarship seems to have been devoted to the elements and different types of injustice in the decade since Occupy than they had in the decade prior. This symposium and the articles in it illustrate those trends.

1. Veena B. Dubal on Gig Workers

Professor V.B. Dubal's article, "The New Racial Wage Code"[740] applies a historically grounded racial justice lens to analyze the passing of California's Prop 22. The proposition, which passed in 2020, classified many gig workers as independent contractors rather than employees, depriving them of employee benefits. Dubal contrasts the rideshare corporation's claims to racial justice, articulated within a frame of racial liberalism, with gig worker declarations that economic justice is racial justice, especially in the context of an industry dominated by Black and immigrant labor. In doing so, Dubal combines and elaborates on at least two of the claims in the Declaration of Occupation: first that "corporations" "have perpetuated inequality and dis-

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tions are upon you. And if you choose to fail us, I say: We will never forgive you." *See supra* text accompanying note 734.

There is, of course, another intergenerational judgment that may matter, and that is today's dominant conception of yesterday's social movements. There are moments of mass mobilization that may or may not fare well in the judgment of hegemonic histories. From populism to prohibition and from nativism to McCarthyism, the retrospective attitudes toward many historical movements is commonly mixed or worse.

[738] This data is from the following Westlaw searches filtered in their "secondary sources" and "law reviews & journals" collections: "wealth inequality" & DA(aft 12-31-2001 & bef 01-01-2012); "wealth inequality" & DA(aft 12-31-2011 & bef 01-01-2022); "income inequality" & DA(aft 12-31-2001 & bef 01-01-2012); "income inequality" & DA(aft 12-31-2011 & bef 01-01-2022); "economic inequality" & DA(aft 12-31-2001 & bef 01-01-2012); "economic inequality" & DA(aft 12-31-2011 & bef 01-01-2022).

[739] This data is from the following Westlaw searches filtered in their "secondary sources" and "law reviews & journals" collections: "systemic injustice" & DA(aft 12-31-2001 & bef 01-01-2012); "systemic injustice" & DA(aft 12-31-2011 & bef 01-01-2022); "economic injustice" & DA(aft 12-31-2001 & bef 01-01-2012); "economic injustice" & DA(aft 12-31-2011 & bef 01-01-2022); "social injustice" & DA(aft 12-31-2001 & bef 01-01-2012); "social injustice" & DA(aft 12-31-2011 & bef 01-01-2022); "racial injustice" & DA(aft 12-31-2001 & bef 01-01-2012); "racial injustice" & DA(aft 12-31-2011 & bef 01-01-2022).

[740] Dubal, *supra* note 322.

crimination in the workplace based on age, the color of one's skin, sex, gender identity and sexual orientation,"[741] and, second, that"[t]hey have continuously sought to strip employees of the right to negotiate for better pay and safer working conditions."[742]

Dubal elucidates the injustice by making "clear the ways in which a third category of work . . . is constituted by and through racialized inequalities."[743] The article in that way is a direct effort to push back against the subtle power exerted by the rideshare companies, who "leveraged the discursive power of liberalism to make their case, while rendering invisible the racialized economic structures and injustices experienced in the everyday lives of many workers."[744] As well as identifying the power, Dubal also describes the way in which the resulting inequality is legitimated: the ability to draw lines, to focus on acts of racism in particular spheres of life but not in others is enabled by a liberal individualist worldview that fails to recognize the epistemic structures that inconspicuously produce racially unequal outcomes.[745] This liberal individualist worldview gives plausibility to "the freedom narratives" of labor platform companies like Uber and Lyft which have served to suppress mass democratic struggle—not just in the workplace, but also beyond.[746]

By drawing on the historical interrelationships between racial and economic inequalities and law, with a particular focus on facially race-neutral exclusions of Black workers from the New Deal, Dubal reframes the current racialized economic inequalities in a way that might otherwise be obscured for many, though not from the workers whose voices she centers.

2. Shi-Ling Hsu on Climate Change

Professor Shi-Ling Hsu's article, "Carbon Taxes and Economic Inequality,"[747] argues that "[t]he case for a carbon tax for the sake of economic justice is . . . compelling if nonobvious."[748] Engaging topics at the heart of the Occupy Wall Street movement, including climate change, economic inequality, taxes, and justice,[749] Hsu seeks to correct the "misapprehension[s]" that have led many "progressive groups concerned with social and economic justice, in addition to climate change,"[750]—to give carbon taxes at best "tepid support."[751]

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[741] *Id.* at 515.
[742] *Id.* at 542.
[743] *Id.* at 518.
[744] *Id.* at 517.
[745] *Id.* at 549.
[746] *Id.* at 545.
[747] Shi-Ling Hsu, *Carbon Taxes and Economic Inequality*, 15 HARV. L. & POL'Y REV. 551 (2021).
[748] *Id.* at 552.
[749] *See supra* text accompanying notes 604–618.
[750] Hsu, *supra* note 747 at 551.
[751] *Id.*

The article focuses on "economic justice," defined in terms of "economic inequality be[ing] reduced," and, perhaps "poor households . . . in general not be[ing] made worse off,"[752] but is addressed to "justice advocates of all kinds—economic, environmental, and climate."[753]

Hsu's strategy, mirroring many of the texts discussed in this Article, is to uncover the "nonobvious"[754] relationship between a carbon tax and justice. To do so, Hsu canvasses the distributive consequences of a carbon tax, including the effect of a tax on shareholders, the potential spending of carbon tax revenues, the offsetting effect of inflation-indexed government benefits to higher energy prices for recipients of those benefits, and the unequal consequences of climate change itself, and therefore the benefits of its mitigation. Given that "[c]limate change is the most brutal segregator of haves and have-nots,"[755] "carbon taxation is," Hsu concludes, "vital to preserving economic justice."[756] After all "reforming human civilization to achieve economic justice depends upon saving human civilization from climate change. Without that, there is no justice for anyone at all."[757]

3. Lisa Alexander on Housing Insecurity

Professor Lisa Alexander's article, "Tiny Homes: A Big Solution to American Housing Insecurity,"[758] examines a potential solution to the dearth of affordable housing, resonating with the first item in Occupy's list of grievances: "They have taken our houses through an illegal foreclosure process, despite not having the original mortgage."[759] Alexander proposes "tiny homes" as a significant potential source of either permanent or transitional housing, describing successful existing models as well as the legal and regulatory barriers to building more.

Alexander describes how the COVID-19 pandemic has exacerbated the already "growing affordable housing crisis in America,"[760] such that affordable housing is not solely an issue for "low income, and very low income"[761] households, but "[m]oderate-income households, who historically have not suffered cost burdens, also experienced increased cost burdens prior to the pandemic."[762] The situation is closer to Occupy's 99% than to a small poverty-stricken minority.

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[752] *Id.* at 564.
[753] *Id.* at 561.
[754] *Id.* at 552.
[755] *Id.* at 568.
[756] *Id.*
[757] *Id.* at 553.
[758] Lisa Alexander, *Tiny Homes: A Big Solution to American Housing Insecurity*, 15 HARV. L. & POL'Y REV. 471 (2021).
[759] *See supra* text accompanying note 618.
[760] Alexander, *supra* note 476, at 706.
[761] *Id.* at 477.
[762] *Id.* at 476.

Although nowhere employing the language of justice, Alexander addresses the inequalities of power that have enabled NIMBYs[763] to block affordable tiny home developments, and the network of local, state, and federal laws, regulations, and ordinances that disempower municipalities and nonprofits, among others, from engaging in this attractive solution. Alexander draws attention to "the flaws and distributional inequities of the American system of housing provision" along "[r]ace and class" lines,[764] and the fact that often disproportionately White "[t]iny homes villages have not substantially ameliorated these disparities."[765] She also describes the efforts some cities and projects are taking to be "intentional about affirmatively furthering fair housing . . . in order for the tiny homes projects to combat systemic racism and equitably distribute tiny homes opportunities."[766]

Alexander gives a compellingly description of the features of some tiny home communities. Ironically, given that tiny homes are explicitly presented as an alternative to "tent cities,"[767] her descriptions evoke some of the practices and norms of Occupy encampments. Like those encampments, many tiny home communities offer alternative economic arrangements, with a focus on empowering those excluded from participating in conventional economic structures. Some tiny home communities employ a "stewardship model,"[768] allowing residents to contribute "sweat equity"[769] as an alternative to monetary investment. Some prioritize shared access and contribution to communal facilities and resources as well as democratic governance.[770] Alexander suggests that with an appropriate policy framework, tiny homes have the potential to make a significant contribution to justice at a variety of scales and across a range of inequalities.

* * *

Together this insightful collection of articles exemplifies how some legal scholars are, owing in part to the awakening that Occupy Wall Street helped to foster, taking up many of the policy problems highlighted by that movement and developing the very sort of concrete, detailed policy proposals that the movement itself lacked. Anyone who cares about the injustices

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[763] NIMBY is the acronym for "Not In My Back Yard."
[764] Alexander, *supra* note 505, at 735.
[765] *Id.* at 506.
[766] *Id.* at 507.
[767] *Id.* at 473.
[768] *Id.* at 788.
[769] *Id.* at 474.
[770] *Id.* Again resonating with the values of the Occupy movement, Alexander also addresses public-private partnerships and questions of land ownership as both practical and policy concerns. : at the same time as Occupy's declaration of injustices includes many items on the intersection of private and governmental injustice, the selection of Zuccotti park was partly based on it being a "Privately Owned Public Space" and therefore "not subject to city park curfews" and "required to be open twenty-four hours a day." *See* Mattathias Schwartz, *Map: How Occupy Wall Street Chose Zuccotti Park*, NEW YORKER (Nov. 18, 2011), https://www.newyorker.com/news/news-desk/map-how-occupy-wall-street-chose-zuccotti-park [https://perma.cc/WN6Q-KG92].

caused by the gig economy, student debt, climate change, or housing policy will benefit from reading this symposium.

C. Why Not "Injustology"?

This Article is premised upon our belief that justice matters. In our view, the U.S. legal system has long hidden unaccountably behind the unfulfilled promise of "justice." In part for that reason, our system is plagued by intersecting systemic injustices. Put differently, the legal system is itself unjust—a tool and source of power that produces inequalities and harm without legitimacy. The time has come either to take justice seriously or to make clear to the public that the law is a fraud.[771]

As noted above, two of the most influential jurists in history—Judge Richard Posner and Justice Oliver Wendall Holmes, Jr.—each abandoned justice for lack of a clear definition.[772] Holmes and Posner were really speaking for most lawyers, judges, and legal scholars who tend to pay no mind to justice beyond occasional platitudes. If anything, as Bill Quigley has lamented, "justice is a counter-cultural value in our legal profession."[773]

The requirement that justice be non-tautologically defined in order to have meaning and to serve as a useful normative goal has effectively been a conversation stopper, an excuse for disregarding justice. Through such misdirection, justice deniers have, consciously or not, obscured a fundamental feature of experience and its significance to our laws and our system as a whole. They are confusing the unseen for unreal, like fish myopically scoffing at the notion of water while floating toward arid perils.

As both Holmes's and Posner's legal-theoretical and jurisprudential legacies make clear, the law is not an island unto itself, and neither are its formal boundaries so impermeable as to exclude the development of new and improved understanding of law or norms for governing legal decisions.

By changing the frame and attending to the feelings of injustice, we have argued, it is possible to disarm the critique that justice lacks content. It is possible to occupy justice with meaning. Beyond providing a framework for understanding justice (as well as freedom and democracy), we have also argued that justice and injustice matter. That should not be a difficult case to make, especially among the personnel of a system ostensibly devoted to justice. And yet, again, very few lawyers consider the topic of much interest.

As central as justice might appear to be in our entire legal and political system, there has been no field devoted to studying how people experience

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[771] We do not offer this latter option rhetorically. Absent a genuine commitment to justice, it would be highly appropriate for the legal system to shed the unearned legitimacy it derives from association with that term. Such a project would implicate every aspect of the legal system, including law schools, bar associations, and courts, all of which gladly accept the prestige and rewards that flow from the legal system's association with—and even claimed monopoly over—justice. *See supra* Part I(B).

[772] *See supra* text accompanying notes 10–11.

[773] William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. FOR SOC. JUST. 7, 10 (2007).

injustice, what the goal of justice means in practice, what are the causal roots of injustice, and how might the legal system be reformed or remade better to achieve its nominal goal of justice.[774]

Assuming the law's justice rhetoric is not solely designed to deceive, it is puzzling that deeper questions of justice and injustice have, in practice, been so irrelevant and so easily marginalized. Why has so little attention been given to the study of injustice, the normative value that the law claims as its paramount concern? Why has "injustology," to give it a name, not been the most important field of study within law and legal theory?

Consider, by way of contrast, the sorts of topics to which scholars do devote themselves. According to *Wikipedia*, there are now thousands of "ologies."[775] There are more than 100 "ologies" that begin with the letter "a" alone. They include abiology (the study of inanimate things), acanthochronology (the study of cactus spines grown in time ordered sequence), accentology (the study of accentuation in language), acyerology (the study of incorrect use of language), agnoiology (the study of things of which humans are by nature ignorant), agnotology (the study of culturally induced ignorance or doubt), alethiology (the study of the nature of truth), anarcheology (the study of how people throughout history have progressed and thrived with limited or no government), anatripsology (the study of friction as a remedy in medicine), aphnology (the study of wealth), and arkeology (the study of the story of Noah's Ark), many others that are similarly esoteric, and a dozen or so that are part of common parlance. Wikipedia's compendium, however, includes none involving "justice."

If, as we've argued, the injustice framework provides valuable insight into the meaning of justice (and, perhaps also, freedom and democracy), there is still an immense amount to learn about those concepts. What is power, how does it operate, how is it understood? Which are the inequalities and harms that we attend to and which do we overlook or look away from and why? What are the mechanisms of perceived legitimacy? What should be the measure of real or normative legitimacy? How are our institutions and structures—both physical and psychological—constructed to conceal power

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[774] *See* WEST, *supra* note 13, at 56–92; ROBIN L. WEST, NORMATIVE JURISPRUDENCE (2011).

At least since the early days of legal realism, thoughtful legal scholars have understood that factors and intuitions operating outside and beneath express legal reasoning drive legal outcomes and that some of those are related to jurists' sense of justice. A common response to that realization has been—especially since the 1970s—to eschew justice as an explicit norm and to embrace other decision standards that purport to be objective including law and economics and textualism. *See supra* text accompanying notes 10–11. Justice Holmes's and Judge Posner's remarks reflect both the understanding and the response. Their prescription of disregarding justice—expressly or otherwise—has been the norm. As we have argued, perceptions of justice are often in play even when cloaked behind claims of neutrality and legal-theoretic abstractions. In our view, those injustice intuitions should not be concealed and ignored; rather, they should be brought into the open and rigorously examined along the dimensions of power, inequality, and legitimacy.

[775] *List of Words Ending in* Ology, WIKIPEDIA https://en.wikipedia.org/wiki/List_of_words_ending_in_ology [https://perma.cc/PA75-XDXN].

and inequality or to provide a false sense of legitimacy? How might perceptions of power, inequality, and legitimacy be biased, motivated, and manipulated? What are the psychological dynamics shaping processes of self-deception and rationalization? What are the social and economic dynamics shaping cultural norms and baselines on all of these sorts of questions? Why do we tend to perceive and respond only to certain types of injustice? How might we design institutions and structures in ways that help us detect, discern, and respond to less visible and more systemic injustices?

That, of course, is only a small sample of potential injustological inquiry. Our point is simply that the search for answers to those questions, and many more like them, should be a central priority of any person, institution, social group, or nation that genuinely seeks to act in accordance with its own purported commitment to justice.

Conclusion

The pursuit of justice should be the legal system's primary—perhaps even its sole—purpose. Given that goal, those most responsible for creating, interpreting, and applying the law should not be permitted to evade that responsibility behind the cover of mystifying doctrine or inaccessible theory. Nor should they get away with dismissing the norm on the ground that it lacks definition. Those in the legal profession, including legal educators, have a special obligation—a fiduciary or near-sacred duty—to occupy justice with meaning. Until our system's purported commitment to justice is paramount in practice, the unbroken cycles of injustice will continue—in which, again and again, through evolving means, the powerful will oppress the vulnerable—perhaps leading to anger-fueled violence and destruction or nominal reforms that leave the roots of injustice intact.

If justice truly lacks meaning, or if justice cannot be used as a normative metric for our legal system, then we should strip the word off of the facades of courthouses and publicly renounce it as our shared purpose. After all, if justice is meaningless, how can the law advance it?

Whether one finds our injustice framework useful or not, justice must not be ignored. No, we cannot "be satisfied until justice rolls down like water."[776] And, if justice continues to run dry, and "[i]If we do not now dare everything," we can expect "the fire next time."[777]

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[776] *See supra* text accompanying note 2 (quoting Martin Luther King, Jr.).
[777] *See supra* text accompanying note 3 (quoting James Baldwin).

Tiny Homes: A Big Solution to American Housing Insecurity

*Lisa T. Alexander**

INTRODUCTION

"There's no place like home," said Dorothy.[1] Yet, millions of people in the United States may face eviction, foreclosure, or homelessness in 2021 and beyond.[2] America is on the brink of an unprecedented housing crisis in the wake of Covid-19.[3] Prior to the Covid-19 pandemic, an increasing number of Americans were facing housing insecurity, defined as the limited or uncertain *availability*, *access*, or the *inability to acquire,* [or retain], stable, safe, adequate, affordable housing and neighborhoods.[4] The economic fallout from the Covid-19 pandemic has only exacerbated American housing

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[1] THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

[2] Yulia Panfil, *There's a Looming Eviction Crisis, and We Have No Idea How Bad It Will Be*, SLATE (Sept. 28, 2020, 5:45 AM), https://slate.com/business/2020/09/eviction-crisis-data-coronavirus.html [https://perma.cc/AD27-MRAS].

[3] Abby Vesoulis, *Millions of Tenants Behind on Rent, Small Landlords Struggling, Eviction Moratoriums Expiring Soon: Inside the Next Housing Crisis*, TIME MAG. (Feb. 18, 2021, 5:29 AM), https://time.com/5940505/housing-crisis-2021/ [https://perma.cc/MUZ9-JNK8].

[4] *See* Robynn Cox et al., *Measuring Population Estimates of Housing Insecurity in the United States: A Comprehensive Approach* 1 (CESR Working Paper Series, Working Paper No. 2017-012, 2017), https://cesr.usc.edu/documents/WP_2017_012.pdf [https://perma.cc/K6VR-ZYQC] (defining housing insecurity) (emphasis added); *see also* JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., STATE OF THE NATION'S HOUSING 2020: KEY FACTS 1–3, https://www.jchs.harvard.edu/sites/default/files/interactive-item/files/Harvard_JCHS_State_of_the_Nations_Housing_2020_Key_Facts.pdf [https://perma.cc/6GQ6-BBCC] (explaining that thirty percent of American households were cost burdened in 2019).

insecurity.[5] The federal government, and various states and localities, have taken actions to avert a housing crisis in the wake of Covid-19.[6] While these measures undeniably help mitigate widespread eviction and foreclosure crises, they do not fully address the more fundamental American housing challenge—an inadequate supply of affordable housing at all income levels, a long-standing problem that Covid-19 has only intensified.[7] Even with the rental assistance, mortgage forbearance, and eviction moratoria provided by governments, thus far, many Americans are still "falling through the cracks" and legal loopholes.[8] The U.S. simply needs a greater supply of habitable, affordable, and sustainable housing that advances residents' human flourishing—defined as housing that affords "a life of dignity, self-respect, and satisfaction of basic material [and social] needs."[9]

This Article argues that tiny homes—homes that are less than 400 square feet[10]—are an understudied and potentially big solution to the problem of housing insecurity, particularly during times of crisis, such as the Covid-19 pandemic.[11] "The tiny house movement is an architectural and social movement that advocates living simply in small homes."[12] It first emerged in the early 2000s, but gained increasing popularity in the United States with the advent of the television shows, "Tiny House Nation in 2014, and Tiny House Hunters."[13] While these shows profiled market-rate tiny

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[5] JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., STATE OF THE NATION'S HOUSING 2020 1 (2020), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2020_Report.pdf [https://perma.cc/9MYD-GSDF] ("The economic fallout from the Covid-19 pandemic has amplified the rental affordability crisis.").

[6] *See infra* Part II.

[7] JOINT CTR. FOR HOUSING STUDIES OF HARVARD UNIVERSITY, *supra* note 5, at 123.

[8] Vanessa Yurkevich, *Evictions, Unemployment and Hunger: The American Economy Joe Biden Inherits*, CNN BUS. (Jan. 26, 2021, 11:22 AM) https://www.cnn.com/2021/01/26/economy/evictions-unemployment-hunger-biden/index.html [https://perma.cc/UYV7-77DT] (explaining that even with Biden extending the eviction moratorium landlords are still using legal loopholes to evict tenants).

[9] GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING 5 (2018).

[10] While the term "tiny homes" connotes many types of smaller homes and shelters, the 2018 International Residential Code, Appendix Q, a model code, defines a tiny home as "[a] dwelling that is 400 square feet ($37m^2$) or less in floor area excluding *lofts*." INTERNATIONAL RESIDENTIAL CODE, APP. Q. §102.1 (Int'l Code Council 2018). This Article will use the 2018 IRC definition of tiny homes and will, primarily, analyze tiny homes on foundations, rather than tiny homes on wheels, as well as tiny homes that are part of a village or in a communal setting with common rules.

[11] This article mainly focuses on tiny homes that are between eighty to four hundred square feet on foundations, although there are many other types of small homes that are characterized in popular culture as tiny homes, such as recreational vehicles (RVs) on wheels, manufactured homes (MNs), or mobile homes, boats, house boats, converted barges, tugboats, "liveabords," sheds, or tree houses. *See* JENIFER LEVINI, ESQ., BUILDING, OCCUPYING & SELLING TINY HOMES LEGALLY 20–25 (2019).

[12] *See Tiny-House Movement*, WIKIPEDIA, https://en.wikipedia.org/wiki/Tiny-house_movement [https://perma.cc/H4WH-Z5K7]; *see also* Ryan Mitchell, *What Is The Tiny House Movement?*, TINY LIFE (Aug. 8, 2009), https://thetinylife.com/what-is-the-tiny-house-movement/ [https://perma.cc/K3MF-F829].

[13] *See* WIKIPEDIA, *supra* note 12.

homes, some homeless people working with housing advocates began to transition from tent cities to tiny homes villages for homeless people.[14]

Now, increasing numbers of localities and nonprofits work in public and private partnerships to develop tiny homes villages as emergency housing or affordable housing in addition to housing for homeless people.[15] Tiny homes villages, if designed properly, can be an affordable and efficient way to add to the housing supply, providing residents with a community in which to advance their human flourishing as well as obtain shelter.[16] The tiny homes villages this Article analyzes often consist of more than one tiny home, including some villages that can accommodate up to 350 tiny homes, with plans for even more to come.[17] Each tiny home serves one to two people; and some villages can accommodate families.[18] The villages provide either temporary or permanent housing for unhoused people.[19]

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[14] *See* ANDREW HEBEN, TENT CITY URBANISM: FROM SELF-ORGANIZED CAMPS TO TINY HOUSE VILLAGES 47-48 (2014). *See generally* Lisa T. Alexander, *Community in Property: Lessons from Tiny Homes Villages*, 104 MINN. L. REV. 385, 394 (2019).

[15] For example, the Cottages on Vaughan will be the first of its kind tiny house community in Clarkston, Georgia, providing eight permanent tiny homes on foundations ranging from 250–492 square feet each on an approximately 750 square foot lot centered around a common green. The owners will purchase and own the home and the lot on which it sits and pay a modest homeowners association fee of one hundred dollars per month. The community in which the tiny homes are situated will have sustainable features such as common green space and consolidated parking, electric vehicle charging stations, proximity to the Path trail leading to Atlanta, Decatur, and Stone Mountain, Georgia, solar packages, permaculture, and edible landscaping, among other features. The Cottages on Vaughn is a project of the MicroLife Institute, a non-profit that educates and promotes micro living in Georgia. It is an example of the growing ecosystem of tiny homes projects developing in the greater Atlanta, GA area. *See, e.g.*, J .D. Capelouto, *Georgia's First 'Tiny Home Neighborhood' Coming to Metro Atlanta*, ATLANTA J.-CONST. (May 12, 2019), https://www.ajc.com/news/local/georgia-first-tiny-home-neighborhood-coming-metro-atlanta/wislGqCKElOGayqngUG81H/ [perma.cc/P9MN-CZZL]; Microlife Institute, The Cottages on Vaughn, MICROLIFE INSITUTE: PROJECTS & PROGRAMS, https://www.microlifeinstitute.org/clarkston [https://perma.cc/U6FX-PM8M]; Brian Douglas, *Atlanta's Tiny House Movement: A Work In Progress*, BRIAN M. DOUGLAS & ASSOCIATES, LLC (Jan. 24, 2020), atlantagaestateplanning.com/atlantas-tiny-house-movement-a-work-in-progress/ [https://perma.cc/32H8-UZ3Y]. *See generally* Alexander, *supra* note 14.

[16] *See* Alexander, *supra* note 14 at 427.

[17] David Leffler, *Community First! Village Celebrates Its Fifth Anniversary*, AUSTIN MONTHLY (Jan. 2021), https://www.austinmonthly.com/community-first-village-celebrates-its-fifth-anniversary/ [https://perma.cc/V28E-4DLJ].

[18] *See, e.g.*, Alexander, *supra* note 14 at 440.

[19] *Id.* at 394.

FIGURE 1: Interbay Village Collage, Low Income Housing Institute

The villages often encourage sharing and social cohesion through communal spaces and shared facilities.[20] In many villages, "[r]esidents often share basic amenities such as bathrooms, water, and cooking facilities as well as green spaces and other basic resources."[21] The villages foster community enhancement through sustainable design practices, gardening, and sometimes sweat equity, in which residents contribute to the construction of homes or shared facilities.[22] Some villages provide microenterprise opportunities, social, health, and job placement services to connect residents to opportunity.[23] The communities, therefore, endeavor to provide more than just shelter by providing opportunities to restore residents' dignity and connections to community and opportunity.[24]

Many municipal leaders are learning that well-designed tiny home communities may serve their respective economic as well as social objectives.[25] Due to the smaller size of the units, the shared facilities and utilities, the low costs and ease of construction, the use of private donations and volunteer efforts, and the smaller-environmental footprint, tiny homes villages

[20] *Id.* at 396, 432–48.
[21] *Id.* at 396.
[22] *Id.* at 396, 432–48.
[23] *Id.*
[24] *Id.*
[25] *See* Lisa Ward, *Cities Hope for Big Benefits from Tiny Houses*, WALL ST. J. (June 26, 2018), https://www.wsj.com/articles/cities-hope-for-big-benefits-from-tiny-houses-1530065161 [https://perma.cc/SFU4-4CHJ].

can be cheaper, quicker and more environmentally sustainable than other affordable housing options, such as those produced by the Low-Income Housing Tax Credit.[26] These communities emphasize community self-governance and self-determination, while artfully balancing privacy, security, and sustainability in ways that, if replicated, can serve as models for temporary housing during times of crisis or as long-term affordable housing.[27] During the Covid-19 pandemic, tiny homes villages can provide homeless, evicted, or unhoused people shelter, as well as the ability to shut the front door and isolate. The villages' common-interest community structure, however, also provides shared outdoor and indoor facilities that provide residents community and stability, while usage rules encouraging masks and social distancing help mitigate the spread of the pandemic.

Tiny homes villages will not work for every homeless person or in every community. Tiny homes villages should not replace all other forms of shelter for homeless people or all other forms of affordable housing. Localities, however, should develop the necessary building codes, zoning designations, land use categories, and approval processes to make living tiny legal and to permit tiny homes villages to mitigate housing insecurity. In order to legalize tiny home villages, municipalities and states ought to, at least, do the following: (1) amend zoning and building codes to permit dwellings less than 400 square feet; (2) reduce minimum area requirements; (3) permit Accessory Dwelling Units (ADUs)[28] and other tiny homes designations; (4) allow for lofts within tiny homes;[29] (5) define and permit different types of tiny homes at the state level;[30] (6) maintain lists of relevant regulations in various municipalities in a state; (7) foster crowdfunding and socially responsible investment funds for tiny homes; and (8) and create databases of best practices and reputable industry participants. While tiny homes communities are not a panacea, they should be one tool in the toolkit of law and policy strategies to forestall a widespread housing and homelessness crisis. Tiny homes villages can adequately and safely house people experiencing housing insecurity during the Covid-19 pandemic and beyond.

In Part I, this Article explains that Covid-19 has exacerbated the problem of the inadequate supply of affordable housing, particularly for low-income and very low-income households. Part II argues that the federal, state,

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[26] Michael A. Stegman, *The Excessive Costs of Creative Finance: Growing Inefficiencies in the Production of Low-Income Housing*, 2 HOUS. POL'Y DEBATE 357, 370 (1991) (arguing that the low-income housing tax credit is inefficient and plagued by high-transaction costs).

[27] *See* Chris Winters, *Tiny Houses Alone Can't Solve the Housing Crisis. But Here's What Can*, YES! SOLS. JOURNALISM (May 8, 2018), https://www.yesmagazine.org/issue/affordable-housing/2018/05/08/tiny-houses-alone-cant-solve-the-housing-crisis-but-heres-what-can/ [https://perma.cc/PH4D-EA2G].

[28] John Infranca, *Housing Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL'Y REV. 53, 53–54 (2014).

[29] State of Oregon Legislative Policy and Research Office, *Tiny Home Regulation: Background Brief* (Oct. 16, 2019), https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Tiny-Home-Regulation-2019.pdf [https://perma.cc/5DAB-PPWG].

[30] LEVINI, *supra* note 11, at 29 (explaining that California has legalized six types of tiny homes that can be legally occupied).

and local actions taken, thus far, to avert a housing crisis, in the wake of Covid-19, are insufficient to address the inadequate supply of habitable and affordable housing for people at all income levels. In the wake of Covid-19 significant numbers of people are losing income, Americans may face a housing crisis in 2021, and beyond, that will rival the housing crisis and Great Recession of 2008, if federal actions to address the problems of supply are not taken.

Part III provides examples of model tiny homes villages that provide permanent long-term housing as well as transitional housing for unhoused people. Part III also argues that states and localities, as well as nonprofits and private individuals and groups, should consider tiny homes villages as both temporary and permanent long-term solutions to rising housing insecurity. Part IV analyzes the challenges to the implementation of tiny homes villages in the U.S. The legal landscape for tiny homes differs throughout the U.S. and in many places tiny homes communities may still be illegal.[31]

Part IV describes how states and localities can legalize tiny homes villages as solutions to mitigate homelessness and housing insecurity, particularly in times of crisis. Part IV also acknowledges the challenges that the NIMBYism and racial discrimination in housing present for the siting and development of tiny homes villages, but offers examples of how some communities have overcome these obstacles. Finally, the Article concludes that the federal government, through the U.S. Department of Housing and Urban Development (HUD), should identify best practices and direct financial resources to states and localities to help develop a national strategy to use tiny homes communities to ameliorate housing insecurity.

I. The Impending Housing Crisis

Before the Covid-19 pandemic, there was a growing affordable housing crisis in America. 37.1 million households (30 percent) were cost burdened in 2019, meaning they spent more than 30 percent of their incomes on housing, "including 17.6 million (14 percent) who were severely cost burdened (spending over 50 percent of their incomes on housing)."[32] Moderate-income households, who historically have not suffered cost burdens, also experienced increased cost burdens prior to the pandemic, as "the share of cost burdened households earning between $25,000 and $49,999 increased from 44 percent in 2001 to 58 percent in 2019."[33]

The Covid-19 pandemic also intensified housing and economic insecurity "with 49 percent of renters and 36 percent of homeowners experiencing employment income loss between March and September."[34] Renters at

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[31] Katherine M. Vail, *Saving the American Dream: The Legalization of the Tiny House Movement*, 54 Univ. of Louisville L. Rev. 357, 370–75.

[32] Joint Ctr. for Hous. Stud. of Harvard Univ., *supra* note 4, at 1.

[33] Joint Ctr. for Hous. Stud. of Harvard Univ., *supra* note 5, at 1.

[34] Joint Ctr. for Hous. Stud. of Harvard Univ., *supra* note 4, at 1.

lower-incomes experienced the greatest cost burdens as "more than half (52 percent) of lowest-income renters" reported lost wages during this period, "compared with 41 percent of all households."[35] "One in five renters earning less than $25,000 also said they were behind on rent, compared with 15 percent of all renters and just 7 percent of renters earning more than $75,000."[36] Moderate-income households were also negatively affected by the pandemic, as 53 percent of those earning $25,000 to $49,000 reported losing income and 16 percent reported being behind on rent from the start of the pandemic in March 2020 to September.[37]

These income losses and cost burdened households coincided with the continuing problem of a low-inventory of affordable home ownership opportunities, a problem Covid-19 also exacerbated. In 2019, the supply of for-sale homes was at its lowest level since at least 1982.[38] The pandemic made the shortage even worse, as many potential sellers refrained from putting their homes on the market, and the number of single-family homes for sale stood at just 1.24 million in September 2020, compared with an already low number of 1.60 million in September 2019.[39] The decreased inventory contributed to high prices for sales of available homes, since the supply of homes was less than the demand, particularly in a period of low interest rates.[40]

Regulatory requirements and development fees in many cities also increase construction costs and limit the amount of new housing that can be built as of right.[41] The costs of construction materials and labor shortages are also rising, contributing to decreased inventory, increased costs, and higher prices.[42] If moderate-income, low-income, and very low-income households seek to purchase new homes in 2021 and beyond, the inventory of affordable homes for purchase will likely still be less than the demand for new homes.[43]

Affordable rental units are also undersupplied. The demand for higher-quality rental units in urban and high-income areas has declined, which might create and expand supply opportunities for more moderate-income renters to afford rents.[44] If those renters face job or income insecurity in the wake of Covid-19, however, their ability to take advantage of high rental vacancy rates may be limited. The undersupply of affordable rental units for those at low- and very low-income levels is also particularly acute.[45] Expiring

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[35] JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., *supra* note 5, at 1.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 11.
[39] *Id.*
[40] "Still, the supply of homes for sale has not kept up with demand, shrinking already tight inventories." *See id.* at 4.
[41] *See id.* at 12.
[42] *Id.* at 12–13.
[43] *Id.* at 11.
[44] *Id.* at 30.
[45] "Lower-income renters, especially those who have lost wages, are likely to see little relief from rising rents and limited housing choices, although the downward filtering of higher-end apartments could help to expand the affordable stock. But without a significant job recovery

affordable units are a continuing reason for a decreasing supply of affordable housing. From 2004-2019, "[l]osses of the low-rent stock were concentrated in small multifamily buildings, where the supply fell by more than 850,000 units. The number of low-rent apartments built before 1970 also declined by 2.1 million over this period, and 44 percent of the low-rent supply was at least 50 years old in 2019. As the rental stock continues to age and landlords of some smaller buildings are unable to collect full rents, more low-cost units will be at risk of deterioration or loss."[46]

Publicly subsidized housing for the very lowest-income renters is particularly scarce. "According to HUD's latest Worst Case Housing Needs report, only one in four very low-income renter households (earning less than 50 percent of area median income) received housing assistance in 2017. Nearly two in four very low-income renter households lack assistance and face either severe cost burdens or severely inadequate housing, or both."[47]

Unsubsidized very low-income renters are left to navigate the private rental market which lacks suitable and affordable units.[48] "According to the National Low Income Housing Coalition's (NLIHC's) latest Gap Report, only 10 million rentals on the private market were affordable and available for the nation's nearly 18 million households with very low incomes in 2018."[49] Further, the location of many existing subsidized very low-income units does not lead to human flourishing as a majority of federally subsidized units are in racially segregated low-opportunity areas.[50] This data shows there is a significant need for additional rental or ownership units for low-income and very low-income people. Covid-19 only complicates this problem, as more people face housing insecurity, and there are declining suitable units.

This growing American housing insecurity also coincides with a rise in homelessness.[51] "Even before the pandemic, the affordable housing crisis was fueling an increase in homelessness. After edging up in 2017 and 2018, the number of people experiencing homelessness rose more sharply in 2019. HUD's latest point-in-time estimates show a spike of 15,000 more people

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and a renewal of income or rental supports, more and more households may have difficulty paying their rents, in turn adding to the financial distress of property owners." *Id.*

[46] *Id.* at 32.

[47] *Id.* at 37.

[48] *See generally* MATTHEW DESMOND, EVICTED: POVERTY AND PROPERTY IN THE AMERICAN CITY (2016).

[49] JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., *supra* note 5 at 37.

[50] Federally subsidized units are the most spatially concentrated of all rentals. About half of all affordable units subsidized by tax credits are located in just 5 percent of census tracts. The project-based HUD stock, including public housing, is similarly concentrated in just 4 percent of tracts. Although somewhat more dispersed, about half of the private market units that accept vouchers are located in 10 percent of tracts. On average, neighborhoods with the most subsidized units have higher rentership rates, lower median incomes, and more households of color than those with the least subsidized housing, directly reinforcing longstanding patterns of economic and racial segregation. *Id.* at 33.

[51] *Id.* at 36.

experiencing homelessness last year, bringing the total to nearly 568,000."[52] Homelessness is increasing in both high-cost states, such as California and New York, as well as in low-cost states, "with increases of more than 10 percent in six states."[53]

Covid-19 has also complicated the viability and safety of the shelter system, as recent evidence reveals that homeless residents of shelters are at a greater risk of catching and transmitting Covid-19.[54] The CDC found that "a quarter of residents in 19 homeless shelters in four cities tested positive for the coronavirus between March 27 and April 15."[55] Several cities and states in the U.S. also responded to the public health crisis that Covid-19 and homelessness can create by providing "emergency shelter in hotels, motels, and trailers."[56]

An Urban Institute study in August found that "about 70 percent of the nation's continuums of care (governing bodies that coordinate homeless services)" used hotels as emergency isolation shelters, yet they were "only able to house about 18 percent of their homeless populations on average. Only a few of these communities had plans to transition their programs to permanent supportive housing, which may be in increased demand if the incidence of homelessness rises over the course of the pandemic."[57] Hotels for homeless and displaced people are also not a viable long-term solution.[58] As greater portions of the population become vaccinated, the economy will slowly rebound, and most hotels will likely resume their more traditional functions of serving the paying public.

Not all communities experienced housing insecurity in 2020. Homeownership markets for higher-income households were robust at the end of 2020, leading some to argue that the prospects for homeownership opportunities are good in 2021 and beyond, with potentially improving job conditions, continuing stable low-interest rates, and increasing house prices.[59] Yet, these optimistic outlooks ignore that approximately 6.3 million home owners entered into mortgage forbearance plans between March and October of

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[52] *Id.*

[53] The six states that experienced increases in homelessness of more than 10 percent in 2019 are California, Idaho, Kentucky, Minnesota, New Mexico, and West Virginia. *See id.* at 37.

[54] *See infra* Part II.

[55] JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., *supra* note 5 at 37.

[56] *Id.*

[57] *Id.*

[58] Sharon Lee, *The Case for Building Tiny House Villages During the Pandemic*, SHELTERFORCE (May 28, 2020), https://shelterforce.org/2020/05/28/the-case-for-building-tiny-house-villages-during-the-pandemic/?gclid=CJwKCAiAsaOBBhA4EiwAo0_AnJ7uzBNVqg49_Q-uvMrbnOOo4MzkARgUCLdiNzsQEpkwBpYZk-Gu1BoC08IQAvD_BwE [https://perma.cc/8GQZ-2868].

[59] National Association of Realtors, *Top Economic and Housing Experts Predict Post-Pandemic Rebound with Continued Job Growth, Stable Interest Rates in 2021*, (December 10, 2020), https://www.nar.realtor/newsroom/top-economic-and-housing-experts-predict-post-pandemic-rebound-with-continued-job-growth-stable [https://perma.cc/3JY3-TT5F].

2020 due to Covid-19.[60] If all of those home owners fall into foreclosure at the end of their respective forbearance plans, it will represent a historically significant number of foreclosures.

During the last housing crisis, "between 2006 and 2014, more than 9.3 million Americans either lost their homes to foreclosure or else gave up their homes to the bank outright."[61] Therefore, 6.3 million foreclosures in one year would represent a housing crisis of significant proportions. Recognizing this, President Biden extended the federal foreclosure moratorium and mortgage forbearance protections at least three times through the end of October 3, 2021.[62] Despite some reasons for optimism, a housing crisis may be likely once federal, state, and local eviction moratoria, mortgage foreclosure moratoria, and mortgage forbearance protections expire. This is particularly true if the economy does not substantially improve, and the supply of affordable housing does not increase.

II. Government Covid-19 Solutions and the Problem of Supply

This section outlines the federal efforts taken, thus far, to avert a housing crisis in the wake of Covid-19. These actions undeniably have mitigated mass American eviction and foreclosure crises.[63] Yet, they will not substantially increase the supply of affordable and habitable housing for homeless, displaced, very low-income, and low-income households. These measures may protect already housed Americans' security of tenure;[64] but they will not protect the many Americans who face eviction, foreclosure, displacement, or chronic homelessness due to legal loopholes, massive unemployment, and other economic or health crises. The federal government's focus on eviction moratoria, rental assistance, and mortgage forbearance, rather than rental and mortgage forgiveness and landlord financial support,[65] will not fully pro-

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[60] Joint Ctr. for Hous. Stud. of Harvard Univ., *supra* note 5, at 4.

[61] Christopher K. Odinet, Foreclosed: Mortgage Servicing and the Hidden Architecture of Homeownership in America 38 (2019).

[62] Daniel Payne, *Biden extends foreclosure moratorium and mortgage forbearance through June*, Politico (February 16, 2021 7:21am EST), https://www.politico.com/news/2021/02/16/foreclosure-moratorium-mortgage-forbearance-extension-469111 [https://perma.cc/6EY5-2LNZ]; Adam Liptak and Glenn Thrush, *Supreme Court Ends Biden's Eviction Moratorium*, N.Y. Times, September 1, 2021, https://www.nytimes.com/2021/08/26/us/eviction-moratorium-ends.html [https://perma.cc/8FRS-4AVL] (explaining that the U.S. Supreme Court held on Thursday, August 26, 2021 that the CDC had exceeded its authority in extending the federal eviction moratorium without Congressional action, and therefore, the national eviction moratorium ended on August 26, 2021).

[63] Joint Ctr. for Hous. Stud. of Harvard Univ., *supra* note 5, at 37–38.

[64] Security of tenure is a term defined by the U.N. Committee on Economic, Social and Cultural Rights as "protections against illegal and forced evictions, harassment and other threats to housing security." Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 Neb. L. Rev. 245, 253 (2015).

[65] Rep. Ilhan Omar proposed a bill that would provide rent cancellation and mortgage forgiveness (meaning renters and mortgage holders would not have to pay at all during the

tect Americans on the cusp of eviction or displacement. These measures also will not quickly and substantially add to the affordable and habitable housing stock.

The first action that Congress took to quell a potential housing crisis due to Covid-19 was enacting the CARES Act on March 27, 2020.[66] The CARES Act provided approximately six trillion dollars of direct and indirect relief to Americans suffering housing instability due to the Covid-19 pandemic.[67] The Act provided mortgage forbearance, which means suspending, but not extinguishing mortgagees' obligations to pay, for those who qualified for it and sought it, for up to 360 days beginning from the date of the Act.[68] It also contained an eviction moratorium that expired on July 25, 2020.[69] On September 4, 2020, then President Trump, through the Centers for Disease Control and Prevention (CDC), enacted another federal eviction moratorium until December 31, 2020, for certain households who could not pay their rent and faced eviction due to a Covid-19 related hardship.[70]

The Trump moratorium, however, did not apply to all renters or owners in the U.S.; households had to apply for the moratorium; it did not provide financial assistance to landlords whose tenants cannot pay rent due to a Covid-19 hardship; and it did not mandate rent or mortgage forgiveness.[71] As a result, Trump's eviction moratorium only delayed a tsunami of evictions until December 31, 2020.[72] Congress then enacted the Covid-19 Economic Relief Bill, and former President Trump did sign the bill on December 27,

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duration of the Covid-19 crisis) to all residential renters and homeowners who cannot pay their respective rents and mortgages due to Covid-19. The bill would also provide financial relief to landlords to replace the cancelled rents. This bill has not been adopted by the House or the Senate, but it illustrates the differences between mortgage forbearance and mortgage forgiveness and rental assistance and rent forgiveness. Under forbearance and assistance plans, payments do not have to be made until the forbearance period is over, but the obligations continue to accrue. Mortgage forgiveness cancels or extinguishes the payments during the forgiveness period. *See generally* Zach Friedman, *Ilhan Omar: Cancel Rent and Mortgage Payments*, FORBES (Dec. 4, 2020 1:06 PM), https://www.forbes.com/sites/zackfriedman/2020/12/04/ilhan-omar-cancel-rent-and-mortgages/?sh=51c32a3f19f7 [https://perma.cc/U7TZ-NA82].

[66] Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, Pub. L. No. 116-136, 134 Stat. 281. *See* National Low-Income Housing Association, *Congressional Leaders Agree to Coronavirus Response Package with Funding for Homelessness and Housing*, (Mar. 25, 2020), https://nlihc.org/resource/congressional-leaders-agree-coronavirus-response-package-funding-homelessness-and-housing [https://perma.cc/FHZ5-VF5J].

[67] *Id.*

[68] *Id.*

[69] Temporary Halt in Residential Evictions to Prevent Further Spread of Covid-19, 86 Fed. Reg. 8020 (Feb. 3, 2021).

[70] *Id.*

[71] *See* Thomas Wade, *The CARES Act and Housing Assistance: A User's Guide*, AM. ACTION F, (May 8, 2020), https://www.americanactionforum.org/insight/the-cares-act-and-housing-assistance-a-users-guide/ [https://perma.cc/9829-WBD7]/

[72] Annie Gowen, *Thousands have been evicted in the pandemic. Housing experts say Trump's new ban is a temporary fix.*, WASH. POST (Sept. 3, 2020) https://www.washingtonpost.com/national/thousands-were-evicted-during-the-pandemic-housing-advocates-say-trumps-new-ban-is-a-temporary-fix/2020/09/03/f0f9bd2e-e5a2-11ea-970a-64c73a1c2392_story.html [https://perma.cc/D2B4-BWXC]

2020.[73] It extended the eviction moratorium until January 31, 2021; lengthened the time within which states must spend CARES Act funds to December 31, 2021; and provided $25 billion for emergency rental assistance that is allocated to states and localities.[74] Congress also enacted a $1.4 trillion government spending plan that enables agency functions to continue through September 2021.[75] Finally, after President Biden took office, the Centers for Disease Control (CDC), extended the federal eviction moratorium until March 31, 2021.[76]

[T]he Federal Housing Finance Agency (FHFA) [also] instructed Fannie Mae and Freddie Mac to suspend foreclosures for at least 60 days from mid-March 2020, later extending the moratorium three times through March 31, 2021.[77] The FHFA also extended mortgage forbearance protections for "qualifying multifamily property owners through March 31, 2021."[78] The Federal Housing Administration (FHA),[79] U.S. Department of Veterans Affairs,[80] and U.S. Department of Agriculture[81] also enacted and extended moratoriums through mid-2021. These federal actions offer foreclosure protection to approximately 70 percent of single-family homeowners with mortgages.[82] As mentioned earlier, President Biden also recently extended mortgage protections through June 2021, and again until October 3,

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[73] Consolidated Appropriations Act, 2021, div. M–N, Pub. L. No. 116-260, 134 Stat. 1182, 1909–2148. *See* Chris Arnold, *COVID-19 Relief Bill Could Stave Off Historic Wave of Evictions.*, NAT'L PUB. RADIO (Dec. 4, 2020 6:15 AM), https://www.npr.org/2020/12/24/949668850/covid-19-relief-bill-could-stave-off-historic-wave-of-evictions [https://perma.cc/4F66-YTU5].

[74] *See* Arnold, *supra* note 73.

[75] *Covid-19 Economic Relief Bill*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 4, 2021), https://www.ncsl.org/ncsl-in-dc/publications-and-resources/covid-19-economic-relief-bill-stimulus.aspx [https://perma.cc/G6LU-U8QU].

[76] Temporary Halt in Residential Evictions to Prevent Further Spread of Covid-19, 86 Fed. Reg. 8020 (Feb. 3, 2021).

[77] *FHFA Extends Foreclosure and REO Eviction Moratoriums*, FED. HOUS. FIN. AGENCY (Dec. 2, 2020), https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-Foreclosure-and-REO-Eviction-Moratoriums-12022020.aspx [https://perma.cc/37FM-66XV].

[78] *FHFA Extends COVID-19 Multifamily Forbearance through Mar. 31, 2021*, FED. HOUS. FIN. AGENCY (December 23, 2020), https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-COVID-19-Multifamily-Forbearance-through-March-31-2021.aspx [https://perma.cc/XE86-M5VW]

[79] *FHA Extends Options for Single Family Borrowers Financially Impacted By COVID-19*, DEP'T OF HOUS. & URB. DEV. (Dec. 21, 2020), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_214 [https://perma.cc/YP7F-JR28].

[80] *Guidance for VA home loan borrowers during COVID-19*, U.S. DEP'T OF VETERANS AFFS. (Feb. 23, 2021), https://benefits.va.gov/homeloans/cares-act-frequently-asked-questions.asp. [https://perma.cc/8VCM-W98E].

[81] Erin McDuff, *USDA Extends Foreclosure and Eviction Moratorium, Relief Options for Single Family Housing Direct and Guaranteed Loan Borrowers*, RURAL DEVELOPMENT U.S. DEPARTMENT OF AGRICULTURE (Dec. 28, 2020) https://www.rd.usda.gov/newsroom/news-release/usda-extends-foreclosure-and-eviction-moratorium-relief-options-single-family [https://perma.cc/2G7F-SAWA].

[82] JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIVERSITY, *supra* note 5, at 22.

2021, but the U.S. Supreme Court ended the CDC's federal eviction moratorium on August 26, 2021.[83]

While these efforts, plus low rates, strong prices, and a slow economic recovery post pandemic may help avert a foreclosure crisis as large as the housing crisis in 2008, these protections do not extend to all homeowners.[84] Owners of manufactured homes were excluded from the CARES Act's forbearance protections because their properties are considered personal property, and approximately "14.6 million owners with privately backed mortgages were not covered by federal forbearance plans and foreclosure moratoriums."[85] Barring any new legislation by Congress or new federal executive orders, all past due rents and mortgage payments of people who have not renegotiated with their respective landlords or lenders will likely become due in mid-2021 or 2022.[86]

III. Tiny Homes Villages: A Solution to Housing Insecurity?

Tiny homes villages, although not without challenges of implementation, can quickly, comprehensively, and cost-effectively add to the supply of affordable housing, particularly in the wake of Covid-19.[87] Municipalities and states can use tiny homes villages to provide rapid and adequate shelter for individuals displaced, due to legal loopholes and lax enforcement of eviction moratoria and forbearance plans.[88] Natural disasters that often lead to temporary or long-term housing displacement have also become a more common feature of American life.[89] Tiny homes villages can provide swift temporary shelter for persons displaced in the wake of a natural disaster,[90] such as wildfires,[91] hurricanes,[92] floods,[93] and snowstorms.[94]

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[83] *See supra* note 62.
[84] *Id.* at 23.
[85] *Id.*
[86] Panfil, *supra* note 2.
[87] *See* Lee, *supra* note 58.
[88] *See id.*
[89] *See* UN Off. for Disaster Risk Reduction & Ctr. for Rsch. on the Epidemiology of Disasters, Hum. Cost of Disasters: An Overview of the Last 20 Years 6 (2020) [https://perma.cc/5KSG-ZAFA]. ("While better recording and reporting may partly explain some of the increase in events, much of it is due to a significant rise in the number of climate-related disasters. Between 2000 and 2019, there were 510,837 deaths and 3.9 billion people affected by 6,681 climate-related disasters. This compares with 3,656 climate-related events which accounted for 995,330 deaths (47% due to drought/ famine) and 3.2 billion affected in the period 1980-1999. The number of people affected by disasters, including injuries and disruption of livelihoods, especially in agriculture, and the associated economic damage are growing in contrast to the decrease in mortality.")
[90] Rachel Farrell & Stacy Fernandez, *Displacement After Disasters: When There's No Place to Call Home*, News 21 (Aug. 22, 2019), https://nondoc.com/2019/08/22/displacement-after-disasters-when-theres-no-place-to-call-home/ [https://perma.cc/NZQ5-7C6T].
[91] Laura Sommer, *Rebuilding After a Wildfire? Most States Don't Require Fire-Resistant Materials*, Nat'l Pub. Radio (Nov. 25, 2020), https://www.npr.org/2020/11/25/936685629/rebuilding-after-a-wildfire-most-states-dont-require-fire-resistant-materials [https://perma.cc/TM3A-ME2B].

Tiny homes villages are also effective during public health crises and in the wake of natural disasters and economic disruptions precisely because they can provide shelter from the elements, can be easily furnished, and in some instances the units have heat, water, and other utilities.[95] Residents receive their own units, with four walls and a door, which they can design according to their preferences, and in which they can isolate from others during a pandemic or other crises.[96] The villages also provide communal interactions and work opportunities, and if administered under public health guidelines in a pandemic, these activities can help residents restore some of the dignity and positive community they may have lost while on the streets or in times of crisis.[97] The next Section provides examples of two types of tiny homes villages: permanent tiny homes villages that provide permanent or long-term housing for formerly homeless residents; and temporary tiny homes villages that provide transitional housing for homeless people who can stay in the village up to two years.[98]

A. Permanent Tiny Homes Villages

A few tiny homes villages for homeless people are designed to be permanent housing for formerly homeless people. Community First! Village in Austin, Texas has developed the most extensive permanent tiny homes village for chronically homeless people in the U.S.[99] Community First! Village is run by a non-profit, Mobile Loaves & Fishes, that obtained a huge swath of land (27 acres) outside of Austin, TX, and near a Capital Metro stop, on

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[92] Doyle Rice, *Record Shattering 2020 Atlantic Hurricane Season Officially Comes to an End*, USA TODAY (Nov. 30, 2020) https://www.usatoday.com/story/news/nation/2020/11/30/hurricane-season-ends-after-record-30-named-storms-12-us-landfalls/6438375002/ [https://perma.cc/YM6C-FBCW].

[93] Lauren Medina & David Armstrong, *New Census Housing Unit Estimates Use FEMA Data to Capture Impact of Disasters in Every State*, U.S. CENSUS BUREAU (May 21, 2020), https://www.census.gov/library/stories/2020/05/how-disasters-affect-the-nations-housing.html [https://perma.cc/R7QW-53E6].

[94] *More Than 2 Million Texans Without Power Due To Rolling Outages From Historic Winter Storm*, KERA NEWS (Mar. 1, 2021) https://www.keranews.org/news/2021-02-10/frigid-weather-hits-north-texas-this-week-and-homeless-shelters-work-to-get-people-inside [https://perma.cc/S5K7-ZMZX].

[95] Mobile Loaves & Fishes, *Community First! Village Video Tour*, FACEBOOK (Sept. 22, 2020), https://www.facebook.com/CommunityFirstVillage/videos/319780292449905/ [https://perma.cc/F6HF-GVT9].

[96] *See* Lee, *supra* note 58.

[97] *Id.*

[98] *See FAQ*, DIGNITY VILLAGE, https://dignityvillage.org/faq/ [https://perma.cc/7YMU-4H79].

[99] *See e.g.*, Megan Kimble, *Austin's Fix for Homelessness: Tiny Houses, and Lots of Neighbors*, CITYLAB (Nov. 12, 2018), https://www.bloomberg.com/news/articles/2018-11-12/austin-s-community-first-village-tackles-homelessness [https://perma.cc/S4Y7-UHA5] (explaining the average Community First! Village resident previously lived on the streets for 10 years); MOBILE LOAVES & FISHES, *supra* 95.

which to locate the village.[100] Community First Village has brought the tiny homes village model for unhoused people to scale. It is now a large, 51-acre community pledged to complete 530 units to help approximately 1,000 or more people coming out of chronic homelessness.[101] Community First! Village serves as a model of how to scale-up the villages to serve larger numbers of people. The village also demonstrates how public and private collaborations, including homeless people, nonprofit partners and funders, the business and artisan communities, limited city and county government, and volunteers from the city and state can add to the supply of affordable housing and advance human flourishing.[102]

The village uses a traditional rental model where residents rent different types of units, such as tiny homes on foundations and RVs, at approximately $1.00 per square foot.[103] Because most units are smaller than 400 square feet, the rents are between 220 and 440 dollars per month, more affordable than what is available in the Austin, TX private market.[104] In Phase I of the development, Community First! Village completed 230 micro units or RVs, some of which accommodate more than one person or families.[105] Phase I contains "100 RV/Mobile homes, 130 micro homes, 5 laundry/restroom/shower facilities, 5 outdoor kitchens, a community art house, community cinema, community concessions and catering, Community First! Car Care, Community Forge, Community Inn, Community Market, Genesis Gardens Organic Farm, Goodness Press Screen Printing, Memorial Garden and Prayer Labyrinth, Topfer Family Health Resource Center, walking trails, and a woodworking shop."[106] Phase II of Community First! Village, which is in development, will add 310 additional micro units, 7 new outdoor kitchens, 7 new laundry facilities, an entrepreneurial hub, as well as a hydroponics facility.[107]

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[100] Community First! Village, MOBILE LOAVES & FISHES, https://mlf.org/community-first/ [https://perma.cc/B2HV-G37P].

[101] *Id.*

[102] Fox 7 Austin Digital Team, *Downtown Austin Alliance Makes Fourth Grant Payment to Community First! Village*, FOX 7 AUSTIN (Nov. 18, 2020) https://www.fox7austin.com/news/downtown-austin-alliance-makes-fourth-grant-payment-to-community-first-village [https://perma.cc/8JHR-ECJA] (nothing that Mobile Loaves & Fishes receives multiple sources of funding, including donations from the Downtown Austin Alliance, a Public Improvement District, which allocates $200,000 thousand dollars a year to the project as part of a 10-year, $2 million dollar grant).

[103] Alexander, *supra* note 14, at 433.

[104] David Leffler, *Community First! Village Celebrates Its Fifth Anniversary*, AUSTIN MONTHLY (Jan. 2021), https://www.austinmonthly.com/community-first-village-celebrates-its-fifth-anniversary/ [https://perma.cc/X5N7-DVZK].

[105] *Id.*

[106] MOBILE LOAVES & FISHES, *supra* note 95.

[107] *Id. See also* Mobile Loaves & Fishes, *supra* note 95; *The What and Why of Hydroponic Farming*, VERTICLEROOTS (Mar. 3, 2020), https://www.verticalroots.com/the-what-and-why-of-hydroponic-farming/ [https://perma.cc/9PLC-CGMS] (explaining that hydroponics farming is a way to grow crops without soil in nutrient-rich water).

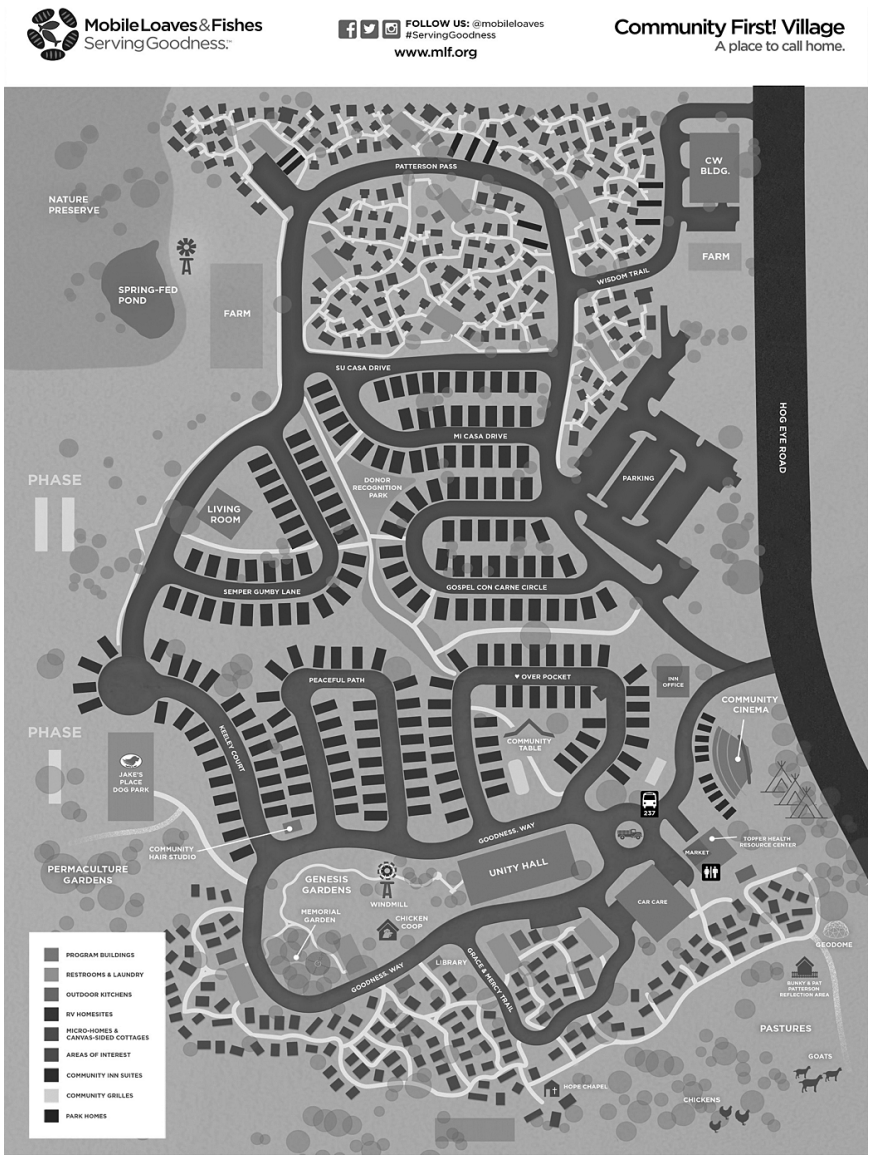

FIGURE 2[108]

The Village not only provides formerly homeless residents with shelter; it also gives them access to a litany of services and activities to enhance their

[108] Mobile Loaves & Fishes; *A Place to Call Home* (Jan. 2019), https://mlf.org/wp-content/uploads/2019/01/mobile-loaves-fishes-community-first-map-2019.jpg [https://perma.cc/7ME6-MU2U].

human flourishing, such as "case workers, mental and physical health practitioners, a sprawling garden and grocery store, and even a Capital Metro stop that runs from the campus to downtown."[109] Residents also have on-site employment opportunities through work programs, chances to create and sell artisanal crafts, and job-training initiatives spearheaded by local businesses.[110] The village encourages, rather than requires, that residents participate in community preservation and collaboration.[111]

Community First! Village also seeks to enhance the social capital[112] of its residents, by providing opportunities for residents to interact with other housed members of the Austin community, thereby creating opportunities for residents to expand their social connections and networks beyond the residents and services of the community. The village enables formerly homeless residents to work in, and enjoy with other housed Austin residents, a community cinema, community concessions and catering operations, and its "missionals" program, which consists of men and women who are not formerly homeless, but who live in the village and partake in the village activities to form a closer bond with the formerly homeless residents.[113] During the Covid-19 pandemic, the Village's outdoor community cinema hosted drive-in movie nights that many mainstream and housed Austinites frequented.[114] The cinema and other micro-enterprise efforts give residents opportunities to earn money while interacting with housed people in Austin, arguably expanding their human capital and social networks.

The Village also provides opportunities to enhance the political capital of its formerly homeless residents by connecting residents to voting opportunities—a privilege that is often unavailable to people who cannot identify a residence.[115] During the 2020 election, for example, Community First! Village became a voting location in Travis County.[116] Community First! Village also relies on an extensive network of volunteers and in-kind contributions to enhance the village and the services and opportunities it provides to residents.[117] For example, "it has also become ground zero for innovation, with local tech firm ICON creating six 3D-printed homes for the property

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[109] *Id.*

[110] Leffler, *supra* note 103.

[111] *Id.*

[112] Lisa T. Alexander, *Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law*, 63 HASTINGS L.J. 803, 825 (2011) ("The term social capital connotes that social networks have value.").

[113] Leffler, *supra* note 103.

[114] Community First Village (@CommunityFirstVillage), FACEBOOK (Sept. 17, 2020, 7:00 PM), https://www.facebook.com/CommunityFirstVillage/posts/3431747493514164 [https://perma.cc/P824-8ZZ3].

[115] *Voters Experiencing Homelessness*, ELECTION PROT., https://texasvoterprotection.org/voting-rights-for-individuals-experiencing-homelessness-in-texas/ [https://perma.cc/N6CX-GV8L].

[116] Community First Village (@CommunityFirstVillage), FACEBOOK (Nov. 3, 2020, 10:34 AM), https://www.facebook.com/CommunityFirstVillage/posts/3569914913030754 [https://perma.cc/NE7F-DL8R].

[117] *Partnerships*, MOBILE LOAVES & FISHES, https://mlf.org/us/partnerships/ [https://perma.cc/Z2EA-GSST].

. . . ."[118] The Village shows how a tiny homes village community can be designed to foster community, opportunity, and human flourishing for formerly homeless people, who may need connections with others.[119]

During the Covid-19 pandemic, Community First! Village's property management team and non-profit owner, Mobile Loaves & Fishes, developed a Covid-19 Response that encouraged all residents to adopt the public health guidelines of the CDC, the City of Austin, and the State of Texas.[120] When one resident developed Covid-19, other residents were able to self-isolate in their respective tiny homes or RV units, and because there are food service and medical facilities on site, all affected or potentially exposed residents received food, testing, and other services.[121] The extensive health facilities and services that the Village provides to its residents were also useful in encouraging residents to maintain their health, follow CDC protocols, and mitigate the spread of Covid-19.[122] When the Covid-19 vaccines and booster shots become widely available, the health care services onsite should enable residents of the village to easily and safely obtain the vaccine at the village, if they are willing.

Other large-scale communities of rental tiny homes villages for homeless people and very low-income people are also in development in Tallahassee, Florida and in Oahu, Hawaii, and other locations.[123] These early examples show how stakeholders in localities across the country can use tiny home villages to provide, low-cost, affordable, rapid, flexible, habitable, and environmentally sustainable housing alternatives to ameliorate homelessness. As more Americans who are not chronically homeless face housing insecurity, due to the economic disruptions of Covid-19, natural disasters, or housing affordability crises, tiny homes villages may be a quick, affordable, and environmentally sustainable way to provide displaced and dispossessed people with shelter that connects them to opportunity.

OM Village, a small village in Madison, Wisconsin, is an example of the first permanent tiny home village community that uses a stewardship model instead of a traditional rental model.[124] Stewardship is a term the author coined for a property or housing tenure that gives stewards rights to exclusive use of the tiny home, rights to exclude others from the unit, and shared use of the common areas, in exchange for the commitment that the steward will participate in the management, decision-making, and maintenance of the tiny home village.[125] OM Village admits residents for free, and

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[118] *Id.*

[119] Alexander, *supra* note 14.

[120] *Community First! Village Covid-19 Response Update*, Mobile Loaves & Fishes, https://mlf.org/covid-19-response-update-from-community-first-village/ [https://perma.cc/L26U-L89W].

[121] *Id.*

[122] *Id. See also Goodness Empowering Community*, Mobile Loaves & Fishes (2020), https://mlf.org/goodness-empowering-community/ [https://perma.cc/E8YY-HUKM].

[123] Alexander, *supra* note 14, at 438–41.

[124] *Id.* at 408–09.

[125] *Id.* at 398–423.

uses a stewardship model in which active participation, decision-making, and sweat equity in the village compensates for the tiny home.[126]

Stewardship can help formerly homeless people advance their self-sufficiency and human flourishing through participation in community management and decision-making, and sweat equity service to the community.[127] Examples of sweat equity projects are designing and building your tiny home, building the tiny homes of others, and working in the onsite community gardens or artisan projects.[128] In exchange for this sweat equity and community self-management, stewards receive the right to remain in the tiny home and the right to exclude others from the unit.[129] Stewardship means that residents do not have to pay traditional expensive rents to access housing. In some instances, stewards have to pay a nominal membership fee, but their primary consideration[130] for the unit is abiding by the community rules, participation in community self-governance and management, and sweat equity to enhance the village.[131] Residents can stay in the village permanently, as long as they abide by the community rules and participate in self-management and service to the community.[132]

OM village is small, with only 5 units, but OM Build, the village's nonprofit sponsor, now plans to expand to 9 tiny homes on one site; and on another recently purchased site OM Build will utilize 28 Conestoga style huts for the winter that are scheduled to be replaced in June of 2021 with 28 permanent tiny homes.[133] OM Village is a planned unit development financed primarily through volunteer donations.[134] OM Village shows how tiny homes villages for homeless people can utilize a stewardship model, rather than a rental or ownership model in a long-term, permanent tiny homes village.

The final examples of permanent tiny homes villages include a few villages that use ownership models, rather than a stewardship or rental model. Square One Villages is a nonprofit founded in 2012 that has produced a

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[126] Brendakonkel, *How Can I Get A Tiny Home?*, OCCUPY MADISON – TINY HOUSES & MORE! (Oct. 10, 2020), https://occupymadisoninc.com/2020/10/10/how-can-i-get-a-tiny-home/ [https://perma.cc/T344-5VX7].

[127] *Id.*

[128] Alexander, *supra* note 14.

[129] *Id.*

[130] Consideration is "[t]he cause, motive, price, or impelling influence which induces a contracting party to enter into a contract." BLACK'S LAW DICTIONARY (6th ed. 1990).

[131] Alexander, *supra* note 14.

[132] *Id.* at 411.

[133] "Occupy Madison building Tiny Homes with and for people without homes. We launched the OM Build shop on June 9th, 2013, purchased a property in 2014 and built a village at OM Village, 304 N. Third, Madison, WI 53704. That village currently has 5 residents but will have 9 once we build the community room and kitchen. We have also purchased 1901 Aberg Ave and will have 28 conestoga style huts there to get people off the street for the winter of 2020-2021. The building will house restrooms, showers, laundry and a kitchen. We will be rezoning the property and building a village similar to the one at 304 N 3rd Street after June 2021 and will replace the huts with tiny homes creating a permanent village." OM Build - OM Village Tiny Homes: Occupy Madison, Inc, *About*, FACEBOOK, https://www.facebook.com/OMBuild/ [https://perma.cc/83YR-N2W4].

[134] Alexander, *supra* note 14, at 409–10.

number of tiny homes villages.[135] Square One Villages developed Opportunity Village in 2013, a transitional tiny home community for homeless people mentioned in Part III Section B below.[136] Square One Villages is also developing what it terms the "the village model," which creates resident-owned, tiny home, shared equity homeownership opportunities for very low-income people.[137] The village model combines a community land trust (CLT) legal structure with a housing cooperative model for very low-income people.[138] A CLT legal structure separates ownership of the land from the ownership of the improvement on the land.[139] A mission-driven non-profit organization will own the land underneath the tiny homes.[140] The resident will own the tiny home on the CLT-owned land through a housing coop.[141] Square One Village's use of a CLT structure with a limited equity housing cooperative reduces the cost of housing, since the cost and appreciatation of the land is not included in the price of the home. The village also demonstrates how tiny homes village communities can be structured to advance an affordable ownership model.[142]

Emerald Village in Eugene, Oregon is Square One Villages' CLT and limited-equity housing cooperative village. It consists of 22 tiny homes on foundations that range from 160-280 square feet.[143] The land on which the tiny homes sit is owned by Square One Villages, through the CLT model.[144] Residents of Emerald Village become part of a housing cooperative.[145] The tiny homes' respective monthly charges range from $250.00 to $300.00 dollars per unit.[146] "As part of this payment, each household will also accumulate a $1500 share, paid in increments over the course of 30 months," "enabling them to create a modest asset that can be cashed out if and when they choose to move-out."[147] Square One Village leases the land under the tiny home to the cooperative home owner through a long-term ground lease, which provides use requirements and resale restrictions, enabling Square

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[135] *About SquareOne*, SQUARE ONE VILLAGES, https://www.squareonevillages.org/about-us [https://perma.cc/Y23D-PDWJ].

[136] *OpportUNITY Village, Eugene*, SQUARE ONE VILLAGES, https://www.squareonevillages.org/opportunity [https://perma.cc/L5CP-8GJK].

[137] *Overview*, THE VILLAGE MODEL, https://www.villagemodel.org/overview [https://perma.cc/8XD8-GKP7].

[138] *Id.*

[139] *Id.*

[140] *Emerald Village Eugene – Fact Sheet*, SQUARE ONE VILLAGES, https://docs.wixstatic.com/ugd/bd125b_f81ce553ab8b4a0c810e3b991bd063bf.pdf [https://perma.cc/245W-2357].

[141] *Id.*

[142] John A. Lovett, *Community Land Trusts: Institutionalizing the Human Flourishing Theory of Property*, 29 CORNELL J.L. & PUB. POL'Y 621, 628 (2020).

[143] *Emerald Village Eugene - Fact Sheet*, *supra* note 138.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *The ReachOUT House*, URBAN RESEARCH + PRACTICE, https://blogs.uoregon.edu/drdeaton/in-the-moment/ [https://perma.cc/URA5-LUYZ].

One Villages to retain ownership of the land and the unit in perpetuity, so it can remain an affordable coop each time a resident leaves.[148]

Square One Village's use of a CLT structure with a limited equity housing cooperative reduces the cost of home ownership, since the cost of land and resale prices are restricted.[149] The CLT and housing cooperative legal structure also limits the profit motive in the ownership transaction. Square One Villages acts as a steward[150] over the land ensuring that the owners of the improvements on the land do not let the land or the unit fall into disrepair. It stewards the land to make sure it can always be used to serve low-income aspiring homeowners.[151]

Emerald Village also demonstrates how tiny homes village communities can be structured to use an ownership model to enhance the human flourishing of very-low-income residents, or residents facing eviction, foreclosure, or housing insecurity.[152] As with other tiny homes communities, residents have to sign and abide by a community agreement and community rules.[153] Yet, by making the residents owners in a cooperative, whereby they develop a limited equity interest in the tiny home unit, the Village can provide opportunities for the residents to build wealth; it also further incentivizes the residents' productive participation in the community because they receive an economic asset, as well as social benefits for their positive participation in the community. The residents of Emerald Village also can participate in sustainable and productive activities such as helping to build the tiny homes of others and participating in sustainable agriculture, activities that help them develop skills and enter into productive relationships with others.[154]

Square One Villages views Emerald Village as a permanent home ownership alternative to which some of the residents in its transitional tiny homes communities can eventually move.[155] Currently, Square One has at least four similar permanent and self-governing limited equity cooperative tiny homes village communities in development.[156] The approach of Square One Villages demonstrates how public-private partnerships can develop a range of tiny homes village options that enable formerly homeless residents, and residents facing housing insecurity, to move from short-term tiny homes, to rental tiny homes villages, eventually to ownership.

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[148] Emerald Village Eugene, SQUARE ONE VILLAGES, https://www.squareonevillages.org/emeraldousing [https://perma.cc/FHH8-S6B7].

[149] Lovett, *supra* note 141, at 628.

[150] Here the article is using the standard dictionary definition of steward here as in someone who takes care of something. *Steward*, MACMILLAN DICTIONARY, https://www.macmillandictionary.com/us/dictionary/american/steward [https://perma.cc/P9T7-4XBB].

[151] Lovett, *supra* note 142, at 625–38.

[152] SQUARE ONE VILLAGES, *supra* note 140.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] SQUARE ONE VILLAGES, https://www.squareonevillages.org/ [https://perma.cc/U97G-57RZ].

Finally, Tiny Homes Detroit is a permanent tiny homes village in Detroit, Michigan that uses a rent-to-own model to expand access to affordable housing and promote home ownership.[157] Tiny Homes Detroit is a project of the non-profit, Cass Community Social Services (CCSS); the village will provide 25 tiny homes that range between 250 to 400 square feet.[158] Each home will be on its own lot that is roughly 30 x 100 feet on a foundation with a front porch or rear deck to increase the living space.[159] At first, residents will rent the units in a rent-to-own relationship for approximately $1.00 per square foot.[160] Any resident who remains in the tiny home for seven years can own the tiny home and the land on which it sits.[161] All prospective residents will be low-income including formerly homeless people, senior citizens, college students, and some Cass employees.[162] These villages are all examples of how public and private partnerships can use permanent housing models to provide housing for unhoused or displaced people.

B. Transitional Tiny Homes Villages

Other municipalities and non-profits develop tiny home villages as transitional housing (staying only for a maximum of two years) for homeless people.[163] Many of these villages use the stewardship model, even in the context of short-term housing, to advance self-sufficiency and to provide formerly homeless people with more than just shelter.[164] These communities show that municipalities, through public and private partnerships that include homeless people in decision-making processes, can design tiny homes villages to create rapid, affordable, and habitable housing, that also advances their human flourishing. As early as 2001, Portland's tent city, Camp Dignity, became Dignity Village, one of the first municipally sanctioned transitional tiny homes communities for up to 60 homeless people on city-owned land.[165] Dignity Village does not receive direct money from the city, but it does lease the land from the city.[166]

Dignity Village was the first example of the stewardship model used in a transitional tiny homes village. Each villager has a different employment, income, and benefits circumstance; therefore, once the village admits a resident, it will work to help the resident transition to more permanent housing,

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[157] *Tiny Homes Detroit*, CASS CMTY. SOC. SERVS., https://casscommunity.org/tinyhomes/ [https://perma.cc/YN4A-A9AH].
[158] *Id.*
[159] *Id.*
[160] C&B Scene, *These Tiny Homes Are Making a Big Difference - Live in the D*, YOUTUBE (Dec. 13, 2017), https://www.youtube.com/watch?v=DY1uVTHwhqI [https://perma.cc/QQT8-B3KU].
[161] CASS CMTY. SOC. SERVS., *supra* note 157.
[162] *Id.*
[163] Alexander, *supra* note 14, at 419.
[164] *Id.* at 398–408.
[165] Heben, *supra* note 14, at 47.
[166] *Id.* at 133.

and provide sweat equity or work opportunities to help each resident meet their membership fees.[167] Dignity Village was also one of the first villages to encourage homeless people to use do-it-yourself techniques to develop their homes in collaboration with volunteer architects, lawyers, and homeless advocates.[168] The tiny homes are approximately 120 square feet each; and the shared common buildings have plumbing and electricity.[169] Each resident has a "small private structure, each with a unique story and style, made from recycled/reused materials."[170] They have gas heat and some have solar electricity.[171]

Dignity Village demonstrates how tiny homes can be designed and structured into a transitional communal village model with shared common resources and minimal case-management services at a relatively low cost.[172] Dignity Village provides the following shared amenities: "a shower, open-air kitchen sink with running water, 4 portable toilets, 2 offices, greenhouse, garden beds, winter shelter for guests, outdoor common spaces, security shack at the gate, computer lab, donations center, several production areas for operating small businesses, the Commons room (large hall for meetings, meals, movies/tv, social functions, and indoor cooking area), garbage/recycling service, mail service, a shared phone, and wifi."[173] The village follows sustainable building practices and uses, and provides limited work opportunities for the formerly homeless residents.[174]

As in the case of permanent tiny homes villages, Dignity Village also provides its residents both privacy and community, as each tiny home gives its resident, or residents, a safe, private, habitable, and affordable place to "lock the door," as well as the opportunity to share common resources and experiences with similarly situated people.[175] Dignity Village was quickly followed by other examples, such as Opportunity Village in Eugene, Oregon, and Quixote Village in Olympia, Washington in 2013 and Beloved Community Village in Denver, Colorado.[176] The median length of stay for each villager is 1.7 years.[177] The village sponsors made the project legal by taking advantage of a law "from the Great Depression era which granted the City permission to set up shanty towns."[178]

Seattle, Washington, a high-cost city with a growing homeless problem, has developed the most extensive city-sanctioned network of transitional tiny homes villages for homeless people (9 villages in total) that all use

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[167] *Id.*
[168] Alexander, *supra* note 14.
[169] Alexander, *supra* note 14, at 419.
[170] DIGNITY VILLAGE, *supra* note 98.
[171] *Id.*
[172] *See id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] Alexander, *supra* note 14, at 418.
[177] Dignity Village, *supra* note 98.
[178] *Id.*

a transitional stewardship model.[179] The Low-Income Housing Institute is a non-profit that provides case management services and real estate services to each of the sites, which are owned and run by different non-profits, churches, and some by the city of Seattle.[180] These transitional tiny homes villages can prepare formerly homeless residents for more permanent long-term affordable housing.[181] The Low-Income Housing Institute (LIHI) "owns and/or manages over 2,200 housing units at 60 sites in six counties throughout the Puget Sound region. Eighty percent of LIHI housing is reserved for households earning less than 30 percent of the area median household income."[182] LIHI provides case management services to formerly homeless tiny homes village residents that enables some residents to transition into LIHI's more permanent supportive housing.[183]

A 2017 study of Seattle's transitional tiny homes villages found that thirteen percent of the villagers went into transitional housing, and thirteen percent went to a place not fit for human habitation.[184] More adult residents from Seattle's transitional tiny homes villages transitioned to permanent supportive housing or permanent housing than those residents of shelters.[185] More recently, Seattle's Mayor Durkan praised the transitional tiny homes village projects calling them, "probably the most successful shelter we have to get people into long-term housing, and it has become some of the most sought-after shelter for some people experiencing homelessness."[186]

During the recent Covid-19 pandemic, the City of Seattle also focused on using hotels and hotel rooms as temporary shelter for homeless people.[187] "[I]n December 2020, HSD expects to have access to approximately 300 temporary shelter units located at leased hotel properties and 125 units of new enhanced shelter spaces."[188] While hotel rooms can be a good temporary solution to the public health crisis that unsheltered homeless people face during the Covid-19 pandemic, they are not a permanent long-term solution; hotels will eventually return to business as usual, and the supply of

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[179] City of Seattle, *City-Permitted Villages,* HOMELESSNESS RESPONSE, https://www.seattle.gov/homelessness/city-permitted-villages [https://perma.cc/6FLS-TQU3].

[180] *See id.*

[181] Aaron Long, *Tiny Houses Big Future*, YOUTUBE (Nov. 1, 2016), https://www.youtube.com/watch?v=OEdKozxmg3w [https://perma.cc/Q4CQ-JX8V].

[182] *About,* LOW INCOME HOUSING INSTITUTE, https://lihi.org/about/ [https://perma.cc/G25X-DL74].

[183] Long, *supra* note 181.

[184] City of Seattle, *Permitted Encampment Evaluation* 8 (2017), http://www.seattle.gov/Documents/Departments/HumanServices/AboutUs/2017%20Permitted%20Encampment%20Evaluation.pdf [https://perma.cc/5XSZ-NARV].

[185] *Id.*

[186] Lee, *supra* note 58.

[187] Micheal Taylor-Judd, *HSD Announces Investments in Single Adult Shelter Surge Hotel Buildings & RRH Supportive Services*, SEATTLE.GOV-HUMAN INTERESTS BLOG (Nov. 10, 2020), https://humaninterests.seattle.gov/2020/11/10/hsd-announces-investments-in-single-adult-shelter-surge-services/ [https://perma.cc/X53H-VB5Z].

[188] *Id.*

adequate shelter that advances human flourishing for unhoused people will decrease.[189]

Seattle's experiences with using tiny home villages as transitional housing for homeless people has proved useful during Covid-19, and strengthens the case for using transitional tiny homes village communities as alternatives to shelters and hotels for homeless people during Covid-19 and other crises.[190] As described above, there is evidence that traditional shelters in which homeless individuals and families sleep in open barracks without walls separating individuals heightens the likelihood of transmission of Covid-19.[191] Specifically, Seattle found in April of 2020 "that 112 homeless people and staff working in homeless shelters were infected with Covid-19, and that two homeless people had died."[192] Similar outcomes were found at the Multi-Service Center South shelter in San Francisco, where "96 people and 10 staff tested positive—this was the largest outbreak in a single shelter nationally.[193] On April 23, officials shut down the Division Circle Navigation Center in San Francisco's Mission District after two people tested positive, and the rest of its residents were moved to hotels."[194]

The Seattle case study demonstrates that tiny homes villages are an effective public health solution for some homeless people during Covid-19. In the 12 tiny homes villages that the LIHI operates throughout Seattle, Tacoma, and Olympia, Washington, they have found that tiny homes provide better social distancing options than shelters because each tiny home is separately insulated and is "8 feet by 12 feet and the houses are spaced 5 feet apart. A person living in a tiny house is automatically sleeping more than 6 feet from another person, plus they are separated by two walls and two doors."[195] In tiny homes strangers are not breathing the same air.[196] Unlike in hotels or multifamily buildings, the tiny homes do not open out into an enclosed corridor; they open to the outside, letting fresh air in and avoiding dissemination of the air in each tiny home into an enclosed space.[197] These

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[189] *See* Lee, *supra* note 58 ("In early April, King County rented the Red Lion Hotel, located in the city of Renton (just south of Seattle), to de-intensify Seattle's largest homeless shelter. The lease was for 90 days. The initial response from the mayor of Renton was a demand that the county remove the 200 homeless people immediately at the end of the lease. Renton officials stated that the hotel is not zoned as a shelter and that the county should ensure that homeless individuals not remain in Renton but return to their original shelters in Seattle or find other options.").

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id. See also* Vivian Ho, *'It Could Have Been Averted': How 92 Residents at a San Francisco Homeless Shelter Got Covid-19*, GUARDIAN (Apr. 15, 2020 6:10 A.M.), https://www.theguardian.com/us-news/2020/apr/15/san-francisco-homeless-coronavirus-msc-shelter [https://perma.cc/LG23-5EUZ].

[194] *See* Lee, *supra* note 58.

[195] Lee, *supra* note 58.

[196] *Id.*

[197] *Id.*

features make tiny homes preferable to shelters, or even hotels, during a pandemic.[198]

The villages' non-profit property managers have also been able to effectively implement public health and safety measures in the facilities' respective shared spaces.[199] "The villages have shared hygiene facilities, including bathrooms, showers, washers and dryers, and cleaning supplies that allow residents to follow recommended Covid-19 hygiene protocols. A community kitchen with refrigerators, freezers, pantry, microwave, cooktops, hot water, and meal deliveries are also available to residents."[200] As of May 12, 2020, LIHI tested hundreds of homeless people that came through their tiny homes villages and "no one was found positive, according to the public health nurses who reported the test results to staff."[201] LIHI's internal analyses also show that the villages' on-site case managers are able to move residents from the transitional villages into permanent housing "at a rate that has outperformed traditional shelters."[202]

Seattle funds nine of the twelve transitional tiny homes villages that LIHI runs, and Seattle's average cost for a person in a tiny home is $38 dollars per day "compared with $56 for an enhanced shelter bed, and $130 or more for a night's stay in a hotel."[203] Most of the tiny homes in Seattle's transitional tiny home villages are built by volunteers, eliminating labor costs, and the costs of materials per home are only $2,500.[204] If the village needs to hire to build they hire small contractors and the costs of construction are "$5,500 each, including labor and materials."[205] The shared facilities are often also constructed by volunteers and electrical and plumbing is done by licensed contractors.[206]

LIHI can set up tiny homes villages "ranging in size from 14 to 50 tiny houses for $150,000 to $700,000, depending on infrastructure costs and site conditions."[207] "Over the past few years, with the support of thousands of volunteers, 400 insulated and heated tiny houses have been built across the Puget Sound region, helping more than 1,000 people annually."[208] In response to the Covid-19 pandemic, LIHI significantly reduced the time it takes to construct and develop these transitional tiny homes communities from three months to approximately four weeks.[209]

These examples show that municipalities can use transitional tiny homes village and stewardship models to provide rapid temporary housing to

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[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*

those experiencing housing insecurity due to a crisis. If in the wake of the economic fallout from the Covid-19 pandemic Americans find themselves evicted, foreclosed upon, or without their homes due to natural disasters, they may find shelter and solace in transitional tiny homes communities. Localities can use the same self-governance, community participation, usage, and conduct rules that tiny home villages for homeless people utilize in the stewardship model, for people who are facing displacement due to a foreclosure, an eviction, or a natural disaster. While tiny homes villages can also serve as permanent supportive housing for some homeless people, and affordable housing for others, the transitional tiny homes villages demonstrate how municipalities can quickly and cheaply produce transitional, temporary housing that adds to the affordable housing supply and advances the human flourishing of residents, particularly during times of crisis.

IV. The Challenges of Implementation

A. Legalizing Tiny Homes Villages

Villages that consist of tiny homes for the general public, or specifically tiny homes for unhoused people, are difficult to create and implement because tiny homes, and tiny homes villages, are not legal in every state or local jurisdiction.[210] Tiny homes construction and village development are regulated by three sources of local laws: building codes, housing codes, and zoning codes.[211] States also have standard building, manufacturing, and residential codes that apply to all municipalities and unincorporated census designated places (CDPs)[212] within the state; these state standards also govern tiny homes construction and village development in each respective locality.[213] Local governments also have their own, sometimes more permissive housing, building residential, and land use codes that also apply to tiny home village development in those respective localities.[214]

There are also national manufacturing, building, energy and utility standards with which tiny homes and tiny homes villages must comply.[215] Some states and localities have adopted international model building, residential, and manufacturing standards that can streamline and facilitate the

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[210] Ciara Turner, *It Takes a Village: Designating Tiny Homes as Transitional Housing Campgrounds,* 50 U. Mich. J.L. Reform 931, 941–46 (2017).

[211] *Id.* at 935.

[212] Robert E. Lang & Dawn Dhavale, *Reluctant Cities? Exploring Big Unincorporated Census Designated Places,* in Gerald E. Frug, Richard T. Ford & David J. Barron, Local Government Law: Cases and Materials 365–367 (6th ed. 2015) (explaining that CDPs is a census derived category to describe urban development areas that range from less 100 to over 100,000 residents and fall outside the boundaries of incorporated cities. This term was designed to replace the former term unincorporated places).

[213] Turner, *supra* note 211, at 941.

[214] Id.

[215] Manufactured Home Construction and Safety Standards, U.S. Dep't of Hous. & Urb. Dev. https://www.hud.gov/hudprograms/mhcss [https://perma.cc/CD3Y-99S4].

creation of tiny homes.[216] Finally, there are multiple sources of federal, state, local, and private financing to fund tiny homes village development. Currently, there is a patchwork of permissive and restrictive state and local zoning regulations; some that legalize tiny homes, others that create unique zoning categories for tiny homes villages for homeless people; and others that outlaw tiny homes as unpermitted dwellings or land uses.[217]

States and localities should legalize tiny homes and tiny homes villages, as alternative sources of housing that can mitigate housing insecurity. States and localities must adopt housing, building, utility, and green building standards that provide guidance as to the proper development of tiny homes and tiny homes villages to ensure that these villages are habitable, humane, resilient and do not revisit the problematic "shanty towns," of old.[218] The federal government, through HUD and other agencies, should develop a national database of projects that represent best practices in tiny homes village implementation as part of an effort to provide guidance for states and localities and develop a national housing policy.[219] The examples described below illustrate successful ordinances, state laws, and best practices in various states and localities that, if adopted, can legitimize and support the development of tiny homes village alternatives nationwide.

The International Building Code (IBC) provides international standards for safe and resilient building design and it applies in all fifty states, the District of Columbia, U.S. Virgin Islands, Guam, and Puerto Rico.[220] Building codes include topics such as minimum floor area requirements, building heights, mechanical and plumbing requirements and other categories that are relevant to tiny homes villages.[221] More importantly, the International Residential Code (IRC) establishes minimum standards for one- or two-family dwellings and townhomes and it defines a dwelling.[222] Only Wisconsin has not adopted a version of the IRC.[223]

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[216] Turner, supra note 211, at 934.

[217] See Molli McGee, Tiny House Laws in the United States; States That Allow Tiny Houses, TINY HOUSE SOCIETY (Dec. 13, 2018), https://www.tinysociety.co/articles/tiny-house-laws-united-states/ [https://perma.cc/HU3A-E7K7].

[218] *See* Helen R. Kanovsky, *HUD General Counsel Reflects on the Department's Fifty-Year History*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 7, 7–8 (2015) ("After the crash in 1929, homeownership rates fell to 44 percent. Unemployment rates spiked to 25 percent, giving rise to shanty towns or "Hoovervilles" across the country. One of the largest of these shanty towns was in New York's Central Park; other large establishments sprung up in Washington, D.C., Seattle, and St. Louis. These towns were constructed of cardboard boxes; some were even just holes in the ground with makeshift roofs."); *see also* PAUL KRUGMAN & ROBIN WELLS, ECONOMICS 569 (2d ed. 2009).

[219] HUD rules regarding building and safety standards for RVs and manufactured homes clarify which recreational vehicles qualify for an exemption from HUD's Manufactured Home Construction and Safety Standards and Manufactured Home Procedural and Enforcement regulations. Yet, it has not developed a comprehensive position on tiny homes villages for homeless people or for affordable housing. *See Manufactured Home Procedural and Enforcement Regulations*, 24 C.F.R. § 3282 (2018).

[220] Turner, *supra* note 210, at 935.

[221] INTERNATIONAL RESIDENTIAL CODE §R101 (Int'l Code Council 2018).

[222] *Id.*

[223] Turner, *supra* note 210, at 935.

The 2018 International Residential Code, Appendix Q, provided, for the first time, a definition of a tiny home, as "a dwelling that is 400 square feet (37m^2) or less in floor area excluding *lofts*."[224] Each local jurisdiction or state has to adopt Appendix Q, in order for a tiny home to be legal, as most building codes do not permit dwellings less than 400 square feet.[225] A few of the states and cities that have market-rate tiny homes and tiny homes villages for homeless people have also adopted Appendix Q, some with amendments and additions.[226] Some states, localities, and jurisdictions have also amended their zoning codes to permit Accessory Dwelling Units (ADUs), that enable home owners to have a small backyard residence for elderly parents, children, or others in need of housing,[227] ADU ordinances legalize backyard "granny flats" or tiny homes on foundations on existing home properties, but they do not define "tiny homes" or create unique zoning categories for tiny homes villages.[228] Tiny homes qualify as ADUs in some jurisdictions, but ADU regulation alone does not legalize tiny homes villages.[229]

Zoning codes can permit tiny homes and tiny homes villages as permissible land uses. Localities within Oregon, Washington, and California have created local zoning designations for different types of tiny homes arrangements, including "transitional home camps" that sanction and legalize tiny homes villages for unhoused people, as an emergency response to increasing homelessness in those cities.[230] Oregon has adopted IRC Appendix Q with amendments, and has created additional categories of legislation that regulates tiny homes.[231] Oregon state law categorizes tiny homes into three major categories: permanent, temporary and transitional.[232] The Oregon Residential Specialty Code (ORSC) also applies to permanent tiny homes; and permits tiny homes built according to the ORSC in any residential or commercial zone that permits single-family dwellings.[233] ORSC tiny homes

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[224] INTERNATIONAL RESIDENTIAL CODE, APP. Q § 102.1 (Int'l Code Council 2018).

[225] *Id.*

[226] *Tiny House Appendix Q*, TINY HOUSE BUILD, https://tinyhousebuild.com/code/ [https://perma.cc/GYP5-JP93].

[227] Infranca, *supra* note 28, at 54.

[228] *See* Alexander, *supra* note 14, at 453. For example, in May 2017, the City of Atlanta amended its zoning laws to permit accessory dwelling units or a tiny house that shares the building lot of another already existing home. The maximum square footage for the lot would remain the same, but it could be shared between an ADU and an existing home, as long as the ADU or tiny home is not more than 750 square feet. The ordinance also eliminated the ban on kitchens in the ADUs or tiny homes. On November 25, 2017, the Georgia Department of Community Affairs also adopted the GA Tiny House Appendix S that applies to tiny houses used as single dwelling units. "Appendix "S" approved a reduction in the minimum habitable room size for all residential structures from 120 to 70 square feet. The Appendix only applies to tiny houses on permanent foundations that are 400 square feet or less, and does not include wheel-based structures, which are still considered Recreational Vehicles in GA." Each city or locality has to adopt the GA Appendix S, but these legal changes to the zoning and building codes permitting tiny homes helps to spur a growing industry. *See* Douglas, *supra* note 15.

[229] Infranca, *supra* note 28, at 71.

[230] Turner, *supra* note 210, at 938–40.

[231] *See generally* State of Oregon Legis. and Pol'y Rsch. Off., *supra* note 29.

[232] *Id.* at 2.

[233] *Id.*

"may be subject to other zoning standards, including minimum size requirements."[234]

Oregon state law categorizes Dignity Village as a "transitional housing" camp.[235] The law enables municipalities within the state to establish transitional housing camps for people who "lack permanent shelter and cannot be placed in other low-income housing."[236] The municipalities establish and regulate transitional camps, but "[a]ny shared water, toilet, shower, laundry, or cooking facilities are regulated under the state standards for recreation parks. The 2017 Oregon Transitional Housing Standard contains suggested construction standards for municipalities to consider when establishing requirements for a transitional housing camp."[237] However, this standard has no regulatory impact until it is adopted at the municipal level.[238] Oregon's permissive tiny homes regulation has enabled nonprofit organizations interested in promoting tiny home living to expand upon the tiny homes village for homeless people model to provide more affordable homeownership and rental opportunities.[239]

Washington has also more recently adopted Appendix Q, and permitted and defined "tiny homes," paving the way for more tiny homes to be built legally in the state.[240] Long before this action at the state level, many cities within Washington state such as Seattle, Tacoma, and Olympia, moved to devise ordinances which permitted tiny homes villages for homeless people as "transitional campgrounds," in response to the emergency rise in homelessness in those cities.[241] These local ordinances enabled cities, counties, and non-profit groups to develop the transitional tiny homes villages for homeless people described above.[242] More recently, in February of 2020, Seattle passed an ordinance[243] that renewed the permits for transitional campgrounds created in 2015 that were set to expire in March of 2020.[244] This step paved the way for up to forty new tiny homes villages for homeless people in Seattle.[245] This ordinance is another example of how municipalities in states with permissive regulation that legalizes tiny homes can expand upon the state regulation to develop ordinances that permit transitional tiny homes villages for unhoused people in response to a shelter crisis.

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[234] *Id.* at 5.
[235] Turner, *supra* note 210, at 938.
[236] *Id.*
[237] State of Oregon Legis. and Pol'y Rsch. Off., *supra* note 29, at 4.
[238] *Id.*
[239] *See The Village Model*, SQUARE ONE VILLAGES, https://www.squareonevillages.org/ [https://perma.cc/8J76-BDXY].
[240] 2019 Wash. Legis. Serv. Ch. 352 (S.S.B. 5383) (WEST).
[241] *See* Lee, *supra* note 58.
[242] *See* Part III, Section 2 *supra*.
[243] Seattle, Washington, Municipal Ordinance 126042 (2020).
[244] King5 Staff, *Up to 40 tiny house villages allowed in Seattle after council approval*, KING 5 (Feb. 19, 2020), https://www.king5.com/article/news/local/homeless/tiny-house-village-ordinance-passes/281-bb459da4-5d4e-4945-8992-4bf610d40c04 [https://perma.cc/5NWZ-S2L6].
[245] *Id.*

Finally, California has also legalized six categories or classes of tiny homes.[246] Under California law, a tiny home must comply with the building codes and design standards that pertain to each of the six categories.[247] California also permits accessory dwelling units (ADUs) and defines ADUs as tiny homes.[248] Many cities within California have also embraced the tiny homes concept as a way to mitigate significant homelessness and increase affordable housing. San Jose, a Silicon Valley city in California, has long faced a growing homelessness problem.[249] In 2017, in the midst of a homelessness crisis, the City of San Jose appealed to the state of California to let it bypass restrictive state building codes to build tiny homes villages for homeless people.[250] The law was sponsored by Assemblywoman Nora Campos, D-San Jose, as Assembly Bill 2176, and was signed by then Gov. Jerry Brown on Sept. 27, 2016; the legislation sunsets in 2022.[251] The law requires each city to declare a "shelter crisis" and to use city-owned or city-leased land as sites for the tiny homes.[252]

San Jose used the law to create its Bridge Housing Program (BHP) which opened its first village on city owned land in January of 2020.[253] BHP residents live in individual tiny homes units and share amenities, such as kitchens, pantries, and laundry facilities.[254] The Emergency Sleeping Units (ESUs) in the completed BHP project are 80 square feet, with two larger units for residents with disabilities, and each unit was built by Habitat for Humanity volunteers at a cost of approximately $6,500 per unit.[255] The BHP Program is for homeless people in Santa Clara County's Rapid Rehousing System, meaning participants receive case workers and housing vouchers to help them transition to affordable housing permanent housing.[256]

The flexibility the state law exemption provided to San Jose, and their experience with the BPH program, also proved valuable during the Covid-19 pandemic; San Jose converted some of its unused BHP units and pledged to spend an additional $17 million dollars on approximately 500 new prefab

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[246] LEVINI, *supra* note 11, at 29.

[247] *Id.* at 31.

[248] *See* Infranca, *supra* note 28.

[249] *See* Elaine Walker, *San Jose Assembly Bill 2176 waives state building code for tiny houses for the homeless*, AM. TINY HOUSE ASS'N (Oct. 9, 2016), https://americantinyhouseassociation.org/san-jose-assembly-bill-2176-waives-state-building-code-for-tiny-houses-for-the-homeless/ [https://perma.cc/BY3T-FH8S].

[250] *See id.*

[251] Ramona Giwargis, *San Jose: New Law Would Make City First to Allow "Tiny Homes" For Homeless*, MERCURY NEWS (Oct. 8, 2016), https://www.mercurynews.com/2016/10/07/san-jose-new-law-would-make-city-first-to-allow-tiny-homes-for-homeless/ [https://perma.cc/5N4K-R8F5].

[252] *See id.*

[253] *See Bridge Housing Communities*, CITY OF SAN JOSE, https://www.sanjoseca.gov/your-government/departments/housing/ending-homelessness/bridge-housing-communities [https://perma.cc/6YK4-54ZY].

[254] *Id.*

[255] Matt Hickman, *San Jose Debuts Tiny House Community for the Homeless*, ARCHITECT'S NEWSPAPER (Mar. 4, 2020), https://www.archpaper.com/2020/03/san-jose-debuts-tiny-house-community-for-the-homeless/ [https://perma.cc/B933-BW86].

[256] CITY OF SAN JOSE, *supra* note 253.

tiny homes, to house homeless people infected or vulnerable to complications from Covid-19 during the pandemic.[257] California Governor Gavin Newsom also relaxed environmental regulations for the project, so the city could complete projects within a few weeks.[258] San Jose then created its Emergency Interim Housing (EIH) program and is building three emergency tiny homes villages, that will be used during the pandemic to house medically vulnerable unhoused people.[259] Each village will have 20 units that are 80 square feet each and are also built by Habitat for Humanity volunteers. After the pandemic, residents in the EIH program housing will be incorporated into the BPH program.[260]

States should develop model codes/ordinances that provide examples of building code changes, zoning amendments, and land use permissions that will be needed to foster tiny homes villages as housing alternatives post-pandemic. These examples show that a permissive legal infrastructure is needed in order for markets to be able to respond efficiently to the housing crises that may be before us in 2021 and beyond. Each state and locality must also identify developers, non-profits, investors, and social enterprises that invest in the rapid development of these communities. Finally, the federal government could develop handbooks that outline best practices and model codes that each state and local jurisdiction should follow to foster the rapid, sustainable, and equitable development of tiny homes communities nationwide in the wake of the Covid-19 pandemic.

B. NIMBYism

Another formidable challenge to the implementation of tiny homes villages is communities' Not-In-My-Backyard (NIMBY) resistance to siting and locating these villages within their respective borders.[261] Community resistance to the siting of tiny homes villages remains as significant as the siting challenges most affordable housing and low-income housing projects face.[262] Recently, an effort by the Chico Housing Action Team (CHAT) to develop a tiny homes village in Chico, California, was thwarted by a lawsuit from a local businessman.[263] Simplicity Village was planned as tiny home housing for 46 seniors; yet a local business owner filed a lawsuit against the

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[257] *See* Mary Meisenzahi, *San Jose Is Building Hundreds of Tiny Homes for The Homeless to Help Protect Them From the Coronavirus*, BUS. INSIDER (Apr. 9, 2020), https://www.businessinsider.com/silicon-valley-city-building-tiny-homes-homeless-coronavirus-2020-4 [https://perma.cc/V6VU-KWJY].

[258] *See id.*

[259] CITY OF SAN JOSE, *supra* note 253.

[260] *Id.*

[261] *See* Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. AFFORDABLE HOUS. & CMTY. DEV. L. 78, 79 (2002).

[262] *Id.* ("The development of affordable housing and services for low—and moderate-income households has been plagued by local opposition.").

[263] *See* Natalie Hanson, *CHAT rescinds request to build Simplicity Village*, ENTERPRISE-REC. (Mar. 24, 2020), https://www.chicoer.com/2020/03/24/chat-rescinds-request-to-build-simplicity-village/ [https://perma.cc/9D2U-ULT8].

City of Chico, "seeking to block the project on grounds that the city's approval for it was legally invalid."[264] In order to avoid costly litigation, CHAT terminated its occupancy of the site and withdrew its request to build Simplicity Village at that location.[265] CHAT maintains that it "remains deeply committed to a tiny homes village or some other low-cost alternative housing model at another location."[266]

Seattle has also faced opposition to the siting of some of its transitional tiny homes villages.[267] In 2018, a conservative think tank, the Freedom Foundation, on behalf of local residents, sued the city of Seattle over the city's approval and siting of a tiny homes village in the South Lake Union area.[268] The suit alleged that the city violated its own laws by failing to conduct an adequate environmental review, neglecting community outreach and input, as well as violating the limits in the city's ordinance on the number of transitional villages permitted in the city.[269] The surrounding community's opposition was also based upon the city's experimental Licton Springs Village, the city's only low-barrier village that permitted residents to use drugs on site.[270] Due to repeated police calls and neighborhood opposition, the city and LIHI closed the Licton Springs Village.[271] None of Seattle's other tiny homes villages explicitly permitted drug use.[272]

Despite the lawsuit, the city and the Low-Income Housing Institute were able to proceed with the development at Lake Union.[273] More recently, in April of 2020, the Seattle Department of Human Services announced that it was expanding the village by 20 tiny homes, based upon Seattle Mayor Jenny Durkan's expanded emergency powers to house homeless individuals during the Covid-19 pandemic.[274] Notably, San Jose was also able to expand its development of tiny homes villages, due to the governor's and mayor's expanded emergency powers to house individuals during the Covid-19 pandemic.[275] Yet, these NIMBY struggles underscore that most of the successful

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[264] *Id.*

[265] *Id.*

[266] *A Dream of a Tiny Home Village: Proposals for Low-Cost Housing Options for Seniors in Chico*, CHICO HOUS. ACTION TEAM, https://www.chicohousingactionteam.net/tiny-house-village-proposals [https://perma.cc/RW48-MJRY].

[267] *See* Sarah Wu, *Lawsuit Filed Over New Tiny-House Homeless Village in Seattle's South Lake Union Neighborhood*, SEATTLE TIMES (July 2, 2018), https://www.seattletimes.com/seattle-news/homeless/lawsuit-filed-as-tensions-flare-over-new-seattle-tiny-house-homeless-village/ [https://perma.cc/3JGW-GXWW].

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *See* Anne Dennon, *Licton Springs Village Is Closing. How Successful Was It?*, SEATTLE MET (Mar. 7, 2019), https://www.seattlemet.com/news-and-city-life/2019/03/licton-springs-village-is-closing-but-it-was-a-tiny-house-success-story [https://perma.cc/F9BX-X82U].

[272] *See id.*

[273] *See* Homeless Response, *Update: Lake Union Village expansion complete*, HOMELESSNESS RESPONSE BLOG-SEATTLE.GOV (Apr. 15, 2020), https://homelessness.seattle.gov/update-lake-union-village-expansion-complete/ [https://perma.cc/X8RS-NWNB].

[274] *Id.*

[275] *See* Meisenzahi, *supra* note 257.

transitional villages analyzed in this Article are located on state, city or county-owned land, enabling governments to locate villages even in the face of some neighborhood opposition.

The permanent tiny homes villages described in Part III also initially faced NIMBY resistance. OM Village in Madison, WI was able to press forward despite NIMBY resistance; area residents only began to embrace the village after the project was built and surrounding residents observed how the village helped homeless people gain shelter and develop productive habits.[276] Similarly, when Community First! Village initially tried to locate in downtown Austin, the Austin business community opposed the project. Only when the village organizers found land outside of Austin, in a remote area, and then brought the project to fruition, did the city officials Austin embrace and praise the project.[277] These permanent villages were not authorized by ordinances or state law. Community First! Village's land was purchased by the non-profit Mobile Loaves & Fishes without government help; and the land was outside the boundaries of Austin, TX enabling the village to avoid the more restrictive zoning regulations of Austin.[278] Community First! Village is a planned unit development. OM Village is also a planned unit development and the non-profit also owns the land on which the village sits.[279]

These examples show that if there is sufficient public land, municipalities can use tiny home villages as a way to fulfill their emerging common law obligations to house unsheltered homeless people as quickly as possible. Recently the City of Boise, Idaho settled a lawsuit in which the city was sued for enforcing a camping ordinance that outlawed homeless individuals sleeping in public.[280] The settlement provides that Boise cannot arrest homeless individuals for sleeping outside when no other shelter is available.[281]

The settlement was partly precipitated by a 9th U.S. Circuit Court of Appeals decision in September of 2018 against the city of Boise which held that cities violate the 8th Amendment's cruel and unusual punishment provision when they arrest people for sleeping on the street if there are no other shelter alternatives.[282] Boise appealed to the U.S. Supreme Court, but the Court denied cert.[283] "The settlement will cost Boise about $1.8 million, in-

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[276] *See* Lisa Speckhard Pasque, *Occupy Madison Tiny Homes Village Looks to Expand*, MADISON.COM (Aug. 21, 2017), http://host.madison.com/news/local/city-life/occupy-madison-tiny-homes-village-looks-to-expand/article_76697ab3-e175-59bb-8e59-dda685c7b684.html [https://perma.cc/467B-843J].

[277] *See* Kimble, *supra* note 99.

[278] Alexander, *supra* note 14 at 433.

[279] *Id.*

[280] Hayley Harding, *Boise will settle controversial homeless camping lawsuit, change city code*, LOS ANGELES TIMES (Feb. 8, 2021), https://www.latimes.com/world-nation/story/2021-02-08/boise-will-settle-controversial-homeless-camping-lawsuit-change-city-code [https://perma.cc/L2YU-C9JF].

[281] *Id.*

[282] *Id.*; *see also* Martin v. City of Boise, 902 F.3d 1031, 1048 (2018).

[283] Press Release, Crys Letona, Supreme Court Lets Martin v. Boise Stand: Homeless Persons Cannot Be Punished for Sleeping in Absence of Alternatives, NAT'L HOMELESS L.

cluding $1.3 million to create overnight shelters or rehabilitate existing shelter spaces . . . ."[284] The settlement puts pressure on the city to find adequate shelter for the homeless, especially during the emergency of Covid-19. The 9th Circuit ruling covers cities within Idaho and "California, Oregon, Washington, Montana, Nevada, Arizona, Alaska and Hawaii."[285] Notably, many of these states have also experienced increases in homelessness and tiny homes villages for unhoused people have become common in cities in these states.[286] These states, and localities within them, should use tiny homes villages as a way of fulfilling their obligations to create shelter for the unhoused, and as a way of resisting NIMBYism, if possible. When local communities resist siting, the cities can appeal to the emergency nature of the situation, then, as in the case of Community First! Village and OM Village, when the villages demonstrate that they can be a productive alternative to people sleeping on the streets or under bridges and highways, NIMBY resistance may wane.

C. Diversity and Segregation in Tiny Homes Villages

Covid-19 also unveiled and compounded the flaws and distributional inequities of the American system of housing provision. Race and class dynamics led to disparate homeownership gains in 2019—"[w]hile the homeownership rate for white households rose to 73.3 percent in 2019, that for Black households held flat at 42.8 percent, widening the gap between the rates to 30.6 percentage points, the largest since 1983, and reflecting the legacy of decades of discriminatory policies and inequitable access to homeownership."[287] The pandemic further exacerbated these gaps in 2020. "Just 7 percent of white homeowners were behind on mortgage payments in late September, but the share was nearly two-and-a-half times higher among Hispanic (18 percent) and Black (17 percent) owners, and nearly twice as high among Asian owners (12 percent)."[288] These racial disparities are particularly acute at the lowest income levels, as the shares of lowest-income households behind on their mortgages was "nearly a third of Hispanic, a quarter of Black, and a fifth of Asian homeowners."[289]

The racial disparities that plague the U.S. homeownership market also permeate U.S. rental markets. "Last year, a larger share of Black and Latino renters had difficulty paying rent than white households."[290] Additionally,

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CTR. (Dec. 16, 2019), https://nlchp.org/supreme-court-martin-v-boise/ [https://perma.cc/UE8T-DSHM].

[284] Harding, *supra* note 280.

[285] *Id.*

[286] *See* Alexander, *supra* note 14, at 387.

[287] JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 4, at 2.

[288] JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 5, at 3.

[289] *Id.*

[290] Solomon Greene & Alanna McCargo, *New Data Suggest COVID-19 is Widening Housing Disparities by Race and Income*, URB. INST.: URB. WIRE (May 29, 2020), https://www.urban.org/urban-wire/new-data-suggest-covid-19-widening-housing-disparities-race-and-income [https://perma.cc/RG96-2TVU].

"We know from the data that the severity and duration of distress may be longer for households of color, and programs should consider the need for additional time for recovery."[291] Studies also show that "the eviction/foreclosure rates for all respondents doubled in August, mainly driven by Black and Hispanic households reporting higher evictions/foreclosures than white households. . . . While the jump in eviction risk among Black households is certainly alarming, Hispanic respondents maintain the highest vulnerability to eviction among the three groups . . . ." [292]

The residential segregation between white communities and communities of color is not only the result of residential choices, but of present and historical patterns of discriminatory housing laws and practices and the inadequate supply of affordable housing.[293] Covid-19's pernicious effects on communities of color are the result of high degrees of residential segregation due to discriminatory housing policies, as well as the inadequate supply of housing in communities of opportunity.[294] As a result, large numbers of low- and moderate-income people of color live in high-poverty neighborhoods with large numbers of essential workers, inadequate health care, and insufficient viable housing opportunities that connect residents to opportunity.[295]

As with the racial disparities in homeownership and renting, people of color are also disproportionately at risk of becoming homeless,[296] likely due to present and historic discrimination and structural racism. "[Forty] percent of people experiencing homelessness in 2019 were Black, 22 percent were Hispanic, 3 percent were American Indian or Alaska Native, and just 48 percent were white."[297] Relative to their percentages in the overall U.S. population, therefore, Blacks and Hispanics were disproportionately homeless in 2019.[298] Available data in 2020 continues and exacerbates these trends, as people of color constitute a disproportionate percentage of the homeless population compared to their percentage of the overall U.S. population.[299]

Tiny homes villages have not substantially ameliorated these disparities. Tiny homes communities often develop organically through collaborations between homeless people, volunteers, non-profit organizations and the city; however, the collaborators and participants are not always diverse, and therefore these communities do not always advance fair housing. For example, a 2017 study of Seattle, Washington's transitional tiny homes villages revealed that 57% of the homeless people served were white, 19% were Black or Afri-

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[291] *Id.*
[292] Yung Chun & Michal Grinstein-Weiss, *Housing Inequality Gets Worse as the COVID-19 Pandemic Is Prolonged*, BROOKINGS: UP FRONT (Dec. 18, 2020), brookings.edu/blog/up-front/2020/12/18/housing-inequality-gets-worse-as-the-covid-19-pandemic-is-prolonged/ [https://perma.cc/LW29-6YCC].
[293] JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 5, at 5–6.
[294] *Id.*
[295] *Id.*
[296] *Id.* at 36–37.
[297] *Id.* at 37.
[298] *Id.*
[299] *Id.*

can-American, and 10% identified as mixed race.[300] The number of Blacks or African-Americans served, for example, was notably low compared to their percentages in the homeless population and their participation in other homeless services programs.[301] In response to these disparities, the city of Seattle and LIHI opened a new village focused on the needs of homeless African Americans, Native Americans, and Alaska Natives and also doubled the size of an existing village which operates on a housing first model.[302] Community First! Village is more diverse, however, it is an exception because of its location in Austin, a diverse place, but also because of its size and diverse accommodations, as well as how it obtains residents.[303] This data suggests that when localities are planning villages of tiny homes, they have to be intentional about affirmatively furthering fair housing at these sites, in order for the tiny homes projects to combat systemic racism and to equitably distribute tiny homes opportunities.

Conclusion

Tiny homes villages are a way for local communities in the U.S. to add to the temporary and permanent housing supply during times of growing housing insecurity. Tiny homes villages are not for every unhoused person or every household facing housing insecurity, but they should be added to the list of possible solutions to ameliorate unsheltered homelessness, the trauma of eviction and foreclosure, and other forms of housing displacement and instability. As this Article shows, tiny homes villages have been developing in an ad hoc manner through public and private collaborations at local levels with little federal guidance or support.

The federal government will need to play a facilitative role in helping tiny homes villages to become part of a national housing agenda. The federal government must support the creation of tiny homes villages at the local level, if tiny homes villages are to become a form of housing that mitigates housing insecurity; and restores privacy, dignity, community and human flourishing to households in crisis. The federal government, through HUD, should develop crowd sourced databases of best practices and case studies to provide examples of how to surmount implementation challenges at the local level. Tiny homes communities also need to be developed in a habitable and sustainable way, so HUD should develop building design and utility standards that apply to tiny homes. Additionally, sustainable and habitable building measures can, in some instances, increase costs in locations where

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[300] Seattle Department of Human Services, Permitted Encampment Evaluation 5 (2017), http://www.seattle.gov/Documents/Departments/HumanServices/AboutUs/Final%202017%20Permitted%20Encampment%20Evaluation.pdf [https://perma.cc/6AC7-WY5P]

[301] *Id.*

[302] Lee, *supra* note 58.

[303] Mobile Loaves & Fishes, *supra* note 95.

land and development costs are high.[304] Therefore, the federal government should provide funding to help mitigate these cost barriers.

HUD should also work with universities and policy analysts to study and analyze tiny homes villages' respective outcomes compared to other homelessness prevention measures and relocation assistance. HUD should view tiny homes, and tiny homes villages, as a way to help states and localities implement the federal government's homelessness services programs such as Housing First,[305] McKinney/Vento Homeless Assistance Act,[306] or Continuum of Care (CoC) programs.[307] Through these efforts, the federal government can also simplify how states and localities utilize the funds they are receiving through Congress and the federal government's Covid-19 relief efforts.

Recently, President Biden announced his efforts to restore the nation's previous commitment to furthering diverse and inclusive communities, and eradicating racial discrimination and structural racism in housing markets.[308] President Biden tasked HUD with assessing the effects of the former Trump Administration's repeal of HUD's Affirmatively Furthering Fair Housing, Disparate Impact, and Discriminatory Effects rules.[309] As the federal government develops these rules, it can identify tiny homes villages as another housing program that should strive to affirmatively further fair housing, and avoid discriminatory impacts and effects in implementation. HUD could provide guidance and identify best practices in outreach to help states and localities promote diversity and inclusion, and thwart discrimination, in tiny homes villages.

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[304] Doug Smith, *$130,000 for an 8-foot-by-8-foot shed? That's what L.A. is paying in a bid to house the homeless*, L.A. TIMES (Dec. 12, 2020, 5:51 P.M.), https://www.latimes.com/california/story/2020-12-12/los-angeles-tiny-homes-homeless [https://perma.cc/JBG6-5DKY]; *See also* Kristin Dickerson, *Tiny Homes for Dallas' Chronically Homeless*, NBCDFW (June 15, 2018, 3:59 P.M.), https://www.nbcdfw.com/news/local/tiny-homes-for-dallas-chronically-homeless/236950/ [https://perma.cc/R92Q-7HJG].

[305] *See Housing First in Permanent Supportive Housing Brief*, U.S. DEP'T OF HOUS. & URB. DEV. (July 2014), https://files.hudexchange.info/resources/documents/Housing-First-Permanent-Supportive-Housing-Brief.pdf [https://perma.cc/7DMF-SM63]; *see also* Nestor M. Davidson, *"Housing First" for the Chronically Homeless: Challenges of a New Service Model*, J. AFFORDABLE HOUS. & CMTY. DEV. L. 125, 125 (2006) ("Housing First, as its name suggests, offers homeless individuals the chance to move directly from the streets to independent housing.").

[306] *Stewart B. McKinney Homeless Assistance Act*, Pub. L. No. 100-77, 101 Stat. 482 (1987).

[307] The Continuum of Care program provides funding to promote a community wide commitment to ending homelessness through funding to nonprofits and state and local governments. *See* U.S. Dep't of Hous. & Urb. Dev., *Continuum of Care (CoC) Program*, HUD EXCH., https://www.hudexchange.info/programs/coc/ [https://perma.cc/Q9JM-GZ7E].

[308] Memorandum from President Joseph R. Biden on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/ [perma.cc/5L5W-PZPH].

[309] *Id.*

Finally, one of the biggest challenges for tiny homes projects to effectively serve as an antidote to growing housing insecurity is to bring the projects to scale to serve large numbers of people. This challenge will be difficult to surmount in dense urban cities with little available and affordable land and space, extensive zoning and land use rules, and NIMBY resistance. Yet, this Article provides examples, such as Community First! Village and Seattle's non-transitional tiny homes villages, as examples of how to bring these projects to scale to serve more people. The federal government, through HUD, could provide a typology of projects and identify best practices, and regulatory guidance to help more projects scale-up. Tiny homes villages, alone, will not solve Americas' housing supply problems. Yet, in a cost-effective manner that restores dignity, control, and opportunity to people in crisis, tiny homes villages can make a big difference to households facing housing insecurity and provide the dispossessed a place to call home.

The New Racial Wage Code

*Veena Dubal**

Abstract: The legal identity of on-demand platform workers has become a central site of conflict between labor and industry. Amidst growing economic inequality, labor representatives and workers have demanded that platform workers be afforded employee benefits and protections, including minimum wage and overtime rights. Platform industrialists, meanwhile, have proffered a new regulatory category of worker—neither employee nor independent contractor—that limits the protections available to the workforce, legalizes unpredictable, digitally-personalized piece-pay, and constricts a worker's right to negotiate different terms. To date, legal and socio-legal scholars have primarily analyzed this third category of worker, codified by Proposition 22 in the state of California, in race-neutral terms.

In this Article, I make visible the racial politics of this tiered system of worker protection. Using historical, legal, and ethnographic methodologies, I argue that the wage system created by Prop 22 and the third category of worker has been both rationalized (by industry) and contested (by labor) through a recognition of systemic racial inequalities. Adopting the language of racial justice, platform employers justified the legal elimination of pay for all time spent laboring (and other worker protections) as a means of providing economic opportunities to struggling immigrants and racial minorities. Workers, however, argued that the corporate recognition of racial inequality strategically neutralized political support for employment protections, including the minimum wage, thereby remaking racialized economic hierarchies and undermining labor solidarity.

Drawing on historical comparisons made by platform workers campaigning against Prop 22, Part I situates the third category of worker within a genealogy of industry-sponsored racial wage codes, proposals, and debates during the First and Second New Deals. In Part II, I argue that companies supporting Prop 22, like their early twentieth century counterparts, strategically used race as a resource to eliminate access to employment protections. Finally, in Part III, I analyze how platform workers who collectively fought the passage of Prop 22 rejected the rhetorical liberalism of their employers and examine their actions and visions for a path to racial and economic justice. Building on the workers' analyses and actions, I argue that facially neutral employment and labor rights carve-outs for the gig workforce are made possible by and reproduce racial subjugation. As the platform companies attempt to spread their Prop 22 wage model in other locales, lawmakers and labor representatives shaping or re-defining minimum employment standards must consider the racialized consequences of this formative reality.

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INTRODUCTION

On August 28, 2020, the anniversary of Martin Luther King's "I have a Dream" speech at the historic March on Washington for Jobs and Freedom, residents of downtown Oakland awoke to a prominent new billboard. On the corner of Broadway and Webster Street, directly above a popular lounge in the city's East African immigrant community, a large black and white advertisement displayed the slogan, "If you tolerate racism, *delete Uber*." Uber's Chief Diversity and Inclusion Officer triumphantly celebrated the campaign by tweeting, "Now is the time for all people and organizations to stand up for what is right."[1] During a summer of widespread Black Lives Matters protests prompted by the police killings of George Floyd and Breonna Taylor, as well as a global pandemic that disproportionately killed Black and Latinx workers, Uber erected similar billboards in cities across the U.S.[2]

The phrase, "If you tolerate racism, *delete Uber*," reappropriated the language from the memorable #DeleteUber campaign, launched as a direct action against the company by the New York Taxi Workers' Alliance (NYTWA) four years earlier.[3] In response to President Donald Trump's 2016 Executive Order 13769, which restricted immigration from seven Muslim-majority countries, thousands of protestors descended upon major U.S. airports and demanded that Trump rescind what became known as "the Muslim Ban." In solidarity with protestors and Muslim immigrants, including the majority of New York City's taxi, Uber, and Lyft drivers, the NYTWA organized a ride-hail work stoppage at the John F. Kennedy Airport. Shortly thereafter, confronted with the falling supply of rides, Uber's surge pricing directed drivers to the JFK airport, resulting in algorithmically-enabled strike busting.[4] This, in turn, outraged the protestors who amplified the NYTWA's call to #DeleteUber in the name of racial and economic justice.[5] Uber, the NYTWA pointed out, had decimated the incomes of the

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[1] Bo Young Lee (@jboyounglee), TWITTER (Aug. 27, 2020, 11:14AM), https://twitter.com/jboyolee/status/1299047636234833925?lang=en [https://perma.cc/3YHQ-Q9JD].

[2] Ian Zelaya, *Uber Urges Those Who Tolerate Racism to Delete the App*, ADWEEK (Aug. 28, 2020), https://www.adweek.com/brand-marketing/uber-urges-those-who-tolerate-racism-to-delete-the-app/ [https://perma.cc/8KVN-CDJH].

[3] NYTWA Statement on Muslim Ban, N. Y. TAXI WORKERS ALL., https://www.nytwa.org/solidarity [https://perma.cc/CPF6-C7T9].

[4] Elena Cresci, *#Delete Uber: How Social Media Turned on Uber*, GUARDIAN (Jan. 30, 2017), https://www.theguardian.com/technology/2017/jan/30/deleteuber-how-social-media-turned-on-uber [https://perma.cc/4LMX-6SHZ].

[5] In a statement, the New York Taxi Workers Alliance wrote, "Now is the time for all those who value justice and equality to join together in holding Uber accountable, not only for its complicity with Trump's hateful policies but also for impoverishing workers. Uber's greed and disregard for social values was evident before the company's CEO Travis Kalanick became an advisor to Donald Trump. And Uber drivers along with other professional drivers bear the brunt of that greed. . .Even as these corporations make million-dollar pledges today [Lyft donated $1 million dollars to the ACLU Immigrants' Rights Project to show opposition to the Muslim Ban], they still refuse to abide by Minimum Wage laws . . . .We are a workforce that is predominantly Muslim and Sikh, a workforce that is predominantly black and brown, and a

city's majority immigrant taxi workforce and refused to provide minimum wages or overtime to its own drivers. The hashtag trended for some time, and hundreds of thousands of people deleted the app from their phone.[6]

Four years later, Uber's new marketing slogan—"If you tolerate racism, *delete Uber*" —was unintelligible to many of its drivers. The morning after the first billboard was erected, an Uber driver snapped a photo of the sign on his smartphone and shared it with other drivers in a group text. "*What does this even mean?*" the driver asked. "*Where is that?*" another responded, *"What does being racist have to do with boycotting Uber?*"

For roughly seven months, members of California's ride hail and food delivery platform workforces—comprised primarily of immigrants and people of color—had been organizing to prevent Proposition 22 (Prop 22) from passing. The initiative threatened to take away the employment rights granted to California platform workers and to codify a third, substandard category of work for delivery and transportation "network workers." Many of these drivers had been laboring for Uber—and its competitor Lyft—for over half a decade. They had experienced the real-life impacts of continual wage cuts, black box algorithmic control, and (mis)classification as independent contractors. As the coronavirus pandemic ravaged their communities[7] and drastically reduced ride-hail demand, many drivers—despite their years of loyalty and hard work—were denied access to basic safety-net protections like health insurance and state unemployment benefits. Some were forced to choose between risking exposure to the virus and going hungry.[8]

In response to Uber's billboard, a coalition of ride-hail workers and groups organized a protest on September 9, 2020. Workers held up a banner, mirroring the font and aesthetic of Uber's billboard, which read, "If you

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workforce that is increasingly impoverished . . . That's why we are so incredibly proud of our members, including Uber drivers, who stood up to the injustice of the Muslim ban on Saturday." New York Taxi Workers' Alliance, Statement on #DeleteUber, FACEBOOK (Jan. 30, 2017), https://www.facebook.com/nytwa/posts/nytwa-statement-on-deleteuber-seeing-thousands-of-you-stand-up-in-defense-of-our/1565406936806813/ [https://perma.cc/D7K7-MLLJ].

[6] Paige Leskin, *Uber Says the #DeleteUber Movement Led to 'Hundreds of Thousands' of People Quitting the App*, BUS. INSIDER (April 11, 2019), https://www.businessinsider.com/uber-deleteuber-protest-hundreds-of-thousands-quit-app-2019-4 [https://perma.cc/AND9-D2W5].

[7] Transportation workers suffered disproportionate death rates in California as a result of the Covid-19 pandemic.Yea-Hung Chen, Maria Glymour, Alicia Riley, John Balmes, Kate Duchowny, Robert Harrison, Ellicott Matthay, Kirsten Bibbins-Domingo. *Excess mortality associated with the COVID-19 pandemic among Californians 18–65 years of age, by occupational sector and occupation: March through October 2020* 16(6) PLoS ONE (2021), https://www.medrxiv.org/content/10.1101/2021.01.21.21250266v1.full.pdf [https://perma.cc/F8ZB-6TEU].

[8] See, e.g., Veena Dubal & Meredith Whittaker, *Uber drivers are being forced to choose between risking Covid-19 or starvation*, GUARDIAN. (Mar. 25, 2020, 10:00 AM), https://www.theguardian.com/technology/2020/mar/25/uber-lyft-gig-economy-coronavirus [https://perma.cc/ATJ9-EWZL].

support racial justice, *Vote No on Prop 22*."[9] Prop 22, the workers explained to the crowd that gathered, would strip workers of the basic economic rights that the California legislature and courts affirmed they were owed—including an hourly minimum wage floor, overtime protections, and reimbursements for expenses. Indeed, the initiative entirely delegated to the companies the power to set individualized, non-standard labor prices. In sponsoring Prop 22, Uber, Lyft, DoorDash, Postmates, and Instacart invested a record $205 million dollars to campaign for, among other things, a differential wage code for the sector which would effectively legalize unpredictable piece-payment.[10] Drivers, under the terms of the proposition, would be paid by task, rather than by the time they spent laboring.[11] Incensed by what she called "Uber's hypocrisy," African American driver and Prop 22-protestor Mekela Edwards denounced the company for having "the gall to exploit the emotions of Black people with this billboard. While I am disappointed, I am not surprised because gig companies like Uber have been exploiting drivers for years now."[12]

Uber's billboard and the workers' protest made race visible as a central component of the fight over Prop 22 and the third category of worker, as well as what is colloquially referred to as "gig work" or "platform work": app-deployed, in-person service work that operates outside the boundaries of work law protections.[13] In the United States, such work is conducted primarily by immigrants and subordinated minorities. Although available statistics are limited, Lyft estimates that 69% of their U.S. workforce identifies as racial minorities. In California, which is both the most diverse and most unequal state in the U.S., this percentage is likely much higher.[14] Indeed,

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[9] Garret Leahy, *Uber Drivers Protest Billboard Campaign*, 48HILLS (Sept. 10, 2020), https://48hills.org/2020/09/uber-drivers-protest-billboard-campaign/ [https://perma.cc/Z46F-88XR].

[10] As discussed in Part II, *infra*, Proposition 22 applied to "transportation network company" workers and "delivery network company" workers. This is the first time in any US statute that delivery companies that deploy their workers via an app have been defined as such.

[11] Under Prop 22, drivers are not paid for the time that they spend waiting for a task. According to drivers in my research, this unpaid time ranges from 40-60% of all the time they spend working. See *infra* Part II for details. For more on digital piecework, see Veena Dubal, *The Time Politics of Home-Based Digital Piecework*, 2020 ETHICS IN CONTEXT 50 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3649270 [https://perma.cc/ESX8-Z49H].

[12] Leahy, *supra* note 9.

[13] Notably, the terms "gig work" and "platform work" do not describe a coherent sector of work. I use the terms in this article as a convenient shorthand. Work that requires shopping for and delivering food is a qualitatively different sector of work than ride-hail driving. Colloquially, however, these terms are generally used to describe work produced by companies that ascribe to a particular business model, one that disseminates assignments through a digital platform, pays by assignment, and maintains that workers are not legally entitled to employment protections, including the minimum wage, overtime, workers' compensation, unemployment insurance, and the right to collectively organize and bargain.

[14] In conversations with media representatives, Yes on Proposition 22 campaign representatives confirmed that people of color and immigrants make up the vast majority of drivers who labor for Uber and Lyft in California. In addition to the nationwide Lyft data, we know that in New York City, 9 out of 10 ride-hail drivers are immigrants, and in Seattle 72% are immigrants and 50% Black. Gina Bellafante, *Uber and the False Hopes of the Sharing Economy*, N.Y.

one study estimates that in the San Francisco Bay Area in 2019, immigrants and people of color comprised 78% of Uber and Lyft drivers, most of whom relied on these jobs as their primary source of income.[15] In this highly racialized labor market, wages are low, unpredictable, and frequently fall below the minimum wage.[16] Through the use of opaque data collection and hidden algorithms, companies personalize wages for each worker, which allows the companies to practice first degree labor price discrimination.[17] As a result of this unpredictable and inconsistent wage calculation system, workers sometimes make no money—or even lose money—after considering vehicle expenses.

Rather than addressing racial inequalities by improving the precarious working conditions of their primarily people-of-color workforce, the ride-hail companies Uber and Lyft have used the existence of such inequalities as a resource to justify and legalize their business model. During their record-breaking campaign to pass Prop 22, the companies deployed the rhetoric of social justice and sought support from and alliances with a number of identity-based groups.[18] In addition to erecting "delete Uber" billboards, Uber announced in an open letter penned by the CEO that they were an "anti-racist" company and donated to criminal justice non-profits—identifying ra-

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TIMES (Aug. 9, 2018), https://www.nytimes.com/2018/08/09/nyregion/uber-nyc-vote-drivers-ride-sharing.html [https://perma.cc/26R9-FF4H]; James A. Parrot & Michael Reich, *A Minimum Compensation Standard for Seattle TNC Drivers* (July 2020), https://irle.berkeley.edu/files/2020/07/Parrott-Reich-Seattle-Report_July-2020.pdf [https://perma.cc/NW6K-QV6N].

[15] Chris Benner, Erin Johansson, Kung Feng & Hays Witt, *On-Demand and on-the-Edge: Ride-Hailing and Delivery Workers in San Francisco*, UC SANTA CRUZ INST. FOR SOC. TRANSFORMATION, https://transform.ucsc.edu/on-demand-and-on-the-edge/ [https://perma.cc/N6CJ-U9Z6].

[16] Uber and Lyft have resisted efforts by the California Public Utilities Commission to share trip and earnings data for drivers. *See* Sarah McBride, *Uber's Fight of California Data-Sharing Rule Highlights its Bumpy Road*, REUTERS (Dec. 18, 2024), https://www.reuters.com/article/us-uber-california-data/ubers-fight-of-california-data-sharing-rule-highlights-its-bumpy-road-idUSKBN0JX01320141219 [https://perma.cc/5X25-9L3S]. Debates over the wages of these ride-hail workers are often not about the data, but about the assumptions made in analysis over expenses. Typically, industry-funded research studies do not adequately calculate and include either waiting time or expenses. *See, e.g.* Dara Kerr, *How Uber and Lyft Battled Seattle over Minimum Wage For Drivers*, CNET (Jul. 14, 2020), https://www.cnet.com/news/heres-how-uber-and-lyft-battled-seattle-over-minimum-wage-for-drivers/ [https://perma.cc/4EXS-2BS5].

[17] First degree price discrimination is most frequently discussed in the context of personalized prices for consumers. Personalized prices can reflect how much a consumer can pay or would be willing to pay for services or products. But this personalization is increasingly happening in the workplace as well. Firms like Uber and Lyft practice first degree *labor* price discrimination to personalize income for workers: collecting individualized data on workers and using that data to algorithmically determine income through a personalized allocation of bonuses and tasks. Together, these systems are used to invisibly control worker behavior. For more on personalized wages, see Zephyr Teachout, "Personalized Wages, Experimentation, and Labor Monopsony Law." Working paper (2021). On file with author.

[18] According to the Yes on Prop 22 campaign, groups that supported Prop 22 included California-Hawaii State Conference of the NAACP, California National Action Network, Sacramento National Action Network, Los Angeles National Action Network, Black Women Organized for Political Action, Compton Branch NAACP, National Asian American Coalition, and the Sí Se Puede Foundation of Fresno, Tulare, Kern and Kings Counties. *Our Coalition*, YES22, https://yeson22.com/coalition/ [https://perma.cc/W7M3-4WLR].

cial inequality in the carceral state while ignoring its presence in the economy.[19] Lyft, for its part, published blogposts condemning "systemic racism," joined forces with the National Action Network, and unveiled LyftUp, an initiative to provide donated rides to underserved communities.[20] Drivers in my research disavowed these gestures by the companies as a "smokescreen." Their lives and racial identities, they insisted, were being instrumentalized for profit.

Many drivers critical of Prop 22 identified their exclusion as reminiscent of earlier moments in U.S. history, in which racial minority workforces were denied the same rights as other workers and, in particular, were excluded from minimum wage protections. For instance, in one of my conversations with her, Nicole Moore, a Lyft driver and organizer with Rideshare Drivers United, a statewide group of self-organized ride-hail drivers, described Prop 22 as part of a lineage of racial exclusion from state work protections:

> Prop 22 plain and simple puts all of us app-based workers in a second-class worker status. Permanently. Historically, who else hasn't been covered by the minimum wage? Domestic Workers. Farm Workers. And now App-Based workers. And just like domestic and farm workers, we're a majority people of color and immigrant workforce – and somehow people make up lies that it's OK for us to not have access to the same protections and wage floors as everyone else.[21]

As Nicole and other workers in my research indicated, this was not the first-time workers of color had been carved out of the protection of employment laws. Like Uber and Lyft, early twentieth century industrialists campaigned for differential wage regulations and even sectoral carveouts for majority Black workforces, denying these workers access to minimum wage protections, unemployment insurance, workers' compensation, and the protected rights to organize and collectively bargain. Over the protest of many African American workers, civil society leaders, and organizations, they succeeded.

This Article takes seriously the drivers' comparison between Prop 22 and this earlier historical moment, when subordinated racial minorities were first carved out of employment and labor law protections. Following Charles Mills' call to engage in knowledge production through a color-conscious genealogy,[22] I use legal and ethnographic research conducted before, during

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[19] Dara Khosrowshahi, *Being an Anti-Racist Company*, UBER NEWSROOM (Jul. 17, 2020), https://www.uber.com/newsroom/being-an-anti-racist-company/ [https://perma.cc/AJ56-XGFX]. In response to this campaign, one ride-hail driver responded sarcastically, "Good Lord. War is peace. Equality is for some people, but not all." Veena Dubal, Fieldnotes (on file with author).

[20] *Introducing LyftUp: Transportation Access for All*, LYFT BLOG (Jan. 21, 2020), https://www.lyft.com/blog/posts/lyftup-bikes [https://perma.cc/KY4E-SQYV].

[21] Interview with Nicole Moore, Rideshare Drivers United (Dec. 2020).

[22] Mills writes that in the sociology of knowledge (referring to philosophy), we "need to highlight the role of historical amnesia (the suppression, or the downplaying of the signifi-

and after the campaign to pass Prop 22 to reframe "the third category of worker" and Prop 22 against the backdrop of the racial wage codes and sectoral carveouts that were proffered, debated, and passed during the First and Second New Deals.[23] In Part I, I show the central role that race and white supremacy played in the formation and implementation of this early 20th century regulation. Drawing on an economic logic rooted in classical racism (e.g., the alleged racial inferiority of African Americans as workers), industrial and agricultural representatives lobbied for lower wage floors for African American workers and advanced facially neutral exclusions from employment and labor laws for sectors in which African Americans constituted the majority of the workforce.

Workers in my ethnographic research insisted that Prop 22 builds upon and tracks this torrid history. In Part II, I argue that Uber, Lyft, DoorDash, Instacart, and Postmates, like early twentieth century industrialists, used race as a resource to eliminate access to minimum wage and overtime protections (among other employment rights) and justified their actions through the mirage of racial benevolence. The companies leveraged the discursive power of liberalism to make their case, while rendering invisible the racialized economic structures and injustices experienced in the everyday lives of many workers. Rather than overtly discuss Prop 22 as a differential wage code or carveout for a workforce of color, the companies munificently framed the initiative as an economic opportunity for struggling immigrants and minorities. I challenge this benevolent framing in Part III by centering "voices from below." Drawing on my embedded ethnographic research of self-organizing Uber and Lyft drivers in California, I show that these ride-hail workers rejected a sub-worker status. These workers fought to oppose a law that would maintain their subjugation and organized to stem the tide of racialized mis-

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cance, of certain facts), [and] the group interests . . . of the privileged race . . . ." in order to address the fact our contemporary, mainstream understandings of the world evade the reality that the U.S. was built on expropriation, slavery, and political, economic, and social segregation. CHARLES W. MILLS, BLACK RIGHTS/WHITE WRONGS: THE CRITIQUE OF RACIAL LIBERALISM 116 (2017). In response to this call, this article is an intervention in the literature on labor platform work.

[23] The ethnographic research that informs this article reflects six years of embedded research amongst self-organizing Uber and Lyft drivers in the San Francisco Bay Area, beginning in 2014 after the first protest in front of Uber headquarters. This research includes thousands of hours of participant observation and action at drivers' meetings, protests, in meetings with regulators, on group phone calls and texts, in government hearings, on social media, and one-on-one conversations. With some drivers, who I came to know over a period of time, my ethnography continued into social spaces. All the workers in the drivers' groups I studied were Uber or Lyft drivers, and many worked for other gig platforms as well, including Wonolo, Doordash, Instacart, UberEats, and Postmates. In the course of my ethnographic research, I interacted with hundreds of drivers of many backgrounds. The findings from my in-depth interviews reflected and were reinforced by the realities I observed through participant observation and everyday conversations with workers. Alongside and at the behest of drivers who were organizing against Prop 22, I attended protests, spoke at townhalls, wrote public essays, and spoke to newspaper editorial boards about the potential impacts of the proposed law on the intended workforce. In this Article, to protect the identity of most workers in my research, I have used first name pseudonyms. For workers who assumed a public role by speaking publicly or writing opinion pieces, I use their real first and last name.

ery by supporting one another through mutual aid and by demanding material justice. In doing so, the workers laid out an alternative framework to address the precarities of platform work: social justice unionism built through the fight for racial equality and basic employment rights.

Based on these research findings, I conclude that facially neutral employment and labor law carve-outs for the highly racialized gig workforce—whether achieved through legislation or agreements with labor representatives—(re)produce and are made possible by racial subjugation.[24] As the labor platform capitalists attempt to spread the third category of worker to other states, countries, and sectors, this Article makes clear the ways in which a third category of work that lowers baseline employment standards is constituted by racial inequalities and how—even in the face of collective worker resistance—it can perpetuate them. Lawmakers and labor representatives seeking to re-define basic work protections in the context of platform work must consider the racialized consequences of this formative reality.

I. Raw Deal-Era Wage Laws: How Legal Correctives to Economic Inequality Entrenched Racial Inequality

"We are becoming convinced that it is because we are poor and voiceless. . .that we are able to accomplish so little [as a civil liberties organization]. . .we believe that what the Negro needs primarily is a definite economic program."

–NAACP in Address to a Century, 1932[25]

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[24] A few months after Prop 22 passed, two proposed state bills circulated, one in Connecticut and one in New York state, both of which reflected the basic principles of Prop 22. Both were supported by the Independent Drivers Guild, an organization that emerged in 2016 from a private contract between Uber and a branch of the Machinists Union in New York City. The specific terms of the private contract are secret, but IDG received funding from Uber in exchange for agreeing not to strike or challenge the employee status of workers. Since then, the IDG has received funding from both Uber and Lyft. *See* Josh Eidelson, *The Gig Economy is Coming for Millions of American Jobs*, Bloomberg Businessweek (Feb. 17, 2021), https://www.bloomberg.com/news/features/2021-02-17/gig-economy-coming-for-millions-of-u-s-jobs-after-california-s-uber-lyft-vote [https://perma.cc/U8JX-96ZH]; Veena Dubal, *Gig Worker Organizing For Solidarity Unions*, LPE Project (Jun. 2019) (reviewing the IDG's origins and problematics), https://lpeproject.org/blog/gig-worker-organizing-for-solidarity-unions/ [https://perma.cc/FJX8-4EAM]. In these draft bills, platform workers are stripped of basic employment protections in exchange for a sectoral bargaining agreement. But the terms of the sectoral bargaining agreement create a funding mechanism for a union that represents platform workers, while depriving the workers of many rights, including, most relevant for this article, the right to be paid for all time spent laboring. Kate Andrias, Mike Firestone & Benjamin Sachs, *Lawmakers Should Oppose New York's Uber Bill: Workers Need Real Sectoral Bargaining Not Company Unionism*, onlabor (May 26, 2021), https://onlabor.org/lawmakers-should-oppose-new-yorks-uber-bill-workers-need-real-sectoral-bargaining-not-company-unionism/ [https://perma.cc/3PGT-73U5]. Had they been introduced and passed, these proposals would have enshrined Prop 22's racial wage code by legalizing the workers' independent contractor status and guaranteeing payment only for "engaged time."

[25] Raymond Wolters, Negroes and the Great Depression: The Problem of Economic Recovery 40 (1970).

The first federal minimum wage regulations were promulgated during the Great Depression, initially through the National Industrial Relations Act (NIRA) and later the Fair Labor Standards Act (FLSA). The federal wage and hour regulations embedded in these laws were bold legal re-imaginings of U.S. capitalism. The goal, in part, was to address the devastating precarity and bolster the consumptive capacities of millions of workers who, if they had work, suffered from unpredictable, too-low earnings.[26] But while raising the wages of many U.S. workers to reignite the economy, both the NIRA (1933) and the FLSA (1938) also conspicuously created differential wages and wholescale legal exclusions for majority African American workforces, building racial inequality into the structure of the economy and undermining the economic stability of Black communities for decades to come.[27]

In response to the racist demands of industrialists and a southern bloc of Congressmen who represented the interests of plantation owners, these Depression-era laws maintained the economic subjugation of African Americans.[28] While uplifting white workers and "providing the most hospitable climate ever fashioned in American history. . .for decent enforceable conditions of employment,"[29] these first wage laws entrenched the existing boundaries of racial hierarchy through the legalization of lower wages for Black workforces and wholescale work law exclusions for racialized sectors.[30] For Black America, these carveouts were, in historian Harvard Sitkoff terms, "an old deal, a raw deal."[31]

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[26] These laws consolidated the relationship between labor, consumption, fair competition, and democracy, instituting national work norms and cultures that endure a century later. LAWRENCE GLICKMAN, A LIVING WAGE 67 (2015).

[27] Historian Keona Ervin calls the New Deal's carveouts for Black workers—and Black women workers, in particular—the creation of a welfare state was "negligent and antagonistic." KEONA K. ERVIN, BREAKING THE 'HARNESS OF HOUSEHOLD SLAVERY': DOMESTIC WORKERS, THE WOMEN'S DIVISION OF THE ST. LOUIS URBAN LEAGUE, AND THE POLITICS OF LABOR REFORM DURING THE GREAT DEPRESSION 49–66, 88 (2015).

[28] *See* Ira Katznelson, FEAR ITSELF: THE NEW DEAL AND THE ORIGIN OF OUR TIME 179 (2013).

[29] Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. AM. POL. DEV. 1, 2 (2005).

[30] *See* PATRICIA SULLIVAN, DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA (2015).

[31] HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE 26 (2009). According to the 1930 census, about 40% of African American wage earners were in engaged in some form of agricultural work, and of these about 70% worked as wage hands, sharecroppers, and share tenants and another 10% as cash tenants. Of African Americans who lived in urban areas, almost 25% worked as domestic workers. Wolters, *supra* note 25, at 92. Despite these racialized carveouts, historians and economists generally agree that racial inequality narrowed after the New Deal and through the civil rights movement, in no small part because of the growth of unions and the Democratic political alliances that grew in the New Deal's aftermath. *See e.g.*, Eric Schickler, *Racial Realignment*: The Transformation of American Liberalism, 1932-1965, at 5 (2016); Henry S. Farber, Daniel Herbst, Ilyana Kuziemko, and Suresh Naidu, *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data* (NBER Working Paper No. 24587 Apr. 2021), https://www.nber.org/system/files/working_papers/w24587/w24587.pdf [https://perma.cc/A5AL-Q9AB].

Labor platform companies today distance themselves from this racialized history through a rhetoric of racial benevolence. However, by returning to these earlier debates, I reveal the ways in which these companies today rely upon analogous arguments to justify a substandard wage code for their predominantly immigrant and racial minority workforce. I also argue that, as African American civil society organizations feared, such facially-neutral wage codes placed severe restrictions on economic mobility for African American families and exacerbated racial disparities.

A. The National Industrial Recovery Act and Racial Wage Differentials

> *"One may safely give long odds that when the Economic Fathers set out to establish the present machinery for industrial recovery they had not the slightest idea that they would meet such a problem as that of a wage differential based on race."*
>
> *—Ira De Augustine Reid*[32]

While the Civil War formally ended the institution of slavery, it did not "end the southern plantation owner's need for a cheap supply of labor or the regime of white supremacy. . ."[33] By 1930, more than one half of African Americans still lived in Southern states and were disproportionately employed in agricultural and domestic labor.[34] Black workers who migrated North had made some economic strides, but many were unemployed, and those who labored in industry systematically earned lower wages than white workers—often for the same work.

African American civil society organizations and workers initially hoped that the NIRA would be a first step in a larger economic reckoning to come for their communities. The NAACP, for its part, supported the 1933 passage of the NIRA to relieve economic distress and despair, especially in African American communities. Black workers enthusiastically joined the parades and demonstrations organized in support of the National Recovery Administration (NRA) after the agency was established to negotiate and set wage codes and price controls.[35] Industry-wide minimum wages, together with the NIRA protection of the right to organize would, the civil society organizations believed, raise the standard of living for all workers laboring in both industry and agriculture.[36]

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[32] Ira De Augustine Reid, *Black Wages for Black Men* OPPORTUNITY, Mar. 1934, at 73–76. Reid was a prominent African American sociologist who wrote extensively on the lives of Black communities in the United States. He was also active in the National Urban League and served as editor of the NUL's newsletter, *Opportunity*.

[33] Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335–48 (1986).

[34] SITKOFF, *supra* note 31, at 27; Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion From the National Labor Relations Act*, 72 OHIO ST. L.J. 95–100 (2011).

[35] WOLTERS, *supra* note 25, at 92.

[36] *See* SULLIVAN, *supra* note 30.

These hopes were soon extinguished. Lacking an explicit anti-discrimination provision, the NIRA did little to address the economic plight of Black workforces. Agricultural workers, two-thirds of whom were Black, were largely excluded (though not unequivocally, as with later New Deal laws),[37] and wage discrimination against Black workers in industry pervaded both the establishment of wage codes and their enforcement.[38] Domestic workers, many of them Black, were explicitly excluded.[39]

In industries where codes were established by the NIRA, Black workers faced, in the words of historian Dona Hamilton, "the battle of their lives."[40] Industrialists submitted wage codes "which shamelessly included grossly discriminatory provisions with reference to Negro labor. Most of the codes. . .provided. . .for a *differential wage rate of twenty to forty percent*."[41] (emphasis added). The situation was particularly dire in cotton-dependent states where industrialists argued for the lowest wage scales. Using statistics to prove "it was 'both necessary and expedient to permit a differential wage for Negro workers,'"[42] employers relied heavily upon classical racist stereotypes to substantiate their arguments. Black workers, they claimed, were inefficient and Black families able to subsist on much less than white families.[43] Paying Black and white workers equally, then, was both unnecessary and economically untenable. The industrialists also maintained that to require them to pay their workers equally would mean the displacement of Black workers from their jobs.[44]

African American civil society organizations vociferously opposed these industrialists' contentions, drawing attention to the long-term consequences of differential wages for African American workers.[45] By 1933, in response to the lack of representation of Black worker interests in the NRA code hearings, the NAACP, National Urban League, Negro Industrial League, and thirteen other civil society organizations formed the Joint Committee on National Recovery (Joint Committee) which monitored the establishment of codes in industries where a substantial number of African American workers

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[37] *See* Linder, *supra* note 33, at 1355–64 (discussing how agricultural workers were administratively excluded during NRA debates); Phyllis Palmer, *Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act*, 7 J. POL'Y HIST. 416, 416–17 (1995).

[38] *See* Linder, *supra* note 33, at 1354.

[39] In describing the NIRA carveout for domestic workers and its logics, Keona Ervin writes, "Reformers understood industrial work as logical, rational, and thus naturally subjected to 'scientific" processes.' By contrast, household work appeared to be individualistic, decentralized, and 'personal' . . . 'Should the problem of household employment be approached as many employers insist as one of right personal relations or of right economic relations?' advocates questioned." This imagined division between home and work undermined efforts to reform working conditions for domestic workers. ERVIN, *supra* note 27, at 59.

[40] Dona Cooper Hamilton, *The National Association for the Advancement of Colored People and New Deal Reform Legislation: A Dual Agenda*, 68 SOC. SCI. REV. 488, 490 (1994).

[41] *Id.*

[42] *Id.*

[43] WOLTERS, *supra* note 25, at 102.

[44] *Id.* at 102–03.

[45] *See generally id.*; Sullivan, *supra* note 36; Hamilton, *supra* note 40, at 490.

labored.[46] Responding to the dual impact of the Great Depression and exclusionary federal initiatives of the New Deal on African American workers, the Joint Committee submitted briefs arguing against differential wage rates during NRA hearings.[47]

The Joint Committee's positions, however, were not embraced by all African American leaders. Some believed that labor market racism was inevitable and accepted the industrialist's argument that a differential wage code for Black workers would mean that those workers could keep their already tenuously held jobs and livelihoods. This concern led to the ambivalent silence of some people,[48] but a few leaders took affirmative steps to endorse the industrialist position. Robert Moton, the second President of Tuskegee Institute, for example, (in)famously joined an NRA petition by Southland Manufacturing Company, which employed Black workers in Alabama, requesting an exemption from code regulations.[49] Southland's petition was made on the grounds that Black workers were "inefficient" and that, accordingly, the company needed time to bring the workers up to the standards of the industry.[50]

Moton believed that a policy of differential wage codes for an African American workforce was necessary to ensure their continued employment. Black workers were experiencing rates of unemployment 30-60 percent higher than that of white workers, and in this context, Moton argued that some work, however poorly paid, was better than none.[51] The Joint Committee, however, vehemently opposed this petition, maintaining that the long-term fight for socioeconomic equality would be crippled by a differential wage rate in which African Americans, by law, made less than their white counterparts.[52]

George Weaver, an influential African American economist who later became the first Secretary of Housing and Urban Development, laid out the Joint Committee's position on differential wage codes for Black workers in a 1934 Issue of the NAACP newsletter, *Crisis*. He argued that lower wages for Black workforces would not only destroy the economic advances that African Americans had made since the Civil War, but that, importantly, it would

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[46] Sullivan, *supra* note 36, at 43–44.

[47] Hamilton, *supra* note 40, at 491.

[48] George Weaver, *A Wage Differential Based on Race*, CRISIS, Aug. 1, 1934, at 236, 238.

[49] Hamilton, *supra* note 40, at 491.

[50] *Id.* at 491–92. Other southern advocates made similar arguments. J.F. Ames of Montgomery, Alabama," for example, "prepared a study [called] 'The Subnormal Negro and the Subnormal Code,' in which he maintained that [Black] labor was 30 percent less efficient than white." WOLTERS *supra* note 25, at 101.

[51] Prior to the Supreme Court finding NIRA to be unconstitutional and the subsequent passage of the FLSA, Roosevelt issues an order specifying maximum work and minimum wages across industries for voluntary compliance. This "blue eagle agreement" ended up, spurred a debate about the potential of Black worker displacement, particularly in the South. WOLTERS *supra* note 25, at 91.

[52] The NRA ultimately denied the petition after finding that the "inefficiency" of the plant was due to outdated machinery and not slow Black workers. Hamilton, *supra* note 40, at 492.

also impede the strength and effectiveness of the larger labor movement. According to Weaver,

> "[T]here is more involved in this question than the arresting of Negro displacement. . .The establishment of a lower minimum wage for Negroes. . .would destroy any possibility of ever forming a strong and effective labor movement in the nation. *The ultimate effect would be to relegate Negroes into a low wage caste and place the federal stamp of approval upon their being in such a position*."[53] (emphasis added)

The NAACP and Joint Committee were successful in campaigning against differential wage rates based *explicitly* on race, but wage discrimination against Black workers under the NRA-promulgated codes nonetheless persisted via facially neutral mechanisms. Work that received lower protections was defined by industry and location, but inevitably, like with platform work today, the workers most affected by these lower standards were workers of color. Racial discrimination permeated the NRA codes; for instance, the codes often allowed lower wage classifications in the South, where African American workers were concentrated, as well as in industries with a majority African American workforce, while maintaining code coverage for primarily white sectors of work.[54] Of the first 275 wage codes established, 114 contained regional differences, which the Joint Committee argued, created racial wage differentials *in practice*. States, like Delaware, were even inconsistently labeled "southern" to pay lower minimum wages if the employees in the industry within that state were majority African American.[55] As Gustav Peck, Executive Director of the NRA's Labor Advisory Board,[56] wrote in 1934, "to the degree the southern rate is a rate for Negroes, it is a relic of slavery and should be eliminated."[57]

While the reign of the NRA was short-lived—it would cease operations in 1935, shortly after the Supreme Court ruled Title I of the NIRA to be unconstitutional— the wage cultures to which it gave rise endured.[58] The

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[53] Weaver, *supra* note 48, at 238.

[54] Linder, *supra* note 33, at 1354.

[55] Linder, *supra* note 33, at 1355. As Wolters points out, John Davis, an African American leader argued that the Mason and Dixon line shifted widely between codes, and "these shifts were related to the proportion of Negroes in each industry." WOLTERS *supra* note 25, at 129. In the case of most industrial wage codes, for example, Delaware was placed in the North and given the higher wage applicable to the North. But in the case the fertilizer industry which was occupied primarily by African American workers, Delaware was defined as being in the South and fertilizer workers given the lower wage rate. *Id.*

[56] *Dr. Gustav Peck Gets NRA Post*, N.Y. TIMES, Nov. 15, 1934, at 2.

[57] Gustav Peck, *The Negro Worker and the NRA*, THE CRISIS, Sept. 1, 1934, at 262, 262–63.

[58] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The Supreme Court invalidated NIRA on grounds that Congress had improperly abdicated its legislative function to the Executive branch to establish fair prices and wage codes. Labor and antitrust law scholar Sanjukta Paul writes on this judicial invalidation of NIRA, "[W]e can ask if the outcome would have been different if Congress had articulated the principles that define "fair competition," delegating only their application to particular sectors. In practical terms it would

New Deal legislation that followed—including the National Labor Relations Act (1935), Social Security Act (1935), and the Fair Labor Standards Act (FLSA, 1938)—recreated many of the racially explicit carveouts and differentials that became de facto realities for African American workers under the agency governance of the NRA.

B. Facially Neutral New Deal Carveouts and Wage Differentials as Racialized Work Laws

"The truth of the matter is that the southern wants a lower wage scale because they do not wish Negroes to have wages equal to whites."[59]
—Roy Wilkins (1938)

Unlike the NIRA, the carveouts for agricultural workers and domestic workers in the FLSA, SSA, and NLRA were not the product of insidious maneuvering at the agency level. Rather, the exclusion of these majority African American workforces was made explicit in the text of the legislative bills.[60] Charles Houston, a board member of the NAACP, testified that the more he studied the proposed laws, "the more it began to look 'like a sieve with holes just big enough for the majority of Negroes to fall through.'"[61]

The aim of the FLSA, the final piece of New Deal legislation, was to "eliminate conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers."[62] Influenced by their experiences with the NRA wage-code promulgation, the NAACP and other African American civil society organizations supported universal coverage of the minimum wage and opposed both the geographic wage rate differential and the exclusion of agricultural and domestic workers. The wage exclusion for agricultural and domestic workers left the racialized hierarchies of the plantation system in place and sparked

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have not, because the Court also held that the statute exceeded Congress' commerce clause power—but that ruling, unlike the nondelegation holding, has been superseded." Sanjukta Paul, *Reconsidering Judicial Supremacy in Antitrust*, 131 YALE L.J. (forthcoming 2021).

[59] WOLTERS *supra* note 25, at 106. Roy Wilkins was a prominent civil rights activist, NAACP leader, and editor of the NAACP's the *Crisis* after W.E.B. DuBois.

[60] Disabled workers were also formally exempted from the FLSA, as they were from the NRA through an exemption for "sheltered workshops." Since then, as Samuel Bagentos writes, "The FLSA's requirements for workers with disabilities have changed through the years, with Congress going back and forth on whether to impose a floor on the wages of those workers who were not entitled to be paid minimum wage." Samuel R. Bagenstos, *The Case Against the Section 14(c) Subminimum Wage Program*, NAT'L FED'N OF THE BLIND http://thegao.org/wp-content/uploads/2012/03/Bagenstos.pdf [https://perma.cc/8S8M-SS5B]. In 1986, Congress through Section 14(c) amended this exemption to create what scholars have called the subminimum wage by authorizing employers to pay disabled workers who are not entitled to the minimum wage, an amount "commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work," and "related to the individual's productivity." 29 U.S.C. § 214(c).

[61] Hamilton, *supra* note 40, at 495.

[62] 29 U.S.C. § 202(a).

protests from workers, NAACP leaders, and union organizers.[63] The geographic wage rate differential for labor that was ultimately included within the FLSA, these advocates correctly feared, mapped onto a racial wage rate differential, just as it had under the NRA codes.

In their 1937 Annual Report, the NAACP argued that creating another geographic wage differential as a concession to southern states, based ostensibly on the cost of living in those places, "would result in a special wage level for Negroes; and that if such a measure should be passed, lower standard wages for Negroes will be fixed with government sanction for years."[64] Black organizations and community members sent letters to Congress in which they argued that the purpose of federal minimum wage was to raise the living standards of *all* and that creating a differential wage rate based on geography or industry would defeat this aim.

Upon the insistence of southern members of Congress, white supremacy was officially upheld through these work law carveouts. Southern political support for any remedial legislation hinged on the preservation of the plantation system and the subjugation of Black agricultural and domestic workers upon whom the social, political, and economic culture of the South depended.[65] Even the definition of an agricultural worker became a racialized endeavor. Were tobacco workers defined as agricultural workers, excluded from the law? How about those workers involved in canning and processing of agricultural products? Answers to these questions, which invariably disfavored Black workers, had both immediate and long-term impacts on African American communities.[66]

The FLSA's agricultural and domestic worker carveouts persisted for several decades until, in the late 1960s and early 1970s, Congress amended the law in response to robust social and labor movements and, in particular, the "persistent actions of excluded groups to reconstruct cultural ideas of work."[67] In 1966, a labor alliance between the American Federation of Labor, Congress of Industrial Organizations, and the NAACP successfully convinced Congress that agricultural work was sufficiently "industrial" in nature to be included in the FLSA, but agricultural workers remained exempt from overtime protections.[68] Eight years later, after a decade of organized agitation by African American women, domestic workers also gained FLSA protections.[69] Nevertheless, the legacy of the New Deal carveouts alongside

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[63] William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697, 700 (1999).

[64] Hamilton, *supra* note 40, at 497.

[65] Linder, *supra* note 33, at 1351–53. Domestic workers were ostensibly excluded on the grounds that their coverage fell outside the bounds of interstate commerce. At the time of the FLSA's passage, domestic workers, "had the lowest annual wages and the highest concentrations of nonwhite workers." Palmer, *supra* note 37, at 419.

[66] Even though agricultural workers were extended minimum wage protections under the FLSA in 1966, they remain ineligible for overtime. Linder, *supra* note 33, at 1337.

[67] Palmer, *supra* note 37, at 418.

[68] *Id.*

[69] *See generally* Premilla Nadasen, *Citizenship Rights, Domestic Work, and the Fair Labor Standards Act*, 24 J. OF POL'Y HIST. 1, 74–94 (2012).

sustained racial inequalities in the labor and housing markets and in public expenditures is found today in the stark racial gaps in wages and wealth.[70]

This history of early 20th century differential wage codes for Black workers is an enlightening prelude to current debates over minimum wage codes for platform workers. Understanding how those earlier laws served as the legal tools of sustained racial oppression helps make evident what Prop 22 and the third category of work portends—exacerbated racialized economic immiseration.

As was (and remains) true in the agricultural and domestic work sectors, racial minorities make up a disproportionate majority of the in-person platform workforce not incidentally, but *because of* the predacious practices central to the business models. While companies claim to offer marginalized workers ease of entry to the labor market, my research suggests that for workers who labor fulltime at these jobs, their "inclusion" often jeopardizes the benefits of the work itself.[71] Without the guardrails of minimum wage and overtime laws, for example, their incomes often fall short of expectations and needs. In contrast to this early 20th century era in which legislators and businesses openly advocated white supremacy, in today's color-coded configuration of poverty, racial hierarchy is often subtextual. As I argue in the following section, however, now as then, racial hierarchy was written into the business models of dominant industries and enshrined in law.

II. "Represent and Destroy"[72]: California's Proposition 22 as the New Racial Wage Code

"It is not permissible that the authors of devastation should also be innocent. It is the innocence which constitutes the crime."

—James Baldwin (1963)[73]

"It should not be possible to be anti-racist without being against oppression. Yet race-liberal hegemony has been so effective that today. . .everyone is an antiracist, and yet oppression is banal and ubiquitous."

—Jodi Melamed (2011)[74]

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[70] *See* Elise Gould, *Racial Gaps in Wages, Wealth, and More*: A Quick Recap, Working Econ. Blog (Jan. 26, 2017), https://www.epi.org/blog/racial-gaps-in-wages-wealth-and-more-a-quick-recap/ [https://perma.cc/SXA5-CFY]; David Leonhardt, *The Black-White Wage Gap Is as Big as It Was in 1950*, N.Y. Times (Jun. 25, 2020), https://www.nytimes.com/2020/06/25/opinion/sunday/race-wage-gap.html [https://perma.cc/4HCD-5DSZ]. Both domestic and agricultural workers remain uncovered by the National Labor Relations Act.

[71] Here, I draw on the work of Louise Seamster and Raphaël Charron-Chénier in their conceptualization and theorizing of the phrase "predatory inclusion." Louise Seamster & Raphaël Charron-Chénier, *Predatory Inclusion and Education Debt: Rethinking the Racial Wealth Gap*, 4 Soc. Currents 199, 199 (2017).

[72] Jodi Melamed, Represent and destroy: Rationalizing Violence in the New Racial Capitalism (2011).

[73] James Baldwin, The Fire Next Time 16 (1963).

[74] Melamed, *supra* note 72, at 49.

In this section, I survey the history and context of Prop 22 in order to demonstrate the ways in which the law is reminiscent of earlier racial wage codes, as well as to examine how companies succeeded in undoing judicial, legislative, and regulatory efforts to enforce the minimum wage, overtime protections, workers' compensation, and unemployment insurance for a low-income California workforce constituted primarily of subordinated racial minorities. I argue that the Prop 22 campaign relied upon an obfuscation of what the proposed law would actually do. In contrast to industrialists during the First and Second New Deals, the gig companies did not deploy racist arguments about the inefficiencies of their workforce as a justification for low and unpredictable earnings. Instead, they instrumentalized benevolent discourses of race reform and alliances with civil rights organizations to generate support for the initiative. Acknowledging that their workforce was made up of primarily immigrants and racial minorities, the gig companies also deceptively claimed knowledge of these workers' struggles, needs, and desires. By highlighting particular forms of racial subjugation, while ignoring and profiting from others, the corporate sponsors of Prop 22 successfully concealed the very structures of racial oppression that the initiative entrenched and from which companies benefit.

A. Proposition 22 as the New Racial Wage Code

Unlike the lower wage codes for African American workers that were promulgated during the NRA hearings, Prop 22's creation of a new, lower wage code was obscured—by design. In my research with Uber and Lyft drivers and conversations with journalists, including the editorial boards of major newspapers in California,[75] prior to the November 2020 election, I found that neither workers nor sophisticated media analysts understood the basic terms of the law. The proposition summary, rated at a readability of level of grade 18,[76] stated, in part, that "independent-contractor drivers would be entitled to . . . compensation—including minimum earnings, healthcare subsidies, and vehicle insurance."[77] In both advertisements and public statements, the Yes on Prop 22 campaign and corporate representa-

[75] At the request of the No on Prop 22 campaign, I attended almost every editorial board meeting with prominent media organizations in California to explain the terms and potential impacts of the initiative as the boards were making decisions about whether to endorse Prop 22.

[76] *Ballot Measure Readability Scores*, BALLOTPEDIA (2021) ("The FKGL formula produces a score equivalent to the estimated number of years of U.S. education required to understand a text. A score of five estimates that a U.S. 5th grade student would be able to read and comprehend a text, while a score of 20 estimates that a person with 20 years of U.S. formal education would be able to read and comprehend a text."), https://ballotpedia.org/Ballot_measure_readability_scores,_2021 [https://perma.cc/NE7V-38PP].

[77] *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative*, BALLOTPEDIA (2020), https://ballotpedia.org/California_Proposition_22,App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)#Readability_score [https://perma.cc/L2VJ-MSCF].

tives emphasized that the proposition would give workers "120% of the minimum earnings" and "new benefits."[78] Though this *sounded* even better than existing minimum wage protections, these guaranteed earnings and benefits were determined by the time that followed the algorithmic allocation of work, rather than the actual amount of time the workers spent laboring. In reality, the law *took away* all basic employment rights—including the minimum wage and overtime protections and in a few instances, replaced them lesser versions (see Figure 1).

To understand the ways in which this proposition creates a racial wage differential reminiscent of the NRA wage codes and New Deal sectoral carveouts, I situate Prop 22 within the recent chronology of California employment laws and unpack its terms. Prop 22 was a referendum on Assembly Bill 5 (AB5) passed by the California legislature in 2019, which extended and codified a recent California Supreme Court decision. The previous year, in *Dynamex Operations West v. Superior Court of Los Angeles*, a case alleging the misclassification of an offline delivery driver, the Court unanimously expanded the reach of California wage orders.[79] The *Dynamex* decision created a presumption of employment status for all California workers and put forth the ABC test to determine who is *not* an employee and therefore uncovered by the wage code.[80] "These fundamental obligations of the IWC wage orders are," the Court wrote, "for the benefit of workers . . . intended to enable them to provide at least minimally for themselves and their families and to accord them a modicum of dignity and respect."[81] In justifying this claim, the Court cited scholarship affirming the importance of the minimum wage for minority communities to "undo historical patterns of injustice."[82]

AB5, authored and sponsored by Assemblywoman Lorena Gonzalez the following year, broadened the Court's holding to the entirety of the California labor code (including workers' compensation laws), as well as to its unemployment insurance code.[83] In support of the legislation, Assemblywoman Gonzalez cited both the growing problem of misclassification in service industries and the fact that California is the most diverse *and* most

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[78] For example, Anthony Foxx, the former Obama Transportation Secretary articulated to NPR that Prop 22 creates a wage floor "So whereas before Prop 22, there was no floor below which driver earnings could go, Prop 22 establishes a minimum standard that is actually 20% over the current prevailing minimum wage anywhere in California." He, like other representatives, failed to explain that this fell far below the hourly minimum wage since workers would not be paid for time they spent awaiting work. Interview by Alisa Chang with Anthony Foxx, Chief Pol'y Off., Uber (Dec. 9, 2020), https://www.npr.org/2020/12/09/944739738/lyft-exec-on-debate-over-classifying-drivers-as-employees-or-contractors [https://perma.cc/4AWB-KSTC].

[79] 416 P.3d 1 (Cal. 2018).

[80] The ABC test has been traced back to 1935 and is used to define eligibility for state workers' compensation coverage. It was brought to California law via *Dynamex*, 416 P.3d at 34, and uses a 3-part conjunctive test to define who is in illegible for state employment protections. *Id.*

[81] *Id.* at 32.

[82] Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. 1543, 1595 (2013).

[83] Assemb. B. 5, 2019 Leg. Sess. (Cal. 2019).

unequal state in the country.[84] While AB5 applied to nearly all California workers, it was commonly referred to as "the Gig Worker Law" because of its potential to undermine Uber and Lyft's legal position that their drivers are not owed basic employment protections.[85] Speaking in favor of the bill, Assemblywomen Gonzalez, like the NAACP and NUL leaders during the New Deal, argued that all workers—including the subordinated racial minorities and immigrant workers doing app-deployed work—needed access to work law protections like the minimum wage. In conversation with me, she framed the law and the problem in explicitly racial terms,

> The gig companies strategically recruit drivers who are from working class, communities of color. They [seek] out vulnerable workers who would be caught in a continual cycle of desperation and need for immediate cash. [They try to] ensure that these drivers—who are overwhelmingly Black and brown—are relegated to a permanent underclass of workers who make less than minimum wage without any actual benefits.[86]

As AB5 was being considered and debated in the California legislature, the bill was robustly supported by organized gig workers and their allies. Thousands of low-income ride-hail drivers went on a historic global strike against Uber and Lyft in May 2019,[87] protested in front of the companies' headquarters on numerous occasions, and participated in a late-summer caravan to the California capital to urge the state legislature to vote in favor of the law. At one protest in Sacramento, Assembly Speaker Anthony Rendon, surrounded by workers of color, accused platform companies' of "oppressed[ing] workers" through their misclassification and described labor platform work as "fucking feudalism all over again."[88]

Despite months of aggressive lobbying by the companies and attempts to draw labor unions into a negotiation,[89] AB5 passed and was signed by Governor Newsom in September 2019. Uber and Lyft drivers in my research believed that the passage of the law meant that they would have immediate access to minimum wage protections, overtime, expense reimbursements,

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[84] Erica Hellerstein, *It's Official: Bay Area Has Highest Income Inequality in California*, KQED (Jan. 31, 2020) https://www.kqed.org/news/11799308/bay-area-has-highest-income-inequality-in-california [https://perma.cc/6H25-FDSZ].

[85] In fact, Uber and Lyft drivers were considered employees under the previous test—the *Borello* test—by the California Labor Commissioner in at least one public case, and by the EDD in distributing unemployment insurance benefits. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989).

[86] Interview with Lorena Gonzalez, Cal. Assemb. (Dec. 2020).

[87] This strike was first called for by the Rideshare Drivers United in California.

[88] Assemb. Speaker Anthony Rendon, Address to Sacramento Protest (July 10, 2019).

[89] Uber, Lyft, DoorDash, Postmates, and Instacart were reportedly in conversation with at least two unions to discuss the introduction of legislation that would undermine the employment rights of drivers in exchange for "sectoral bargaining" defined as potential sector-wide union representation on certain, but not all, issues. Noam Scheiber, *Debate Over Uber and Lyft Drivers' Rights in California Has Split Labor*, N.Y. TIMES (June 29, 2019), https://www.nytimes.com/2019/06/29/business/economy/uber-lyft-drivers-unions.html [https://perma.cc/Z9KN-9XWK].

workers' compensation, and unemployment insurance. But even after the law went into effect, many California ride-hail drivers reported that their net earnings fell below the minimum wage. In one of the most dangerous jobs in the country[90], these workers also continued to labor without workers' compensation.

Rather than complying with *Dynamex* and AB5, the companies' representatives publicly insisted that the law did not apply to them.[91] In addition to their refusal to comply with existing law, Uber, Lyft, DoorDash, Instacart, and Postmates wrote and sponsored Prop 22, a referendum initiative that would carve the companies out of state employment laws and legalize their business model.[92] Prop 22 created a third category of California worker—defined as transportation or delivery "network worker"—who was ineligible for protection under state work laws.[93] Though the language of the proposition states that workers who meet this definition are "independent contractors" and not "employees" for purposes of the state's labor code and unemployment insurance code, the proposition also restricted workers' individual right to contractually bargain to different terms, a hallmark of true independent contractors.[94] Instead of setting their own prices, for example, the workers for Transportation Network Companies (TNC) and Delivery Network Companies (DNC) are ascribed a set of pay rules that applies only to them.[95] Similarly, rather than building a clientele, TNC and DNC workers are prohibited by contract from cultivating clients.[96]

As the campaign to pass Prop 22 surged, efforts to enforce AB5 were bolstered both by organized drivers and by the exigencies of the Covid-19 pandemic. Beginning in February 2020, thousands of drivers tired of waiting for the enforcement of their employment rights filed individual wage claims

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[90] Samuel Stebbins, Evan Comen & Charles Stockdale, *Workplace Fatalities: 25 Most Dangerous Jobs in America*, USA TODAY (Jan. 9, 2018), https://www.usatoday.com/story/money/careers/2018/01/09/workplace-fatalities-25-most-dangerous-jobs-america/1002500001/ [https://perma.cc/57YZ-PXHV].

[91] Andrew J. Hawkins, *Uber Argues Its Drivers Aren't Core to Its Business, Won't Reclassify Them as Employees*, VERGE (Sept. 11, 2019), https://www.theverge.com/2019/9/11/20861362/uber-ab5-tony-west-drivers-core-ride-share-business-california [https://perma.cc/B2GG-HQV3].

[92] Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html [https://perma.cc/W33Y-QHVW]. Uber and Postmates also filed an action in federal court to enjoin the enforcement of AB5 against them. Uber's Chief Legal Officer Tony West said that while AB5 "certainly sets a higher bar for companies to demonstrate that independent workers are indeed independent," Uber can satisfy the test. Rey Fuentes, Rebecca Smith and Brian Chen, *Rigging the Gig*, FOR WORKING FAMS. 7 (July 2020) https://www.forworkingfamilies.org/sites/default/files/publications/Rigging%20the%20Gig_Final%2007.07.2020.pdf [https://perma.cc/QF5D-YXCD].

[93] Proposition 22 (Cal. 2020), https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop22.pdf [https://perma.cc/GU9U-8HW5].

[94] *Id.*

[95] *Id.*

[96] Lawrence Mishel and Celine McNicholas, *Uber Drivers are Not entrepreneurs: NLRB General Counsel ignores the Realities of Driving for Uber*, ECON. POL'Y INST. (Sept. 20, 2019) https://www.epi.org/publication/uber-drivers-are-not-entrepreneurs-nlrb-general-counsel-ignores-the-realities-of-driving-for-uber/ [https://perma.cc/M4KQ-B54J].

against their employers with the California Labor Commissioner's Office, under the auspices of Rideshare Drivers United's "People's Enforcement Campaign." Rideshare Drivers United (RDU), an advocacy group made of up of Uber and Lyft drivers, was launched two years earlier by drivers who sought to improve their working conditions through self-advocacy and collective action. By January 2020, the organization's membership included over 20,000 ride-hail drivers from across the state.[97]

By the third week of March 2020, as the Covid-19 pandemic began to spread throughout California,[98] many RDU members and ride-hail drivers across the country fell ill, and some died from occupational exposure to the virus.[99] The Governor of California issued lock-down orders across the state, sanctioning "essential" workers to continue to labor. Under Executive Order N-33-20, food delivery and ride-hail drivers were deemed "essential," but with demand for ride-hail work at an all-time low,[100] drivers who risked exposing themselves to the virus nevertheless lost money on shifts.[101] As tens of thousands of drivers filed for unemployment insurance, they faced a bureaucratic nightmare created through their misclassification.[102] The California Employment Development Department, the agency responsible for administering unemployment insurance benefits, had no record of the drivers' employment or their wages. Their employers, Uber and Lyft, were exhorting drivers to apply for Pandemic Unemployment Assistance, a federal temporary emergency measure for independent contractors that calculated benefits based on net rather than gross income, providing significantly lower weekly payments.[103]

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[97] RDU leaders often call themselves an "undocumented union" because they conceptualize themselves as a union of workers, but for a variety of reasons, including the ambiguities behind their legal status under the NLRA, they have not sought formal recognition.

[98] *Governor Gavin Newsom Issues Stay at Home Order*, OFF. OF GOVERNOR GAVIN NEWSOM (Mar. 19, 2020), https://www.gov.ca.gov/2020/03/19/governor-gavin-newsom-issues-stay-at-home-order/ [https://perma.cc/FH5U-SPZ4].

[99] *See, e.g.*, Suhauna Hussain, *This Uber Driver Died of Covid-19. Proposition 22 Will Sway His Family's Fate*, L.A. TIMES (Nov. 1, 2020), https://www.latimes.com/business/technology/story/2020-11-01/prop-22-uber-driver-covid-19-death-benefits-workers-comp [https://perma.cc/P9VY-NV3Q]; New York Taxi Workers' Alliance, *supra* note 5.

[100] Kate Conger & Erin Griffith, *The Results Are in for the Sharing Economy. They Are Ugly*, N.Y. TIMES (May 7, 2020), https://www.nytimes.com/2020/05/07/technology/the-results-are-in-for-the-sharing-economy-they-are-ugly.html [https://perma.cc/KM8B-ZF8C].

[101] Because drivers have to bring capital to their work—investing in cars, phones, and other instrumentalities of business—their net profit is often dramatically different than their gross profit. When demand is extremely low, a driver can make so little during a shift that once they subtract expenses, they net nothing—or even find that they have lost money.

[102] Sam Harnett, *Uber and Lyft Officially Owe California Unemployment Money. Will the State Get It Back?*, KQED (May 5, 2020), https://www.kqed.org/news/11816091/uber-and-lyft-officially-owe-california-unemployment-money-will-the-state-get-it-back [https://perma.cc/KX93-AF5V].

[103] *See, e.g.*, *Maryland Government Relief Guide*, UBER (Jan. 19, 2021), https://www.uber.com/us/en/coronavirus/government-relief/ [https://perma.cc/6H9U-JEE4]. Pandemic Unemployment Insurance (PUA) was emergency federal assistance created through the CARES Act that provided temporary income to independent contractors who had lost work as a result of the Covid-19 pandemic. PUA was calculated according to net income and not gross income, as state unemployment insurance is calculated. In California, ride-hail drivers who

Catalyzed by RDU's People's Enforcement Campaign and the exigencies of the Covid19 pandemic, the California Attorney General Xavier Becerra, alongside the city attorneys of California's largest cities, brought suit against Uber and Lyft in early May 2020 to enforce AB5, alleging that the companies were in violation of the state's labor code and unemployment insurance code.[104] A few weeks later, they also filed for a preliminary injunction to force the companies to immediately comply with state employment laws.[105] In a judicial opinion released in early August, the state's request was granted, and the court found unequivocally that Uber and Lyft drivers were employees for purposes of state law.[106] The companies appealed, but on October 22, 2020, an appellate court upheld the lower court's finding and the injunction.[107]

A mere fifteen days later, however, Prop 22 passed. The law rolls back decades of court decisions, California agency policy, and state statutory law on workers' rights. It grants TNC and DNC complete control over their relationship to their California workers through contracts, meaning that TNC and DNC workers are vulnerable to constant changes in their contractual terms and conditions and to the vicissitudes of algorithmic control. Reminiscent of the impact of differential wage codes and New Deal carveouts on largely African American agricultural and domestic workforces, Prop 22 ensures that a majority racial minority workforce no longer has access to any of the protections in California employment laws—present or future. Although these workers continue to bear the expenses of business and many work full-time hours, they have no right to appropriate vehicle reimbursements (calculated in 2020 at 57.5 cents per mile), workers' compensation, unemployment insurance, sick leave, paid family leave, employer-provided health insurance, or protection from discrimination based on immigration status, among other things.[108] Prop 22 also effectively prevents

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filed for PUA and not state unemployment insurance often got their checks much more quickly, but they sometimes received hundreds left per week. Nationally, Uber and Lyft drivers filed for $80 million of this emergency funding. Faiz Siddiqui & Andrew Van Dam, *As Uber Avoided Paying Into Unemployment, the Federal Government Helped Thousands of its Drivers Weather the Pandemic*, WASH. POST (Mar. 16, 2021), https://www.washingtonpost.com/technology/2021/03/16/uber-lyft-unemployment-benefits/ [https://perma.cc/33AR-FSYX].

[104] *Attorney General Becerra and City Attorneys of Los Angeles, San Diego, and San Francisco Sue Uber and Lyft Alleging Worker Misclassification*, STATE OF CAL. DEP'T OF JUST. (May 5, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-and-city-attorneys-los-angeles-san-diego-and-san [https://perma.cc/8E8W-TBF8].

[105] *Attorney General Becerra and City Attorneys of Los Angeles, San Diego, and San Francisco to Seek Court Order to Immediately Halt Worker Misclassification by Uber and Lyft*, STATE OF CAL. DEP'T OF JUST. (June 24, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-and-city-attorneys-los-angeles-san-diego-and-san-0 [https://perma.cc/667H-Q4SN].

[106] People v. Uber Techs., Inc., No. CGC-20-584402, 2020 WL 5440308, at *9–10 (Cal. Super. Ct. Aug. 10, 2020).

[107] People v. Uber Techs., Inc., 270 Cal. Rptr. 3d 290, 311 (Ct. App. 2020).

[108] Proposition 22 (Cal. 2020).

local and state governments from legislating further in the arena of TNC and DNC workers' rights.[109]

Prop 22 creates, for the first time in U.S. work law, an entirely new wage code for people defined as "transportation or delivery network workers." In one important respect, the method legalized by Prop 22 to calculate the wage floor licenses even greater inequality than the lower wages guaranteed to African American workers by the NRA: critically, this method *does not guarantee any net earnings*. Instead of being paid for the time they spend laboring, workers are paid by the piece or task. Their piece pay is not based on a predictable rate, but instead calculated according to how much work they are algorithmically allocated, a personalized determination over which they have no control. On paper, TNC and DNC workers are entitled to 120% of the applicable minimum wage and 30 cents per mile reimbursement.[110] But these wages and reimbursements are tied to "engaged time" and "engaged miles"—that is, time and miles after they have been allocated a fare—instead of all time spent working and miles driven. Most importantly, workers are not paid for the time that they spend anxiously waiting for rides or delivery requests. Industry-funded studies put the amount of unpaid waiting time at about 37% of total time worked.[111] Workers in my research calculate that, typically, unpaid waiting time comprises between 40-60% of their total working hours each week. Based on the industry-sponsored studies' estimation of non-engaged time, in San Francisco, I calculate that TNC drivers working a 50-hour week earn at least $634.29 *less* under Prop 22 than under local and state employment laws, based on wage calculations and the loss in mileage reimbursements.

Even the percentage of downtime, however, is unpredictable and subject to changes in demand (caused by a pandemic, for example) and the whims of the algorithms that allocate personalized work for each driver. The algorithms serve as a node for extreme employer control. Drivers, for example, have reported that they feel the app "punishes" them for not taking certain fares or for getting too close to their bonus threshold.[112] The substandard benefits provided by the law are also easily evadable. The black box in which this algorithmic control operates makes it impossible to know exactly what workers are experiencing, but some workers have said post-Prop 22

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[109] Specifically, Prop 22 prohibits local legislation, and it states that any statewide legislation broadly pertaining to the rights and benefits of RNC and TNC workers must pass by a 7/8 majority vote (which is a near impossibility). *Id.*

[110] *Id.*

[111] Melissa Balding, Teresa Whinery, Eleanor Leshner and Eric Womeldorff, *Estimated TNC Share of VMT in Six U.S. Metropolitan Regions*, FEHR & PETERS 7 (2019), https://issuu.com/fehrandpeers/docs/tnc_vmt_findings_memo_08.06.2019 [https://perma.cc/WRA5-J8BW].

[112] Uber and Lyft both send out weekly personalized bonus offers to drivers to encourage them to drive during certain hours, for certain lengths of time, and in certain places. Drivers in my research told me that the only way to earn a living was to attempt to meet the conditions of these bonuses.

that as they approach the "engaged time" threshold for the health insurance stipend, for example, they stop receiving work.

For these reasons, the gig companies' wage code amounts to a much-lower, differential wage code for a workforce of color. And unlike the wage code differentials endured by African American workers in the New Deal era, these wages are neither certain nor predictable.

FIGURE 1: SUMMARY OF CENTRAL RIGHTS OWED TO TRANSPORTATION AND DELIVERY NETWORK WORKERS IN CALIFORNIA, BEFORE AND AFTER PROPOSITION 22

Pre-Proposition 22	**Post Proposition 22**
Minimum Wage	Payment for "engaged time"* only at 120% of minimum wage **engaged time does not include time with app on, awaiting work*
Overtime at 150% of minimum wage for work over 8 hrs/day and 40 hrs/week	None
Reimbursement at $.575/mile for all miles driven when working	Reimbursement at $.30/mile for miles driven during "engaged time"*
Health Insurance through Affordable Care Act	Healthcare "subsidies" for workers who have health insurance and who labor for fifteen or more hours of "engaged time"*
Paid Sick Leave of at least 3 days	None
Paid Family Leave for 8 weeks	None
Workers' Compensation – no fault coverage for on-the-job injuries	Limited accident insurance to cover injuries (not no fault)
Unemployment Insurance – up to 26 weeks of benefits for no-fault job loss	None
Disability Insurance – life coverage	Disability payments for up to two years

B. Branding Racial Injustice as Racial Benevolence

While the third sub-worker category created by Prop 22 is best understood as a new form of legalized racial subordination—lower wages and benefits for a people of color and immigrant workforce—this fact was obscured in the proposition's campaign. Unlike the industrialists of the early 20th century, the Yes on Prop 22 campaign cloaked the purpose and effect of the proposed law in the language of benefits, minimum earnings, and, perhaps most ironically, racial benevolence. Nevertheless, echoing the arguments made by early 20th century business representatives and their allies, the Yes on 22 campaign alleged that if the law did not pass, workers of color would suffer from disemployment.[113] This racialized threat, combined with the law's opacity and the companies' support from some prominent Black civil rights organizations, likely influenced the African American electorate, 44% of whom voted in favor of the initiative.[114]

Amidst the historic national Black Lives Matters uprisings of 2020, both Uber and Lyft developed strategic alliances with select civil rights organizations and made public statements in condemning police violence against people of color. Moreover, despite advocating for a law that would entrench the economic precarity experienced by many low-wage workers of color, the companies benefited from "racializing" their workers in campaign imagery and marketing, claiming knowledge of and compassion towards these workers' struggles.[115] In their campaign materials, the gig companies strategically activated tropes endemic to neoliberal racialization by presenting "freedom narratives" of workers and arguing that gig work facilitated economic independence for racial minorities. Via text, email, television, radio and internet ads, California voters were bombarded with what one journalist described as "ads featuring smiling Black and brown faces championing Proposition 22."[116] These visual codes differed dramatically from those used in the companies' earliest marketing campaigns in 2013 and 2014, which were aimed at drawing consumers to their services. Those ads featured smiling, hip white men and women who were driving for "fun." By contrast, the Yes on Prop

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[113] Caroline O'Donovan, *Prop 22 May Hurt Drivers, But Uber Wants it to Pass*, BUZZFEEDNEWS (Oct. 31, 2020), https://www.buzzfeednews.com/article/carolineodonovan/proposition-22-uber-gig-economy [https://perma.cc/UM8R-AKX3].

[114] Only 35% of California's African American electorate voted against Prop 22. In other communities, which were less targeted by the Yes on 22 campaign, the outcome was different. Latinx and Asian American voters were more evenly split, while they supported Prop 22 at lower rates than white voters. Data on File with Author.

[115] Here, I draw in part of the theoretical work of sociologists Michael Omi and Howard Winant whose mode of racial formation helped scholars understand that "race is a fundamental axis of organization" in the United States, and yet race does not have stable social meaning. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 109 (2015).

[116] Levi Sumagaysay, *Race Has Played a Large Role in Uber and Lyft's Fight to Preserve Their Business Models*, MARKETWATCH (Oct 24, 2020), https://www.marketwatch.com/story/race-has-played-a-large-role-in-uber-and-lyfts-fight-to-preserve-their-business-models-11603143399 [https://perma.cc/SXA5-CFYU].

22 campaign frequently featured single moms of color who needed gig work to make ends meet and immigrant men who relied on this "side hustle" to support their families. More broadly, advertisements and representations from the Yes on Prop 22 campaign relied heavily on the logic and the purported need for flexible work and desire to "hustle" without a boss. The campaign provided a narrative that allowed its audience to ignore the fact that Prop 22 would entrench these racial inequalities by downsizing corporate and state responsibility, increasing the power of concentrated capital, and evading legal accountability.

The flip side of the companies' claims that gig work facilitated economic freedom was the threat of disemployment if Prop 22 failed to pass. Like New Deal era industrialists, the companies pointed to this possibility in order to make the logic of their business model appear racially just. An Uber email campaign, for example, featured Alice Huffman, the head of the California NAACP and a political consultant paid by the campaign, titled, "Why communities of color support Prop 22." The email quoted Huffman as saying, "It's a win-win that will save hundreds of thousands of jobs for Black and Brown workers and for all Californians who are choosing independent app-based work, while setting up job protections for the modern economy."[117] The mailing even analogized the present moment to the Great Depression, alleging, as industrialists then did, that minimum wage protections would take away "work and income from the communities already hardest hit by the pandemic and the worst economy since the Great Depression."[118]

The allegation that Prop 22 was necessary to stave off potential disemployment, while politically compelling, was easily shown to present a misleading picture of the platform workforce. The companies' own data indicated that 68% of drivers stop working for the platform after six months,[119] suggesting both that most people found the work untenable and that the companies relied on the most vulnerable workers in the labor market. This statistic casts doubt upon the percentage of workers who the companies alleged would lose their jobs if the sector was forced to calibrate supply and demand under an employment model. Independent research also found that, in contrast to the companies' representation that most of their workforce was casual, the majority of work done for Uber and Lyft was performed by drivers laboring for more than 30 hours a week.[120] By obscuring or

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[117] Email from Uber (Sept. 10, 2020), https://calmatters.org/wp-content/uploads/2020/09/Gmail-Prop-22.pdf [https://perma.cc/8MYA-AMGM].

[118] *Id.*

[119] This national data is from 2016, when driver wages were much higher Eliot Brown, *Uber and Lyft Face Hurdle of Finding and Keeping Drivers*, WALL ST. J. (May 12, 2019), https://www.wsj.com/articles/uber-and-lyft-face-tough-test-of-finding-and-keeping-drivers-11557673863 [https://perma.cc/CNB7-P8DQ].

[120] *See* Michael Reich, *Pay, Passengers and Profits: Effects of Employee Status for California TNC Drivers*, INST. FOR RSCH. ON LABOR AND EMP. 6 (Oct. 2020), https://irle.berkeley.edu/files/2020/10/Pay-Passengers-and-Profits.pdf?fbclid=IWAR3zp0s2VQIRCvbAQBfLBw_h9F0phDN1_zDgNbYrvUg9XK2XclbpYPbKrNk [https://perma.cc/23B6-PBFB]. "[P]atterns suggest the companies' references to the typical driver as very part-time significantly understate the centrality of full-time and regular part-time drivers in their business

ignoring these realities, the corporate advertisements and mailers aimed to internalize in voters and consumers a form of sentimental compassion for workers while externalizing the structural causes of racialized insecurity. The labor platform worker became identifiable as an economically struggling person of color, but the structures that created and sustained the economic struggle and racialized marginality disappeared in the process. Gig work, in this depiction, became a solution, rather than a source of the problem.

Uber and Lyft also signaled their racial benevolence through strategic alliances with African American civil rights and immigrant rights organizations. Uber, for instance, committed $1 million dollars to the Equal Justice Initiative and the Center for Policing Equality to support criminal justice reform,[121] while investing (but not donating) $60 million dollars in loans to support Black-owned businesses.[122] Lyft, meanwhile, launched LyftUp on Martin Luther King Day, partnering with the National Urban League and the National Action Network, to provide "affordable" rides in underserved communities.[123] "Everyone," Lyft unironically announced, "should have access to safe, reliable, and affordable transportation,"[124] a narrative meant to cast the company as bolstering access to transportation in minority communities, as well as overshadow the empirical evidence that ride-hail companies *reduce* funding for and therefore access to public transportation most relied upon by communities of color.[125]

Among African American and immigrants' rights organizations, the proposition sparked a contentious debate analogous to the exchanges among African American leaders during the NRA code promulgation. A few prominent organizations took the side of industry, often publicly defending the proposition as providing jobs for workers of color, while privately embracing the financial perks that came along with their endorsement. Both the National Action Network (NAN) of Sacramento and the California NAACP, whose parent organizations received donations from one or both companies,

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model. The majority of these drivers rely on their earnings from Uber and Lyft as their sole or main source of income. Many acquired a vehicle primarily to drive for Uber and Lyft. *Id.* Most of these workers are driving 30,000 miles per year for the companies." *Id.*

[121] Alex Nicoll, *Uber CEO Tweets That the Company Will Donate $1 Million to Groups 'Making Criminal Justice in America More Just for All'*, INSIDER (May 31, 2020), https://www.businessinsider.com/uber-ceo-company-to-donate-1-million-to-police-reform-2020-5# [https://perma.cc/KBY6-9G3Z].

[122] Jeff Green and Lizette Chapman, *Uber's $50 Million Pledge Adds to Push for Minority Lending*, BLOOMBERG (Nov. 17, 2020), https://www.bloomberg.com/news/articles/2020-11-17/uber-s-50-million-pledge-adds-to-push-for-minority-lending [https://perma.cc/5MB9-K5SX].

[123] *Supporting Communities of Color During the Covid-19 Crisis*, LYFT BLOG (Apr. 16, 2020), https://www.lyft.com/blog/posts/supporting-communities-of-color [https://perma.cc/WP5L-6XYV].

[124] *Introducing LyftUp: Transportation Access For All*, LYFT BLOG (Jan 21, 2020), https://www.lyft.com/blog/posts/lyftup-bikes [https://perma.cc/PLH9-8LGZ].

[125] Michael Graehler, Jr., Richard Alexander Mucci & Gregory D. Erhardt, *Understanding the Recent Transit Ridership Decline in Major US Cities: Service Cuts or Emerging Modes?*, 98TH ANNUAL MEETING OF THE TRANSP. RSCH. BOARD 15 (2019), https://usa.streetsblog.org/wp-content/uploads/sites/5/2019/01/19-04931-Transit-Trends.pdf [https://perma.cc/M5NU-TWL2].

endorsed the passage of Prop 22.[126] They argued, as Robert Moton did in the early 1930s, that differential wage codes ensured that workers at the margins of the labor market—like formerly incarcerated people—had access to some form of work.[127] Tecoy Porter, Chair of NAN of Sacramento, said that opponents of Prop 22, "are willing to sacrifice hundreds of thousands of jobs held by drivers of color."[128] This support, however, was contested within prominent civil rights organizations.[129] Other NAN organizational representatives, like NAN Western Regional Director Jonathan Mosely, took issue with this characterization and argued that the proposition "did not benefit Black workers."[130] Dissent within the CA NAACP over Prop 22 and two other 2020 propositions ultimately resulted in the resignation of longtime president Alice Huffman, who critics within the organization said "did not support . . . propositions that were made to help Black people."[131] Following her resignation, the national NAACP signed a letter to Congress, insisting that app-based workers *are* employees and that they deserve the same wages and protections as other workers.[132]

Despite openly campaigning to strip their primarily people of color workforce of wage and other employment protections, Uber and Lyft sought to position themselves as champions of anti-racism through acts of racial justice symbolism. By focusing on particular liberal discursive forms of antiracism, the companies obscured the material conditions in which the work-

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[126] Sofie Kodner, *Tech is Writing Checks to Anti-Racism Groups. Here's Who's Giving, and How Much*, PROTOCOL (June 4, 2020), https://www.protocol.com/tech-companies-donations-racial-injustice?rebelltitem=57#rebelltitem57 [https://perma.cc/8RAG-86YN].

[127] *Leading CA Social Justice Groups Endorse Prop 22; Urge Elected Leaders to Follow*, YES22 (July 20, 2020), https://drivers.yeson22.com/leading-ca-social-justice-groups-endorse-prop-22-urge-elected-leaders-to-follow/ [https://perma.cc/KQX6-6HEB].

[128] Matthew Rozsa, *Rideshare Drivers Say Uber is Co-Opting Anti-Racist Rhetoric*, SALON (Sept. 10, 2020), https://www.salon.com/2020/09/10/uber-drivers-protest-oakland-black-lives-matter-co-optation/ [https://perma.cc/JAB2-9B43].

[129] Caroll Fife, an officer within the Oakland Chapter of the NAACP, said she felt that Huffman's endorsements of Prop 22 and other campaigns was "a conflict of interest and. . .misleading to the public." Laurel Rosenhall, *California NAACP President Aids Corporate Prop Campaigns—Collects $1.2 Million and Counting*, CAL MATTERS (Oct. 23, 2020), https://calmatters.org/politics/2020/09/california-naacp-president-helps-corporate-ballot-measure-campaigns/ [https://perma.cc/4BH3-SRLX]. Fife attended the protest in front of the Oakland Delete Uber billboard and said of Prop 22, "[t]hey are exploiting our labor for their wealth." Levi Sumagaysay, *Protesters Call Uber's Antiracism Billboards 'Hypocritical and* Offensive', MARKET WATCH (Sept. 9, 2020, 5:20 P.M.), https://www.marketwatch.com/story/protesters-call-ubers-antiracism-billboards-hypocritical-and-offensive-11599686425 [https://perma.cc/F3BH-44ZK]. Notably the Yes on Prop 22 also relied on other forms of misinformation to signal support from the African American community. The Black Lives Matter President in Sacramento, for example, stated publicly that while her organization's name was listed by the companies in support, this listing was done without the organizations permission and that the group did not support Prop 22. *See* Sumagaysay, *supra* note 116.

[130] Email from Jonathan Mosely to Emilia (June 23, 2020).

[131] *Longtime Head of NAACP's California-Hawaii Chapter Resigns*, ASSOCIATED PRESS (Nov. 22, 2020), https://apnews.com/article/sacramento-california-hawaii-a25b0c0c80f05a22257fc704eff5ed2f [https://perma.cc/8A5E-7Q8K].

[132] *Letter to Congress on Labor Protections for App-Based Workers*, NAT. EMP. L. PROJECT (Jan. 25, 2021), https://www.nelp.org/publication/letter-congress-labor-protections-app-based-workers/ [https://perma.cc/FE6W-NURS].

ers labored and instead claimed to be promoting economic independence for racial minorities. In some instances, the companies even appropriated the emancipatory language of "systemic racism."[133] Many ride-hail workers, however, resisted this appropriation, and like African American workers and civil society leaders of the early 20th century, fought against the legalization of racial subordination and towards racially just democratic unionism, while simultaneously fighting for their lives.

III. Workers on the Third Category: "You Can't Divide Our Bodies"

"Ultimately, the only check upon oppression is the strength and effectiveness of resistance to it. . . [Freedoms] emerged from centuries of day-to-day contest, overt and covert, armed and unarmed, peaceable and forcible."[134]

—Barbara Fields (1990)

Ride-hail and food delivery companies attempted to mobilize grassroots support for Prop 22 by instrumentalizing their unprecedented in-app access to both consumers and their workforce. While a century before, industrialists depended upon corporate representatives to make the argument that paying a minimum wage to African American workers would result in job loss and business closure, Uber and Lyft cultivated and relied upon their own drivers to make this argument.[135] In the months leading up to the November 2020 election, drivers received text messages, emails, and in-app messages on a near-daily basis threatening that if Prop 22 did not pass, they could lose their jobs and scheduling flexibility.[136] Grocery shoppers and food delivery drivers were even ordered to include Prop 22 propaganda in shopping bags.[137] These workers, however, were not passive recipients of these messages from the companies and the Yes on Prop 22 campaign. Remarkably, in the face of this

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[133] *Environmental, Social & Corporate Governance Annual Report*, Lyft 37 (2020), https://s27.q4cdn.com/263799617/files/doc_downloads/esg/Lyft_ESG_Report_2020.pdf [https://perma.cc/9KRA-N6FR].

[134] Barbara Jeanne Fields, Slavery, Race and Ideology in the United States of America, 181 New Left Rev. 95, 103 (1990).

[135] Edward Walker's carefully examines in *Grassroots for Hire* the mobilizational efforts by corporations' since at least the 1980s to generate policy change. He writes, "elite political consultants target key public audiences for mobilization on behalf of their paying clients." Edward T. Walker, Grassroots For Hire: Public Affairs Consultants in American Democracy 155 (2014). The additional point here is that in campaigning to pass Prop 22, the employers marshalled not only key members of the public, but also their own workforces.

[136] Marie Edinger, *Prop 22 Explained: Should Rideshare Drivers Be Employees or Independent Contractors?*, Fox26 News (Oct. 15, 2020), https://kmph.com/news/local/prop-22-explained-should-rideshare-drivers-be-employees-or-independent-contractors [https://perma.cc/96QN-EAQ3].

[137] Lauren Kaori Gurley, *Instacart Asked Its Gig Workers to Distribute Propaganda That Would Hurt Them*, Vice (Oct. 14, 2020), https://www.vice.com/en/article/7kp5yq/instacart-asked-its-gig-workers-to-distribute-propaganda-that-would-hurt-them [https://perma.cc/C9WT-XMJN].

intimidation and coercion, thousands of ride-hail and food-delivery workers and their allies—many of them immigrants and people of color—opposed their employers and mobilized against the law, building coalitions and systems of emancipatory mutual aid to support and care for one another. Their collective opposition to the law became an important site of powerful independent labor organizing in which rank-and-file control prevailed.

In this section, I center "voices from below" to frame how organizing workers understood Prop 22 and to examine how they shaped their resistance in terms of racial and economic justice.[138] In my embedded ethnographic research on self-organizing ride-hail workers, I found that in the course of their fight, the workers' resistance evolved into social movement unionism, coalescing around the idea that Prop 22 was a threat not just to their wages and working conditions, but also to issues of racial justice, immigrants' rights, dignity, and safety.[139] California ride-hail workers organizing against Prop 22 understood that their industry was defined by racialized subjugation and connected their exploitation to earlier history. They did this work because of their economic marginalization, and they believed that their racial identities were instrumentalized to ensure their continued economic subjugation. Drivers and drivers' groups in California, like the Rideshare Drivers United (RDU) which I studied, explicitly rejected the benevolent racial discourse of their employers. In doing so, their protest challenged not just their conditions but also the existing liberal order. The way forward, they demonstrated through their actions, was robust rank-and-file unionism that centered racial justice and economic equality.

In the context of the global coronavirus pandemic and historic Black Lives Matter uprisings, these workers became acutely aware of their disproportionate exposure to extreme economic insecurity and premature death. They were fighting for their lives on at least three different fronts: against the police brutality that many experienced on and off the job, against their legal categorization as "essential workers" without access to worker-protections in the context of a pandemic, and against a proposition that would carve them out of basic employment protections, including the minimum wage. In all of these contexts, the workers' susceptibility to poverty, violence and disease was exacerbated by the fact that they are a highly racialized workforce.

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[138] As other scholars have noted and I have highlighted above, many of these platform workers had inherited racialized (and feminized) labors through the legacy of New Deal labor exclusions. *See* Niels Van Doorn, *Platform Labor: On the Gendered and Racialized Exploitation of Low-Income Service Work in the 'On Demand' Economy*, 20 INFO., COMMC'N & SOC'Y 898, 909 (2017). This history of legalized racial and gender inequality explained, in part, their participation in and dependence upon labor markets with low wages and few protections

[139] Social movement unionism is often juxtaposed with "bread and butter unionism." Social justice unionism centers social equity, and not just economic equity. It also favors "rank and file control and activism, participatory democracy, broad alliances, innovate tactics, and a focus on the far-reaching goals such as justice and equality." VANESSA TAIT, POOR WORKER'S UNIONS: REBUILDING LABOR FROM BELOW 9 (2016).

The organizing workers articulated their racialized vulnerability and precarity by exposing the ways in which their lives and racialized bodies were instrumentalized to grow the profits of the ride-hail industry. In their understanding, the benevolent racial discourse of their employers served to rationalize the violence the workers experienced in their everyday lives. Juan, an RDU organizer and ride-hail driver said in a meeting, alluded to the ways the companies attempted to bifurcate the injustices experienced by subordinated racial minority workers, "They're talking about helping our communities while they're hurting our communities."[140] On the one hand, the companies attested to knowing about and even working to address "systemic racism." On the other hand, they created what drivers called a "caste system" of work in which a primarily immigrant and people of color workforce were not afforded the same protection as other low-income workers—sometimes not even the same protections as other workers in the same sector.[141] According to my driver interlocutors, the conditions that created institutional racism could not be transformed in one arena of life while being ignored in others.

As African American organizations during the New Deal era formed the Joint Committee to fight differential wage codes, drivers and driver advocacy groups joined together to form the No on Prop 22 Coalition (Coalition).[142] Workers in the Coalition challenged their second-class status, demanding equal treatment and respect. They engaged in one-on-one organizing and political education about the dangers of the proposition and built power alongside and with other workers through a politics of mutual aid. Though not legally recognized as a union or a bargaining unit, these workers engaged in militant social justice-based unionism, committed both to claiming employment rights and to collective empowerment. While the companies that sponsored Prop 22 paid lip service to racial justice goals, the drivers organized socially distanced protests, personal protective equipment (PPE) distributions, and unemployment insurance assistance campaigns. They also organized online townhalls with other workers across the state to discuss what Prop 22 really meant for them and their lives, as well as to recognize and address their struggles on and off the job. The workers who constituted the No on Prop 22 Coalition consistently rooted the campaign

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[140] Veena Dubal, Fieldnotes (on file with author).

[141] For example, some grocery store delivery workers in California are unionized and members of UFCW. Others labor for Instacart as "delivery network workers" under Prop 22. Sam Harnett, *'Coming for You and Your Job': With Prop. 22, Are Grocery Staff layoffs Just the Beginning?*, KQED (Jan 20, 2021), https://www.kqed.org/news/11855985/coming-for-you-and-your-job-with-prop-22-are-grocery-staff-layoffs-just-the-beginning [https://perma.cc/P3WB-SHPZ].

[142] This Coalition included the Rideshare Drivers United (the independent self-organized drivers' group that I studied), Gig Workers Collective (an independent self-organized group of delivery workers), Gig Workers Rising (a program of Working Partnerships USA), We Drive Progress (an initiative of SEIU 1021), and Mobile Workers Alliance (an initiative of SEIU 721).

in material anti-racism, as many drivers stressed to me in our conversations that, "economic justice is racial justice." They also grounded their campaign in care for one another. Mutual aid actions, in this context, opened up space for dispossessed workers to interrogate why it was that their colleagues—and not the state and not their employers—provided resources and support.

As the labor platform companies attempt to spread their Prop 22 model and racial wage code via both legislation and compromises with labor unions, the rank-and-file organizing and social justice-centered unionism that emerged from the fight against Prop 22 serves as a powerful example of how to advance the wages and working conditions of platform workers.

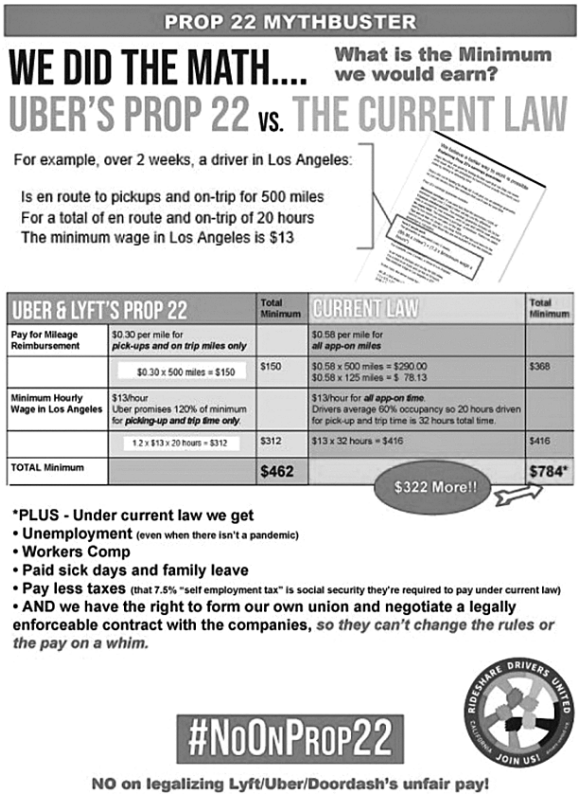

Image 1: Rideshare Drivers United flier created by workers for workers to demystify the confusing proposition.

A. Black Lives Matters & California Labor Platform Workers

The events that catalyzed the Black Lives Matter (BLM) uprisings in the summer of 2020 dramatically shaped how ride-hail workers in the No on Prop 22 Coalition understood the relationship between economic justice and

racial violence—and how to center these issues in their organizing. California ride-hail drivers, like people across the world, were horrified by the video of George Floyd, an African American man, asphyxiated by the police. While the ride-hail workers in my research had up until this point persistently referred to Prop 22 as an initiative that disproportionately impacted people of color, the BLM movement influenced a political shift in the drivers' conversations and narratives. When protestors took to the streets, many California ride-hail and food delivery workers fighting against Prop 22 joined their ranks. Drivers' groups issued statements and workers penned powerful essays supporting the uprisings, arguing that material inequities were central to state violence against racial minorities. The violence that many of them experienced at the hands of the state, drivers explained, was intertwined with the slow violence they endured as workers at the margins of the labor market. One driver wrote, "The conditions that make police killings of Black People possible and inevitable are the same conditions that make the exploitation of Black and Brown workers possible and inevitable."[143]

As the BLM uprisings continued to spread throughout the nation, conversations about the relationship between economic violence and police violence became more commonplace among self-organizing worker leaders in both worker meetings and text chats. Drivers of color who had thus far only spoken of their shared complaints about wages and working conditions began to open up about their experiences with racialized police harassment and brutality. Connecting corporate and state violence, workers expressed indignation and anger at their experiences as low-income, people of color workers in the U.S. After one particularly emotional meeting, Inmer, an El Salvadorean immigrant driver and organizer, texted the group, "We get beat on the job, and we get beat by the police."[144]

In response to these conversations, RDU worker leaders from across California organized a statewide meeting to discuss how police violence impacted their everyday lives. Workers shared their encounters with both local police and border police, making the connection between the racialized criminalization of both African American and Latinx workers. Though some expressed anxieties about alienating fellow workers with public support of the Black Lives Matter movement, the group ultimately decided that they had to issue a statement. "If we don't," Chris, a young African American driver, said, "we have no moral authority."[145] Together, RDU worker leaders democratically agreed on principles that related their everyday experiences to the death of George Floyd, underscoring how their fight, too, was against the structural oppression of racism. In a collective statement, they wrote, in part,

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[143] Cherri Murphy. *The Shameful "Black Lives" Hypocrisy of Gig Companies.* PRECINCT REPORTER NEWS, July 16, 2020, https://www.precinctreporter.com/2020/07/16/shameful-black-lives-hypocrisy-of-gig-companies/ [https://perma.cc/DES9-B4MD].

[144] Veena Dubal, Fieldnotes (on file with author).

[145] *Id.*

> As Uber and Lyft drivers we are one of the largest Black workforces and we are majority people of color and immigrants. Mr. Floyd could have been our brother. Many of us have also experienced violence and harassment at the hands of police and ICE. As labor organizers and unionists, we organize not just for fair wages, but against racism and structural oppression in any form. These injustices are closely interwoven.[146]

These self-organized ride-hail workers and groups, similar to the African American leaders and organizations that fought for inclusion in the New Deal, understood clearly that the material conditions of their lives and the safety of their racialized bodies were inextricably linked in the fight for both labor protections and civil rights. But perhaps more importantly, they used this insight to center racial justice in their organizing.

B. Coronavirus Pandemic and Formalized Essentiality

Another way in which the social justice-oriented rank-and-file organizing against Prop 22 took shape and blossomed was in response to the dangers of the Covid-19 pandemic. For the Rideshare Drivers United workers who organized to oppose Prop 22, the coronavirus pandemic also highlighted the ways in which the state—and not just the corporations—instrumentalized their bodies, rather than caring for them. These workers were deemed legally "essential," yet they were also treated as largely disposable. Akin to domestic workers and agricultural workers upon whose labor the U.S. economy has long subsisted, ride-hail workers conducted dangerous, essential services without any safety net or wage guarantees. The state's response to the pandemic immediately shaped how these workers thought about their precarity and Prop 22 organizing. As Abdul, an East African immigrant driver and Bay Area RDU leader, relayed the first week of the lockdown, "Wh[y] we have to risk yourself when the government declared state of emergency? Do we have any human right at all? For company that not even cover my expenses, we have to give our life? For what? I don't get it."

Within the No on Prop 22 Coalition, many drivers transformed the oppositional consciousness that followed the declaration of their "essentiality" into active resistance. For example, Jerome Gage, an African American man in his mid-twenties and member of Mobile Workers' Alliance who became active in the No on Prop 22 coalition, said,

> "It wasn't really until the pandemic hit that I realized how much I was being exploited. . .can you imagine how many drivers felt that 'oh no, I think I might have Covid' but because they have no alternative. . .have no access to sick leave, they have to force themselves

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[146] *RDU Statement on the Murder of George Floyd*, RIDESHARE DRIVERS UNITED https://www.drivers-united.org/p/george-floyd-statement [https://perma.cc/3FTZ-ZXM9].

> out on the road to take care of their families? . . .That's why I'm fighting for my rights."

For Jerome and others, organizing against Prop 22 was intertwined with the everyday difficulties of just staying safe and alive. As a result, their resistance often took the form of mutual support and uplift.

Mutual aid efforts, which became more common during the Covid-19 pandemic,[147] have long existed among dispossessed groups in the U.S. to fill gaps in insurance, support, education, and relief. Complementing the advocacy of the Joint Committee in political fora, for example, African American civil society groups during the Great Depression responded to plight on the ground through "benevolent societies," countering poverty with community.[148] In this sense, the No on Prop 22 coalition and Rideshare Drivers United, in particular, did the work both of the Joint Committee and the mutual aid groups, investing in a politics of care and reciprocal uplift, while concurrently fighting to maintain basic employment safeguards.

One of the most profound ways in which worker-to-worker care took place involved navigating the bureaucratic morass of the unemployment insurance system, which people across the U.S. relied upon to survive during the pandemic as work dried up or they were laid off.[149] Alongside and with the oversight of legal aid attorneys, drivers with Rideshare Drivers United put together a toolkit explaining to other drivers how to apply for unemployment insurance benefits and how to appeal when they were inevitably denied.[150] They held townhalls, walked workers through the appeals process, and created a script for people to follow when they called the EDD. Drivers who were fighting to oppose Prop 22 spent hours every day helping others receive the unemployment they needed to feed and house their families. In at

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[147] *See, e.g.*, Orlando Mayorquin, *Mutual Aid: When Neighbors Look to Each Other for Pandemic Relief*, CAL MATTERS (Oct. 20, 2020), https://calmatters.org/california-divide/2020/10/california-mutual-aid-networks-pandemic-relief/ [https://perma.cc/JD2P-FTZY].

[148] For a discussion of these mutual aid organizations in New York, for example, *see* CHERYL GREENBERG, OR DOES IT EXPLODE?": BLACK HARLEM IN THE GREAT DEPRESSION (1997).

[149] Because ride-hail demand plummeted dramatically in response to the proliferation of Covid-19, in the weeks following the lockdown, drivers were bombarded with emails from Lyft and Uber, urging them to file for Pandemic Unemployment Assistance (PUA) and telling them that if they did work, they should do so with the appropriate personal protective equipment (PPE). One's benefits under PUA, which emerged from the CARES Act as a federal measure to provide some form of emergency temporary income replacement for independent contractors, were, however, calculated based on net income, not gross income. Thus, drivers who filed for PUA received far fewer benefits than workers who filed for standard unemployment insurance (UI); often, the amount provided by PUA was not enough to keep them and their families afloat. One driver who had decided to file for state UI, instead of PUA, despite the long wait took me through his calculations. His gross earnings after a year of driving for Lyft were $45,750. Under state unemployment insurance, he would receive the full amount of possible benefits at $440 per week. However, after accounting for expenses, his net income was $21,437. His weekly benefits under PUA would have been $207 per week.

[150] The California Employment Development Department (EDD) had long taken the position that Uber and Lyft drivers were employees, but in the flood of UI claims, this position was applied rarely and inconsistently.

least one instance, an older African American ride-hail worker and RDU organizer from Los Angeles split his unemployment insurance check with his fellow organizing workers who were ineligible for their own because of their status as undocumented workers.[151]

The No on Prop 22 coalition drivers also supported and uplifted their fellow workers by providing free personal protective equipment (PPE). Though Lyft donated money to racial justice organizations, it *sold* PPE to their own majority racial minority workforce.[152] In response, the No on Prop 22 coalition held several PPE actions throughout the Bay Area, including in front of Lyft headquarters, advertising them as "We Got Your Back" actions (*see* images 2 and 3). During these distributions, the driver leaders provided fellow workers with donated masks and other equipment and alerted them to the dangers of Prop 22. Providing resources that neither the state nor their employers would, the workers shared stories about how negligent the companies had been in the context of the pandemic and developed social-justice oriented solidarity, growing their membership and the movement. "This proposition," one driver told another who had come to pick up masks and cleaning equipment, "It is like a slap in the face to us workers of color. . .We are worth more than what they are giving us."[153] Another driver organizer reminded the group, "Together, we have the power."[154]

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[151] California later created a separate program to provide income replacement support for undocumented immigrants. *See* Kim Bojórquez, *Which State Is Doing More for Undocumented Residents in COVID Era? California or New York?*, SACRAMENTO BEE (Apr. 14, 2021), https://www.sacbee.com/news/politics-government/capitol-alert/article250608884.html [https://perma.cc/D8US-7FHM].

[152] Sarah Emerson, *Lyft Is Selling — But Not Providing — Masks and Sanitizer to Drivers*, ONEZERO (July 17, 2020), https://onezero.medium.com/lyft-is-selling-but-not-providing-ppe-to-drivers-71bd95c43104#:~:text=%E2%80%9CAll%20cleaning%20supplies%20and%20safety,told%20OneZero%20in%20an%20email.&text=%E2%80%9CTo%20date%2C%20we%20have%20distributed,them%2C%E2%80%9D%20Lyft's%20spokesperson%20said [https://perma.cc/2UBS-AM54].

[153] Veena Dubal, Fieldnotes (on file with author).

[154] *Id.*

Image 2: This photo was taken at an August 2020 PPE Action in the South Bay. Rideshare Drivers United organizers were distributing food, personal protective equipment, and talking to other drivers about Prop 22. Photo Credit: Rideshare Drivers United

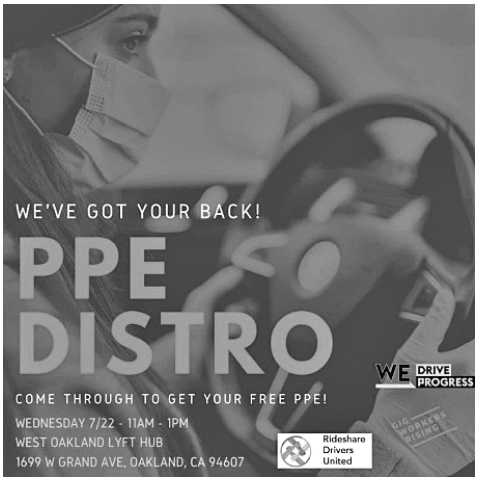

Image 3: Rideshare Drivers United driver organizers circulated this digital flier to advertise a July 2020 PPE event that they held alongside partners of the No on Prop 22 Coalition.

Conclusion

"Despite progress toward social and political equality, the Negro worker finds that his relative economic position is deteriorating or stagnating. . .. Long ago, during Reconstruction, the Negro learned the cruel lesson that social and political freedom cannot be sustained in the midst of economic insecurity and exploitation. He learned that freedom requires a material foundation."[155]

—Philip Randolph (1968)

"The essence of collective bargaining is an impersonal and standard wage. Unionism rests upon the cooperation of all workers. A racial wage differential prevents both of these developments. It would, therefore, destroy the possibility a real labor movement in this country."[156]

—George Weaver (1934)

In the throes of the Yes on Prop 22 campaign, Lyft advertised its effort to "uplift" communities of color in a one-minute YouTube ad set to the powerful voice of Maya Angelou, African American poet and former public transportation worker, as she recited her much-loved poem "On the Pulse of Morning." Angelou's poem, written for and recited at Bill Clinton's 1993 presidential inauguration,[157] is about the possibilities of a new day and hope in the face of devastation. In the Lyft ad, Maya Angelou's voice serves as the backdrop to scenes of workers of color, masked and happy—in a café, their ride-hail car, a commercial kitchen. As the advertisement ends, the following words are displayed, "LyftUp provides free rides to communities who lack access to food, jobs, and essential services."[158] Using Angelou's words and voice to convey racial sensitivity, the company strategically excluded the next few lines in which the famed poet details the violence of racial capitalism, "*Your armed struggles for profit/Have left collars of waste upon/My shore, currents of debris upon my breast.*"[159]

In this Article, I have metaphorically revived Angelou's excised lines by making racial domination visible as a centrifugal force in the legalization of partitioned, substandard protections for workforces of color. Specifically, I have situated Prop 22 and the third category of worker within a longer history of racialized wage codes in the U.S. Although white supremacy was clearly visible as a structuring force during the first promulgation of federal

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[155] ?Philip Randolph, *Foreword* to Negroes and Jobs: A Book of Readings v. (Louis A. Ferman, Joyce L. Kornbluh & J.A. Miller 1968).

[156] Weaver, *supra* note 48 at, 236.

[157] Brian Resnick & National Journal, *What Maya Angelou's Reading at Bill Clinton's Inauguration in 1993 Meant to Her* (May 28, 2014), https://www.theatlantic.com/politics/archive/2014/05/what-maya-angelous-reading-at-bill-clintons-inauguration-in-1993-meant-to-her/454389/ [https://perma.cc/ET78-BSRF].

[158] Lyft, *Lyft Up — Maya Angelou — Good Morning — Transportation Access — Lifting Up Communities of Color*, YouTube (Feb. 17, 2021), https://www.youtube.com/watch?v=RBNkvDsmmpc [https://perma.cc/B22M-RJWT].

[159] *Id.*

minimum wage laws in the early 20th century, the role of racial subordination in lowering labor standards has become less obvious to many observers a century later. This, I have argued here, is by design. In writing and passing Prop 22, platform companies like Uber and Lyft obscured the ways in which the law created a new racial wage code, claiming instead to offer economic opportunities for people of color and concealing the exploitative conditions endemic to those "opportunities." To accomplish this, the companies and the Yes on Prop 22 Campaign created confusion about the terms of the initiative and relied heavily on a discourse of racial benevolence.

My research traces how immigrant and subordinated racial minority workers organized to contest these corporate representations of racial justice, and in the process, made discernable the intertwining ways in which their bodies and lives were dangerously instrumentalized for profit. Through rank-and-file unionism that centered social equity, these workers grew their coalition and compellingly argued that their economic exploitation via labor platform business models was intimately linked to other forms of racialized violence in their lives. The example that they set for organizing around racial justice and mutual aid—and not just wages and benefits—has the potential to radically restructure how we think about mobilizing to address the exploitation of low-wage platform workers.

The lesson of the research embodied in this Article is that promulgated through agency law, legislation, the initiative system, or private conciliation with labor representatives, a decreased wage code for platform work will have unjust racialized ramifications. The lowering of wage and benefits regulations for workers at the margins of the labor market through a third category—whether that category reflects the specific terms of Prop 22 or is framed more benevolently through legislation or a private business-labor compromise—will necessarily entrench racialized hierarchies and be understood historically as a form of abandonment of dispossessed workers.[160]

As platform companies and their funders attempt to spread this model of work to other sectors and the third category to other states, we must conceptualize these corporate efforts not only as broad attacks on economic security, but also as the insidious development of empires of capital upon the bodies of subordinated racial minorities. We may turn to the visions, actions, and articulations of the rank-and-file platform workers who fought racialized economic subordination in the context of Prop 22 for inspiration on how to mobilize against dispossession and towards justice.

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[160] For more on the way in which labor platform companies have turned to the idea of "sectoral bargaining" to cement their business models while appeasing some unions, see these principles for reform that I co-drafted and signed: *Sectoral Bargaining: Principles for Reform*, PRINCIPLES FOR SECTORAL BARGAINING (Mar. 1, 2021), https://concerned-sectoral-bargaining.medium.com/sectoral-bargaining-principles-for-reform-7b7f2c945624 [https://perma.cc/SUP6-Z2QK].

Carbon Taxes and Economic Inequality

*Shi-Ling Hsu**

INTRODUCTION

Carbon taxation has become a central, if understated, component of a comprehensive program to address climate change. A carbon tax is a unitary tax on emissions of carbon dioxide, and potentially other greenhouse gases that warm the climate, targeted almost exclusively on the combustion of fossil fuels. While economists have universally endorsed the idea of a carbon tax,[1] it remains politically challenging for lawmakers to enact one.[2] Besides opposition from those denying the significance of climate change,[3] there is surprisingly tepid support from progressive groups concerned with social and economic justice, in addition to climate change.[4]

Progressive ambivalence about carbon taxation is both understandable and misplaced. It is understandable because carbon taxation is widely believed to be regressive.[5] It has become standard fare that a carbon tax increases energy costs, which make up a larger portion of a poor household's

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[1] *See* Opinion, *Economists' Statement on Carbon Dividends*, WALL ST. J. (Jan. 16, 2019, 6:55 PM), https://www.wsj.com/articles/economists-statement-on-carbon-dividends-11547682910 [https://perma.cc/AWD9-FL32].

[2] *See, e.g.*, Howard Gleckman, *Why Carbon Taxes Are So Hard to Pass*, FORBES (Aug. 15, 2019), https://www.forbes.com/sites/howardgleckman/2019/08/15/why-carbon-taxes-are-so-hard-to-pass/?sh=77f61a204f05 [https://perma.cc/NC6D-CKC3].

[3] *See, e.g.*, Brad Plumer, *The Heritage Foundation Has a Plan for Gutting the EPA and the Energy Department. It's Eerily Plausible*, VOX (Mar. 1, 2017), https://www.vox.com/energy-and-environment/2017/3/1/14777536/heritage-budget-trump-epa-cuts [https://perma.cc/8HXV-VBPX].

[4] *See, e.g.*, Bill Scher, *Why Is the Left Ignoring the Bipartisan Carbon Tax Bill?*, REAL-CLEARPOLITICS (Dec. 3, 2018), https://www.realclearpolitics.com/articles/2018/12/03/why_is_the_left_ignoring_the_bipartisan_carbon_tax_bill_138811.html#! [https://perma.cc/V2CY-YUXC].

[5] *See, e.g.*, Sarah E. West & Roberton C. Williams III, *Estimates from a Consumer Demand System: Implications for the Incidence of Environmental Taxes*, 47 J. ENVTL. ECON. & MGMT. 535, 535 (2004) ("Most studies suggest that environmental taxes tend to be at least mildly regressive, making such taxes less attractive options for policy.").

budget than a rich household's budget.[6] As it turns out, this perception is inaccurate: carbon taxes actually hurt fossil fuel industries, which are owned by relatively wealthy shareholders, more than they injure consumers.[7] Moreover, carbon tax revenues can be redistributed in such a way that overcompensates *most* poor households for increased energy costs (resulting from carbon taxation) and undercompensates *most* rich households, in which case some progress can be made toward economic equality. That said, that redistribution would be fairly modest at the carbon tax levels currently under discussion—on the order of a few hundred or a few thousand dollars per household annually.[8] So at best, carbon taxation can only advance modest gains toward greater equality.

At the same time, progressive ambivalence about carbon taxation is also misplaced because climate change itself is the ultimate *un*-equalizer, amplifying economic inequality to potentially apocalyptic extremes. The most important policy that can be adopted to stave off climate change, as much as possible, is a carbon tax. Without a broad price in the form of a carbon tax, it will be impossible to induce the many changes that must be made to wean humankind off fossil fuel usage. Conventional environmental laws and regulations can accomplish much, and in any case are needed to fill the gaps left by a carbon tax. But, without a policy foundation in the form of a carbon price, the necessary scale of changes will not occur. Carbon taxation is thus a critically important component for economic justice, just by virtue of being the most important policy to minimize climate change. While carbon taxation has only modest potential to *advance* economic justice, it is critical for minimizing the *backsliding* that would inevitably occur in a climate-changed future.

The case for a carbon tax for the sake of economic justice is thus compelling, if nonobvious. It is important to recognize, as some justice advocates seem to recognize or intuit, that the core goals of carbon taxation and economic justice seem to point in orthogonal directions: the preservation of human civilization and the reformation of human civilization. However, both of those goals require economic reform, and it so happens that carbon taxation is effective reform for advancing policy in both of those directions. Most importantly, reforming human civilization to achieve economic justice

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[6] *See* ADELE MORRIS & APARNA MATHUR, DISTRIBUTIONAL EFFECTS OF A CARBON TAX IN THE CONTEXT OF BROADER FISCAL REFORM, CLIMATE AND ENERGY ECONOMICS PROJECT, BROOKINGS INSTITUTION 1 (2012); Corbett A. Grainger & Charles D. Kolstad, *Who Pays a Price on Carbon?*, 46 ENVTL. & RESOURCE ECON. 359, 360 (2010) ("Our results suggest that the burden as a percent of annual income is much higher among lower income groups than higher income groups.").

[7] *See* Lawrence H. Goulder et al., *Impacts of a Carbon Tax Across US Household Income Groups: What Are the Equity-Efficiency Tradeoffs?*, 175 J. PUB. ECON. 44, 51 tbl. 3 (2019).

[8] On the impact of one such proposal, House Bill 763 *see infra* notes 81–82 and accompanying text; *see* Kevin Ummel, *Household Impact Study II* 6 figs. 3 & 4 (Citizens' Climate Lobby, Working Paper V1.1, 2020), https://citizensclimatelobby.org/wp-content/uploads/2018/06/HIS2-Working-Paper-v1.1.pdf [https://perma.cc/C5W7-Q2WC].

depends upon saving human civilization from climate change. Without that, there will be no justice for anyone at all.

I. Carbon Taxes Are Essential to Minimizing Climate Change

The likely effects of climatic changes are broad, frightening, and well-documented.[9] The most troubling consequence of climate change may be the exacerbation of inequality. Climate change will be costly for everyone, but it will be catastrophically costly for the poor, and probably even for the middle classes. Among nations, within countries, and even within regions, the gap between rich and poor will grow much larger; the rich will become poorer, but the poor will become *much* poorer. For the poor in the United States, an increase in the number and intensity of extremely hot days could be fatal for some who lack access to air conditioning or cool spaces.[10] Neighborhoods redlined in the past to the disadvantage of communities of color remain more vulnerable to extreme heat than affluent neighborhoods, even within the same part of a city.[11] Climate change exacerbates the effects of air pollution,[12] which are disproportionately endured by disadvantaged groups.[13] And finally, even in a technologically rich future, some work will still need to be performed outdoors. Those tasks will, as they always have, fall upon socioeconomically disadvantaged groups, but will be more dangerous in a climate-changed future.[14]

Inequality inflamed by climate change could be darker still. If, as models suggest, climate change constricts the supply of resources,[15] it is hard to imagine that they will not be hoarded by those with the means to do so.

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[9] For a very comprehensive review, see Intergovernmental Panel on Climate Change, AR5 Climate Change 2014: Impacts, Adaptation, and Vulnerability (2014).

[10] *See* U.S. Global Change Research Program, Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment 544–45 (2018).

[11] *See* Brad Plumer & Nadja Popovich, *How Decades of Racist Housing Policy Left Neighborhoods Sweltering*, N.Y. Times (Aug. 24, 2020), https://www.nytimes.com/interactive/2020/08/24/climate/racism-redlining-cities-global-warming.html [https://perma.cc/GQ3C-4MMG].

[12] *See, e.g.*, Andy Haines et al., *Climate Change and Human Health: Impacts, Vulnerability and Public Health*, 120 Pub. Health 585, 589 (2006).

[13] *See* Diarmid Campbell-Lendrum & Carlos Corvalán, *Climate Change and Developing Country Cities: Implications for Environmental Health and Equity*, 84 J. Urb. Health 109, 111 (2007).

[14] *See, e.g.*, Marielle Beenackers et al., *Socioeconomic Inequalities in Occupational, Leisure-Time and Transport Related Physical Activity Among European Adults: A Systematic Review*, 9 Int'l J. Behav. Nutrition & Physical Activity 116, 129 (2012) (" . . . persons in lower socioeconomic groups did more occupational [physical activity].").

[15] For a review of the resource impacts of climate change, see Intergovernmental Panel on Climate Change, Special Report: Global Warming of 1.5 °C, Summary for Policymakers (Valérie Masson-Delmotte et al. eds., 2018) https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf [https://perma.cc/4YVX-UCZ5].

Climate change could bring about water shortages, and while water cannot be physically hoarded, water rights *can* be bought up. In an economy riven by inequality, it is entirely conceivable that the allocation of water determined by market forces *could* result in a concentration of water rights that threatens access for disadvantaged populations. The degree of economic inequality in the United States and in the world is so great that it is entirely conceivable that wealthy households could buy up water rights in excess of immediate subsistence needs, paying prices that are well out of the reach of disadvantaged groups. Water need not be physically acquired to be hoarded; buying land with appurtenant water rights is a means of obtaining access to water that could increase the effective price of water. Harvard University, with its fifty-billion-dollar endowment,[16] began buying up California vineyards in 2019, with a view toward obtaining groundwater rights as a hedge against rising water prices.[17] It is quite plausible to imagine, if California were to suffer another prolonged drought, that fear of water scarcity could trigger a wave of Harvard-like acquisitions, and possibly remove a significant fraction of California water rights from publicly-available supply.

Water is only one example of the way climate change will stress populations. Resource shortages leading to or exacerbating poor economic conditions may cause migrations, which may be dangerous and greeted with hostility and violence. Food-growing could become more challenging in some regions, stressing food supplies and again, in a market economy, quite possibly distorting allocations to the disadvantage of poor people. With an already widening gulf between rich and poor blasted open by the prospect of chronic water shortages and other deprivations, mass unrest could be frighteningly plausible.

If economic justice means anything, it requires that climate change be arrested as much as possible. That will require many actions by many governments, but it will definitely require a carbon tax. Carbon taxation addresses economic inequality indirectly but critically, just because it is the most important policy tool to reduce greenhouse gas emissions, and the most important step in reducing the severity of impending climatic changes. To be sure, carbon taxation is a necessary, but not sufficient condition for saving human civilization from climate change. The nature of climate policy is such that many essential pieces must fall into place, but carbon taxation is the policy keystone. It is simply too difficult to make the breadth of changes in a fossil fuel economy without a price on carbon. For example, a century of fossil fuel subsidies and low fossil fuel prices have done more than distort

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[16] *See* HARVARD UNIV., FINANCIAL REPORT: FISCAL YEAR 2020, at 6 (2020), https://finance.harvard.edu/files/fad/files/fy20_harvard_financial_report.pdf [https://perma.cc/E32H-WGMZ].

[17] *See* Russell Gold, *Harvard Quietly Amasses California Vineyards—and the Water Underneath*, WALL ST. J. (Dec. 11, 2018), https://www.wsj.com/articles/harvard-quietly-amasses-california-vineyardsand-the-water-underneath-1544456396 [https://perma.cc/89QN-XXUH].

consumer decisions; they have drawn millions of workers worldwide into fossil fuel industry jobs.[18] Transitioning away quickly from a fossil fuel-based economy will require a broad price signal that dampens hiring in fossil fuel industries and boosts hiring and training in alternative energy industries. Only then will individuals seek training and education in fields conducive to a low- or no-carbon economy. That will not happen without a carbon price.[19] All in all, the artificially low prices of fossil fuels are so ubiquitous and far-reaching that it would be extremely difficult to undertake the scale of change required without a predictable, strong, broad price signal provided by a carbon tax.

II. Carbon Taxation's Bad Rap

Economists are unified in extolling the virtues of a carbon tax. A 2019 Wall Street Journal op-ed, *Economists' Statement on Carbon Dividends,* endorsed a carbon tax proposal, signed now by over 3,500 economists, including forty-five Nobel Laureates and four former chairs of the Federal Reserve.[20] But does anyone else agree? Carbon taxation has historically suffered from a bad reputation.[21]

One political problem with carbon taxation is purely aesthetic. Often, the political palatability of a policy is determined by public opinion polls, and carbon taxes poll poorly compared to alternative policies. As I have written in the past, it is problematic that public opinion polls ask superficial questions and get superficial responses, a format that biases against carbon taxation.[22] The way polling questions are typically asked emphasizes the "tax" aspect of a carbon tax and juxtaposes it with "investment in clean energy" or other positive-sounding things. "Tax" and "investment" are loaded with respectively negative and positive connotations that have an outsized influence in the quick-response context of a survey.[23]

John Podesta, the chair of Hillary Clinton's failed presidential campaign, and someone who remains influential in the Democratic Party, wrote

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[18] In the United States alone, the energy sector, broadly speaking, employed 6.7 million Americans in 2018. *See* Nat'l Ass'n of State Energy Officials & Energy Futures Initiative, The 2019 U.S. Energy & Employment Report 2 (2019), https://static1.squarespace.com/static/5a98cf80ec4eb7c5cd928c61/t/5c7f3708fa0d6036d7120d8f/1551849054549/USEER+2019+US+Energy+Employment+Report.pdf [https://perma.cc/VR2M-4MJV].

[19] *See* Shi-Ling Hsu, *Capital Transitioning: An International Human Capital Strategy for Climate Innovation*, 6 Transnat'l Envtl. L. 153, 163 (2017).

[20] *See Economists' Statement on Carbon Dividends*, *supra* note 1.

[21] *See* Shi-Ling Hsu et al., *Pollution Tax Heuristics: An Empirical Study of Willingness to Pay Higher Gasoline Taxes*, 36 Energy Pol'y 3612, 3612 (2008).

[22] *See* Shi-Ling Hsu, The Case for a Carbon Tax: Getting Past Political Hang-ups To Effective Climate Policy 148–61 (2011).

[23] *Id.*

in 2015: "We have done extensive polling on a carbon tax. It all sucks."[24] Podesta has been influential in steering climate policy in the Democratic Party, and while he and the Party have not disavowed carbon taxation, they seem to have accepted as given many illusory faults of carbon taxation.[25] Why does Mr. Podesta conclude that carbon tax polling "sucks"? Consider a 2019 poll conducted for the Democratic Party, which posed the alternative choices this way: [26]

> Question A: Would you support or oppose a policy levying a new tax on carbon pollution to reduce pollution and protect the environment?
>
> Question B: Would you support or oppose a policy providing for public investment in clean energy infrastructure and requiring carbon emissions reductions through regulation to reduce pollution and protect the environment?[27]

Of the subgroup responding to question A, 50% supported, 31% opposed, and 18% were unsure; of those responding to question B, support for "investment" and "regulation" was 59%, 25% opposed, and 15% were unsure. On the basis of this, the Democratic Party concluded that the public prefers "public investment in clean energy infrastructure and requiring carbon emissions reductions through regulation" over "levying a new tax on carbon."[28]

What did the pollsters think respondents would say? They might as well have asked, "do you like the idea of paying more for energy?" or "would you like to see somebody else spending money and investing in clean energy?" In the few seconds that a survey respondent is given to answer a question of that nature, there is barely enough time to grasp the question, let alone reach the second-order considerations of revenue, if they even go there at all. Respondents don't even place much weight on getting a rebate back from the tax revenues.[29] There is a deep discounting of the revenues of carbon taxes, and of the fiscal costs of "investment." That is certainly *not* to say that I personally oppose the investment of the sort hypothesized; only that

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[24] Patrick Gleason, *For First Time in Six Years A Carbon Tax Won't Be On The Ballot, But Politicians Supporting One Will*, FORBES (Sept. 29, 2020, 8:16 PM), https://www.forbes.com/sites/patrickgleason/2020/09/29/for-first-time-in-six-years-a-carbon-tax-wont-be-on-the-ballot-but-politicians-supporting-one-will/#4340d2f41fb4 [https://perma.cc/8HAJ-8KW6].

[25] Podesta was more recently quoted as saying, "the [climate] community has largely moved into a different framework." Amy Harder, *Joe Biden Unlikely to Push Carbon Tax as Part of Climate Change Plan*, AXIOS (Aug. 20, 2020), https://www.axios.com/joe-biden-carbon-tax-climate-change-plan-e8d522a8-5015-45fc-8164-3ec5c8a0d8a3.html [https://perma.cc/N2SQ-9JNR].

[26] *See* Memorandum from Sean McElwee, Co-Founder of Data for Progress, and John Ray, Senior Political Analyst at YouGov Blue, to Interested Parties 12–13, https://filesforprogress.org/memos/wide_open_field.pdf [https://perma.cc/M4YN-WCEC].

[27] *Id.*

[28] *Id.* at 13.

[29] *See* Soren Anderson et al., *Can Pigou at the Polls Stop Us Melting the Poles?* at 2 (Nat'l Bureau of Econ. Research, Working Paper No. 26146, 2019), https://www.nber.org/system/files/working_papers/w26146/w26146.pdf [https://perma.cc/4YRZ-U5LM].

there is a deep imbalance in the way those two options might be considered by a broader public.

For polls to provide meaningful results, they must be carefully worded to avoid biasing responses. For policies with complicated economic implications, that may require a bit more groundwork before posing a question. One NBC/Wall Street Journal poll on the Clean Power Plan,[30] the Obama administration's regulation to reduce emissions from power plants,[31] went into some depth on the views of advocates and opponents of the plan and described, in plain language, some of the less obvious effects of regulation.[32] While lengthy explanations and questions test the patience of survey respondents, they provide more reliable indicators of public preferences.

There are other ways in which carbon taxation gets a bad rap. Some progressives believe that carbon taxes are ineffective in reducing emissions.[33] The environmental activist organization Food and Water Watch declares a carbon tax to be a "fake solution" that is a "win-win for factory farms and fossil fuels" and that fails to reduce emissions.[34] Those claims are eerily similar to false claims made on the extreme right[35] and fly in the face of decades

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[30] 80 Fed. Reg. 64662 (Oct. 23, 2015).

[31] For a review of the Clean Power Plan, see Gabriel Pacyniak, *Making the Most of Cooperative Federalism: What the Clean Power Plan Has Already Achieved*, 29 GEO. ENVTL. L. REV. 301 (2016).

[32] The question was posed after the following explanation: "Now, as you may know, President Obama has directed the Environmental Protection Agency, known as the EPA for short, to set strict carbon dioxide emission limits on existing coal-fired power plants with a goal to reduce emissions significantly by the year 2030 . . . . When it comes to the new limits on carbon dioxide emissions being set by the Obama administration and the EPA, which comes closer to your point of view? 'Supporters say action is needed because coal plants are a major source of carbon pollution. These reductions will mean cleaner air and reduce the health care costs associated with asthma and respiratory diseases by billions of dollars. Significantly lowering carbon pollution is the critical step in addressing climate change and the natural disasters and property damage it causes. These reductions will help create a new generation of clean energy and jobs.' 'Opponents say coal plant carbon emissions have already dropped over the last decade and this action will mean fewer jobs. The compliance costs for electric companies will be three times more expensive than any current EPA regulation, which means higher prices. Consumers and businesses will both end up paying more for electricity. These regulations will mean only a small change to the global climate as carbon emissions in China, India, and other developing countries will continue to rise.'" Patrick O'Connor, *Poll Shows Erosion in President's Support*, WALL ST. J. (June 18, 2014, 12:22 PM), https://www.wsj.com/articles/poll-shows-erosion-in-presidents-support-1403064301 [https://perma.cc/7BK6-47G7].

[33] Washington State had a carbon tax ballot initiative in 2016 that was opposed by Food and Water Watch, and by a number of environmental and social justice groups, in part on the grounds that they believed that the carbon tax would not decrease emissions. *See, e.g.*, Ben Henry, *I-732 Kowtows to Polluters, Disrespects Communities of Color*, SEATTLE GLOBALIST (Dec. 30, 2015), https://seattleglobalist.com/2015/12/30/45907/45907 [https://perma.cc/M46S-3DDN]. For a review of the carbon tax ballot initiative campaign, see David Roberts, *The Left vs. a Carbon Tax*, VOX (Nov. 8, 2016, 11:00 AM), https://www.vox.com/2016/10/18/13012394/i-732-carbon-tax-washington [https://perma.cc/M9RD-GLCU].

[34] Jim Walsh, *The Oil Industry's Carbon Tax Dream is a Climate Nightmare*, FOOD AND WATER WATCH (Oct. 7, 2019), https://www.foodandwaterwatch.org/news/oil-industrys-carbon-tax-dream-climate-nightmare [https://perma.cc/T9EN-XQW6].

[35] *Compare* Robert P. Murphy et al., *The Case Against a U.S. Carbon Tax,* CATO INSTITUTE POLICY ANALYSIS 801 (2016) (falsely claiming, for example, that "after an initial (but temporary) drop, the [British Columbia] carbon tax has not yielded significant reductions in

of empirical economic research.[36] When gas prices increase, people drive less.[37] When electricity prices increase, people conserve electricity.[38] Empirical evidence from the relatively few carbon tax schemes around the world is robust: carbon taxes reduce carbon dioxide emissions.[39] Now, it *could* be that other factors, including economic growth, make those reductions smaller, but that does not support the argument that extreme left and extreme right organizations make: that carbon dioxide emissions are unaffected by, or even increased by, a carbon tax.

At the root of this skepticism is a skepticism that markets change behavior. Carbon taxation is a utilization of markets, and markets are strange things. Economist Maureen O'Hara once quipped that "while markets appear to work in practice, we are not sure how they work in theory."[40] That joke is a self-deprecating poke at her own economic profession, which always seems to have a theory for how things are supposed to work, but is often at a loss to explain the real world's many divergences from economic theory. Markets, by contrast, are difficult for economists to explain, but empirically, they work. They *always* work. In authoritarian societies, black markets are inevitable. Prohibition spawned bootlegging. Markets reflect prices which influence behavior, always, even if that influence is not obvious or not visible.

Perhaps because it is so difficult to explain, many people find it difficult to believe markets work, or perhaps find it difficult to imagine that they could actually drive profound change. Professor Alice Kaswan, a prominent environmental justice scholar, argues that carbon pricing is "essential but insufficient,"[41] an assessment with which I agree. A carbon price, if in the form of a carbon tax, *must* be complemented by a bevy of other policies that would address problems like fugitive emissions, emissions from a melting permafrost, emissions from land use changes, and research for a variety of technologies that will be needed for humankind to fend off apocalyptic climatic change. Moreover, trying to address climate inequality and reduce the risk to vulnerable populations will require many other policies. Professor Kaswan would, however, place the emphasis of climate policy on a variety of prescriptive government measures, regulations, and mandates. She mistrusts carbon pricing as a transformative tool, arguing that pricing is just "reducing

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gasoline purchases, and it has arguably reduced the BC economy's performance relative to the rest of Canada") *with* Brian Murray & Nicholas Rivers, *British Columbia's Revenue-Neutral Carbon Tax: A Review of the Latest 'Grand Experiment' in Environmental Policy*, 86 *Energy Pol'y* 674 (2015) (provides data showing Murphy's arguments are false).

[36] For a review, see Hsu, *supra* note 22, at 140–41 (2011).

[37] *See* West & Williams, *supra* note 5, at 547 tbl.2 (showing negative gas price elasticities for all income quintiles).

[38] *See* James A. Espey & Molly Espey, *Turning on the Lights: A Meta-Analysis of Residential Electricity Demand Elasticities*, 36 J. Agric. & Applied Econ. 65, 79 (2004).

[39] For analyses of the effects of a carbon tax in Sweden, see Gilbert Metcalf & James H. Stock, *Measuring the Macroeconomic Impact of Carbon Taxes*, 110 Am. Econ. Ass'n Papers & Proceedings 106 (2020), and Julius J. Anderson, *Carbon Taxes and CO_2 Emissions: Sweden as a Case Study*, 11 Am. Econ. J. 1 (2019). For a review of the literature surrounding the effects of the British Columbia carbon tax, see Murray & Rivers, *supra,* note 35, at 678.

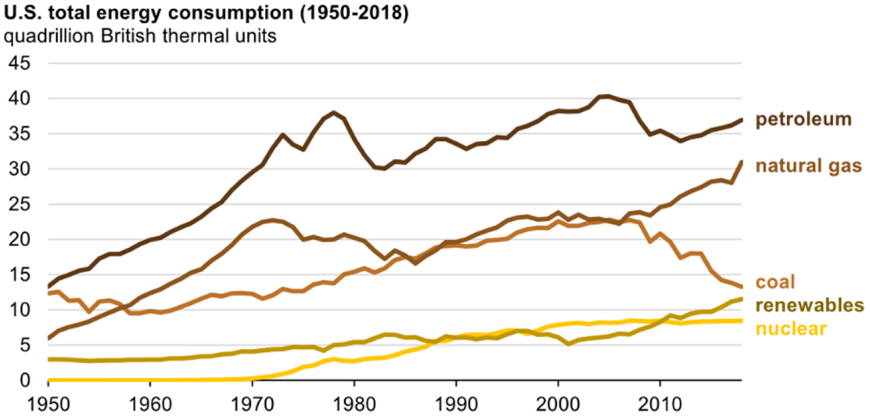
[40] Maureen O'Hara, *Making Market Microstructure Matter*, 28 Fin. Mgmt. 83, 83 (1999).

[41] Alice Kaswan, Carbon Pricing: Essential but Insufficient 1 (2019).

a single pollutant at the margins," and that "market prices cannot address the systemic implications of relinquishing fossil fuels."[42]

On this last point, I part ways with Professor Kaswan. What she fails to fully appreciate is that markets can and do transform entire societies, sometimes very quickly. In the case of markets for fossil fuels, prices can transform energy markets much more quickly than even an ambitious program of government mandates. For example, coal production in the United States in the past decade has fallen rapidly and continues to do so. This has not been due to government regulation. In fact, decades of regulation failed to accomplish what hydraulic fracturing has done in less than one decade, which is to supplant coal as the fossil fuel of choice for electricity generating firms. "Fracking," as it is called, is a technology that cracks geologic formations for the purpose of extracting small deposits of natural gas (and petroleum) that would otherwise be impossible to extract profitably. Before 2007, when fracking became widespread in the United States,[43] coal trended upwards steadily; since then, it has fallen sharply. (See figure 1, below).

FIGURE 1[44]



Source: U.S. Energy Information Administration

It is also worth noting that the contribution of renewable energy has increased quickly over this period, and a good part of this increase can be attributed to federal subsidies that were offered as part of government stimulus spending after the financial crisis of 2008–2009. The form of subsidies

[42] *Id.* at 1.

[43] *See* Thomas W. Merrill & David M. Schizer, *The Shale Oil and Gas Revolution, Hydraulic Fracturing, and Water Contamination: A Regulatory Strategy*, 98 MINN. L. REV. 145, 154 (2013).

[44] *See* U.S. ENERGY INFO. ADMIN., *In 2018, the United States Consumed More Energy Than Ever Before* (April 16, 2018), https://www.eia.gov/todayinenergy/detail.php?id=39092# [perma.cc/GGE9-NN3H].

was varied. Some reduced the cost of investment. Some, which are ongoing, award a tax credit on electricity generated, in effect a negative tax. Government subsidies for renewable energy sources are less efficient, and are inferior in a number of ways to carbon taxation.[45] But, to the extent that they are more politically palatable than a tax, they represent a flawed and problematic, but second-best instrument that acts as a negative carbon tax, and as a price instrument that can help transform markets. Wind and solar companies and electricity generating firms have invested heavily over the past fifteen years, and perhaps most importantly, learned lessons about how to produce wind and solar energy more cheaply.[46] Facing increasing price competition from multiple sources, coal was further pushed to the margins. In 2019, for the first time since 1885, more electricity was generated by renewable energy sources than by coal.[47]

Of course, there is much, much more work to be done, well beyond the decline in coal usage. The next stage of decarbonization is the phasing out of fossil fuels generally, which it now appears, must take place sooner rather than later.[48] A carbon price must emerge soon to slow down natural gas exploration, and stall the quest for new pipelines and shipping terminals. That capacity must be replaced with renewable energy and energy storage technologies, which will require a carbon price in order to supplant natural gas as the fuel of choice for electricity generation. The economics of natural gas and renewable energy sources are different, but despite historically low gas prices,[49] wind and solar energy are competitive: the levelized cost of electricity for wind and solar energy[50] has declined rapidly, so that they are clearly lower than coal and generally (but not uniformly) lower than efficient

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[45] *See, e.g.*, Gilbert E. Metcalf, *Using Tax Expenditures to Achieve Energy Goals,* 98 AM. ECON. REV. 90, 94 (2008).

[46] *See, e.g.*, Eric Williams et al., *Wind Power Costs Expected to Decrease Due to Technological Progress*, 106 ENERGY POL'Y 427, 433 (2017) (showing positive learning rates of 7.7 to 11%).

[47] *See U.S. Renewable Energy Consumption Surpasses Coal for the First Time in 130 Years*, U.S. ENERGY INFO. ADMIN., EIA.GOV (May 28, 2020), https://www.eia.gov/todayinenergy/detail.php?id=43895# [https://perma.cc/N464-Y5FW].

[48] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 15, at 15 ("In 1.5°C pathways with no or limited overshoot, renewables are projected to supply 70–85% (interquartile range) of electricity in 2050 (*high confidence*). In electricity generation, shares of nuclear and fossil fuels *with carbon dioxide capture and storage* (CCS) are modelled to increase in most 1.5°C pathways with no or limited overshoot. In modelled 1.5°C pathways with limited or no overshoot, the use of CCS would allow the electricity generation share of gas to be approximately 8% (3–11% interquartile range) of global electricity in 2050, while the use of coal shows a steep reduction in all pathways and would be reduced to close to 0% . . . ." (emphasis added)).

[49] *See, e.g.*, *Henry Hub Natural Gas Spot Price*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/dnav/ng/hist/rngwhhdm.htm [https://perma.cc/3EKR-5UBX] (last updated Nov. 18, 2020); *Natural Gas Prices – Historical Chart*, MACROTRENDS, https://www.macrotrends.net/2478/natural-gas-prices-historical-chart [https://perma.cc/WJY8-ZFD5] (last visited Nov. 21, 2020).

[50] "Levelized cost" is the term used to describe the cost of a unit of energy produced, taking into account both the capital costs and the variable costs. In electricity production, it would be both the cost of fuel and the cost of constructing the power plant, spread out over the useful life of the power plant. *See* U.S. ENERGY INFO. ADMIN., LEVELIZED COST OF NEW GENERATION RESOURCES IN THE ANNUAL ENERGY OUTLOOK 2020, at 1–3 (2020), https://www.eia.gov/outlooks/aeo/pdf/electricity_generation.pdf [https://perma.cc/7WYX-CZBG].

combined cycle natural gas plants.[51] That does not necessarily translate into a cost advantage, as many considerations go into fuel choice, such as intermittency, traditionally a problem with renewable energy sources.[52] However, a carbon tax of $30 per ton of CO_2 would add about $5.50 to a megawatt-hour of electricity generated by natural gas, which has levelized costs in the neighborhood of $30-40 per MWhr,[53] and could thus provide a decided advantage to renewable energy and energy storage technologies. That may bring about yet another transformation of the energy industry. Of course, a higher carbon tax would make that outcome a greater certainty.

While eminently reasonable in her prescription, Professor Kaswan underestimates, like many others, the power of prices and the effectiveness of carbon taxation. What is missed by many justice advocates of all kinds—economic, environmental, and climate—is that changing prices *is strong, radical policy*. For those that crave large changes soon, a carbon price will work more quickly and broadly than even a broad and ambitious set of government mandates.

III. Are Carbon Taxes Regressive?

Another concern with carbon taxes is the common belief that they are regressive.[54] That is, carbon taxation can be expected to disproportionately hurt poor households more than affluent ones because carbon taxation would increase energy prices, which account for a larger fraction of poor households' expenditures. Moreover, poor households may have less capacity for adjustment to higher energy prices.[55]

While nominally accurate, this perception is incomplete. Accepting as a normative matter that climate policy should insulate *most* poorer households from economic hardship (insulating *every* single poor household, however that is defined, would be impossible),[56] a carbon tax should not be dismissed. First, it is worth seriously reconsidering exactly how regressive carbon taxation itself is, independent of what is done with the revenues. Economic

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[51] *See* U.S. Energy Info. Admin., *supra* note 50, at 3 fig.1; *Renewable Electricity Levelized Cost of Energy Already Cheaper Than Fossil Fuels, and Prices Keep Plunging*, Energy Innovation Pol'y & Tech. LLC (Jan. 22, 2018), https://energyinnovation.org/2018/01/22/renewable-energy-levelized-cost-of-energy-already-cheaper-than-fossil-fuels-and-prices-keep-plunging/ [https://perma.cc/4VRC-8TRD].

[52] *See* U.S. Energy Info. Admin., *supra* note 50, at 9 (noting renewable energy technologies are intermittent and therefore "non-dispatchable" energy sources).

[53] U.S. Energy Info. Admin., *supra* note 50, at 3 (figure 1, showing levelized costs of electricity for natural gas combined cycle, onshore wind, and solar photovoltaic energy).

[54] *See* Morris & Mathur, *supra* note 6, at 1; Grainger & Kolstad, *supra* note 6, at 361.

[55] *See* Don A. Dillman et al., *Lifestyle and Home Energy Conservation in the United States: The Poor Accept Lifestyle Cutbacks While the Wealthy Invest in Conservation*, 3 J. Econ. Psych. 299, 312 (1983).

[56] *See, e.g.*, Julie Anne Cronin et al., *Vertical and Horizontal Redistributions from a Carbon Tax and Rebate*, 6 J. Ass'n Envtl. & Resource Economists S169, S170 (2019) ("Because of heterogeneity of income sources and expenditures, any package of reforms is likely to create winners and losers within each income group.").

modeling research over the past decade suggests that carbon taxation—without considering revenue recycling—is economically painful to individuals but is more so to fossil fuel companies, energy-intensive companies, and the affluent shareholders in these corporations. Second, any regressive effects of carbon taxation can be reversed by a well-designed "recycling" of the revenues, a disbursement of carbon tax proceeds for the purpose of offsetting the economic harm from higher energy prices. Focusing on the tax itself without any consideration of the revenues is to ignore an entire half of a policy, akin to assuming that carbon taxes are collected up in a pile of cash and set on fire.[57] Granted, carbon tax revenues *could* be spent in a way that is regressive, which would certainly give rise to a powerful objection. But carbon tax revenues could also be used to reduce economic inequality, by recycling them in such a way that poorer households are *over*compensated for the higher energy costs stemming from carbon taxation. Ignoring those possibilities is to miss a chance to make some progress against inequality.

A. Are Carbon Taxes Really Regressive?

That carbon taxation is regressive has become a widespread belief, seemingly based on evidence as well as an intuitive understanding that poor households spend a larger fraction of their budget on fossil fuel-intensive energy than rich households do.[58] That fraction may be changing.[59] As shown in Figure 1 above, coal combustion is rapidly being replaced in the electric utility sector by natural gas and renewable energy. As this trend continues, an increasing number of households would see a lower carbon tax bill.

But there is good reason to question whether carbon taxation is truly regressive at all. Relatively recent economic research has delved more deeply into higher-order economic effects of a carbon tax.[60] In addition to considering the immediate budgetary effects on households, a more sophisticated economic analysis must also consider the effect of carbon taxation on demand for fossil fuels, adjustments made by consumers and producers, the effects on intermediate industries, and the effects on shareholder income caused by a decrease in demand for fossil fuels. As it turns out, a carbon tax

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[57] Shi-Ling Hsu, *A Complete Analysis of Carbon Taxation: Considering the Revenue Side*, 65 BUFF. L. REV. 857, 870–71 (2017).

[58] *See, e.g.*, Grainger & Kolstad, *supra* note 6, at 360.

[59] An article by Fullerton, Heutel and Metcalf estimated that in 2008, as a fraction of income, the lowest decile of income earners spent 47.4% on electricity, natural gas, fuel oil, and gasoline, and the second lowest spent 20.3%. *See* Don Fullerton et al., *Does Indexing of Government Transfers Make Carbon Pricing Progressive?*, 94 AM. J. AGRIC. ECON. 347, 349 tbl.1 (2012) ("Four types of expenditures out of 74 are categorized as dirty because they directly involve the combustion of fossil fuels: electricity, natural gas, fuel oil and other fuels, and gasoline."). Using data from 2013, Goulder, Hafstead, Kim, and Long found that those four components totaled about 7.3% for the lowest quintile. *See* Goulder et al., *supra* note 7, at 51.

[60] *See, e.g.*, Fullerton et al., *supra* note 59, at 347 (indexing); Goulder et al., *supra* note 7, at 56-57 (source-side impacts); Sebastian Rausch et al., *Distributional Impacts of Carbon Pricing: A General Equilibrium Approach with Micro-Data for Households*, 33 ENERGY ECON. S20, S20 (variation within subgroups) (2011).

that decreases the demand for fossil fuels reduces the returns to capital, which would represent losses to the high-income households that own stock.[61] This is especially true of investments in fossil fuel industries, such as power plants, pipelines, and refineries, which are large, expensive, and cannot be repurposed for some other use. [62] Fossil fuel industries could try to pass the added cost of carbon taxation onto consumers, but consumers can find ways to avoid the tax by reducing their carbon footprint. Gasoline consumers economize by driving less.[63] Homeowners adjust their thermostats and conserve electricity.[64] Fossil fuel consumers buy more efficient appliances, vehicles, and lighting.[65] By contrast, fossil fuel industries and fossil fuel-intensive industries tend to be heavily invested in expensive brick-and-mortar machinery, making adjustment difficult.[66] The price elasticity of supply and demand, the capacity of producers and consumers to change their behavior in response to changing prices, are central in determining whether producers or consumers will bear the added cost of a tax.[67] In the case of fossil fuels, it would appear that consumers have the upper hand.

In addition, it is worth noticing, as these researchers have, that many poor households receive government benefits that are indexed to inflation, so that an increase in energy prices (at least energy from fossil fuels) caused by a carbon tax would be largely invisible to *most* government transfer recipients.[68] Not all government transfers are indexed. In fact, indexing is a complicated

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[61] *See, e.g.*, Goulder et al., *supra* note 7, at 57 ("the carbon tax reduces after-tax returns to capital more than returns to labor. . ..").

[62] *See* Fullerton et al., *supra* note 59, at 350; Goulder et al., *supra* note 7, at 51.

[63] *See* West & Williams, *supra* note 5, at 547 tbl.2 (showing negative gas price elasticities for all income quintiles).

[64] *See* Harrison Fell et al., *A New Look at Residential Electricity Demand Using Household Expenditure Data*, 33 INT'L J. INDUS. ORG. 37, 47 (2014) (finding consistent price elasticity of demand of about -0.50, indicating a 50% drop of usage in response to a 1% increase in price).

[65] *See, e.g.*, Shanjun Li et al., *Gasoline Taxes and Consumer Behavior*, 6 AM. ECON. J.: ECON. POL'Y 302, 335 tbl.11 (2014) (showing changes in miles per gallon as responses to price). Differences between short- and long-run electricity price elasticities are attributable to durable changes, such as changes in appliances. *See, e.g.*, Jeffrey A. Dubin & Daniel L. McFadden, *An Economic Analysis of Residential Electric Appliance Holdings and Consumption*, 52 ECONOMETRICA 345, 358 tbl.6 (1984) (showing greater price elasticity of electricity demand with a portfolio shift—a change in appliances—than without).

[66] *See* Goulder et al., *supra* note 7, at 57 ("[C]apital-labor ratios of carbon intensive goods and services tend to be higher than the average ratios for the economy. Consequently the carbon tax reduces demands for capital relative to labor and lowers capital's relative return.").

[67] *See, e.g.*, WALTER NICHOLSON, MICROECONOMIC THEORY 441 fig.15.6 (5th ed. 1992) ("The extent to which consumers or producers pay the tax depends on the price elasticities of the demand and supply curves."); West & Williams, *supra* note 5, at 538 n.60 ("[F]or simplicity, many incidence studies (including all those cited in this section) assume that the supply of consumer goods is perfectly elastic. This implies that the imposition of a tax on a consumer good does not affect the producer price of that good, and thus that the entire burden of the tax falls on consumers. Similarly, studies commonly assume that the burden of labor taxes falls entirely on workers. Together, these two assumptions mean that there is no incidence on firms. The present paper makes both assumptions. In practice, of course, these assumptions do not hold, and thus our incidence estimates will differ somewhat from the true incidence of the tax.").

[68] *See* Fullerton et al., *supra* note 59, at 350 (table 3, showing Social Security and Railroad Retirement income as largest category of government transfer, and showing 100% indexing).

matter, as parts of some programs are indexed and some are not. Most benefits under Social Security, Medicaid and Medicare, and the Children's Health Insurance Program, which make up about for 85% of government assistance programs[69] are indexed,[70] and therefore protect their recipients from increased energy prices. On the other hand, unemployment insurance, public assistance, and Supplemental Nutrition Assistance Program (SNAP) benefits are not indexed,[71] and are more likely to be more targeted at needy households, so those recipients remain vulnerable to higher energy costs caused by a carbon tax. On the whole, however, the effect of indexing of government benefits would offset increased energy prices brought on by a carbon tax for a good number of poor households.

All this is to say that a carbon tax is likely not regressive, as widely believed. It turns out that a carbon tax would impose a fair amount of economic pain on fossil fuel industries and on fossil-intensive industries, which would in turn impose a measure of economic pain on rich households that depend on investment income that, at least in part, depends upon those industries. If by "regressive" one means that the poor bear a disproportionate amount of the economic pain, it would appear to merit a more complicated discussion.

It is worth noting that carbon taxation by itself—considered without consideration of what is done with carbon tax revenues—still makes poor households worse off. It may not be much consolation to them that rich households are made even worse off. If economic justice is defined in a stronger form—that not only should economic inequality be reduced, but poor households must in general not be made worse off—then carbon taxation on its own would fail that test; imposing more pain on the rich than the poor would be insufficient.

Be that as it may, it is still worth recognizing that carbon taxation may not be regressive after all. It is worth making the case for carbon taxation on multiple normative grounds, and the recognition that carbon taxation by itself does not aggravate economic inequality is an important policy consideration.

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[69] For fiscal year 2019, about $2.1 trillion were spent on Social Security, Medicare and Medicaid, and the Children's Health Insurance Program, while $361 billion was spent on Supplemental Nutrition Assistance Program (SNAP), unemployment assistance, and other government assistance programs. *See* CTR. ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: WHERE DO OUR FEDERAL TAX DOLLARS GO? 1–2 (2020), https://www.cbpp.org/sites/default/files/atoms/files/4-14-08tax.pdf [https://perma.cc/T66F-Z54H].

[70] For a review of indexing rules for government assistance programs, see DAWN NUSCHLER, CONG. RESEARCH SERV., R42000, INFLATION-INDEXING ELEMENTS IN FEDERAL ENTITLEMENT PROGRAMS (2013), https://fas.org/sgp/crs/misc/R42000.pdf [https://perma.cc/Z78N-ESZ3].

[71] *Id.*

B. Revenues

Considering carbon taxation without considering what to do with the collected tax receipts is omitting analysis of an entire half of a policy. If carbon taxation were subjected to a cost-benefit analysis, ignoring the revenues is akin to considering only the costs, while zeroing out the benefits. A carbon tax of $30 per ton would yield approximately $150 billion in revenues in early years.[72] That money could go a long way towards alleviating the fiscal impacts on many households.

"Recycling" revenues, finding ways to use the carbon tax revenues in an economically productive way, is an old concept that has branched out into many different proposals. There are many plausible options. The revenues could be used to reduce corporate income taxes (on the grounds that they are distortionary), personal income taxes (also distortionary), payroll taxes such as Social Security and Medicare (distortionary and also regressive), to pay for infrastructure (in lieu of Congressional action on funding), and to simply return carbon tax proceeds to households on a lump-sum or modified per-person basis (to help households with higher energy costs).[73]

As a normative matter, the choice is not obvious, as there seem to be tradeoffs between the goals of reducing inequality and maximizing economic growth. Recycling the revenues by reducing corporate income taxes or taxes on capital would be the most economically growth-inducing, because those taxes are the most distortionary.[74] Reducing those distortionary taxes would be most effective in counteracting the growth-reducing effects of higher fossil fuel prices.[75] Reducing rates of corporate income taxes or capital taxes, however, has a regressive effect, because the benefits flow to those wealthy enough to own capital, or shares of corporate stock.[76] By contrast, rebating carbon tax revenues on a lump sum basis to all households has a progressive effect because the resulting lump-sum payment would be larger than the increase in energy costs of most poor households, and would be smaller than the increase in energy costs of most affluent households, which consume more energy.[77] At a carbon tax of $30 per ton, households in the three lowest quintiles of income would, *on average*, be better off.[78]

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[72] This rough approximation is based on the fact that greenhouse emissions in the United States totaled 5.41 gigatons of CO_2 in 2018. *See Overview of Each Country's Share of CO2 Emissions*, UNION OF CONCERNED SCIENTISTS, https://www.ucsusa.org/resources/each-countrys-share-co2-emissions [https://perma.cc/Y82L-TJPM] (last updated Aug. 12, 2020).

[73] *See, e.g.*, Hsu, *supra* note 57, at 874–80.

[74] "Distortionary" means that a tax is likely to alter behavior or investment patterns away from an optimum. Corporate income taxes or taxes on capital income are considered to be highly distortionary. *See* Goulder et al., *supra* note 7, at 54.

[75] Roberton C. Williams III et al., *The Initial Incidence of a Carbon Tax Across Income Groups*, 68 NAT'L TAX J. 195, 210 (2015).

[76] *See id.* at 197 ("Directing revenue to reduce the capital income tax has the least effect on economic well-being, but it is a regressive approach . . . .").

[77] *See id.* at 210.

[78] *See id.*

It is worth emphasizing the caveat *on average* because it is impossible to generalize about every single household in the lowest three income quintiles, or the lowest quintile, or any large group of economically disadvantaged people about which we would be concerned. Even in the lump-sum method, it is impossible to ensure that *every* household, even in the lowest income quintiles or deciles, can be insulated from energy price increases.[79] Some 50,000 employees in the coal industry,[80] for example, will have to find other employment, and a carbon tax rebate of a few hundred dollars or even a few thousand dollars will be of little help. As a carbon tax increases, that may become true of workers in the natural gas industry as well. That said, no proposed or suggested revenue recycling plan would be nearly as effective as returning carbon tax revenues directly to taxpayers, lump-sum, or on a modified per-person basis.[81]

It is also worth noting at this point, that where one might expect a partisan or at least an ideological divide on the question of how to use carbon tax proceeds, the economic profession seems to have unified, surprisingly and spectacularly, on a lump-sum dividend, the option that minimizes GDP growth but reduces inequality. The Wall Street Journal op-ed of 3,500 economists noted above called for a carbon tax with lump sum payments.[82] Among those that signed on, essentially coming down on the side of redistribution and against higher economic growth, are many prominent economists that have written about economic growth their entire illustrious careers. They include Martin Feldstein, chief economic advisor to Presidents Reagan and George H.W. Bush, Gregory Mankiw, chief economic advisor to President George W. Bush, and Robert Lucas, University of Chicago Nobel Laureate who once wrote: "Of the tendencies that are harmful to sound economics, the most seductive, and in my opinion the most poisonous, is to focus on questions of distribution."[83] That such a strong and unified signal can come from such an ideologically diverse group of people is a compelling reason to favor the lump-sum revenue option.

House Bill 763,[84] introduced in the 116th Congress, sponsored by eighty-one House Democrats and *one* House Republican, largely adopted the economists' proposal. House Bill 763 imposes a carbon tax and provides that the tax proceeds should be deposited into a trust fund for distribution to all U.S. households, on a modified per-person basis, with a half share for all minors in a household.[85] This scheme would have a redistributive effect,

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[79] *See* Cronin et al., *supra* note 56, at S193.

[80] *See* NAT'L ASS'N OF STATE ENERGY OFFICIALS & ENERGY FUTURES INITIATIVE, THE 2019 U.S. ENERGY & EMPLOYMENT REPORT 4–5 (2019).

[81] For example, carbon tax "rebates" could be distributed to adults per household, with a fractional share to minors.

[82] *See Economists' Statement on Carbon Dividends*, *supra* note 1.

[83] Robert E. Lucas, *The Industrial Revolution: Past and Future: 2003 Annual Report Essay*, FED. RESERVE BANK OF MINNEAPOLIS (May 1, 2004), https://www.minneapolisfed.org/article/2004/the-industrial-revolution-past-and-future [perma.cc/PFV6-97HU].

[84] H.R. 763, 116th Cong. (2019).

[85] *See id.* § 9512(c)(3)(B).

though a very modest one: at the starting rate of $15 per ton, the lowest income quintile household of four (two adults and two children) would receive a "dividend" of $514, after taxes, against an increase in energy costs of $273; the average highest income quintile household of four would receive a post-tax dividend of $383[86] against an increase in energy costs of $921. As the carbon tax rate increases by $10 per ton per year, those figures would increase. That bill, unfortunately, did not advance.

Beyond that, there is a live question of whether or not any carbon tax revenues should be earmarked to help workers in distressed industries. A case could be made for using carbon tax revenues to assist coal workers as the coal industry finds itself increasingly anachronistic. Alternatively, additional federal monies other than carbon tax revenues could be appropriated for this purpose. In any case, this is a very difficult ethical and political question, upon which I demur. But I do note that there is precedent for providing assistance to dislocated workers: The Trade Adjustment Assistance Program helps workers losing jobs due to international trade. Qualifying workers apply to the Department of Labor for an extension of unemployment benefits, plus help with retraining and relocation. The program has been poorly funded and controversial.[87] But if reducing the economic pain to workers in the fossil fuel industries is considered to be one objective of revenue recycling, the Trade Adjustment Assistance Program is at least a model for consideration.

If a carbon tax is to advance, albeit modestly, the goal of reducing inequality, recycling the revenues on a lump-sum basis is clearly the most straightforward and effective option. There is no other way to assist the maximum number of people without adopting a universal rebate policy. While there would be still some iniquities *within* income quintiles of poor Americans, no other use of carbon tax revenues would be as effective in insulating the maximum number of households against economic hardship from climate pricing. Some environmental justice advocates have proposed that money be devoted to helping low-income households cope with higher energy prices by subsidizing the installation of renewable energy sources, such as rooftop solar panels.[88] Some impetus for this policy lies in the fact that low- and moderate-income households are much less likely to participate in rooftop solar programs, and thus less likely to benefit from the tax subsidies accruing to rooftop solar owners.[89] While a laudable and intuitively

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[86] Dividends under H.R. 763 would be taxable, so that higher-income households would receive less of a net dividend.

[87] For reviews of this topic, see ADELE C. MORRIS, BUILD A BETTER FUTURE FOR COAL WORKERS AND THEIR COMMUNITIES (2016); Howard Rosen, *Trade Adjustment Assistance: The More We Change the More It Stays the Same*, *in* C. FRED BERGSTEN AND THE WORLD ECONOMY 79-113 (Michael Mussa ed., 2006).

[88] *See* GREEN JUSTICE COAL., AN ACT RELATIVE TO SOLAR POWER IN ENVIRONMENTAL JUSTICE AND URBAN COMMUNITIES 1 (2018), http://greenjusticecoalition.org/wp-content/uploads/2018/06/Solar-Access-1-Pager.pdf [perma.cc/3KPL-KRV4].

[89] *See, e.g.*, BENJAMIN SIGRIN & MEGHAN MOONEY, ROOFTOP SOLAR TECHNICAL POTENTIAL FOR LAW-TO-MODERATE INCOME HOUSEHOLDS IN THE UNITED STATES 4

appealing remedy, that would not necessarily be a good pairing with carbon taxation, as that would be an inefficient way to insulate poor households from higher energy prices. First, it would not insulate them from higher gasoline prices. But more significantly, the cost of a solar rooftop system would be much more expensive than the energy savings. Just a very rough back-of-the-envelope calculation should suffice to illustrate: a $30 per-ton carbon tax would generate first-year revenues of $150 billion which, if it were devoted *entirely* to buying rooftop solar systems for poor families, could only pay for about 7.5 million homes. Admittedly, this is a blunt calculation of what is always a subtler policy. But the point still remains that there are far more effective ways of protecting poor households from price increases than tapping into carbon tax revenues. If a carbon tax is to advance economic justice by reducing inequality, it is important to use that money efficiently, as inefficient uses could leave many poor households worse off.

Conclusion

Carbon taxation and the advancement of economic justice do not seem to be particularly consonant goals. But in fact, carbon taxation is vital to preserving economic justice, because it is the most important tool for arresting, to the greatest extent possible, climate change. Climate change is the most brutal segregator of haves and have-nots, and unless a dramatic economic transformation takes place quickly, climate change could drive inequality to apocalyptic extremes. Moreover, a carbon tax can be designed so that the revenues are distributed on a per-household or per-person basis, which would have a modest redistributive effect, because such lump-sum payments would have the effect of overcompensating poor households and undercompensating rich households for the increased energy costs resulting from a carbon tax.

Despite almost universal approval from economists, carbon taxes remain politically challenging to enact, for three reasons. First, carbon taxes are viewed unfavorably because people superficially perceive carbon taxes as pure costs while paying only secondary attention (if any at all) to the revenue side, and the benefits that could be obtained using carbon tax revenues. This is a misapprehension that is unfortunately reinforced by public opinion polls. This negative bias contrasts starkly with alternative policies such as subsidies for renewable energy, which are less economically efficient and less effective,[90] but for which the costs are less salient for survey respondents, and

(2018) ("Adoption of rooftop solar in the United States primarily has been concentrated in higher income households.").

[90] *See* Metcalf, *supra* note 45, at 94 ("An examination of the ethanol tax credit, however, suggests that this credit is a particularly expensive policy instrument for reducing CO2 emissions. A better policy would be to replace the credit with a carbon price . . .").

perhaps legislators.[91] Second, skepticism persists about the effectiveness of markets for changing behavior. And finally, concerns persist that carbon taxation is regressive, hurting poor households much more than rich households.

This essay offers a counter to these concerns, but the most important proposal to take would be to enact a carbon tax in which the revenues are returned directly to taxpaying households on a per-household or per-person basis, leading to a modestly redistributive outcome. The only way to cure misperceptions about carbon taxation may simply to institute one, and let the outcomes speak for themselves.

[91] *See, e.g.*, Wallace E. Oates, *On the Nature and Measurement of Fiscal Illusion: A Survey*, *in* STUDIES IN FISCAL FEDERALISM 65–82 (Wallace E. Oates ed., 1991) (discussing biases of legislators towards spending).

The Oath Doesn't Require Originalist Judges

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INTRODUCTION

Judges take oaths to uphold the Constitution. Little do they know, this ritual commits all of them to originalism—or so several scholars have recently argued.[1] And it's not just a small group of vocal originalists who believe this. The idea that pledging allegiance to a constitutional document somehow entails originalism has gained a foothold in Utah.[2] Here is Associate Justice Thomas Rex Lee, writing for its Supreme Court:

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[1] *See, e.g.*, William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2394 (2015); Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 497 (2018); Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2009) [hereinafter Green, *Constitutional Indexicals*]; Christopher R. Green, *Does the Oath of Office Bind Constitutional Interpretation?*, NEWSWEEK (May 21, 2020, 12:16 PM), https://www.newsweek.com/does-oath-office-bind-constitutional-interpretation-opinion-1505760 [https://perma.cc/SXJ7-VAUN]; Christopher R. Green, *Is the Oath Argument for Originalism Circular?*, THE ORIGINALISM BLOG (May 11, 2020, 9:48 PM), https://originalismblog.typepad.com/the-originalism-blog/2020/05/is-the-oath-argument-for-originalism-circular.html [https://perma.cc/MBM6-W978] [hereinafter Green, *Circular*]; Josh Hammer, *Common Good Originalism*, THE AM. MIND (May 6, 2020), https://americanmind.org/features/waiting-for-charlemagne/common-good-originalism/ [https://perma.cc/BVR3-MHWW]; Michael Stokes Paulsen, *Originalism: A Logical Necessity*, NAT'L REV. (Sept. 13, 2018, 11:20 AM), https://www.nationalreview.com/magazine/2018/10/01/originalism-a-logical-necessity/ [https://perma.cc/8EB8-L4NQ].

[2] *See* Mitchell v. Roberts, 469 P.3d 901, 904 (Utah 2020).

> We are asked . . . to interpret and apply the terms of the Utah Constitution . . . . We take a solemn oath to uphold that document—as ratified by the people who established it as the charter for our government, and as they understood it at the time of its framing. That understanding is controlling.
>
> The original meaning of the constitution binds us as a matter of the rule of law. Its restraint on our power cannot depend on whether we agree with its current application on policy grounds. Such a commitment to originalism would be no commitment at all. It would be a smokescreen for the outcomes that we prefer.[3]

This is an unfortunate development. Nothing about oaths to support constitutions necessarily requires judges to be originalists.[4] Although others have criticized attempts to establish originalism on the thin basis of constitutional oaths,[5] we emphasize—uniquely, we believe—that oath-based arguments fail for reasons that proponents of these arguments already accept. Specifically, we argue that careful attention to the content of Constitutional oaths shows why judges have discretion to adopt nonoriginalist approaches to adjudicating constitutional disputes. More specifically still, judges are bound to discharge their responsibilities to the best of their abilities and understanding.[6] Because this proviso allows judges to be nonoriginalists—as indeed most judges over the course of our history have been—the oath cannot plausibly be regarded as requiring judges to be originalist in any interesting sense. We argue that, ironically, oath-based originalists don't take Constitutional oaths seriously enough.

But first we need to get clear on some terminology. After all, any discussion of "originalism" risks equivocation. The term is slippery. Originalists disagree among themselves. Some purportedly "originalist" claims seem trivial.[7] It is trivial, for example, that judges assessing constitutional cases should take seriously the original text of the Constitution. Nonoriginalists hold this view as well, so it certainly isn't what makes an approach originalist.

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[3] *Id.*

[4] Here is Utah's oath in full: "I do solemnly swear (or affirm) that I will support, obey, and defend the Constitution of the United States and the Constitution of the State of Utah, and that I will discharge the duties of my office with fidelity." UTAH CONST. art. IV, § 10. This oath says nothing about originalism or original public meaning.

[5] *See* Charles Barzun, *The Oath Argument*, BALKINIZATION (May 19, 2020), https://balkin.blogspot.com/2020/05/the-oath-argument.html [https://perma.cc/TC5Y-5A67]; Cass R. Sunstein, *The Debate over Constitutional Originalism Just Got Ugly,* BLOOMBERG (May 15, 2020), https://www.bloomberg.com/opinion/articles/2020-05-15/is-the-constitution-a-living-document-supreme-court-can-decide [https://perma.cc/32UZ-MCCC]; Adrian Vermeule, *On "Common-Good Originalism*," MIRROR OF JUSTICE BLOG (May 9, 2020), https://mirrorofjustice.blogs.com/mirrorofjustice/2020/05/common-good-originalism.html [https://perma.cc/8H78-YU5T].

[6] This "best of my abilities and understanding" language was part of the judicial oath for over 200 years, but then was removed. Nevertheless, the oath as amended continues to communicate the same idea. *See infra* notes 36–38 and accompanying text.

[7] *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 10–12, 22 (2009).

With this warning in mind, there are at least two types of originalism that have been pressed by those pursuing oath-based arguments: First, there is what Professor Randy Barnett calls "Fearless Originalism"; and, second, there is "Ontological Originalism."[8] We understand Fearless Originalism to accept the following claims: (a) the Constitution is a set of propositions expressed by the Constitutional text, propositions which were fixed in time when a given textual provision was adopted—i.e., the Constitution is a set of original meanings,[9] (b) officials are "bound to" or constrained by those meanings,[10] and (c) more specifically, if some official conduct—including an act of legislation—conflicts with that set of original meanings, then courts must invalidate it as unconstitutional when that conduct is challenged as such.[11]

As we will see, Fearless Originalists make strong claims about how judges should do their jobs and are no fans of doctrines of judicial deference. But other originalists, Ontological Originalists, commit to less.[12] They argue that Constitutional oaths tell us something important about what the Constitution *is* (hence the label, "Ontological"). And, they maintain, it is widely accepted by oath-taking officials that their oaths are the same—indeed, that the content of those oaths is identical to the content of the constitutional

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[8] Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006) [hereinafter Barnett, *It's a Bird, It's a Plane*].

[9] *See* Green, *Constitutional Indexicals*, *supra* note 1, at 1607; Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1249 (2019) [hereinafter Solum, *Conceptual Structure*]; Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) [hereinafter Solum, *The Fixation Thesis*]. As Solum observes, original public meaning has seemingly become the consensus winner on what the originalist object should be. *See* Solum, *The Fixation Thesis*, *supra*, at 27. But we use "original meaning" to elide more fine-grained distinctions that won't make a difference for our purposes, such as the distinction between original public meaning, original intended meaning, and original legal meanings.

[10] *See* Mitchell v. Roberts, 469 P.3d 901, 904 (Utah 2020); Evan D. Bernick & Christopher D. Green, What is the Object of the Constitutional Oath 43 (Sept. 1, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441234 [https://perma.cc/4UV3-VP73]; Green, *Circular*, *supra* note 1.

[11] *See* Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037, 2065 (2006); *see also* Solum, *Conceptual Structure*, *supra* note 8, at 1243, 1249, 1261 (describing the "constraint principle" and suggesting a distinction between originalist theories and judicial theories of strong deference, such as Thayerism).

[12] The distinction between Fearless Originalism and Ontological Originalism here is very similar to the distinction identified by Mitchell Berman between prescriptive originalism and constitutive originalism. *See* Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1337–44 (2018). We use the terms "Fearless" and "Ontological" because they do not necessarily refer to the same things. "Ontological" originalism, according to our interlocutors, is a theory that explains what *object* is picked out by "this Constitution" in the Constitutional text, whereas constitutive originalism concerns theses about what makes it the case that certain propositions of constitutional law are true. *See id.* at 1337. It is not logically incoherent to maintain that "this Constitution" refers to the set of propositions expressed by the constitutional text as a matter of, say, original public meaning, but then deny that the set is constitutive of true propositions of constitutional law. As for what we call "Fearless Originalism," it is a subset of what Berman calls "prescriptive" theories of originalism. For these reasons, we keep the similar labels apart.

oath taken by George Washington: a commitment to support "the Constitution."[13] But "the Constitution" as the founding generation understood it could only refer, as (a) stipulates, to the set of meanings that the Constitutional text expressed to the founding generation—i.e., "the Constitution" *just is* a set of original meanings expressed by the Constitutional text.[14] And because officials take the "same" *oath* as all other officials, it follows that they must all undertake obligations to be constrained by those original meanings (as (b) stipulates). But Ontological Originalists don't necessarily endorse (c), given that originalists differ on what it means to give legal effect to the Constitution's original meanings, with some (for example) permitting adherence to nonoriginalist precedent. In short, Ontological Originalists accept (a) and (b) but remain silent about (c). So, Ontological Originalism is supposed to be both more limited and more fundamental than its Fearless cousin.

Regardless of whether originalism is understood in "fearless" or more basic ontological terms, taking an oath to uphold the Constitution does not require judges to be originalists. And the oath itself shows why.

I. The Oath Doesn't Require "Fearless" Originalism

In our view, "originalism" worth the name provides robust guidance to or constrains judges in some meaningful way, even though originalists may differ on how judges should define and implement those constraints.[15] After all, "originalism" is supposed to be an appealing doctrine because it provides a principled and superior alternative to, say, common law constitutional adjudication or living constitutionalism, which originalists deride as unmoored from the Constitutional text itself. Originalism worth the name is supposed to provide a strongly constraining method that imposes limits on judges otherwise inclined to impose their own policy preferences on the polity in the guise of interpretation.[16] Or as Nelson Lund writes, "The core of originalism is the proposition that text and history impose meaningful, binding constraints on interpretive discretion."[17]

With those remarks in mind, our first target is the view that the judicial oath to uphold "this Constitution" necessarily, with a few other premises, requires judges to adopt a very strong form of originalist judging. Again, call

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[13] *See* Bernick & Green, *supra* note 9, at 13–17; Green, *Circular*, *supra* note 1.

[14] *See* Green, *Constitutional Indexicals*, *supra* note 1, at 1643.

[15] *See generally* Solum, *Conceptual Structure*, *supra* note 8; Lawrence B. Solum, Semantic Originalism (Nov. 25, 2008) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 [https://perma.cc/BYS7-57XM]. For a discussion of the sense in which originalist methodologies may count as "constraining," see generally William Baude, *Originalism as a Constraint on Judges*, 84 U. Chi. L. Rev. 2213 (2017).

[16] *See* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 Geo. L.J. 713, 714 (2011) ("Originalism was born of a desire to constrain judges. Judicial constraint was its heart and soul—its *raison d'être*.").

[17] Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1372 (2009).

this robust view of originalism Fearless Originalism.[18] As noted above, the view accepts the following claims: (a) the Constitution is a set of propositions expressed by the Constitutional text, propositions which were fixed in time when a given textual provision was adopted—i.e., the Constitution is a set of original meanings,[19] (b) officials are in some sense "bound to" or committed to give legal effect to those meanings,[20] (c) more specifically, if some official conduct—including an act of legislation—conflicts with that set of original meanings, then courts *must* invalidate it as unconstitutional when that conduct is challenged as such.[21]

Michael Stokes Paulsen endorses this very strong version of originalism.[22] He thinks it somehow follows from the fact that judges take an oath to uphold "this Constitution."[23] He writes, "the Constitution itself (in Article VI's specification of '[t]his Constitution' as the supreme law of the land . . . and the nature of written constitutionalism generally), requires a methodology of original, objective-public-meaning textualism."[24] As a corollary, he asserts that swearing an oath to uphold "this Constitution" requires adhering to its original public meaning and eschewing any competing interpretive methodology.[25] While acknowledging that forcing officials to abide by ancient constitutional strictures presents a "dead hands" problem, the oath, claims Paulsen, solves that problem too: by pledging to uphold "this Constitution."[26] He writes:

> To willfully depart from the document one is sworn to uphold is, indeed, revolution by judiciary, an overthrowing of the ancien regime. . . . When a prior interpretation of the Constitution, by any branch of government, including the courts, has departed from the meaning of the Constitution, one must always prefer—if one is truly interpreting and applying the Constitution—the objective,

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[18] Barnett, *It's a Bird, It's a Plane*, *supra* note 8, at 1233 (contrasting "faint-hearted" originalism with "fearless" originalists like "Mike Paulsen, Gary Lawson, and [Barnett himself] who reject the doctrine of stare decisis in the following sense: if a prior decision of the Supreme Court is in conflict with the original meaning of the text of the Constitution, it is the Constitution and not precedent that binds present and future Justices").

[19] *See* Green, *Constitutional Indexicals*, *supra* note 1, at 1624; Solum, *Conceptual Structure*, *supra* note 8, at 1249; Solum, *The Fixation Thesis*, *supra* note 8, at 1. As Solum observes, original public meaning has seemingly become the consensus winner on what the originalist object should be. *See* Solum, *The Fixation Thesis*, *supra* note 8, at 27. But we use "original meaning" to elide more fine-grained distinctions that won't make a difference for our purposes, such as the distinction among original public meaning, original intended meaning, and original legal meanings.

[20] *See generally* Bernick & Green, *supra* note 9; Green, *Circular*, *supra* note 1.

[21] *See* Paulsen, *supra* note 10, at 2065; Solum, *Conceptual Structure*, *supra* note 8, at 1249 (describing the "constraint principle"); *id.* at 1261 (suggesting a distinction between originalist theories and judicial theories of strong deference, such as Thayerism).

[22] *See* Paulsen, *supra* note 10, at 2063–65.

[23] *Id.*

[24] Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2741 n.96 (2003) (citation omitted).

[25] *See id.*

[26] *See* Paulsen, *supra* note 10, at 2063.

> original linguistic meaning of the Constitution's words and phrases to past departures from that meaning . . . . A principled originalist must reject strong theories of stare decisis.[27]

Let's set aside the question of whether the oath genuinely solves the dead hands problem (hint: it doesn't).[28] Notice instead that, according to Paulsen, the oath to uphold "this Constitution" entails a requirement that judges be original-public-meaning originalists. And, what's more, this further requires that judges decline to abide by precedent that is not justifiable on originalist grounds, including nonoriginalist precedent.

Paulsen is a Fearless Originalist, since he plainly accepts criteria (a) through (c). He accepts that the Constitution *is* the linguistic meanings expressed by the Constitutional text (as in (a)). But he not only believes that those meanings should be given *some* legal effect (as in (b)). After all, some faint-hearted originalists hold that, in effect, original meanings should be afforded *defeasible* legal status that nonoriginalist precedent may sometimes override.[29] Instead, as in (c), Paulsen maintains that courts must afford the original meanings of the Constitutional text *decisive* weight against any other source of constitutional legal norms, including conflicting nonoriginalist precedent. This leads Paulsen to reject any version of originalism that embraces *stare decisis* when it calls for adhering to precedent that conflicts with the original meaning of the Constitutional text.

Paulsen is not alone in regarding principled originalism to be incompatible with a strong view of *stare decisis*. So-called "fearless originalists"—including Randy Barnett and Gary Lawson—agree that a strong commitment

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[27] *Id.* at 2063–65 (emphasis omitted).

[28] In brief: the dead-hands problem has many formulations. One (very rough) version focuses on how a plainly immorally restricted group of constitutional decision makers—only white male property owners of a certain kind that excluded women and slaves from decision-making—could legitimately bind a polity to a structure of government, and set of substantive rights, more than two hundred years later. *See, e.g.*, Eric J. Segall, *Burying the Dead Hand: Taking the Original Out of Originalism*, AM. CONST. SOC'Y (Oct. 24, 2019), https://www.acslaw.org/expertforum/burying-the-dead-hand-taking-the-original-out-of-originalism [https://perma.cc/45XH-9KHG]/. Originalists may have an answer to the problem but the oath cannot be part of it. It is no answer to this problem that officials are currently promised to be bound, when the whole dead-hands question is whether making that promise should be regarded as legitimate or binding, and if so, to what extent. Richard Re argues that the oath to uphold the Constitution commits the oath's taker to uphold contemporaneous understanding of it, which needn't be an originalist one. *See* Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 299 (2016). This approach—although problematic in its own right—appears to mitigate the problem somewhat, since committing to more recent understandings of Constitutional practice does not necessarily face quite the legitimacy concerns faced by founding-era decisions.

[29] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862, 864 (1989) (observing that "most originalists are fainthearted," while acknowledging that "in a crunch" he would act as a fainthearted originalist). Years later Scalia disavowed fainthearted originalism—at least with respect to the constitutional permissibility of flogging. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 4, 2013, https://nymag.com/news/features/antonin-scalia-2013-10/. It is unclear whether he his ostensive repudiation of fainthearted originalism made its way into his opinions.

to *stare decisis* is incompatible with originalism.[30] And in his recent concurrence in *Gamble v. United States*,[31] Justice Clarence Thomas set forth his "simple" rule of precedent, drawn from Caleb Nelson's work: "When faced with a demonstrably erroneous precedent, . . . We should not follow it. This view of stare decisis follows directly from the Constitution's supremacy over other sources of law—including our own precedents."[32] Justice Thomas's proposed rule is plainly incompatible with a strong commitment to *stare decisis*.[33] Where Paulsen apparently differs is in *justifying* his fearless originalism on the basis that judges take an oath to protect the Constitution.

But that justification doesn't follow from the oath. Here is the actual oath taken by judges under the Judiciary Act of 1789:

> I, _____, do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that *I will faithfully and impartially discharge and perform all the duties incumbent upon me* as _____, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.[34]

This best-of-my-abilities language appeared explicitly in oaths taken by federal judges for 200 years, from 1789 to 1990. Under the Judicial Improvement Act of 1990, this best-of-abilities language was stricken.[35] But the language expressing the fundamental obligation—i.e., "to faithfully and impartially discharge and perform all the duties incumbent upon me as

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[30] *See, e.g.*, Barnett, *It's a Bird, It's a Plane, supra* note 8, at 1233 (contrasting "faint-hearted" originalism with "fearless" originalists like "Mike Paulsen, Gary Lawson, and [Barnett himself] who reject the doctrine of stare decisis in the following sense: if a prior decision of the Supreme Court is in conflict with the original meaning of the text of the Constitution, it is the Constitution and not precedent that binds present and future Justices."); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258–59 (2005); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24, 27–28 (1994); Paulsen, *supra* note 10, at 2063–65.

[31] 139 S.Ct. 1960 (2019).

[32] *Id.* (Thomas, J., concurring); *see generally* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

[33] For an originalist rejoinder to Justice Thomas, see John O. McGinnis, *Why Justice Thomas Is Wrong About Precedent*, L. & LIBERTY (July 25, 2019), https://lawliberty.org/why-justice-thomas-is-wrong-about-precedent/ [https://perma.cc/BHU4-RW5M]. McGinnis contests Justice Thomas's reading of history, though it's less obvious whether he is fully responsive to Justice Thomas's core jurisprudential claim, which is that the constitutional text's original meaning should prevail when in conflict with other subordinate sources of law. Regardless, even McGinnis—who defends the in-principle compatibility of stare decisis with originalism—appears to reject a *strong* commitment to stare decisis; that is, he denies that a doctrine of constitutional precedent should look like "the strong form of precedent that English courts applied to the statutory decisions," while adding, "precedent rules should indeed be less protective of wrong constitutional decisions than they have become in the modern era." *Id.* So we might count McGinnis among those originalists who would accept (c).

[34] Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (emphasis added) (codified as amended at 28 U.S.C. § 453 (2018)).

[35] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 404, 104 Stat. 5089, 5124 (codified at 28 U.S.C. § 453 (2018)).

_____ under the Constitution and laws of the United States"—remains the same.[36]

In Part II, we deploy this language against the argument that the judicial oath requires judges to embrace Ontological Originalism. For now, notice first and most obviously that nothing in the text says anything about the strength or weakness of a particular judge's conception of *stare decisis* or about interpretive methodology more generally. Nor do "the Constitution and laws of the United States."[37] The Constitutional text says remarkably little about how judges should do their jobs.[38] The only way that the judicial oath requires judges to commit to Fearless Originalism—whether in the present or prior versions—is by somehow presupposing that the only way that a federal judge can faithfully and impartially discharge her duties as a judge is as a fearless originalist.

But that begs the question. We cannot simply assume that the only way one can faithfully discharge one's judicial obligations is by rejecting a strong form of stare decisis. That position must be argued for. Indeed, Fearless Originalists have done precisely this.[39] But their arguments are independent of the oath.[40] The basic idea they pursue is as simple as it is elegant: because the original meaning of the Constitutional text sets forth the supreme law and overrides any conflicting decisions by officials, any judicial precedent that conflicts with original meaning must yield to that meaning, notwithstanding *stare decisis*.[41] But notice that the oath performs no independent work in this argument. Oath-based arguments are entirely parasitic on the more basic one. In terms of the three criteria that define Fearless Originalism, this shows that the oath fails to establish thesis (c): that judges are duty-bound to invalidate official acts that contravene original meaning.

Paulsen might insist that our objection misses the point. Surely the oath adds a decisive *moral* reason to be a Fearless Originalist. Put differently, the oath raises the stakes by showing that any judge that fails to give full legal effect to original meaning in the face of contrary precedent necessarily commits a moral wrong by failing to comply with the oath that she has taken.

But this argument yields absurdity. It entails that many judges, indeed, probably all of them, have either violated their oaths of office or are expressly willing to do so. According to the Fearless Originalist, nonoriginalist judges not only make mistakes of law when they, for example, commit to a strong version of *stare decisis*, or when they otherwise fail to treat original meaning as dispositive. Doing these things—according to the Fearless Originalist—also violates their oaths of office. Nor are all originalists spared from the

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[36] *Id.*

[37] *Id.*

[38] Indeed, it famously—or infamously—fails to mention any power of judicial review of legislation. *See generally* Stephen R. Alton, *From* Marbury v. Madison *to* Bush v. Gore*: 200 Years of Judicial Review in the United States*, 8 TEX. WESLEYAN L. REV. 7, 17 (2001) ("As we know, the United States Constitution is silent on the power of judicial review.").

[39] *See, e.g.*, Barnett, *It's a Bird, It's a Plane*, *supra* note 28, at 1233.

[40] *See id.*

[41] *See supra* note 26.

harsh judgment of Paulsen's Fearless Originalism. After all, nonoriginalists are not the only ones who willingly set aside original meaning in the face of precedent. Faint-hearted originalists like Justice Scalia explicitly made exceptions for pragmatic considerations.[42] Fearless Originalists would be forced to conclude that even Justice Scalia's willingness to set aside original meaning for pragmatic reasons would violate his oath of office.[43] But the problem is even worse. The oath of office is not limited to requiring judges to faithfully and impartially administer the Constitutional text; the oath also requires faithfully and impartially administering all laws. But by the reasoning of the Fearless Originalist, this "faithful and impartial" discharging of judicial duties means that any mistake of law made by a judge would count as a violation of that judge's oath, not merely a cause for reversal on appeal. And because all judges that have ever served on the federal bench have either been nonoriginalists, or faint-hearted about it, or have made a mistake of law, the Fearless Originalist position would entail that virtually all Judges and Justices have violated their oaths of office.

This implication is absurd. It strains credulity to imagine that virtually all judges have *violated their oaths*, even if we think that virtually all judges fall short of our high expectations. This means that there's a flawed assumption in the argument. Indeed, it mistakenly assumes that judges who make mistakes of law—including, for the sake of argument, originalists or nonoriginalists who embrace strong versions of *stare decisis*—thereby simultaneously violate their oaths of office. This is implausible. More plausible is that oaths involve an official's voluntarily undertaking an obligation to discharge her responsibilities in good faith. This is a far cry from the obligation to always get the right answer or to never make a mistake, whether regarding interpretive methodology or a more run-of-the-mill legal mistake. After all, it is a much more serious charge to claim that a judge has violated her constitutional oath than to claim that she made a mistake of law. Lower courts make the latter type of mistake all the time; that's why we have courts of appeal. To err is human. But it would be intuitively far more troubling if judges systematically failed to discharge their duties in good faith.

Sensitive to this concern, one might reply that systematic oath violations might be excusable, and certainly not the kind of mistake that would warrant "mass impeachments" of judges.[44] But this response misses the

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[42] *See* Scalia, *Originalism: The Lesser Evil*, *supra* note 29, at 864.

[43] Some have argued that Scalia's exceptions to originalism prove that he is not, truly, an originalist. *See, e.g.*, Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13 (2006); ERIC SEGALL, ORIGINALISM AS FAITH 122–40 (2018). But this is still a far cry from arguing that Justice Scalia violated his oath of office. For a partial defense of Scalia's originalism, see Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017) *but see* RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS 54–55 (2018) (discussing Justice Scalia's purported embrace of fearless originalism, while noting doubts about whether he put his change of heart into practice).

[44] Bernick & Green, *supra* note 10, at 42. Bernick and Green offer this in response to a similar worry voiced by Cass Sunstein. Cass Sunstein, *The Debate Over Constitutionalism Just Got Ugly*, BLOOMBERG OPINION, May 16, 2020, https://www.bloombergquint.com/gadfly/is-the-constitution-a-living-document-supreme-court-can-decide.

point. The point is that understanding the oath of office to *require* upholding a constitutional methodology that *no judge has actually adhered to* renders implausible that understanding of the oath, especially given that other understandings do not yield that absurdity. That is, as between an understanding that implies that every virtually judge has violated his or her oath of office and a fair understanding that does not imply that result, we should choose the latter. And a fairer understanding is available. As Thomas Grey remarks, for example, "The oath is a ritual of allegiance, requiring officers to affirm their primary loyalty to the Union that the Constitution represents."[45] Grey's understanding—or others like it that construe the oath of office as primarily an oath of allegiance—explains why it is so serious to allege that officials have violated their oaths: it is a wrongdoing on par with betraying one's country.[46] Choosing the "wrong" version of originalism—or declining to be an originalist altogether—can be criticized on many grounds. An act of betrayal it is not.

To summarize, the oath of office does not require judges to be Fearless Originalists. The oath plays no independent role in determining whether this is so. Nor does it provide an additional moral obligation to be a Fearless Originalist. Fearless Originalism might be correct. But the oath is entirely beside the point.

II. The Oath Doesn't Require Ontological Originalism

Not everyone who endorses oath-based arguments for originalism also accepts the full baggage of Fearless Originalism. We might wonder whether there is an oath-based argument that yields a much weaker, less committed form of originalism. Christopher Green, alone and in his co-authored work with Evan Bernick, tries.[47] He is concerned with "ontology" and not epistemology or judicial practice. The oath is supposed to tell us something about what "this Constitution" refers to as opposed to showing anything deep about how judges should do their jobs. And what the Constitution *is*, according to Green and Bernick, is a set of meanings fixed in time when a given constitutional provision was ratified.[48] They accept, in other words, (a) from above, without necessarily endorsing a particular methodology about how to go about unearthing or implementing those meanings, and hence,

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[45] Thomas C. Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1, 18 (1984).

[46] *See, e.g.*, Martin Pengelly & Richard Luscombe, *'Complicit in big lie': Republican Senators Hawley and Cruz Face Calls to Resign*, The Guardian, Jan. 10, 2021, ("On Saturday, Sherrod Brown, a Democratic senator from Ohio, called for Cruz and Hawley's 'immediate resignations' and said they had 'betrayed their oaths of office and abetted a violent insurrection on our democracy'".), https://www.theguardian.com/us-news/2021/jan/10/capitol-attack-republican-senators-josh-hawley-ted-cruz-face-resign.

[47] The argument spans two papers, one authored by Green alone and one work in progress co-authored with Bernick. *See* Green, *Constitutional Indexicals*, *supra* note 1, at 1618; *see also* Bernick & Green, *supra* note 9, at 39.

[48] Bernick & Green, *supra* note 9, at 4–5.

without necessarily taking a position on, say, how strong *stare decisis* should be. That is, they can *agree* that the oath doesn't entail Fearless Originalism while insisting that originalism is true. They are principally concerned to show that, whatever the Constitution *is*, that thing has not changed over time, except through a formal amendment process. And originalism best fits with this understanding of the Constitution as an unchanging "thing" (again, whatever that thing is).

It also seems clear that, despite their professed interest in what "the Constitution" refers to (i.e., claim (a)), they also embrace proposition (b), which holds that officials are bound, in virtue of their Constitutional oaths, to give legal effect to the original meaning of the Constitution.[49] Although we believe that the preceding argument in Part I refutes even (b),[50] we will not pursue that line of argument further. Instead, we will now consider Green and Bernick's view on its own terms, in Section A below, followed by a critique in Section B.

A. An Argument for Ontological Originalism

Green's argument consists of two parts. The first is his joint work with Evan Bernick, in which they present statements by public officials that aim to establish that they believe that they all take the "same" constitutional oaths.[51] More specifically, they assert that these officials—including judges, legislators, and presidents—routinely claim that they all take "the same" oath to support or defend "the Constitution."[52] Some representative examples:

- Senator Joe Manchin: "We take the same oath. We swear on the Bible to the same Constitution—that we will uphold it."[53]
- Justice Antonin Scalia: "Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do . . . ."[54]
- Senator Martin Heinrich: "Throughout our history, the defense of our Nation has depended on the leadership of men whose names we now remember when we visit their memorials, names like Lincoln and Washington and Roosevelt. These men all swore the same oath that President Trump did when they assumed our Nation's most powerful office."[55]

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[49] See Green, *Circular*, *supra* note 1 (concluding that the constitutional text's original meaning "binds" oath takers).

[50] The only difference is that, in addition to fearless originalists, faint-hearted originalists might also escape the charge of having violated their oaths of office. But every other judge, including every judge (originalist or not) ever to have made a mistake of law, would still be guilty of violating the oath of office. This too is implausible for reasons already explained.

[51] *See* Bernick & Green, *supra* note 9, at 9–19.

[52] *See id.*

[53] 164 CONG. REC. S625 (daily ed. Feb. 6, 2018) (statement of Sen. Manchin).

[54] Webster v. Doe, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting).

[55] 166 CONG. REC. S791 (daily ed. Feb. 3, 2020) (statement of Sen. Heinrich).

Green and Bernick point out that many officials also claim to take the same oath as their long-dead predecessors and members of the founding generation, including George Washington.[56] And this sameness is supposed to matter. If judges' oaths are the same across the board and across time, then they have all sworn an oath to support and defend *the same thing* as the founding generation, too: that is, whatever the term "the Constitution," contained in their oaths, happens to refer to.

But clearly this is not enough to yield originalism. If "the Constitution" refers to a living thing with evolving rather than fixed meanings (apart from the formal amendment process), then that entails that even the late Justice Scalia had unwittingly pledged to defend a living rather than his preferred "dead" Constitution. And Green and Bernick admit as much; so far, the argument is compatible with "the Constitution" referring to a thing that changes beyond the formal amendment process—i.e., living constitutionalism.[57] We need to understand what "the Constitution" refers to, after all, and none of the politicians that Green and Bernick cite cast much light on the matter.

Of course, their joint paper is not quite so modest. It contains further suggestions that are supposed to nudge us towards Ontological Originalism. After all, if George Washington truly took the same oath as Donald J. Trump, and if both swore to support and defend the Constitution, then whatever contemporaneous understanding of the Constitution that Washington felt obligated to defend should also bind Trump, including the public meaning of the text and its amendment processes as understood by Washington's contemporaries. This observation shifts the burden, according to Bernick and Green, to nonoriginalists to show how Washington and his cohort could understand the Constitution to change outside the formal amendment process.[58] And they think it unlikely that persuasive evidence of that is forthcoming.

But ultimately Green, at least, wishes to press further than this burden-shifting argument. In the second part of the overall argument, Green relies on his earlier, solo work to fill the gap, work that emphasizes the importance of indexicals in the constitutional text.[59] And indexicals—words like "I," "my," and "that"—are words that refer to different things depending on the context in which a person utters them.[60] Green argues that the indexical phrase, "this Constitution," refers to the text of the Constitution itself, and in turn, its original meaning.[61] His argument is abductive; that is, he acknowledges that the phrase "this Constitution" may refer to several different things. But he argues, through a process of elimination, that only one refer-

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[56] *See* Bernick & Green, *supra* note 9, at 14–17.
[57] *See id.* at 39, 41.
[58] *See id.* at 41.
[59] *See* Green, *Constitutional Indexicals*, *supra* note 1, at 1643.
[60] *See* David Braun, *Indexicals*, STAN. ENCYC. PHIL. (Jan. 16, 2015), https://plato.stanford.edu/entries/indexicals/ [https://perma.cc/8NZH-UC27].
[61] *See* Green, *Constitutional Indexicals*, *supra* note 1, at 1643.

ent makes sense: that "this Constitution" refers to the set of authoritative provisions embodied in the Constitutional text.

With this missing piece, and glossing over the difference between "the Constitution" and "this Constitution," Green combines both parts of the argument to yield the following, surprising conclusion: that officials are committed to be ontological originalists—they are, in other words, bound to the original meaning of the Constitution. Not only are officials *permitted* to embrace (a), i.e., that the Constitution is whatever the original meaning of the Constitutional text is, but in fact the oath shows that they are, (b), *duty-bound* to give that meaning legal effect on pain of acting as immoral oath breakers.

Suffice it to say these efforts are unconvincing.

B. Why the Argument Fails

The preceding argument fails. Before explaining why, Section (1) will clear the ground by pressing certain basic methodological concerns with the Bernick–Green argument. Section (2) takes aim at their core argument that the oaths of office bolster Ontological Originalism. To preview: Their core argument is that oaths of office typically involve upholding the Constitution, and that officials take the same oath. The problem is that, strictly speaking, they do not take the same oaths—and this matters: it creates a dilemma according to which they must either abandon a key premise in their argument or concede that the oaths have subjective content that allows office holders to follow their consciences to some degree. This dilemma either means that the oath permits officials to reject Ontological Originalism or that their argument contains a false premise and is therefore inconclusive. Finally, although our main concern is to show that nothing about the Oath provides an independent reason for officials to be originalists, we raise some independent doubts about Christopher Green's work, to the extent that it attempts to argue that Constitutional terms called "indexicals" show that the words "the Constitution" refer to the set of original meanings of the Constitutional text. We argue that his argument is incomplete at best.

1. Methodological Concerns About the Green-Bernick Project

Before revisiting their arguments, we should mention some threshold methodological worries about the Bernick–Green project that will *not* be our main focus. Notice first that narrowing originalism seems odd for oath-based arguments. We have claimed that "originalism" worth the name is the originalism that tells us something significant about how judges are supposed to do their jobs. Originalist methodology is often "sold" that way: as promising a principled method of constitutional adjudication that constrains

judges.[62] But once we learn that Bernick and Green's originalism is compatible with a dizzying variety of highly deferential and self-effacing constitutional methodologies, their version of originalism seems a far cry from originalism worth caring about.[63] At the extreme, a judge could in principle be an Ontological Originalist but adopt and promote a bright-line practical rule that *no judges ought try to discover original meanings in any case of practical importance* because attempting to do so would likely be a fool's errand.[64]

The focus is also puzzling given the point of oaths. Oaths themselves concern *actions* that the oath taker commits to undertake. They are speech acts that aim primarily to change the normative situation by undertaking obligations. A survey of the *constitutional* oaths reveal that they usually address "support[ing] and defend[ing] the Constitution."[65] Constitutional oaths speak, at least superficially, in terms of behavior judges are obligated to take, and not so much what judges ought to believe or what oath takers presuppose about the Constitution.[66] But Bernick and Green studiously avoid talking in any concrete way about what swearing an oath to support the Constitution requires of judges specifically.[67] If, as they insist, the oath is so important, it would be helpful to know what specifically it requires, especially of judges, as opposed to vague gestures towards supporting the Constitution and being bound by it.

Still, maybe we can learn something interesting about what the Constitution is by studying the oath, without attending to the messy and multifarious ways that actual judges understand their constitutional oaths, or without engaging in any systematic sociological research on how constitutional oaths

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[62] *See* Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 825 (1986) (defending originalism on the basis of its "capacity to control judges"); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L. J. 713, 714 (2011) ("Originalism was born of a desire to constrain judges. Judicial constraint was its heart and soul—its *raison d'être*."); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 2 (2009); Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599, 602 (2004).

[63] As already noted, Bernick and Green argue that the general form of their argument permits, given the appropriate contingent facts, even *living constitutionalism*. *See* Bernick & Green, *supra* note 9, at 41 ("The constitutional ontology presented here does not preclude living constitutionalism or other forms of nonoriginalism.").

[64] There is an analogy here well known in moral philosophy. Utilitarianism might be the correct theory of normative ethics, but utilitarianism itself might be committed to promoting non-utilitarian theories if doing so maximized the overall good. *Cf.* BERNARD WILLIAMS & JCC SMART, UTILITARIANISM: FOR AND AGAINST 134 (1973) ("[U]tilitarianism's fate is to usher itself from the scene.").

[65] Bernick & Green, *supra* note 9, at 7.

[66] We can put this another way. An oath, like a promise, is a performative that effectuates changes in normative states of affairs, including voluntarily undertaking certain commitments. But the contents of those commitments may come apart from the communicative contents of the utterances. If a couple vows to stay together "till death," this does not necessarily mean that they've flouted any moral or legal obligation if they subsequently get divorced. *See* Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 233–34 (Andrei Marmor & Scott Soames eds., 2011).

[67] Again, see Bernick & Green, *supra* note 9, at 41 ("The constitutional ontology presented here does not preclude living constitutionalism or other forms of nonoriginalism.").

are actually understood as an objective matter by ordinary people. Perhaps by obligating themselves to take certain actions, judges *presuppose* that certain claims are true. But taking the further step of assuming that those claims are *actually* true seems strange. Making a promise or taking an oath does not guarantee any truths about reality. Suppose a father holds up an envelope while promising his young son to mail "this Letter to Santa Claus." This promise presupposes that Santa exists and a letter exists. But Santa doesn't exist. Indeed, "this letter" may fail to refer to anything if, say, the envelope is empty, and even if the father and son sincerely believe that the envelope contains a letter. Conjuring truths about the world from linguistics is a tricky business.[68]

That said, we can agree that the phrases "this Constitution" and "the Constitution" refer to *something*. We are not constitutional nihilists. Even so, there are other good reasons to doubt that the oath requires any ontological commitments that are *distinctively* originalist. Before we proceed further, a quick clarification on this point. According to Ontological Originalism, the nature of the Constitution is fixed across time, and as a consequence, the meaning of the Constitution is likewise static. But nonoriginalists also hold that certain things about the Constitution, like the words printed in writing, are fixed. Likewise, the claim that the Constitution exists is not a distinctively originalist ontological claim. So, for originalist claims about the Constitution's ontology—i.e., claims about what a Constitution *is*—to be distinctive, those claims cannot also be shared by nonoriginalist views.

2. The Main Objection

Setting aside these threshold, methodological remarks, let's return to the arguments. Recall that Bernick and Green marshal evidence showing that officials of all stripes and ranks routinely claim to take the "same oath."[69] But why should we take fashionable political rhetoric at face value? After all, strictly speaking, it is *false* that they all take the same oaths. Here is the text of the Presidential Oath from Article II:

> I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.[70]

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[68] *See* Nicholas Laskowski, *How to Pull a Metaphysical Rabbit out of an End-Relational Semantic Hat*, 91 RES PHILOSOPHICA 589, 589 (2014) (criticizing an attempt to derive a naturalistic reduction of ethics by relying on a particular semantics for evaluative terms); Jonathan McKeown-Green, Glen Pettigrove & Aness Webster, *Conjuring Ethics from Words*, 49 NOŪS 71, 72–73 (2015) (criticizing a "sort of *direct* move from premises about the semantics of 'good', 'right', and 'ought' to conceptual or metaphysical conclusions about goodness, rightness, reasons, and obligations," without denying that semantics might be useful as one piece of evidence for further metaphysical inquiry).

[69] Bernick & Green, *supra* note 9, at 9.

[70] U.S. CONST. art. II, § 1.

Here, the language of the oath differs markedly from the oath taken by judges from the Judiciary Act of 1789:

> I, _____, do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.[71]

That oath, in turn, was modified by the Judicial Improvement Act of 1990, which deleted "according to the best of my abilities and understanding, agreeably to" and replaced that language with "under."[72] So the *language* of the oaths appears to vary depending on which official is taking it, and when they took the oath (in the case of judges, before December 1990 or afterwards). And oaths also appear to vary across jurisdictions.

This much Bernick and Green acknowledge, as they must. Still, they insist that the *content* of constitutional oaths—the content of the obligations that oath takers undertake—does *not* differ notwithstanding the different language.[73] But they do not explain how these textually very different formulations produce identical content. For example, language of impartiality and doing "equal right to the poor and to the rich" are conspicuously absent in the case of the President's oath.[74] And at least with respect to the President, the demands of impartiality appear, for obvious reasons, far less constrained. After all, having a presidential agenda requires a level of partiality in the form of policy preferences, some of which may prioritize the interests of the poor, the rich, or some other cohort. All of these par-for-the-course presidential preferences seem, at least if we take the judicial oath seriously, off limits for judges. So, it is simply implausible to assert that these differences in the oath are, as Green and Bernick insist, merely verbal. And so, it is a mistake to claim that the content of the oaths is the same no matter what.

But maybe this mistake is minor. More carefully put, they may insist on a more basic commitment shared by all officials, something to the effect that each official swears to support or defend or discharge one's obligations under "the Constitution." A common denominator of sorts. *Of course* supporting "the Constitution" will entail different things depending on the office at issue, they may acknowledge. And these role-based responsibilities perhaps explain the differences between the presidential and judicial oaths, for example, without denying that all oath takers support the Constitution. This re-

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[71] Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (codified as amended at 28 U.S.C. § 453 (2018)).

[72] 28 U.S.C. § 453 (2018); Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 404, 104 Stat. 5089, 5124 ("Section 453 of title 28, United States Code, is amended by striking out 'according to the best of my abilities and understanding, agreeably to' and inserting 'under.'").

[73] Bernick & Green, *supra* note 9, at 8.

[74] Richard M. Re, *"Equal Right to the Poor"*, 84 U. CHI. L. REV. 1149, 1149 (2017).

sponse preserves the way that very different officials may, despite having very different jobs, claim to take the "same" oath. But when it comes to the question of what judges *in particular* commit to by taking oaths, we cannot simply assume—as Bernick and Green evidently do—that the judicial oath's full content is exhausted by a vague requirement to support the Constitution.

To see why, notice that for all of Green's work about the significance of indexical terms,[75] and for all the words Bernick and Green devote to the importance of oaths, it is surprising that their work ignores or downplays the full content of the oaths actually taken by judges. Notice another salient indexical in the oath codified by the Judiciary Act of 1789, an indexical that affects the oath's content: the word "my" in "to the best of my abilities and understanding."[76] For one thing, it undermines an essential premise of their argument, which is that the content of the oath is wholly objectively accessible.[77] Their argument, it seems, illicitly shifts from the objectivity of the language of the oath to the objectivity of its content. But this is a mistake. Even though the *language* used in the oath is objectively and publicly accessible, that objective language itself denotes *subjective* content. That is, the full *content* of the oath itself calls for subjective assessment concerning the "best" of the particular oath taker's "abilities and understanding."[78]

Although Bernick and Green ignore the subjective content contained in the oath that federal judges took for two hundred years, they should not underestimate its significance. This best-of-*my*-abilities-and-*understanding* proviso shows that a key premise of their argument is false because that premise holds that the entire content of the oath has always been wholly objectively accessible.[79] It has not been. Indeed, the oath's content is wholly consistent with the possibility that a particular judge (i) accepts that the test of "the Constitution" is significant in constitutional practice but (ii) *denies* originalist ontology and judges in a nonoriginalist way, given that, pursuant to *a particular oath-taking judge's abilities and understanding*, the Constitution's meaning is *not* fixed in time. In short, the oath itself shows why a nonoriginalist may with a clear conscience take the oath. The oath is consistent with a judge's commitment to nonoriginalism.

This invites an objection: Does allowing the oath to have subjective content allow officials to hold "mental reservations" while secretly promising

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[75] *See* Green, *Constitutional Indexicals*, *supra* note 1, at 1607.

[76] Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (emphasis added) (codified as amended at 28 U.S.C. § 453 (2018)); *see also* David Kaplan, *Demonstratives: An Essay on the Semantics, Logic, Metaphysics and Epistemology of Demonstratives and Other Indexicals*, *in* THEMES ON KAPLAN 481, 489 (Joseph Almog et al. eds., 1989) (listing the most common demonstratives, including "my").

[77] *See* Green, *Circular*, *supra* note 1 (stating so in Premise 3).

[78] Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (emphasis added) (codified as amended at 28 U.S.C. § 453 (2018)).

[79] Again, this false premise is found in Premise 3 of the schematic argument provided by Christopher Green. *See* Green, *Circular*, *supra* note 1.

to pursue their own private agendas?[80] And if so, does this suggest that the oath *cannot* be understood to have subjective content?

Hardly. Bernick and Green worry about officials crossing their fingers behind their backs while secretly pledging allegiance to private political causes in the guise of swearing to support "the Constitution."[81] But objecting to secret oaths attacks a straw man. The alternative to oath-based originalism is not to permit *secret oaths*; the alternative is the perfectly banal observation that undertaking some legal obligations requires satisfying both objective and subjective standards, some of which are indexed to the particular person undertaking those obligations. As it happens, the oath's content is itself partially subjective and underspecified, and thus, permits a broad range of constitutional understandings including nonoriginalist ones that judges have employed for centuries. We have other *institutional* mechanisms—like elections, selection processes, and confirmation hearings—that are designed to uncover secret agendas or idiosyncratic and deleterious views. But within the broad set of reasonable understandings of constitutional meaning, the oath hardly rules out nonoriginalist views.

However, there is a second possible objection. Recall that the Judicial Improvement Act of 1990 eliminated the best-of-my-abilities-and-understanding language from the 1789 version of the judicial oath. Does this help Bernick and Green? After all, they can now argue that the oath, as *presently* administered, lacks any subjective content since the offending indexical phrase—i.e., "my . . . understanding"—has been deleted.[82]

But this response introduces a dilemma. If Bernick and Green *agree* that the content of the 1990 oath differs from the 1789 version, then they concede that the political rhetoric is wrong because judges have *not* always taken the same oath as each other, let alone as with other officials. This casts doubt on the reliability of the political rhetoric as a source of evidence for the sameness claim. And this concession would be severely undermining because it breaks the link that they insist connects the founding generation with present-day judges. This concession would also open the door to Richard Re's argument that judges take a binding commitment to uphold "the Constitution" as understood at the time the judge took the oath—or at least that the oath is indexed to public understandings of the Constitution's content circa

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[80] Bernick & Green, *supra* note 9, at 23–27.

[81] *See id.*

[82] The reasons for this deletion aren't entirely clear. *See* Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective,* 76 KY. L.J. 763, 792 (1988) ("At the very least, the qualifying phrase 'to the best of my abilities and understanding' should be deleted. A judge who violates the oath should certainly not have a defense of weakness, of ability, or of mind."). According to Richard Re, "Robert W. Kastenmeier was on the House Judiciary Committee, and this article was entered into the record on Pub L No 101-650." Re, *supra* note 70, at 1166 n.87. *But see* Joyce Lee Malcolm, *Defying the Supreme Court: Federal Courts and the Nullification of the Second Amendment*, 13 CHARLESTON L. REV. 295, 310 (2018) ("Apparently the mention of the judge's abilities and understanding was thought either not necessary or unnecessarily raising the possibility that the new judge's abilities and understanding might leave something wanting.").

1990.[83] The concession would be fatal, in short, because it defeats the claim that all judges take the same oath as the one taken during the founding, a claim on which their entire argument rests.

Green and Bernick have another option. They can double down on their claim that judges take the same oath, by insisting that notwithstanding the different linguistic formulations, the fundamental obligation undertaken by officials — to support the Constitution — remains the same. At this point, however, such a response would be dogmatic, unsupported by the evidence, and odd for avowed textualists, as it would simply ignore the language of the oath contained in the Judiciary Act of 1789. And even if we were to grant for the sake of argument that the judicial oaths remained unchanged after 1990, this would simply show that the subjective content of the 1789 oath survives to this day, albeit implicitly rather than explicitly. Judges would still be pledging allegiance to the Constitution subject to the proviso that they do so to the best of their abilities and understanding.[84]

To recap: So far we have established that, even if (a) is true, and the Constitution is a set of original meanings, nothing *about the oath* establishes (b)—that judges are bound or constrained by those meanings. Instead, they are bound to their best understandings of what the Constitution requires, which may be a nonoriginalist understanding. Alternatively, Bernick and Green would have to give up on their claim that judges have always taken the same oaths as each other and as officials in the founding generation. This likewise breaks the link that is supposed to show that officials are bound to uphold the Constitution's original understanding.

C. Further Reflections on Constitutional Indexicals

But what about (a)? Have Green's arguments about Constitutional indexicals established that "this Constitution" refers to the original meanings of a Constitutional text? Although this paper aims mainly to refute the claim that constitutional oaths *require* judges to be originalists, Green's arguments purporting to establish that the Constitution *is* a set of original meanings remain doubtful.

Consider again the indexical phrase "this Constitution." According to Green, there are only seven plausible referents for "this Constitution": "(1) the original expected applications; (2) the original ultimate purposes; (3) the original textually-expressed meaning or Fregean sense (the alternative [he] favor[s]); (4) a collection of evolving common law concepts; (5) a text expressing meaning by today's linguistic conventions; (6) a collection of moral

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[83] *See* Re, *supra* note 26, at 304.

[84] Another possible position Green and Bernick might take is that the oath always remained the same, but that even with the "best of my abilities and understanding" proviso, the oath never imported a subjective understanding. But, we think this position is untenable because it contravenes the oath's plain language.

concepts refined through an evolving tradition of moral philosophy; and (7) a collection of non-binding recommendations."[85]

But these possibilities don't exhaust the possible theoretical space: Of course, there could be complex combinations of these enumerated seven. For one thing, it is possible that "this Constitution" simply refers ambiguously to two or more items on the list. Nothing Green writes appears to rule this out.[86]

More importantly, "this Constitution" may refer to a particular legal system. The kernel of that legal system is the text of the Constitution, with certain core values. Adding to the kernel there is a legal tradition, including the norms of argumentation, the way we engage in legal discourse, commitment to the rule of law, and so on. Indeed, something like this plausible understanding of "this Constitution" in Article VI roughly fits the views of David Strauss, Mitchell Berman, Richard Fallon, and other nonoriginalists.[87] And, ironically, this systemic understanding of the term's referent may be closer to the actual understanding of members of the founding generation. "As Bernard Bailyn described it," recounts Farah Peterson in her recent work, "what they meant by the term 'constitution' was 'the constituted—that is, existing—arrangement of governmental institutions, laws, and customs together with the principles and goals that animated them.'"[88] This laundry list goes far beyond the written text's meaning and includes *unwritten* principles and values. And it is not obvious that the meaning is static and fixed in quite the way presupposed by originalist scholarship today.[89] Indeed, "the Constitution" in the sense described by Peterson and many nonoriginalists is not fundamentally about linguistic *meaning* at all: it's about what comprises or *constitutes* a particular set of institutions. And, as John Gardner points out, it is a category mistake to conflate what constitutes institutions with a constitutional text or its meanings.[90] So to rely on the constitutional text's index-

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[85] Green, *Constitutional Indexicals*, *supra* note 1, at 1607.

[86] Green might argue that such ambiguity should be disfavored and that a theory that avoids ambiguity is a much better one. We agree with this general proposition. But in making sense of what "the Constitution" references, context matters. Consider a term like "the Country"—in one speech by the President, it could refer to the citizenry, the land, or the foundational principles and ideals. Similarly, "the Constitution" could also refer to the text, the expected applications, the intentions of the drafters, or the broader legal system—all dependent on the context of how the term is used. So, while we may generally prefer to avoid interpreting the term in a text ambiguously, the context of the occurrences of the term may reveal the ambiguous interpretation to be the most sensible.

[87] *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 33–49 (2010); Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1376–90 (2018); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1252–68 (1987).

[88] Farah Peterson, *Constitutionalism in Unexpected Places*, 106 VA. L. REV. 559, 567–68 (2020).

[89] *See id.*

[90] John Gardner, *Can There Be a Written Constitution?*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 162, 170 (Leslie Green & Brian Leiter eds., 2011) ("On closer inspection, it may seem, it is part of the nature of a constitution that it is unwritten, and that its so-called written parts are only parts of it because of their reception into the unwritten law that is made by the customs and decisions of the courts and other law-applying officials. If that much is

icals to definitively establish the referent of "this Constitution" is to rely on an overly blunt instrument.

Notice how this institutional, systemic, and dynamic understanding of "the Constitution" accords with the oath. Two judges, from different time frames, could plausibly say that they work in the "same" legal system. Both Justice John Paul Stevens and Justice Antonin Scalia would have sincerely said that they were judges working in the same legal system that Justice John Marshall, Justice Oliver Wendell Holmes, Jr., and Justice Earl Warren had served. And they could say so, despite the fact that the text, interpretations, and applications of the Constitution were different. Moreover, they could say so even though their interpretive methodologies were substantially different. Consequently, under this understanding of "the Constitution," they could also plausibly say they took the "same" oaths to the "same" Constitution. One of the judges could be a die-hard originalist while the other could be a committed living constitutionalist. And neither of them would be mistaken about the content of the oath so understood.

Is this concept of a constitutional system embedded in the list? Green may insist that Fregean "senses" embedded in the constitutional text add up to a legal system—but, again, that's a category mistake: neither texts nor linguistic meanings, taken alone, count as a legal system.[91] We can draft up a Constitutional text of our choosing without thereby creating a legal system. Nor is it clear that some other combination of items on the list add up to a constitutional legal *system*. Suffice it to say that Green's list is incomplete.

But let's return to Green's argument and show why it doesn't exclude the possibility that "the Constitution" refers *at least* to a legal system. Green attempts to exclude (4)–(7) on the basis of indexicals like "this," and "here."[92] Among his examples, Green suggests that these indexicals show that the Constitution is reduced to its text.[93] For one representative example, Article I, Section 1 provides: "All legislative Powers HEREIN granted shall be vested in a Congress of the United States . . . ."[94] But this doesn't do the work he thinks it does. Our proffered construction of "the Constitution" can recognize that part of the legal system is the text of the Constitution, in addition to other features of the legal system. Understood that way, there is no contradiction. Article I, Section 1 can acknowledge that the Constitution INCLUDES text, but that does not require that the Constitution is ONLY text.

In a similar vein, Green argues that a few temporal references, like "now" and "the time of the Adoption of the Constitution" fix the Constitution to the text of the Founding.[95] But this too doesn't get very far. Our

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true, then 'The Constitution of the United States of America' is a serious misnomer, for inasmuch as it is a name given to a document containing canonical formulations of law, it involves a category mistake. Constitutions cannot be, or be contained in, documents.").

[91] *Cf.* Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 786–88 (2017) (demonstrating that a legal text is not identical to either its meaning or law).

[92] *See* Green, *Constitutional Indexicals*, *supra* note 1, at 1649–53.

[93] *See id.* at 1649.

[94] *Id.* at 1652 (quoting U.S. CONST. art. I, § 1) (emphasis omitted).

[95] *Id.* at 1662–66.

construction of "this Constitution" can recognize that it was adopted at a certain point in time—but the "it" that was adopted was the text as well other features of a legal system, all together.

In short, Green's case that these textual references in the Constitution require originalism is inconclusive. Moreover, importantly, none of these references actually come from the oath—they come from the Constitution's text. Even if these arguments won the day for Green's favored brand of textualism, they would be separate and apart from the oath.

Now, what about Green and Bernick's observation that various officials all purport to swear the *same* oath as, say, George Washington? This seems to load the dice in favor of their idea that, whatever the Constitution *is*, it is the same thing that George Washington swore to uphold. Recall that from these official statements, Green and Bernick conclude that, because the declarants knew that the words of the oaths were sometimes distinct, they must not have meant identity of text when they said they took the "same" oath—they must have meant identity of referent. But this unanimity might be an illusion. Indeed, remarks in the prior paragraph are important to revisit here. Alternative understandings of the referent of "this Constitution" or "the Constitution" help to explain why so many officials, from all walks of life and given all sorts of political priors, so readily and breezily claim that they all take "the same" oath to uphold "the Constitution": this claim simply reflects incompletely theorized agreement or an agreement obtainable only because the oath's language expresses content at a high level of generality, admitting multiple reasonable understandings of the proper referent of "the Constitution."[96] Oath-taking officials might be thinking about a particular Constitutional *text*. Or its original meaning. Or of a particular Constitutional *political order*. Or maybe officials understood "same" to mean near-identity—whether referring to text of oath, concept of Constitution, or attitude toward Constitution.[97] But if we were to pressure the oath takers as to what the oath refers to *specifically*, familiar disputes about originalism versus nonoriginalism would quickly re-emerge.

Green and Bernick may disagree with all this—they may contend that a legal system view—or any other of a number of candidate referents—reflect implausible understandings of "this Constitution." That's a costly claim, in

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[96] *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1733 (1995).

[97] If there is no consensus on what the oath means to a certain specificity, then per the Hartian view of the law, there is no legal obligation that the oath confers to that degree of specificity. That is not changed if judges mistakenly believe that others view the oath as they do—because despite the mistakes, there would actually be no consensus. This is not much of a bitter pill, because we don't have the intuition that the oath confers very particular legal obligations. However, we also don't think the oath is contentless: It likely does confer an obligation to reject and oppose, say, fascism and autocracy. But, if so, that's because there is consensus on that point, at least on the Hartian view: Whatever you reasonably think of the Constitution, fascism and autocracy aren't part of it.

We don't seek to tie Green and Bernick to a particular theory of law. Rather, we pick the Hartian theory because of its prominence, to show that varied views of the oath are unproblematic for purposes of the law's smooth operation.

the way we saw before: that response would reveal that the oath performs no independent analytical work in supporting originalism. And again, their claim is not really one about the oath; it's a separate claim about the nature of the Constitution that doesn't depend on the constitutional oath.[98]

Green and Bernick may also respond affirmatively—that such an understanding of the Constitution just IS originalism, properly understood. For this, they may look to the "original-law originalism" of William Baude and Stephen Sachs.[99] Here we observe that there are strong reasons to doubt that such an originalism is meaningfully distinct from other theories of interpretation.[100] As a consequence, the oath does not entail any DISTINCTIVE ontological originalist claims. For example, if the "originalist" ontology that Green and Bernick have in mind is that the law of the United States is the law of the founding put through a process of evolution, by legal processes that have themselves evolved, all the way to the present, that might be true—but it would not be DISTINCTIVELY originalist because many mainstream nonoriginalist theories contend the same.

In sum, Green and Bernick's arguments that the oath requires a commitment to Ontological Originalism fails for the following reasons. First, *either* the judicial oath taken by federal judges contains subjective content that appeals to a judge's conscience (and in turn, is consistent with nonoriginalism) *or* central premises in Green's and Bernick's argument are false (i.e., the premise that officials take the same oath or that we can take at face value officials' claims to that effect). Either way the oath itself provides no independent support for claim (b) of Ontological Originalism: that the Constitutional text's original meaning constrains judges. Second, we offered rea-

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[98] Adrian Vermeule makes a similar point that the oath argument is question-begging and superfluous. *See* Vermeule, *supra* note 5 ("[T]he argument from oath-keeping begs the question; it is necessarily parasitic on some independent account of constitutional interpretation, an account whose validity is itself the contested issue. The current debate isn't over the question whether to respect the oath of constitutional fidelity, rightly understood; all concerned agree on that aim. Rather the whole debate is over what the Constitution is best taken to say, and how to decide what it says.")

Green responds to this point with a seven-premise argument, including "(5) A constitution with different powers to change is a different constitution" and "(7) At the Founding, the text of the Constitution imposed its requirements by expressing meaning on the basis of the legal interpretive conventions that existed at the time, applied to the original context." Green, *Circular*, *supra* note 1. We do not explore this at length here, but suffice it to say that these premises are underspecified in present form. This in turn seems to prove Vermeule's point: They either entail originalism, in which case the oath is again beside the point; or they don't, because other nonoriginalist competitor theories would agree with the specified premises, and the oath does not advance the argument.

[99] *See* Baude, *supra* note 1, at 2349; William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019); William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 812 (2019); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 817 (2015).

[100] *See, e.g.*, SEGALL, *supra* note 41, at 106 (criticizing "inclusive originalism" as "indistinguishable" from "living constitutionalism"); Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1330 (2017); Guha Krishnamurthi, *False Positivism: The Failure of the Newest Originalism*, 2020 B.Y.U. L. REV. (forthcoming 2021) (manuscript at 6–8) (on file with authors); Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44, 44 (2016).

sons to doubt Christopher Green's arguments in support of claim (a) of Ontological Originalism. We pointed out that the purportedly objective referent of "this Constitution" can take many forms, including a constitutional *system* of government, that understanding how to best support that system can be similarly capacious, and that Green has not adequately ruled out other plausible referents of the term. Of course, these may be controversial views about our Constitution, but resolving them requires going beyond the oath and into the very substance of debates about the Constitution that we have been engaged in for generations.

Conclusion

We have shown that the oath argument does not entail that judges must be committed to originalism, either in a practically significant way (what we called Fearless Originalism) or as a distinctive thesis about what the Constitution really is (as Ontological Originalism). Some form of originalism may be true. But determining whether it is so requires looking beyond the oath to the underlying questions constitutional scholars have been considering for generations. The oath argument simply does not make progress on those questions.

We might wonder whether the oath tells us *anything* about the constitution. At least one of the present authors doubts that the oath adds any significant moral obligations beyond those incurred upon taking the job of a Judge or Justice. Regardless, and at best, the oath might tell us something very weak, something about which everyone already agrees: that by swearing an oath a new judge conveys the seriousness which he or she undertakes the role of an adjudicator within a constitutional order, and that such a judge promises to discharge her duties in good faith. But you don't need to be an originalist to believe *that*.

The *Boerne-Rucho* Conundrum: The Congressional Power over State-District Partisan Gerrymanders

*Peter A. Kallis**

This Article explores the scope of Congress's authority to enact comprehensive partisan-gerrymandering reform governing state and local electoral districts. While there is a broad consensus that Congress can regulate partisan gerrymandering of federal (i.e., congressional) electoral districts under the Elections Clause, the background assumption in the field has been that Congress lacks the power to regulate a state's attempts to partisan gerrymander state and local electoral districts. To do so, Congress would have to rely on its Section 5 power under the Fourteenth Amendment, a task made near insurmountable in the partisan-gerrymandering context by the stringent "congruence and proportionality" test that Section 5 legislation must meet under City of Boerne v. Flores. *This Article challenges that background assumption. It argues that* Rucho v. Common Cause*—which held that partisan gerrymandering cases are nonjusticiable but at the same time left untouched the Court's previous determinations that "extreme" partisan gerrymanders violate the Equal Protection Clause—opened a new opportunity for Congress to comprehensively regulate state and local partisan gerrymandering using its Section 5 powers. The Court justified* Boerne*'s heightened standard of review for Section 5 legislation as a way of safeguarding the judiciary's prerogative to "say what the law is." But when the Court, by invoking nonjusticiability, disclaims its ability to "say what the law is" in the context of an acknowledged constitutional right, as it did in* Rucho, Boerne*'s "congruence and proportionality" test becomes incoherent. Instead, the Court must apply a lesser standard of review and evaluate Section 5 partisan gerrymandering legislation under a "rational means" test. This revelation makes possible a previously doubtful proposition—that Congress may pass legislation to regulate partisan gerrymandering of not just congressional districts but state and local legislative districts as well.*

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INTRODUCTION

In *Rucho v. Common Cause*,[1] the Supreme Court held that partisan gerrymandering claims are nonjusticiable, ending a thirty-three-year search for a manageable framework through which to evaluate partisan gerrymanders under the Equal Protection Clause.[2] The decision in *Rucho* foreclosed any possibility that a judicial fix to partisan gerrymandering would simultaneously, comprehensively, and uniformly regulate the ability of states to gerrymander federal and state electoral districts on a partisan basis. In the wake of *Rucho*, reform efforts have turned to two alternative forms of regulation, each of which provides a less complete solution than the federal judiciary might have offered.

The first is congressional action. Congress is widely believed to possess the authority, under the Elections Clause,[3] to mandate changes to redistricting processes.[4] The House relied in part on this power when it passed the For the People Act of 2021 (also known as "H.R. 1")—legislation that, if eventually passed by the Senate and signed by the President, would (in part) constrain states' ability to partisan gerrymander congressional districts.[5] However, the text of the Elections Clause clearly limits Congress's power to regulate *federal* electoral districts.[6] Congress cannot use its Elections Clause authority to regulate the process for redistricting state legislatures or local offices, and, as a result, the For the People Act does not purport to do so.[7]

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[1] 139 S. Ct. 2484 (2019).

[2] *See id.* at 2508.

[3] U.S. CONST. art. I, § 4, cl. 1.

[4] *See, e.g.*, *Rucho*, 139 S. Ct. at 2508 ("The Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause."); Adam B. Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 794 (2004). In fact, Congress has previously exercised its Elections Clause power to regulate partisan gerrymandering. *See* Apportionment Act of 1842, ch. 47, 5 Stat. 491; *see also* ELMER CUMMINGS GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 12 (1907).

[5] For the People Act of 2021, H.R. 1, 117th Cong. (2021). Among other reforms, H.R. 1 would require states to establish independent redistricting commissions for drawing U.S. congressional districts. *Id.* §§ 2400-2455; *see also* Franita Tolson, *The Elections Clause and Underenforcement of Federal Law*, 129 YALE L.J.F. 171, 171 (2019) (defending the constitutionality of a previous version of H.R. 1).

[6] *See* U.S. CONST. art. I, § 4, cl. 1 (limiting Congress's authority to "[E]lections for Senators and Representatives"); *see also* Cox, *supra* note 4, at 794–95.

[7] *See* H.R. 1 § 2400 (limiting the scope of redistricting reform to "congressional redistricting" and locating Congress's authority for such reform in Article I, Section 4 and Section 2 of the Fourteenth Amendment). Some commentators have suggested that because states typically use the same process for drawing federal and state electoral districts, congressional efforts to reform congressional district drawing might in practice have the effect of preventing state partisan gerrymandering as well. *Cf.* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 41 (2013) (Alito, J., dissenting) ("As a practical matter it would be very burdensome for a State to maintain separate federal and state registration processes . . . . For that reason, any federal regulation in this area is likely to displace not only state control of federal elections but also state control of state and local elections."). However, this outcome seems highly implausible in the partisan-gerrymandering context. State legislatures bent on preserving the electoral maps that got them elected would likely create a separate process for state map drawing in response to an effort to regulate congressional district drawing. *See* David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 VAND. L. REV. 673, 738 (2020) ("[I]t

A second source of reform avoids this problem: regulating congressional and state legislative redistricting processes through state law. As the *Rucho* decision itself notes, a handful of states have already taken this approach.[8] But problems abound with this source of regulation too. State reform is slow and fractured: it must proceed piecemeal on a state-by-state basis.[9] Moreover, reform efforts undertaken by state legislatures must garner the support of the very legislative majorities that benefit from the gerrymandered districting scheme. This conflict of interest presents a formidable barrier to reform. Where permitted, popular ballot initiatives can provide a partial solution to circumvent conflicted legislatures. But, historically speaking, gerrymandering reform by popular ballot initiative has failed more often than not.[10] And even when such initiatives succeed, their implementation risks being curtailed in states where legislative majorities oppose the reform.[11]

Neither the Elections Clause nor state-level reform, then, has been or will be able to provide a complete solution to partisan gerrymandering. While the Elections Clause can offer a nationwide solution for congressional districting, a simultaneous, nationwide, and uniform solution to gerrymandering in state legislative districts would remain elusive. Yet partisan gerrymandering reform for *state* elected offices matters tremendously, as gerrymandering can prevent actual electoral majorities from controlling the levers of government. For example, in 2018 a majority of the electorate in four states voted for a Democratic candidate for state assembly, but Democrats won fewer than 50% of the seats in the legislature. The disparities were not close: the gap between the Democratic share of the popular vote, on the one hand, and the share of seats won, on the other, exceeded 6% in all four states. In Michigan, Democrats won statewide races for governor, attorney

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seems probable that were legislation like H.R. 1 enacted into law, some states might seek to evade the full application of federal law by creating two-tiered systems of voter registration and electoral processes that distinguish between state and local elections and federal elections. Several states have already attempted to do this.").

[8] *See Rucho*, 139 S. Ct. at 2507–08.

[9] *See* Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 337 (2007).

[10] *See id.* at 333; *see also id.* at 338 (observing that "redistricting initiatives always fail when they are strongly opposed by the majority party in the state legislature"); Cox, *supra* note 4, at 793–94 (discussing the headwinds that states face in reforming their own redistricting processes, including conflicts of interests by state legislators).

[11] Lawmakers in multiple states that passed successful ballot initiatives in 2018 have sought to limit the effects of gerrymandering reform and make it more difficult for similar initiatives to make it to the ballot in the future. *See* Ari Berman, *After Voters Passed Progressive Ballot Initiatives, GOP Legislatures Are Trying to Kill Future Ones*, MOTHER JONES (Dec. 20, 2018), https://www.motherjones.com/politics/2018/12/after-voters-passed-progressive-ballot-initiatives-gop-legislatures-are-trying-to-kill-future-ones [https://perma.cc/VNU6-G7UH]; Timothy Smith, *In Ballot Initiatives, They Made Their Voices Heard. Then Came the Backlash.*, WASH. POST (Mar. 13, 2020, 9:52 AM), https://www.washingtonpost.com/outlook/in-ballot-initiatives-they-made-their-voices-heard-then-came-the-backlash/2020/03/13/5b40220e-526e-11ea-b119-4faabac6674f_story.html [https://perma.cc/GP3G-QQLH] (reviewing DAVID DALEY, UNRIGGED: HOW AMERICANS ARE BATTLING BACK TO SAVE DEMOCRACY (2020)); Jesse Wegman, Opinion, *A World Without Partisan Gerrymanders? Virginia Democrats Show the Way*, N.Y. TIMES (Mar. 28, 2020), https://www.nytimes.com/2020/03/28/opinion/virginia-gerrymandering-law.html [https://perma.cc/88PL-ZCCC].

general, and secretary of state,[12] as well as 53% of the statewide vote for state house candidates, yet ended up with only 47% of seats in the state house.[13] In North Carolina, Democrats won 51% of the popular vote but just 45% percent of the seats.[14] In Pennsylvania, they won the statewide governor's race and 55% of the popular vote but just 46% of the seats.[15] The most startling disparity occurred in Wisconsin, where Democrats won all five statewide offices and 54% of the state-assembly popular vote but walked away with only 36%(!) of the seats in the state legislature.[16]

Setting aside the paramount importance of a distortion-free representative body to the inhabitants of each state, the makeup of state legislatures is significant even from a purely federal perspective. State legislatures control the time, places, and manner of federal elections,[17] the makeup of a state's federal electoral base,[18] and the means of assigning a state's Electoral College votes.[19] Thus, the need persists for a regulatory scheme that can uniformly, comprehensively, and simultaneously affect both congressional *and* state legislative redistricting.

This Article argues that an avenue to enact just such a regulatory scheme exists, even after *Rucho*. Specifically, I contend that the Court's decision in *Rucho* may—and in fact, *must*—be read to grant Congress the authority under Section 5 of the Fourteenth Amendment to enact remedial and prophylactic legislation that regulates partisan gerrymandering of state and local election districts. By enabling the Section 5 power over state elec-

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[12] *See Michigan Election Results*, N.Y. TIMES (May 15, 2019, 2:10 PM), https://www.nytimes.com/interactive/2018/11/06/us/elections/results-michigan-elections.html [https://perma.cc/X83D-J37M].

[13] *See* Christopher Ingraham, *In at Least Three States, Republicans Lost the Popular Vote but Won the House*, WASH. POST (Nov. 13, 2018, 6:00 AM), https://www.washingtonpost.com/business/2018/11/13/least-three-states-republicans-lost-popular-vote-won-house [https://perma.cc/HM4B-M7EQ].

[14] *See id.*

[15] *See 2018 General Election Official Returns Statewide*, PA. ELECTIONS (2018) https://www.electionreturns.pa.gov/General/OfficeResults?OfficeID=13&ElectionID=63&ElectionType=G&IsActive=0 [https://perma.cc/MS4M-FCYD].

[16] *See* Dylan Brogan, *No Contest*, ISTHMUS (Nov. 15, 2018), https://isthmus.com/news/news/dems-sweep-statewide-offices-in-midterms-but-remain-underrepresented-in-assembly [https://perma.cc/8933-ZKMB].

[17] *See* U.S. CONST. art. I, § 4, cl. 1.

[18] *See id.* § 2, cl. 1. Several federal constitutional amendments constrain a state legislature's ability to determine the makeup of the state's electoral base, including the Fifteenth, Nineteenth, and Twenty-Sixth Amendments. *See id.* amend. XV, § 1 (prohibiting the denial or abridgement of the right to vote on the basis of race); *id.* amend XIX (prohibiting the denial or abridgement of the right to vote on the basis of sex); *id.* amend. XXVI, § 1 (prohibiting the denial or abridgement of the right to vote on the basis of age for those over the age of eighteen). However, the felon-disenfranchisement context provides a salient and dynamic example of the ways in which state legislatures may still expand or contract the electorate. *See id.* amend. XIV, § 2 (acknowledging that the right to vote may be "denied" or "abridged" for "participation in . . . crime"); *see also Felon Voting Rights*, NAT'L CONF. ST. LEGISLATURES (Oct. 1, 2020), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [https://perma.cc/C3PX-NXPY] (summarizing the various state approaches to felon disenfranchisement).

[19] *See* U.S. CONST. art. II, § 1, cl. 2.

toral districts to be combined with Congress's Elections Clause power over federal electoral districts, this Article demonstrates that comprehensive, uniform, and simultaneous reform for *all* forms of partisan gerrymandering remains constitutionally feasible, even after *Rucho*. In other words, contrary to the background assumption that has motivated the work of scholars and legislators in the field, I argue that Congress has the authority to pass partisan-gerrymandering reform that reaches congressional, state, and local electoral districts.[20]

The idea that Congress might regulate partisan gerrymandering under Section 5 power is not a new one, but it is an avenue that has largely been dismissed by commentators in light of the Supreme Court's decisions in *City of Boerne v. Flores*[21] and progeny, which require that Section 5 legislation be "congruen[t] and proportional[ ]" to demonstrable constitutional violations.[22] This is in part why modern efforts by Congress to address the issue have focused only on federal electoral districts.[23] I add a new perspective to this debate that revises the conventional wisdom: I argue that the Court's holding in *Rucho* that partisan gerrymandering claims are nonjusticiable makes the *Boerne* "congruence and proportionality" test inapplicable to partisan-gerrymandering legislation and instead returns the status of Congress's power in this field to the pre-*Boerne* "rational means" framework set forth in *South Carolina v. Katzenbach*[24] and *McCulloch v. Maryland*.[25]

Crucial to this claim is the fact that the *Rucho* decision left untouched, and indeed reaffirmed, past statements by the Court declaring extreme partisan gerrymanders to be unconstitutional. This presents the Court with a dilemma should Congress pass comprehensive partisan gerrymandering reform under Section 5. *Boerne*'s congruence and proportionality analysis becomes incoherent where the Court admits that a constitutional right exists but refuses to delineate—in fact, disclaims authority to delineate—precisely where that right begins and ends. Because *Boerne* rests on the premise that it is the province of the Court, and not Congress, to say what the law is, *Boerne*'s heightened review necessarily does not apply to contexts—like non-

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[20] Certainly any effort to reform partisan gerrymandering will face political headwinds in Congress. Although the political feasibility of comprehensive partisan gerrymandering reform is outside the scope of this Article, it is worth noting that federal legislation that regulates state legislative districts might be more likely to pass than Elections Clause legislation that regulates congressional maps, due to the fact that self-dealing and conflicts-of-interest concerns afflict the latter process but not the former. That is, Congress might be more likely to pass legislation that would remedy gerrymanders afflicting other (i.e., state) legislative bodies but leave untouched the very gerrymanders that got Congress elected. That said, to some degree, a "sunrise provision" could decrease some of the friction associated with a congressional fix to congressional gerrymandering. On sunrise lawmaking, see generally AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 474 (2012); and Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, but Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975 (2015).

[21] 521 U.S. 507 (1997).

[22] *Id.* at 520.

[23] *See supra* notes 3–7 and accompanying text.

[24] 383 U.S. 301, 324 (1966).

[25] 17 U.S. (4 Wheat.) 316, 317 (1819).

justiciability—where the Court has held that it cannot exercise its law-declaring function as normal.

I. Section 5 and the Partisan Gerrymandering Landscape

A. City of Boerne v. Flores *and the Scope of Congress's Section 5 Power*

Section 5 of the Fourteenth Amendment grants Congress "the power to enforce, by appropriate legislation, the provisions" of the Amendment.[26] This language is nearly identical across the enforcement clauses of the Reconstruction Amendments.[27] Before 1997, Congress and the courts had long understood this language to confer on Congress the same scope of authority as many of its Article I powers. In *South Carolina v. Katzenbach*, the Court examined the meaning of the language "enforce . . . by appropriate legislation" in the context of Section 2 of the *Fifteenth* Amendment.[28] It held that the Amendment's assignment of enforcement power was broad, permitting Congress to enact measures that are a "rational means to effectuate the constitutional prohibition" in the Amendment.[29] The Court explained:

> The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation [in *McCulloch v. Maryland*]:
>
> > Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.
>
> The Court has subsequently echoed his language in describing each of the Civil War Amendments.[30]

Although *South Carolina* concerned Section 2 of the Fifteenth Amendment, as the Court noted, the Reconstruction Amendments—including Section 5 of the Fourteenth Amendment—share materially identical

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[26] U.S. Const. amend. XIV, § 5.

[27] Section 2 of the Thirteenth Amendment provides that "Congress shall have power to enforce this article by appropriate legislation." *Id.* amend. XIII, § 2. Section 5 of the Fourteenth Amendment reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* amend. XIV, § 5. Section 2 of the Fifteenth Amendment provides: "The Congress shall have power to enforce this article by appropriate legislation." *Id.* amend. XV, § 2.

[28] 383 U.S. 301, 325–26 (1966).

[29] *Id.* at 324.

[30] *Id.* at 326 (citation omitted) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

enforcement language.[31] That is why, in *Katzenbach v. Morgan*, the Court recognized that the same test applies under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. There, the Court explained that "the McCulloch v. Maryland [*sic*] standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment."[32] Before 1997, then, Congress's Section 5 authority was understood to be limited only by the rational connection between its end and its means.

In 1997, *City of Boerne v. Flores*[33] effected a major shift in the previously understood scope of Section 5.[34] In *Boerne*, the Court struck down the Religious Freedom Restoration Act (RFRA), which Congress had passed in an effort to overturn a constitutional doctrine that the Court had set forth in *Employment Division v. Smith*.[35] In striking down RFRA, the Court introduced a new, separation-of-powers-based limitation to Congress's exercise of its Fourteenth Amendment authority.[36] "Congress' power under § 5," the Court wrote, "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment."[37] As a result, Congress lacks "the power to decree the substance of the Fourteenth Amendment's restrictions on the States."[38] The Court continued:

> Legislation which alters [the] meaning of the [substantive provisions of Section 1] cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what

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[31] The Court acknowledged the significance of the Reconstruction Amendments' near-identical enforcement language in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 365, 373 n.8 (2001).

[32] 384 U.S. 641, 651 (1966). The Court noted that this "same broad scope" of the Section 5 power had first been decided "12 years after the adoption of the Fourteenth Amendment" in *Ex parte Virginia*, 100 U.S. 339 (1879). *Id.* at 650.

[33] 521 U.S. 507 (1997).

[34] Over the years, the *Boerne* decision has been subject to considerable criticism by legal commentators, who have attacked the decision on textual, historical, structural, and functional grounds. For a sampling, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127 (2001); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743 (1998); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE. L.J. 441 (2000); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) [hereinafter Post & Siegel, *Legislative Constitutionalism*]; and Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) [hereinafter Post & Siegel, *Protecting the Constitution*].

[35] 494 U.S. 872 (1990).

[36] The precise question in *Boerne* concerned the scope of Congress's authority to enforce the religious-freedom guarantees of the First Amendment against the states through the Religious Freedom Restoration Act (RFRA). Because the First Amendment applies to the states only through the Due Process Clause of the Fourteenth Amendment, RFRA amounted to an exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment.

[37] *Boerne*, 521 U.S. at 519 (alteration in original).

[38] *Id.*

> the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.[39]

Only this arrangement, the Court reasoned, would ensure that "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary."[40]

The *Boerne* decision makes no mention of *South Carolina*'s "rational means" test. Nevertheless, the Court ostensibly concluded that the "rational means" test was insufficient to preserve the judiciary's "province . . . to say the what the law is,"[41] because it announced a new test for Section 5 cases. Moving forward, Congress could still use its Section 5 enforcement powers to enact prophylactic or remedial legislation that prohibits a broader range of conduct than violations of the Fourteenth Amendment.[42] But now the scope of such legislation would need to be "congruen[t] and proportional[ ]" to the constitutional "injury to be prevented or remedied."[43]

Curiously, the *Boerne* opinion is replete with references to *South Carolina*, as if that decision supported its holding in *Boerne*, despite the analytical incompatibility of the two cases and the absence of any mention of *South Carolina*'s "rational means" test. Post-*Boerne* it has remained unclear whether (1) *South Carolina*'s reasoning has been abrogated and only its holding remains intact, (2) different standards now apply to the near-identical language of Section 2 of the Fifteenth Amendment and Section 5 of the Fourteenth Amendment, or (3) something else entirely occurred.[44] Subsequent decisions concerning the constitutionality of the Voting Rights Act,

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[39] *Id.*

[40] *Id.* at 524. Robert Post and Reva Siegel flag the import of the Court's conceptual move:

> At the heart of the enforcement model lies a particular view of separation of powers, which holds that the constitutional function of courts is to declare the substance and nature of Fourteenth Amendment rights, whereas the constitutional function of Section 5 legislation is to "enforce" those rights. The central premise of the enforcement model is that courts are the only legitimate source of authoritative constitutional meaning. Courts hold this privilege because the Constitution is a form of law[,] and "the province of the Judicial Branch . . . embraces the duty to say what the law is."

Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1953 (quoting *Boerne*, 521 U.S. at 536).

[41] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[42] "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Boerne*, 521 U.S. at 517 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

[43] *Id.* at 520.

[44] *See, e.g.*, Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 183–85 (2005); Calvin Massey, *The Effect of* Shelby County *on Enforcement of the Reconstruction Amendments*, 29 J.L. & POL. 397, 398–400, 404–06 (2014); Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 337–38 (2019). One scholar has recently argued that the historical record of the passage of the Fourteenth and Fifteenth Amendments requires that *Boerne*'s congruence and proportionality test be limited to the Fourteenth Amendment only. *See* Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1555 (2020) (arguing that the decision to enact universal black suffrage through an amendment, rather than a statute, meant that the Fifteenth Amendment provided a source of enforcement

which *South Carolina* originally upheld, have declined to discuss or reconsider the standard.[45]

The Court expanded on the meaning of *Boerne*'s new requirements in *Kimel v. Florida Board of Regents*,[46] *Board of Trustees v. Garrett*,[47] and *Nevada Department of Human Resources v. Hibbs*.[48] *Kimel* and *Garrett* dealt with challenges to the federal government's abrogation of the states' Eleventh Amendment immunity in the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA), respectively.[49] In both laws, Congress sought to create a direct remedy for individuals to sue states for statutory rights violations in federal court, on the theory that Congress's power to enforce the Fourteenth Amendment permits it to override sovereign immunity.[50] Yet, in both *Kimel* and *Garrett*, the Court held that Congress's abrogation was ineffective because neither the ADEA nor the ADA constituted "appropriate legislation" within the meaning of Section 5.[51]

In *Kimel*, the Court examined the equal-protection backdrop of age-discrimination claims. The Court observed: "[A]ge is not a suspect classification under the Equal Protection Clause,"[52] and, as a result, states may "draw lines on the basis of age when they have a rational basis for doing so."[53] Yet despite the low bar for a constitutional violation, the provisions of the ADEA imposed "broad restriction[s] on the use of age as a discriminating factor, [and] prohibit[ed] substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[54] Judging the scope of the ADEA against *Boerne*'s congruence and proportionality standard, then, the Court concluded that "the ADEA is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or de-

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that was distinct from and broader than Congress's Fourteenth Amendment enforcement authority).

[45] *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009) (declining to resolve whether *Boerne*'s "congruence and proportionality" test or *South Carolina*'s "rational means" test applies to the scope of Congress's enforcement authority under the Fifteenth Amendment); Shelby County v. Holder, 570 U.S. 529, 542 n.1 (2013) (explaining that "*Northwest Austin* guides our review under both [the Fourteenth and Fifteenth] Amendments in this case," but failing to adopt either the *Boerne* or *South Carolina* test); *see also* Richard Hasen, *The Curious Disappearance of* Boerne *and the Future of Voting Rights and Race*, SCOTUSBLOG (June 25, 2013, 7:10 PM), https://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race [https://perma.cc/EA8V-AKFZ]. *But see* Massey, *supra* note 44, at 404–06 (arguing that the Court applied *Boerne*'s congruence and proportionality test *sub silentio* in *Shelby County*).

[46] 528 U.S. 62 (2000).

[47] 531 U.S. 356 (2001).

[48] 538 U.S. 721 (2003).

[49] *See Garrett*, 531 U.S. at 356; *Kimel*, 528 U.S. at 62.

[50] The Court held in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that Section 5 of the Fourteenth Amendment permitted Congress to abrogate the states' Eleventh Amendment sovereign immunity and make them liable in federal civil suits. *See id.* at 456.

[51] *See Garrett*, 531 U.S. at 365, 374; *Kimel*, 528 U.S. at 80, 91.

[52] *Kimel*, 528 U.S. at 83.

[53] *Id.* at 86.

[54] *Id.*

signed to prevent, unconstitutional behavior.'"[55] Toward the end of its opinion, the Court appeared to add a new requirement to its Section 5 analysis: it pointed out that part of the reason why the statute was inappropriate was that Congress had "fail[ed] to uncover any significant pattern of . . . widespread and unconstitutional age discrimination by the States."[56]

The Court later crystallized this observation into a formal requirement of Section 5 analysis in *Garrett*. *Garrett* prescribes a two-step inquiry for courts to follow when assessing congruence and proportionality. First, a court should "determine[ ] the metes and bounds of the constitutional right in question"[57]—an analysis that is consistent with the judiciary's role as the final expounder of constitutional meaning. Second, the court should "examine whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States" when crafting its remedy.[58] Applying this test to the ADA, the Court reached a similar conclusion to that of *Kimel*. The Court observed that "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational."[59] As a result, the ADA's broad requirements forbidding practices "without regard to whether such conduct has a rational basis" violated *Boerne*'s congruence and proportionality mandate.[60]

The Court's decisions in *Garrett* and *Kimel* rested on rights protected only under a rational-basis standard. In *Hibbs*, which concerned the Family and Medical Leave Act (FMLA),[61] the Court considered whether Congress could abrogate sovereign immunity when the state action at issue involved gender discrimination.[62] The *Hibbs* Court took the opportunity to draw a distinction between Section 5 cases that concern state action subject to rational-basis review and cases that implicate state action subject to heightened scrutiny. It held that while Congress must identify "a 'widespread pattern' of irrational reliance on [discriminatory] criteria" when rational-basis rights are concerned,[63] Congress's evidentiary burden is much easier to meet when Section 5 legislation seeks to remedy discrimination that triggers heightened scrutiny.[64] Applying this framework, the *Hibbs* Court proceeded to uphold the FMLA's abrogation of sovereign immunity. It reasoned that the FMLA was "appropriate legislation" under Section 5 because the relevant provisions of the Act (1) targeted state gender-based classifications, which are subject

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[55] *Id.* (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).
[56] *Id.* at 91.
[57] Bd. of Trs. v. Garrett, 531 U.S. 356, 368 (2001).
[58] *Id.*
[59] *Id.* at 367.
[60] *Id.* at 372.
[61] 29 U.S.C. §§ 2601–54 (2000).
[62] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003).
[63] *Id.* at 735 (2003).
[64] *See id.* at 736. Armed with this new framework, the Court engaged in some creative reinterpretation of its holding in *South Carolina v. Katzenbach*—which it recast as a Fourteenth Amendment case. *South Carolina* was so broad, the Court explained, because "racial classifications are presumptively invalid" (i.e., subject to strict scrutiny). *Id.*

to intermediate scrutiny; (2) "narrowly targeted . . . the faultline between work and family"; and (3) did not apply to "every aspect of state employers' operations" like the statutes in *Boerne*, *Kimel*, and *Garrett*.[65]

The upshot of the *Boerne-Kimel-Garrett-Hibbs* line of cases is that Congress must surpass an evidentiary threshold—i.e., it must document a pattern of widespread state constitutional violations—any time it wishes to enact prophylactic or remedial legislation under Section 5.[66] And although this standard is somewhat relaxed in the context of legislation aimed at conduct subject to heightened scrutiny, *Garrett*'s strict evidentiary standard persists in all other contexts. As a result, the scope of Congress's Section 5 power is directly tied to, and constrained by, its ability to demonstrate that states have violated judicial interpretations of the Fourteenth Amendment.

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[65] *Id.* at 738.

[66] The Court's imposition of an evidentiary requirement has been subject to withering scrutiny by a number of commentators. For example, Robert Post and Reva Siegel argue that there is a "deep confusion" in this model:

> The model requires Congress to enact Section 5 legislation that will implement constitutional meaning as that meaning is determined from the institutional perspective of a court. Courts construe the Constitution in order to pursue the practice of adjudication . . . . [T]hat this framework should dominate and control the exercise of congressional power under Section 5 . . . leads to patent absurdity.

Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1967; *see also* McConnell, *supra* note 34, at 156 (arguing, contra *Boerne*, that "when Congress interprets the provisions of the Bill of Rights for purposes of carrying out its enforcement authority under Section Five, it is not bound by the institutional constraints that in many cases lead the courts to adopt a less intrusive interpretation from among the textually and historically plausible meanings of the clause in question"). Post and Siegel point to the decisions in *Kimel* and *Garrett*, in which the Court addressed whether Congress could exercise Section 5 power based on classifications that receive rational-basis review, as a perfect illustration of the flaws of the *Boerne* model:

> Rational basis review . . . explicitly defines a constitutional right in terms of the specific institutional purposes of the judiciary. The Court has explained that rational basis review is "a paradigm of *judicial* restraint" . . . . Rational basis review thus articulates the substance of the right to equal protection of the law by reference to the deference that the judiciary should adopt vis-à-vis the democratically accountable branches of government. It does not define the substance of the right in a way that can coherently be applied to Congress.
>
> It is easy to see that the thesis of the enforcement model makes little sense when it requires Congress to enforce rights that are defined in terms of institutional values pertinent to courts, but logically irrelevant to Congress. . . . Rights are not abstract statements of principle, but constitutional conclusions articulated in ways designed to make sense within particular institutional frameworks. We can, therefore, ask how rights defined in terms of specific institutional characteristics of courts *can* be translated into the distinct institutional framework of a legislature. And we may further ask why a legislature *should* be constrained by the distinct institutional purposes of courts.

Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1967–68 (footnote omitted) (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993)). The seminal treatment of institutionally driven judicial underenforcement of constitutional rights is set forth in Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV L. REV. 1212 (1978), which argues that Congress should be allowed to enforce constitutional norms to their full extent even when the judiciary "underenforces" the norm due to institutional limitations such as concerns about federalism or judicial competence.

The Court has justified this requirement as a separation-of-powers limitation on Congress: only by showing that the legislation is targeting a pattern of unconstitutional conduct can the Court be sure that Congress is seeking to remedy or deter violations of what the *Court* has declared the substance of the Constitution to be.

The separation-of-powers grounding of the *Boerne* line of cases is significant. Prior cases examining the outer limits of Congress's enforcement power under the Reconstruction Amendments had focused primarily on federalism concerns—namely, whether congressional overreach into traditional state domains would undermine the independence and autonomy of the states.[67] By contrast, the *Boerne* line of cases signaled for the first time that the Court would also police the boundary of the Reconstruction Amendments for threats to judicial supremacy and the courts' own ability to "say what the law is."[68]

B. Section 5 and Partisan Gerrymandering

The specter of *Boerne* (and its progeny) has heavily influenced the scholarly discussion over Congress's power to enact partisan-gerrymandering reform under Section 5. The background assumption in the field has been that the Court's stringent Section 5 requirements preclude a congressional fix to partisan gerrymandering at the state and local level.[69] Because the Court had failed to coalesce around a framework for distinguishing between unconstitutional and constitutional gerrymanders, it would be difficult—impossible even—for Congress to design legislation that would be congruent and proportional to a documented history of constitutional *violations*. To do so, Congress would need to know what constituted a violation in the first place. But how could it?[70] The only solution—to decide the metes and

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[67] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 11 (1883); *Ex parte* Virginia, 100 U.S. 339, 357–59 (1879).

[68] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1945 (discussing *Boerne*'s addition of separation-of-powers concerns to the courts' historical preoccupation with federalism in the Section 5 context).

[69] *See, e.g.*, Cox, *supra* note 4, at 795–96 (raising doubts, post-*Boerne*, as to whether Section 5 legislation to remedy partisan gerrymandering would pass judicial muster); Mark D. Rosen, *Can Congress Play a Role in Remedying Dysfunctional Political Partisanship*, 50 IND. L. REV. 265, 272 (2016) (same); *see also* Luke P. McLoughlin, *Section 2 of the Voting Rights Act and* City of Boerne*: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 74–75 (2006) (cataloging the "problems . . . cause[d] under the *City of Boerne* analysis" but protesting that "it is hard to believe that Congress would be prohibited from legislating because the Court had not enunciated a standard"). *But cf.* Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 15–17 (2007) (observing, specifically in the context of the Voting Rights Act, that *Boerne* "[a]rguably" does not erect an insurmountable barrier to congressional regulation of state and local elections).

[70] *See* McLoughlin, *supra* note 69, at 74–75 ("[H]ow can the inquiry even begin into whether the statutory remedy sweeps beyond the constitutional protection, when the constitutional protection is undefined?").

bounds of the right on its own—would have been to determine the substance of a constitutional violation—precisely the type of separation-of-powers violation that was central to *Boerne*'s reasoning.

In the absence of an articulable equal-protection framework, Section 5 partisan-gerrymandering legislation almost certainly would have met the same fate as the rational-basis-based rights in the ADEA (*Kimel*) and the ADA (*Garrett*). The Court would have found the analogies irresistible. In *Kimel* especially, the Court placed heavy emphasis on the fact that the Court had not once before found a state's discrimination based on age or disability to violate the Equal Protection Clause.[71] The same has been true in the partisan-gerrymandering context. As the Court observed in *Rucho*, "We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years."[72] As a result, the consensus thinking has largely dismissed the possibility of a congressional fix to partisan gerrymandering that would reach beyond congressional districts and regulate state and local district maps.[73] Unsurprisingly then, the nonjuricentric partisan-gerrymandering literature has primarily focused on Congress's authority to regulate congressional districts under the Elections Clause[74] or on state-level reform.[75]

II. Nonjusticiability and the New Section 5 Deference

This Article's central claim is that *Rucho v. Common Cause* upended the conventional wisdom in the field and reinvigorated the feasibility of Section 5 legislation in the partisan gerrymandering space. In this Part, I argue that *Rucho*'s holding that partisan gerrymandering claims are nonjusticiable political questions, combined with its confirmation that extreme partisan gerry-

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[71] *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82 (2000) ("We have considered claims of constitutional age discrimination under the Equal Protection Clause three times. In all three cases, we held that the age classifications at issue did not violate the Equal Protection Clause.").

[72] Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).

[73] For this reason, the For the People Act only sought to regulate congressional partisan gerrymandering and did not purport to govern state and local electoral map-drawing. *See supra* note 5 and accompanying text. A growing body of recent scholarship has broached whether Congress might be able to regulate partisan gerrymandering of state legislative districts under the Guarantee Clause. *See, e.g.*, Louk, *supra* note 7; Rosen, *supra* note 69, at 271–79; Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 Ariz. L. Rev. 183, 218 (2020). Because the Court has engaged in so little explication of the bounds of Congress's affirmative powers under the Guarantee Clause—and Congress has seldom relied on such authority—these proposals remain speculative compared to Congress's firmer authority to enact Section 5 legislation. In any case, extended discussion of the Guarantee Clause is outside the scope of this project, the primary goal of which is to explore the implications of *Rucho*'s nonjusticiability holding for the restrictions *Boerne* was understood to have placed on comprehensive partisan-gerrymandering legislation.

[74] *See* Richard H. Pildes, *The Constitution and Political Competition*, 30 Nova L. Rev. 253 (2006); Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 Yale L.J. 1021 (2005); *see also* Tolson, *supra* note 44.

[75] *See, e.g.*, Derek T. Muller, *Nonjudicial Solutions to Partisan Gerrymandering*, 62 Howard L.J. 791 (2019).

manders violate the Constitution, makes the *Boerne* line of cases inapplicable to partisan gerrymandering. Post-*Boerne*, the framework that now applies to Section 5 partisan gerrymandering legislation is the more deferential *South Carolina-McCulloch* "rational means" standard.

Specifically, I argue that *Rucho*'s nonjusticiability holding puts the Court in a dilemma: *Boerne*'s Section 5 requirement of congruence and proportionality implies a judicial act of "measurement"—that is, a measurement of the distance between the scope of Section 5 legislation and the outer limits of a constitutional right. Yet, that type of measurement is made impossible when, as in *Rucho*, the Court has said that it is incompetent to say where the outer boundary of a constitutional right falls.

This conundrum leaves the Court with four options if it were to be faced with Section 5 legislation regulating partisan gerrymandering: It could either (1) reverse course and concede that partisan gerrymandering claims are justiciable, thereby allowing the Court to measure the congruence and proportionality of Section 5 legislation; (2) double down on *Boerne* and declare that partisan gerrymandering must always be constitutional; (3) preserve both *Rucho* and *Boerne*, with the end result that Congress can never demonstrate congruence and proportionality to a constitutional violation and therefore never pass Section 5 legislation concerning partisan gerrymandering; or (4) decide that *Boerne* does not apply to Section 5 legislation in the context of a constitutional right whose contours are nonjusticiable.

As I demonstrate below, options (1)-(3) are unlikely and unsatisfactory responses to this dilemma. Option (1) is unlikely because the Court will be immensely reluctant to revisit *Rucho* (at least in the near term) after so much time spent struggling to find a judicial standard over the past three decades. Option (2) is unlikely because the Court has also repeatedly declined to hold that extreme partisanship in redistricting does not run afoul of the Equal Protection Clause. And option (3) is unsatisfactory because it would make an acknowledged constitutional right completely unenforceable. This leaves option (4) as the most logical and coherent outcome.

A. Rucho*'s Implications for* Boerne

The *Rucho* decision is significant not only for what the Court did, but also for what the Court did *not* do. Despite declaring partisan gerrymandering claims to be "beyond the competence of the federal courts,"[76] the *Rucho* decision does *not* say that partisan gerrymandering is therefore always constitutional. In fact, the Court explicitly rejects such a conclusion in several places. *Rucho*'s holding, the Court cautions, "does not condone excessive partisan gerrymandering."[77] Rather, "excessive partisanship in districting leads

[76] *Rucho*, 139 S. Ct. at 2500.
[77] *Id.* at 2507.

to results that reasonably seem unjust"[78] and is "incompatible with democratic principles."[79]

Other parts of the opinion demonstrate that partisan gerrymandering exists in both constitutional and unconstitutional forms. For example, the Court repeatedly characterizes its search for a judicial test as one that would "reliably differentiate *unconstitutional* from constitutional political gerrymandering."[80] At another point the Court asks: "At what point does permissible partisanship become *unconstitutional*?"[81] And further in the opinion it rejects the lower courts' methodology for failing to "separat[e] constitutional from *unconstitutional* partisan gerrymandering."[82] These quotes explicitly acknowledge that partisan gerrymandering can, indeed, be unconstitutional.

The Court therefore left undisturbed, and indeed confirmed, its prior constitutional statements about partisan gerrymandering. For instance, in *Davis v. Bandemer*, a plurality of the Court held that a partisan gerrymander results in "unconstitutional discrimination"[83] and an "equal protection violation"[84] when plaintiffs prove "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[85] Justice Powell and Stevens disagreed with the plurality's method for measuring discriminatory effect.[86] But they became the fifth and sixth Justices to agree that a "partisan political gerrymander violates the Equal Protection Clause" where intentional discrimination and discriminatory effect are proven.[87] Eighteen years later in *Vieth v. Jubelirer*, [88] a four-Justice plurality opined that partisan gerrymandering claims were nonjusticiable.[89] But all nine Justices agreed that at least some partisan gerrymanders violated the Constitution.[90] Justice Scalia, writing for the plurality, explained:

> Much of [Justice Stevens's] dissent is addressed to the incompatibility of severe partisan gerrymanders with democratic principles. We do not disagree with that judgment . . . . The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.[91]

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[78] *Id.* at 2506.
[79] *Id.* (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015)).
[80] *Id.* at 2499 (emphasis added) (citing Hunt v. Cromartie, 526 U.S. 541, 551 (1999)).
[81] *Id.* at 2501 (emphasis added).
[82] *Id.* at 2504 (emphasis added).
[83] 478 U.S. 109, 132 (1986).
[84] *Id.* at 133.
[85] *Id.* at 127.
[86] *See id.* at 162 (Powell, J., concurring in part and dissenting in part).
[87] *Id.* at 161.
[88] 541 U.S. 267 (2004)
[89] *See id.* at 306.
[90] *See* Karlan, *supra* note 69, at 14 ("In *Vieth v. Jubelirer* . . . . [a]ll nine Justices acknowledged that excessive partisan gerrymanders raise serious constitutional questions, and all nine located the constitutional infirmity at least in part in the Equal Protection Clause.").
[91] *Vieth*, 541 U.S. at 292.

In even more direct and forceful terms, he continued: "Justice Stevens says . . . that an excessive injection of politics is unlawful. *So it is*, and so does our opinion assume."[92] The four dissenters and Justice Kennedy, who concurred in the judgment, at a minimum agreed with this part of the plurality.[93]

Post-*Rucho*, then, the law remains that once partisan gerrymandering reaches the point at which it becomes *excessive*, it violates the Constitution—specifically the Equal Protection Clause. Although a majority of the Court could never agree on how to measure excessiveness, majorities in *Bandemer*, *Vieth*, and *Rucho* have all acknowledged that unconstitutional partisan gerrymandering exists (even if it is not *judicially* discoverable).

The fairest reading of *Rucho*, then, is not as a reimagination of the constitutional status of partisan gerrymandering, but principally as a statement about the judicial role. The decision repeatedly emphasizes the importance of institutional-competence considerations to its analysis. The Court writes: "Some criterion more solid and more demonstrably met than [fairness] seems to us necessary . . . to meaningfully *constrain the discretion of the courts*, and to *win public acceptance for the courts' intrusion* into a process that is the very foundation of democratic decisionmaking."[94] "Deciding among . . . different visions of fairness," the Court reasoned, "poses basic questions that are *political, not legal*. . . . Any *judicial* decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question *beyond the competence of the federal courts*."[95] To the Court, none of the various tests offered by the litigants in *Rucho* would provide "solid grounding for *judges* to take the extraordinary step of reallocating power and influence between political parties."[96] *Rucho*'s core message, then, is a narrow one: the federal judiciary, for legitimacy and competence reasons, cannot come up with a limit for when partisan map-making has gone too far. The

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[92] *Id.* at 293 (emphasis added) (emphasis omitted); *see also id.* at 316 (Kennedy, J., concurring in the judgment) ("I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible. Indeed the plurality seems to acknowledge it is not.").

[93] *See id.* at 316 (Kennedy, J., concurring in the judgment); *id.* at 339 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting). Justice Kennedy, the swing vote in the case, set forth an example of a clear constitutional violation: "If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated." *Id.* at 312 (Kennedy, J., dissenting). It's fair to assume from the content of their opinions that, at a minimum, the four dissenters in *Vieth* would have agreed with Justice Kennedy on this point.

It is also noteworthy that lower courts in Wisconsin, Maryland, and North Carolina all cited to *Bandemer* and *Vieth* for the proposition that extreme partisan gerrymandering is unconstitutional. *See, e.g.*, Benisek v. Lamone, 348 F. Supp. 3d 493, 511–13 (D. Md. 2018); Common Cause v. Rucho, 318 F. Supp. 3d 777, 837–38 (M.D.N.C. 2018); Whitford v. Gill, 218 F. Supp. 3d 837, 885–86 (W.D. Wis. 2017). In none of these three cases did the Supreme Court qualify or reverse the lower court on the basis of those propositions. *See* Gill v. Whitford, 138 S. Ct. 1916 (2018); Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[94] *Rucho*, 139 S. Ct. at 2499–500 (emphasis added) (quoting *Vieth*, 541 U.S. at 291).

[95] *Id.* at 2500 (emphasis added).

[96] *Id.* at 2502 (emphasis added).

Court does *not* say that such a limit does not exist—only that the *judiciary* is ill-equipped to draw it.

But a problem arises: *Rucho*, correctly understood, now generates a conundrum. As the decision declares,

> Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." Sometimes, however, "the law is that the judicial department has no business entertaining the claim . . . ."[97]

Recall, however, the Court's central justification for *Boerne*:

> When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.[98]

And so the central question emerges: how does the logic of *Boerne*, which held that only the Court, and not Congress, can create substantive law,[99] apply to a context in which the Court has said it will not decide what the law is, because the issue is nonjusticiable? The Court has confirmed on multiple occasions that extreme partisan gerrymandering violates the Equal Protection Clause,[100] but has declined to explain where the metes and bounds of the violation lie. Say Congress codified the "extreme outlier approach" favored by the four dissenters in *Rucho v. Common Cause*[101] in com-

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[97] *Id.* at 2494 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); and *Vieth*, 541 U.S. at 277).

[98] City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (citation omitted).

[99] By "create substantive law" I mean the ability of Congress to determine or inform the meaning of the substantive provisions of the Fourteenth Amendment.

[100] *See supra* notes 76–93 and accompanying text.

[101] *See Rucho*, 139 S. Ct. at 2518 (Kagan, J., dissenting) ("'[T]he extreme outlier approach' . . . begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State's physical and political geography and meet its declared districting criteria, *except for partisan gain*. For each of these maps, the method then uses actual precinct-level votes from past elections to determine a partisan outcome (*i.e.*, the number of Democratic and Republic seats the map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other . . . . And we can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution."). *See generally* Brief for Eric S. Lander as Amicus Curiae at 7–22, *Rucho*, 139 S. Ct. 2484 (Nos. 18-422, 18-726); Brief for Mathematicians et al. as Amici Curiae at 19–20, *Rucho*, 139 S. Ct. 2484 (Nos. 18-422, 18-726). As the dissent recognizes, the majority in *Rucho* did not reject this test as a means of vindicating constitutional rights in the gerrymandering context; rather, it disclaimed judicial authority to draw a line somewhere along the spectrum. *See Rucho*, 139 S. Ct. at 2520 ("[The majority] never tries to analyze the serious question presented here—whether the kind of stan-

prehensive legislation applying to all the states: in this case, would Congress be improperly creating substantive law by delineating a boundary for when a partisan gerrymander became unlawful? Or would it be permissibly remedying and deterring violations in a way that is overinclusive of the constitutional right but would at least capture *some* unconstitutional conduct? The Court has never made the line between substance and prophylaxis clear. Adding to the confusion: if the Court has said it will never draw a boundary for the constitutional right at issue, how could it ever assess whether such a proposal was congruent and proportional to the violation? And how could Congress document a pattern of unconstitutional conduct by the states?

What to do then? If one takes the *Rucho* decision as given—meaning that partisan gerrymandering claims are nonjusticiable but extreme partisan gerrymanders still violate the Constitution—then it appears that one of two views is available: either (1) *Boerne* applies, and Congress does not get to put remedial legislation in place—since assessing congruence or proportionality in this context would be impossible absent clear examples of what violates the law; or (2) *Boerne* does *not* apply, meaning that Congress can legislate free of the congruence and proportionality test and the need to document historical constitutional violations.

The problem with option one is that it eviscerates a constitutional right that the Court has repeatedly said exists. The "logical terminus" of the *Boerne* line of cases—particularly *Garrett*—is such that Congress can legislate "only to remedy [constitutional] violations that courts have already condemned."[102] *Rucho*, however, prevents such determinations from ever occurring. Option one, then, violates the longstanding Anglo-American legal principle *ubi jus ibi remedium*—"where there is a right, there is a remedy."[103] Moreover, as Robert Post and Reva Siegel have observed, "[r]ights are not abstract statements of principle, but constitutional conclusions articulated in ways designed to make sense within particular institutional frameworks."[104] It is therefore incoherent to refer to the existence of a right in the absence of an institution—be it judicial, legislative, or administrative—that gives the right effect.[105] Finally, option one would also violate the express terms of Section 5. There, Congress is given the authority to enforce

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dard developed below falls prey to [its] objections, or instead allows for neutral and manageable oversight."); *see also id.* at 2519 ("[T]he majority continues, they will have to decide '[h]ow much is too much?'—that is, how much deviation from the chosen 'touchstone' to allow? In answering that question, the majority surmises, they will likely go far too far. So the whole thing is impossible, the majority concludes." (citations omitted)).

[102] Post & Siegel, *Protecting the Constitution*, *supra* note 34, at 17.

[103] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *51, *123; *see also* Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 40 (1916) (citing BLACKSTONE, *supra*, at *51, *123). Lord Chief Justice Holt articulated the classic formulation of the maxim in *Ashby v. White* [1703] 92 Eng. Rep. 126 (KB).

[104] Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1968.

[105] It does not make sense to think of state legislatures as right protectors, because they are the right *violators* in this context. State courts, moreover, likely fall under the same nonjusticiability mandate as federal courts when interpreting only federal constitutional provisions to adjudicate partisan gerrymandering claims.

the provisions of the Fourteenth Amendment, including the Equal Protection Clause. Because the Court has recognized that a right against extreme partisan gerrymandering exists under the Fourteenth Amendment, some degree of congressional enforcement power *must* exist, or else the Court itself has violated the terms of the Fourteenth Amendment.

Option two, then, is the more promising and coherent solution—in fact, it is arguably implied by the terms of *Boerne* itself. *Boerne* did not consider situations in which the Court refused to decide what the law is. It spoke only of scenarios where the Court has already declared what the law is. (Recall that in *Boerne* the Court rejected a congressional attempt to overrule a substantive constitutional precedent.) Thus, the separation-of-powers logic underlying *Boerne*'s heightened threshold for Section 5 legislation need not apply to the limited set of cases, like partisan gerrymandering, where the Court cannot decide the substance of the law.

Another way to think about *Boerne*'s inapplicability is to consider the counterfactual. If *Boerne* did apply, how would the Court review Congress's legislation? Or, to put it another way, how could it *overturn* Congress's remedy? The Court would either have to conclude that there is no constitutional violation at issue, which it has not done in any of the partisan-gerrymandering cases that have come before it (even though it could have done so), or it would have to apply *Boerne* and say that Congress's legislation is not congruent and proportional to a constitutional violation. But on what basis? How could the Court say that the legislation *isn't* congruent and proportional—or that Congress isn't responding to longstanding constitutional violations—when the Court has disclaimed its authority to determine when there is a constitutional violation or not in any given case? The best way out of this quagmire is to conclude that nonjusticiability fundamentally alters the balance of authority between Congress and the courts—and the amount of deference due to Congress—when it comes to Section 5 legislation.

In the absence of *Boerne*, what standard would apply to congressional action? The answer is not complicated—it is the same standard that governs other congressional powers under Article I, and that applied to Section 5 legislation before *Boerne*: *South Carolina v. Katzenbach*'s "rational means" test.[106] This approach makes sense. Once the separation-of-powers justification for heightened review under *Boerne* becomes inapplicable, what remains is Congress's "entitle[ment] to much deference"[107] in its conclusions regarding "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[108] The Court ought to defer, therefore, to the line Congress draws in its prophylactic and remedial legislation, unless the line is unreasonable.

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[106] *See* Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964) ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.").

[107] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[108] *Id.* (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

Support for this deferential approach is found in other contexts—analogous to nonjusticiability—in which the Court has determined that it is poorly positioned to make a statement about the law or has recognized that a different branch has been granted primary responsibility for law-making. One of the more ready examples is embodied in the *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*[109] and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[110] line of cases.[111] There, the Court defers to reasonable interpretations of the law made by the executive branch because Congress has determined that the executive branch, and not the judiciary, is best equipped institutionally to determine what the effect of the law should be in a particular context.[112] This is true even when the Court would draw or has drawn differently the metes and bounds of the law that the agency has been assigned to enforce.[113] Notably, the executive branch, when "law-making" pursuant to a congressional mandate to issue rules and regulations, is still operating in its constitutional capacity to *enforce* the law Congress wrote,[114] much like Congress has been assigned responsibility by Section 5 to *enforce* the provisions of the Fourteenth Amendment. Deference to an institution's line drawing in the course of "enforcement" responsibilities, even if it means the creation of some substantive law, is thus neither an unprecedented nor an unworkable posture for the Court to take.[115]

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[109] 467 U.S. 837 (1984).

[110] 545 U.S. 967 (2005).

[111] *See* McConnell, *supra* note 34, at 184 ("The question in a Section Five case should be whether the congressional interpretation is within a reasonable range of plausible interpretations—not whether it is the same as the Supreme Court's. An analogy may be drawn to the *Chevron* doctrine . . . .").

[112] *See* Smiley v. Citibank (South Dakota), N. A., 517 U.S. 735, 740–41 (1996) ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by the agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (*rather than the courts*) to possess whatever degree of discretion the ambiguity allows." (emphasis added)).

[113] *See Brand X*, 545 U.S. at 983 ("Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.").

[114] *See, e.g.*, J.W. Hampton, Jr. v. United States, 276 U.S. 394, 409 (1928) ("Congress may use executive officers in the application and enforcement of a policy declared in law by Congress, and authorize such officers in the application of the Congressional declaration to *enforce it by regulation* equivalent to law." (emphasis added)); *see also* Julian Davis Mortenson & Nicholas Bagely, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 43) (on file with author) ("When an administrative agency issues a generally applicable rule that regulates private conduct, has it acted in an executive capacity? Under the standard constitutional grammar of the founding, the answer is yes. That's because executive power had an extremely thin meaning: the authority to execute instructions and prohibitions as formulated by some prior exercise of legislative power.").

[115] The fact that the court shies away from the creation of substantive law in the Section 5 context but accepts it as a necessity under *Chevron* serves to underscore the incoherence of drawing a line between the two—and explains why the Court has never been able to articulate a clear division in the first place.

A few notes about the desirability and feasibility of the "rational means" approach in this context are in order. First, critics might counter that the approach above permits Congress free rein to determine the scope of its jurisdiction unbounded by the Court. That objection falls short, however. It is not true that Congress's authority would be boundless. As with Congress's exercise of any of its Article I powers, the Court still "retains the power . . . to determine if Congress has exceeded its authority under the Constitution."[116] Here, that power takes the form of the Court's final say over whether partisan gerrymandering can ever constitute a violation of Section 1 of the Fourteenth Amendment and over whether Congress's proposed solution is a rational means of addressing such gerrymanders. When the Court reviews congressional legislation under the Commerce Clause, or various other Article I powers, we do not say that Congress's authority is "boundless" despite the broad deference the Court affords Congress.

Moreover, the Court has already dismissed a similar objection in the analogous *Chevron* context. In *City of Arlington v. FCC*,[117] in the face of a delegation of lawmaking authority from Congress to the Federal Communications Commission (FCC), the Court explained that it would defer to the FCC's reasonable interpretation of the scope of its own jurisdiction under the authorizing statute.[118] The Court justified this rule by the futility of attempts to distinguish between whether an agency lacks jurisdiction or improperly exercised its authority within that jurisdiction. Writing for the majority, Justice Scalia described the line between jurisdictional and nonjurisdictional questions to be "incoheren[t],"[119] "arbitrary[,] and undefinable"[120] and explained that "judges should not waste their time in the mental acrobatics needed"[121] to distinguish between them. "Once those labels are sheared away," he wrote, "it becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not."[122] That Congress will have some control over the scope of its authority to enforce the Equal Protection Clause in the partisan gerrymandering context, within reasonable limits of the Constitution's ambiguity on the question, raises the same concerns and therefore merits the same resolution.

Second, implementing the *South Carolina-McCulloch* test would not require the Court to simply "rubber stamp" any partisan gerrymandering legis-

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[116] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
[117] 569 U.S. 290 (2013)
[118] *See id.* at 301–02.
[119] *Id.* at 306.
[120] *Id.* at 307.
[121] *Id.* at 301.
[122] *Id.* It is hardly a coincidence that similar arguments may be employed to undermine the coherence of the distinction between "substantive lawmaking" and "enforcement" under Section 5 of the Fourteenth Amendment: both false dichotomies arose out of somewhat arbitrary line-drawing exercises intended to preserve greater judicial authority. *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1949 (arguing that *Boerne* "does not offer a coherent framework for distinguishing between Section 5 laws that unconstitutionally 'interpret' the Fourteenth Amendment and Section 5 laws that merely 'enforce' it").

lation that Congress might pass under Section 5. The "rational means" test is not wholly without bite: In *Shelby County v. Holder*, the Court struck down Section 4(b) of the Voting Rights Act because it was an "irrational" exercise of Congress's enforcement authority under the Fifteenth Amendment.[123] In other words, the Court held that Section 4(b) failed the "rational means" test.[124] In so holding, the Court injected new content into *South Carolina*'s previous formulation of the test. In particular, it explained that departures from the constitutional default-rule that state legislatures will draw legislative districts must adhere to two requirements: they must (1) do justice to the principle of "equal sovereignty" among the states and (2) ensure that the "current burden" placed on the states is tailored to remedy the "current needs" and actual conditions in the states.[125] The Court ultimately determined that Section 4(b) was "irrational"[126] because the Section fulfilled neither condition. Thus, one way of reading *Shelby County* is that it modernized the *South Carolina* test into a "rational means plus" or "rational means with a bite" test. And since I argue that the "rational means" test governs partisan-gerrymandering legislation post-*Rucho*, both components of the *Shelby County*'s conception of "rational means" will need to be met by any future legislation Congress passes on the subject.

A further reason why the rational means test would function as a non-trivial constraint on Congress is that the standard as formulated in *McCulloch* is not merely a test for rationality—it is also a test for *pretext*. That is, under *McCulloch*, the Court is on the watch for instances in which Congress is purportedly exercising one of its constitutional powers but does so with the goal of circumventing some other constitutional limitation on its authority—perhaps an end it does not have the power to pursue.[127] Under this Article's proposal, the Court would be able to police for pretextual partisan-gerrymandering legislation and strike down any effort by Congress to achieve an

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[123] Shelby County v. Holder, 570 U.S. 529, 554, 556 (2013); *see also supra* notes 44–45 and accompanying text.

[124] As I describe above, *Shelby County* left unresolved whether *Boerne*'s "congruence and proportionality" test or *South Carolina*'s "rational means" test applies to the Voting Rights Act. *See supra* note 44 and accompanying text. The Court said only: "*Northwest Austin* guides our review . . . ." *Shelby County*, 570 U.S. at 542 n.1. But *Northwest Austin* famously *declined* to resolve whether the "congruence and proportionality" test or the "rational means" test applies to enforcement legislation under the Fifteenth Amendment. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009). In the end, the Court grounded its ultimate holding in *Shelby County* in the irrationality of Section 4(b). 570 U.S. at 554, 556. One way of reading *Shelby County*, then, is that the rational means test remains applicable to Congress's enforcement powers under the Fifteenth Amendment. But it is also possible that the Court saw an opportunity to kick the can further down the road, determining that it need not decide whether *Boerne* or *South Carolina* applies to the Fifteenth Amendment since Section 4(b) failed even the more permissive "rational means" test.

[125] *Id.* at 542.

[126] *Id.* at 556.

[127] As Chief Justice Marshall explained, "[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

impermissible (that is, otherwise unconstitutional) end using the cloak of gerrymandering reform.

Third, this Article's approach is not outside the Overton window with respect to the current Court such that it could not garner majority support. In fact, openness to the logic of this Article's argument has been indicated from an unlikely source. Consider Justice Alito's concurrence in the recent Fourth Amendment case, *Riley v. California*.[128] *Riley* dealt with the constitutionality of a warrantless police search of an arrestee's cell phone. Because Justice Alito decided he could "not see a workable alternative," he joined the Court's opinion holding that, without a warrant, such searches violate the Constitution.[129] But he added the following caveat:

> While I agree with the holding of the Court, *I would reconsider the question presented here if either Congress or state legislatures*, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, *enact legislation* that draws reasonable distinctions based on categories of information or perhaps other variables . . . .
>
> [B]ecause of the role that [modern cell phones] have come to play in contemporary life, searching their contents implicates very sensitive privacy interests *that this Court is poorly positioned to understand and evaluate* . . . .
>
> In light of [the increased role these devices have come to play in contemporary life] it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts . . . . *Legislatures, elected by the people, are in a better position than we are* to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.[130]

Justice Alito's message in *Riley* is essentially an argument that, where the Court has difficulty drawing coherent or functional distinctions in a constitutional space because of its institutional limitations, it might be appropriate for Congress to step in and for the Court to take its cue from Congress. What's striking about Justice Alito's opinion is his suggestion that Congress's regulation might actually *alter* the Court's substantive determinations about the substance of the Fourth Amendment.[131] This is significant because it unmistakably implicates the scope of Congress's Section 5 authority: because the Fourth Amendment has been incorporated against the states through the Due Process Clause of the Fourteenth Amendment, congressional regulation of the authority of state police to search cell phones, as in

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[128] 573 U.S. 373 (2014).

[129] *Id.* at 407 (Alito, J., concurring in part and concurring in the judgment).

[130] *Id.* at 407–08 (emphases added).

[131] *See id.* ("I would *reconsider* the question presented here if . . . Congress . . . enact[ed] legislation . . . ." (emphasis added)).

Riley, would derive its authority from Section 5. Justice Alito, then, has signaled a break with the Rehnquist Court's skepticism toward Congress's relative institutional advantages—a skepticism that underwrote and embodies much of the Court's Section 5 jurisprudence.[132]

It is unlikely that Justice Alito considered the extent to which this language might have implications for other contexts like voting rights. But his *Riley* concurrence does demonstrate that this Article presents a promising and "on-the-wall"[133] conceptual framework for assessing what happens to Congress's Section 5 authority when the Court has confessed—as it has in the partisan gerrymandering context—that institutional limitations prevent it from determining the precise metes and bounds of a constitutional right.

B. Counterarguments and Responses

The foregoing analysis still admits of two serious counterarguments that are important to address. Crucial to this Article's argument is the view that *Boerne* and *Rucho* interact to create a contextual incompatibility: *Boerne*'s heightened requirement of congruence and proportionality presupposes that the Court can *measure* whether a constitutional violation has occurred in a particular case, but *Rucho* stands for the proposition that any such measurement is impossible for the judiciary to undertake, even though the Court has acknowledged that constitutional violations do occur at some (judicially unknowable) point.

One possible critique of this view is that it overreads *Rucho*, because while the majority may disclaim its ability to pin down the exact contours of a vague category, that does not mean that the Court cannot spot clear instances of a deviation when they occur.[134] To illustrate: Suppose I have been asked by the dean of a law school to develop a mechanism for classifying the top twenty percent of a law school class according to each student's "intellectual excellence." It is perfectly imaginable that I might respond, "I don't feel confident in my ability to write down criteria. That's not to say that there's no such thing as intellectual excellence, or that ordinal differences in intellectual excellence do not exist—only that I don't believe I'm equipped to measure it." Now suppose the university's psychology department were to send me its views on the question—perhaps a checklist to use to "grade" the intellectual excellence of students. If, in response, I were to say, "It would be incoherent for me to pronounce on the validity of this model, since I wasn't able to specify criteria of my own," the dean would certainly look askance at

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[132] *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 34, at 1980; Post & Siegel, *Protecting the Constitution*, *supra* note 34, at 2.

[133] *See generally* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011); Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040 [https://perma.cc/C88F-S5JL].

[134] I am grateful to Kiel Brennan-Marquez and Douglas Spencer for raising this critique and for engaging in thoughtful conversations about my response.

me. That's because, while it might be impossible for me to evaluate whether the psychology department *got it right*, it would not be *impossible* for me to evaluate whether they *got it wrong*, depending on how wrong they got it. If, for example, the checklist included "height and weight" as relevant traits, it would be ludicrous for me to say, "This certainly looks unrelated to intellectual excellence, but I have no choice but to accept it because I've stripped myself of the ability to exercise this sort of judgment." No. Instead, I would be well within my rights to say, "I may not know exactly what intellectual excellence consists of, but it certainly does *not* depend on height and weight."

The problem with this critique is that it misreads my argument. I do not mean to claim through my analysis of *Rucho* and *Boerne* that the Court can never review congressional legislation; rather, I argue that the implication of *Rucho* is that *Boerne*'s congruence and proportionality standard has become impossible to employ in the partisan-gerrymandering context, and instead a different level of deference applies. I claim that there is no way for the Court to evaluate congruence and proportionality because these terms implicate measurement: they require that the Court *measure* the distance between the reach of a legislative proposal and the reach of a constitutional right.[135] But such measurement becomes impossible where the Court has said it cannot determine the precise metes and bounds of a constitutional right. The problem is answering the question, "Congruent and proportional relative to *what*?" Nevertheless, I do believe that the Court can still pass upon whether legislation passes the *South Carolina-McCulloch* test—that is, whether there is a nonpretextual, rational relationship between Congress's proposed remedy and a constitutional violation. To revisit the intellectual excellence analogy above, then, the Court would still be able to say that height and weight are not rational means to measure intellectual excellence, despite the specific definition of intellectual excellence being "nonjusticiable." But the Court would not be able to pass judgment on the psychology department's checklist beyond a cursory review for rationality, since it has said it is ill-equipped to delineate the precise metes and bounds of intellectual excellence. Here, Congress is the institution that is better positioned, because of its proximity to the political process, to "measure" the extent to which the partisan gerrymandering runs afoul of the Equal Protection Clause—that is, when partisan gerrymandering has become "extreme." The Court's role would be to examine whether Congress's proposed remedy is rationally and nonpretextually connected to the equal protection values that extreme partisan gerrymandering offends.

An apt comparison might be drawn to Justice Souter's concurrence in *Nixon v. United States*.[136] *Nixon* upheld a challenge to a Senate rule that permitted impeachment-trial witness examinations to be conducted by a

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[135] *See* Laycock, *supra* note 34, at 746 ("The proportionality part of this standard seems to require an empirical judgment . . . .").

[136] 506 U.S. 224 (1993).

special committee, which would then summarize the evidence for the full Senate to vote on.[137] The Court declined to address the merits of the constitutionality of the rule, instead holding that the meaning of the word "try" in the Impeachment Trial Clause of the Constitution was a nonjusticiable political question committed to the Senate alone to determine—thus, the rule could stand.[138] Concurring with the majority, Justice Souter agreed that the precise question before the Court was nonjusticiable, but argued that judicial review might be preserved under certain circumstances.[139] For example, if the Senate decided that it would "try" impeachments via coin flip, Justice Souter remarked that the Court would surely be able to determine that a coin flip is not a trial, despite the Constitution's commitment of the definition of "try" to the Senate.[140] Justice Souter's view demonstrates that the nonjusticiability of a question can still preserve a limited form of judicial review for legislative actions that are so clearly outside the scope of Congress's powers that they enter the realm of irrationality.

A second possible critique of this Article's analysis goes something like this: *Rucho* stands for the simple proposition that partisan-gerrymandering suits are nonjusticiable because any judicial intervention in such cases will necessarily be seen as an illegitimate intervention into political matters and taint the judiciary. However, if Congress were to move first and pass legislation addressing partisan gerrymandering under Section 5, this legitimacy concern would melt away, since the Court would now not be reallocating power between political parties but instead be conducting the familiar, and legitimate, exercise of passing judgment upon the scope of Congress's powers.

The force of this critique depends on whether *Rucho*'s nonjusticiability finding rests solely on considerations of judicial *legitimacy* or also rests, at least in part, on judicial *competence*.[141] Put another way, are partisan gerrymandering claims nonjusticiable because any line that the judiciary draws will be seen as an illegitimate political intervention by unelected officials, or because the judiciary lacks the proper legal tools to competently determine when partisan considerations in districting go too far? To the extent that *Rucho* is solely about legitimacy, this critique has some force—and, to be sure, several passages in *Rucho* indicate that legitimacy was an important concern for the majority.[142] But the opinion also makes clear that legitimacy

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[137] *Id.* at 226.
[138] *Id.* at 238.
[139] *Id.* at 253-54 (Souter, J., concurring in the judgment).
[140] *Id.*
[141] Scholars have observed in other contexts that when the Court determines that it is unable to delineate the precise boundaries of a vague constitutional right, it is because of concerns about either legitimacy or competence (or both). *See, e.g.*, Nancy Gertner, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585, 1589 (2012) ("Since the Constitution is not clear regarding the metes and bounds of 'cruel and unusual punishment' as applied to imprisonment, the plurality [in *Ewing v. California*, 538 U.S. 11 (2003),] implies that the Court lacks either the competence or the legitimacy to make the decision in most cases.").
[142] For example, at various points the Court writes:

was not the Court's sole concern, and that its nonjusticiability holding independently (if not primarily) rests on a view that the nature of partisan gerrymandering prevents the judiciary from *competently* measuring the metes and bounds of the constitutional right against excessive partisan gerrymandering. Thus, the Court explicitly grounds its nonjusticiability finding in the lack of any "judicially *discernible* and *manageable*" standards for resolving partisan gerrymandering disputes, in addition to prudential concerns about tainting the judiciary with politics.[143] Further passages in the majority opinion underscore the basis of its holding in concerns about competence rather than legitimacy:

- "Courts have . . . been called upon to resolve a variety of questions concerning districting. Early on, doubts were raised about the *competence* of the federal courts to resolve those questions."[144]
- "The 'central problem' is . . . '*determining* when political gerrymandering has gone *too far*.'"[145]
- "Federal courts are not *equipped* to apportion political power as a matter of fairness . . . ."[146]
- "Any judicial decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question beyond the *competence* of the federal courts."[147]
- "Federal judges have no license to reallocate political power between the two major political parties, with . . . no legal standards to *limit* and *direct* their decisions."[148]

- "Any standard for resolving [partisan gerrymandering] claims must be . . . 'politically neutral.'" Rucho v. Common Cause, 139 S. Ct. 2484, 2498 (2019) (majority opinion) (quoting Vieth v. Jubelirer, 541 U.S. 267, 308 (2004) (Kennedy, J., concurring in the judgment)).
- "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 307).
- "Some criterion more solid and more demonstrably met than ['fairness'] seems to us necessary . . . to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking." *Id.* at 2499–500 (quoting *Vieth*, 541 U.S. at 291 (plurality opinion)).
- "Appellees and the dissent propose a number of 'tests' . . . but . . . none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties." *Id.* at 2502.
- "Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role."

Id. at 2507.

[143] *Id.* at 2502 (emphasis added).

[144] *Id.* at 2496 (emphasis added).

[145] *Id.* at 2497 (emphasis added) (quoting *Vieth*, 541 U.S. at 296).

[146] *Id.* at 2499 (emphasis added).

[147] *Id.* at 2500 (emphasis added) (quoting Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012)).

[148] *Id.* at 2507 (emphasis added).

- "No one can accuse this Court of having a crabbed view of the reach of its *competence*. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to *guide* us in the exercise of such authority."[149]

The upshot of this language is such that even if we assume judicial-legitimacy concerns disappear once Congress passes partisan-gerrymandering legislation, an impediment to *Boerne*-style heightened review of the legislation still remains.[150] This is because *Rucho* rests in part—if not primarily—on the belief that the judiciary is *ill-equipped* to measure the extent of the underlying constitutional violation, even though the language of *Boerne* presupposes that such measurement is possible. Because the political fairness questions involved in partisan gerrymandering cases do not admit of precise legal standards that allow the Court to measure the outer bounds of the relevant constitutional violation (here, excessive partisan gerrymandering), it cannot then compare the distance between that boundary and the reach of the congressional statute, as *Boerne* requires.

Conclusion

This Article demonstrates that Congress may regulate state and local partisan gerrymanders under Section 5 of the Fourteenth Amendment, contrary to the conventional wisdom that has reigned since *City of Boerne v. Flores*. I have argued that *Rucho*'s abdication of judicial responsibility for declaring the substance of the Equal Protection Clause in the partisan gerrymandering context makes the *Boerne* framework inapplicable to partisan gerrymandering reform and thereby alters the limits that constrain Congress's powers under Section 5. In place of *Boerne*'s congruence and proportionality requirement, prophylactic and remedial legislation would now be judged under the *South Carolina v. Katzenbach* and *McCulloch v. Maryland* "rational means" test. The increased deference due to Congress in this context would permit Congress to enact tests and standards that the Court has previously considered but declined to adopt because they presented *judicially* unmanageable—but not necessarily irrational or unreasonable—standards. One promising standard would be the "comparator map" approach favored by four Justices in *Rucho*;[151] another might be H.R. 1's requirement that all states draw electoral maps using independent commissions.[152]

To be sure, political headwinds face any congressional effort to reform partisan gerrymandering, particularly for reforms that involve adopting a

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[149] *Id.* at 2508 (emphasis added).

[150] The contents of any congressional solution would thus need to address *both* legitimacy and competence.

[151] *See supra* note 101 and accompanying text. This standard was the first to achieve the support of at least four Justices.

[152] *See supra* note 5.

standard whose immediate effects, and winners and losers, can be calculated and known in advance.[153] While I acknowledge these hurdles, my goal in this Article has been to demonstrate that Congress now has greater latitude than it did pre-*Rucho* to make partisan gerrymandering reform of state legislative districts a reality. Congress has yet to recognize this greater authority: its most recent foray into the partisan-gerrymandering space—H.R. 1—seeks only to regulate congressional districting and does not attempt to reach state-level districts. However, this Article demonstrates that future efforts to revisit comprehensive partisan gerrymandering reform would be legally justified in extending beyond the ambit of the Elections Clause to eliminate extreme partisan gerrymanders of state and local legislative districts.

A final takeaway is that the logic of this Article is generalizable beyond the partisan-gerrymandering context. Since the Court has justified its heightened review of Section 5 legislation by pointing to separation-of-powers considerations rooted in judicial supremacy, by extension *any* nonjusticiable constitutional right protected by the Fourteenth Amendment cannot be subject to the requirements of the *Boerne* line of cases. Importantly, this observation applies not just to rights protected under the Equal Protection Clause, but also to the other substantive provisions of the Fourteenth Amendment and all rights protected by the Due Process Clause—including those provisions of the Bill of Rights that have been incorporated against the states. As a result, this Article raises broader questions about the general applicability and staying power of the *Boerne* line of cases.

[153] *See* discussion *supra* note 20.

Getting to "There": Inter/Intra City Solidarity and Lawyering for Right to Counsel Movements

Jocelyn Hassel[*]

Abstract

The need for a "civil Gideon" has been reiterated and revisited throughout the ongoing urgency of the affordable housing crisis in the United States. As frivolous eviction proceedings are brought against tenants by landlords seeking to "flip" units and capitalize on ongoing waves of gentrification across major urban epicenters, unrepresented tenants suffer due to the disproportionate bargaining power of landlords.

Right to Counsel is but one tool to tackle the affordable housing crisis. By allowing tenants falling under certain criteria to have guaranteed legal representation, tenants are able to fight back against the consequences of the eviction process while also biding time for a collective movement. This larger movement is focused on the eventual outcome of housing as a human right.

The Right to Counsel movement is well underway in major cities across the United States. New York was able to successfully enable Right to Counsel through the direct efforts of tenants organizing. The nuance of a tenant-led movement allowed for legislation and the Right to Counsel rollout to directly abide by the conditions called for by tenants, for tenants. The remarkable difference of a tenant-led movement is a key feature of evaluating how a successful nationwide Right to Counsel movement could sustain itself.

The successes of the Right to Counsel movement in New York can become a framework for larger commentaries on the role of certain players in the movement and how these players were able to fundamentally transform the nature of housing court. In the midst of these players, the role of the lawyer is a hotly contested question. The role of the lawyer must be tool-based and should be structured so that the movement remains tenant-led. This assertion highlights that movement lawyering should not co-opt a tenant-led struggle while still performing essential functions through direct representation, advocacy, and litigation.

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INTRODUCTION

Because I grew up in Queens, I reflect in retrospect on the ways in which my family of immigrants from the Dominican Republic were effectively neglected by landlords. As I encountered procedural defenses and counterclaims in my own legal education, I became aware of the countless claims my *own* family could have brought against many landlords. The unfortunate reality of my own upbringing in Queens, as well as the upbringing of many of my peers was the following: the landlord neglect that we experienced was seen as "business as usual." That is, these conditions were normalized as simply the product of living in New York.

Though I equated these conditions with the nature of "you get what you pay for" while growing up in Queens as a first-generation Dominican woman, immersing myself in legal academia illuminated the true injustice that my communities encountered. Why is crucial legal information such as important defenses not given to the communities that are actively contesting eviction proceedings? Of course, the answer was: the system is inherently built upon scarce access to knowledge. This "knowledge" is predicated on who has power, capital, and wealth. The legal system operates under this paradigm.

During the summer following my first year of law school, I was the Housing Rights Project intern for Queens Legal Services. I was told that I would assist with "Right to Counsel Day." As the concept was explained, I realized that I had no idea that a "civil *Gideon*" did not exist in Housing Court. Just as *Gideon v. Wainwright*[1] guarantees every individual charged with a felony the right to an attorney regardless of ability to afford an attorney, so a "civil *Gideon*" argument asserts that "in many civil cases, the stakes are as high as those in criminal cases, and consequently the concept of equitable access to justice is empty without a recognized right to counsel in these cases."[2] I had perhaps naively assumed that access to legal representation would be an inherent norm for tenants. Wearing a magenta pin with the Right to Counsel NYC Coalition's logo, I approached named tenants in the courtroom and informed them that their zip code fell under the Right to Counsel Program and that they were subsequently eligible to receive legal representation after an intake process. Tenants were, for the most part, unaware that they had such a right available to them. They had either attempted to hire expensive legal representation, or they had come into court *pro se*.

After my first Right to Counsel Day, I volunteered to attend Right to Counsel NYC Coalition meetings. Through the structure of the meetings, I was able to understand an incredibly powerful organizing structure: the Coalition, joined by tenants, lawyers, organizers, students, researchers, academics, and advocates, showed me that the movement was a *collaborative* one that necessitated the resources and capacities of a wide range of actors. Above all, it operated under the ethos that housing is a human right, and Right to Counsel was more than just a legal funding infrastructure.[3]

These Right to Counsel Coalition meetings represented a core element of why Right to Counsel was so successful in New York: it was a movement *led* by tenants. The current model of Right to Counsel organizing utilizes multiple facets of community coalition-building with tenant resistance and advocacy, policy advocacy, and community/movement lawyering. It represented the true notion that, when it comes to tenants' rights, "when we fight, we win."

Right to Counsel is not fully implemented in all New York City zip codes[4], but the idea has steadily gained momentum. This momentum was spurred along by the momentous passing of the Housing Stability and Ten-

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[1] 372 U.S. 335 (1963).

[2] Rachel Kleinman, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1509 (2004).

[3] *See* Andrew Scherer, *Why a Right: The Right to Counsel and the Ecology of Housing Justice*, *in* 2 IMPACT: COLLECTED ESSAYS ON EXPANDING ACCESS TO JUSTICE 11, 11–20 (2016).

[4] *See Oversight Hearing T2020-5733: Implementation and Expansion of Right to Counsel in Housing Court Before N.Y.C. Council Comm. on Justice Sys. and Comm. on Hous. & Bldgs.*, at 2 (Feb. 24, 2020) (written testimony of New York City Bar Association President Juan Maldonado) http://documents.nycbar.org/files/RTChearingWrittenTestimony_2.24.20.pdf [https://perma.cc/X73X-668A].

ant Protection Act of 2019,[5] because of which rent laws became increasingly pro-tenant. The shift in legal frameworks for housing law seems to be a step towards a larger movement: invoking housing as a human right, and using this movement to tackle displacement.

This Article explores the tenant-led movement behind Right to Counsel, and the long-term organizing that led to its mass success. By using the Right to Counsel toolkit[6] created by the Coalition itself, this Article will illuminate the groundbreaking organizing strategies that could serve a blueprint for similar Right to Counsel movements across the United States. Although the Housing Stability and Tenant Protection Act of 2019 played a major role in creating a pro-tenant legal landscape in New York City, the law itself would not have been marked by urgency had it not been for the tactics of the Right to Counsel coalition. Therefore, the Right to Counsel toolkit is one mechanism that directly contributes to policy change.

Part I describes the various impediments within the courtroom that create a pro-landlord landscape and disadvantages pro se tenants in housing court. While instruments like informal tenant blacklists are not a direct product of the court, the utilization of court dockets to deny housing to tenants is one way in which the court system operates to the detriment of tenants, even once their official interaction with the court has ended. Mediation in housing court is also a barrier to tenants' rights, leading tenants to settle into unfavorable agreements that lead them back into the courtroom. Sheer statistical data surrounding who is represented and who faces evictions further highlights the place that Right to Counsel can play in addressing the disparate outcomes of eviction proceedings.

Part II explores the legal landscape that allows for the proliferation of the landlord-tenant power imbalance in the courtroom. The parallel connections drawn between *Gideon* and Right to Counsel would create space for countless advocates to posit that although *Gideon* is nuanced to the criminal (in)justice system, a Right to Counsel reinforces the same values of *Gideon*, but in a housing context. This argument, combined with arguments about Due Process and Equal Protection, leaves much room for creative policymaking on why such legislation should be enacted to support tenants. The push to argue that Right to Counsel in a housing context should be a constitutional right is one that has been contested by actors such as landlords; due to the precarity of a constitution-oriented argument, this Article focuses more on the policy justifications that were later codified into law.

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[5] Housing Stability and Tenant Protection Act of 2019, ch. 36, 2019 Laws of N.Y. 154; *see also* Denis Slattery, *New York Enacts Pro-Tenant Rent Law Overhaul as Landlords Plan Legal Challenge*, N.Y. DAILY NEWS (June 14, 2019), https://www.nydailynews.com/news/politics/ny-rent-regulations-tenants-landlords-overhaul-20190614-ezcbph2fvbf2bn4vmfg5aetfay-story.html [https://perma.cc/JU4S-XYDH].

[6] *See* RIGHT TO COUNSEL TOOLKIT, https://www.rtctoolkit.org/ [https://perma.cc/XM92-ZBB5]. The "Right to Counsel Toolkit" constitutes the majority of the Right to Counsel NYC Coalition's website.

Part III provides a bird's eye view of the system of power that creates the disparities we see in Housing Court. On a systemic level, the prevalence of landlord-corporate power is able to reinforce itself through the institutionalization of racial capitalism. I explore what racial capitalism signifies in the affordable housing crisis and how the nation's housing regime is governed by selective disenfranchisement of communities of color.

Part IV explores the demands of the movement and the factors that played into the vitalization of a tenant-led movement in a major urban area. These demands and factors will touch upon the strategic campaign tactics leveraged by Coalition actors to conduct effective outreach and apply pressure for a successful victory in New York City. It is important to note that the coalitions established for Right to Counsel are not *only* devoted to Right to Counsel. Rather, these coalitions are groups of organizers set on a framework of housing justice, where Right to Counsel is but one of many pit stops.

Part V highlights the various tactics that the Right to Counsel movement utilized in pushing back against the endless structural elements that sought to uphold the status quo of inaccessible affordable housing. These tactics involved creative, visual means of honoring tenant narratives while highlighting the egregious practices of landlords throughout New York City and boosting accountability. Although the tactics used by the Right to Counsel Coalition were tailored to the localized interests of communities in New York City, such tactics can and should be leveraged by other coalitions outside of New York City. Other coalitions can utilize the Right to Counsel NYC movement's tools to address their own local housing law, policy, and actors.

Part VI posits lingering models of social change espoused by the Right to Counsel movement. In employing a movement lawyering model, I assert that lawyers must resolve not to disrupt the importance of a tenant-led movement and ought to imagine their role as more of a "tool" as opposed to becoming centralized key players in radical coalition-building.

In writing this Article, I do not intend to serve as a spokesperson for the movement. That is, as someone who had the honor of viewing Right to Counsel meetings through my short-term presence at Queens Legal Services, I was not a part of the long-term movement to bring such change to the nature of housing law. Rather, I write these reflections and observations as a Queens native humbled and inspired by the on-the-ground movements that have combated the displacement of thousands of communities of color across each borough. By putting forth these reflections, I hope to present an alternative lens that will propel thoughtful critiques of the role of the lawyer and how a remodeling the role of the lawyer can help, rather than systematically harm.

I. The Courtroom And Disproportionate Bargaining Power

In providing the backdrop of systemic forces and other underlying circumstances that necessitate Right to Counsel, a review of the current courtroom landscape is appropriate. The impediments that the current system poses to tenants' rights demonstrate how a "civil *Gideon*" provides a meaningful opportunity for tenants to emerge out of the exhaustion of Housing Court with the conviction that they can fight for their rights.

In cities like New York, it is abundantly clear that Housing Court is a site of mass confusion: tenants are often demoralized by Housing Court's ability to systematically strip them of their nuanced lived experiences in order to produce speedy decisions issued by a judge overloaded with an extensive docket.[7] The process on its face is not only demoralizing, but it also creates a setting where tenants have to compound the shame associated with the eviction process with dehumanization by the courtroom's own infrastructure.[8]

There are many bureaucratic barriers that prevent tenants from equitable access to Housing Court. Tenants must jeopardize their own employment in order to appear in court and prevent default. They do not receive sufficient interpreter services. These factors, along with the pure volume of Housing Court caseloads, make it clear that Right to Counsel could provide foundational assistance to tenants already burdened by the severe systemic inequality of the courtroom process.

Many of the courtroom conditions that create hardships for tenants, however, are not actively condoned by the courtroom itself: many of these conditions are the material results of the leverage that landlords and their allies harbor within. This disproportionate bargaining power already presents immense difficulty for tenants looking to have their "day in court" and to present their own defenses and motions in front of a judge. This unequal footing means that Right to Counsel would provide a form of representation that can slowly destroy the hurdles that tenants face daily in housing court.

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[7] *See* Harvey Gee, *From Hallway Corridor to Homelessness: Tenants Lack Right to Counsel in New York Housing Court*, 17 GEO. J. ON POVERTY L. & POL'Y 87, 87 (2010) (noting that New York City's Housing Court, at the time of publication, dealt with more than 300,000 new cases per year and stating that "Housing Court judges in New York City handle more cases than their counterparts in all federal district courts combined").

[8] *See id.* at 92–93. (noting that "[t]he combination of massive caseloads, litigants largely unfamiliar with the legal process and limited judicial resources has resulted in an environment that more closely resembles a hospital emergency room than a court"). Even if a right to counsel would theoretically raise the possibility of an increase in dockets, the outcome of such an increase is leveled out by the ability for tenants to stand against the mass confusion of the proceeding and be able to argue their own defenses and claims with the additional help of a lawyer.

A. Tenant Blacklists

Evictions are notably harmful not only because of their displacing effects, but also because of the long-term stigma that follows the proceeding in the form of an extensive paper trail. A judgment entered against a tenant and in pursuance of a full-scale eviction shows on credit reports.[9] The effects of evictions on one's credit and ability to take out loans, apply for jobs, and other essential opportunities for a standard quality of life are often debilitating.

However, even if a tenant is not evicted, the very fact that they were involved in a court proceeding can negatively affect their lives. Landlords often use courtroom dockets to effectively create "tenant blacklists" which landlords utilize as a screening device in deciding who can and cannot have access to fair, affordable housing.[10] Tenants can be included on a blacklist regardless of the outcome of the summary process proceeding - the existence of the docket itself remains a "red flag" for landlords. Even if the outcome of a court appearance were in the tenant's favor, the publicly listed appearance itself is often looked up negatively by landlords who will often take housing court appearances as signs of "unruly tenants" or tenants who are assumed to not pay rent on time. A simple mark of appearance on public records goes a long way in creating assumptions and biases that effectively bar tenants from fair access to housing. Although the court does not condone the use of court dockets as a tenant screening/blacklist service, the practice is still rampant and unchecked. In fact, the misuse of such personal data to predict consumer behavior is a larger problem of capitalism and affects the functionality of the legal system. Even if the existence of tenant blacklists is not "systemic" insofar as it is not sanctioned by the court, the ability for landlords to gather this information and utilize it becomes a tool in systemic displacement.[11]

The use of docket lists as a means of creating an accessible "tenant blacklist" device for landlords is an example of the existence of a surveillance regime. The digitization of court appearances makes it easy for landlords to simply search a tenant's first and last name in housing court.[12] The surveillance of tenants in housing court becomes an extension of the role of capitalism in influencing a landlord's decision. Even if the tenant is able to settle the claims against them, and even if the tenant is able to attain what they believe is a favorable outcome, landlords nonetheless bar tenants from access

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[9] *See* Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1346 (2007).

[10] *See* Esme Caramello & Annette Duke, *The Misuse of MassCourts as a Free Tenant Screening Device*, BOS. B.J., Fall 2015, at 15, https://bostonbar.org/docs/default-document-library/bbj-fall-2015-vol59-no4.pdf [https://perma.cc/5UBK-GY5S].

[11] As of June 2019, the Right to Counsel Coalition in NYC was able to have tenant blacklist practices banned, but landlords' informal use of this information is still entirely possible. *See* Brian Bieretz, *A Right to Counsel in Eviction: Lessons from New York City*, HOUSING MATTERS (Dec. 31, 2019), https://housingmatters.urban.org/articles/right-counsel-eviction-lessons-new-york-city [https://perma.cc/AWF7-TJ8V].

[12] *See* Caramello & Duke, *supra* note 10, at 15.

to units purely because tenants have taken the initiative to become involved in the legal process to fight their own displacement.

It is clear that tenants entering the court are already pitted against a system that seeks to further jeopardize access to fair, affordable housing. If tenants continue to deprived of fair access to housing due to informal tenant blacklists and screening devices, tools such as Right to Counsel allow this discriminatory practice to be challenged. Indeed, it was precisely the advocacy of organizers and lawyers in the movement that brought an end to the use of tenant blacklists in 2019. Even if this practice is still utilized in innocuous ways, the Coalition's work to tackle other forms of inaccessibility that tenants face in Court shows that continually contesting such practices is an essential part of sustaining the Right to Counsel.

B. Mediation in the Courtroom

Mediation is a way to silo landlord-tenant disputes in order to seek outcomes without the need for a judge and/or jury. Courtroom dockets in housing court are often so congested that judges will encourage parties to engage in mediation prior to bringing a motion before the court. Some judges will refuse to hear a motion before the parties have tried mediation, even if parties are adamant on arguing their case, with the justification that parties should at least be open to mediation beforehand. Mediation as it exists within the realm of alternative dispute resolution has a breadth of applicable benefits and drawbacks to those who seek to use it as an alternative to the adjudicative process.[13]

Parties often pursue mediation as a way to mitigate potential court cases associated with litigation. Because they may avoid the potentially unpredictable rulings that a judge may determine, parties may view mediation as a venue in which they can assume more agency over the outcome of a dispute.[14] Additionally, mediation can be perceived as less reliant on legal doctrine and precedent. Another benefit of mediation and alternative dispute resolution more generally is its fulfillment of the desire to "vent."[15] Additionally, mediation provides the ability to tailor an agreement to the exact needs of the tenant as opposed to relying on the unpredictable whims of a judge.[16] Mediation is often seen as a "faster and much cheaper resolution to

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[13] *See generally* DAVID A. HOFFMAN ET. AL., MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS (1st ed. 2013). Hoffman discusses advantages and disadvantages of mediation as it relates to the general realm of alternative dispute resolution. *See id.* § 1.8.

[14] *See id.* (describing the advantages of mediation, which include cost savings, privacy, and preservation of ongoing relationships).

[15] *See* JENNIFER E. BEER & CAROLINE C. PACKARD WITH EILEEN STIEF, THE MEDIATOR'S HANDBOOK 87 (rev. & expanded 4th ed. 2012).

[16] *See* Gary Allen, *Using the Court System, in?* LEGAL TACTICS: TENANTS' RIGHTS IN MASSACHUSETTS 327, 332 (Annette R. Duke ed., 8th ed. 2017), https://www.masslegalhelp.org/housing/lt1-chapter-14-using-court-system.pdf [https://perma.cc/LZ3S-97H7].

problems."[17] Mediation could eliminate extensive fees associated with discovery and landlords' counsel billing. It could also ensure that tenant do not have to take time off from work and other commitments in order to prioritize housing court. Another advantage involves the notion that mediation could provide "an opportunity to repair the often very personal relationships between landlords and tenants."[18] This relationship-oriented advantage could be compelling for tenants who might want to stay in their unit but had one issue with payment, or for tenants whose landlords are also coincidentally family friends or even family.

Despite these advantages, the drawbacks of mediation are plenty. The principal disadvantage that reigns in the world of housing court mediation is that tenants may not be on "equal footing" with their landlord and may subsequently be unable to negotiate a favorable agreement.[19] Even in a seemingly innocuous sense, the presence of a "strong personality," be it the persistent opposing counsel who attempts to prod tenants to accept unfavorable terms that are loaded with jargon, or the landlord who displays a haughty reaction to the process, may make it impossible to attain a favorable agreement.[20] Although tenants are more than capable of holding their own during interpersonal encounters of any kind (and advocates for increasing legal representation should not say otherwise at risk of sounding extremely paternalistic), the presence of another party with the tenant can remind the landlord and his attorney that the tenant is not alone and possibly "negate" the bravado of landlord's attorney. Many tenants already come well-prepared to shut down landlord attorney's legal quips and larger use of "legalese" to intimidate them. With a Right to Counsel, however, even more tenants may be able to distribute the labor of arguing certain legal claims and making certain decisions that may be a burden to make on one's own.

Another glaring disadvantage involves the logistical barriers of resource allocation to tenants. Requesting an interpreter, for instance, can often be a painstaking process. Given the sheer volume of dockets in civil court, the limited availability of interpreters for mediations may encumber a tenant's ability to mediate their own claims. Even though tenants have the right to request an interpreter, there have indeed been instances where landlords try to convince tenants that there is no need for an interpreter.[21] All of these factors create an environment where tenants feel compelled to accept an agreement that is contrary to their best interests.

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[17] *Id.*
[18] *Id.*
[19] *See id.*
[20] *See id.*
[21] This claim is based on my own advocacy in Housing Court in Boston. In one instance, a landlord attorney attempted to get a tenant to agree to a payment plan. When I had asked the landlord's attorney if I could go over the agreement with the tenant and ensure that it was proper and that they understood it (the tenant was Spanish-speaking), the attorney was perplexed—if not visibly annoyed. There also have been a handful of times when tenants came to volunteer student attorneys and told us of an instance where they did not know what they had signed onto, and they were not given an interpreter.

Owen M. Fiss's *Against Settlement* outlines core policy-based arguments that apply to the shortcomings of mediation in housing court.[22] An inequitable bargaining process will create an environment where "the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant."[23] Settlement is easily influenced by these disparities, as: 1) the party with less means "may be less able to amass and analyze the information needed to predict the outcome of the litigation," which could be remedied by some form of legal advice 2) the tenant may be "induced to settle as a way of accelerating payment" and 3) the tenant may be forced to settle because of the ways in which opposing counsel may impose additional expenses, along with the sheer financial burden of litigation alone.[24] Mediation also prevents tenants from experiencing their "day in court," especially since judges often requires mediation as a pre-requisite to court.

If tenants engage in mediation without representation while landlords retain legal counsel, landlords would possess disproportionate bargaining power, which presents a barrier to favorable outcomes within housing court. It would be reductionist to state that mediation provides *no* positive benefits to tenants. However, the lack of positive benefits for tenants stems from the structural deficit of legal representation and holistic services provided to tenants in housing court. If tenants were able to attain the full-scale representation that rights such as Right to Counsel would institute, there is a strong possibility that tenants would be able to attain favorable agreements through mediation. Mediation is and could be a positive venue for tenants, but until the severe disproportionate bargaining power inherent to housing court is addressed, the current normative outlooks on mediation in housing present glaring disparities in access.

C. Beyond the Bureaucracy

Inaccessibility is sanctioned not only by the bureaucratic shortcomings of housing court, but also by the lack of implemented policy recommendations that would alleviate congestion. The first of such policy recommendations is, of course, a Right to Counsel—but the Right to Counsel is but one tool. Policy recommendations gathered by the community and for the community have already embodied the legal critiques of mediation and of tenant blacklists, and much more.

In March 2013, Community Action for Safe Apartments (CASA) and the Community Development Project created a report titled *Tipping the Scales: A Report of Tenant Experiences in Bronx Housing Court*.[25] This report

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[22] *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J., 1073, 1075 (1984).
[23] *Id.* at 1076.
[24] *Id.*
[25] COMTY. ACTION FOR SAFE APARTMENTS & COMTY. DEV. PROJECT, TIPPING THE SCALES: A REPORT OF TENANT EXPERIENCES IN BRONX HOUSING COURT (2013), https://www.rtctoolkit.org/docs/2/Report-CASA-TippingScales-full-201303.pdf [https://perma.cc/9S6X-MU8V].

was incredibly significant not only because of its exhaustive policy recommendations and empirical data, but because it also relied on the power of *tenant narrative* to show that systemic barriers were prevalent across the board. The report noted that almost eighty-five percent of tenants reported that "no one told them that they had the right to object to legal fees," while fifty-six percent of tenants reported that "no one explained their options if the landlord did not make repairs as promised in the agreement."[26]

CASA's organizing work does not only illuminate the nitty gritty details of bureaucratic shortcomings to legal processes. Rather, the report discusses basic shortcomings of inaccessibility in the courtroom that are often taken for granted or overlooked by those in positions of power. The report highlighted the pervasive lack of assistance from Bronx Housing Court personnel.[27] The report noted that, out of the tenants who participated in the project: "[fifty-four percent] of tenants were NOT helped by court personnel to get to the proper place in the court building; [fifty-three percent] of tenants reported that court personnel, including judges, did NOT explain rules or court procedures to them; [and] [d]uring judge observations, two-thirds of the courtrooms did not have any rules and procedures posted."[28]

The report's most highlighted policy recommendations included the following: increasing resources for tenant representation, requiring court attorneys to be present at negotiations, requiring judges to fully allocate stipulations before they are signed, requiring all court personnel to wear clear and visible IDs, improving quality of language access, improving procedural information given to tenants and information concerning rights, increasing information resources for tenants, providing childcare, and passing legislation to create a Repair Enforcement Board.[29] Although reform in the courtroom will not completely remove the complexities and emotional difficulties of going through housing court, addressing and naming these widespread barriers will allow advocates, organizers, lawyers, and other actors to be more proactive in understanding how the courtroom is not exempt from enabling forms of harm. As the courtroom is enabling injustice, the work of community organizations and coalition-building will allow for a truly impactful movement of demanding accountability, transparency, accessibility, and reform for those who rely on courtroom processes to maintain dignity and livelihood in a capitalist society.

II. Setting the Stage for Right to Counsel

The case to be made for Right to Counsel is fundamentally tied to the larger movement of housing as a human right. Every individual is deeply aware of the significance of housing to one's sense of identity, wellbeing, and

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[26] *Id.* at 14, 18.
[27] *See id.* at 11.
[28] *Id.*
[29] *See id.* at iii–iv.

livelihood. Housing is not an isolated issue. On the contrary, housing is central to other economic, social, and cultural rights.[30] Housing and prison abolition movements, for instance, go hand in hand: as formerly incarcerated individuals are unable to access affordable housing, a movement for prison abolition is a movement that remains tied to housing justice.[31] Housing and education are connected to wellbeing, as the quality of a child's home life and access to stable, affordable housing is directly tied to performance in school. Our collective narrative of the importance of a "house versus a home" highlights the conclusion that home is directly correlated to sense of belonging, which informs how we navigate our daily lives.

The right for an individual to maintain their human dignity is inherently tied to the right to housing. For so many social justice advocates, the notion that housing should be a human right is intuitive. However, because our nation views housing as "a commodity to be determined primarily by the market,"[32] housing as a human right would disrupt an existing model so heavily entrenched and reliant on profit before people. To say that housing is a human right, therefore, is to challenge an entire system—a system that landlords and corporate entities will fight to preserve. Yet, even though corporate regimes challenge the idea of housing as a human right, many legal practitioners nevertheless champion the Right to Counsel, finding the absence of such a right to be contradictory to basic jurisprudence.[33]

The reason that Right to Counsel is referred to as a "civil *Gideon*" is precisely because of its symmetry to the intent behind *Gideon v. Wainwright*.[34] As *Gideon* guaranteed every individual charged with a felony the right to an attorney regardless of their ability to afford one, a "civil *Gideon*" argument asserts that "in many civil cases, the stakes are as high as those in criminal cases, and consequently the concept of equitable access to justice is empty without a recognized right to counsel in these cases."[35] The invocation of *Gideon* has been a strategic means of highlighting that since a model of legal representation for indigent individuals already exists, a civil model is in the realm of jurisprudential possibility.[36]

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[30] *See* Martha F. Davis et al., *Introduction to the Symposium on Bringing Economic & Social Rights Home: The Right to Adequate Housing in the United States*, 45 COLUM. HUM. RTS. L. REV. 732, 732–37 (2014).

[31] Individuals with "criminal" records have dealt with constant systemic barriers to accessing vouchers through Section 8 programs, including overall individual biases of landlords who may openly discriminate against formerly incarcerated individuals on account of their record.

[32] ERIC TARS, NAT'L LOW INCOME HOUSING COALITION, HOUSING AS A HUMAN RIGHT, at 1-14 (2017), https://nlihc.org/sites/default/files/AG-2017/2017AG_Ch01-S06_Housing-Human-Right.pdf [https://perma.cc/96LQ-SFRK].

[33] *See generally* Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699 (2006).

[34] *See* Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963).

[35] Kleinman, *supra* note 2, at 1509.

[36] *See* John Whitlow, *Gentrification and Countermovement: The Right to Counsel and New York City's Affordable Housing Crisis*, 46 FORDHAM URB. L.J. 1081, 1117 (2019). According to Whitlow, *Gideon* and a "civil *Gideon*" are "rooted in dignitary considerations." *Id.* However, a right to counsel for housing carries more of an emphasis on positive outcomes in court, as

Arguments for Right to Counsel have been compelling insofar as they provide a viable framework to suggest that counsel for indigent tenants is legally permissible.[37] For instance, a rational basis test under an Equal Protection analysis is easy for a government actor to satisfy, should the following prerequisite exist: "[I]f a law neither burdens a fundamental right nor targets a suspect class, [a court] will uphold the legislative classification so long as it bear a rational relation to some legitimate end."[38] If a strict scrutiny analysis would be applied under the hesitation that the legislation would "burden" a right or discriminate against a suspect classification, an argument would have to made that would prove "either that the assistance of council is a fundamental right, or that discrimination based on wealth should be considered a suspect category."[39]

In New York City, other legal arguments have been added to basic Equal Protection analyses. Article XVIII of the New York State Constitution mandates that: "[t]he aid, care, and support of the needy. . . shall be provided by the state."[40] Judges even have direct agency in deciding how a right to counsel could be instituted in their own courtroom: Article 11 of Civil Practice Laws and Rules gives judges the "power to assign counsel to civil litigants who have sought leave to proceed as a [low-income] person when appropriate."[41] A Due Process analysis could be boiled down to a procedural argument: a tenant's property and liberty interests are at stake in an eviction proceeding, and the tenant therefore should be entitled to legal representation.[42]

A. The Policy Argument for Right to Counsel

There is a wealth of policy-based justifications for why Right to Counsel could have an enormously positive impact beyond tenants who are seeking equitable access. Harvey Gee notes that "landlords' knowledge that tenants would have counsel would probably encourage resolution rather than encourage protracted litigation. Attorneys are interested in efficient adjudications and saving their clients' money."[43] Judges and clerks also lament about the congested courtroom dockets that create the same conditions

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opposed to just due process. *See id.* Whitlow also notes with important consideration that right to counsel is in "contention with private power," and not just public power. *Id.* at 1118.

[37] *See* Kleinman, *supra* note 2.

[38] *Id.* (quoting Romer v. Evans, 517 U.S. 620, 631 (1996) (citation omitted)).

[39] *Id.* at 1509–10.

[40] Gee, *supra* note 7, at 99 (quoting N.Y CONST. art. XVII, § 1).

[41] *Id.* (quoting N.Y. C.P.L.R. 1102(a) (McKinney 2008)).

[42] *See* Kleinman, *supra* note 2, at 1511–12; *see also* Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 561 (1988). Scherer's use of a liberty/property interest analysis is in response to *Mathews v. Eldridge*, 424 U.S. 319 (1976) (presenting a balancing test in determining due process for loss of property, which includes an analysis of the private interest that will be affected, the risk of erroneous deprivation of the interest, and the government's interest).

[43] Gee, *supra* note 8, at 100.

preventing tenants from having their narratives heard with respect and dignity. By instituting a Right to Counsel, which could disincentivize landlords from filing evictions, courts could one day reach a point where they operate less like "eviction mills" and more in a way that harbors "greater civility and greater respect of tenants' rights across the board."[44]

B. Criticisms of Right to Counsel

The long movement to bring Right to Counsel in so many cities begs the question: *why* has it taken so long for our decision makers to pass such legislation in hotspots like New York City? Many already know the answer: allowing such a program would fundamentally change the nature of Housing Court. Those who benefit from the status quo of inaccessibility would vehemently oppose such a change. Arguments made *against* Right to Counsel range from the "high" government cost, to the "high" cost to landlords, to increased incentives to litigate.

Although Right to Counsel advocates emphasize that "the government interest is served by the provision of counsel to indigents and increased equality with respect to access to justice," critics of Right to Counsel rely on the belief that "the financial cost to the government of providing legal services might arguably outweigh other government interests."[45] These critics also foresee that the provision of legal services could lead to "the revocation of any number of rights" when resources are scarce, such as in times of fiscal crisis.[46]

On the issue of cost, critics point to the burdens that landlords would face in response to a Right to Counsel. In a 1973 study on the effects of legal representation for indigent tenants in eviction proceedings in New Haven, John Bolton and Stephen Holtzer concluded the following:

> [T]he time differential created by lawyers' zealous representation of tenants puts financial burdens on landlords. Landlords facing tenants represented by counsel have increased legal fees of their own, and they do not receive rent from tenants pending the outcomes of these hearings. These costs . . . are then passed on to other tenants in the form of rent increases and poorer quality in housing conditions.[47]

This assertion that the cost of legal representation for all indigent tenants would paradoxically lead to poorer quality of living for indigent tenants, however, ignores the number of instances where eviction proceedings are halted or completely stopped due to advocacy. In situations where the proceeding is successfully settled or cured, the alleged detrimental effects

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[44] *Id.*

[45] Kleinman, *supra* note 2, at 1520.

[46] *See id.*

[47] *Id.* at 1521–22 (citations omitted) (discussing John Bolton & Stephen Holtzer, *Legal Services and Landlord-Tenant Litigation: A Critical Analysis*, 82 YALE L.J. 1495 (1973)).

articulated by Bolton and Holtzer are overstated.[48] In addition, those who argue that Right to Counsel would financially burden landlords largely ignore the reality that a Right to Counsel aims to ameliorate the already inherent disproportionate bargaining power between landlords and tenants. In other words, a Right to Counsel would level the playing field to some extent, and in the case of small landlords without such access, a Right to Counsel would perhaps provide tenants an opportunity for mediation and other forms of compromise that can prevent a long proceeding.

Finally, critics assume that the presence of a Right to Counsel would create an "overly-litigious society."[49] Namely, tenants would bring "frivolous claims" or put forth "unmeritorious defenses."[50] This argument fails because tenants do not begin eviction proceedings, so the assertion that they would bring forth frivolous claims ignores the structure of eviction cases.[51] Additionally, such a contention ignores the obligations and duties of the lawyer in this model—based on the rules of professional conduct, lawyers are advised not to litigate frivolous claims. Ultimately, this fear of an increased "incentive to litigate" ignores the fundamental purpose of a right to counsel: it is a means for tenants to have a *defense* mechanism against the possibility of displacement and houselessness.

All of these arguments against Right to Counsel simply belie a hesitation and unwillingness to be more intentional in fighting the underlying systemic forces that have allowed such disparity to exist. The hesitation is the result of a reactionary politic that does not view the courtroom as a site for building tenant power. Right to Counsel would mean that courts would be forced to acknowledge the ways they have allowed landlords to manipulate the legal system to their advantage and would have to dramatically alter themselves in response to tenant demands.[52]

C. Addressing Lingering Criticisms of Capacity of Right to Counsel as Social Change

Right to Counsel guarantees tenants the right to full legal representation while enduring the trauma of an eviction proceeding. The tool of Right to Counsel, which provides tenants with every possible resource to maximize the chance of preventing displacement, is of course one part of a larger process of tackling mass displacement and landlord-corporate power. However, lawyers and legal professionals should take care to avoid viewing legal repre-

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[48] *See id.* at 1522–23.

[49] *Id.* at 1523 (citing DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 253, 727 (2001)).

[50] *Id.*

[51] *See id.*

[52] Perhaps the system itself is already designed to do what it has been doing. Invited by the Harvard College Project for Justice, Yusef Salaam remarked that "criminal justice reform" is a misnomer because the system is "doing exactly what it was designed to do," which is to sustain a prison-industrial complex. Yusef Salaam, "When They See Us: A Conversation with Dr. Yusef Salaam," (Oct. 22, 2019).

sentation itself as the sole solution to mass displacement. Lawyers who operate under such a limited understanding of the movement will not interrogate the larger structural inequalities present in the housing justice landscape.

John Whitlow's *Gentrification and Countermovement: The Right to Counsel and New York City's Affordable Housing Crisis* explains many of the critiques of an over-emphasis on Right to Counsel.[53] Whitlow cautions against viewing representation as a remedy to structural racism and other "isms" by pointing to Paul Butler's argument in *Poor People Lose: Gideon and the Critique of Rights* that "an over-investment in rights [in this context] diverts attention from necessary political-economic and racial critiques of the criminal justice system, as well as the critical solidarity-building and organizing efforts that are required to change it."[54]

By naming the potential pitfall of losing sight of the underlying political-economic and racial critiques of the affordable housing landscape, Whitlow also leaves space for a complementary perspective of the benefits of such intentional legal rights-oriented movements championed by individuals like Kimberlé Crenshaw:

> [S]ocial movements have deployed legal rights as a central organizing feature, insofar as the use of a rhetoric of rights becomes a potent movement-building act for people who have been constructed as right-less. In addition to rights signaling a sense of belonging to those who have been excluded from the body politic, a discourse of legal rights can mobilize group action, as well as provide an agenda for group mobilization.[55]

Those who pinpoint certain legal rights as the resolution to a larger systemic issue will fail to see the underlying structural frameworks that allow such systemic issues to exist. At the same time, those who discount the importance of a legal rights-oriented movement are also perpetuating harms. So often, critiques of rights-oriented movements are made by those who enjoy positions of privilege and do not realize that having access to legal representation is indeed a massive win for disenfranchised communities who are already at a severe disadvantage in the court system.[56] Indeed, Whitlow recognizes the shortsightedness of such perspectives by offering the powerful perspectives of Susanna Blankley:

> [T]he RTC Coalition sees Housing Court as a piece of a broader political-economic puzzle that is structured by deep-seated power

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[53] Whitlow, *supra* note 36.

[54] *Id.* at 1119 (discussing Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2196–97 (2013)).

[55] *Id.* at 1121 (discussing Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1365 (1988)).

[56] Of course, using the "master's tool" is never a truly radical means of enabling social change. At the same time, however, allowing for the possibility of tenants to be able to even *have* the option of legal representation is perhaps better than no representation at all.

> imbalances. For the RTC Coalition, the right to counsel is a means to protect tenants from eviction, although that is important. It is a tool to help subordinated people articulate a collective narrative of their systematic mistreatment by a legal system that favors landlords, in a political economy dominated by real estate. Through the expansive framework of the right to counsel that is deployed by the RTC Coalition, tenants come to see their grievances as commonly held, and they can consequently build solidarities that enhance their organizing capacity.[57]

It is crucial to recognize the power of collective narrative as an organizing strength and as a form of solidarity-building for larger movements within housing justice. The ability for tenants to speak their truth, to live with dignity, and to be able to fight back against landlord attempts to strip them of their livelihood is a powerful ability indeed—and one that ought to be protected within the Right to Counsel movement. One must simply return to the values underlying Right to Counsel and its role in the fight for affordable housing: housing should be a human right, and every tenant should be able to enjoy the values of home that are prominent within our nation's social fabric.

Hesitation surrounding Right to Counsel is part and parcel of the underlying structural issues that sustain inequities within the current system. Part III will touch upon these structural and systemic inequities that have spurred organizers to action.

III. Racial Capitalism and the Affordable Housing Crisis

The call for Right to Counsel is inextricably linked to the rise of gentrification and increasing cost of living for historically marginalized communities. In New York City, low-income communities of color face the brunt of gentrification as transplants and non-native New Yorkers move to the city. The discourse on gentrification and its impact on the accessibility of affordable housing has been at the forefront of urban law and policy throughout major cities.

The history of evictions and the nature of the power imbalance that lends to landlord-corporate power is linked to access to wealth, capital, and privilege. These connections are legitimized by current legal regimes. In property law, for instance,[58] the definition of what is deemed "valuable"[59] and

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[57] *Id.* at 1129 (discussing Susanna Blankley, *The Right to Counsel Is an Important Victory*, Socialist Worker (June 25, 2018), https://socialistworker.org/2018/06/25/the-right-to-counsel-is-an-important-victory [https://perma.cc/2WQW-TQKW]).

[58] *See generally* Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993).

[59] *Id.* The dehumanization of such subjects in order to assign them "value" as means of production to fund white profit has remained clear with respect to chattel slavery as the bedrock of property law. I bring Harris's scholarship to remind that the nature of property law is not a neutral matter: it was intentionally built as a project of maintaining the white supremacist

who is able to own property[60] have been directly tied to a common system of disenfranchisement that has burdened communities of color through the history of the United States.

The phenomenon of gentrification in New York City has stretched from Brooklyn all the way to 125th Street. The association of Brooklyn with hipsters and the common adage among communities of color, "there goes the neighborhood," both speak to this fact. As a result of gentrification, the material landscape of the city has changed: neighborhood bodegas[61] that reached the same age as many of the neighborhood elders either shut down or remodeled to cater to the vegan, gluten-free diets of newly arrived transplants. Costs of living that were already insurmountably high skyrocketed in response to a massive influx of students, start-up tech company employees, and freelancers consuming new urban frontiers as material for their art form.

Although discourse on gentrification is not new, it is crucial to point out underlying systems of power that unite with gentrification to produce systemic marginalization of low-income tenants of color. Such systems of power are not only the result of market-driven factors, but also of ascribing normative societal value to whiteness. In saying this, I primarily would like to draw attention to not only what makes gentrification brutal for low-income communities of color (particularly Black communities), but also to why neoliberals legitimate gentrification. Neoliberals and liberals alike see gentrification as "the inevitable" and thus condone their own movement into areas where low-income communities of color are facing rapid displacement. Liberals and neoliberals are unexpected allies in condoning and benefitting from the displacement and rapid transformation of Black and brown communities. Even if one may harbor good politics, at the end of the day, displacement is a bipartisan project.

Rather than repeating the oft-discussed historical narrative of the affordable housing crisis, which includes the history of predatory lending[62] and

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notion of racial subordination. To discuss housing, which is a property law issue, is to remind ourselves that this conversation is tied to racial justice.

[60] Harris also argues that whiteness and property both share a "right to exclude," and that whiteness as property has evolved to become a "legal legitimation of expectations of power and control" that "enshrine the status quo" through a codification of white privilege. *Id.* at 1714–15. The "visibility" of whiteness even in space and place is precisely how gentrification is able to become a successful initiative by an elite seeking to completely displace communities that deviate from such norms.

[61] *See* Ethan Davison, *The Future of the Bodega is Clear*, CURBED N.Y. (Oct. 23, 2019), https://ny.curbed.com/2019/10/23/20925428/nyc-bodega-corner-store-design [https://perma.cc/8QK2-7BL6]*; see generally* Whitlow, *supra* note 36.

[62] *See* Nikitra S. Bailey, *Predatory Lending: The New Face of Economic Injustice*, A.B.A. (July 1, 2005), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol32_2005/summer2005/hr_summer05_predator/ [https://perma.cc/A7D6-LTNE]*; see also* Sandra Phillips, *The Subprime Crisis and African Americans*, 37 REV. BLACK POL. ECON. 223 (2010). The foreclosure crisis and 2008 housing market crash generally had various contributing factors that underscore "misconduct by those within the financial services industry and a lax regulatory environment that allowed abusive products and practices to be developed and expanded." *Id.* at 226. Among these factors include: "decades of housing and lending discrimination that led to the exponential growth in abusive subprime

redlining,[63] I offer a parallel analysis by utilizing discourse on the system of power that has allowed the affordable housing crisis to reach exorbitant highs in urban centers like New York City: racial capitalism. The use of racial capitalism to describe the necessity for Right to Counsel emphasizes that low-income communities of color are not only being devalued and rendered expendable by an elite, but that they are also being paradoxically valued for the social and material capital they provide to this predominantly white elite.

The concept of "racial capitalism" is attributed to Cedric Robinson's prominent text, *Black Marxism: The Making of the Black Radical Tradition*.[64] In his text, Robinson makes the powerful claim that capitalism and racism are *not separate* axes of power. Rather, he asserts:

> In contradistinction to Marx's and Engels' expectations that bourgeois society would rationalize social relations and demystify social consciousness, the obverse occurred. The development, organization, and expansion of capitalist society pursued essentially racial directions, so too did social ideology. As a material force, then, it could be expected that racialism would inevitably permeate the social structures emergent from capitalism.[65]

Robin D.G. Kelley, another brilliant figure closely acquainted with Robinson's teachings, further explains that capitalism and racism "did not break from the old order but rather evolved from it to produce a modern world system of 'racial capitalism' dependent on slavery, violence, imperialism, and genocide."[66] Capitalism cannot be divorced from its codependence on racism. Racism cannot be divorced from its codependence on capitalism.

Applying this framework to the urban landscape, the role of gentrification as a capitalist means of displacement inextricably implies racism. In New York City, predominantly Black neighborhoods like Bedford-Stuyve-

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loans, the deregulation in the financial sector . . . , lack of adequate regulations in the mortgage lending sector, failure to enforce existing consumer protection laws, the unchecked close relations between rating agencies and companies packaging mortgages and selling securities, and failure of the Securities and Exchange Commission (SEC) to oversee the brokerage firms." *Id.* at 228–229. Paradoxically, "predominantly [B]lack and Latin[e] communities shifted from being objects of *economic exclusion* to targets for *financial exploitation* by intermediaries seeking to expand the pool of loans available for securitization." *See* Justin P. Steil et al., *The Social Structure of Mortgage Discrimination*, 33 HOUSING STUDIES 759, 761 (2018) (emphasis added).

[63] *See generally* Phillips, *supra* note 62. Redlining reflects a process of rating and assigning risks for loans to be used on refinancing or reversing the dangers of foreclosure. *See id.* at 224. The word "redlining" is a nod to the literal drawing of a red line on a map "to distinguish those neighborhoods where lending would occur from those neighborhoods where no lending would take place—'banks would not make loans to areas that were [B]lack, turning [B]lack, or threatened with the possibility of [B]lack entry.'" *Id.*

[64] CEDRIC ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION (Univ. of N.C. Press 2000) (1983).

[65] *Id.* at 2.

[66] Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism?*, BOS. REV. (Jan. 12, 2017), https://bostonreview.net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism [https://perma.cc/EDJ4-HXZD].

sant have been converted into a site where "hipster" transplants seek housing for lower market-value rents than they could find in other (predominantly white) neighborhoods. Paradoxically, sites that have historically been undermined by systemic racism become a site of profit for white tenants seeking to extract benefits from nonwhite residents. This is effectively racial capitalism at work. With racial capitalism looming in the backdrop of the housing market and threatening the quality of life of nonwhite residents, a Right to Counsel would provide residents with the tool to fight back against this landlord-corporate power and to operate effectively in entities like tenant associations without fear of retaliation. Even though the presence of a lawyer would not reduce the instances of exploitation and appropriation through racial capitalism per se, the availability and accessibility of legal representation would allow tenants additional resources to contest and fight back against evictions caused by waves of gentrification.

Racial capitalism is inherently violent. When self-professedly liberal/progressive "hipsters" gentrify neighborhoods while paradoxically donning "Black Lives Matter" pins, they might have trouble viewing the immediate *violence* of this occupation in the same way that they would view the genocide and conquest that formed the basis for racial capitalism. To help situate this paradox of a liberal elite enacting violence while touting solidarity with those directly burdened by racial capitalism, I would like to point to Nancy Leong's "Racial Capitalism." Leong's text defines racial capitalism as "the process of deriving economic and social value from the racial identity of another person."[67] Leong uses as a case study institutions that tout commitment to people of color, yet profit from them while offering them little support. In doing so, Leong illuminates a form of contemporary racial capitalism where "white individuals or predominantly white institutions exploit relationships or affiliations with nonwhite individuals in order to accumulate for themselves the capital associated with nonwhiteness."[68]

Leong's analysis is mostly relegated to conversations on affirmative action and its utilization by white institutions. Affirmative action is enormously beneficial in remedying past injustice, but when white institutions leverage nonwhite bodies as a diversity selling point to bolster the institution's own legitimacy and profitability, that is simply racial capitalism at work.[69] This example, along with other systemic commentary, aims to show that racial capitalism is a system where white institutions determine what they deem as the "selling points" of communities of color, and figure out how to leverage that into a source of capital and profit. These institutions

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[67] Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2156 (2013).

[68] *Id.*

[69] *See* Sean Illing, *How Capitalism Reduced Diversity to a Brand*, VOX (Feb. 16, 2019), https://www.vox.com/identities/2019/2/11/18195868/capitalism-race-diversity-exploitation-nancy-leong [https://perma.cc/QZ9J-A88G]. Illing details how racial capitalism is predominantly manifesting within higher education and academia in general. Examples include the use of diversity media campaigns to highlight that an institution's acceptance of students of color as somehow denoting that the institution is aligned with values of inclusiveness, equality, and community. Such institutions often ignore the exact needs of these same students.

further remove the agency and autonomy of nonwhite communities under the guise of a mission of "diversity" or other larger social visions of community development.

In discussing the diversity rationale in relation to racial capitalism, Leong states that racial capitalism "values nonwhiteness in terms of its worth to white people."[70] Even further, she postulates that rationales related to racial capitalism "confers on white people and predominantly white institutions the *power* to determine the value of nonwhiteness."[71] Nonwhiteness, however, is "valued in terms of what it adds to white people's experiences or endeavors," leading white people to "determine what nonwhiteness is worth."[72]

This assignment of value to nonwhiteness is directly relevant to the functioning of the real estate market. The relative attractiveness of particular communities of color to transplants and the overall "allure" of the Other to the gaze of a white elite seeking to partake in a new urban landscape are key drivers of racial capitalism. Nonwhiteness has always been present in neighborhoods across the country. What is new is that the addition of whiteness to traditionally nonwhite spaces is now characterized by buzzwords and phrases such as "up and coming neighborhoods"—a statement implying that prior to the introduction of white institutions, white bodies, and the white elite's gaze, the community was not of the same proximate "value." With neighborhoods like Bushwick and Bedford-Stuyvesant quickly converting to zones of kava cafés and white-owned dive bars, the inflow of white residents who seek to increase their own wealth while consequently *surging* the cost of living for Black and brown residents is increasing drastically. This will cause New York City to become unlivable for the people of color who were there first. It is precisely this phenomenon that causes countless proceedings in housing court: landlords increase property value after performing renovations to attract white transplants (where white transplants are entranced by the "aesthetic" of Black communities as a site of appropriation by occupation), and with that, those who cannot keep up with the rising cost of living are forced to relocate or face housing insecurity.

Even if Leong's racial capitalism analysis was predominantly rooted in adding value to an elite institution based on a diversity rationale, the core of her analysis can be applied to the housing context to produce the following observations: 1) the reason gentrification is occurring is because certain communities are now looked upon with an eye toward how they can be rebranded to contribute "value" to a gentrifying elite, 2) the forces of market demand, real estate, and physical development of new units are reliant on what a gentrifying elite sees as a profitable site for bourgeois interests, and 3) the "diversity" of communities that are gentrified seemingly "enriches" the

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[70] Leong, *supra* note 67, at 2170.
[71] *Id.* at 2171.
[72] *Id.*

lived experience of a gentrifying elite that then dilute such communities into a space easily consumed by transplants.

This same paradigm is exactly what contributes to the need for Right to Counsel. Low-income communities of color are directly impacted due to racial capitalism in New York City. Eviction proceedings and the extensive dockets in civil court confirms that this demographic is the most heavily impacted by racial capitalism. Right to Counsel's effects in this sense allows it to be a tool of racial justice and a tool of dismantling the hegemony in the affordable housing crisis—a hegemony that impacts Black and brown communities that have long thrived prior to the severe disruption of displacement projects. Instead of being pushed out of their communities because of racial capitalism at work, long-term residents would be able to leverage legal representation to effectively contest a landlord's attempt to displace them. This, combined with collective action via tenants' associations, creates a larger messaging to gentrifying communities that it is *possible* to fight back against the forces that aim to devalue their existence through profit.

IV. The Demands Of The Right to Counsel Movement

The Right to Counsel movement converts an understanding of the systemic trauma and mass displacement attendant to evictions into concrete demands and agendas through organizing. The Right to Counsel NYC Coalition's organizing capacity is unique and powerful in its ability to create a large alliance of members contributing their own resources, experiences, and expertise in a holistic mission for housing justice. The Coalition's work itself is not solely focused on achieving a right to counsel for tenants in housing court: rather, the Coalition's work views Right to Counsel as one tool of a larger movement. To further this outlook, the Coalition's organizing structure and governance is designed to respond in real time to urgent issues impacting tenants across the five boroughs while also remaining focused on pushing legislators to create a Right to Counsel in New York City.

One of the most powerful assets of the Coalition's work is a virtue attributable to powerful on-the-ground grassroots organizing: it recognizes that its movement is a part of a national struggle and that, because of this, its strategies and successes should be made available as a form of institutional knowledge for other coalitions. The Right to Counsel NYC Coalition attempted to make this knowledge a collective platform by publishing The Right to Counsel Toolkit.[73] This resource reminds other coalitions that although material circumstances may differ from city to city,[74] the underlying issue is the same: tenants throughout the nation are not able to access the

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[73] *See* Right to Counsel Toolkit, https://www.rtctoolkit.org/ [https://perma.cc/XM92-ZBB5].

[74] *See 11. Celebrating and Documenting Your Win*, Right to Counsel Toolkit, https://www.rtctoolkit.org/chapters/11-celebrating-and-documenting-your-win/ [https://perma.cc/EH3B-VRW8].

courtroom, to honor their narrative, or to maintain dignity in the face of the trauma of the eviction process. Part IV of this Article will discuss the campaigning and organizing strategies that the Right to Counsel NYC Coalition utilized. The Right to Counsel NYC Coalition's framework is an admirable example of organizing led by tenants for a cause that directly impacts tenants.

A. Players in the Field

Housing is inextricably linked to many other on-the-ground movements. The Right to Counsel NYC Coalition,[75] led by tenants and with a deeply rooted understanding of the precarity of tenants' position in this citywide struggle, describes itself as an organization composed of "law schools, legal services organizations, tenant advocacy groups, and tenant organizing groups."[76] For the Coalition, membership is extended to "any organization that does direct advocacy and/or organizing around issues of housing and displacement in NYC and is committed to building tenant power in NYC."[77] This allows for extensive cross-community collaboration and capacity building that does not exclude any coalition living in the same "world" of tenant organizing. Members hold decision-making capacity within the Coalition.[78] The Coalition also accepts supporters within their organizing model. Supporters are described as "an individual or an organization that cannot commit time or resources to the regular meetings or planning of events, but supports the Coalition's goals."[79]

The decision-making structure of the Coalition reflects the ethos of a true collective organism. Decisions are made by general consensus, with decision-making often taking place at monthly meetings.[80] To foster true solidarity, the Coalition created a structure where brainstorming sessions, forums, and public forums ensure that tenant groups and tenants who are not "official" members of the Coalition can contribute their expertise and be a part of the collective power of movement-building.[81]

The Coalition itself is divided into three committees: the Research and Data Committee, the Community Organizing Committee, and the Legal Services Model Committee. Many of the meetings feature break out groups among these committees, which are a crucial means of disseminating updates on the Coalition's work, plans, and events in different boroughs. The purpose of the committees includes an overall assessment and internal scan of what resources are available. The Legal Services Model Committee, for

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[75] I will refer to the Right to Counsel NYC Coalition as the Coalition, or at times, the Right to Counsel Coalition.

[76] *See Tool 3.1 RTCNYC Coalition*, RIGHT TO COUNSEL TOOLKIT, https://www.rtctoolkit.org/docs/3/RTCNYC%20Structure.pdf [https://perma.cc/73QX-QB5G].

[77] *Id.*

[78] *See id.*

[79] *Id.*

[80] *See id.*

[81] *See id.*

instance, could provide a wealth of resources through its own capacity-building: access to legal research mechanisms, publicity models through close relationships with consulting and public relations firms,[82] and rapport with Bar Associations are useful resources to draw upon.

The Coalition has been able to build a robust community of tenants, organizers, lawyers, students, and advocates who are committed to providing resources and capacity to a tenant-led movement seeking to implement a Right to Counsel alongside other necessary reforms for housing justice. As these key players are incorporated into the organization's structures, the ongoing pieces of the movement allow for these players' assets and access to resources to be leveraged to the benefit of activating necessary allies and audiences for the Right to Counsel NYC Coalition's mission.

B. Pieces to the Movement

The pieces of the Right to Counsel NYC Coalition's own movement for their historic win might be specific to the needs of citywide tenants during that moment, but may still nonetheless be referenced and utilized by other coalitions seeking a right to counsel in their own cities. Many of the tools of the organizing strategy are applicable to successful organizing campaigns, with the understanding that such a movement necessitates an active power analysis.[83]

The different agencies and institutions that the Coalition had targeted as part of its campaign strategy included the Office of the Administrative Justice Coordinator, the Comptroller, NYCHA, HPD, and the Department of Youth and Community Development (to name a few).[84] This clear idea of which actors would lend crucial support to movement meant that the Coalition was able to execute clear cut media campaigns and outreach strategies that would skillfully present the mission of the Coalition in a way that intersected with the target institution's goals.

The overall strategy of the campaign became the following: outreach to tenants/members, outreach to secondary targets (i.e. state elected officials), outreach to a primary target (the mayor), platforms for tenants to tell their stories, addressing opponents, and garnering media appearances.[85] The more that the Coalition organized and established such relationships, the more the

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[82] *See Tool 3.2: How to Leverage the Power of Institutional Members*, RIGHT TO COUNSEL TOOLKIT, https://www.rtctoolkit.org/docs/3/Leveraging%20the%20Full%20Power%20of%20Your%20Coalition.pdf [https://perma.cc/6U5B-UAEV].

[83] The Coalition discusses the importance of a constant power analysis, particularly in Chapter 4 of its toolkit: Campaign Strategy, Development and Implementation. *See 4. Campaign Strategy, Development and Implementation*, RIGHT TO COUNSEL TOOLKIT, https://www.rtctoolkit.org/chapters/4-campaign-strategy-development-and-implementation/ [https://perma.cc/32CN-4CYH].

[84] *See Tool 4.3: Outreach to Agencies and Institutions*, RIGHT TO COUNSEL TOOLKIT, https://www.rtctoolkit.org/docs/4/Outreach%20to%20Agencies%20and%20Institutions.pdf [https://perma.cc/MT2D-69K8].

[85] *See Tool 4.1: Campaign Plan*, RIGHT TO COUNSEL TOOLKIT, https://www.rtctoolkit.org/docs/4/RTC%20Campaign%20Plan.pdf [https://perma.cc/Q9XG-DC2E].

Coalition created an extensive resource archive of presentation materials, sample letters and outreach materials, and memos of support.[86]

The key framing used by the Coalition revolved around a description of Right to Counsel as a *right.* This framing as a "right" was meant to push elected officials and other allies to be more proactive about instituting the movement's demands. This framing is crucial not only because it conveys the movement's urgency but also because it affirms the dignity of tenants who are consistently disenfranchised and abused in housing court. The framing of Right to Counsel as a right rather than as a discretionary expansion of funding is not just a tool to impress urgency upon decision-makers and audiences who are not entirely familiar with the movement or its platform. Rather, these campaign tactics involved the Coalition's mission to stay true to its identity as a tenant-led movement and continue to put tenants' voices front and center.[87]

The Coalition used a combination of outreach, solidarity-building, legislation-lobbying, and public pressure through media to achieve its goals.[88] A media plan is essential to spreading awareness about the issue to those who may have little to no knowledge of the necessity of a Right to Counsel. The Coalition's intent was to create its own publicity to engage the public, to share information about the progress of the campaign, and to "create and control [its] own narrative."[89] The Coalition's effort to create media highlighting tenant power efforts and on-the-ground work can be seen as a radical focus on disenfranchised communities that are usually not afforded screen time in elite-controlled mainstream media.

V. Tactics of the Right to Counsel Movement

The Right to Counsel NYC Coalition also employed tactics designed to combat landlord-corporate power. Through the use of visual data, the power of narrative, and calls for accountability, the Right to Counsel movement was able to reach new highs in its ability to spread knowledge and awareness of the deeper systemic barriers at hand in eviction processes.

The Coalition's knowledge sharing focused on illuminating the egregious actions of landlords and corporate actors through the City, particularly their reputation for evicting record numbers of tenants. These actions not only led the Coalition to bring this behavior to the forefront of its model of showing *why* Right to Counsel is needed to tackle such actors, but also led

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[86] *See 5. Conducting Institutional Outreach and Building Allies*, Right to Counsel Toolkit, https://www.rtctoolkit.org/chapters/5-conducting-institutional-outreach-and-building-allies/ [https://perma.cc/D795-NS7T].

[87] *See Mobilizing Communities*, Right to Counsel Toolkit, https://www.rtctoolkit.org/chapters/8-mobilizing-communities/ [https://perma.cc/N6Z2-533K].

[88] *See 10. Garnering and Creating Media*, Right to Counsel Toolkit, https://www.rtctoolkit.org/chapters/10-garnering-and-creating-media/ [https://perma.cc/L425-59J6].

[89] *Id.*

tenants across the city to share their narratives as part of a mission of housing justice. Such tactics are the focus of Part V of this Article.

A. The People's Tribunal

Landlords utilize summary court processes dockets and credit checks as a resource for screening tenants. These screening devices not only effectively prevent tenants from accessing fair, affordable housing, but they also create a more extensive network of knowledge for landlords. In light of this paradigm, the Right to Counsel Coalition in New York City partnered with allies to create institutional knowledge of the harms perpetuated by large-scale landlords.

The "Worst Evictors List" is an example of the Right to Counsel movement's efforts to create large-scale knowledge of "repeat players" in housing injustice. This list used extensive empirical data gathered from summary process outcomes and dockets. Just as landlords use this data to screen tenants, tenants have re-appropriated court data as a way to create visibility into exploitative landlords' tactics. The website is a powerful tool that is easily accessible as a URL: worstevictorsnyc.org.[90] Not only does the website put pressure on landlords looking to maintain their credibility in the city, but it is also a way for tenants to feel a sense of camaraderie and solidarity if one of the landlords listed is indeed their own.

NYC's Worst Evictors welcomes visitors to the site with the following preliminary context and mission:

> Right to Counsel (RTC) is a law passed in New York City in 2017, giving tenants the right to an attorney in housing court. It will be fully in effect by 2022, and is currently being phased in by neighborhoods. The first 20 neighborhoods to have RTC were chosen by the city, in part, because they have some of the highest rates of eviction.
>
> After one year of RTC, evictions are down, landlords are suing people less, and almost everyone who had an attorney through RTC stayed in their homes. We are also seeing tenants across the city fight landlord abuse, with bold actions like rent strikes, because they know RTC will protect them if the landlord retaliates.
>
> But in order for RTC to remain powerful, tenants have to know about this right. There are 345,000 renter households in the 20 neighborhoods that currently have RTC. Many of these tenants don't know about the new RTC law. Also, because evictions are terrifying and traumatic, many tenants choose to move out instead

[90] *See generally* NYC's WORST EVICTORS, https://www.worstevictorsnyc.org/ [https://perma.cc/UA9Z-5LC6].

> of to fight their case. Landlords know this and sue thousands of people betting on tenants' fear. We shouldn't let them.
>
> We created the RTC Worst Evictors List as a call to action. This list focuses on the landlords who carry out evictions in neighborhoods where tenants currently have RTC. We want tenants who have this new right to know about it, use it, and fight to stay![91]

The Worst Evictors List was generated using holistic data of residential evictions executed by City Marshals in 2018.[92] The information regarding landlords and other entities marked as responsible for mass evictions was gathered through HPD Registrations and HPD Contacts datasets.[93] The data sources collectively involved HPD Registration and Registration Contacts, Marshals Evictions Data, Evictions Filing Data from the Public Advocate's office, ACRIS lender data, building unit counts from Pluto 18v1 (Department of City Planning) and rent stabilization unit estimates from taxbills.nyc.[94]

The descriptions of legal representation for the Worst Evictors were gathered through the New York State Unified Court System database of cases; the compilation of accounts related to each landlord and their dense volume of evictions was gathered through press news and accounts from tenant associations and organizers.[95] The significance of NYCHA evictions and the sheer amount of evictions that also occur for tenants who lose their public housing (and may also lose their Section 8 vouchers) illuminate the breadth of data gathered to compile this website. The possibility of this data aggregation was made possible through collaborative efforts between the Right to Counsel Coalition, JustFix.nyc, and the Anti-Eviction Mapping Project.[96]

The Worst Evictors List can be accessed either as a map or as a list broken down citywide or by Right to Counsel zip code.[97] The list breaks down the landlord statistics through the following sets of data: number of evictions, the number of families housed, the number of families sued, the number of lawsuits per family, and the percentage of units that are rent-stabilized.[98] The list also details who funds the landlords and lists the legal

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[91] *Id.*
[92] *See id.*
[93] *See id.*
[94] *See id.*
[95] *See id.*
[96] JustFix.nyc is "a nonprofit that builds technology and support . . . for over 50 long-standing tenants rights organizations, legal aid, and neighborhood groups." *About This Project*, NYC's WORST EVICTORS, https://www.worstevictorsnyc.org/about/ [https://perma.cc/5J22-8YTJ]. The Anti-Eviction Mapping Project is "a volunteer-run data visualization, data analysis, and storytelling collective documenting the dispossession of residents in gentrifying landscapes." *Id.*
[97] Note that this list is based on data from 2018 alone.
[98] *See About This Project*, *supra* note 96.

representation utilized by the landlord.[99] Under each landlord's statistical breakdown, the Coalition gives a brief description of the landlord's history of eviction tactics, as well as detailed instances of when other Tenant Coalitions have attempted to demand that the landlord cease specific tactics within and outside their units. The Coalition also encourages tenants who have had experiences with the landlord to reach out directly to the Coalition as an organizing effort.

The Worst Evictors List is an exemplary tool of tenant power: digital media and empirical data becomes a site for knowledge sharing, for coalition-building, and for a call to organize and create wider implementation of Right to Counsel in New York City. The byproduct of the website is a form of putting landlords on notice for their practices and a larger accountability process by coalitions who have demanded basic housing rights within localized movements. Similar to a bad Yelp review, the Worst Evictors List is a tool that other tenants can use to steer clear of the landlord. Additionally, highlighting egregious practices strip the landlord's business of its credibility and legitimacy. By putting such landlords on the map (quite literally), the Right to Counsel Coalition reminds tenants of the power of organizing in numbers, and removes the fear that may often accompany the desire to hold landlords accountable for their practices.

The Worst Evictors List's goal to illuminate the conduct of landlords citywide has not been pursued solely to the website and its tracking system. The Right to Counsel NYC Coalition, along with tenants across the city, decided to emphasize the urgency and severity of mass evictions by creating events like the "People's Tribunal on Evictions."[100] The Right to Counsel Coalition members described the event as the following: "In NYC, landlords try to evict hundreds of thousands of people every year. It's time we put them on trial for the eviction crisis in NYC."[101] The event itself, which is available as a digital recording, allowed tenants to present specific egregious actions of landlords who are notorious for mass evictions. Interpreters were able to translate the mass scale of evictions in languages like Haitian Creole and Spanish. Prior to the Tribunal, tenants were invited to attend a Tenants' Rights Info & Resource Fair, which gave additional opportunities for tenants to collectively organize and find legal and community-based resources for landlord-tenant disputes.[102] By using the rhetoric of "putting landlords on trial," the movement leveraged community power to expose landlords on a mass scale for their actions in a way that could harm their personal and business reputations. This strategy is a way to boost tenant morale, to high-

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[99] *See id.*

[100] *See* Alyssa Figueroa, *Save the Date! People's Tribunal on Evictions!*, RIGHT TO COUNSEL TOOLKIT, https://www.righttocounselnyc.org/save_the_date_people_s_tribunal_on_evictions [https://perma.cc/C99M-3ZYF]. *See also*, "The People's Tribunal Jury Indicts Landlords and the City on Charges Against Tenants' Rights," RIGHT TO COUNSEL COALITION, https://www.righttocounselnyc.org/the_jury_indicts_landlords_and_the_city [https://perma.cc/2CBK-4GPV].

[101] *Id.*

[102] *Id.*

light the violence of eviction, and to create institutional memory for movements.

All of these tools used by the Right to Counsel NYC Coalition and other movements in tandem reveal that effective organizing does not only have to take place in the courtroom or through lawyering. The movement's ability to highlight the most egregious evictors in New York City, create robust paper trails to document these patterns, and create spaces for sharing narratives builds morale for the Right to Counsel movement while also shifting shame away from tenants. As the eviction process can leave many tenants feeling a sense of shame and hopelessness, these organizing tactics remind tenants that the true shame should be redirected to the private, for-profit entities that attempt to remove access to affordable housing. This is a way to build up tenant power and to build up a community movement.

B. When We Fight, We Win!

On July 20, 2017, forty-two council members voted to pass Right to Counsel in New York City. The bill was signed into law on August 11, 2017.[103] Local Law 136 (file Int. 0214-2014B)[104] provides clear information on what legal services are guaranteed under Right to Counsel in New York. Full legal representation is defined as "ongoing legal representation provided by a designated organization to an income-eligible individual and all legal advice, advocacy, and assistance associated with such representation. Full legal representation includes, but is not limited to, the filing of a notice of appearance on behalf of the income-eligible individual in a covered proceeding."[105] Brief legal assistance is defined as "individualized legal assistance provided in a *single consultation* by a designated organization to a covered individual in connection with a covered proceeding."[106]

With regard to the actual *provision* of legal services, the law mandates that "all covered individuals receive access to brief legal assistance no later than their first scheduled appearance in a covered proceeding in housing court, or as soon thereafter as is applicable; and all income-eligible individuals receive access to full legal representation no later than their first scheduled appearance in a covered proceeding in housing court, or soon thereafter as is practicable."[107] It is important to note that the Right to Counsel also applies to the provision of legal services in administrative proceedings of NYCHA.[108]

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[103] *See RTC History Interactive*, RIGHT TO COUNSEL TOOLKIT, https://www.rtctoolkit.org/docs/11/RTC%20History%20Interactive--revised%202018.pdf [https://perma.cc/53FR-GWUY].

[104] *See* File #: Int 0214-2014B, N.Y.C. COUNCIL, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80&Options=ID%7cText%7c&Search=214 [https://perma.cc/UE9V-HKNJ].

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *See id.*

As the law went into effect, the next tremendous step would be the gradual implementation of Right to Counsel in housing courts throughout New York City. Notwithstanding the fact that this implementation would require continuous organizing by the Coalition to ensure that the Right to Counsel is respected, the law itself is a testament to the true power of a tenant-led movement led by those who are experiencing systematic disenfranchisement firsthand. The next module of Right to Counsel, even though it has already passed, is taking place today: the rollout has yet to reach all zip codes, but courtroom accountability processes are still an active mission.

With the lessons learned from the movement[109] and the tools it provided to countless housing justice movements throughout New York City, another transformative wave surfaced in our understanding of housing justice in New York City. On June 14, 2019, Governor Cuomo signed the Housing Stability and Tenant Protection Act of 2019, one of the strongest laws protecting tenants in New York.[110] Among the many components of the Act include the extension of rent regulation laws, the repeal of vacancy bonuses, the reform/caps of Major Capital Improvement increases, limitations of security deposits to one month's rents, and a ban on landlords evicting tenants for good-faith complaints about violations of warranty of habitability.[111] Such an Act, when combined with Right to Counsel, can drastically change the extent to which landlords assume that they can bring frivolous eviction proceedings. It is very possible that tenants who have access to Right to Counsel could experience a monumental increase in positive outcomes in Housing Court.

VI. Final Reflections: What Lawyers Outside The Right To Counsel Movement Can Learn

The Right to Counsel success in New York City reveals not only the power of persistent community-power building, but that a tenant-led reform movement does not have to include a central role for the lawyer. Many of those who enter the legal field for social change often observe an emphasis on the role of law and the role of the lawyer in instituting radical change. However, it is difficult to institute such change when one participates in the very system that perpetuates harm. When we attempt to use the system to change the system, our efforts are likely to fall short. Even if a current harm

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[109] *See* RTC NYC, Lessons from NYC's Right to Counsel Campaign, https://www.rtctoolkit.org/docs/11/Lessons%20Learned.pdf [https://perma.cc/9KV9-UKXS].

[110] *See From the Field: New York State Legislators Pass 'Housing Stability and Tenant Protection Act of 2019'*, Nat'l Low Income Housing Coalition (July 1, 2019), https://nlihc.org/resource/field-new-york-state-legislators-pass-housing-stability-and-tenant-protection-act-2019 [https://perma.cc/Z72S-CKZQ].

[111] *See id.*; *see also New Rights for Tenants: Housing Stability and Tenant Protection Act of 2019*, N.Y. State Senate (Sept. 19, 2019), https://www.nysenate.gov/newsroom/articles/2019/new-rights-tenants-housing-stability-and-tenant-protection-act-2019-1 [https://perma.cc/QA9D-VAQ3].

might be removed or mitigated, other harms quickly arise because the underlying systemic issues that gave rise to the problem were never fully addressed. The legal field can never be fully cured of its systemic disenfranchisement and inaccessibility by a single direct legal services model or an impact litigation model.

The tenant-led movement we have seen through Right to Counsel shows that lawyers should continually center the works of grassroots organizers. This includes centering platforms of intentionally politicized value systems that move away from the seemingly "neutral" stance that the law encourages as a form of "justice." A crucial facet of the Right to Counsel movement has been that the Right to Counsel is not an end, but simply a tool. The intentional strategy of organizing to allow tenants to have the tool of legal representation is one facet of a long movement of racial justice and anti-capitalism within housing justice.

A movement lawyering[112] framework can ensure that similar movements to Right to Counsel—that is, legal tools aimed at providing tenant power—will honor the interests and immediate needs of the individuals most directly impacted by the systems of power that burden them daily. By continually contesting the role of the law, of the lawyer, and of the courtroom, movement lawyers can understand the importance of supporting the needs of grassroot organizers through capacity-building and resource redistribution.

A. Movement Lawyering Frameworks

Throughout the course of the Right to Counsel movement's lifespan, there has been debate among organizers and legal organizations about whether we should be centering Right to Counsel as an anti-displacement tactic. Those who view the legal field as a venue of social change may conceptualize Right to Counsel as a due process tool that could cause a ripple of systematic reform in the courtroom. However, for many organizers and movement lawyers, such an emphasis on the role of law and the role of legal representation fails to recognize a core issue that has spurred the Right to Counsel movement: that the system we operate under is inherently tied to wealth disparity, inequality, disenfranchisement, and capitalist hegemony.

Even though some may view the courtroom as an opportunity to "have your day in court," it is still true that the court cannot be an all-encompassing remedy when the court is an extension of the issue itself. For movement lawyers, understanding the power that the court has and the harms it has

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[112] For introductory works, see generally Scott L. Cummings, *Movement Lawyering*, 2017 UNIV. ILL. L. REV. 1645 (2017); Alexi Nunn Freeman & Jim Freeman, *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLINICAL L. REV. 147 (2016); Betty Hung, *Movement Lawyering As Rebellious Lawyering: Advocating with Humility, Love and Courage*, 23 CLINICAL L. REV. 663 (2017); Susan D. Carle, Forward, *Ethics and the History of Social Movement Lawyering*, 2018 WIS. L. REV. 12 (2018).

sanctioned throughout the course of our nation's history leads to the conclusion that Right to Counsel is simply a tool, but not a solution, and certainly not a complete fix to a housing justice movement.

Movement lawyering can provide a useful lens that supplements existing legal work. There are many ways to describe movement lawyering. Law For Black Lives, for instance, states that movement lawyering "means taking direction from directly impacted communities and from organizers, as opposed to imposing our leadership or expertise as legal advocates. It means building the power of the people, not the power of the law."[113] Movement lawyering can be perceived as an ethos that a lawyer harnesses when practicing law in a variety of fields, contexts, and missions. The purpose of movement lawyering is to be intentionally *political* as a practice: a Right to Counsel movement for community stakeholders, for instance, can be conceptualized as a pro-Black, pro-queer, anti-capitalist, anti-colonial outlook. Movement lawyering is an active practice of naming systems of power and harm, and recognizing that the lawyer is *not exempt* from these systems.

Jim Freeman's *Supporting Social Movements: A Brief Guide for Lawyers and Law Students* succinctly describes five essential elements of movement lawyering. Such elements have been broken down into the following attributes of a movement lawyer: 1) dedication to building the capacity and power of oppressed communities, 2) willingness to address the root causes of structural disempowerment and oppression, 3) use of knowledge, skills, and connections to support community organizing and movement-building, 4) commitment to meeting the full array of on-the-ground advocacy needs, and 5) professional humility.[114]

In naming these attributes, Freeman also spends (rightfully) a considerable amount of time discussing the prominent barriers that lawyers impose on themselves and their own affiliated movements when not operating under a movement lawyering framework. Lawyers, for instance, may operate in an openly or subtly paternalistic way when engaging with community partners This can occur during strategic organizing discussions, in which lawyers adhere so rigidly to doctrine and their litigation strategy that they derogate the community's own ideas for building solidarity and power. Lawyers may even use community spaces to paradoxically disempower the community—by using the tools of legal practice, which are in and of themselves linked to a tool of systematic oppression, lawyers may reinforce the same systems of harm that they hoped to combat.[115]

Additionally, lawyers may hamper a movement by conceptualizing the harms voiced by community members as simply a "legal violation" committed by a landlord or other entity. For those deeply committed to social movements and aware of the fact that there is not one "legal violation," but

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[113] *What We Can Do: Movement Lawyering in Moments of Crisis*, LAW FOR BLACK LIVES, http://www.law4blacklives.org/respond [https://perma.cc/LCR6-6FHG].

[114] *See* Jim Freeman, *Supporting Social Movements: A Brief Guide for Lawyers and Law Students*, 12 HASTINGS RACE & POVERTY L.J. 191, 195–203 (2015).

[115] *Id.* at 195–97.

interlocking forms of inequities, the lawyer's perspective may be perceived as myopic and overly concerned with the technicalities of the law.[116]

To avoid these pitfalls, the movement lawyer must show up and intentionally cultivate community relationships and be aware of the community's history and the community's own timeline of movement-building. The lawyer must be ready to recognize that the legal system confers upon them elite status and seek to redistribute their access to power and wealth. The lawyer must be ready to take risks in response to the interests and asks of the community. This is all, of course, not part of an exhaustive list—the list is extensive, and varies by issue area and community. In addition to these tasks and the many more that will be demanded of the lawyer as they embody a movement lawyer ethos, the lawyer must be endlessly aware and self-reflective of their own complicity and power within the system they are fighting against. This awareness will only strengthen the movement, and will allow lawyers to be more responsive and useful to the needs of the community when called upon to build coalitions.

B. What Next for Legal Services Organizations?

With new rent laws in cities like New York City, as well as new Right to Counsel programs in other major cities, the role of legal services organizations is unclear, especially considering the influx of representation that will be promulgated by Right to Counsel. We must apply the movement lawyering perspective to legal services organizations. Such an analysis, of course, could remain at odds with the very fact that many legal services organizations may not immediately envision each individual case as a larger "systemic" battle—each client has their own individual facts, and their desired outcome in a case may not be compatible with the larger goals of a movement.

Direct legal services models provide essential services for indigent clients. It is an *understatement* to say that legal services have profoundly impacted the lives of countless clients who seek such representation while tackling larger systemic barriers. Especially for cities with Right to Counsel, legal services organizations have been able to provide clients with the opportunity to build tenant power while fighting landlord-corporate power.

However, for those committed to organizing a sustainable movement for a certain cause, legal services can sometimes be limiting. One divergence between some legal services lawyers and movement lawyers is that the former may center the presence of lawyers and the hiring of more lawyers as the *solution* to many of these systemic barriers, while the latter sees the lack of lawyers as a relatively small problem compared to the attendant disparity in power.[117] Additionally, individual clients are not interlocutors of a whole

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[116] *Id.* at 197.

[117] *See* Purvi Shah & Chuck Elsesser, *Community Lawyering*, COMMUNITY JUSTICE PROJECT (Jun. 2010), http://communityjusticeproject.com/media/2014/9/24/purvi-chuck-commu-

movement, and should not be treated as such (favorable outcomes for one tenant, for example, might not be compatible with the needs of a movement or a larger group). Because of this, the individual wins of legal service representation might chip away at the issue, but do not constitute a long-term solution. The technicalities of certain legal services organizations also might not provide enough space for lawyers to assume roles for organizing with movements; organizations funded by Legal Services Corporation (LSC) are limited insofar as many cannot bring class actions and cannot engage in lobbying.[118]

Notwithstanding this tension, the role of legal services organizations in the time of Right to Counsel must still heavily incorporate the concepts of community lawyering and movement lawyering as they work in the interests of the people, particularly as tenants are more empowered to endure the courtroom process without feeling completely at odds with landlords who may already have representation.

Legal services organizations will still undoubtedly operate on client-centered models of advocacy. This client-centered advocacy, however, does not have to deviate from a movement lawyering model in which lawyers are constantly available and in tune with the asks of on-the-ground movements led by grassroots organizers. In fact, the Right to Counsel NYC Coalition was already doing this work: the coalition included advocates from legal services organizations, in addition to organizers and tenants. Legal service providers have and will inherently view these forms of advocacy as part and parcel of a larger movement of housing justice. Thus, to expect legal services organizations to collaborate with grassroots efforts is not an unrealistic ask, nor is it an ask that is only relevant to "movement lawyering." Normalizing the lawyer's responsibility to be mindful and aware of ongoing organizing, and to be proactive in redistributing resources to aid such causes, is needed now more than ever.

Perhaps a larger question that will become more salient as Right to Counsel rolls out in other cities where legal services capacity was limited is the question of hiring practice. As Right to Counsel rolls out, it will be clear that hiring capacity will be extended in order to account for more legal representation for tenants in housing court. However, adding more lawyers might not further the goals of the Right to Counsel movement if the lawyers hired carry profound implicit biases or counterintuitive methods to lawyering that do not operate within community or movement lawyering ideology. To preserve the radical ethos of movement lawyering centered on a mission of racial justice, legal services organizations must create hiring practices that allows for a diverse range of legal representation. Although diversity in and

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nity-lawyering [https://perma.cc/38PH-Q5ZJ]. This awareness of the fact that lawyers are not the end-all, be-all for these larger systemic issues are indeed deeply understood by members of legal services organizations in close collaboration with the Right to Counsel NYC Coalition. I only bring this point as a larger commentary on divergences that happen between various lawyers when conceptualizing various means of social change.

[118] *See id.*

of itself does not necessarily mean that a lawyer will be able to zealously advocate for their client[119], such hiring practices and training modules for legal services organizations will allow lawyers to be more aware of the underlying power analyses and imbalances when they work with clients. That is, an intentional desire to incorporate a mission of racial justice in housing justice means ensuring that lawyers are adequately trained to combat implicit biases. As mentioned, legal services organizations that combine a movement lawyering practice with their current representation and community partnership models will be highly in demand as other Right to Counsel programs are instituted.

The ripple effect of Right to Counsel will challenge existing legal services organizations in their own determinations as to whether their current infrastructure will respond well or poorly to the extended Right to Counsel for tenants throughout a city. To account for this pending massive shift, legal services organizations have an enormous opportunity to revisit their missions, their value systems, and how often they center tenants in their mission. This reimagination of values and praxis will allow legal services organizations to emerge into the Right to Counsel landscape with a reinvigorated perspective on a model of lawyering compatible with a long-term, sustainable movement for social change.

Conclusion

The Right to Counsel is not a complete solution to the affordable housing crisis, nor is it a cure for the countless issues presented by the eviction mill regime. Despite the fact that this is but one tool for housing justice, Right to Counsel is a testament to the power of tenant coalition-building in spaces that seek to contest their rights and livelihoods in the midst of displacement and gentrification. The tactics of the Right to Counsel NYC Coalition are but one example of a sustainable housing justice movement in but one city. Adapting Right to Counsel's approaches to the nuances of other

[119] It should be reminded that even for legal services organizations, hiring practices rooted in diversity should also operate under the same caution as discussed above with regard to racial capitalism and the use of diverse staff to reflect value to an organization based on what this nonwhiteness adds to the organization's own image (assuming the organization is also only representative of a large elite in its governance structure and does not provide safeguards for its staff of color). Even if a legal services organization is diverse on its face, this does not necessarily mean that the staff will be aware of the distinct struggles of their clients—relational identity might be helpful, but lawyers still enter the lawyer-client relationship with a large degree of power and privilege (an access that is not shared by the client). Furthermore, even if such organizations are "diverse," this does not mean that a legal services organization cannot commit harms to communities of color with respect to its inability to hear the community's narratives. While incorporating a more diverse workforce, legal services organizations must still perform inner structural reform and assessment as to how staff and structure currently embody implicit biases and how such biases may be reflected in the governance structure and operations of the organizations. It is only after this work is done that legal services organizations can employ new tactics that adjust to the demands of a movement lawyering ethos.

cities would present an immense victory nationwide in tempering the calamitous effects of landlord abuse.

Now that the Right to Counsel has been on the radar of decision makers across the nation, the question then becomes how other localized movements can continue to center tenant narratives in order to build a collective groundwork for social change. Coalition-building is endlessly re-invented in response to the immediate needs of a movement. Such adaptability and creativity in leveraging a wide variety of tools and allies are components of current Right to Counsel movements occurring on the ground. Tenants are learning to be responsive to context when conducting power analyses of the actors who are preventing them from living with dignity. Such a tactic, when spread as collective knowledge, will prove to be an insurmountably powerful force that will alter the way movements navigate housing justice.

As lawyers, it is crucial to remain mindful of the forces that threaten a full implementation of Right to Counsel. Lawyers must also understand what they can do to mitigate harms closely associated to a lack of Right to Counsel: namely, a lack of rent freezes during crises, increases in rent caused by gentrification, retaliation in response to tenants asserting their rights, and the stigmatization and denial of tenants from units because of their membership in a protected class. The roster of issues that countless movements are still fighting for are endless, but the mission remains the same: movements on-the-ground, and those who are in solidarity with such movements, are continually demanding that our nation recognize that housing is a human right and that access to housing be expanded by any means necessary.

Statement of Retraction & Withdrawal: "No Imbecile At All": How California Won the Autism Insurance Reform Battle, and Why Its Model Should be Replicated in Other States (2016)

*Ariana Cernius**

Introduction

In 2015, as a second-year law student, I authored a research paper entitled, "'No Imbecile At All': How California Won the Autism Insurance Reform Battle, and Why Its Model Should be Replicated in Other States."[1] The piece, which explored the health insurance landscape with respect to services for autism, and argued for wider access to what has become known as the main form of "treatment" for autistic individuals—Applied Behavior Analysis ("ABA") therapy—is one that I would now like to withdraw. This statement and letter of explanation comprise my formal retraction of this work. Thank you to the Harvard Law & Policy Review for accepting my withdrawal request and affording me this space to discuss my change in perspective, in the hopes that those who have read my work, cited it, or come across it in the future, will step with me into greater enlightenment about autism.

I. Author's Reasons for Retraction

This is a topic concerning a community I care a great deal about. My decision to retract this piece stems from my love for my brother and years of inner turmoil over wanting to support both autistic individuals and their parents and caregivers, and growing up in an era and within a community that framed ABA as a positive tool for the autistic population that they had been wrongfully denied. That, in recent years, has been followed by the slow realization and resolution of cognitive dissonance in light of recent studies and literature reviews on the impact of ABA on people with autism and the individual testimonials of autistic adults on the trauma ABA caused them—that real harm is being done to these individuals by ABA. ABA has been in my family's life for decades, since my brother was diagnosed in the 1990s,

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[1] Ariana Cernius, *No Imbecile at All: How California Won the Autism Insurance Reform Battle, and Why Its Model Should be Replicated in Other States*, 10 Harv. L. & Pol'y Rev. 565 (2016).

and though I am aware this retraction may not be well-received in our community of origin, I have seen enough for myself to be convinced that ABA is the autistic community's analog to the LGBTQ community's conversion therapy.

I thank the autistic individuals who have spoken out for their willingness and bravery to share their experiences publicly, which lent clarity to internal feelings of unease about people with autism's experiences with ABA that had not yet resolved themselves into convictions, and helped provide a path to see this clearly. I apologize to them for the role my actions have played in perpetuating these practices, and I urge others to take a hard look as well.

Although this was just a paper I wrote in law school, it has had real world effects for autistic individuals and families like my own.[2] While I did not argue in the paper that people with autism should have ABA, I did make a case for expanding access to ABA throughout the United States, which given current research and new knowledge, would contribute to the damage being done. Moreover, I feel that maintaining this article without a formal and thorough retraction on a well-respected platform like HLPR's would itself be a statement contributing to the continued acceptance of ABA as a legitimate form of intervention for autism. These facts, along with the confluence of evidence and experiences described below, are what compel me now to reverse myself and state that I can no longer in good conscience support ABA.

A. Experience with ABA and the Medical Model of Autism

I held different views at the time this article was written—views that were shaped by the medical model of autism,[3] which is the approach that dominated the era when my brother was diagnosed, and which came to dominate our lived experience with him. Back then, autism was framed as a tragedy, and "treatment" was recommended.[4] Autism was so rare at the time that the smattering of physicians involved in my brother's diagnosis had to think back to their medical residency training years to convey the meaning of the word to my family. The 1994 DSM-IV definition of autism,[5] the criteria

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[2] *See* R. E. B. v. Hawai'i Dep't of Educ., 870 F.3d 1025 (9th Cir. 2017).

[3] *See* N. Chown and L. Beardon, *Theoretical Models and Autism*, *in* FRED VOLKMAR (ed.) ENCYCLOPEDIA OF AUTISM SPECTRUM DISORDERS (2017) https://doi.org/10.1007/978-1-4614-6435-8_102171-1; *cf. What Is Autism?*, THE ART OF AUTISM, https://the-art-of-autism.com/what-is-autism/ [perma.cc/23GR-75FH].

[4] Steve Silberman, *It's time we dispelled these myths about autism*, BBC FUTURE (Oct. 6, 2015) https://www.bbc.com/future/article/20151006-its-time-we-dispelled-these-myths-about-autism [perma.cc/T2HE-9QTP].

[5] *See DSM IV Criteria For Diagnosing Autism Disorder*, INTERACTIVE AUTISM NETWORK, https://iancommunity.org/cs/autism/dsm_iv_criteria [perma.cc/K97P-A23D]; *Autism in the DSM*, THE AUTISM HISTORY PROJECT, https://blogs.uoregon.edu/autismhistoryproject/topics/autism-in-the-dsm/#:~:text=when%20DSM%2DIV%20was%20published,Disorder%2C%20and%20Childhood%20Disintegrative%20Disorder [perma.cc/P8YT-XLSF]; N.E.

which directed diagnosis, was translated to us as a lack of empathy disorder by the medical community. ABA was recommended as one of the few things that could help him learn to socialize, thrive, eliminate "harmful" behaviors, earn societal acceptance, and avoid the fate of being "other."[6]

In those days there were few centers offering ABA, no standards, no billing procedures, no licensing levels, and very few trained therapists. ABA was a theory based on behavioral science, and as a practice was nascent. My parents put out an advertisement through the local university and hired a handful of college-aged students who were willing to learn ABA and paid them to deliver the therapy to my brother, who was about four at the time. One of the core tenets of ABA is family involvement and consistency—in order for an ABA program to be effective for the child, the family must globally and consistently reinforce the child's behavioral program.[7]

Family integration was something that occurred in my family around my brother. From the start of his program to the present day, his ABA therapists would actively incorporate my parents, our other siblings, and me into my brother's program. From a young age, I remember his therapists would walk him over to me as I practiced the piano, and prompt him to ask me a question so he could work on developing social interaction skills. In practice it looked something like this: "Ask Ariana," they would say. "Ask Ariana," he would echo back, standing in front of me, and quickly follow up with the predetermined question, which varied: "How are you?" / "How was school?" / "What are you doing?" My siblings and parents experienced and participated in similar encounters. If my brother was excited to see us and jumped up and down on his tip-toes, his therapists would prompt us to tell him "no" to stop that behavioral response and instead to use his words to convey his excitement, as his therapy plan dictated. If my brother was frustrated and closed his eyes and flapped his hands because something in the environment irritated him, my family members and I would be prompted to redirect him to express this feeling in a more normal way—with words.

As ABA became more standardized (ways to implement it on a person, train professionals in it, charge families for it, and set up business structures around it) and drew together the worlds of psychology, medicine, and business, my brother's program became more regimented and supervised. It also cost more, and had more steps and parties involved. Licensing boards emerged, charging fees to train those interested in becoming ABA practi-

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Rosen, et al., *The Diagnosis of Autism: from Kanner to DSM-III to DSM-5 and Beyond*, J. AUTISM. DEV. DISORDER (2021), https://link.springer.com/article/10.1007/s10803-021-04904-1 [perma.cc/KP26-LVGT].

[6] *See Applied Behavioral Analysis*, THE AUTISM HISTORY PROJECT, https://blogs.uoregon.edu/autismhistoryproject/topics/applied-behavior-analysis/ [perma.cc/PY8J-2ARC].

[7] *See Autism Spectrum Disorder and ABA Therapy: It's All About Family*, LUMIERE CHILDREN'S THERAPY, https://www.lumierechild.com/lumiere-childrens-therapy/asd-and-aba-therapy-family-involvement-is-key [perma.cc/4KM4-HA6H]; *Parent Training in ABA: Why Parent Involvement is Critical for Success*, BEHAVIORAL INNOVATIONS (Oct. 7, 2019) https://behavioral-innovations.com/blog/the-importance-of-parent-training-in-aba-therapy/ [perma.cc/E6ZP-4KS9].

tioners[8]; lawyers passed legislation forcing insurance companies to cover ABA as a medical treatment; and companies were created, which would hire teams of therapists to deliver ABA on a more robust level, to a wider number of clients.[9]

As my brother's 40-hour per week therapy schedule was implemented our collective lives assumed a new normal. ABA utilized most of the hours on the weekdays and half of the day Saturday to provide therapy at the appropriate intensity recommended for someone like him—with "severe" autism—by the medical community's consensus and prescription. When we would wake up in the morning, my brother's therapists would be there getting ready to work with him, prepping the binder that tracked the discrete trials that had been worked on the previous day by the other therapists on the team. When my siblings and I came home from tennis practice, my brother's therapists would be there working with him, and would prompt him to make eye contact and ask us questions about our activities so that he would know how to interact with us. When my family hosted a high school AP test review session in our home for my teacher and classmates, and my brother, listening to a YouTube video, danced diagonally across the neighboring room and into the kitchen, singing along with joy, his therapists followed and made sure to help him calm down and "take the volume down to a 1." When my brother was overstimulated and would say video talk from a familiar Disney movie to calm himself down and I would repeat it back to him to help him laugh and know that someone heard him, my parents and his therapists would let me know that I was holding him back in his program because that was behavior that had been extinguished or "put on extinction." When I went away to college and visited over the holidays, bringing back two sand-filled stress pillows with my college's name on them to help my brother understand where I had been, his therapists were there to help him learn how to play with the pillows properly, and put them on his bed. And when I took the California Bar Exam and passed, and came home to hug my brother, his therapists were there working with him, and explained to us that we could have some more substantive time together once his therapy was done that day.

Ever since we were young—both before his diagnosis and after it—everywhere we go, my brother is the light. Gradually I have watched that light, which emanates from the natural exercise of being authentically oneself, go out because it has been and continues to be put out by ABA, which is, essentially, compliance therapy. My brother has developed anxiety, increasingly worsening OCD-like behaviors, and intensifying self-harm tendencies, and I have seen the same effects in many of my clients over the years who have received ABA.

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[8] *See* James M. Johnston, James E. Carr, and Fae H. Mellichamp, *A History of the Professional Credentialing of Applied Behavioral Analysts* 40 (2) THE BEHAVIOR ANALYST 523–38 (2017) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6701231/ [perma.cc/4Z2B-FAR6].

[9] *See, e.g.*, Doreen Granpeesheh, A Letter from Our Founder, CENTER FOR AUTISM & RELATED DISORDERS, https://www.centerforautism.com/about/ [perma.cc/LY43-V2CE].

I share these personal experiences with my brother, which are supported and supplemented by the results of recent research and statements of the adult autistic community not as an accusation, but to lend credence, from a non-autistic individual's firsthand lifelong witnessing of ABA and its effects, to what these individuals are recounting in their declarations that ABA is harmful. As autistic individuals have grown up and information sharing mechanisms have improved and proliferated compared to what was available in the 1990s, these individuals are speaking out and trying to raise society's awareness as to what is going on.[10] Many have Post-Traumatic Stress Syndrome (PTSS), anxiety, depression, and other trauma-based conditions as a direct result of ABA. [11] While several in the community have heard their cries and responded productively with scientific investigations which have yielded credible evidence to support these claims, as well as reports to human rights commissions,[12] a great many have responded in the opposite way: doubling down on ABA and/or silencing individuals who speak out. In the author's view, this response is abhorrent and utterly wrong. It is my intent, with this letter, to course-correct those professionals, parents, and other family members and caregivers of people with autism who continue to use ABA as an intervention for autism. The autistic adults speaking out are not misinterpreting, exaggerating, or complaining. They are seeing reality correctly, and telling the truth as it is. It is my sincerest hope that people will open their minds and hearts and listen.

B. New Research, Evidence, and Testimonials Available

In the years since this paper was published, new and comprehensive research has been conducted offering credible insight into the documentable harm caused by ABA to autistic individuals. ABA is abusive, according to these studies, because it ignores the structure of the autistic brain and the overstimulation of the autistic experience, focuses on measurable behavior at the expense of internal processes, ignores the complex nature of human psychology, and promotes dependence rather than independence. It is not just

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[10] *See* Elizabeth Devita-Raeburn, *The controversy over autism's most common* therapy, SPECTRUM NEWS (Aug. 10, 2016), https://www.spectrumnews.org/features/deep-dive/controversy-autisms-common-therapy/ [perma.cc/F7RK-K63V].

[11] *See* H. Kupferstein, *Evidence of increased PTSD symptoms in autistics exposed to applied behavior analysis*, 4.1 ADVANCES IN AUTISM 19 (2018); Frank L. Ludwig, *Why Applied Behavior Analysis Harms Your Autistic* Child, FRANKLUDWIG.COM, http://franklludwig.com/aba.html [perma.cc/9UXM-R92H].

[12] "Violations of the right to dignity granted in the UN Convention on the Rights of Persons with Disabilities include victimization by care providers (University of Cambridge 2017), being excluded from public places due to their behaviors, and exposure to treatments that can cause harm, especially Applied Behavior Analysis (one of the only treatments thought to be effective in teaching children social interaction). Applied Behavioral Analysis is inspired by training for animals and in its original form includes both positive rewards for behavioral changes—being more like neurotypical people—as well as negative sanctions for neurodiverse behavior (Silberman 2016)." Keri E. Iyall Smith, *Understanding and Promoting the Human Rights of Autistic People*, 15.1 SOCIETIES WITHOUT BORDERS 3 (2021).

"old ABA," (which involved negative reinforcement) that is abusive, but even "new ABA," (exclusively based on positive reinforcement) because it is ABA itself that is fundamentally abusive to the autistic person. It promotes the idea that autistic children must change to fit in. As excerpted from Sandoval-Norton, Shkedy, and Shkedy (2021)[13]:

- "ABA is concerned with outward manifestations of behavior and the treatment of those manifestations."
- "Wilkenfeld and McCarthy (2020) demonstrated that ABA is unethical from a bioethics perspective because ABA violates autonomy insofar as it coercively closes off certain paths of identity formation. It also violates autonomy by coercively modifying children's patterns of behaviors to be misaligned with their preferences, passions, and pursuits."
- "We have moved away from old science and the primitive understanding of human beings as merely a bundle of behaviors and moved towards more developed and more scientifically supported models which incorporate cognitions, internal processes, neuroscience, genetic predispositions, multiculturalism, etc. There would be no need for various psychological orientations if all human beings were a mere bundle of behaviors who could be rewarded, punished, or conditioned into achieving anything."
- "Furthermore, Shkedy (2019) demonstrated there is a plethora of research showing the oversensitivity of the autistic brain has to do with external stimuli with some of them actually causing physical pain."
- "While the behaviors may be viewed as abnormal, they help to soothe and calm the autistic person. Yet the practice of large scale extinguishing of all forms of undesired behavior, whether harmful or not, largely continues and persists within ABA circles. The fact that it's claimed that there are hundreds of studies that effectively reduce self-stimulatory behaviors that are deemed problematic by consumers, parents, and families only serves as further evidence of abuse."
- It has been "demonstrated that self-injurious behaviors in non-verbal children with autism are a cry for help due to their lack of communication skills; ABA therapists overwhelmingly predominantly denote these behaviors as task avoidance."
- "Moreover, one treatment that ABA uses for negative attention is called extinction, where the reinforcement for the behavior is discontinued in order to attempt to decrease the incidence of the behavior. The literature on ABA lists possible side effects of extinction, one of which is depression (Powell et al., 2016). ABA therapists are not trained to recognize depression and therefore will

[13] *See* Aileen H. Sandoval-Norton, Gary Shkedy, and Dalia Shkedy, *Long-term ABA Therapy Is Abusive: A Response to Gorycki, Ruppel, and Zane*, 5 ADVANCES IN NEURODEVELOPMENTAL DISORDERS 126–34 (2021) [perma.cc/D49K-JML8].

continue this treatment while unknowingly causing psychological harm."

- "Rather than live up to the promise of supporting independence, ABA forces compliance and ignores the child's true feelings, methods of coping, and development in favor of external behavior that is pleasing to allistic, neurotypical members of society."
- "Research indicates prompt dependency is a very prevalent problem, even in 'higher functioning' individuals."
- "Providing a treatment that causes pain in exchange for no benefit, even if unknowingly, is tantamount to torture and violates the most basic requirement of any therapy, to do no harm. As ABA focuses solely on a behavior itself as opposed to internal constructs (e.g., thoughts, emotions, pain), Sandoval-Norton and Shkedy (2019) illustrated and cited research demonstrating how this can lead to psychological and physical abuse and violates the ethical obligation to 'do no harm.'"

This study along with the studies cited within are corroborated by the narratives autistic adults who have received ABA during childhood are recounting. For example, C.L. Lynch, an autistic woman and blogging contributor to Neuroclastic, Inc., describes ABA:[14]

- In general: "'But ABA has changed,' people argue. 'My ABA therapist never uses punishment. It's all positive and reward-based.' That is very true for many people. Most ABA therapists don't set out to hurt children. And yet, despite making ABA therapy fun and positive, the underlying goals of ABA have not changed. And it is these goals that, like gay conversion therapy, do long-term damage to the human psyche. The reason parents and ABA therapists can't see it as abusive is because they can't see it from an autistic point of view."
- Regarding a recorded ABA session, used as an example: "While they do not address it in the voice-over, if you watched it again you would notice how often the therapists take the children's hands and fold them into the children's lap. You would also notice how often the child's feelings are ignored . . . In the video with the girl in the supermarket, an autistic person can spot that she was getting overstimulated, exhausted, and was increasingly desperate to escape this environment . . . She isn't happier. She's just accepted that her feelings don't matter and the fastest way to escape the situation is by complying . . . [y]ou can see that ABA therapists deliberately ignore

[14] C.L. Lynch, *Invisible Abuse: ABA and the things only autistic people can see*, NEUROCLASTIC (March 28, 2019), https://neuroclastic.com/invisible-abuse-aba-and-the-things-only-autistic-people-can-see/ [perma.cc/5KDJ-8TY3]; *see also The Controversy Around ABA*, CHILD MIND INSTITUTE, https://childmind.org/article/controversy-around-applied-behavior-analysis/ [perma.cc/4B4U-3PUU]; *How Does ABA Actually Impact Autistic Populations*, PLANET NEURODIVERGENT, https://www.planetneurodivergent.com/how-does-aba-actually-impact-autistic-populations/ [perma.cc/6CMV-PF9W].

attempts to communicate or produce behaviors that have not been demanded by the therapist . . . The problem with ABA is that it addresses the child's behaviors, not the child's *needs* . . . You can go to any ABA website and read what they say and you'll see that there will be no discussion of the child's emotional welfare or happiness, only behaviours. To ABA, behavior is the only thing that matters. ABA considers autistic children as unbalanced kids who need to be balanced out, and if you balance their behavior, they are fixed."

- On stimming and sensory needs: "Stimming isn't like doodling when you're bored or throwing a basketball. Stimming is a comforting self-soothing behavior which helps us reduce stress, feel more comfortable in uncomfortable environments, and regulate our emotions. Grabbing my hands when I stim the way ABA recommends would not help my day go better. It would be an excellent way to piss me off and make me feel frustrated and anxious, though . . . The parents say the ABA really helped their daughter. Does it really help the child, or the parents? The grocery store isn't any less noisy or bright or overwhelming. And the child obviously still finds it difficult to go in. Instead, she has learned to keep her feelings to herself, to try and focus on pleasing her family, and bottle up her stress inside until she can't take it anymore. That's a healthy thing to teach a child, *right?* With time she may become excellent at this. She may be able to go to the store, put items in the cart, and go home without a meltdown. But the meltdown WILL come. It will come over something minor, some silly thing that seems like nothing and pushes her over the edge where she was already teetering. And they will wonder where it came from. They'll talk about how unpredictable her meltdowns can be. It isn't unpredictable to us. . . We can see that her autism hasn't been treated to improve her life so much as to improve her family's life. And while that is important too, wouldn't it be better to find a solution that works for everyone? . . . I know that ear defenders [e.g. earmuffs or noise-canceling headphones] [15] are not part of standard ABA protocols. Instead of teaching them to understand their sensory needs and self-advocate for having their needs met, they are taught to ignore them."
- On the recommended 40-hour per week program: "Now understand that sessions like this are not a couple of hours a week. ABA therapists recommend that small children between 2 and 5 go through 40 hours a week of this type of learning . . . My allistic[16] eight year old doesn't do 40 hours a week of school. He goes to school from nine to three and gets a half hour recess and a half hour lunch. That's 5 hours a day five days a week. 25 hours of active learning . . .

[15] *See*, *e.g.*, *Kids Ear Defenders for Autism*, SENSORY DIRECT, https://www.sensorydirect.com/environment/out-and-about/ear-defenders [perma.cc/3J28-7HSY].

[16] This term describes a nonautistic person.

Imagine asking double that for a preschooler . . . 40 hours a week is too much for *me* so I can't imagine how a small child manages it."

- On the gaslighting and abusive nature of ABA: "I know that ABA aims to be positive and rewarding for the child, but doesn't allow the child to tap out whenever they need to. I know that ABA considers vital emotional regulation tools to be problems that must be extinguished. I know that neurotypical pre-schoolers are not usually expected to learn for 40 hours a week. I know that neurotypical children are encouraged to express their emotions, not smother them. I know that ABA believes in removing a child's language tool like the iPad when they are naughty[17] . . . Whenever autistic people protest ABA, we are told that we don't understand, that we don't know how hard autistic children are to live with. They talk about improving the child's independence and argue that it isn't cruel to teach a child to write or play with toys. They don't see how weird it is to try to systematically shape a child's behavior to teach them to play with a toy the "right" way . . . They don't see how dangerous it is to teach a child to do whatever they are ordered to do, no questions asked, and to never object or say 'no.'"

C. Unethical Practices, Conflicts of Interest, Cognitive Dissonance, and Bad Incentives Around ABA and Organizations that Support It

While ABA has been in my brother's life for decades, it is only in recent history that I have gained experience within this space in a professional capacity, and over the past few years, have had access to leadership in several ABA proponent organizations. What that experience has shown me is that there are many people in the world of ABA and autism therapy who are operating from the ego and not from a genuine desire to improve things for this population, and aside from them, many others who do want to help but have not yet awakened to the several critical flaws inherent to the business of ABA.[18] In the years since writing the original article, I have obtained both a J.D. and an M.B.A., which has enabled me to better see the misguided structures and incentives involved.

First, "ABA therapists are not required to take even a single class on autism, brain function, or child development," and they do not understand why the child is doing what they are doing, but they understand how to change the child's external behavior.[19] "We are unaware of other professions

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[17] Ms. Cernius supports this author's assertion, as Ms. Cernius's family members have been trained to withhold her brother's iPhone and iPad to motivate him to comply.

[18] *See Why I Left ABA,* Socially Anxious Advocate (May 22, 2015), https://socially-anxiousadvocate.wordpress.com/2015/05/22/why-i-left-aba/ [perma.cc/4RPP-T6M2].

[19] *See* Aileen H. Sandoval-Norton, Gary Shkedy, & Dalia Shkedy, Long-term ABA Therapy is Abusive: A Response to Gorycki, Ruppel, and Zane, 5 Advances in Neurodevelopmental Disorders, 126–34 (2021); *see also* Behavior Analyst Certification Board, Board Certified Behavior Analyst Handbook, https://www.bacb.com/wp-content/uploads/2020/11/BCBAHandbook_210513.pdf [perma.cc/

or circumstances where it's considered ethical to not study anything about the manifestation or circumstances of a condition and then attempt to treat it."[20] This has essentially transformed into a situation where ABA therapists "have no training, knowledge, or expertise on the behaviors they are treating within the context of the autistic brain,"[21] but at the same time, ABA therapists and associations present themselves to the government and to the public as scientific experts on treating autism. "Representing oneself as an expert in a subject area one has no knowledge of is usually considered fraud, at least once revealed. At its very core, it is the epitome of unethical action."[22]

Furthermore, under ABA's model, the dignity of the child is not taken into account. "The aspects of the child have been neglected likely because the people entrusted to help these children specifically have no training on how to study, understand, and treat this population, and so, they must wholly rely on the observations of parents instead of on a theoretically based, structurally sound model."[23]

Additionally, ABA is imposed with little scientific validation. "There have been limited, if any, scientifically validated studies on the use of ABA on nonverbal children with ASD. Still, this population is forced to engage in these same interventions, perhaps more often than the non-severe population, despite these studies occurring without them as a primary participant. Many of them have ABA imposed on them over nearly their entire lifetime, despite the dearth of any studies focused on determining the efficacy of ABA on the severe autism population specifically."[24]

Cognitive dissonance is the psychological stress experienced from holding two conflicting beliefs, values, or attitudes.[25] "The inconsistency between what people believe and how they behave motivates people to engage in actions that will help minimize feelings of discomfort. People attempt to relieve this tension in different ways, such as by rejecting, explaining away, or avoiding new information."[26] It is my belief and experience that much of the autism community is trapped in cognitive dissonance surrounding ABA and the notion of "treating" or "curing" autism. The pro-ABA community wants to help people with autism, but persists in the provision of ABA despite the plethora of accounts of autistic adults who received ABA as children describing the ways the therapy abused them; the pro-ABA community insists that ABA leads to increased independence for people with autism, despite the

AWY9-NVWY]; *About Behavior Analysis*, BEHAVIOR ANALYST CERTIFICATION BOARD, https://www.bacb.com/about-behavior-analysis/ [perma.cc/3MJD-XHCB].

[20] *See* A. H. Sandoval-Norton, G. Shkedy & D. Shkedy, *supra* note 19.

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.* .

[25] *See* Eddie Harmon-Jones and Judson Mills, *An Introduction to Cognitive Dissonance Theory and an Overview of Current Perspectives on the Theory*, *in* E. HARMON-JONES (ED.) COGNITIVE DISSONANCE, SECOND EDITION: REEXAMINING A PIVOTAL THEORY IN PSYCHOLOGY (2019).

[26] Kendra Cherry, *What is cognitive dissonance?* (July 2, 2020) VERY WELL MIND, https://www.verywellmind.com/what-is-cognitive-dissonance-2795012 [perma.cc/T3U9-5U43].

fact that ABA cultivates a mindset of self-quieting and compliance[27]; ABA suppliers represent themselves as experts in autism despite the factual situation that training in autism, brain function, and child development is not required to become an ABA practitioner; the pro-ABA community denies that ABA is ableist despite the eugenicist views expressed by its founder, Ole Ivar Lovaas (discussed further in Section D); and the pro-ABA community recommends ABA for children with nonverbal or "severe" autism, blind to the fact that studies do not exist that validate ABA's efficacy for this group.

As it stands, the business of ABA is poised to reach a market value of $2.45 billion by 2025.[28] The growth of the neurodiversity movement in autism is a direct result of the practice of ABA on the autism population—they are fighting back against a billion-dollar industry of pseudoscience professionals who are profiting off of institutional child abuse.

D. Ableist[29] History, Eugenics, and Comparison to Conversion Therapy

The history of ABA has been sanitized to appeal to caregivers. I know this because I reiterated much of it in my original paper. Ole Ivar Lovaas, who is widely considered the father of ABA, was an involved pioneer in conversion therapy and a supporter of eugenics, and the history and development of ABA largely parallels that of conversion therapy.[30]

II. Other Points of Correction and Clarity

I would also like to correct a few additional assertions, associations, and terminology referenced and cited throughout the paper:

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[27] Mismatching incentivizations with hopeful outcomes is a well-known and studied psychological and behavioral principle, artfully documented in Steven Kerr, On the Folly of Rewarding A, While Hoping for B, 18 Academy of Management J. 769–82 (1975).

[28] John LaRosa, $2 Billion U.S. Autism Treatment Market Is Poised for Growth Next Year, MarketResearch.com (December 16, 2020), https://blog.marketresearch.com/2-billion-u.s.-autism-treatment-market-is-poised-for-growth-next-year [perma.cc/9TTT-VRRK].

[29] Abelism is defined as discrimination or social prejudice against people with disabilities based on the belief that typical abilities are superior. It can manifest as an attitude, stereotype, or an outright offensive comment or behavior. *See* Rakshitha Arni Ravishankar, Why You Need to Stop Using These Words and Phrases, Harvard Business Review (Dec. 15, 2020), https://hbr.org/2020/12/why-you-need-to-stop-using-these-words-and-phrases [perma.cc/BK4B-29DL].

[30] *See* Margaret F. Gibson & Patty Douglas, *Disturbing Behaviours: Ole Ivar Lovaas and the Queer History of Autism Science,* 4(2) Catalyst: Feminism, Theory, Technoscience 1 (2018); Alex Kronstein, *Treating autism as the problem: The connection between Gay Conversion Therapy and ABA*, The Nova Scotia Advocate (July 11, 2018), https://nsadvocate.org/2018/07/11/treating-autism-as-a-problem-the-connection-between-gay-conversion-therapy-and-aba/ [perma.cc/GAS8-7KJT]; Jake Pyne, *"Building a Person": Legal and Clinical Personhood for Autistic and Trans Children in Ontario*, 35 Can. J.L. & Soc. 341 (2020); Victoria Costello, *NeuroTribes, Steve Silberman on haunting history and new hope for autistic people*, PLOS Blogs: Your Say (Nov. 2, 2015), https://yoursay.plos.org/2015/11/02/neurotribes-steve-silberman-on-a-haunting-history-and-new-hope-for-autistic-people/ [perma.cc/G9YM-QPV4].

- "Special Needs": the use of this term to describe people with disabilities is outdated and tone-deaf.[31]
- "Treatment": the author regrets the suggestion in the paper that people with autism need treatment.
- "Severity, mild": the author regrets alluding to the medical model of autism throughout the paper through the usage of outdated autism spectrum terminology.
- The author supports the use of other services, such as speech therapy, occupational therapy, communication devices, sensory integration therapy, etc., to assist individuals with autism.
- Contemporaneously with the publication of this retraction, the author has notified the courts, representatives, and other authors who have cited her work of this retraction, and has made similar efforts to retract other writings on ABA with other journals as well.

Conclusion

It pains me deeply that I was ever involved in furthering ABA, and I hope this retraction will be a productive step in undoing the harm that has been done to the autistic community. I've had my arm around my brother for our entire lives together, and my love for him is such that I would put aside my own discomfort at the dynamics of ABA in order to prioritize his needs, which, due to the circumstances of our childhood, were framed to me as being intensive ABA therapy. With greater education, knowledge stemming from the increasing visibility of autistic voices, and personal and professional experiences within this community over the past few years, I am convinced that the opposite is true. While this letter is a thorough explanation of many of my thoughts on ABA, it is not exhaustive, the discussion is long from over, and there is much more to be uncovered and said. The story of autism up until now has been told by the voices of everyone but autistic individuals, who have a right to be heard and respected where their wellbeing is concerned. I will do my best to support them as the discussion gains momentum and takes shape.

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[31] *See* David Oliver, *"I am not ashamed": Disability advocates, experts implore you to stop saying 'special needs'*, USA Today (June 11, 2021), https://www.usatoday.com/story/life/health-wellness/2021/06/11/disabled-not-special-needs-experts-explain-why-never-use-term/7591024002/ [perma.cc/3X3T-TDF2]; *see also See* National Youth Leadership Network and Kids As Self Advocates, *Respectful Disability Language: Here's What's Up!* (2006) https://www.aucd.org/docs/add/sa_summits/Language%20Doc.pdf [perma.cc/3TRR-XCJU].