

# LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS

Edited by  
Jennifer Weiss-Wolf and Jeanine Plant-Chirlin

BRENNAN CENTER  
FOR JUSTICE  
TWENTY YEARS

*at New York University School of Law*



BRENNAN CENTER FOR JUSTICE  
AT NEW YORK UNIVERSITY SCHOOL OF LAW

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LESSONS FROM AMERICA'S  
SOCIAL MOVEMENTS**

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## INTRODUCTION

*“THE GENIUS OF THE CONSTITUTION RESTS NOT IN ANY STATIC MEANING IT MIGHT HAVE HAD IN A WORLD THAT IS DEAD AND GONE, BUT IN THE ADAPTABILITY OF ITS GREAT PRINCIPLES TO COPE WITH CURRENT PROBLEMS AND CURRENT NEEDS.”*

*— JUSTICE WILLIAM J. BRENNAN, JR.*

The Brennan Center for Justice at NYU School of Law was founded 20 years ago as a living memorial to the values of the late U.S. Supreme Court Justice William J. Brennan, Jr. Known for his expansive vision of the Constitution as a driver of social change and his belief in the transformative power of law, Justice Brennan inspired many reformers moved by the enduring American values of democracy, justice, freedom, and equality.

At the Brennan Center today, we seek to reform and revitalize today’s institutions in the light of those enduring values. We focus on the systems of democracy and justice — the way our nation makes the decisions that most affect ordinary people. We believe those systems are badly in need of repair.

We have forged a distinct model to help spur that change. It is based on the belief that lasting social change comes from the creation of smart policy innovation driven by a motivated public. In contrast to an earlier generation of public interest lawyers, who might have begun by filing a lawsuit to address an injustice, we believe that it is necessary to win in the court of public opinion *and* to win in a court of law. We have built what we regard as a new model organization: part think tank, part legal advocacy organization, and part communications hub.

We put this model into action most visibly in the fight to protect the vote. In 2011, 19 states passed 27 new measures to make it harder to vote — the most since the Jim Crow era. Minorities, students, and the poor were hardest hit. These sudden shifts drew little sustained attention. In October 2011, we released *Voting Law Changes in 2012*,

which rigorously reported that 5 million citizens could find it harder or impossible to vote. It was the lead story in *The New York Times*. And it fostered a fierce public debate. The Justice Department joined the fight. Together with allies, we worked to shift the terms of public debate. So that when the Center and other voting rights groups went to court the next year, every single one of the worst new laws was blocked, blunted, postponed, or repealed. These rulings came from Republican and Democratic judges, state and federal. It was a tremendous victory for voters, and democracy.

Today we are engaged in a similar drive to move the law across our issues. We are helping lead a decades-long drive to overturn *Citizens United* and other misguided Supreme Court decisions that have given us a dystopian campaign finance system. We are pushing our signature proposal for universal, automatic voter registration — a breakthrough reform passed most recently by California’s legislature. We are working to harness the tools of economics and the credible voices of law enforcement to end mass incarceration. And we are working to protect constitutional values as the nation enters the 15th year of its fight against terrorism.

In all this, we take our cue from Abraham Lincoln’s admonition at another time of constitutional debate: “Public sentiment is everything. With public sentiment, nothing can fail; without it, nothing can succeed. Consequently he who moulds public sentiment goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed.”

As we proudly mark the Brennan Center’s 20th anniversary, we thought it a good time to dig deeper into the lessons learned from fights in which we have played a part, and from other social movements, too. Some have remarkable examples of success. The victorious fight for marriage equality is the most obvious stunning illustration. The path forged by gun rights activists to change the Supreme Court’s interpretation of the Second Amendment is another. Deep partisan wrangling over the right to vote, reproductive freedom, the environment, and the death penalty has caused these issues to be among the most

divisive of our time. Conversely, for criminal justice reform efforts, bipartisan alliances are driving momentum for change.

We are honored and grateful that so many thought leaders representing these and other issues — as well as perspectives from philanthropy, academia, and organizing — are part of this publication.

To each of the contributors, we asked:

- Is it necessary to first win in the court of public opinion before the court of law? Or, conversely, does litigation prompt or direct public attention? What are the risks and benefits of court rulings that are ahead of public opinion?
- Which has a better, longer lasting chance — a favorable legal ruling or winning in the democratic branches? Is the goal legal change ... or change?
- What to do when the thing you care about is the thing you cannot say out loud? Or when the public is against you? How to grapple when the issue is divisive racially or in partisan terms, but strategy suggests reaching a broader majoritarian audience?

Ultimately, we at the Brennan Center believe the institutions of American democracy themselves must be the subject of our energy and efforts. Those institutions are badly corroded. Voter turnout in 2014 plunged to its lowest level in seven decades. Government is paralyzed, polarized, overwhelmed by the new tide of dark money loosed by the Supreme Court's rulings in *Citizens United* and other cases.

The kind of sweeping reform of the institutions by which decisions get made requires deep, sustained, and at times jarring rethinking. The ramifications go well beyond any one set of issues. Those who care most about the social movements covered in this volume will find it increasingly challenging to hold ground or win victories so long as the political and justice systems tilt ever more sharply toward an ideological extreme.

And the kind of institutional reform needed to win will not come from a lawsuit, but rather an upsurge of citizen creativity, innovation, and engagement.

Our deepest thanks to the talented staff and scholars who do this work, especially our colleagues at the Brennan Center; the funders and donors for their invaluable support and for making this work possible; and the allied organizations from myriad fields who have given us the benefit of their wisdom and strategic insight in this volume. We look forward to your partnership as we fight the good fight in the months and years to come.

*Michael Waldman*  
*President*  
*Brennan Center for Justice at NYU School of Law*

## A NOTE FROM THE FOUNDING LEGAL DIRECTOR

On April 25, 1996, when Justice William Brennan, Jr. became the first Justice since Oliver Wendell Holmes to celebrate a 90th birthday in the Supreme Court chamber, Josh Rosenkranz and I were thrilled to present the Justice with a unique present — the joyful news that the Brennan Center was up and running. On that moving and memorable day, we promised Justice Brennan that his lifelong legacy of fierce commitment to justice for all, especially the weak, would endure into the new century, defended and advanced by a dedicated band proud to have the privilege of fighting in Bill Brennan’s name.

When, 18 months earlier, Josh and I, on behalf of a number of Brennan law clerks, had asked the Justice for permission to seek to found the Brennan Center, he smiled and agreed, but imposed two conditions:

First, he said: “I want you to do your best to deal creatively with hard issues, but always from the perspective of the folks on the bottom. It’s too easy to impose solutions that serve the top.”

Second, he added, “I don’t want you to give any special consideration to my proposed solutions. Assemble the best people you can,” he told us, “and try to solve the problem without engaging in some perverse form of originalism.”

The essays in this collection celebrate 20 years of effort by those of us who have worked at the Brennan Center to be true to the Justice’s wishes. They tell the story of creative efforts to advance the values held dear by Justice Brennan — continuing efforts to rescue

the egalitarian democracy that Bill Brennan loved and fought for all his life from dominance by the ultra-rich and powerful; continuing efforts to assure that the folks at the bottom enjoy not only an effective right to vote, but fair representation in the democratic process; continuing efforts to prevent the criminal justice system from operating as a soulless machine that chews up the weak, the poor, and people of color; continuing efforts to preserve democracy from slipping into secret shadows cast by a national security state; continuing efforts to assure access to the courts by the weakest among us; and continuing efforts to seek equal justice in Bill Brennan's "Living Constitution."

It is fair, after 20 years, to ask ourselves whether we have lived up to the Justice's challenge that day in the Supreme Court chamber to "never give up, never give up, never give up." If I could speak to him one more time, I would hand these essays to Justice Brennan and tell him, "Mr. Justice, we haven't given up, we'll never give up, and we're going to win."

I like to hope that the Justice's eyes would twinkle, and that he would give me one of his cherished elfin smiles as he clapped me on the shoulder and said, "Keep up the good work, pal."

*Burt Neuborne*  
*Founding Legal Director, Brennan Center for Justice*  
*Norman Dorsen Professor of Civil Liberties, NYU School of Law*

**THE COURTS AND  
PUBLIC OPINION**





# 1

## SHAPING THE VOTING RIGHTS NARRATIVE

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PERSUADING THE COURTS TO INVALIDATE ONEROUS  
VOTING LAWS STARTS WITH GREATER PUBLIC ATTENTION  
TO THE ISSUES AT STAKE.

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*Wendy Weiser*  
*Director, Democracy Program*  
*Brennan Center for Justice at NYU School of Law*

Alexis de Tocqueville famously observed in 1835, “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.” That is certainly true with respect to the major issues affecting our democracy today — voting rights, money in politics, redistricting, and fair courts. But what is the relationship between the judicial and political questions, and what does that mean for advocates seeking change?

This essay explores that relationship through the lens of recent court cases on voting rights. It argues that the outcomes in voting rights cases have reflected — and been influenced by — the evolving public discourse on the subject. Those cases, in turn, have impacted the politics of voting legislation in the states. Throughout, advocates like the Brennan Center have helped shape both the public discourse and the lawsuits to maximize positive outcomes for voters. While the fight is by no means over and victory is not assured, the interim successes achieved to date offer lessons for advocates in other fields as well.

### *Voting Rights Challenges: Context*

Increasingly over the past decade, Americans have been embroiled in a high-pitched battle over the right to vote. States across the country have passed new laws to make it harder to cast a ballot, and advocates have been pushing back in the courts, in the legislatures, in the streets, and at the voting booth. Beginning in late 2005, states started creating new barriers to voting, from strict new ID laws, to laws cutting back on early voting opportunities.<sup>1</sup> The push to restrict voting reached a fever pitch in the lead-up to the 2012 election, with 41 states introducing and 19 states passing laws making it harder to vote,<sup>2</sup> and has continued since.<sup>3</sup> Today, 21 states have more restrictive voting laws than they did in 2010. In the 2016 election, 15 states will have more strict rules in place than they did in 2012.

From the outset of this recent movement to block the vote, newly passed voting restrictions have been challenged in court. Initially, the legal claims available to advocates had to be dusted off since legislatures had not passed — and hence courts had not considered — laws cutting back on voting rights for decades. Before 2008, the last U.S. Supreme Court case addressing a law that hindered access to the polls was in 1974.<sup>4</sup> Courts and advocates alike were faced with a new problem in a new context.

Despite differences in strategy, the lawsuits filed against this new wave of restrictions have generally raised similar arguments against similar laws. Judicial receptivity to those arguments, however, has varied. New voter ID laws, for example, have been struck down in Missouri,<sup>5</sup> Pennsylvania,<sup>6</sup> Arkansas,<sup>7</sup> and Texas (at least as of now);<sup>8</sup> mitigated in Georgia<sup>9</sup> and South Carolina;<sup>10</sup> and upheld in Indiana,<sup>11</sup> Tennessee,<sup>12</sup> and Wisconsin.<sup>13</sup>

What accounts for the different outcomes in cases challenging similar laws? The specific details of the challenged statutes and the factual records assembled in the cases undoubtedly played a significant part, as did the attitudes of the judges assigned to those cases.<sup>14</sup> But, so too did the public discourse and advocacy around the challenged laws. In general, the greater the public attention to the causes and consequences

of challenged laws, and the greater the opprobrium directed at those laws, the more likely courts have been to closely scrutinize and invalidate those laws.

### *Judge Posner: Two Voter ID Decisions*

The evolving judicial attitudes toward voting rights cases is perhaps best exemplified by Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit. In January 2007, he penned a brief and rather flippant opinion upholding a strict new photo ID law passed in Indiana — the first such law in the country.<sup>15</sup> Almost eight years later, Judge Posner found himself on the opposite side of the issue, writing an impassioned dissent from a decision upholding a similar law coming out of Wisconsin.

In the first case, *Crawford v. Marion County Election Board*,<sup>16</sup> the plaintiffs argued that Indiana's newly minted ID law would impose burdens on tens of thousands of voters who did not have state-issued photo IDs, preventing many from voting. They further claimed the law was not justified as a measure to combat voter fraud since there was no evidence of any such fraud in Indiana's history. Writing for the court, Judge Posner dismissed these claims.

After acknowledging that Indiana's law will keep some people from voting, Judge Posner minimized both the importance of the vote and the burdens on voters: "The benefits of voting to the individual voter are elusive ... and even very slight costs in time or bother or out-of-pocket expense deter many people from voting, or at least from voting in elections they're not much interested in." The burden of Indiana's law, which he assumed could be overcome by almost anyone willing to "go to the bother and ... the expense of obtaining a photo ID," was not enough to raise concern, or even to cause the court to closely examine the evidence regarding the number of people who would be affected by the new law and the difficulties of obtaining the required IDs. Instead of considering the law's impact, the court questioned the motivation behind the suit, suggesting it was not to protect voters' rights but rather to prevent the Democratic Party and other groups from having "to work

harder to get every last one of their supporters to the polls.” Because he saw little harm in increasing the cost of voting, Judge Posner had no trouble finding the law was justified by the admittedly unsubstantiated need to prevent voter impersonation fraud. Thus, the court upheld the country’s first strict photo ID law. The U.S. Supreme Court affirmed that decision a year later.<sup>17</sup>

Fast forward to 2014. In a challenge to another strict voter ID law from Wisconsin,<sup>18</sup> Judge Posner completely turned around. Faced with the same arguments presented in the Indiana case, he came to the opposite conclusion — that Wisconsin’s ID law imposed serious burdens on those citizens who are most easily deterred from voting, and that, in the “absence of any evidence that voter impersonation fraud is an actual rather than an invented problem,” the law was not justified by the state’s interest in deterring fraud. His dissenting opinion in *Frank v. Walker* was everything his *Crawford* opinion was not — thorough, searching, and respectful — though he unfortunately did not succeed in persuading enough of his colleagues to rehear the case and strike down the law.

Why did he change his mind? The accumulation of evidence. As Emily Bazelon reported, Judge Posner explained that “judges sometimes don’t understand a subject well enough to ‘gauge the consequences of their decisions.’”<sup>19</sup> So it was when *Crawford* was first decided in 2007. His colleague, Judge Terence Evans, had dissented, calling Indiana’s new voter ID law “a not-too-thinly veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”<sup>20</sup> In retrospect, Judge Posner commented, Judge Evans’s conjecture “seem[ed] prescient.”<sup>21</sup> But at the time, there was very little public understanding of the likely impact of new ID laws or other voting regulations, the scope of voter fraud problems, or of election administration more generally. The voting wars were young, and there was little basis to mistrust legislative motives or facts. Precious few studies gauged the rates of ID possession or voter fraud, and no state yet had experience with new voter ID or other restrictions.

By 2014, on the other hand, the public evidence on voter ID laws was miles thicker — thanks in significant part to concerted efforts by

the Brennan Center and others to develop and publicize that evidence. After exposure to more information about the impact, causes, and consequences of new voter ID laws, Judge Posner was better equipped to assess their costs and benefits. And so, eight years later, he came to believe that he had been wrong to uphold “a type of law now widely regarded as a means of voter suppression rather than of fraud prevention.”<sup>22</sup> He was not the only judge to experience a change of heart: Justice John Paul Stevens, who authored the Supreme Court decision affirming Judge Posner and upholding Indiana’s law, has since also come to agree with the dissenters.<sup>23</sup> Justice Stevens expressed regret that his decision prompted other states to pass similar voter ID laws.<sup>24</sup>

To be clear, none of these facts justify the judicial abdication in the *Crawford* case. Applying the appropriate standard of review, the courts should have been more skeptical of restrictions on voting access and required the state to work harder to justify new restrictions. Nonetheless, the courts’ cursory rubber-stamping of Indiana’s law was consonant with the public’s blasé attitude toward the issue at the time. By 2014, however, there was a much broader understanding, at least among elites, that new voter ID laws were not all they were cracked up to be, but rather were part of a bigger and deeply troubling effort to impede access to the ballot box.

### ***Growing Concern Over New Voting Laws***

Judge Posner’s story, while anecdotal, is illustrative of a broader trend during this period. As public attention to new voting restrictions intensified, judges, public officials, and opinion leaders became increasingly skeptical of laws restricting the vote and increasingly willing to challenge them. While some states like Georgia and Missouri had experienced active and public efforts to push back on new voting restrictions prior to 2008,<sup>25</sup> most had not. The big breakthrough on the issue did not come until the fall of 2011.

On October 3, 2011, the lead story in *The New York Times*, covering a new Brennan Center report,<sup>26</sup> announced a wave of new restrictive laws that could make it harder for more than 5 million eligible voters to cast

ballots in 2012.<sup>27</sup> The impact of this story — and the underlying report — was considerable and swift. It spread through the media, vaulting the issue of voting rights from an occasional feature to a broad and sustained national story. In the months before that story, there were only a handful of major news media references to voting issues. Afterward, there were hundreds. Investigative journalists, including the prestigious News21, a project at Arizona State University helmed by the former editors of *The Washington Post* and *The Philadelphia Inquirer*, launched investigations into voting restrictions and fraud. One of the major cable networks — MSNBC — made the voting wars a centerpiece of its reporting leading up to the 2012 election.

Public officials started to take notice, too. In response, congressional Democrats held multiple hearings on the new threat to voting rights<sup>28</sup> and frequently cited the study on the House floor. The report's findings provided the impetus for the Voter Empowerment Act, a comprehensive voting reform bill to improve access to the ballot box, with the Brennan Center's voter registration modernization proposal as a centerpiece.<sup>29</sup> New partners also began taking up the cause of voting rights. In the summer of 2012, for example, a coalition of civil rights, environmental, and labor groups launched a new "Democracy Initiative" to underscore the centrality of these issues. That coalition has steadily expanded and grown.

The public attention to the crisis in voting rights also helped put pressure on the Department of Justice, which until that time had been sitting out the voting wars. The shift at the Justice Department was perhaps the most consequential development in the fight over new barriers to the vote.

Throughout 2011, the Department was silent on the restrictive voting laws sweeping the states. Its voting rights enforcement record during that period was also very sparse.<sup>30</sup> Despite repeated pleas by voting rights advocates to push back against new restrictions, the Department did not get involved. But on December 13, 2011, at a speech at the LBJ Library in Austin, Texas, then-Attorney General Eric Holder for the first time took a strong stand against the "state-level voting law changes" that Rep. John Lewis (D-Ga.) had condemned as part of "a deliberate and systematic attempt to prevent millions of elderly voters, young voters,

students, [and] minority and low-income voters from exercising their constitutional right to engage in the democratic process.”<sup>31</sup> The attorney general continued: “It is time to ask: What kind of a nation—and what kind of people — do we want to be? Are we willing to allow this era — our era — to be remembered as the age when our nation’s proud tradition of expanding the franchise ended?”<sup>32</sup>

Ten days later, the Justice Department issued a letter objecting to a new photo ID law from South Carolina under Section 5 of the federal Voting Rights Act.<sup>33</sup> With that shot across the bow, the Department launched itself full force into the fight for voting rights. It objected to restrictive laws coming out of Texas and Florida, delayed laws in Mississippi and Alabama, and fought against these new restrictions in multiple suits. The Department’s involvement altered the nature of the fight, making clear the seriousness of what was happening to the vote.

### *The Courts Respond*

As the public debate on voting issues intensified, the courts became more receptive to legal challenges. In the year leading up to the 2012 election, virtually every court that considered a law or policy restricting voting found in favor of voters. Overall, 11 court decisions in eight states blocked or blunted new laws that would have made it harder for eligible Americans to vote.<sup>34</sup> Earlier, the outcomes of voting rights cases too often depended on whether the assigned judges were liberal or conservative.<sup>35</sup> But in 2012, voting rights prevailed before conservative and liberal judges, in both state and federal courts. It was a remarkable string of victories, and a remarkable turnaround. These decisions — along with Department of Justice actions and successful repeal efforts in some states — meant that the bulk of the restrictive voting laws passed in the lead-up to 2012 were not in place for that election.

How much of an impact did the public discourse have on these court victories? It is difficult to know. From the perspective of someone who litigated multiple voting rights cases before and after the spike in public attention, the courts seemed to approach the cases more carefully, examining the evidence and underlying facts far more scrupulously than before.

Overall, the courts' more thorough examinations led to better outcomes for voters. For example, when the Seventh Circuit considered the burdens of Indiana's voter ID requirement in 2007, it was content to rest on its observation that "it is exceedingly difficult to maneuver in today's America without photo ID" and its assumption that those who don't have such ID simply weren't willing to go through the "bother" of obtaining one.<sup>36</sup>

In contrast, examining a strict new voter ID law in Pennsylvania several years later, the state supreme court looked carefully not only at the number of people who would be affected by the law (760,000), but also at just how hard it would be for affected people to obtain acceptable IDs. The result: The court blocked the law until the state put in place a system that would ensure IDs were free and accessible to prospective voters.<sup>37</sup> (Not surprisingly, the state subsequently failed in this endeavor.)

The same was true on the opposite side of the ledger. When the U.S. Supreme Court considered the state's justification for requiring Indiana voters to show photo ID, it was not at all concerned by the fact that the record contained no evidence of even a single instance of voter fraud in Indiana's history. Based on a handful of unrelated historic anecdotes, it assumed that the "risk of voter fraud" was "real."<sup>38</sup> In the aftermath of that decision, some courts credited state assertions of voter fraud as justifications for voting restrictions — including ones having little logical connection to fraud — without any further inquiry at all.<sup>39</sup> More recent cases, in contrast, have looked more closely at state claims of voter fraud and the extent to which the challenged laws minimize that risk or cause harm.<sup>40</sup> Judge Posner's opinions reflected this shift — from an unquestioning acceptance of voter fraud as a justification for Indiana's voter ID law, to suspicion of the exact same justification in the Wisconsin case.

One possible reason for the increased care by courts is that their decisions were being closely watched — by advocates, the media, and the public. Another is that the facts and assumptions underlying new voting laws had become highly contested. What previously could be assumed to be "facts" — everyone has photo ID or can get it easily, voter fraud is a real problem, to mention a few examples — were no



longer widely accepted as true. A fair decision-maker would now have to examine those factual assumptions more closely.

### ***Setting the Record Straight: The Role of Advocates***

What was it about the increased public attention to voting issues that helped shift the legal terrain? At the most general level, the attention signaled that the issue was important and merited close scrutiny and care. More specifically, the public dialogue called into question several basic assumptions that had previously propped up voting restrictions and allowed them to slip by the courts. Those assumptions were that new voting restrictions would harm very few people, that they would be easy to overcome, that voter fraud was a real threat that justified burdening voting rights, and that the laws were well-intentioned efforts by public officials to address a pressing public policy issue. Over time, each of these assumptions has been — I believe successfully — shot down.

Advocates played a major role in shaping the public conversation and setting the record straight. Since the voting rights battles were being fought simultaneously in the courts, in the legislatures, and in the press, it was necessary to build a strong and persuasive public case against new restrictions. To do so, the Brennan Center and others sponsored scores of studies and ensured that those studies were both well accepted by experts and injected into the public debate.

Take, for example, the impact of voter ID and documentary proof of citizenship laws. Many advocates strongly believed that new laws would harm voters, and especially those who are most vulnerable. But, at the time of the earliest voter ID challenges, there was no overarching evidence to gauge the impact of new ID laws or the number of people who could be affected. As these cases were winding their way through the courts, therefore, in November 2006 the Brennan Center commissioned the reputable National Opinion Research Corporation to survey the rate of possession of both state-issued photo IDs and documentary proof of citizenship (which was required by a new state law out of Arizona).<sup>41</sup> The resulting study, *Citizens Without Proof*, found that 11 percent of voting-age Americans did not have state-issued photo IDs, and that the

rate of ID possession was far lower for African Americans, the elderly, and citizens with low incomes.<sup>42</sup> These findings have since become widely accepted.

The study came out too late to affect the record in the Indiana case (the Seventh Circuit decision was issued only a month later), but Judge Posner cited it in the Wisconsin case.<sup>43</sup> In the intervening time period, advocates worked both to publicize the study's findings to ensure that the harms of voter ID laws pervaded the public debate and to foster additional studies to ensure that these facts would become accepted among experts. Our efforts were successful. *Citizens Without Proof* has been pervasively cited in the media as the classic study on the topic,<sup>44</sup> and its findings have been replicated by multiple state-level and national studies, using various methodologies.<sup>45</sup> Advocates and reporters have also since uncovered hundreds of examples of eligible Americans thwarted by new voting laws.<sup>46</sup>

Other misconceptions in the voter ID debate that advocates systematically debunked through studies include the myth of widespread voter fraud,<sup>47</sup> and the belief that voter ID was reasonably low cost and accessible to all eligible Americans.<sup>48</sup> Our findings that fraud concerns have been overblown and that states had not made their IDs free and accessible have similarly been ratified and come to be accepted as true. Other research was also done to gauge the impact of other voting restrictions — such as cutbacks to voter registration opportunities or early voting access.

Public research also cast doubt on the motivations underlying restrictive voting laws. At first, our research showed troubling patterns — for example, that new laws were being passed solely in states with Republican-controlled governments, or that they were more frequent in states that saw increases in African-American voter turnout or Latino population.<sup>49</sup> These observations were confirmed by statistical studies showing, for example, that the more a state saw increases in minority or low-income voter turnout, the more likely it was to introduce and pass legislation cutting back on voting rights.<sup>50</sup> Widely publicized statements by proponents of new restrictions also suggested that new laws were motivated, at least in part, by a desire by some Republicans to

gain unfair electoral advantage and to reduce participation by minority voters.<sup>51</sup> This information was especially powerful, as the public was already very concerned about the prospect of politicians manipulating the rules of elections for their own benefit.

This accumulation of research and evidence changed the public understanding, at least among elites, of the causes and effects of restrictive voting laws. This evolution has made its mark on the cases as well. A number of court cases cited the findings and statistics of these new studies, and some even used language similar to that advocates used in their public messaging.

### *The Courts, Public Discourse, and Legal Change*

Many major social and political advances and setbacks in our nation's history have been embodied in judicial decisions — including *Brown v. Board of Education*, *Obergefell v. Hodges*, and *District of Columbia v. Heller*, to name a few discussed in this volume. But few take the position that desegregation, marriage equality, and gun rights were conceived and won solely in the courts. Courts may pronounce the meaning of the Constitution, but the values and factual assumptions underlying constitutional decisions are profoundly shaped by social and political forces outside the courtroom. Understanding this dynamic, successful advocates for legal change, including for judicially recognized rights, have often built their case for change not only in court but also in the public sphere. This is true of recent fights for voting rights as well.

Much has been written about the ways in which social movements and evolving social norms can help reshape our understanding of constitutional values and their application to public policy. But not all major legal changes require mass movements or fundamental value shifts. Legal change can also result from changes far more mundane — like a changed understanding of facts, causes, or consequences. Thus, for example, when in 1943 it became clear that the policy of requiring public school children to salute the flag led to the expulsion of Jehovah's Witness children and the burning of their churches, the Supreme Court reversed its earlier decision that the policy does not interfere with the free exercise of religion.<sup>52</sup>

That is the story of the recent shift in the courts on voting rights. As the harms of restrictive voting laws have become increasingly apparent, courts have grown more willing to police the electoral system. To be sure, there have been exceptions, and it is not yet clear that voting rights advocates will ultimately prevail.

The Supreme Court caused a major setback for voting rights when it gutted a key protection of the federal Voting Rights Act in its 2013 decision in *Shelby County v. Holder*.<sup>53</sup> That provision — which prevented voting law changes from going into effect in certain jurisdictions unless a federal court or the Department of Justice certified that the changes were not racially discriminatory — was one of the key tools advocates had used to beat back new restrictions in 2012. The decision was based in part on the Court’s determination that significant progress had been made against racial discrimination in voting. But issued one year before Ferguson and the “Black Lives Matter” movement, the ruling may prove to be an outlier. With several high-profile cases making their way through the lower courts, the next chapter of the voting rights struggle may be written in the U.S. Supreme Court.

While the voting rights fight is ongoing, the victories to date offer potentially valuable lessons for advocates seeking legal change on other issues as well. First, the public discourse matters. Legal change should be nurtured outside of court as much as it is in court. Second, facts matter. It is critical to build a strong factual record to support the desired change, and to ensure that this record wins widespread acceptance, at least among elites. Third, perceptions matter. Whether or not bad motives are relevant to a legal claim, courts, like the public, are more likely to be skeptical of laws or policies that are infected with bad or self-serving motives. Advocates can build a stronger case for legal change in the courts by building a stronger case for change in the public sphere, using verifiable facts and widely held public constitutional values.

## 2

# THE SUPREME COURT FOLLOWS PUBLIC OPINION

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SINCE WORLD WAR II, SUPREME COURT OPINIONS HAVE  
OFTEN REFLECTED WIDESPREAD MORAL CONVICTIONS.

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*Cass R. Sunstein\**  
*Robert Walmsley University Professor*  
*Harvard Law School*

In his powerful dissenting opinion from *Obergefell v. Hodges*, Chief Justice John Roberts asks an excellent question: “Just who do we think we are?” That question deserves an answer.

If we look at the arc of the Court’s history, we might be able to offer one. Contrary to appearances, the Court usually pays attention to an actual or emerging moral consensus, certainly with respect to fundamental rights. It follows public opinion, it does not lead it. When Justice Anthony Kennedy wrote that the Constitution protects “the right of all persons to enjoy liberty as we learn its meaning,” he did not mean the Justices consult philosophical texts or make things up.<sup>1</sup> He meant to refer instead to an emphatically social process, in which the Justices learn from their fellow citizens.

A survey of the Court’s major decisions, at least since World War II, attests to this conclusion. In establishing basic rights, the Justices have reflected widespread moral convictions. The gay marriage decision is

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\* This piece originally appeared at Bloomberg View on June 26, 2015. It is reprinted with permission from the author.

no outlier. It stands in a long line of prior decisions, all of which were highly controversial at the time, but most of which are now widely celebrated, even taken as iconic.

### *A Look at History*

The Court did not strike down school segregation until 1954, when a strong majority of Americans was committed to integration (and not incidentally, six years after President Harry Truman had desegregated the armed forces).<sup>2</sup> It did not take a firm stand against sex discrimination until the 1970s, in direct response to the movement for sex equality and rapidly changing social norms.

When the Court invalidated Connecticut's ban on the use of contraception in 1965, it was well aware that Connecticut was an outlier, and that the overwhelming majority of states took a different path.<sup>3</sup> *Roe v. Wade* in 1973 is often seen to exemplify the Court's willingness to defy democratic will, but it took place in a nation in which many states had been rapidly moving to liberalize their abortion laws.

To be sure, there is one context in which the post-World War II Court seems to have acted in clear opposition to the views of an overwhelming majority, and that is school prayer, which the Court struck down in 1962.<sup>4</sup> But, as the University of Richmond's Corinna Barrett Lain has recently demonstrated, the Court sincerely believed that in so ruling, it was reflecting the emerging views of the American people.<sup>5</sup> By the late 1950s and early 1960s, religious pluralism was on the rise, and the Court itself thought the case was relatively easy.

### *A Permission Slip*

To the Justices, the views of the American people seem to matter for two reasons. The first is that they give a kind of permission slip: If most people agree with what the Court wishes to do, it is less likely to risk its own prestige, or to put its own role in question, if it acts on its wishes.

The second, and perhaps more fundamental reason, directly related to the same-sex marriage issue, is that the views of the American people provide valuable information: If most people have come to share a moral commitment, or if the arc of history is clearly on one side, then judges are likely to pay respectful attention. That is the only way to understand the agreement of five members of the Court with these remarkable sentences: “They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”<sup>6</sup>

### *The Arc of History and the Constitution*

But is all this an adequate response to the chief justice? His best rejoinder is that if political majorities really have come to embrace new moral commitments, they should entrench those commitments through democratic means, not through the courts. In his words, those who favor same-sex marriage should “celebrate the achievement of a desired goal,” but they should “not celebrate the Constitution. It had nothing to do with it.”

It is a worthy argument, but the arc of American history — including the arc of constitutional law — suggests that it is wrong.<sup>7</sup> In decisions that we now applaud, and even take as part of our national fabric, the Court’s understanding of the Constitution has been influenced by the emerging moral commitments of “We the People.” The meaning of our founding document, as we live it, is a product not only of text and history, but also of social movements and struggles, dissents, and sometimes deaths, changing hearts and minds.

Celebrate the Constitution. It had everything to do with it.





### 3

## THE IMPROBABLE VICTORY OF MARRIAGE EQUALITY

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THE SUCCESSFUL PUSH TO WIN MARRIAGE EQUALITY  
WAS THE PRODUCT OF A STRATEGIC LEGAL CAMPAIGN  
AND AN EMERGING SOCIAL MOVEMENT.

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*John F. Kowal\**  
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Marriage equality has been just one in a series of affirmative battles fought by the lesbian, gay, bisexual, and transgender (LGBT) rights movement over the past half-century. Once envisioned as the distant — and far from universally embraced — capstone of a movement with other, more immediate, priorities, it vaulted to an improbable victory even as many of the movement’s less ambitious goals remain unfulfilled.

The successful push to win marriage equality in all 50 states was, in part, a strategic legal campaign played out through litigation and legislative advocacy in courthouses and legislatures across the country. It was also a social movement that inspired countless LGBT Americans and a growing number of allies to engage their families, friends, neighbors, and colleagues. And it was a strategic communications

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success story, taking an issue that elicited emotions from confusion to strong disapproval and — over two decades — changing millions of minds. It is one of the most compelling recent case studies in how the law changes.

### ***Background***

The goal of winning equality for LGBT people under the law depended first and foremost on the eradication of sodomy laws, which criminalized private consensual relations at the very core of gay<sup>1</sup> identity — the pretext for many other forms of discrimination. While state sodomy laws began to fall in the 1970s and 1980s through state court rulings and legislative action, an attempt to win a national resolution through the courts failed disastrously. In the 1986 *Bowers v. Hardwick* decision, the Supreme Court rejected a challenge to Georgia's sodomy statute, declaring with thinly concealed contempt that the claim that "homosexual sodomy" was protected under the Constitution was "at best, facetious." When pressed to consider whether it was legitimate to base these laws on "majority sentiments about the morality of homosexuality," the Court replied that the law is "constantly based on notions of morality." In a separate opinion, Chief Justice Warren Burger felt the need to "underscore" this point: "To hold that the act of homosexual sodomy is protected as a fundamental right would be to cast aside millennia of moral teaching." The pall of illegality was only lifted in 2003, when the Supreme Court repudiated *Bowers* in *Lawrence v. Texas*. At the time, sodomy laws were still in force in 14 states.

The community's activists also set their sights on other important goals: legal recourse for discrimination in employment and housing, protection from violence and bullying in schools, adoption and child custody rights, hospital visitation rights, the right to serve openly in the military, and culture change to foster acceptance and visibility. Some of the earliest victories, in the decade following the launch of the modern gay rights movement in 1969, came at the local level as counties and municipalities enacted anti-discrimination measures. The most visible early victory came in Dade County, Florida, which passed

such an ordinance in 1977. For every incremental gain, however, LGBT rights advocates encountered pushback. The Dade County measure was overturned in a ballot initiative campaign led by former beauty queen Anita Bryant, who became the polarizing face of anti-gay backlash.<sup>2</sup>

Eventually, opponents of LGBT rights — often allied with an emerging Religious Right represented by the likes of Jerry Falwell and Pat Robertson — saw the value in going on offense: By advancing ballot measures that blocked protections for gay people, anti-gay activists forced the LGBT community to engage in (and often lose) expensive defensive efforts.

The defensive efforts did not always fail, however, and one notable victory marked a decisive turning point in the Court's LGBT rights jurisprudence, helping to pave the way for marriage equality victories almost two decades later. In 1992, 53 percent of Colorado's voters approved Amendment 2 to the state's constitution, precluding state and local governments from prohibiting discrimination based on "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships."<sup>3</sup> A case challenging Amendment 2, *Romer v. Evans*, reached the Supreme Court in 1996. Ten years after the Court's callous dismissal of LGBT people in *Bowers*, a six-justice majority ruled that Amendment 2 violated the 14th Amendment's Equal Protection Clause. It was the first case in which the Court ruled that discrimination against gay people violated constitutionally protected rights. Writing for the majority was Justice Anthony Kennedy, a Reagan appointee who replaced Justice Byron White, the author of *Bowers*. Notably, Justice Kennedy never once mentioned *Bowers* in his opinion. Starting with *Romer*, Justice Kennedy would play a central role in gay rights jurisprudence over the coming decades.

### *The Lessons of Hawaii*

Around the same time as *Romer*, in the super-heated atmosphere of the 1996 presidential election campaign, marriage equality erupted for the first time as a national issue. The impetus was a lawsuit wending its way through the state courts in Hawaii. Three years earlier, the Hawaii

Supreme Court ruled that the exclusion of gay people from marriage was a form of sex discrimination under the state's constitution. The case was remanded for trial to give Hawaii's government the opportunity to justify its policy.<sup>4</sup> Amazingly, gay advocacy groups showed little interest in taking the case, viewing the cause as hopeless. A young lawyer named Evan Wolfson from Lambda Legal, an organization dedicated to protecting the civil rights of the gay community and those with HIV/AIDS, volunteered on the litigation, working with a straight attorney from the local ACLU named Dan Foley. In 1996, after trial, a Hawaii Circuit Court found discrimination in marriage unconstitutional. The trial judge then stayed his judgment over concerns of "the untenable legal state" of homosexual marriages in the state should his ruling be overturned on appeal.<sup>5</sup> However, before the trial had even concluded, a fierce national backlash set in.

Politicians in Washington fell over themselves to signal their disapproval of the Hawaii litigation. In 1996, by overwhelming margins — 85-14 in the Senate<sup>6</sup> and 342-67 in the House<sup>7</sup> — Congress passed the Defense of Marriage Act (DOMA). The law had two key provisions. Section 2 declared that states were free to withhold recognition of same-sex marriages from other states, overturning the usual presumption that a lawful marriage in one state is recognized in others. Section 3 defined marriage for purposes of federal law as the union of one man and one woman, barring federal recognition of same-sex marriages even if valid under state law. Although he criticized the measure as "unnecessary and divisive," President Clinton signed DOMA into law.<sup>8</sup>

Hawaiians also took matters into their own hands. In 1998, the state's voters put an end to the effort to win a breakthrough victory judicially, amending the state constitution to give the legislature "the power to reserve marriage to opposite-sex couples." In 1999, the Hawaii Supreme Court upheld the state's gay marriage ban under this new constitutional provision.<sup>9</sup>

The short-term damage from the Hawaii litigation was obvious. Not only had the lawsuit failed to bring marriage to the gay citizens of Hawaii, but it resulted in a torrent of anti-gay sentiment and a new and harmful law: DOMA. But the Hawaii case also planted the seeds

of change. It introduced marriage equality into the national dialogue, bringing increased (although still nascent) public support. And it was critical in focusing the gay community's attention on marriage as a clear and compelling goal.

In the post-mortems that followed, two important lessons emerged. First, as a matter of legal strategy it was preferable to bring marriage equality lawsuits in states where victory could be not only won but secured. Accordingly, advocates needed to consider the relative ease or difficulty of overturning a favorable judicial decision through the ballot box in deciding where to bring future cases. Second, and even more importantly, marriage equality advocates recognized that victory would not come solely through the courts. The Hawaii campaign focused heavily on traditional legal strategy, but it did not have an adequate parallel strategy to win over the public. To win in the courts, advocates knew they also had to appeal to the court of public opinion.

By 2001, a new national organization — Freedom to Marry — was founded with modest foundation funding. Led by Evan Wolfson, the Lambda Legal attorney who led the Hawaii litigation effort, it was dedicated to education and coalition building — as well as cajoling LGBT advocacy organizations that sat on the sidelines during the Hawaii fight.

### *The New England Strategy*

The lessons learned following the Hawaii litigation and subsequent anti-gay legislation faced their first test three years later as the battleground shifted from our 50th state to some of our oldest. In New England, Gay and Lesbian Advocates and Defenders (GLAD), a Boston-based legal advocacy organization, had developed a regional strategy to win marriage equality — led by another visionary legal strategist, Mary Bonauto. Unlike Hawaii, the constitutions of New England states could not be amended through voter initiatives. The process of amending state charters in the region is typically arduous, requiring action by state legislatures in successive legislative sessions. The lawyers at GLAD also felt that the region's more progressive (and secular) politics, evidenced

by progress in areas like anti-discrimination protection, would make it fertile territory for public outreach efforts to build broad public support.

Still, the idea of marriage equality was far from popular in the region. When the next big marriage equality case came before Vermont's Supreme Court in 1999, the issue once again stirred public controversy. In *Baker v. State*, the court held that the state's constitution entitled same-sex couples to "the common benefit, protection, and security that Vermont law provides opposite-sex married couples." But the court left it to the legislature to devise a remedy — either marriage or some "parallel" or "equivalent" institution. The legislature opted for the halfway measure of civil unions.

*Baker* and the subsequent Vermont legislation was, at best, an incremental victory. No one really believed that a separate institution, created solely to forestall equal access to marriage, was "equal." Civil unions were a compromise legal status that provided legal protections to couples at the state law level, but no federal protections. "Civil union" also lacked the dignity and clarity of the word "marriage." In Vermont, it would take a decade of patient organizing and activism before the legislature would finally take the next step and grant equal access to the institution of marriage.

The next — and ultimately pivotal — state to take up marriage equality was Massachusetts. In November 2003, the state's highest court went one step further than Vermont. In *Goodridge v. Department of Public Health*, a divided court not only held that excluding gay people from civil marriage was discriminatory, but also that the *only* remedy was providing equal access to marriage. In a stirring majority opinion, Justice Margaret Marshall declared that the Massachusetts Constitution "forbids the creation of second-class citizens." Quoting the Vermont court's ruling four years prior, she added: "Without the right to marry — or more properly, the right to choose to marry — one is excluded from the full range of human experience and denied full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.'" The court gave the legislature 180 days to enact legislation consistent with its ruling. By May 2004, same-sex weddings started taking place across the Bay State.

To avoid a replay of Hawaii, where progress in the courts met with political backlash, activists deployed a more sophisticated strategy in

Massachusetts following the win in *Goodridge*. MassEquality, a new statewide LGBT advocacy organization, was founded to spearhead advocacy and public education efforts. Donors and philanthropic foundations supported a multiyear campaign to protect the win in Massachusetts at all costs. It would prove to be an epic fight over three years, mobilizing armies of activists and interest groups on both sides and costing millions of dollars.

From the outset, Gov. Mitt Romney was a sharp critic of the court's ruling. He vowed to prevent Massachusetts from becoming "the Las Vegas of same-sex marriage." His strategy was, in part, to enforce a long-forgotten 1913 law that prevented out-of-state couples from marrying in Massachusetts if the marriage was invalid in the state where they lived.<sup>10</sup> Romney's enforcement strategy signaled a continuation of the law's ignoble history: It had been enacted initially to prevent interracial couples from marrying in Massachusetts if their home state banned interracial marriage. He also urged the legislature to begin the lengthy process of amending the state's constitution to define marriage as a union between one man and one woman. In Massachusetts, amendments to the state constitution may be enacted in two ways. They may be approved by a majority of legislators, meeting in a constitutional convention over two successive legislative sessions, followed by a voter referendum. Or they may be presented to the legislature by petition, requiring approval by only a quarter of legislators during two successive sessions before a voter referendum.

Opponents of same-sex marriage deployed both strategies between 2004 and 2007. Neither succeeded.<sup>11</sup> Following the election of Gov. Deval Patrick, who ran on a platform of support for marriage equality, opponents' last ditch attempt at a petition failed to reach the legislative threshold required. The campaign's activists and strategists savored a crucial win: The beachhead of marriage equality in Massachusetts was secure.

### ***The National Backlash and a Retooled National Strategy***

Meanwhile, the advent of same-sex marriages in Massachusetts unleashed a wave of new activism — and a tsunami of political outrage. Inspired by the prospect of a major civil rights milestone, mayors in

San Francisco<sup>12</sup> and New Paltz, New York<sup>13</sup> ordered the issuance of marriage licenses and officiated at marriages of same-sex couples. TV cameras beamed images of happy same-sex newlyweds all across the country. Depending on one's point of view, this was inspiring civil disobedience or lawless chaos. Self-proclaimed defenders of traditional marriage called for an amendment to the United States Constitution to define marriage as the union between one man and one woman. In February 2004, as his re-election campaign was getting underway, President George W. Bush lent his support. Congress would vote on two separate iterations of the amendment in 2004 and 2006. But supporters fell far short of the supermajorities<sup>14</sup> needed and the federal amendment strategy died.

At the same time, Bush's chief campaign strategist Karl Rove saw the marriage issue as a potent tool to bring socially conservative voters to the polls in 2004. Working with state-level activists, Rove helped orchestrate campaigns to introduce ballot initiatives in 13 states, including the pivotal state of Ohio, that would amend state constitutions to ban same-sex marriage. On Election Day 2004, all 13 measures easily passed. While there is little evidence that these referendums aided Bush's re-election effort, they represented a harsh setback for the marriage equality movement. In total, 31 states would amend their constitutions through popular referendums to preclude same-sex marriage. Others would pass legislation similar to the federal Defense of Marriage Act. Some of these measures allowed for civil unions or similar protections, while others foreclosed *any* legal protections for same-sex couples.

At this low moment for the marriage equality movement, leading strategists and funders regrouped to devise a realistic, winnable strategy. While the goal of winning marriage equality nationwide in the Supreme Court or Congress did not seem achievable in the near-term, the movement envisioned a series of incremental wins that would pave the way for a national solution. A consensus document, dubbed "Winning Marriage" or the "10-10-10-20 strategy," set an ambitious goal: By the year 2020, there would be 10 states with marriage equality, 10 states with civil unions deemed comparable to



marriage, 10 states with domestic partner or other limited protection, and 20 states where public opinion moved in the right direction. This plan, which seemed like a stretch at the time, helped focus advocacy efforts and the allocation of resources. It also lent strategic focus — and a sense of optimism — when it was needed most.

At the same time, the goal of marriage equality was far from universally embraced within the LGBT community. The setbacks of 2004 led some to question why marriage was a movement priority at all. Others worried that other movement priorities were being given short shrift. Intramural disputes about the movement's goals continued over many years.

To strengthen the campaign for the long haul, activists and funders came together around a more sophisticated, multi-pronged strategy, with public education as the centerpiece. The goal: to reach a “moveable middle” constituency uncomfortable with the novelty of same-sex marriage but also uneasy about discrimination. Significant polling and message research was done, but for a few years strategists dithered on whether putting a human face on the issue — showcasing real LGBT families, for example — would help or hinder the cause.

Organizing and broadening the base was also a priority. Target audiences included communities of color (where polling revealed greater discomfort on gay rights issues, often tied to deeply held religious beliefs) and businesses (which had unique credibility with legislators and opinion leaders). Another key constituency was faith leaders and religious congregations whose support for same-sex marriage was grounded in their religious beliefs.

Finally, advocacy capacity at the state level was viewed as pivotal. Historically, state-based LGBT rights groups were small and perennially under-resourced — if they even existed at all. The success of MassEquality prompted the creation of similar groups in other states. It also led a group of foundations that support marriage equality to create the Civil Marriage Collaborative, a grant-making initiative that pooled foundation funds to strengthen and build a state-by-state movement for marriage equality. After its launch in 2004, the Collaborative invested more than \$20 million in states to help them prepare for the marriage equality battles that would ensue.

### *Disappointment in the Courts*

Following the success in Massachusetts, legal advocates launched litigation efforts in a number of other states. But given the firestorm over marriages in the Bay State, and the unbroken streak of wins in state ballot measures to ban same-sex marriage, it is perhaps not surprising that other state supreme courts were reluctant to follow Massachusetts's lead. In 2006 and 2007, high courts in New York, New Jersey,<sup>15</sup> Maryland, and Washington all held, by narrow margins, that same-sex couples had no constitutional right to marry. The majority opinions in those cases stated that the only recourse was through legislation. Dissenting opinions countered that fundamental rights may not be left to the legislative process.

Andrew Sullivan, a pioneering conservative advocate of marriage equality, has argued that these setbacks were a blessing in disguise. In the blue states at least, the failure of courts to act focused advocacy efforts on persuading the American people and their elected representatives. By 2006, a new generation of political candidates — friendly to the LGBT community, which provided them financial and other forms of support — vowed to support marriage equality if elected.

The 2006 election, which brought Democrats to power in a number of statehouses, marked another turning point. A flood of pro-LGBT legislation was enacted in the next legislative session, including civil union measures in New Jersey, New Hampshire, Connecticut, and Oregon (one of the 13 states to pass a marriage ban in 2004). In California, which enacted civil unions in 2000, the legislature twice passed a marriage equality bill — the first legislature to do so. Gov. Arnold Schwarzenegger vetoed both measures, however, asserting that marriage equality was an issue for the courts to decide. A marriage bill was also introduced in Connecticut that year, but went nowhere when Gov. Jodi Rell threatened a veto.

By 2009, following more good election results for Democrats, the governors of three New England states — Vermont, New Hampshire, and Maine — signed marriage equality legislation into law. This was a signal moment, undermining arguments that marriage was being “redefined

by activist judges” against the will of the people. Not coincidentally, all three states had been targeted for investment by the Civil Marriage Collaborative and other LGBT donors. The success in these three states was soon tempered — the Maine law was overturned by a popular referendum — but the potential of a legislative strategy was apparent.

### ***Renewed Success in the Courts and Renewed Backlash***

Following the disappointing court rulings of 2006 and 2007, the marriage equality movement’s litigation strategy showed renewed vitality in three key states. In California, where Schwarzenegger twice vetoed a marriage bill, the National Center for Lesbian Rights developed a new, litigation-focused strategy that bore fruit: In May 2008, the California Supreme Court ruled that access to marriage was a fundamental right under the state constitution. That same year, the Connecticut Supreme Court followed suit, holding that making civil unions, but not marriage, available to same-sex couples violated the equality and liberty provisions of the state constitution. And then, in 2009, a unanimous Iowa Supreme Court similarly held that the equal protection provisions in its state charter mandated marriage rights for same-sex couples.

Predictably, the victory in California led to calls for a statewide ballot measure to reverse it. Proposition 8 was submitted for the November 2008 election ballot after garnering more than 1.1 million signatures. After a fiercely contested campaign, where opposing sides spent \$80 million on ad campaigns and organizing efforts, the measure was adopted by a margin of 52-48 percent. In the five months between the court ruling and Election Day, 18,000 couples were married in the state.<sup>16</sup> The verdict of the voters would be challenged in court, in an epic legal battle that would end up before the U.S. Supreme Court

The ruling of the Iowa court, meanwhile, faced a public verdict of a different sort: an organized campaign of retribution against individual justices. Iowa uses a merit selection system for its supreme court. Under that system, justices are initially appointed to the bench

and then face periodic retention elections. In the November 2010 election, critics of the marriage equality ruling — with significant support from out-of-state groups — engineered a successful “vote no” campaign that ended the tenure of three members of the court. A second campaign in 2010, targeting another justice, did not succeed.

The story played out differently in Connecticut. Thanks to successful organizing over many years, the court’s ruling enjoyed wide public support. The public support no doubt led Rell — who had once threatened to veto marriage equality legislation — to sign a law implementing the court’s directive.

### *Growing the Campaign to Scale*

In the wake of California’s Proposition 8, the movement realized it needed to expand its efforts to meet the moment. Freedom to Marry worked with key national partners to raise significantly larger sums for the marriage equality effort. The increased funds supported the creation of state marriage equality campaigns operating with greater sophistication and coordination. Those campaigns started projects like Mayors for Marriage and Young Conservatives for Marriage — signaling that no group or population would be ignored or presumed to be unreachable. The movement also ramped up its social media capabilities, developing mini-campaigns that focused on the stories of real couples. Freedom to Marry also created a 501(c)(4) sister entity, allowing greater flexibility to engage in political activity, and aligned with powerful political donor networks including the Gill Action Fund, which steered contributions to LGBT-friendly candidates nationwide.

The defeat in California also prompted the movement to overhaul its messaging. The advice of messaging consultants to emphasize the rights and benefits of marriage had not worked. Instead, the state campaigns began to stress gay couples’ “love and commitment” — getting to the emotional underpinnings of marriage. In addition, the movement’s backers more aggressively targeted anti-equality legislators for defeat.

### *A New Wave of Victories in the States and a Tipping Point in Public Opinion*

Once again, setbacks in the movement's litigation strategy shifted focus back to the political strategy. For the first time, polls began to trend toward majority support for marriage equality. And, significantly, opposition to same-sex marriage began to lose its power as a wedge issue. Many Republicans, who had embraced the issue in 2004, looked for ways to avoid the topic. Increasingly, it was pro-equality Democrats with national ambitions — including New York Gov. Andrew Cuomo and Maryland Gov. Martin O'Malley — who pressed the issue.

In his first year as governor, Cuomo signaled his commitment to the passage of a marriage equality bill. He worked with activists and funders on a sophisticated strategy to build public support. In June 2011, the strategy paid off when Cuomo signed the measure into law, making New York the sixth marriage equality state.<sup>17</sup>

The New York win was a crucial milestone. It gave renewed confidence to the activists who lobbied present and future politicians, and it lent, for the first time, an air of inevitability to the state-by-state battle. The year after New York enacted its marriage equality law, legislatures in Washington and Maryland passed marriage equality legislation, subject to ratification by the voters on Election Day. In addition, citizens in Maine put marriage equality on the November ballot, asking voters to undo the referendum that reversed Maine's 2008 marriage equality law.

With the tide shifting dramatically, marriage equality emerged as a political issue in the 2012 election campaign, but this time it was not a wedge issue. For the first time, the two candidates at the head of the Democratic ticket — President Barack Obama and Vice President Joe Biden — described their own “evolution” on marriage equality, an issue they had declined to support in 2008. An increasing number of down-ticket candidates followed suit.

On Election Day 2012, voters across the country rendered a sharply different verdict from the one in 2004. Not only did Obama and other pro-equality candidates win their races, but for the first time the pro-equality side swept the four contested ballot measures. Voters in Washington and

Maryland affirmed marriage equality laws passed by their legislatures. Voters in Maine passed a new marriage equality law (the first time marriage equality was enacted through a voter-initiated referendum). And voters in Minnesota rejected a proposed state constitutional amendment to define marriage as the union of one man and one woman.<sup>18</sup>

With the wind now at their backs, governors in five states — Delaware, Illinois, Hawaii, Rhode Island, and Minnesota — signed marriage equality legislation during the first six months of 2013. In Minnesota, the victory was especially breathtaking since it came just months after the constitutional amendment battle. And the Rhode Island victory was noteworthy for marking the successful culmination of GLAD’s visionary New England strategy.

One additional state joined the ranks of marriage equality states in 2013. While New Jersey’s legislature also had passed a marriage equality bill in 2013, it had been vetoed by Gov. Chris Christie. But the state’s supreme court settled the question that same year, holding that a civil union was not “equal” to marriage when only marriage entitled couples to crucial federal benefits.

### ***Two Major Cases Reach the Supreme Court — One Planned, One Not***

From the early days through the “10-10-10-20” plan, the national litigation strategy was always clear: First, win marriage in a handful of states, either through court rulings or legislation. Once marriage equality moved from an unrealized goal to the lived experience of millions of couples, the country would adapt to this new reality. Second, challenge Section 3 of the Defense of Marriage Act that barred federal recognition of same-sex marriages even if valid under state law. Marriage has historically been the province of state law. What justification did the federal government have in overriding the states to deny over a thousand federal benefits to their citizens — from Social Security survivor benefits to the ability to sponsor one’s spouse for a green card? Third, challenge Section 2 of the Act, which allowed states to refuse to recognize legally valid same-sex marriages from other states. Opposite-sex couples can move to another state without ever worrying that their marriage would

be deemed invalid. Why should same-sex couples worry whether the rights, responsibilities, and protections of marriage would follow them across state borders? Finally, as more and more married same-sex couples sought the protection of the courts in cases involving adoption, divorce, and inheritance, raising complex legal questions amidst a patchwork of state marriage laws, the U.S. Supreme Court would eventually rule that the only rational response was a national solution on marriage.

By 2009, with marriage equality a settled proposition in four states, litigation challenging DOMA's Section 3 started moving through several federal courts. The most famous of these cases involved a widow named Edie Windsor. Windsor married her wife Thea Speyer in Canada in 2007. When Speyer died in 2009, she left her entire estate to Windsor. As a surviving spouse, Windsor claimed an exemption from federal estate tax. Although New York routinely recognized marriages from Canada as valid, and the state explicitly adopted a policy of recognizing same-sex marriages performed out-of-state in 2008, the Internal Revenue Service denied the exemption. It said that under DOMA the term "spouse" could not refer to a person of the same sex. Windsor was required to pay \$363,053 in federal estate taxes on her inheritance. Had federal law recognized the validity of their marriage, Windsor would have qualified for an unlimited spousal deduction and paid no tax.<sup>19</sup>

As that lawsuit and others proceeded, Attorney General Eric Holder announced a major policy change in February 2011. While the Department of Justice had previously litigated to defend the constitutionality of DOMA in earlier lawsuits, it would no longer do so.<sup>20</sup> No doubt, the Department's decision was affected by the shifting tide of public opinion. It was surely also the product of successful public advocacy. In an unprecedented action, the Bipartisan Legal Advisory Group of the House of Representatives, controlled by the House Republican leadership, which remained hostile to marriage rights for same-sex couples, intervened in the *Windsor* suit for the limited purpose of defending Section 3.<sup>21</sup>

In the meantime, a second major lawsuit materialized — one not envisioned in the movement's carefully crafted litigation plan. Following the passage of Proposition 8 in California, which overturned the state court's ruling on marriage equality, two celebrated lawyers joined forces to

win marriage equality once and for all. Ted Olson and David Boies, who became household names when they went head-to-head in the *Bush v. Gore* recount battle of 2000, argued that the Supreme Court was ready to provide a judicial victory that would extend marriage to gay couples nationwide.

Lawyers and activists in the movement were concerned. For years, they had successfully prevailed upon would-be plaintiffs to abandon their plans to push for a quick judicial solution to this question. They believed in a long-term, incremental strategy that took its inspiration from the patient, decades-long strategy of the civil rights movement, led by icons like Thurgood Marshall and Charles Hamilton Hughes. Olson and Boies said they weighed those concerns but ultimately decided to “trust our instincts and carefully considered judgments.”<sup>22</sup>

So two separate cases, with two very different endgames, wended their way toward the Supreme Court. *United States v. Windsor* sought an incremental win, according to plan, by testing the constitutionality of Section 3 of DOMA. *Hollingsworth v. Perry* challenged Proposition 8 under a legal theory that called for a decisive and final win in favor of marriage equality.

Along the way, Olson and Boies performed a valuable service appreciated by few at the time. While they originally hoped to get to the Supreme Court quickly by bypassing a trial and making arguments to the court through lawyers’ briefs alone, the presiding judge in the case ordered a trial with witness and expert testimony. In a proceeding lasting several weeks, the two attorneys proved masterful at exposing the weak arguments and unsubstantiated assertions of the anti-equality side.<sup>23</sup> They demolished the credibility of their leading experts, a fact not lost on a succession of judges who would be hearing marriage equality cases over the next few years.

The legal challenge to Proposition 8 also galvanized a California base of political donors, from Hollywood to Silicon Valley, straight and gay, who bankrolled the lawsuit and funded communications efforts. Many of those same donors were also major contributors to Democratic campaigns, and they did not flinch from making their views known.

In December 2012, the U.S. Supreme Court agreed to hear both *Windsor* and *Perry*. An extraordinary two days of argument were scheduled



for March 2013. Dozens of organizations and individuals filed “friend-of-the-court” briefs urging the Court to end discrimination in marriage, reflecting growing support from influential constituencies including business, academics, the legal and medical professions, and religious groups. Given the heightened national interest in the issue, the Court took the unusual step of releasing an audio recording of oral arguments that same day. It provoked a significant “teachable moment” on the issue.

In June 2013, on the last day of its term, the Court handed down rulings in the two cases. Proving the skeptics right, the Court was not ready to mandate marriage equality from coast to coast. A fractured 5-4 majority dismissed the *Perry* case on standing grounds. Since California’s governor and attorney general were no longer willing to defend Proposition 8, the ruling had the effect of reinstating marriage equality in the Golden State.

It was the *Windsor* case that pointed the way toward a national resolution. In a 5-4 decision, Justice Anthony Kennedy ruled that the Constitution prevented the federal government from treating state-sanctioned heterosexual marriages differently from state-sanctioned same-sex marriages. Such disparate treatment “demean[ed] the couple, whose moral and sexual choices the Constitution protects.” The ruling drew on principles of federalism, equal protection, and liberty. “DOMA’s principal effect,” wrote Kennedy, “is to identify a subset of state-sanctioned marriages and make them unequal.”

In an angry dissent, Justice Antonin Scalia argued that the Court’s reasoning in *Windsor* would apply equally in cases challenging bans on same-sex marriage:

As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe. By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition.

In *Edie Windsor*, the movement gained a charming and telegenic heroine who helped provide a human face to the issue of marriage equality. But it was Justice Kennedy’s soaring language — and Justice Scalia’s too-

clever-by-half denunciations of the Court's reasoning — that set in motion a rapid succession of federal court victories not anticipated by any of the movement's legal strategists.

### *A Domino Effect in the Federal Courts — and an Earlier-than-Expected Endgame*

The Court's ruling in *Windsor* was followed by a series of federal policy changes that made same-sex married couples eligible for the first time for a whole raft of benefits, including military benefits, immigration benefits, and the ability to file joint tax returns.

It also unleashed a wave of marriage equality lawsuits in states not previously thought to be fertile terrain. Prior to *Windsor*, with the sole exception of *Perry*, the state-by-state litigation strategy focused on the interpretation of state constitutions. Any claim under federal law would have to contend with the odd precedent of *Baker v. Nelson*. *Baker* involved a 1971 Minnesota Supreme Court case holding that a state law limiting marriage to a man and a woman did not violate the U.S. Constitution. At the time, federal law provided an appeal “as of right” to the U.S. Supreme Court from the decision, but in 1972 the Supreme Court inexplicably dismissed the appeal for “want of a substantial federal question.” Though the Court never heard arguments in *Baker*, it had long been considered binding precedent.

The first federal judge to weigh in on this question post-*Windsor* was based in Utah. In the case of *Kitchen v. Herbert*, decided in December 2013, Judge Robert J. Shelby found the holding in *Baker* no longer controlling given the logic of *Windsor*. Ignoring the irony in Justice Scalia's criticism of the majority opinion in *Windsor*, Judge Shelby wrote: “The court agrees with Justice Scalia's interpretation of *Windsor* and finds that the important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law.”

A month later, in January 2014, a federal court in Oklahoma applied the same analysis in striking down that state's same-sex marriage ban. In *Bishop v. Oklahoma*, Judge Terence C. Kern wrote: “There is no precise legal label for

what has occurred in Supreme Court jurisprudence beginning with *Romer* in 1996 and culminating in *Windsor* in 2013, but this Court knows a rhetorical shift when it sees one.”

Within a period of 16 months, a remarkable succession of federal district courts came to the same conclusion. From December 2013 through March 2015, federal judges invalidated marriage bans in 18 states. In a 19th state, Kentucky, a federal judge ordered the state to respect out-of-state marriages. The winning streak was only broken in September 2014, when a federal court in Louisiana ruled that the state’s marriage ban was nonetheless constitutional.

It is hard to say for sure how public opinion affects the courts. But one sees an interesting correlation here: In the years immediately following the 2003 *Goodridge* decision, which brought fierce criticism of the courts and a succession of anti-equality ballot measures, four state supreme courts declined to follow the Massachusetts example. But by 2013, with marriage equality enjoying a majority of the public’s support for the first time and also winning the support of political leaders, these federal judges may have had an easier time.

On appeal, four federal appellate courts also applied the logic of *Windsor* to rule in favor of marriage equality. Each appellate victory affected litigation in other states in the same circuit, adding more states to the win column. Some states, like Pennsylvania and Virginia, withdrew their appeals and joined the burgeoning roster of marriage equality states. Others, like Utah and Oklahoma, sought a final resolution before the Supreme Court. Remarkably, in October 2014, the Court declined to hear those cases. While it did not provide a reason, Justice Ruth Bader Ginsburg suggested in a public appearance that the Court might be waiting for a split among the appeals courts before taking the case.

That split came the next month when the Sixth Circuit Court of Appeals, ruling on a set of four cases from Ohio, Kentucky, and Tennessee, ruled that state marriage bans did not violate the U.S. Constitution. Writing for the court, Judge Jeffrey Sutton cited *Baker* as still-binding precedent. He also went further, rejecting the arguments of the marriage equality side: “Not one of the plaintiffs’ theories, however, makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters.”

In January 2015, the U.S. Supreme Court agreed to hear the four cases. It asked the parties to argue two questions: Does the 14th Amendment require a state to license a marriage between two people of the same sex? And does it require states to recognize valid same-sex marriages performed in other states?

In some respects, the oral arguments in this final appeal — *Obergefell v. Hodges* — seemed less suspenseful than the argument in *Windsor* a mere two years before. In that short period of time, marriage equality had spread to three-quarters of the states, and public opinion had shifted decisively in favor of marriage equality, with polls showing support hovering around 60 percent.<sup>24</sup> LGBT advocacy groups worked hard to press their advantage, advancing social media campaigns to drive home the point that “America is ready for the freedom to marry.”

In June 2015, in another 5-4 decision, the Supreme Court finally held that the 14th Amendment requires all states to grant same-sex marriage licenses and recognize same-sex marriages granted in other states.

Justice Kennedy once again delivered the opinion of the Court. Joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, he wrote:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The four dissenting justices each wrote their own separate opinions — evidence perhaps of the crumbling justifications for the continued exclusion of LGBT couples from the institution of marriage.

## 4

# HOW CAN WE END CAPITAL PUNISHMENT?

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TO PERSUADE THE SUPREME COURT TO OUTLAW THE  
DEATH PENALTY, ADVOCATES MUST WORK STATE BY STATE  
TO CHANGE PUBLIC ATTITUDES AND PUBLIC POLICY.

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*Diann Rust-Tierney\**

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If the death penalty is to be outlawed in the United States, the Supreme Court must find it falls outside of “evolving standards of decency that mark the progress of a maturing society” — in short, that it violates the Eighth Amendment.

The Court’s view of that evolving standard is not static. The Eighth Amendment “is not fastened to the obsolete but may acquire meaning as public opinion becomes more enlightened by humane justice.”<sup>1</sup>

However, the Supreme Court will not lead this inquiry. It will assess and then follow.

In *McCleskey v. Kemp*, a case raising an unsuccessful constitutional challenge to Georgia’s racial pattern of death sentencing, the Court reasoned:

“It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. *It is the legislatures, the elected representatives of the people, that are ‘constituted to respond to the will and consequently the moral values of the people.’* [emphasis added]”<sup>2</sup>

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\*I’d like to thank Elena Dennis for her incredible research assistance while drafting this essay.

Consequently, in our democratic form of government, advocates seeking to change the status quo must succeed in the court of public opinion and then in state houses and offices and conference rooms of public officials. To end the death penalty in the United States we must (1) educate the public and policymakers on the flaws that are inherent in the practice, (2) identify policymakers who will challenge the status quo and inertia, and (3) engage and connect community stakeholders in a process that enables them to work with policymakers to affect the change.

More than in other contexts, Eighth Amendment criminal justice advocates must use a multi-disciplinary approach to change policy. The more significant the change contemplated, the more important it is to include and engage the participation of a wide range of actors.

### *Educate the Public and Policymakers*

Justice Thurgood Marshall was right when he said: “Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand.”<sup>3</sup>

Justice Marshall was pointing out that most people know little about capital punishment. Support is largely support in the abstract. Capital cases account for only a small percentage of all homicide cases. Few people have direct knowledge or experience with capital punishment in practice. Until more recently, individual executions failed to even garner significant media attention.

Recently, public attitudes about the death penalty have shifted dramatically. Polls by the Pew Research Center and CBS News indicate that support for capital punishment is at 56 percent — a 40-year low. Opposition to the practice has increased to 38 percent. Support for the death penalty among women has declined by 10 points since 2011. Fifty-six percent of Democrats now oppose the death penalty. Just four years ago, 49 percent of Democrats supported the death penalty and 43 percent opposed it.<sup>4</sup> While support for the death penalty has declined overall, there are still marked differences based on race. Sixty-three

percent of whites favor the death penalty compared with 34 percent of African Americans and 45 percent of Hispanics. Finally, numerous polls find that support shifts away from the death penalty when the public is presented with a range of alternatives to the practice.<sup>5</sup>

Public skepticism of capital punishment is reflected further in its limited use.<sup>6</sup> Only 2 percent of the counties in the United States have been responsible for the majority of cases leading to executions. In 2014 there were only 72 new death sentences nationwide and only 35 executions were carried out. Eighty percent of the executions in 2014 took place in three states: Texas, Florida, and Missouri.<sup>7</sup>

### *How to Shift Attitudes?*

Understanding more about what issues concern the public most and have the most impact on public opinion provides some guidance for our continued efforts.

One of the most significant issues in public discourse about the death penalty is the risk of executing an innocent person. Eighty-four percent of those who oppose the death penalty say there is a risk of executing someone who is innocent.<sup>8</sup>

The Troy Davis case exposed many to the harrowing reality that people can be executed despite doubt of guilt. Troy Anthony Davis was sentenced to death and executed for murdering Officer Mark McPhail, despite recantations from seven of the nine witnesses, evidence pointing to another suspect, and no reliable physical evidence linking him to the crime. Millions of people for whom the death penalty had been just an abstraction focused on the practice and its problems because Troy Davis and his beautifully determined and brave family made it real — up close and personal. The Davis case forced death penalty supporters to rethink their position. Moreover, death penalty opponents demonstrated that they could mobilize by the millions. The Troy Davis effort provides a model for coordinated grassroots communications that can enhance the reach of our current public education efforts.

Similarly, the way in which information is conveyed is also important. Stories about men and women who were condemned, often

told in their own voices, have heightened the public's uneasiness with capital punishment.<sup>9</sup>

Finally, botched executions and controversies surrounding the extremes to which some state officials will go to conduct an execution has repeatedly cast the death penalty in a negative light.

All of this suggests that we have been on the right track in pressing "the Marshall thesis." Our task is to increase and intensify the public's exposure to the many flaws inherent with the administration of capital punishment, including, and most importantly, its failure to enhance public safety overall.

### *Enlist Sympathetic Policymakers*

Even the most educated and engaged public is powerless to make significant policy change without political leadership that has the courage, wisdom, and work ethic to tackle complex and emotionally difficult topics.

Policymakers have labored under the false impression that they will be punished politically for opposing capital punishment or articulating a thoughtful critique of the practice. However, a consistent body of research demonstrates that the public will not vote against a lawmaker solely because he or she expresses concern or opposition to the death penalty.<sup>10</sup>

The successful bipartisan effort to end the death penalty in Nebraska demonstrates that there is a broad base of opposition to capital punishment.<sup>11</sup> Similar efforts under way in states like Kansas further indicate that opposition to the death penalty has become mainstream opinion.

The increased visibility and engagement of people representing a broad spectrum of political views will go a long way toward helping policymakers rethink faulty assumptions. Moreover, consistent concern and opposition to the death penalty from victims' family members demonstrates that there is not a monolithic view on this issue among survivors of homicide.

We must continue to mobilize a broad and growing constituency to challenge and change the outdated "political wisdom" on capital punishment.



### *Engage Community Stakeholders*

The environment in which the death penalty policy debate is taking place has changed dramatically. Sadly, recent instances of racially motivated violence, police abuse, and overreaching have forced a broader conversation about race, power, and privilege on a reluctant country. We are asking questions about overly-harsh criminal sanctions, mass incarceration, and disparate treatment of survivors of crime. Other features of the current system are coming under greater scrutiny too, including the use of solitary confinement and felony disenfranchisement.<sup>12</sup> Communities are discussing the ways in which barriers to employment and the denial of access to state educational, housing, and subsistence income assistance programs undermines our goals of rehabilitation — a core value and objective underlying criminal justice policy.

These concerns about the way in which other aspects of the criminal justice system undermine respect for human dignity apply with equal force to capital punishment. Advocates for ending the death penalty will need to continue to align with people of color and communities that have been marginalized and abused by the current system.

Said another way: Reforms in other areas of criminal justice policy — such as reductions in mass incarceration, police abuse, or conditions of confinement — will be incomplete if the death penalty is left out of the equation. We cannot truly celebrate a shift to a more enlightened approach to criminal justice if ending capital punishment is not central to that effort as well.

The change we seek is as much or more a cultural change as it is a legal change.

Legal change happens when advocates persuade policymakers that a practice or institution does not work and that popular will supports change.

We have four decades of empirical evidence to support the conclusion that the death penalty experiment licensed by the Supreme Court has failed.<sup>13</sup> The death penalty is as arbitrary, biased, and prone to error as it ever was.<sup>14</sup> Justice Harry Blackmun chronicled his unsuccessful effort to reconcile the aspirational goals of fairness and predictability expressed in *Gregg v. Georgia* with the nitty-gritty reality of the death penalty in practice.

He finally admitted defeat in a dissent from the Court's denial of a petition for certiorari challenging a capital murder conviction in *Callins v. Collins*. He wrote, "I shall no longer tinker with the machinery of death."<sup>15</sup>

An active and engaged constituency for repeal can force even reluctant politicians to take Justice Blackmun's journey and examine the facts and the failures of the current system.

### ***Litigation or Public Policy Strategy?***

There can be endless debate over whether the struggle to end the death penalty is a litigation strategy or a public policy strategy. I argue that it is both, or neither one or the other.

The legal context in which a litigation challenge to capital punishment arises is not a philosophical or pragmatic debate about capital punishment. It is a singular effort to vindicate and protect the rights of one individual or groups of individuals against the actions of the state. It may raise or illuminate policy questions or create a more or less favorable political environment for discussion. With few exceptions, litigation is not an exercise designed to render lasting *social change*, although change might be an immediate outcome.

While vigorous defense of every capital case at every stage of the proceedings *is not* the work of ending the death penalty, capital litigation provides concrete and tangible evidence of the problems associated with the practice. Litigation creates the context and climate in which the policy debate takes place.

As an example, the litigation surrounding lethal injection protocols, and the secrecy surrounding the identities of manufacturers and suppliers, is not an abolition strategy. To the contrary, lethal injection litigation presumes that executions are lawful and will continue. The question is whether a specific protocol risks an unconstitutionally cruel death. Litigation in this area does raise policy questions, which the public and lawmakers should confront, but winning on the question of whether a prisoner may essentially be tortured to death does not settle the question of whether or not we should have capital punishment in the first place.

Policy advocacy does change the law and the environment in which litigation can or does protect the rights of the individual or groups of individuals. Policy change, whether in the state legislature, through ballot initiative, or official practice, is also a means of changing culture. When citizens are engaged directly, the policy and cultural change it brings will be sustainable.

We cannot persuade the Court to outlaw the death penalty so long as it believes that significant public support remains for the death penalty. Nor can we persuade the Court to outlaw the practice while a significant number of states *have and use* the punishment.

We must work state-by-state to change public attitudes and policy. We must use all of the tools available to us: cogent legal and empirical data and analysis, grassroots engagement insisting that policymakers pay attention, and demonstrated political will to spur policymakers to action when the evidence shows the death penalty must end if our nation is to move forward. At the same time, we must ensure that every individual capital defendant is afforded competent, experienced, and vigorous representation.

While the task that the National Coalition to Abolish the Death Penalty took as its mission nearly 40 years ago — countering decades of misinformation and elevating the pursuit of civil and human rights — may seem daunting, the speed with which the tide is turning against capital punishment is encouraging.

Justice Marshall's thesis was indeed correct: The more you know about the death penalty, the less you like it.

We have the tools today to make him proud, to help more people to know more about the death penalty.

The National Coalition to Abolish the Death Penalty has a 40-year history building a network of organizations around the country and nationally who are committed to making sure the public knows more and does more. New technology and social media make it possible to do the job faster, broader, and deeper. And we are seeing the results.

The key to changing the hearts and minds of the nine is in the hands of the millions who have already abandoned capital punishment. By that measure we may have already won.



## 5

# THE ROAD TO *HELLER*

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IT TOOK DECADES, BUT A DEDICATED BAND OF SCHOLARS  
AND ACTIVISTS SHIFTED THE ENTIRE GUN CONTROL DEBATE.

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*Michael Waldman*  
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“A fraud on the American public.” That’s how former Chief Justice Warren Burger described the idea that the Second Amendment gives an unfettered individual right to a gun. When he spoke these words to PBS in 1991, the rock-ribbed conservative appointed by Richard Nixon was expressing the longtime consensus of historians and judges across the political spectrum.<sup>1</sup>

Twenty-five years later, Burger’s view seems as quaint as a powdered wig. Not only is an individual right to a firearm widely accepted, but increasingly states are also passing laws to legalize carrying weapons on streets, in parks, in bars — even in churches. Many may be startled to learn that the U.S. Supreme Court didn’t rule that the Second Amendment guarantees an individual’s right to own a gun until 2008, when *District of Columbia v. Heller* struck down the capital’s law effectively banning handguns in the home. In fact, every other time the court had ruled previously, it had ruled otherwise. Why such a head-snapping turnaround? Don’t look for answers in dusty law books or the arcane reaches of theory.

So how does legal change happen in America? We've seen some remarkably successful drives in recent years — think of the push for marriage equality, or to undo campaign finance laws. Law students might be taught that the court is moved by powerhouse legal arguments or subtle shifts in doctrine. The National Rifle Association's long crusade to bring its interpretation of the Constitution into the mainstream teaches a different lesson: Constitutional change is the product of public argument and political maneuvering. The pro-gun movement may have started with scholarship, but then it targeted public opinion and shifted the organs of government. By the time the issue reached the Supreme Court, the desired new doctrine fell like a ripe apple from a tree.

### *The National Rifle Association*

During the civil war, a group of Union officers, perturbed by their troops' poor marksmanship, wanted a way to sponsor shooting training and competitions.<sup>2</sup> After the war, they became the National Rifle Association, a new organization to train American men to shoot safely and accurately. The group lobbied quietly against the most stringent regulations, but its principal focus was hunting and sportsmanship: bagging deer, not blocking laws. The group even testified in *support* of the first federal gun law in 1934, which cracked down on the machine guns beloved by Bonnie and Clyde and other bank robbers.<sup>3</sup>

Cut to 1977. Gun-group veterans still call the NRA's annual meeting that year the "Revolt at Cincinnati." After the organization's leadership had decided to move its headquarters to Colorado, signaling a retreat from politics, more than 1,000 angry rebels showed up at the annual convention. By four in the morning, the dissenters had voted out the organization's leadership. Activists from the Second Amendment Foundation and the Citizens Committee for the Right to Keep and Bear Arms pushed their way into power.<sup>4</sup>

The NRA's new leadership was dramatic, dogmatic, and overtly ideological. For the first time, the organization formally embraced the idea that the sacred Second Amendment was at the heart of its concerns.

### *A Larger Conservative Backlash*

The gun lobby's lurch rightward was part of a larger conservative backlash that took place across the Republican coalition in the 1970s. One after another, once-sleepy traditional organizations galvanized as conservative activists wrested control.

Conservatives tossed around the language of insurrection with the ardor of a Berkeley Weatherman. The "Revolt at Cincinnati" was followed by the "tax revolt," which began in California in 1978, and the "sagebrush rebellion" against Interior Department land policies. All these groups shared a deep distrust of the federal government and spoke in the language of libertarianism. They formed a potent new partisan coalition.

Politicians adjusted in turn. The 1972 Republican platform had supported gun control, with a focus on restricting the sale of "cheap handguns."<sup>5</sup> Just three years later in 1975, preparing to challenge Gerald R. Ford for the Republican nomination, Ronald Reagan wrote in *Guns & Ammo* magazine, "The Second Amendment is clear, or ought to be. It appears to leave little if any leeway for the gun control advocate." By 1980 the GOP platform proclaimed, "We believe the right of citizens to keep and bear arms must be preserved. Accordingly, we oppose federal registration of firearms."<sup>6</sup> That year the NRA gave Reagan its first-ever presidential endorsement.

We all know of the organization's considerable power over the ballot box and legislation. Bill Clinton groused in 1994 after the Democrats lost their congressional majority, "The NRA is the reason the Republicans control the House."<sup>7</sup> Just two years ago, it managed to foster a successful filibuster of even a modest background-check proposal in the U.S. Senate, despite 90 percent public approval of the measure.<sup>8</sup> What is less known — and perhaps more significant — is its rising sway over constitutional law.

From 1888, when law review articles first were indexed, through 1959, every single one on the Second Amendment concluded it did not guarantee an individual right to a gun. The first to argue otherwise, written by a William and Mary law student named Stuart R. Hays, appeared in 1960. He began by citing an article in the NRA's *American*

*Rifleman* magazine and argued that the amendment enforced a “right of revolution,” of which the Southern states availed themselves during what the author called “The War Between the States.”

### *A Profusion of Scholarship*

At first, only a few articles echoed that view. Then, starting in the late 1970s, a squad of attorneys and professors began to churn out law review submissions, dozens of them, at a prodigious rate. Funds — much of them from the NRA — flowed freely. An essay contest, grants to write book reviews, the creation of “Academics for the Second Amendment,” all followed.<sup>9</sup> In 2003, the NRA Foundation provided \$1 million to endow the Patrick Henry professorship in constitutional law and the Second Amendment at George Mason University Law School.<sup>10</sup>

This fusillade of scholarship and pseudo-scholarship insisted that the traditional view — shared by courts and historians — was wrong. There had been a colossal constitutional mistake. Two centuries of legal consensus, they argued, must be overturned.

If one delves into the claims these scholars were making, a startling number of them crumble. Historian Jack Rakove, whose Pulitzer Prize-winning book *Original Meanings* explored the Founders’ myriad views, notes: “It is one thing to ransack the sources for a set of useful quotations, another to weigh their interpretive authority. ... There are, in fact, only a handful of sources from the period of constitutional formation that bear directly on the questions that lie at the heart of our current controversies about the regulation of privately owned firearms. If Americans has indeed been concerned with the impact of the Constitution on this right ... the proponents of individual right theory would not have to recycle the same handful of references ... or to rip promising snippets of quotations from the texts and speeches in which they are embedded.”

And there were plenty of promising snippets to rip. There was the ringing declaration from Patrick Henry: “The great object is, that every man be armed.” The eloquent patriot’s declaration provided the title for the urtext for the gun rights movement, Stephen Halbrook’s 1984 book, *That Every Man Be Armed*. It is cited reverentially in law review articles and



scholarly texts. The Second Amendment professorship at George Mason University is named after Henry. A \$10,000 gift to the NRA makes you a “Patrick Henry Member.”

The quote has been plucked from Henry’s speech at Virginia’s ratifying convention for the Constitution in 1788. But if you look at the full text, he was complaining about the cost of both the federal government and the state arming the militia. (“The great object is, that every man be armed,” he said. “At a very great cost, we shall be doubly armed.”)<sup>11</sup> In other words: Sure, let every man be armed, but only once! Far from a ringing statement of individual gun-toting freedom, it was an early American example of a local politician complaining about government waste.

Some of the assumptions were simply funny. In his book on judicial philosophy, Supreme Court Justice Antonin Scalia, for example, lauded Professor Joyce Lee Malcolm’s “excellent study” of English gun rights, noting sarcastically, “she is not a member of the Michigan Militia, but an Englishwoman.” But a historian fact-checked the Justice: “Malcolm’s name may sound British, and Bentley College, where Malcolm teaches history, may sound like a college at Oxford, but in fact Malcolm was born and raised in Utica, New York, and Bentley is a business college in Massachusetts.”<sup>12</sup>

Still, all this focus on historical research began to have an impact. And eventually these law professors, many toiling at the fringes of respectability, were joined by a few of academia’s leading lights. Sanford Levinson is a prominent liberal constitutional law professor at the University of Texas at Austin. In 1989, he published an article tweaking other progressives for ignoring “The Embarrassing Second Amendment.” “For too long,” he wrote, “most members of the legal academy have treated the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change of subject to other, more respectable, family members. That will no longer do.”<sup>13</sup> Levinson was soon joined by Akhil Reed Amar of Yale and Harvard’s Laurence Tribe. These prominent progressives had differing opinions on the amendment and its scope. But what mattered was their political provenance — they were liberals! (One is reminded of Robert Frost’s definition of a liberal: someone so open-minded he will not take his own side in an argument.)

### *Honing in on an Individual Right*

In the meantime, the “individual right” argument was starting to win in another forum: public opinion. In 1959, according to a Gallup poll, 60 percent of Americans favored banning handguns; that dropped to 41 percent by 1975 and 24 percent in 2012. By early 2008, according to Gallup, 73 percent of Americans believed the Second Amendment “guaranteed the rights of Americans to own guns” outside the militia.<sup>14</sup>

Over the past decade, the idea of a Second Amendment right has become synonymous with conservatism, even with support for the Republican Party. In 1993, for example, *The New York Times* mentioned “gun control” 388 times, and the Second Amendment only 16. By 2008, overall mentions of the issue dropped to 160 but the Second Amendment was mentioned 59 times.<sup>15</sup>

In the end, it was neither the NRA nor the Bush administration that pressed the Supreme Court to reverse its centuries-old approach, but a small group of libertarian lawyers who believed other gun advocates were too timid. They targeted a gun law passed by the local government in Washington, D.C., in 1976 — perhaps the nation’s strictest — that barred individuals from keeping a loaded handgun at home without a trigger lock. They recruited an appealing plaintiff: Dick Heller, a security guard at the Thurgood Marshall Federal Judiciary Building, who wanted to bring his work revolver home to his high-crime neighborhood. The NRA worried it lacked the five votes necessary to win. The organization tried to sideswipe the effort, filing what Heller’s lawyers called “sham litigation” to give courts an excuse to avoid a constitutional ruling. But the momentum that the NRA itself had set in motion proved unstoppable, and the big case made its way to the Supreme Court.

The argument presented in *District of Columbia v. Heller* showed just how far the gun rights crusade had come. Nearly all the questions focused on arcane matters of colonial history. Few dealt with preventing gun violence, social science findings, or the effectiveness of today’s gun laws — the kinds of things judges might once have considered. On June 26, 2008, the Supreme Court ruled 5-4 that the Second Amendment guarantees a right to own a weapon “in common use” to protect “hearth and home.”

Improbably, the gun movement's triumph has become a template for progressives, many of whom are appalled by the substance of the victories. Once, conservatives fumed about activist courts enforcing newly articulated rights — a woman's right to reproductive choice, equal protection for all races. But just as they learned from the left's legal victories in those fields, today progressives are trying to re-learn from their conservative counterparts.

One lesson: patience. The fight for gun rights took decades. Another lesson, perhaps obvious: There is no substitute for political organizing. A century ago the satirical character Mr. Dooley famously said in an Irish brogue, "No matter whether th' Constitution follows th' flag or not, the Supreme Coort follows th' iliction returns."<sup>16</sup> Before social movements can win at the court they must win at the ballot box. The five Justices in the *Heller* majority were all nominated by presidents who themselves were NRA members.

### ***Waging a Constitutional Crusade***

But even more important is this: Activists turned their fight over gun control into a constitutional crusade. Modern political consultants may tell clients that constitutional law and the role of the Supreme Court is too arcane for discussion at the proverbial "kitchen table." Nonsense. Americans always have been engaged, and at times enraged, by constitutional doctrine. Deep notions of freedom and rights have retained totemic power. Today's "Second Amendment supporters" recognize that claiming the constitutional high ground goes far toward winning an argument.

Liberal lawyers might once have rushed to court at the slightest provocation. Now, they are starting to realize that a long, full jurisprudential campaign is needed to achieve major goals. Since 2011, activists have waged a widespread public education campaign to persuade citizens that new state laws were illegitimate attempts to curb voting rights, all as a precursor to winning court victories. Now many democracy activists, mortified by recent Supreme Court rulings in campaign finance cases (all with *Heller's* same 5-4 split),

have begun to map out a path to overturn *Citizens United* and other recent cases. Years of scholarship, theorizing, amicus briefs, test cases, and minority dissents await before a new majority can refashion recent constitutional doctrine.

Molding public opinion is the most important factor. Abraham Lincoln, debating slavery, said in 1858, “Public sentiment is everything. With public sentiment, nothing can fail; without it, nothing can succeed. Consequently he who moulds public sentiment goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed.” The triumph of gun rights reminds us today: If you want to win in the court of law, first win in the court of public opinion.

## **POLITICAL ADVOCACY**



## 6

# THE PATHS TO CHANGE IN ENVIRONMENTAL LAW

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PUBLIC SENTIMENT CAN FUEL CHANGE, BUT IT MUST BE  
SUPPORTED BY LEGAL AND LEGISLATIVE ADVOCACY.

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Perhaps the most important function of the instruments of government — the executive, legislative, and judicial branches — is to sense the potential demand for change and channel it in an orderly way toward a more just and stable state. We are not speaking here of the day-to-day work of wrangling over a piece of legislation, nor of the typical case brought before the courts. We are speaking of the major actions of government that respond to the gathering sentiments of the population.

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Abraham Lincoln captured the essential role of the public in making legal change when he said:

“With public sentiment, nothing can fail; without it, nothing can succeed. Consequently he who moulds public sentiment goes deeper than he who enacts statutes or promulgates decisions.”

Public opinion is like snow melt water accumulating behind an old dam. Often nothing will happen for a long time, while millions of individually tiny drops accumulate. But all the while, the backed-up water is accumulating potential energy. If nothing is done to relieve the potential, the energy may be released suddenly in a massive flood that sweeps all before it, destroying the physical and social fabric below.

Over the history of the United States, seven large issues have tested the ability of our government to respond to the gathering potential energy of popular dissatisfaction:

- The application of constitutional rights to racial or ethnic minorities through the 13th, 14th, and 15th Amendments to the Constitution and the civil rights movement of the 1960s;
- Statutory recognition of the right of labor to organize to represent working people;
- Women’s suffrage, resulting in the 19th Amendment to the Constitution;
- The protections of the welfare state through Social Security, bank regulations, pension regulation, Medicare, Medicaid, and other programs of the New Deal and Great Society enacted into statutory law during Franklin Roosevelt’s and Lyndon Johnson’s presidencies;
- Environmental protection, through many new statutes enacted during the 1970s;



- Protection of the reproductive rights of women through judicial decisions interpreting the Constitution; and
- Assuring rights of gay, lesbian, bisexual, and transgender persons, initially through the court system, later through executive and legislative action, and eventually with a Supreme Court decision.

Each of these major legal transformations resulted from the gradual build up of dissatisfaction among Americans broadly. Most, though not all, were achieved with little or no violence because of the work of leaders who shaped the public debate to channel public dissatisfaction constructively into legal change.

The relative success of the U.S. in eventually responding to social pressures for legal change is all the more remarkable because of the sheer complexity of our governmental system. Indeed, the Founding Fathers deliberately made change difficult for the federal government through the tripartite division of power, the nature of the Senate, and the difficulty of amending the Constitution. The 10th Amendment, leaving all powers not enumerated in the Constitution to the semi-sovereign states, enshrined the further complication of Federalism. In this complex structure, those seeking to prevent change can usually find a venue sympathetic to their cause.

The playing field, as demonstrated above, is complex. And yet somehow change has happened, if often at far too slow a pace. In this process, two groups stand out as critical: (1) those “who mould public sentiment,” in Lincoln’s phrasing, by writing and speaking out about the need for change, and (2) those who actually change the law through the political or legal system. In this essay, we illustrate how legal change happens with the issue of environmental protection, with which we are most familiar. First, we will concentrate on the legislative process — what one author has called “the dance of legislation.”<sup>1</sup> Later, we discuss the process of legal change through the courts. And finally, we comment upon new barriers to the fulfillment of the demands of public sentiment.

### *The Dance of Environmental Legislation*

Explanations of how legal change occurs are many, and they tend to reflect the position of the observer in the process. Those close to the legislative, administrative, or legal processes tend to focus on the personalities and arguments made at or after the moment of change in the law; while those farther away may emphasize the great social and political movements influencing the process, or the larger economic or historical forces at play in society. All these perspectives are valid, in the sense that change does not happen without both the large currents of history and the effective use of them by the actors in the political/legal process.

Until the last third of the 19th century, there was little concern in the U.S. about protecting nature. To the contrary, in a “new” continent filled with forest and wild animals, nature was a thing to be tamed and exploited rather than protected. Abraham Lincoln, in 1864 in the midst of the Civil War, did take an early step to protect nature by setting aside Yosemite “for public use, resort and recreation...inalienable for all time.” In 1892, John Muir founded the Sierra Club, reflecting public interest in preserving some of the declining natural beauty remaining. Muir and others wrote extensively of these places, most often visited at that time by the wealthy few who had the time and resources to devote to appreciating nature.

In the 1960s, a new kind of public concern for nature began to be expressed — what came to be called “environmentalism.” It was part of a society-wide awakening, flowing from the civil rights and anti-Vietnam War movements — a sense that those entrusted with running the country were not looking out for their fellow citizens.

Rachel Carson’s “Silent Spring,” published in 1962, helped arouse the new environmental consciousness. The book focused on the effects of pesticides on human health and the environment. Carson declared, “For the first time in the history of the world, every human being is now subjected to contact with dangerous chemicals, from the moment of conception until death.”<sup>2</sup> She derided human “control of nature,” a phrase she described as conceived “when it was supposed that nature exists for the convenience of man.” As she and others raised alarm over the effects

of air and water pollution and chemical alteration of the environment, the new environmentalism became part of the larger currents of social change of the period. This “powerful public sentiment” demanded that the government act to protect people and nature. However, this “sentiment” might not have produced effective change in the laws had it not been for a handful of politicians and judges. The most important was U.S. Senator Edmund S. Muskie, a former governor of Maine familiar with the foul water pollution then associated with Maine’s huge paper industry. When he came to the Senate, Muskie became chairman of the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works. With rising public sentiment for environmental reform, Muskie transformed the subcommittee into a powerful force for legal change. Under his chairmanship, the subcommittee, and then the Senate, passed the 1970 Clean Air Act Amendments, which mandated the auto industry to cut pollution by 90 percent in four years. Two years later, the subcommittee wrote, and the Senate passed, the Clean Water Act of 1972.<sup>3</sup>

Both these laws passed with overwhelming majorities in both the Senate and the House. The Clean Air Act was signed into law by President Richard Nixon, whose administration had tried to weaken it throughout the legislative process.<sup>4</sup> Nixon nonetheless signed it because he expected Muskie would be his most formidable opponent when running for reelection as president in 1972, in part because Muskie had tapped into the power of public support for environmental reform. When one reporter asked at the president’s Clean Air Act signing ceremony why Muskie was not present, given that the bill was universally known on Capitol Hill as the “Muskie bill,” a presidential staff person reportedly shot back, “Not in this room.”

Muskie’s contribution to environmental progress would be difficult to overstate. He was a skillful politician, with a sense of what mattered to his colleagues and how to use their desires to achieve reform. His combination of fearsome intellect and legendary temper (to which one of us can speak personally) gave him a great advantage in committee hearings and on the floor of the Senate.

Muskie had the political wind at his back, and he took full advantage of it. That was impressive enough, but far more important, he wrote a

law that must be considered one of the great policy successes of modern legislation. Since 1970, every index of increasing pollution potential has risen — GNP (+124%), energy consumption (+30%), vehicle miles traveled (+103%) — but air quality has steadily and dramatically improved. Between 1980 and 2006, emissions of lead fell (-97%), as did sulfur dioxide (-47%) and particulates (-31%). For the 20 years between 1990 and 2010, the Environmental Protection Agency (EPA) estimated that the law delivered net health and welfare benefits of \$83 billion.<sup>5</sup>

So Muskie rode the flood tide of public support to pass new air and water pollution laws. Important as that was, the rare confluence of public “sentiment” that forced lukewarm and even hostile senators to vote for these laws could have been wasted in the hands of a less skillful legislator. Muskie’s legal and political experience had taught him how to make the laws so easily and powerfully enforceable that few could successfully skirt them.

This was most clearly seen in two provisions of the Clean Air Act Amendments. First was the requirement that the auto industry reduce the three major pollutants from vehicles by 90 percent within four years after enactment. Muskie himself insisted that the law include no opportunity for the auto industry to extend the deadline without statutory amendment. He repeatedly beat back attempts in his committee to allow the EPA administrator or a federal court to extend the deadline. He argued that the protection of public health was too important to allow a judge or administrator to weaken the requirements; that Congress should decide whether to grant more time, because Congress was the only body institutionally capable of weighing technological capability and cost against public health. As a matter of fact, Congress did extend the requirements to some extent (full compliance was achieved in 1981), but there can be little doubt that the seriousness of purpose conveyed by the initial deadlines contributed to the urgency with which the industry approached the technological challenge.

The second provision, permitting citizen suits, was proposed by Michigan Senator Phil Hart and introduced by Missouri Senator Thomas Eagleton. Hart was concerned that the government would grow too cozy with the regulated industries, and that the many deadlines for action that

had been written into the statute would slip and become meaningless. He proposed to provide a right for ordinary citizens to bring suit to compel the government to discharge duties written in the law, and also to enforce the law against private violators if the state or federal governments did not.<sup>6</sup> While the courts had held just a few years earlier that citizens had standing to litigate against the government in environmental cases, no other statute had ever so explicitly made citizens full partners in implementing the law. Hart's idea was not self-executing, of course. It might have come to little had organizations such as the Natural Resources Defense Council (NRDC) not skillfully used it to enlist the courts in overcoming the tremendous weight of governmental inertia caused by entrenched economic special interests' resistance to investing in pollution control technologies.

The public "sentiment" that enabled passage of the Clean Air Act of 1970 and the Clean Water Act of 1972 seeded a crop of new environmental legislation during the '70s, including laws that regulated toxic substances and pesticides, protected endangered species and marine mammals, restricted destructive mining practices, curbed oil pollution, controlled solid waste disposal, and mandated the cleanup of hazardous waste disposal facilities. Congress also strengthened, by amendment, the Clean Air Act and Clean Water Act.

With the bipartisan adoption of these new and powerful laws, however, protecting the environment and public health became a much more technical matter, dependent on scientific and technological arcana that the average citizen could not be expected to understand. NRDC and other environmental organizations became expert, standing in for the public in hundreds of administrative proceedings before EPA and many other agencies of federal and state government.

At the same time as "marching in the streets" environmentalism gave way to technical debates, the political forces that opposed change regrouped. A brash young congressman from Georgia, Newt Gingrich, proposed that Republicans seize control of the House of Representatives for the first time in more than 40 years. As a vehicle, Gingrich nationalized the House campaigns with a proposed "Contract with America." His "contract" was cleverly crafted to deliver different messages to different Republican constituencies. To the grassroots, it conveyed the message that a Republican

House would restore small, limited government. Industry could see, however, that almost every provision of the contract promised to roll back or hamstring environmental regulation. Gingrich's confrontational approach worked. The election of 1994 delivered the House into Republican control and made Gingrich speaker of the House in 1995.

The passage of the 1990 Clean Air Act Amendments and the ascent of Newt Gingrich marked an end of the tide of environmental legislation. An issue that had been bipartisan in the '70s and '80s had become polarized. By the time of the George W. Bush and Obama administrations, opposition to environmental legislation and regulation became a reflexive central tenet of the Republican Party. While environmental protection has grown ever more mainstream in public sentiment, Congress will not act on it. With today's Congress unable or unwilling to respond to relieve the growing pressure of "public sentiment" to address global warming, the question has become whether the executive agencies or the courts are capable of averting a future flood of citizen anger and worldwide harm as the adverse environmental, economic, and health effects of global warming become more obvious.

### ***Legal Change Through Executive Branch Action***

Students of government correctly point to the rise of the executive branch as the most important structural change in the American government in the 20th century. Two World Wars and an unprecedented economic Depression almost inevitably centralized power in the branch of our government that could act in a rapid and organized manner.

As it became clear that the states were not capable of successfully regulating the polluting activities of large economic interests such as the auto, oil, steel, coal, and utility industries, Senator Muskie turned to the federal government. The creation of EPA in 1970 provided the staffing, technical expertise, and enforcement capability needed.

As in Congress, legal change in the executive branch takes on a different character depending on who is in charge. The Ronald Reagan and George W. Bush years were known for government

agencies' aggressive attempts to roll back environmental regulations and policies, some of which had been in place for decades. During those periods, environmental advocates attempted to slow adoption of less protective regulations through advocacy and litigation. In other, more environmentally friendly administrations, they were able to advocate for stronger interpretations and enforcement of environmental laws.

The regulations promulgated by EPA are usually complex and technical. It is rare that agencies adopt a rule that offers more protection for the environment than the one they had proposed for public comment. More typically, the final regulation or policy adopted by the agency or department is likely to reflect more of the views of the regulated industry than the original proposal. Some agencies, such as the Bureau of Land Management, the Department of Agriculture, and the Nuclear Regulatory Commission, suffer from industry capture — an acceptance of the regulated industry perspective so pervasive that the advocates for environmental protection are seen as nuisances, not as contributors to a legitimate policy debate. Even where different views are welcome, advocates for better environmental protection seldom succeed in strengthening the policies an agency reaches in its internal consideration of an issue.

More often the influence of environmental advocates lies in opposing policies damaging to the environment. NRDC's decades-long effort to persuade the U.S. Navy to adopt policies for using sonar that would protect marine mammals is an example.<sup>7</sup> In this case, litigation is paired with highly informed technical policy advocacy to the agency. After repeated defeats in court, the Navy has finally agreed to a settlement that would forgo entirely or limit significantly its testing of sonar devices in areas of importance to blue and other whale species.

### ***Legal Change Through the Courts: Making the Executive Agencies Implement the Law***

The key federal environmental laws of the early 1970s are examples of public outcry producing useful legislation. In turn, litigation is often necessary to enforce the requirements of law. Senator Hart's

“citizen suit” idea was prescient. For political or economic reasons, government regulators often do not press environmental claims against private polluters who are breaking the law. Examples abound. NRDC has brought cases against the second largest private employer in the state of Delaware, and a chemical company that serviced the giant paper industry in Maine. In neither case was the government willing to cross powerful interests to prosecute environmental violations; that task was left to citizens. And it is not only politics that pushes government to the sidelines; sometimes it is resources. Many environmental regulators, federal and state, have limited enforcement budgets, and must select a small subset of many possible cases. It is universally known that, for the last 45 years, citizen suits have been a critical supplement to government enforcement of the nation’s environmental laws. Fee-shifting provisions in the Clean Air Act, the Clean Water Act, the Resources Conservation and Recovery Act, and other laws facilitate these suits by permitting prevailing plaintiffs to recover their costs, including reasonable attorney fees.

The right of citizens to invoke the powers of the courts to force agencies to implement the law is critical to fulfilling the potential of environmental laws. For example, NRDC litigation resulted in court orders to EPA (1) banning the use of tall smokestacks to dilute pollution as a substitute for pollution controls;<sup>8</sup> (2) requiring EPA to implement the toxic water pollutant requirements of the Clean Air Act;<sup>9</sup> and (3) forcing EPA to protect the air quality of the West and other areas of relatively clean air.<sup>10</sup> Almost as important were the cases where the courts enforced the deadlines for government action on key programs, which forced EPA and other agencies to make the policy choices demanded by Congress and take action to protect public health and the environment.

The “citizen suit” provisions also authorized direct citizen enforcement of the laws against private polluters. For example, NRDC joined with citizen organizations from Tennessee and Virginia to successfully enforce the Clean Air Act on the Tennessee Valley Authority (TVA). TVA was then the nation’s largest emitter of sulfur dioxide, and the consent decree settling the case eliminated half of TVA’s emissions, equal to about 5 percent of the nation’s total at the time.



### *Legal Change Through the Courts: Removing Antibiotics from Animal Feed*

Litigation is often necessary to prompt environmental change. But litigation is inherently limited. Effective litigation is often narrow in both aim and effect. That makes it a productive tool for combating, for example, government approval of a particular project like a highway or a mine. Litigation was pivotal, for example, in defeating the multi-billion dollar proposed Westway Highway Project in New York City in the mid-1980s, even though nearly all powerful political, economic, and media players (the president of the United States, the governor of New York State, New York's two senators, the New York City mayor, the banks, the real estate industry, the major unions, and the three daily newspapers) lined up in favor of the project. After a lengthy trial, the federal courts found that approvals for the highway violated the Clean Water Act because the highway would cause impermissibly significant adverse impacts on Hudson River striped bass.<sup>11</sup> But cases like Westway are rare. The more typical role for successful litigation is as a component of a larger, multifaceted advocacy strategy that includes public mobilization.

One limitation inherent in litigation is, of course, the possibility of losing the case. However, even if specific judicial relief is denied, a case can have some catalytic effect on environmental progress. But it is equally true that, even if a case is won, it will take more than the litigation victory to effect necessary change, especially if the issue is a large and complex one.

Take, for example, the issue of antibiotics in animal feed.

Antibiotics save lives. But through overuse and misuse, these life-saving drugs are losing their potency as bacteria develop resistance to them. People who face antibiotic-resistant infections are more likely to have longer hospital stays, be treated with less effective and more toxic drugs, and even die as a result of infection. The Food and Drug Administration (FDA) considers antibiotic resistance to be a "mounting public health problem of global significance."

Since the 1950s, FDA has approved as livestock feed additives, the use of two particular antibiotics used in human medicine, penicillin and tetracyclines. The drugs promote faster animal growth on less

feed. But scientific research has shown that the use of antibiotics in livestock production leads to the development of antibiotic-resistant bacteria that can be transferred from animals to humans through direct contact, environmental exposure, and the consumption and handling of contaminated meat and poultry products.

Based in part on the findings of a task force convened to study whether the long-term use of antibiotics in livestock might pose threats to human health, in 1973 FDA proposed to withdraw its approval for all nontherapeutic uses of antibiotics in animal feed. In 1977, after reviewing information submitted by drug sponsors, who wanted to keep the approvals in place, FDA found that certain uses of penicillin and tetracyclines in animal feed were not shown to be safe for human health.

For decades, nonprofit public health groups engaged in administrative advocacy that did not solve the problem. Citizen petitions filed with FDA in 1999 and 2005 went unanswered. Finally, in 2011, a group of nonprofits sued the FDA<sup>12</sup> claiming that FDA's decades-old findings that the use of low-dose antibiotics in animal feed was not shown to be safe for human health required FDA to hold hearings and then withdraw its approvals unless the drug sponsors could demonstrate safety. Once FDA denied the citizen petitions (which it did after plaintiffs filed suit), the groups also asserted that FDA had acted arbitrarily because the denials were not based on science; indeed, FDA *agreed* with the plaintiffs that the drug uses were not shown to be safe. Nevertheless, FDA denied the petitions because it preferred to seek the voluntary cooperation of drug companies in eliminating these dangerous drug uses.

The district court ruled for plaintiffs.<sup>13</sup> The court ruled that “the Agency has been confronted with evidence of the human health risks associated with the widespread subtherapeutic use of antibiotics in food-producing animals” for over 30 years, and “despite a statutory mandate to ensure the safety of animal drugs, the Agency has done shockingly little to address these risks.” By a vote of 2-1, the Court of Appeals reversed.<sup>14</sup> The appellate majority determined that neither the Food and Drug Act nor the Administrative Procedure Act mandated that FDA withdraw its approvals, and that the agency had discretion to pursue a voluntary program to address the acknowledged public health problem. One can

debate the relative merits of the conflicting judicial opinions in the case, but that is not the point of this article. Rather, the point is to illuminate the limits of litigation as an exclusive tool to effect environmental change.

First, cases themselves do not always produce the desired litigation result. In the antibiotics case, plaintiffs failed to win a judicial order compelling FDA to proceed to ban the nontherapeutic use of antibiotics in animal feed. If the courts had compelled FDA to proceed down that path, plaintiffs could have intervened in administrative withdrawal proceedings, pressing FDA to ban the drug uses. They could have carried out a focused public campaign to exert further pressure on the agency, citing solid scientific evidence of threats to human health. The suit did not succeed in opening those particular doors to productive advocacy.

But perhaps more interesting to note is that, even had plaintiffs prevailed in the lawsuit, the battle to effect change on the ground would not have been over. Had FDA been compelled to hold hearings, the drug companies and livestock producers would have tried to prove the safety of the disputed drug uses. In addition, the powerful agricultural and pharmaceutical lobbies might have pressured Congress to step in to thwart any attempt by FDA to regulate. And even if Congress had not intervened, and FDA had banned the drug uses, producers might have persuaded veterinarians, many of whom depend on the producers for their livelihood, to prescribe antibiotics liberally for flocks and herds, so that producers could call the use medical (and permitted) rather than production-related (and impermissible).

FDA still has not withdrawn its approval of nontherapeutic uses of antibiotics in livestock production. Instead, it has issued a series of nonbinding, unenforceable guidances. There is no doubt that the advocates' lawsuit accelerated FDA's issuance of the guidances, which may promote diminished use of antibiotics in animal feed. However, the guidances themselves have a gaping loophole: They advise against routine use of antibiotics to speed animal growth, but they do not advise against the overlapping routine use of antibiotics to counter disease risks posed by crowded, unsanitary conditions in factory farms. So producers may be using the same volume of antibiotics, but justifying the uses on different grounds. Indeed, the most recent FDA data show a continuing increase in the use in factory farms of antibiotics considered important in human medicine.

The continuing battle to remove antibiotics from animal feed highlights the suite of advocacy techniques and the persistence required to bring about real change on a major policy issue. The root of the problem is the way we produce most meat and poultry products. Animals are stuffed into filthy factory farms, and both livestock producers and drug companies profit from the widespread prophylactic use of low-dose antibiotics, to the detriment of public health. The litigation itself did not succeed, but it invigorated advocates, drew charitable funding to further advocacy, and heightened public awareness of the dangers antibiotics in animal feed pose to public health. Just recently, as a result of consumer pressure, Tyson Foods, Perdue, McDonald's, and Pilgrim's Pride have announced that they will phase out the use of human antibiotics in their chicken flocks or in chicken products they sell. This move, by large purveyors and purchasers of poultry, did not occur in a vacuum; it is the direct result of citizen advocacy, advanced in this instance in part, if indirectly, by litigation.

On this issue, where there are entrenched and powerful interests invested in the status quo, it will take a combination of science, public education and mobilization, administrative advocacy, political work, and litigation to generate the deep change advocates seek. Citizen pressure is essential, whether directed at the government or private parties or both.

Citizen pressure in the United States can be a powerful force even outside the United States. So it was in the mid-1990s when Mitsubishi announced a plan to build a giant saltworks at Laguna San Ignacio in Baja California, Mexico. The lagoon is a major breeding and birthing area for the giant Pacific gray whale, also called the California gray whale. It is also an absolutely pristine environment — a World Heritage Site, a biosphere reserve, a whale sanctuary, and a migratory bird sanctuary. Mitsubishi, as part of a joint venture with the Mexican government called Esportadora de Sal, had applied to the Mexican Environment Ministry for a permit to build the salt plant, which through exposure of water pumped from the lagoon to sun and wind over a period of two years would convert lagoon water into salt. The 116-square miles of evaporation ponds, plus a new port and two-kilometer pier for docking

of ocean-going container ships to pick up the expected 7 million tons of salt per year, would despoil the pristine area and risk harm to the whales.

NRDC fought the project through an array of tactics, including an economic boycott campaign against Mitsubishi's many products, from cars to cameras to electronics and even a major bank. The boycott was focused in California, whose coast the whales closely paralleled on their annual migration to and from their summer feeding grounds in the Alaskan Arctic. Ultimately, after the five-year international campaign undertaken by NRDC, the International Fund for Animal Welfare, and the largest environmental coalition ever assembled in Mexico, Mitsubishi and the Mexican government abandoned the project.<sup>15</sup>

### *New Barriers to Meeting the Demands of Public Sentiment*

The current debate about climate change brings together many of the themes in this essay and adds a new one. There is no longer any doubt among serious people that climate change poses extreme dangers to the planet and all that live on it. Nor that human use of fossil fuels is a major contributing cause. It is clear that unusual droughts, heat waves, and more extreme storms are caused by climate change here and all over the globe.

President Obama has taken useful steps by executive action. For example, EPA has just promulgated rules curtailing carbon emissions from coal-fired power plants. But the ability of the executive branch to make major policies is limited by the statutes that govern it, and by the fact that any major initiative by the executive branch can be nullified by Congress or the courts. Only Congress can authoritatively adopt the kind of major changes in public policy, such as, for example, a carbon tax, that are needed to deal with global warming.

"Public sentiment" strongly favors action on global warming. A powerful moral prod came recently from Pope Francis. But despite public sentiment, Congress has not enacted major reforms. Why? One reason that we have explored above is that one of our major parties has chosen, since 1995, to make environmental policy a partisan issue. There are also new factors that impede reform. Changes in the law, as

interpreted by the Supreme Court, and in the political culture, have unleashed floods of money from economic special interests to influence politicians. Huge amounts of that money come from companies and individuals whose fortunes are based upon the fossil fuel industry. These companies and individuals also fund dozens of front groups to throw sand in the public's eyes through claims that the science of global warming is in doubt. Also, in the world's longest lasting democracy, one party, in many states, is now taking steps to make it harder to vote. This adversely affects some of the groups most likely to vote for candidates who pledge to protect the environment.

One result of these changes is to make the environmental movement a natural ally of groups trying to reduce the impact of money in politics and to protect the right to vote. Fundamental issues of democracy are now environmental issues.

The statutory changes needed to deal with global warming cannot be enacted until the complexion of Congress changes. That will require either an awakening in the Republican Party to the need to address climate change, or a change in the composition of Congress. To state this point is to convey the intensity of "public sentiment" that will be needed to make meaningful change. The United States has been extremely fortunate for much of its history in finding ways to deal with major social and economic issues. As the Civil War shows, however, our government's ability to solve such problems is not assured. In the case of global warming, we must hope that the needed changes will be accomplished early enough to avert irretrievable and disastrous changes in the earth's climate.

## 7

# THE UNLIKELY ALLIES BEHIND CRIMINAL JUSTICE REFORM

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A SINGULAR GROUP OF PROGRESSIVES, FISCAL CONSERVATIVES,  
LIBERTARIANS, AND EVANGELICALS ALL AGREE: WE NEED TO  
REIN IN INCARCERATION. NOW, WHAT'S NEXT?

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This year has been the biggest for criminal justice in more than two decades. For the first time, a sitting president visited a federal prison and made a major speech calling for an end to mass incarceration. In July, President Bill Clinton, addressing an audience at an NAACP convention, expressed regret in signing the 1994 Crime Bill, which served to increase state and federal prison populations. In a new book, leading Republican and Democratic presidential hopefuls offered various proposals to curb the prison population.<sup>1</sup> Congress may pass a criminal justice reform bill. And protesters have filled our cities' streets calling for change.

This is a signal moment in criminal justice reform. Leaders are coming at the issue for a variety of reasons — the religious right who believe in redemption, fiscal conservatives who see waste, libertarians turned off

by a sprawling government program, civil rights advocates seeking racial justice, and progressives hoping to eradicate inequities. All draw the same conclusion: The country needs to reduce its prison population while improving public safety. Not only is there bipartisan agreement on the problem, there is also agreement on some solutions, a rarity today.

How we reached this point is a complex tale. Although progressives had been calling for action for years, only when conservatives took up the mantle and explained how their version of reforms dovetailed with conservative principles did momentum for change intensify. The criminal justice reform movement offers a powerful example of bipartisan reform efforts during a time of polarized politics and dysfunctional government. In an important way, the unlikely alliance on criminal justice is distinct from other issues: All sides agree that it is a core function of government, but the role should be more limited. Yet, at base, the criminal justice story about an awakening to reverse a major national overreaction translates to other issues. And today's ripe political context has opened up a bigger role for advocacy organizations across the political spectrum.

### *The "Tough on Crime" Era*

Ever since Richard Nixon's presidential campaign in 1968, politicians have tried to outdo each other to see who could be tougher on crime. As crime increased and city streets were marred with violence, public safety became a major issue. By 1991, violent crime had grown more than 500 percent in 30 years. The 1977 mayoral contest in New York City turned on the death penalty — an issue over which a mayor has no control. In the 1988 presidential race, George H. W. Bush benefitted from the infamous "Willie Horton ads," one of the most influential political ads in history, which seized on the narrative that Michael Dukakis, then governor of Massachusetts, was to blame for the release of a violent criminal into society.<sup>2</sup>

These public fears culminated in 1994 with the passage of the federal Violent Crime Control and Law Enforcement Act, the largest crime bill in U.S. history. Commonly called the 1994 Crime Bill, it broadened the federal death penalty and added new federal offenses.



Its most pernicious aspect was the \$9.7 billion it provided to states to pass harsh “truth in sentencing” laws, which fueled a prison construction boom.<sup>3</sup> That same year, California passed a “three-strikes-and-you’re-out” ballot initiative, with an astonishing 72 percent of the vote.<sup>4</sup>

The result? Increasing numbers of people — especially minorities — locked up in prison. The numbers of those incarcerated doubled from 1.1 million in 1990 to almost 2.3 million today.<sup>5</sup> The United States has 5 percent of the world’s population, yet 25 percent of the world’s prisoners. If the prison population were a state, it would be the 36th largest — bigger than Delaware, Vermont, and Wyoming combined. This explosion in incarceration has been termed “mass incarceration,” “over-criminalization,” or “over-incarceration.” Research has shown such high levels of incarceration are unnecessary for controlling crime, and can even be counterproductive. Increasing incarceration offers rapidly diminishing returns.<sup>6</sup>

This growth in imprisonment takes a large toll on Americans. The criminal justice system costs taxpayers \$260 billion a year. Corrections spending grew almost 400 percent over the past 30 years. With so many people withdrawn from society, then stigmatized as “convicts” when they return, the justice system drains overall economic growth. Best estimates suggest it contributed to as much as 20 percent of the U.S. poverty rate. Nearly two-thirds of the 600,000 people who exit prisons each year face long-term unemployment.<sup>7</sup>

### *The Case of Texas*

For decades, criminal justice advocates, such as Bryan Stevenson and the Innocence Project, called for reforms to our criminal laws. With much hard work, they pioneered a movement, particularly on death penalty reform. But their calls to change how the country treats crime and punishment did not go far enough.

Then, in 2005, the unlikely happened. John Whitmire, a Democratic Texas state senator, teamed up with Jerry Madden, a GOP member of the Texas House, to offer a bill that overhauled the state’s probation system. It expanded both the number of specialty courts, such as drug

courts, and the number of probation offices around the state. Despite the fact that the bill passed both houses of the legislature, it was vetoed by Texas Gov. Rick Perry.

In 2007, while Whitmire and Madden continued to contemplate legislation, the Texas Legislative Budget Board offered lawmakers some startling figures. It projected that the state would need 17,000 new prison beds by 2012, and would need to build three new prisons at a cost of \$2 billion. “I said ‘No, there’s a better way to do it,’” Whitmire later told *The Daily Beast*. “There ought to be a requirement that you release a better person than the one you receive.”<sup>8</sup> Although the state was flush with cash, lawmakers were becoming impatient with seemingly endless prison construction. Under the previous governor, George W. Bush, the state had built 38 prisons. And when Madden was named chairman of the Corrections Committee in the House, the speaker told him, “Don’t build new prisons — they cost too much.”<sup>9</sup>

Whitmire and Madden moved modestly. Instead of allocating money for new prisons, they offered a proposal to spend \$241 million on treatment programs and new specialty courts.<sup>10</sup> Perry signed the bill, which would become the first of many measures in Texas to overhaul its criminal justice system. The reforms successfully reduced the state’s prison population and saved \$2 billion, while crime dropped to the lowest level since 1968.

The two lawmakers were not operating in a vacuum. The Texas Public Policy Foundation (TPPF), a conservative think tank, had begun to take an interest in criminal justice. Three strands of conservatism were coming together to support reform: Libertarians who opposed the big government aspect of corrections, evangelicals who believed the system should be based more on redemption and rehabilitation than on punishment, and fiscal hawks who saw the overgrown system as a form of government waste.

### *A National Movement for Reform*

TPPF thought it could harness what happened in Texas and take it national. Its staff set out to make reducing imprisonment a national,

*conservative* issue. In 2010, TPPF founded an initiative called “Right on Crime.” Who better to tell the public that the country does not need to “lock ’em up and throw away the key” than law-and-order, tough-on-crime conservatives? TPPF drafted a statement of principles and enlisted various conservative luminaries — including Edwin Meese, Newt Gingrich, the late Chuck Colson, Grover Norquist, and Pat Nolan — to sign on. “The corrections system should emphasize public safety, personal responsibility, work, restitution, community service, and treatment — both in probation and parole, which supervise most offenders, and in prisons,”<sup>11</sup> its statement of principles reads. The word “punishment” never appears.

Once these conservatives were secured to push the issue forward, more key figures — such as former Florida Gov. Jeb Bush, Ohio Gov. John Kasich, big donors David and Charles Koch, Sens. Ted Cruz and Marco Rubio, and even House Speaker John Boehner — quickly joined the fold. Reducing imprisonment has become a bona fide Republican issue.

While Right on Crime was stirring things up on the right, things were also moving quickly on the left. In the same year Right on Crime formed, Michelle Alexander published “The New Jim Crow: Mass Incarceration in the Age of Colorblindness.”<sup>12</sup> Documenting the racial disparities and arguing that mass incarceration was “the new Jim Crow,” Alexander’s book spent more than 100 weeks on *The New York Times* bestseller’s list and galvanized liberal elite opinion and civil rights advocates. Groups such as the ACLU, NAACP, and Brennan Center for Justice strengthened their criminal justice programs, making them institutional priorities.

Squeezed by tight budgets and nudged by the political cover provided by Right on Crime, several “red” states started moving on prison reform. The Pew Center also started helping states analyze the drivers of incarceration and develop data-driven policy responses. Surprisingly, as these reforms were largely championed by conservative lawmakers, Democratic politicians largely sat on the sidelines. Right on Crime members wrote op-eds in major state papers, testified at hearings, and met with legislators to advocate for passage of reforms. They provided political persuasion and cover for fellow Republicans to get on board.

After Texas took the first step in 2007, states as diverse as Kentucky (2011), Mississippi (2013), South Dakota (2013), and Oregon (2013) passed legislation to rein in the size and cost of their corrections systems while further decreasing crime. More recently, Utah Gov. Gary Herbert signed a reform bill in March 2015. The legislation converts drug possession offenses from felonies to misdemeanors, increases alternatives to prison for probation and parole violations, and strengthens re-entry services. It is expected to avert nearly all of the state's projected prison growth and save \$500 million.<sup>13</sup>

These changes occurred largely outside the courts. The one major exception was the decade-long fight about overcrowding in California's prisons. Originally brought in 2001, the plaintiffs in *Plata v. Brown* charged that the overcrowding in state prisons made it impossible for inmates to receive adequate medical care, violating the Eighth Amendment. After numerous procedural battles, including the failure of the state to abide by the terms of a settlement, the case went to the U.S. Supreme Court. In a 5-4 ruling, the Justices agreed with the plaintiffs, upholding a lower court order that the state had to reduce its prison population. To meet this order, California needed to release more than 30,000 inmates.<sup>14</sup> The state raced to pass legislation and ballot initiatives in response.

The results of these state efforts are compelling. Since 2008, crime and incarceration have fallen together nationally for the first time in 40 years.<sup>15</sup> The 10 states that reduced imprisonment the most saw crime drop even more (13 percent on average) than the 10 states that increased imprisonment the most (8 percent on average).<sup>16</sup> These successes have shown the country it can reduce both imprisonment and crime.

### *The Next Stage in the Fight for Reform: Changing Public Opinion*

These left-right efforts have now culminated with criminal justice becoming an issue in the 2016 presidential election. In the wake of the killings of black men in Ferguson, Staten Island, and Baltimore, and ensuing national protests, the "Black Lives Matter" movement emerged.

Regardless of whether one agrees with the movement's tactics, it has indisputably put policing and other criminal justice policies at the center of

the political zeitgeist. Protesters have made headlines by confronting Democratic presidential candidates, putting pressure on politicians to speak out on race and criminal justice.

Meanwhile, two of the most influential political donors in the country, Charles and David Koch, emphasized over-criminalization. The Kochs' questionnaire to Republican presidential candidates on the policy issues most important to them included two questions on justice reform.

The question now at hand: How do we harness this growing bipartisan agreement to ensure bold, long-lasting change to end over-imprisonment?

Public support must grow for the issue. The movement must persuade the public on four key things:

- This country uses incarceration excessively;
- We are safer today than we have been in a generation, and reducing imprisonment will not lead to a rise in crime (if paired with initiatives to improve rehabilitation, treatment, probation, and parole);
- Excessive imprisonment imposes high fiscal, economic, social, and human costs; and
- There are proven, easy-to-understand solutions to fix the problem.

Public opinion is shifting. Most surveys show that strong majorities support using alternatives to prison for nonviolent offenders. In a poll earlier this year, 61 percent of Texans agreed their state should spend more money on effective treatment programs than on prisons.<sup>17</sup> A national survey by the Pew Research Center found that 67 percent of Americans think government should focus more on treatment instead of prosecution for illegal drugs users.<sup>18</sup>

The resilience and depth of public support, however, is less clear, especially when confronted with the idea that a particular proposal will increase crime or be too lenient. Current public opinion is also divided on more challenging questions involving repeat offenders and violent offenders.

Perhaps more problematically, the public is not fully informed about crime trends. Most Americans mistakenly believe crime is rising. According to a 2014 poll, “For more than a decade, Gallup has found the majority of Americans believing crime is up, although actual crime statistics have largely shown the crime rate continuing to come down from the highs in the 1990s and earlier. ... [M]ajorities of Americans maintain that there has been an increase in crime from the previous year.”<sup>19</sup> This perception has worsened with the current media hysteria about a recent “crime spike” and speculation about policing changes as the cause.

The intensity of public support for the issue also remains a challenge. The nation’s sprawling criminal justice system touches so many people and families. Yet criminal justice reform is still nowhere near the top of the list of issues on which people vote. Nor it is at the top of either political party’s agenda.

It is not enough for organizations on the left and right to call for change. Politicians need to be more vocal about why they support criminal justice reform and what animates their concerns. From Rand Paul to Hillary Clinton to John Kasich to Chris Christie, this is beginning to happen. Research has found that people are much more inclined to believe a message if it comes from an ideologically trusted source.<sup>20</sup> The more politicians and leaders speak out on the issue, the more public support will follow.

### *The Role of Advocacy Organizations*

How can advocacy organizations help make this happen? It is up to groups on the left and the right to toil in their own vineyards, leveraging their credibility on each end of an increasingly polarized political spectrum to put pressure on politicians to speak out. Groups can convince politicians that they have permission from their own base to step out on the issue. One powerful tool: Groups can and should push out their message into polarized news arenas. With today’s fragmentation of news sources, Fox News and MSNBC can affect voters’ views more than the evening news or daily papers.

The pressure must not only be to speak on the issue. We must also hold politicians accountable for devising and implementing concrete policy solutions that live up to the sweeping rhetoric. Bold solutions are required: Treatment instead of prison for drug addicts. Hospitals instead of prison for the mentally ill. A reduction of sentence lengths. Strong financial incentives to reduce incarceration. A juvenile system that does not rely so heavily on prison.

What lessons could other movements learn from the efforts for justice reform? In one way, criminal justice is distinct from other issues. All sides agree that criminal justice is a core function of government — one of the few for those on the right. And liberals and conservatives both want less crime, fewer government dollars spent on prisons, and better reintegration of offenders into society so they do not recidivate upon release. Both sides are also driven, in part, by compassion, whether be it from the pro-life<sup>21</sup> stance of Christie or the racial justice concerns of Clinton.

Does it make a difference that both sides arrived at the issue for different reasons? Ultimately, it may not matter what forces motivate the change as long as the reforms are durable. Perhaps the most compelling reason to believe the momentum is durable is the change the conservative movement has undergone over the last several decades. Today's conservatism is more animated by a deep skepticism of government than by a desire to preserve the status quo. For example, conservatives almost universally support school choice, rather than seeking to preserve the government's long-standing role in education. Criminal justice reform fits squarely in the broader conservative effort to roll back the massive growth in the scope and cost of government. It also gives hope that, even though the fiscal health of state governments has improved since, states have not reversed the trend to reduce their incarceration rates.

Mainstream politicians beginning to carry the issue are also a cause for optimism. With 30 percent of American adults with criminal records, the number of voters personally affected by or whose friends and families are affected by the criminal justice system is growing rapidly.<sup>22</sup> This is another reason to think this momentum will not vanish.

As this new era of criminal justice reform enters a presidential race, 2016 will be a defining year for the effort. It is the year we will know

whether this movement will bring lasting change, whether politicians will bring criminal justice reform to the top of their agenda, whether voters, for the first time in 20 years, will vote on the issue.

It is up to us, as criminal justice advocates, to take advantage of this unique and unexpected moment. The entrance of conservatives into the movement helped break open the issue. But that is not enough. We must keep the pressure up and hold politicians accountable for delivering systemic reforms that transform lives and help make us both a safer and freer society.



## 8

# THE NEW YORK STATE PLAYBOOK FOR REFORM

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ONE OF THE MOST REMARKABLE POLITICAL DRIVES IN MORE THAN THREE DECADES FELL JUST SHORT OF WINNING IN THE MOST CORRUPT STATE IN THE COUNTRY. ARE THERE LESSONS FOR THE NEXT STAGE AND THE BROADER MOVEMENT?

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Surprisingly, the very closest any state has come to enacting fundamental campaign finance reform in recent years was, of all places, New York.

Known for its secretive “three men in a room” deal-making between the governor, the Assembly speaker and the Senate majority leader, the Empire State has earned a notorious reputation for being one of the most dysfunctional and corrupt state governments in the nation, with incumbents virtually guaranteed re-election even as they stymie reforms.<sup>1</sup>

Despite this political environment, reformers came so close — a remarkable effort and what some considered to be the most effective campaign of its kind in more than three decades.

For years, good government groups like Common Cause, the League of Women Voters, and the New York Public Interest Group had been advocating for strong campaign finance reform, including public financing of elections and robust disclosure and enforcement provisions. But in 2011, a new set of voices joined the chorus. A multi-pronged, broad coalition of unlikely allies united around the need for reform: Prominent financial and philanthropic leaders joined forces with the political activists at the Working Families Party. Even a super PAC, underwritten by Jonathan Soros, played a major role in advancing the cause.

This movement was engaged in a complex tango with a mercurial politician, Andrew Cuomo — alternately a passionate public proponent of reform who took big risks, and a backroom “dealmaker” whom critics charged was never willing to sacrifice political capital to push reform over the finish line.<sup>2</sup>

It is a compelling tale — and a compelling group that came together. How did this happen? Crucially, what went wrong — what lessons can we draw from that?

### *Legislative Push Falls Short*

In 2010, Cuomo won the race for governor on a reform platform, and he went on to call for public financing in three consecutive State of the State addresses.<sup>3</sup> The governor’s staff held many meetings with representatives of the coalition, and his office welcomed the advocacy of NY LEAD, the business and philanthropic group convened by the Brennan Center, to help push for reform.

Midway through Cuomo’s first term, a state Senate race became a referendum on reform. Cecilia Tkaczyk, an upstate Democrat, ran on the issue of campaign finance reform and eked out a surprise win, boosted by expenditures from coalition member Friends of Democracy, the Soros super PAC.<sup>4</sup> Tkaczyk’s win gave the Democrats a majority in the Senate, giving hope to reformers.<sup>5</sup> (In prior years, the Assembly had passed many reform bills, but they all died in the Senate, where the Republican leadership staunchly opposed reform.) But despite the

Democrats' numerical majority in the Senate after Tkaczyk's election, they did not gain control of the chamber. A small group of Democrats broke away from party leadership to forge the Independent Democratic Conference and caucused with the Republicans, ensuring that Majority Leader Dean Skelos could continue to block public financing from reaching a floor vote.<sup>6</sup>

In 2013, the Assembly passed a comprehensive reform bill centered on public financing.<sup>7</sup> Toward the end of the legislative session, Cuomo sent his own reform bill to the legislature, which also featured public financing.<sup>8</sup> As before, Senate leadership blocked a floor vote. The Brennan Center, along with a Working Families Party-affiliated think tank called the Center for Working Families and others, worked behind the scenes to devise a legislative strategy for getting public financing to the floor. In the final days of the session, Democrats used a rare maneuver, a hostile amendment, to add public financing to a must-pass bill addressing problems with voting machines for the upcoming election. The amendment came within two votes of passing.<sup>9</sup>

### ***A Public Commission to Investigate Corruption and the Budget Deal***

After the legislature ended its session without enacting reform, Cuomo followed through with a threat to establish a public commission to investigate Albany corruption and propose solutions to its long-standing dysfunction.<sup>10</sup> This Moreland Commission, named after a 1907 law, became the focus of reform efforts. Members of the coalition lobbied Moreland commissioners, testified at hearings, and provided analysis and policy recommendations. The Commission issued a preliminary report in December 2013, detailing a wide range of corrupt and unseemly practices and strongly recommending campaign finance reform with public financing as its centerpiece.<sup>11</sup> The report argued public financing would “make a real difference, empowering regular citizens, reducing the power of massive checks and special interests, and increasing the accountability of officials to those they serve.”<sup>12</sup>

The Moreland Commission's report spurred the movement, leading 30 organizations, including the Brennan Center, to call upon

the governor to include public financing in the state's 2014 budget.<sup>13</sup> The strategy was simple: convince Cuomo to use his most powerful tool to control legislation. Under New York law, the legislature has only limited authority to amend budget legislation proposed by the governor, giving the governor great control. And of course, budget bills are must-pass legislation.

Other political leaders soon joined the effort. At an event sponsored by the coalition, U.S. Sen. Elizabeth Warren (D-Mass.) and New York Attorney General Eric Schneiderman espoused strong support for public financing. The event was characterized as part of the growing pressure on the governor to make strides on reform at the time his budget proposal was being finalized.<sup>14</sup>

These efforts paid off. After the letter was sent and the event was announced, Cuomo released a budget that included public financing along with other ethics and campaign finance reforms. Assembly Speaker Sheldon Silver had sponsored and passed his own reform bill, meaning two of the so-called three men in a room with ultimate control over budget decisions were (at least publicly) in support of reform. The third, Majority Leader Skelos, was still a major obstacle.<sup>15</sup>

Advocates continued to push, now focused on the budget process. Coalition member Public Campaign Action Fund paid for TV ads and mailers designed to weaken Republican senators' opposition to the governor's proposal.<sup>16</sup> The super PAC Friends of Democracy announced plans to spend money to unseat senators opposed to reform in the next election.

In the days before the April 1, 2014, deadline for passing the budget, the public financing provisions were the subject of several closed door negotiations. Rumors of a deal to finally pass a public financing system spread through the Capitol.

But in the final hours, statewide public financing and other campaign finance reforms were removed from the budget bill. Worse, the last-minute deal included only tepid reforms while also disbanding the Moreland Commission nine months earlier than anticipated.<sup>17</sup> Though the creation of the Commission was announced amid high expectations and with great fanfare, its demise was mentioned by the governor only in passing.<sup>18</sup>

Cuomo agreed to terminate the Commission in exchange for the legislature's passage of several "ethics" measures in the 2014 budget.<sup>19</sup> The laws, collectively referred to as the Public Trust Act, purported to bolster anti-bribery and anti-corruption regulation, and increase disclosure requirements.<sup>20</sup> Yet many campaign finance reform advocates argued that the measures were laughably weak.<sup>21</sup>

Of greatest disappointment was that the new legislation did not include a statewide public financing measure, despite the Moreland Commission's strong recommendation.<sup>22</sup> In what appears to have been a compromise, the Public Trust Act did establish a pilot public financing system limited to the Office of the Comptroller for the 2014 election.<sup>23</sup> The program, which never disbursed any public funds, was so flawed that advocates called for a boycott of the system.<sup>24</sup>

### *The Political Fallout*

In the aftermath of the 2014 budget negotiations, the Working Families Party was particularly vocal in expressing its disappointment. It threatened to withdraw its endorsement for Cuomo in the coming 2014 gubernatorial election, and to run its own candidate, with many in the party looking to Fordham Law professor Zephyr Teachout.<sup>25</sup>

In exchange for the Working Families's endorsement, Cuomo promised to help the Democrats win a majority in the state Senate, with the understanding that this could finally lead to the passage of public financing.<sup>26</sup> Yet the election did not proceed quite the way the Working Families Party had hoped: The Republicans once again captured the Senate. For the next two years, there was little chance comprehensive campaign finance reform would come to Albany.

However, that was not the end of the story. Investigations begun by the Moreland Commission are still continuing: The panel referred some matters to prosecutors, and U.S. Attorney Preet Bharara obtained Moreland records in order to seek out Albany corruption.<sup>27</sup> Probes of several lawmakers are under way.<sup>28</sup> Indeed, two of the "three men in a room" — Republican Senate Majority Leader Dean Skelos and Democrat Assembly Speaker Sheldon Silver — who failed to enact

campaign finance reform in 2014, have now been ousted due to corruption allegations.<sup>29</sup>

Meanwhile, in the summer of 2015, the Brennan Center brought together a coalition of current and former political candidates and officeholders to sue the Board of Elections to close the state's "LLC loophole," which allows wealthy individuals and special interests to skirt New York's already lax regulations to provide candidates with nearly unlimited and often secret campaign money.

### *An Assessment of the Effort*

While these developments keep the issue of campaign finance reform in the news, transformative change through reforms like public financing cannot come through the courts. They must come through the legislative and executive branches.

Which brings us back to the question: What caused the campaign to fall short?

A number of factors combined to scuttle the reform effort. Although advocates put together a broad coalition, they did not appear to have an insider champion in Albany. As noted, Cuomo's public support never seemed to translate into any expenditure of political capital on his part. Many believed he was not pushing legislators behind closed doors on the issue the way he had in pursuit of his early victories on same-sex marriage and gun control. And while Silver introduced a public financing bill almost every session for years, many suspected he was not truly invested in the proposal. In New York's divided legislature, symbolic one-house bills can be passed safe in the knowledge that they will never move in the other chamber.

Arrayed against this lukewarm support from Democratic leaders is implacable opposition from Republicans. This comes despite polls showing strong support for comprehensive campaign finance reform, including public financing, among all New Yorkers, liberal and conservative, upstate and down.<sup>30</sup> It is likely that the Republican Senate leadership sees reform as an existential threat. In a state where registered Democrats outnumber registered Republicans two-to-one, GOP control

of one house of the legislature may feel precarious.<sup>31</sup> The Republicans in the Senate know they do well under the current campaign finance system and see no political advantage in allowing reform.

In addition, reformers faced cynicism from many in the Albany press corps. Advocates were able to place many op-eds and secure favorable editorials in papers all over the state. However, reporters have seen many cycles of scandal followed by much-ballyhooed but inconsequential reforms. Even during the burgeoning ethics crisis of recent years punctuated by arrest after arrest of sitting legislators, many in the press were not open to the idea that comprehensive campaign finance reform would bring about significant change.

After the near misses at the end of the 2013 session and in the 2014 budget negotiations, campaign finance reform did not stay in the public eye. The issue failed to garner as much attention in the 2014 election as it had two years earlier. The Republicans recaptured their Senate majority, and no obvious path to legislative victory remains until at least 2016.

### *Lessons Learned for the Broader Reform Movement*

The course of this New York-focused effort offers lessons for campaign finance reform generally. Most notably, the campaign was executed by a coalition that was both broad and well-coordinated. Good government groups, business leaders, labor, environmental groups, and others all worked together. The core members of the coalition were in virtually constant contact to collaborate on strategy. At the same time, each group had the leeway to best leverage its strengths, whether through mobilizing grassroots, recruiting elite voices, or engaging in electoral politics.

This last mechanism, electoral influence, was a powerful tool that is often missing from government reform efforts. As mentioned, the coalition counted a political party as a member and other members used independent spending on elections to further the cause. This can be a delicate issue for groups organized under section 501(c)(3) of the tax code or with a commitment to remaining nonpartisan, but the coalition was able to divide labor and maintain the relevant boundaries.

Playing politics can also have the undesired effect of reinforcing assumptions about partisanship. Although strong majorities of voters across the political spectrum support reform, Republican elected officials remain staunchly opposed. Cuomo may have had the ability to secure Republican votes during the budget fight, but he did not, leaving support for reform lopsided. This makes strategies for engaging Republicans and building bipartisan support crucial.

Campaign finance is remarkable among reform issues in that the public does not need to be educated about the problem or convinced of its magnitude. However, the widespread belief in the problem is paired with an equally widespread belief that nothing can be done about it.<sup>32</sup> Also unique is the fact that the problematic political process that the movement seeks to change must be relied upon to enact change. Incumbent legislators have a natural inclination to maintain the political process they have mastered.

This reality fosters cynicism, and the New York reform effort faced an uphill battle to convince policymakers and others that the possibility for reform was real and that it would actually bring about change. Nevertheless, the coalition came within a hair's breadth of securing transformative policy solutions in the Empire State, providing a blueprint for the ongoing push for reform in New York and across the nation.



## 9

# POLICING THE POLICE

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STRATEGIC RESEARCH, COALITION BUILDING, AND WORKING  
WITH LAWMAKERS ALL COMBINED TO MAKE A LONGSHOT  
PROPOSAL FOR AN NYPD INSPECTOR GENERAL A REALITY.

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Playing offense on national security reform is tough. Any attempt to roll back the extraordinary authorities granted to the government since the 9/11 attacks is met with resistance — partly based on genuine concern about terrorism, and partly due to entrenched bureaucratic interests in maintaining power and budgets. One instance in which the Brennan Center was able to pursue and achieve positive change was our campaign to establish an inspector general for the New York City Police Department (NYPD).

Having led this initiative for the Brennan Center, I think its success can — at least in part — be fairly attributed to the Center’s preferred way of approaching an issue, which relies on comprehensive research to identify solutions and uses public education and communications to build support for proposed reforms. Of course, no organization operates alone. We worked closely with Muslim, Arab, and South Asian (MASA) groups, and were fortunate to forge an early alliance with police accountability groups in New York City who were organized under the banner of Communities United for Police Reform. This cooperation was critical to persuading the City Council, under the leadership of Council Members Brad Lander and Jumaane Williams, to pass legislation establishing an inspector general for the police.

### *The NYPD on the Frontlines of Domestic Counter-Terror Efforts*

Policing issues are traditionally considered part of the criminal justice field rather than national security. But in the last decade, state and local law enforcement agencies have assumed a larger role in the frontlines of domestic counterterrorism efforts. No police department has embraced this role as enthusiastically as the NYPD.

In the aftermath of 9/11, then-Police Commissioner Raymond Kelly dedicated 1,000 officers to counterterrorism duties,<sup>1</sup> with intelligence operations headed by a 35-year veteran of the Central Intelligence Agency. One of his first moves: to ask a federal judge to loosen constraints on intelligence operations that had been imposed as part of a 1983 consent decree settling claims of police spying and disruption of anti-war and other activist groups. In the anxious time after the 9/11 attacks, the supervising judge readily agreed to the NYPD's request.<sup>2</sup>

Almost as soon as the NYPD was granted increased authority, it began to use it aggressively and, in some cases, illegally. In 2003, for example, teams of undercover NYPD police officers traveled to cities in the U.S., Canada, and Europe to infiltrate groups that planned to protest at the Republican National Convention in New York the following year.<sup>3</sup> Police kept track of hundreds of these groups and individuals, not just those suspected of planning criminal activities.

Starting in 2007, the Brennan Center began hearing complaints of aggressive intelligence activities in American Muslim neighborhoods in New York City. We were told about informants who trawled communities looking to provoke discussions of politics and religion. The same year, the NYPD released a report titled *Radicalization in the West*, which claimed that it could identify the next terrorist among young American Muslim men by keeping tabs on whether they started praying, grew beards, or stopped smoking and drinking. The Center worked with grassroots MASA groups to push back against this narrative, which justified broad monitoring of communities and pointed to normal religious observance as a sign of incipient terrorism.

### *2011 as a Signal Year for Reform Efforts*

In 2011, the Brennan Center published a report debunking this and similar theories, which had become prevalent among both local law enforcement and the Federal Bureau of Investigation (FBI). We demonstrated that empirical research uniformly rejects the notion that there is one fixed path to becoming a terrorist or indicators (other than criminal behavior) that allow police to reliably identify a “pre-terrorist.”<sup>4</sup> Launched at the time that Rep. Peter King (R-N.Y.) was holding his controversial hearings on radicalization among American Muslims, the report garnered wide media coverage and offered a useful counterpoint in national security debates going forward.

Later that year, tensions between the Muslim community and the NYPD reached a tipping point when the Associated Press (AP) began publishing its Pulitzer Prize-winning series detailing the full extent of the NYPD’s Muslim surveillance program. The AP stories showed the police had targeted broad swaths of Muslims without any suspicion of wrongdoing. They had been systematically mapping Muslim communities, creating dossiers of what was said at mosques, cafes, bookshops, barbershops, and gyms. The investigation also documented police monitoring and infiltration of Muslim student groups in and around the city, and the NYPD’s plans to place undercover informants in several area mosques and in service organizations in Muslim communities.

The extensive publicity provided an opening to rein in the program. The growing opposition to the NYPD’s stop-and-frisk program, which had been demonstrated to overwhelmingly target minorities, provided a useful context for making the case that the NYPD had gone too far in its surveillance operations as well. It had unfairly subjected an entire community to surveillance, a tactic that had the added disadvantage of discouraging Muslims from cooperating with police (studies show that up to 40 percent of the tips that have stopped terrorists come from American Muslims).<sup>5</sup> After 9/11, many Muslim community organizations had reached out to law enforcement, including the NYPD and the FBI in an effort to build cooperative partnerships. After the AP stories, these doors began to close.

The FBI's special agent in charge in Newark publicly stated that the NYPD's spying on mosques and Muslim businesses in New Jersey had made "the job of gathering counter terrorism intelligence much more difficult."<sup>6</sup> The response of the deputy chief of the Los Angeles Police Department was typical of what we heard: "There is no reason for us to survey Muslim students or where people buy their meat; that is not suspicious to us. That is how someone lives their life."<sup>7</sup>

### ***Collaborating with Grassroots Groups and Deploying Research***

To take advantage of the opening for reform, the Center ramped up its longstanding cooperation with grassroots groups working in this space, and took on a leadership role in developing research and advocacy on the need for oversight over what then-Mayor Michael Bloomberg called, "the seventh largest army in the world." Even before the AP stories broke, the Center had been conducting research into the rules governing NYPD intelligence activities. Partly because these rules emanated from a consent decree which could not be modified without court involvement, and partly because of a climate of continuing security concerns, we were unconvinced that a legislative campaign to limit the NYPD's substantive authorities would be successful. Moreover, we were operating in an informational conundrum: For each document that suggested the NYPD was spying on Muslims without cause, the police responded by saying they had an ongoing investigation based on concrete suspicion. In the he-said-she-said game, the police had the upper hand. Finally, the Center's focus has traditionally been on fixing the *systems* of democracy and justice. As an outgrowth of this, the Liberty and National Security Program has always promoted transparency and accountability in counterterrorism policies and laws.

One of the major difficulties with local law enforcement becoming involved in counterterrorism is the lack of local legislative expertise in controlling these operations, often coupled with limited resources and information, which has led to a gap in oversight and accountability. The Brennan Center proposed to fill this gap by establishing an inspector general for the NYPD.

Normally, we would have published a research report explaining why this was a good idea. But in the case of the NYPD, a different opportunity presented itself and we seized it. In early 2011, *The Village Voice* published a story claiming that police recruits had been shown a virulently anti-Muslim video called the “Third Jihad,” which included a cameo by the police commissioner.<sup>8</sup> The NYPD brushed off these claims, insisting the video was mistakenly screened only a couple of times to a few officers. Curious about how such an inappropriate video came to be approved for training, the Brennan Center used New York’s freedom of information law to request relevant records. As is typical with the NYPD, it was months before we got a response. But, late in 2011, we found an unexpected smoking gun: An internal NYPD report showed that the film was played to recruits “on a continuous loop” for between three months and one year. Some 1,500 officers had surely seen it.<sup>9</sup>

*The New York Times* published the story on its front page on January 24, 2012.<sup>10</sup> Initial interest in the discrepancy between police claims and the truth was further fanned when it turned out that the on-film interview with Police Commissioner Kelly was not, as the NYPD had claimed, lifted from previously existing footage. Rather, Kelly had been interviewed specifically for the film and had done nothing to disassociate himself from it. *The Times* published a blistering editorial. Mayor Bloomberg delivered a rare rebuke to his police chief, who issued an equally rare apology.

We used the interest in the story and our central role in bringing it forward as a platform to pen an op-ed in *The Times* calling for an inspector general for the police. Building on this influential piece, we launched a multi-pronged campaign to make it a reality:

- We reached out to police accountability groups, organized under a coalition called Communities United for Police Reform (CPR). This coalition was focused on putting an end to stop-and-frisk and related practices. An inspector general was part of the menu of reforms they were proposing, but not initially a priority. The coalition agreed that stop-and-frisk and Muslim surveillance were part of a pattern of discriminatory

policing and made the inspector general a central part of their reform efforts. This brought the clout of a large, well-organized coalition to the inspector general proposal. This alignment also had the salutary effect of forging closer relationships between the grassroots groups working on racial justice and policing, and those who were focusing on surveillance issues.

- We stepped up conversations with allies on the New York City Council. We had already started educating Council members on Muslim community concerns about surveillance by bringing our grassroots partners into the conversation to explain the impact on their communities. Council Members Brad Lander and Jumaane Williams (who was working on police reform measures) agreed to sponsor legislation to establish an inspector general and introduced the measure in June 2012.
- Research on the need for an NYPD inspector general was fast-tracked. In October 2012, we published a report, *A Proposal for an NYPD Inspector General*, in which we demonstrated the need for independent oversight for the type of counterterrorism and intelligence operations undertaken by the police, and explained how current mechanisms were not suitable or sufficiently empowered. We launched the report at an event at John Jay College of Criminal Justice, with Council members and criminal justice experts, to show the viability and the need for the proposal.
- We launched a public education campaign aimed at grassroots audiences. This included publishing our own op-eds and blogs, but also encouraging other influential voices to weigh-in. For example, on March 28, 2013, the *Daily News* ran an op-ed by three former New York City corporation counsels supporting the inspector general proposal. *The New York Times* wrote no less than three editorials supporting the proposal.

- In order to win the support of the speaker of the City Council (which was essential to bringing the issue to a vote), the original legislation introduced by Lander and Williams required revisions. Along with our allies, we provided input to city attorneys to strengthen the legislation against court challenge while preserving the key functions and independence of the inspector general

On June 26, 2013, the City Council overwhelmingly passed the law establishing an NYPD inspector general. It did so as part of a package of reforms intended to halt discriminatory policing tactics. Linking the inspector general initiative to the high profile issue of stop-and-frisk was extremely helpful in garnering such broad support, even in the face of implacable opposition by Commissioner Kelly and Mayor Bloomberg. The latter's veto was handily overridden by the City Council on August 22, 2013.<sup>11</sup>

Of course, passing the law was only the first step. Establishing a new office and ensuring that it was adequately funded and appropriately staffed was critical, too. The change in administration was enormously helpful in this regard. Newly-elected Mayor Bill de Blasio threw his support behind the inspector general and allocated the necessary resources. Incoming Police Chief Bill Bratton also expressed his willingness to work with the office.

NYPD Inspector General Philip Eure took office in May 2014,<sup>12</sup> but our campaign is not over. Its ultimate goal is to obtain a reckoning of the police's Muslim surveillance program. This is one of Eure's priorities for 2015 and we are eagerly awaiting the results.





# **21ST CENTURY CHALLENGES**



# 10

## DOES THE CIVIL RIGHTS MOVEMENT MODEL STILL WORK?

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THE CIVIL RIGHTS MOVEMENT PIONEERED A FORMULA FOR  
LEGAL CHANGE INVOLVING PEACEFUL PROTESTS, CREATIVE  
LAWYERING, AND SAVVY MESSAGING — AND OFFERED A  
POWERFUL TEMPLATE FOR OTHER EFFORTS.  
ARE THERE LESSONS FOR TODAY?

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The civil rights movement for African American equality stands out as the archetypical social change drive in American history. This is not only because of the momentous transformation it brought to the lives of African Americans, but because it has arguably served as a template for nearly every disenfranchised, persecuted group seeking social justice in the United States since the 1960s.

From the women's movement to the successful campaign to win marriage equality, the civil rights movement has been credited with inspiring the strategies and tactics that drove these battles for equality and acceptance.

The question remains, however: Can this template be used to address the current issues plaguing the African-American community? Can the theory of change created by the civil rights movement, which

has spawned successive victories for other movements, still work for the very people it was created to benefit?

### ***In the Beginning, There Was Charles Hamilton Houston***

Charles Hamilton Houston was a legal scholar and civil rights pioneer who, as dean of the Howard University School of Law and, later, as special counsel for the National Association for the Advancement of Colored People (NAACP), devised and implemented the legal strategy that culminated in *Brown v. Board of Education*.<sup>1</sup> This successful strategy, which led to the U.S. Supreme Court striking down segregation in public schools in 1954, catalyzed a mass movement beyond the education realm to vindicate the civil rights of African Americans in areas such as voting, employment, and housing. Over the next decade, this movement won significant victories in the courts and legislatures — and, though not without resistance, in the court of public opinion. Among the jewels in its legacy are the Civil Rights Act of 1964 and Voting Rights Act of 1965.

Houston aimed to undo the “separate but equal” doctrine established in the Court’s odious 1896 ruling in *Plessy v. Ferguson*,<sup>2</sup> which provided legal cover for laws mandating racial segregation. His great insight was to attack *Plessy* in a piecemeal fashion, through a series of incremental legal victories that undermined its doctrinal foundations, rather than attempt to overturn the ruling in one bold stroke.<sup>3</sup> The strategy also focused on changing minds in “the court of public opinion,” not only about equality in the public education system, but also about race generally.<sup>4</sup>

### ***The Seeds of Change: Brown Leading the Way***

The Court’s ruling in *Brown* opened the door for challenges to other forms of institutional segregation in the United States, beyond education. Although the decision struck down *Plessy*’s “separate but equal” doctrine, many states refused to follow the Court’s order.<sup>5</sup> Strategists and organizers concluded that expanding the promise of *Brown* required directly challenging these other forms of segregation.

Among the early test cases was that of Claudette Colvin, a 15-year-old from Virginia, who was arrested on March 2, 1955 for refusing to give up her seat on a bus to a white person.<sup>6</sup> But it was not until the 1956 boycott of the segregated bus system of Montgomery, Alabama, that the outlines of an effective social justice movement began to take real shape.

The Montgomery Bus Boycott presented the first real opportunity for an organized and sustained protest to tackle segregation in another everyday institution — public transportation. A. Philip Randolph, a noted labor leader and head of the Brotherhood of Sleeping Car Porters, helped devise the strategy behind the boycott. Bayard Rustin, the noted intellectual and pacifist, who traveled to Montgomery to lend support, helped shape the nonviolent approach that later became the strategy for the movement. This is when Rustin introduced Dr. Martin Luther King, Jr. to the teachings of Mahatma Gandhi and the concept of nonviolent protest as a means for creating social change.

As we know from history, the Montgomery Bus Boycott was indeed successful, working in tandem with strategic litigation to force change. As the nation's attention was riveted on the boycott throughout 1956, a federal district court invalidated the state's segregation policy in *Browder v. Gayle*.<sup>7</sup> The Supreme Court affirmed the decision in November of that year. And in December — after a boycott lasting 381 days — the city succumbed to these twin pressures and passed an ordinance permitting black and white passengers to ride on an equal basis.

But it was more than simply a successful movement to integrate the public transportation system in Montgomery. It was the first major successful campaign to desegregate a racist system since *Brown*, using a combination of the principles and teachings of nonviolent resistance and strategic, planned coordination as well as the tools of the law.

The example set by the Montgomery Bus Boycott became the template for other civil rights campaigns throughout the South, from a drive to desegregate the interstate travel system to efforts to remove barriers to voting. Each campaign, led by entities like the Student Nonviolent Coordinating Committee (SNCC), relied on the “playbook” developed through Houston's legal strategy and expanded upon by Rustin, Randolph, and later King and countless other leaders.

The successful use of this strategy led to the end of legally mandated segregation in housing, employment, voting, and public transportation.<sup>8</sup>

The movement's formula for success started with devising specific campaigns with clear goals and objectives. Once these goals and objectives were established, plans were put in place to determine how each would be achieved. A combination of sustained peaceful protests, savvy messaging, well-positioned political pressure, and creative lawyering were all ingredients in the recipe for creating a successful and sustained movement. The use of these very same elements — in varying combinations — became the template for many of the social justice campaigns that would be waged from the 1960s onward.

### *The Civil Rights Movement as a Model for Reform*

The civil rights movement developed a successful model for social change that relied on several key features. First, the movement recognized the importance of having visionary leaders to serve as its spokespeople and tacticians. Second, it organized activists and concerned citizens into an effective mass movement. Third, it garnered support through messaging that appealed to the American public's sense of fairness and justice. And fourth, it looked to the courts as a forum for redress. Identifying the correct legal challenge to discrimination was the key element in successfully gaining civil rights victories in the 1950s and 1960s. As in the case of the Montgomery Bus Boycott, resolution by the courts, in the face of relentless public resistance, served as the foundation for some of the key civil rights victories during this period. At its peak, the movement also inspired the political branches to act, enshrining voting rights and other protections against discrimination through legislation.

Significant and history-altering events, building upon the success in Montgomery, served as breakthroughs during the 1960s. Birmingham, Alabama, was the battleground for street protests led by children (and the children were, for the first time, the victims of manifested segregationist hatred). These protests eventually led to a negotiated plan to desegregate in exchange for an end to demonstrations. In Selma,

Alabama, protestors led peaceful marches for voting rights, the first of which resulted in Bloody Sunday, when marchers attempting to walk to Montgomery were beaten back at the foot of the Edmund Pettus Bridge. Both of these efforts led to the eventual passage of key legislation, like the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The focus of the movement in the 1960s turned from a particular focus on court victories to one marked by legislative victories. Legal mechanisms remained a way to protect the efforts of the protestors, including the Freedom Riders who sought to desegregate interstate transportation, but the largest victories of the 1960s were political ones. This bifurcated strategy of using legal and political tools to effect change is a hallmark of the template from which other movements learned and copied best practices for creating social change.

Many of the significant social justice movements of the latter half of the 20th century and the early part of the 21st have adhered to this template. Activists with a wide array of goals have found inspiration in the pioneering work of civil rights activists, organizing themselves in the same tradition as the “civil rights movements.”

A brief look at a small sample of other social justice movements bears evidence of the impact the civil rights movement had on other historic campaigns for equality.

### ***Gender Equity and the Fight for Reproductive Rights***

The fight for women’s rights in the United States has a long and storied history dating back to 1848, when the first women’s rights convention was held in Seneca Falls, New York. That meeting produced a Declaration of Sentiments identifying social, legal, and institutional barriers that limited women’s rights.<sup>9</sup> It would take decades before activists coalesced around the more controversial goal of securing the right to vote, culminating in the passage of the 19th Amendment to the U.S. Constitution in 1919.<sup>10</sup>

After decades of gradual social change — as more women sought higher education and joined the workforce — another transformative women’s rights revolution took hold in the 1960s, drawing on the model

of the civil rights movement. This new wave of activism coincided with the advent of the birth control pill, approved by the Food and Drug Administration in 1960.<sup>11</sup> Significant victories resulted from a focus on legal challenges and legislative reform including the 1964 passage of the Civil Rights Act, which barred discrimination in employment on the basis of race or sex.<sup>12</sup>

The real change that galvanized the movement was the effort to add an “Equal Rights Amendment” (ERA) to the Constitution. The push to pass the ERA became the principle organizing, movement building, and political strategy for the women’s movement in the 1970s and into the 1980s. While the proposed amendment fell just short of the support needed for final ratification, it fostered a national debate over gender inequality. That helped propel a visionary litigation strategy — led by Ruth Bader Ginsburg and others — to greatly expand protections for women under other constitutional provisions, including the Equal Protection Clause.

As with the civil rights movement, strong leaders emerged who would lead the effort for equal rights for women, leaders like Gloria Steinem, Eleanor Smeal, and Bella Abzug, to name a few. These leaders, like King, Lewis, Randolph, Abernathy, and others, would become the faces of the movement and would help chart the path to victories in both the court of law and the court of public opinion.<sup>13</sup>

### *The Gay Rights Movement and the Fight for Marriage Equality*

The fight for gay rights in the United States can be traced at least as far back as 1924 when the Society for Human Rights was founded by Henry Gerber in Chicago,<sup>14</sup> the first documented gay rights organization in America. While other nascent efforts to expand and protect gay rights occurred throughout the first half of the 20th century, it was not until the Stonewall Riots of 1969 that the movement took a historic turn.<sup>15</sup>

From the outset, the modern gay rights movement patterned itself as a “liberation” movement, taking a cue from the women’s movement. Initially, it focused less on the courts — which were dismissive of gay rights claims — and more on social action to promote tolerance and



visibility. Peaceful demonstrations, drawing on the powerful marches of the civil rights era, became a mainstay of the gay rights movement, beginning with the first Christopher St. Liberation Day parade commemorating the one-year anniversary of the Stonewall riots.<sup>16</sup>

Like the civil rights movement, gay rights advocates sought to advance legal and policy goals through city councils, legislatures — and eventually the courts. The movement's early priorities were laws barring discrimination in employment and housing, protection from violence and bullying, and early forms of family recognition, including hospital visitation rights, and adoption and child custody rights. But much energy was also directed to the battle against government indifference to the AIDS crisis and the campaign to protect the right of gays and lesbians to serve openly in the military. Unlike the civil rights movement, LGBT rights activism rarely coalesced around a unified goal. The LGBT community also lacked leaders with the stature of a Dr. King. Despite these differences, beginning in the mid-2000s, a coalition of state and national groups developed and executed a successful campaign to bring marriage to all 50 states — drawing heavily on the lessons of the civil rights movement.<sup>17</sup>

### *The Next Generation*

One need not look far to see that the template created by the civil rights movement continues to serve as a roadmap for new fights for equality affecting the next generation. The “Dreamers,” who seek to secure the rights of children of the undocumented who came to the U.S. at a young age, have used similar techniques to successfully garner attention from the public and support from the White House to expand their opportunities.

The Occupy Wall Street movement is another recent example. This coalition of activists sought to challenge the status quo and demand a solution to the unequal wealth distribution that many feel is destroying the middle class. Chief among their concerns was the vertically hierarchical nature of society's economic and political distributions. Although each local group in the movement focused on a

different problem, each rallied behind the primary concern of economic inequality. Like the civil rights movement, strategic use of the media in this case, of social media — played a major role in elevating the issues of economic inequality and the challenges facing the “99 percent.” that meant strategic use of social media. Messages of nonviolence were shared and the group developed a clear agenda by working toward and agreeing on consensus-based decisions.

### *The Current State of Civil Rights and Thinking Ahead*

The civil rights movement was one of the most successful efforts to secure equal rights for a disenfranchised group in the history of the United States. And the strategy devised by Charles Hamilton Houston and other activists provided a roadmap for other struggles: for women’s rights, LGBT rights, and the fight for economic justice.

But the struggle for civil rights within the African-American community — and indeed for all of these groups — is far from over. In fact, the fight has arguably taken on a new urgency with a new set of targets and social ills to combat. But does the strategy employed in the 1950s and 1960s, which won significant gains in the areas of housing, voting, and education, remain a viable strategy to combat the problems African Americans currently face?

Unlike the 1960s, today’s problems facing the African-American community are less blatant and more wide-ranging. Many of the problems — from economic inequality to mass incarceration — are systemic problems not easily dealt with through a court order. They require longer, more far-reaching responses. Mass incarceration has disproportionately impacted the African-American community with staggering numbers of black men serving draconian prison sentences for low-level drug crimes. The housing bubble of 2006-2008 resulted in the loss of massive wealth within the African-American community. Many experts predict it will take generations before the black community will be able to regain that lost wealth.<sup>18</sup> More potent than the loss of voting rights, freedom, and wealth has been the loss of life. Since the death of Trayvon Martin, an unarmed teenager shot by a neighborhood watch

patrol in 2012, there has been a seeming barrage of police-involved shootings of unarmed African-American men and women. The “Black Lives Matter” movement, formed in response to these recent killings, is — like the civil rights movement of the 1950s and 1960s — a strategic, youth-led movement focused on securing rights and protections for the African-American community.

Also unlike the 1960s, the courts today play a different role. In the decade after *Brown*, the civil rights movement depended on brave federal judges who upheld the rights of African Americans in the face of searing public condemnation. But today, the federal courts are far less friendly to claims of racial discrimination. Nearly 50 years after the passage of the Voting Rights Act of 1965, the Supreme Court gutted a key provision of the Act, removing protections that many experts argue are still vitally needed to ensure equal access to the ballot box for African Americans. To today’s Supreme Court, racial discrimination seems to be a thing of the past.

As our young activists chant “Black Lives Matter” and look toward the vanguard of leadership that won signal victories to end segregation and advance equal opportunity, we must ask ourselves, “What is the state of the civil rights movement?” Can the template shaped by Charles Hamilton Houston and molded by civil rights leaders throughout the 1960s and early ’70s serve as the roadmap for 21st century battles for racial justice as it did for other disenfranchised groups? Can it successfully address the myriad ills that plague the African-American community today?

The answers to these difficult questions are uncertain. We should start by examining whether the tools of change that were so heavily relied upon in the 1960s are still viable to address the problems facing the African-American community in the early 21st century. This question is significant not only for the current civil rights movement, but also for the movements that will follow.



# 11

## A VOTING RIGHTS ACT FOR REPRODUCTIVE RIGHTS?

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ASSESSING THE JARRING SIMILARITIES BETWEEN THREATS  
TO ABORTION RIGHTS AND THE RIGHT TO VOTE.

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*Nancy Northup\**  
*President & CEO*  
*Center for Reproductive Rights*

From its inception, the Brennan Center was hard-wired to think big and act creatively in the pursuit of justice under law. Josh Rosenkranz and Burt Neuborne envisioned a new type of public interest organization. With one foot in the academy and one foot in the world of action, its initial focus was on an ambitious and necessary agenda: to advance laws and policies that would make America’s electoral systems more fair and participatory. Having grown up during the Cold War with the constant contrast of democratic and totalitarian societies, I was glad to be on the democratic side of the divide, but still well aware that the rules of engagement shaped how closely we lived up to — or not — the ideal of a government “of the people, by the people, and for the people.” So I was thrilled to get Josh’s call to come on board as the Brennan Center was getting up and running.

We went to work on improving those rules of engagement so that Election Day would more closely represent “one person, one vote.”

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\* I am indebted to Hillary Schneller, legal fellow at the Center for Reproductive Rights, for her research and editing support for this essay.

An early Brennan Center flagship initiative was a multi-pronged effort to reform our nation's campaign finance systems at the federal, state, and local levels. It seems quaint now, in the wake of *Citizens United*,<sup>2</sup> but we set out to reduce the influence of money in politics through robust campaign finance reform, including contribution limits, voluntary spending limits, public funding, and addressing the pernicious influence of soft money and independent expenditures that even 20 years ago was having a corrosive effect. It seemed, even then, that money was far more important than constituents, and unless there was serious structural reform, the power of the individual voter would be lost to well-funded interests.

We strove to open up access to the ballot, both within the two major parties and in order to give more third party and independent candidates a fair shot. For example, we successfully sued the Democratic and Republican parties on behalf of candidates as diverse as John McCain and Bill de Blasio in order to knock out burdensome rules that made it impossible for individuals not favored by the establishment to even get on the ballot and make their case to voters.<sup>3</sup>

Our agenda also included voting rights, both reapportionment issues as the 2000 Census loomed, and a glaring flaw in America's claim to universal suffrage: the permanent disenfranchisement of ex-felons. I was lead counsel in *Johnson v. Bush*,<sup>4</sup> a federal case we filed in the fall of 2000 to challenge Florida's denial of the right to vote to 600,000 of its citizens who had fully served their sentences.<sup>5</sup> We sued under the U.S. Constitution and the Voting Rights Act because the purpose and effect of the law was to deny African-Americans the right to vote.<sup>6</sup> Indeed, the law's disenfranchisement of 1 in 6 black men in Florida<sup>7</sup> was a vestige of our country's disgraceful history of racial oppression.

The laws around campaign finance reform, ballot access, and voting rights seem worlds away from my current work on ensuring that access to the full range of reproductive health care — from essential obstetrics care, to contraception, to reproductive and sexual health information, to safe and legal abortion services — is protected as a fundamental human right by governments around the world. In 2003, when I packed up my Brennan Center files to head for the Center for Reproductive Rights,

I did not see much of a connection between my work on voting and my work on reproductive rights. The Brennan Center did not work on gender and the Center for Reproductive Rights did not work on elections. It appeared that I was off to a new area of law and justice.

Apparently not. By 2011, reproductive rights and voting rights were being significantly undermined by a similar and insidious foe: pretextual state laws that purported to be advancing legitimate state interests, but were designed to strip away constitutionally guaranteed rights.

### *Pretextual Laws in Voting and Reproductive Rights*

In the case of voting rights, the deceitful laws took the form of voter ID laws. While some states had longstanding laws that required a document with the voter's name, there was a rapid acceleration after the 2010 election for photo ID requirements.<sup>8</sup> States without any ID requirements continued to adopt them, while states that already requested some sort of ID made the laws more stringent, adding a requirement that the ID have a photo — a burden to all voters, but disproportionately impacting the poor and racial minorities.<sup>9</sup> Legislators claimed these laws were necessary to prevent fraud and safeguard confidence in the election system.<sup>10</sup> But photo ID laws were passed in state after state with no evidence of fraud.<sup>11</sup> All that had triggered these laws, it seems, was a change of political power in state capitols and a concerted effort to keep racial minorities from the polls — a 21st century version of the poll tax.<sup>12</sup>

On the issue of access to reproductive healthcare, new sham laws ushered in after 2010 hid behind the pretext of “health and safety.” Without justification, states began to make an end run around public opinion and Supreme Court rulings by pushing laws they claimed would promote women's health and well-being — but did not. Abortion is one of the safest medical procedures.<sup>13</sup> Less than one-quarter of 1 percent of abortions result in a major complication.<sup>14</sup> Nevertheless, states enacted laws singling out abortion providers for onerous regulations such as requiring providers to have admitting privileges at a local hospital, and mandating facilities meet the standards of ambulatory surgical centers — in essence mini-hospitals.

It is politicians, not doctors, advancing these laws, often based on model legislation developed by anti-abortion groups. When Mississippi enacted such a law in 2012, a state senator put it plainly: “There’s only one abortion clinic in Mississippi. I hope this measure shuts that down.”<sup>15</sup> Others made similar comments demonstrating their true motivations. Lieutenant Governor Tate Reeves stated that the measure “should effectively close the only abortion clinic in Mississippi” and “end abortion in Mississippi.”<sup>16</sup> Governor Phil Bryant, vowing to sign the bill, said he would “continue to work to make Mississippi abortion-free.”<sup>17</sup> When he signed the bill, he said, “if it closes that clinic then so be it.”<sup>18</sup>

In Texas, Governor Rick Perry, who called a special session of the state’s legislature in 2013 specifically to pass that state’s most recent set of abortion restrictions, not only stated his intention to “make abortion, at any stage, a thing of the past,”<sup>19</sup> but also wrote the preface to the 2014 legislative playbook by the anti-abortion group Americans United for Life that wrote the language on which parts of the Texas law are based.<sup>20</sup>

### ***Challenges to Sham Laws***

Lawsuits challenging sham laws attacking both voting and reproductive rights have been mounted in recent years. While results have been mixed, in many instances courts have seen through the pretextual reasons that politicians have used to enact the laws, and exposed their true aim of rights suppression.

Prior to the 2014 election, voters and advocates challenged newly-enacted voter ID laws and other voting restrictions in Texas, North Carolina, and Wisconsin as violations of the Constitution and the Voting Rights Act. Some courts evaluating these laws have accepted the states’ reasons for them. For instance, the U.S. Court of Appeals for the Seventh Circuit upheld Wisconsin’s law, accepting the state’s justification that the law promoted public confidence in elections generally, despite the absence of documented evidence of voter fraud.<sup>21</sup> Other courts rejected those stated reasons as pretextual, instead seeing the voting restrictions for what they were: designed to suppress minority voting.



For instance, considering Texas's law, the federal district court observed that while the state has a legitimate interest in detecting and preventing voter fraud, there was little, if any, evidence that this was a problem in Texas.<sup>22</sup> The court noted that the law "was clearly overkill in that its extreme limitation on the type of [qualifying] photo IDs... does not justify the burden that it engenders."<sup>23</sup> The stated policies for the law were only tenuously related to its provisions.<sup>24</sup> The court concluded, among other rulings, that the law had an unconstitutional discriminatory purpose, as well as a discriminatory effect against Hispanics and African Americans in violation of Section 2 of the Voting Rights Act.<sup>25</sup> The U.S. Court of Appeals for the Fifth Circuit affirmed the lower court's ruling on discriminatory effect, but remanded for further consideration of discriminatory purpose under the Act,<sup>26</sup> continuing the litigation over whether Texas's voter ID law is pretextual.

In North Carolina, the U.S. Court of Appeals for the Fourth Circuit rejected the state's administrative convenience reasons for cutting early voting, stating that the Voting Rights Act "does not prescribe a balancing test under which the State can pit its desire for administrative ease against its minority citizens' right to vote."<sup>27</sup>

In the area of reproductive rights, recent challenges to clinic shutdown laws have by and large succeeded. Laws in Alabama,<sup>28</sup> Louisiana,<sup>29</sup> Mississippi,<sup>30</sup> Tennessee,<sup>31</sup> and Wisconsin<sup>32</sup> have been preliminarily or permanently blocked by federal courts.<sup>33</sup> Courts evaluating these laws have done more than merely accept states' purported rationale for passing them.

For example, Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit noted, in affirming the lower court's decision preliminarily blocking Wisconsin's admitting privileges requirement, "the apparent absence of any medical benefit from requiring doctors who perform abortions to have [admitting] privileges at a nearby or even any hospital [and] the differential treatment of abortion vis-à-vis medical procedures" with comparable risks.<sup>34</sup> The district court subsequently permanently enjoined the law, "more convinced that the admitting privileges requirement... remains a solution in search of a problem, unless that problem is access to abortion itself."<sup>35</sup>

A federal district court in Alabama likewise described that state's justifications for its clinic shutdown law as "weak, at best,"<sup>36</sup> and "by no means sufficiently robust to justify the obstacles that the requirement would impose on women seeking abortion."<sup>37</sup> Rather than merely accepting the state's proffered justifications, courts in these two cases have looked behind the states' sham women's health rationale at the reality of the burdens these laws impose on women's lives.

One major exception to these successes is in a case from Texas now pending certiorari review before the U.S. Supreme Court. Two court challenges were mounted against Texas's sweeping abortion restrictions, enacted in 2013, and in both cases the plaintiffs prevailed in the trial court. They demonstrated that not only would the restrictions fail to enhance the safety of abortion or women's health, but also that they would drastically cut the number and geographic distribution of facilities in Texas and increase health risks for women seeking services. Indeed, the law would eliminate all licensed providers from large regions of the state, meaning that women who live in those areas would have to travel hundreds of miles to obtain a legal abortion in the state. This shortage would postpone the service for many women — and for some, block access altogether.

In the latest lawsuit, the federal district court concluded that "the severity of the burden imposed by [the] requirements is not balanced by the weight of the interests underlying them."<sup>38</sup> The court catalogued the law's burdens on Texas women's access to abortion, observing that the law would leave so few clinics in the state that it would "undeniably reduce meaningful access to abortion care for women throughout Texas."<sup>39</sup> Further, the court observed, these burdens, coupled with other abortion regulations already in place in the state, would fall most heavily on "poor, rural, or disadvantaged women."<sup>40</sup> The state's argument — that despite this drastic shortage of clinics, the remaining clinics could meet the demand for women in the entire state — in the court's words, "stretches credulity."<sup>41</sup> Moreover, even if the remaining clinics could meet such demand, the court concluded that "the practical impact on Texas women due to the clinics' closure statewide would operate for a significant number of women in Texas just as drastically as

a complete ban on abortion.”<sup>42</sup> Against these burdens, the court deemed the state’s interest in women’s health wholly inadequate — describing the ambulatory surgical center (ASC) requirement as bearing such “a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary,”<sup>43</sup> and the safety rationale for the admitting privileges requirement as “weak and speculative.”<sup>44</sup> The court also concluded that, given the operation of the ASC requirement and “the dearth of credible evidence” supporting the state’s position, the ASC requirement was enacted with an improper purpose, finding that it “was *intended* to close existing licensed abortion clinics.”<sup>45</sup>

On appeal, the Fifth Circuit chose to ignore the persuasive evidence in front of the trial court, ruling that the state did not have to provide *any* evidence in support of its claim that the law was about protecting women’s health — and instead concluded that speculation was sufficient to justify restricting women’s constitutional rights.<sup>46</sup> The court ruled for Texas despite the joint amicus brief filed by the American Medical Association and the American College of Obstetricians and Gynecologists disputing the medical basis of these laws.<sup>47</sup>

This legal reasoning and the impact of the Texas rulings are devastating. After the Texas law went into effect in 2013, nearly half of Texas’s abortion facilities were forced to close. If the Fifth Circuit’s 2015 ruling goes into effect, more than half of the remaining abortion facilities in Texas will be shuttered.<sup>48</sup> This will amount to a more than 75 percent reduction in Texas facilities in just a two-year period, creating a severe shortage of safe and legal services in a state in which more than 5 million women of reproductive age live.<sup>49</sup> Fortunately, the Supreme Court has stepped in to block the Fifth Circuit’s decision from going into effect while it decides whether to take the case in the 2015-16 Term.<sup>50</sup>

It is imperative that the Supreme Court stops these underhanded legislative attempts to sneak around the Court’s prior decisions. The Court needs to make clear that its 1992 ruling in *Planned Parenthood v. Casey*<sup>51</sup> was not a free pass to enact any burden on accessing abortion services. The Court should take the Texas case, expose the flimsy pretext, and clarify that *Casey*’s undue burden standard is a meaningful restriction on attempts to outlaw abortion. In *Casey*, the Court recognized that

the ability to terminate a pregnancy is “central to personal dignity and autonomy ... [and] the liberty protected by the Fourteenth Amendment,”<sup>52</sup> and held that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”<sup>53</sup> The Court should reject the Fifth Circuit’s approach of applying the undue burden standard in a manner that renders hollow *Casey*’s protection for women’s constitutional rights. The Fifth Circuit failed to evaluate whether the abortion restrictions actually further an interest in women’s health, to consider the fact that the laws single out abortion without medical justifications, and to look at how the restrictions actually impact women. This bears no resemblance to the close scrutiny the Supreme Court held courts must apply to abortion restrictions.

### ***It’s Time for a Voting Rights Act for Reproductive Rights***

Not only is it time for the Supreme Court to reiterate the constitutional protections for access to abortion services, but it is also time for the equivalent of the Voting Rights Act for reproductive rights. In response to states’ relentless efforts to curtail constitutionally-protected voting rights, Congress shored up those protections by passing the Voting Rights Act of 1965, which limits states’ ability to enact election laws that undermine meaningful access to the ballot. Specifically, Section 2 of the Voting Rights Act prohibits any state or local government from imposing any voting law that results in discrimination against racial or language minorities, and prohibits any standard, practice, or procedure that results in a denial or abridgment of the right to vote based on race or color.<sup>54</sup> The legislation responded to the inadequacy of case-by-case litigation as a means of ensuring the right to vote since “enforcement of the law could not keep up with violations of the law.”<sup>55</sup> In doing so, the Voting Rights Act gave teeth to judicial review of voting restrictions premised on pretext.<sup>56</sup>

Currently, the case-by-base constitutional adjudication of abortion restrictions, while largely successful, is like a game of whack-a-mole with the avalanche of pretextual laws designed to make end runs around the Supreme Court’s rulings. This state of affairs is not just business-as-usual

in the four-decade campaign to deprive women of the promise of *Roe v. Wade*. Never before has there been legislation like the one contested in Texas right now that would shut down more than 75 percent of the clinics in the second most populous state in the country. While we continue to vigorously litigate in the courts, we also need a strong legislative fix to the current crisis in rights deprivation. That fix is the Women's Health Protection Act, which was first introduced in 2013.<sup>57</sup> The proposed legislation would enforce and protect a woman's access to safe, legal abortion care no matter what state she lives in. It would prohibit states from singling out reproductive health care providers with oppressive requirements. It would allow true health and safety laws that apply to all similarly-situated medical care to be maintained, while prohibiting dangerous regulations passed under pretext that cut off access to abortion care and endanger women's health and lives. Simply put, it would ban pretextual laws that seek to regulate abortion care vastly differently from other low-risk practices and procedures. And it would give the Department of Justice much-needed oversight to address violations of the Act.

One in three women in the United States makes the decision at some point in her life that terminating a pregnancy is the right decision for her.<sup>58</sup> Her decision is based on her individual circumstances, her health, and her life. And when a woman makes that decision, she needs access to good, safe, reliable care from a health care provider she trusts, in or near the community she calls home. Today, however, a woman's ability to access safe and legal abortion care increasingly depends on the state in which she happens to live. In response to stealth efforts to suppress the votes of low-income people and people of color, Congress made clear with the Voting Rights Act that the right to vote cannot depend on the state in which a person lives. Congress and the Supreme Court must make clear that the same is true of a woman's fundamental right to access abortion. We know that the Women's Health Protection Act has a long road from conception to enactment. But we are ready to take that long road to ensure that every woman in the nation has an equal ability to exercise her constitutional rights.



# 12

## HOW PHILANTHROPY BUILDS INFRASTRUCTURE

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LESSONS LEARNED AFTER 20 YEARS  
FIGHTING FOR SOCIAL PROGRESS.

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*Gara LaMarche*  
*President*  
*Democracy Alliance*

From its earliest days in the early years of the last century, organized philanthropy has played an important part in movements to transform the legal profession and to use the law to protect and advance civil liberties, human rights, and social and environmental justice.

I've been fortunate to have a ringside seat for the last generation of such foundation investments in legal change. After spending the first 20 years of my career in advocacy organizations like the ACLU and Human Rights Watch, I've spent almost the last 20 in social justice philanthropy, starting in 1996 with the job of a lifetime, founding and shaping the U.S. Programs of the Open Society Foundations established by George Soros.

As it happens, the Brennan Center for Justice was founded only months before Soros began his U.S. philanthropy program, and the two institutions grew up together. The Brennan Center was focused on several areas that Open Society had identified as initial funding priorities, like campaign finance reform and legal services for the poor, and over the years, there developed others, like criminal justice reform and the balance between civil liberties and national security.

George Soros started his U.S. programs with several notions about what were the greatest challenges to what he called, as a disciple of the philosopher Karl Popper, open society. At that time, Soros believed that the U.S. did not have many urgent problems of civil liberty, as in the former Soviet world on which most of his philanthropy had previously centered. (He revised that view during the Bush years.)

But Soros did believe the U.S. had growing equality problems and, in the wake of the 1994 election of the Gingrich Congress, a burgeoning and disturbing ideology that touted an untrammelled free market as a solution to all problems. Among the places where Soros saw pernicious consequences of this philosophy were the law and medicine — professions he believed were increasingly dominated by marketplace values, to the detriment of professional ethics and standards. Put more bluntly, these professions were becoming like businesses.

### *Assessing Private-Sector Law Firms*

We set about to work on this, beginning with the law. What could we do to change the culture of law firms, more and more bottom-line focused, where public service and pro bono work — producing great civic-minded lawyers like Arthur Liman, Cyrus Vance, Helene Kaplan, Rita Hauser, the Brennan Center's own Fritz Schwarz, and others — was increasingly undervalued and under supported? Could we do anything to influence the business model of the corporate law firm?

We pulled together an advisory committee for what we called our Law and Society Program and some of the best people in the profession, inside and outside the academy, served on it — Robert Gordon of Yale, Deborah Rhode of Stanford, Peter Edelman of Georgetown, Lani Guinier and David Wilkins of Harvard, the late Robert Joffe of Cravath, Swaine & Moore, and others. They worked with a top-notch staff, including Catherine Samuels as program director, John Kowal (now of the Brennan Center), and Raquiba LaBrie — all of whom, unusually for a private foundation, had significant private firm experience.



We concluded there was little a foundation could do to affect the law as a business. As John Kowal put it in remarks to a professionalism symposium in Savannah, Georgia, “Those of us outside the profession can only do so much in terms of dealing with the entrenched self-interest of those in the profession.” He went on to say, “The profession has historically not been accountable to those outside,” and “there are surprisingly few institutes and organizations” — surprisingly few partners — “that have the credibility to serve a watchdog function, that could help educate the public, that could deal with the very important policy issues involving the public’s interest in the profession.”

### *Investing in Public Interest Law*

We never gave up trying to influence the profession, but determined that if we widened our frame, in light of these realities, to the larger system of justice, there was a lot we could do. We learned about the public interest law fellowships run by Equal Justice Works, then called NAPIL, and issued a challenge grant to match law firms, corporations, foundations, and other donors in creating new opportunities for talented recent law graduates to work for nonprofits dealing with human rights, women’s rights, housing, employment, the environment, and other causes. At its peak, there were 140 new fellowships funded by the Soros match — a virtual army of public interest lawyers, many of whom would stay in the field and go on to leadership positions, and all of whom would continue to influence the law in a positive way, in firms, government, or whatever they did.

We looked at the landscape and saw that the historic and vital independence of the courts was under attack: from politicization of the federal judiciary in confirmation battles, efforts to limit courts’ jurisdiction in many key areas of civil rights law, and the appalling infusion of money in state judicial elections. We launched the Justice at Stake campaign to create an ongoing organization — backed by almost 60 national and local partners — to work on these issues.

### *Boosting Legal Services for the Poor*

And we looked at the state of legal services for the poor and found it woefully underfunded and hampered by restrictions on the kinds of cases legal services lawyers could take and the kinds of clients they could represent, with the most marginalized—prisoners, immigrants, and welfare recipients—increasingly cut off from access to justice. We supported a variety of responses to this, including expanding the technological capacity of legal assistance providers and pro bono coordinators, backing public education campaigns on the value of publicly financed legal services, and supporting litigation to challenge efforts to strip the courts of their jurisdiction to hear certain kinds of cases.

The most poignant observation, to me, in Brian Tamanaha's recent and influential "Failing Law Schools," is this: "Perversely, the United States has an oversupply of law graduates at the same time that a significant proportion of the populace—the poor and lower middle class—go without legal assistance. This is reaching crisis proportions."<sup>1</sup> A 2009 Legal Services Corporation study found that nearly a million cases—one out of every two seeking legal assistance—were rejected by legal aid programs owing to insufficient resources.<sup>2</sup> That's people, as Tamanaha notes, who are facing eviction, divorce, child custody issues, foreclosure, workplace problems, and disputed insurance claims. There is a tremendous mismatch, it seems, now as in 1996 when OSF launched its Law and Society Program, between the need for lawyers and what most lawyers are educated for and encouraged to do.

We also provided early support for more innovative and holistic approaches to public interest law, like the Advancement Project and Make the Road by Walking, which combined legal advocacy, grassroots organizing, and much deeper engagement by affected communities. Moreover, we funded organizations that strengthened the progressive legal infrastructure, like the American Constitution Society, which was a response to the success of conservative foundations like Olin in building a pipeline of Justice Department officials and judges through the Federalist Society.

### *Reforming the Criminal Justice System*

A leading forum for Soros's equality concerns, and another arena where legal change was central to our efforts, was the criminal justice system. We came to believe that the system in its totality operated as a successor to the racist institutions of the past, from slavery to segregation to Jim Crow. We employed a variety of approaches in taking this on, in 1996, at a time when few major funders — or even minor ones — focused on criminal justice, and almost none did so on the basis of the same critique of the structural flaws in the system.

We found effective but underfunded organizations, like the Washington, D.C.-based Sentencing Project, and gave them sufficient resources to strengthen and expand their work. We found arenas not specifically focused on criminal justice, like the Council of State Governments, a regional network, and provided funds to help draw them into the issue and work with our other grantees. We examined where gaps in the research could be filled. In many cases, the gaps existed because of ideological bias in governmental funding agencies, long in the grip of “war on drugs” hysteria, and we provided support for that research — so that, for instance, Harry Levine of Queens College could document the extraordinary racial disparities in low-level marijuana arrests in New York, a key piece of data used to fuel the campaign against stop-and-frisk laws. We created a Soros Justice Fellowship for advocates, social entrepreneurs, and scholars like Michelle Alexander, whose “The New Jim Crow” is this generation’s “Silent Spring,” a book that names a phenomenon, lifts it up for public understanding, and spurs action. Perhaps most importantly, we tried to find, or help launch, organizations working for change that were led by the people most affected, such as drug users, formerly incarcerated persons, and their families.

### *Lessons Learned*

My experience in funding legal change at the Open Society Foundations — and also at the Atlantic Philanthropies, where I was president from 2007 to 2011, and in my present post as president of

the Democracy Alliance, which supports the Brennan Center, the American Constitution Society, and the Constitutional Accountability Center — has offered up a few lessons (some learned the hard way) that I think may be useful for other donors interested in supporting legal reform. Most are applicable to philanthropy more broadly as well.

The first: Start with the ultimate goal you are seeking, and work back from there. Judge all the steps along the way by whether and how they advance that goal. That is a lesson I learned from widening the frame of OSF's "legal profession work." What I mean most by this is that the goal should be big, and you should not confuse the means with the end.

Forexample, why try to change the way law schools are organized, and law students are educated? Because we want different kinds of lawyers, with different kinds of priorities. We want that not because the profession or craft is an end in itself, but because we want to better serve the ends of justice.

Second is to ask: Who are the principal stakeholders in the change you are seeking, and are those with the most at stake involved? That is what I learned from OSF's work to change the criminal justice system, which involved substantial support, through fellowships and grants, for former prisoners and their families. Those with most at stake are not lawyers and law professors, but the people they purport to represent — those who need justice in an increasingly unjust world. That argues to me for greater connection and alignment with civil society organizations like community groups and organizing networks.

At the same time, unusual allies and even strange bedfellows are extremely important. The anti-death penalty movement made very effective use of cops, wardens, and district attorneys who think the death penalty is inhumane or a waste of money, just as the anti-torture movement made alliances with retired generals who could testify that, in addition to its immorality, torture does not work.

To draw a wider range of groups into reform efforts will require a third thing, which is greater attention to language, story, and narrative. We realized in our work on the criminal justice system that the way we talked about these issues among ourselves, among

advocates and academics, had little resonance with the wider public. Rattling off statistics about the disproportionate number of African Americans on death row — or more to the point, people of any race who had murdered white people — was not very effective, however passionately we believed they communicated injustice. Telling stories of innocent people on death row did, however, resonate, and made a critical difference in reversing decades of negative momentum. It turned out that those not immersed in the criminal justice system were not as shocked as we were by the fact that the U.S. had an incarceration rate 10 times as high as Japan or Norway. But they did perk up and listen when the cost and waste of mass incarceration was documented, or when we framed the debate in terms of whether the right people were in prison, with consequences for public safety.

Fourth, drawing on OSF's work in law, medicine, and criminal justice, I believe leadership, supported by investments in people, is essential to any movement for social change. The civil rights movement had the Highlander Institute, a social justice leadership institute founded in the 1930s by Myles Horton; many of today's civil rights, environmental, and economic justice leaders go through the Rockwood Institute's well-regarded program. The conferring of recognition on disciplines and sectors that have not received much of it — doctors as concerned with easing the end of life, when inevitable, as with heroic rescues; drug policy researchers formerly starved of federal grants; civic-minded law graduates — is a powerful statement in itself, and building a cadre of such people to cohere and press forward together is probably the most valuable thing we did at both foundations I have been privileged to lead.

Fifth is the importance of time. Important change feels urgent, and a sense of urgency is a powerful fuel for social movements. At the same time, everything we know about social change tells us that it takes time, and a kind of patience — or in any case, tenacity and resilience. Teaching a course on social movements to 22 incarcerated men in the Bard College Prison Initiative in the year after I left Atlantic reminded me, in reacquainting myself with the abolition, prohibition, and civil rights movements, that the arc of justice is

indeed long, an undertaking over generations where victories often lead to new challenges. Even movements that have seemed to make rapid gains in just a few years, like the ones for marriage equality or universal health care, have in fact taken a century or half of one, and having been won, or partially won, instantly require vigorous defense against the forces of reaction.

# 13

## A 21ST CENTURY MODEL FOR CHANGE?

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A LOOK AT THE STRATEGIC CHALLENGES FOR  
ADVANCING SOCIAL JUSTICE IN THE DIGITAL AGE.

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Increasingly, Americans no longer see government as the primary way to change the policies that guide the way we live. Constituent communities, however, still place enormous pressure on government, and have higher expectations for social justice groups, organizers, and advocates to be effective as policy influencers and movement builders.

To frame this discussion, I would first like to outline the trajectory, or the “arc of change,” of a movement. An arc of change must have three elements: (1) a public awakening to a problem, (2) a change in the law or legal parameters, and (3) a cultural and behavioral reformation, where the actions and attitudes by both individuals and institutions change to conform to both the letter and intention of the law. Some arcs are relatively short, others take decades.

There are several 20th century movements exemplifying the “arc of change.” The civil rights, women’s equality, gay rights, and environmental movements were primarily counter-majoritarian, organized around specific goals where populations that constituted a numerical minority sought concessions from the larger power structure. Today, however, much of the current political and populist energy is focused on elevating

the “99 percent,” a very different base. The “99 percent” is diverse, culturally fragmented, and majoritarian. Any attempt to bring a majority of U.S. residents together challenges the fundamental conceptions of identity politics, partisan allegiances, and class identification that many 20th century models for movement-building depended upon.

Simply importing historical models may be insufficient to effect change today. New organizing, advocacy, and communications strategies are needed for engaging a significant majority who share economic self-interest, but are often politically, socially, and culturally divided.

This essay discusses four distinct challenges for social change movements focused on reforming public policy in the United States today.

### ***Harnessing Disruption***

To be “disruptive” is often the focus of organizations or individuals seeking transformative change. Disruptive action seeks to shift the current distribution of power, undermine structural racism, or subvert economic inequality. Disruption is an important tactic, distinct from infrastructure development. Political and economic systems, like nature, abhor a vacuum. Absent a replacement for an effectively disrupted system, opportunists will take advantage of any void created by disruptive action. Those opportunists will likely represent change, but *any* change is not necessarily better than no change. Disruptive action must be accompanied by a way to leverage power to fill the void created by the disruption.

Disruption without a clear demand for meaningful, discrete change may create a moment of energy and important attention, but will ultimately be unable to create long-term change. This is not to say that disruptive moments are not important. Indeed, those moments are essential, but taken alone they are not enough to create the opportunities for structural, transformational change. To paraphrase Rashad Robinson of ColorofChange.org, organizing strategies must evolve from creating cultural presence to leveraging cultural power toward a specific goal.



Occupy Wall Street (OWS), the movement that began on September 17, 2011 in Zuccotti Park in New York City's financial district, is an important example of a contemporary disruptive protest movement. OWS received global attention, spawning a worldwide Occupy movement and creating a populist moment for people who believe the current state of economic inequality is unsustainable. According to a June 2015 statement, Micah White, the co-creator of OWS, believes that attracting millions of people to the streets no longer guarantees the success of a protest. He has asserted that learning to use social networks to benefit social movements is one of the greatest challenges of activism. Importantly, White understands that protest is reinvented all the time. According to him, every generation experiences its own moments of revolution. In the 21st century, we are now living through a time when tactical innovations are happening much more often because people can see what others are doing around the world and innovate in real time.

In comparison, another important organization to evaluate is #BlackLivesMatter. According to its website, #BlackLivesMatter was created in 2012 after the vigilante George Zimmerman was acquitted for the murder of an unarmed 17-year-old black teenager, Trayvon Martin. Rooted in the experiences of black people in this country who actively resist our dehumanization, #BlackLivesMatter identifies itself as a call to action and a response to the virulent anti-black racism that permeates American society. #BlackLivesMatter operates as a national organization with 26 chapters working to address foundational legal, cultural, and behavioral change in communities across the country. #BlackLivesMatter works to give meaning to the promises made by the laws passed during the civil rights movement in the United States by changing the culture and behavior related to the dehumanization of black lives. This organization has a broad and wide cultural presence and continues to strive to leverage that presence to create discrete change. Certainly, #BlackLivesMatter as a hashtag and organizing tool is important, but the organization creates the vehicle for structural change.

In short, there is great potential for disruption to be little more than a distraction. Disruptive protest must do more than destabilize loci of power. It must be part of a pathway toward transformation.

### *Maximizing Opportunities in the Digital Age*

In our highly mobile and digital society, there are increasing opportunities to organically elevate issues unconstrained by temporal and geographic limitations. Opportunities for digital media and traditional offline organizing spaces do not rely upon singular leadership, but in fact take on multi-nodal models of leadership. Indeed, organizationally branded ideas are often less trusted than those that arise organically. The ability to create cultural moments through online presence has become meaningful in the last 15 years through Twitter, Facebook, Instagram, and other platforms utilizing online petitions like MoveOn.org, or through crowdsourcing efforts for fundraising. Messages, memes, and campaigns move quickly, but are often short-lived. Despite these engagement trends, policy reform and political infrastructure remain geographically based. As new styles of leadership and organization bring about governmental policy reforms, effective leaders consider the limitations and benefits of leveraging decentralized actors on geographically-focused systems of governance.

Dysfunctional government is also a problem. The inability of government to respond to citizens in the digital space is very much part of the exasperation with government felt by many. Digital visionary Micah Sifry of Civic Hall in New York City has noted that the online interface of most government agencies mimics a brick-and-mortar building rather than creating truly interactive environments to address constituent needs. Moreover, legislative bodies at the municipal, county, state, and federal levels should be far more transparent and effective at integrating digital participation in the legislative process. Certainly, organizations like Code for America have seen the need for government systems to create interactive spaces where citizens and residents can interact with government, not just to meet service needs, but also to participate in public deliberation.

Increasingly, emerging social justice leaders see corporations as key drivers for social change. These leaders push corporations to be leaders through environmental sustainability programs, wellness programs for employees, higher wage standards, and corporate responses to

disfavored public policies. Corporations themselves are finding a public voice in the fight against economic inequality by pushing for a model of “sustainable capitalism.” Corporations can lead trends, push governments to act (or cease acting), serve as philanthropic support for programs, and take on contracts for traditional public-service areas, like prisons, schools, and roadways. Corporations, however, should not take the place of elected officials in a representative democracy. Corporations can lead and influence, but cannot create public policy in place of formal governance systems. Moreover, corporate leadership has little incentive to create spaces for alternative economic systems reliant upon collective ownership, and non-market solutions to problems that present unique opportunities for economic reform.

Ultimately, the ability of reformers to influence policy will depend on their ability to leverage a digital presence into genuine political will. This is not to suggest that traditional boots-on-the-ground grassroots organizing models will not matter — to the contrary, the need to touch people individually will remain as important as it always has been. The challenge is to effectively integrate online organizing with face-to-face grassroots organizing to influence change.

### *Elevating the Issues of Racial and Economic Justice*

Racial and economic inequality have broad implications beyond the moral imperative to advance policies where all persons are treated equally. Economic inequality has its greatest effect on communities of color. Efforts to improve government should strive to achieve equality in every sense, but the goal of achieving a measure of economic equality cannot wait until the establishment of a fully functioning democracy.

Democratic reforms must provide meaningful access to all persons regardless of economic status or racial designation. As academics, think tanks, and advocates consider reform proposals, they cannot merely operate assuming “all things being equal.” The reforms must operate to serve all persons with an understanding that all things are *not* equal. Reforms must specifically consider structural barriers created or exacerbated by race or economic hardship, and address them directly —

rather than operate with the general assumption that any improvement in the system will necessarily improve the condition of everyone.

In addition, there must be an understanding that there are fewer “neutral” normative values than current discourse would suggest. For example, property values are often treated as a constant. So much so that efforts to improve economic development in communities of color are often based upon building wealth through home and small-business ownership. However, property values are not truly neutral. Research and experience show that property values vary based upon whether the residents of a home are white, Asian, Latino, or black. Reformers must consider what factors are truly “neutral” versus factors that vary based upon the whiteness or non-whiteness of those directly implicated.

Finally, advocates must understand the limits of effecting change through the courts. Current jurisprudence certainly acknowledges that in some sectors, like housing, proof of contemporary discrimination is deserving of redress. However, courts are less sympathetic to cases of historical and structural discrimination or economic inequality that results in unequal opportunity and disparate outcomes, even where that inequality is manifest along racial lines. This leaves a significant gap that must be addressed by social movements.

### *Improving Intergenerational Communications*

Baby Boomers are transitioning leadership to Millennials. Generation X is in between and has an essential role in bridging communication gaps and facilitating leadership transition. Given the relative size of Generation X and the economic reality that many Boomers now must continue working beyond what was once considered retirement age, it is unlikely that significant numbers of leadership positions will pass to Generation Xers. Nonetheless, Generation Xers are essential in establishing communication bridges.

There are genuine differences in communication styles between Baby Boomers and Millennials, as well as mutually reinforced ageism, which often results in misperceptions. The ability to exchange information,

experience, and knowledge between these age groups is essential for social change organizations to function effectively.

Effective intergenerational communication is facilitated by repeated interaction, where trust can be built. This type of interaction does not just happen — it must be purposeful with clear goals. It is particularly difficult where the language and manners of communication are so different. In so many situations, the ability to communicate relates to use of tools and false signals that convey different messages rather than different values.

The ability of change agents to leverage the best of all generations is completely dependent on respectful communication between individual actors within and between organizations.

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The growing gap in economic inequality and the distrust of government show change agents that it is not enough to repair how the system operates, and that there is a need to create transformational systemic change. There is no silver bullet to improve democracy. It will require, as it always has, different communities, approaches, and strategies. The challenges identified here cut across most strategies and organizational efforts to create the transformational change necessary to establish a vital and inclusive democracy in the 21st century.



## 14

# HOW DOES LEGAL CHANGE HAPPEN? PERSPECTIVES FROM THE ACADEMY

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POPULAR CONSTITUTIONALISM IS THE SUBJECT OF INTENSE STUDY IN THE ACADEMY. THREE TOP LAW SCHOLARS DISCUSS THE DIFFERENT WAYS TO ACHIEVE LASTING SOCIAL CHANGE: THROUGH LEGISLATURES, THE COURTS — AND THE COURT OF PUBLIC OPINION.

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MICHAEL WALDMAN: At the Brennan Center we say that you have to win in the court of public opinion before you win in court. How true, as a general matter, do you think that is?

BARRY FRIEDMAN: It depends what your goal is. It's possible to win in court in a one-off. But if you want lasting change, then I think it's correct

that there has to be some relationship between public opinion and your goals. Nothing you achieve in any form is likely to be enduring, unless you can bring the public along with you. And I think that's equally true in court as it is in a legislative body or elsewhere.

KENJI YOSHINO: I think it is a question of what we mean when we talk about a court of law. So if we're talking about the United States Supreme Court, absolutely. The Supreme Court is much more willing to wash out outliers than to start social revolutions. But if you're talking about state supreme courts, when I look at my own area of gay rights and same-sex marriage in particular, the *Goodridge* opinion,<sup>1</sup> in 2003, was a game changer in terms of changing public opinion. Because the state had [gay] marriage through a judicial opinion, and from the Massachusetts high court, it then was able to live under the reality of [gay] marriages thereafter.

The reality that the sky didn't fall on Massachusetts after people started getting married was transformative for the national conversation. And then the Connecticut and the Iowa decisions were both court decisions. It was only after those court decisions that we got legislative victories in states like New Hampshire and Vermont. So it's always a dialogue, because a court of law is instructing the court of public opinion about what's possible.

HELEN HERSHKOFF: I think it's also important to focus on what you mean by public opinion or democratic discourse. The public does not speak with a uniform voice. The Supreme Court has nine voices and may speak through a majority, plurality, concurring, or dissenting opinion. The public speaks through multiple voices and at different times. Sometimes public opinion will endorse the status quo. And sometimes public opinion will want to move in favor of change, at least for certain segments of that public.

I think it's also important to recognize that these are fundamentally questions of power. And unless you have multiple counterpoints to the existing status quo, it's very difficult to secure any change. As Kenji said, it's not simply a matter of persuading broad swaths of the public, or



getting a particular judicial outcome. You need different levers, and you need to secure support along many different channels if one is going to consider serious change that really foments a fundamental, transformative improvement in society and politics.

FRIEDMAN: I think that there's some consensus that often what moves social change is backlash. There certainly are studies — though there are too few of them and they are not good enough — that suggest that when a visible court, like the United States Supreme Court, decides a case, those who have succeeded will often go rest on their laurels. Those who have lost will be motivated to step out into the public and begin to make their case. One example of that is certainly abortion, where I think the people that were pro-choice felt that they had won a victory and at some level sat on their hands while much of the country mobilized and moved the politics in the country very much to the right. It was true in gay rights after *Bowers v. Hardwick*.<sup>2</sup> I think that the loss in that case was an energizing moment for the gay rights movement. So it's very often a reaction to what's been said that starts the process rolling.

HERSHKOFF: Does that set of observations apply across the board? Let's take certain economic issues. When the Supreme Court decided against a right to a living income, to public assistance, in the *Dandridge*<sup>3</sup> case, it was very difficult, if not impossible, for those who were shut out of the court to mobilize in public or even on the streets or in public discourse, because they were so inherently excluded from political life. They have no channel. So although for certain issues a Supreme Court decision can mobilize backlash and have counterproductive effects, on other issues, a judicial order is absolutely essential for those who want access to the political process who otherwise don't have it.

### ***The Risks of Backlash***

WALDMAN: When is the risk of backlash so great that it should suggest not heading to court? Or is it the case that it's hard to ever really know how these things play out?

YOSHINO: I agree that there's a huge amount of uncertainty about whether or not a decision will occasion backlash. But I think that there are certain cues or factors that we might examine. One is the nature of the group itself. Another is the nature of the right that you're seeking. With regard to the first, I think what distinguishes the lack of backlash that was experienced after *Dandridge* and the backlash that was experienced after *Bowers* — *Dandridge* says there's no right to living wage, and *Bowers* says that there's no right to same-sex sexual intimacy — can really be described in part by the groups most affected by those rulings. As Helen was saying, if you are indigent, then you're going to be much less politically powerful than if you are LGBT, a group distributed throughout society in every socioeconomic class.

In addition, we have to consider the nature of the right. The Supreme Court has just handed down a landmark decision that gay marriage is now legal in 50 states. I am quite confident that the backlash will fizzle out in part because of the nature of the right. It's much easier to issue a same-sex marriage license than, say, to integrate a school. So I think that the kind of foot-dragging that we saw after *Brown v. Board of Education*<sup>4</sup> is not going to happen in the context of same-sex marriage. There are no strong, in my view, secular objections on the other side. Whereas in the abortion context, I think that there is a strong secular objection on the other side in the form of, I don't have to be a person of faith to believe that this is a potential life that is being destroyed.

FRIEDMAN: I actually see this very differently than Kenji. I'm all for trying to develop a theory about why we'll see backlash and under what sets of circumstances, but I'm not certain that those are the factors.

I think what's really important to understand is that we've had an extraordinary opportunity in our lives to be part of a learning experience about social change in the relationship between courts and legislatures. We've learned that public opinion has a lot to do with the backlash. And so at the beginning of the gay marriage litigation, many of us were concerned that there would be a serious backlash. I agree with Kenji wholeheartedly that I don't expect one in light of the gay marriage decision. But I think it's because we have lived through a remarkably

rapid period of change in people's thinking on this issue. And that created a comfortable place for the courts. Now, in fairness, one of Kenji's factors, about the group, may well be a causal variable for why public opinion has moved along the way that it has. Though I think there's some complexity there as well. But I can see why that might be the case.

HERSHKOFF: Using courts for social change is not a new phenomenon. Of course, our generation has experienced great lessons about public law and achieving social change through the courts and through the legislature. But this is hardly a new phenomenon. If one thinks about the use of the courts in the great debates about the establishment of a public bank and free credit in the United States; if we think about the use of the courts in establishing whether there would be a gold standard or not; when we think about the use of the courts in the campaign against slavery and the *Dred Scott*<sup>5</sup> decision itself, which is recognized to be a public law test case — from the beginning of the republic, the political parties and the people have recognized that the courts are one site for significant social and political change.

I also think that it's very important to focus on this topic of administrability.

I have a very different view of the success or not of *Roe v. Wade*.<sup>6</sup> From the minute *Roe v. Wade* was decided — not 20 years later in *Casey*<sup>7</sup> — the Supreme Court began to retrench. And they retrenched by carving out significant numbers of poor women from the right to an abortion by deciding in *Harris v. McRae*<sup>8</sup> that public money would not be available to support medical decisions involving reproductive choice. But from the beginning, the Court had a legal approach that divided the female community and made it very difficult to enforce the right on the ground. And now we have a situation in perhaps as many as three-quarters of the states that have no abortion providers for women, particularly in the South. One can't think of rights as an on/off switch in any of these areas. They all require bricks and mortar on the ground in some way. If *Loving v. Virginia*<sup>9</sup> was a success, think of all the race-related issues that have not been a success because the implementation

of the right required building hospitals, schools, and housing to carry out an equality right.

***Litigation: Offense or Defense?***

WALDMAN: So many of the great decisions and judicial questions in the past have involved the democratically accountable branches making policy. The litigation has frequently challenged that policy — not seeking to get rights enforced but seeking to block legislatures or Congress from making policy that protects people or enforces rights. The entire *Lochner*<sup>10</sup> era was not about affirmative litigation, but litigation to defend statutes. Starting in the mid-20th century there was a shift toward going to the court to try to protect rights, as opposed to going to legislatures to try to get policies that you then defended against assaults on them.

Do you buy that broad narrative of how people have sought social change over time? Was there another, more recent phase, in which the limitations of a court-focused strategy have become more evident since the 1970s?

FRIEDMAN: I've been focusing a great deal of my attention on policing. It's an area where the courts have not acquitted themselves well. They had a brief shining moment during the Warren court. But it's also an area where it's not clear that we would want the courts to be the be-all and end-all. And there are many other areas where this is true. So courts are good at saying yes and no to things. They're not good at making policy. If you take something like a SWAT raid, it may be that courts can say, as they have, that using a SWAT team was appropriate or inappropriate in certain situations. But they're never going to speak to the rules regarding when SWAT teams get mustered and the training that the people on the SWAT teams have and the equipment that they carry and the protocols that they use for ensuring that a residence is secured safely and how to minimize harm. And even if they do, by deciding cases episodically, it's going to be glacially slow to get those rules in place.

HERSHKOFF: I think that courts have engaged in policymaking of a first order nature from the beginning, and that this role is consistent with their common law authority. The court shifts policy and directs policy in so many ways. Think of the rule of reason under the antitrust law. Think about a breach of fiduciary care in a securities context. Think about the habitability of warranty under the common law. These are policy questions of a first order nature. They are affirmative. They are not negative. Courts sometimes have been willing to do this in a slow process. But I think there's a danger in making an essentialist argument about what courts can and cannot do. Common law courts are fully equipped to engage in policy analysis and always have been making policy.

YOSHINO: Well, here's an interesting instance from the criminal procedure context. The Supreme Court in the 2000 *Dickerson*<sup>11</sup> case had to decide whether the Miranda warning was just a common law rule that could be superseded by a congressional act, or whether it had a constitutional dimension, such that Congress was powerless to change it. The Court ruled that it had a constitutional dimension.

We can assume Chief Justice Rehnquist, who wrote the majority opinion, was no friend of the Miranda warning. But what he said was really telling. He said, this has become so much a part of our national culture that we couldn't get rid of this even if we wanted to. So that's a really interesting dynamic, where on the one hand we see elements of what Helen is talking about, these are affirmative rights that are creating policy.

But also, I do think that this is always a conversation. And it was a conversation that the court was having with the democratic process. So this is not Congress as a co-equal interpreter of the Constitution. This is Hollywood as a co-equal interpreter. I hear Chief Justice Rehnquist saying that there have been too many episodes of "Law & Order" for us to tell the American people they no longer have these rights. And so it's always this dialogue where the court can release a right into the world, and the popular uptake of the right is such that even a subsequent court that might want to take that right away by overruling the prior decision finds itself unable to do so.

### *Organizing to Influence the Courts?*

WALDMAN: Groups like the Brennan Center must grapple with the question of what kind of organizing can have an impact on the courts — given the booming power of a court decision to create a right or to delegitimize one. Are there broad trends that you see for activists of any kind dealing with these kinds of questions?

YOSHINO: So much of what I see in a gay rights context has been about this notion of public education. One of the light bulb moments for Freedom to Marry, which has been a flagship organization in this effort, occurred when they surveyed individuals about why straight people got married. And the answer was, “love and commitment.” And then they asked, why do gay people seem to get married? And the answer was, “we have no idea.” The second answer — and it was a distant second — was “to get benefits.” So love and commitment just didn’t register as a reason same-sex couples would wish to marry. And so that suggested that there needed to be a much more significant effort to render gays and lesbians visible in the public sphere, and to help individuals understand that there was much more similitude here than difference between the aspirations of gay and straight couples.

I think a particularly poignant example of that was the issue of children. For a while, the notion that gay people would be anywhere near children was so toxic that even the pro-gay side stayed away from it. In the 1970s, Anita Bryant’s “Save Our Children” campaign emphasized the idea that gay people were child molesters and predators. And even in the Prop 8 campaign in 2008, “Protect Our Children” was one of the big themes in the successful campaign to entrench a ban on same-sex marriage in the California constitution. After the pro-gay side lost Prop 8, there was a lot of soul-searching in movement. Activists realized that until they rebutted the idea that gay people are a harm to children, they were going to lose the debate. And so the rebranding was not so much a change in the underlying reality, so much as it was a change in the messaging of the underlying reality. That reality is the existence of a multitude of gay people who are raising kids — either because they

were in heterosexual marriages before or, more recently, because of gay adoption or surrogacy arrangements.

It was really interesting to see an example of “ideological drift,” where an idea from the right drifts over to become an idea of the left, or vice versa. “Protect Our Children” started out as a core argument against same-sex marriage and ended up as a core argument for same-sex marriage. In Justice Kennedy’s opinions, he repeatedly notes that bans on marriage humiliate the children of gay parents. He observes in both *Windsor* and *Obergefell* that those hundreds of thousands of children in the United States should not be made to feel like second-class citizens simply because their parents happen to be of the same sex. It shouldn’t be dismissed as just a kind of P.R. strategy. It was really a revelatory strategy that said, this is the underlying reality and people need to be educated about what the underlying reality is here, which is that there are gay families. If you think about gay individuals, atomized individuals who can only have sexual relationships with each other, of course you’re going to be much less likely to give them marriage than if you think of them as being in stable relationships that look very similar to what heterosexual marriage has always looked like.

### ***Public Arguments vs. the Legal Case***

WALDMAN: Given the interplay between judicial direction and public opinion and political intermediaries, what about those situations where the arguments that are mobilizing arguments for the public are not the arguments ultimately that one wants to bring either to the court or maybe to a legislature?

I’ll give you an example from the work the Brennan Center does right now. *Citizens United*<sup>12</sup> is an opinion that I would suggest flies somewhat in the face, Barry, of what you’ve written about the Court not stepping out too far ahead of public opinion. Political equality is one of the main reasons the public doesn’t like *Citizens United*. But that word — “equality” — is verboten in making the arguments to the courts. The Roberts Court has made clear that even breathing mention of “equality” may be enough to put a statute at constitutional jeopardy. So what is the

interplay between the types of arguments one can make to the public and to the courts? Must there be a broad synchronicity between them? Are they really different audiences?

FRIEDMAN: I think it is important to speak in the public sphere about things that might not be appropriate to speak about in court, and yet it's not that courts don't hear it — and in fact, it penetrates. If you want to talk about rapid transformational change, you can't fail to talk about the Affordable Care Act case, which is also a very perplexing one around the question of public opinion. It would be too simplistic to take anything I'm saying as "we can take a poll and then we know what the Court's going to do." I have never suggested that and I never would. And I think it would be a horrible thing if it were true. But certainly, in the first Affordable Care Act case,<sup>13</sup> nobody thought that the Court was going to take any Commerce Clause argument seriously; that there was any chance that the Court was going to find that the law violated the Commerce Clause. Indeed, once the folks in Washington started to get concerned about it, I helped lead an effort to write an amicus brief to the Court on the subject. I called lots of leading conservatives, who are friends, and said, will you join this? And they said, "Look, I can't join it. But everybody knows you're going to win. This whole thing is ridiculous." Well, of course by the time it got to the court, it wasn't ridiculous at all. To the contrary, it was a very good example of what [Yale Law School Prof.] Jack Balkin talks about as the move from off-the-wall arguments to on-the-wall arguments. Those arguments get on the wall, I believe, because of a public discourse that isn't always the same as the legal discourse. And I think it is extremely important that when fighting issues in a legal arena, you'll also be fighting in other places, and that you'll also be articulating your positions in ways that appeal to common sensibility.

HERSHKOFF: I think there's a view in the United States — this is a broad overstatement, of course — that politics are intended to be authentic and sincere and transparent. And we try to avoid any discussion of the Machiavellian or strategic aspects of politics. But what



about the actual practice of politics? Consider the conservative success of the last 40 years. No one was going to speak about the language of racial discrimination or class oppression. Yet it became convenient to talk about state rights and the 10th Amendment. Ultimately, arguments about state's sovereign immunity prevailed and did so much harm to progressive causes in the United States.

So I think that there is a form of law talk that is made in the courts. And I even think that there's a form of political discourse made within the corridors of power. These forms of rhetoric may be quite different from the real motivators of policy. But I don't think that there's anything new about that development. One can go back to Roman classical texts and see that there's always a dissonance between what people are actually asking for and the way in which they say it.

### *Legislative Wins or Winning in the Courts?*

WALDMAN: When he was teaching at the University of Chicago Law School but was a state senator, Barack Obama said that he thought it was a tragedy of the civil rights movement that it became so court focused. That there was a tendency to lose track of the political and community organizing activities on the ground, he said, that can put together the coalitions of power through which you bring about redistributive change. Another version, perhaps less sincerely: Chief Justice Roberts's dissent in the marriage case, where he said the proponents of change were winning in legislatures and in public opinion and had the wind at their back. What do you think of the argument that it is better and creates deeper social change to win through the democratic branches, the democratic activities of legislating and elections, even if a win in the courts is available?

FRIEDMAN: One might have asked your question exactly the opposite way. Which is to say, why would you ever go to the democratic arena when, given constitutional politics, you can achieve much more lasting change in the courts? But I think that the answer ought to be both. They are dialogic. Everything I wrote in my early career had the word

“dialogue” in the title, because I so firmly believe in everything Kenji was saying, which is that there’s an ongoing conversation that happens among the broader public — or at least the informed or elite broader public — and the different branches of government. It is the wise social change organization that understands that it should be present in a variety of arenas.

WALDMAN: If you look especially at the way social change unfolded in the past, it was often differentiated. During the civil rights movement, for example, Thurgood Marshall belittled Martin Luther King’s tactics. Some organizations were litigation focused, some were lobbying groups, some were think tanks. Often, people have not tended to see these as kind of unified parts of a strategy, over the long run.

HERSHKOFF: Is that how the civil rights movement unfolded? I’m not convinced there was a bifurcation or trifurcation of communication, strategy, and law. When the NAACP litigated, it always had people in the field who were trying to determine what community sentiment was — the sit-down strikes, the boycott in Montgomery, the march from Montgomery into Selma. Along the way the civil rights movement became branded as a court-centered strategy, certainly after *Brown v. Board of Education*, and largely by academics. But I don’t think that it represents the reality of what happened.

YOSHINO: Joe Biden said in the gay rights movement “Will & Grace” was just as important as any court decision. I think that was absolutely true. It brought gay people’s lives into the living rooms of Americans. This was a hit NBC show for close to a decade. And then other shows continued in that vein. So I agree with Barry that it’s not either/or, and I agree with Helen that this is not only true in the past but it’s also true in the modern civil rights era. I just don’t see this bifurcation. The place that the question becomes interesting for me is what is the end game envisioned to be? I think that the end game in the gay rights arena for marriage was always a Supreme Court ruling. So all eyes were ultimately on the Supreme Court. I think that the gay rights movement would

never have said that its ultimate goal was to wait until the 50th state was willing, through its own legislation or a referendum process, some non-judicial avenue, to secure its rights. I think from the very beginning the strategy was to ultimately end up in the Supreme Court. And the reason for that is to prevent the backsliding that occurs when something is not secured at the Supreme Court level under the Constitution. So if you really believe that the right to same-sex marriage is a constitutional right, then you'd be crazy not to ask for it as a matter of constitutional right at the United States Supreme Court, because otherwise states that might once have been friendly could backslide from that understanding.

## ENDNOTES

### WEISER: SHAPING THE VOTING RIGHTS NARRATIVE

- 1 See Wendy Weiser & Justin Levitt, *Cast Out: New Voter Suppression Strategies 2006 and Beyond*, BRENNAN CENTER FOR JUSTICE (Oct. 31, 2006), <http://www.brennancenter.org/analysis/cast-out-new-voter-suppression-strategies-2006-and-beyond>.
- 2 See Wendy Weiser & Lawrence Norden, *Voting Law Changes in 2012*, BRENNAN CENTER FOR JUSTICE (Oct. 3, 2011), <http://www.brennancenter.org/publication/voting-law-changes-2012>; Wendy Weiser & Diana Kasdan, *Voting Law Changes: Election Update*, BRENNAN CENTER FOR JUSTICE (Oct. 28, 2012), <http://www.brennancenter.org/publication/voting-law-changes-election-update>.
- 3 See Wendy Weiser & Erik Opsal, *The State of Voting in 2014*, BRENNAN CENTER FOR JUSTICE (June 17, 2014), <http://www.brennancenter.org/analysis/state-voting-2014>; Brennan Center for Justice, *Voting Laws Roundup 2014* (December 18, 2014), <http://www.brennancenter.org/analysis/voting-laws-roundup-2014>; Brennan Center for Justice, *Voting Laws Roundup 2015* (June 3, 2015), <http://www.brennancenter.org/analysis/voting-laws-roundup-2015>.
- 4 That case was *O'Brien v. Skinner*, 414 U.S. 524 (1974).
- 5 *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006).
- 6 *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014); *Applewhite v. Commonwealth*, 617 Pa. 563 (2012).
- 7 *Arkansas State Bd. of Election Comm'rs v. Pulaski County Election Comm.*, 437 S.W.3d 80 (Ark. 2014).
- 8 *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).
- 9 *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1345 (N.D. Ga. 2006); *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1343 (N.D. Ga. 2007), *vacated on other grounds*, 554 F.3d 1340 (11th Cir. 2009).
- 10 *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.C. Cir. 2012).
- 11 *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).
- 12 *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013).
- 13 *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).
- 14 As election law scholar and blogger Richard Hasen pointed out, the fact that judicial votes may correlate with the judges' party affiliations may not reflect a desire to help their chosen political parties, but rather, "in the face of a paucity of evidence, the judges may be swayed by beliefs that seem to correlate with those who are members of their party." Richard Hasen, *Initial Thoughts on the Indiana Voter Identification Decision*, ELECTION L. BLOG (Jan. 5, 2007), <http://electionlawblog.org/archives/007581.html>.

- 15 Georgia and Missouri had passed similar laws at around the same time, but both were blocked in court in 2006 before being implemented.
- 16 Crawford v. Marion County Election Bd., 472 F.3d 949, 954 (7th Cir. 2007), *aff'd*, 554 U.S. 181 (2008).
- 17 Crawford v. Marion County Election Bd., 553 U.S. 181 (2008).
- 18 Frank v. Walker, 773 F.3d 783 (7th Cir. 2014) (Posner, J., dissenting from denial of reh'g en banc).
- 19 Emily Bazelon, *Better Judgment*, N.Y. TIMES MAG., June 21, 2015, available at [http://www.nytimes.com/2015/06/21/magazine/better-judgment.html?\\_r=0](http://www.nytimes.com/2015/06/21/magazine/better-judgment.html?_r=0).
- 20 Crawford v. Marion County Election Bd., 472 F.3d 949, 954 (7th Cir. 2007). (Evans, J., dissenting).
- 21 *Frank*, 773 F.3d at 784 (Posner, J., dissenting from denial of reh'g en banc).
- 22 Bazelon, *supra* note 19.
- 23 Jess Bravin, *Voter-ID Laws Worry Jurist*, WALL ST. J., Oct. 17, 2013, available at <http://www.wsj.com/articles/SB10001424052702304384104579141701228734132>.
- 24 Bazelon, *supra* note 19.
- 25 In Georgia, the passage of a strict voter ID law prompted the state's legislative black caucus to walk out in protest. In Missouri, the debate over the state's new voter ID law became part of a very close and hotly contested U.S. Senate seat race, along with other election administration shenanigans.
- 26 Wendy Weiser & Lawrence Norden, Voting Law Changes in 2012 (Brennan Center for Justice, Oct. 3, 2011), available at <http://www.brennancenter.org/publication/voting-law-changes-2012>. The Brennan Center had released a fair amount of this research months earlier, including on NPR, but it was the front-page coverage on the *New York Times* that catapulted to story forward.
- 27 Michael Cooper, *New State Rules Raising Hurdles at Voting Booth*, N.Y. TIMES, Oct. 3, 2011, at A1, available at <http://www.nytimes.com/2011/10/03/us/new-state-laws-are-limiting-access-for-voters.html>.
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### SUNSTEIN: THE SUPREME COURT FOLLOWS PUBLIC OPINION

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### RUST-TIERNEY: HOW CAN WE END CAPITAL PUNISHMENT?

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## AYRES, BERNARD & SCHWARZ: THE PATHS TO CHANGE IN ENVIRONMENTAL LAW

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- 12 The organizations are the NRDC, Center for Science in the Public Interest, Food Animal Concerns Trust, Public Citizen, and Union of Concerned Scientists.
- 13 Natural Resources Defense Council, Inc. v. FDA, 872 F. Supp. 2d 318 (S.D.N.Y. 2012); Natural Resources Defense Council, Inc. v. FDA, 884 F. Supp. 2d 127 (S.D.N.Y. 2012).
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- 15 During the boycott, the general counsel of Mitsubishi, USA, wrote NRDC's chair asking for a meeting. The response was to deny a meeting unless the chair of Mitsubishi's Japanese parent responded to a letter from the NRDC chair that said: "I want you to consider a hypothetical which is that a steel company decides to build a small steel plant on Mt. Fuji. Assume that it would not release enough pollution to kill animals or affect humans because the smoke would be too far away. Nonetheless, wouldn't you protest that because you would want to keep Mt. Fuji pristine? That's the same reason we want to keep Laguna San Ignacio pristine. Not that it's likely that a lot of whales would be killed by what you're doing, although that would be possible from spills of the brine. But it should be kept pristine." Mitsubishi's chair never responded.

### LEVIN & CHETTIAR: THE UNLIKELY ALLIES BEHIND CRIMINAL JUSTICE REFORM

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- 32 State courts have similarly blocked clinic shutdown laws. Burns v. Cline, 339 P.3d 887 (Okla. 2014) (temporarily enjoining Oklahoma admitting privileges requirement); Hodes & Nausser, MDs, P.A. v. Moser, No. 2:11-cv-02365-CM-KMH, 2011 WL 7714071 (Kan. Dist. Ct. Dec. 2, 2011) (extending until final judgment issues temporary restraining order against Kansas law and regulations singling out abortion providers for burdensome regulation).
- 33 Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 791 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014).
- 34 Planned Parenthood of Wis., Inc. v. Van Hollen, No. 13-CV-465-WMC, 2015 WL 1285829, at \*1 (W.D. Wis. 2015) (internal quotation marks and citation omitted), *appeal filed* No. 15-1736 (7th Cir. Apr. 6, 2015).
- 35 Planned Parenthood Se., Inc. v. Strange, 33 F. Supp. 3d 1330, 1342 (M.D. Ala. 2014), *as corrected* (Oct. 24, 2014), *supplemented*, 33 F. Supp. 3d 1381 (M.D. Ala. 2014) *and amended*, No. 2:13CV405-MHT, 2014 WL 5426891 (M.D. Ala. Oct. 24, 2014).
- 36 *Id.* at 1378.
- 37 Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014), *aff'd in part, vacated in part, rev'd in part sub nom.* Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015) (per curiam), *modified*, 790 F.3d 598 (5th Cir. 2015), *staying mandate*, 135 S. Ct. 2923 (2015).
- 38 *Id.* at 682; *see also id.* at 680–84.
- 39 *Id.* at 683; *see also id.* at 686 (noting that law creates undue burden especially “[w]hen viewed in the context of other state-imposed obstacles a woman faces when seeking an abortion in Texas”).
- 40 *Id.* at 682.
- 41 *Id.*
- 42 *Id.* at 684.
- 43 *Id.* at 685.
- 44 *Id.* (emphasis added).
- 45 *See* Whole Woman's Health v. Cole, 790 F.3d 563, 587 (5th Cir.) (per curiam) (noting that trial court was wrong to evaluate whether laws that restrict abortion access actually further a valid state interest), *modified*, 790 F.3d 598 (5th Cir.), *staying mandate*, 135 S. Ct. 2923 (2015) ; *see also* Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott, 748 F.3d 583, 594–95 (5th Cir. 2014) (stating that “rational speculation” that admitting privileges requirement would protect women's health sufficient to justify the law).

- 46 See Brief Am. Coll. Obstetricians & Gynecologists & Am. Med. Ass'n as Amici Curiae Supporting Pls.-Appellees, *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015).
- 47 Application for Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari, at 1, *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015) (per curiam) (filed June 19, 2015), available at [http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/2015-06-19-Supreme\\_Court\\_Motion\\_to\\_Stay.pdf](http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/2015-06-19-Supreme_Court_Motion_to_Stay.pdf).
- 48 *Id.*
- 49 *Whole Woman's Health v. Cole*, 135 S. Ct. 2923 (June 29, 2015).
- 50 *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).
- 51 *Id.* at 851.
- 52 *Id.* at 878.
- 53 52 U.S.C. § 10301 (1982).
- 54 See S. REP. NO. 97-417, at 5 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 182.
- 55 See *id.* at 193-94.
- 56 *Women's Health Protection Act*, S. 1696, 113th Cong. (2013); see also *Women's Health Protection Act*, S. 217, 114th Cong. (2015).
- 57 See *Induced Abortion in the United States*, GUTTMACHER INSTIT. (July 2014), [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.html](http://www.guttmacher.org/pubs/fb_induced_abortion.html).

### LAMARCHE: HOW PHILANTHROPY BUILDS INFRASTRUCTURE

- 1 BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 170 (2012).
- 2 LEGAL SERVICES CORP., *DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 9 (2009), available at [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf)

### WALDMAN, FRIEDMAN, HERSHKOFF & YOSHINO: HOW DOES LEGAL CHANGE HAPPEN? PERSPECTIVES FROM THE ACADEMY

- 1 *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). (Massachusetts Supreme Judicial Court decision finding same sex couples have the right to marry).
- 2 *Bowers v. Hardwick*, 478 U.S. 186 (1986). (A 5-4 U.S. Supreme Court decision, overturned in 2003, that upheld the constitutionality of a Georgia anti-sodomy law).
- 3 *Dandridge v. Williams*, 397 U.S. 471 (1970). (A U.S. Supreme Court decision which said states can cap welfare payments regardless of a family's size or need).
- 4 *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954). (Landmark U.S. Supreme Court decision which declared segregated public schools unconstitutional).

- 5 Dred Scott v. Sandford, 60 U.S. 393 (1857). (U.S. Supreme Court decision which said slaves were not citizens and had no standing to sue in federal court).
- 6 Roe v. Wade, 410 U.S. 113 (1973). (U.S. Supreme Court ruling upholding a woman's right to an abortion).
- 7 Planned Parenthood v. Casey, 505 U.S. 833 (1992). (U.S. Supreme Court decision largely upholding *Roe v. Wade*).
- 8 Harris v. McRae, 448 U.S. 297 (1980). (U.S. Supreme Court ruling which said states that participated in Medicaid did not have to fund medically necessary abortions if federal reimbursement was not available).
- 9 Loving v. Virginia, 388 U.S. 1 (1967). (U.S. Supreme Court decision that overturned prohibitions on interracial marriage).
- 10 Lochner v. New York, 198 U.S. 45 (1905). (One of several Supreme Court decisions that invalidated state and federal statutes to regulate working conditions).
- 11 Dickerson v. United States, 530 U.S. 428 (2000). (U.S. Supreme Court decision which upheld that Miranda warning had to be read to criminal suspects).
- 12 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). (U.S. Supreme Court decision which held the First Amendment prohibited the government from restricting independent political expenditures by a nonprofit corporation).
- 13 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct 2566 (2012). (U.S. Supreme Court opinion which upheld most of Congress's power to enact the Affordable Care Act).





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