

ORIGINALISM: PRIVILEGES V. FUNDAMENTAL VALUES

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I. INTRODUCTION

Originalism¹ has arguably fossilized our constitutional interpretation and set our recognition of existing human rights back by stingily offering us privileges we must pay for individually if we can afford them or else go without. In that way, originalism subordinates many aspects of the common good to privilege. In different ways, a gap between theory and reality exists at the “original” time and later.² Constitutions of the

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1. The Reagan administration adopted originalism during the 1980s to combat judicial activism. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 375, 409 (2013) (explaining that today originalism is less tied to “the importance of judicial restraint than it once was” but now emphasizes a “public meaning of the constitutional text”). The perhaps judicially activist change in function of the Second Amendment’s original support for a well-regulated militia (proto-national guard) to an individual right to bear arms with no stated purpose may illustrate the de-emphasis on judicial restraint. *See* *District of Columbia v. Heller*, 554 U.S. 570, 595, 623-24 (2008). The purpose of the Second Amendment had long been thought to keep a proto-national guard in readiness to assist in emergencies. *See id.* at 671-77 (Stevens, J., dissenting). During this century, the duty of the citizen was transformed into a seemingly unfettered private individual right to bear arms for any reason. *See infra* notes 96, 261 and accompanying text for popular reaction to unregulated circulation of all guns.

2. A large body of work about originalism provides various interpretations, most beyond the scope of discussion in this Article. Larry Solum agrees that originalism is constantly changing (for example, from emphasizing the linguistic meaning of the text to giving the text legal effect) and may even produce progressive results as much as the “living constitution.” Lawrence B. Solum, *Originalism in Constitutional Time*, *LEGAL THEORY BLOG* (Apr. 8, 2017), <http://lsolum.typepad.com/legaltheory/2017/04/originalism-roundup-the-case-for-the-constraint-principle-and-much-else.html> (writing on the arrival of originalist Neil M. Gorsuch on the Court); *see*

eighteenth century were often theoretical in the sense that they expressed ideals and were not meant to be taken literally. The English Bill of Rights of 1689,³ the avowal in the Declaration of Independence (1776) that all men are created equal,⁴ and the French Declaration of the Rights of Man (1789)⁵ enshrined idealistic sentiments at the time of the Constitutional Convention of 1787 without the implication that the Constitution would be taken and followed literally.

We have a very old Constitution (1787) and Bill of Rights encompassing the First Ten Amendments to the Constitution (1789) with only twenty-seven amendments in 229 years,⁶ in part because the doctrine of *stare decisis* extends originalism and other methods of interpretation in cases to favor retaining the small number of already recognized rights by preventing change to prior holdings in older cases. When women first joined the federal courts as judges, they were considered fairly conservative and were certainly not radical in any way. The example of Ruth Bader Ginsburg reminds us that in the 1970s and 1980s she was fairly conservative and not more than in the middle of the pool of federal judges.⁷ More recently, Justice Ginsburg has been deemed further to the

Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 123-24 (2013) (arguing that originalism does not permit state governmental affirmative action); see also JOHN O. MCGINNIS, ACCELERATING DEMOCRACY: TRANSFORMING GOVERNANCE THROUGH TECHNOLOGY 50-53 (2013).

3. 1 W. & M., sess. 2, c.2 (1689) (Eng.); Randall Lesaffer & Shavana Mura, *The Emergence of the Rule of Law in Western Constitutional History: Revising Traditional Narratives*, in CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM 94, 97 (Maurice Adams, Anne Meuwese & Ernest Hirsch Ballin eds., 2017) (describing the inspirational importance of the Bill of Rights).

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

5. DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN (Fr. 1789).

6. Throughout history and long before our Constitution, pockets of what we might think of as fundamental rights or social justice appeared. For example, Roman cities in the Empire were structured with the same amenities for all, including military veterans with twenty-five years of service. See F. HAVERFIELD, ANCIENT TOWN-PLANNING, 51 (1913), <http://www.gutenberg.org/files/14189/14189-h/14189-h.htm>. But see DUNCAN B. CAMPBELL, ROMAN LEGIONARY FORTRESSES 27 BC-AD 378 45-46, 48, 50-54 (2006) (describing both shared amenities and the more luxurious amenities of military officers). Again, the medieval period included good faith in the bargaining period, based on its inheritance of certain kinds of contracts in Justinian's compilation of Roman Law. Eric M. Holmes, *A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation*, 39 U. PITTSBURGH L. REV. 381, 420-22 (1978). Analogs can be found at common law. In American law, several concepts serve some of the functions of *culpa in contrahendo*, including mistake, misrepresentation, estoppel, implied contract, and various notions of negligence. These concepts often first arose in one type of obligation and later are applied more broadly. See, e.g., Saul Levmore, *Variety and Uniformity in the Treatment of the Good Faith Purchaser*, 16 J. LEGAL STUD. 43, 58-60 (1987). See also *infra* notes 240-42 and accompanying text for other common law rights derived from torts.

7. See Dahlia Lithwick, *The Irony of Modern Feminism's Obsession with Ruth Bader Ginsburg*, ATLANTIC MONTHLY (Jan.-Feb. 2019), <https://www.theatlantic.com/magazine/archive/2019/01/ruth-bader-ginsburg-feminist-hero/576403>.

left in the array of Supreme Court Justices without much changing her views, as the United States Supreme Court has grown more “conservative.”⁸

While only twenty-seven amendments have been approved, (together with other constitutional and legal changes since 1787), the deepest meaning (and indeed, the beauty) of the Constitution is always to hold out the promise of a more perfect union with better opportunities for everyone, especially those who are behind in having access to the full opportunities of the average American citizen. The hope of achieving the full measure of fundamental rights has been the inspiration for this Article to call for reform, renewal, and restoration of the Aristotelian and other principles from which our constitutional foundations were derived, stressing cooperation, honoring human rights, and remembering that we are more effective when we engage with others as equal human beings in solving the challenges of the day which impede the realization of full and equal constitutional rights for each person. This is a woman’s perspective and honors the contributions of such women as Ruth Bader Ginsburg by paying homage to these fundamental rights she championed.

Early debates on rights and other policies show that entrepreneurial oligarchs prevailed on most issues and retained the narrow scope of most rights.⁹ Certainly, the winners in the constitutional debates did not think that men without property should vote, that women were legal persons, or that slaves were equal or free persons.¹⁰ How does the notion of privileges in the originalist interpretations of the Constitution slow down and in some cases thwart this achievement of greater equal rights and a more perfect union? The Bill of Rights tracked political and procedural rights to speak, assemble, worship freely (if no state laws established a denomination), and not to incriminate oneself or be searched without a warrant based on probable cause.¹¹ There were those who believed that political rights were enough protection for them to take care of

8. Charlotte Alter, *Here’s Why Ruth Bader Ginsburg Is ‘Notorious,’* TIME (Nov. 4, 2015, 9:49 AM ET), <http://time.com/4093354/heres-why-ruth-bader-ginsburg-is-notorious> (“The 2000 Bush v. Gore case marked a turning point for Ginsburg, who had previously been known as a restrained moderate . . . during the resulting Bush presidency the court got much more conservative,” providing “more to dissent from”); see Jill Lepore, *Misjudged: Ruth Bader Ginsburg’s Career and Complexities*, NEW YORKER, Oct. 8, 2018, at 34, 38-39.

9. PETER L.P. SIMPSON, *POLITICAL ILLIBERALISM: A DEFENSE OF FREEDOM* 159-61 (2015) (explaining that during the period of the Constitutional Convention federalists and anti-federalists argued about their visions for society and government with the result that the federalists prevailed on most issues). For perspective from the development of the English state, see MICHAEL J. BRADDICK, *STATE FORMATION IN EARLY MODERN ENGLAND c. 1550-1700* 16-20, 35-38 (2000).

10. See U.S. CONST. art. I, § 2, cl. 3.

11. U.S. CONST. amends. I, IV, V.

themselves.¹² God may have created all men equal, but powerful men overrode natural rights recognized in the Declaration of Independence for more limited political recognition of these rights.¹³

At various later points in time, we amended the Constitution to abolish slavery (following the Emancipation Proclamation of 1863),¹⁴ recognized a certain equality (following the Declaration of Independence after nearly ninety years),¹⁵ and allowed women to vote.¹⁶ Further, we “found” some personal privacy rights in cases (privacy¹⁷ in the penumbras of earlier Amendments, the right to choose to terminate a pregnancy¹⁸ and marriage).¹⁹

With the rights of privacy in sexual expression and marriage and equality under the Fourteenth Amendment leading up to *Brown v. Board*,²⁰ as well as the example of international law and other, younger, more inclusive constitutions,²¹ we may have thought that the United States Constitution would allow a more generous avenue of expansion. In fact,

12. THOMAS HOBBS, *LEVIATHAN OR THE MATTER, FORME, & POWER OF A COMMON-WEALTH ECCLESIASTICALL AND CIVILL* 102-05 (Ian Shapiro ed., Yale University Press 2010) (1651) (explaining that Hobbes, a master psychologist focused on fear, lived (1588–1679) in extremely dangerous times but circumvented his situation by becoming a temporary war refugee); *see also* THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE 60-62, 67-71 (Paul E. Sigmund ed., 2005) (including treatment of leading scholarly analyses of Locke (1632–1704) as collectivist, atomistic individualist, capitalist, Hobbesian materialist, man of property, representationist, and revolutionary); RICHARD TUCK, *HOBBS* 69-71 (1989).

13. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3 (differentiating between “free Persons” and “all other persons”); SIMPSON, *supra* note 9, at 157-61.

14. U.S. CONST. amend. XIII.

15. U.S. CONST. amend. XIV, § 1.

16. U.S. CONST. amend. XIX; *see also* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428-33 (1994) (demonstrating that the Fourteenth Amendment protects against visible, non-moral differences among persons).

17. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

18. *Roe v. Wade*, 410 U.S. 113, 163 (1973) (allowing termination in additional circumstances besides saving the life of the mother, however controversial that was and remains). Women face many other very serious difficulties as well. *See* Linda C. Fentiman, *In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (and Other Countries Don't)*, 18 COLUM. J. GENDER & L. 647, 648-51 (2009) (treating this as a local issue allows vindictive prosecutors exercising punitive discretion (for example, in Alabama) to punish women as offenders rather than offering them entrance into addict rehabilitation programs, job training, and parenting sessions, all of which treat women more like human beings but cost more public or state money to provide what these women often never had).

19. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015); *United States v. Windsor*, 570 U.S. 744, 766 (2013); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1968); Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648, 699-706 (2016) (setting forth the meaning of the guarantee of equality in constitutional law); David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 6-7 (2015) (discussing *Obergefell*).

20. 347 U.S. 483 (1954); *see* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 279-83 (2d ed. 2004).

21. *See* Robert McCorquodale, *An Inclusive International Legal System*, 17 LEIDEN J. INT'L L. 477, 486-87 (2004).

we have not found many other rights other western societies enjoy today. Arguing under the equal protection enshrined in the Fourteenth Amendment to seek justice may not be wise in light of the failure of the Equal Rights Amendment (“ERA”) to pass.²² Its goal of providing women with equality was rejected, not even equal pay for equal work being accepted.²³ That failure followed not long after the first rejection to help children in poor, segregated communities receive a decent education, perhaps because of the cost to well-to-do taxpayers desiring proverbial low rates²⁴ or for the same reason to deny all who cannot afford the “privilege” of medical care with the attack on the Affordable Care Act (“ACA”) (pejoratively also known as “Obamacare” among those who argue medical care today is a privilege).²⁵

Privilege and the common good never met in compromise. The current effect of education and medical care on longevity, health, and quality of life does not sway those who deem these fundamental rights mere “privileges” available only to those who can afford them. Some echoing those early constitutional debates find that social justice “does not offer a particularly useful ‘take’ on the moral problems of society.”²⁶

22. See *infra* text accompanying notes 130-34.

23. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)) (amending the Civil Rights Act of 1964). For United States, the cultural and legal inheritance from United Kingdom is still close. Wiktor Szary, *Firms Rush to Report on U.K. Pay*, WALL STREET J., Apr. 4, 2017, at B7. Because no recent comparable American data are available, United Kingdom figures for American multinationals in the United Kingdom are being reported heavily in United States.

24. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-37 (1973); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (reaffirming the *San Antonio* decision); Stephen Lurie, *Why Doesn't the Constitution Guarantee the Right to Education?*, ATLANTIC MONTHLY (Oct. 16, 2013), <https://www.theatlantic.com/education/archive/2013/10/why-doesnt-the-constitution-guarantee-the-right-to-education/280583>. But see Samar A. Katnani, Note, *PICS, Grutter and Elite Public Secondary Education: Using Race as a Means in Selective Admissions*, 87 WASH. U. L. REV. 625, 652-54 (2010). Nearly two decades ago the United States Department of Education warned that we should, as part of a national policy, address the educational needs of the poor both for their own achievements and for the common good of the country. *Low-income and Minority Students*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/offices/OPE/AgenProj/report/theme1a.html> (last visited Sept. 17, 2019) (archiving data from 1999). As a result, society will profit from larger taxes trained and educated people will pay since they will be enabled to make larger individual contributions. See *id.* It is clear, even apart from the recent teachers' strikes, that we have failed to address this problem. Whether treating education as a constitutional right, or even a federal statutory right, would have required us to take action is unknown, but we clearly do not consider the education of the poor a national responsibility in the sense of ameliorating its *lacunae* and general lack of responsiveness to clear necessity.

25. Nat'l Fed'n of Indep. Bus. v. Sibelius, 567 U.S. 519, 563-74 (2012). A reporter with Kaiser Health Care contends that Stephen Ubl, head of the lobby organization Pharmaceutical Research and Manufactures of America, routes difficult to trace or “dark” money to urge repeal of the ACA. Jay Hancock, *The Stealth Campaign to Kill Obamacare*, N.Y. TIMES, July 29, 2018, at BU4, <https://www.nytimes.com/2018/07/27/business/the-stealth-campaign-to-kill-off-obamacare.html>.

26. Walter Olson, Opinion, *Yale and the Puritanism of 'Social Justice'*, WALL STREET J., Mar.

Yet, we spend inordinate amounts of time and energy trying to persuade the courts that further fundamental rights reside in the Constitution,²⁷ which is clearly not the vehicle for adapting laws and norms to our evolving needs and rights. Can our eighteenth-century Constitution lend itself to tying down the nineteenth-century concept of equality in the Fourteenth Amendment for twenty-first-century citizens? These questions look beyond doctrinal studies, if not to the penumbras of constitutional law, to social opinions concerning the law and the Constitution as well as the effects on peoples' lives from the lack of recognition of fundamental rights.²⁸

The American political system makes originalism so strong and stately because, at the moment, the two political parties disagree too much to compromise in order to attend to the country's business.²⁹ To be sure, political disagreements are assumed in Madison's world picture, but arguably not continuing stalemate or paralysis.³⁰ Stalemate leaves the Constitution unchanged and non-responsive to long-standing claims of rights, from the ERA to housing, education, or medical care in either the Congress for legislation or in the courts for constitutional cases seeking recognition of constitutional rights and even less in constitutional amendments.³¹

7. 2018, at A21, <https://www.wsj.com/articles/yale-and-the-puritanism-of-social-justice-1520381642>. The political parties can only agree on what is already written in the Constitution. Nevertheless, the parties disagree on how to interpret the meaning of the words in the text of the Constitution partly because they are swayed by powerful, but different, lobbyists. The desire of members of the political parties in Congress to compromise, govern, and reach agreement usually signifies pre-conditions for the success of any such negotiating efforts. A change in attitude of voters, including students in high schools across the country, may allow an educational effort on these important issues and practices to appeal to voters.

27. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1022-24, 1023 n.246 (2002).

28. See Reva Siegel's explorations of courts' interaction with representative government, social movements in interpreting the Constitution, and urging constitutional change. *Id.* at 987-93 (demonstrating that the pre-history of the adoption of women's suffrage in the Nineteenth Amendment provides the foundation for a stronger jurisprudence of sex equality); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 31-32 (2003).

29. Stephen Holmes, *How Democracies Perish*, in CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA 387, 418-22 (Cass R. Sunstein ed., 2018). While the founders wanted a strong presidency with solid Article II powers and four-year terms of office, at the same time they tried to protect against a tyrant, dictator, or king by including impeachment as a last political resort against an imperial president. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE: WHAT HISTORY TELLS US ABOUT OUR FUTURE 22-24 (2018) (presenting four key indicia of authoritarian behavior); see Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 148-51 (2018).

30. THE FEDERALIST NO. 10 (James Madison).

31. See *supra* note 29 and accompanying text.

This Article does not deal with the technical characteristics of originalism as an interpretive methodology itself. Rather, it covers the response of citizens, affected residents, and advocates to the perceived effects of originalism and other limiting factors on their lives during the twenty-first century.³² Part II identifies not so much what the human person and society need to flourish but the protections, rights, and remedies needed to implement and actualize these values, norms, and virtues.³³ The difficulty may be that the remedy is denied because a right may be deemed attenuated or so limited as not to require a remedy, eliminating the remedy and thereby effectively extinguishing the right. The affected group is the family (workers, voters, parents, children, and individual persons).³⁴ The focus is first on their ability to achieve a family's goals in raising children who can flourish in this society with adequate health care, an education appropriate to, and satisfying for, the child, and an acceptance of that growing child as a person who belongs in the society.³⁵ The second focus centers on whether originalism or any other legal or political interpretation of the laws and Constitution affects the family positively or adversely so that positive avenues and methodologies may be chosen over adverse paths.³⁶

This Article will explore these issues in three Parts.³⁷ Each Part will highlight one example, the first two from opposite ends of the political spectrum (funding of public school education and defunding of any non-military sectors).³⁸ The third will include concerns both groups should/may share, such as philosophical and legal principles existing independently before and outside the wording of the Constitution.³⁹ Issues such as flexibility in addressing and accommodating problems and fidelity to old structures thus introduces legal and procedural rights and remedies

32. See *infra* Part II.

33. See *infra* Part II.

34. The first Part identifies not so much what the human person and society need to flourish but the protections, rights, and remedies to implement and actualize these values, norms, and virtues. The difficulty may be that the remedy is denied because a right may be deemed attenuated or so limited as not to require a remedy, eliminating the remedy and thereby effectively extinguishing the right. "Neutralizing a right by eliminating its remedy and converting it into a mere description of favored behavior effectively nullifies the attendant right and deprives the courts of the ability to protect our legal rights." Tracy A. Thomas, *Ubi Jus & Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1640 (2004).

35. See *infra* Part II.A.

36. See *infra* Part II.B.

37. See *infra* Parts II–IV.

38. See *infra* Parts II–III.

39. See *infra* Part IV.

to the basic list of goods necessary for human life to flourish in twenty-first-century society.⁴⁰

The Part III demonstrates that the Constitution has not responded to concerned families.⁴¹ Originalism remains entrenched in the American system.⁴² Fundamental rights deemed only privileges show us the consequences of dismissing serious violations of rights. The examples of the damages from the neglect of education and housing as important fundamental rights for human flourishing allow us in Part III to justify continuing the campaign for constitutional recognition of these rights.⁴³ Meanwhile, despite the worth and necessity of continuing this struggle for constitutional recognition of fundamental rights, Part III also examines avenues other than the Constitution which may contribute to the project of providing the legal framework for the flourishing of the human person in a healthy, peaceful, and just society, including the common law's contributions, jurisprudential insights, and legislation (statutes).⁴⁴ The premise of customary international law is practice and belief which looks back to the fundamentals of society's values.⁴⁵ Part III deals with the constitutional dimension inhering in ordinary private law cases in which a person seeks redress for a violation of her rights.⁴⁶ The developing consciousness in the European Union of fundamental rights inhering in private law questions involving torts, contracts, consumer protection, and fair housing may help shorten the time for the United States to accept a more perceptive consciousness of the importance of these issues for human flourishing. A comparative perspective demonstrates the success in the international system, for example, in the Court of Justice of the European Union (*la cour de justice de l'union europ'eene* ("CJUE")), established in 1952, and its application of the European Charter of Human Rights as well as the European Court of Human Rights, and its application of the European Convention of Human Rights.⁴⁷

40. See *infra* Part IV.

41. See *infra* Part III.

42. The equivalent of originalism, known under different guises in Europe, hindered the development of private European law, compared to the interpretation in some areas of the law, including international law with treaties in which access to justice is often read into the texts of the provisions along with individual and human rights. Aurelia Colombi Ciacchi, *European Fundamental Rights, Private Law, and Judicial Governance*, in CONSTITUTIONALIZATION OF EUROPEAN PRIVATE LAW 102, 106-07, 118-19 (Hans-W. Micklitz ed., 2014) (discussing the merging of constitutional traditions and general principles of civil law).

43. See *infra* Part III.

44. See *infra* Part III.

45. Part III of this Article will deal with some of these practices, particularly remedies. See *infra* Part III.

46. See *infra* Part III.

47. W. van Gerven, *Of Rights, Remedies and Procedure*, 37 COMMON MARKET L. REV. 501,

Our own early cases, as well as state constitutions⁴⁸ and the legal history of England studied during the eighteenth and early nineteenth century in American political philosophy and law curricula, allow us to draw similar conclusions about the earlier flexibility of the common law. Edward Coke and Blackstone not only inherited the earlier English common law tradition but also interpreted and shaped that tradition for their own and later centuries.⁴⁹ Early cases recognized the right to claim due process when a right is violated.⁵⁰ As far as the use of the common law tradition to expand due process or other rights is concerned, the acceptance of the Blackstonian notion of implied rights at common law waxes and wanes and may be awaiting renewed acceptance, as this Article urges.⁵¹

504-05 (2000) (discussing actions taken by the court). The Charter of Fundamental Rights of the European Union has the force of law under the Treaty of Lisbon's Treaty of the European Union art. 6 (2009). See Consolidated Version of the Treaty on European Union art. 6, Mar. 30, 2010, 2010 O.J. (C 83) 19. La Cour de Justice de l'Union Europe'enne, founded in 1952, is discussed in Ditlev Tamm, *The History of the Court of Justice of the European Union Since its Origin*, in *THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE* 9, 9-22 (Allan Rosas, Egils Levits & Yves Bots eds., 2013). The European Court of Human Rights was established under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221. For more information from an information gathering agency, see also EUROPEAN AGENCY FOR FUNDAMENTAL RIGHTS, <https://fra.europa.eu/en> (last visited Sept. 17, 2019).

48. Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 & n.4 (2003) (stating the importance of "a right of access to the courts to obtain a remedy for injury" going back in English law beyond Blackstone and Edward Coke (1552-1634) at least to Magna Carta). State constitutions continue this right of access to the courts "to obtain a remedy for injury." *Id.* at 1310 n.6. Even with these state constitutional provisions, seeking remedies for new wrongs is a continuing struggle, as with recent statutory setbacks for medical care not enshrined in a strong state constitution or amendment. For Coke's views, see Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 L. & HIST. REV. 439, 440 (2003).

49. Thomas, *supra* note 34, at 1637 (referring to the quotation of Blackstone's *Commentaries* in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). Blackstone and Coke's work built upon the great treatise, collectively known as Bracton and "finished" around 1268, closest in time to Magna Carta, when Roman law had become well known throughout Europe. BRACTON, *ON THE LAWS AND CUSTOMS OF ENGLAND* (Samuel E. Thorne, trans., 1968).

50. *Marbury*, 5 U.S. (1 Cranch) at 163.

51. Susan J. Stabile, *Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 865-66 (1996). The United States Supreme Court took a strong, and still lasting, turn away from common law notions providing remedies to right wrongs such as in *Moore v. Chesapeake & Ohio Railway*, 291 U.S. 205, 214-15 (1934), which reversed *Texas & Pacific Railway v. Rigsby*, 241 U.S. 33, 57 (1916). Stabile, *supra*, at 865.

II. WHAT LEGAL RIGHTS AND REMEDIES DOES A HUMAN BEING NEED TO FLOURISH?

What do children need to flourish in a just society? Sufficient prescriptions ranging out from a core consensus (life, for example, although not necessarily the same definition of protected life, is accepted on all lists) provide enough variety to accommodate a very varied society. Human flourishing is both “morally pluralistic and objective,” allowing certain necessities such as health care and security, to become conditions of the well-lived or flourishing life of families.⁵² Philosophers thinking about flourishing have made lists of necessary conditions for flourishing at least since the time of Aristotle (384–322 BCE), who searched for the highest good.⁵³ Later lists do have some continuity with Aristotle about what might contribute to a flourishing and happy person in her/his society.⁵⁴ Given these serious, flexible definitions of human flourishing,

52. See generally GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING (2018) (connecting property, ownership, and human flourishing with obligations arising from human desire to live in social communities, addressing homelessness, eviction, and mortgage foreclosures); EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY (Lee Anne Fennell & Benjamin J. Keys eds., 2017) (examining several issues such as the meaning of housing with the community for stability, change and culture, the equity of home ownership for families, and the returns on housing for the financing system).

53. ANTHONY KENNY, ARISTOTLE ON THE PERFECT LIFE 4 (1992).

54. *Id.* at 4–6. Adam Etinson, a philosopher at St. Andrews University, describes the norms of flourishing as congruent with international human rights law, prohibiting discrimination and limiting the power of the state in favor of civic rights in the public and daily lives of persons, which should be left to the family. See HUMAN RIGHTS: MORAL OR POLITICAL? 3 (Adam Etinson, ed. 2018); Adam Etinson, *How High to Dream?: The Rise of Human Rights Amid the Collapse of Socialist Ideals*, TIMES LITERARY SUPPLEMENT (July 25, 2018), <https://www.the-tls.co.uk/articles/public/human-rights-how-high-to-dream>. As the poet George Herbert (1593–1633) wrote, “Lord, with what care hast thou begirt us round! / Parents first season us; then schoolmasters . . .” GEORGE HERBERT, *Sin (I)*, in THE COMPLETE ENGLISH POEMS 40, 40 (John Tobin ed., 2004). It is axiomatic that the bond between a parent and child is the primary relationship for a person’s well-being, the foundation for the rest of the child’s life. The child needs the parent and the loving protection the parent gives the child to feel secure, complete, and ready to assume independence at maturity. The presence or absence of this bond determines much about the child’s resiliency, mental and emotional health, and even about the kind of adult the child will become. *Jane Fonda Quotes*, BRAINYQUOTE, https://www.brainyquote.com/quotes/jane_fonda_468010 (last visited Sept. 17, 2019). Beyond the importance of the family, Etinson in the same article includes these protections for flourishing: “rights to an adequate standard of living, to rest and leisure, education, health care, food, clothing and shelter.” Etinson, *supra*.

Libertarian followers of Aristotle want to make sure that the state does not encroach on personal freedoms or the rights of religious guardians, bodies, or authorities. See, e.g., Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue’s Home in Originalism*, 80 FORDHAM L. REV. 1997, 2000 (2012) (arguing that the concept of virtue makes “originalism . . . more normatively attractive” and gives originalism “greater explanatory power”); Edward W. Younkens, *Aristotle, Human Flourishing and the Limited State*, LE QUÉBÉCOIS LIBRE (Nov. 22, 2003), <http://www.quebecoislibre.org/031122-11.htm>. But see JOHN RAWLS, POLITICAL LIBERALISM 54–58 (expanded ed. 2005) (setting forth a theory of the just society which leaves to each person a choice of

Part II concentrates on the legal and remedial possibilities to protect physical safety and security, food, clothes, health care, and shelter.⁵⁵

A. *Other Considerations of Fundamental Rights*

Confusion reigns about the meaning of equality (which can be applied to legal, social, political, and economic status) as the Declaration of Independence uses the word equal when slaves were still being imported here.⁵⁶ The tug over the definition of equality in the Declaration of Independence and the Fourteenth Amendment sadly continues.⁵⁷ Nevertheless, basic, unstated equality must be embedded in the concept of personal flourishing, unless society is to be divided economically and other ways into the “haves” and the “have nots.”⁵⁸ Therefore, flourishing cannot require the personal wealth of a billionaire or else only the some 2100 people *Forbes* identifies as billionaires could be happy.⁵⁹ On the other hand, a wealth component to flourishing might specify the basic income.⁶⁰ That income would vary, calculated at whatever amount of money keeps body and soul together in the year and specified location in the society in question.⁶¹ The economists would estimate the diminishing returns of the next dollar or unit of currency in the basic income.⁶²

What would equality require under the Fourteenth Amendment if equality were treated in the abstract without individual value judgments? In other words, according to the old saw, if we each did not know our own

substantive philosophical goods).

55. *See infra* Part II.

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

57. Dennis Parker, *The 14th Amendment Was Intended to Achieve Racial Justice—And We Must Keep It That Way*, ACLU (July 9, 2018, 5:45 PM), <https://www.aclu.org/blog/racial-justice/race-and-inequality-education/14th-amendment-was-intended-achieve-racial-justice>.

58. Martha Nussbaum’s list of goods centers on “capabilities” which has an economic caste, like Locke’s theory of work as value: “life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one’s environment.” Ingrid Robeyns, *The Capability Approach*, STAN. ENCYC. OF PHILOSOPHY (Oct. 3, 2016), <https://plato.stanford.edu/entries/capability-approach> (citation omitted). John Finnis has a similar list with the addition of a transcendent connection, something beyond the individual person, including the concept of God. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 388-98 (2d ed. 2011). Not surprisingly, even Blackstone lists in a legal sense his conditions for flourishing. Phillips, *supra* note 48, at 1321 nn.44-45. “Personal security” includes “the right to life and limb, . . . body (freedom from assault), health and reputation.” *Id.* Other rights include personal liberty and private property, as well as less important economic and personal relationships. *Id.*

59. *Billionaires: The Richest People in the World*, FORBES (Mar. 5, 2019), <https://www.forbes.com/billionaires/#522b189c251c>.

60. *See* Brishen Rogers, *Basic Income in a Just Society*, BOS. REV. (May 15, 2017), <http://bostonreview.net/forum/brishen-rogers-basic-income-just-society>.

61. *Id.*

62. *See id.*

place in the Garden of Evil after fruit became a desirable good, what should each person be able to access in order to flourish?⁶³ Several of these would find a place on many people's lists under the aegis of equality: equality of voting rights; equal pay for equal work for all sexes; equality in education with access in school to computers for students in grade and high school; equal access to medical care, however funded, for those who cannot afford it; adherence to the international conventions banning/outlawing torture; applying the Eighth Amendment prohibition against cruel and unusual punishment; and providing greater physical safety for all on United States soil, including prisoners, in a positive way.⁶⁴

Furthermore, public safety for women and minorities, especially police violence against the community the police should be protecting, is often deemed a local matter only.⁶⁵ Therefore, a local matter allows the federal government to escape responsibility for standards themselves or enforcement and money insofar as a local matter does not call for a partnership with, or even comment from, federal government officials in the Department of Justice. Equal safety is a serious issue gun manufacturers will have to confront. We do not as a nation wish to recognize these rights and instead consider these requirements for human

63. Mike Rappaport argues inequality from lack of color-blind eyes, if it in fact exists, may not now be remedied since originalism currently requires color-blindness in accordance with his interpretation. Rappaport, *supra* note 2, at 117-18, 122. On the other hand, a Nobel prize-winning economist gives reasons for working to remedy all kinds of inequality. Robert J. Schiller, *Inequality Today, Catastrophe Tomorrow*, N.Y. TIMES, Aug. 26, 2016, at BU4, <https://www.nytimes.com/2016/08/28/upshot/todays-inequality-could-easily-become-tomorrows-catastrophe.html> (explaining that economic inequality, "already a concern," could become "a nightmare in the decades ahead . . . dire political changes, like the rise of racist or otherwise exclusionary social structures, could have terribly damaging consequences for less privileged people. . . . But even if they are unlikely, as part of our progress to a better world, we should be thinking now of how we might address them.").

64. JEN MANION, LIBERTY'S PRISONERS: CARCERAL CULTURE IN EARLY AMERICA 185-88 (2015) (describing the harsh treatment of poor women, kept in isolation in Eastern State Penitentiary, Philadelphia, due to the fear of established people who felt their control over the police powers was threatened in the face of economic and social volatility during the end of the eighteenth century and into the nineteenth century). The underlying narrative did not lose its essential character with the passage of time. See Michelle Goodwin, *Invisible Women: Mass Incarceration's Forgotten Casualties*, 94 TEX. L. REV. 353, 382-83 (2015). Another list (this time of situations in which judges have ordered, or been asked to order, injunctions) shows the close relationship of remedies to supporting central requirements for human flourishing. Frank H. Easterbrook, *Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103, 103-11 (1991). These norms all involve equality in areas of civil rights: school and housing desegregation, *id.* at 104-06, judicially-imposed school taxes, *id.* at 106-08, quotas in employment, *id.* at 108-09, jail administration involving cruel and unusual punishment, *id.* at 109-10, and judicially directed voting, *id.* at 110-11. For the opposite interpretation from Easterbrook, see Post & Siegel, *supra* note 28, at 3-5 and *passim*.

65. See *infra* Part II.B; see also *infra* note 145 and accompanying text. The same argument as in *United States v. Morrison*, 529 U.S. 598, 609-12 (2000) is used for abstaining from commenting on or investigating police shootings of unarmed citizenry encountered outside their homes.

flourishing merely privileges.⁶⁶ It is as dishonest an approach as the pretense in *Plessy v. Ferguson*⁶⁷ that separate could ever be equal when separation itself signifies inequality.⁶⁸ The Great Recession took ten years to work through. Because we would not spend tax revenues to help Main Street but bailed out only big institutions we, as a society, managed only a partial recovery.⁶⁹

Conservatives are said to believe in “presumed constitutional ideals of limited government, religious devotion^[70] and capitalist enterprise [in addition to] . . . loyalty to the canonical document [presumably the final draft of the Constitution in 1787], to the Framers, or to the very idea of a written constitution.”⁷¹ Their conception of loyalty may not include the claims of families seeking social justice, good schools, access to medical care, safe (possibly including gun-free) environments, clean air, or other fundamental rights for human flourishing, even though human flourishing by its very nature promotes “capitalistic enterprise.”⁷² The financial start-up costs may be considered not to provide an immediate enough return to the society as a whole, though such budgetary provisions will help a whole generation of children to flourish and grow within eighteen years. Then these children can be given a name not like X or Y but instead the flourishing generation. It may be that even *Marbury*’s remedial principles citing Blackstone’s *Commentaries*, and later invocations in cases of Aristotle, Cicero, Coke, and Lord Mansfield, could be deemed part of a disloyal attempt to “impose foreign moods, fads, or fashions on Americans.”⁷³

66. See *supra* notes 24-26 and accompanying text.

67. 163 U.S. 537 (1896).

68. MARK V. TUSHNET, THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925–1950 21–22 (1987); Susan M. Olson, *Interest-Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory*, 52 J. POL. 854, 856 (1990).

69. After the Great Recession (2007–2009), we paid much more attention to research into “economic behavior” after the quite theoretical “efficient capital markets hypothesis” was challenged by Nobel-prize winning behavioral economists making sense of the economic realities of the Recession. GEORGE A. AKERLOF & ROBERT J. SHILLER, PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEIT 23–40, 163–64 (2015); ROBERT J. SHILLER, FINANCE AND THE GOOD SOCIETY 132–33 (2012); RICHARD H. THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS 164–66 (2015).

70. In the conservative credo, religious devotion may or may not include the commandment to love thy neighbor as thyself, and the performance of other public and private good works found in almost all natural religions, revealed religions and philosophies, from the admonition to lead an examined life to the injunction to behave as good stewards and pass on a living earth to the next generation. Barbara J. Elliot, *Conservative Credo*, IMAGINATIVE CONSERVATIVE (Apr. 25, 2013), <https://theimaginativeconservative.org/2013/04/conservative-credo.html>.

71. David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 927 (2016) (referring to Henry Monahan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 377–78, 384, 392–93 (1981)).

72. See Pozen, *supra* note 71, at 927 (making no mention of claims).

73. *Id.* at 928 & n.212 (quoting *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J.,

In other words, some conservatives may not object to humans flourishing, but they do not envision making any contribution to the project of human flourishing as a fundamental right.⁷⁴ They couch this argument in terms of narrowing the scope of the judiciary's role by precluding the courts from recognizing these fundamental rights because such a recognition might function like an insurance policy or guarantee, which would obligate the country.⁷⁵ For the working poor, not yet on the first rung of the ladder leading to flourishing, the budget would provide the basic means to enable flourishing. According to this view, courts are, or should be, deemed impotent as far as recognizing additional constitutional or fundamental rights, fashioning structural injunctions, or otherwise actualizing unrecognized fundamental rights.

B. An Engaged Citizenry Working without Judicial Recourse to Obtain Remedies in an Age of Small Government

Arguing from the position that the Declaration of Independence in 1776 was unaccompanied by intent to free the slaves or empower women, conservatives suggest aspiration inheres in their consideration of basic income.⁷⁶ Conservatives find the proposal risky for the fisc without incentives or prods for those expected to live on a basic income.⁷⁷ Two such examples include an adult daughter caring full-time for a parent to enable the parent to remain at home, or a father retraining for a different type of work and watching the children after school while his wife is at work. We should therefore also seriously look at other bills of rights and constitutions following upon the Universal Declaration of Human Rights (1948) after the Second World War to fill out the picture of serious considerations of fundamental rights,⁷⁸ including the dream of a Republican new deal introduced in this Subpart.⁷⁹ These exemplars include various rights for people in the different roles they fulfill in society beyond the political actor as a voter in elections. Rights of the individual⁸⁰

dissenting)).

74. *Id.* at 928.

75. *See id.*

76. *See supra* notes 56-63 and accompanying text.

77. *See supra* notes 24-25 and accompanying text.

78. *See supra* note 47 and accompanying text.

79. *See infra* note 98.

80. Finn Bowring, *The Individual and Society in Durkheim: Unpicking the Contradictions*, 19 EUR. J. SOC. THEORY 21, 25-26 (2016); Charles E. Marske, *Durkheim's "Cult of the Individual" and the Moral Reconstitution of Society*, 5 SOC. THEORY 1, 10-11 (1987).

as a worker,⁸¹ a person (dignity, education,⁸² medical care), and a family member (the importance and integrity of the family) were recognized in the Declaration of Human Rights⁸³ but were not always updated under equal protection, due process, or privacy clauses in the United States Constitution.⁸⁴ The Universal Declaration of Human Rights⁸⁵ and revised post-World War II national constitutions evidence the need, which is ongoing and dynamic, to recognize and update the canon of fundamental

81. See generally Russell W. Galloway Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121 (1989). Natural rights were overridden for more limited political recognition of these rights, including economic strictures on the bargaining power of the average worker, given vivid expression in *Lochner v. New York*, 198 U.S. 45, 57-58 (1905), which was overruled in part by *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424-25 (1952). Obtaining exemptions from state legislation setting minimum wages and maximum hours was the most important goal of last-century proponents of “liberty of contract.” See RUSSELL W. GALLOWAY, JUSTICE FOR ALL?: THE RICH AND POOR IN SUPREME COURT HISTORY 1790-1990 88-89, 101 (1991). *But cf.* *Bunting v. Oregon*, 243 U.S. 426, 429 (1917) (referring to wage and labor controls as an exclusively economic matter); *Muller v. Oregon*, 208 U.S. 412, 415 (1908) (allowing the restrictions of liberties in certain scenarios). *Lochner* is continuously re-evaluated. See Keith Whittington, *The Troublesome Case of Lochner*, LAW LIBERTY (Mar. 1, 2012), <https://www.lawliberty.org/2012/03/01/keith-whittington-the-troublesome-case-of-lochner> (reviewing DAVID BERNSTEIN, REHABILITATING LOCHNER (2011), and explaining that Justice Holmes dissented on the ground “that the Court had no business evaluating such legislative decisions” as “limiting how many hours bakers could work,” although the Court had “already . . . [decided] cases considering whether legislatures had exceeded the scope of their authority”).

82. Erica L. Green, *Education Dept. Aims for Efficiency by Dismissing Rights Cases*, N.Y. TIMES, Apr. 21, 2018, at A14, <https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html> (describing “an agency’s dwindling role in enforcing civil rights law in schools”). Disabled students who found an advocate were able to file with the Department of Education’s Office for Civil Rights, but practitioners representing colleges and universities did not want those complaints filed. The number of individual cases, they found, prevented them from making policies to deal with the disabled students, despite Congressional allocation of an additional \$8.5 million in funding for the Office of Civil Rights to process the cases more efficiently. *Id.* Secretary of Education, Betsy DeVos, cut more than 500 cases and “has already rescinded guidances meant to protect students.” *Id.* The head of the Office for Civil Rights under the previous administration averred that there is no “limitation on justice. . . . To say you’ve reached your quota is to say that there’s somehow a cap on the number of children who might be harmed.” *Id.*; see also Erica L. Green, *Education Dept. Is Sued Over Ability to Dismiss Complaints*, N.Y. TIMES, June 1, 2018, at A15, <https://www.nytimes.com/2018/05/31/us/politics/devos-education-civil-rights-lawsuit.html> (following up on the situation).

83. G.A. Res. 217 (III) A art. 8, Universal Declaration of Human Rights (Dec. 10, 1948).

84. U.S. CONST. amends. I, V, XIV.

85. Article 8 of the Universal Declaration recognizes that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him[her] by the constitution or by law.” G.A. Res. 217 (III) A, *supra* note 83, at art. 8. The EU’s Charter of Fundamental Rights (“CFR” or “UCFR”) tracks this provision in article 47. See Chantal Mak, *Rights and Remedies: Article 47 UCFR and Effective Judicial Protection in European Private Law Matters*, in CONSTITUTIONALIZATION OF EUROPEAN PRIVATE LAW 236, 238-39 (Hans-W. Micklitz ed. 2014). The European Agency for Fundamental Rights, which can be found at <https://fra.europa.eu/en>, is an information-gathering agency which tracks human rights violations or progress. See *supra* note 47.

human rights in the United States of America.⁸⁶ Generations of political philosophers, steeped in Aristotle and medieval philosophical development of Aristotelian principles, described the purpose of reason as discovering and maintaining the law, bound by the “consent of our ancestors” and buoyed by the workable compromises within the contemporary society.⁸⁷ The accompanying need for dynamic reform (lest entropy set in, as a more recent generation might say) was also recognized.⁸⁸ Opponents with a stake in the current, shaky resolution wish to restrict the concept of reform to the laws of thermodynamics, but society, politics, and the universe itself, operating in accordance with law, required repair even before the American Revolution and at various earlier points in time.⁸⁹ To bring the principle of reform and renewal back to reality despite enormous resistance and neglect, any homeowner will sadly echo the need for repair and maintenance, to avoid rot from within for government and society, as much as for its physical buildings.

Peaceful demonstrations and marches have over the last half-century (and longer) focused on the central issues politicians have failed to solve. In other words, the legislature does not amend its agenda to include strong desires of voters without voices that count. Instead, Congress composes its “to-do list” in accordance with the desires of lobbyists who contribute

86. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 196-98*, 207-11 (2010) (tracing over the last half century the notion of individual self-determination no longer moored to any particular state or type of government). Those developments left some problems because activists “seek remedies for indigence without challenging wealth.” SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* 120 (2018).

87. See *supra* notes 52-54 and accompanying text.

88. C.M.A. Mc Cauliff, *Law as a Principle of Reform: Reflections from Sixteenth-Century England*, 40 *RUTGERS L. REV.* 429, 443-48 (1988) (discussing RICHARD HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY* (A. McGrade & B. Vickers eds. abr. 1975)); see also JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 192-94* (1978); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 107 (1991). See generally GERHARDT LADNER, *THE IDEA OF REFORM: ITS IMPACT ON CHRISTIAN THOUGHT AND ACTION IN THE AGE OF THE FATHERS* (1959) (discussing the idea of reform in early Christian history).

89. Reform and renewal, even when urgently embraced from time to time, occur ever so slowly over the millennia. Several corollary factors, including greater orientation to rational problem solving, improved treatment of children subject to less violence from the average disciplinarian, the growing reliance on trade over war as a means of international engagement and the greater influence of women, are operating at different times and with different emphases. STEPHEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 168-69 (2011). Nevertheless, our approach to meeting the needs of children in America must drastically change for the future of the children and the United States. See generally IRWIN REDLENER, *THE FUTURE OF US: WHAT THE DREAMS OF CHILDREN MEAN FOR TWENTY-FIRST CENTURY AMERICA* (2017) (showing how larger policy issues hinder us from effectively eliminating childhood poverty, leading to continuing and persistent deprivation, with rippling harmful effects on the health, prosperity, and creativity of the adults these deprived children become).

to re-election campaigns.⁹⁰ It continues to ignore the demonstrable desires of large portions of the citizenry and thus “the role of social movements in shaping constitutional meaning [must be discussed] in a different framework” due in part to political voices expressed with First Amendment-protected dollars, as embraced in *Citizens United*.⁹¹

Currently, the marching of the important group Black Lives Matter has drawn attention to the killings of hundreds of mostly young black men at the hands of police officers who feared, rationally or irrationally, that the people they saw and sometimes thought they were searching for might be armed.⁹² Deferred Action for Childhood Arrivals (“DACA”) children (registered by June 15, 2007, and before) have marched against the chaos and volatility in their educational and working lives caused by various legal reversals in their status.⁹³ Temporary relief from deportation of DACA children has figured as part of the President Trump’s offer in return for funding for a southern border.⁹⁴ Since 2017, continuing disrespect for women before and after the failure of the ERA has led women to march. Women and their families march to have and enjoy their personal and professional rights, in short, to be taken seriously as persons.⁹⁵ Similarly, students in 2018 have been marching against gun

90. Russell Berman, *An Exodus from Congress Tests the Lure of Lobbying*, ATLANTIC MONTHLY (May 1, 2018), <https://www.theatlantic.com/politics/archive/2018/05/lobbying-the-job-of-choice-for-retired-members-of-congress/558851>.

91. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 302-04 (2001). Whether or not the activities of a social movement amount to lawmaking, Siegel locates social movements in a framework of constitutional culture, that is, “the network of understandings and practices that structure our constitutional tradition, including those that shape law but would not be recognized as ‘lawmaking’ according to the legal system’s own formal criteria.” Siegel, *supra* at 302-04.

92. Cases of excessive force and killing of sometimes unarmed civilians occur every day but often the police officer is not held accountable, and police departments are not challenged to develop training programs about and principles for guarding against using excessive and even lethal force against residents in the precinct the police are charged with protecting. Dissenting from a *per curiam* opinion in *Kisela v. Hughes*, 128 S. Ct. 1148, 1162 (2018), Justice Sotomayor (joined by Justice Ginsburg) said the majority “transforms the doctrine [of qualified immunity for police officers] into an absolute shield for law enforcement officers.” See also Adam Liptak, *Supreme Court Sides with Police Officer Accused of Using Excessive Force*, N.Y. TIMES, Apr. 3, 2018, at A15, <https://www.nytimes.com/2018/04/02/us/politics/supreme-court-rules-for-police-officer-in-excessive-force-case.html>.

93. Cheyenne Haslett, *Dreamers Protest on Capitol Hill on DACA Deadline Day*, ABC (Mar. 5, 2018, 7:16 PM), <https://abcnews.go.com/Politics/dreamers-protest-capitol-hill-daca-deadline-day/story?id=53539262>.

94. Dara Lind & Li Zhou, *Here’s Trump’s Latest Offer to End the Shutdown—And Why Democrats Aren’t Interested*, VOX (Jan. 19, 2019, 3:53 PM), <https://www.vox.com/2019/1/19/18189549/trump-shutdown-announcement-deal-daca-democrats>.

95. Charlotte Alter, *‘It’s a Women’s Wave Coming.’ The Women’s March is Turning into a True Political Force*, TIME (Jan. 21, 2018), <http://www.time.com/5111480/womens-march>.

violence and crime to promote school safety and save lives.⁹⁶ Grassroots human rights activists “understand that enforcement of rights—including economic, social and cultural rights—is an inherently political fight. And they are stepping into the ring.”⁹⁷ Pre-natal and maternal medical care and continued medical care, as well as dental care for people in poor areas, are ever more necessary where Medicaid is disfavored in states with pockets of well-to-do taxpayers but even larger surrounding rural⁹⁸ or urban populations without the means to access the health care delivery system.⁹⁹

This situation reflects a basic inability, or refusal, to respond to loudly voiced democratic preferences, nevertheless rendered voiceless amid the wash of campaign dollars approved instead in *Citizens United* as having a politically recognized voice with a claim or call.¹⁰⁰ While protests and demonstrations form part of the First Amendment landscape, these protests are a cry for redress. In a democracy, should a jobs march for poor people in August 1968 still have to be followed up with a jobs

96. Charlotte Alter, *The School Shooting Generation Has Had Enough*, TIME (Mar. 22, 2018), <http://time.com/longform/never-again-movement> (discussing the large Washington, D.C. March for Our Lives, organized by the surviving students of the 2018 Parkland school shooting). These students, some from hunting families, are well aware of the Second Amendment and do not wish to prohibit private ownership of guns. Jack Healy, *Gun Country Backlash When Rural Students Speak Out for Limits*, N.Y. TIMES, May 23, 2018, at A13, <https://www.nytimes.com/2018/05/22/us/marshall-county-kentucky-student-gun-protests.html> (reporting on the backlash against those teens who confronted the NRA about gun safety, not suggesting a ban, in rural Kentucky after a fatal shooting at their high school); ‘*We Deserve to Live Without Fear*’, N.Y. TIMES, Apr. 21, 2018, at A10, <https://www.nytimes.com/2018/04/20/us/school-walkout-students.html> (interviews with students across the country marching on the nineteenth anniversary of Columbine).

97. Elisa Massimino, Letter to the Editor, ‘*The New American Human Rights Movement*’, N.Y. TIMES, Apr. 30, 2018, at A20, <https://www.nytimes.com/2018/04/29/opinion/human-rights.html> (explaining the political momentum the Dreamers, Black Lives Matter, #MeToo, the Parkland, Florida students and Vets for American Ideals are gaining).

98. “The impact of these problems [which need Medicaid to address and help solve them] is greatest in the ‘left-behind’ rural and nonurban areas that overwhelmingly vote Republican.” Geoffrey Kabaservice, Opinion, *The Dream of a Republican New Deal*, N.Y. TIMES, Apr. 15, 2018, at 3, <https://www.nytimes.com/2018/04/13/opinion/sunday/trump-republican-new-deal.html>. Kansas reflects the Republican journey “of curbing the radicalism in their ranks.” *Id.* Senator Sam Brownback later became Governor of Kansas. Governor Brownback’s

[R]eckless tax cuts led to economic stagnation; a collapse in state revenues; and hugely unpopular cutbacks in public services that damaged not just schools but also hospitals, highways, law enforcement agencies, programs for the disabled and children in foster care. In 2016, moderate Republicans replaced dozens of Mr. Brownback’s conservative allies in the Kansas Legislature and, a year later, voted to restore state revenues over his veto.

Id.

99. See ANGUS S. DEATON, HEALTH, WEALTH, AND THE ORIGINS OF INEQUALITY 144-47 (2013); see also KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 203-05 (2017) (discussing the legalization of a demeaning attitude toward poor women’s reproductive health and rights by equating poverty with immorality since women with some means can avoid governmental intrusion and arguing that change will only come with our greater understanding of the causes of poverty).

100. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 344 (2010); ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 40-42 (2014).

march in 2018, not only celebrating the fifty-year anniversary of a bold concept but also still seeking the same result—decent jobs? “[T]hose who battled for rights, for recognition, and for inclusion throughout our history most often chose the path of the law. They chose litigation. They chose legislation. They loved the law when the law did not love them back.”¹⁰¹ In that sense, we have not been able to guarantee human flourishing without the assistance of the courts in recognizing the violation of fundamental rights and its remediation.¹⁰²

If it is not the courts’ job to guarantee these rights mentioned as a major judicial function in *Marbury* in reliance on Blackstone,¹⁰³ we can see one reason we do not yet have a recognized right to a job, even aspirationally. An engaged citizenry should be capable of securing positive change through such political means as demonstrations and directly through elections, with those same views reflected in political surveys of large numbers of the population. Unfortunately, DACA children, some 200,000 survivors of school shootings since Columbine, and people waiting for Medicaid are still plaintively crying out for the relief they seek.¹⁰⁴ A combination of stubborn disregard of the peoples’ wishes and the unlimited lobbying efforts made ever clearer after *Citizens United* by the few with politically-enabled and dollar-supported First Amendment voices renders life much harder than it needs to be or should be. People are painfully reminded that the rights they seek are deemed privileges by those who can buy these privileged goods, including food, housing, and education. Life, even with conditions for flourishing in place, is a challenging but draining struggle in all too many situations for the working poor and many in less precarious economic situations. Boot camp should not be one of the homeless soldiers’ most pleasant and secure periods in his life and memory.

One very telling area, because it is so visible and so predominant in many areas of the country, is the escalating failure after the Great Recession to provide for the future of the nation’s children. Deliberate

101. Elizabeth J. Cabraser, Address at the American Law Institute 95th Annual Meeting (May 22, 2018), <https://www.ali.org/annual-meeting-2018/speaker-videos>.

102. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding the right to privacy as a constitutionally protected right).

103. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

104. See John Woodrow Cox, ‘Please Keep Kids Safe from Guns’: How Trump Replied to a 7-Year-Old’s Anguished Letter, WASH. POST (Feb. 4, 2018), https://www.washingtonpost.com/local/please-keep-kids-safe-from-guns-how-trump-replied-to-a-7-year-olds-anguishedletter/2018/02/04/5b8d9f9a-079b-11e8-8777-2a059f168dd2_story.html?utm_term=.73942cf63c1c (“Townville’s kids joined a group that now includes more than 150,000 students, attending at least 170 primary or secondary schools, who have experienced a shooting on campus since the Columbine High School massacre in 1999.”).

neglect of the physical upkeep of the schools and every other supply that should go into a school as well as failing to recruit the best teachers, offering salaries only acceptable to non-credentialed apprentices, are conditions found all too frequently.¹⁰⁵ The children, after all, have had no more voice in the conditions and circumstances of their daily lives at school than they did for their physical security after Newtown.¹⁰⁶ In the area of education, teachers in West Virginia, struggling like the families of the students they serve, to make a decent living were told that the State could not find the money for a pay raise.¹⁰⁷ West Virginia, like Oklahoma and many other states, skimmed on education without appropriate money for the purchase of replacement textbooks, for old and worn-out copies, or even repairing schools.¹⁰⁸ The teachers struck in each and every one of the fifty-five counties in West Virginia but made a provision to leave hot lunches for the students, although the schools were closed.¹⁰⁹ Much confusion about the facts arises from different versions of what the state

105. See DANA GOLDSTEIN, *THE TEACHER WARS: A HISTORY OF AMERICA'S MOST EMBATTLED PROFESSION* 203, 255 (2015). "When the modern teachers' union movement began in Chicago in 1897, it was an explicitly feminist movement with close ties to the suffragists. Teachers are relatively underpaid compared with other skilled workers because they historically have been women." Dana Goldstein, *Protests Spread, as Teachers Press for Better Pay and More Funding*, N.Y. TIMES, Apr. 4, 2018, at A16, <https://www.nytimes.com/2018/04/03/us/teacher-walkouts-strikes.html>. In Wisconsin, in 2011, Gov. Scott Walker rolled back collective bargaining and cut pensions for teachers and other public employees. *Id.*

106. James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES, Dec. 14, 2012, at A1, <https://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html>.

107. Paul Kehler, *With Acrimony—And Teachers Watching—Senate Advances 1 Percent Raise*, CHARLESTON GAZETTE-MAIL (Feb. 2, 2018), https://www.wvgazette.com/news/politics/with-acrimony---and-teachers-watching--/article_22099053-59ac-5ac6-b323-a7b6a0f454e0.html.

108. See *id.* To hire teachers at low salaries, standards had been lowered. The West Virginia Senate offered an annual increase of \$404.00 for each of four years (deemed an insult) and at the same time nevertheless planned to cut business inventory taxes by \$140 million a year. *Id.* Teachers asked the State Senate to reset its priorities. *Id.* No unions were involved in West Virginia. One commentator suggests that in a state allowing unions, the teachers seek power: "For teachers, reducing the size of each class means fewer children to mind and assignments to grade. For unions, it means more jobs for dues paying teachers . . . to spend lobbying politicians . . ." Jason L. Riley, Opinion, *Teachers Unions Don't Really Strike for 'the Kids'*, WALL STREET J., Jan. 23, 2019, at A15, <https://www.wsj.com/articles/teachers-unions-dont-really-strike-for-the-kids-11548201544>.

109. See Dana Goldstein, *Fed Up, Teachers in Oklahoma May Walk Next*, N.Y. TIMES, Mar. 21, 2018, at A1, <https://www.nytimes.com/2018/03/20/us/oklahoma-teachers-strike.html> (explaining the teachers had not had a raise in ten years, and face austere conditions similar to those teachers face in Arizona, Kentucky, Mississippi, and South Dakota). Licensed teachers do not apply to teach for \$45,000 per year in Tulsa (which uses emergency certifications to employ apprentices). *Id.* Moderate Republican Earl Sears, Chair of the Oklahoma House Appropriations Committee, accused Democrats of opposing increased taxes on the new wind industry instead of seeking increases on the established lobbying industries of oil and gas because "[t]hey really don't want to give the Republican Party a victory." *Id.*

was prepared to do.¹¹⁰ At one point the Senate's president seems to have offered either adjustments in insurance costs shifted to teachers over the years or pay raises but not both.¹¹¹ Conservative and Republican teachers felt forced to go on strike but seem otherwise not to have altered their views.¹¹² The teachers found the strike necessary to remedy the democratic deficit which arose from the state's gross failure to maintain its school system, preferring instead an extremely severe decline maintaining the school system's human and physical assets.¹¹³

James Q. Wilson and George L. Kelling warned of the danger of leaving broken windows unrepaired in poor communities.¹¹⁴ More than physical harm follows because the message sent is in fact that a breakdown in doing the right thing, a moral failure to uphold standards and norms, has occurred, thereby signaling to petty and hardened criminals that they are free to act without fear of reprisal.¹¹⁵ Teachers,¹¹⁶

110. See Jess Bidgood, *West Virginia's Teachers Get Pay Raise to End Statewide Strike*, N.Y. TIMES, Mar. 7, 2018, at A15, <https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html>.

111. *Id.*

112. "The white working class clearly wants to protect and build upon the public sector, not destroy it." Kabaservice, *supra* note 98.

113. See Dana Goldstein & Elizabeth Dias, *Protest in Oklahoma Ends, but Without Adding to Modest Gains in Funding*, N.Y. TIMES, Apr. 13, 2018, at A13, <https://www.nytimes.com/2018/04/12/us/oklahoma-teachers-strike.html>. Teachers asked for the repeal of an exemption on capital gains for wealthy taxpayers, but the state government refused, preferring to have average residents pay many new taxes, including gambling and gaming taxes and increased cigarette and sales taxes. *Id.* During the last decade, both personal income taxes and public service cuts declined drastically in tandem. *Id.* The state income tax was cut by \$1 billion since the Great Recession. *Id.* The Oklahoma Oil & Gas Association is being made to bear some of the burden but hopes to win a reprieve by introducing "a ballot referendum to reverse the increase in [oil and gas] production taxes," still among the lower state taxes on oil and gas in the region. *Id.*

114. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31-32, <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465>. Many follow-ups and criticism tested this hypothesis in all directions. See, e.g., MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 141-43 (2000).

115. The commodification of society as market democracy and the seeming neutrality of the market versus the hidden consequences of marketing everything, much as the broken windows speak subliminally to criminals, has attracted commentary from contrasting schools of thought. See, e.g., MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* 48-50 (2012) (arguing that we deliberately choose to ignore the consequences of behaving as though everything is for sale, leading to unfairness and the trashing of values in education, nature, health, and treatment of life itself, thereby increasing the democratic deficit). But see JOHN TOMASI, *FREE MARKET FAIRNESS* 130-31, 159-60 (2012) (denying that he must choose between Hayek and Rawlsian justice by looking for market democracy which protects the Lockean version of happiness (property) and a fair distribution of opportunities).

116. Despite watching the determination of the teachers in West Virginia strike in the face of a legislature equally opposed to reducing business tax cuts but willing to ignore educational needs of all kinds for the public-school system, Oklahoma was unprepared for the teachers' strike on Monday, Apr. 2, 2018. See Michelle Hackman, *Teachers in Oklahoma Continue Walkout*, WALL STREET J.,

making the case for the educational requirements of the children and the necessity of pay increases for teachers' aides, guidance counselors, and nurses, as well as for their own salaries, derived some sympathy from public opinion due to the marches and vigils of the high school students (educated by teachers, some of whom died with the students in the attack) over assault-style weapons and their functional equivalents in long guns that are easily convertible to assault-style weapons.¹¹⁷ Public school education, therefore, became a major issue in several "red (most conservative) states" where extreme tax cuts had been given to businesses and wealthy individuals over the last decade.¹¹⁸ These out-sized tax cuts in several Southern, North Central, and Western states funded corresponding cuts to every kind of public school equipment from desks to air conditioning (with ninety-degree temperatures in classrooms without drinking water for children): If children are sent to school, "then we should be held accountable for keeping them safe there."¹¹⁹

The "small government" agenda in Kansas, Oklahoma, West Virginia, Kentucky, and other states extends beyond education, despite parents who "care about their kids. They care about their futures," even including medical care, cut "to the detriment of our schools and hospitals and services to people" in Oklahoma.¹²⁰ To keep tax cuts in place, the Oklahoma Building Code Commission in 2017 "removed the requirement

Apr. 4, 2018, at A3, <https://www.wsj.com/articles/oklahoma-teachers-continue-walkout-1522795680>; see also Rivka Galchen, *The Teaching Moment: How an Educators' Strike Reinvigorated Local Politics*, NEW YORKER, June 4 & 11, 2018, at 38, 43 (pointing out that the end of the strike coincided with candidate filing deadlines).

117. See Dana Goldstein & Ben Casselman, *Teachers Find Support as Campaign for Higher Salaries Goes to Voters*, N.Y. TIMES, June 1, 2018, at A13, <https://www.nytimes.com/2018/05/31/us/politics/teachers-campaign.html>.

118. Dana Goldstein & Alexander Burns, *Teacher Walkouts Threaten Republicans' Grip on Red States*, N.Y. TIMES, Apr. 13, 2018, at A13, <https://www.nytimes.com/2018/04/12/us/teacher-walkouts-threaten-republican-grip-on-conservative-states.html>.

119. Tim Goral, *How Schools Fail at Keeping Children Safe*, DIST. ADMIN. (June 25, 2018), <https://districtadministration.com/how-schools-fail-at-keeping-children-safe>; Lori Peek, Opinion, *Our Deathtrap Schools*, N.Y. TIMES, April 7, 2018, at 7, <https://www.nytimes.com/2018/04/07/opinion/sunday/americas-deathtrap-schools.html> (describing crumbling schools, schools lacking tornado shelters in tornado alley, and schools not built to earthquake standards in Utah); see also Goldstein & Casselman, *supra* note 117 (reporting that Americans, in a recent survey, by a wide margin and across party lines, said they would favor increasing teachers' salaries even if it meant raising taxes); Noam Scheiber, *Can Weak Unions Get Teachers More Money?*, N.Y. TIMES, May 6, 2018, at 3, <https://www.nytimes.com/2018/05/05/sunday-review/unions-teachers-money-strike.html> (explaining that weak unions in states in the South and West are not able to effectuate a significant investment in public schools, as some of the prolonged lengths of the strikes demonstrate). See generally Jaime Lowe, *The Second Shift: What Teachers Do to Pay Their Bills*, N.Y. TIMES MAG., Sept. 9, 2018, at 46 (reporting the decisions teachers must make in order to survive).

120. Goldstein & Burns, *supra* note 118.

that new schools” include a tornado shelter.¹²¹ Fiscal restraint in these states extends to pensions (or lack of pension funding) for state workers, changing to a 401(k) account.¹²² The leader of the Senate in Kentucky believes in the popularity of Republican budget-slashing measures.¹²³ But teachers in Kentucky with different views are planning to run for state legislative seats, and perhaps conditions must become intolerable to motivate every-day citizens to participate in government.¹²⁴ They clearly see government-provided safety for children in schools (whether safety from guns or from freezing in cold schools without heat) as compatible with their own conservative principles.¹²⁵

Young activists’ pleas for safe schools arise from their own experience of witnessing the terrorist’s (whether a former student or a foreigner commits these atrocities, the terror experienced is the same) wanton taking of already-born lives in schools, at concerts, and in soft-crowd targets at popular gathering spaces, and the failure of adults to restrict access to assault weapons.¹²⁶ This virtually unrestricted access to assault weapons, for those who wish to obtain them, leaves the children and, indeed, the rest of society, without access to legal remedies for the harms done physically to a few, as far as percentages are concerned, but psychologically to an entire generation. We watch the young people, in favor of life and the common good, striving to overcome the self-interest

121. Peek, *supra* note 119. The Oklahoma legislature was not only angered by the strike but refused to pass further sources of revenue. Michelle Hackman, *Oklahoma Teachers to End Their Nine-Day Walkout*, WALL STREET J., Apr. 13, 2018, at A3, <https://www.wsj.com/articles/oklahoma-teachers-declare-end-to-nine-day-strike-1523576962>. One legislator went on Facebook to complain about teachers’ “stinking” behavior. *Id.*

122. Goldstein & Burns, *supra* note 118.

123. *Id.*; see also Dana Goldstein, *In Protest of Low Pay, Educators in Arizona Threaten to Walk Out*, N.Y. TIMES, Apr. 21, 2018, at A15, <https://www.nytimes.com/2018/04/20/us/arizona-teacher-walkout.html> (reporting that Arizona has cut about \$1 billion from its education budget since 2008); Dale Russakoff, *The Teachers’ Movement: Arizona Educators Were Shocked When Lawmakers Decimated Their Budgets. Then They Got Angry.*, N.Y. TIMES MAG., Sept. 9, 2018, at 54, 58. Senator Thayer acknowledges that “the hate-filled rhetoric on social media” might pressure some legislators but that overall, Republican measures are popular. Goldstein & Burns, *supra* note 118. “I believe there is a huge, silent majority out there, who are shaking their heads ‘yes’ at what Republicans are doing right now. . . . Frankly, I don’t think this will be a negative, in terms of this fall’s campaign.” *Id.*

124. Goldstein & Burns, *supra* note 118. Nevertheless, many of these teachers are Republicans and otherwise fiscally conservative, with some nonpartisan positions, thinking about safety for the school children rather than denying any political official a “victory.” See Goldstein, *Protests Spread, as Teachers Press for Better Pay and More Funding*, *supra* note 105.

125. “Revenue draining cuts inevitably starve the public services that the aging and economically insecure white working class increasingly depends on. Popular support for the teachers’ strikes in Arizona, Kentucky, Oklahoma and West Virginia in recent weeks indicates that even solidly Republican states are turning against this kind of anti-government economic doctrine.” Kabaservice, *supra* note 98.

126. Healy, *supra* note 96.

of adults who care nothing for the next generation. Their hardened, vested interests allow the children's pleas in the March 2018 rallies against gun violence to fall on deaf ears.

One major difficulty to overcome in a focus on remedies is that the remedies themselves become a proxy war for whether the equal rights should in fact exist, either to remedy the effects of past wrongs or, more radically, even to remedy ongoing wrongs. Judge Frank Easterbrook has stated the problem in somewhat benign terms: An objection to a remedy "is almost always a disguised objection" to the claimed right, and therefore, to select a remedy "we must examine our understanding of rights."¹²⁷ But Judge Easterbrook makes an even more important point, although he says that it is not the "purpose" for his writing, that neutral principles may not be able to be restored, if we attempt for any length of time to remedy past (and by implicit definition since they have not been remedied, therefore ongoing) harms.¹²⁸

The implications of Easterbrook's observations need to be explored. Although not cast in terms of fear, "we'll never be able to go back to 'life' as we (our group) enjoyed it"; if we remedy past harms, the situation and rejection of solutions may be read that way.¹²⁹ Persons previously harmed, once compensated, will assume a different (more equal) status in society. Those who feel comfortable with, profit from, or accept not fixing a harm because of the fear that we can never go back are willing to see the unequal continue to suffer in order to alleviate their own fears of a permanent change in society. Any woman seeking but not receiving equal pay in the workplace or not seeing a critical mass of women promoted to middle and upper management is familiar with that same fear (which is at the root of any inequality) in their male colleagues.

The ERA was not passed because our society was, and remains, unready to accept that equality.¹³⁰ As some feared and others hoped, economic independence of women would lead them to run their own lives and challenge the old statutes. One reason not to pass the ERA may be disagreement with, and fear of, what women might do in accordance with their new-found freedom after *Roe v. Wade*.¹³¹ Instead, the fear itself is

127. Easterbrook, *supra* note 64, at 103; *see also* Rappaport, *supra* note 2, at 116. *But see* Post & Siegel, *supra* note 28, *passim*.

128. Easterbrook, *supra* note 64, at 104.

129. *Id.*

130. Thomas I. Emerson et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *YALE L.J.* 871, 872 (1971) (explaining that "American society has always confined women to a different and, by most standards, inferior status"); Claire Kilpatrick, *Gender Equality: A Fundamental Dialogue*, in *LABOUR LAW IN THE COURTS: NATIONAL JUDGES AND THE EUROPEAN COURT OF JUSTICE* 31 (Silvana Sciarra ed., 2001).

131. 410 U.S. 113 (1973); Pozen, *supra* note 71, at 950 (citing Reva B. Siegel, *Constitutional*

disguised as a neutral principle, color-blindness in housing, schools, and work, or gender-blindness in finding the “most (more?) qualified” candidate for the job. That implication of lack of qualification in a pool of workers, male and female, is irrational because it is a fear and not an accurate depiction of how many men and how few women are qualified to fill the position. The expressed fear, nonetheless, allows the unequal condition to continue un-remedied because if not enough women are qualified, no right is infringed.¹³² It is hard for society even to admit that these concerns express fears rather than adherence to fair or neutral principles, let alone to address the possible remedies. Those who worked hard over the generations to obtain the dignity and other rights of the ERA may argue that the precious few results achieved demonstrate liberalism has failed.¹³³ Many of the first proponents of the ERA have lived and died without its benefits since its proposal in 1971. By 1971, thirty-five states had ratified the ERA when “extensive conservative opposition arose.”¹³⁴ Does the “dismal record” of failure in seeking various kinds of constitutional relief mean that we should give up on the Constitution and return to an earlier yesteryear?

The main thrust of Part II is the argument that struggling people, symbolized by the striking teachers, have literally too hard a row to hoe.¹³⁵ But the conclusion is that constitutional (and other) remedies are not ameliorating those conditions with due deliberate speed, and probably never did in any age since indebted plantation owners wanted cheap money.¹³⁶ Sufficient food and other basic rights are not recognized in the

Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 CALIF. L. REV. 1323, 1394-98 (2006)). The suspicion is that the seemingly innocent women looking for job equality, which would have been threatening enough during the Arab oil crisis of 1973, extended also to women’s desires to control their own bodies. Today, women and men have pressed on. Matthew Haag, *One More State to Go, to Approve the E.R.A.*, N.Y. TIMES, June 1, 2018, at A17, <https://www.nytimes.com/2018/05/31/us/equal-rights-amendment-illinois.html> (noting the inspiration for women comes from the fact that the Twenty-Seventh Amendment, providing salary increases for Congress go into effect only in the term after approval, was proposed by James Madison in 1791 and received its thirty-eighth state ratification in May 1992).

132. Easterbrook, *supra* note 64, at 104 (citing Jennifer Roback as discussing flaws in public choice which prevent us from returning to neutral principles once we depart from them to remedy a harm); *see also* Rappaport, *supra* note 2, at 115 (applying the same reasoning to racial discrimination). Finally, the claims that not enough women have been trained to provide an applicant pool for a position in middle or higher management is a frequent fear. *See* Catherine M.A. Mc Cauliff & Catherine A. Savio, *Gender Considerations of the Boards of European Companies: Lesson for US Corporations or Cautionary Tale?*, 16 GEO. J. GENDER & L. 505, 510-12 (2015).

133. Editorial, *The Equal Rights Amendment Returns*, N.Y. TIMES, Apr. 20, 2018, at A30, <https://www.nytimes.com/2018/04/19/opinion/a-rebuke-to-trump-a-century-in-the-making.html>.

134. *Id.*

135. Angus Deaton, *What Do Self-Reports of Wellbeing Say about Life-Cycle Theory and Policy?*, 158 J. PUB. ECON. 18, 24 (2018); *see supra* Part II.

136. *See infra* Part III.

Constitution.¹³⁷ The poor have few advocates in the mainstream of society, or Angus Deaton's Nobel Prize-winning work would not be a revolutionary discovery.¹³⁸ Even worse, the legal aid societies and law school clinics can barely touch the genuine legal needs of people struggling with food insufficiency before they can hope to flourish. The constitutional route to securing rights provides the strongest protection for the rights in question but efforts are likely to fall short in the foreseeable future of the current generation of children in elementary and high school because the recognition of constitutional rights "grinds exceeding[ly] slow," as the state of the ERA shows.¹³⁹ The strength of constitutionalizing rights is not only the quality of the protection itself but also relief from the necessity of having to prove the right itself again and again under a statute, through a restitutionary principle or at common law. The failure of the ERA makes this point clear. Would the #MeToo movement have arrived earlier if we had passed the ERA? Would the struggle have been easier or less protracted?

Women would be much further ahead with constitutional protection of their rights, even if that extra measure of protection came only from the public's knowledge that this right is serious. But the country is unwilling fully and wholeheartedly to support women then and now, as *Morrison*, the necessity for the #MeToo Movement, and sex discrimination cases, too numerous to contemplate, demonstrate.¹⁴⁰ Women, therefore, must

137. A young teacher in Tulsa described trying to feed three young children and support her husband, a veteran in school, on \$2,200 a month in take-home pay. Goldstein, *supra* note 109.

138. Many cases from the early Rehnquist Court set us on this pathway. *See, e.g.,* Patterson v. McLean Credit Union, 491 U.S. 164, 176-78 (1989) (holding that the Civil Rights Act of 1866 does not create a cause of action for racial harassment of employees); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 659 (1989) (disabling disparate impact by shifting the burden of persuasion on business necessity to the employees); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507-08 (1989) (striking down the City of Richmond's affirmative action program setting aside thirty percent of public works construction dollars for minority businesses, saying the program could not survive strict scrutiny); GALLOWAY, *supra* note 81, at 177-78; *see also* DEATON, *supra* note 99, at 305-06 (discussing the popular view of poverty at the time).

139. "Originalism is no anodyne doctrine, nor simply a matter of interpretation. [Originalism] turns a document with a potential for justice [such as the Constitution] into a dead, and deadly, letter." *See* Cabraser, *supra* note 101 (writing about her Address).

140. *See* *United States v. Morrison*, 529 U.S. 598, 627 (2000) ("If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States."); *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896) ("Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. . . . If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."). Despite the disgraceful approach in *Plessy*, Virginia continued not to allow its female residents into the state military academy. *See* *United States v. Virginia*, 518 U.S. 515, 520-22 (1996) (noting that the Virginia Military Institute ("VMI") only accepted male students

struggle much harder than they should have to do in order to remediate their situations. The difficulties are definitely much greater than if constitutional protection had been forthcoming in the form of the ERA. The same is true for access to medical care and education, shunted aside by state governments which reward lobbyists rather than voters. The symbol of change is the defeat of conservative budgets in Brownback dominated Kansas.¹⁴¹

The claims must be pursued anew in many different ways: under statutory provisions, at common law, and for lesser remedies. For some people, as with the victim in *Morrison*, justice may never be done and may be botched, even for the attackers.¹⁴² Most originalists do not believe that the Fourteenth Amendment protects against discrimination on the basis of sex because the Amendment was not adopted with that type of discrimination in mind.¹⁴³ Therefore under originalism, women are only protected constitutionally in regard to their voting rights, which is all the Nineteenth Amendment gave them, leaving most non-originalists to conclude that the ERA is still necessary.¹⁴⁴ The dismay, or perhaps

throughout its 157-year history). It took a lawsuit a century after *Plessy* to overturn the single-sex academy. *Id.* at 558 (“There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the ‘more perfect Union.’”); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 100-01 (2011) (describing how “Justice Ginsburg and the majority’s assessment of the facts [in *United States v. Virginia*] has been vindicated.”). If we had had the ERA, the Commonwealth of Virginia would not have been able to restrict admission to the state military academy to males. The importance of equality between the sexes is still downplayed and the ERA would be able to help ameliorate the discrimination. Is the glass half-full because near the end of the twentieth century, the Supreme Court recognized equality in education for all? Or is it half-empty because having the vote since 1919 was not strong enough to overturn separate but equal for women? See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476-78 (2001). But contrast an arguably more convincing position in Siegel, *supra* note 91, at 298-99 (demonstrating that the text of the Constitution “plays a more significant role in our constitutional tradition than Strauss contends”).

141. The same is true for access to medical care and education, shunted aside by state governments which often reward lobbyists rather than voters. The symbol of change is the defeat of conservative budgets in Brownback-dominated Kansas. Kabaservice, *supra* note 98. Brownback’s legislative director in the Senate was Paul Ryan, “the Republican Party’s most prominent cheerleader for the Ayn Rand-inspired idea that society’s ‘makers’ should be lavished with tax cuts while its ‘takers’ should be deprived of a social safety net.” *Id.*

142. See Brooke Masters, ‘No Winners’ in Rape Lawsuit, CTR. FOR INDIVIDUAL RTS. (May 19, 2000), <https://www.cir-usa.org/2000/05/no-winners-in-rape-lawsuit>.

143. Calabresi & Rickert, *supra* note 140, at 2, 25-26. Nevertheless, invocation of Reconstruction-era cases in *Morrison* and other originalist cases has been demonstrated to be inaccurate. Kermit Roosevelt III, *Bait and Switch: Why United States v. Morrison Is Wrong About Section 5*, 100 CORNELL L. REV. 603, 603 (2015) (examining *Morrison*’s creation of the limiting rule that the Section Five power cannot be used to regulate private individuals but is based on “essentially nothing at all” because the cited Reconstruction-era decisions do not show that. “Thus, the article urges that *Morrison* be overruled”).

144. See Calabresi & Rickert, *supra* note 140 at 25-26.

confusion, some constitutional law professors express when fundamental rights are discussed, even when not constitutionally recognized, is disclosed in their distressed protest that those are only possible statutory provisions and not part of a constitutional discussion. Their interpretation of spotting the issue may, through their narrowness, contribute to keeping fundamental rights from being more seriously considered.

III. CAN AN INTERPRETIVE THEORY OF THE CONSTITUTION BE SEEN TO AFFECT THE FAMILY ENOUGH SO THAT POSITIVE AVENUES AND METHODOLOGIES SHOULD BE CHOSEN OVER ADVERSE PATHS?

From time to time, the going federalist theory, perhaps in an abiding effort to reduce the federal budget,¹⁴⁵ reasserts themes underlying federalism, such as policies about how generous (or not) a government should be with its own citizens.¹⁴⁶ Thus the theory restricts responsibility for the notion and enforcement of public safety and security to the states alone.¹⁴⁷ Others have concerns that the states may not be able, or even choose, to put a high priority on these responsibilities, thus endangering human flourishing.¹⁴⁸ Evangelicals take a different approach, as this motto shows: Justice is the public-law face of the private-law injunction to “love thy neighbor as thyself.”¹⁴⁹ Federalism may not worry about the importance of the common good, responsibility to individual lives, or the ability of the states to shoulder the financial responsibility the federalists decline for the federal government. But maybe federalism does worry that the only route to the common good in a Hobbesian world view is military protection.¹⁵⁰

Then this federalist theory would be a political or constitutional version of “tough love” (to learn individual self-sufficiency). Whether directly as part of its intent or merely as collateral damage, this federalist approach to interpreting the Constitution does not preclude disfavoring

145. Moderate Republicans “can rally around Mr. Trump’s 2016 vision of a Republican Party no longer bound by unpopular conservative dogma. They could even support a Trump New Deal.” Kabaservice, *supra* note 98.

[T]he Republican Party is widely disliked, even by its own voters. It has become the party of the white working class—six out of 10 Republicans are now whites without a college degree—but it has done next to nothing to address the terrible problems that disproportionately affect that class.

Id. “Mr. Trump also recognized that the principal reason for this disconnection is that the party’s penchant for tax-cutting has devolved from a policy preference into a sacred cult.” *Id.*

146. *Id.*

147. *See id.*

148. *Id.*

149. *Matthew* 22:39 (King James).

150. *See* Jenna Bednar, *Federalism as a Public Good*, 16 CONST. POL. ECON. 189, 192, 194, 198 (2005).

some groups of state residents by providing no federal protection from harsh state treatment.¹⁵¹ Two major goals appear to characterize the modern Grand Old Party. The first goal is spending as little as possible beyond military expenses, even with authorized funding for other projects.¹⁵² In the effort to carry out this budgetary credo, the second goal is returning the federal government to the twenty-first century equivalent of the Articles of Confederation, having few functions, but with the added fillip of leaving states unaccountable to their residents, beyond wealthy election donors and regular state lobbyists.¹⁵³ The scope of government in accordance with the originalist theory of interpreting the Constitution, whatever its historical accuracy, is narrow. The theoretical strength of fifty state federalist “sovereigns” acting independently of the United States government keeps governmental functions isolated and narrow. Thus, both originalism and federalism, in this guise, allow courts often to reach the same restrictive result.¹⁵⁴

Conservative federalism and its accompanying small budget methodology to ensure small federal government demonstrate the difficult effects for ordinary people of this approach of cutting down on federal government and adopting a no-spending policy for human cost centers in the budget.¹⁵⁵ Secular “sacred texts” like the American Constitution are extremely difficult to amend. David Pozen goes further: “Even to propose

151. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). For examples of state funding (or lack thereof) for education, see *supra* notes 115-35.

152. Niv Elis & Peter Sullivan, *House GOP 2019 Budget Calls for Deep Medicare, Medicaid Spending Cuts*, THE HILL (June 19, 2018), <https://thehill.com/policy/finance/393028-house-gop-2019-budget-calls-for-deep-medicare-medicaid-spending-cuts>; Damian Paletta & Seung Min Kim, *Trump Calls for 5 Percent Spending Cut in Some Programs*, WASH. POST (Oct. 17, 2018), https://www.washingtonpost.com/business/economy/trump-calls-for-5-percent-spending-cut-in-some-programs/2018/10/17/112ce5a8-d236-11e8-b2d2-f397227b43f0_story.html?utm_term=.c14cbe7e3202.

153. See EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 4-10 (2007) (explaining historical originalism (weak) and Rehnquist’s theory of federal-state relationships (stronger) as textual interpretations of the Constitution); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 167-68 (1999); Richard A. Epstein, *The Natural Law Influence on the First Generation of American Constitutional Law: Reflections on Philip Hamburger’s Law and Judicial Duty*, 6 J. L., PHIL. & CULTURE 103, 125-30 (2011); Kabaservice, *supra* note 98 (explaining that “the Koch brothers and other big donors would still work for Republican majorities to supply the regulatory relief and conservative justices they crave” in both the state capitols and on K Street).

154. *United States v. Morrison*, 529 U.S. 598, 627 (2000); *Williamson*, 348 U.S. at 488-89; *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896).

155. Kabaservice, *supra* note 98 (“Revenue-draining cuts inevitably starve the public services that the aging and economically insecure white working class increasingly depends on. Popular support for the teachers’ strikes in Arizona, Kentucky, Oklahoma and West Virginia in recent weeks indicates that even solidly Republican states are turning against this kind of anti-government economic doctrine.”).

a revision is to admit the document's fallibility and expose one's own skepticism."¹⁵⁶ Short of amendment, even judicial interpreters of the Constitution are not generally, and sometimes not at all, cooperative. "Efforts to redeem the Constitution's perceived flaws are therefore pushed to the realm of interpretation (even beyond . . . procedures), which only puts more pressure on the concept of fidelity and the integrity of the interpretive enterprise."¹⁵⁷ That means a much harder journey for people seeking redress regarding unrecognized fundamental human rights deemed mere privileges (that is, for the wealthy who can pay), perhaps traveling bit by bit down country lanes and secondary roads which will slow that journey down.

But this is an extra-constitutional journey nonetheless worth all the effort.¹⁵⁸ Levitsky and Ziblatt trace in housing and in voting rights that apparently all political parties engaged in racial exclusion.¹⁵⁹ Freed slaves who got voting rights under the Fifteenth Amendment gradually saw these rights pulled almost completely back by the end of the nineteenth century.¹⁶⁰ The promise of nineteenth-century attempts to reach the vision of the Declaration of Independence (1776) that "all men are created equal" was torn away by the dawn of the twentieth century, but the two Amendments remained in the Constitution for others to invoke.¹⁶¹

Is it more than a political challenge if states wish not to protect their poor children's health or to prepare them well for their future as working adults by letting the schools run down?¹⁶² Is this the very sort of reason

156. Pozen, *supra* note 71, at 944.

157. *Id.* (footnote omitted).

158. MARTIN LUTHER KING, JR., Letter from Birmingham Jail (Apr. 16, 1963), in *WHY WE CAN'T WAIT* 77, 83-84 (1964) (proposing a natural law argument for human rights and nonviolent resistance to racism in order to achieve recognition of these rights for African-Americans and all people, forgoing waiting through lifetimes for judicial implementation).

159. LEVITSKY & ZIBLATT, *supra* note 29, at 125-44.

160. *Id.* at 90-92.

161. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954); *Sweatt v. Painter*, 339 U.S. 629, 635 (1950); *Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938). Depictions are presented in movies, *MARSHALL* (Chestnut Ridge Productions 2017), television programs, *MR. CIVIL RIGHTS: THURGOOD MARSHALL AND THE NAACP* (PBS 2014), and print, MICHAL R. BELKNAP, *THE VINSON COURT: JUSTICES, RULINGS, AND LEGACY* 149-58, 164-66 (2004); GARY M. LAVERGNE, *BEFORE BROWN: HERMAN MARION SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE* 245-47 (2010); Stanley N. Katz, *The Strange Birth and Unlikely History of Constitutional Equality*, 75 J. AM. LEG. HIST. 747, 757-59 (1988). For discussion in KLUGER, see *supra* note 20, at 273-75. Sometimes violated norms may reclaim their place in a community. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 34-35 (1983); see also ALASDAIR MACINTYRE, *A SHORT HISTORY OF ETHICS* 149 (2d prtg. 1966) ("Christianity shares with the Aristotelian view the advantage of not taking our actual desires as given; and it incarnates on moral ideal which is foreign to both the other views, the ideal expressed by saying that somehow or other all men are equal in the sight of God.").

162. A special ten-page report on universal health care by *The Economist* is accompanied by an

for the adoption of the Fourteenth Amendment, protection of a state resident against improper state treatment, starting with voting and race but extending to additional necessities of life for a family, including access to health care and safe schools? Should state residents be able to seek a remedy from the federal government when states harm their citizens? Should Congress “guarantee rights of Americans everywhere against their own state governments” under “the power granted to the national government by Civil War amendments[?]”¹⁶³

One of the political reasons for narrowing the scope of government is to keep the budget as low as possible to limit the costs of entitlements. Courts often share this motivation, although the Constitution was designed to establish justice, and *Marbury v. Madison* recognized the right to seek legal redress for an injury.¹⁶⁴ Judges may often hesitate to enforce fundamental rights because finding that one statute does not violate the Constitution may mean another, later statute might not be able to receive funding under the available tax revenues. In 2018, the Federal Budget Act of December 2017 provided one example of “principled conservatives” wishing to “undo the worst of the omnibus.”¹⁶⁵ “Principled conservatives” later wished to cut out the bargain with the Democrats to reduce the budget on the grounds that Democrats violated conservative principles by adding into the budget money for carbon-recapture technology, infrastructure like the Gateway Tunnel Project, Environmental Protection Agency’s clean air, education, and other such cost centers.¹⁶⁶ Therefore, “Republicans used that as an excuse to stuff in their own pork.”¹⁶⁷

editorial summarizing the conclusions of its report. *Within Reach: Universal Healthcare, Worldwide*, THE ECONOMIST, Apr. 28, 2018, at 3, 8-11. Basic universal health care is pro-growth, affordable and practical: “It is a way to prevent free-riders from passing on the costs of not being covered to others, for example by clogging up emergency rooms or spreading contagious diseases. It does not have to mean big government. Private insurers and providers can still play an important role.” *Id.* at 9.

163. Walter Dellinger, *In Memoriam*, SLATE, (Sep. 4, 2005), <https://slate.com/news-and-politics/2005/09/william-h-rehnquist-in-memoriam.html>.

164. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

165. Kimberley Strassel, Opinion, *In for a Penny, in for Impound*, WALL STREET J., Mar. 30, 2018, at A13, <https://www.wsj.com/articles/in-for-a-penny-in-for-impound-1522364438> (invoking the Impoundment Act to rescue the budget from the Tax Cuts and Jobs Act of 2017); *see also* Tax Cut and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (amending the tax code). The importance of discussing this time-limited and now lapsed possible “solution” of revising the omnibus budget Act is to set forth the approaches, attitudes, and tactics of those who wish to accommodate two opposing principles: very large (rather than proportionately scaled) tax cuts and arguably acceptable budget deficits falling short of the ideal balanced budgets. The problems arising from the Act continue to attract debate as well as calls for both reform of this Act and creation of an ideal taxation model. Patricia Cohen & Maggie Astor, *Democrats’ Aggressive New Tax Plans Are Finding an Audience*, N.Y. TIMES, Feb. 10, 2019, at BU1, <https://www.nytimes.com/2019/02/08/business/democratic-wealth-tax-warren-sanders-ocasio-cortez.html>.

166. Strassel, *supra* note 165.

167. *Id.* Larger national debt causes interest rates to rise. Ramesh Ponnuru, Opinion, *How the*

Nevertheless, the historically close connection between a tight budget and the conservative principle of small government, at least in theory, precludes general welfare for the sick and the poor. The first apparent fact is that, thanks to the tax-cut law, the omnibus tax law has new welfare clients, no longer poor people, but instead wealthy people who receive the welfare of many poor people aggregated together, but given in large amounts for those with the largest incomes.¹⁶⁸ Because the tax is not progressive, the wealthy person wins both at the percentages and in the large number of the general welfare dollars diverted to high-income taxpayers, individual and business. If welfare entitlements should not be created for poor and sick people, why is it important to allocate those same tax dollars as welfare for the wealthy in the form of extraordinary tax cuts, at the expense of the lowest income earners who see no tax cut dollars coming to them? Equality has been cynically repressed in every sense of the word when the tax cuts of 2017 were so large that those worried about federal debt find the solution in cutting the very small budgets of domestic agencies.¹⁶⁹ “Their [then] control of the White House and both chambers gives them an unusual opportunity to cut big . . . [because] the party needs to prove it can do a better job with the federal fisc” and highlight “[w]holesale cuts in domestic agencies—like the EPA or the Education Department.”¹⁷⁰

Like Robert Cover before them, Levitsky and Ziblatt stress the importance of unwritten norms supporting the formal constitutional and statutory protections, as well as statutorily and constitutionally established courts sworn to uphold the rule of law.¹⁷¹ These norms, like civilization itself, may not hang much more securely than by a delicate thread, always needing to be respun to repair the frayed edges. In the phraseology of Aziz Huq and Tom Ginsburg, a dangerously thin “tissue of convention” is held

Fed Keeps Its Eye on the Deficit, BLOOMBERG (July 20, 2018), <https://www.bloomberg.com/view/articles/2018-07-20/fed-impact-on-deficit-has-nothing-to-do-with-trump>. Overspending caused legislators to make other cuts to the budget to subsidize the tax cuts for corporations and high-net-worth individuals. Some opponents of certain provisions of the new tax law argue that “tax cuts for the wealthiest Americans will be paid for by providing less support for working families to buy health insurance. Indirectly, however, people who need insurance the most—older, less healthy Americans—will subsidize tax cuts via higher premiums.” Ezekiel J. Emanuel & Aaron Glickman, *Obamacare Architect: How Is Trump Paying for Wealthy Tax Cuts? By Kicking People Off Their Health Insurance*, FORTUNE (Dec. 4, 2017), <http://fortune.com/2017/12/04/tax-reform-bill-2017-explained-obamacare-individual-mandate> (stating that because the new tax law repeals the ACA’s individual mandate without providing an alternative to creating a pool of healthy adults applying for insurance, the government will pay out less in premium support).

168. Emanuel & Glickman, *supra* note 167.

169. Strassel, *supra* note 165.

170. *Id.*

171. LEVITSKY & ZIBLATT, *supra* note 29, at 118-44.

together by courageous public servants with the political will to stand up for the rule of law.¹⁷² The budget solution, were it to have succeeded, would have given lawmakers whose votes were nullified post hoc the stinging sensation that they were had.¹⁷³

Too great a tax cut¹⁷⁴ without a reduced budget disgorges large percentages of the country's expected tax revenue to the "makers" and impoverishes the very large remainder of the country's population.¹⁷⁵ Kim Strassel's analysis of the tax law of December 2017 lays bare the underlying motivations (*radix malorum est cupiditas*, greed is the root of financial harm to others) driving the drafters.¹⁷⁶ Whether due to greed or

172. Huq & Ginsburg, *supra* note 29, at 160 (noting that "little beyond the thin tissue of convention" prevents a rogue, criminal, or tyrannical government from benefiting itself and punishing objectors on behalf of the common good).

173. *See id.* at 146-47.

174. Larry Elliott, *World's 26 Richest People Own as Much as Poorest 50%*, *Says Oxfam*, THE GUARDIAN (Jan. 20, 2019), <https://www.theguardian.com/business/2019/jan/21/world-26-richest-people-own-as-much-as-poorest-50-per-cent-oxfam-report>. Chris Hughes, a founder of Facebook, notes that the amount of the tax cuts going to the richest one percent is about the same amount as the cost of the basic annuity for all workers earning under \$50,000 each year. Matthew J. Belvedere, 'Free-Rider Problem'—Facebook Co-founder Chris Hughes Says 0.1%-ers Need to Pay More Taxes, CNBC (Feb. 11, 2019), <https://www.cnbc.com/2019/02/11/facebook-co-founder-chris-hughes-says-0point1percent-ers-need-to-pay-more-taxes.html>. If that amount is too much for taxpayers to bear, then so is the tax cut for the wealthiest, by a parity of reasoning. CHRIS HUGHES, *FAIR SHOT: RETHINKING INEQUALITY AND HOW WE EARN* 165-66 (2018); Peter Kotecki, *The First Major Basic Income Trial in the US Just Announced How It Plans to Give Away Free Money*, BUS. INSIDER (Aug. 21, 2018), <https://www.businessinsider.com/basic-income-experiment-stockton-details-about-trial-2018-8> (detailing the terms of a trial (Feb. 2019–Aug. 2020)) providing \$500 each month from a foundation (started by Chris Hughes and other Facebook founders) for 100 persons selected from applicants at least eighteen years old and residing in a neighborhood in Stockton, California with a median income of \$46,033 or less). Researchers from the foundation will track the recipients throughout the trial to figure out how basic income affects people's health, financial security, and civic engagement and will also monitor a control group. *Id.* The corollary concept of family wealth shows a crippling gap between the poor and others. Christina Gibson-Davis & Christine Percheski, Opinion, *The Wealth Gap Hits Families Hardest*, N.Y. TIMES, May 20, 2018, at 7, <https://www.nytimes.com/2018/05/18/opinion/wealth-inequality-families-children-elderly.html> (reporting that the latest statistics (2013) show some one-third of families had debt but no wealth); *see also* Nathan Heller, *Take the Money and Run*, NEW YORKER, July 9 & 16, 2018, at 65, 66 (discussing, among other works, ANNIE LOWREY, *GIVE PEOPLE MONEY: HOW A UNIVERSAL BASIC INCOME WOULD END POVERTY, REVOLUTIONIZE WORK, AND REMAKE THE WORLD* 185, 187, 190 (2018)).

175. Devising ways to cut expenditures was on the agendas of many Republicans who are widely interested in funding the budget by cutting entitlements. *See* Louise Radnofsky & Nick Timiraos, *Ryan Exit Dents Odds of Entitlement Cuts*, WALL STREET J., Apr. 13, 2018, at A5, <https://www.wsj.com/articles/with-paul-ryan-s-exit-gop-loses-advocate-for-changes-to-retirement-healthcare-1523525402> ("House speaker, Mr. Ryan[,] had pressed for curbs on federal spending . . ."). Republicans are particularly against "Social Security, Medicare and Medicaid." *Id.* Congress is narrowing availability of food stamps and additional requirements for Medicaid eligibility, with work requirements. *Id.* The average older member of the Republican party does favor these entitlements. *Id.*

176. 1 *Timothy* 6:10 (King James); Strassel, *supra* note 165.

lack of political will, the proponents and drafters of the tax law confused means and ends when they could not decide whether they wanted a very large tax cut for themselves even more than a debt or deficit reduction which they hoped to fund by cutting entitlements.¹⁷⁷ That scenario in Strassel's article of the conservatives' conviction that the tax-cuts are theirs, and all theirs, and the failure, in Strassel's view, of the minority Democrats to restrain the majority's excess, reveals the conservative emotional position.¹⁷⁸ On a larger scale, greed, more than any other explanation, may drive some of these originalist prohibitions on the recognition of fundamental rights and the insertion into their place of limited privileges.¹⁷⁹

Thus, two vastly different visions of how strength overcomes fear describe the claim of fundamental rights versus limited privileges. Originalist privilege exists under the shadow of a strongman, doling out the country's assets to his henchmen who keep the people in civil order. The other view emphasizes personal rights, such as providing individual workers affordable housing, education, health care, and some retirement savings against an uncertain future. These views arguably leave some of the adherents of each approach leery of one another, giving rise to political mistrust. Political danger for the society as a whole arises from the destabilizing mistrust so that many ordinary people are disabled from seeking and obtaining remedies for the harms they suffer. This breaches the promise of *Marbury v. Madison* to provide a cause of action to obtain judicial remedy for harm.¹⁸⁰ Pozen, highlighting trust and mistrust in the public square, has analyzed these various difficulties.¹⁸¹ A major issue of trust/mistrust includes the problem of compromising but then having more

177. Strassel, *supra* note 165.

178. *Id.*

179. Months later, Fred Barnes, like Ms. Strassel, continues to blame Democrats for the excesses of the disastrous tax bill but with a variation involving the Democrats' strategy to seek a bipartisan bill when it was not possible in a Senate, House, and executive controlled by Republicans. Fred Barnes, Opinion, *The Downside of Anti-Trump Rage*, WALL STREET J., Jan. 23, 2019, at A15, <https://www.wsj.com/articles/the-downside-of-anti-trump-rage-11548201671> (expressing his opinion that the Democrats' overreach in seeking a bipartisan bill thereby consigned themselves not to be taken seriously on matters of tax law). Barnes catalogued the losses in the final text of the elimination of carried interest and the twenty-five percent corporate tax rate, the deduction for state and local taxes, the individual mandate in the ACA, and the protection of the Arctic National Wildlife Refuge from oil and gas drilling. *Id.*

180. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *see also supra* notes 34, 48, 49 and accompanying text.

181. Pozen, *supra* note 71, at 920-34.

buyer's remorse about the original compromise itself than a "principled conservative" can stomach.¹⁸²

Pozen's treatment of the role of bad faith can be applied to the budget act.¹⁸³ "[The] sacralization of the Constitution pushes interpreters not only to insist on their own fidelity but also to see competing views as treacherous or deceitful."¹⁸⁴ In the budget solution, "principled conservatives" are deemed justified in their action because they accuse Democrats of having violated conservative principles.¹⁸⁵ Because the Democrats base their principles on the democratic notion of providing government services to voters and further services to those in need, fiscal conservatism to provide tax cuts to conservative but wealthy people is not part of Democratic principles. The Democrats know they have not violated their budgetary principles while the principled conservatives treated themselves to pork since they deem infrastructure and public works "Democrat[ic] pork."¹⁸⁶ Democrats, in turn, argue that the "principled conservatives" are withholding services and failing to recognize the basic needs of human rights and flourishing.¹⁸⁷

Pozen therefore diagnoses our ills as follows: "The overarching obligation to keep faith with the canonical text, in other words, contributes to a culture rife with suspicion of interpretive bad faith."¹⁸⁸ Chief Justice Rehnquist's strangulation of the government's ability to redress harms through the Commerce Clause provides the legal justification for the excessive tax cuts.¹⁸⁹ Those who want safe, reasonably well-equipped but not dilapidated schools—safe from guns and safe for learning—may

182. See *id.* at 949 ("charges of bad faith may compromise social trust and harmony").

183. *Id.* at 923 (describing the non-enforcement of good faith requirements in the context of separation of powers).

184. *Id.* at 886.

185. See *id.* at 933-34 ("The perceived weakness or outlandishness of someone's . . . reasoning, that is, may furnish evidence that she is up to no good.").

186. Strassel, *supra* note 165. Whether the market or federalism is being described, the method is neutral. The deciders add factors to provide an outcome one way or another. The example of *Lochner v. New York*, 198 U.S. 45 (1905) is useful here. The state of New York passed legislation to protect bakers working in hot oven factories by establishing a maximum number of work hours per week. *Id.* at 46 n.1. While some people might blame the market ("[t]he market is a tool, it is incredibly malleable" as Dean Baker assures us) the decision in *Lochner* itself dealt this blow to workers when politicians on the Court manipulated the outcome to protect the bargaining power of the entrepreneurs at the expense of the bakers without an attempt to balance both interests. Dean Baker, *The Political Economy of Anti-Rent-Seeking Equality Agendas*, in REFLECTIONS ON THE FUTURE OF THE LEFT 23, 24-27 (David Coates ed., 2017) (explaining that markets today permit severe levels of inequality because they are established with ancillary rules to favor the rich and are not in fact neutral or balanced); ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 39-40 (1999) (1941).

187. Cohen & Astor, *supra* note 165.

188. Pozen, *supra* note 71, at 886, 923.

189. Dellinger, *supra* note 163.

conclude with the victims of Hurricanes Katrina and Maria that assertive states' rights not to act, coupled with limited national power "seem particularly and starkly outmoded concepts."¹⁹⁰ In some instances, weak legislative and executive branches lead to judicial supremacy filling the power vacuum.¹⁹¹

What would happen if principled conservatives, still haunted by the specter of the "welfare queen," could face the irresponsibility of their own tax cuts and unmask the chimera of trickle-down?¹⁹² What would happen if Democrats could harness data-management technology to reduce, if not eliminate, free-riding on the public fisc in federal aid programs? Pozen highlights trust and mistrust in the public square.¹⁹³ If both conditions occurred at the time, perhaps by negotiation of bipartisan appropriations committees, "Gangs of Eight"¹⁹⁴ and other congressional bipartisan groups used to working with each other to compromise for the common good, then perhaps each side could face its own special type of greed. Those women and men of good will with differing but principled positions often make what could become good laws. Larger political forces, however, prevent them from getting to the floors of their respective chambers for a vote. With the help of various social movements seeking good and responsible government, these seed groups may come to have the sway they deserve. Without calls for reform and renewal which seek recognition of the rights for families to flourish, entropy (other peoples' swamps?) holds us back.

IV. OTHER VEHICLES ABLE TO PROVIDE A LEGAL FRAMEWORK FOR THE FLOURISHING OF THE HUMAN PERSON IN A JUST SOCIETY

New theories for federal-state cooperation, suits as old as the common law itself, statutory claims, and the use of public policy and

190. *Id.*

191. *Id.* Dellinger reminds us of two examples of judicial overreach: "[The Rehnquist Court] set aside acts of Congress because it disagree[d] with the social judgments of the officials who had been elected by the people of the United States. Nor did the court hesitate to step in ahead of Congress to decide a disputed presidential election." *Id.*

192. Emelyn Rude, *The Very Short History of Food Stamp Fraud in America*, TIME (Mar. 30, 2017), <http://time.com/4711668/history-food-stamp-fraud> (showing that fraudsters always composed a small percentage of recipients, even when the total numbers of recipients increased following the Great Recession).

193. Pozen, *supra* note 71, at 920-34.

194. Gang of Eight is a colloquial term referring to bipartisan groups of senators, specifically the group that passed immigration reform in 2013. Michael Bennet, Opinion, *Donald Trump Should Look to Gang of Eight for Immigration Reform*, DENVER POST (Feb. 1, 2017, 10:34 AM), <https://www.denverpost.com/2017/01/14/trump-should-look-to-gang-of-eight-for-immigration-reform>.

economic considerations are brought to bear in Part IV.¹⁹⁵ Pathways will be sought to address the harms occurring due to our failure to recognize the privileges by which fortunate Americans flourish as fundamental rights for all Americans. Judge Frank Easterbrook, originalists Mike Rappaport, John McGinniss, others mentioned above, and still others not yet invoked, such as historian David Kennedy or capitalist Ken Langone, paint a picture of internal demand in the Constitution for limited government.¹⁹⁶ Limited or narrow government effectively symbolized by the medieval motto that not doing is no trespass (or violation), precludes the address, much less the redress they seek, of many different claims long allowed in the legal spirit carried forward into American common law in *Marbury v. Madison*.¹⁹⁷ To these same scholars and commentators, legal acolytes of the Austrian economist Friedrich von Hayek, and perhaps the apostle of a hard Brexit, the policy of limited government trumps that ancient commitment embodied in *Marbury*, that where there is a wrong, there is also a remedy.¹⁹⁸

Deeming education and affordable housing privileges rather than fundamental rights means that the Constitution can recognize no real equality, despite the words of the Fourteenth Amendment or the notion in 1776 that all are created equal.¹⁹⁹ The privileged enjoy exclusivity, fine for perquisites like yachts and “helicopter views.” Privileging food, education, housing, health care, and equal pay for equal work is a

195. See *supra* Part IV.

196. David M. Kennedy, ‘*The Second Bill of Rights*’: A New New Deal, N.Y. TIMES (Sep. 19, 2004), <https://www.nytimes.com/2004/09/19/books/review/the-second-bill-of-rights-a-new-new-deal.html?mtref> (arguing that the “stubborn peculiarities of American political culture,” which persisted on and off during the twentieth century and even since the Constitutional Convention of 1787, have prevented the advance of the second bill of rights). For similar views to Kennedy’s, see MCGINNIS, *supra* note 2, at 50; Easterbrook, *supra* note 64, at 103-04; Rappaport, *supra* note 2, at 81-85. For the opposite argument, see Post & Siegel, *supra* note 28, at 3-5 and *passim*.

Ken Langone, in his ethnographic study of one billionaire, amply, if unintentionally, demonstrates the urgent need for the measures designed to include more people in the full participation as equals in American society. See KEN LANGONE, I LOVE CAPITALISM!: AN AMERICAN STORY 261-66 (2018). For academic discussions of the market, see *supra* note 115. A believer in extensive “capitalist rewards” but in limited government at any level, Langone finds a minimal role for some local and federal governmental functions: “You need cops, you need the military, and you need infrastructure.” Alexandra Wolfe, *Ken Langone*, WALL STREET J., May 5, 2018, at C11, <https://www.wsj.com/articles/ken-langone-wants-you-to-know-he-loves-capitalism-1525458885> (quoting both Langone’s book and her interview with Langone). Seeing young people at political rallies advocating “an expanded government role in health care, child care and higher education” inspired Langone to write his own biography and life’s testimony with opinions about his life as a “capitalist” in a free-market manifesto to counteract “guaranteed income. Free college tuition. Single-payer healthcare . . . I disagree. Strongly.” *Id.*

197. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

198. *Id.*

199. U.S. CONST. amend. XIV; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

pernicious concept, akin to a government shutdown, or quasi-lockout, of ordinary Americans.²⁰⁰ The political will to overcome the limitation of privilege on many Americans' fundamental rights, imposed by the exaltation of a misplaced self-sufficiency theory, may prove the most difficult to achieve, much to the detriment of the good working of the Constitution itself. We might like to think that a person living on \$20,000 a year with responsibilities would "still be OK," if we as a society do nothing and lose Saint-Exupéry's next Mozarts to life under a bridge.²⁰¹ But neither that person living on \$20,000 a year nor our country is okay when these views heavily influence policy and legislation. In fact, Congress in the Tax Cuts and Jobs Act of 2017 safeguards privileges of entrepreneurs well represented by lobbyists who of course are not paid to work to protect all Americans' rights.²⁰²

The routes to recognition of fundamental rights and restitution for their violation are many. It, therefore, helps that among these multifaceted solutions to achieve a constitutional place for fundamental rights, such as education and housing, now deemed mere privileges for the few, one or two of these different approaches may fit each of the disrespected or unrecognized rights. It will be reassuring to find that European lawyers have seen the constitutionalization of many parts of their private law. We can do the same without fear, seeing that the European example works for people.

200. Contrast the invisible but desperately struggling lives portrayed in a six-year ethnographic study of such working poor as cashiers, migrant workers in fields, and seamstresses. *See generally* DAVID K. SHIPPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* (2004) (describing the tribulations of the working poor). Reading this book would make the person of ordinary heart agree immediately with Hughes, who lived for a time a mild version of this life among a more secure community in Appalachia, or with Rogers. HUGHES, *supra* note 174, at 98-101; Rogers, *supra* note 60.

An example of the life of a person needing medical and other attention is a hard-working poor woman in Trump country—New Hampshire: Caroline Payne, then fifty-years-old stocking shelves and working at the cash register for minimum wage, with four children to support:

including a teenage daughter who has epilepsy and a low I.Q.; bosses who will not let her juggle her schedule to accommodate her daughter's needs . . . nagging ailments that go untreated because she cannot afford health insurance; and not least, the loss of her teeth, . . . which causes male managers to pass her over at promotion time.

Michael Massing, *Take This Job and Be Thankful (for \$6.80 an Hour)*, N.Y. TIMES, Feb. 18, 2004, at E8, <https://www.nytimes.com/2004/02/18/books/books-of-the-times-take-this-job-and-be-thankful-for-6.80-an-hour.html>.

201. *See* Wolfe, *supra* note 196 (interviewing Ken Langone and recognizing "nobody can live on \$20,000 a year"); *see infra* note 240 and accompanying text.

202. *Money Spent on Lobbng Skyrocketed During Tax Overhaul*, CBS NEWS (Feb. 12, 2018, 9:45 PM), <https://www.cbsnews.com/news/money-spent-on-lobbying-skyrocketed-during-tax-overhaul/>; *see* Strassel, *supra* note 165.

Part II of this Article gives no definitive list of goods that allow a family to flourish,²⁰³ but Part II emphasizes that the right to flourish requires ongoing legal and political pressure to be realized.²⁰⁴ We are used to the Foxcons, less a sure bet, and Amazons, still carrying risks for the region embraced, lobbying governments for billions in tax reductions in order to locate hubs in that state and city. The voters through public advocacy and grassroots groups must similarly emphasize and publicize the need for public education and job training, affordable housing, access to health care, and assurance of food sufficiency. A list at the remedial end of fundamental rights in Part III consists of political and economic policies and actions.²⁰⁵ These broader approaches may carry unrecognized rights to the recognition due them and the persons who claim restitution for the violation of their rights, even though dominant more narrow constitutional theories have not allowed such recognition of rights to emerge. The approaches surveyed in Part IV include legal theories re-examining federalism as well as social and economic policies in different states designed to spread at least threshold participation in capitalism to as many people as possible with affordable housing programs, education, job training, and equal pay for equal work as starters.²⁰⁶ The socio-economic perspective emphasizes approaches to attack the languishing and unresolved problems of education and housing, now dire problems for many Americans in many states.²⁰⁷ These approaches provide more Americans with the resources to flourish and to exercise their constitutional rights as participants in the broader capitalistic society ready to perform a job, contribute to the economic growth of the country, and pay taxes. Those Americans, now cut off from access to society at large, would have (rather than the silver spoon of inheritance and privilege) the opportunity to live in a home and be ready for work on the road to flourishing.

203. *See supra* Part II.A.

204. *See supra* Part II.B.

205. *See supra* Part III.

206. *See supra* Part III.

207. *See supra* Part IV.

A. *Legal Theories and Analysis: New, Old, and European*

At a more abstract level, theories such as federalism²⁰⁸ and originalism²⁰⁹ embody these limitations in various and changing incarnations of the results-oriented requirement of stunted government. Originalism metamorphosed from modeling a judiciary that follows what the law always was to judicial activism in settling the election of 2000 when the state legislature in Florida had not yet acted. Because this version of originalism is less pure, it leaves much more room for the recognition of fundamental rights for those who have no privileges. In 2000, the Supreme Court itself dismantled the originalist barriers against change and development erected during the 1970s.²¹⁰ The purveyors of these theories, long-surviving in different, short-lived guises, recognize only limited versions of political rights and certainly not a human right to flourish, in any Aristotelian (to say nothing of Epicurean and Stoic) notion of human flourishing.²¹¹ In practical terms, it became obvious for all to see that “original” theorists shift their tactics to use whatever devices will restrict voting, starting with gerrymandered voting districts (from the political party in power at the time).²¹² The theorists pay only lip service to declarations that all are created equal.²¹³

Some attention, therefore, turned to newer theories, featuring “national federalism,” designed to present a fuller picture of the workings of government and interchanges among governmental entities of different

208. The traditional incarnation of federalism placed states as independent policy makers in the position of challenging the federal government’s legislative powers. ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 132-35, 155-57 (2010); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1261, 1265 (2009). More recently, scholars have examined the states’ challenges of, and cooperation with, the federal government. Bulman-Pozen & Gerken, *supra*, at 1270-74.

209. ORIGINALISM: A QUARTER-CENTURY OF DEBATE 113-16 (Steven G. Calabresi ed. 2007) (distinguishing between original meanings and original expectations in application, among other concepts); *see also* Cass R. Sunstein, *Originalism*, 93 *NOTRE DAME L. REV.* 1671, 1673-77 (2018).

210. *Bush v. Gore*, 531 U.S. 98, 103-04 (2000); *see also* Whittington, *supra* note 1, at 380-81.

211. *See* Edward W. Younkins, *Toward the Development of a Paradigm of Human Flourishing in a Free Society*, 9 *J. AYN RAND STUD.* 253, 266 (2008) (arguing the inability of a restricted government, instead of a government based on natural rights, to promote human flourishing).

212. Earl M. Maltz, *Inconvenient Truth: Originalism, Democratic Theory and the Reapportionment Cases*, 86 *MISS. L.J.* 1, 22-30 (2017); *see* Younkins, *supra* note 211, at 277.

213. Eric J. Seagall, *Judicial Originalism as Myth*, *VOX* (Feb. 27, 2017, 10:10 AM), <https://www.vox.com/the-big-idea/2017/2/27/14747562/originalism-gorsuch-scalia-brown-supreme-court>. One person above the fray who clearly knows the meanings of “well-being” and “thriving” in multiple languages is the First Lady, Melania Trump, who on May 7, 2018, launched her anti-bullying campaign to help children. *See also* *Melania Trump Launches ‘Be Best’ Campaign Focusing on Children’s Wellbeing, Social Media*, *ABC* (May 7, 2018, 10:39 PM), <https://www.abc.net.au/news/2018-05-08/melania-launches-be-best-campaign-for-childrens-wellbeing/9737382>.

types.²¹⁴ These theories are proving to be just as complicated and variable in their exploration of content and issues.²¹⁵ National federalists see the role of states evolving in their interactions with the national government and its agencies in an effort to promote a well-functioning democracy, as (in theory at least) state federalism also promotes.²¹⁶ Rather than focus on federalism as facilitating state autonomy and independent state policy-making, national federalists find cooperation between the states and the federal government as an avenue for state influence.²¹⁷ Using their influence, states improve national policymaking, knit together the national polity, and work together as states to share information and facilitate strong local goals.²¹⁸

In the new national, or cooperative, federal legislation gives states a role in implementing its legislation: The state's authority in this matter is thus a product of the statute itself.²¹⁹ In other words, this new federalism is not simply a continuation of Chief Justice Rehnquist's fifty-one autonomous, and sometimes adversarial, sovereigns.²²⁰ All fifty-one sovereigns were, at least theoretically, equally powerful in initiating independent action outside the enumerated congressional powers. Today, cooperation with Congress in implementing a statute is equally important. In a study of the ACA, the states took the lead in implementing health care insurance for those who wish to participate.²²¹ This method of statutory operation does not emphasize policy content and appears to operate independently of whether the states agree with the content of the statute

214. Bulman-Pozen & Gerken, *supra* note 208, at 1268.

215. Other reasoning about constitutional matters can also be difficult and complicated unless performed by a master. See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969) (describing a mode of constitutional interpretation based on “inference from the structures and relationships created by the constitution in all its parts or in some principle part”).

216. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1890-93 (2014).

217. *Id.* at 1906-07.

218. *Id.* at 1893. For the goals of the interstate Gun Safety coalition, see *infra* note 261. The American Legislative Exchange Council (ALEC) provides model state legislation in the manner of the majority's laissez faire opinion in *Lochner v. New York*, 198 U.S. 45, 64 (1905). Steven Wishnia, *'Right to Work': From Racist Roots to Recent Resurgence*, LABORPRESS (Mar. 24, 2017), <http://laborpress.org/right-to-work-from-racist-roots-to-recent-resurgence>. Founded by state legislators in 1973, along with the Heritage Foundation, its sister organization, ALEC states that its mission is to “advance limited government, free markets, and federalism at the state level . . .” *Mission*, ALEC, <https://web.archive.org/web/20140801192535/http://www.alec.org/news/mission>.

219. See Abbe R. Gluck, Comment, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 71-72 (2015).

220. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 52 (2004).

221. Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Health Care For?*, 70 STAN. L. REV. 1689, 1759 (2018).

but the expansion (or not) of Medicaid, state-run health insurance, and the private health exchanges.²²²

Meanwhile, the earlier concept of federalism as fifty-one autonomous actors (in areas not enumerated as congressional powers in the Constitution) under Rehnquist's theory, envisioned the American Articles of Confederation rather than the early post-Civil War national government designed to uphold equality and the fundamental rights recognized under the concept of equality, however defined or limited.²²³ Although the ACA shows that Rehnquist's federalism is not the only scenario today, the pull of the spirit embodied in the Articles remains strong among various sectors of Americans and Brexit looks like a variation on the theme of isolation and small interaction with the rest of the world.²²⁴

Nevertheless, constitutional principles have entered into legal adjudication of problems in various branches of private law. Scholars and practitioners bring to bear different concepts and values to the development of private law.²²⁵ Here, as in interpreting the Constitution itself, it is important to have some self-awareness in assessing not only the sincerity of judges' and other scholars' positions but also to question one's own views, and as far as humanly possible, to avoid behavior which calls one's good faith into question.²²⁶ For example, Robert H. Stevens believes that tort demands limited remedies in order for human beings to

222. The Supreme Court dealt with the interaction in *NFIB*, the health care insurance case, of federal and state governments regarding the Spending Clause as it pertains to *NFIB v. Sibelius*, 567 U.S. 519, 540-45 (2012). See, e.g., Gluck & Huberfeld, *supra* note 219, at 1729. Later litigation, which did not involve the Spending Clause but a statute, became even more complicated when (but not because) *Burwell* replaced *Sibelius*. See Gluck, *supra* note 227, at 76-79 (coping with the extreme complications of navigating *King v. Burwell*, 135 S. Ct. 2480 (2015)). State Medicaid Programs and Clean Air Act "State Implementation Plans" present questions about where the jurisdiction lies for implementing federal statutory schemes.

223. Randy E. Barnett & Heather Gerken, *Article I, Sec. 8: Federalism and the Overall Scope of Federal Power*, CONST. CTR. (July 6, 2016), <https://constitutioncenter.org/blog/article-i-section-8-federalism-and-the-overall-scope-of-federal-power>.

224. Matt A. Mayer, *The Parallel Between Brexit and U.S. Federalism*, AEI (June 30, 2016, 12:59 PM), <https://www.aei.org/publication/the-parallel-between-brexit-and-us-federalism> (suggesting "a strong parallel between the issues raised by Brexit . . . and those in American Federalism. When America debated the proposed Constitution in 1787-88, a key concern raised by the Anti-Federalists focused on the potential power the federal government could acquire over individual states in the course of time").

225. See Young, *supra* note 220, at 144-45, 149 (discussing private rights of enforcement and remedies under federal law).

226. Pozen, *supra* note 71, at 935 & n.252 (citing Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 369, 378 (2002)). For an ancient observation of the same principle, see the mote and beam parable in the Sermon on the Mount: "And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?" *Matthew* 7:1-5 (King James).

function as responsible, hard-working heirs to Victorian libertarian values assuming responsibility for oneself.²²⁷ The libertarian element in torts is not, however, the only interpretive factor operative in torts theory.²²⁸ People have long wished to control property and direct its devolution after their death, particularly when basic economic rights from farming income were directly tied to property.²²⁹ Today, economic benefits from property ownership extend beyond farming income so that rights for various types of stakeholders can be elaborate.²³⁰ Private property law thus encompasses both rights and duties and extends to public aspects of ownership. Contracts law may follow a laissez-faire pattern or be subject to acting in good faith. Precisely these areas concern both American and European scholars of private law and their accompanying remedies.²³¹

Concerned European anti-rights scholars looked first at the political and institutional implications of judicial promotion of human and fundamental rights in labor, consumer, and tenant law.²³² The fear and concern of lawyers against integrating social values and justice into private law was that private law might be swallowed up in rights law, lose its autonomy and become impossibly complicated and slow-moving in extending remedies to those seeking redress.²³³ Hugh Collins is not alone in worrying about “juristocracy.”²³⁴ He concluded that entrepreneurs should be allowed to work from the bottom up, that is—citizen-to-

227. ROBERT STEVENS, TORTS AND RIGHTS 58, 62-63 (2007) (presenting a limited rights model of torts law).

228. Contrast laissez-faire economics with rights redressing tortious harms. *See generally* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003) (explaining that torts interpretations may fit under several theories, including economic and compensatory deterrence, social justice, individual justice (extending to libertarian, reciprocal, and corrective justice), and enterprise liability).

229. *Id.* at 545.

230. *See* ALEXANDER, *supra* note 52, at 39-40.

231. *See* Giovanni Comandé, *The Fifth European Union Freedom: Aggregating Citizenship . . . Around Private Law*, in CONSTITUTIONALIZATION OF EUROPEAN PRIVATE LAW 78, 78-79, 81 (Hans-W. Micklitz ed. 2014) (demonstrating the aggregation of the rights of citizenship around private law with the intrusion of fundamental and human rights).

232. HUGH COLLINS, THE EUROPEAN CIVIL CODE: THE WAY FORWARD 102-08 (2008); *see generally* Hugh Collins, *Lord Hoffman, the Common Law of Contract*, 5 EUR. REV. CONTRACT 474 (2009).

233. Hugh Collins, *On the (In)compatibility of Human Rights Discourse and Private Law* 36-37 (July 2012) (unpublished manuscript) (<http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2012-07-Collins.pdf>).

234. *Id.* at 21-25; Symposium, *From the Counter-majoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power*, 65 MD. L. REV. 1 (2006). Redress at the individual and consumer contracting level may be found for the person suffering harm in an ordinary contractual situation. Levmore, *supra* note 6, at 57-60.

citizen—rather than be swallowed up by legislators working from the top down for the common good.²³⁵

Later Collins looked more broadly at whether human rights and private law are so incompatible after all, suggesting the closed system of private law, especially contracts, torts, and property might, so to speak, find itself messed up, if, for example, a mortgagor had constitutional rights to property.²³⁶ Many in civil law were concerned that “[t]he extension of fundamental rights between and among private (non-state) actors would . . . [threaten] private law’s libertarian core of private autonomy by placing private actors . . . under the same duties as public bodies acting in the common interest.”²³⁷ In terms of American law, the fear is that everyone had to go back to an old Roman law duty of good faith in contracting, but extended to every private action, as though one had the accommodative duties of an inn-keeper in a Hobby-Lobby or cake baker’s situation.²³⁸ Much like the ancient *culpa in contrahendo*, bad faith in contracting and bad faith in constitutionalizing, as Pozen suggests, may hinder the growth of our constitutional jurisprudence, perhaps also on the basis of the rule that not doing is no trespass.²³⁹ Yet can we safely assume no harm occurs from the delay so that the issue may live to rise in another more settled age?

B. *Various Social and Political Approaches to Greater Recognition of Fundamental Rights*

If we change our focus from inn-keepers, consumers, and artisanal bakers to those struggling to keep their not-so-affordable homes and those who have already lost their homes, we can see different aspects of the public-private partnership emerging in a more carefully articulated way in the precarious and nerve-racking pictures Desmond and Alexander present of people without “decent and secure housing.”²⁴⁰ “[T]he moral

235. See generally Hugh Collins, *Lord Hoffman, the Common Law of Contract*, 5 EUR. REV. CONTRACT 474 (2009). Cf. COLLINS, *supra* note 232, at 102-08 (“There is a consequent risk that the application of indirect effect may strengthen certain kinds of liberties . . . while diminishing the importance attached to the issues of fairness and social justice.”); Easterbrook, *supra* note 64, at 105-06 (applying the same reasoning to desegregation of schools).

236. Collins, *supra* note 233, at 11-14.

237. *Id.* at 2.

238. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 702-04 (2014).

239. See Pozen, *supra* note 71, at 922.

240. ALEXANDER, *supra* note 52, at 295; MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 282-92 (2016). Housing is not a reward for getting a job but a condition for obtaining a job. Candice Payne, an ordinary young real estate broker in Chicago, called hotels and found rooms which eventually housed 100 homeless people for five days in February 2018. Sandra E. Garcia, ‘*Spur-of-the-Moment*’ Act Gets Homeless Out of Cold, N.Y. TIMES, Feb. 3, 2019, at N19,

end,” or foundation, of property, “both as a concept and as an institution, is human flourishing,” which property law, therefore “strives to realize.”²⁴¹ Human flourishing includes affordable housing so that “the person lives a life of dignity, self-respect, and satisfaction of basic material needs.”²⁴²

Ethnographer Matthew Desmond tells the story of eight families evicted from a trailer park in Milwaukee after welfare reductions and during the Great Recession when high rents made poor people too poor to hang on, while others better fixed financially continued to receive their subsidized mortgage deductions and only some of the poorest receive any aid.²⁴³ The continuing decrease in the number of affordable housing units has caused more and more people at the edge of survival to fall off the precipice into eviction, just as medical debt from an extended hospital stay (whether the patient survives or not) forces many slightly better off families into foreclosure.²⁴⁴ Many children suffer the functional equivalent of post-traumatic stress disorder which in turn, together with the homelessness itself, brings personal and social instability to the forefront of their lives and interferes with their flourishing and successful entry into adulthood.²⁴⁵

More than one person has speculated that the spread of higher-cost, very basic housing, may, (like the drug crisis which moved up the income ladder from the poorest to the more visible members of society), make society more aware of this crisis as an extremely complicated problem requiring multiple solutions to reduce the squalor and instability.²⁴⁶ In his final chapter, Alexander uses public and private law to attack the housing crisis which “elude[s] solutions merely through private law and judicial application of the flourishing theory of ownership” because the crisis is “systemic in nature” and requires “structural solutions.”²⁴⁷ The

<https://www.nytimes.com/2019/02/02/us/candice-payne-homeless-chicago.html>. During that time, temperatures dropped as low as negative twenty-five degrees Fahrenheit. *Id.* Payne paid \$4,700.00 with her own credit card and then searched online for vans or SUVs to transport the people from the tent city, including two pregnant women and a family of five in the first group. *Id.* Payne received a call from Gov. J.B. Pritzker, being inspired to find a more permanent solution, as other donors were inspired by the news of the young woman’s human compassion. *Id.*

241. ALEXANDER, *supra* note 52, at 4.

242. *Id.* at 5.

243. DESMOND, *supra* note 240, at 5, 282.

244. ALEXANDER, *supra* note 52, at 301-05.

245. DESMOND, *supra* note 240, at 296-98.

246. See ALEXANDER, *supra* note 52, at 301-02; Emily Badger & Jim Wilson, *They Cannot Afford to Lose*, N.Y. TIMES, May 13, 2018, at BU1, <https://www.nytimes.com/2018/05/12/upshot/these-95-apartments-promised-affordable-rent-in-san-francisco-then-6580-people-applied.html>.

247. ALEXANDER, *supra* note 52, at 296.

motivation, or “theoretical foundation for concrete solutions,” will have to be drawn from judicial, legislative, administrative, and executive sources at every level of government.²⁴⁸ The desire not to abandon homeless veterans but to enable them to flourish led to the largely successful efforts in the town of Newington, Connecticut to house homeless veterans living under bridges and unable to obtain jobs.²⁴⁹ A public-private partnership evolved beyond the veterans to provide greater attention to homelessness among other single people, then to homeless families and now to building affordable housing units.²⁵⁰

The “new” federalism is another approach to expand fundamental rights indirectly through a statute and therefore short of a constitutional claim, reaching a smaller approximation of what David Kennedy and like-minded conservatives agree cannot be justified by application of the Fourteenth Amendment’s Equal Protection Clause.²⁵¹ This “new” federalism applies to the operation of the ACA, which started out slowly because of computer glitches but then became extremely popular among voters for its access to health care.²⁵² The example of the ACA leads legislators, activists, and voters to urge measures to limit unfettered applications of the market economy, which increases inequality.²⁵³ Those in control of the economy use many tactics to keep their primacy by

248. *Id.* at 313.

249. Joseph De Avila, *Connecticut Is Credited for Its Housing of Homeless Vets*, WALL STREET J., Aug. 28, 2015, at A15, <https://www.wsj.com/articles/connecticut-ends-chronic-vet-homelessness-1440723643>.

250. Kevin Walsh, the mayor of Boston, implemented the public goal of providing conditions for flourishing, starting with housing which requires financial commitment “taking several forms including wealth transfer payments, subsidies, tax credit, and enforcement subsidies.” ALEXANDER, *supra* note 52, at 296. In his State of the City address in January 2016, Mayor Walsh announced that the program to eliminate veterans’ chronic homelessness had succeeded in housing all then-identified chronically homeless vets, some 850 people, so that the program could pick up new homeless people on a rolling basis, expand the program to other homeless adults and add affordable living units. *Mayor Walsh Announces Gifts Totaling \$3M to Boston’s Way Home Fund*, PARTNERS HEALTHCARE (Mar. 28, 2018), <https://www.partners.org/newsroom/articles/Bostons-Way-Home-Announcement.aspx>. Previously, Connecticut had ended “chronic homelessness among veterans” when, over two years, 300 homeless veterans had been placed in housing. De Avila, *supra* note 249 (reporting that once vets are housed, officials could provide them with services for mental illness, addiction, health care, and job training).

251. See Kennedy, *supra* note 196.

252. Jacob Weindling, *New Fox News Poll: Obamacare’s Popularity Is at an All Time High*, PASTE (Oct. 18, 2018, 12:30 PM), <https://www.pastemagazine.com/articles/2018/10/new-fox-news-poll-obamacares-popularity-is-at-an-a.html> (explaining that the “standard Republican health care policy of stripping people of their health care is wildly unpopular, and the preeminent boogeyman on the right is now one of the most popular policies in America. In fact, ‘Obamacare’ is as popular as it has ever been in Fox News’ poll”).

253. Joseph E. Stiglitz, *How Policy Has Contributed to the Great Economic Divide*, WASH. POST (June 22, 2012), https://www.washingtonpost.com/opinions/how-policy-has-contributed-to-the-great-economic-divide/2012/06/22/gJQAXTX2vV_story.html?utm_term=.c1afabe15933.

putting a thumb into the operation of the market. The most effective ways to ensure privileges outweigh rights include: 1) repressing inflation by increasing unemployment; 2) bailing out (using federal tax dollars) only the failing financial sector without providing relief for mortgagors in the same circumstances; 3) creating patent and copyright protections for drug companies which impose high charges for patients beyond the insurance coverage; and 4) failing to protect individual workers from the conditions of global competition (long hours, low wages, unsafe working conditions).²⁵⁴ In the same way, American manufacturers outsource the manufacture of everything from clothes to appliances but protect the chief executive officers' ("CEO") salaries in these companies.²⁵⁵ This list of privileges counters the right even to food, as independent workers under federal contracts and federal employees living from paycheck to paycheck appeared at food banks when their salaries were withheld to make a political point in 2018 to 2019.²⁵⁶

Without directly involving the Supreme Court in litigation, new federalists would be able to reform the rules surrounding the market in individual states (such as other insurance markets than health care delivery) and allow the market to work for greater numbers of average Americans or small entrepreneurs.²⁵⁷

Similarly, rights recognition for people not enjoying privilege may include imposition of registration fees in a progressive fashion. Scaling provides small enterprises with support from various Blue Sky and state corporate statutes, thereby fashioning measures opposite to those state legislatures which gave large businesses state capital gains deductions financed by the depletion of the budget for state public schools.²⁵⁸ State corporation laws could instead require greater accountability from both CEOs and their boards of directors, by establishing supervisory boards, as

254. Baker, *supra* note 186, at 25-27.

255. DESMOND, *supra* note 240, at 24. While he recognizes severe income inequality as a problem, unsurprisingly, Langone then (2003) the head of the executive pay committee using public money for the CEO of the NYSE, Dick Grasso, does not advocate legislation to tamp down the worst excesses at either end of the "wage" scale. Wolfe, *supra* note 196. Thus, a legally mandated minimum wage incentivizes "owners to figure out a way to change that factor of production" with automation or outsourcing to foreign countries. *Id.* Acknowledging "nobody can live on \$20,000 a year," Langone admits he likes "all the trappings of success absolutely. . . . I have custom-made suits and airplanes, I have businesses . . . and I have guys that made paintings for me But I'd also like to think if it didn't happen, I'd still be OK." *Id.*

256. Darran Simon, *Federal Employees Turn to Food Banks to Feed Their Families During Shutdown*, CNN (Jan. 20, 2019, 10:42 PM ET), <https://www.cnn.com/2019/01/17/us/government-employees-shutdown-food-banks/index.html>.

257. Baker, *supra* note 186, at 25-27.

258. Teachers' strikes in several states revealed the devastation and destruction in the public school system from deliberate predation to continue funding tax cuts for large campaign contributors during the decade-long Great Recession. *See supra* notes 109, 113 and accompanying text.

in several Member States of the European Union, for large public companies incorporated in the state.²⁵⁹ In cities and in states, grassroots support for a fifteen-dollar-per-hour minimum wage (many employers seem not to believe they can survive higher minimum wages) could deliver improvement in living standards to at least some workers now, until further and larger programs in the future and pensions for state employees are made more financially secure.²⁶⁰ These measures covering large groups of workers are broader than case-by-case suits for individual harms, though not rising to the protection recognition that a fundamental right would provide. Such measures would effectively put the subjects for several different types of class actions into state and local policies for the common good across the board. These are state and local alternatives to a call for an amendment to the Constitution, such as the ERA, or a call for a federal statute to address the injuries caused by incompetent or otherwise impaired and unsuitable shooters.²⁶¹

Various local, state, and interstate organizations exist to help state attorney generals, governors, state legislatures, secretaries of state, and mayors,²⁶² among others, cooperate in determining and solving, separately

259. Ken Langone, once head of the NYSE's compensation committee, serves in the media still today as poster-boy for lack of restraint in allocating extravagant, if not notorious, "rewards" to CEOs, even in public service corporations. Wolfe, *supra* note 196.

260. See Baker, *supra* note 186, at 32-33; Dean Baker, *If Progressives Wanted to Win*, HUFFINGTON POST (May 25, 2011, 4:40 PM), http://www.huffingtonpost.com/dean-baker/if-progressives-wanted-to_b_819871.html; see also David Brooks, Opinion, *The Future of the Left in America*, N.Y. TIMES, May 4, 2018, at A23, <https://www.nytimes.com/2018/05/03/opinion/future-american-left.html> (describing without approving larger reforms for the next step, probably on a national level "to ensure economic security for all. This would involve . . . providing universal basic income and having the federal government provide a paying job to all who want one.").

261. The Republican Governor of Massachusetts, Charlie Baker, announced at the end of February 2018 that Massachusetts is joining the "States for Gun Safety" coalition of New York, New Jersey, Rhode Island, and Connecticut. Bob Shaffer, *Massachusetts Joining Interstate Gun Safety Coalition*, WBUR (Feb. 25, 2018), <http://www.wbur.org/news/2018/02/25/mass-gun-safety-coalition>. The coalition will share information on applicants denied gun owners' licenses and coordinate tracking and intercepting illegal guns. *Id.* Massachusetts has had an assault weapon ban since 1998 and enacted a bump stock law early in 2018. Scott S. Greenberger, *State Moves on Assault Weapons Ban*, BOS. GLOBE (June 24, 2004), http://archive.boston.com/news/local/articles/2004/06/24/state_moves_on_assault_weapons_ban/?page=1; Danny McDonald, *Massachusetts Becomes the First State to Ban Bump Stocks*, BOS. GLOBE (Nov. 3, 2017, 5:14 PM), <https://www.bostonglobe.com/metro/2017/11/03/gov-polito-signs-supplemental-budget-makes-mass-first-state-ban-bumpstocks/YK6clBxBbsKDz0Phg4Np6O/story.html>.

262. Some 250 American mayors meeting in conference (June 2018) held sessions on "infrastructure, cybersecurity, school safety, immigration, automation and the economic future of cities." *About the 86th Annual Meeting*, U.S. CONF. OF MAYORS, <https://www.usmayors.org/meetings/86th-annual-meeting> (last visited Sept. 17, 2019); Sara Durr, *Sheryl Sandberg, COO of Facebook, to Address Nation's Mayors at U.S. Conference of Mayors Annual Meeting in Boston*, U.S. CONF. OF MAYORS (Mar. 30, 2018), <https://www.usmayors.org/2018/05/30/sheryl-sandberg-coo-of-facebook-to-address-nations-mayors-at-u-s-conference-of-mayors-annual-meeting-in-boston>. They had expert presentations on "how

or sometimes together, the problems they face. Surely these organizations are not ideal nor should they in more favorable times be relied upon heavily as first responders seeking fundamental rights, though they can often help and do accomplish useful goals, as when governors supported the ACA in 2017.²⁶³

One recent and on-going example of individual states taking action at the governors' and legislators' level is the states' treatment of additional revenue coming to at least some states from the tax cuts act signed at the end of 2017.²⁶⁴ From the point of view of human flourishing, the additional money should be allocated to necessary public projects such as infrastructure of various kinds or to various earned income or health care credits. Thus the state of Maryland provides an example of what might be done within the state for the greatest number of citizens with the money resulting from federal tax changes.²⁶⁵ Legislators in Maryland expected some revenue due to the federal tax cut and allocated a large portion of that revenue to "K-12 education," save some in the "Rainy Day Fund," and use a portion for tax cuts for low and moderate income taxpayers in an expanded state "Earned Income Tax Credit ("EITC") for workers without children in the home, an increase in the standard deduction and expanded tax benefits for retired veterans and public safety employees."²⁶⁶

From the point of view of strong, independent wealthy libertarians, who do not need civic services other than to attract employees to their businesses, the money should not be allocated to improvements in the state but be given back to those who pay the highest taxes.²⁶⁷ "[T]he tax

communities can use technology to grow and thrive," including wireless infrastructure, automation & artificial intelligence, as well as building sustainable communities (with financial advice from large national banking funders) and smart cities. See Durr, *supra*; see also *About the 86th Annual Meeting*, *supra*. Women's leadership, youth involvement in civic government, and protection against gun violence were the other important topics discussed at their conference. See *About the 86th Annual Meeting*, *supra*.

263. While the sessions were similar to those the mayors, see *supra* note 261, and each group had access to "Best Practices" policy papers, the governors at the National Governors Association conference were open to criticism because of the large corporate funders who met specially with the governors. Andrew Oxford, *National Governors Association Conference: The Corporate Connection*, SANTA FE NEW MEXICAN (July 18, 2018), https://www.santafenewmexican.com/news/local_news/national-governors-association-conference-the-corporate-connection/article_20bd77f8-2b26-5441-a910-3a491602e520.html. For a report, Public Citizen surveyed several groups which use corporate sponsors for meetings: "[c]orporate sponsors have both a financial stake in the procurement decisions officials make and a financial interest in the policy decisions they make." *Id.*

264. Tax Cut and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054.

265. Dylan Grundman, *An Update on State Responses to the Federal Tax Bill*, INST. ON TAXATION & ECON. POLICY (July 3, 2018), <https://itep.org/an-update-on-state-responses-to-the-federal-tax-bill>.

266. *Id.*

267. Editorial, *States Get a Windfall From GOP Tax Cuts, but Will They Return the Money to*

cuts shifted a bit of the tax burden to the states. Is that a bad thing? Not if the states use the windfall to cut their own tax rates or reform their tax code.”²⁶⁸ Returning the money to the taxpayers would give the wealthiest both the federal tax cut and the money returned to the states without improving public education, health care, or affordable housing. Constitutional interpretation of rights has been significantly narrowed without the present likelihood of wider interpretation. Therefore, these state and local initiatives and partnerships with relevant not-for-profit organizations will need to be strengthened in order to be ready for the recognition of fundamental rights in a future more hospitable time.

The ancient principles of renewal and reform lead us to consider whether constitutional amendment and less convoluted rules for construction and interpretation might benefit the American people, whose flourishing, after all, should be the objective of constitutional law. Tom Ginsburg finds that a flexible constitution is better able to meet the people’s requirements and recognize their fundamental rights.²⁶⁹ The question, therefore, becomes: What do the people of each state want from the point of view of whether they promote human flourishing or protect all present capital without increasing taxes, at least for that generation, in the hands of the leading entrepreneurs and corporations? What do they provide to make life more difficult or smoother for the average member of the society in accordance with their tax structures, allocation of government spending for domestic improvement, and the fostering of community or isolated individualism?

While more flexible constitutions not only allow but also pursue change within the context of continuity, in the United States, on the other hand, conditions of “social pluralism, political partisanship, and ‘Constitution worship’ help drive the unamendability of the constitutional text; which forces us back on constitutional development through

Taxpayers?, INV.’S BUS. DAILY (May 18, 2018), <https://www.investors.com/politics/editorials/gop-tax-cuts-state-revenues-democrats>.

268. *Id.* (“The reason for this windfall is that the tax bill expanded the tax base—by limiting or ending deduction—in exchange for lower income tax rates. In states that rely on federal tax law for their own income taxes, this can result in extra revenue if those states keep their income tax rates the same.”).

269. ZACHERY ELKINS, THOMAS GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 81-88 (2009); TOM GINSBURG & JAMES MELTON, *NORWAY’S ENDURING CONSTITUTION: IMPLICATIONS FOR COUNTRIES IN TRANSITION* 5, 7-9 (2014), http://comparativeconstitutionsproject.org/files/Norways_Enduring_Constitution.pdf?6c8912; see Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All?: Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT’L J. CONST. L. 686, 711 (2015); see also Eivind Smith, *The Constitution Between Politics and Law*, in *THE CONSTITUTION AS AN INSTRUMENT OF CHANGE* 21, 35-36 (Eivind Smith ed., 2003).

interpretation and construction.”²⁷⁰ We are assured of continuity even when change might prove respectful of more Americans’ rights. Thus we are left to solve the much harder practical problems of the person seeking redress almost on a case-by-case basis, first at common law, embodied for us in *Marbury v. Madison*, and now increasingly through federal legislation.²⁷¹ The emotional and societal cost of fighting each time for relief in an expense of energy and a waste of shame from the greed or lust for money of those who believe society and the constitution cannot help those members of society most needing help is very great, as the great Bard noticed. This expense of energy, sometimes to the point of exhaustion in seeking to maintain and extend equality,²⁷² would not be necessary without the narrowness of originalism. It syphons off into individual suits many of the resources which could be used in more productive ways, including an expansion of Medicare and Medicaid, if we committed to policies covering groups of people and at times all the people in legislation, rather than requiring individual suits which clog the courts and delay justice.

V. CONCLUSION

One point is clear from the ever-changing concepts of active and inactive originalist judges, the evolving role of congressional legislation, and the relationships between the states and Congress: New challenges for people whose quest for recognition of their rights requires interaction with the legal system will continue to arise. Misinterpretation or willful distortion of constitutional provisions, particularly the Fourteenth Amendment clause mandating equal protection of the laws, is the most common challenge. Only the greed of corporations and wealthy individuals (like that in the Tax Cuts and Jobs Act of 2017) can override the historical and real meaning of the Fourteenth Amendment.

Now the old arguments that the Fourteenth Amendment of the Constitution prevents the recognition of rights are no longer strong enough to prevail in the face of so many other arguments and historical studies, from Walter Dellinger’s to Steven Calabresi’s to Kermit

270. Pozen, *supra* note 71, at 954.

271. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

272. Supreme Court Justice Neil Gorsuch during his confirmation hearing committed to *Brown v. Board* as the law of the land, but some appellate-level judges in 2018 wish to leave open the question of whether they favor *Plessy* or *Brown*. Perry Grossman & Dahlia Lithwick, *Mimes in Robes*, SLATE (Apr. 26, 2018, 5:46 PM), <https://slate.com/news-and-politics/2018/04/why-it-matters-that-trumps-judicial-nominees-refuse-to-answer-questions-about-brown-v-board.html>.

Roosevelt's, as well as Post and Seigel's.²⁷³ The old arguments championing non-recognition of rights may still erect roadblocks and detours for litigants seeking redress. After the historians' work on the Fourteenth Amendment exposed misinterpretations, litigants seeking redress must still fight but their opponents' arguments present old, inauthentic interpretations whose continued use now amounts to willful distortion.

It may or may not be worthwhile for one person or another to seek redress of wrongs committed against her fundamental rights via the constitutional route. Surely, the high cost to us all of disregarding these rights signifies that any and every legitimate avenue for pressing a right must be explored rather than become the road not taken. Tempering hope with an assessment of realistic chances of a commitment to human flourishing under the Constitution requires the delicate balance between having enough energy to do the work when gains may be temporary, if achieved at all, and the apprehension of paralyzing futility.

Today as always, whether before the United States Constitution was drafted when merchants sought out Lord Mansfield for relief or adult children petitioned the Lord Chancellor for their parents' property,²⁷⁴ or *Marbury* sought his commission under the Judiciary Act,²⁷⁵ or after the passage of the Fourteenth Amendment, people continue to seek relief from harms committed against their rights. The people hid as best they could from the state-sanctioned terrorism of lynching which for too long obliterated the promise of the Fourteenth Amendment. Today, high school students march in the Florida sun against the wrongful deaths of people whose lives were stolen from them by other American terrorists.²⁷⁶ The violations of rights wronged, against which individual persons seek redress, cannot be smothered under unaccommodating categories. The Second Amendment protects the right to bear arms.²⁷⁷ Victims of terrorism have no corresponding constitutional right to sue the manufacturers of the weapons, much less a right to public safety or even the protection of their own lives. In order to elicit a response from the legal system, lawyers must seek to publicize the unredressed wrongs people suffer. How, when he knew that he would not live to see the justice of the promised land, the recognition of the fundamental human rights promised

273. Calabresi & Begly, *supra* note 19, at 672-74, 682-86; Dellinger, *supra* note 163; Post & Siegel, *supra* note 28, at 19, 25-26, 31-32. See generally Roosevelt, *supra* note 143.

274. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 26-27, 387 (4th ed. 2002).

275. *Marbury*, 5 U.S. (1 Cranch) at 138.

276. Emanuella Grinberg & Nadeem Muaddi, *How the Parkland Students Pulled Off a Massive National Protest in Only 5 Weeks*, CNN (Mar. 26, 2018, 9:17 AM ET), <https://www.cnn.com/2018/03/26/us/march-for-our-lives/index.html>.

277. U.S. CONST. amend. II.

in post-Civil War Amendments to the Constitution, did Dr. King keep going until that fateful shot?

Still, some of those with political voices and power might say working together does not make them stronger when they are better off alone, not a part of the larger society. Those who at times wish to reduce the United States to little more than a customs union/free trade area with better defenses than the Second Amendment's long guns and assault weapons often ignore the human dimension.²⁷⁸ When demands for attention to human flourishing and fundamental rights are raised, these thinkers are often found wanting not only in performing their duties to their fellow citizens but in human compassion.²⁷⁹ Nothing gets done to improve the rights and lives of others. With the view that we are better together, people, perhaps members of various groups helping veterans, could resolve to work on one aspect of the right to flourish, to house homeless veterans. The work of some of these groups has been highlighted in this Article.²⁸⁰ Such groups could concentrate on one large city (and in New York, on one of the five boroughs) in each of the fifty states, the District of Columbia, and Puerto Rico. Such a focus on the fundamental right to housing could touch off the beginning of a journey toward recognition of the right to housing in the knowledge that poverty causes homelessness, personal and societal instability, and despair. Affordable housing, group homes, and assisted living for elderly and disabled people allow people to flourish. With success, these programs will allow governments and citizens to appreciate this right as veterans' groups and others work toward public-private partnerships so that more homeless people can be covered, and affordable housing can be expanded.²⁸¹

278. See *supra* notes 196-202 and accompanying text.

279. See *supra* notes 196-202 and accompanying text.

280. See *supra* Part.IV.

281. See also Badger & Wilson, *supra* note 246 (exploring the instability of inadequate housing lotteries for the poor during San Francisco's continuing housing crisis and the congressional Tax Cuts and Jobs Act of 2017 which provided a much lower corporate tax rate at the expense of hundreds of thousands of affordable rental units nationwide). Changes in the tax code lowered incentives to build affordable housing units, making it more expensive for cities to come up with money for affordable housing. *Id.* Housing only a small number of the poor and homeless (979 applicants for every home at Our Lady of Lourdes Apartments in Bushwick, Brooklyn) indicates that "we have never in America made affordable housing a right." *Id.*

Compare the work of Mayor Marty Walsh of Boston, see *supra* note 250, and the Burlington, Vermont not-for-profit Cathedral Square Corp a provider of low-income housing, and its wellness program, with the drastic cuts Dr. Ben Carson, Secretary of Housing and Urban Development Secretary, desires to impose on poor people in federally subsidized housing. Mark Miller, *Vermont Can Show Washington the Way on Senior Housing Policy*, RETIREMENT REVISED (May 10, 2018), https://retirementrevised.com//vermont-can-show-washington-the-way-on-senior-housing-policy/?utm_source=feedburner&utm_medium=email&utm. Support and Services at Home

With good outcomes, human flourishing may begin to embrace wider swathes of needy people and allow the children with this opportunity later to contribute as working adults to a sounder, more stable democracy under the Constitution. The thread of the Constitution is just out of reach for many and frayed enough that it may not be repaired, as realistic assessor David Kennedy predicted.²⁸² Kennedy may wish to teach self-reliance to people suffering from food insufficiency or simply to retain in private hands all of the windfall benefits of enormous global companies and their executives when fundamental human rights privileges, the purchases of those who can afford to buy and therefore privatize fundamental rights.²⁸³

The failure to pay federal workers and contractors during the government shutdown of 2018 to 2019 revealed to the general public how much ground in recent years the average worker has lost in ability to access medical care and even food.²⁸⁴ The employed, but unpaid, workers stood in what appeared on television like the long breadlines of the Depression.²⁸⁵ They told reporters of their anguish in having to choose between rent and medicine for a diabetic child.²⁸⁶ Recognizing the fundamental rights David Kennedy rejected would return dignity to the struggling middle class and working poor, removing the pangs and fears of food insufficiency and housing insecurity, and harnessing their scattered energies in a productive way for themselves and society.²⁸⁷ Coherent recognition of these rights would lead to both a prohibition on nonpayment of workers during a shutdown, as well as a basic increase in the minimum wage and the whole scale of wages.

Honoring fundamental rights allows all of us to flourish without consigning the working poor, many disabled and senior people, and others to life on the precipice of the dark abyss when one disaster, natural or

(“SASH”) in conjunction with Cathedral Square Corporation (“Cathedral”) also wishes to save money and would like to think it can show Dr. Carson its better way by connecting housing and healthcare. *Id.* SASH combines wellness programs with the housing services by having a nurse in each federally subsidized affordable housing unit in the SASH-Cathedral program. *Id.* SASH has “documented reduced spending of \$1200 annually per patient.” *Id.*

282. Kennedy, *supra* note 196.

283. *See id.*

284. The effects of one emergency on a family were well known to sociologists before the shutdown. *See Poverty Tracker*, ROBIN HOOD, <http://povertytracker.robinhood.org/#fall2016> (last visited Sept. 17, 2019) (showing household shocks, compound disadvantage, and persistent poor health have a work-limiting effect).

285. Michael Barnes, *Kaine Likens Sidelined Gov’t Workers w/ Smartphones to Depression-Era Breadlines*, LIBERTY HEADLINES (Jan. 25, 2019), <https://www.libertyheadlines.com/kaine-pr-stunt-great-depression>.

286. Phil McCausland & Suzanne Ciechalski, *Federal Worker Forced to Ration Insulin Because of Government Shutdown*, NBC (Jan. 13, 2019, 3:55 AM), <https://www.nbcnews.com/news/us-news/federal-worker-forced-ration-insulin-because-government-shutdown-n958066>.

287. Kennedy, *supra* note 196.

manmade, suddenly appears. Failing such a nationwide recognition of rights, state and local partnerships with community organizations and businesses will continue to do case-by-case emergency work, just as the food pantries did temporarily during the shutdown when the real answer was being allowed to work for pay.²⁸⁸ Complainants in the past, rebuffed by the complications of the forms of action at common law, became petitioners in equity under principles that allowed the chancellor to fashion remedies beyond the strict elements of causes of action in order to do justice and state the law properly.²⁸⁹ The Supreme Court reflected this tradition in *Marbury v. Madison*.²⁹⁰ Clearly, a flourishing life in the sunshine of recognized rights is preferable to uncoordinated, case-by-case remedies used in everyday private law disputes as a substitute for fundamental rights.

Teachers in the streets outside the legislatures in state capitals in West Virginia, Oklahoma, Kentucky, and Arizona²⁹¹ make a sad sight. Their pictures also remind us of the crowds of people in the Depression, like the workers victimized by the recent government shutdown.²⁹² Are we closer to the situation in the Depression than most of us wish to be? Human flourishing is constitutionally, legally, and economically²⁹³ possible for so many more people on the edge of having enough control over their own lives to work at a job that sustains them and their children, to access education and medical care, if we fulfill the promise of the Constitution and act for the common interest of the country. Human greed and artificial barriers interpreting the Fourteenth Amendment make life so much harder for those already struggling. The fundamental rights to flourish and to seek redress from harms are denied to these millions of Americans. This year, with the greatest number of women yet serving in Congress, is the time to renew our efforts to pass the Equal Rights Amendment and to recognize the rights to health care, sufficient food, education, and affordable housing for each and every person.²⁹⁴ “Injustice anywhere is a threat to justice everywhere. We are caught in an

288. See Simon, *supra* note 256.

289. BAKER, *supra* note 274, at 105-08.

290. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

291. See *supra* notes 105-25 and accompanying text.

292. Barnes, *supra* note 285.

293. *Within Reach: Universal Healthcare, Worldwide*, *supra* note 162, at 9, 11-12 (discussing the affordability of basic health care and surgery).

294. Margaret Talbot, *Democrats in the House*, *NEW YORKER*, Jan. 14, 2019, at 13, 13-14 (noting that the 116th Congress has “the most women ever (a hundred and twenty-seven . . . a hundred and six of whom are Democrats)”).

inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly.”²⁹⁵

295. KING, *supra* note 158.