

INEQUALITY, INDIVIDUALIZED RISK, AND INSECURITY

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INTRODUCTION

[T]he laws, . . . forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.

—Anatole France¹

In this world, you get what you pay for.

—Kurt Vonnegut²

Three facts are clear: economic inequality is extreme in this country, our social and legal policies dealing with employment impose a broad set of risks on individuals,³ and individuals have much more difficulty coping with these risks in this era of business volatility leading to employment uncertainty.⁴ As a result, general insecurity increases.⁵ The thesis of this Lecture is that our extreme inequality in part results from government policy, that much government policy is the result of the undue influence of money in politics, and that, before any reform is likely, the dominance of money in politics must be substantially reduced. An important question is how that dominance can be reduced; however, the answer to that question is far from clear.

Recent events—such as the emergence of the Tea Party Movement, the dispute over public sector unionism here in Wisconsin and elsewhere, and the Occupy Movement⁶—reveal an increasing public awareness of

1. ANATOLE FRANCE, *THE RED LILY* 91 (Winifred Stephens trans., Dodd, Mead & Company 1925) (1894).

2. KURT VONNEGUT, *CAT'S CRADLE* 128 (1963).

3. From a comparative law aspect, the American people have always been exposed to more personal risk than the people in other developed countries who have much more social security. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-126, *SOCIAL SECURITY REFORM: OTHER COUNTRIES' EXPERIENCES PROVIDE LESSONS FOR THE UNITED STATES* (2005), available at <http://www.gao.gov/new.items/d06126.pdf>.

4. See generally BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS (Katherine Porter ed., 2012). The rise in consumer debt has left today's families with debt burdens that would have been unthinkable a mere generation ago. Katherine Porter, *Driven by Debt: Bankruptcy and Financial Failure in American Families*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS, *supra*, at 2. Debt has become one of the most common shared qualities of middle-class Americans. *Id.*

5. See LARRY ELLIOTT & DAN ATKINSON, *THE AGE OF INSECURITY* 287 (1999).

6. The underlying thrust or driving rationale of Occupy Wall Street is not entirely clear. Brishen Rogers captures what he thinks is the essence of the movement as “a reaction against and rejection of neoliberal governmentality. . . . The concern is not just that private interests have captured the public, but that it no longer makes complete sense, politically or phenomenologically, to distinguish public from private forms of power and discipline.” Brishen Rogers, *Occupy Wall Street and Neoliberal*

the extent of our economic inequality and a reaction against it.⁷ This Lecture will in Part I describe the present state of economic equality in the United States. Part II describes how the present state of economic volatility heightens the employment risks that workers in the United States face. Four different areas of labor and employment law will be examples of that heightened risk. Part III attempts to explain how the United States got into the situation where workers suffer the heightened insecurity resulting from the risks they carry. Part IV begins the discussion of what it will take to begin to re-establish balance in our society, with the first step aimed at reducing the amount of money in politics followed by a discussion of the need for a new social movement framed around economic equality.

I. THE PRESENT CONSEQUENCES OF ECONOMIC INEQUALITY

Economic inequality in this country has become so extreme because most gains have gone to those at the top of the economic ladder while the rest have done little better or worse than before this trend began in the 1970s. Inequality has risen to the same level as in 1928, just before the Great Depression.⁸ In the 1970s, many European countries had greater inequality than the United States, but now the United States is far and away the most unequal.⁹ The top 10% of the population own 80% of all financial assets, while the bottom 90% own only 20%.¹⁰ Income inequality over time exacerbates wealth inequality because “[h]igh

Governmentality, CONCURRING OPINIONS (Mar. 2, 2012, 1:40 PM), <http://www.concurringopinions.com/archives/2012/03/occupy-wall-street-and-neoliberal-governmentality.html>.

7. Sabrina Tavernise, *Survey Finds Rising Strain between Rich and the Poor*, N.Y. TIMES, Jan. 12, 2012, at A15 (“About two-thirds of Americans now believe there are ‘strong conflicts’ between rich and poor in the United States. . . . The share was the largest since 1992, and represented about a 50 percent increase from the 2009 survey [by the Pew Research Center].”); Shaila Dewan & Robert Gebeloff, *One Percent, Many Variations*, N.Y. TIMES, Jan. 15, 2012, at A1, <http://www.nytimes.com/2012/01/15/business/the-1-percent-paint-a-more-nuanced-portrait.html> (it takes \$380,000 in annual earnings to be in the top one percent at the national level).

8. OFFICE OF THE VICE PRESIDENT OF THE U.S., ANNUAL REPORT OF THE WHITE HOUSE TASK FORCE ON THE MIDDLE CLASS 5 (2010) [hereinafter WHITE HOUSE TASK FORCE].

9. See JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 38–39 (2010).

10. CHARLES E. HURST, SOCIAL INEQUALITY: FORMS, CAUSES AND CONSEQUENCES 34 (6th ed. 2007).

earners add much more to their wealth every year than low earners”¹¹ since they have more disposable income.

“If the total income growth [between 1979 and 2005] were a pie, . . . the slice enjoyed by the roughly 300,000 people in the top tenth of 1 percent would be half again as large as the slice enjoyed by the roughly 180 million in the bottom 60 percent.”¹² “[S]ince 1985, the lower 60 percent of households [in earnings] have lost \$4 trillion, most of which has ascended to the top 5 percent”¹³ From 1985 to 2010, the overall real increase in earnings of all employed Americans rose 7%. During that period, the professions that gained the most were physicians and surgeons, university professors, law partners, and corporate CEOs, with, for example, the earnings of some CEOs rising over 800%.¹⁴ Between 1979 and 2005, “the average after-tax income of households in the top 0.01 percent increased from just over \$4 million to nearly \$24.3 million—more than quintupling in little more than a quarter-century.”¹⁵ The poor are getting poorer while the percentage of the population falling into poverty increases.¹⁶ “More than two million workers toil in

11. Daniel Altman, *To Reduce Inequality, Tax Wealth, Not Income*, N.Y. TIMES, Nov. 19, 2012, at A2.

12. HACKER & PIERSON, *supra* note 9, at 3 (“These mind-boggling differences have no precedent in the forty years of shared prosperity that marked the U.S. economy before the late 1970s.”).

13. Andrew Hacker, *We’re More Unequal than You Think*, N.Y. REV. BOOKS (Feb. 23, 2012), <http://www.nybooks.com/articles/archives/2012/feb/23/were-more-unequal-you-think/?pagination=false> (“[T]he upward flow of money has reduced the spending power of those lower down, most notably the bottom 60 percent. . . . [I]n a not-so-distant past, families of modest means made enough to put something aside for their children’s college fees. That cushion is gone. . . . By way of contrast, parents in the top 5 percent can write full tuition checks, which gives their children an edge in admissions decisions, even if colleges deny this.”). The emphasis on markets, deregulation, and commodification has caused this extreme inequality. See JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* 5–6 (2012) (“[M]uch of America’s inequality is the result of market distortions, with incentives directed not at creating new wealth but at taking it from others.”). Stiglitz uses as a prime example the actions of the financial sector that “made enormous amounts of money by preying upon these groups with predatory lending and abusive credit card practices.” *Id.* at 37.

14. STIGLITZ, *supra* note 13, at 21 n.88. Executives and managers form 40.8% of the top 0.1% of taxpayers, followed by those not working at 6.3%, and lawyers at 6.2%. HACKER & PIERSON, *supra* note 9, at 46. The phenomenal growth in CEO income does not reflect their market worth and is not justified based on shareholder value. It is a result of the capture of the board by these top managers. *Id.* at 63.

15. HACKER & PIERSON, *supra* note 9, at 24.

16. See Jason DeParle et al., *Older, Suburban and Struggling, ‘Near Poor’ Startle the Census*, N.Y. TIMES, Nov. 19, 2011, at A1; Sabrina Tavernise, *Study Finds Big Spike in Poorest in the U.S.*, N.Y. TIMES, Nov. 3, 2011, at A20; Sabrina Tavernise & Robert Gebeloff, *New Way to Tally Poor Recasts View of Poverty*, N.Y. TIMES, Nov. 8, 2011, at A17.

food preparation jobs at limited-service restaurants. . . . They are the lowest-paid workers in the country . . . typically earning \$8.69 an hour . . . [A]lmost three-quarters of them live in poverty.”¹⁷ Poverty is at a level not seen since the Great Depression¹⁸ and the welfare safety net has failed to protect an increasing number of people.¹⁹ It is not only that the poor are getting poorer. Productivity has continued to increase but the workers have not shared in those gains.²⁰ The middle class is fast disappearing, if to be middle class is to be able to live a relatively comfortable and secure life.²¹ Economic mobility—the ability to climb

17. Eduardo Porter, *Unionizing the Bottom of the Pay Scale*, N.Y. TIMES, Dec. 5, 2012, at B1 (The nation faces a straightforward choice: “[E]ither we build an economy in which most workers can earn enough to adequately support their families or we build a government with the wherewithal to subsidize the existence of a lower class that can’t survive on its own. We are doing neither.”).

18. See BUREAU OF LABOR STATS., U.S. DEP’T OF LABOR, USDL-11-1691, THE EMPLOYMENT SITUATION—NOVEMBER 2011 (2011), available at <http://www.bls.gov/news.release/empstat.nr0.htm> (“In November, the unemployment rate declined by 0.4 percentage point to 8.6 percent. From April through October, the rate held in a narrow range from 9.0 to 9.2 percent. The number of unemployed persons, at 13.3 million, was down by 594,000 in November. The labor force, which is the sum of the unemployed and employed, was down by a little more than half that amount.”); *National Unemployment Update*, NAT’L CONF. OF ST. LEGISLATURES (Feb. 1, 2013), <http://www.ncsl.org/issues-research/labor/national-employment-monthly-update.aspx> (updated monthly).

19. See Jason DeParle, *Welfare Limits Left Poor Adrift as Recession Hit*, N.Y. TIMES, Apr. 8, 2012, at A1. DeParle traces the impact of the 1996 welfare reforms that now work to leave many of the poorest without help because they have used their lifetime allotment of welfare. *Id.* Single women with children are the largest group of affected people. *Id.*

20. WHITE HOUSE TASK FORCE, *supra* note 8, at 3. The Gini index for the United States moved from forty-fifth most unequal to fortieth between 1997 and 2007. CIA, *Distribution of Family Income—Gini Index*, WORLD FACTBOOK, http://www.cia.gov/library/publications/the-world-factbook/fields/print_2172.html (last visited Feb. 13, 2013). This is an international phenomenon. “Between 1999 and 2011 average labour productivity in developed economies increased more than twice as much as average wages. . . . The global trend has resulted in a change in the distribution of national income, with the workers’ share decreasing while capital income shares increase in a majority of countries.” INT’L LABOR ORG., GLOBAL WAGE REPORT 2012/13: WAGES AND EQUITABLE GROWTH xiv (2013), available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_194843.pdf.

21. Binyamin Applebaum, *For U.S. Families, Net Worth Falls to 1990s Levels*, N.Y. TIMES, June 12, 2012, at A1 (The median family “had a net worth of \$77,300 in 2010, compared with \$126,400 in 2007,” according to the Federal Reserve’s Survey of Consumer Finances, a report issued every three years that provides comprehensive information about the financial health of American families.). “Middle-class families are defined by their aspirations more than their income. . . . [They] aspire to home ownership, a car, college education for their children, health and retirement security and occasional family vacations.” WHITE HOUSE TASK FORCE, *supra* note 8, at 10; see also Paul Harris, *The Decline and Fall of the American Middle Class*, GUARDIAN (Sept. 13, 2011, 1:35 PM), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/sep/13/american->

up the economic ladder—is now less likely in the United States than in countries such as Australia, Canada, Finland, France, Germany, Norway, and Spain: “Americans enjoy less economic mobility than their peers in Canada and much of Western Europe.”²² In 2003, seventeen percent of American households had zero or less net worth, and this was before the Great Recession.²³ An element of the middle class lifestyle is to own one’s own home, yet the Great Recession has destroyed that expectation for many. Residential foreclosures have exploded.²⁴ A significant percentage of people are “underwater” vis-à-vis their homes so that their risk of losing them is significant.²⁵ Another element of membership in the middle class is the expectation that the children will go to college and will do better than their parents. The ability to go to college is increasingly difficult since the cost of higher education has spiraled out of sight for many families.²⁶ It is particularly troubling that public higher

middle-class-poverty; Jim Siegel, *Middle Class “Hard to Define,”* COLUMBUS DISPATCH, Sept. 4, 2011, at 2G.

22. Jason DeParle, *Harder for Americans to Rise from Economy’s Lower Rungs*, N.Y. TIMES, Jan. 4, 2012, at A1 (“[Forty-two] percent of American men raised in the bottom fifth of incomes stay there as adults. That shows a level of persistent disadvantage much higher than in Denmark (25 percent) and Britain (30 percent) [J]ust 8 percent of American men at the bottom rose to the top fifth. That compares with 12 percent of the British and 14 percent of the Danes. . . . [A]bout 62 percent of Americans (male and female) raised in the top fifth of incomes stay in the top two-fifths [while] 65 percent born in the bottom fifth stay in the bottom two-fifths.”); see also HACKER & PIERSON, *supra* note 9, at 29.

23. HACKER & PIERSON, *supra* note 9, at 33.

24. See Saskia Sassen, *Inequality? We Need a New Word*, OCCUPIED WALL ST. J. (Feb. 10, 2010), <http://occupiedmedia.us/2012/02/inequality-we-need-a-new-word/> (“From 2005 to 2010, some 9.3 million mortgage foreclosure notices were sent to households in the U.S., amounting to about 35 million people losing their homes.”). Those in the financial services industry involved with the derivatives and credit default swaps got a bailout, not the mortgagors of their homes. See *id.*

25. Sam Hooper, *More Than One-Fifth of Homeowners Have Underwater Mortgages*, PERS. MONEY NETWORK (Mar. 2, 2012), <https://personalmoneynetwork.com/moneyblog/2012/03/02/homeowners-underwater-mortgages/> (“In the second quarter of 2011, according to the New York Times, the market analysis firm CoreLogic estimated that 10.9 million homeowners owed more on [the] remainder of their mortgages than their homes were worth on the market. By the third quarter, it had receded slightly to 10.7 million, though the reduction was largely due to foreclosures. CoreLogic has just released its analysis of the fourth quarter of calendar 2011, according to Time magazine. CoreLogic found the number of homeowners holding negative equity had increased by 3.7 percent, to 11.1 million homes being underwater. That is roughly 22.8 percent of the population, just more than one in five people.”).

26. Catherine Rampell, *Where the Jobs Are, the Training May Not Be*, N.Y. TIMES, Mar. 2, 2012, at A1 (“State appropriations for colleges fell by 7.6 percent in 2011–12, the largest annual decline in at least five decades In one extreme example, Arizona has slashed its college budget by 31 percent since the recession began in 2007.”). Adjusted for inflation, state support for higher education has declined twelve percent over

education has lost significant state support.²⁷ Going in debt in increasing amounts, with the resulting increase in economic insecurity for students and their parents, pushes the present generation of workers, as well as the next, ever closer to the line of financial disaster, to say nothing of the distortions that debt causes in the career paths of our future workforce.²⁸

The population of the United States at the beginning of 2012 was approximately 313 million.²⁹ The total labor force, including wage and salary workers—agricultural and nonagricultural workers, domestics and other private household workers, the military on active duty, self-employed persons and unpaid workers who worked at least fifteen hours per week in a family-operated enterprise—was some 156 million people.³⁰ Over 18 million of these workers were part time, either because of economic or noneconomic reasons.³¹ About 2.5 million workers were employed by temporary service agencies.³² The contingent workforce made up of part-time and temporary workers has grown rapidly.³³ Part-time workers are typically not entitled to the benefits that are

the past five years. Paul Krugman, *Ignorance Is Strength*, N.Y. TIMES, Mar. 9, 2012, at A31 (“[T]uition at public four-year colleges has risen by more than 70 percent over the past decade.”).

27. Rampell, *supra* note 26. Public higher education is fundamentally a state activity, with some federal support. With the Great Recession devastating the finances of the states, public higher education becomes a target in order to balance state budgets.

28. Differences in educational levels do not explain the intense economic inequality. HACKER & PIERSON, *supra* note 9, at 35–36 (“American inequality is not mainly about the gap between the college-educated and the rest It is about the pulling away of the very top.”). Further, child care programs for babies and young children are increasingly being privatized. See MADELYN FREUNDLICH & SARAH GERSTENZANG, AN ASSESSMENT OF THE PRIVATIZATION OF CHILD WELFARE SERVICES: CHALLENGES AND SUCCESSES ix, 14 (2003), available at <http://www.childrensrights.org/policy-projects/workforce-and-systemic-issues/privatization-of-child-welfare-services/>.

29. See *Census Bureau Projects U.S. Population of 312.8 Million on New Year’s Day*, U.S. CENSUS BUREAU (Dec. 29, 2011), <http://www.census.gov/newsroom/releases/archives/population/cb11-219.html>.

30. BUREAU OF LABOR STATS., U.S. DEP’T OF LABOR, USDL-12-0163, THE EMPLOYMENT SITUATION—JANUARY 2012 tbl.A (2012), available at http://www.bls.gov/news.release/archives/empsit_02032012.pdf [hereinafter EMPLOYMENT SITUATION—JANUARY 2012]. In 2011, just short of 22 million people worked for government. See BUREAU OF LABOR STAT., U.S. DEP’T OF LABOR, CURRENT EMPLOYMENT STATISTICS HIGHLIGHTS: JANUARY 2012, at 17 (2012), available at <http://www.bls.gov/ces/highlights012012.pdf>.

31. EMPLOYMENT SITUATION—JANUARY 2012, *supra* note 30, at tbl.A-8.

32. *Id.* at tbl.B-1.

33. The business of providing temporary workers has become a huge industry. Since 2009 through 2011, temporary staffing agencies accounted for ninety-one percent of the new jobs that were created. Steven P. Berchem, *American Staffing 2011: Leading U.S. Job Growth*, STAFFING SUCCESS, Special Issue 2011, at 12, 12, available at <http://www.asa-digital.net/amstaffingassoc/spissue#pg15>.

provided full-time employees.³⁴ Temporary employees have to look to their temporary staffing employer for their wages and benefits.³⁵ Almost 4 million people were not in the labor force because they were discouraged from looking for work.³⁶

Unemployment remains high, even though the Great Recession was declared to have ended in 2009.³⁷ “Federal Reserve Chairman Ben Bernanke said [on January 25, 2012] that the central bank did not expect the U.S. unemployment rate to go below 8.2 percent in 2012 or below 7.4 percent in 2013.”³⁸ If the underemployed, the informal workers, and those who have given up looking for work are added, the total is over 15%.³⁹ Youth unemployment is especially severe, with 18.1% of those between ages 16 and 24 unemployed in July 2011.⁴⁰ Minority

34. Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective on Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 159 (2003).

35. *See id.*

36. EMPLOYMENT SITUATION—JANUARY 2012, *supra* note 30, at 2.

37. MICHAEL REICH, CENTER ON WAGE & EMP. DYNAMICS, HIGH UNEMPLOYMENT AFTER THE GREAT RECESSION: WHY? WHAT CAN WE DO? 1–2 (2010), available at <http://www.irle.berkeley.edu/cwed/wp/2010-01.pdf> (“In the recovery phase that began in April or May of 2009, what went up quickly has not come down very much. Since its cyclical peak of 10.1 percent in October 2009, the overall unemployment rate fell to 9.7 percent in January 2010 and remained at 9.7 percent in May 2010. But in the same period, the long-term unemployment rate has continued to skyrocket as rapidly as during the recession phase. By May 2010, the proportion of the unemployed with jobless durations of six months or more had reached 46.0 percent. By comparison, in the 1957–58 recession, this proportion peaked at about 10 percent; in 1982–83, it peaked at about 26 percent.”) (internal citations omitted).

38. Catherine New, *Ben Bernanke: Unemployment High, Interest Rates Unchanged for Many Months to Come*, HUFFINGTON POST (Jan. 25, 2012, 5:43 PM), http://www.huffingtonpost.com/2012/01/25/ben-bernanke-unemployment-high-interest-rates-unchanged-_n_1231262.html.

39. *See* BUREAU OF LABOR STAT., U.S. DEP’T OF LABOR, USDL-13-0144, THE EMPLOYMENT SITUATION—JANUARY 2013 tbl.A-15 (2013), available at <http://www.bls.gov/news.release/pdf/empstat.pdf>. Most people, even those earning considerable amounts of money, are only several paychecks away from economic disaster. While employees receive unemployment compensation, that is limited in amount and in duration. Those who are not employees but work in the informal economy have only their own resources to survive on until those are spent when they can go on welfare. *See* Becky Yerak, *Number of Asset-Poor Americans Is on the Rise*, CHI. TRIB., Jan. 31, 2012, at C1.

40. BUREAU OF LABOR STAT., U.S. DEP’T OF LABOR, USDL-11-1246, EMPLOYMENT AND UNEMPLOYMENT AMONG YOUTH—SUMMER 2011, at 2 (2011), available at <http://bls.gov/news.release/youth.nr0.htm> (“The number of unemployed youth in July 2011 was 4.1 million, down from 4.4 million a year ago. The youth unemployment rate declined by 1.0 percentage point over the year to 18.1 percent in July 2011, after hitting a record high for July in 2010. Among major demographic groups, unemployment rates were lower than a year earlier for young men (18.3 percent) and

communities have been particularly hard hit, with African-American unemployment at 31% and Latino at 20%.⁴¹ The United States increasingly resembles a developing country.⁴² People at the bottom of the economic pyramid have always been insecure, especially as to their employment, but now that sense of insecurity has moved up into the middle management and middle class.⁴³

II. ECONOMIC VOLATILITY HEIGHTENS THE RISKS FOR INDIVIDUALS

Increased globalization of economic activity has increased business competition by opening many countries to the product and services of enterprises based outside of their national economies.⁴⁴ To prosper in face of that competition, U.S. businesses have increasingly begun to compete transnationally.⁴⁵ The pace of business has increased as has the pace of change in the way businesses can and do operate.⁴⁶ In part because of the increasing sophistication of information technology and the availability of efficient means to transport people and goods, worldwide enterprises can now operate with flatter organizational structures. Real-time information is readily available to top management

Asians (15.3 percent), while jobless rates were little changed for young women (17.8 percent), whites (15.9 percent), blacks (31.0 percent), and Hispanics (20.1 percent).”).

41. *Id.* at tbl.1.

42. HACKER & PIERSON, *supra* note 9, at 37.

43. Elisabeth Jacobs & Katherine S. Newman, *Rising Angst? Change and Stability in Perceptions of Economic Insecurity*, in LAID OFF, LAID LOW: POLITICAL CONSEQUENCES OF EMPLOYMENT INSECURITY 74, 87–89 (Katherine S. Newman ed., 2008).

44. JEFFREY D. SACHS, *THE PRICE OF CIVILIZATION: REAWAKENING AMERICAN VIRTUE AND PROSPERITY* 88–89 (2011) (“The main economic implication of globalization is that a tremendous and rapidly expanding range of sophisticated economic activities that once were carried out only in the United States, Europe, and Japan can now be carried out even more profitably in China, India, Brazil, and elsewhere. . . . As the production of a widening range of goods and services is relocated to the emerging economies, United States employment and incomes are subjected to tremendous upheaval.”); *see also* Peter Thomas Muchlinski, *Globalisation and Legal Research*, 37 INT’L LAW. 221, 222–23 (2003) (describing five ways of viewing “globalization”).

45. U.N. CONFERENCE ON TRADE & DEV., *WORLD INVESTMENT REPORT 2009* xxi (2009), *available at* http://www.unctad.org/en/docs/wir2009_en.pdf. There are 82,000 transnational corporations involved in international production worldwide. *Id.* These entities operate through 810,000 foreign affiliates. *Id.* They generate over two-thirds of world trade. Bernhard G. Gunter & Rolph van der Hoeven, *The Social Dimension of Globalization: A Review of the Literature*, 143 INT’L LAB. REV. 7, 16 (2004).

46. SACHS, *supra* note 44, at 93 (Globalization “provides the conduit for today’s emerging economies to leapfrog technologies, and thereby to rapidly narrow the income gap with rich countries, notably the United States.”).

about all of the operations of the business wherever they occur.⁴⁷ Flattened hierarchies give businesses the ability to make significant decisions quickly and to implement them quickly across far-flung operations because proposals for action need no longer work their way slowly up through numerous layers of management.

Enterprise now has an increased opportunity to disaggregate its various parts and to locate them anywhere in the world that is to its advantage. One reason to move some element of a business from one country to another would be to escape the application of the laws of one nation if those laws were burdensome and another country had laws more beneficial to the business. Globalization, therefore, lessens the ability of any nation state to effectively regulate its national economy.⁴⁸ For example, a large U.S. insurance and reinsurance company, Aon, moved its headquarters from Chicago to London to take advantage of the insurance markets in London as well as to take advantage of tax laws.⁴⁹

Economic globalization expanded the global labor market because countries that had only minor participation in the worldwide economy, like China or India, opened to the global economy expanding it

47. The concept of a unified global economy implies much more than greater trade between nations. As Professor Brian Langille notes:

To get to the real phenomenon of globalization . . . we must shift from a world in which not only goods, but services, ideas, money, markets, and production are truly global and mobile by virtue of advances in communication and transportation technologies. We must move from the model of *shallow* economic integration to a model of *deep* economic integration in which advancements in transportation and technology enable capital to see the whole world as its stage.

Brian A. Langille, *Seeking Post-Seattle Clarity—and Inspiration*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION* 137, 143 (Joanne Conaghan et al. eds., 2002). For a description of the use of these techniques at a high level by Wal-Mart, see James Hoopes, *Growth through Knowledge: Wal-Mart, High Technology, and the Ever Less Visible Hand of the Manager*, in *WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM* 83, 90–91, 101–103 (Nelson Lichtenstein ed., 2006).

48. See, e.g., *Flags of Convenience Campaign*, INT’L TRANSPORT WORKERS’ FED’N, <http://www.itfglobal.org/flags-covenience/index.cfm> (last visited Feb. 1, 2013) (attempting to force ship owners to register their ships in the country of ownership). The maritime industry is an early example of enterprise moving its legal residence far from where the owners lived or where the ships operated. *Id.* Registering oceangoing ships in countries that have favorable labor and employment laws is a longstanding practice in the maritime industry. See *id.*

49. See Becky Yerak et al., *Aon Move a Blow to City: Company Cites Tax Savings in Moving HQ to London*, CHI. TRIB., Jan. 14, 2012, at C1, available at http://articles.chicagotribune.com/2012-01-14/business/ct-biz-0114-aon-moving--20120114_1_aon-center-aon-ceo-aon-corp.

significantly.⁵⁰ Many of these changes in business in direction or method of operation have significant impact on the workers, sometimes good but frequently bad. In short, employment has become more volatile and volatility breeds insecurity.⁵¹ The watchword for labor policy by business has become “flexibility.”⁵² Labor flexibility means “rapid changes in employment—including high levels of turnover, shorter periods of employment, and widespread contingent employment contracts.”⁵³ That “translates into risk, insecurity, low wages, and deteriorating labor conditions for a significant proportion of the labor force.”⁵⁴ The following Sections, developing four different areas of labor and employment law, will demonstrate the contingent status of workers as well as the decreasing opportunities workers have to diminish the insecurity that flows from the individualized risks they now bear.

A. Independent Contractor Law as a Method of Doing Business

With greater volatility in business, employers now have an increased capacity and incentive to organize their relationship with workers in ways that no longer value long service or involve any expectation of permanence.⁵⁵ Even where the employer establishes a direct relationship with a worker, it has considerable say in whether a worker is an employee for purposes of labor and employment law or is

50. SACHS, *supra* note 44, at 94 (“China’s opening to global trade in 1978 was tantamount to bringing hundreds of millions of low-skilled workers into a globally integrated labor pool [that pushed] down the wages of low-skilled workers around the world.”).

51. See ELLIOTT & ATKINSON, *supra* note 5.

52. In Europe, the concept is “flexicurity.” See Frank Hoffer, *Flexicurity: The Broken Promise*, SOC. EUR. J. (July 21, 2011), <http://www.social-europe.eu/2011/07/flexicurity-the-broken-promise>.

Globalisation and enhanced competition requires greater flexibility by companies. They must have the ability to hire and fire with the lowest possible transaction costs to adapt as quickly as possible to changing market conditions. Workers need to accept this. However, giving up workplace protection should be compensated through the provision of social security that guarantees income security while strengthening employability through active labour market policies.

Id. Hoffer claims that during the Great Recession there has been flexibility for employers but not security for workers. *Id.*

53. CHRIS BENNER, *WORK IN THE NEW ECONOMY: FLEXIBLE LABOR MARKETS IN SILICON VALLEY* 5 (2002).

54. Manuel Castells, *Preface to BENNER, supra* note 53, at xi.

55. See James Gray Pope et al., *The Employee Free Choice Act and a Long-Term Strategy for Winning Workers’ Rights*, 11 WORKINGUSA: J. LAB. & SOC. 125, 129 (2008).

an independent contractor.⁵⁶ A written agreement between the worker and the enterprise characterizing the worker as an independent contractor is not always controlling but it is evidence of the nature of the relationship.⁵⁷ One example gives a taste of how that status is sometimes determined. In *Seafarers International Union v. NLRB*,⁵⁸ the Yellow Cab Company in Chicago established its relationship with the cab drivers of its cabs by charging the drivers a daily “lease” between independent contractors rather than having the drivers pay the cab company a share of the daily receipts as had been the general practice in the cab industry.⁵⁹ Because of that supposedly independent contractor relationship, Yellow Cab claimed that it did not control where its drivers found fares and

56. See generally Micah Prieb Stoltzfus Jost, Note, *Independent Contractors, Employees, and Entrepreneurialism under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311 (2011). There are competing common law tests for determining employee status for different purposes as well as differing statutory definitions and interpretations. Traditionally, the question looked at whether the alleged employer had the right to control the worker. The RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 (Tentative Draft No. 2, 2009), for purposes of the common law, defines the employment relationship by looking at whether the alleged independent contractor is an entrepreneur. It provides:

(1) Unless otherwise provided by law or by §1.02 or §1.03, an individual renders services as an employee of an employer if (a) the individual acts, at least in part, to serve the interests of the employer, (b) the employer consents to receive the individual’s services, and (c) the employer precludes the individual from rendering services as part of an independent business.

(2) An individual renders services as part of an independent business when the individual in his or her own interest exercises entrepreneurial control over the manner and means by which the services are performed.

(3) Entrepreneurial control over the manner and means by which services are performed is control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to service other customers.

Id.

57. Comment b to § 1.01 of the Restatement makes the distinction:

The underlying economic realities of the relationship, rather than any formal descriptions of the relationship, determine whether a particular individual is an employee. Thus, even an agreement between a principal and an agent stating that the agent is providing services, not as an “employee” but as an “independent contractor,” would not be controlling.

Id.

58. 603 F.2d 862 (D.C. Cir. 1978). To the extent that the common law test as described in the Restatement was applied, it would appear that these cab drivers were employees of Yellow Cab.

59. *Id.* at 866–68.

therefore the drivers were entrepreneurs.⁶⁰ Because of that, the drivers were held not to be employees for purposes of organizing a union, even though the drivers worked only for Yellow Cab and did so for extended shifts every day so that they in reality could not be in business independent of the cab company.⁶¹ Instead of employees, they were found to be independent contractors who are not within the protection of the National Labor Relations Act.⁶² That meant that these cabbies were relegated to the informal economy, therefore lacking the protection of labor and employment laws.⁶³ Their relationship was essentially determined by the terms of their contracts that the cab company required them to sign. Sometimes called contingent or precarious workers, these independent contractors are left without the benefits and protections of labor and employment law as well as the fringe benefits the enterprise provides to workers it characterizes as employees.⁶⁴

As an alternative to contracting with individuals to work for the enterprise as independent contractors, businesses can decide to contract with other enterprises to undertake various aspects for the enterprise, again with the nature of the relationship determined by the contract between the two supposedly independent entities. A common type of independent contractor relationship involves the outsourcing of employment itself through the use of staffing agencies to have agency employees perform the enterprise's work, frequently at the workplace of the enterprise.⁶⁵ Traditionally, some enterprises organized themselves vertically to perform in-house every element of their operation, but

60. *Id.* at 880–81.

61. *Id.* The relationship the cab company has with its workers resembles the informal employment structure of street vendors in Mexico City. See ROGER BLANPAIN, SUSAN BISOM-RAPP, WILLIAM R. CORBETT, HILARY K. JOSEPHS & MICHAEL J. ZIMMER, *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW* 283 (2d ed. 2012).

62. *Seafarers*, 603 F.2d at 881; see also National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006).

63. For a discussion of how workers are defined as “employees” of “employers,” see Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland between an Employer-and-Employee Relationship*, 14 U. PENN. J. BUS. L. 605 (2012).

64. See Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 75–76 (1998).

65. See, e.g., Jayanth K. Krishnan, *Outsourcing and the Globalizing of the Legal Profession*, 48 WM. & MARY L. REV. 2189 (2007) (even professional work is becoming outsourced).

increasingly businesses have reorganized so that their core functions are still performed by their employees but the rest is outsourced.⁶⁶

Employers have used that flexibility to organize their operations to maintain corporate profits in part by offshoring United States jobs: “US multinational corporations cut domestic employment by 2.9 million during the 2000’s while adding 2.4 million workers overseas.”⁶⁷ American businesses not only offshore operations and their employees, they frequently combine offshoring with outsourcing.⁶⁸ Apple is a good example of how this works. Apple is quite profitable.⁶⁹ It is organized to combine offshoring and outsourcing.⁷⁰ “Apple employs 43,000 people in the United States and 20,000 overseas. . . . Many more people work for Apple’s contractors: an additional 700,000 people engineer, build and assemble iPads, iPhones and Apple’s other products. But almost none of them work in the United States. Instead, they work for foreign companies in Asia, Europe and elsewhere.”⁷¹

In addition to offshoring parts of its own operations abroad, an enterprise can also outsource parts of the business to supply chains made up of independent contractors. The actual producer of the goods or the provider of the service is at the bottom of the chain, with added contractor links moving up the chain to the branded consumer enterprise or a major retailer at the top.⁷² Using Apple as an example, the obligation

66. BLANPAIN ET AL., *supra* note 61, at 450 (“Today . . . we live in the information society. The bigger companies explode: Their work becomes outsourced, offshored, sub-contracted, or externalized. Networking is in. The virtual company is a reality. Today, the slogan is: Stick to your core business, outsource the rest.”).

67. THOMAS BYRNE EDSALL, *THE AGE OF AUSTERITY: HOW SCARCITY WILL REMAKE AMERICAN POLITICS* 170 (2012); *see also* Stephan Manning et al., *A Dynamic Perspective on Next-Generation Offshoring: The Global Sourcing of Science and Engineering Talent*, *ACAD. MGMT. PERSP.*, Aug. 2008, at 35, 35. (“Offshoring refers to the process of sourcing any business task, process, or function supporting domestic and global operations from abroad, in particular from lower cost emerging economies.”).

68. “Outsourcing” involves the contracting out of a business function—commonly one previously performed in-house—to an external provider. *See Definition of Outsource*, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/outsource> (last visited Feb. 5, 2013).

69. Charles Duhigg & Keith Bradsher, *How the U.S. Lost Out on iPhone Work*, *N.Y. TIMES*, Jan. 22, 2012, at A1 (Apple earned over \$400,000 in profit per employee in 2011).

70. *See, e.g.*, Nick Wingfield, *Apple, Aided by an iPhone Frenzy, Doubles Its Quarterly Profit*, *N.Y. TIMES*, Jan. 25, 2012, at B1.

71. Duhigg & Bradsher, *supra* note 69. Recently, Apple announced that it was going to resume some manufacturing in the United States. Catherine Rampell & Nick Wingfield, *In Shift of Jobs, Apple Will Make Some Macs in U.S.*, *N.Y. TIMES*, Dec. 7, 2012, at A1.

72. SMALL BUS. ADVANCEMENT NAT’L CTR., UNIV. OF CENT. ARK., *WHAT IS A SUPPLY CHAIN?*, http://www.sbaer.uca.edu/publications/supply_chain_management/

of Apple's contractors is to deliver the goods pursuant to the terms of the contract. Apple's obligation is to pay the contract price for the finished goods to the penultimate contractor in the chain who then compensates the contractors down the chain. Each contracting party down the chain gets paid its contract price from the entity above. Except for their obligation to observe the terms of their immediate contracting partners both up and down the chain, all are independent contractors. Apple, like many multinational enterprises, requires that all of these contracts in the chain contain Apple's Supplier Code of Conduct.⁷³ These codes typically require the contractors to abide by all local labor and employment laws and standards. They also typically contain clauses that give the ultimate purchaser the right to inspect the facilities where each contract in the chain is being performed and to take action, including terminating the contractual relationship, if a contractor violates any of its contractual commitments, including the Code.

Until recently, Apple had claimed that it audited its contractors and each year reported on violations of the Code by them, but some independent reports began to surface showing that enforcement was haphazard at best.⁷⁴ In response to the publicity alleging that it did little

pdf/01.pdf (last visited Feb. 13, 2013) ("A supply chain consists of all parties involved, directly or indirectly, in fulfilling a customer request. The supply chain not only includes the manufacturer and suppliers, but also transporters, warehouses, retailers, and customers themselves. Within each organization, such as manufacturer, the supply chain includes all functions involved in receiving and filling a customer request.").

73. See *Apple Supplier Code of Conduct*, APPLE, <http://www.apple.com/supplierresponsibility/code-of-conduct> (last visited Feb. 5, 2013).

74. See, e.g., Charles Duhigg & David Barboza, *In China, the Human Costs That Are Built into an iPad*, N.Y. TIMES, Jan. 26, 2012, at A1. A recent article describes how inadequate Apple's enforcement of the Code has been:

[W]orkers assembling iPhones, iPads and other devices often labor in harsh conditions, according to employees inside those plants, worker advocates and documents published by companies themselves. Problems are as varied as onerous work environments and serious—sometimes deadly—safety problems.

Employees work excessive overtime, in some cases seven days a week, and live in crowded dorms. Some say they stand so long that their legs swell until they can hardly walk. Under-age workers have helped build Apple's products, and the company's suppliers have improperly disposed of hazardous waste and falsified records, according to company reports and advocacy groups that, within China, are often considered reliable, independent monitors.

More troubling, the groups say, is some suppliers' disregard for workers' health. Two years ago, 137 workers at an Apple supplier in eastern China were injured after they were ordered to use a poisonous chemical to clean iPhone screens. Within seven months last year, two explosions at iPad factories, including in Chengdu, killed four people and injured 77. Before

to enforce its Code, Apple announced that it had chosen an outside auditor, Fair Labor Association, to do the audits.⁷⁵ Those audits revealed that its major subcontractor, Foxconn, not only violated Apple's Code but also Chinese labor law.⁷⁶ In fairly rapid order, Apple and Foxconn announced substantial changes, including significant wage increases with much reduced work weeks for Foxconn workers.⁷⁷

So far, the employees of these overseas subcontractors have not been successful at enforcing these codes of conduct against the enterprises at the top of the supply chain.⁷⁸ Foxconn's Chinese employees would not likely be able to sue Apple even if it was clear that Foxconn had violated Chinese labor laws or Apple's Code. In absence of enforcement of their labor laws and standards by the countries where the work has been outsourced and offshored, these Codes are only subject to enforcement by the multinational enterprise at the top of the supply chain pyramid. Thus, a recent attempt to enforce a Code against Wal-Mart for its failure to enforce its Code vis-à-vis its offshore and outsourced subcontractors failed. In *Doe I v. Wal-Mart Stores, Inc.*,⁷⁹ employees of Wal-Mart's foreign suppliers in countries including China, Bangladesh, Indonesia, Swaziland, and Nicaragua sued Wal-Mart using California law to try to hold Wal-Mart liable for their injuries caused by their immediate employers' failure to honor their commitment in the Code and for Wal-Mart's failure to enforce it.⁸⁰ Plaintiffs relied on four traditional legal theories but the Ninth Circuit rejected all of them.⁸¹ The key theory

those blasts, Apple had been alerted to hazardous conditions inside the Chengdu plant, according to a Chinese group that published that warning.

Id.

75. Charles Duhigg & Nick Wingfield, *Apple in Shift, Pushes an Audit of Sites in China*, N.Y. TIMES, Feb. 14, 2012, at A1. The choice of Fair Labor Association was criticized as being too close to Apple to be truly independent. *See, e.g.*, Steve Greenhouse, *Critics Question Record of Monitor Selected by Apple*, N.Y. TIMES, Feb. 14, 2012, at B1. That the president of Fair Labor Association was almost immediately quoted as saying that the Foxconn "facilities are first-class" did little to assuage the critics. *See, e.g.*, Steven Greenhouse, *Early Praise in Inspection at Foxconn Brings Doubt*, N.Y. TIMES, Feb. 17, 2012, at B6.

76. *See* Juliette Garside, *Apple's Factories in China Are Breaking Employment Laws, Audit Finds*, GUARDIAN (Mar. 29, 2012), <http://www.guardian.co.uk/technology/2012/mar/30/apple-factories-china-foxconn-audit>.

77. David Barboza, *Foxconn Plans to Sharply Lift Workers' Pay*, N.Y. TIMES, Feb. 19, 2012, at A14.

78. *See, e.g.*, *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009).

79. 572 F.3d 677 (9th Cir. 2009).

80. *Id.* at 680.

81. *Id.* at 681–85. The four theories were: "(1) Plaintiffs are third-party beneficiaries . . . ; (2) Wal-Mart is Plaintiffs' joint employer; (3) Wal-Mart negligently breached a duty to monitor the suppliers and protect Plaintiffs from the suppliers'

that underpins the others is that these workers are third-party beneficiaries of the contract between their employers and Wal-Mart because the Code requires contractors to comply with all labor standards. Citing the *Restatement (Second) of Contracts*, however, the court held that these employees of the suppliers were not intended by the parties to the contract to be beneficiaries of it.⁸² “The language and structure of the agreement show that Wal-Mart reserved the right to inspect the suppliers, but did not adopt a duty to inspect them.”⁸³ It is not clear why the inspection clause determines the overall intent of the parties. The underlying clause that was directly involved with the question of the intent of the parties is the commitment to provide decent labor standards for the workers of the contractors. Wal-Mart could argue that its intent for including the Code in these contracts is the cynical one of protecting its brand from negative publicity resulting from these contractors failing to provide decent wages and working conditions, but that still does not mean that the objective meaning of the terms of the contract did not create an obligation to these workers. Nevertheless, the result in *Doe I* means that contracting parties can, by the language they use in a contract, either create a duty to third parties or not. That leaves the obligation under this theory to be completely within the control of the enterprise at the top of the supply chain. If it is careful in drafting its contracts and codes of conduct, any obligation under these provisions is only discretionary with the branded enterprise at the top of the chain.⁸⁴ In other words, despite the terms of these contracts, the risk of substandard wages and working conditions is thrust upon the individual workers in

working conditions; (4) Wal-Mart was unjustly enriched by Plaintiffs’ mistreatment.” *Id.* But see Joe Phillips & Suk-Jun Lim, *Their Brothers’ Keeper: Global Buyers and the Legal Duty to Protect Suppliers’ Employees*, 61 RUTGERS L. REV. 333, 333 (2009) (All four contract theories “are colorable, posing risks for buyers and potential for foreign workers.”). Further, for purposes of U.S. antidiscrimination laws, the Equal Employment Opportunities Commission uses a “joint employer” theory to treat employees of staffing firms to also be employees of the enterprise where they were assigned to work. See EEOC NOTICE NO. 915.002, APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS (1997), available at <http://www.eeoc.gov/policy/docs/conting.html>.

82. *Wal-Mart Stores*, 572 F.3d at 681 (citing RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (1981)).

83. *Id.* at 681–82.

84. Carrying over the no-duty approach from contract law to negligence, the court found that Wal-Mart did not owe a duty to plaintiffs to monitor the suppliers or to prevent the alleged mistreatment. *Id.* at 683. Further, because Wal-Mart had a right only to inspect the suppliers’ facilities, it was not a joint employer of these workers. *Id.* at 682–83. Finally, the court found that “[t]he lack of any prior relationship between Plaintiffs and Wal-Mart precludes the application of an unjust enrichment theory here.” *Id.* at 685.

these other countries because they have little or no opportunity to enforce their rights in their own countries or anywhere.

Substandard working conditions abroad also indirectly impact workers in the United States.⁸⁵ As the economy has gone global, so has the labor market. Thus, workers in the United States are competing with workers in the rest of the countries that are active in the global economy. Like workers everywhere, American workers face substantial competition based on legitimate differences in labor costs across this much-broadened, globalized labor market. But they also face competition based on the illegitimate differences in labor costs flowing from the abuse of workers across the world, even though their United States employers are able to take advantage of those lower labor costs through their contracts with the employers of these employees.⁸⁶

B. The At-Will Presumption and the Dependence upon Employment

Most workers in the United States are at-will which means that either party can terminate the employment contract at any time for good reason, no reason, or even a bad reason unless the reason is an illegal one.⁸⁷ At-will is such a strong presumption that, even if the employee

85. See, e.g., *International Trade*, WORLDPUBLICOPINION.ORG, http://americans-world.org/digest/global_issues/intertrade/laborstandards.cfm (last visited Feb. 1, 2013). It must be acknowledged that workers are also consumers and, in that part of their lives, they have the advantages of presumably lower prices and better choices among products and services that flow from the expanded global economy.

86. The International Labour Office's 2008 Declaration on Social Justice for a Fair Globalization differentiates legitimate from illegitimate comparative differences. INT'L LABOUR ORG., ILO DECLARATION ON SOCIAL JUSTICE FOR A FAIR GLOBALIZATION (2008), available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@cabinet/documents/publication/wcms_099766.pdf. Article I.A.(iv) provides that member states must respect, promote, and realize fundamental worker rights while also recognizing, "that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes." *Id.* at 11. The Labor Side Agreement, according to the North American Free Trade Agreement, does abjure the three North American member states to enforce their own labor and employment laws, as do the subsequent Free Trade Agreements that the United States has entered into with other countries. See MARY JANE BOLLE, CONG. RESEARCH SERV., 97-861E, NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER RIGHTS AND FAST-TRACK DEBATE (2001), available at <http://fpc.state.gov/documents/organization/6211.pdf>. These are agreements among the member states and do not provide any basis for legal actions by individual or groups of workers. At the state-to-state level, it is not apparent that the member states have enhanced and expanded their enforcement because of their ratification of these agreements. *Id.* at 16.

87. *Bammert v. Don's SuperValu, Inc.*, 2002 WI 85, ¶¶ 8-9, 254 Wis. 2d 347, 646 N.W.2d 365; see also RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.01 (Tentative

proves that the employer promised “permanent employment,” the courts will still likely find the employment to be at-will.⁸⁸ While that presumption can be overcome,⁸⁹ most workers face the risk every day that it will be their last day working for that employer no matter how hard or well they work or even how well the employer’s business is doing.⁹⁰

In the earlier industrial age, real but informal job security existed as a practical matter for many workers, even if they were legally at-will. That security was based on business models where employers expected operations to continue at the same workplace in more or less the same

Draft No. 2, 2009) (“Unless a statute, other law or public policy, or, . . . an agreement, binding promise or statement limits the right to terminate, either party may terminate an employment relationship with or without cause.”).

88. See, e.g., *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967).

89. Restatement (Third) of Employment Law section 2.02 does list some exceptions to at-will based on common law:

The employment relationship is not terminable at will by an employer if: (a) an agreement between the employer and the employee provides for (1) a definite term of employment, or (2) an indefinite term of employment and requires cause to terminate the employment; or (b) a promise by the employer to limit termination of employment reasonably induces detrimental reliance by the employee; or (c) a policy statement made by the employer limits termination of employment; or (d) the implied duty of good faith and fair dealing applicable to all employment limits termination of employment; or (e) any other principle recognized in the general law of contracts limits termination of employment.

RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.02 (Tentative Draft No. 2, 2009) (internal citations omitted).

90. To the question, “what is the first thing to do when you get a new job?” the answer, based on the at-will rule, is to update your resume. Some workers, such as teachers with tenure, workers covered by a collective bargaining agreement, and public sector employees within a civil service system, are protected by a good cause standard for termination. Employees with high value in the labor market, such as top executives and sports and entertainment stars, have economic power to protect themselves through contract negotiations. See *The Rights of Employees*, ACLU, http://www.aclufl.org/take_action/download_resources/info_papers/12.cfm (last visited Feb. 1, 2013). Richard Epstein argues that workers are adequately protected because the employer would face increased replacement costs and, perhaps, reputational injuries if it terminated workers without a good reason. Richard A. Epstein, *In Defense of the Contract At-Will*, 51 U. CHI. L. REV. 947, 967–68, 973–74 (1984). Questionable at the time it was written, it now flies in the face of the reality that stock prices go up when top management slashes employment. See Jessica Silver-Greenberg, *Citigroup to Cut 11,000 Jobs and Take \$1 Billion Charge*, N.Y. TIMES DEALBOOK (Dec. 5, 2012, 9:22 AM), <http://dealbook.nytimes.com/2012/12/05/citi-to-cut-11000-jobs-and-take-1-billion-charge>.

manner for the long term.⁹¹ Many firms were highly integrated vertically so that most, if not all, elements of the business were performed by firm employees.⁹² Employers would invest in job training for its workers on the expectation that the investment would be returned because the workers would have an incentive not to leave. Given the development of their skills specific to the job, workers would have an incentive to stay with their employer because those skills were unlikely to be valued as highly in the external labor market. In that business environment, the legal provision of job security, at least as to those workers, was not as significant as it would be in the present era with greatly increased volatility in employment. Further, in the industrial era, relatively high rates of unionization provided added job security for many workers, regardless of their skill levels.

At-will employees are not only at risk that they will lose their jobs at any time but they also face the loss of significant benefits beyond wages because those benefits are attached to their employee status.⁹³ Before the enactment of the Affordable Care Act (ACA), most people who had health insurance got it through their employers. Health insurance was not mandated but tax incentives to employers and to their employees drove the way health insurance was provided.⁹⁴ The ACA, which expands health insurance coverage significantly by reaching beyond employment status, was upheld by the Supreme Court against a

91. See Paul Osterman, *Choice of Employment Systems in Internal Labor Markets*, 26 *INDUS. REL.* 46, 50–51 (1987) (although Osterman notes this security was found mainly in salary-modeled employment systems, not industrial systems where seniority based layoffs were common).

92. See Herbert Hovenkamp, *The Law of Vertical Integration and the Business Firm: 1880–1960*, 95 *IOWA L. REV.* 863, 879 (2010). The River Rouge plant of Ford Motor Company took in a wide array of raw natural resources—sand to make glass, iron ore to make steel, etc.—at one end and put out new Ford cars at the other. See *Ford Rouge Center Illustrates 20th Century Progress*, *FORD* (Nov. 3, 2000), http://media.ford.com/article_display.cfm?article_id=6486.

93. Attaching benefits such as health insurance and pension plans through employment was less a policy decision and more of a way for employees to receive added compensation without violating the wage-price controls during World War II. See Richard E. Schumann, *Compensation from World War II through the Great Society*, *COMPENSATION & WORKING CONDITIONS*, Fall 2001, at 23, 24, available at <http://www.bls.gov/opub/cwc/archive/fall2001art4.pdf>.

94. If the employer does provide health insurance and the employee leaves the employer, the employee does have continued access to participate in that insurance for a limited time pursuant to the Consolidated Omnibus Budget Reconciliation Act (COBRA). *Health Plans and Benefits: Continuation of Health Coverage—COBRA*, U.S. DEPARTMENT LAB., <http://www.dol.gov/dol/topic/health-plans/cobra.htm> (last visited Feb. 22, 2013). Without the contribution of the employer to pay for the insurance, it may be prohibitively expensive for ex-employees.

constitutional challenge.⁹⁵ Even with the ACA, coverage is far from universal with employer-provided health insurance still at the core of our national health policy.⁹⁶

As part of their employee benefit packages, many employers provide retirement benefits to their employees. In 2007, over 86 million workers were covered by employer-sponsored qualified retirement plans, which, with Social Security and personal savings, is the basis for old age economic security.⁹⁷ But because fifty-four percent of workers are not covered by any employer retirement plan, most workers to rely on only Social Security and their meager personal savings.⁹⁸ While there are restrictions against employer discrimination among its employees who are covered in these tax qualified retirement plans,⁹⁹ the decision whether or not to have a retirement plan is up to the employer. Many employers

95. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012).

96. The Congressional Budget Office predicted that about 30 million people will not be covered by the ACA. CONG. BUDGET OFFICE, EXEC. OFFICE OF THE PRESIDENT, ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION tbl.1 (2012), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf>.

97. TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2010-10-097, STATISTICAL TRENDS IN RETIREMENT PLANS 6 (2010), available at <http://www.treasury.gov/tigta/auditreports/2010reports/201010097fr.pdf> (“Employer-sponsored retirement plan participation has significantly outpaced the growth in the working age population over the past 30 years. Between July 1977 and July 2007, the working age population (i.e., people between the age of 18 and 64 years) grew 44.8 percent (from 130.9 million to 189.5 million). However, employer-sponsored retirement plan participation grew 102.1 percent (from 42.7 million to 86.3 million) between CYs 1977 and 2007. This rate of growth indicates that working Americans are increasingly participating in retirement plans sponsored by their employers.”). While not legally mandated, there are tax incentives for employer-sponsored retirement plans. Employer contributions to employee retirement plans are deductible to the employer as a business expense but are not included in the income earned by the employees at the time of the contribution. See Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (2006) (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.). Payouts are, however, taxed as income when received by the worker. See 26 U.S.C. § 402 (2006).

98. The fifty-four percent figure is the sum of subtracting those covered, 86.3 million, from the total workforce, 189.5 million, which equals 103.2 million, and dividing that by the total workforce of 189.5 million.

99. See 29 U.S.C. § 1140 (2006) (“It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan.”). There are some lesser requirements for some other types of employee benefit plans. Many benefits, such as paid vacations, are not within the Employee Retirement Income Security Act because they are not plans that hold assets.

have terminated or dropped their retirement plans.¹⁰⁰ Given the increasing economic pressure on workers, an increasing number of workers do not participate in the section 401(k) plans that are offered by their employers because they cannot afford to make the contribution required to participate.¹⁰¹ Requiring employee contributions to be a prerequisite to enrollment obviously has a disparate impact on lower income workers.

For employees lucky enough to be covered by an employer's retirement plan,¹⁰² the risk of investment for retirement plans is increasingly theirs.¹⁰³ Historically, many employers provided their employees with "defined benefit" plans—colloquially described as

100. Emily Brandon, *Fewer Employers Offer Retirement Plans*, U.S. NEWS (Oct. 19, 2010), <http://money.usnews.com/money/blogs/planning-to-retire/2010/10/19/fewer-employers-offer-retirement-plans-> ("Access to retirement benefits has been declining since the beginning of the decade and the 2008 recession pushed even more workers out of the employment-based retirement system. The number of employees participating in a retirement plan at work decreased from 63.7 million in 2008 to 61 million in 2009. That's well below the 67.1 million workers who participated in a plan in 2000. And we're not even talking about traditional pensions, which have been declining for decades. Retirement benefits included in the study include traditional pensions, 401(k)s, and similar types of retirement accounts both with and without employer contributions. Even among full-time workers between ages 21 and 64, the group most likely to have retirement benefits, just over half (54 percent) participated in a retirement plan in 2009, down from a high of 60 percent in 1999."); *see also* Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2009*, EMP. BENEFIT RES. INST., Oct. 2010, at 6, available at http://www.ebri.org/pdf/briefspdf/EBRI_IB_10-2010_No348_Participation.pdf.

101. *401(k)s Are Failing Millions of Americans*, BUS. INSIDER (Apr. 22, 2012, 10:05 AM), <http://www.businessinsider.com/401ks-are-failing-millions-of-americans-2012-4> ("The average balance in all 50 million 401(k) accounts is just over \$60,000, according to the Employee Benefit Research Institute. Even people within 10 years of retirement have saved an average of only \$78,000, and more than a third of them have less than \$25,000. More than half of U.S. workers have no retirement plan at all. With Social Security averaging \$14,780 a year for individuals and \$22,000 for couples, many Americans will exhaust their savings in just a few years. Because millions of boomers are likely to live into their 70s and 80s, the country is headed toward a major crisis. 'It looks like most middle-class Americans will become poor or near-poor retirees,' said Teresa Ghilarducci, a retirement specialist at the New School in New York.").

102. *See generally Retirement Plans, Benefits & Savings: Types of Retirement Plans*, U.S. DEPARTMENT LAB., <http://www.dol.gov/dol/topic/retirement/typesofplans.htm> (last visited Feb. 3, 2013).

103. *See* JOHN BROADBENT ET AL., THE SHIFT FROM DEFINED BENEFIT TO DEFINED CONTRIBUTION PENSION PLANS—IMPLICATIONS FOR ASSET ALLOCATION AND RISK MANAGEMENT ii (2006), <http://www.bis.org/publ/wgpapers/cgfs27broadbent3.pdf> ("The transition from DB to DC plans in private sector pensions is shifting investment risk from the corporate sector to households. Households are therefore becoming increasingly exposed to financial markets, and retirement income may be subject to greater variability than before.").

“pensions.” These plans would provide a guaranteed monthly payment at retirement with a monthly benefit determined by a formula based on length of service and income over the final years of employment.¹⁰⁴ The employer was obligated to make contributions regularly to a trust in order to fund the retirement benefits as they came due and the employer would be liable if it did not.¹⁰⁵ To say this another way, the risk was on the employer if the contributions and accumulated investment income would not be enough to provide the guaranteed benefits when they came due. More recently, there has been a significant move away from defined benefit plans to “defined contribution” plans, commonly called “401(k) plans.”¹⁰⁶ In these plans, employees contribute a percentage of income to an investment account. Many employers also contribute to their workers’ accounts.¹⁰⁷ When an employee retires, she is entitled to the amount that has accumulated in the account over the time of employment. That amount is made up of the contributions plus or minus the results of the investment decisions that the employee has made over time.¹⁰⁸ In other words, the investment risk is on the worker, not the employer. If the investment experience was good, the retiree could have a significant amount of money to support herself during retirement. If, on the other hand, the investments produced poor results, or retirement occurred in a down market, the worker could have a much smaller account to fund her retirement years.¹⁰⁹

104. See KATHRYN J. KENNEDY & PAUL T. SHULTZ III, *EMPLOYEE BENEFITS LAW: QUALIFICATION AND ERISA REQUIREMENTS* 7–8 (2006).

105. See *id.* at 9. The government backstops that liability through the Pension Benefit Guaranty Corporation that provides retirement benefits to workers whose defined benefit plans have been terminated. See *id.* at 291–92.

106. See BROADBENT ET AL., *supra* note 103, at ii.

107. See *id.* at 8. Employee contributions to their accounts are the property of the account holder and thus are vested immediately on creation, but employer contributions need only become vested in a gradually vesting formula from the second to the sixth year. *Id.*

108. *Id.* at 7.

109. At present, the retirement plans of most public sector employees are traditional pensions with the employer bearing the investment risk. *Public Sector Pension Plans: Change Is Underway*, STANFORD GRADUATE SCH. BUS. (Aug 4, 2011), <http://www.stanford.edu/group/knowledgebase/cgi-bin/2011/08/04/public-sector-pension-plans-change-is-underway/>. But, as part of the attack on public sector workers that has emerged since the beginning of the Great Recession, those defined benefit plans are being threatened. It is interesting that in 2002 President George W. Bush proposed “privatizing” Social Security by creating individual retirement accounts where the money in the accounts would be invested by the account holder who would therefore carry the investment risk for the results of those investment decisions. See Elisabeth Bumiller, *Bush Renews Push to Partly Privatize Social Security*, N.Y. TIMES, Mar. 1, 2002, at A1. This attempt to further impose risks on individuals was unsuccessful but it is an idea that

Most employees are at-will so they face the risk of termination on a daily basis. Because health insurance and retirement benefits are typically dependent on employee status, the risk of losing a job is significant over and above the loss of a paycheck. With more employment volatility, these risks grow greater for individual workers. Although previously collective action countered some of employment risks, increasingly there are barriers to many forms of collective action.

C. Diminished Opportunities for Employee Collective Action

One way that workers might overcome the at-will presumption and the insecurity flowing from it is to act collectively by organizing or joining a union to represent them. With the enactment of the Wagner Act in 1935,¹¹⁰ now known as the National Labor Relations Act,¹¹¹ employees of employers covered by the Act have a legal right to organize and to join unions, to seek union representation, to collectively bargain, and to enter a collective bargaining agreement.¹¹² Unionized workplaces with collective bargaining agreements in place provide good-cause protection for the covered workers.¹¹³ Thus, the broader the coverage of collective agreements, the more workers there are who will have job security. That coverage, however, has gone down steadily since the 1970s.¹¹⁴ Private sector unionization peaked in the 1950s at about thirty-five percent.¹¹⁵ In “2011 the union membership rate—the percent of wage and salary workers who were members of a union—was 11.8 percent, essentially unchanged from 11.9 percent in 2010. . . . Public-sector workers had a union membership rate (37.0 percent) more than five times higher than that of private-sector workers (6.9 percent).”¹¹⁶

may return as part of the continuing movement to impose more and different kinds of risks on individuals.

110. Act of July 5, 1935, ch. 372, 49 Stat. 449.

111. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 452 (2006) (codified as amended at 29 U.S.C. §§ 151–169 (1935)).

112. 29 U.S.C. § 157 (2006).

113. See generally ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING (2d ed. 2004).

114. Nick Gillespie, *Why Private-Sector Union Membership Declined. And Why Public-Sector Unions Might Follow*, REASON.COM (Mar. 1, 2011, 10:26 AM), <http://reason.com/blog/2011/03/01/why-private-sector-union-membe>; Alejandro Reuss, *What’s Behind the Union Decline in the United States?*, DOLLARS & SENSE, May/June 2011, at 25.

115. Gillespie, *supra* note 114.

116. BUREAU OF LABOR STATS., U.S. DEP’T OF LABOR, USDL-12-0094, UNION MEMBERS—2011 (2012) [hereinafter UNION MEMBERS—2011], available at

As the number of workers covered by collective bargaining agreements continues to decline, there are widespread negative effects on all workers. As unionization declines, the workers not covered by collective bargaining agreements lose some leverage in the labor market because there is a positive correlation between the extent of unionization and the general level of economic equality.¹¹⁷ Take the American auto industry, for example. So far, the United Auto Workers union has been unable to organize the workers in foreign-owned assembly plants—“transplants”—in this country, though it has recently redoubled its efforts.¹¹⁸ These foreign-owned automakers have an incentive to set their wage and benefit levels, including the level of voluntary job security through internal but unilateral grievance procedures, to be somewhat above the labor market in their respective locales but also to be not too far below the levels provided unionized auto workers.¹¹⁹ Employees of these plants have little incentive to unionize if that would, at best, lead only to marginal gains in wages and benefits and, perhaps, fly in the face of stiff management resistance.¹²⁰ Still, the autoworkers’ collective bargaining agreement does act as a baseline for nonunion autoworkers. The foreign-owned automakers do have to maintain some level of parity with the union contract to minimize the risk that their U.S. workers will

<http://www.bls.gov/news.release/union2.htm> (In 2011, 16.3 million wage and salary workers were represented by a union. This group includes both union members (14.8 million) and workers who report no union affiliation but whose jobs are covered by a union contract (1.5 million). Government employees comprised about half of the 1.5 million workers who were covered by a union contract but were not members of a union.).

117. ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* 100 (1997) (unions are “a force for greater equality, because they promote[] a more egalitarian distribution of earnings”).

118. See Bernie Woodall & Deepa Seetharaman, *Exclusive: UAW Steps up Bid to Organize VW U.S. Plant: Sources*, REUTERS (Mar. 23, 2012), <http://www.reuters.com/article/2012/03/23/us-uaw-vw-idUSBRE82M00M20120323>. In 2001, workers at a Nissan assembly plant overwhelmingly rejected the UAW. See *id.* The UAW has announced that it is attempting to organize the workers at Volkswagen’s plant in Chattanooga, Tennessee. *Id.*

119. Comparing the earnings of union versus nonunion workers, union workers earn more, though many factors other than unionization may influence this. See UNION MEMBERS—2011, *supra* note 116. In 2011, among full-time wage and salary workers, union members had median usual weekly earnings of \$938, while those who were not union members had median weekly earnings of \$729. *Id.* (“In addition to coverage by a collective bargaining agreement, earnings differences reflect a variety of influences, including variations in the distributions of union members and nonunion employees by occupation, industry, firm size, or geographic region.”).

120. See Marco Biagi, *Forms of Employee Representational Participation*, in MARCO BIAGI: SELECTED WRITINGS 191, 193–95 (Michele Tiraboschi ed., 2003) (characterizing the United States as having an “anti-union managerial culture”).

organize. Thus the collective bargaining agreements the UAW has with Ford, Chrysler, and General Motors (“Big Three”) have a real impact on the wages and conditions provided to auto workers who are not unionized. If the U.S. automakers were not unionized, it is not likely that these nonunionized workers would be as well off as they are now.

With less than seven percent of private sector workers belonging to unions, private employers face a much-reduced risk that their workers will seek a union. Given the inadequacy of the National Labor Relations Act to protect unionization efforts, the question of union representation is now less in the hands of the workers and ultimately more in the hands of management.¹²¹ It may be that only in the most extreme circumstances of employer abuse would workers resort to union representation.¹²² With enough determination and long-term effort and expense, even such an abusive employer can successfully avoid unionization.¹²³

Where collective bargaining relationships and bargaining still exist, the nature of collective bargaining has changed. Back in the industrial era, unions would bargain for improvements in wages, hours, and benefits and employers would resist as best they could, hoping to operate as long as possible under the status quo. Now, collective bargaining more often focuses on concessions that the employer demands from the union.¹²⁴ That defensive posture is not conducive to unions maintaining their bargaining relationships much less organizing new workplaces. Part of the reason for the shift is that national economies have much less significance than they once had.¹²⁵ Back in the day when U.S. automakers faced little competition from foreign automakers in the U.S. auto market, the UAW could bargain with each of the Big Three, starting with one agreement and then use that agreement to set the pattern for the other two automakers. Having more or less uniform labor costs across substantially all of the cars sold in the U.S. auto industry meant that labor cost differences did not contribute to price competition in the industry. However, with the borders open to imports and with foreign-owned auto plants operating in the United States that are not unionized, the UAW can no longer offer the Big Three the carrot of taking labor cost

121. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1553–54 (2002).

122. David J. Doorey, *A Model of Responsive Workplace Law*, OSGOODE HALL L.J. (forthcoming), available at <http://ssrn.com/abstract=1965685>.

123. Estlund, *supra* note 121, at 1554.

124. See BRIGHAM R. FRANSDEN, *THE EFFECT OF PUBLIC SECTOR COLLECTIVE BARGAINING RIGHTS: PRELIMINARY AND INCOMPLETE* (2011), available at <http://economics.mit.edu/files/6740>.

125. See Michael J. Zimmer, *Unions & The Great Recession: Is Transnationalism the Answer?*, 15 EMP. RTS. & EMP. POL’Y J. 123, 143 (2011).

differences out of price competition for cars. Whether the workers for these foreign-owned companies are in the United States or in some other country, the Big Three autoworkers and their union now face global competition on labor costs. While the automobile industry has essentially become a globalized product market, the labor market is globalized as well with significantly different labor costs across globalized enterprises.

Even if there were to be a renaissance of unionism and collective bargaining, it is not so clear that the main sources of worker insecurity would necessarily be significantly reduced. Where a union is the exclusive bargaining representative of the employees in a bargaining unit, the employer has a duty to bargain with the union, and only the union,¹²⁶ but only for the “wages, hours, and other terms and conditions of employment” of those workers.¹²⁷ Because the scope of bargaining subjects is limited, not every question that impacts workers is required to be bargained.¹²⁸ Basic entrepreneurial decisions, such as whether to continue a line of business or open a new workplace, are permissive, not mandatory, subjects of bargaining.¹²⁹ That means that, even with a union representing workers, employers can unilaterally make fundamental business decisions without the input of the union because the employer can veto bargaining over those decisions. Those kinds of decisions have become more frequent because of the increasingly volatile business climate. While collective bargaining agreements typically have provisions structuring layoffs and recall that flow from these decisions, the protection of the workers is only vis-à-vis their fellow workers to determine the order of their layoff and recall. The only legal duty required of employers when they make major decisions leading to the

126. *J. I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944) (individual employment contracts are no bar to collective bargaining because the employer can only bargain with the union for covered workers).

127. 29 U.S.C. § 158(d) (2006). Both sides have a duty to bargain in good faith, but that does not require reaching an agreement or even making concessions.

128. In *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), the Court divided subjects of bargaining into three categories: mandatory subjects must be bargained, illegal subjects cannot be bargained, and permissive subjects may be bargained if both parties agree, *id.* at 349.

129. Two decisions set the parameters of these entrepreneurial decisions. In *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), the Court held that the decision to subcontract work so that the workers for the new subcontractor would do the same work, in the same place, and with the same conditions as the workers represented by the union, was a mandatory subject of bargaining, *id.* at 211. In *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981), the decision of an employer to cancel a contract with a customer for cleaning that resulted in employees being laid off was a permissive subject of bargaining where the employer's duty was only to bargain the effects of that decision on the workers, *id.* at 679.

layoff of workers is the Worker Adjustment and Retraining Notification (WARN) Act.¹³⁰ Generally, the WARN Act requires employers with 100 or more employees to provide sixty-days notice to employees who will be subject to a mass layoff or plant closing.¹³¹

Private sector employees still have the right to organize collectively to overcome their at-will status but the present state of the law makes that more of a theoretical, rather than a real, right. Even if workers are represented by a union and are protected by a collective bargaining agreement, employers still need not bargain with the union over basic entrepreneurial decisions, the decisions that are increasingly common in the present volatile employment context. Just as worker rights to collective action have become marginalized, the following Section will show that individual statutory rights have become ever more difficult to enforce.

D. The Illusory Statutory Exceptions to the At-Will Presumption

Since the 1960s, Congress and many state legislatures have expanded the statutory exceptions to the at-will rule.¹³² Rather than tracing the breadth of those rights and the laws that enforce them, this Lecture will look at just one example, the federal antidiscrimination laws. The actual level of enforcement is so low as to question the efficaciousness of these laws. The substantive law articulating how these rights are to be protected is quite daunting to legal professionals and incomprehensible to most lay people. In general, the federal judiciary does not favor these claims. Even if federal judges were sympathetic to claims of discrimination, the law is complicated and hardly intuitive. Most federal discrimination claims are brought by an individual claiming that, by discharging her, the defendant committed individual disparate

130. §§ 2101–09.

131. § 2102. An exception in WARN for “unforeseen business circumstances” was construed so broadly that the employer was relieved of the obligation to give notice once the decision to layoff was made. *Roquet v. Arthur Anderson LLP*, 398 F.3d 585, 589 (7th Cir. 2005).

132. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011) (there is “pluralism anxiety” because of the extensive legislation to an ever increasing numbers of protected groups); Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 411 n.6 (2012) (“Depending on how one counts, there are at least eight different protected classes pursuant to federal statutory law. The states generally protect the same classes as Title VII but, again, depending on how one counts, the states have expanded the protected classes to at least 25, including such things as political views and appearance.”).

treatment discrimination.¹³³ The law dealing with individual disparate treatment is complex and not well articulated despite the courts having had thousands of cases in which to clarify the law.¹³⁴ At base, the real question is whether, based on the evidence, it is reasonable to draw the inference of discrimination.¹³⁵ In other words, discrimination involves a question of fact. Over the years, the courts have generally failed to grasp that fundamental idea. That may be because treating discrimination as a straightforward factual question would diminish the ability of judges to clear their dockets through summary disposition. Instead of letting cases go to trial for findings of fact, courts have created numerous legal rules that can be utilized to throw plaintiffs' cases out of court before they get to trial. Despite the law on the books, individual workers continue to bear the substantial risk that they will be victims of their employer's discrimination.

The Supreme Court, in the last several years, appears to have undercut the two broad theories of discrimination—systemic disparate treatment and systemic disparate impact discrimination. In *Ricci v. DeStefano*,¹³⁶ the New Haven firefighters' case, the Court undercut systemic disparate impact law by holding that race conscious decision making to avoid the risk of disparate impact liability is illegal disparate treatment discrimination.¹³⁷ In his concurring opinion, Justice Antonin Scalia even went so far as to suggest that the disparate impact provisions

133. See *Charge Statistics: FY 1997 through FY 2012*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 16, 2013). In 2011, the EEOC received a record 99,947 charges of employment discrimination, with 74,789 of the charges involving discharge. *Statutes by Issue, FY 2010 - FY 2012*, U.S. EQUAL OPPORTUNITY EMP'T COMM'N, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited Feb. 22, 2013).

134. I have over the years made numerous attempts to clarify individual disparate treatment law all to little avail. See, e.g., Joseph E. Slater, Michael J. Zimmer, Charles A. Sullivan & Alfred A. Blumrosen, *Proof & Pervasiveness: Employment Discrimination in Law & Reality after Desert Palace, Inc. v. Costa: Proceedings of the 2005 Annual Meeting, Association of American Law Schools, Sections on Employment Discrimination, Civil Rights, Labor Relations and Employment Law, and Minority Groups*, 9 EMP. RTS. & EMP. POL'Y J. 427 (2005); Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 COLO. L. REV. 1243 (2008); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887 (2004); Michael J. Zimmer, *Leading by Example: An Holistic Approach to Individual Disparate Treatment Law*, 11 KAN. J.L. & PUB. POL'Y 177 (2001); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001) (Reeves v. Sandford Plumbing symposium).

135. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80–81 (1998).

136. 557 U.S. 557 (2009).

137. *Id.* at 592–93.

of Title VII violated equal protection because the theory requires the employer to know the racial consequences of its actions if it is to avoid liability.¹³⁸ Subsequently, in *Wal-Mart Stores, Inc. v. Dukes*,¹³⁹ the Court seems to have used disparate impact theory to undercut the systemic disparate treatment theory.¹⁴⁰ Extensive analysis of the federal substantive law prohibiting employment discrimination is well beyond the scope of this Lecture. But suffice it to say that its complexity and lack of grounding in generally understandable concepts erects a significant barrier to its enforcement, especially where the judiciary appears to value that barrier.

Ironically, at least as to federal antidiscrimination statutes, broadened statutory protections have not led to an increased chance that a worker will get a day in court on his or her claim. It has become ever more difficult for workers to have these statutory rights vindicated in court or, perhaps, at all. The Supreme Court has promulgated new procedural laws in ways that, as a practical matter, have all too often left these rights unenforceable. For example, the Supreme Court has created out of whole cloth new law enforcing pre-dispute arbitration agreements between nonunion employers and their individual employees.¹⁴¹ This appears to be the case even if the only written agreement between the employer and the employee is the agreement to arbitrate disputes and otherwise leaves the relationship at-will. Pre-dispute agreements to arbitrate employment disputes, especially if that is the sole term of the contract, are almost always contracts of adhesion: if an applicant wants the job and the employer demands that she sign an arbitration agreement to get it, that is a take-it-or-leave-it situation based on the unequal bargaining power between the parties. Subsequently, the Court extended this judicially created policy of diverting statutory claims away from courts into arbitration to situations where employees are represented by a union. Now a union can waive the right of individuals to have their

138. *Id.* at 594–96 (Scalia, J., concurring). For an example of a commentator that took Justice Scalia up on his suggestion and developed a comprehensive analysis of how strict scrutiny would apply, see Eang L. Ngov, *War and Peace between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L.J. 1, 29–46 (2010).

139. 131 S. Ct. 2541 (2011).

140. *See id.* at 2554–57; Zimmer, *supra* note 132.

141. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court held that statutory claims, such as claims of age discrimination under the Age Discrimination in Employment Act, may be the subject of an arbitration agreement, enforceable pursuant to the Federal Arbitration Act that had been adopted to overcome the common law resistance to the arbitration of commercial, not employment nor consumer claims, *id.* at 32–34.

statutory claims go to court by agreeing to send them instead to arbitration under the collective bargaining agreement.¹⁴² Arbitration is not necessarily always inferior to court litigation,¹⁴³ but the Supreme Court's policy of privatizing statutory enforcement undermines the justification for arbitration as based on the actual consent of the parties.¹⁴⁴ That a union can waive a worker's individual right to take a statutory claim to court rips away the last fig leaf that consent is involved in arbitration.¹⁴⁵ Further, the employee whose statutory claim is diverted to arbitration loses the right to a jury trial that many antidiscrimination statutes provide. More recently, in *AT&T Mobility LLC v. Concepcion*,¹⁴⁶ the Supreme Court has upheld an arbitration clause that cuts off a consumer's right to bring a class action.¹⁴⁷ Employment discrimination statutes, such as Title VII of the Civil Rights Act of 1964,¹⁴⁸ involve claims that are well suited to resolution in class actions.¹⁴⁹ Therefore, arbitration provisions that redirect all statutory claims of employees to arbitration would presumably be enforced, even if the arbitration agreement cuts off all statutory class actions just as the consumer class action claims were cut off in *Concepcion*.¹⁵⁰

In sum, putting these decisions together, employers with collective bargaining agreements have a strong incentive to require an arbitration

142. See Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825, 826–27 (2010). In *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), the union had agreed to an arbitration agreement in a collective bargaining agreement with the employer that the Court interpreted as waiving the employees' statutory rights to go to court, even though the individual employees had never agreed to take their statutory claims to arbitration, *id.* at 273–74.

143. Post-dispute agreements to arbitrate are, by their nature, consensual and can be a fair and efficient means to resolve disputes.

144. See Margaret L. Moses, *Privatizing "Justice,"* 35 LOY. U. CHI. L.J. 535, 547 (2005).

145. By supporting or joining a union, employees are not in any way consenting to send their statutory claims to arbitration rather than allowing them to go to court. Employees represented by unions with collective bargaining agreements may not even support the union that represents them. They have not consented to the union in any sense, including the union's waiver of their right to take statutory claims to court.

146. 131 S. Ct. 1740 (2011).

147. *Id.* at 1752–53 (holding that the Federal Arbitration Act preempted a California law that found arbitration clauses that disallowed class-wide proceedings are unconscionable).

148. 42 U.S.C. §§ 2000e to e-17 (2006).

149. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

150. See *supra* note 146 and accompanying text. *Concepcion* cuts off claims that would only be economically viable if aggregated with the claims of others similarly situated. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752–53 (2011).

clause shifting all statutory claims to arbitration but at the same time precluding jury trials and class actions.¹⁵¹ That same incentive exists for employers without a union representing its workers.¹⁵²

If, somehow, an employee with a federal statutory claim is able to avoid having it shunted into arbitration,¹⁵³ the Supreme Court has erected formidable procedural barriers to it reaching trial. Until recently, employment discrimination cases were not likely to be dismissed before the summary judgment stage, which was typically triggered once discovery was complete.¹⁵⁴ In *Ashcroft v. Iqbal*,¹⁵⁵ the Court moved up the possibility of dismissal to the earlier pleading stage before any discovery typically takes place.¹⁵⁶ A civil rights case, *Iqbal* modified the longstanding Rule 8(a)(2) of the Federal Rules of Civil Procedure that a complaint need only contain a “short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁵⁷ After *Iqbal*, to avoid dismissal for failing to state a claim upon which relief can be granted, the plaintiff as the nonmoving party must include factual allegations sufficient to “state a claim to relief that is *plausible* on its face.”¹⁵⁸ The key question of fact in many statutory claims of discrimination is whether the employer acted with an intent to discriminate.¹⁵⁹ The basis for the employer’s action is frequently not known to the worker, or the reason the employer advances may be a pretext for the real reason. Therefore, dismissing a discrimination case before discovery forecloses the right of employees who have been discriminated against to have any

151. That simply puts *Pyett* together with *Concepcion*. See *supra* notes 142, 147, and accompanying text.

152. There is, however, a recent decision, *D.R. Horton, Inc.*, 357 NLRB 184 (2012) by the National Labor Relations Board that holds that predispute arbitration clauses that cut off class actions violate the workers’ National Labor Rights Act-based right to engage in protected concerted activity, *id.* at 12. Given the extent the Supreme Court created out of whole cloth a law pouring all employee claims, including class action claims, into arbitration, *Horton* may not stand up to judicial review.

153. There is a significant difference in predispute agreements to arbitrate and those that are subject to an agreement of the parties to go to arbitration once a dispute has arisen. Post-dispute arbitration is the result of the actual consent of the parties.

154. See Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2276 (2012) (increasing dismissals at the motion to dismiss stage reduces the number of cases where summary judgment is granted).

155. 556 U.S. 662 (2009).

156. *Id.* at 677–84.

157. *Id.* at 677–79; FED. R. CIV. P. 8(a)(2).

158. *Iqbal*, 556 U.S. at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (emphasis added).

159. See *supra* note 135 and accompanying text.

real chance to prove it.¹⁶⁰ Given the skepticism of the federal judiciary about the existence of discrimination, what is plausible to many may not be plausible to most federal judges.

A procedural vehicle that could be valuable as a private enforcement tool of statutory claims, class actions,¹⁶¹ has also been truncated by the Supreme Court. While discrimination claims are very important to the alleged victims, many are of comparatively small economic value. Thus, these cases should be ideal candidates for resolution through class actions.¹⁶² The Supreme Court, however, has made bringing class actions in federal court claiming discrimination more difficult because of the decision in *Wal-Mart Stores, Inc. v. Dukes*. In *Dukes*, the Court narrowed the availability of class actions by its interpretation of Rules 23(a)(2) and 23(b)(2) of the Federal Rules of Civil Procedure.¹⁶³ Rule 23(a)(2) requires a party seeking class certification to prove that the class has common “questions of law or fact.”¹⁶⁴ That means that the determination of the answer to that common question will resolve an issue that is central to the validity of the claims of all class members, all in one lawsuit. The plaintiffs in *Dukes* argued that Wal-Mart’s policy of granting store managers unstructured and unreviewed discretion to make pay and promotion decisions created a risk of discrimination for all the women working in all the stores which risk was a common question of “law or fact.”¹⁶⁵ But the Court rejected that argument.¹⁶⁶ Further, plaintiffs’ “claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2) . . . where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.”¹⁶⁷ Claims for backpay could be brought under Rule 23(b)(3), but class members must be given notice and the opportunity to opt out before the case can proceed.¹⁶⁸ The combination of reading common questions of law or fact very narrowly and then requiring all members of the putative class be given notice and the opportunity to opt out of the action will minimize the possibility of bringing class actions involving employment.

160. See Gelbach, *supra* note 154, at 2338.

161. Class actions are a way to aggregate individual claims of comparatively small dollar value in order to be able to litigate them.

162. It is especially true that workers at the bottom of the compensation scale are disproportionately impacted by cutting off class actions. It is also true that women and members of minority groups are likely to be near the bottom of the wage scale.

163. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–57 (2011).

164. FED. R. CIV. P. 23(a)(2).

165. *Dukes*, 131 S. Ct. at 2549–50.

166. *Id.* at 2554–56.

167. *Id.* at 2557.

168. *Id.* at 2558.

Cutting off class actions pours individual claims not subject to arbitration into individual lawsuits in court. Many claims that may well be good ones on the merits but have only the potential of a small recovery will therefore never be brought.¹⁶⁹ Plaintiffs can bring actions without a lawyer to represent them by proceeding pro se, but the success rate of pro se cases is very poor, given the complexity of the law and the lack of sophistication of almost all the claimants.¹⁷⁰ Thus, this fundamental failure to provide legal services means that the workers most in need of protection and most likely to be victims of discrimination are denied a chance to have their cases decided on the merits in federal court.¹⁷¹

In sum, for workers who are at-will, the changes in the way businesses operate, including the expanding use of part-time, temporary, and independent contractors, the risks connected with important benefits like health insurance and retirement plans, and the way the law treats

169. This is true even though a prevailing party can recover attorney fees in discrimination cases. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (2006).

170. *See* Alan Feuer, *Lawyering by Laymen; More Litigants Are Taking a Do-It-Yourself Tack*, N.Y. TIMES, Jan. 22, 2001, available at <http://www.nytimes.com/2001/01/22/nyregion/lawyering-by-laymen-more-litigants-are-taking-a-do-it-yourself-tack.html?pagewanted=all&src=pm>. Of course, many pro se cases may be without merit. There no doubt are, however, cases that would be successful if the plaintiff was represented by counsel, but that have virtually no chance of success when attempted to be litigated by someone without legal expertise. *Id.* (“Most courts in the city and across the country do not keep statistics on pro se litigation, though court watchers say there is plenty of anecdotal evidence that they are on an upswing. The increase has been attributed to the abundance of court programs on television and to the popularity of the do-it-yourself movement as a whole. But the most prevalent reason still is not being able to afford hundreds to thousands of dollars in lawyers’ fees.”); Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 305–06 (2002) (“Lost in the world of legal procedure and substantive case law, the pro se litigant often finds herself confused and overwhelmed, if not frustrated and bitter. Throughout their litigation, pro se litigants are confronted with numerous difficulties including complying with procedural rules, understanding substantive legal concepts, articulating relevant factual allegations, and simply knowing how to proceed with their action. Despite the liberal reading granted to pro se litigant pleadings, pro se litigants are almost unanimously ill equipped to encounter the complexities of the judicial system.”) (internal citations omitted).

171. One consequence of diminishing federal protections for workers is that workers are left to their remedies under state laws. While many states provide protections against discrimination that are broader and more amenable to enforcement than federal laws, some states have failed to provide any greater protection than is now available in federal court. This consequence of our federal system means that there can be considerable differences in protection depending on where workers live and work. In other words, there is unequal protection of laws that are supposed to provide equal treatment.

their federal statutory claims, all result in a large accumulation of risks. Individuals face increased insecurity as to employment and employment-related issues. At-will workers have much reduced protection, protection that once was provided by stable employer organizations that valued the retention of workers with job-specific skills through the operation of internal labor markets.¹⁷² Employer-provided health insurance has declined as medical costs have risen.¹⁷³ Further, employers have dropped their retirement plans or have shifted them from defined benefit to defined contribution plans.¹⁷⁴ Fewer employees can afford the contributions necessary to participate. All the workers who do participate in defined contribution plans now carry the investment risk that there will not be enough assets to fund a decent retirement. While legislatures have expanded the statutory exceptions to the at-will rule, especially antidiscrimination legislation, the federal courts have diminished the ability for individuals to find protection from discrimination. By convoluted and difficult-to-apply substantive rules for individual cases and by the Supreme Court's recent decisions diminishing the systemic theories for attacking discrimination, the risk of discrimination is borne by the workers, even if they have potentially good cases. Claims of rights are shunted into nonconsensual arbitration by individual employment contracts as well as by collective bargaining agreements. Arbitration cuts off the right to trial by jury and can preclude the right to bring class actions. For claims that escape arbitration, procedural barriers have been erected both as to individual and class actions that diminish access to justice, again leaving workers to bear the risk that they will be victims of discrimination. The question of union representation is now more a question for employers rather than workers to decide because labor law is so weak that employers can, over time and with sufficient resources, simply destroy the organizational efforts of their workers and of unions. This Lecture will not trace the numerous failed efforts at addressing some of these problems.¹⁷⁵ Instead, it will look at how we got to where we are.

172. See Jeffrey Pfeffer & Yinon Cohen, *Determinants of Internal Labor Markets in Organizations*, 29 ADMIN. SCIENCE Q. 550 (1984).

173. See William P. Kratzke, *Tax Subsidies, Third-Party Payments, and Cross-Subsidization: America's Distorted Health Care Markets*, 40 U. MEM. L. REV. 279, 315–16 (2009).

174. See Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 469–71 (2004).

175. Revamping labor and employment law to remedy its present imbalance while providing for economic efficiency would be daunting and is beyond the scope of this Lecture.

III. HOW DID WE GET HERE AND WHY HAVE WE DONE SO LITTLE?

There has been a significant disconnect between what seems to be the common interests and needs of most of us and important government policies that affect us all. The Great Recession that began in 2008 made quite clear the tremendous problems we face—economic inequality, individualized risks, and insecurity. One might think these problems would galvanize large groups of us to join together to push for the government to redress at least some of the problems the vast majority face.¹⁷⁶ By that standard, the reaction of our government then and even now has been quite inadequate. The response of the federal government to the Great Recession was, first, to save the financial system, which was no surprise, but, what was surprising, especially in light of how the government dealt with the managers of U.S. auto industry, was that it left in place the Wall Street bankers who caused the Great Recession.¹⁷⁷ Second, by ousting the top management of General Motors and Chrysler, the government forced change in management that may be turning around the U.S. auto business. But the financial sector, with the same managers in place, seems to have changed very little and, when pushed, only grudgingly.¹⁷⁸ While our auto industry had been gradually dying because of poor management, the financial industry caused the Great Recession and so, without much change, the risk of another economic collapse continues substantially unabated.¹⁷⁹ Third, a stimulus package was enacted that was too small and short lived, at least when compared to the scope of the disaster.¹⁸⁰

Instead of our elected officials responding to the needs of the many, they quickly returned to the tried but tired and hollow debate based on neoliberal microeconomic theory¹⁸¹: Taxes can never be raised but only

176. The Tea Party Movement challenging the protection of the financial sector but not the middle class, the collective response to state legislation attacking public sector unionism, and the Occupy Movement may all be the beginning of collective responses to the Great Recession.

177. *Frontline: Money, Power, and Wall Street* (PBS television broadcasts Apr. 24 and May 1, 2012), available at <http://www.pbs.org/wgbh/pages/frontline/money-power-wall-street/>.

178. STEVEN A. RAMIREZ, *LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW* 178–81 (2013).

179. *Id.*

180. See CONG. BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2010 TO 2020*, at 5, 23, 27 (2010), available at <http://www.cbo.gov/ftpdocs/108xx/doc10871/Chapter2.html>.

181. At the onset of the Great Recession, there were pronouncements that neoliberalism was dead and that Keynesian theory would be revived to supplant it. See Brian Langille, *Imagining Post “Geneva Consensus” Labor Law for Post “Washington*

reduced further even though the rates are at a comparatively low rate historically.¹⁸² Reducing taxes does not help the economy grow,¹⁸³ but, instead, austerity measures flowing from reduced tax revenues generally result in economic decline.¹⁸⁴ All of this talk of the need for austerity is supposedly in response to what both political parties claimed was the need to reduce federal debt obligations, a background concern for sure, but one that is far from the most significant and pressing problem resulting from the Great Recession.¹⁸⁵ In other words, the political and policy debate quickly returned to old themes as if the Great Recession had not happened. Given the dimensions of the economic disaster, the failure to respond effectively seems inexplicable. It is as if there exists a natural law of economics that cannot be altered by human decision making.¹⁸⁶ But it is simply wrong to view the present economy as some pre-political state of nature that is not subject to human control.¹⁸⁷ So, how did all this happen with such a paltry response by government?

One place to start to explain the disconnect between the problems we actually face and our collective response is to look at the intellectual background that informs the perceptions all of us have—those in power

Consensus” *Development*, 31 *COMP. LAB. L. & POL’Y J.* 523, 524–27, 531 (2010) (showing a similar policy shift when the consensus about international economic policy, characterized as the “Washington Consensus,” broke down); Paul Krugman, *Keynes: The Return of the Master* by Robert Skidelsky, *GUARDIAN* (Aug. 29, 2009), <http://www.guardian.co.uk/books/2009/aug/30/keynes-return-master-robert-skidelsky> (reviewing ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* (2009)) (People giggled at the thought of reviving Keynesian economics in the 1980s, but it looks like Keynes got the final giggle because many governments are increasingly turning back to Keynesian economic principles.).

182. Annie Lowrey, *For Two Economists, the Buffett Rule is Just a Start*, *N.Y. TIMES* (Apr. 17, 2012), http://www.nytimes.com/2012/04/17/business/for-economists-saez-and-piketty-the-buffett-rule-is-just-a-start.html?pagewanted=all&_r=0.

183. See Paul Krugman, *Austerity and Growth*, *N.Y. TIMES BLOG* (Feb. 18, 2012, 5:54 PM), <http://krugman.blogs.nytimes.com/2012/02/18/austerity-and-growth/>.

184. *Id.*

185. See Paul Krugman, Op-Ed., *The Austerity Debacle*, *N.Y. TIMES*, Jan. 30, 2012, at A23 (The austerity policy of the government in Britain has failed but the austerity doctrine has dominated elite policy discussion both in Europe and, to a large extent, in the United States for the past two years.).

186. See HACKER & PIERSON, *supra* note 9, at 4–5. Hacker and Pierson express this assumption of inevitability as follows:

If most commentators are to be believed, the answer [to the question how this extreme inequality happened] lies in inevitable shifts in our economy driven by global, universal pressures. . . . Globalization, skill shifts, technological transformation, economic change [are factors to show that], to use James Carville’s famous catchphrase, It’s the economy, stupid.

Id.

187. *Id.* at 56.

and the rest of us. Princeton history professor Daniel T. Rodgers has undertaken an intellectual history of the last forty years to help understand our presuppositions about ourselves, our roles in society and the role of government.¹⁸⁸ His *Age of Fracture*¹⁸⁹ explores the intellectual basis for an ever increasing disconnect between the world as it is and the way we are conditioned to see it and ourselves in that world.¹⁹⁰ Looking at a broad set of social, economic, philosophical, and political disciplines, Rodgers explains how the intellectual underpinnings of our thought processes have shifted from the idea of collective identity to one of individualized freedom,¹⁹¹ but a freedom that is far distant from the reality of the lives most of us live. His analysis crosses the left-right divide to show how, in the last part of the twentieth century, these different disciplines all came to point in the same direction and that was to focus on individuals to the exclusion of the collective.¹⁹²

Rodgers starts by describing the political rhetoric used by Presidents in their public speeches.¹⁹³ Presidential speechwriters rely on tropes that at that time resonate quite broadly because that rhetoric helps bolster presidential power and the depth and breadth of those beliefs: the closer the rhetoric connects to the prevailing mindsets of the people, the more effective the “bully pulpit.” While Rodgers does not cite it, Garry Wills’s Pulitzer Prize winning book, *Lincoln at Gettysburg: The Words That Remade America*,¹⁹⁴ is a good example connecting the ideas Presidents use in their speeches to the intellectual underpinnings of the time.¹⁹⁵ Wills analyzed President Lincoln’s use of rhetoric to show how it both reflected and helped reify a change in the concept of the very nature of our country.¹⁹⁶ To paraphrase Wills’s analysis, over the course of Lincoln’s presidency his rhetoric reflected and bolstered a change in our collective concept of America: “*These United States are*” became “*The United States is*.”¹⁹⁷

188. Daniel T. Rodgers is the Henry Charles Lea Professor of History at Princeton University. *Daniel Rodgers*, PRINCETON U. DEPARTMENT HISTORY, http://www.princeton.edu/history/people/display_person.xml?netid=drodgers (last updated Sept. 6, 2012).

189. DANIEL T. RODGERS, *AGE OF FRACTURE* (2011).

190. *See id.* at 2–3.

191. *Id.* at 3, 10.

192. *Id.* at 5–6, 8.

193. *Id.* at 15.

194. GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992).

195. *Id.* at 41, 52–53.

196. *Id.* at 90, 92, 102–03.

197. *See id.*

Rather than going back that far, Rodgers begins with the rhetoric of our Cold War era Presidents. He starts with President Kennedy's famous quote from his inaugural address, "ask not what this country can do for you—ask what you can do for this country."¹⁹⁸ The basic theme was a call to all to gird our loins and stand united to advance our collective national interest to better confront the menace we faced from Communism and the Soviet Union. Kennedy's rhetoric relied on, but also bolstered, the then-prevailing conception that all Americans share a common ground, a common destiny, with the need for united collective action to achieve that destiny. In contrast, President Reagan's presidential rhetoric had moved away from that sense of collective identity and obligation toward an idealized, almost dream-like sense of individual "freedom" that included freedom from the actual conditions of our lives as well as from much sense of collective obligation or need for collective action.¹⁹⁹ This predominant mindset allowed us to escape hard choices, implicitly assuming that a perfected individual life was within reach for all without government action. Thus, in his inaugural address, he claimed that, "In this present crisis, government is not the solution to our problem; government is the problem."²⁰⁰ It is not that Reagan's rhetoric by itself caused the shift. Rather, presidential rhetoric reflects but also amplifies the ideas that form our largely unexamined background mindset.²⁰¹

198. RODGERS, *supra* note 189, at 19; *see also* SACHS, *supra* note 44, at 52 ("[T]he nation as a whole had passed through two 'near-death' experiences together [the Depression and World War II] and emerged as an increasingly united society" and "the government was viewed as highly competent and representative of broad national interests."); John F. Kennedy, President, Inaugural Address (Jan. 20, 1961) (transcript available at <http://www.jfklibrary.org/Asset-Viewer/BqXIEM9F4024ntF17SVAjA.aspx>).

199. An excellent example of this fantasy approach is the expansion of lotteries. On March 30, 2012, the jackpot for the Mega Millions lottery was \$640 million, the largest jackpot in history. *Mega Millions Makes History with \$640 Million World Record Jackpot*, MEGA MILLIONS (Mar. 30, 2012), <http://www.megamillions.com/mcenter/pressrelease.asp?newsID=4AA5E778-C8B7-48AF-A9B8-201E11810209>. All the tickets were sold and so the chances of winning were infinitesimal. The purchasers, however, bought these tickets because of the fantasy that they would win. In financial markets, other people's money was used to gamble over the outcome of derivatives that had added no economic value. The stakes were much bigger than the Mega Millions jackpot but the gamblers, at least during the Great Recession, were insulated from loss because their institutions were "too big to fail." Most of the rest of us were not so well positioned to enjoy the upside while being sheltered from the down side of our economic activities.

200. Ronald Reagan, President, Inaugural Address (Jan. 20, 1981) (transcript available at <http://www.reagan.utexas.edu/archives/speeches/1981/12081a.htm>).

201. Ironically, Americans continue to agree broadly that "there should be equality of opportunity[,] . . . individuals should make the maximum effort to help themselves[,] . . . the government should help those in real need, as long as they are

Having launched this project through the lens of presidential rhetoric, Rodgers then looks at developments across a wide swath of intellectual disciplines. He starts with economic theory and describes how post-World War II Keynesian macroeconomic theory was supplanted by microeconomic theory.²⁰² He quotes University of Chicago economist Robert Lucas for the proposition that microeconomic theory would triumph: “[T]he term ‘macroeconomic’ will simply disappear from use.”²⁰³ Instead of the perspective of the economy as a whole, microeconomics looks at the economy from the viewpoint of what is hypothesized to be the economic behavior of individuals: each of us is a rational actor motivated to maximize individual economic gains.²⁰⁴ This idealized and individualized economic theory fits easily within the broader conceptual view of the world of the individualized but unreal “freedom” reflected in President Reagan’s speeches. John Kenneth Galbraith’s earlier macroeconomic-based view that the overwhelming economic power of megacorporations gave them extraordinary political power dropped from sight.²⁰⁵ By focusing on individual economic actors each setting their own economic agendas while excluding all other motivations, microeconomic theory created a divide between economic and political power.

Public choice theory, which applies economic theory to politics, focused on self-interested individual political action, the “[p]ower-seeking saturated . . . world of politics.”²⁰⁶ If all the attention is on those with the ability to seek their individual self-interest politically, the problems of powerless subordinated groups simply slip out of the categories of analysis.²⁰⁷ In a tour de force, Rodgers describes how the widely divergent approaches of Gramsci, Genovese, Geertz, and Foucault, when taken together, conceptualize power as dispersed broadly throughout “spheres of culture, ideas, everyday practices, [and]

trying to help themselves[, and] the rich should pay more in taxes.” SACHS, *supra* note 44, at 79–80.

202. RODGERS, *supra* note 189, at 46.

203. *Id.* at 67. For a theory of how one paradigm supplants another, see THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 43–51 (3d ed. 1996).

204. The macroeconomic perspective is reduced to aggregating all individual economic decisions to determine Gross Domestic Product (GDP) and to assume that bigger is better without regard to who gets what share of GDP.

205. *See generally* JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967).

206. RODGERS, *supra* note 189, at 89.

207. *See id.* at 97–99; Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 *STAN. L. REV.* 191, 227 (2012) (lobbying skews public policy away from the interests of the poor).

science.”²⁰⁸ In sum, if microeconomic theory is all about individual economic gain disconnected from politics, political gain is all about special interest “rent seeking” divorced from the collective good. The share of power most of us have in our everyday lives is inconsequential when looked at individually. And we no longer look to aggregate that power based on common interests or the common good.²⁰⁹

These intellectual developments tending all in the direction of an individualized view without a developed sense of collective identity are clear. The question is whether these changes in ways of thinking had some impact on how this nation came to have such extreme economic inequality, individualized risks, and individual insecurity.²¹⁰ One important part of the explanation is that we got where we are as a result of government policy: “[s]tep by step, and debate by debate, America’s public officials have rewritten the rules of American politics and the American economy in ways that have benefited the few at the expense of the many.”²¹¹ Yale professor Jacob S. Hacker and Berkeley professor Paul Pierson attribute the present state of our country—with enormous economic inequality benefitting the top tenth of one percent while those lower down the earnings and wealth scale are either only slightly better

208. RODGERS, *supra* note 189, at 92, 106–07.

209. The book is so rich with ideas that it is not possible to develop all of them here. But I would like to briefly note a bit more about the rest of the book. Rodgers carries forward the theme of intellectual dispersion and granulation in two very interesting chapters on race and gender by arguing that confronting essentialism left conceptions of group solidarity fractured. *Id.* at 111, 144–45. In his chapter “The Little Platoons of Society,” Rodgers pulls off another tour de force by connecting Rawls with Hayek, Novick, Murray, and even Walzer, showing how together they left the intellectual foundation for social solidarity “thinner and more fragmented.” *Id.* at 180–220. In “Wrinkles in Time,” Rodgers moves from the “imagined community” of Reagan’s rhetoric to the disaggregation of “history” into “histories,” Fukuyama’s “end of history,” the debate over constitutional originalism, and the microeconomic shock therapy used to “rescue” Eastern Europe countries from the throes of Communism. *Id.* at 221–55. He characterizes how all these different intellectual disciplines resulted in the “folding of the future into the present.” *Id.* at 247.

210. Inequality has been rising in most of the countries whose economies are engaged in the globalized economy. OECD, GROWING INCOME INEQUALITY IN OECD COUNTRIES: WHAT DRIVES IT AND HOW CAN POLICY TACKLE IT? 5 (2011), available at <http://www.oecd.org/social/socialpoliciesanddata/47723414.pdf>. Rates of unionization have also generally declined. Catherine Rampell, *Trade Unions’ Decline around the World*, N.Y. TIMES BLOG (Nov. 5, 2009, 11:58 AM) <http://economix.blogs.nytimes.com/2009/11/05/trade-unions-around-the-world/>. And, the United States has always been exceptional in providing a comparatively weak safety net for people in need.

211. See HACKER & PIERSON, *supra* note 9, at 6.

off than they were in the 1970s or worse off—to “American government and politics.”²¹²

Big business and the very wealthy undertook a huge effort to change the direction of American law, policy, and intellectual perspective. In the late 1960s, they made a significant investment creating a broad-based campaign, led by Milton Friedman among others, to replace Keynesian macroeconomics with free market, microeconomic theory of the Chicago School.²¹³ That theory was pushed by the organized effort of big business and the very wealthy. In 1971, then-chair of a committee of the Chamber of Commerce and future Supreme Court Justice, Lewis Powell, wrote a memo to his committee, titled “Confidential Memorandum: Attack on the Free Enterprise System,” as a call to business to mobilize politically: “Strength lies in organization [and in] the political power available only through united action and national organizations. . . . Business must learn the lesson . . . that political power is necessary”²¹⁴

One result of that effort to advance their self-interest is that the tax rate of the top one percent of earners is now one-third less than it was in 1970.²¹⁵ “[I]f the effects of taxation on income at the top had been frozen in place in 1970, a very big chunk of the growing distance between the superrich and everyone else would disappear.”²¹⁶ That effort continues to

212. *Id.* at 41–43. The federal government “turned the levers of power over to the corporate lobbies.” SACHS, *supra* note 44, at 105.

213. See Paul Krugman, *Who Was Milton Friedman?*, N.Y. REV. BOOKS, Feb. 15, 2007, at 27. That same year Naomi Klein, a journalist author and filmmaker, published *The Shock Doctrine: The Rise of Disaster Capitalism*, which looked at the connection of free market economics and politics internationally and in the United States:

For more than three decades, Friedman and his powerful followers had been . . . waiting for a major crisis, then selling off pieces of the state to private players while citizens were still reeling from the shock, then quickly making the “reforms” permanent Some of the most infamous human rights violations of this era, which have tended to be viewed as sadistic acts carried out by antidemocratic regimes, were in fact either committed with the deliberate intent of terrorizing the public or actively harnessed to prepare the ground for the introduction of radical free-market “reforms.”

NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* 6, 9–10 (2007). Klein then described how Friedman’s Chicago School policies were implemented following shocks in Argentina, Chile, Russia, the United Kingdom, the former Yugoslavia and, after 9/11, the United States. *Id.* at 11–14.

214. Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce 11, 25–26 (Aug. 23, 1971), available at <http://research.greenpeace.usa.org/?a=view&d=5971>.

215. HACKER & PIERSON, *supra* note 9, at 48 (The top 0.1% rate is less than one-half the tax rate in 1970.).

216. *Id.* at 49 (“The top 0.1 percent had about 7.3 percent of total national after-tax income in 2000, up from 1.2 percent in 1970. If the effect of taxes on their

bear fruit. Recent attempts to close the enormous tax loophole that treats hedge fund managers' earnings as "carried interest" subject to capital gains rates rather than ordinary income have so far failed.²¹⁷ The significant reduction in tax rates for the very wealthy is a result of a "bidding war in which Democrats as well as Republicans took part."²¹⁸

The federal government is doing much less to reduce inequality and poverty now than it did before 1970.²¹⁹ It has, however, provided great benefits to the extreme top of the income pyramid both through its actions as well as its inaction.²²⁰ A study looking at key votes in the Senate in the late 1980s and early 1990s showed that senators acted consistently with the opinions of their constituents in the top third of the income distribution but actually voted against the opinions of the bottom third.²²¹ Neither the word "poor" nor "poverty" was uttered during any of the three presidential debates in 2008.²²²

There are so many actions (and failures to act) of the government that furthered the advantage of big business and the very wealthy, they are hard to count or to understand fully. A few examples should suffice. Private enforcement of shareholder rights to sue corporations and their high officials was hobbled.²²³ The Securities and Exchange Commission was defanged.²²⁴ From the presidency of Jimmy Carter until today, reforms to labor law that would begin to make those laws more effective in protecting workers' rights in face of intensified employer resistance

income had remained what it was in 1970, they would have had about 4.5 percent of after-tax income."'). From 1981 to 2010 there were much lower top marginal tax rates but economic and employment growth declined. See Eliot Spitzer, *Debunking the Claim That Higher Income-Tax Rates Reduce GDP*, SLATE (Feb. 23, 2010), http://www.slate.com/articles/news_and_politics/the_best_policy/2010/02/tax_fraud.single.html.

217. HACKER & PIERSON, *supra* note 9, at 228–29.

218. *Id.* at 49. "We can consider America's political system today to be not so much a true democracy as a stable *duopoly* of two ruling parties, whose members shout at each other from time to time but which both basically stand for many of the same things when it comes to issues touching the interests of business, the rich, and the military." SACHS, *supra* note 44, at 114.

219. HACKER & PIERSON, *supra* note 9, at 52.

220. There is rather constant complaining about government gridlock, see Thomas L. Friedman, Op-Ed., *Down with Everything*, N.Y. TIMES, Apr. 22, 2012, at SR11, but preventing the government from acting can be of considerable value to interests that would be affected by new legislation. Stopping bills before they ever see the light of day is common and, because it is hidden, relatively easy to accomplish.

221. HACKER & PIERSON, *supra* note 9, at 111. Republicans were much more responsive to those at the top of the income pyramid than were Democrats. *Id.*

222. SACHS, *supra* note 44, at 107.

223. See HACKER & PIERSON, *supra* note 9, at 219.

224. See *id.*

were all stopped.²²⁵ The Roberts Supreme Court has shaped numerous laws in ways that protect corporate interests at the expense of the interests of workers and consumers.²²⁶

During the 1990s, bank regulation even fell below pre-New Deal levels.²²⁷ More broadly, the finance industry was largely deregulated.²²⁸ In 1980, nearly one-hundred percent of financial instruments were regulated; by 2008, ninety percent were not.²²⁹ The Great Recession was the result of too little regulation and too many financial institutions that were “too big to fail.”²³⁰ The lack of government regulation allowed the financial industry to go “off the rails,” but it was the financial industry that drove the government to deregulate in the first place.²³¹ Regulations were repealed to foster the fast growing and dangerous derivatives business and attempts to again regulate it after the Great Recession have had limited effect.²³² Just as in the Great Depression, the cause of the Great Recession was not that the key actors were irrational. Instead, they all were acting rationally in the sense of their own self-interest. But, at the macro level, the result has been disastrous.²³³

At a more fine-grained level, an untold number of large and small actions, as well as inaction, by the government has contributed to produce our current unbalanced society.²³⁴ While major pieces of legislation are stalled in Congress, never seeing the light of day or a vote, huge numbers of small changes are added to legislation and rules and regulation that do get adopted with those changes providing significant advantages to a small group of individuals or businesses.²³⁵ Aggregating

225. *Id.* at 99.

226. *See generally* ALLIANCE FOR JUSTICE, THE CORPORATE COURT’S 2010–11 TERM: PROTECTING CORPORATE INTERESTS WHEN IT MATTERS MOST 3–10 (2011), available at <http://www.afj.org/connect-with-the-issues/the-corporate-court/the-corporate-court-2010-11-end-of-year-report.pdf> (describing the Court’s corporate-leaning decisions during its 2010-11 term).

227. HACKER & PIERSON, *supra* note 9, at 69.

228. *Id.* at 248.

229. LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 76 (2011).

230. *Id.* at 81; *see also* Hasen, *supra* note 207, at 234 (lobbying on behalf of the financial industry helped cause the Great Recession).

231. LESSIG, *supra* note 229, at 85.

232. *See generally* RAMIREZ, *supra* note 178.

233. *See* HACKER & PIERSON, *supra* note 9, at 68.

234. *See* Hasen, *supra* note 207, at 226 (lobbyists are effective at preserving the status quo).

235. “Earmarks” are significant but only a small part of the overall implementation of provisions assisting special interests.

the thousands of small actions and adding them to the major actions has left us where we are.

It should be no surprise that all of this has occurred as a result of the investment of tremendous amounts of resources in the political process. While one Republican Congressman, Jim Leach, who did not accept any financial support from Wall Street, predicted the derivative crisis as early as 1994, the issue did not go anywhere.²³⁶ From 1998 to 2008, the financial sector gave \$1.7 billion in campaign contributions and spent \$3.4 billion on lobbying.²³⁷ In 2009, there were twenty-five times the number of lobbyists representing financial institutions than those supporting consumer groups, unions, and other supporters of financial reform.²³⁸ The rise in campaign spending outstripped inflation, increasing over 500 percent from 1977 to 2010.²³⁹ Fundraising became the central activity of the members of Congress, with them spending from thirty to seventy percent of their time on it.²⁴⁰ From 2003 to 2008, for example, Senator Max Baucus received over \$5 million from the financial, insurance and health care sectors, none of which have significant interests in Montana.²⁴¹

Recently, Ira Glass's radio show, "This American Life," looked at how money has come to dominate politics.²⁴² University of Kansas Tax professor Raquel Alexander was interviewed about a study she had done tracing the money spent by multinationals on lobbying to get the 2004 American Jobs Creation Act (JOBS) enacted and used that to determine what the rate of return on that investment was in terms of the resulting tax breaks.²⁴³ After running the numbers a good number of times because she had trouble believing her eyes, she concluded that the return on

236. LESSIG, *supra* note 229, at 84.

237. *Id.* at 83.

238. *Id.* at 147.

239. *Id.* at 91.

240. *See id.* at 138.

241. *Id.* at 99. Just to show how much was obtained for so little, there is a story going back to the presidency of Ronald Reagan: a member of Congress agreed to vote for the controversial B-1 bomber in exchange for a VIP tour of the White House for the member's major contributors. *Id.* at 163.

242. For a report describing the total corruption of the legislative process because of campaign fund raising and lobbying, listen to *This American Life: Take the Money and Run for Office*, CHICAGO PUBLIC RADIO (Mar. 30, 2012), <http://www.thisamericanlife.org/radio-archives/episode/461/take-the-money-and-run-for-office> [hereinafter *Take the Money and Run*].

243. Thomas G. Donlan, *Investment Opportunity*, BARRON'S (Jan. 21, 2012), <http://online.barrons.com/article/SB50001424052748704900804577171210133092408.html>.

lobbying investment was 22,000 percent.²⁴⁴ Hopefully this is an extreme example, but it certainly shows that money invested in lobbying is likely to be money well spent.

Fundraising dominates the lives of our elected representatives. House Minority Leader Nancy Pelosi attends some 400 fundraisers a year, more than one a day.²⁴⁵ Former Democratic Congressman Walt Minnick said, “I needed to raise \$10,000 to \$15,000 a day, and you only do it by elbow grease. . . . I would spend two or three hours a day as a congressman trying to raise money.”²⁴⁶ Senator Dick Durban is quoted saying that generally the people he called to contribute or, even better, to host a fundraiser: “don’t ask for special favors. But there are exceptions. There are some who won’t waste any time to tell you what they think is the most important issue in Washington as they talk about their donation.”²⁴⁷

A key source of campaign contributions comes from lobbyists, who “bundle” contributions and are therefore given credit for them by the particular targeted Congressmen.²⁴⁸ While the lobbyist and the member of Congress know why she received that bundle, this is not bribery in the sense of a quid for a quo. Instead, the relationship between lobbyists and Congressmen is a “gift economy” where there are a series of reciprocal exchanges that build personal relationships and friendships.²⁴⁹ Not surprisingly, friends help friends and can do so without any direct quid pro quo.²⁵⁰ One ongoing gift to the lobbyist is access to the Congressman, because access is power.²⁵¹ The Capitol has become a farm team for K Street lobbyist jobs through a “revolving door.” In the 1970s, only 3% of retiring members became lobbyists while between 1998 and 2004, 50% of the retiring Senators and 42% percent of the retiring members of the House joined the K Street crowd.²⁵²

244. *Id.*

245. Andrea Seabrook, *On Tour with Nancy Pelosi, Fundraising Rock Star*, NPR (Mar. 30, 2012), <http://m.npr.org/news/front/149698946>.

246. *Take the Money and Run*, *supra* note 242.

247. *Id.*

248. LESSIG, *supra* note 229, at 120.

249. *Id.* at 108; *see also* Hasen, *supra* note 207, at 194, 219 (The relationship between legislators and their staffs and lobbyists sometimes is so extreme that lobbyists draft legislation serving their clients’ interests.).

250. LESSIG, *supra* note 229, at 108. A lobbyist’s most important tool is personal contact with legislators and their staffs. Hasen, *supra* note 207, at 219.

251. LESSIG, *supra* note 229, at 145; *see also* Hasen, *supra* note 207, at 219 (“A lobbyist with access to a legislator is in the best position to influence public policy.”).

252. Sanford A. Lakoff, Professor Emeritus, Dep’t of Political Sci., Univ. of Cal. San Diego, Lecture at the Osher Institute: The 2012 Election (Feb. 14, 2012) (transcript available at olli.ucsd.edu/documents/Osher0212lecture2-14-12.pdf). Former congressmen

The “This American Life” exposé included an interview with a lobbyist who described how the process works. Jimmie Williams, a former lobbyist for the National Association of Realtors, described how congressmen traded access to themselves for contributions or maybe more than access.²⁵³ Having brought two constituents with a specific legislative agenda to see a congressman, Williams described how he would first be asked to talk to the congressman in private.²⁵⁴ The congressman says, “I have put in two calls to your PAC director and I haven’t received any return phone calls. Now why am I taking this meeting?”²⁵⁵ Williams knows the congressman will not support his clients’ issue unless he contributes, or gets others to contribute, to the congressman’s campaign.²⁵⁶

The Supreme Court’s decision in *Citizens United v. Federal Election Commission*²⁵⁷ has further opened the floodgates for unlimited spending in elections. The decision is noted for allowing corporations and unions to spend money on elections, but the holding is much broader than that. The First Amendment now protects all expenditures, whether by individuals, corporations, or unions, spent on electioneering unless the money is a contribution to a candidate’s campaign or otherwise can be regulated because it is justified by a compelling governmental interest. The Court held that the only compelling government interest that could justify regulating spending in elections independent of the candidates or their campaigns is quid pro quo corruption or its appearance.²⁵⁸ Because there is not a direct quo for any quid, “independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.”²⁵⁹ Further, “[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”²⁶⁰

earn much more as lobbyists than they did while in Congress. Congressional staffers follow the members through the revolving doors.

253. *Take the Money and Run*, *supra* note 242.

254. *Id.*

255. *Id.*

256. *Id.*

257. 130 S. Ct. 876 (2010). *Citizens United* has resulted in considerable comment and analysis. *See, e.g.*, Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); Deborah Hellman, *Money Talks, but It Isn’t Speech*, 95 MINN. L. REV. 953 (2011); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012).

258. *Citizens United*, 130 S. Ct. at 909.

259. *Id.* at 910.

260. *Id.* The Court also rejected the argument that regulations on election spending could be justified by an antidistortion rationale, that is, restrict expenditures to equalize candidates’ resources. *Id.* at 904–05.

As a consequence of *Citizens United*, Super PACs can raise and spend unlimited amounts of money for electioneering with the possibility that they would not be required to disclose the names of the contributors.²⁶¹ These Super PACs could lose their tax exempt status if they coordinate their activities with the candidates they support but the fact that they are typically run by people with close ties to the candidates does not amount to coordination. Steven Colbert and Jon Stewart have used parody to demonstrate that the line between candidates and Super PACs that support them cannot hold.²⁶² The scenario has Stewart in charge of Colbert's Super PAC but no matter how close they were to each other and how much information they shared, there was, according to former chair of the Federal Election Commission, Trevor Potter, no "coordination" sufficient to disqualify the tax exempt status of Colbert's Super PAC.²⁶³

Further, the "This American Life" show described how *Citizens United* has already opened politics to more money and will do so much more in the future. One example involved a Democratic candidate for Congress in the 2010 midterm election, Dr. Ami Bera, who was closing fast on a Republican incumbent.²⁶⁴ He was hit just days before the

261. See *A Guide to the Current Rules for Federal Elections*, THE CAMPAIGN LEGAL CENTER, http://www.campaignlegalcenter.org/index.php?option=com_content&id=1187%3Aa-guide-to-the-current-rules-for-federal-elections (last visited Feb. 21, 2013). While PACs, the predecessor of Super PACs, are organized pursuant to § 527 of the Internal Revenue Code are required to disclose their contributors, Super PACs that are organized pursuant to § 501(c)(4) as "social welfare" nonprofits do not. Super PACs can engage in electioneering as long as that is not the primary activity of the organization. There is, however, authority that the Bipartisan Campaign Reform Act mandates disclosure of the names and addresses of those who contribute over \$1000 per year for electioneering. 2 U.S.C. § 441d(a)(3) (2006); see also § 431(4).

262. Steven Colbert won a Peabody award, *Stephen Colbert Wins Peabody Award for SuperPAC Satire*, REUTERS (Apr. 4, 2012), <http://www.reuters.com/article/2012/04/04/entertainment-us-peabodyawards-idUSBRE83314Y20120404>, for having an election lawyer and the former chair of the Federal Election Commission, Trevor Potter, explain in simple terms the absurdity of our campaign finance laws after the Court's decision in *Citizens United*, *The Colbert Report* (Comedy Central television broadcast Apr. 3, 2012), available at <http://www.colbertnation.com/the-colbert-report-videos/411674/april-03-2012/colbert-super-pac-shh----501c4-disclosure---trevor-potter>. With Jon Stewart running candidate Colbert's Super PAC, the pair demonstrate how the Super PAC would be treated as independent of his candidacy because their closeness nevertheless did not constitute "coordination." *The Colbert Report* (Comedy Central television broadcast Jan. 12, 2012), available at <http://www.colbertnation.com/the-colbert-report-videos/405889/january-12-2012/indecision-2012---colbert-super-pac---coordination-resolution-with-jon-stewart> [hereinafter *Jan. 12 Colbert Report*].

263. *Jan. 12 Colbert Report*, *supra* note 262.

264. *Take the Money and Run*, *supra* note 242.

election with a \$682,000 media buy.²⁶⁵ He then lost the election.²⁶⁶ The money came from American Crossroads, a Super PAC organized by Karl Rove, which, as a § 504(c)(4) organization, is so far not required to, nor does it identify, its donors.²⁶⁷

Congressmen not only worry about the contributions they get, they also worry about the threat that their opponents will get even larger campaign contributions and independent electioneering support, even though about eighty-five percent of House of Representatives seats are safe.²⁶⁸ Norman Ornstein describes how, as a consequence of *Citizen United*, incentives have increased for members of Congress to seek financial support. Congressmen imagine that:

[T]wo weeks before the election, somebody—and you may not even know who it is—spends \$10 million in a blanket television campaign defining you as a scoundrel, an alien, a felon, and a louse. You can't raise the money at that [late] date to do anything about it. You don't have time. So what's happening now is more and more members of Congress are raising a protective war chest, just in case.²⁶⁹

The 2012 elections were marked by the expenditure of a tremendous amount of money used in various forms of electioneering. “The most expensive election in American history drew to a close . . . with a price tag estimated at more than \$6 billion, propelled by legal and regulatory decisions that allowed wealthy donors to pour record amounts of cash

265. *Id.*

266. *Id.*

267. *Id.*; see also Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the Citizens United Decision*, *NEW YORKER*, May 21, 2012, at 36, 47. For the effect that *Citizens United* has already had, see *id.*

[T]he implications of *Citizens United* were quickly apparent. In March, 2010, the D.C. Circuit ruled that individuals could make unlimited contributions to so-called Super PACs, which supported individual candidates. This opened the door for Presidential campaigns in 2012 that were essentially underwritten by single individuals. Sheldon Adelson, the gambling entrepreneur, gave about fifteen million dollars to support Newt Gingrich, and Foster Friess, a Wyoming financier, donated almost two million dollars to Rick Santorum's Super PAC. Karl Rove organized a Super PAC that has raised about thirty million dollars in the past several month for use in support of Republicans.

Id. at 47.

268. LESSIG, *supra* note 229, at 97, 258.

269. *Take the Money and Run*, *supra* note 242; see also THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012).

into races around the country.”²⁷⁰ Over \$2 billion dollars was spent for the presidential contest alone.²⁷¹ *Citizens United* accounted for seventy-eight percent of the election spending in 2012.²⁷² It is interesting that President Obama was reelected even though Governor Mitt Romney had almost a three-to-one advantage in outside spending.²⁷³ This shows that just spending money may not buy an election. The Republicans used their money in ways that proved not to be all that productive.²⁷⁴ In part, many voters may have voted just because of the way money was being spent to prevent them from voting at all or because the airways were beyond saturation with negative advertising.²⁷⁵

It should be no surprise that those at the top of the economic ladder have used their considerable resources to engage in politics to serve their own self-interest.²⁷⁶ Doing that is, after all, economically rational. But, once the Great Recession struck, why was there so little response by all the rest of us to begin to act in our collective self-interest to redress the significant imbalance that became so obvious? That small groups with a shared interest can easily trump the interests of a large group presents a tremendous collective action problem.²⁷⁷ The big money interests that sit at the top of the economic ladder can organize their efforts comparatively easily in order to advance their shared interest. With a small group it is

270. Nicholas Confessore & Jess Bidgood, *Little to Show for Cash Flood by Big Donors*, N.Y. TIMES, Nov. 8, 2012, at A1.

271. Jack Gillum & Stephen Braun, *Election 2012 Spending Hits \$2 Billion Mark amid Last-Minute Donations*, HUFFINGTON POST (Dec. 7, 2012, 4:05 AM), http://www.huffingtonpost.com/2012/12/07/election-2012-spending-hi_n_2256602.html.

272. Adam Gabbatt, *Citizens United Accounts for 78% of 2012 Election Spending, Study Shows*, GUARDIAN, Sept. 24, 2012, 2:20 PM), <http://www.guardian.co.uk/world/2012/sep/24/super-pac-spending-2012-election>.

273. *Did Super PAC Attacks Make a Difference in 2012 Election?*, CENTER FOR PUB. INTEGRITY, <http://www.publicintegrity.org/2012/11/02/11686/did-super-pac-attacks-make-difference-2012-election> (last visited Jan. 28, 2013) (outside spending for President Obama was \$141.5 million to \$408.5 million for Governor Romney).

274. Confessore & Bidgood, *supra* note 270 (“[O]utside spending affected the election in innumerable ways—reshaping the Republican presidential nominating contest, clogging the airwaves with unprecedented amounts of negative advertising and shoring up embattled Republican incumbents in the House.”).

275. Elizabeth Drew, *Determined to Vote*, N.Y. REV. BOOKS, Dec. 20, 2012, at 26; *see also* Confessore & Bidgood, *supra* note 270, at A1, P4.

276. STIGLITZ, *supra* note 13, at 93 (“The more divided a society becomes in terms of wealth, the more reluctant the wealthy become to spend money on common needs.”).

277. *See* MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 11–16 (1968). While all the members of a large group would benefit if they joined together in collective action to achieve a common end, each individual is better off by being a “free rider,” gaining the benefit of the collective efforts of everyone else. If enough individuals are “free riders,” however, collective action fails.

easier to hold the organization together and to reduce the risk of “free riders,”²⁷⁸ who share the interest of the group but do not support its activities. Further, that particular small group has plenty of resources to devote to achieving its goal.²⁷⁹ While the interests of the vast majority of people may be at odds with the small group, large groups are hard to organize at all and especially hard to articulate an issue that the members feel strong enough to be motivated to take action. While all the members of a large group would benefit if they joined together in collective action to achieve a shared goal, the value that such action would produce for each individual is comparatively small. Each individual is better off by being a “free rider” and not participating but hoping, nevertheless, to gain the benefit of the collective action undertaken by everyone else. If enough people free ride, collective action fails. In our politics today, the huge scale spending on elections can break the connection between what voters want, what they thought they voted for, and what the government subsequently does.²⁸⁰

Professor Rodgers’s *Age of Fracture* ties together threads from divergent intellectual disciplines over the last forty years to show that their vectors pointed essentially in the same direction: free markets, but also a dreamy and unreal sense of individualized freedom, unlinked from our actual condition or much real sense of community identity or collective obligation.²⁸¹ At most, we all have the sense that there are multiple and distinct “communities” to which we may belong. All of this helps blind us to the real world and to our collective condition and our shared needs.

In sum, a number of intellectual disciplines have had the net effect of reducing our perception of and commitment to a collective identity. Instead, the focus has become increasingly individualized but not necessarily in a realistic way. Instead, a fuzzy and unconnected sense of personal freedom prevails despite the dissonance between that perception and the reality of most peoples’ lives. Microeconomic theory has helped diminish a sense of collective identity by concentrating on individual, rational actors who have choices that allow them to strive to maximize their own economic gain. Those without many options, the poor, are left

278. “Free riders” have the same interests as the group but they fail to carry their weight to achieve the goals of the group, hoping to gain the advantages gained by those who continue to work.

279. See Hasen, *supra* note 207, at 226–28 (lobbying skews policy toward the interests of small groups by helping to overcome the collective action problem at the expense of the interests of the general public).

280. *Id.* at 216–17. A tremendous dissonance has developed between what Congress does and what people want. *Id.*

281. See generally RODGERS, *supra* note 189.

outside the focus when a macroeconomic view of the whole is neglected. There has been a major shift in our national government, away from a sense of responsibility for the collective well-being and toward maximizing the interests of the richest segment of our society, the top tenth of one percent. The investment by the most economically powerful segments of society in the political process has resulted in tremendous advantage for them. With campaign contributions to candidates and an unlimited capacity to spend money to support candidates outside and beyond their campaign contributions, Congress has become a “gift exchange” market. With the help of a revolving door between Congress and K Street, both major political parties and our government have been captured by those representing the very top economic strata of society. That capture of the government helped to cause the Great Recession because so much governmental action and inaction served the interests of the few at the expense of good social policy necessary to meet the real needs of our society.

IV. WHAT CAN BE DONE?

The steps to be taken to redress economic inequality are many. Given the Supreme Court’s protection as free speech of unlimited political expenditures for the purpose of gaining access to elected officials has created an effective threshold block to efforts to reduce the role of money in politics. Electioneering money has saturated elected government to the exclusion of serious actions to advance the public interest, particularly efforts to make us more economically equal. Before meaningful efforts to reduce economic inequality are likely to be successful, the role of money in politics must be addressed. Section A develops the possibility of reducing substantially the role of money in politics. Section B then sketches out some preliminary steps that then can be taken to redirect our government away from its present course that leads to ever increasing economic inequality and to direct it towards a politics in which policies to reduce inequality can be addressed.

A. Controlling Campaign Finance

A threshold to turning the trend away from ever greater economic inequality starts with campaign finance. Reducing the role of money in politics is a necessary prerequisite to addressing the real problems most of the people in this country face. While the Court in *Citizens United* did strike down limits on the amount of money that could be spent electioneering, nevertheless, it did uphold some requirements that the identity of those spending electioneering money be disclosed. The plaintiff had challenged provisions of the Bipartisan Campaign Reform

Act (BCRA) that required televised independent electioneering communications to identify who is responsible for the ad, to indicate that it is not authorized by the candidate, and to display the name of the person or group that funded the ad.²⁸² Further, any person or entity who spent more than \$10,000 on electioneering communications was required to file a disclosure statement identifying the person making the expenditure, its amount, the election to which it was aimed, and the names of certain contributors.²⁸³ Because these requirements imposed “no ceiling on campaign-related activities” such as spending,²⁸⁴ the Court distinguished them from the ones it found unconstitutional. “At the very least, [these disclosure requirements] avoid confusion by making clear that the ads are not funded by a candidate or political party.”²⁸⁵ Further, disclosure is a less-restrictive alternative to more comprehensive speech regulations. Thus, the requirements were justified by the government’s “sufficiently important” interest in providing voters with information about the sources of election spending.²⁸⁶ Thus, the Court upheld these disclosure requirements.²⁸⁷

The disclosure rules promulgated by the Federal Election Commission (FEC), however, do not require disclosure of the identities of contributors to organizations that engage in electioneering spending. In *Center for Individual Freedom v. Van Hollen*,²⁸⁸ the District of Columbia Circuit upheld for the time being a 2007 rule promulgated by the FEC,²⁸⁹ requiring disclosure of the names of contributors only if the contribution had been earmarked for electioneering.²⁹⁰ With that loophole, no contributions are ever earmarked for electioneering and so these organizations have not been required to disclose who gave them the money. The court’s decision did not finally decide whether the

282. *Citizens United v. FEC*, 130 S. Ct. 876, 913–14 (2010); *see also* 2 U.S.C. § 441d(d) (2006).

283. § 434(f).

284. *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam)).

285. *Id.* at 915.

286. *Id.* at 914. Requiring disclosure, however, might be unconstitutional “as applied to an organization if there were a reasonable probability that the group’s members would face threats, harassment, or reprisals if their names were disclosed.” *Id.* at 916.

287. *Id.* at 916.

288. 694 F.3d 108 (D.C. Cir. 2012) (per curiam).

289. *Id.* at 110–12.

290. 11 C.F.R. § 104.20(c)(9) (2012).

challenged FEC rule was consistent with the BRCA but it has the effect of delaying a final decision.²⁹¹

The FEC could revise its rules to require disclosure of the names of the sources of the money used in electioneering but it has, so far, been deadlocked on whether or not to do that because its membership is split evenly between the two political parties.²⁹² While requiring disclosure of the contributors would be an improvement over the present system and would likely reduce at least some of the money pouring into political campaigns,²⁹³ there still are a number of ways in which money can be removed from politics. For one, public financing of elections was not

291. The decision of the D.C. Circuit was based on a technical administrative law issue. Essentially, the district court had erred by deciding that the underlying provision of BRCA was unambiguous and that the FEC rule construing it was inconsistent with its plain meaning. *Van Hollen*, 694 F.3d at 110. In its decision rejecting the lower court decision, the court remanded the case to the trial court to retain jurisdiction and to refer the matter to the FEC to advise the court whether it intended to pursue rulemaking concerning that rule. *Id.* at 111–12. If the FEC does not initiate rulemaking, the district court in *Van Hollen* would then go ahead and decide whether the challenged rule should be overturned under administrative law interpretative approaches that it had not taken in its original decision. *Id.* at 112. The FEC, made up of three Democrats and three Republicans, then deadlocked on whether or not to initiate rulemaking. See CYNTHIA L. BAUERLY, FED. ELECTION COMM’N, STATEMENT ON THE PROPOSAL TO COMMENCE A RULEMAKING TO ADDRESS ELECTIONEERING COMMUNICATION DISCLOSURE RULES (Oct. 4, 2012), available at http://www.fec.gov/members/bauerly/statements/Bauerly_statement_on_EC_disclosure_rules.pdf. The successful appellant in *Van Hollen* petitioned the FEC to initiate rulemaking by essentially reenacting the rule in its present form. The FEC subsequently published notice in the Federal Register opening a comment period to be closed on December 26, 2012, on the question whether rulemaking should be initiated. Rulemaking Petition: Electioneering Communications Reporting, 77 Fed. Reg. 65,332 (Oct. 26, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-10-26/pdf/2012-26116.pdf>. With action pending before the FEC, the district court in *Van Hollen* will not decide the challenge to the present rule.

292. The FEC is made up of six members, no more than three of whom can be of the same political party. *Commissioners*, FEC, <http://www.fec.gov/members/members.shtml> (last visited Feb. 13, 2013). With three Democrats and three Republicans on the Commission, action can only be taken on an essentially consensus basis. Controlling electioneering spending is clearly not a consensus issue. It has also been proposed that Congress could amend the Internal Revenue Code to ban all tax exempt organizations from spending money on electioneering or, if they did so, to disclose the names of all donors. See Greg Colvin, *A Silver Bullet That Would End Secret Tax-Exempt Money in Elections*, CAMPAIGN AMERICA’S FUTURE (Apr. 11, 2012), http://blog.ourfuture.org/20120411/A_Silver_Bullet_That_Would_End_Secret_Tax-Exempt_Money_in_Elections. Congress, however, appears as deadlocked on this issue as on many others.

293. Corporations and their top managers, particularly retailers and brand name businesses, would likely recalculate their political contributions for fear of a consumer backlash. Since that backlash could come from any direction, any political contributions might be viewed as risky.

directly implicated in *Citizens United*.²⁹⁴ Complete public funding would create incentives to reduce the amount of money spent on electioneering but, given the present law, would not reduce the right of candidates themselves or of others wishing to weigh in on an election to spend money on independent electioneering.²⁹⁵

One key to the role of money in politics involves lobbying. Requiring disclosure²⁹⁶ or even public financing of all election spending would not directly impact lobbying, but it would alter the way lobbying was done.²⁹⁷ Disclosure of the sources of campaign contributions and electioneering would make the current practice of “bundling” of this money by lobbyists vulnerable to public scrutiny that some contributors might want to avoid.²⁹⁸ Further, the complete financing of elections would eliminate any need for campaign contributions so lobbyists would not be able to use those contributions to build a relationship with a Congressman and so the “gift exchange” nature of the relationship between legislators and lobbyists would be weakened. Building those relationships would not, however, be foreclosed and the regulation of lobbying is subject to some First Amendment protection: After all, the First Amendment provides that “Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”²⁹⁹

294. *Citizens United* did find unconstitutional some partial public funding of campaigns where distortion of the campaign would occur due to one side having tremendously more money than the other. 130 S. Ct. at 883–84. The so-called “antidistortion” rationale for public funding of one side in a campaign is not a compelling governmental interest. *Id.* at 903–04. But that says nothing about complete public financing of campaigns. Steps short of complete public funding of elections may reduce the impact of big money in electioneering. See MICHAEL J. MALBIN ET AL., THE CAMPAIGN FIN. INST., PUBLIC FINANCING OF ELECTIONS AFTER *CITIZENS UNITED* AND *ARIZONA FREE ENTERPRISE* (2011), http://www.cfinst.org/pdf/state/CFI_Report_Small-Donors-in-Six-Midwestern-States-2July2011.pdf (study of partial public funding of elections through contributions of donors matched by public funds).

295. See Richard M. Esenberg, *The Lonely Death of Public Financing*, 33 HARV. J.L. & PUB. POL’Y 283, 287–88 (2010).

296. There is precedent upholding a requirement that lobbying information be disclosed. *United States v. Harriss*, 347 U.S. 612, 625–26 (1954).

297. See Hasen, *supra* note 207, at 226–28.

298. LESSIG, *supra* note 229, at 120. “Bundling” is important to lobbyists because the recipient knows that the lobbyist was responsible for collecting the contributions.

299. U.S. CONST. amend. I.

The opposition of big money interests to any attempt to enact even these partial measures predictably would be fierce.³⁰⁰ Even if enacted, neither enhanced disclosure requirement nor complete public financing of elections would likely be sufficient to take enough money out of politics that it would be possible for members of Congress to turn their attention to the needs of the people rather than their own needs.³⁰¹

Another possibility is that *Citizens United* and the earlier cases involving money in politics could be undermined or even overruled. Recent action by the Supreme Court shows how unlikely that is given the present composition of the Court. In *American Tradition Partnership, Inc. v. Bullock*,³⁰² the Court granted certiorari and reversed per curiam the decision of the Montana Supreme Court that upheld the State's prohibition on corporate spending for electioneering purposes.³⁰³ Distinguishing *Citizens United*, the Montana Supreme Court had engaged in an extensive investigation of the sordid history of political corruption in Montana.³⁰⁴ It had concluded that such corruption continued to justify the restrictions on corporate politicking.³⁰⁵ In a five-to-four decision, the Supreme Court summarily rejected that finding:

300. Devin Henry, *Senate GOP Objects to Campaign Finance Bill for Second Straight Day*, MINNPOST (July 17, 2012), <http://www.minnpost.com/dc-dispatches/2012/07/senate-gop-objects-campaign-finance-bill-second-straight-day>.

301. Because a large portion of electioneering money is spent on television and media subject to governmental regulation, perhaps requiring all media subject to regulation to provide public service slots for electioneering as a condition of their operation would further reduce the incentive of individuals to pour money into politics.

302. 132 S. Ct. 2490 (2012) (per curiam).

303. *Id.* at 2491.

304. *W. Tradition P'ship, Inc. v. Attorney Gen. of State*, 2011 MT 328, ¶¶ 23–33, 363 Mont. 220, 271 P.3d 1.

305. The court concluded that this history of corruption distinguished the case from *Citizens United*:

[T]he State of Montana, or more accurately its voters, clearly had a compelling interest to enact the challenged statute in 1912. At that time the State . . . and its government were operating under a mere shell of legal authority, and the real social and political power was wielded by powerful corporate managers to further their own business interests. The voters had more than enough of the corrupt practices and heavy-handed influence asserted by the special interests controlling Montana's political institutions. Bribery of public officials and unlimited campaign spending by the mining interests were commonplace and well known to the public.

Id. at 11 (In the ninety-nine years subsequent to the enactment of the law, Montana did not “lose the power or interest sufficient to support the statute.”); see also Larry Howell, *Once upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, 73 MONT. L. REV. 25, 27–28 (2012). That history of corruption is undisputed, including the 1899 election of “copper king” William Andrews Clark to the United States Senate. *Id.* at 32. One of the richest men in America, Clark's most fervent desire was to

The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does. Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.³⁰⁶

While the present majority is sure *Citizens United* is good law and that it should be applied even in the presence of strong historical evidence of actual corruption in campaign financing, it is possible that *Citizens United* would not be sustained in the long run. If the situation were not so dire, it might be prudent to take the long view, that over time, the composition of the Supreme Court would change in response to changes in society and our politics and, as a result, revisit *Citizens United* and the other decisions that allow unrestricted money to flow into politics. Barry Friedman has demonstrated that, over time, the Justices make sure that their decisions do not stray too far from public opinion.³⁰⁷ In part because of its decision in *Citizens United*, the Court is losing its high regard by the people. For example, as of May 2012, the public assessment of the Supreme Court has reached a quarter-century low, with

be a Senator. "To satisfy that desire, Clark reportedly was willing to spend as much as a million dollars of his fortune [of \$50 million] to bribe state [senators], who elected U.S. senators until [the] adoption of the Seventeenth Amendment . . . at [a] rate of up to \$10,000 per vote. *Id.* "When later asked to justify his bribery, he reportedly said: 'I never bought a man who wasn't for sale.'" *Id.* The 2012 Montana election between Democratic incumbent Jon Tester and Republican challenger Denny Rheberg demonstrates the impact of unlimited election spending such that election spending exceeded the per capita income: "Fewer than one million people live in the great state of Montana, where per capita income in 2010 was less than \$25,000." Alison Frankel, *Election Results Raise Questions about Impact of Citizens United*, THOMSON REUTERS NEWS & INSIGHT (Nov. 7, 2012), http://newsandinsight.thomsonreuters.com/Legal/News/2012/11_-_November/Election_results_raise_questions_about_impact_of_Citizens_United/.

Now try to guess how much money Super PACs and politically involved non-profits spent on the race for a U.S. Senate seat in Montana in the 2012 election cycle. Would you believe \$25 million? According to the most recent data assembled by The Center for Public Integrity, Republican challenger Denny Rheberg attracted \$11.9 million in outside spending on his campaign, slightly less than the \$12.8 million in outside money that went to the Democratic incumbent, Jon Tester. Do the math: That's more than \$25 per voter

Id.

306. *Am. Tradition P'ship*, 132 S. Ct. at 2491 (internal citation omitted).

307. *See* BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 370 (2009).

only fifty-two percent having a favorable opinion, while twenty-nine percent indicated they have an unfavorable view.³⁰⁸

If overturning *Citizens United* is not likely in the present Supreme Court, another approach would be to enact an amendment to the Constitution to overturn it.³⁰⁹ Then-Representative Dennis Kucinich introduced an amendment that would require public financing of all federal elections and would ban expenditures from any other source.³¹⁰ Some other members of Congress have proposed amendments that are less extensive but would authorize Congress and the states to regulate public financing.³¹¹ None of these proposed amendments have advanced in Congress, much less through the further steps required by Article V to amend the Constitution. While Article V also provides for calling constitutional conventions in which the election financing could be reviewed along with every other possible issue, that has not yet come to fruition, despite over our history some 400 applications for a convention having been made over time by forty-nine of the fifty states.³¹²

308. PEW RESEARCH CTR. FOR PEOPLE & PRESS, SUPREME COURT FAVORABILITY REACHES NEW LOW 1 (2012), available at <http://www.people-press.org/2012/05/01/supreme-court-favorability-reaches-new-low/>. A later poll concludes that only forty-four percent approve of the Court. See Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in Poll*, N.Y. TIMES, June 8, 2012, at A1, http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=1&_r=1&hp.

309. For a chart listing all of the amendments that have been proposed that deal with election financing, see PR WATCH, http://www.prwatch.org/files/08_09_Constitutional_Amendments.pdf (last visited Feb. 10, 2013).

310. Eric W. Dolan, *Kucinich Proposes Public Financing to Overturn Citizens United Ruling*, RAW STORY (Jan. 19, 2012, 8:33 PM), <http://www.rawstory.com/rs/2012/01/19/kucinich-proposes-public-financing-to-overturn-citizens-united-ruling/>.

311. *Id.*

312. FRIENDS OF THE ARTICLE V CONVENTION, <http://foavc.org/> (last visited Feb. 1, 2013). Interestingly, the ratification of the Seventeenth Amendment providing for the direct election of Senators came in 1913 and was the result of a long campaign by a public outraged by recurring scandals, including the scandal over Senator Clark from Montana, over the selection of Senators by state legislatures. Howell, *supra* note 305, at 34. That reform effort included repeated attempts to call a constitutional convention pursuant to Article V. Ann Stuart Diamond, *A Convention for Proposing Amendments: The Constitution's Other Method*, PUBLIUS, Summer 1981, at 113, 122. Perhaps the best known campaign for an Article V convention involved efforts to amend the Constitution to permit direct election of senators. From 1895 to 1911 a total of thirty-one states addressed seventy-five petitions to Congress. *Id.* The proposed Direct Election Amendment passed the House several times—in 1900 by a vote of 240 to 15. *Id.* Not surprisingly, the Senate refused to pass an amendment that directly involved the fortunes of its own members. *Id.* “Apparently the number of petitions for a convention came within one of the required two-thirds before the Senate finally acted in 1912, when Congress proposed what became the Seventeenth Amendment.” *Id.*

A much less drastic alternative to changes in the Constitution would be to rely on normal politics to redress issues such as the ones addressed in this Lecture. Election financing and economic inequality could become the focus of politics to push one or both of the major political parties toward reform of electioneering financing. Relying simply on the present political process, however, seems unlikely to lead to success in the foreseeable future because both of the major parties appear to be so beholden to big money.³¹³ The current system of big money, and its underlying microeconomic worldview, is so deeply embedded and powerful that participation in the normal electoral processes is unlikely, at least in any short term, to overcome the impact that big money has and continues to bring to bear on politics and government policy.³¹⁴ The newly expanded potential that *Citizens United* opens for virtually unlimited amounts of money to flood the entire political process makes serious reform within the present political context unlikely to be successful. Both political parties and all candidates are now so beholden to ever larger amounts of financial support in terms of campaign financing and independent electioneering that substantial change through normal politics is quite remote at least in the short run.

Creating a third political party is possible, especially if it were organized around one issue like money in politics or, more generally, economic inequality. While third parties are not likely to supplant a major party,³¹⁵ third-party candidates can influence the outcome in

313. See *Take the Money and Run*, *supra* note 242 (All the politicians interviewed complained about the present state of campaign financing but none seemed ready to push for change because they all had been elected within this system and feared change that might impact on their electability in the future.).

314. The 2012 presidential election campaign did take one step in the direction of reform. President Obama ran on a platform of raising income taxes for the very wealthy but reducing them for ninety-eight percent of the people. See Lori Montgomery & Paul Kane, *Obama, Senate Republicans Reach Agreement on 'Fiscal Cliff'*, WASH. POST, Jan. 1, 2013, http://www.washingtonpost.com/business/fiscal-cliff/biden-mcconnell-continue-cliff-talks-as-clock-winds-down/2012/12/31/66c044e2-534d-11e2-8b9e-dd8773594efc_story.html. Since his reelection, this platform has been maintained as a prerequisite to avoiding the looming "fiscal cliff." See Philip Rucker & Lori Montgomery, *Obama Takes Push for Higher Taxes on Wealthy to Workers at Michigan Plant*, WASH. POST, Dec. 10, 2012, http://www.washingtonpost.com/politics/obama-heads-to-michigan-seeking-support-for-fiscal-plan/2012/12/10/583c2098-42e1-11e2-8061-253bccfc7532_story.html.

315. The America Elect Party dropped out of the 2012 presidential race in part because it could not find a candidate. See Amy Bingham, *'Americans Elect' Ends Online Primary after No Candidates Qualify to Run*, ABC NEWS (May 17, 2012, 5:44 PM), <http://abcnews.go.com/blogs/politics/2012/05/americans-elect-ends-online-primary-after-no-candidates-qualify-to-run/>.

elections.³¹⁶ Witness two examples: Ross Perot in 1992 took support from the Republican Party resulting in Bill Clinton's victory and Ralph Nader in 2000 took enough support from the Democratic Party that resulted in George W. Bush's victory. Further, third parties can influence the way the major parties treat specific issues. For example, Governor George Wallace's American Independent Party pushed the Republican Party towards its Southern Strategy that has proved so important to its political success since 1968 when Richard Nixon lost a majority of southern electoral votes to Wallace.³¹⁷

In sum, the prospects of attempting to take as much money as possible out of federal electoral politics are not good. Congress and the President have vested interests in maintaining the present system. The present Supreme Court has created a substantial constitutional jurisprudence that protects the present system from change through regular politics. Amending the Constitution to take the *Citizens United* block out of electioneering would be an extraordinarily difficult accomplishment.³¹⁸ It may be necessary to start toward that goal by creating a social movement dedicated to taking money out of politics and decreasing economic inequality.

B. An Economic Equality Social Movement

Separate from and a possible prelude to organizing a third political party would be to organize a robust social movement to push for change.³¹⁹ Social movements are not just politics by other means but are groups of individuals in search of a new collective identity.³²⁰ According

316. See generally J. DAVID GILLESPIE, *POLITICS AT THE PERIPHERY: THIRD PARTIES IN TWO PARTY AMERICA* (1993).

317. See EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* 210–11 (2002). Today's Republican Party resulted from a split of the Whig Party, with the southern part of the party becoming the contemporary Democratic Party and the northern part of the party becoming the Republicans. See LEWIS L. GOULD, *GRAND OLD PARTY: A HISTORY OF THE REPUBLICANS* 14–16, 18 (2003).

318. See generally SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

319. Social movements can achieve success without forming new political parties. Witness the success of the gun rights movement whose agenda was accepted by the Republican Party and the earlier Civil Rights Movement whose agenda came to be part of the platform of the Democratic Party. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 191–95, 245 (2008).

320. See BERT KLANDERMANS, *THE SOCIAL PSYCHOLOGY OF PROTEST* 204 (1997). Social psychology includes a substantial literature regarding social movements. See, e.g.,

to social movement theory,³²¹ social movements are based on individuals joining together around shared beliefs,³²² who then expand the size of the group and the intensity of belief among its members. This sets the stage for the group to undertake collective action to achieve its goals.³²³ To say this another way, the goal of the movement is to shift paradigms.³²⁴ A focused social movement can progress by incubating, articulating, and justifying evolving understandings of contemporary values and, at least at the beginning, to do so outside the support of the regular institutions of democratic governance.³²⁵ To succeed, social movements must overcome the prevailing ignorance, apathy, and indifference of most people.³²⁶ “Protest is staged by people who came to *share* a contentious identity”³²⁷ Social movements face a significant collective action problem described earlier.³²⁸ While big money was able to shift the national

CHARLES TILLY, *SOCIAL MOVEMENTS: 1768–2004* (2004). Tilly is perhaps the best known American student of social movements.

321. See KLANDERMANS, *supra* note 320, at 2 (“Social movements . . . are ‘collective challenges, based on common purposes and social solidarities, in sustained interaction with elites, opponents, and authorities.’” (quoting SIDNEY G. TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 9 (updated and revised 3d ed. 2011))).

322. *Id.* at 4. The first step is the “construction and appropriation of collective beliefs” and the second is “the transformation of discontent into collective action.” *Id.* at 206.

323. *Id.* at 4 (“Individual beliefs may properly be viewed as the internalized byproduct of socialization and publicly shared discourse.”).

324. *Id.* at 17. Three conditions need to be present to generate a social movement: (1) people must feel a sense of justice or righteousness in the cause, (2) they must identify with the cause, and (3) their beliefs must be powerful enough so that they are motivated to join in actions that will advance the cause. *Id.*; see also WILLIAM A. GAMSON, *TALKING POLITICS* 7 (1992). A social movement can be effective even without anywhere near majority support. Siegel, *supra* note 319, at 241–42. Social movements can quickly gain ascendancy if adopted by one of the major parties. For instance, witness the transformation of the idea that the Affordable Care Act was unconstitutional from an “off the wall” idea to one that is “on the wall.” The Tea Party movement had its claims quickly picked up by the Republican Party. See Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012, 2:55 PM), <http://www.theatlantic.com/politics/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040>.

325. See KLANDERMANS, *supra* note 320, at 205 (“Relative deprivation is the raw material from which the individual propensity to mobilize generates. . . . [While] grievances are socially constructed and so is relative deprivation, and discontent must be converted into action, . . . felt injustice is at the roots of any protest.”).

326. See *id.* at 14–16.

327. *Id.* at 211.

328. See generally OLSON, *supra* note 277. While all the members of a large group would benefit if they joined together in collective action to achieve a common end, each individual is better off by being a “free rider” gaining the benefit of the collective

paradigm of collective identity and action to one of individualized self-interest, a new social movement could try to reestablish collective identity based on increasing economic equality.

Where to start? The Occupy Movement is a start³²⁹ since it gained significant support among a broad range of people based on a rather broad belief that inequality and insecurity had become too extreme and that too much money in politics was to blame.³³⁰ Popular culture represented by Jon Stewart, Steven Colbert, and Ira Glass has begun a broad-based focus on the problems of money in politics and economic inequality. While Dan Rodgers in *The Age of Fracture* demonstrated that many different academic disciplines had over the past forty years increasingly focused on concepts narrowed to individuals rather than the collective,³³¹ there already is a growing amount of significant scholarship that has been begun to turn attention to the problems of inequality, individualized risk, insecurity, and the role of money in politics.³³² This scholarship does connect with the beliefs underpinning the Occupy Movement and potentially can form the basis of a set of beliefs that could trigger the collective action necessary for there to be a fundamental change of direction.

There is important new social science literature that portrays economic inequality as the cause of many of the ills our society faces. Richard Wilkinson and Kate Pickett have published an important book, *The Spirit Level: Why Greater Equality Makes Societies Stronger*,³³³ reporting on that research. They collected internationally comparable data on health and as many social problems as they could find reliable figures for.³³⁴ The list they ended up with included:

- Level of trust;

action of everyone else. If enough individuals are “free riders,” collective action fails so all are in the condition they were in when collective action was first contemplated.

329. The Occupy Movement is not the start of organized opposition to Chicago school economics domestically as well as nationally. *See, e.g.*, KLEIN, *supra* note 213.

330. Mark Trumbull, *Can ‘Occupy Wall Street’ Really Get Money Out of Politics?*, CHRISTIAN SCI. MONITOR (Oct. 14, 2011), <http://www.csmonitor.com/USA/Politics/2011/1014/Can-Occupy-Wall-Street-really-get-money-out-of-politics>.

331. *See* RODGERS, *supra* note 189.

332. *See* HACKER & PIERSON, *supra* note 9; DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (a best-selling popular description of behavioral economics by one of its founders); LESSIG, *supra* note 229; SACHS, *supra* note 44. Behavioral economics is microeconomic theory but, instead of focusing on the hypothetical rational profit maximizer, it studies the actual behavior of people which is not always consistent with their individual profit maximization.

333. RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER (2009).

334. *Id.*

- Mental illness (including drug and alcohol addiction);
- Life expectancy and infant mortality;
- Obesity;
- Children's educational performance;
- Teenage births;
- Homicides;
- Imprisonment rates;
- Social mobility.³³⁵

Based on the combination of the data on all of these issues, they developed an Index of Health and Social Problems for each country and for each of the states in the United States.³³⁶ The overall outcome of their study shows that higher economic inequality correlates with worse outcomes on these basic health and social problems, but that differences in the level of national incomes was not correlated with the occurrence of these issues.³³⁷ The result is the same when graphing the outcomes for states.³³⁸ That demonstrates that economic inequality is the key to understanding the intensity of all of these problems. Much of the rest of the book describes the research correlating greater economic inequality with worse outcomes on all of these social problems and demonstrating the causal connection between inequality and these issues.³³⁹

Some characterize any attempt to raise taxes on the wealthy as “class warfare.” One of many interesting insights of *The Spirit Level* is that it demonstrates that everyone, even the wealthy, benefit from greater economic equality. “[L]iving in a more equal place benefited everybody, not just the poor. . . . [T]he benefits of greater equality spread right across society, improving health for everyone—not just those at the bottom.”³⁴⁰ Whether looking at countries or states, “greater equality brings substantial gains even in the top occupational class and among the richest or best-educated quarter or third of the population, which include the small minority of the seriously rich.”³⁴¹

Wilkinson and Pickett close by calling for a social movement to transform our societies. “A social movement for greater equality needs a sustained sense of direction and a view of how we can achieve the necessary economic and social changes. . . . What we need is not one big

335. *Id.* at 19.

336. *Id.* at 21–22, Figs.2.3–2.5.

337. *Id.* at 20–21, Figs.2.2, 2.3.

338. *Id.* at 22–21, Figs.2.4, 2.5.

339. *Id.*

340. *Id.* at 84.

341. *Id.* at 186.

revolution but a continuous stream of small changes in a consistent direction.”³⁴²

The direction of social discussion as well as of many academic disciplines may be moving away from raw individualism back toward a vision of society based on the collective welfare of all members of society, the richest and the poorest and everyone in between. All of these individual disciplines may be grouped under a resurgent vision of justice based on the work of Nobel prize winner Amartya Sen. His *The Idea of Justice*³⁴³ focuses directly on the development of the full capabilities of the individual.³⁴⁴ It is interesting that Sen’s focus on individualism is what Professor Rodgers shows dominates our intellectual life at present. But Sen takes individualism in quite a different direction. His capability approach judges the advancement of justice by looking at “a person’s capability to do things he or she has a reason to value.”³⁴⁵ “[W]e have to seek institutions that *promote* justice, rather than treating the institutions as themselves manifestations of justice”³⁴⁶ “The identification of redressable injustice is not only what animates us to think about justice and injustice, it is also central . . . to the theory of justice.”³⁴⁷ Underlying many competing theories of justice, Sen finds the willingness to fight against injustice and the disposition to do so by engaging in public discussion: “to reason, argue, disagree and concur.”³⁴⁸ Sen argues that a variety of intellectual disciplines—economics, game theory, law, and sociology as well as political philosophy—and theories of government decision making—rational choice, voting theory, etc.—should all be engaged to battle injustice.³⁴⁹ He acknowledges that the primary

342. *Id.* at 231–32.

343. AMARTYA SEN, *THE IDEA OF JUSTICE* (2009); *see also* MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006). For an interesting set of reviews of *The Idea of Justice*, see Cesar Arjona et al., *Senses of Sen: Reflections on Amartya Sen’s Ideas of Justice*, 8 INT’L J.L. CONTEXT 155 (2012).

344. *See* SEN, *supra* note 343, at 231.

345. *Id.* This approach focuses “not just on what a person actually ends up doing, but also on what she is in fact able to do, whether or not she chooses to make use of that opportunity.” *Id.* at 235.

346. *Id.* at 82.

347. *Id.* at vii. Sen begins by quoting Pip in Charles Dickens’s *Great Expectations*. *Id.* (“In the little world in which children have their existence, . . . there is nothing so finally perceived and finely felt, as injustice.” (quoting CHARLES DICKENS, *GREAT EXPECTATIONS* 59 (Penguin Popular Classics 1994) (1861))).

348. *Id.* at 415.

349. *See id.* at xi. Utilizing these disparate approaches to undermine the prevailing microeconomic “paradigm” can lead to the emergence of a new paradigm that better explains the appropriate way to proceed. *See* KUHN, *supra* note 203.

motivator for people to undertake action about injustice is, as described by the social movement theorists, anger.³⁵⁰ Thus, “[o]utrage can be used to motivate, rather than to replace, reasoning.”³⁵¹ Sen delivers a devastating critique of the prevailing microeconomic assumption that social policy should be based on the role of people as rational profit maximizers.³⁵² For Sen, people do not always act rationally in that economic sense, reason does not always point to a single outcome, and acting rationally does not mean always pursuing one’s own self-interest.³⁵³ That fight consists of confronting the prevailing dogmas and prejudices to expose their fragility in order to end injustice.

CONCLUSION

Issues of inequality, individualized risk, and insecurity are the underlying social conditions that could drive a new social movement for justice. To successfully redress those conditions, however, the threshold issue of unlimited money in politics must be addressed because the flow of virtually unlimited amounts of money into politics is a barrier to reform.

The task ahead is daunting. So as not to conclude the twenty-fourth Fairchild Lecture pessimistically, let us look back to what “Tommy” Fairchild accomplished in his life.³⁵⁴ At age twelve, he was putting signs in the front yard supporting Calvin Coolidge; in college he supported Herbert Hoover. When Wisconsin’s Progressive Party imploded with the loss by Bob LaFollette in 1946, “Tom” Fairchild, with his merry band of smart, talented, energetic, and funny friends, created Wisconsin’s Democratic Party. Having won (and lost) elections for political office, Thomas E. Fairchild ended up being one of the most distinguished jurists of his time. There should always be hope.

350. See SEN, *supra* note 343, at 389.

351. *Id.*

352. See *id.* at 174–224.

353. *Id.*

354. See Joan H. Lefkow, Address, *Thomas E. Fairchild: A Judge’s Legacy*, 2007 WIS. L. REV. 1 (the eighteenth Fairchild Lecture).