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THAT THOSE ALONE MAY BE
SERVANTS OF THE LAW WHO LABOR
WITH LEARNING, COURAGE, AND
DEVOTION TO PRESERVE LIBERTY
AND PROMOTE JUSTICE.

— *Leslie H. Buckler, Professor, UVA School of Law, 1931*

Inscribed on the face of Clay Hall

INTRODUCTION

IN THE PRIOR TWELVE ISSUES OF THE *Virginia Journal*, we have profiled the scholarship of thirty-six members of the Virginia faculty. A law school faculty perpetually renews itself, so it is perhaps fitting that none of the three scholars profiled in this issue was a member of the faculty when we began this publication. Indeed, each joined us from another law school and had already made a mark on legal scholarship before his or her arrival here. Each has enriched Virginia's intellectual life and I believe each would report that there is something special about this community that encourages, inspires, and facilitates one's very best work. I am tremendously proud of the research produced by our faculty and hope you will enjoy reading about it.

This issue profiles the following three members of the Virginia faculty:

Tomiko Brown-Nagin has made a substantial mark on legal history in less than a decade as an academic. Her forthcoming book, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* looks at the civil rights era from the bottom up, focusing on local lawyers in Atlanta whose concerns were in some respects narrower and in some respects broader than those of the national civil rights organizations with which they cooperated uneasily. The book reflects lengthy and painstaking archival work and interviews and will certainly change our understanding of this pivotal period of American legal history. Virginia boasts one of the nation's finest collections of legal historians and Brown-Nagin is part of an outstanding new generation in that discipline.

Rich Hynes is one of the few bankruptcy scholars concentrating on consumer bankruptcy, perhaps one of the least-studied areas of commercial law. One of his primary contributions has been to focus attention on "informal" bankruptcy, or the ways in which consumers in financial distress and their creditors interact outside the bankruptcy system. Faced with a dearth of systematic data about consumer financial distress outside

bankruptcy, Hynes has been dogged in tracking down information from records kept by multiple agencies in different states to create a tentative picture of life on the (financial) edge. Hynes has also made contributions to bankruptcy theory, such as exploring the consequences of seeing bankruptcy as a form of insurance.

Fred Schauer hardly needs introduction; he is one of the world's most prominent and influential legal scholars. He analyzes issues of first-order importance to the design of a well-functioning legal system. Schauer made his name as a First Amendment scholar, soon broadened his focus to include jurisprudence, and has also written extensively on Constitutional law more generally. Schauer's current work incorporates his interest in the philosophy and psychology of cognition and decision making that ties in nicely with his longstanding fascination with the role and functioning of rules in society. Thirty-six years after joining the academy, his scholarship remains innovative and protean.



PAUL G. MAHONEY
Dean



Reconstructing Civil Rights Legal History From the Bottom Up

TOMIKO BROWN-NAGIN'S BOOK, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (forthcoming in January 2011 from Oxford University Press) is the product of a scholarly journey upon which she embarked many years ago. The book—an ambitious mix of social history and legal history—brings together several strands of her interests. It merges her fascination with the enterprise of public interest lawyering, her study of the social history of the civil rights movement, and her critical engagement with how constitutional law and education law and policy influenced the past and shape the present.

Brown-Nagin entered law teaching in 2003, joined the Law School three years later, and is now the Justice Thurgood Marshall Distinguished Professor of Law. Although she has been in the legal academy for just seven years, Brown-Nagin already is well-known and widely admired for her scholarship in the areas of civil rights, constitutional law, legal history, and education law.

Brown-Nagin re-conceives how we think about the constitutional and social history of the civil rights movement.

With the release of her much-anticipated new book, Brown-Nagin will enhance her already superb reputation. *Courage to Dissent* will offer fresh insights about and new perspectives on one of this country's most important episodes—the 20th Century struggle for racial equality.

In the book, which grew out of years of archival and legal research and interviews with key figures of the era, Brown-Nagin re-conceives how we think about the constitutional and social history of the civil rights movement. She moves the historical lens away from the legendary Justice Thurgood Marshall, who famously won the landmark victory in *Brown v. Board of Education*. Unsurprisingly, Marshall's perspective and the strategic choices of the non-profit law firm that he headed, the NAACP Legal Defense Fund, dominate much of the legal history of the civil rights movement. Marshall and the LDF remain important in Brown-Nagin's narrative, but she shifts the focus to less well-known civil rights lawyers and to the question of how grassroots actors experienced and shaped constitutional law making. Brown-Nagin asks: What would the story of the mid-twentieth-century struggle for civil rights look like if legal historians de-centered the U.S. Supreme Court, the national NAACP, and the NAACP LDF and instead considered the movement from the bottom up?

In answering this question, Brown-Nagin discusses a spectrum of lawyers, activists, courts, organizations, strategies, and tactics, and illuminates the movement's dynamism. She examines the careers of lawyers who had strategic disagreements with Marshall and the national NAACP, particularly over *Brown*. Brown-Nagin discusses the careers of attorneys on the Right and the Left—unsung pragmatic and movement lawyers—who sought something different from, or more complicated than, “integration.” She changes the scholarly landscape by adding to the pantheon of historic public interest lawyers: A.T. Walden, one of the South's first African-American lawyers, but dismissed by some as an accommodationist of segregation; Donald Hollowell, “Georgia's Mr. Civil Rights” and an ally of student activists; Len Holt, a radical lawyer-activist and thorn in LDF's flesh who collaborated with scores of community-based organizations throughout the South; Howard Moore, Jr., a lawyer who labored for the

civil rights, anti-poverty, and peace movements; and Margie Pitts Hames, an abortion rights litigator who also advocated for civil rights and welfare rights.

The fuller portrait of legal advocacy presented in her work reframes the scholarly discussion of how civil rights lawyers employed courts and the law as tools of reform. Many of the lawyers in her work—alert to the economic and cultural dimensions of racial inequality—relied on civil rights litigation as a tool of reform less often, and in different ways, than some scholars presume. When they litigated, they did so fully aware that “civil rights” might be an illusory or incomplete prescription for community ills, Brown-Nagin argues. Several supplemented work inside the courtroom with political advocacy outside of the courtroom. Other lawyers sought familiar objectives and employed traditional styles. The personal identities and backgrounds of all of the lawyers shaped their professional pursuits and modes of advocacy. And, for a variety of reasons, most of these advocates found it difficult to fully represent the interests of the poorest African Americans, Brown-Nagin concludes.

Brown-Nagin’s book analyzes the grassroots struggle for social justice over four decades; her work spans 1940 through 1980, setting her book apart from many other works. It moves political and social activists from the periphery to the center of constitutional history, showing how they experienced civil rights litigation during the remedial phase. In Brown-Nagin’s study of law and social change, laypeople are critical; she places them on the same footing as the well-known public interest lawyers in the movement and the justices of the U.S. Supreme Court who decided the leading civil rights cases of the era.

Indeed, a major innovation of Brown-Nagin’s work is the extent to which it blends the methodology of community-based social history, mostly concerned with how local people without access to traditional levers of power seek change, and the methodology of legal history, mostly concerned with courts and doctrine. Her work delves deeply into on-the-ground dynamics in Atlanta’s and the nation’s civil rights movements. Brown-Nagin found the opportunity to interview some of the activists who

participated in the civil rights movement one of most rewarding aspects of her research. She interviewed members of the Student Non-Violent Coordinating Committee, a catalyst of the civil rights movement, and lawyers who were outside of the civil rights mainstream. Equally important, she interviewed little-known local activists, including a central figure in her work, Ethel Mae Mathews, a tenant of an Atlanta housing project and a welfare rights organizer who grew disaffected with veteran movement leaders and civil rights lawyers. Such oral histories played a prominent role in her research. These sources, combined with the many other archival and legal records that she reviewed for her book, provide a depth and breadth that make Brown-Nagin's rendering of movement history distinct.

By paying close attention to a variety of voices, relying on many sources, covering several decades, and anchoring her work in a particular place, Brown-Nagin aspires in *Courage to Dissent* to a compelling synthesis of the social and legal history of the postwar civil rights movement. The book highlights the changing political opportunity structures of lawyers and activists, shifting forms of white resistance to equality, synergies and tensions over racial and economic justice strategies, and strife over war and peace—all set against the dynamic arena of constitutional litigation and doctrine. Ultimately, her work suggests a more nuanced understanding of history, law, and social change. Grand theories about the courts' role in society and heroic narratives about civil rights lawyers are attractive and important, but also can be misleading. Brown-Nagin's bottom-up perspective on civil rights legal history, on the other hand, emphasizes the numerous variables, fragile personalities, tortured debates, and imponderable contingencies that influence change over time. She insists that local citizens shape constitutional law; local-level politics, organized and unorganized, routinely affect the implementation of remedies for constitutional violations. Brown-Nagin argues that dissident, protest action by local groups is a crucial but undervalued element in the failure or success of litigation designed to bring about social change. But, Brown-Nagin is quick to note, the many contingencies of history leave her hopeful, rather than hopeless, that civic engagement, coupled with

thoughtful judging and responsive legislative processes, can push society toward the good.

While Brown-Nagin de-centers and critically analyzes Thurgood Marshall's perspective on civil rights in her historical scholarship, Marshall's advocacy centers her own life experience. Brown-Nagin's scholarly interest in questions of law, inequality, and social change are partly rooted in the world she experienced as a young girl growing up in South Carolina. Brown-Nagin enrolled in her local public elementary school just a few years after the local county had finally resigned itself to desegregation. The school system had desegregated in the wake of threats by the U.S. Department of Health, Education and Welfare to withhold federal funds pursuant to its enforcement powers under Title VI of the Civil Rights Act of 1964. U.S. Supreme Court decisions that Brown-Nagin later would study for the first time as a law student—*Alexander v. Holmes County* (1969) and *Swann v. Charlotte-Mecklenburg County School Board* (1971)—had also spurred the school system to action. Although almost two decades had passed since *Brown v. Board of Education*, the Ku Klux Klan rallied when school desegregation finally occurred in the early 1970s. Given white resistance, Brown-Nagin's parents—who had lived under Jim Crow and attended segregated schools—sent her off to experience school desegregation with a mixture of hope and trepidation.

AS IT TURNED OUT, BROWN-NAGIN FLOURISHED ACADEMICALLY. She thrived, in part, because her mother and father insisted on it. Her father, who had labored as a sharecropper in his youth and then worked as a machine operator in a textile factory, pushed Brown-Nagin to seize every opportunity. Assigned to classes for advanced students because of her performance on standardized tests—exams initially administered to children in first grade—she found it a thrill to learn in the same classroom as the children of the town's college professors, doctors, and lawyers.

Even as she maximized her opportunities within the local educational system, she came away from the experience with questions that she continues to puzzle over in her scholarship. Although Brown-Nagin's school

district had officially desegregated in the 1970s, blacks and whites virtually never attended class together. The school system sorted and tracked students using so-called intelligence tests and subjective assessments of ability; pursuant to this system, whites simply did not share classroom space with blacks. The children in her “high-ability” classes invariably were white and from upper-middle class or wealthy families; indeed, white males dominated the ranks of her classes for the “gifted.” The overwhelming majority of black students, whose own parents had attended Jim Crow schools, were assigned to the general curriculum for “low-ability” students, where teacher expectations were low and matriculation to college was not considered an attainable goal. In essence, two different school systems existed within one building. In the eyes of the law, however, the school system had desegregated; to be sure, the schools’ testing and sorting mechanisms began early in a student’s life and had disparate racial impacts, but it did not rely on explicit racial classifications. Still, the demographic make-up of her public school classes troubled Brown-Nagin and inspired much of her interest in civil rights history and law.

Before she entered academia, those interests led her on a career path that included expected and unexpected turns. She obtained a law degree from Yale and a Ph.D. in history from Duke. She did stints in internships at LDF, the Department of Justice, Civil Rights Division, and the Lawyers Committee for Civil Rights. She clerked on the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Third Circuit. For two years, Brown-Nagin practiced law in New York City with a major litigation firm. All the while, she plodded along on the dissertation that, over many years, grew into *Courage to Dissent*. The Samuel I. Golieb Fellowship in Legal History at New York University School of Law and the Charles Hamilton Houston Fellowship at Harvard Law School facilitated her transition to academia.

Brown-Nagin has examined questions of structural inequality in several articles. For it turns out that the challenges Brown-Nagin first observed in a southern elementary school in the aftermath of *Brown* are common still today across the country. The South’s social patterns represented an

extreme form of a general phenomenon. The question of under what circumstances classes protected by the Civil Rights Act of 1964 can be denied educational and employment opportunities on the basis of tests and other evaluations of merit remains a live issue in educational settings, ranging from K–12 education to law schools, and in workplace settings. Discussions of the so-called “achievement gap,” its causes and remedies, are ubiquitous. Debates over whether school integration helps or harms black students persist. Meanwhile, the integration-as-equality paradigm associated with *Brown* is deeply controversial in contexts outside of race—for other students of color, for English-language learners, for students with disabilities. She discusses this theme in a forthcoming review of Martha Minow’s new book, *In Brown’s Wake: Legacies of America’s Educational Landmark*. The review, entitled “Hollow Tropes: Fresh Perspectives on Courts, Politics, and Inequality,” also examines books on the courts and reform in the contexts of the labor movement and interracial marriage. In the review, Brown-Nagin urges balanced appraisals of how courts interact with lawmakers and citizens to shape law and policy. Currently, she argues, it is fashionable to emphasize courts’ limitations as problem solvers; it is just as important to appreciate judicial competencies and courts’ social utilities.

Brown-Nagin also has wrestled with the difficulties surrounding *Brown*’s legacy in several articles at the intersection of constitutional law, educational policy, and socio-legal history. In a 2003 article, “Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intra-racial Conflict,” published in the *University of Pennsylvania Law Review*, Brown-Nagin rejected an exclusively race-based theory of plaintiffs’ interests in civil rights litigation. This article constituted Brown-Nagin’s initial effort to move the scholarship in civil rights legal history away from its heavy focus on doctrine and familiar heroes and villains, and toward community-based social history. In this piece, she argued that scholars had overemphasized white resistance and inadequate doctrine as explanations for failed school desegregation campaigns. Brown-Nagin instead explored intra-racial class conflict over the meaning of equality in school desegregation cases as a factor relevant to remedial success. Taking an

interdisciplinary vantage point that has become characteristic of her legal scholarship, Brown-Nagin pushed scholars of law and inequality to take class seriously as an analytical factor—something that leading scholars in other disciplines had done for years. She highlighted the agency of the black middle class—actors missing from juri-centric scholarship. Brown-Nagin told a narrative in which local black decision makers successfully allied with whites to oppose school integration in Atlanta. In *Courage to Dissent*, she deepens her analysis, and connects the conflagration over school desegregation in Atlanta during the 1970s to the long struggle of local black professionals against employment discrimination and for affirmative action as a tool to achieve job equity.

In a 2005 *Columbia Law Review* article, Brown-Nagin turned her attention to the University of Michigan affirmative action cases. In “Elites, Social Movements, and the Law: The Case of Affirmative Action,” she used an attempt by a group of intervenors in the litigation who styled themselves a “mass movement” for social justice to engage the literatures on law and social movements. The intervenors hoped to highlight the adverse impact of the university’s admissions criteria on black students—an argument that the university itself could not be expected to make. They made little headway. Brown-Nagin used their relative lack of success to highlight the difference between protests that define themselves through litigation and protests that are un-tethered to the courtroom. She argued that the latter types of protests have distinct advantages over the former. Additionally, Brown-Nagin suggested that advocates should consider the disadvantages of participating in equal protection litigation over affirmative action, where courts employ doctrinal frameworks that have long excluded meaningful discussions of structural discrimination. Instead, problems related to educational inequality can also be addressed through a range of political tactics. In policy forums and informal political circles, stakeholders can formulate their own agendas with due attention to the cultural dimensions of the educational process.

Brown-Nagin also has written about constitutional law and democratic experimentalism in the context of charter schools. The juxtaposition of

opposing narratives about charter schools piqued Brown-Nagin's interest in the subject. Initially, she read news stories that critiqued charter schools as the new "segregation academies." Commentators feared that whites would use the autonomy permitted by charter school laws to found all-white, state-supported schools, as segregationists did during the era of resistance to *Brown*. However, she then read of excitement in local communities of color, where charter schoolteachers had found the freedom to experiment with their curricula in ways that addressed the needs of at-risk students, in particular. In a 2000 *Duke Law Journal* article, completed when she was a legal fellow, Brown-Nagin argued that courts should be open to local-level charter school experimentation for disadvantaged students. She wrote "Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education," at a time when courts appeared poised to thwart such experiments, especially in districts with extant school desegregation orders. Brown-Nagin found this potential outcome ironic and even perverse, since many whites had fled those districts, leaving the families of color left behind with few educational options. More recently, however, when Brown-Nagin comments on charter schools, she cautions against overreliance on charter schools as the *exclusive* engines of national educational policy, given their tendency to exacerbate race and class segregation.

Currently, Brown-Nagin is launching a major new project that requires her to think like a lawyer, a historian, a social scientist, and perhaps, she notes, a psychologist, too. She is writing a biography of the Honorable Constance Baker Motley, the first African-American woman appointed to the federal bench, the first black woman elected to the New York State Senate, the first female Manhattan Borough President, and a trailblazing litigator with the NAACP Legal Defense Fund, where she worked alongside her mentor, Thurgood Marshall. Motley co-counseled the Atlanta school desegregation case for several years and is one of the lawyers featured in *Courage to Dissent*. Brown-Nagin became fascinated with the judge based on what she learned about Motley during research for *Courage to Dissent*.

The daughter of Caribbean immigrants, Motley grew up in working-class New Haven, Connecticut; her father worked as a chef for Yale's Skull and Bones, the famous secret society for the children of the country's elites. Motley endured discrimination on several fronts, but overcame fantastic odds and went on to storied careers in law and politics. Motley embodied social change, Brown-Nagin notes, and is a compelling subject for a judicial biography. Motley's service on the United States District Court for the Southern District of New York provides an intriguing perspective from which to consider judges' roles and the impact of courts on society. The prospect of writing about how Motley's background, values, and experiences as a practicing lawyer, a legislator, a woman, a person of color, and a daughter of immigrants, influenced her, and perhaps, the path of law in the wide variety of cases that she either litigated or presided over—criminal law, trademark, environmental, sex discrimination, school desegregation, disabilities, securities—strikes Brown-Nagin as a project worthy of the next few years of her life. 🌿

EXCERPTS

Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement

(forthcoming, Oxford University Press, 2011)

AUSTIN THOMAS (“A.T.”) WALDEN, THE SON OF ILLITERATE FORMER slaves, graduated with honors from the University of Michigan Law School in 1911. Walden established a law practice in Georgia in 1912 while Thurgood Marshall, who one day would be known nationwide as the man who slew Jim Crow, was still in high school. Walden—one of the South’s first African-American attorneys—charted Atlanta’s path toward racial equality in the years before and after *Brown v. Board of Education*, the landmark Supreme Court decision outlawing segregation in public schools.

Walden, the president of the Atlanta branch of the NAACP for many years, became Thurgood Marshall’s “man” in Atlanta once Marshall took the helm of the NAACP’s legal committee. In public, at annual conferences and at meetings of the legal committee, Walden had dutifully pledged allegiance to Marshall’s strategy.

In practice, the story was more complicated. Rather than obediently follow the NAACP’s strategy, Walden and other leaders in Atlanta, the thriving metropolis of black education and culture, exercised considerable agency and independence. Reflecting the perspectives of the band of middle-class blacks that W. E. B. Du Bois had called the “Talented Tenth,” Walden added his own designs to Marshall’s blueprint for achieving equality through law. He fashioned a brand of socially conscious lawyering that fit local circumstances, and deviated in crucial ways from the model of legal activism of the NAACP Legal Defense Fund (LDF). Walden did not oppose elements of the NAACP’s strategy because he and his clients lacked an affirmative vision of racial justice. Rather, black Atlanta’s leadership deviated from the

NAACP's course for what they saw as compelling reasons. Most tellingly, they sought to preserve the economic self-sufficiency that black elites had achieved under Jim Crow, expand black political influence, and preserve personal autonomy. This book terms this approach pragmatic civil rights.

During the 1960s, Walden and like-minded leaders greeted calls for direct action with great skepticism. His approach to civil rights activism, now expressed in tepid support for civil disobedience, cost him many admirers. Some among a new generation of dissenters from the racial status quo now called Walden—a man whom the Klan had wanted dead because of his work in the cause of racial equality—an “Uncle Tom.”

Walden's skepticism could not hold back the new wave of dissenters, the students who launched sit-ins across the South. In Atlanta and elsewhere, the sit-ins raised numerous questions—ranging from the practical to the legal. Would such efforts at civil disobedience succeed in helping to loosen Jim Crow's hold over public accommodations? Who would represent the students, now bound in jail, against the charges they faced? Did the Constitution truly confer upon the students a right to enter and use these properties? Could the students really hope to claim constitutional rights through social activism in the streets? What role would the Student Non-violent Coordinating Committee (SNCC), the organizational vanguard of the new student movement founded in April 1960, play in the struggle for civil rights and its interactions with the law and lawyers over time?

Unsurprisingly, the advent of the sit-in movement and the emergence of SNCC caused alarm within Atlanta's white power structure. But it also inspired uneasiness among some prominent blacks. Soon after the sit-ins began, reports surfaced of a rift between sit-in leaders and civil rights lawyers, who already had done so much to weaken Jim Crow. The national media claimed that the sit-ins constituted a shift in the direction and the leadership of the civil rights movement. Just six years earlier, the LDF, the nation's premier civil rights law firm, had achieved its great legal victory in *Brown*. Now, the lawyers of the NAACP—the nation's oldest and largest civil rights organization—had apparently been toppled as leaders of the civil rights movement.

Then, the tables turned. During the early 1970s, new rebels emerged. A group of desperately poor black women arose to challenge some of the same student leaders who had been such fierce critics of the NAACP, the LDF, and the Atlanta pragmatists. Ethel Mae Mathews, the president of the Atlanta chapter of the National Welfare Rights Organization, took center stage in this drama. In 1950, Mathews had arrived penniless in Atlanta with a sixth-grade education after toiling with her parents, Alabama sharecroppers, on “Mister Charlie’s farm.” Ten years later, Mathews still toiled for whites—now as a maid—but had found her political voice. A community organizer, she coordinated a push for school desegregation among fellow public housing residents.

Mathews squared off against Lonnie King, the heroic sit-in activist who ten years earlier had led the student movement’s assault on segregation. He now led an assault on the LDF’s interpretation of *Brown*. King, who had become president of the Atlanta NAACP branch, repudiated his long-held position that *Brown* required pupil integration.

With the passage of the Voting Rights Act—what John Lewis, now a Congressman, called the “finest hour” of the black freedom struggle—civil rights activists had assumed that black access to the political process would yield effective political representation. A cohesive black community, it was thought, could achieve its policy goals by voting for preferred candidates and by continuing to work through interest groups such as the NAACP. Civil rights litigation, the tool of social change that Thurgood Marshall had used to tear down Jim Crow and to begin opening up the political process, would continue to be vital, buttressing African Americans’ political and social position. Yet, reality proved more complicated than imagined. The community did not always unite as hoped. Black leaders, elected and self-appointed, did not, and perhaps could not, represent the entire community. Interest groups did not easily rise to the challenges of the new racial order. Civil rights litigation could have unintended negative consequences. Meanwhile, white domination still constrained the world in which all African Americans lived.

Ethel Mae Mathews and Atlanta’s black poor confronted this uncertain world. They believed that many of the old student radicals and much of

EXCERPTS

new black middle class, now a part of the establishment, had become a part of the problem. Consequently, Mathews and her comrades lost faith in black representatives, spurned the local NAACP and even the LDF, whose lawyers proved unreliable sources of help. Ultimately, Mathews and others turned to the American Civil Liberties Union for assistance. The episode reinforced how difficult it always had been for African Americans to represent multidimensional black interests—whether battles against racism occurred inside or outside of the courtroom.

The disagreements between Walden and Marshall during the 1940s and 1950s; between Marshall, Walden, and sit-in leaders during the 1960s; and between Mathews and black officials during the 1970s were three of many important conversations within black communities about the goals, strategies, and tactics of the civil rights struggle. This book tells the story of these divisions, and the vibrant debates that accompanied them in Atlanta—simultaneously home to many of the South's leading civil rights organizations, to its largest black middle class, and to black ghettos ravaged by poverty—from the postwar era through the 1970s.

In telling these stories, I seek to answer the following question: What would the story of the mid-twentieth-century struggle for civil rights look like if legal historians de-centered the U.S. Supreme Court, the national NAACP, and the NAACP LDF and instead considered the movement from the bottom up? The answer, I contend, is this: a picture would emerge in which local black community members acted as agents of change—law shapers, law interpreters, and even law makers. Each contested and contingent step in the struggle for racial change comes into clearer focus. One can only see this picture by looking beyond the Court and the national NAACP and LDF, and examining developments in local communities before, during, and after lawyers launched civil rights litigation.

To these ends, this study uncovers the agency of local people in Atlanta—lesser-known lawyers and organizers, litigators and negotiators, elites and the grassroots, women and men—and visions of law and social change that sometimes were in conflict with that of the national NAACP and the NAACP LDF. In so doing, the perspectives of local client

communities have been moved from the periphery to the center of the legal history of the civil rights era. These Atlantans and their stories show how struggles for social change involving the law and lawyers look in action on the ground. This local perspective is crucial. As important as national organizations and national leaders were, local actors helped to define equality, too—and did so in profound ways. Local actors worked to create the conditions necessary to achieve change. They played leading roles in everyday struggles to ameliorate inequalities in the social and political order. And they experienced the gap between civil rights and remedies once the movement achieved formal equality.

By analyzing tensions and synergies between the national and local civil rights movements, this project seeks to understand more fully the interaction between civil rights lawyers and communities. I consider consensus and conflict between those who championed equality inside the courts and those who did so outside the courts. The complicated and changing relationships between leaders of the national and local NAACP, and between leaders of the national and local civil rights bars, are at the root of this narrative. In the story told here, members of the national bar and bench, considered the primary engines of racial change even in much recent scholarship, play important, but less commanding roles. They remain protagonists and catalysts of change, but I critically examine the national actors in relation to the local clients and communities on whose behalf they labored. 🌿

“Elites, Social Movements, and the Law: The Case of Affirmative Action”

105 *Colum. L. Rev.* 1436 (2005)

INTRODUCTION

SUPREME COURT OPINIONS ARE FORMS OF PUBLIC DISCOURSE that both shape and reflect national debates about controversial subjects, including race. For this reason, identifying the voices in legal discourses about race, listening to their stories, and connecting them to themes in the Court’s equal protection jurisprudence can be illuminating. This exercise can reveal much about both political and constitutional cultures.

Grutter v. Bollinger and *Gratz v. Bollinger*, the University of Michigan affirmative action cases, underscore this point. Robert Post aptly characterizes the dynamic between the legal and political cultures in the Michigan decisions: “[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.” Post notes, for example, that the “beliefs and values of non-judicial actors” heavily influenced the Court’s result in *Grutter*. Surely, Post’s insights are correct.

This Article expands on the observation that constitutional law and culture are mutually reinforcing by exploring questions concerning the nature and consequences of this dialectic. Which beliefs and values of nonjudicial actors affect the Court? How are their values reflected in the Court’s opinions? What does the dialectical process by which cultural norms influence constitutional norms suggest about the relationship between law and democracy? These are complex questions, and this Article does not purport to address all of them completely. Instead, it begins a conversation that uses these questions as points of departure for analyzing *Grutter* and *Gratz* from sociopolitical and cultural perspectives, and considers, in particular, what the cases suggest about the relationship between

law and social movements. Based on my analysis of the cases and the sociopolitical dynamics around them, I contend that social movements—defined as politically insurgent and participatory campaigns for relief from socioeconomic crisis or the redistribution of social, political, and economic capital—are [in many ways] incompatible with constitutional litigation. My argument primarily rests not on assumptions about the institutional capacity of courts to produce change, a topic that has been considered many times by others, but on observations about the nature and purposes of social movements themselves. In short, progressive social movements should not make juridical law definitional to their campaigns for social justice. To date, the legal literature has failed to appreciate the tension between social movements and the law, and thus has overstated the utility of juridical law to movements for social justice.

The affirmative action cases are excellent texts to consider from a social movement perspective because they featured a group of intervenors in *Grutter* who styled themselves a “mass movement” for social justice. The intervenors entered the law school case to offer a perspective they believed to be missing in the diversity-based defense of affirmative action offered by the university and buttressed by amici curiae representing the military, business, academia, and leading professional organizations. These amici made utilitarian arguments in support of the law school’s affirmative action policies. By contrast, the *Grutter* intervenors focused on discrimination and distributive justice.

Values, arguments, and narratives evident in [public and litigants’] discourse about the Michigan cases found expression in the Court’s description of the benefit of diverse educational environments. Sociopolitical and cultural norms also influenced how the Court analyzed the harm of overwhelmingly white colleges and universities and of admissions systems that give preferential treatment to minorities.

At the same time, these decisions suggest that the more moderate (and most elite) elements of the mobilization were the greatest influence on the majority’s decision upholding affirmative action in law school admissions. As Justice Thomas noted, the *Grutter* majority justified the constitutionality

of affirmative action in terms favored by the “cognoscenti”—the military, business, academic, and professional elites who championed the University of Michigan’s race-conscious admissions policies.

The attention of the *Grutter* majority was not focused solely on the cognoscenti. The Court heard other voices as well. The Center for Individual Rights (CIR), the public interest litigator that represented the plaintiffs, prevailed in *Gratz*. But its view on a crucial issue also found expression in *Grutter*—a case that it ostensibly lost. The *Grutter* majority tacitly accepted the premise of the CIR’s case (shared or undisputed by the law school) that, by virtue of better average performance on the relevant admissions criteria, the plaintiffs were more qualified for—and hence more deserving of admission to—the law school than were the affirmative action admits. Hoping to draw attention to the issue of discrimination, the intervenors turned the CIR’s argument on its head and asserted that affirmative action was justified as a remedy for the university’s reliance on discriminatory admissions criteria. The intervenors, however, were unsuccessful on this point. The claim of credentials bias was met with silence, even in concurrences by Justices Ginsburg, Souter, Stevens, and Breyer.

The fate of the *Grutter* intervenors and their “mass movement” for social justice is my point of entry into the scholarly conversation about the relationship between social movements and law in the courts. The reigning view in the legal literature, advanced principally in the work of Professor Bill Eskridge, is that juridical law is and should be a critical player in the creation and evolution of social movements. Legal mobilization theorists agree that law and legal discourse can be an especially useful point of reference for social movements.

In contrast, this Article argues that social movements and juridical law are fundamentally in tension. I turn to nineteenth- and twentieth-century social movement history and the social science literature to demonstrate this point. I then argue that in privileging law in analyses of social movements, constitutional theorists and legal mobilization scholars are overlooking an important distinction—namely, the difference between

the definitional and inspirational roles that constitutional law in the courts can play in protest movements. Social movements may profitably use rights talk to inspire political mobilization, although with less success than legal mobilization theorists assume. But social movements that define themselves through law in the courts risk undermining their insurgent role in the political process, thus losing their agenda-setting ability....

III. IMPLICATIONS

The legal literature on social movements speaks in a different voice about popular efforts to effect change than does the literature developed by sociologists, political scientists, and social historians. Constitutional and legal mobilization theorists typically write about social movements from a perspective internal to law. The discussions of these scholars pivot around the legal system and, more particularly, around judges and the texts that they interpret in the adjudication process.

This Part suggests that the scholarship on law and social movements is in need of further refinement because the power of law is still exaggerated in the literature. Given the hegemony of law in our society, the positive claim of legal scholars that law is definitive in social relations and that judges are pivotal as arbiters of these relations is undeniable. It is the normative implication of the positive claim—the assumption that (judge-made) law should define social movements—that is troubling. It is contrary to my understanding of how social movements have interacted with law over time and how they are best positioned to achieve their goals. Nineteenth- and twentieth-century social movement history, as well as the social science literature, counsel that law and social movements are fundamentally in tension. They teach that social movements attain leverage in the political and legal processes by engaging in disruptive protest action taken outside of institutionalized political structures; that legal and political change are codependent, but that influence runs from politics to law.

A. CONSTITUTIONAL THEORY ON SOCIAL MOVEMENTS

In a recent symposium article on social movement scholarship, Professor Edward Rubin noted that legal scholars seem “oblivious” to the social science literature on social movements. He assumed that this lacuna results from the juricentrism of law. Professor Bill Eskridge’s interdisciplinary, theoretically sophisticated, and wide-ranging work on social movements suggests that Rubin is only half right. Eskridge, the leading legal theorist of social movements, is well versed in the literature and finds it wanting. The major objective of his scholarship is to correct the fact that “law and even legal actors” are “bit players” in social movement theory (written by social scientists). Eskridge freely acknowledges that social movements have “generated many important statutes we now take for granted” and contributed more to the “modern meaning of the Equal Protection Clause” than “the Fourteenth Amendment’s framers.” But his aim is to demonstrate that “[l]aw and legal actors are critical to the instigation and dynamics, as well as the goals, of [the identity-based social movement].”

Eskridge’s scholarship in this area is profound and refreshing, but one must nevertheless ask whether the conceptual foundation on which his arguments rest is persuasive. As an initial matter, his rhetoric of “identity” suggests a major question about his normative vision of social movements. The one-dimensional identity that the law of equal protection and interest group politics imposes on “suspect” racial classes is deeply problematic for claims of distributive justice, as I have argued above. It limits the goals of political struggle and legal agenda to those objectives preferred by and most useful to elites. Second, Eskridge’s failure to discuss the formation, organization, evolution, strategies, and tactics of social movements simplifies and flattens these movements into static repositories or mirrors of legal epistemologies, norms, and processes. Eskridge overlooks the interactive and temporal dimensions of a social movement’s engagement with law; law envelops and defines the movements, in his telling. Most troubling, Eskridge’s vision of “peaceable

pluralism” is an ... undesirable portrait of society and of social movement’s role in the polity—a reaction that even he anticipates. In his view, human agency is excessively subservient to the dictates of law and order. This portrait bears little relation to the social history of the marginalized groups that Eskridge concedes have been so influential in shaping constitutional history. Nevertheless, Eskridge’s vision probably does accurately describe how the Supreme Court has mediated democracy and social movements in recent history; thus, it helps to explain the fate of the Grutter intervenors’ “mass movement....”

C. DISTINGUISHING LAW FROM SOCIAL MOVEMENTS

Legal theorists’ confidence in the compatibility of law and political struggles for change, including identity-based movements, flows, I propose, from their tendency to characterize social movements in ways that deny their distinctive features. Those who champion the centrality of law to social movements or advance the concept of legal mobilization wrongly conflate politicized legal campaigns with “social movements.”

In ascribing such vast capacities to lawyers or constitutional text as mobilizing agents, or assigning judges the role of “necessary safety valve” “channeling” movements in “assimilative directions,” legal scholarship overlooks the characteristics of social movements that make them unique.

Attaching concrete meaning to the term “social movement” illuminates the distinction that I offer between social movements as agents of “peaceable pluralism” and progressive social movements that seek political agency outside of the law. In using the term “social movement,” I mean to suggest a set of characteristics and activities typically associated with and flowing from participatory democratic action. Participants in social movements engage in a sustained, interactive campaign that makes sustained, collective claims for relief or redistribution in response to social marginalization, dislocation, change, or crisis. The hallmark of such participatory democratic action is the effort by citizens to influence public

policy by appealing directly to the public and a target audience of decision-makers. Participatory democracy thus functions quite differently from indirect democracy, in which citizen preference is subsumed within the organizational structures and strategic apparatus of political parties and interest groups. Instead, citizens seek influence through political activism that occurs outside of such structures, and they practice a “contentious politics,” as Professor Charles Tilly, a leading theoretician of social movements, has explained.

Social movement activity is characterized by organization, cohesion, and agenda setting. Despite planning, social movements retain fluidity and an improvisational quality. They must retain the ability to change course and tactics quickly because they must respond to the changing political environment if they are to sustain themselves and achieve and implement their goals. As historian Jo Freeman has maintained, “It is the tension between spontaneity and structure that gives a social movement its peculiar flavor.”

Members of progressive social movements typically participate in the decision-making process on equal footing, although they may choose leaders or spokespersons to act on behalf of the group. “[M]ost movements are not subject to hierarchical control,” Freeman explains, because hierarchy and the structure that it implies can undermine the egalitarian ethos that animates social movements. Moreover, a hierarchical structure can undermine movement goals such as mobilizing and organizing communities to challenge authority. This is true in part because the constituency typically involves “ordinary people as opposed to army officers, politicians, or economic elites.” These are people on society’s margins—for instance, poor people with little formal education—for whom the domination and status differentiation associated with hierarchy would be counterproductive. Or the constituency might simply lack the social and intellectual capital, and thus the confidence, of people in dominant positions in society, as was true of many women at the beginning of the second wave feminist movement. Either case suggests why elite and/or professional involvement in social movements is fraught with difficulty:

Professionals are accustomed to hierarchy, expect to occupy leadership roles, and expect to utilize their expertise; their perspectives can clash with those of lower-status participants in a social movement.

Lawyers ... must translate claims about social problems into the language and form of law, framing them as constitutional issues. They do so for purposes of appealing in a formal forum (the courtroom) to a fact-finder unaccountable to the public, rather than to the public generally, or to those with direct power over public policy. Law is, then, the essence of a state-mediated process, one that privileges arcane language and expertise over the frames of reference familiar to laypeople.

Even when favorable outcomes are achieved through the legal process, legal remedies are unlikely to satisfy a social movement's conception of substantive justice because courts are likely to adopt a centrist alternative to a progressive social movement's goals. Remedies that aspire to distributive justice—for instance, structural injunctions used in school desegregation cases—are considered extraordinary exercises of judicial power. Thus, these judicial remedies generally have not fared well during the implementation process. Given the limited nature of legal remedies, the unpredictable ways in which legal strategies can aid social movements, and the ancillary role that law often plays to politics, law in the courts is an implausible tool of choice for protest groups seeking distributive justice.

D. THE DEFINITIONAL/INSPIRATIONAL ROLE DISTINCTION

The relationship between social movements and law is essentially antagonistic, but activists do and must utilize legal processes when necessary to advance their goals. Given the tension between the two, however, the objectives of such movements typically will be best served by circumspection about legal epistemologies and processes. Calculated, strategic uses of law that do not threaten the movement's ability to exercise influence by introducing conflict may be advantageous. Litigation

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or the threat of litigation might be a tactic among a broader arsenal of tools to which the movement turns at an opportune moment. But if law wholly defines a social movement in the way that recent constitutional scholarship suggests that it does or should, the movement likely would lose its capacity to shape, or stand outside of, the decision-making processes of political and legal elites.

The decision-making calculus that I suggest can be captured by distinguishing between two ways in which law and social movements can relate: Law in the courts can play either a definitional role or an inspirational role in social movements. Social movements may profitably use rights talk to inspire political mobilization, even though legal mobilization theorists overstate law's effectiveness in this regard. But social movements that make litigation definitional to their agendas threaten their insurgent role in the political process. Without an insurgent element, social movements lose their agenda-setting ability. 🌿

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The Insolvent Consumer and the Legal System

RISING FORECLOSURE AND BANKRUPTCY RATES HAVE PLACED consumer insolvency on the front page, but America has always been a nation of debtors. In 2009 bankruptcy courts received approximately one bankruptcy filing for every two hundred Americans; in 1833 America imprisoned approximately one debtor for every two hundred Americans. Although consumer insolvency is not new, the nature of consumer finance and the law's treatment of the defaulting debtor have changed. While most bankruptcy scholars focus on corporate insolvencies, Professor Richard Hynes has devoted most of his scholarship to the understanding of consumer insolvency in the modern world.

Hynes joined the University of Virginia in 2007 after having spent seven years on the faculty of the College of William & Mary. In just one decade in the legal academy, Hynes has made an important mark on his field. Because of his inter-disciplinary training, Hynes brings to his study of consumer insolvency formidable empirical skills. Relying

Hynes has devoted most of his scholarship to the understanding of consumer insolvency in the modern world.

on these skills, Hynes has been able to answer some important policy questions, and also to raise new ones. Hynes has also made a signature conceptual contribution to his field by more completely studying the way the legal system handles consumer debt. The bankruptcy system tends to have pride-of-place in scholarship about consumer debt, but Hynes has called attention to and analyzed the parallel legal system, which is both vast and understudied, that handles debtor-creditor relations outside of bankruptcy. Hynes' study of these parallel systems for handling consumer debt—bankruptcy and non-bankruptcy debtor-creditor law—has produced several lasting insights.

In his article, "Bankruptcy and State Collections Proceedings: The Case of the Missing Garnishments," 91 *Cornell L. Rev.* 603 (2006) Hynes looks to state court records to quantify the importance of non-bankruptcy debtor-creditor law. The consumer bankruptcy literature had assumed that state courts played little role in debt collection because studies of consumer bankruptcy filings found that few bankrupt debtors had been sued. Hynes's examination of garnishment records in Virginia and Cook County, Illinois revealed that, at least in some jurisdictions, creditors commonly use state courts to collect consumer debts. In fact, the number of garnishments issued by Virginia courts in 2004, 188,325, dwarfed the number of non-business bankruptcies filed in Virginia in that year, 39,726.

The Case of the Missing Garnishments also offers evidence that may help resolve an important debate about the reason for the rapid rise in bankruptcy filings prior to the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005. Annual bankruptcy filings rose more than six hundred percent between the first years after the passage of the Bankruptcy Reform Act of 1978 and 2005. This startling rise in filings was explained by some as evidence of a consumer debt crisis; for others, it was proof that the law made it too easy to file for bankruptcy. *The Case of the Missing Garnishments* reveals that garnishment and bankruptcy have followed very different trends. Between 1992 and 2004 Virginia's non-business bankruptcy filing rate (bankruptcy filings divided by population) was *relatively* stable, but it still rose almost thirty percent.

By contrast, the garnishment rate fell by about eight percent. To the extent that garnishment serves as a proxy for consumer insolvency and default, *The Case of the Missing Garnishments* provides some evidence for those who argue that the dramatic rise in consumer bankruptcy filings was due at least in part to an increase in a willingness to file for bankruptcy and not just an increase in financial distress.

In “Broke but Not Bankrupt: Consumer Debt Collection in State Courts,” 60 *Fla. L. Rev.* 1 (2009) Hynes extends his analysis of *The Case of the Missing Garnishment* in two ways. First, this article verifies that the relative stability in civil litigation is not an artifact of Hynes’ earlier focus on one remedy (garnishment) in just two jurisdictions. Looking at civil filing statistics in nearly all states, *Broke but Not Bankrupt* reveals that the rate of civil litigation remained remarkably stable during the years of rapidly rising bankruptcy filing rates. Between 1980 and 2002 the average number of civil filings per person rose by just twelve percent; the bankruptcy filing rate rose by over 275%. This comparison between civil filing rates and bankruptcy filing rates is only interesting if consumer debt collection comprises a significant portion of the civil docket. *Broke but Not Bankrupt* therefore looks more closely at litigation in one of the most litigious states, Virginia. In some years Virginia courts receive more than one million civil filings, and *Broke but Not Bankrupt* finds evidence that consumer debt collection dominates the civil docket. Over ninety percent of suits list an individual as the defendant, and the claims and stakes are consistent with consumer debt collection. Only about twenty percent of judgments are ever satisfied, but only twelve percent of the debtors who failed to pay their judgments for several years bothered to file for bankruptcy.

Broke but Not Bankrupt, however, does more than provide important insights about the rate of bankruptcy filings. It maps a large, parallel system of creditor-debtor law that occurs outside of bankruptcy. In doing so, Hynes demonstrates that a complete understanding of legal responses to consumer insolvency includes not only the formal bankruptcy system, but also the much more commonly used (and less studied) “informal” bankruptcy system in which debtors simply fail to pay. In subsequent work,

Hynes begins to ask and answer questions about the relationship between these parallel legal systems for handling creditor-debtor relations.

“Non-Judicial Debt Collection and the Consumer’s Choice among Repayment, Bankruptcy and Informal Bankruptcy,” a working paper co-authored with Lawrence Ausubel and Amanda Dawsey, asks what determines the debtor’s choice between formal or informal bankruptcy. More specifically, *Non-Judicial Debt Collection* focuses on state laws that provide a private right of action against an abusive creditor. Many debtors are effectively judgment-proof. For these debtors, the primary benefit of bankruptcy is that it will stop the telephone calls and other non-judicial collection effects. Federal law provides some protection against abusive debt collectors, but this law contains an important gap—it applies only to third party debt collectors and creditors who purchased the loan after it was in default. About half of the states fill this gap with a statute that provides debtors with a private right of action against an abusive creditor.

To the extent that these laws lessen the ability of creditors to harass debtors, they make a formal bankruptcy filing less necessary. *Non-Judicial Debt Collection* presents empirical evidence to support this theory. First, it uses aggregate filing statistics to show that counties in states with these anti-abuse statutes tend to have lower bankruptcy filing rates. Second, it uses individual level data to show that credit-card holders are more likely to choose informal bankruptcy (simply refuse to pay) if they live in a state with an anti-abuse statute.

In “Why Consumer Bankruptcy,” 56 *Ala. L. Rev.* 121 (2004) Hynes tries to understand the proper roles for the parallel systems of debt relief—formal and informal bankruptcy. Standard theory provides two justifications for bankruptcy law: i) to maximize creditor return by preventing a wasteful race to the assets and ii) to provide a fresh start to the honest but unfortunate debtor. The first theory cannot apply to consumer bankruptcy because the most common form of consumer bankruptcy, Chapter 7, does not generate *any* distributions for general creditors in over ninety-five percent of cases. The second theory is incomplete because non-bankruptcy law offers protection for the honest but unfortunate debtor as well.

Why Consumer Bankruptcy suggests that the presence of the two systems may allow the law to address the fact that procedures appropriate for some debtors may be far too expensive for others. Bankrupt consumers frequently spend thousands of dollars on court and attorneys' fees. A rational system would seek to avoid spending much money to verify a debtor's inability to pay when the creditors have prior knowledge that this is the case. By protecting at least some income and assets outside of bankruptcy, non-bankruptcy law can allow the debtor and her creditors to avoid the expense of a formal bankruptcy proceeding. To the extent that policy makers are worried that legal reforms have made bankruptcy too expensive for the poor, the remedy may not require a reform of our bankruptcy laws. We may be better served by simply increasing the level of protection afforded to those debtors who proceed in the parallel, informal bankruptcy system.

While *Why Consumer Bankruptcy* addresses the inequality in the procedures applied to defaulting debtors, "Non-Procrustean Bankruptcy," 2004 *Ill. L. Rev.* 301 addresses the inequality in the living standards afforded to defaulting debtors. News reports of celebrity bankrupts remind us that some debtors maintain lavish standards of living even after default, and debtor-creditor law also allows middle-class debtors to maintain a standard of living far beyond the reach of the poor. Debtor-creditor law only allows debtors to keep what they have, and it therefore cannot offer as much to those debtors without significant assets or income. However, debtor-creditor law also explicitly endorses inequality. For example, exemptions from wage garnishment protect a percentage of the debtor's income; those who earn more can protect more from their creditors. Similarly, bankruptcy law now explicitly allows debtors to include payments to secured creditors, such as mortgage or car payments, in the calculation of allowable living expenses. Those who lived in larger homes or drove more expensive cars prior to bankruptcy are entitled to continue doing so after filing.

If debtor-creditor law were a social assistance program funded by the taxpayer, this inequality would be hard to explain. However, bankruptcy is most commonly justified as a form of social insurance, not social assis-

tance. Bankruptcy provides a benefit, debt-relief, when debtors are unable to repay their debts, and debtors pay premiums for this insurance in the form of higher interest rates. If debtors contracted for this insurance, wealthier debtors would demand greater benefits. Poorer debtors would like to have a high standard of living after default just as poorer individuals would like large life insurance benefits. They would not, however, want to pay the necessary premiums. As long as most debt is contractual in nature and creditors can distinguish rich from poor at the time of contracting, the higher standard of living afforded to wealthier debtors will not affect the interest rates that poorer debtors must pay. To the extent that this is the case, the inequality provided by debtor-creditor law is unobjectionable.

Hynes has also brought his empirical skills to bear on the property exemptions that protect a defaulting debtor's assets both inside and outside of bankruptcy. The literature has studied these exemptions extensively due to their dramatic variation from state to state. For example, seven states, including Florida and Texas, protect a debtor's home regardless of its value while four others have no homestead exemption at all. Despite extensive study, the literature has not demonstrated that these exemptions have a robust effect on debtor or creditor behavior. Some studies find that they increase bankruptcy filings, but others find that they do not. Some studies find that these exemptions reduce access to credit, but these studies sometimes find the most pronounced effects for debtors with nothing to exempt. If one does not own a home, it should not matter whether the state's homestead exemption is \$100,000 or unlimited. "Credit Markets, Exemptions and Households with Nothing to Exempt," 7 *Theoretical Inq. L.* 493 (2006) makes precisely this point and suggests that the exemptions may be serving as proxies for other laws that do affect creditor or debtor behavior.

"Bankruptcy Exemptions and the Market for Mortgage Loans," 42 *J. L. & Econ.* 809 (1999), co-authored with Jeremy Berkowitz, attempts to bring some clarity to the question of the effect of these exemptions on availability of credit. It argues that researchers must distinguish between secured and unsecured loans when discussing exemptions. Exemptions do

not prevent a secured creditor from seizing her collateral and thus should have no direct effect on a creditor's willingness to lend. It is possible that there will be indirect effects. For instance, homestead exemptions may reduce mortgage creditor recoveries if they encourage debtors to file for bankruptcy and delay the mortgage creditor's recovery. But these transaction cost effects are likely to be small and other factors point in the opposite direction. Exemptions are only relevant when the mortgage creditor is fully secured and therefore entitled to interest in bankruptcy. Moreover, a bankruptcy filing may actually improve the mortgage creditor's return if it discharges the debtor's unsecured debts and allows the debtor to repay the mortgage lender in full. *Bankruptcy Exemptions* finds some support for the claim that exemptions should not have a negative effect on the availability of credit, and in fact may have a positive effect. The data show that larger homestead exemptions seem to increase the willingness of mortgage creditors to lend, though the effect is very small.

The literature on property exemptions suffers from a common problem in empirical scholarship. The literature treats the exemptions as exogenous, but they are a product of legislative choice. The legislature may consider factors such as the bankruptcy filing rate or the availability of credit when setting exemptions, and this would bias the result of a study of the effect of exemptions on these variables. "The Political Economy of Property Exemption Laws," 47 *J. L. & Econ.* 19 (2004), co-authored with Anup Malani & Eric Posner, examines the determinants of the legislative choice to adopt or modify an exemption. The most robust finding is that a state's current exemptions are strongly affected by the exemptions it had in place in the late 19th or early 20th century. This mitigates concerns of bias in the literature and suggests a proxy (historical exemptions) to avoid this bias in future studies.

The law must protect debtors who cannot repay their debts without undue hardship, but it must do so without severely limiting the ability of creditors to collect from debtors who can pay or creditors will be unwilling to lend. Bankruptcy law plays an important role in the effort to separate the debtors who can pay from those who cannot, but Hynes' scholarship

reminds us that it is but a part of a larger system of debtor-creditor law. He has used his legal and economics training to establish himself as a leading scholar in consumer finance. Given the long history of consumer insolvency, this area should provide important research questions for years to come. 🌿

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The Regulation of Non-Judicial Debt Collection and the Consumer's Choice among Repayment, Bankruptcy and Informal Bankruptcy

(Working Paper)

ECONOMISTS STUDYING THE EFFECTS OF THE LAW ON THE consumer bankruptcy filing decision generally look at statutes limiting the enforcement of judgments. Typically, the focus is on exemptions of assets in bankruptcy (the level of the homestead exemption and other property exemptions) or limitations on creditors' ability to seize property or garnish wages in state courts prior to bankruptcy. This article examines another set of laws that could play an equally important effect on the bankruptcy decision: laws that regulate aggressive non-judicial debt collection.

Many creditors rely heavily on non-judicial debt collection techniques such as dunning letters and telephone calls to debtors, foregoing the legal process altogether. Bankruptcy rarely serves as a means of collection for general unsecured creditors; fewer than five percent of Chapter 7 cases have non-exempt assets available for distribution. Creditors do collect in state court, but the use of courts to collect consumer debt varies tremendously by state. Moreover, even in the most litigious states many creditors choose not to sue.... Lawsuits may also be declining in importance as a means of collecting debts. The rate of civil litigation has remained fairly stable over the last thirty years, and the evidence suggests that the change in rate of consumer debt collection litigation has not matched the generally upward trend of consumer borrowing or the bankruptcy filing rate.

The fact that creditors do not sue does not mean that they do not try to collect. Either they or third-party debt collectors will use telephone

calls, dunning letters, and a variety of other non-judicial debt collection techniques to try to convince the debtor to pay. The pressure on the debtor may be severe, and may often be enough to cause a debtor to choose bankruptcy. Sullivan, Warren & Westbrook (1989) find that about two-thirds of bankrupt debtors file before they are sued, and Stanley & Girth (1971) found similar results a generation ago.

At least some of the non-judicial collection techniques employed by creditors and their agents can be fairly described as aggressive, if not harassing or abusive, and the law tries to limit this conduct. For example, the New York State Attorney General's office recently obtained a court order to shut down a Buffalo-area debt collection operation. Employees were alleged to have routinely impersonated police officers, threatening to arrest consumers and throw them in jail unless they made arrangements to pay the company immediately. In more common incidents, collectors threaten debtors that if they are successfully sued and do not pay, they may be jailed; and collectors telephone debtors at their workplace, knowing that the employer does not permit such contacts.

The federal Fair Debt Collections Practices Act (FDCPA) regulates collection practices. It limits whom the creditor may contact and when the creditor may contact them, and it gives the consumer the right to sue the creditor for violations of this act. Significantly, however, the federal FDCPA largely exempts the original creditors from its coverage; rather it targets third-party debt collectors (including lawyers) and creditors who purchased the debt after default.


The original creditors, however, are not entirely free from regulation. The Federal Trade Commission uses its power to police "unfair or deceptive acts or practices" to bring administrative actions against creditors for overly aggressive debt collection. State unfair trade practice statutes and tort law provide further protection. In addition, many state legislatures have passed statutes specifically regulating non-judicial debt collection. These laws vary greatly. Some merely require licensing and others apply only to third-party debt collectors. This article focuses on those statutes that fill the gap created by the Fair Debt Collection Practices Act by giving

the consumer a private right of action against the abusive or harassing original creditor. About half of the states have such a statute.

Section III uses the existence of these anti-harassment statutes and county-level bankruptcy data to reexamine one of the most commonly-asked questions in the consumer finance literature: whether differences in the law affect the consumer's bankruptcy filing decision. Anti-harassment laws may reduce the pressure that creditors can exert on a consumer in default, and they may therefore reduce the demand for bankruptcy protection. We find that counties in states without anti-harassment statutes have average bankruptcy filing rates that are twelve to nineteen percent higher than counties in states that do. This effect remains statistically and economically significant in a wide variety of regressions using county-level data.

Regressions that use aggregate bankruptcy filing rates could confound several effects because, in addition to the direct effects discussed above, anti-harassment laws may have several indirect effects on the bankruptcy filing rate. Anti-harassment laws may reduce the cost of default and thereby increase the number of defaults, and some of these additional defaults could ultimately lead to bankruptcy. To the extent that these laws reduce the ability of a creditor to collect, they may also reduce the supply of credit. If this results in lower debt burdens, it may ultimately lead to fewer bankruptcies. Ideally one would use individual repayment records to separate these three effects, and Section IV uses data from individual credit card accounts to do just this. Section IV finds that defaulting credit-card holders who live in states with anti-harassment laws are more likely to become "informally bankrupt." *Informal bankruptcy* is a term that describes borrowers who have defaulted, but who have not filed for formal bankruptcy protection. At the same time, borrowers in these states are less likely to file for bankruptcy. We find that the thought experiment of moving a borrower from a state without an anti-harassment law to a state with an anti-harassment law increases the likelihood of informal bankruptcy by fourteen percent, and decreases the likelihood of formal bankruptcy by fifteen percent. These results, taken together, strongly suggest that

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anti-harassment laws significantly decrease the cost of resisting creditors' collection activities and thereby significantly decrease consumers' use of the bankruptcy courts. 

Bankruptcy and State Collections: The Case of the Missing Garnishments

91 *Cornell L Rev.* 603 (2006)

AFTER YEARS OF INTENSE LOBBYING BY THE CONSUMER CREDIT industry, Congress enacted reforms that reduce the generosity of consumer bankruptcy and restrict the availability of bankruptcy. Consumer advocates and most bankruptcy scholars vigorously opposed these reforms, and will almost certainly strive to limit the impact of these reforms by influencing judicial interpretation. Consumer advocates have not merely played defense, however, and they have extended the fight far beyond bankruptcy. Congress and the states have passed legislation designed to stop “predatory lending,” and many scholars advocate much stronger reform, such as a return to strict usury laws and other limits designed to stop lenders who “seduce” consumers with easy credit.

Much of the interest in consumer finance stems from the continued rise in consumer bankruptcy filings. Americans filed over 1.5 million nonbusiness bankruptcies in 2004, a sharp increase from the roughly 189,000 total (business and nonbusiness) bankruptcies Americans filed in 1974 and the roughly 53,000 total bankruptcies Americans filed in 1954. These stark filing statistics dominate much of the modern consumer finance literature, though scholars interpret the numbers differently. Some espouse an “Incentive Theory” of bankruptcy that claims more Americans choose bankruptcy to avoid paying their debts, either because various changes have made bankruptcy more attractive or because more consumers are aware of bankruptcy’s benefits. According to the competing theory, the “Distress Theory,” bankruptcy’s role in financial distress has not changed significantly, and more Americans are forced into bankruptcy by an increase in social instability and indebtedness. Though they generally disagree on policy, proponents of the two theories share the belief that the bankruptcy statistics indicate a deepening crisis.

The consumer finance literature's focus on federal bankruptcy law has come at a cost, as scholars have largely ignored collections efforts that occur outside of bankruptcy. If the bankruptcy statistics indicate a serious problem, the problem is not really bankruptcy itself, but rather financial distress and default more generally. In fact, many, and probably most, Americans who do not repay their debts do not bother filing for bankruptcy. A consumer suffers financial distress regardless of whether she admits failure by filing for bankruptcy. A creditor must write off a bad debt regardless of whether the debt is discharged in bankruptcy or if the creditor simply cannot collect using state collections proceedings and nonjudicial collections techniques. If we are to understand the extent of consumer financial distress, we must look beyond bankruptcy.

This Article adds to our understanding of financial distress by examining one of the most important collections tools afforded by state law: garnishment. Garnishment is a judicial remedy used to seize property of a debtor held by a third party, such as unpaid wages in the hands of an employer or money deposited in a bank account. . . . Surprisingly, this is the first article in thirty years to carefully examine garnishment statistics.

These new data present a surprising puzzle for consumer finance scholars that challenges some of their most basic assumptions. While the nonbusiness bankruptcy filing rate has increased dramatically over the last ten to fifteen years, the rate of garnishment has declined slightly in Virginia and appears to have fallen dramatically in Cook County, Illinois. Though the data uncovered by this Article do not predate the late 1980s, they do provide insight into the state collections proceedings of Cook County, including the city of Chicago, one of the jurisdictions that Professor David Caplovitz studied a generation ago. Comparing Professor Caplovitz's estimate of the number of garnishment orders in the late 1960s with the number of garnishment orders in recent years suggests that state collections proceedings may have been more common in the past than they are today. Given the sharp rise in bankruptcy filings during this period, the relative decline in garnishments is striking. Thus, this Article uncovers a new puzzle in consumer finance: the case of the missing garnishments.

Assuming the missing garnishments are part of a national trend, they have important implications for the ongoing debate over the cause for the rise in bankruptcies and the need for reform. Fundamentally, the Incentive Theory claims that Americans in financial distress today are more likely to file for bankruptcy, and the Distress Theory claims that today there are more Americans in financial distress. Both claims could be true, and the debate is really over their relative importance. Unfortunately, one cannot weigh the relative importance of these two theories by counting the number of Americans in financial distress, as it is difficult to measure or even define financial distress. Until now, scholars have largely focused on the bankruptcy filing rate as “a thermometer, recording the economic temperature of American families.” This Article argues that the rate of garnishment serves as an additional indicator that tells a markedly different story.

The missing garnishments appear to be much more consistent with the Incentive Theory than with the Distress Theory. An increased willingness of debtors to file for bankruptcy could cause the rate of garnishment to fall because the bankruptcy discharge will protect the debtor from garnishment. By contrast, the missing garnishments appear sharply inconsistent with the claim that the rising tide of bankruptcy filings consists of debtors forced into bankruptcy by crushing debt levels, or at least sharply inconsistent with the claim that an increasing number of debtors are forced into bankruptcy by their creditors’ efforts to collect these debts. While this apparent inconsistency can perhaps be explained, many of the most obvious explanations are inconsistent with the data, and others are either incomplete or lack empirical support at this time.

The most important implication of this Article may be the need for more research. If the opponents of the recent reforms are correct, bankruptcy may no longer shield distressed debtors from debt collectors. Consequently, policymakers concerned with the plight of these debtors must seek a better understanding of nonbankruptcy collections. Moreover, even after the proper interpretation of the new legislation is settled, broader questions concerning the regulation of consumer finance will remain open, and policymakers will need data to inform their decisions. Viewed with a

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wider lens, the world of consumer finance may not have changed as much as previously thought—or at least not in the ways previously thought. Policymakers should facilitate more research to better inform their decisions and should make more information about nonbankruptcy debt collection publicly available. 🌿

The Political Economy of Property Exemption Laws

47 *J. L. & Econ.* 19 (2004)

EVERY STATE HAS LAWS THAT PROTECT SOME OF THE ASSETS of debtors from the satisfaction of claims by creditors. These property exemption laws, which are also called bankruptcy exemptions, have long and important political histories. Texas entered the union as the first state with property exemptions—designed, it was said at the time, to draw settlers from other states—but the southern states responded quickly with exemptions of their own, and today every state has property exemptions, frequently quite generous. Like usury, stay, and currency laws, exemption laws have played an important role in the perennial conflict between debtors and creditors.

Exemption laws also play an important role in federal bankruptcy law, and it is here that they enjoy a higher profile. The treatment of state property exemptions in the federal bankruptcy code of 1978 resulted from a compromise between the House, which sought to establish a mandatory system of federal exemptions, and the Senate, which sought to incorporate state exemption laws as the older bankruptcy law did. The compromise law established a set of federal exemptions and permitted debtors to choose between these federal exemptions and the exemptions of the state in which they reside, unless that state had by statute “opted out” of the federal system, in which case the debtors would have to use that state’s exemptions. Feelings about exemptions were strong enough in 1978 that this compromise almost did not occur, and these strong feelings persist today. Recent efforts to amend the federal bankruptcy law have foundered over, among other issues, the question of whether state exemptions should be capped by a federal ceiling, and more than sixty-five law professors have written to Congress to ask for greater federal control over bankruptcy exemptions.

Exemptions are important because of their role in the regulation of consumer credit and the light they shed on the federal relationship between the states and the national government. But they are a puzzle for economists because, like usury laws, they restrict credit markets in the absence of a well-defined market failure to which they would be a suitable response. Studies of the impact of exemptions on credit markets show that, while exemption laws may provide some insurance against income shocks, they increase the cost of credit, particularly for the poor.

Many scholars have tried to explain the effect of exemption laws on economic behavior, including lending practices and the bankruptcy filing rate. The latter had been rising gradually through the 1960s and 1970s, but after the enactment of the Bankruptcy Reform Act of 1978, the filing rate increased markedly. Some commentators have blamed the increase on the generosity of federal exemption laws, but the evidence is conflicting. Nevertheless, concerns about the default rate and the bankruptcy filing rate have provoked calls for reform of the Bankruptcy Code, including a provision that would cap exemptions so that states can no longer provide generous relief to the wealthiest debtors, but this could hardly be expected to affect the filing rate, because very few debtors who have valuable assets file for bankruptcy.

A separate concern is that state property exemptions are not sufficiently generous and that they vary too much across states. Many state property exemption laws have archaic provisions that have not been changed since the nineteenth century. In Oklahoma, for example, the debtor can exempt a gun, 20 head of sheep, and “all provisions and forage on hand.” Commentators assume that state legislatures must not care enough about exemptions to update them, which would justify a federal role. Although, as we will see, these concerns are exaggerated, the debate reflects the important role of federalism in bankruptcy policy.

Despite the absence of an intuitive theory to explain the market failure for which exemptions would be the solution, no one has tried to explain why states create exemption laws in the first place or why these laws differ across states. Understanding this relationship also has important

implications for studies that attempt to determine the effect of exemptions on lending and bankruptcy. These studies often treat exemptions as exogenous variables. If exemptions are instead driven by the very economic outcomes that these studies examine, the studies may suffer endogeneity bias and be suspect.

This paper attempts to fill this gap in the literature. An initial examination of a data set of the exemption laws of the 50 states between 1975 and 1996 reveals only that the best predictor of current levels of a state's exemption is that state's historical exemptions. To overcome this difficulty, we exploit the opt-out provision of the 1978 Bankruptcy Code, which confronted states with a stark choice of whether to allow their residents to use new, federal exemption that were often much more generous than the exemptions in effect in the state at the time or whether to restrict their residents to the state's exemptions. By examining how states reacted, we can discover some of the factors that influence their exemption choice

WE HAVE NOT FULLY EXPLAINED EXEMPTION LAWS, BUT WE HAVE fitted together a few pieces of the puzzle. Historical evidence suggests that exemptions were initially popular as a way to protect existing debtors against creditors and, thus, of attracting migrants to sparsely populated states. The best predictor of current levels of exemptions is historical levels of exemptions. This is not surprising. Existing law always supplies the starting point from which legislators bargain over reform, and so very old laws exert influence over the present and recent past. Although we do not have enough observations for our initial regressions to pick out the determinants of recent variation in exemption levels, regression of exemption levels to the mean suggests that these determinants are converging.

In 1978, state legislatures were confronted with federal exemptions that were often more generous than state homeowner exemptions and nearly always greater than state nonhomeowner exemptions. States with below-federal exemptions opted out. Although expected, this validates other

evidence, such as the frequency with which states modify their exemptions, that exemptions are still important to most states. Also as expected, states that ultimately opted out did so almost immediately after the passage of the 1978 act. Finally, the 1978 act shifted bargaining power in favor of state legislators who preferred generous exemptions. As a consequence, legislators who preferred less generous exemptions had to agree to moderate levels in order to obtain the political support for opt out.

Our main finding with respect to the question of why states care about exemptions is that states with high bankruptcy rates were more likely to opt out; the effect was larger for states with lower-than-federal homeowner exemptions. The latter group also opted out more quickly. Moreover, states that were conservative, at least in terms of their attitude toward government transfers of wealth to the poor, were more likely to opt out of the more generous federal exemptions. But this effect was relatively small. It appears, therefore, that the perception that generous exemptions increase the costs of existing bankruptcies or raise the rate of future bankruptcies explains why low-exemption states care about exemptions.

The findings in this paper also give us some clues about the political history of the Bankruptcy Reform Act. The battle between the House and the Senate over exemptions was, it turns out, really a battle over whether nonhomeowners ought to enjoy more generous exemptions (the original House bill) or be stuck with the original ungenerous state exemptions (the original Senate bill). The compromise was the opt-out system, and it really was a compromise in the sense that the effective exemptions for nonhomeowners in nearly all ungenerous states rose—either because federal exemptions became available to debtors or states increased their exemptions as they opted out. At the same time, the law permitted the states more local control and resulted in more variation than would have been the case if the Senate and House had merely agreed on uniform federal exemptions that were somewhat lower than those in the House bill. ☺

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Unconventional Wisdom

LIKE MOST LAW PROFESSORS WITHOUT PHDS IN A NON-LAW discipline, Fred Schauer's first scholarly efforts were based on his practice experience. And because some of his experience as a litigator in Boston involved the defense of obscenity prosecutions in state and federal courts—"I was a smut lawyer," he says—he started off writing articles and then a treatise (*The Law of Obscenity* (BNA, 1976)) about obscenity law. Believing strongly that scholarship needs to be distinguished from advocacy, however, the treatise and articles often took positions different from those he advanced as an advocate. Indeed, his willingness to defend the constitutionality, even if not the wisdom, of obscenity restrictions set him apart not only from those who defended sexually explicit publications in court, but also from the conventional academic wisdom.

He may have started as a "smut" lawyer, but today Schauer is one of the most influential scholars in the legal academy. The author of six books, co-au-

*His willingness to defend
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thor or co-editor of several more and the author of more than 200 articles, Schauer has written on an astounding number of subjects in the fields of constitutional law, legal theory, and philosophy. His work is characterized by analytic clarity, intellectual range, and skepticism about received wisdoms. As evidenced by the many honors he has received and the volumes of essays devoted to examining his work, Fred Schauer has shaped the terms of the debate in several fields.

Following his work on pornography and obscenity, Schauer broadened his scholarship to questions of First Amendment law in general. There, he continued to challenge the accepted views about the strength and scope of the First Amendment. In his writings about libel, incitement, privacy, and the speech of students, teachers, and government employees, for example, he took pains to recognize that freedom of speech, for all of its importance, exists in a world in which other and competing values are also important. “American protection of freedom of speech and freedom of the press is much greater than anywhere else in the world, and that includes all of the other open democratic countries,” he observes. “That does not necessarily mean that the rest of the world is right and the United States wrong,” he adds, “but it does suggest that it is a mistake to assume that free speech does not compete with other legitimate concerns, and a mistake to fail to recognize that we protect speech not because it is harmless, but despite the harm it may cause.”

If speech is protected despite its capacity to cause harms, there must be a deeper reason for protection, and the search for these reasons led Schauer to turn his free speech interests to the more philosophical and theoretical. His 1982 book—*Free Speech: A Philosophical Enquiry* (Cambridge University Press)—focused on these reasons, again in ways that challenged many of the standard platitudes about the value of self-expression and the ability of truth to prevail in the so-called marketplace of ideas. The book has achieved a central place in the free speech literature, and is often credited with shifting the nature of free speech scholarship from pure advocacy to a deeper and more balanced attempt to recognize and accommodate competing interests. Most recently, Schauer has been

as interested in the speech that the First Amendment does *not* touch as in the speech that it protects. He has explored this theme in several articles (“The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience,” 117 *Harvard Law Review* 1765 (2004); “Facts and the First Amendment” (The Melville Nimmer Lecture), 57 *UCLA Law Review* 897 (2010)), and he argues that it is important to recognize that the First Amendment deals with only a small sliver of our communicative and our linguistic life, and only a thin slice of the universe of communications policy.

Schauer continues to write about issues of freedom of speech and press, but his scholarly interests and efforts have broadened to general issues of constitutional law. His wide-ranging work focuses on issues of constitutional interpretation; comparative constitutional law; and the theories of constitutionalism, judicial review, and judicial interpretive authority. In one important strain in this work, Schauer has provided a defense of so-called judicial supremacy. His nuanced arguments in this vein have made him a leading voice against those who champion a major role for the President, Congress, and citizens generally in interpreting the Constitution.

Schauer’s work has frequently stressed the role of constitutional text, which he believes can have constraining power independent of question of original intent or original meaning (“An Essay on Constitutional Language,” 29 *UCLA Law Review* 797 (1982)). And he is particularly interested in the importance (or the lack thereof) of constitutional constraints in the decision-making processes of officials other than judges. In a series of articles with Larry Alexander, he has urged greater deference by legislative and executive officials to Supreme Court interpretations of the Constitution (“On Extrajudicial Constitutional Interpretation,” 110 *Harvard Law Review* 1359 (1997); “Defending Judicial Supremacy,” 17 *Constitutional Commentary* 455 (2000)).

One reason for this view, he says, is that there is little evidence that people or policy-makers can distinguish second-order constitutional constraints from first-order policy preferences. In his recently published

Sibley Lecture at the University of Georgia (“When and How (If at All) Does Law Constrain Official Action,?” 44 *Georgia Law Review* 769 (2010)) he has marshaled examples and empirical support for the proposition that constitutional law in particular and law in general has little effect on the decisions of public officials, thus supporting the view that the courts must have a substantial role in the enforcement of legal and constitutional constraints on policies and political preferences.

While Schauer argues that courts can and should constrain public officials, in his view, less is more. He has argued that the courts can perform their task of constitutional interpretation most effectively if they do not take on too much. He started to develop this argument when he was invited to write the prestigious *Foreword* to the *Harvard Law Review*'s annual Supreme Court issue. In the *Foreword*, Schauer drew heavily on public opinion research to show that the Supreme Court's agenda diverges considerably from the public's agenda of concerns and policy-makers' agenda of activities (“Foreword: The Court's Agenda – and the Nation's,” 120 *Harvard Law Review* 4 (2006)), a strategy he believes helps the Court retain a degree of legitimacy and respect. By generally deciding either low controversy or low salience issues, he argues, and avoiding issues that are both high controversy and high salience (such as health care, bailouts of banks and auto companies, and the wars in Iraq and Afghanistan), the Supreme Court can and does avoid the kind of crises that existed in the 1930s when its actions prompted Roosevelt's court-packing plan.

Schauer's interest in the role of courts parallels his interests in the nature of legal argument and legal reasoning. In his 1991 book *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press) and a series of articles (“Slippery Slopes,” 99 *Harvard Law Review* 361 (1985); “Precedent,” 39 *Stanford Law Review* 571 (1987), “Formalism,” 97 *Yale Law Journal* 509 (1988); “Is the Common Law Law,?” 77 *California Law Review* 455 (1989); “Exceptions,” 58 *University of Chicago Law Review* 871 (1991); “Giving Reasons,” 47 *Stanford Law Review* 633 (1995)), he has explored the various characteristic forms of legal argument, with a particular focus

on (and sympathy with) the role of rules in constraining decision-makers. And thus in a recent book, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, 2009), he has tried to explain that legal reasoning—“thinking like a lawyer”—is distinctive in its comparative willingness to reach the wrong result in particular cases in the service of the values of generality in decision, constraint by precedent, and limitation of discretion by written rules. He sees the distinctive forms of legal argument and legal decision as embodying the special values of the Rule of Law, values that appropriately diverge from the values that motivate much of executive, legislative, administrative, and individual decision-making.

As with his work on freedom of speech, much of Schauer’s work on legal reasoning is informed by the methods of modern analytical philosophy, with some emphasis on the philosophy of language. More recently, he has used his philosophical interests to write about the enduring questions of jurisprudence and legal philosophy. Although much of jurisprudence focuses on ideal actors engaged in ideal decision-making, Schauer’s interests are in the role of law with respect to non-ideal decision-makers making decisions under non-ideal conditions. This concern with the non-ideal, and with the relationship between law and the messy motivations and skills of real decision-makers, explains not only his long-standing interest in rules and in the occasional but often-ignored virtues of formalistic decision-making (see “A Critical Guide to Vehicles in the Park,” 83 *New York University Law Review* 1109 (2008)), but also his more recent focus on the role of force and coercion in law and legal institutions (“Was Austin Right After All? On the Role of Sanctions in a Theory of Law,” 23 *Ratio Juris* 1 (2010)). That focus is likely to culminate in a book that will attempt to reorient much of modern jurisprudence away from a concern with abstract conceptual analysis under ideal conditions and towards a jurisprudence more focused on the non-ideal aspects of our legal lives.

Schauer’s focus on the non-ideal has led him to an increased interest in the empirical and institutional side of legal scholarship. Institutions matter, he argues, in much the same way that rules matter, because they

structure the decisions and incentives of inevitably imperfect human beings. This is reflected in the persistence of even the psychologically naïve formal rules of evidence (“On the Supposed Jury-Dependence of Evidence Law,” 155 *University of Pennsylvania Law Review* 165 (2006); “In Defense of Rule-Based Evidence Law—and Epistemology Too,” 5 *Episteme* 295 (2008)). For Schauer, the law of evidence is a microcosm of the role of law more generally: structuring real-world decision-making institutions so as to achieve the optimal balance between empowering wise decision-makers to make wise decisions and preventing unwise, misguided, or genuinely evil decision-makers from making disastrous ones. Schauer recognizes that neither of these goals can be taken as exclusive, and that achieving the balance between the two in light of what we know about human behavior and human decision-making capacities remains the perennial dilemma of law. In thinking this way, Schauer often draws in a non-technical way on the decision theory he was introduced to when studying for an M.B.A. prior to law school, and his interest in decision theory and probabilistic reasoning, *Profiles, Probabilities, and Stereotypes* (Harvard University Press, 2003), has produced a particular interest in the mistakes that people make and how legal institutions might be structured to recognize the persistent phenomenon of human error.

In his current and planned future work, Schauer is interested in focusing more on the empirical and comparative dimensions of the topics of his greatest interest. He is planning a series of experiments on legal reasoning, trying to determine whether those who self-select for law school or those with legal training think and decide differently from others. And he is also interested in further empirical exploration of the effect of law in general and constitutional law in particular on the decisions of officials and ordinary people. But he has not abandoned his longstanding philosophical interests and focus, and is also trying to develop a new conception of legal positivism that will better connect traditional jurisprudential debates about legal positivism with historically and currently important concerns about the legal interpretation and the role of judges. 🌱

EXCERPTS

Is It Important To Be Important?: Evaluating The Supreme Court's Case-Selection Process

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AS THE SUPREME COURT'S CASELOAD SHRINKS, FROM ABOUT 150 cases per year in the 1980s and early 1990s to about seventy now, concern has grown over whether the Court is leaving too many important cases undecided. But the extent to which the concern is justified depends in part on what we mean by "important," and in part on whether it is important that the Supreme Court decide important cases. That the Court has traditionally taken on important cases and issues is a commonplace, but whether the commonplace is true depends on how we phrase the question. Whether what much of what the Supreme Court does is important is very different from whether much of what is important is done by the Supreme Court, and without knowing which we are asking, we cannot intelligently evaluate the Court's case selection process.

The difference between how much of what the Court does is important and how much of what is important the Court does emerges upon even a casual glance at the daily newspapers. Although the Court has addressed important issues of gun control, campaign finance, capital punishment, punitive damages, presidential power, detention of enemy combatants, sexual orientation, and religion in the public sphere, among others, it has decided no cases determining the authority of a president to commit troops to combat outside of the United States. Nor has it directly decided cases involving health care policy, federal bailouts of banks and automobile manufacturers, climate change, and the optimal rate of immigration. And nothing the Court has decided for years is even in the neighborhood of

addressing questions involving mortgage defaults, executive compensation, interest rates, Israel and Palestine, and the creation of new jobs.

The latter list is not randomly chosen. Rather, it is a list of the issues that dominate public and political discourse, a list surprisingly removed from what the Supreme Court is actually doing. Three years ago I noticed this gap between what the public cares about and what the Supreme Court does, and updating the data does not change the picture. When asked in non-prompted fashion to name the most important issues facing the country, Americans overwhelmingly name the economy, health care, wars in Iraq and Afghanistan, jobs, immigration, and education, as they have for the past eight years. Indeed, the list resembles those for much of the past three decades. Crime occasionally breaks into the top ten, but the most recent lists capture not only the long-standing importance of basic foreign policy and economic issues, but also the persistent non-appearance in the top ten (and usually even in the top twenty) of abortion, sexual orientation, race, gender, and the other issues that represent the salient part of the Court's docket.

When importance is measured by what the public and their elected representatives think is important, therefore, and by what the government actually works on, the Supreme Court's docket seems surprisingly peripheral. That is not to say that what the Court does is not important, but it is to say that its actual business is less important to the public and to the public's representatives than lawyers and law professors tend to believe. And it is hardly clear there is anything wrong with this. By dealing either with low-controversy issues or with high-controversy low-salience issues, and thus by generally avoiding high-controversy high-salience issues, the Court may retain public confidence and empirical legitimacy necessary to secure at least grudging acquiescence in its most controversial decisions.

It is one thing to recognize the strategic value of avoiding most publicly important issues, but quite another to see much value in the Court's avoidance of *legally* important issues, one measure of which would be the extent to which the issue appears in lower court litigation. If that is the measure, however, then there is evidence that the Supreme Court

is little more inclined to take on legally important issues than publicly important ones.

It is impossible here to offer full empirical analysis and support for this claim, but consider as an example litigation under the First Amendment's speech and press clauses, a great deal of which is represented by free speech issues arising in public employment and the public schools. Indeed, issues involving student and teacher speech, employee speech, organizational membership, and related topics vastly overwhelm the quantity of lower court First Amendment issues dealing with obscenity, indecency, incitement, press freedoms, and the numerous other topics that dominate the casebooks. Yet although schools and public employee cases far surpass other categories of First Amendment litigation in the lower courts, the Supreme Court takes surprisingly few such cases. In forty years it has taken only four involving speech in the public schools, three dealing with speech in colleges and universities, and twelve on the free speech rights of various public employees.

That the Supreme Court takes few cases in a number of high-litigation areas would be of less moment if the cases it did take were representative, and the decisions it issued useful in terms of providing guidance. But in fact neither of these occur. In *Morse v. Frederick*, for example, the “Bong Hits 4 Jesus” case, the Court, in deciding only its fourth student speech case ever and the first in more than a decade, took and decided a case that was highly unrepresentative of the student speech cases that bedevil the lower courts. And having taken the case, even the majority issued an opinion that was so narrow, so case-specific, and so idiosyncratically about alleged encouragement of drug use as to provide virtually no guidance to the courts that have to deal with the issue.

Morse is hardly unusual. On a large number of issues of regulatory law, constitutional law, criminal procedure, and others, the Court's cases have been similarly unrepresentative and its decisions similarly unhelpful. And thus if frequency of litigation in the lower courts combined with unanswered questions about the state of the law is some indication of legal importance, then the Court's record of taking legally important cases is

little stronger than its record of taking socially important cases, but with far less justification.

The Court's weak record of deciding legally important cases is likely a function of its inability systematically to gain needed information about legal importance. When appellate courts make decisions, they determine the outcome of the dispute between the parties and set forth a rule that governs large numbers of other acts and events. In order to perform the latter task adequately, however, courts need a sense of the array of events that some putative rule or standard or policy or test will control. The problem, however, is that courts find themselves suffering from a structural inability to obtain just that kind of information.

First, courts are of course not well situated to go out and actually research the field of potential application of some rule. Occasionally one of the parties might do this in a brief, but it is rare, and even at the Supreme Court level amicus briefs seldom serve this function. Second, everything we know about the availability heuristic and related phenomena tells us that a court trying to make a rule in the mental thrall of the particular case before it will likely assume, often inaccurately, that the case before it is representative of the larger field. Finally, and most importantly, the selection effect—the process by which cases with certain characteristics get to appellate courts and other cases with different characteristics do not—provides further distortion of information. Whenever the Supreme Court—or any court—sets forth a rule, standard, principle, or test, it creates the possibility of three different forms of behavior on the part of those the rule addresses. One is compliance, another is violation, and the third is “dropping out,” ceasing to engage in the behavior the rule seeks to regulate. So when the Court decided *Miranda v. Arizona*, it created a world in which some police officers complied by giving the required warnings, others violated by conducting custodial interrogations with giving warnings, and some stopped conducting custodial interrogations.

The selection problem arises because the courts will never see the dropout cases, and rarely see the compliance cases. By seeing only the violations, courts find themselves subject to severe information distortion.

And because this phenomenon is exacerbated as litigation ascends the appellate ladder, the Supreme Court, even taking into account the information provided by amicus briefs, the research done by the Justices and their clerks, and the fact that the Justices read the newspapers, will be at an informational disadvantage in deciding which cases to decide and how broadly or narrowly to decide them. 🌿

From Chapter One of *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*

(Harvard University Press, 2009)

LAW SCHOOLS CLAIM TO INSTRUCT THEIR STUDENTS IN HOW TO “think like a lawyer.” Studying law is not about learning a bunch of legal rules, they insist, for law has far more rules than can be taught in three years. Nor is legal education about being told where to stand in the courtroom or how to write a will, for these skills are better learned in practice than at a university. What really distinguishes lawyers from other sorts of folk, so it is said, is mastery of talents in argument and decision-making often collectively described as *legal reasoning*. So even though law schools teach some legal rules and practical professional skills, they maintain that their most important mission is to train students in the arts of legal argument, legal decision-making, and legal reasoning—in thinking like a lawyer.

But *is* there distinctively *legal* reasoning? *Is* there something that can be thought of as thinking like a lawyer? Of course some lawyers think and reason better than others, but the same can be said for physicians, accountants, politicians, soldiers, and social workers. So the claims of law schools to teach legal reasoning must be other than just teaching students how to think more effectively. And indeed they are. Law schools aspire to teach their students how to think *differently*—differently from ordinary people, and differently from members of other professions. The idea that legal reasoning is different from ordinary reasoning, even from good ordinary reasoning, has been the belief of most lawyers, judges, and law schools for a long time. The traditional belief in the distinctiveness of legal reasoning might be mistaken, but it comes with a sufficiently distinguished provenance that the possibility that there is *legal* reasoning ought not be easily dismissed.

That there might be something distinctive about legal reasoning does not flow inexorably from the existence of law as a discrete profession.

Electricians know things that carpenters do not, and carpenters know things that plumbers do not. But it would be odd to talk of thinking like a carpenter or a plumber. Indeed, maybe it is odd to talk of thinking like a lawyer. Yet law schools and most lawyers do not think it odd. What lawyers have other than technical skills and knowledge of the law is not so simple to pin down, however. Indeed, that difficulty may account for the numerous skeptical challenges over the years to law's claim to distinctiveness. Legal Realists insisted that lawyers and judges do not approach problems much differently from other public decision-makers. Political scientists often make similar claims about the Supreme Court, arguing that the attitudes and policy preferences of the justices play a larger role in the Court's decisions than the traditional methods of legal reasoning. Psychologists examining the reasoning processes of lawyers and judges focus less on modes of legal reasoning than on the shortcomings of rationality that bedevil all decision-makers, whether lawyers or not. Lawyers and judges may be lawyers and judges, so these challenges maintain, but they are also human beings with human talents and human failings. And the fact that lawyers and judges are human explains more about legal and judicial reasoning, it is said, than anything that may have been learned in law school or legal practice. Consequently, one way of approaching the alleged distinctiveness of legal reasoning is to consider how much of the reasoning of lawyers and judges is explained by their specialized training and roles, on the one hand, and just how much is explained simply by the fact that they are human, on the other.

This book is dedicated to exploring the various forms of reasoning that have traditionally been especially associated with the legal system, such as making decisions according to rules, treating certain sources as authoritative, respecting precedent even when it appears to dictate the wrong outcome, being sensitive to burdens of proof, and being attuned to questions of decision-making jurisdiction as well as result. But we should not set up unrealistic aspirations for legal reasoning's claim to distinctiveness. In the first place, law cannot plausibly be seen as a closed system like the game of chess. All the moves of a game of chess can be

found in the rules of chess, but not all of the moves in legal argument can be found in the rules of law. Not only does law depend on numerous non-legal skills, but it is also inevitably subject to the unforeseeable complexity of the human condition. We can at best imperfectly predict the future, just as we continue to be uncertain about what to do with that future once we get there. Law may well contain within its arsenal of argument and decision-making the resources it needs to adapt to a changing world, but the image of a totally closed system is an inaccurate picture of what law does and how it does it.

Not only is law not a closed system, but its methods of reasoning are not completely unique to law. Perhaps there is little overlap between Estonian and English, or between literary criticism and multivariate calculus, but the forms of legal reasoning are found outside the legal system. Judges often make decisions based on the dictates of written-down rules, but so do bureaucrats, bankers, and every one of us when we observe the speed limit written on a sign. The legal system is concerned with precedent, but this is again hardly unique to law, as is well known to the parents of more than one child when dealing with the argument by a younger child that he or she should be allowed to do something at a certain age just and only because an older sibling was allowed to do the same thing at that age. And although law is also characterized by authority-based reasoning, this too is hardly unknown outside of the legal system. Every parent who has ever in exasperation said “Because I said so!” to a stubborn child recognizes that appeals to authority rather than reason have their place throughout human existence.

Yet although the modes of legal reasoning are found outside the law, these forms of reasoning and decision-making may be particularly concentrated in the legal system. For however much these various forms of reasoning exist throughout our decision-making lives, it is important not to forget that they are odd in a special way: each of the dominant forms of legal reasoning can be seen as a route towards reaching a decision *other than* the best all-things-considered decision for the matter at hand. Often when we obey a speed limit we are driving at a speed that is not the same

as what we think is the best speed given the traffic, the driving conditions, and our own driving skills. Similarly, following precedent is interesting primarily when we would otherwise now make a different decision. The parent who gives the younger child the same privileges at the same age as an older child feels the pull of precedent only when the parent otherwise thinks there is a good reason for treating the two differently. And we say we are *obeying* or *following* an authority only if what we are doing because of what the authority has said is not the same as what we have done if left to our own devices to make the decision we thought best.

Once we understand that these admittedly common forms of reasoning are peculiar in dictating outcomes other than those the decision-maker would otherwise have chosen, we can understand as well that the substantial and disproportionate presence of these forms of reasoning in the legal system can support a plausible claim that there is such a thing as legal reasoning. If these counter-intuitive forms of reasoning are dominant in law but somewhat more exceptional elsewhere, then we might be able to conclude that there is such a thing as legal reasoning, that there is something we might label “thinking like a lawyer.”

Law’s seemingly counter-intuitive methods are a function of law’s inherent *generality*. Although legal disputes involve particular people with particular problems engaged in particular controversies, the law treats the particulars it confronts as members of larger categories. Rather than attempting to reach the best result for each individual controversy, law’s goal is to make sure that the outcome for *all* or at least most of the particulars in a given category is the right one. Often in law it is better to reach the wrong result in the particular controversy than to adopt a rule that would produce what would seem to be the correct result for this case but at the cost of producing the wrong result in many others.

This principle explains the traditional ritual of Socratic dialogue that takes place in the first year of law school. After eventually being coaxed into accurately reciting the facts of some reported case, the student is asked what she thinks should be the correct result. Typically the student responds by announcing what she believes to be a fair outcome as between

the particular parties. At this point the student is asked to give the rule or principle that would support this outcome, and then the pattern of Socratic inquiry begins. By a series of well-planned hypothetical examples, the professor challenges the student's initially offered rule, with the aim of demonstrating—at the expense of the chosen victim—that a rule that would generate a fair outcome in the present case might generate less satisfactory results in other cases.

Socratic inquiry is also the common form of judicial questioning in appellate argument. Because appellate opinions serve as precedents in subsequent cases, judges are as concerned with the effect of their immediate ruling on future cases as with reaching the best result in the present case. Appellate advocates thus frequently find themselves asked in oral argument how the rule or result they are advocating will play out in various hypothetical situations. As in the law school classroom, judges pose hypothetical scenarios to lawyers because the right result in the particular dispute before the court will wind up as the actual outcome only if it can be justified in a way that will not produce the wrong outcomes in too many future cases.

In seeking to demonstrate to the hapless student or struggling advocate how the best legal outcome may be something other than the best outcome for the immediate controversy, Socratic interrogation embodies law's pervasive willingness to reach a result differing from the one that is optimally fair in the particular case. Law is typically concerned with the full array of applications of some general rule and principle, and law often pursues that concern at the cost of being less worried than non-legal decision-makers might be with a possible error or injustice or unfairness in the particular case. Although it may seem unfair to take the existence of a clear rule or a clear precedent as commanding a result the judge herself thinks wrong, following even a rule or precedent perceived by the judge to be erroneous is what, under the traditional understanding, the law often expects its decision-makers to do. 🍃

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FRED SCHAUER

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University of Virginia School of Law

580 Massie Road

Charlottesville, Virginia 22903-1738

www.law.virginia.edu

