

**A LOOK AT THE EFFICACY OF THE AMERICAN
JUDICIARY AS A CATALYST FOR PUBLIC POLICY
AND INSTITUTIONAL REFORMATION**

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A LOOK AT THE EFFICACY OF THE AMERICAN JUDICIARY AS A CATALYST FOR PUBLIC POLICY AND INSTITUTIONAL REFORMATION

I.

INTRODUCTION

In a mid-nineteenth century treatise on contract law, William Wetmore Story, son of Associate United States Supreme Court Justice Joseph Story,¹ aptly described the intangible character of policymaking when he stated:

“Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been left loose and free of definition.”²

Modern legal commentators have defined policymaking as an ‘effort by governmental actors to create an overall plan to achieve socially desirable results for its citizenry’.³ The creation and execution of public policy is generally understood to be one of the primary tasks assigned to the legislative branch of our democratic form of government. Over the last hundred years or so, however, courts and members of the judiciary have found themselves thrust into the role of policymakers to codify the citizenry’s cries for public policy change, or to stimulate institutional reform when they are forced to act to bring an end to political or bureaucratic

¹William Wetmore Story began his career following in his father’s footsteps as a lawyer. After his father’s death, he went on to distinguish himself as a noted American poet and sculptor. See Mary E. Phillips, *Reminiscences of William Wetmore Story: The American Sculptor and Author* (Rand McNally & Co., 1897) at 17, 57, 60-61, 79-84.

²William Wetmore Story, *A Treatise on the Law of Contracts* (Little Brown & Co., 1844), Vol. I at 480-481.

³Ronald Dworkin, “Hard Cases”, 88 *Harv. L. Rev.* 1057, 1067-73 (1975).

deadlock, or when it is clear that jurists must act to address a disinclination on the part of the other branches of government to fulfill their missions.

Beginning in earnest in the mid-twentieth century, individuals and groups have turned to the nation's courts as a vehicle for inspiring policy change or institutional reform when faced with intractable politically-influenced legislative bodies who are slow to tackle difficult, oftentimes divisive issues with the potential to threaten or disrupt their personal careers. Quite simply, the judiciary is the only branch of government that is required to reach a decision in a dispute between adverse parties. Legislators can engage in endless debates as to the appropriateness of a proposed bill or on the need to pass a particular law, while members of the executive branch of government routinely exercise their discretion on whether to support a bill or veto its eventual passage based on whether it is politically expedient to do so.

In the face of this harsh reality, policymaking has become an important and generally effective tool for judges to use in combination with their more traditional roles as fact finders or interpreters of precedent and authoritative texts.⁴ Almost no authoritative legal scholar who has studied the role of the judiciary in a democratic society disputes the presumption that courts make public policy.⁵ Policy formulation by courts is also not a new phenomenon. Many

⁴See generally Aryeh Neier, *Only Judgment: The Limits of Litigation in Social Change* (Wesleyan University Press, 1982)(since the 1950s courts have been the most effective instrument for bringing about policy change sought by social protest movements); see also generally Edward L. Rubin & Malcolm M. Feeley, "Judicial Policy Making and Litigation Against the Government", 5 *U. Pa. J. Const. L.* 616 (2003); Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge Univ. Press, 1998).

⁵See e.g., Lawrence Baum, *American Courts: Process and Policy* (Houghton Mifflin College Division, 1990); Lee Epstein & Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (University of North Carolina Press, 1992); Charles

nineteenth and early twentieth century decisions in the areas of contract law, torts and federal jurisdiction were shaped by jurists seeking to transform existing public policy to advance the country's emerging capitalist system.⁶

Johnson & Bradley Canon, *Judicial Policies: Implementation and Impact* (2d ed. Congressional Quarterly Press, 1984); Martin Shapiro, *Courts: A Comparative Analysis* (University of Chicago Press, 1981). The issue as to the capacity of courts to effectuate policy change or bring about institutional reform has generated a great deal of discussion amongst legal theorists and social and political scientists, particularly over the last twenty years. This question is clearly beyond the scope of this paper. It is, however, important to note in this context that court decisions of this magnitude must rely upon action by the legislative and executive branches of government to insure doctrinal implementation. For a discussion on this inherent capacity, *see generally* Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991). A plethora of articles and books written both by political scientists who generally support his conclusion that courts "can almost never be effective producers of significant social reform" and, at best, may only act to "second the social reform acts of other branches of governments", *Id.* at 338, and those authored by legal scholars who are critical of his analysis for its failure to draw distinctions between different types of litigation, for failing to submit his conclusions to counterfactual analysis, and for confusing the litigants' goals with those of social reformers. For a glimpse into this debate, *see generally*, Michael W. McCann, "Reform Litigation on Trial", 17 *Law & Soc. Inq.* 715 (1992)(critical of Rosenberg's standard to measure efforts by courts to effectuate social change through measured compliance); L.A. Powe, Jr., "The Supreme Court, Social Change, and Legal Scholarship", 44 *Stan. L. Rev.* 1615 (1992)(arguing that the Supreme Court has played a significant role in changing social attitudes); Ronald Kahn, "The Supreme Court, Constitutional Theory, and Social Change", 43 *J. Legal Educ.* 454 (1993)(likening Rosenberg's approach to that of a strict behaviorist who views the Court as one of many policymaking institutions in a wider political system which seriously understates the significance of the Supreme Court); Peter H. Schuck, "Public Law Litigation and Social Reform", 102 *Yale L. J.* 1763 (1993)(commenting that court-directed reform although not inevitably doomed to failure is highly problematic); Stephen L. Carter, "Do Courts Matter?", 90 *Mich. L. Rev.* 1216 (1992)(concluding that if courts cannot bring about major social changes as Rosenberg insists then the great bulk of contemporary constitutional theory which assumes otherwise is a waste); Malcolm M. Feeley, "Hollow Hopes, Flypaper, and Metaphors", 17 *Law & Soc. Inq.* 745 (1992)(critical of Rosenberg's analysis and assessment characterizing same as simply "wrong"); David Schultz and Stephen E. Gottlieb, "Legal Functionalism and Social Change: A Reassessment of Rosenberg's *The Hollow Hope*", 12 *J. L. & Pol.* 63 (1996) (concluding that Rosenberg's analysis actually demonstrates that the Court is, indeed, an effective institution).

⁶*See generally* Morton J. Horowitz, *The Transformation of American Law: 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press, 1977, reprinted 1994).

Policies may be viewed as types of standards which establish goals to be reached, often under the guise of improvements in economic, political, or social conditions. Principles, on the other hand, are standards to be observed, not because they will advance or secure an economic, political or social goal, but because they are needed to ensure justice, fairness or some other measure of morality.⁷ Some scholars note that the distinction between policies and principles collapses when policies are capable of simply being converted into principles. For instance, racial or gender equality may be viewed as a desirable social, political or economic policy, as well as a standard for justice or fairness.⁸

This essay will look at the legitimacy and effectiveness of courts as catalysts for policy change and institutional reform by looking at both sides of the judicial policymaking issue, reviewing the history of the phenomenon in American jurisprudence from the development of modern legal theory through twentieth century institutional reform litigation, and will close with an examination of the efforts of a national children's advocacy group to provide a real-world assessment as to whether the American judicial system is an effective agent for policy change and institutional reform.

⁷See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), at 22. See also Roy L. Brooks, "The Use of Policy in Judicial Reasoning: A Reconceptualization Before and After *Bush v. Gore*", 13 *Stan. L. & Pol'y Rev.* 33, 35-36 (2002); Richard Posner, *The Problematics of Moral and Legal Theory*, (Belknap Press, 1999), at 91-102; Richard Posner, "The Problematics of Moral and Legal Theory", 111 *Harv. L. Rev.* 1637 (1998).

⁸Brooks, fn. 7 at 35.

II.

WHAT IS JUDICIAL ACTIVISM?

In 1840, French political thinker and historian, Alexis De Tocqueville, penned the thoughtful comment: “There is hardly a political question in the United States which does not sooner or later turn into a judicial one”⁹. De Tocqueville wrote *Democracy in America* after having spent a considerable amount of time in this country during which he examined the nature of the close relationship between American politics and the law, before notably concluding that the American judiciary’s real power and effect lies in how its decisions influence the way we think about political and social issues.¹⁰

Judicial policy formulation can occur on the trial and appellate levels in both federal and state courts. A principle may enter the judicial process through the actions of a single judge, but as it makes its way through the legal process gaining acceptance and modification from others, it exits the process as an institutional policy.¹¹ In addition to the many landmark decisions rendered by the United States Supreme Court over the last hundred years, many state courts have also played significant leadership roles in interpreting the legal rights of their citizens in such areas as equal educational opportunity and privacy.¹² One such leading state supreme court is

⁹Alexis DeTocqueville, *Democracy in America* (orig. translation published by Harper & Row, 1966, Doubleday & Co. 1969), *see generally* and at 270.

¹⁰*Id.*

¹¹Mark Tushnet and G. Edward White, *The Warren Court in Historical and Political Perspective* (University of Virginia Press, 1993), at 41.

¹²*See* Neil Devins, “Judicial Matters, 80 *Cal. L. Rev.* 1027 (1992), n. 8 at 1028-1029. For commentary on the importance of state constitutional interpretation, *see* William J. Brennan, Jr., “State Constitutions and the Protection of Individual Rights”, 90 *Harv. L. Rev.* 489 (1977).

the New Jersey Supreme Court which has a long history as an independent and activist body of jurists earning it a reputation as one of the nation's leading reformist courts,¹³ and invoking a comparison to the United States Supreme Court under Chief Justice Earl Warren for its desire to effectuate social change.¹⁴

As will be discussed *infra*, legal commentators, politicians and social theorists use the terms 'judicial policymaking' or 'judicial activism' when analyzing the legitimacy of controversial decisions rendered by state and federal judges. While some legal writers use the term 'judicial activism' pejoratively when referring to what they construe to be inappropriate and improper liberal decisions,¹⁵ others have used it to characterize the Supreme Court under the

¹³See John B. Wefing, "The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism", 29 *Rutgers L. J.* 701, 730 (1998). See also Leigh B. Bienen, "A Good Murder", 20 *Fordham Urb. L. J.* 585, 590 (1993)(New Jersey Supreme Court has a history of being a leader in the development of constitutional doctrine); John B. Gates & Charles A. Johnson, *The American Courts, A Critical Assessment* (Congressional Quarterly Press, Washington, D.C. (1991), at 111 (New Jersey appears on every list of innovative or prestigious courts).

¹⁴Jonathan Banks, Note, "State Constitutional Analysis of Public School Finance Reform Cases: Myth or Mythology?", 45 *Vand. L. Rev.* 129 n.177 (1991)(discussing the New Jersey Supreme Court's school finance reform decisions).

¹⁵See generally Matthew J. Franck, *Against the Imperial Judiciary: The Supreme Court vs. the Sovereignty of the People* (Univ. of Kansas Press, 1996)(activists judges should not have veto power over Congress); Edwin Meese, III and Rhett Dehart, "The Imperial Judiciary and What Congress Can Do About It", *Policy Review*, Issue No. 81, Jan/Feb 1997 at 54-60 (activist judges exceed their duty to interpret law and instead read their personal views and prejudices into the Constitution); W. James Antle III, "Massachusetts Gay Marriage Ruling Is Judicial Activism in Action", Nov. 24, 2003, *Intellectual Conservative* at <<http://www.intellectualconservative.com/article2883.html>> (Massachusetts judges decision over gay marriage is judicial activism at its best); Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court* (Doubleday, 2012)(reciting Senator John McCain's comments during the 2008 presidential campaign referring to "the common and systemic abuse of our federal courts by the people we entrust with judicial power", at 42). In recently refusing to reappoint a sitting justice to the New Jersey Supreme Court, Governor Christopher J. Christie described the justice, whom he deemed to be too liberal in his legal philosophy, as "out of control" in usurping the

undeniably conservative Chief Judge William Rehnquist as “perhaps as activist as the Warren Court¹⁶ in its heyday”.¹⁷ Noted legal scholar Donald Zeigler describes Chief Justice Rehnquist’s decision in *Lucas v. South Carolina Coastal Council*¹⁸ as an activist one because, in reaching out for the case, the Court chose to rule on the issue even though it may not have been ripe for judicial review. Furthermore, according to Zeigler, in so doing, it created a new rule of law by badly distorting existing legal precedent.¹⁹ And the Rehnquist Court’s activism was not restricted solely to cases involving property rights. In 1988, the Rehnquist Court invaded the province of both Congress and state law legislators by creating a defense for military contractors

roles of the governor and the state legislature in setting social and tax policies. See Richard Perez-Pena, “Christie, Shunning Precedent, Drops Justice from Court”, *New York Times*, May 4, 2010, at <<http://nytimes.com/2010/05/04/nyregion/04christie.html>>.

¹⁶The “Warren Court” is a phrase oftentimes used to refer to decisions out of the United States Supreme Court under Chief Judge Earl Warren who served on and presided over the Court from 1953 through 1969.

¹⁷Donald H. Zeigler, “The New Activist Court”, 45 *Am. U. L. Rev.* 1367 (1996).

¹⁸505 U.S. 1003, 12 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

¹⁹Zeigler, fn. 17 at 1370. *Lucas* established a new rule in the area of takings law which is explicitly prohibited under the Fifth Amendment in the absence of just compensation. The Court’s decision suggests that courts can consider a partial restriction on an owner’s rights to be a total taking thereby constituting one that requires compensation to be paid in more cases than had been necessary under existing precedent. Prior to *Lucas*, the Court shied away from formulating a hard and fast rule as it pertains to the Fifth Amendment’s Takings Clause, reaffirming over and over that takings issues must be evaluated by weighing the public and private interests on a case-by-case basis. *Id.* citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 332 (1922); see also *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 295, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981)(the Court has generally been unable to develop any ‘set formula’ for determining takings issue); *Agins v. Tiburon*, 447 U.S. 255, 260-261, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980)(no precise rule determines when property has been taken).

in *Boyle v. United Technologies*,²⁰ ignoring controlling precedent to achieve its result.²¹ The *Boyle* ruling arose in the context of a wrongful death lawsuit filed by the family of a Marine pilot against an independent contractor who defectively designed an emergency escape hatch in a helicopter it manufactured for the government. There was no legal precedent or statutory support for the Court's decision, and the defense it created to protect private military contractors from civil liability preempted previously applicable state law. Nevertheless, the Court chose to characterize questions of military contractors' liability as a 'uniquely federal interest'²² requiring the displacement of state laws that conflicted with federal interests leaving the family of the deceased airman with no legal recourse.²³ It is easy to see why Donald Ziegler stated that with respect to the Rehnquist Court's activist decision in *Boyle*, "there are things happening [in the case] to upset you, no matter what your political persuasion".²⁴

Finally, many believe that the ultimate example of judicial activism can be found in the Supreme Court's decision, *Bush v. Gore*,²⁵ in which the undeniably conservative Justices

²⁰487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

²¹In a footnote, Zeigler observed that the *Boyle* Court relied on "spontaneous generation", a process under which a court "makes up the law, either out of thin air, or by borrowing it from whatever source it chooses." Zeigler, fn. 17 at 1383 citing *Boyle* 487 U.S. at 504, 511-513.

²²487 U.S., at 505-506.

²³*Id* at 515 (Brennan, J., dissenting).

²⁴Zeigler, fn. 17 at 1383. Ziegler points to yet another decision from the Rehnquist Court as a 'striking example of judicial activism' when the majority overruled Congress' enactment of the Gun-Free School Zone Act of 1990 for exceeding its power under the Commerce Clause and departing from nearly 60 years of precedent. *Id.* at 1389 citing *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995).

²⁵531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).

overruled the Florida Supreme Court's order for a recount in the 2000 presidential election by essentially arguing that a hand recount would violate the equal protection clause of the Fourteenth Amendment, thereby giving the office to then-Governor Bush.

In short, 'judicial activism' means different things to different people. By their very essence, judicial decisions will satisfy one party while displeasing that party's adversary simply because it is just that - a decision that is in some way determinative of an outcome related to a dispute or controversy brought before a judicial tribunal. In the twentieth century alone, the term judicial activism was used by those favoring social reform to criticize rulings made by conservative Supreme Court Justices sitting on the High Court's bench during the late 1890s through the late 1930s who overruled legislation requiring business owners to adhere to mandated employee working conditions, wages or hours, and the same term has also been used to disparage decisions made by other Justices who sat on the Supreme Court during the turbulent decades of the fifties and sixties who extended constitutional guarantees to victims of discrimination and expanded upon other fundamental civil liberties when the political process did not provide its victims with an avenue to seek recourse.²⁶

III.

THE HISTORY OF COURTS AND JUDGES ACTING AS CATALYSTS FOR PUBLIC POLICY CHANGE IN THE UNITED STATES

Negligence or tort law began to take root in this country in the mid-nineteenth century. Not surprisingly, its development was coincident with, and stimulated by, the Industrial Revolution which brought about major changes in agriculture, manufacturing, mining and

²⁶Toobin, fn. 15 at 44.

transportation, and also precipitated a significant increase in the number of accidents caused by newly developed machinery. Many early legal decisions sought to protect fledgling industries from liability for monetary damages on the premise that such damages would hinder the economic viability of these businesses.²⁷ The New York Court of Appeals, the highest court in the state, and its distinguished Chief Judge Benjamin Cardozo, would play a defining role in the development of tort law in this country. As the Court's jurists sought to balance the need to continue to stimulate the growth of commerce while providing legal recourse for injured persons, many of the decisions issued by the New York Court of Appeals would come under fire and be labeled by those opposed to the extension of legal rights as inappropriate policymaking or activism by the judiciary.²⁸

In 1916, Judge Cardozo wrote the majority opinion in *MacPherson v. Buick Motor Co.*²⁹ in which the Court ruled that product manufacturers could be held liable for injuries to ultimate consumers who had purchased the product from a retailer (in this case a car dealer) rather than directly from the manufacturer, a maxim that would form the legal basis for modern product liability cases. Five years later in *Hynes v. New York Central Railroad Company*,³⁰ Judge Cardozo established a duty of care by property owners owed to persons injured on their property, and later that same year, he and his fellow justices created the negligence rescue doctrine

²⁷See generally G. Edward White, *Tort Law in America: An Intellectual History* (Oxford University Press, 1980).

²⁸Benjamin Cardozo served as an Associate Judge and then Chief Judge of the New York Court of Appeals until his appointment as Associate Justice of the United States Supreme Court in 1932. See generally Andrew L. Kaufman, *Cardozo* (Harvard Univ. Press, 1998).

²⁹217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916).

³⁰231, N.Y. 229, 131 N.E. 898 (N.Y. 1921).

whereby a tortfeasor could be held liable not only to an injured person, but also to someone who comes to his or her aid in situations where the tortfeasor created a danger.³¹ Lest it appear that Judge Cardozo was a liberal activist only concerned about protecting the rights of injured parties, in 1928, in what would become known as “one of the most famous cases ever decided”³², he elaborated on the concept of a duty owed, and established limitations on the responsibility of a negligent defendant by holding that a tortfeasor cannot be held liable for an injury that was not reasonably foreseeable in *Palsgraf v. Long Island R.R.*³³ A year later, he wrote an opinion denying a monetary recovery to a man injured as a result of a fall at an amusement park ride by finding he had assumed the risk of injury by taking the ride.³⁴ Each of these decisions fundamentally changed the nature of legal relationships, and each was considered ground-breaking when it was delivered.³⁵

The Lochner Years

Legal historians generally refer to the years beginning in the decade before the turn of the twentieth century until 1937 as the “Lochner Years”, invoking the name of the period’s most notorious decision from the United States Supreme Court.³⁶ During the Lochner Years, the High

³¹*Wagner v. International Railway*, 232 N.Y. 176, 133 N.E. 437 (1921).

³²Horowitz, fn. 6 at 61.

³³248 N.Y. 339, 162 N.E. 99, 100 (N.Y. 1928).

³⁴*Murphy v. Steeplechase Amusement Park*, 232 N.Y. 176, 133 N.E. 437 (N.Y. 1921).

³⁵Horowitz, fn. 6 at 61-63.

³⁶Barry Friedman, *The Will of the People* (Farrar, Straus and Giroux Publishing, 2009) at 167, citing Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, *The Oliver Wendell Holmes Devise, History of the Supreme Court, Volume VIII*, Macmillan (1993) at 4.

Court engaged in decades of conservative judicial activism by issuing dozens of decisions striking down federal and state economic regulations designed to improve and protect the lives of lower and working class Americans who possessed little, if any, political power, while advancing the interests of business owners to operate without government interference.³⁷

In 1905, the United States Supreme Court held that a law unanimously passed by New York's state legislature that prohibited bakery workers from working more than 10 hours a day or sixty hours a week violated their right to contract as protected by the Fourteenth Amendment.³⁸ Joseph Lochner, owner of Lochner's Home Bakery in Utica, New York, was fined for overworking an employee and he appealed his conviction. After his conviction was upheld by an appellate court and the New York State Court of Appeals, Mr. Lochner sought to have it overturned by the United States Supreme Court by arguing that the statute represented an unreasonable exercise of a state's power.

Writing for the 5-4 majority in *Lochner* and relying on a line of cases dating back to the

³⁷Interestingly, many of the "Lochner Years" overlapped with what historians refer to as the Progressive Era that lasted in this country from approximately 1890 to 1920. In the late 19th century, the prevalent economic policy in the U.S. was 'laissez-faire', essentially one that opposed government interference in the economy's private sector except where its influence was needed to maintain order. By the turn of the century, a burgeoning middle class had developed that was concerned about the influence wielded by elite business leaders and farmers operating large tracts of land in the Midwest and the Western states. Leaders who rose from the middle class came to be known as "Progressives" and believed that government regulation of business practices would stimulate competition and free enterprise. Among other pieces of legislation, Progressives pushed for and saw enacted were the Sherman Antitrust Act of 1890, 26 Stat. 209, codified at 15 U.S.C. § 1 *et seq.*, which prevented large companies from controlling a single industry, and the Interstate Commerce Act of 1887, codified at 24 Stat. 379, which regulated the country's nascent national railroad system. *See generally* Lewis L. Gould, *America in the Progressive Era, 1890-1914* (Pearson Publishing, 2001).

³⁸*Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).

Supreme Court's shameful 1857 decision in *Dred Scott v. Sandford* where the Court held that African Americans were property and incapable of possessing the rights that belonged to human beings³⁹, and *Plessy v. Ferguson*,⁴⁰ the 1896 decision whereby the Court gave its formal approval to an American system of apartheid by upholding Louisiana's system for railcars based upon race, Justice Rufus Peckham overturned Mr. Lochner's misdemeanor conviction by contorting the principles underlying the passage of the Fourteenth Amendment to benefit business owners. Specifically, Justice Peckham found that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution"⁴¹ before going on to conclude that the law limiting the number of hours a worker was required to work was unrelated in any real and substantial degree to employee health, and construed same as an "unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family."⁴²

In the years following *Lochner*, the United States Supreme Court continued to narrowly construe the power of states to legislate and protect workers in the private sector of the economy,

³⁹60 U.S. 373, 15 L.Ed. 691 (1857). During the Reconstruction period following the Civil War, Congress and the states passed three amendments to the Federal Constitution – the Thirteenth, Fourteenth and Fifteenth – with the express objective of overturning the Supreme Court's *Dred Scott* decision. Although the amendments were written with the intention of providing the recently freed slave population with full rights of citizenship, acceptance of these rights would take more than a century to be firmly implemented in this country's jurisprudence. See *infra* for a discussion of the legal battles for racial equality.

⁴⁰163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

⁴¹198 U.S., at 53.

⁴²*Id.* at 54.

particularly in the area of employment contracts, by finding time and again that the Fourteenth Amendment included a fundamental right to contract that should be free from governmental interference.⁴³ In 1915, it struck down a state statute forbidding “Yellow Dog” contracts between an employer and employee under which the employee agreed, as a condition of employment, not to be a member of a labor union,⁴⁴ and in 1923, the Court held that federal minimum wage laws for women violated due process protections.⁴⁵

Following the crash of the country’s financial markets at the end of the twenties and as the Great Depression took hold of the country and its economy, criticism about the decisions emanating from the country’s highest court favoring business interests above individuals began to be loudly voiced and apparently heard by the Justices. In 1934, the Court determined in *Nebbia v. New York*⁴⁶ that neither property or contracts rights are absolute, and that occasional regulation by states may be necessary for government to properly function, particularly when

⁴³Noted legal historian Morton Horowitz summed up the Court’s philosophy by describing the *Lochner* holding and its progeny as “the post-Civil War triumph of laissez-faire principles in political economy and of the view that the government is best which governs least.” Horowitz, fn. 6 at 33.

⁴⁴*Coppage v. Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915). Coppage, an employer, forbade his employees from joining labor unions by making it part of their employment contract. The provision outlawing participation in a labor union violated a Kansas law that prohibited anti-union contracts. Finding that the state statute violated Mr. Coppage’s due process rights, the Court held that it was not the government’s job to ensure equal bargaining power. *Id.* at 21.

⁴⁵*Adkins v. Children’s Hospital*, 261 U.S. 525, 435 S.Ct. 394, 67 L.Ed. 785 (1923). The decision in *Adkins* came on the heels of the Nineteenth Amendment granting women the right to vote in 1920. In its reasoning, the Court found that a minimum wage standard would artificially restrict an employer’s side of a wage negotiation. The case was ultimately overturned by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

⁴⁶291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934).

such regulation is used to promote general welfare.⁴⁷ The case arose out of a challenge to maximum and minimum retail milk prices as established by a New York State governmental authority which sought to prevent price cutting. Noting the effects of the Great Depression on milk prices and the significance of milk production to the agriculture sector of the United States' economy, the Court distinguished the regulation at issue with its earlier precedent dealing with Fourteenth Amendment due process protections, and held that the state was within its authority to enact economic policies to further the public good as long as the policy was neither unreasonable, arbitrary or capricious.⁴⁸

The *Lochner* Years are generally thought to have ended in 1937 with *West Coast Hotel Co. v. Parrish*⁴⁹ in which the Court ultimately agreed to a much broader view of the power of states to regulate economic activities, although not without a skirmish amongst the Justices themselves. Before the Court was a challenge to the constitutionality of minimum wage legislation directed at women enacted by the state of Washington. The trial court, using the United States Supreme Court's 1923 *Adkins v. Children's Hospital*⁵⁰ decision as precedent, ruled for the defendant and the Washington Supreme Court reversed the trial court. During their eventual review of the case, the Justices from the United States Supreme Court were sharply divided over the need to adhere to the principles of *stare decisis*⁵¹ and the controlling precedent it

⁴⁷*Id.* at 523.

⁴⁸*Id.* at 525.

⁴⁹300 U.S. 379 (1937).

⁵⁰261 U.S. 525 (1923).

⁵¹A doctrine or policy of following rules or principles laid down in previous judicial decisions unless they contravene the ordinary principles of justice. Definition found at

had established in *Adkins*, as well as the mounting public controversy over their rulings and personal ideologies. After seemingly endless negotiations, the Court finally agreed to depart from the principles it had articulated in *Adkins*, and concluded in its decision that states could be permitted to restrict the liberty to contract to protect the health and safety of vulnerable groups. This consensus was reached only after Associate Justice Owen J. Roberts suddenly, and somewhat inexplicably, altered his long-standing conservative voting pattern a few weeks after President Franklin Roosevelt proposed legislation to reform the Supreme Court and weaken the votes of anti-New Deal Justices.⁵²

While some historians believe that the Supreme Court's radical shift away from the protectionist policies that predominated its discourse in the years prior to the Great Depression arose out of a growing awareness of the world's precarious financial footing, others point to

<<http://www.merriam-webster.com/dictionary/staredecisis>>.

⁵²See, generally, Marian C. McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937* (Fordham Univ. Press, 2002) at 419. Actions to "pack" the Supreme Court by Roosevelt began in 1935 after the Justices unanimously struck down three pieces of New Deal legislation thought by Roosevelt to be a means to lift the country out of the Great Depression. The following year, the Justices declared that several more economic recovery laws proposed by the administration violated the Constitution. Frustrated by the Court's refusal to interpret the Constitution to cede broad control over the economy to the government, Roosevelt and his advisors put together a so-called "court-packing" proposal. Designed under the guise of streamlining the entire federal court system, the proposal was clearly aimed at forcing the retirement of several of the anti-New Deal Justices. The Bill seeking judicial reorganization was sent to Congress in February 1937 and quickly attacked by members of both political parties, including New Deal Democrats who expressed concern over their opponents who equated Roosevelt's actions with those of Hitler in seeking dictatorial power in Europe. In the midst of this court-packing debate, the Supreme Court issued its decision in *West Coast Hotel* with Justice Owen Roberts switching sides to provide the more liberal Justices with a one-vote majority, a move that became known as "the switch in time that saved nine". Although his New Deal legislation was now being upheld by the newly constituted Court, Roosevelt continued to pursue court reform despite strong congressional opposition to his efforts until months later when one of its supporters died, dooming the bill's passage. *Id.*

President Franklin Roosevelt's aggressive actions to alter the Court's membership to include jurists favorably disposed to his desire to enact New Deal legislation.⁵³ Within a hundred days of taking office in March 1933, Roosevelt sought the enactment of hundreds of New Deal laws including many related to banking reform, work relief and agricultural programs. He also instituted new industrial policies to provide aid to the nation's unemployed and its crippled farmers, and to reform business and financial practices that many believed contributed to the Great Depression hoping to stimulate an overall economic recovery. Building upon Roosevelt's New Deal principles and policies, federal and state legislators quickly acted to pass laws promoting labor unions, setting minimum wages for most categories of workers, establishing the nation's social security system, and providing financial aid to tenant and migrant farm workers.⁵⁴

Those critical of the actions taken by the United States Supreme Court during the Lochner Years argue that it discarded sound constitutional interpretation in favor of personal ideology and these commentators charge the Justices with favoring property rights over legislative efforts to enact progressive economic regulations.⁵⁵ During the twenty-five years or

⁵³For a discussion on the debate over the Supreme Court's motivation for its abrupt shift, see, generally, Barry Cushman, *Rethinking the New Deal Court: The Structure of A Constitutional Revolution* (Oxford University, 1998); Bruce Ackerman, *We The People*, Vol. 2: *Transformations* (Harvard University Press, 1998) at 279-382; William E. Leuchtenburg, *The Supreme Court Reborn* (Oxford University Press, 2005) at 132-162; G. Edward White, *The Constitution and the New Deal* (Harvard University Press, 2000) at 198-236; Stephen M. Griffin, "Constitutional Theory Transformed", 108 *Yale L. J.* 2115 (1999); Laura Kalman, "Law, Politics and The New Deal", 108 *Yale L. J.* 2165 (1999).

⁵⁴See, generally, Jonathan Alter, *The Defining Moment: FDR's Hundred Days and the Triumph of Hope* (Random House, 2007).

⁵⁵See generally Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (University of Kansas Press, 1998); Friedman, fn. 36 at 173-177. Attacks upon the Lochner Court's economic decisions came from many fronts and were initially led by Theodore Roosevelt who, by that time, had already served two terms in the White House. In 1912, Teddy

so that followed the end of the *Lochner* era, the Supreme Court continued to uphold economic regulations, but it also began to use the Due Process Clause of the Fourteenth Amendment to protect personal rights, including the freedom of speech⁵⁶ and the right to send one's child to private school⁵⁷, which mark the beginning of a line of cases interpreting privacy rights.

The Warren Court

The tenure of Earl Warren as Chief Justice of the United States Supreme Court between the years 1953 and 1969, is often referred to as the years of the Warren Court, and has been described in the words of one prominent legal authority as “breathtaking”.⁵⁸ Other noted legal scholars have observed that the Warren Court was the driving force for change when the country's political institutions had defaulted on their responsibility to try and address many of the nation's social ills.⁵⁹ Chief Justice Warren led the Court from a pragmatic perspective,

Roosevelt again ran for the presidency, this time as a candidate of the Progressive Party speaking out against corporate corruption of politics and social injustices he viewed as a byproduct of America's industrial revolution. He was particularly critical of the *Lochner* decision, and publically decried the power that rested in the hands of the Supreme Court Justices to nullify what he viewed to be the desire of the nation's citizens. He lost the election, but the battle calling for the removal of life-tenured Supreme Court Justices continued and was picked up by his cousin Franklin Roosevelt when he assumed the presidency in 1933. *Id.* at 167-168.

⁵⁶In *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925), the Court noted that freedoms of speech and the press are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment. *Id.* at 666.

⁵⁷*Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 60 L.Ed. 1070 (1925) (overturning an Oregon law prohibiting private and parochial school education).

⁵⁸Friedman, fn. 36 at 237.

⁵⁹Bernard Schwartz, *The Warren Court: A Retrospective* (Oxford University Press, 1996) at 6. *See also* Brennan, fn. 12. Associate Justice William J. Brennan, Jr. served as a member of the Warren Court and remarked that in his opinion, many of the decisions rendered by the United States Supreme Court during years of 1962 through 1969 had a profound impact on American life, particularly those which extended nine of the specifics of the Bill of Rights to the states. *Id.*

relying on broad ethical principles oftentimes viewing the cases from philosophical and moral perspectives as opposed to limiting their focus to narrow statutory interpretative norms.⁶⁰

It was during these years that the Supreme Court established its role of policymaker in such notorious battles as those fought to rein in centuries-long customs of racial discrimination and school segregation⁶¹, prohibiting states from excluding Blacks from exercising their right to vote by requiring a rule of one-person, one-vote⁶², mandating the implementation of constitutional protections for accused criminals⁶³, and identifying constitutional rights to privacy,⁶⁴ all of which are examined *infra*.

Racial Discrimination and the Twentieth Century Advocacy Movement

The recent appointment of former Second Circuit Court of Appeals Judge Sonia Sotomayor as Associate Justice of the United States Supreme Court stands as a testament to

at 493-494 referencing, *e.g. Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)(Eight Amendment's prohibition of cruel and unusual punishment applied to state action which lead to the striking down of the death penalty as then administered in 1972 in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)(extended right to assistance of counsel to state prosecutions, discussed *infra*); and *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)(Fifth Amendment privilege against compulsory self-incrimination extended, discussed *infra*).

⁶⁰Tushnet and White, fn. 11 at 40-42.

⁶¹See *Brown of Board of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

⁶²See *e.g. Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

⁶³See *e.g. Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Gideon*, 372 U.S. 335 (1963); *Miranda*, 384 U.S. 436 (1966).

⁶⁴See *e.g. Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Cruzan v. Missouri*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990).

more than a century-long battle over racial equality in this country. Justice Sotomayor's path to the nation's Highest Court was laid, in many ways, by the tireless work of advocacy groups such as the National Association for the Advancement of Colored People ("NAACP") who sought to effectuate public policy change through the legal system. As discussed *supra*, during the first half of the twentieth century, the Supreme Court under Chief Justice Lochner focused much of its attention on cases involving economic and business regulation issues. Following World War II, the Court moved in a different direction, and addressed legal questions involving civil rights and civil liberties including various forms of racial discrimination which had begun to creep into the nation's discourse.⁶⁵

Alarmed by the growing disenfranchisement of Blacks that was occurring in many Southern states following the Civil War after legislatures ratified new constitutions which established barriers to voter registration, a small group of prominent African Americans met at a hotel on the Canadian side of Niagara Falls in 1905 to discuss possible strategies to challenge these and other legal prohibitions. Ironically, the group chose Canada as the place to meet since hotels in the United States at that time were segregated by law. Following a large-scale race riot in Springfield, Illinois in 1908, these leaders, who had been joined by several prominent Whites and Jewish-Americans, met in New York City in January 1909, and on February 12, 1909 the

⁶⁵World War II had a profound influence on national attitudes pertaining to segregation. The war was fought against Hitler's theories of White supremacy, and Black soldiers returning home were not willing to embrace what they had valiantly fought against overseas. Powe, fn. 5 at 1627. *See also generally* Roy B. Flemming, John Bohte, B. Dan Wood, "One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-1992", *Leveraging the Law: Using the Courts to Achieve Social Change*, David A. Schultz, ed. (Peter Lang Publishing, 1988), at 22-23, citing Richard L. Pacelle, Jr., *The Transformation of the Supreme Court's Agenda* (Westview Press, 1991).

NAACP was founded.⁶⁶ Specifically identified as part of its mission statement, was the need to promote racial equality and increase opportunities for securing justice through the judicial system.⁶⁷

During its early legal battles, the NAACP focused on using federal courts to overturn state statutes, often referred to as “Jim Crow Laws,”⁶⁸ that had legalized racial segregation. These laws were enacted at the state and local level in this country after the Civil War and, in many instances, stayed in place through the mid-1960s. Jim Crow laws mandated *de jure* segregation of Blacks and Whites in all public places, including schools, restaurants, restrooms and various modes of public transportation under the guise of providing “separate but equal” facilities for Blacks.⁶⁹ In 1913, the group, which had grown to include several thousand members operating out of membership branches throughout the country, organized formal opposition to President Woodrow Wilson’s introduction of racial segregation into federal government policies, offices and hiring practices.⁷⁰ A year later, the group was instrumental in

⁶⁶See Keith Herbert, “Progress by the Decade” *Newsday*, Feb. 12, 2009, at A18.

⁶⁷*Id.*

⁶⁸See generally C. Vann Woodward and William S. McFeely, *The Strange Career of Jim Crow* (Oxford University Press, 2001).

⁶⁹*Id.* Although the Civil Rights Act of 1875, codified at 18 Stat. 335, included a guarantee that all Americans, regardless of their race or color and notwithstanding whether they were freed Slaves, were entitled to the same treatment in public accommodations, it had little, if any, practical impact. While a decision out of the Supreme Court during the late nineteenth century found the Act unconstitutional on other grounds, White Southern Democrats who opposed the abolition of slavery and the extension of equal rights to Blacks held the majority of power in Congress due to the manner in which legislative districts were drawn, and almost all of them refused to pass any other version of civil rights legislation until 1957. *Id.*

⁷⁰J.W. Schulte Nordholt and Herbert H. Rowen, *Woodrow Wilson: A Life for World Peace* (Univ. of California Press, 1991), at 99-100. Wilson was a Southern Democrat and the

winning African Americans the right to serve as officers in World War I. As a result of their efforts, hundreds of Black officers were commissioned and more than half a million registered for the draft.⁷¹

During the years of the first World War, the NAACP continued to seek out opportunities for securing justice for Blacks in the courts by challenging discriminatory statutes and racial segregation practices. In 1915, the group played a significant role in a successful challenge to an Oklahoma statute that sought to disenfranchise Black citizens while exempting Whites from onerous voter registration requirements.⁷² A few years later, members of the organization began a battle that would last for decades pushing for federal legislation prohibiting the prevalent Southern practice of lynching,⁷³ only to be stymied by the fact that there were no African American representatives in Congress during this time, and White Southern Democrats consistently and repeatedly voted against any federal infringement upon states' rights to inflict

first-Southern-born president elected after the Civil War. He appointed fellow Southerners to serve as members of his cabinet, many of whom were vocal in their push for segregated work places even though all of the nation's federal offices had been integrated since the conclusion of the war. Wilson himself also held a firm belief that racial segregation was in the best interests of both Black and White Americans. *Id.*

⁷¹See Woodward and McFeeley, fn. 68.

⁷²See *Guinn & Beal v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915).

⁷³After the period of Reconstruction, White Southerners institutionalized lynching, the act of putting someone to death without a legal trial, as a means of terrorizing, intimidating and controlling Blacks. While most lynchings involved hanging, some victims were shot, burned at the stake, dismembered or in other ways tortured to death. See Mark Curriden, "A Supreme Case of Contempt", *ABA Journal*, June 2009, at 39. After years of persistent pressure by the NAACP, President Wilson finally made a public statement against the practice in 1918. Herbert, fn. 66 at A18.

criminal punishment as they saw fit.⁷⁴

By 1940, it appeared on the surface as though advancements in racial equality were taking place in the country. In 1944, representing the NAACP before the United States Supreme Court, Thurgood Marshall, who would go on to become the country's first African American Supreme Court Justice, persuaded the Court to overturn the Democratic Party's use of all-White primary elections in Texas and several other southern states in *Smith v. Allwright*.⁷⁵

As the first half of the twentieth century approached, the legal battles waged and fought by members of the NAACP also included significant successes in striking down laws that sanctioned segregated facilities in interstate train and bus travel in *Mitchell v. United States*⁷⁶ and

⁷⁴See generally Desmond King, *Separate and Unequal: Black Americans and the US Federal Government* (Oxford University Press, 1995).

⁷⁵321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). Lonnie Smith, a Black voter in Harris County, Texas, sued for the right to vote in a Democratic primary election by challenging a law which permitted the party to enforce a rule that required all voters to be Caucasian. Since the Democratic Party had controlled Southern politics since the late 19th century, most, if not all, Southern elections were decided by the outcome of the Democratic primary. The state argued that the Democratic Party was a private organization and was entitled to establish its own rules of membership, to which Mr. Smith argued that the law as written essentially disenfranchised him by denying him the right to vote in what amounted to the only meaningful election in his jurisdiction. The Supreme Court agreed, and held that the restricted primary election effectively denied Mr. Smith his constitutionally guaranteed equal rights protection. *Id.*

⁷⁶313 U.S. 80, 61 S.Ct. 873, 85 L.Ed. 1201 (1941)(Black U.S. Representative from Illinois traveling by railroad in interstate commerce on first class ticket was denied appropriate accommodation upon reaching Arkansas and forced to move to second class 'colored-only' section of train in violation of Fourteenth Amendment's separate but equal standard).

Morgan v. Virginia,⁷⁷ housing segregation in *Shelley v. Kraemer*,⁷⁸ and graduate school admission in *McLaurin v. Oklahoma Board of Regents*,⁷⁹ all of which laid the predicate for a series of ground-breaking decisions from the United States Supreme Court that would forever change the face of race relations in this country.

School Desegregation

On May 17, 1954, the United States Supreme Court delivered a unanimous seminal decision that dramatically altered the role of the judiciary in American politics and changed prevailing public policy.⁸⁰ *Brown v. Board of Education*⁸¹ was authored by Chief Justice Earl Warren, and is justly regarded as the most important and influential decision of the Warren Court.⁸² Coming after years of decisions in which the judiciary publically acknowledged the

⁷⁷328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317 (1946)(Supreme Court strikes Virginia “Jim Crow” laws mandating racially segregated seating on public conveyances after African American woman was arrested for refusing to move to segregated seating area on public bus).

⁷⁸334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161(1948)(judicial enforcement of racially-based restrictive covenants constitute discriminatory state action prohibited by Fourteenth Amendment).

⁷⁹339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950)(Public institution of higher learning that provided different treatment to student solely based on race violated Fourteenth Amendment equal rights protections).

⁸⁰Long regarded as a symbol of the Court’s role as a defender of minority rights and of what their decisions could achieve, the path to the actual decision in *Brown v. Board of Education* was anything but smooth. See Friedman, fn. 36 at 242-248 for a discussion of the Justices’ considerations pertaining to the release of the *Brown* decision.

⁸¹347 U.S. 483, 74 S.Ct. 686, L.Ed. 873 (1954).

⁸²Horowitz, fn. 6 at 252. See also Schuck, fn. 5 at 1773 (*Brown* is the most famous example of effective judicial activism in the modern history of the Supreme Court); William Lasser, *The Limits of Judicial Power* (University of North Carolina Press, 1988), at 163 (noting that *Brown* forever altered the role of the Supreme Court in American politics and society); Tushnet and White, fn. 11(*Brown* brought with it a new era of Supreme Court jurisprudence in

growing societal shift to accept and honor equal rights treatment for all Americans, the Justices united in *Brown* to abandon long-standing precedent, and hold that legally segregated schools violated the Equal Protection Clause of the Fourteenth Amendment. This formal step would help bring about the dismantling of the apartheid system that had existed in hundreds of Southern and borders state school districts for more than a century,⁸³ and the process of desegregation that resulted from *Brown* has been hailed as one of the greatest social reforms in American history.⁸⁴ The decision was highly visible and deeply affected thousands of citizens who were blatantly subjected to unequal treatment.⁸⁵ *Brown* ultimately led to litigation throughout the country in which judges were forced assume legislative policymaking roles abandoned by elected officials to shape school attendance and management plans, and implement the busing of school children to achieve racial balance.⁸⁶

Before announcing its conclusion that legally segregated schools were unconstitutional, it was necessary for the Court to deal with its own binding precedent that had stood since 1896.

which moral justifications carried greater weight); Gerald N. Rosenberg, “Tilting at Windmills: *Brown II* and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation”, 24 *Law & Ineq.* 31 (2006)(*Brown* is celebrated as one of the Supreme Court’s greatest decisions); Schultz and Gottlieb, fn. 5 at 77 (*Brown* put something on the agenda and made it acceptable and legitimate to criticize segregation).

⁸³Robert A. Kagan, “American Courts and the Policy Dialogue: The Role of Adversarial Legalism”, *Making Policy, Making Law*, Mark C. Miller and Jeb Barnes, eds. (Georgetown University Press, 2004), at 22.

⁸⁴Bradley C. Canon, “The Supreme Court and Policy Reform: The Hollow Hope Revisited”, *Leveraging the Law: Using Courts to Achieve Social Change* (Peter Lang Publishing, 1998), at 230.

⁸⁵*Id.*

⁸⁶*Id.*

*Plessy v. Ferguson*⁸⁷ upheld the constitutionality of racial segregation in public accommodations under the doctrine of ‘separate but equal’ treatment for persons of color. After the Civil War ended in 1865, the federal government attempted to protect the civil rights of the newly-freed slaves during the period of military occupation which became known as the Reconstruction Period by ratifying the Thirteenth Amendment to the U.S. Constitution on December 6, 1865 which abolished slavery.⁸⁸ Also added to the constitutional rights arsenal was the Fourteenth Amendment adopted on July 9, 1868 which enunciated a broad definition of citizenship and effectively overturned *Dred Scott v. Sandford*,⁸⁹ which had prohibited former-slaves and their descendants from possessing constitutional rights.⁹⁰ When Reconstruction ended and federal troops were withdrawn from the Southern states, local and state governments in the area began passing Jim Crow laws legally segregating Blacks from White citizens in public facilities.⁹¹

⁸⁷163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

⁸⁸Herman Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* (W.W. Norton & Co., 1978). The Thirteenth Amendment was an attempt to extend the power of the Emancipation Proclamation issued by President Abraham Lincoln in 1863 that many Southern legislators viewed only as a temporary war measure. *Id.*

⁸⁹60 U.S. 393, 15 L.Ed. 691 (1857).

⁹⁰Alexander Tsesis, “The Inalienable Core of Citizenship: From *Dred Scott* to the Rehnquist Court”, 39 *Ariz. St. L. J.* 1179 (Winter 2007).

⁹¹See Feeley and Rubin, fn. 4 at 159. Following the Civil War and the official abolition of slavery, the Northern states lost their enthusiasm for a long term total transformation of the South’s culture. During the latter decades of the 19th century, that culture gradually came together such that Blacks were banned from holding government positions and in many ways were virtually re-enslaved by means of the segregationist Jim Crow laws, a crop lien system and other forms of political and economic subjugation. These conditions continued during the first half of the 20th century so that the only way for many Blacks to achieve ‘real’ emancipation was to migrate to Northern states. The federal government did not commit itself to achieving equality for Blacks in any real way until after World War II, and truly not until after *Brown* was published in 1954. *Id.*

On June 7, 1882 Homer Plessy, a man of mixed racial heritage, boarded a railroad car in Louisiana designated for white patrons in violation of one of the state's Jim Crow laws. When he refused to leave the car, he was arrested and jailed. During trial, Mr. Plessy's counsel argued that the actions of the railroad company in forcibly removing him from the White-only car violated his Thirteenth and Fourteenth Amendment rights. The judge who presided over his trial ruled that Louisiana had the right to regulate railroad companies who operated within its boundaries. On appeal, the Supreme Court of Louisiana upheld the lower court's ruling, and an appeal was filed with the United States Supreme Court which upheld the lower courts' findings that the Louisiana law did not imply any inferiority of Blacks which would have violated the Fourteenth Amendment, and simply separated the races as a matter of public policy which was well within the state's power.⁹²

It was against this precedent and with this background that Chief Justice Earl Warren concluded that "separate educational facilities are inherently unequal" reversing *Plessy*'s separate but equal doctrine.⁹³ The *Brown* case was actually filed as a class action against the Topeka, Kansas Board of Education in the U.S. District Court for the District of Kansas by parents of children attending public schools in that district. Separate elementary schools had been operated by the Topeka Board of Education under an 1879 Jim Crow law. The plaintiffs in the lawsuit were recruited by leaders of the local branch of the NAACP to serve as representatives of other similarly situated parents of school-aged children who they believed

⁹²*Plessy*, 163 U.S., at 545. See also Harvey Fireside, *Separate and Unequal: Homer Plessy and the Supreme Court Decision That Legalized Racism* (Carroll & Graf, 2004).

⁹³*Brown*, 347 U.S. 483, 489-490, 492-495 (1954).

were being denied equal protection rights under the Kansas law. Each of the plaintiffs in the lawsuit attempted to enroll their children in the nearest neighborhood elementary school in the Fall of 1951. Each were denied enrollment and directed to register at segregated schools. The district court found that segregation had a detrimental effect upon Black children, but ruled in favor of the Board of Education based upon *Plessy v. Ferguson* and the fact that the segregated schools within the district were substantially equal with respect to buildings, transportation, curriculum and the educational qualifications of the teachers.⁹⁴

The *Brown* case was procedurally combined with four others filed by the NAACP in South Carolina, Virginia, Delaware and Washington, D.C. when it reached the United States Supreme Court.⁹⁵ Each of the cases sought relief from the Supreme Court to permit children to attend public schools in their community on a nonsegregated basis.⁹⁶ After analyzing the cases before it and the ‘separate but equal’ doctrine established by *Plessy*, the Court took on the task of looking beyond the facts and the language of the earlier cases which succeeded *Plessy* to address the effect segregation had on public education “in light of its full development and its present place in American life”.⁹⁷ Characterizing education as the most important function of state and local governments, and calling it a foundation for good citizenship and a principal instrument in awakening a child to cultural values, Chief Justice Warren concluded that segregating children in

⁹⁴*Brown v. Board of Education*, 98 F.Supp. 797 (D. Kan. 1951).

⁹⁵The Black plaintiffs in the South Carolina action were children of both elementary and high school age. In the Virginia case, the children were high school students, and the Delaware action involved both elementary and high school age students. *Brown*, 347 U.S., 486 n. 1.

⁹⁶*Id.* at 487.

⁹⁷*Id.* at 492-493.

public schools solely on the basis of race, regardless of whether the physical facilities and other tangible factors might be said to be equal, deprives those children of equal educational opportunities.⁹⁸ He went on to state that segregated schools had “no place” in American society⁹⁹, finally fulfilling the broken promise upon which the nation was founded which is that the full panoply of rights would be extended to all Americans, including those who had formerly been enslaved.¹⁰⁰

Since the cases that formed the basis for the *Brown* decision were class actions and subject to a variety of local conditions, the Court concluded that the formulation of decrees applicable to each of the cases and, indeed, all public schools throughout the country, would be considerably complex, and that a determination as to the appropriate relief for the plaintiffs could be handled more effectively following reargument based upon the Supreme Court’s specific guidance that segregation is a denial of the Black students’ equal protection rights.¹⁰¹ The rehearing on the question as to the appropriate means to be used to implement the Court’s *Brown* principles was held in the Spring of 1955 and resulted in *Brown II*.¹⁰² In *Brown II*, the Court determined that the problems it had identified in its original decision required varied local solutions so it conferred a great deal of responsibility on local school authorities and courts¹⁰³ to

⁹⁸*Id.* at 493.

⁹⁹*Id.* at 495.

¹⁰⁰Feeley and Rubin, fn. 4 at 160.

¹⁰¹*Brown* 347 U.S., at 495-496.

¹⁰²394 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

¹⁰³In light of the debate raised by the issue of school desegregation throughout the country, the Court was understandably concerned about having the lower courts involved in the

implement its mandate based on their evaluation of local schools' physical condition, transportation system, personnel and other conditions. The Court concluded by remanding the cases back to their originating jurisdictions with the instruction to move toward full compliance with the ultimate goal of complete desegregation of all public schools "with all deliberate speed".¹⁰⁴

The Court's "with all deliberate speed" language would prove to be particularly problematic.¹⁰⁵ Critics argued it was too ambiguous to ensure that attempts at desegregation would be made expeditiously. Many Southern states and school districts who had long supported racial segregation as part of their culture interpreted *Brown II*'s ambiguity as providing them with legal justification for resisting and delaying integration for years. Some went so far as to close down school systems or use state money to finance segregated "private" schools to avoid the Court's mandate.¹⁰⁶ Elected officials pledged defiance to the *Brown*

process so as to assess school districts' good faith implementation of its directive based upon equitable principles. *Id.* at 299-300.

¹⁰⁴*Id.* at 301.

¹⁰⁵See Michael J. Klarman, *Unfinished Business: Racial Inequality in American History* (Oxford University Press, 2007) at 153, discussing the Justices' motivation for letting the process play itself out without strict deadlines.

¹⁰⁶See generally Robert C. Smith, *They Closed Their Schools* (University of North Carolina Press, 1965). The federal district court that initially handled the Virginia case that became part of the original *Brown* decision concluded that according to the language of *Brown II*, it was not required to desegregate immediately. In 1959, the county board of supervisors stopped appropriating money for public schools in an attempt to avoid the Court's mandate forcing them to remain closed for 5 years. White students who resided within the county were given financial assistance to attend segregated "private" academies taught by teachers who were formerly teachers in the county's public schools. Black children living within the district had no access to public education unless their families moved out of the county. *Id.*

decisions.¹⁰⁷ In February 1956, U.S. Senator Harry F. Byrd, Sr. united with other White politicians and political leaders in Virginia and undertook the creation of new state laws which would come to be known as the “Massive Resistance” to prevent public school desegregation.¹⁰⁸ At the same time, Senator Byrd joined with Senator Strom Thurmond and more than 100 Southern Congressman and lent their signatures to a document entitled a “Declaration of Constitutional Principles” which later became known as the “Southern Manifesto”. The document accused the Supreme Court of abusing its power, and the lawmakers pledged to bring about a reversal of its decisions in *Brown I and Brown II*.¹⁰⁹

Violent protests erupted over the Court’s *Brown* decisions throughout the country, but they were particularly intense in the South. In 1957, the Governor of Arkansas called out his state’s National Guard to block nine Black students from entering Little Rock High School. President Eisenhower reluctantly responded by deploying troops from the 101st Airborne Division to Arkansas and federalizing Arkansas’ National Guard to restore order.¹¹⁰

¹⁰⁷See Friedman, fn. 36 at 246 (describing the Georgia governor’s refusal to admit Blacks to “White schools” and a similar response from the South Carolina governor who had briefly served on the Supreme Court as an appointee of Franklin Roosevelt).

¹⁰⁸*Id.* While most of the laws created to implement Massive Resistance throughout the South were negated by state and federal courts by 1960, some of the policies which sought to prevent public school integration and the effects of the campaign that was waged continued in Virginia for many more years due to the power and influence of Harry F. Byrd, a former Governor of Virginia and the state’s senior U.S. senator. *Id.*

¹⁰⁹Rosenberg, fn.5 at 78; *see also* Powe, fn. 5 at 60-62 (discussing the Southern Manifesto).

¹¹⁰Eisenhower’s reluctance to send federal troops to Arkansas stemmed from his personal belief that the Justices had erred in calling for school desegregation. According to the memoirs published by Chief Justice Warren, Eisenhower had expressed his personal beliefs to the Justice that Southerners were concerned about having “their sweet little girls ... sit in school alongside some big overgrown Negroes”. Earl Warren, *The Memoirs of Earl Warren* (Doubleday, 1977) at

In the months following the integration crisis in Little Rock, members of the city's school board and its superintendent filed a lawsuit in the United States District Court for the Eastern District of Arkansas asking the federal district court to suspend the desegregation plan it had prepared consistent with the *Brown* decision a few years earlier. In their lawsuit, the plaintiffs argued that public hostility to desegregation and the actions taken by the Governor and the state legislature had created an intolerable and chaotic situation for them and their constituents such that it was necessary for the federal court to return the Black children to segregated schools and delay the implementation of the desegregation plan for two and a half years allowing sufficient time for state laws seeking to dismantle the desegregation process to make their way through the judicial system. The district court granted the school board's request,¹¹¹ but that decision was quickly overturned by the Eighth Circuit Court of Appeals.¹¹² The case reached the United States Supreme Court, and in a strong decision, the Justices reminded the litigants that *Brown* had become the 'supreme Law of the Land' consistent with Article VI of the Constitution and was binding on all of the states as were the instructions laid out in *Brown II* to undertake a prompt and reasonable start towards full compliance and taking such action as was necessary to bring about the end of racial segregation in public schools.¹¹³ The Justices noted that while the Little Rock School Board had moved forward with preparations for desegregating the city's

291 quoting Eisenhower. It was Warren's belief that had Eisenhower stood behind the Court in its decision, it would have "been relieved . . . of many of the racial problems which have continued to plague us". *Id.* See also generally John A. Kirk, *Beyond Little Rock: The Origins and Legacies of the Central High School Crisis* (Univ. of Arkansas Press, 2007).

¹¹¹*Cooper v. Aaron*, 163 F. Supp 13 (E.D. Ark. 1958).

¹¹²257 F.2d 33 (8th Cir. 1958).

¹¹³358 U.S. 1, 18, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958).

schools, other state authorities were actively pursuing a program designed to perpetuate racial segregation in violation of the Fourteenth Amendment.¹¹⁴ Not surprising, the Court publically chastised the Governor and the Arkansas state legislature for their actions by stating “[t]he constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. . . . [L]aw and order are not here to be preserved by depriving the Negro children of their constitutional rights”¹¹⁵ and reminded them that “the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding ...” and that this is “especially true when they are confronted with a problem like a racially discriminating public school system”.¹¹⁶

Violent opposition to school desegregation in Southern and border states would continue in many places for years.¹¹⁷ Time and time again the Supreme Court stood firm and rejected clever excuses offered for maintaining segregation, requiring school districts to adopt plans for immediate desegregation, and expanding remedies to meet its desegregation order. In 1963, the Court invalidated one-way student transfers from schools where a transferee’s race is a minority to one where it predominates.¹¹⁸ The following year the Justices invalidated a local order closing the public schools in Prince Edward County, Virginia to avoid desegregation, as well as the use

¹¹⁴*Id.* at 8-9.

¹¹⁵*Id.* at 16.

¹¹⁶*Id.* at 26.

¹¹⁷Friedman, fn. 36 at 244-250.

¹¹⁸*Goss v. Board of Education*, 373 U.S. 683, 688, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963).

of state tuition grants and tax credits to support private segregated schools for White children.¹¹⁹ Four years later, the Court instructed a local school board to immediately desegregate without further delay.¹²⁰ In 1968, it denounced a plan in which a district sought to operate a dual school system based on race,¹²¹ and in 1971, the Justices upheld the power of federal district court judges overseeing desegregation plans to include busing as part of any remedial decree in order to achieve desegregation.¹²²

In the end, segregation came to an end in this country because the decisions and precedent created by the Warren Court motivated Congress and the Executive branch of government to take off their blinders and undertake the admittedly difficult but essential steps necessary to hold school districts accountable for protecting the rights of Black children to receive the same education as White children.¹²³ The Supreme Court did not limit its efforts to promote policy change to the desegregation of public schools. The Justices also accepted cases which allowed them to build upon their earlier decisions dealing with discriminatory practices in

¹¹⁹*Griffin v. County School Board*, 377 U.S. 218, 225, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964).

¹²⁰*Green v. Country School Board*, 391 U.S. 430, 439, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

¹²¹*See Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20, 90 S.Ct. 29, 24 L.Ed.2d 19 (1968).

¹²²*See Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 30, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

¹²³Title VI of the 1964 Civil Rights Act allowed the U.S. Department of Health, Education and Welfare to cut off federal funds to schools practicing racial discrimination, and in 1965, Congress passed the Elementary and Secondary Education Act, Pub. L. 89-10, 79 Stat. 27, which provided significant federal funding to generally poor Southern schools in order to meet the Court's mandate. *Id.*

transportation, voting, and housing as it sought to ensure that equal rights protection would be extended to American citizens who had been disenfranchised for centuries.

Transportation Desegregation

Bolstered by their achievements in *Brown*, the NAACP continued to pursue desegregation as a matter of public policy through the country's judicial system, particularly in the South. Despite several Supreme Court decisions banning segregation in transportation, interstate travel in the South, like in almost all of its schools, remained segregated. In July 1944, Irene Morgan, a young African-American woman, boarded a bus in Gloucester County, Virginia to travel through the District of Columbia to Baltimore, Maryland and took a seat four rows from the back of the bus. When a White couple boarded the bus and needed seats, the driver instructed Ms. Morgan and her seat mate to move farther back. Ms. Morgan refused and was arrested, jailed and convicted of violating a Virginia segregation law which permitted the bus driver to rearrange passenger seating based upon race and established penalties for those who refuse to abide by that request.¹²⁴

In *Morgan v. Virginia*, the Supreme Court was not asked to evaluate whether Ms. Morgan's equal protection rights had been violated, but, rather, to ascertain whether the statute which established segregation during interstate travel violated the Constitution's Interstate Commerce Clause. The Court held that the Virginia statute imposed so great a burden so as require constant seat changes to accommodate passengers who board and depart a bus within the jurisdiction of the state as to interfere with the need for uniformity in commerce.¹²⁵

¹²⁴*Morgan v. Virginia*, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317 (1946).

¹²⁵*Id.* at 386.

In 1950, the Court addressed a case in which a Black man, who was an employee of the federal government traveling interstate by railroad, was refused a meal in a segregated dining car and filed a lawsuit against the Interstate Commerce Commission to force the railroad company to change its practices. In *Henderson v. United States*¹²⁶, the Justices did not address the ‘separate but equal’ *Plessy* standard, but they did hold that the rules which separated the dining car by races violated a provision of the Interstate Commerce Act which made it unlawful for a railroad to subject any person to unreasonable prejudice or disadvantage.¹²⁷

On December 1, 1955, Rosa Parks made her infamous stand by refusing to give up her seat on a Montgomery, Alabama bus to a White man in accordance with a city ordinance which segregated seating on its buses by race. Ms. Parks, an active member of the NAACP and secretary of the group’s Montgomery chapter at the time, was arrested and jailed. Her act of defiance led to a boycott of the Montgomery bus system by Blacks throughout the city that lasted for almost a year and resulted in riots, arson and bombings throughout the area.¹²⁸

Once the bus boycott was underway, lawyers from the NAACP searched for a case to replicate the earlier strategy it had employed in *Brown v. Board of Education* to challenge the constitutionality of the city and state bus segregation laws. Since Ms. Parks’ case would spend time making its way through the state criminal justice system before a federal challenge could be mounted, a decision was made to seek out city residents who had been discriminated against while riding in the Montgomery bus system. On February 1, 1956, the case of *Browder v. Gayle*

¹²⁶339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302 (1950).

¹²⁷*Id.* at 824.

¹²⁸*See generally* Douglas Brinkley, *Rosa Parks* (Penguin Books, 2000).

was filed in the United States District Court for the Middle District of Alabama seeking a declaratory judgment as to whether the existing bus segregation laws deprived Black citizens of equal protection under the law. On June 19, 1956, a three-judge panel of the district court ruled that in light of the fact that *Plessy* had been effectively overruled by the Supreme Court's decision in *Brown*, there was no rational basis upon which the separate but equal doctrine, which formed the basis for the city and state laws, was justifiable.¹²⁹ On November 13, 1956, the Supreme Court affirmed the decision of the panel without issuing an opinion, effectively abolishing racial segregation on buses.¹³⁰

In 1960, in *Boynton v. Virginia*, the Supreme Court went further and held that bus companies that made services including restaurants and waiting rooms available to interstate passengers during travel were required to desegregate those facilities.¹³¹ Despite the Court's unambiguous mandate, the Interstate Commerce Commission continued to fail to enforce its own desegregation policies and regulations, and Jim Crow travel laws remained in effect throughout the South.

Faced with this reality, civil rights activists sought opportunities to challenge the remaining local laws and customs prevalent in the South which allowed segregation to continue in bus transportation. Beginning in May 1961, groups of them banded together to ride on interstate buses throughout Southern states to force local authorities to adhere to the Supreme

¹²⁹142 F. Supp. 707, 717 (M.D. Alabama 1956).

¹³⁰352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956).

¹³¹364 U.S. 454, 81 S.Ct. 182, 5 L.Ed.2d 206 (1960), *see also* Louis Lusky, "Racial Discrimination and the Federal Law: A Problem in Nullification", 63 *Col. L. Rev.* 1163, 1168 (1963).

Court's *Boynton* decision. Referred to as "Freedom Riders", these activists and the violent reactions they provoked, resulted in massive media attention that helped to bolster the credibility of the Civil Rights Movement. Members of the group were met by angry mobs when they attempted to board and disembark, and many were arrested for violating state and local Jim Crow laws or were charged with trespassing or violating prohibitions against unlawful assembly.¹³²

Congress repeatedly refused to draft legislation prohibiting segregation in interstate travel, forcing civil rights leaders to seek justice from the judiciary who had taken a bold and decisive stand against segregationist practices in their *Brown* decisions. Civil rights activists simultaneously sought to push the Executive branch to action by imploring then-U.S. Attorney General Robert F. Kennedy to petition the Interstate Commerce Commission to comply with its own ruling which had called for bus desegregation after the Supreme Court's decision in *Morgan* several years earlier. That ruling explicitly repudiated the separate but equal doctrine in the realm of interstate bus travel, but under the chairmanship of a South Carolina Democrat, the Commission repeatedly failed to enforce its own ruling. In September 1961, bowing to the pressure brought about by the violence which accompanied the actions of the Freedom Riders and the efforts of the Attorney General's office, the Interstate Commerce Commission finally issued orders and established policies that punished segregation in interstate travel by fines and/or prison terms.¹³³

¹³²See generally Klarman, fn. 105.

¹³³See generally Raymond Arsenault, *Freedom Riders: 1961 and the Struggle for Racial Justice* (Oxford University Press, 2006).

Voting Discrimination

Blacks also faced debilitating obstacles as they sought to exercise their right to vote prior to a number of decisions issued in the latter half of the twentieth century. Although the Fifteenth Amendment added in 1870 assured Black citizens a constitutional right to vote, Jim Crow laws passed by Southern legislatures following Reconstruction effectively ended Black voting in the South. Many states instituted literacy or comprehension requirements as a condition to register, while others imposed poll taxes or residency and record-keeping requirements. Some states sought to protect uneducated Whites from losing their voting rights as a result of these onerous provisions and enacted grandfather clauses to permit illiterate Whites to demonstrate that their ancestors had the right to vote so as to establish their own eligibility. As a result, voter turnout dropped drastically in the South during the late nineteenth and early twentieth centuries.¹³⁴ Denied the ability to vote, Blacks were effectively barred from serving on juries,¹³⁵ or working in local government offices. Incapable of influencing state legislatures or local elections, the needs and interests of African American citizens were consistently overlooked leaving them disenfranchised from the governmental process, a situation that would continue until the 1960s.¹³⁶

¹³⁴By 1903 every Southern state had passed laws limiting the right of Blacks to vote. *See generally* Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910* (Yale University Press, 1974).

¹³⁵A *de jure* disqualification of Blacks for jury service based on their race was addressed by the Supreme Court which held that the practice was a denial of equal rights protection as early as 1880 in *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880).

¹³⁶*See Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964)(abolishing rural over-representation in congressional districts by mandating that same be drawn approximately equal in population); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 136, 12 L.Ed.2d 506 (1964)(seats in both houses of bicameral state legislature must be approximately equal in

The United States Supreme Court first visited voting restrictions, an area long-believed to fall within the exclusive province of state law, in 1901 in *Guinn & Beal v. United States*¹³⁷ when it struck down the grandfather clause contained in Oklahoma's voting laws as violative of the Fifteenth Amendment. The statute required voters to pass a reading test to prove their eligibility, but exempted those individuals who could prove their ancestors (i.e. "grandfathers") were entitled to vote on January 1, 1866, just after the Civil War concluded. Many local voting registration officials interpreted the Act to mean that they could flatly refuse to administer literacy tests to Blacks or could impose ones that were unreasonably difficult.¹³⁸ Concerned about constitutional violations, the federal government prosecuted Oklahoma voting officials for criminal conspiracy to deny voting rights to Blacks. The Supreme Court affirmed the convictions and struck down the law as a blatant attempt to disenfranchise Blacks since it was based solely on a period of time before the enactment of the Fifteenth Amendment and made that time frame the controlling and dominant test of an individual's right to vote.¹³⁹ Despite the Supreme Court's admonitions of the actions of the state and its expression of a need for the country's legislatures to act to put an end to the bald unconstitutional process, neither Congress nor the Executive branch acted to correct discriminatory voting restrictions.

As a result, the Supreme Court was forced to look at voting discriminatory practices

population). These cases form the basis of one-person-one-vote in this country.

¹³⁷238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915).

¹³⁸Pamela S. Karlan, "The Right to Vote: Some Pessimism About Formalism", 71 *Tex. L. Rev.* 1705 (1993); Christopher L. Tomlins, *The United States Supreme Court: The Pursuit of Justice* (Houghton Mifflin Harcourt, 2005), at 195.

¹³⁹*Guinn* 238 U.S., at 355.

again twelve years later, this time in the context of Texas primary elections. In Texas in the early 1900s, as in most of the South, the Democratic primary proved to be the real election, with the general election being merely a procedural formality. Keenly aware of this reality, the Democratic parties of all of the Southern states, who controlled the states' legislatures, enacted laws that banned Blacks from voting in their primaries. In *Nixon v. Herndon*,¹⁴⁰ a Black physician tried to vote in the Democratic Party primary of 1924 but was prohibited from doing so by election officials who relied on a Texas statute which banned Blacks from voting in primary elections. Dr. Nixon commenced an action in the United States District Court for the Western District of Texas charging that the statute violated his Fourteenth and Fifteenth Amendment protections. The district court dismissed the suit based upon the defendants' argument that the court lacked jurisdiction over the issue since it was a political question, and an appeal was filed with the United States Supreme Court. In an opinion authored by Justice Oliver Wendell Holmes, a unanimous Court reversed the lower court and rejected the defendants' political question argument as "little more than a play upon words".¹⁴¹ When looking at the substance of the claim, the Court stated that it was "hard to imagine a more direct and obvious infringement of the Fourteenth Amendment".¹⁴²

Determined to restrain Blacks from voting, Texas state legislators quickly enacted a new provision restricting voter participation by giving political parties the authority to determine who should vote in their primaries. Within months, the Executive Committee of the Texas

¹⁴⁰273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927).

¹⁴¹*Id.* at 540.

¹⁴²*Id.* at 541.

Democratic Party passed a resolution that only Whites were permitted to participate in the upcoming primary election. Five years later, Dr. Nixon once again appeared before the United States Supreme Court as a plaintiff challenging Texas' all-White primary elections.¹⁴³ In *Nixon v. Condon*,¹⁴⁴ the defendants argued that there was no state action and, therefore, no equal protection violation since the Texas Democratic Party was a voluntary association which had the power to choose its own membership.¹⁴⁵ The Supreme Court soundly rejected this ruse reasoning finding that because the Texas statute gave the party's Executive Committee the authority to exclude would-be members of the party, it was, in fact, acting under a state grant of power and was subject to the Court's earlier ruling in *Nixon v. Herndon*.¹⁴⁶

The Court also invalidated other blatant attempts to disenfranchise Black voters. In one case heard by the Court in 1960, the Alabama legislature had redrawn the city boundaries to exclude nearly all of the Black residents of Tuskegee, Alabama. In *Gomillion v. Lightfoot*,¹⁴⁷ the Court stated that it would look past the obvious question as to why all of the city's Black residents had "suddenly" moved out of the city limits, and summarily threw out the redistricting

¹⁴³Note, "*Nixon v. Condon*. Disenfranchisement of the Negro in Texas", 41 *Yale Law J.*, 1212 (1932).

¹⁴⁴286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932).

¹⁴⁵There can be no equal protection violation without state action. *Id.* at 83 citing *U.S. v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1875); *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664; *Ex Parte Virginia*, 100 U.S. 339, 346, 25 L. Ed. 676 (1879); *James v. Bowman*, 190 U.S. 127, 136, 23 S.Ct. 678, 47 L. Ed. 979 (1903).

¹⁴⁶*Id.* at 88. The Supreme Court also addressed two other cases brought to it to review statutes prohibiting Blacks from voting in Texas primary elections - *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935) and *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944) each of which had a similar result.

¹⁴⁷364 U.S. 339, 81 S.Ct. 125, 5 L.ed.2d 110 (1960).

plan.¹⁴⁸

Throughout this time, the Supreme Court remained steadfast in its promise to provide Blacks with their constitutionally guaranteed protections. Until 1957, it spoke virtually alone as a governmental voice calling for the abolition of discriminatory practices in this country as the other two branches were reluctant to address the plight of African-Americans until Congress finally acknowledged the will of the nation and passed its first Civil Rights Act in more than eight decades.¹⁴⁹ This Act was limited in its scope, but did include some voting rights provisions, and authorized the Justice Department to initiate suits on behalf of Blacks who were deprived of these rights.¹⁵⁰ In 1960, Congress passed another Civil Rights Act¹⁵¹ that was again limited, although it did add some minor provisions intended to protect Black's voting rights that were not addressed in the 1957 legislation.

It was not until five years later that Congress finally took steps to ensure that Blacks would be able to vote in their home districts by enacting the Voting Rights Act of 1965.¹⁵² Unlike the earlier statutes, the Voting Rights Act of 1965 provided for direct federal action to enable Blacks to exercise their voting rights. The Act suspended all literacy tests and directed

¹⁴⁸*Id.*

¹⁴⁹*See* Pub. L. 85-315, 71 Stats. 634-638 (1957).

¹⁵⁰The Eisenhower Justice Department instituted only three suits involving voting discrimination under the 1957 Civil Rights Act. Rosenberg, fn. 5 at 59.

¹⁵¹*See* Pub. L. 86-449, 74 Stat. 86 (1960).

¹⁵²79 Stat. 437, codified at 42 U.S.C. § 1973.

the Attorney General to file a lawsuit challenging the constitutionality of poll taxes.¹⁵³

Housing Discrimination

After World War II, many Black servicemen who had risked their lives in service to the country sought to assimilate themselves back into civilian life and many hoped to join the country's burgeoning middle class at a time when discriminatory practices in housing were prevalent throughout the nation. The Supreme Court brought judicial attention to this virulent practice, and made the first of its positive contributions towards ending the practice in *Shelley v. Kraemer*¹⁵⁴ in 1948. The *Shelley* case was actually a combination of two lawsuits filed by Blacks involving restrictive covenants barring persons of color from owning property for residential purposes.¹⁵⁵ Until *Shelley* reached the Supreme Court, it was thought that this form of private discrimination was legal because restrictive covenants were private agreements without state involvement.¹⁵⁶ The nation's highest court disagreed with this interpretation, and found that judicial enforcement of discriminatory restrictive covenants constituted state action that was

¹⁵³Poll taxes were rendered unconstitutional in federal elections by the enactment of the Twenty-Fourth Amendment in 1964. In 1966, the Supreme Court held that poll taxes were also unconstitutional in state elections as violative of the Fourteenth Amendment. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966).

¹⁵⁴334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

¹⁵⁵*Id.* at 10. Restrictive covenants are provisions in deeds limiting or restricting the use of the property that are transferrable at the time of purchase. Discriminatory covenants were used to prevent minorities from moving into suburban White residential neighborhoods. A group of homeowners would agree not to sell or rent their homes to Black Americans and other minorities by including this restriction in their real estate deeds. *See* Michael Jones-Correa, "The Origins and Diffusion of Racial Covenants", 115 *Pol. Sci. Quarterly* 541 (2001).

¹⁵⁶*Shelley*, 334 U.S. 1, at 12-13.

specifically prohibited by the Fourteenth Amendment.¹⁵⁷

In 1953, the Supreme Court built upon *Shelley* by holding that a race-based restrictive covenant could not be enforced at law through a suit for damages against a co-covenantor who broke the covenant by selling property to Blacks as such enforcement would constitute state action.¹⁵⁸ The Court did not hear another housing discrimination case until 1967 when it struck down an amendment to the California state constitution. In *Reitman v. Mulkey*,¹⁵⁹ the Justices found that the language of the California amendment in question would actually encourage, and impermissibly involve the state in private racial discrimination contrary to the Fourteenth Amendment.¹⁶⁰

A year later, Congress finally lifted itself from its political lethargy and enacted provisions banning housing discrimination more than twenty years after the Supreme Court's *Shelley* decision. The legislation codified many of the policies created by the Warren Court dating back to the early fifties, and included Title VIII which came to be known as the Fair Housing Act.¹⁶¹

The history of action by Congress and the Executive branch in combating housing

¹⁵⁷*Id.* at 20-21.

¹⁵⁸*Barrows v. Jackson*, 346 U.S. 249, 254, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

¹⁵⁹387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967).

¹⁶⁰*Id.* at 376. In 1964, pursuant to an initiative and referendum, art. I, §26, was added to the California state constitution providing in part that neither the State nor any agency thereof "shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." *Id.*

¹⁶¹Codified at 42 U.S.C. § 3601-3631. The Fair Housing Act expressly prohibits racial discrimination in the sale or rental of residential housing.

discrimination was, without a doubt, appalling until the passage of the Fair Housing Act. The principal government financial agencies responsible for supervising and regulating home-mortgage lenders actually endorsed racially discriminatory lending practices until the passage of this statute, and since federal funds make up a large part of mortgage financing, government policies also actively contributed to segregated housing prior to the statute's enactment.¹⁶² Although the Truman Administration articulated its support of efforts to outlaw restrictive covenants in *Shelley* as an *amicus*, subsequent administrations did little else to stem the tide of discriminatory practices until the passage of the Fair Housing Act, and even supported the principal that builders and lenders should be free to make decisions as to who could buy or rent even when federal financing was involved.¹⁶³

The Civil Rights Act of 1964

After more than a decade of overt violence and massive protests, Congress finally embraced the national policy sentiment expressed by Chief Justice Earl Warren and the Justices of the Supreme Court in *Brown I* and *Brown II*, and enacted the Civil Rights Act of 1964.¹⁶⁴ The Act represented the most far-reaching civil rights statute since the Reconstruction Era, and invoked the power of the Commerce Clause to outlaw discrimination in all public accommodations including privately owned restaurants, hotels and stores, and in private schools and workplaces. Several months after it was passed, the Supreme Court upheld the use of the

¹⁶²Rosenberg, fn. 5 at 68.

¹⁶³See *Levitt and Sons, Inc. v. Division against Discrimination*, 31 N.J. 514, 158 A.2d 177, 181 (N.J. 1960), *cert. denied*, 363 U.S. 418 (1960).

¹⁶⁴Pub. L. 82-352, 78 Stat. 241 (1964).

Commerce Clause in *Heart of Atlanta Motel v. United States*,¹⁶⁵ and finally brought some measure of resolution to the thousands of Blacks who sought judicial review to sustain their fundamental constitutional rights.

Criminal Rights Protections

While the Warren Court may be best known and recognized for its ground-breaking decisions which paved the way for desegregation in this country, the Court was no less instrumental in protecting the constitutional rights of those accused of committing a crime.¹⁶⁶ In 1961, the Court held that evidence obtained in violation of the Fourth Amendment prohibition against unreasonable searches and seizures that had previously been outlawed in federal criminal trials could also not be used in state criminal prosecutions.¹⁶⁷ Two years later, it again addressed a criminal suspect's procedural rights and spelled out the Sixth Amendment requirement that an

¹⁶⁵379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964). *Heart of Atlanta* was an action brought by a motel operator seeking to challenge the constitutionality of the 1964 Civil Rights Act. Relying on voluminous Senate and House hearing testimony recounting the discrimination faced by Blacks who sought rest at hotels and motels while traveling interstate, the Court concluded that by relying upon the Commerce Clause as the basis for the Act, Congress was well within its right to legislate in an area that concerns more than one state and has a real and substantial relationship to the national interest. *Id.* at 254-255.

¹⁶⁶Critics of the Warren Court point to its decisions involving criminal rights protections, and particularly its 1966 decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, as its ultimate undoing which pushed the judicial pendulum back to conservative right leanings with the election of Richard Nixon in 1968. Supporters defend against this charge, and suggest that by the time criminal rights issues reached the High Court, the country was deeply embroiled in deadly civil rights riots which brought with it millions of dollars worth of property destruction in cities, and violent protests against the Vietnam War. In 1965, Black activists Huey P. Newton and Bobby Seale formed the militant Black Panthers. See Thomas Byrne Edsall and Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics* (W.W. Norton & Co., 1992) at 58-59; Friedman, fn. 36 at 270-277. As will be seen *infra*, the Supreme Court acted to bring national uniformity to laws governing the treatment of criminal suspects by gradually incorporating Bill of Rights protections to the states.

¹⁶⁷*Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

accused shall have the assistance of counsel.¹⁶⁸ Three years later, the Justices articulated that in order for the Fifth Amendment's privilege against self-incrimination to be effective, it was necessary for law enforcement officials to advise a suspect being interrogated of his right to remain silent and have access to an attorney, a procedure that was considered earth-shattering in 1966, but is so common place today as to be incorporated into every television or movie drama depicting an arrest.¹⁶⁹ Additionally, in 1967, the High Court established that under the Fourteenth Amendment, juveniles accused of committing a crime facing consequences in a delinquency proceeding were required to be accorded the same due process rights as adults.¹⁷⁰

Each of these opinions are considered milestones in American jurisprudence, and at the time they were issued by the Warren Court, all were thought to be part of a dangerous criminal rights or due process revolution capable of destroying the country's criminal justice system.¹⁷¹ History has shown that the hysteria that followed each of these protection pronouncements was overblown and unjustified. The American criminal justice system, and the protections it provides to those accused of committing a crime, remains one of the most respected and admired in the world.

The Fourth Amendment's Prohibition Against Unreasonable Search and Seizure

Mapp v. Ohio arose out of an incident involving the Cleveland Police Department. After receiving an anonymous tip that the defendant was harboring a suspected bombing fugitive, the

¹⁶⁸*Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

¹⁶⁹*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

¹⁷⁰*In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

¹⁷¹Rosenberg, fn. 5 at 304; *see also* Kagan, n. 83 at 25.

police demanded access to the defendant's home to conduct a search even though they did not have a warrant. Dollree Mapp refused to allow the police into her home in the absence of a warrant. The police persisted and during the search of her home, they found a suitcase which contained pornographic drawings, but no sign of the suspected fugitive. The police arrested Ms. Mapp for violating an Ohio law which prohibited the possession of obscene material. She was convicted, and the case made its way through the Ohio state court system before being heard by the United States Supreme Court.

The basis for Ms. Mapp's defense was that she was wrongfully prosecuted because the evidence obtained by the police resulted from an illegal, warrantless search. While the Fourth Amendment explicitly protects individuals from unreasonable searches and seizures, it does not instruct courts as to how they should treat a search conducted without a warrant. Prior to *Mapp*, the Supreme Court had previously determined that the government could not use evidence obtained without a warrant in a federal criminal prosecution in 1914 in *Weeks v. United States*.¹⁷² *Weeks* involved the illegal seizure of items from a private residence. The Supreme Court held that such a seizure constitutes a Fourth Amendment violation, and it set up the Exclusionary Rule which prohibits the admissibility of such illegally obtained evidence in a federal court prosecution.¹⁷³ The law remained unsettled on the state level with respect to evidence of a crime obtained without warrants, and oftentimes federal prosecutors would "tip" their state counterparts of information that could be admissible on a state level to sustain an arrest and

¹⁷²232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

¹⁷³*Id.*

possible conviction, but would be prohibited during a federal prosecution.¹⁷⁴ When analyzing the basis for the defendant's conviction in *Mapp*, the Supreme Court put an end to this under-the-table practice and declared that the Exclusionary Rule applied to state prosecutions through the Due Process Clause of the Fourteenth Amendment".¹⁷⁵

The Sixth Amendment Right to Counsel

In 1963, a unanimous Court held that indigent criminal defendants must be provided with the assistance of counsel in *Gideon v. Wainwright*¹⁷⁶ and, in so concluding, the Justices dramatically changed the criminal justice landscape. Prior to this ruling, a decision as to whether counsel was required was dependent upon the circumstances surrounding a particular case which meant courts had to determine on a case-by-case basis whether a lack of legal representation effectively denied an accused his or her due process rights so as to render a criminal trial unfair.

Mr. Gideon appeared before a Florida state court judge in connection with a misdemeanor breaking and entering charge, and advised the judge that he did not have a lawyer and was unable to pay for legal representation. The judge somewhat reluctantly advised Mr. Gideon that he was without power to appoint counsel for him under the laws of Florida which restricted appointment to individuals charged with a capital offense. Mr. Gideon was forced to represent himself and was convicted and sentenced to serve five years in prison.¹⁷⁷

¹⁷⁴See generally, Carolyn Long, *Mapp v. Ohio: Guarding Against Unreasonable Searches and Seizures* (Kansas Univ. Press, 2006); Potter Stewart, "The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases", 83 *Col. Law R.* 1365 (1983).

¹⁷⁵*Mapp* 367 U.S., at 655.

¹⁷⁶372 U.S. 335 (1963).

¹⁷⁷*Id.* at 336-337.

After appointing counsel to represent Mr. Gideon,¹⁷⁸ the Supreme Court undertook an analysis of all of the constitutional implications before overruling earlier precedent which had permitted states to selectively apply the Sixth Amendment right to counsel.¹⁷⁹ In plain language, the Court recognized it to be an “obvious truth” that the right to counsel was “fundamental and essential to fair trials” before reversing the state court judgment and remanding the action back to the state trial court.¹⁸⁰

Gideon was a clear and concise statement from the Court which had enormous practical effect. By interpreting the Constitution to require local governments to provide legal assistance to indigent defendants, the Justices played a significant role in the creation and funding of public defender offices throughout the country.¹⁸¹

The Fifth Amendment Protection Against Self-Incrimination

In yet another landmark decision involving criminal rights protections, the Supreme Court extended the Fifth Amendment guarantee against self-incrimination in *Miranda v. Arizona*¹⁸² by requiring police to inform suspects they have taken into custody of their explicit constitutional rights. Prior to this ruling, the Court had invalidated the use of an incriminating statement obtained from a suspect during a police interrogation in 1964 in *Escobedo v. Illinois*

¹⁷⁸*Id.* at 338. The Court tapped Abe Fortas to present Mr. Gideon. Mr. Fortas would later be appointed by President Lyndon Johnson to sit as Associate Justice of the Supreme Court, and was considered a staunch supporter of children’s rights, authoring the majority opinion in *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) discussed *infra*.

¹⁷⁹*Id.* at 339.

¹⁸⁰*Id.* at 344.

¹⁸¹Kagan, fn. 83 at 23; Rosenberg, fn. 5 at p. 330.

¹⁸²384 U.S. 436 (1966).

where the suspect was denied access to counsel.¹⁸³ The defendant in *Escobedo* had requested, but was denied, a chance to consult with his lawyer during an intimidating interrogation which lasted for four hours while the suspect was handcuffed and standing, and had not been warned by the police questioning him that he had a Fifth Amendment right to remain silent.¹⁸⁴

The *Escobedo* case generated a spirited legal debate in the two years preceding *Miranda* and saw uneven application in state and federal courts.¹⁸⁵ The Court's holding in *Miranda* went beyond providing for constitutional protections during police interrogations. Ernesto Miranda was arrested for robbery and while in custody, he confessed to raping a young woman two days earlier. At trial, state prosecutors offered his rape confession, and also offered the rape-victim's positive identification of Mr. Miranda as her assailant. He was convicted of rape and kidnapping and sentenced to 20 to 30 years on each charge. Consistent with the Supreme Court's decision two years earlier in *Gideon*, Mr. Miranda was represented by a court-appointed lawyer who appealed the conviction to the Arizona Supreme Court on the grounds that Mr. Miranda did not have an attorney present at the time he signed his written confession.¹⁸⁶

¹⁸³378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

¹⁸⁴*Id.* The contextual background for the Court's decision involved police interrogation practices at the time thought by many to be barbaric and unjust. For a discussion of same see generally Gary L. Stuart, *Miranda: the Story of America's Right to Remain Silent* (Univ. of Arizona Press, 2004). See also Rosenberg, fn. 5 at 324 (police brutality to obtain confessions was rampant practice at time of *Miranda* holding); Brennan, fn. 12 (decades of police coercion ranging from torture to trickery came to an end in *Miranda*).

¹⁸⁵*Miranda*, 384 U.S., at 440-441 n. 1 comparing *United States v. Childress*, 347 F.2d 448 (7th Cir. 1965), with *Collins v. Beto*, 348 F.2d 823 (5th Cir. 1965); *People v. Dorado*, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361 (1964) with *People v. Hartgraves*, 31 Ill.2d 375, 202 N.E.2d 33 (1964).

¹⁸⁶*Arizona v. Miranda*, 98 Ariz. 18, 401 P.2d 721, 728 (Ariz. Sup. Ct. 1965).

In a lengthy opinion reviewing long-standing constitutional precedent and many cases in which police interrogation practices were particularly brutal, the Court identified the Fifth Amendment privilege against self incrimination as “fundamental” to an accused’s constitutional rights.¹⁸⁷ Chief Justice Earl Warren, writing for the majority, established without ambiguity that in a criminal proceeding, “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination”.¹⁸⁸ The Court went even further, and laid out the procedural safeguards to be followed by police. Relying on both the Fifth and Sixth Amendments, Chief Justice Warren stated that prior to any questioning of a suspect, law enforcement officials must warn the individual “that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed”.¹⁸⁹ Finally, the Court went on to find that as part of the mandated procedural requirements, once a suspect requests counsel, all questioning must stop, and the police may not question suspects who have indicated they do not wish to talk, even if they have already answered some questions or made any statements.¹⁹⁰

As stated previously, the Court’s *Miranda* decision dramatically altered the conduct of police officers’ interrogation of suspects, and has become a widely accepted part of this nation’s

¹⁸⁷*Miranda*, 384 U.S., at 468.

¹⁸⁸*Id.* at 444.

¹⁸⁹*Id.* at 444-445.

¹⁹⁰*Id.*

criminal justice system even though it was widely criticized when it initially came down. Many supporters of law enforcement personnel, particularly unions representing police officers, were angered by the negative view the decision painted of law enforcement personnel. Other critics of the decision thought it would be detrimental to inform suspected criminals of their rights as carefully mapped out by the Court. Richard Nixon, who was elected President in 1968, ran for the presidency on an anti-crime platform. He joined with other conservatives in denouncing the decision for undermining the efficiency of law enforcement and argued that the decision would result in a further increase in crime which was on the rise across the country.¹⁹¹ As the years wore on, however, the terms of *Miranda*, particularly the language of the warnings, grew to be a universally accepted and an anticipated procedure.

Constitutional Protections for Juvenile Defendants

For many years, the juvenile justice system did not include due process protections that are an integral component of an adult suspect's rights when he or she is accused of a crime.¹⁹² Separate courts to adjudicate juvenile crimes were initially established in this country around the start of the twentieth century, and arose out of a public sentiment that the adversary system with its elaborate procedural protections designed to protect an accused from a hostile state were

¹⁹¹See fn. 166 describing the violence occurring throughout the country at the time of the *Miranda* decision.

¹⁹²Prior to 1967, courts were divided on the existence and operation of constitutional protections during juvenile adjudicative hearings. Some state statutes provided that the issue of whether a juvenile should have counsel appointed to represent him was one left to the discretion of the individual court. The privilege against self-incrimination was virtually unrecognized, and some juvenile courts took the position that ordinary rules of criminal procedure would interfere with the relationship between the child and the court. See Norman Lefstein, Vaughan Stapleton, and Lee Teitelbaum, "In Search of Juvenile Justice: *Gault* and Its Implementation," 3 *Law & Soc'y Rev.* 491, 492-493, n. 2 (1968)(citations omitted).

inappropriate in a juvenile setting since delinquency was generally thought to be a social disease. As such, it was believed that experts such as social workers, teachers and physicians would be better suited to work with judges to obtain a ‘cure’ for the child.¹⁹³ As a result of this thinking, the philosophical underpinnings of the juvenile justice system in this country evolved with the intention to rehabilitate youths rather than ascertain guilt.¹⁹⁴ With this predicate, juvenile courts adopted a paternalistic approach, ostensibly focused on the needs of the children who appeared before them. Since this was the goal of these courts, criminal procedure rules were thought to be as inapplicable as the concepts of crime and punishment.¹⁹⁵

As well intentioned as this premise appeared to be, the stories of what transpired in juvenile courts revealed a darker, more sinister reality. The public grew disillusioned with what many viewed as social scientists’ experiments with troubled children, as well as with the legitimacy of those controlling the juvenile justice system. As a result, judges and courts were no longer viewed in a benevolent light and came to be viewed as oppressive.¹⁹⁶ In 1967, the Supreme Court changed the juvenile justice system that had existed for decades by deciding that children accused of committing a crime who were adjudicated in a delinquency proceeding must be accorded many of the same due process rights as are available to adults in *In re Gault*.¹⁹⁷

¹⁹³Horowitz, fn. 6 at 233-234. *See also*, Julian W. Mack, “The Juvenile Court”, 23 *Harv. L. Rev.* 104, 107 (1909)(juvenile offenders were to be dealt with “as a wise and merciful father” would deal with his own children).

¹⁹⁴Rosenberg, fn. 5 at 314.

¹⁹⁵Horowitz, fn. 6 at 233.

¹⁹⁶*Id.* at 234.

¹⁹⁷387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). *See also* Lefstein, fn. 192.

Gerald Gault was 15 years old when he was charged with making a lewd telephone call to a female neighbor.¹⁹⁸ He and another juvenile were taken into custody and removed to a children's detention center without parental notification. At a detention hearing held in the local county juvenile court the following day, at which the complainant failed to appear, Gerald was questioned by the judge during which he admitted to making a lewd statement. No record was made of the proceeding and the judge indicated he would 'think about it' and ordered Gerald returned to the detention center. More than a week passed before a subsequent hearing was held and again the accused was absent. After reviewing a report made by state probation officials which was not made available to Gerald or his parents, the judge declared him to be a juvenile delinquent and committed him to the state's industrial school until his 21st birthday.¹⁹⁹

At the time, Arizona law did not permit any appeal in juvenile cases. Gerald's parents petitioned the Arizona Supreme Court for a writ of habeas corpus to obtain their son's release and the state's high court referred the case back to the original county juvenile court. During a hearing in the juvenile court, the judge who issued the commitment order was questioned as to the basis of his delinquency conclusion.²⁰⁰ The county court dismissed the Gault's habeas corpus writ, and they appealed its dismissal to the Arizona Supreme Court.²⁰¹ There, the Gaults alleged that the Arizona Juvenile Code was unconstitutional since it did not require that notice of the

¹⁹⁸In the Supreme Court decision, Justice Fortas who authored the opinion for the majority noted that "for purposes of this opinion . . . [it was sufficient] "to say that the remarks or questions put to her were of the irritatingly offense, adolescent, sex variety". *Id.* at 4.

¹⁹⁹*Id.* at pp. 4-8.

²⁰⁰*Id.* at 8-9.

²⁰¹*See* 99 Ariz. 181, 407 P.2d 760 (Ariz. Sup. Ct. 1965).

specific charges be provided to either the accused or his parents, there was no requirement that a juvenile's parents be given proper notice of the hearings, and no appeal was permitted. The Gaults also argued that the actions of the county officials constituted a denial of their son's constitutional rights protections.²⁰² The Arizona Supreme Court affirmed the dismissal of the habeas corpus writ, and while the Court acknowledged that the constitutionality of the juvenile court proceedings required the adherence to some due process requirements, they found that a juvenile proceeding differed from a criminal one,²⁰³ and concluded that the Arizona Juvenile Code and the proceedings in the Gault case did not violate the minor's rights.²⁰⁴

Observing that the Court had not previously delivered an opinion as to the issue presented by the Gaults, Justice Fortas, who championed a number of children's rights causes throughout his career, found that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone".²⁰⁵ After discussing the development and history of the juvenile court system in this country, Justice Fortas observed that "[d]ue process of law is the primary and indispensable foundation of individual freedom . . . which defines the rights of the individual and delimits the power which the state may exercise".²⁰⁶ He noted that some courts had found that juveniles benefitted from the special procedures applicable to them and that this claimed benefit could offset the disadvantages they suffered as a result of a denial of some substantive due process

²⁰²*Id.*

²⁰³*Id.* at 766-768

²⁰⁴*Id.* at 768.

²⁰⁵*In re Gault*, 387 U.S., at 12 (1967).

²⁰⁶*Id.* at 20.

rights,²⁰⁷ but cautioned against relying on such sentiment as a basis for denying the extension of fundamental due process protections to juveniles, since an extension of same would not work to impair the beneficial features of the juvenile justice system.²⁰⁸ Justice Fortas was skeptical on the question of whether youthful offenders actually received the special considerations and treatment that supporters of the existing system claimed were available to them, and was particularly critical of the stigma created by the terminology used to describe juveniles as ‘delinquents’ and he expressed same in this opinion.²⁰⁹

Moving beyond the philosophical justifications for the nation’s juvenile justice system, Justice Fortas focused on the harm done to Gerald Gault and others like him who were committed to institutions and deprived their liberty without receiving due process protection. He famously noted that “[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court,”²¹⁰ and remarked that had Gerald been over 18, he would have been entitled to due process rights and representation of counsel, and would have faced a potential fine of five to fifty dollars or imprisonment in jail of not more than two months as opposed to being committed to a state-run institution for six years.²¹¹ Concluding that the wide disparity of treatment of adults and children required protection beyond ‘mere verbiage’,²¹² Justice Fortas ruled that Gerald’s

²⁰⁷*Id.* at 21-22, citing Note, “Rights and Rehabilitation in the Juvenile Courts”, 67 *Col. L. Rev.* 281, 321 *and passim* (1967).

²⁰⁸*Id.* at 22-23.

²⁰⁹*Id.* at 24 fn. 30 and 31.

²¹⁰*Id.* at 28.

²¹¹*Id.* at 29.

²¹²*Id.* at 29-30.

commitment was a clear violation of his Fourteenth Amendment due process rights since he had been denied the right to legal counsel,²¹³ had not been formally notified of the charges against him,²¹⁴ and had not been informed of his Fifth Amendment right against self-incrimination.²¹⁵

The Court's decision in *In re Gault* was considered revolutionary by many legal commentators and completely revamped juvenile judicial proceedings in this country.²¹⁶

Development of Privacy Rights

Having watched the success achieved by the NAACP and others who were able to curtail racial discrimination through the legal process, many women's rights groups sought to follow the predicate established by these groups to bring about societal change as it relates to gender equality through Fourteenth Amendment equal protection challenges.²¹⁷ Where the Supreme

²¹³*Id.* at 41.

²¹⁴*Id.* at 33-34.

²¹⁵*Id.* at 55.

²¹⁶*See generally* Lefstein, fn. 192.

²¹⁷*See generally* Caruthers Gholson Berger, "Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women", 5 *Val. U. L. Rev.* 326 (1971). For examples of cases that relied on gender-based equal rights protection violations as they relate to women, *see Reed v. Reed*, 404 U.S. 1, 92 S.Ct. 5, 30 L.Ed.2d 1 (1971)(Idaho law that established automatic preference for males as executors of Wills held to be unconstitutional); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973)(striking down federal statutory scheme that automatically granted dependency benefits to wives of servicemen without demonstrating any dependency but required husbands of servicewomen to make such a showing); *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)(gender-based jury exemptions violate 14th Amendment equal rights protection). For gender-based equal rights protection violations related to the rights of gay citizens, *see Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996)(Colorado constitutional amendment preventing recognition of already-enacted gay rights laws invalidated); *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 505 (2003)(Court strikes down Texas sodomy statute which made it a crime for gays to engage in intimate conduct by overruling *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) which held there was no constitutional protection of sexual privacy).

Court had even more historic impact, however, was in its decisions in which it expanded upon privacy rights. These rights were strongly articulated by the Court in the sixties, and were used to strike down state and federal laws drafted to control personal conduct. Beginning with *Griswold v. Connecticut*²¹⁸ in 1965, which overturned a law prohibiting the use of contraceptives by married women, and including the historic 1973 decision legalizing abortion in *Roe v. Wade*,²¹⁹ and the interpretation of liberty interests that helped form the basis of the decision dealing with the cessation of life in *Cruzan v. Missouri*,²²⁰ the right to privacy articulated by thoughtful federal and state court jurists has evolved into one of the most important of personal freedoms guaranteed to Americans under the United States Constitution, and one of the most controversial.

Reproductive Rights

In 1879, the Connecticut legislature passed a law banning the use of any means to prevent pregnancy. In 1943, a doctor who was prohibited from dispensing contraception advice sought to strike down the statute on the grounds that such a ban could threaten the lives and well-being of his patients.²²¹ The Supreme Court refused his challenge stating that he lacked the necessary standing to pursue the relief requested since the right to bring such a suit was held by his patients alone.²²² A second challenge to this law was raised by two married couples and their

²¹⁸381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

²¹⁹410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

²²⁰497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2s 224 (1990).

²²¹*Tileston v. Ullman*, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943).

²²²*Id.*

physician and made its way to the Supreme Court in 1961. In *Poe v. Ullman*,²²³ one woman sought contraceptive advice after having given birth to three stillborn fetuses,²²⁴ and the other plaintiff requested similar advice after a miscarried pregnancy left her critically ill, unconscious for two weeks and partially paralyzed.²²⁵ Again the Supreme Court opted not to address the merits of the case since neither the women nor their physician had been charged or threatened with prosecution, although strong dissents to this position were filed by both Justice William O. Douglas and Justice John Marshall Harlan II, the grandson of Justice John Marshall Harlan who served on the Supreme Court bench from 1877 to 1911.²²⁶ Both Justices admonished the majority for failing to hear the case since the Court's failure to do so left the women with no recourse, and both expressed reservations about Fourteenth Amendment due process violations. Of particular significance to future cases, was Justice Harlan's characterization of constitutionally protected due process liberties as something well beyond those spelled out within the Constitution such as the freedoms of speech, press and religion, and the right to be free from unreasonable searches and seizures. He explained that in his view, due process liberties were part of "a rational continuum which ... includes a freedom from all substantial impositions and purposeless restraints".²²⁷

²²³367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

²²⁴*Id.* at 499.

²²⁵*Id.* at 500.

²²⁶*Id.* at 509. *See also*

<<http://www.supremecourthistory.org/history-of-the-court/associate-justices/john-marshall-harlan-1955-1971>> for a discussion of the life, service and decisions of Justice Harlan.

²²⁷*Id.* at 543.

Griswold made its way to the Supreme Court in 1965 when the Executive Director of the Planned Parenthood League of Connecticut and a physician and professor at the Yale School of Medicine opened a birth control clinic in New Haven, Connecticut. Days after the clinic opened, they met with, examined and counseled a married woman about contraception practices. Shortly thereafter, both were arrested, tried and found guilty of violating the Connecticut law which was the subject of the suits in *Tilston* and *Poe*.²²⁸ Since they had the necessary standing to challenge the statute, the Court was able to address the merits of the case and held that the statute violated a constitutionally protected right to marital privacy.

Despite a vote of 7-2, the Justices produced six different opinions, with Justice Douglas writing for the majority. Building upon the due process concerns he expressed in his dissenting opinion in *Poe* and those raised by Justice Harlan, Justice Douglas conceded that while there is no privacy right expressly articulated in the Bill of Rights “[s]pecific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance [and] [v]arious guarantees create zones of privacy”,²²⁹ a passage that is frequently referred to as one of the Court’s most famous, or infamous, depending upon the viewpoint of the author.²³⁰ Finding that the right to privacy in marital relations is “older than the Bill of Rights,

²²⁸See generally Andrea Lockhart, “*Griswold v. Connecticut*: A Case Brief”, 14 *J. Contemp. Leg. Issues* 35 (1997).

²²⁹*Griswold*, 381 U.S., at 484. A penumbra is defined as a ‘partly shaded region around the shadow of an opaque body’. See *Oxford Dictionary and Thesaurus*, 2d American Ed. (Oxford University Press, 2002). Supreme Court precedent had previously established similar penumbras. See e.g. *NAACP v. State of Alabama*, 357 U.S. 449, 462, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)(Court protected freedom to associate by finding a First Amendment penumbra where privacy is protected from governmental intrusion); *Mapp v. Ohio*, 367 U.S., at 656 (Fourth Amendment created right to privacy against unreasonable searches and seizures).

²³⁰Toobin, fn. 15 at 64.

older than our political parties and older than our school system”, Justice Douglas recognized that such a right arose out of several fundamental constitutional guarantees and he used them as the basis to overturn the antiquated Connecticut statute.²³¹

In 1972, the Court expanded its *Griswold* holding in *Eisenstadt v. Baird*²³² by overturning a Massachusetts law that made it a felony for anyone other than a registered physician or pharmacist to dispense to any unmarried person drugs or articles with the intention that same be used for preventing conception.²³³ William Baird was charged with a felony for displaying contraceptive materials during a lecture he conducted on population control at Boston University and for giving a sample of same to an unmarried woman.²³⁴ Writing for the majority, Justice Brennan held that the statute which sought to differentiate between classes of individuals violated the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.²³⁵ He went on to address the fundamental right to privacy recognized in *Griswold*,

²³¹*Griswold*, 381 U.S., at 485. The concurring opinion written by Justice Goldberg that was joined by Chief Justice Warren and Justice Brennan relies on the language and history of the Ninth Amendment to extrapolate the Framers’ belief that there were additional fundamental rights protected from government infringement which exist alongside those specifically mentioned in the first eight constitutional amendments. The Ninth Amendment reads “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” *Id.* at 488-489.

²³²405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

²³³*Id.* at 440-441, citing Massachusetts General Laws Ann., c. 272, §21 which specifically prohibited single persons from receiving contraceptives from anyone to prevent pregnancy. *Id.* at 442.

²³⁴The Massachusetts Supreme Court set aside the conviction for exhibiting the contraceptive materials as violative of Mr. Baird’s First Amendment rights, but sustained the conviction for giving away the material. *See Commonwealth v. Baird*, 355 Mass. 746, 247 N.E.2d 574 (1969).

²³⁵*Eisenstadt*, 405 U.S., at 447-453.

and extended it to include procreative decisions made by unmarried couples stating, “[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to beget a child.”²³⁶

While the practice of abortion had been debated for many years in the medical community,²³⁷ it was not until the sixties when publicity over the infertility drug Thalidomide and a German measles epidemic, both of which led to serious birth defects, brought it to the forefront of a national dialogue. Laws dealing with abortion practices were determined by individual states. In reaction to the real medical issues raised by the Thalidomide and measles epidemic, and as a result of a subtle but clear push away from societal norms that had previously condemned sexual conduct, many states began to rewrite or repeal laws which restricted the practice. On the eve of the Court’s landmark 1973 decision in *Roe v. Wade*,²³⁸ public opinion

²³⁶*Id.* at 453. Many supporters of the Court’s *Eisenstadt* decision thought that the decision recognizing the rights of single people to procreate or not on the same basis as married couples would naturally lead to the logical legal conclusion that all sex between consenting adults is constitutionally protected. This process, however, took some time in extending the same rights to homosexuals. *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) upheld a Georgia law classifying sexual conduct between persons of the same gender as illegal sodomy, but was ultimately overruled by *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) in which the Court stated that “*Bowers* was not correct when it was decided, and it is not correct today”. *Id.* at 578. In *Lawrence*, the Court explicitly found that consensual sexual conduct was a constitutionally protected liberty. *Id.*

²³⁷See generally Kristen Luker, *Abortion and the Politics of Motherhood* (University of California Press, 1984). Luker posits that the split in the medical community over abortion played a major role in changing the issue from a purely medical question into a moral and then political one. *Id.* at Chaps. 4 and 5.

²³⁸410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). A second case entitled *Doe v. Bolton* which sought to challenge a Georgia law prohibiting abortion except where the pregnancy would endanger the life of the pregnant mother or seriously and permanently injure her health was joined together with *Roe* and addressed by the Court’s decision. Unlike the

had shifted dramatically to the point that there was substantial, if not majority, support for the repeal of abortion laws.²³⁹

At issue in *Roe*, was a Texas statute that prohibited abortions, except when the procedure was necessary to save the life of the mother, that was challenged as violative of a pregnant woman's personal liberty rights. Justice Harry Blackmun authored the majority opinion²⁴⁰ striking down the state statute which was joined by Chief Justice Warren Burger and Justices William O. Douglas and Potter Stewart.²⁴¹ In his decision, Justice Blackmun reaffirmed the rights of personal privacy found in the First, Fourth, Fifth, Ninth and Fourteenth Amendments that had been articulated in decisions from the Court dating back to 1891, as well as those encompassed in the penumbras of the Bill of Rights that had been set forth in the *Griswold* decision.²⁴² Specifically, Justice Blackmun found that the guarantees of certain zones of privacy which existed were "broad enough to encompass a woman's decision whether or not to terminate her pregnancy".²⁴³ This finding effectively invalidated state abortion laws throughout the

Roe plaintiff who sought to challenge a Texas law restricting abortion, the *Doe* plaintiff was not pregnant or denied the right to the procedure under state law. Accordingly, the Court found her to be an improper plaintiff whose complaint was properly dismissed by the lower courts. *Id.* at 129.

²³⁹Rosenberg, fn. 5 at 184.

²⁴⁰Justice Blackmun was appointed to the Supreme Court by Richard Nixon in 1970 and was generally considered to be conservative in his legal analysis until the publication of the *Roe v. Wade* decision in 1973. See generally, Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (Henry Holt & Co. 2005).

²⁴¹___ U.S. ___, 93 S.Ct. 755, 756 (1973).

²⁴²410 U.S. at 152.

²⁴³*Id.* at 152.

country, and established what came to be known anecdotally as a ‘woman’s right to choose’.²⁴⁴

Although the decision concluded that a woman’s constitutionally protected personal privacy rights include the abortion decision, Justice Blackmun very carefully noted that this right is not unqualified, and must be considered against a state’s important interest in protecting health, medical standards and potential life, and determined that these interests, at some point in pregnancy, become sufficiently compelling to sustain governmental regulation.²⁴⁵ Under Blackmun’s reasoning, which was based upon a trimester framework,²⁴⁶ the Court found that a state did not have an a compelling interest in the health of the mother until the approximate end of the first trimester,²⁴⁷ leaving a pregnant woman free to choose to undergo the procedure without government interference at any point up until the end of the first trimester. After this point, and going forward in a pregnancy, the Court concluded that a state is permitted to regulate the procedure to the extent its regulation “reasonably relates to the preservation and protection of maternal health”.²⁴⁸ He also found that the state had a compelling interest in protecting a fetus at

²⁴⁴This phrase may have been drawn from the Court’s language when it stated that rights of personal privacy derived by the Court in a variety of contexts “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”. *Id.*

²⁴⁵*Id.* at 153-155.

²⁴⁶Prior to joining the judiciary, Justice Blackmun had served as general counsel to the Mayo Clinic. During this time, he developed a reverence for doctors that is reflected in his analysis which includes the physician in a woman’s abortion decision. *See generally* Greenhouse, fn. 240, Toobin, fn. 15 at 64, and 410 U.S., at 153.

²⁴⁷*Id.* at 163.

²⁴⁸*Id.* The Court listed examples of permissible state regulation during this phase of pregnancy to include requirements as to the qualifications of the individual to conduct the procedure, any licensing requirements, and any restrictions on the place the procedure may be performed. *Id.*

the point it is viable, or in the third trimester when it is presumably capable of ‘meaningful life outside the mother’s womb’.²⁴⁹ Under the Court’s rationale, a state is permitted to go so far as to proscribe abortion during this period, except when necessary to preserve the life or health of the mother.²⁵⁰

The Supreme Court’s decision in *Roe v. Wade* is viewed by both its supporters and its critics as having brought about significant social reform.²⁵¹ Because of religious and moral implications, any decision issued by any court dealing with abortion is certain to be controversial and the subject of vocal support as well as opposition, as was the case with *Roe*.²⁵² This is also the case when addressing other intimate and personal choices central to personal dignity are part of the fundamental liberties protected by the Constitution.²⁵³

²⁴⁹*Id.* at 163-164.

²⁵⁰*Id.* at 164.

²⁵¹See e.g., Rosenberg, fn. 5 at 173 citing Lawrence M. Friedman, “The Conflict Over Constitutional Legitimacy”, *The Abortion Dispute and the American System*, ed. Gilbert Y. Steiner (Brookings, 1983) at 13 (*Roe* sent shock waves through the country); John T. Noonan, Jr., “Raw Judicial Power”, *National Review* Mar. 22, 1973 at 260-264 (*Roe* may stand as the most radical decision ever issued by the Supreme Court).

²⁵²Commenting on the Court’s decision in *Roe v. Wade*, legal author Jeffrey Toobin made the following succinct observation: “[l]iberals have long regarded the right to privacy, and Blackmun’s opinion, as a touchstone of American liberty – a vindication of what Justice Louis Brandeis called ‘the right to be let alone – the most comprehensive of rights and the right most valued by civilized men’ while “[c]onservatives have always reviled *Roe* as the ultimate power grab by a liberty judiciary”. Toobin, fn. 15 at 65.

²⁵³See *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2711, 120 L.Ed.2d 674 (1992). In this challenge to *Roe*, the Supreme Court noted that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”. *Id.* at 851.

The Right to Die

Beyond its decisions dealing with a woman's right to an abortion, the United States Supreme Court has been called upon to decide other cases that involve intimate personal liberties, including the right to end life that was the subject of *Cruzan v. Director, Missouri Dept. Of Health*.²⁵⁴ While many of the cases discussed thus far speaking to the judiciary's role as catalysts of social policy change have involved decisions rendered by the nation's highest federal court, the right to die issue was initially decided by the New Jersey Supreme Court in its seminal decision entitled *In re Quinlan*.²⁵⁵ As the first state Supreme Court to deal with this

²⁵⁴497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) affirmed the Missouri Supreme Court which required the husband and parents of a woman who was surviving in a persistent vegetative state after an automobile accident to provide clear and convincing evidence that she would reject hydration and nutrition if she were capable of making such decision. The trial court initially authorized the termination of life support, finding that a person in Nancy Cruzan's condition had a fundamental right under both the Missouri and federal constitutions to direct or refuse the withdrawal of death-prolonging procedures. The state Supreme Court reversed the trial court, declining to read a broad right to privacy into its state constitution that would support an unrestricted right to refuse medical treatment. Chief Justice Rehnquist, writing for the majority of the U.S. Supreme Court, narrowed the inquiry and focused on whether the federal Constitution prohibited Missouri from requiring that the standard of evidence to support such a request be "clear and convincing". Acknowledging that a competent person has a liberty interest under the due process clause to refuse unwanted medical treatment (citing *Jacobson v. Massachusetts*, 117 U.S. 11, 24-30, 25 S.Ct. 358, 49 L.Ed. 643 (1905)), the Court noted that even this interest must be balanced against a state's legitimate interests. According to Judge Rehnquist, since an incompetent is unable to make an informed and voluntary choice to exercise that or any other right, it is permissible for a state to seek to protect human life by instituting procedural safeguards including the application of a clear and convincing evidence standard to insure that a guardian's actions conform to a patient's wishes expressed while competent. *Id.* at 261-262. After the Court rendered its decision, the family produced evidence that Nancy Cruzan would have chosen to terminate life support. Her husband and parents eventually obtained a court order to remove the life-sustaining support, and she died shortly thereafter, almost seven years after her original injury.

²⁵⁵70 N.J. 10, 355 A.2d 647 (N.J. 1976), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976). *See also* Wefing, fn. 13 at 706 citing Mary Cornelia Porter & G. Alan Tarr, *State Supreme Courts: Policy Makers in the Federal System*"

profound philosophical and moral issue, the thoughtful analysis undertaken by the New Jersey Supreme Court formed the basis for the United States Supreme Court's decision in *Cruzan* and virtually all of the right to die cases that followed it.

In re Quinlan involved a decision to withdraw life sustaining treatment from a patient who was not terminally ill, but who lingered in a persistent vegetative state. In 1975, then-21 year old Karen Ann Quinlan became unconscious after consuming an excessive amount of drugs and alcohol at a party. She was taken to a hospital, and shortly thereafter lapsed into a coma. Her breathing was sustained by a ventilator for several months during which time she showed no signs of improvement. Her parents requested that the respirator be removed so she would be permitted to die. Their request was opposed by their daughter's physicians, the hospital, the county prosecutor, and the State of New Jersey. Joseph Quinlan went to court to seek appointment as his daughter's guardian to gain the legal power to authorize the discontinuance of all extraordinary measures. The trial court denied his request, and the case was heard by the New Jersey Supreme Court in a direct appeal.²⁵⁶

In their appeal, the Quinlans sought permission to have their daughter's life supporting equipment removed charging that the refusal to grant same violated their daughter's constitutional protections. The New Jersey Supreme Court granted the Quinlan's request, and held that Karen had a privacy right grounded in both the federal and state constitutions to

(Greenwood Press, 1982), at 16 (describing *In re Quinlan*, at that time, as one of the most activist handed down by any court in the nation).

²⁵⁶70 N.J. 10, 355 A.2d 647 (N.J. 1976).

terminate treatment.²⁵⁷ As the United States Supreme Court did in *Roe v. Wade*, the New Jersey Supreme Court recognized, however, that such a right was not absolute, and must be balanced against the state's legitimate interests. Specifically noting that the state's interest "weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims", the Court concluded that under the facts and circumstances before it, the state's interests had to give way to Karen's right to refuse medical treatment.²⁵⁸ The Court also concluded that the "only practical way" to prevent the loss of Karen's privacy right due to her incompetency was to allow her guardian and family to decide whether she would exercise it under her circumstances.²⁵⁹

Following the lead of the New Jersey Supreme Court, other courts addressing an individual's right to refuse treatment have relied on constitutional privacy rights, as well as on the common law right to informed consent. In *Superintendent of Belchertown State School v. Saikewicz*,²⁶⁰ the Supreme Judicial Court of Massachusetts relied on both these rights to withhold chemotherapy from an elderly and profoundly retarded man, and adopted a substituted judgment standard for courts to determine what an incompetent person's decision would have been under

²⁵⁷*Id.* at 38-42. Relying on earlier decisions from the United States Supreme Court including *Griswold v. Connecticut*, 381 U.S. 479 (1965), the New Jersey Supreme Court viewed such a right to be broad enough to encompass a patient's decision to decline medical treatment under certain circumstances. *Id.* at 40. The Court also found that the New Jersey Constitution was a separate source of fundamental liberties and that it recognized liberty interests more extensive than those independently protected by the federal constitution. *See generally*, Brennan, fn. 12.

²⁵⁸70 N.J., at 41.

²⁵⁹*Id.*

²⁶⁰373 Mass. 728, 370 N.E.2d 417 (1977).

the circumstances.²⁶¹ The California Court of Appeals found a right to refuse treatment grounded in both the common law and a constitutional right to privacy, and also relied on a state probate statute enacted after the New Jersey Supreme Court's *In re Quinlan* decision which authorized a patient's conservator to order the removal of life-sustaining treatment under identified circumstances.²⁶² Illinois' Supreme Court found a right to refuse treatment was captured within the state's informed consent doctrine in a case involving the request made by the family of an elderly incompetent woman to discontinue the use of artificial nutrition and hydration.²⁶³ Over the years, many other states developed their right-to-die case law following the landmark decision *In re Quinlan*.²⁶⁴

Same-Sex Rights and Discriminatory Legal Challenges

Much in the same manner in which the United States Supreme Court's courageous decision in *Brown* abolished almost two centuries of segregationist practices in the country was subjected to a long period of turmoil before ultimately gaining public acceptance, recent decisions made by several of the nation's highest appellate courts involving same-sex civil unions and marriage have begun to stimulate similar vigorous debate and acceptance.²⁶⁵

²⁶¹*Id.* at 745, 752-753.

²⁶²*See Conservatorship of Drabick*, 200 Cal.App.3d 185, 245 Cal.Rptr. 840, *cert. denied*, 488 U.S. 958, 109 S.Ct. 399, 102 L.Ed.2d 387 (1988).

²⁶³*See In re Estate of Longeway*, 133 Ill.2d 33, 139 Ill. Dec. 780, 549 N.E.2d 292 (1989).

²⁶⁴*See e.g. Corbett v. D'Alessandro*, 487 So.2d 368 (Fla. App. 1986); *Gray v. Romeo*, 697 F.Supp. 580 (RI 1988); *In re Grant*, 109 Wash.2d 545, 747 P.2d 445 (Wash. 1987); *McConnell v. Beverly Enterprises-Connecticut, Inc.*, 209 Conn. 692, 553 A.2d 596 (Conn. 1989).

²⁶⁵In a poll conducted by the *Washington Post* and ABC News in May 2012, 53% of Americans supported legalizing same-sex marriage, with 39% opposed. *See* <<http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2012/05/23/National-Politics/Polling/que>

In 1993, Hawaii's Supreme Court issued what was potentially believed to be a groundbreaking decision in *Baehr v. Lewin*²⁶⁶ in which it indicated that same-sex couples might be entitled to marry under the state's constitution. In 1990, several same-sex couples sought

tion 4923.xml?uuid=DsJGrKSMEeGoEekBtKbiMQ>, see also Phil Pruitt, "Majority of Americans Support Legalizing Same-Sex Marriage Poll Shows", *The Ticket*, Jun. 6, 2012 available at <<http://news.yahoo.com/blogs/ticket/majority-americans-support-legalizing-same-sex-marriage-poll-101314711.html>>. Further demonstrating that there has been a shift in the way Americans view gay marriage, is seen in legislative bills making their way through various state legislatures seeking to legalize same sex marriage. As of November 2012, sex-sex marriage had been approved in 9 states: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia. See Chelsea Carter and Allison Brennan, "Maryland Maine Washington Approve Same Sex Marriage; 2 States Legalize Pot", *CNN*, Nov. 7, 2012, available at <<http://www.cnn.com/2012/11/01/politics/ballot-initiatives>>. A vote was scheduled in the Illinois state senate for Valentine's Day 2013, and the governor pledged to sign such a law if presented with it, which would make it the tenth state to legalize gay marriage. Joanne von Alroth "Illinois Senate Prepares for Valentine's Day Vote on Gay Marriage", available at <<http://www.chicagotribune.com/news/sns-rt-us-usa-gaymarriage-illinoisbre91d168-20130214,0,1492252.story>>. As of February 2013, the Defense of Marriage Act of 1996, Pub. L. 104-199, 110 Stat. 2419, which prevents the federal government from recognizing same-sex marriages, had been held to be unconstitutional by several federal district courts and by the First and Second Circuit Courts of Appeals. See Denise Lavoie, "DOMA Ruled Unconstitutional by Federal Appeals Court", *Huffington Post*, May 31, 2012 available at <http://www.huffingtonpost.com/2012/05/31-doma-unconstitutional-ruling-appeals-court-boston_n_1559031.html>, Jim Malewitz, "Defense of Marriage Act Discriminates Against Gays, Federal Court Rules", *Pewstates.org*, Oct. 19, 2012 available at <<http://www.pewstates.org/projects/stateline/headlines/defense-of-marriage-act-discriminates-against-gays-federal-court-rules-85899424320>>. The Second Circuit decision followed much of the reasoning outlined several months earlier by the First Circuit, see *Massachusetts v. U.S. Dept. Of Health & Human Svcs.*, 680 F.3d 1, 10 (1st Cir. 2012), but went further to hold that sexual orientation constituted a quasi suspect classification under the law triggering a heightened level of scrutiny under which the government must prove its classification is substantially related to an important governmental interest. *Windsor v. United States*, 699 F.3d 169, 184-185 (2nd Cir. 2012). This decision and one from the Ninth Circuit Court of Appeals involving the constitutionality of California's 2008 Proposition 8 initiative, *Hollingsworth v. Perry*, 133 S.Ct. 786 (Dec. 7, 2012), are currently pending before the United States Supreme Court and will be argued on March 26, 2013. See Adam Liptak, "Justices to Hear Two Challenges on Gay Marriage", *New York Times*, Dec. 8, 2012 at A1.

²⁶⁶74 Haw. 530, 852 P.2d 44 (Haw. 1993).

marriage licenses under the provisions of the state’s marriage law,²⁶⁷ and all were denied solely on basis of their gender. In 1991, the plaintiffs filed a complaint seeking a declaration that Hawaii’s marriage laws established an unconstitutional violation of their privacy rights as well as equal protection violations as articulated in the Hawaii Constitution.²⁶⁸ The Circuit Court for the First Circuit for the State of Hawaii dismissed the case, and the plaintiffs’ appealed to the Hawaii Supreme Court. In a case of first-impression, the justices of the Hawaii Supreme Court analyzed the right to marry as a fundamental privacy right guaranteed by the federal Constitution and by extension, the state constitution,²⁶⁹ and concluded that the privacy right did not include a fundamental right to same-sex marriage.²⁷⁰ The Court did, however, preserve the plaintiffs’ equal protection claims, raising the possibility, for the first time, that same-sex couples could obtain state-sanctioned marriage licenses. In response, the state constitution was amended to allow the state legislature to limit marriage to opposite-sex couples.²⁷¹

In 1996, Congress adopted the Defense of Marriage Act of 1996 (“DOMA”)²⁷² partly in

²⁶⁷H.R.S. § 572-1 (1985).

²⁶⁸*Baehr*, at 537.

²⁶⁹*Id.* at 555-556, citing *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 680, 54 L.Ed.2d 618 (1978).

²⁷⁰*Id.* at 557.

²⁷¹*See* HAW. CONST. art I, § 23. For more detailed discussion of this ruling, *see* Jason Pierceson, *Courts, Liberalism, and Rights: Gay Law and Politics in the United States and Canada* (Temple Univ. Press, 2005) at 107-125, 125-129.

²⁷²Pub. L. 104-199, 110 Stat. 2419 (codified in relevant part at 1 U.S.C. §7).

response to the Hawaii Supreme Court's decision in *Baehr v. Lewin*.²⁷³ Of particular concern at the time of the enactment of the statute, was the financial impact a redefinition of marriage in Hawaii would have on the availability of federal rights and benefits,²⁷⁴ and Congress' moral disapproval of homosexuality.²⁷⁵ DOMA was written to expressly limit the federal definition of marriage to a legal union between one man and one woman,²⁷⁶ prevents married gay couples from receiving federal benefits, including Social Security, and prohibits them from filing joint income tax returns.²⁷⁷ Following the passage of this Act, many states enacted similar provisions

²⁷³The House Judiciary Committee's Report on DOMA referenced *Baehr* as the start of an "orchestrated legal assault being waged against traditional heterosexual marriage", and expressed concern this such a development "threaten[ed] to have very real consequences ... on federal law." See Aff. Of Gary D. Buseck, Ex. D, H.R. Rep. No. 104-664 at 2-3 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906-07 ("H. Rep.").

²⁷⁴*Id.* at 10. In January 1997, the General Accounting Office ("GAO") issued a report describing the effect DOMA would have in which it concluded that at least 1,049 federal laws, including entitlement programs, health benefits and taxation were effected by the statute. See Aff. Of Gary D. Buseck, Ex. A, Report of the U.S. General Accounting Office, Office of General Counsel, Jan. 31, 1997 (GAO/OGC-97-16). A follow-up study conducted by the GAO in 2004 found that 1,138 federal laws tied benefits, protections, rights or responsibilities to marital status. See U.S. Gov. Accountability Office, GAO-04-353R Defense of Marriage Act (2004) at <<http://www.gao.gov/products/GHO-04-353R>>.

²⁷⁵*Id.* at 16. Although startling to read more than 15 years after the enactment of the statute, the House Report justified the enactment of DOMA by setting forth "a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." *Id.* Even more shocking in light of today's culture, the Committee Chairman at the time stated that "[m]ost people do not approve of homosexual conduct ... and they express their disapprobation through the law." See 142 CONG. REC. H7480 (daily ed. July 12, 1996).

²⁷⁶1 U.S.C. § 7. DOMA also permitted states to decline to give effect to the laws of other states pertaining to same-sex marriage. See § 2 which provides that "[n]o State ... shall be required to give effect to any public act, record, or judicial proceeding or any other State ... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State."

²⁷⁷See *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D. Mass. 2010), where a Massachusetts same-sex couple successfully argued to a federal court that DOMA

limiting marriage to unions between opposite-sex couples into their own bodies of law.²⁷⁸

Notably, in February 2011, President Barack Obama ordered the Department of Justice to stop defending DOMA in court challenges, a reflection, many believe, of the profound shift in attitude toward gay rights that has transpired in this country since the enactment of the statute more than 15 years ago.²⁷⁹

The Vermont Supreme Court delved into the tempestuous national debate over the rights of same-sex couples when it ruled in 1999 that they are entitled to the same benefits and protections afforded to married opposite-sex couples under the Vermont constitution in *Baker v. State*.²⁸⁰ In a unanimous decision, the Vermont Court found that statutory prohibitions on same-sex marriage violated an individual's rights under the state's constitution. The justices did not rule on whether the state was required to issue marriage licenses to homosexual couples, but ordered the legislature to either allow same-sex marriages, or implement an alternative legal mechanism that would provide those couples with similar rights.²⁸¹ In 2000, the Vermont

interferes with Equal Protection Clause of federal Constitution by treating gay married couples differently than opposite-sex couples. *See also* Geoffrey A. Fowler, "Federal Ban on Gay Marriage Unconstitutional, Judge Says", *Wall Street Journal*, Jul. 9, 2010, at A4; Abby Goodnough and John Schwartz, "Judge Topples U.S. Rejection of Gay Unions", *New York Times*, Jul. 8, 2010 at A1.

²⁷⁸For a discussion of DOMA and these state statutes, *see* Andrew Koppelman, "The Difference the Mini-DOMAs Make", 38 *Loy. U. Chi. L.J.* 265 (2007).

²⁷⁹*See* Evan Perez, "Reversal on Gay Marriage", *Wall Street Journal*, Feb. 24, 2011 at A3. During the 2012 presidential campaign, President Obama announced his support for same-sex marriage. *See* Sam Stein, "Obama Backs Gay Marriage", *Huffington Post*, May 9, 2012 available at http://www.huffingtonpost.com/2012/05/09/obama-gay-marriage_n_1503245.html.

²⁸⁰744 A.2d 864 (Vt. 1999).

²⁸¹*Id.* at 864.

legislature enacted a statute, which was signed into law by then-Governor Howard Dean, that enabled same-sex couples to be joined in civil unions to provide them with the same legal rights and responsibilities found in marriage and, nine years later, legislation was enacted in the state legalizing same-sex marriage.²⁸²

On November 18, 2003, the Massachusetts Supreme Judicial Court became the first in the country to legalize same-sex marriage, viewed by many today to be one of the country's most divisive social issues, when it ruled in *Goodridge v. Department of Public Health*,²⁸³ that the state could not deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry.²⁸⁴ Writing for the majority, Chief Justice Margaret Marshall stated that the state's constitution "affirms the dignity and equality of all individuals . . . [and] forbids the creation of second-class citizens".²⁸⁵ Refusing to characterize the right to marry as a privilege to be conferred by the state legislature, the Court instead stated

²⁸²See <<http://bischa.state.vt.us/insurance/insurance-consumer/guide-civil-unions-publication>>. Legislation permitting same-sex couples to marry was introduced in the Vermont legislature in 2007. A committee was formed made up of representatives from both the state house and senate to study the issue of same-sex marriage, but it failed to make a recommendation. See Dave Gram, "Vermont Commission Stops Short of Recommending Gay Marriage", *The Boston Globe*, Apr. 21, 2008. In February 2009, supporters introduced another a Bill enabling same-sex couples to marry. See Louis Porter, "Vermont House to Introduce Same-Sex Marriage Bill", *Rutland Herald*, Feb. 6, 2009. The Bill passed both chambers, but was vetoed by the governor in April 2009. See "Vermont Governor Vetoes Gay Marriage Bill" at <<http://www.abc22.com/Global/story.asp?S=10134685>>. The veto was immediately overridden by both houses, and the law permitting same-sex marriage went into effect on September 1, 2009. See "Vermont Legalizes Same-Sex Marriage", *Burlington Free Press*, Apr. 7, 2009, at 1.

²⁸³440 Mass. 309, 798 N.E.2d 941 (Mass. 2003).

²⁸⁴*Id.* at 312.

²⁸⁵*Id.*

that same is a fundamental right that is protected against unwarranted State interference.²⁸⁶

Finding that Massachusetts did not have a rational basis to deny same-sex couples the right to marry on due process and equal protection grounds, the Court ordered the legislature to change the existing law within six months.²⁸⁷

The decision generated a great deal of controversy. In response to the opinion, former Republican President George W. Bush advocated a federal constitutional amendment to overturn the Court's ruling, this despite the fact that six of the seven justices on the Massachusetts Supreme Court were Republican appointees.²⁸⁸ In response to the Court's directive, the Massachusetts Senate sought an advisory opinion from the Supreme Judicial Court in January 2004 as to whether civil unions similar to those in place in Vermont would meet the Court's mandate. The Court responded that civil unions would not be sufficient under its analysis²⁸⁹ although attempts to overrule the decision continued.²⁹⁰

²⁸⁶*Id.* at 329.

²⁸⁷*Id.* at 344.

²⁸⁸See Mark C. Miller, "Conflicts between the Massachusetts Supreme Judicial Court and the Legislature: Campaign Finance Reform and Same-Sex Marriage", 4 *Pierce L. Rev.* 279 (2006) fn. 97 at 295 citing "New Fuel for the Culture Wars: Gay Marriage, *Economist* 29-30, Feb. 28, 2004.

²⁸⁹*Id.* at 295-296, citing *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 566 (Mass. 2004).

²⁹⁰See Jeff Jacoby, "The People's Voice on Gay Marriage", *Boston Globe*, Feb. 5, 2004, reprinted Oct. 5, 2005, at A19. After several weeks of intense debate as to the appropriateness of such a step, the state legislature narrowly passed an amendment that would ban same-sex marriage but allow civil unions which would go into effect if it was approved by the legislature in 2005 and by popular vote in the state in 2006. See Rick Klein, "Vote Ties Civil Unions to Gay Marriage", *Boston Globe*, Mar. 30, 2004 at <http://www.boston.com/news/specials/gay_marriage/articles/2004/03/30/vote_ties_civil_unions_to_gay_marriage-ban/>. On the heels of the sixth month anniversary of the Court's decision, Governor Mitt Romney ordered town

Following the Massachusetts Supreme Judicial Court's landmark opinion legalizing same-sex marriage, the Connecticut legislature created a right for homosexual couples to unite in civil unions in 2005, becoming the first state to adopt such laws without judicial intervention. After the law went into effect, advocacy groups continued to press for recognition of a constitutional right to marry since civil unions did not provide the full panoply of benefits to same-sex couples that were available to married opposite-sex couples. A lawsuit was filed challenging what gay rights advocates viewed to be the state's discriminatory exclusion of same-sex couples' rights. *Kerrigan v. Commissioner of Public Health* reached the Connecticut Supreme Court and on October 28, 2008, the Court held that the state constitution protects the right to same-sex marriage, and that a failure to provide same-sex couples with the full rights, responsibilities and marriage title violated the constitution's equal protection clause.²⁹¹

In the Fall of 2006, the New Jersey Supreme Court declared that same-sex couples in the

clerks to issue marriage licenses to same-sex couples consistent with the legislature's failure to amend Massachusetts' marriage laws and the first of the state's same-sex couples were granted marriage licenses. See Joanna Weiss and Lisa Koclan, "Cambridge Plays host to a Giant Celebration", *Boston Globe*, May 17, 2004 at <http://www.boston.com/news/specials/gay_marriage/articles/2004/05/17/cambridge_plays_host_to_a_giant_celebration/>. In the Fall of 2005, a second attempt was made to amend the Massachusetts constitution to prohibit same-sex marriage but permit civil unions to enable the issue to be presented to the state's citizenry for a vote in 2006. See Emelie Rutherford, "Lawmakers Nix Measure to Prohibit Gay Marriage", *Boston Herald*, Sep. 15, 2005, at 16. The amendment was soundly defeated and never reached the electorate. See Pam Belluck, "Massachusetts Rejects Bill to Eliminate Gay Marriage", *New York Times*, Sep. 15, 2005 at <<http://www.nytimes.com/2005/09/15/national/15amendment.html>>. The legislature eventually repealed a 1913 Massachusetts law that prohibited non-residents from marrying in the state if their marriage would be void in their home state in 2008. See Michael Levenson, "Same-sex Couples Applaud Repeal: Mass. Opens Door For Out-of-State Gays to Marry," *Boston Globe*, Aug. 1, 2008 at <http://www.boston.com/news/local/articles/2008/08/01/same_sex_couples_applaud_repeal/>.

²⁹¹289 Conn. 135, 957 A.2d 407 (Conn. 2008). See also Mark Spencer, Alaine Griffin and Daniela Altimari, "High Court Grants Gay Marriage Rights", *Hartford Courant*, Oct. 28, 2008.

state are entitled to the same rights and benefits as heterosexual couples, but for the title of ‘marriage’. The opinion rendered in *Lewis v. Gwendolyn L. Harris, et al.*²⁹² arose out of an action brought by several gay couples each of whom had been in permanent committed relationships for more than ten years, and all of whom sought the right to marry his or her partner. After each couple was denied a marriage license in their respective municipalities, lawsuits were filed seeking a declaration that state laws denying same-sex marriage violated the liberty and protection guarantees of the state Constitution.²⁹³

Undeterred by the force of the maelstrom swirling around the issue of same-sex marriage in this country,²⁹⁴ in writing for the majority, Justice Barry T. Albin found that while the Court

²⁹²188 N.J. 415, 908 A.2d 196 (2006).

²⁹³N.J. Const. art. I, ¶1. The language at issue is as follows: “All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty . . . and of pursuing and obtaining safety and happiness”. In an unpublished opinion, the New Jersey Superior Court entered summary judgment in favor of the state and dismissed the plaintiffs’ complaint, finding that marriage in the state was restricted to the union of a man and a woman. *See Lewis v. Harris*, unpublished op. at 2003 WL 23191114 (N.J. Super. Nov. 5, 2003). While the appeal of the case was pending before the Appellate Division, the New Jersey legislature enacted the Domestic Partnership Act which afforded certain rights and benefits to same-sex couples who entered into domestic partnerships. *See* 2004 N.J. Laws 246 (codified at N.J.S.A. 26:8A-1 *et seq.*). The Appellate Court upheld the lower court’s ruling and found that New Jersey’s marriage statutes did not contravene the substantive due process and equal protection guarantees contained within the state constitution as these rights extend only to marriages between heterosexual couples. *See* 378 N.J. Super. 168, 875 A.2d 259 (2005). In a spirited dissent, Judge Donald G. Colleser, Jr. vigorously disagreed with the majority stating that “the right to marry is meaningless unless it includes the freedom to marry a person of one’s choice”. *Id.* at 278-279 (Colleser, J., dissenting). Judge Colleser went on to declare that the right to marry “is a fundamental right of substantive due process”, *id.* at 289, under the New Jersey Constitution, and the state was obligated to afford same-sex couples the right to marry on terms equal to those afforded to same-sex couples. *Id.* This split paved the way for the issue to make its way to the state’s Supreme Court.

²⁹⁴Evidencing the strength of the controversy over the issue, the New Jersey Supreme Court was inundated with dozens of *amicus curiae* briefs filed by such groups as the Alliance for Marriage, Inc., the American Civil Liberties Union, the American-Arab Anti-Discrimination

was unable to find a fundamental right to same-sex marriage under the New Jersey Constitution,²⁹⁵ it was compelled to conclude that “the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution.”²⁹⁶ Relying on its tradition and history of supporting the fundamental rights of all of its citizens, including those most alienated and disfavored, the Court renewed its commitment to those persons “no matter how strong the winds of popular opinion may blow.”²⁹⁷ Noting that “times and attitudes have changed”,²⁹⁸ the Court acknowledged a developing trend by state legislatures, including its own, to outlaw discrimination against homosexual persons.²⁹⁹ Expanding upon this legislative groundwork and looking to United States Supreme Court jurisprudence³⁰⁰ as well as some of its own earlier decisions to protect gay and lesbian

committee, the Asian American Legal Defense and Education Fund, the Hispanic Bar Association of New Jersey, the National Organization for Women of New Jersey, both the American and the New Jersey Psychological Associations, the Equality Federation, People for the American Way Foundation, the Vermont Freedom to Marry Task Force, various representatives from the various clergy groups from New Jersey, the Family Research Council, the Human Rights Campaign, Children of Lesbians and Gays Everywhere, the Family Pride Coalition, the New Jersey Gay & Lesbian Coalition, the National Association of Social Workers, the National Black Justice Coalition, the National Legal Fund, the New Jersey Coalition to Protect Marriage, the New Jersey Catholic Conference, as well as several distinguished law professors and bar associations.

²⁹⁵*Lewis*, 908 A.2d at 211.

²⁹⁶*Id.* at 200.

²⁹⁷*Id.* at 211.

²⁹⁸*Id.* at 209.

²⁹⁹*See e.g.* N.J.S.A. 10:5-4 (New Jersey became fifth state in the nation to formally prohibit discrimination on the basis of sexual orientation).

³⁰⁰*See Romer v. Evans*, 517 U.S. 620, 623-24, 116 S.Ct. 1620, 1623, 134 L.Ed.2d 855, 850-61 (1996)(Supreme Court struck down Colorado constitutional amendment which appeared

individuals from discrimination on the basis of their sexual orientation,³⁰¹ the Court chose to base its decision not on the politically-charged issue of whether committed same-sex couples should be permitted to marry, electing instead to focus on whether same-sex couples are entitled to the same rights and benefits afforded to married heterosexual couples. Finding that under the current law same-sex couples and their children are not afforded the benefits and protections available to heterosexual couples and their children,³⁰² Justice Albin declared that the Court was unable to “find a legitimate public need for an unequal legal scheme of benefits and privileges that disadvantages committed same-sex couples”.³⁰³

The Court acknowledged its role as policymaker when it concluded that the New Jersey Constitution guarantees that every statutory right and benefit conferred on heterosexual couples through civil marriage must be made available to same-sex couples in committed relationships. It did, however, stop short of ordering the state to recognize same-sex marriages as the Massachusetts Supreme Judicial Court did in 2003, choosing instead to instruct the legislature to either amend New Jersey’s marriage statutes to include same-sex couples, or enact an appropriate statutory structure such as civil unions within 180 days from the date of its decision

to be motivated by an animus toward gays and lesbians); *Lawrence v. Texas*, 539 U.S. 558, 562, 578, 123 S.Ct. 2472, 2485, 2484, 156 L.Ed.2d 508, 515, 525-26 (2003)(Texas sodomy statute making it a crime for homosexuals to engage in certain intimate conduct invalidated on Fourteenth Amendment grounds).

³⁰¹See *In re J.S. & C.*, 129 N.J. Super. 486, 489, 324 A.2d 90 (Ch. Div. 1974), *aff’d per curiam*, 142 N.J. Super. 499, 362 A.2d 54 (App. Div. 1976)(parental visitation rights of a divorced homosexual parent could not be denied or restricted based on his sexual orientation); *see also In re Adoption of J.M.G.*, 267 N.J. Super. 622, 632 A.2d 550 (1993)(New Jersey one of the first states country to judicially recognize right to adopt same-sex partner’s biological child).

³⁰²*Lewis*, 908 A.2d at 209.

³⁰³*Id.* at 218.

to meet its mandate.³⁰⁴

In response, the New Jersey legislature passed a bill granting same-sex couples civil unions which was signed into law by then-Governor Jon Corzine effective February 19, 2007.³⁰⁵ Included in the bill was a provision establishing a Civil Union Review Commission to evaluate whether providing civil unions rather than marriage to same-sex couples afforded them equality. On December 10, 2008, the Commission issued a report in which it found that numerous employers in New Jersey had denied equal benefits to civil union partners because of the deprivation of marriage equality, and that numerous hospitals in the state had denied visitation and medical decision rights to civil union partners because of the deprivation of marriage quality. Its conclusion was that instead of ending discrimination against same-sex couples, the civil union law actually “invites and encourages unequal treatment” of same-sex couples.³⁰⁶

Following months of intense political lobbying by supporters of gay rights who argued that the state’s civil union law still left them subject to discrimination when applying for health insurance or visiting hospitalized partners, and just days before Corzine was scheduled to leave office and be replaced by Republican Christopher J. Christie on January 19, 2010, the New Jersey Senate rejected a proposed Bill that would have legalized gay marriage in the state.³⁰⁷

³⁰⁴*Id.* at 224.

³⁰⁵N.J. Pub. L. 2006, c103 (codified at N.J.S.A. 37:1-28).

³⁰⁶The Civil Union Review Commission Report can be found at <<http://www.nj.gov/dag/dcr/downloads/1st-Interimreport-CURC.pdf>>. See also John Figlar, “Commission Says New Jersey Should Allow Gay Marriage” <<http://www.nj.com/news/index.ssf/2008/12/goldstein.html>>.

³⁰⁷David Kocieniewski, “New Jersey Senate Defeats Same-Sex Marriage Bill”, *New York Times*, Jan. 8, 2010, at A18.

Undeterred, advocates continued to push for a legislative solution to the issue of gay marriage in New Jersey. On January 24, 2012, members of the Senate Judiciary Committee voted to send the Marriage Equality and Religious Exemption Act to the full state Senate for a vote where it passed easily.³⁰⁸ Governor Christie, a practicing Catholic and staunch opponent of gay marriage, reacted quickly threatening to veto it while calling, instead, for a public referendum on the issue,³⁰⁹ a suggestion that released a firestorm of criticism.³¹⁰ The Act was easily passed by the

³⁰⁸Mary Ann Spoto, “N.J. Senate Committee Advances Gay Marriage Bill”, *New Jersey Star Ledger*, Jan. 24, 2012 at <http://www.nj.com/news/index.ssf/2012/01/nj_senate_advances/1607/comments-5.html>. See also Heather Haddon, “N.J. Gay Nuptials Clear Hurdle”, *Wall Street Journal*, Feb. 14, 2012 at A21, reporting that the Bill to legalize same-sex marriage in NJ cleared the state senate by a wider than expected margin.

³⁰⁹David Ariosto, “Same-Sex Marriage Debate Flares Up In New Jersey”, *CNN*, Jan. 28, 2012 at <http://articles.cnn.com/2012-01-28/us/us_new-jersey-same-sex-marriage-1-garden-state-equality-marriage-bill-gay-rights-advocates?s=PM:US>. Ricardo Lopez, “New Jersey Gay-Marriage Bill Advances; Chris Christie Vows Veto”, *Los Angeles Times*, Jan. 24, 2012 at <<http://latimesblogs.latimes.com/nationnow/2012/01/new-jersey-gay-marriage-chris-christie.html>>.

³¹⁰See Heather Haddon, “Christie: Put Gay Nuptials To Vote” *Wall Street Journal*, Jan. 25, 2012, at A19. Many influential Black leaders objected to Governor Christie’s comments when he articulated the possibility of placing the issue of same-sex marriage in the hands of the voters in the November 2012 state elections. Of particular concern was his statement that “The fact of the matter is ... I think people would have been happy to have a referendum on civil rights rather than fighting and dying in the streets in the South.” Several leaders, including Newark New Jersey Mayor Cory Booker, himself an African American, criticized Christie’s cavalier comments stating “I shudder to think what would have happened if the civil rights gains, heroically established by courageous lawmakers in the 1960s, were instead conveniently left up to popular votes ...”. See Matt Friedman, “Black Leaders: Gov. Christie Needs History Lesson After Linking Civil Rights To Gay Marriage Vote”, Jan. 25, 2012, at <http://www.nj.com/news/index.ssf/2012/01/black_leaders_gov_christie_nee.html>. The outcry went viral through various the news media and social networking outlets, and Governor Christie was forced to issue an apology. See John Bacon, “N.J. Governor Apologizes For Civil Rights Remark”, *USA Today*, Feb. 1, 2012, at <<http://content.usatoday.com/communities/ondeadline/post/2012/02/nj-governor-apologies-for-civil-rights-remark/1>>.

state assembly, and, as promised, Governor Christie vetoed the legislation.³¹¹ Under New Jersey law, legislators have until January 2014 to acquire a two-thirds majority in both state houses to override the governor's veto.³¹²

The path to recognition of gay marriage in California has also followed a twisted course. In 1999, the state created the designation of 'domestic partnership' to reference two adults living "in an intimate and committed relationship of mutual caring".³¹³ Although the rights granted to domestic partners were initially limited in scope, over the next several years the state legislature substantially expanded these rights.³¹⁴ Following the enactment of the 1999 Domestic Partner Act, the state adopted an initiative measure entitled Proposition 22 which limited the state's recognition of marriage to only that between a man and a woman.³¹⁵

In 2004, lawsuits were filed in various California state courts by several same-sex couples and the City and County of San Francisco, alleging that the state's marriage laws and

³¹¹See John Wilson, "Gov. Chris Christie's Veto of N.J. Marriage Equality Bill Is A Civil Rights Tragedy", *Trenton Times*, Feb. 21, 2012, at <http://impact.nj.com/times-opinion/print.html?entry=/2012/02/opinion_gov_chris_cristies_ve_1.html>.

³¹²See Mel Evans, "N.J. Gov. Christie Vetoes Gay Marriage Bill A Vowed", *USA Today*, Feb. 17, 2012, at <<http://www.usatoday.com/news/nation/story/2012-02-17/gay-marriage-new-jersey/53136648/I>>.

³¹³Cal. Stats. 1999, ch. 588, §2 (codified at Cal. Fam. Code §297(a) ("the 1999 Domestic Partner Act")).

³¹⁴The 2003 Domestic Partner Act provided that registered partners "shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." Cal. Stats. 2003, ch. 421, § 4 (codified at Cal. Fam. Code § 297.5(a)).

³¹⁵See Cal. Fam. Code § 308.5 (2000).

Proposition 22 violated the Equal Protection Clause of the California Constitution.³¹⁶ The cases made their way through the trial and appellate level courts, and in May 2008, the California Supreme Court ruled that same-sex couples enjoyed the same fundamental right to marry as opposite-sex couples,³¹⁷ and concluded that an individual's sexual orientation is not a constitutionally legitimate basis for withholding or restricting his or her legal rights.³¹⁸ The remedy fashioned by the California Supreme Court was to strike the language from the state's marriage statutes that limited the designation of marriage to a union between a man and a woman, invalidating Proposition 22, and ordering that the designation of 'marriage' be made available to both opposite-sex and same-sex couples.³¹⁹

Opponents of gay marriage took their campaign to overturn the California Supreme Court's decision to the electorate during the November 2008 elections by introducing another initiative measure, this time entitled "Proposition 8", to amend the state Constitution to ban marriage other than between a man and a woman.³²⁰ Proposition 8 passed by a slim margin, resulting in the filing for a writ of mandate in the state's high court by individuals and groups seeking to overturn the Proposition and clarify the status of the thousands of gay couples who

³¹⁶CAL. CONST. art. I, § 7.

³¹⁷*In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384, 426, 433-434, 76 Cal. Rptr.3d 683 (2008).

³¹⁸*Id.* at 429.

³¹⁹*Id.* at 453.

³²⁰Proposition 8 sought to add a new provision to the California Constitution's Declaration of Rights, immediately following the Constitution's due process and equal protection clauses providing "only marriage between a man and a woman is valid or recognized in California". CAL. CONST. art. I, § 7.5.

legally wed between the Court’s May 2008 decision and the November 2008 vote.³²¹ On May 26, 2009, the California Supreme Court upheld the Proposition banning same-sex marriage, but preserved the legality of the unions of those persons who had already married.³²² Writing for the majority, California Supreme Court Chief Justice Ronald M. George noted that the decision reserved the official designation of the term ‘marriage’ for the union of opposite-sex couples, but left “undisturbed all of the other extremely significant substantive aspects of a same-sex couple’s state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection under the laws.”³²³ Since Proposition 8 did not include language specifically stating that its application was retroactive, the unions of those same-sex couples who were legally married between the Court’s May 2008 decision and the Proposition’s passage were not overturned by the decision.

After being denied marriage licenses, two same-sex couples filed a declaratory judgment action in May 2009 in the United States District Court for the Northern District of California seeking an injunction barring the enforcement of Proposition 8 arguing that it violated their Fourteenth Amendment protections. The trial court conducted a 12-day bench trial during which an evidentiary record was established. On August 4, 2010, Chief Judge Vaughn R. Walker, issued an lengthy opinion making 80 findings of fact, and determining that Proposition 8 was unconstitutional under the Due Process Clause because no compelling state interest justifies

³²¹*Strauss v. Horton*, 46 Cal. 4th 364, 207 P.3d 48, 93 Cal. Rptr.3d 592 (Cal. 2009).

³²²*Id.* at 98-110, 119-22.

³²³*Id.* at 61, 75.

denying same-sex couples the fundamental right to marry.³²⁴ He also concluded that Proposition 8 violated the Equal Protection Clause because there is no rational basis for limiting the designation of ‘marriage’ to opposite-sex couples.³²⁵

On February 7, 2012, the United States Ninth Circuit Court of Appeals upheld the trial court’s finding that the Proposition 8 ban on same-sex marriage is an unconstitutional violation of the Fourteen Amendment of the Constitution. Writing for the majority,³²⁶ Circuit Judge Stephen Roy Reinhardt, clearly set forth that Proposition 8 “serves no purpose ... other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples. ...”, before stating, “[t]he Constitution simply does not allow for ‘laws of this sort.’”³²⁷ Opponents of gay marriage reacted swiftly, promising to pursue their support of Proposition 8 to the United States Supreme Court, a promise that will be fulfilled when oral argument is heard on March 26, 2013.³²⁸

³²⁴*Perry v. Schwarzenegger (Perry IV)*, 704 F.Supp.2d 921, 991-995 (N.D. Cal. 2010), *see also* Jesse McKinley and John Schwartz, “California’s Ban On Gay Marriage Is Struck Down”, *New York Times*, Aug. 5, 2010 at A1.

³²⁵*Perry* at 997-1003.

³²⁶Concurring in part and dissenting in part, Circuit Judge N.R. Smith elected to issue his own opinion in which he stated that he was not convinced that Proposition 8 is not rationally related to a legitimate governmental interest. *See Perry v. Brown, et al.*, No. 10-16696, *slip op.* Dissent at *1 (9th Cir. Feb. 7, 2012).

³²⁷*Id.* at *5, citing *Romer v. Evans*, 517 U.S. 620, 633 (1996).

³²⁸*See* Maura Dolan and Carol J. Williams, “Divided Court Rejects Proposition 8”, *Los Angeles Times*, at <<http://www.latimes.com/news/local/la-me-prop8-20120208,0,7729505.story>>; Geoffrey A. Fowler and Jess Bravin, “Court Rejects State Ban on Gay Marriage”, *Wall Street Journal*, Feb. 8, 2012 at A1; Peter Henderson and Dan Levine, “Court Overturns California Gay Marriage Ban, Appeal Planned”, at <<http://reuters.com/article/2012/02/08/us-usa-gaymarriage-california-idUSTRE8160HO20120208>>. *See also* fn. 265 for a discussion on the cases that will be argued before the Supreme Court on March 26, 2013.

Following the actions taken in Vermont, Iowa recognized same-sex marriage on April 3, 2009 when the state's Supreme Court justices overturned a statute that restricted marriage to a union between a man and a woman as violative of the equal protection clause of its state constitution in *Varnum v. Brien*.³²⁹ Parsing through dozens of *amicus* briefs filed by religious organizations and civil liberty advocates arguing both for and against the premise, and making repeated references to the analysis of the Massachusetts, California and Connecticut state supreme courts, the Iowa Supreme Court held that the state's statute enacted in 1998 to define marriage as a union between only a man and a woman impermissibly failed to provide homosexual couples with the same right to marry as it afforded to heterosexual couples.³³⁰

Other states, including New Hampshire, have acted to grant status to same-sex couples through the legislative process without first responding to a judicial ruling.³³¹ The New Hampshire legislature initially enacted laws providing same-sex couples with the right to enter

³²⁹763 N.W.2d 862 (Iowa 2009).

³³⁰See Monica Davey, "A Quiet Day in Iowa as the State Begins Allowing Same-Sex Couples to Marry," *New York Times*, Apr. 27, 2009, A12.

³³¹On May 6, 2009, a Bill allowing same-sex couples to marry was signed into law in Maine, making it the first state to recognize same-sex marriage through the legislative process. See Jenna Russell, "Gay Marriage Law Signed in Maine, Advances in New Hampshire", *Boston Globe*, May 6, 2009, at <http://www.boston.com/news/local/breaking_news/2009/05/gay_marriage_la.html>. The Maine same-sex marriage law was originally set to take effect in September 2009, but after national conservative opposition groups flocked to the state, they delivered the signatures needed to put the measure on the public ballot on November 3, 2009 where it was defeated by a small margin. See <<http://www.cnn.com/2009/POLITICS/11/04/maine.same.sex/index.html>>. Gay rights advocates gathered more than 100,000 signatures to put the issue again on the state's 2012 November ballot where it passed. See Ben Brumfield, "Voters Approve Same Sex Marriage for First Time", *CNN*, Nov. 7, 2012 available at <<http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage>>.

into civil unions starting on January 1, 2008,³³² and the governor signed into law legislation approving same-sex marriage on June 3, 2009.³³³ In June 2011, the New York State Legislature passed the Marriage Equality Act permitting same-sex couples to marry making it the largest state to recognize this right.³³⁴ In a Bill the mirrors the one enacted in New York, the Washington State Senate passed a law permitting same-sex couples to marry within the state³³⁵

³³²See Carol Robidoux, “Civil Unions Ring in the New Year”, *New Hampshire Union Leader*, Jan. 1, 2008.

³³³Kevin Landrigan, “Same Sex Marriage Bill Heads for Governor’s Desk”, *Nashua Telegraph*, Jun. 3, 2009. Under the New Hampshire law, the civil unions of same-sex couples will automatically be converted to marriages on January 1, 2011.

³³⁴N.Y. Pub. L. 2011, ch. 95; *see also* Nicholas Confessore and Michael Barbaro, “New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law”, *New York Times*, Jun. 24, 2011, at <<http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html>>. New York’s ultimate enactment of the Marriage Equality Act followed a ruling by the New York State Court of Appeals in 2006 that provisions in the state’s Domestic Relations Law prohibiting same-sex marriage were supported by a rational basis, and that the issue was best addressed by the legislature. *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1, 5, 821 N.Y.S.2d 770 (N.Y. 2006). The Marriage Equality Act effectively overturns *Hernandez*. While same-sex marriage legislation was explored in New York in earlier legislative sessions, it was not until 2011 that political forces were able to coalesce when provisions were added to the Bill affording protections against discrimination lawsuits for religious groups and non-profit organizations. A month after Governor Cuomo signed New York’s Marriage Equality Act into law, a group calling itself “New Yorkers for Constitutional Freedoms” filed a lawsuit in state court seeking to overturn the Act and nullify the marriages performed under it based upon the manner in which it was enacted. *See New Yorkers for Constitutional Freedoms v. New York State Senate*, Index No. 000807/2011, Sup. Ct. Livingston Co., Jul. 25, 2011. New York State’s Attorney General Eric Schneiderman sought to have the lawsuit dismissed, but on November 18, 2011, Acting Justice Robert B. Wiggins of the Livingston County Supreme Court denied the motion, leaving open the possibility for there to be further judicial review. *See* Thomas Kaplan, “Judge Says Suit To Void Marriage Act May Proceed”, *New York Times*, Nov. 29, 2011, at <<http://www.nytimes.com/2011/11/30/nyregion/judge-says-lawsuit-against-gay-marriage-law-in-new-york-may=proceed.html>>.

³³⁵William Yardley, “Washington State Senate Passes Gay Marriage Bill”, *New York Times*, Feb. 2, 2012, A13. *See also* “Wash. Gov. Signs Gay Marriage Bill Into Law”, Feb. 13, 2012 at <<http://usnews.msnbc.msn.com/news/2012/02/13/10398748-wash-governor-signs-gay-marriage-bill-into-law>>.

making it the seventh state in the country where same-sex couples may legally wed. On March 1, 2012, Maryland became the eighth when its governor signed similar legislation that was ratified by the state's citizens during the November 2012 elections, as did voters in Maine, making it the ninth state to recognize same-sex marriage rights.³³⁶

Looking over the actions of several of this country's state supreme courts, it is clear that judicial decisions can act as the spark for policy change, and oftentimes lay the foundation for state legislators to act to acknowledge public sentiment.

IV.

INSTITUTIONAL REFORM LITIGATION

Over the last forty years, thousands of lawsuits have been filed by public interest lawyers³³⁷ and groups interested in seeking institutional reform against federal, state and local

³³⁶See CNN U.S. newswire, "Maryland Governor Signs Same-Sex Marriage Bill", March 1, 2012, at <http://articles.cnn.com/2012-03-01/us/us_maryland-same-sex-marriage-law-marriage-bill?s=PM:US>. Same-sex couples are also able to legally marry in the District of Columbia, following the Council of the District of Columbia's passage of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, at <<http://www.dcwatch.com/council/18/18-482.htm>>. Maine, Maryland and Washington State put the issue of legalization of same-sex marriage before their voters during the November 2012 elections and it passed in each state. See Lauren Markoe, "Election 2012 Shows a Social Sea Change in Gay Marriage", *Huffington Post*, Nov. 8, 2012 available at <http://www.huffingtonpost.com/2012/11/08/election-2012-gay-marriage-sea-change_n_2090106.html>.

³³⁷Public interest lawyers seek to provide legal representation to individuals and/or groups who historically have been unrepresented and under-represented in the legal process. These include not just poor and disadvantaged persons, but also include those who, because they cannot afford lawyers to represent them, lack access to courts, administrative agencies and other legal forums in which basic policy decisions affecting their interests are made. Public interest lawyers provide these individuals and groups with legal representation to insure that their needs and interests are understood and acknowledged by decision makers. Public interest cases that seek to enforce specific rights are also frequently referred to as institutional reform cases. See Ross Sandler and David Schoenbrod, *Democracy By Decree* (Yale Univ. Press, 2003) at 112 citing Colin S. Diver, "The Judge as Political Powerbroker: Superintending Structural Change in

governments and/or agencies who have failed to protect the rights of citizens or deliver mandated services to individuals who, sadly, are oftentimes those with the greatest need for same. There are two basic types of institutional reform cases that typically generate decrees as a result of the litigation. In the first type, plaintiffs and their lawyers adopt a structural approach and file a lawsuit to challenge systemic institutional deficiencies touching on nearly all aspects of an institution's operations. Any decree resulting from this type of litigation must, by its definition, be designed in such a way to overhaul the existing institutional structure and lay out the minutia associated with its day-to-day operations. The second type of institutional reform case is more focused in what it seeks to accomplish. Under this approach, plaintiffs and their lawyers select a few aspects of institutional conduct and develop a record of violations. A remedial decree issued in these types of cases does not seek to restructure an institution's entire operation, but instead seeks to resolve the problems identified in the lawsuit.³³⁸ There are,

Public Institutions", 65 *Virginia L. Rev.* 43 (1979). See also Council for Public Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law in America: A Report* (Council for Public Interest Law, 1976) at 3; see also generally Ford Foundation Report, *The Public Interest Law Firm: New Voices for New Constituencies* (Ford Foundation, 1973). When the *Brown* decision was handed down, the only cause-oriented lawyer groups were the ACLU and the NAACP Legal Defense Fund. In 1963, the Ford Foundation funded the first recognizable public interest law firm in New Haven, Connecticut, and that same year a similar organization entitled Mobilization for Youth came together in New York City. Sandler and Schoenbrod, at 25-26.

³³⁸ A recent example of the use of a Remedial Decree arose in context of an action brought in the United States District Court for the Eastern District of New York by Disability Advocates, a non-profit legal services group, against the State of New York. The basis of the claims were that New York had violated the federal Americans with Disabilities Act (ADA) and Rehabilitation Act (RA) by failing to provide supported housing to more than 4,300 mentally ill residents of institutional adult homes. Judge Nicholas G. Garaufis presided over an 18-day bench trial during which dozens of experts testified and hundreds of exhibits were admitted into evidence. On September 8, 2009, Judge Garaufis issued a 210-page Memorandum and Order setting forth his findings of fact and conclusions of law in which he determined that the state had

however, instances where some cases began with a focused approach and evolve into a structural one when the circumstances warrant complete change.³³⁹

Regardless of the approach, after filing the initial complaint, the lawyers representing both the plaintiffs and the defendants in the case engage in a process called “discovery” under which they review documents and take sworn deposition testimony from persons with knowledge as to the facts and circumstances surrounding the claim. The defendants generally have an arsenal of lawyers at their disposal to defend them, which typically leads to years of litigation involving thousands of documents and hundreds of motions and appeals, all of which are taken on by the lawyers representing the plaintiffs without compensation until there is a final resolution of all claims. Oftentimes there comes a point during the discovery process and prior to a public trial on the issues, when the lawyers representing the plaintiffs and the defendants are encouraged by the judge handling the case to try and negotiate a detailed plan designed to correct the inadequacies within the agency or the system itself. This plan is then reduced to a written order which may be approved by the court and referred to as a Consent Decree or Settlement Order. Governors, mayors or commissioners who agree to the substance of such a Decree, and their successors, are required to obey the terms of the agreement and implement each of the stated provisions. Failure to do so could result in a contempt charge which can be

unlawfully discriminated against the plaintiff’s constituents. On March 1, 2010, he issued a detailed Order setting forth the many conditions New York State is mandated to address which includes provisions for monitors to supervise the process. *See Disability Advocates, Inc. v. Paterson*, 2010 WL 786657 (E.D.N.Y. Mar. 1, 2010).

³³⁹Samuel R. Bagenstos, “The Judiciary’s Now Limited Role in Special Education”, *From Schoolhouse to Courthouse: The Judiciary’s Role in American Education*, eds. Joshua Dunn and Martin R. West (Brookings Institution Press, 2009) at 130.

punishable by fines or even imprisonment in some circumstances. The parties' compliance with the terms of the remedial decree are generally monitored by the lawyers, court designated experts, and ultimately by the judge assigned to the litigation.

Institutional reform litigation has been used to address a variety of failures in government-run systems such as those in place to provide special education services to disabled school children, to finance public schools, to secure low income housing, and has been used by advocates to secure the essential services needed by children who are dependent upon government-controlled foster care or child welfare programs. While our democracy was founded on the principle of separation of powers, neither the legislative, executive or judicial branches of this country's federal or state governments operate in a vacuum. Institutional reform litigation arising out of violations of constitutionally protected rights typically generates a great deal of media coverage and can serve as a wake up call for legislators who may view it as an opportunity to act. When this occurs, it satisfies one of the unstated goals of this type of litigation which is to stimulate legislative action to correct such violations or shortcomings. Governors and mayors faced with legislative dictates that have sprung from court-ordered Consent Decrees may also see this as a beneficial opportunity since it allows them to save political face by implementing the mandated changes while simultaneously providing them with an chance to publically criticize the judiciary as the source of the changes. This occurs even in situations where politicians know that change was necessary but were either politically powerless or fearful of the personal repercussions of instituting such change.³⁴⁰

³⁴⁰See generally Sandler and Schoenbrod, fn. 337. As demonstrated throughout this paper, in situations involving politically controversial choices, elected officials routinely turn to judges to make policy so they can avoid personal responsibility. *Id.* at 172 (examples of cases in

Due to its intent to bring about institutional change, reform litigation can exist long beyond what is needed to address the rights of an individual plaintiff which may have been the spark that ignited the case. As in any civil lawsuit, much may be learned during the discovery phase which can create the need to address offenses and violations not envisioned at the time the suit was initially filed. As plaintiffs' attorneys dig into the operation of a municipality's special education programs, or its foster care and/or child welfare systems, they are frequently forced to expand the initial focus of their suit to address horrendous conditions affecting other children. To conserve judicial resources, these issues are often joined into the existing case which can then unintentionally expand the life of the case. It is the length and expense associated with institutional reform litigation that is frequently pointed at by critics who charge that it is impermissible judicial policymaking.³⁴¹

Special Education and Disabled Children

During the decade of the sixties, litigation began to arise between parents of disabled and special needs children and state and local governments over educational opportunities for these children relying in large measure upon state constitutionally guaranteed protections.³⁴² It was

which defendants consented to a Decree to avoid responsibility for politically difficult choices).

³⁴¹One of the byproducts that arose out of several decisions from the Warren Court was controversy over the federal judiciary's power over state and local governments. Much of this controversy arose over the issue of whether the Justices were correct when they articulated certain rights from the U.S. Constitution. See e.g. Abram Chayes "The Role of the Judge in Public Law Litigation", 89 *Harv. L. Rev.* 1281 (1976); Donald L. Horowitz, *The Courts and Social Policy* (Brookings Institute, 1977). While there are some modern legal commentators who continue to voice this position, many more now direct their criticism against the ability of institutional reform litigation to implement policy change. See e.g. Rosenberg, fn. 5; Feeley and Rubin, fn. 4.

³⁴²See e.g. *PARC v. Commonwealth of Pennsylvania*, 334 F.Supp. 1257 (E.D. Pa. 1972)(court held that mentally retarded children entitled to receive a free public education);

not until 1975 that Congress reacted to these lawsuits and created a federal right to a free appropriate public education for children suffering from both physical and mental disabilities by enacting the Education for All Handicapped Children Act.³⁴³ In fact, many of the standards included in the Act were adopted by Congress directly out of a Decree negotiated between attorneys representing the Pennsylvania Association for Retarded Children.³⁴⁴

Recognizing the need to provide costly services to a significant number of children across the country, Congress agreed to provide substantial federal funding to states to help provide these services. In exchange, states were required to meet newly articulated federal standards which would be enforceable in federal court.³⁴⁵ Under the Act, every state was required to provide, at public expense, specialized programs such as speech therapy and related services including transportation and medical technician support to enable every child with a disability to have an individually tailored, expertly written and parentally-approved educational program made available to him or her and provided in a regular classroom setting wherever

Mills v. Board of Ed., 348 F. Supp. 866 (D.D.C. 1972)(finding that disabled children are entitled to free public education regardless of school district's financial capability).

³⁴³Pub. L. No. 94-142, 89 Stat. 773 (1975).

³⁴⁴*See PA Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972).

³⁴⁵Under §611(a)(1)(B)(i-v) of the Act, Congress would continue to increase its special educational grants to states so that by 1982 the federal government would absorb 40% of the costs associated with providing such services. New Mexico initially refused to adhere to the newly enacted federal standards, although it eventually acquiesced when a federal appeals court held that since the state accepted other federal educational funds, it was required to meet the standards set out in the Act as it related to the delivery of special services for disabled children. *See N.M. Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir. 1982).

possible.³⁴⁶

In 1979, a landmark lawsuit got underway when public interest lawyers working for Advocates for Children of New York and Brooklyn Legal Services filed a complaint on behalf of disabled children and their parents in the United States District Court for the Eastern District of New York entitled *Jose P. v. Ambach*.³⁴⁷ The complaint alleged that the New York City Board of Education failed to promptly evaluate and properly place disabled students into appropriate educational programs and provide them with necessary services in its public schools as legislatively required.³⁴⁸ Filed almost simultaneously with the *Jose P.* case was *United Cerebral Palsy of NYC v. Board of Education*³⁴⁹ which took a broader approach and sought a complete overhaul of New York City's special education system charging officials with failing to institute individual placement procedures or provide mainstream opportunities, inadequate preparation of individual education programs, inaccessible facilities for non-ambulatory students, a lack of requisite related services, and inefficiencies in the contracting procedures for placement in private schools.³⁵⁰ Judge Eugene H. Nickerson was assigned to manage both cases, and he found

³⁴⁶Pub. L. No. 94-142.

³⁴⁷Civil Action No. 79 Civ. 270 (E.D.N.Y. Feb. 1979).

³⁴⁸The lead plaintiff was a deaf-mute physically disabled 15 year-old living in Manhattan with his mother who had recently arrived from Puerto Rico where he had received no educational services. Upon arriving in New York City, his mother notified the New York City Board of Education of her son's condition, and several months passed without any action on the part of government officials to set up an initial evaluation to determine his placement in an appropriate educational setting as required under the federal statute. At the time the complaint was filed, more than 14,000 students sat on waiting lists for evaluation or placement in the New York City school system. Bagenstos, fn. 339 at 131.

³⁴⁹Civil Action No. 79 Civ. 560 (E.D.N.Y. Mar. 1979).

³⁵⁰Bagenstos, fn. 339 at 131-132.

that the violations alleged in each complaint were sufficiently intertwined so as to require the cases to be consolidated under the *Jose P.* title.³⁵¹

A few months after the cases were filed, the New York City Board of Education conceded that it did not meet evaluation and placement deadlines, and New York State acknowledged that it was unable to provide parents with a prompt administrative remedy. The parties negotiated a potential resolution to the plaintiffs' claims, and in December 1979, Judge Nickerson approved a Consent Decree that addressed a wide range of issues.³⁵² In doing so, he became, in effect, the principal federal official responsible for enforcing the federal right to special education in New York City.³⁵³ To correct the legal deficiencies in New York City's special education system, Judge Nickerson essentially created an extrajudicial process to be overseen by a former federal judge he appointed to serve as Special Master that was more legislative than judicial in nature.³⁵⁴ As negotiations got underway as to the directives to be included in the Consent Decree, Judge Nickerson permitted several other related groups and organizations who sought to be heard on the issues to enter into the case so their input and

³⁵¹*Jose P. v. Ambach*, 557 F. Supp. 1230 (E.D.N.Y. 1983).

³⁵²Bagenstos, fn. 339 at 131. In addition to directing the Board of Education to comply with both federal and state law, the Consent Decree directed it to (1) engage in a multiparty planning process for the implementation of a new special education services delivery system; (2) develop a set of operating procedures by which Board of Education staff members should undertake the evaluation and service delivery process; (3) increased resources to facilitate timely evaluation and placement, including hiring staff, purchasing office equipment, creating office space and providing instructional materials for classrooms, (4) develop informational materials for parents to inform them of their rights; and (5) reduce physical barriers that kept children with impaired mobility from participating in programs. *Id.* at 131-132.

³⁵³Sandler and Schoenbrod, fn. 337 at 55.

³⁵⁴*Id.* at 55-56.

interests would be reflected in the eventual remedial order.³⁵⁵

The Consent Decree recommended a radical new approach to the manner in which New York City would operate its special education system, and was based largely upon the recommendations and experience of Dr. Jerry Gross who was hired in July 1979 to serve as the Director of Special Education for the New York City school system. Dr. Gross had previously run the Minneapolis Special Education Program, and had given what many believed was critical testimony during the Congressional hearings which lead to the passage of the Education for All Handicapped Children Act of 1975. The program he proposed called for a complete reworking of the school system's bureaucracy. Previously, final decisions on a child's placement were made by borough-level committees that categorized each child's needs and dictated educational assignments. The Gross Program changed that philosophy, and consistent with the federal statute invoked radical institutional reform that called for New York City to abandon categorization of disabled students in favor of mainstreaming them, and instituted a parental participatory policy on assignments which would be made in the local school rather than centralized through committees.³⁵⁶ In addition, lawyers for the plaintiffs insisted that the Consent Decree include specific timelines and resource commitments to insure the defendants' compliance.³⁵⁷ Instead of fearing the new plan, city educational officials welcomed the Court Order since it converted a voluntary program that was never able to obtain appropriate funding due to diverse political pressures into one that was mandatory and one that spelled out large

³⁵⁵*Id.* at 57-58.

³⁵⁶*Id.* at 58-60.

³⁵⁷Bagenstos, fn. 339 at 132.

staffing requirements.³⁵⁸

Over the next year and a half, lawyers for the plaintiffs, the school district and other interested parties negotiated over the details and created two plans to implement different aspects of the Court's order.³⁵⁹ Institutional change at the grass roots level was, as to be expected, very slow to evolve. The parties to the litigation were aware that they had instituted a radical reformation process through the issuance of the Consent Decree. The attorney who filed the initial lawsuit on behalf of United Cerebral Palsy of New York City that was consolidated with the *Jose P.* action described the implications of this decree years later when he stated that the Gross Program "did not constitute a proven educational system that could be fully implemented over time if sufficient resources were provided. Rather, it was an imaginative proposal for beginning a structural reform process whose direction and substance would be subject to ongoing reformulation."³⁶⁰ The parties to the original agreement continued to meet and discuss feedback that was coming from those out in the field dealing with implementation issues and they reduced these findings into orders and stipulations which spelled out duties and deadlines that were backed up by the Court's power to hold the defendants in contempt. The Special Master remained involved in the process for years,³⁶¹ and was often called upon to mediate a compromise between the parties' positions.

³⁵⁸Sandler and Schoenbrod, fn. 337 at 61.

³⁵⁹Bagenstos, fn. 339 at 132-134.

³⁶⁰Michael A. Rebell, "*Jose P v. Ambach: Special Education Reform in New York City*," in *Justice and School Systems: The Role of Courts in Education Litigation*, ed. Barbara Flicker (Temple Univ. Press, 1990) at 35.

³⁶¹The original Special Master resigned from the position after four years, and was replaced in 1983. Sandler and Schoenbrod, fn. 337 at 79.

The *Jose P.* plaintiffs repeatedly turned to the federal court to force school officials to adhere to the terms of the agreement,³⁶² and fought vigorously against New York City when it sought to terminate court supervision.³⁶³ Mayors and New York City School Chancellors came and went while the *Jose P.* Consent Decree remained in effect, and many of them sought to change or modify its terms in an effort to ameliorate political or financial pressures. For the most part, these efforts were to no avail as Judge Nickerson repeatedly held the parties to the essential terms of the original agreement until his death in 2002.³⁶⁴

The *Jose P.* litigation remains open today, more than thirty years after Judge Nickerson issued the original Consent Decree in 1979.³⁶⁵ Supporters of the use of institutional reform litigation argue that the case forced New York City education officials to focus on the needs of disabled children and devote resources to their education, and that this would not have occurred in the absence of the lawsuit. Undoubtedly, the number of disabled students served and the government's funding of special needs programs dramatically increased since the execution of

³⁶²*Id* at 62-83.

³⁶³*See Jose P. v. Ambach*, 557 F.Supp. 1230, 1243 (E.D.N.Y. 1983)(court rejected school officials' request to be relieved of judicial supervision and suggested that in light of the city's continued refusal to adhere to mandated deadlines they might be in contempt of the original Consent Decree). The federal district court would go on to issue dozens of orders dealing with the reformation of the school system's special education programs throughout the tenure of the litigation. In 1988, the original Consent Decree was formally updated through an agreed upon Stipulation essentially adhering to the underlying principles laid out in the original Consent Decree. *See generally* Rebell, fn. 360.

³⁶⁴Bagenstos, fn. 339 at 133.

³⁶⁵The original *Jose P.* case was consolidated with a later filing in the Eastern District of New York under civil action number 96-cv-01834 and supervised by Magistrate Judge Steven M. Gold who continues to oversee the case to date.

the original Consent Decree.³⁶⁶ Detractors counter this argument by claiming that a strong demand from parents, educators and others would have forced schools to enhance their special education programs, although it is unlikely that it would have happened in the same manner as was spelled out in the Court's order. There is, however, no way to prove either position since both seek to compare what actually occurred with what may have, and the result of such an inquiry will vary with the views of the observer.³⁶⁷

Public School Financing

Public school financing in the United States relies primarily on local property taxes supplemented by varying levels of state funding and, in certain circumstances, very limited federal monies. As discussed *supra*, dramatic social and economic transformations took place in this country during the mid-twentieth century triggered by a number of causes including urban industrialization which brought a significant number of African Americans from rural Southern states to Northern cities. As Blacks moved into cities, Whites gravitated to suburbs. While many of the Supreme Court's anti-discrimination decisions of the sixties sought to end segregation, the practical effect was often "White flight" out of desegregated urban cities to essentially what remained segregated suburban communities. This demographic shift produced wealthier property tax bases in suburban areas where home ownership was the norm in comparison to urban cities that struggled to provide a wide variety of social services to a large percentage of its residents, many of whom could not afford to own their own homes.³⁶⁸

³⁶⁶Bagenstos, fn. 339 at 134-136.

³⁶⁷*Id.* at 131, citing Sandler and Schoenbrod, fn. 337 at 94.

³⁶⁸*See generally*, Diane Ravitch, *The Troubled Crusade: American Education, 1945-1980* (Basic Books, 1984).

Decreased property values and an increase in deteriorating rental properties worked to reduce tax revenues available to fund city school districts.³⁶⁹

Legal advocates for the poor turned to the federal court system for relief arguing that children residing in poor urban school districts were denied access to the same education that children being educated in suburban schools were receiving which effectively relegated them to a life of poverty. In 1971, the United States Supreme Court held that because wealth was not a suspect classification, Texas only had to demonstrate a rational basis as to why it adopted a school funding system based on local property taxes.³⁷⁰ Since state attorneys were able to meet this somewhat easy standard by establishing that its system furthered local control over and participation in education policy, the Supreme Court upheld its scheme.³⁷¹ Following this decision, lawyers turned to individual state constitutions to find a basis to challenge school financing plans based on local property taxes since many state constitutions contained clauses explicitly granting a right to free education.³⁷²

New Jersey included such language when the legislature amended the state constitution in 1875 to require the state to provide its children with a ‘thorough and efficient’ education.³⁷³

³⁶⁹Michael J. Dumas and Jean Anyon, “Toward a Critical Approach to Education Policy Implementation”, *New Directions in Education Policy Implementation: Confronting Complexity*, ed. Meredith I. Honig (State University of New York Press, 2006) at 157-158.

³⁷⁰*Id.* at 158, citing *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1971).

³⁷¹John Dinan, “School Finance Litigation: The Third Wave Recedes”, *From Schoolhouse to Courthouse*, Joshua M. Dunn and Martin R. West, eds. (Brookings Institution, 2009) at 97.

³⁷²Dumas and Anyon, fn. 369 at 158.

³⁷³New Jersey Const. art. VIII, § 4, ¶ 1.

By the late 1960s, like many other states, New Jersey's cities had become home to the overwhelming majority of the state's poorest disenfranchised minority groups and their children. As many of its cities had become financially crippled by the high costs associated with caring for a growing indigent population, as well as dealing with an overall economic downturn, many New Jersey municipalities had become incapable of raising the funds necessary to provide for even basic educational services for the state's heavily disadvantaged children, many of whom had significant educational needs.³⁷⁴

The New Jersey Supreme Court became the first state supreme court in the country to strike down its school financing system based upon provisions contained in the state's constitution.³⁷⁵ In 1973, in *Robinson v. Cahill*,³⁷⁶ the Court found that the 'thorough and efficient' education clause of the New Jersey Constitution was violated by the system used by the state's public schools which relied heavily on local property taxes. When the initial law suit was filed in 1970, New Jersey, like many other states, relied on a minimum foundation plan to fund its school districts. Under this funding scheme, the state guaranteed local school districts a specified level of funding per pupil if the district raised what was deemed to be its local fair share.³⁷⁷ The *Robinson* plaintiffs argued that the state's heavy reliance on local property taxes as a means to fund its school districts created wide disparities in the quality of education received by students residing in poor and wealthy districts, and they argued that this disparity violated

³⁷⁴See Paul L. Tractenberg, "The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947", 29 *Rutgers L.J.* 827, 892-895 (1998).

³⁷⁵Wefing, fn. 13.

³⁷⁶62 N.J. 473, 303 A.2d 273 (1973)(*Robinson I*).

³⁷⁷Tractenberg, fn. 374 at fn. 384 describing the state's guaranteed funding plan.

equal protection guarantees.³⁷⁸ While it disagreed with the plaintiffs' constitutional interpretation, the New Jersey Supreme Court unanimously found that the state's system for funding schools violated the education clause of the New Jersey Constitution.³⁷⁹

The decision in *Robinson I* was significant, not only for its impact on the state's struggle to finance its urban schools, but also because it served as the basis for a national wave of school finance litigation that turned its focus away from challenges waged under the Equal Protection Clause of the federal constitution to state-based constitutional claims.³⁸⁰ Although the state Supreme Court's construction of the Education Clause in *Robinson I* was a clear victory for the plaintiffs in the suit, subsequent rulings that followed the initial decision arising out of legislative resistance halted the progress of actual reform.³⁸¹ Frustrated by the legislature's failure to act, the New Jersey Supreme Court spoke again in *Robinson IV* threatening to order a redistribution of state funds if the funding stalemate continued.³⁸² Just two days before the last deadline and fearful of the Court's proposed remedy, the legislature enacted the Public School Education Act

³⁷⁸See *Robinson I*, 303 A.2d at 276.

³⁷⁹*Id.* at 280, 282-283. See also Tractenberg, fn. 374 at 844, citing one of his earlier writings, "Reforming School Finance Through State Constitutions: *Robinson v. Cahill* Points the Way", 27 *Rutgers L. Rev.* 365 (1974).

³⁸⁰See William Evans, "The Impact of Court-Mandated School Finance Reform", *Equity and Adequacy in Education Finance* (Helen F. Ladd, et al. eds., National Academy Press, 1999), at 72. For a discussion of state constitutional challenges to state school financing systems, see Dinan, fn. 371 at 97-98, fn. 9-16.

³⁸¹See *Robinson II*, 63 N.J. 196, 306 A.2d 65 (N.J. 1973)(extending deadline established by lower court to adopt legislation compatible with *Robinson I*); *Robinson III*, 67 N.J. 35, 335 A.2d 6 (N.J. 1975)(Court again extending legislative deadline for compliance).

³⁸²351 A.2d 713, 718, 721-722 (N.J. 1975).

of 1975.³⁸³ While this statute increased overall aid to poor districts, it ignored the larger issue of overburdened urban municipalities and continued to rely heavily on local property taxes for funding.³⁸⁴ Despite these failings and in the face of grave concerns raised by several justices,³⁸⁵ the majority found the statute constitutional on its face.³⁸⁶ Not surprisingly, the legislative inertia continued, and the statute remained unfunded giving rise to *Robinson V* which enjoined further expenditures, effectively shutting down New Jersey's public school system in the summer of 1976.³⁸⁷ It was only at this desperate juncture that the legislature reluctantly enacted the state's first income tax in an attempt to equalize funding for all of its school districts.³⁸⁸

While the *Robinson* cases clarified the source of the rights of disadvantaged students, litigation over school finance reform would continue for many years in the state, centering around the question of what constitutes a 'thorough and efficient' education. In February 1981, the Newark-based public interest group Education Law Center filed a lawsuit on behalf of

³⁸³ 1975 N.J. Laws 871 (codified as amended at N.J. Stat. Ann. § 18A:7A (2003)).

³⁸⁴ Note, "Unfulfilled Promises: School Finance Remedies and State Courts", 104 *Harv. L. Rev.* 1072, 1076 (1991) citing *Robinson V*, 355 A.2d 129, 138 (N.J. 1976).

³⁸⁵ Chief Justice Hughes noted that despite his misgivings, "judicial restraint" and an "accommodation to the exigencies of government" compelled his concurrence, *Robinson V*, 355 A.2d at 142-143 (Hughes, C.J., concurring); Judge Conford felt it important to note that urban students were actually worse off under the Public Education Act of 1975 than under the Court's provisional remedies, *Id.* at 150-151 (Conford, J., temporarily assigned, concurring and dissenting), and in a comment that was to become somewhat prophetic, in his dissent, Justice Pashman scolded the majority for being "perfectly satisfied . . . to await further legislative action . . . which will not likely be forthcoming". *Id.* at 178 n.10 (Pashman, J., dissenting).

³⁸⁶ *Robinson V* at 139.

³⁸⁷ 358 A.2d 457, 459 (N.J. 1976).

³⁸⁸ James C. Sheil, Note, "The Just-Do-It Decision: School Finance Litigation Tests the Limits of Judicial Deference", 28 *Seton Hall L. Rev.* 620, 634 (1997).

several students from New Jersey's poorest cities challenging the Public School Education Act as inadequate to ensure a thorough and efficient education in a case entitled *Abbott v. Burke*. In 1985, the New Jersey Supreme Court issued the first of what would become more than twenty *Abbott* decisions to date dealing with both procedural and substantive aspects of the prevailing law, as well as various methodologies and political solutions developed to meet the mandate of the state's highest court that all New Jersey students' receive equal educational opportunities.³⁸⁹ Concerned about the nature of the constitutional challenges being raised, the New Jersey Supreme Court transferred the cases back to an administrative law judge in *Abbott I* to establish a more detailed factual record.³⁹⁰

In 1990 in *Abbott II*,³⁹¹ the Court addressed the plaintiffs' substantive challenges to the Public Education Act. At the outset, the unanimous Court made known its intention when Chief

³⁸⁹*Abbott v. Burke*, 195 N.J. Super. 59, 477 A.2d 1278 (App. Div.), *cert. granted*, 97 N.J. 669, 483 A.2d 187 (N.J. 1984), *rev'd and transferred*, 100 N.J. 269, 495 A.2d 376 (N.J. 1985)(*Abbott I*); *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359 (N.J. 1990)(*Abbott II*); *Abbott v. Burke*, 137 N.J. 444, 643 A.2d 575 (N.J. 1994)(*Abbott III*); *Abbott v. Burke*, 149 N.J. 145, 693 A.2d 417 (N.J. 1997)(*Abbott IV*); *Abbott v. Burke*, 153 N.J. 480, 710 A.2d 450 (N.J. 1998)(*Abbott V*); *Abbott v. Burke*, 163 N.J. 95, 748 A.2d 82 (N.J. 2000)(*Abbott VI*); *Abbott v. Burke*, 164 N.J. 84, 751 A.2d 1032 (N.J. 2000)(*Abbott VII*); *Abbott v. Burke*, 170 N.J. 537, 790 A.2d 842 (N.J. 2002)(*Abbott VIII*); *Abbott v. Burke*, 172 N.J. 294, 798 A.2d 602 (N.J. 2002)(*Abbott IX*); *Abbott v. Burke*, 177 N.J. 578, 832 A.2d 891 (N.J. 2003)(*Abbott X*); *Abbott v. Burke*, 177 N.J. 596, 832 A.2d 906 (N.J. 2003)(*Abbott XI*); *Abbott v. Burke*, 180 N.J. 444, 852 A.2d 182 (N.J. 2004)(*Abbott XII*); *Abbott v. Burke*, 182 N.J. 153, 862 A.2d 538 (N.J. 2004)(*Abbott XIII*); *Abbott v. Burke*, 185 N.J. 612, 889 A.2d 1063 (N.J. 2005)(*Abbott XIV*); *Abbott v. Burke*, 187 N.J. 191, 901 A.2d 299 (N.J. 2006)(*Abbott XV*); *Abbott v. Burke*, 196 N.J. 348, 953 A.2d 1198 (N.J. 2006)(*Abbott XVI*); *Abbott v. Burke*, 193 N.J. 34, 935 A.2d 1152 (N.J. 2007)(*Abbott XVII*); *Abbott v. Burke*, 196 N.J. 451, 956 A.2d 923 (N.J. 2008)(*Abbott XVIII*); *Abbott v. Burke*, 196 N.J. 544, 960 A.2d 360 (N.J. 2008)(*Abbott XIX*); *Abbott v. Burke*, 199 N.J. 140, 971 A.2d 989 (N.J. 2009)(*Abbott XX*); *Abbott v. Burke*, 206 N.J. 332, 20 A.3d 1018 (N.J. 2011)(*Abbott XXI*).

³⁹⁰*Abbott I*, 495 A.2d 376 (N.J. 1985).

³⁹¹119 N.J. 287, 575 A.2d 359.

Justice Robert N. Wilentz stated:

“We find that under the present system the evidence compels but one conclusion: the poorer the district and the greater its need, the less the money available, and the worse the education. That system is neither thorough nor efficient. We hold the Act unconstitutional as applied to poorer urban school districts. Education has failed there, for both the students and the State. We hold that the Act must be amended to assure funding of education in poorer urban school districts at the level of the property-rich districts; that such funding cannot be allowed to depend on the ability of local school districts to tax; that such funding must be guaranteed and mandated by the State; and that the level of funding must also be adequate to provide for the special educational needs of these poorer urban districts in order to address their extreme disadvantages.”³⁹²

Reaching this conclusion, the New Jersey Supreme Court raised the bar it had first laid down in the *Robinson* cases. After *Abbott II*, funding in poor urban districts, which would come to be known as “Abbott” or special-needs districts, could no longer be based on some assumed level of adequacy, but, rather, were required to be measured against the spending levels of property-rich districts. Additionally, the funding had to be sufficiently adequate to enable poor urban school districts to meet the extreme disadvantages of their children. These mandates form the core of the New Jersey Supreme Court’s reasoning in each of its subsequent school financing reform decisions.

In *Abbott II*, the state’s high court left to the legislature several important determinations which would ultimately give rise to years of legal discourse, including the responsibility to identify which districts were ‘poorer urban districts’, to decide whether or not to alter the school funding system as it pertained to districts not identified as ‘poorer urban districts’, and to define the nature and details of a funding system which would satisfy the ‘thorough and efficient’

³⁹²*Abbott II*, 575 A.2d at 359, 363 (N.J. 1990).

education clause of the state's Constitution.³⁹³

New Jersey's legislature reacted with astonishing speed and within weeks passed the Quality Education Act of 1990³⁹⁴ to meet the New Jersey Supreme Court's directives. The statute provided for increased state aid to *Abbott* districts, a phase-out of state aid to wealthy school districts, and a reduction in state funding for teacher's pensions, all of which was to be paid for with money raised by a \$2.8 billion dollar tax increase, the largest in New Jersey's history.³⁹⁵ The political backlash from the enactment of the law and its funding source was swift and immediate. Suburban voters, whose property and incomes taxes were set to rise significantly to fund the required parity spending joined with New Jersey's largest teacher organization which opposed the substance of the law in so far as it transferred responsibility for funding teachers' pensions from state to local governments, many of whom could ill afford to make the payments. Fearful of losing their re-election bids, legislators bowed to the pressure and replaced the statute with a watered-down version that decreased the tax burden for residents, provided less of an increase in state aid to poorer urban districts, and delayed shifting the costs of teachers' pensions to local school districts.³⁹⁶ Nevertheless, the political damage to the democratically controlled house and senate were overwhelming, and the 1991 legislative

³⁹³*Id.* at 409.

³⁹⁴1990 N.J. Laws 587 (codified as amended at N.J. Stat. Ann. §§18A:7D (West 1999)), repealed by 1991 N.J. Laws 200 & Comprehensive Educational Improvement and Financing Act of 1996, 1996 N.J. Laws 954 (codified at N.J. Stat. Ann. §§18A:7F-1 to 34 (West 1999)).

³⁹⁵Tractenberg, fn. 374 at 911. *See also* Alexandra Greif, "Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott Mandate", 22 *Yale L & Pol'y Rev.* 615, 621-622 (2004).

³⁹⁶Craig A. Ollenschleger, Comment "Another Failing Grade: New Jersey Repeats School Funding Reform", 25 *Seton Hall L. Rev.* 1074, 1097-1098 (1995).

elections resulted in a republican majority in both houses. A few years later, the spiral continued when Democratic Governor Florio lost his bid for reelection, despite the fact that he entered the office in 1990 with the third largest margin of victory in the history of a modern New Jersey gubernatorial race.³⁹⁷

While the political battles raged, the *Abbott* plaintiffs continued to pursue legal challenges to the state's funding practices, next focusing their attention on the validity of the Quality Education Act. In *Abbott III*, the New Jersey Supreme Court declared the statute unconstitutionally defective "because it failed to ensure parity funding . . . and because it did not provide for supplemental programs to help disadvantaged urban students", and once again the Court imposed a deadline on the legislature for devising a funding scheme.³⁹⁸ Politics would continue to play a significant role in what transpired in the aftermath of the Court's reiteration of its constitutional mandate. Republican Governor Christine Todd Whitman's response to the decision was quite simple - she virtually ignored the Court's directives when she had the Republican-controlled legislature pass the Comprehensive Educational Improvement and Financing Act³⁹⁹ ("CEIFA"). This statute did not provide for the required parity spending, but instead changed the focus of school finance reform from what the government contributed to education, or what was referred to as its 'inputs' (i.e. labor, equipment and capital), to what

³⁹⁷Greif, fn. 395 fn. 35 citing Michael Heise, "The Courts, Educational Policy and Unintended Consequences", 11 *Cornell J. L & Pub. Pol'y*, 633, 655 n. 146 (2002).

³⁹⁸*Abbott III*, 643 A.2d 575, 580-581 (N.J. 1994).

³⁹⁹1996 N.J. Laws 954 (codified as amended at N.J. Stat. Ann. §§18A:7F (West 1999 & Supp. 2003)).

schools produced or measuring their ‘outputs’ (i.e. types of achievement or graduates).⁴⁰⁰ The statute included a definition of a thorough and efficient education that centered on the achievement of substantive educational standards, and allocated funding to schools based upon the amount of money a model school would need to help its students meet specified proficiencies set forth under the Act.⁴⁰¹

Dissatisfied with the legislative response to its prior orders, upon review of the plaintiffs’ allegations that the latest legislative effort persisted in failing to correct the economic disparities between poor urban and wealthy districts brought to it in *Abbott IV*, the New Jersey Supreme Court reprimanded the legislature for attempting to turn the focus away from the core issue of funding to a standards analysis stating “standards themselves do not ensure any substantive level of achievement. Real improvement still depends on the sufficiency of the educational resources, successful teaching, effective supervision, efficient administration . . . and societal factors . . .”.⁴⁰² The Court also admonished the legislature for permitting school facilities in *Abbott* districts to deteriorate to the point where many of them were dilapidated, unsafe and overcrowded and it ordered the state to immediately upgrade these facilities.⁴⁰³ Finally, having become so discontented with CEIFA’s special needs provisions and by the New Jersey Department of Education’s persistent bureaucratic stonewalling, the Court took it upon itself to initiate a study and called for the preparation of a report with specific findings and

⁴⁰⁰Greif, fn. 395 at 623 n. 59.

⁴⁰¹*Id.* at 623.

⁴⁰²*Abbott IV*, 693 A.2d 417, 428 (N.J. 1997).

⁴⁰³*Id.* at 437-438.

recommendations covering the special needs to be addressed to assure a thorough and efficient education.⁴⁰⁴ The responsibility for this unprecedented and enormous task to oversee and make recommendations concerning school finance fell to Superior Court Judge Michael Patrick King.⁴⁰⁵

In January 1998, after conducting dozens of site visits and meeting with children, parents, teachers and administrators, listening to hundreds of hours of testimony and pouring over the thousands of documents including legal precedent in school financing lawsuits dating back more than 25 years, Judge King issued a lengthy report to the New Jersey Supreme Court. In it, Judge King recommended that for its special needs districts, New Jersey should (1) institute parity spending between poor and wealthy school districts; (2) undertake whole school reform (which is an approach to educational improvement that integrates supplemental programs including special education, art and music with a regular education format which would require schools to restructure their core curricula); (3) establish full-day pre-kindergarten programs for three and four year olds;⁴⁰⁶ (4) mandate full-day kindergarten for five year olds; (5) add school-based health and social services; (6) establish summer school or extended term programs; (7) reduce overall class sizes; (8) put in place accountability measures aimed at encouraging competition,

⁴⁰⁴*Id.* at 444, 456.

⁴⁰⁵See Carla Anderson, “School Reform Judge Hits the Books”, *Trenton Times*, Nov. 20, 1997 at A1 (quoting Special Master Dr. Allen Odden on the appointment of a Superior Court judge to oversee the reformation of the state’s school financing system: “It’s never been done before in the history of this country . . .”).

⁴⁰⁶When the Supreme Court adopted Judge King’s recommendations in *Abbott V*, it was the first time any court in the country had declared that public education must include well-planned preschool programs for children as young as three years old. Greif, fn. 395 fn. 78 citing Erain Applewhite & Lesley Hirsch, Educ. Law Ctr., “The Abbott Preschool Program: Fifth Year Report on Enrollment and Budget”(2003).

and (9) provide for additional funding for security protective services in at-risk facilities.⁴⁰⁷ A few months later, the New Jersey Supreme Court adopted most of Judge King's recommendations in *Abbott V*.⁴⁰⁸ As was the case with each of its earlier *Abbott* decisions, the Court also set up a timetable for the implementation of its recommendations.⁴⁰⁹ The Court also recognized that schools in the Abbott districts, while similar in many ways, did not all share the same problems and it stressed the "importance of having the particularized needs of [Abbott] children drive the determination of what programs [were] developed".⁴¹⁰

Despite the Court's prediction at the outset of *Abbott V* that its decision "should be the last major judicial involvement in the long and tortuous history of the State's extraordinary effort to bring a thorough and efficient education to the children in its poorest school districts",⁴¹¹ such was not the case. Implementation and compliance once again proceeded more slowly than the state Supreme Court demanded, with some districts failing to meet the imposed deadlines, and teachers and administrators expressing dissatisfaction with the quality of the new programs.⁴¹² By March of 2000, the Supreme Court was forced to again weigh into the morass in *Abbott VI* which found that the state had failed to implement preschool programs as directed, and it ordered

⁴⁰⁷See *Abbott V*, 710 A.2d 450, 456-457 (N.J. 1998).

⁴⁰⁸*Id.* at 473.

⁴⁰⁹*Id.* at 458, 461.

⁴¹⁰*Id.* at 466.

⁴¹¹*Id.* at 455.

⁴¹²Greif, fn. 395 at 626.

the Department of Education to overhaul the program for the upcoming school year.⁴¹³ Several months later, the Court published another opinion, this time reaffirming its prior ruling that the state must fully fund the capital reconstruction project for *Abbott* schools.⁴¹⁴ In *Abbott VIII*, the Court again found that under Governor Whitman's Administration, New Jersey continued to default on its obligation to provide high-quality preschool programs for its children, and it ordered the Department of Education to develop and distribute a preschool curriculum strategy and provide special needs districts with supplemental funding so that Head Start programs could be upgraded to meet state requirements.⁴¹⁵

January 2002 saw the installation of Democrat James McGreevey to the Office of Governor who stated an intention to make education a cornerstone of his administration. Weeks into the position, McGreevey signed an Executive Order establishing the Abbott Implementation and Coordinating Council, bringing together the parties to the litigation, the State Attorney General and the Commissioners of Education and Human Services, Higher Education and the Economic Development Authority to identify implementation problems arising out of *Abbott V* and to work together to develop a resolution.⁴¹⁶ Faced with growing pressure on the state's finances, in the Spring of 2002, the McGreevey Administration reached a compromise with the *Abbott* plaintiffs to place a one year freeze on further implementation of the *Abbott* remedies at current levels in exchange for the Administration's commitment to increase preschool spending

⁴¹³*Abbott VI*, 748 A.2d 82 (N.J. 2000).

⁴¹⁴*Abbott VII*, 751 A.2d 1032 (2000).

⁴¹⁵790 A.2d 842, 844-45, 850, 853, 856 (N.J. 2002).

⁴¹⁶Greif, fn. 395 at 639-640.

and maintain parity spending, an agreement that was memorialized by the Court in *Abbott IX*.⁴¹⁷

The parties continued to engage in court-ordered mediations and entered into agreements with respect to such issues as whole school reform, budgetary constraints and the practical need for greater flexibility in the implementation of the *Abbott* standards which were addressed in *Abbott X*⁴¹⁸ and *Abbott XI*.⁴¹⁹ Today, the Court continues to issue opinions dealing with funding allocations and statutory interpretations,⁴²⁰ and elected leaders continue to try to craft ways around the decades-long legal precedent.⁴²¹

⁴¹⁷798 A.2d 602 (N.J. 2002).

⁴¹⁸177 N.J. 578, 832 A.2d 891 (N.J. 2003)(mediation agreement order).

⁴¹⁹177 N.J. 596, 832 A.2d 906 (N.J. 2003)(maintenance budget order).

⁴²⁰*See e.g. Abbott v. Burke*, 180 N.J. 444, 852 A.2d 185 (N.J. 2004)(*Abbott XII*)(preschool teacher qualifications); *Abbott v. Burke*, 182 N.J. 153, 862 A.2d 538 (N.J. 2004)(*Abbott XIII*)(orders mediation as to *Abbott X*); *Abbott v. Burke*, 185 N.J. 612, 889 A.2d 1063 (N.J. 2005)(*Abbott XIV*)(facilities constructions budgets); *Abbott v. Burke*, 187 N.J. 191, 901 A.2d 299 (N.J. 2006)(*Abbott XV*)(maintenance budget order); *Abbott v. Burke*, 196 N.J. 348, 953 A.2d 1198 (N.J. 2006)(*Abbott XVI*)(intervenor districts seek clarification of *Abbott XV*); *Abbott v. Burke*, 193 N.J. 34, 935 A.2d 1152 (N.J. 2007)(*Abbott XVII*)(denying plaintiffs' contempt motion); *Abbott v. Burke*, 196 N.J. 451, 956 A.2d 923 (N.J. 2008)(*Abbott XVIII*)(denying plaintiffs' contempt motion); *Abbott v. Burke*, 196 N.J. 544, 960 A.2d 360 (N.J. 2008)(*Abbott XIX*)(court remands challenge to 2008 School Funding Reform Act (N.J.S.A. 18A:7F - 43 to -63 "SFRA") to a court-appointed Special Master, the Honorable Peter E. Doyne, Acting Justice of the New Jersey Superior Court, Bergen County, to develop factual record); *Abbott v. Burke*, 199 N.J. 140, 971 A.2d 989 (N.J. 2009)(*Abbott XX*)(court upholds constitutionality of SFRA); *Abbott v. Burke*, 206 N.J. 332, 20 A.3d 1018 (N.J. 2011)(*Abbott XXI*)(state fails to fully fund SFRA in Fiscal Year 2011 and is ordered to do so for Fiscal Year 2012).

⁴²¹Governor Chris Christie's "education reform" agenda does not include provisions to establish fair school funding, relying instead on cutting the state's spending budgets. He is an outspoken critic of SFRA and makes no secret of his desire to amend or eliminate the Act. *See* David G. Sciarra, "N.J. Public Education Funding Myths Repeated By Christie", October 5, 2011 at <<http://www.newjerseynewsroom.com/commentary/nj-public-education-funding-myths-repeated-by-christie>>.

Exclusionary Zoning and Low Income Housing

Beyond the significant effect its rulings have had over the methods by which public schools are financed in this country, the New Jersey Supreme Court has also had a substantial impact on affordable housing opportunities. The Court's decisions in this area came to be known as the *Mount Laurel* cases,⁴²² and relied heavily on the central concerns articulated by the United States Supreme Court in *Brown v. Board of Education*.⁴²³ There is, however, a significant distinction between the *Mount Laurel* cases and the equitable relief ordered in *Brown* which was directed at public institutions that were capable of being targeted as defendants in private lawsuits. By its *Mount Laurel* rulings, the New Jersey Supreme Court set out to influence not only the behavior of public officials, but also the actions of thousands of individuals and entities who participated in the state's housing market.⁴²⁴

The doctrine delineated in *Mount Laurel* arose out of a lawsuit filed by the local chapter of the NAACP who alleged that low and moderate income families were being unlawfully excluded from residing within the suburban township as a result of its land use and zoning regulations. As the case made its way through the legal system, and faced with the prospect that the state's highest court would ultimately intervene to put an end to the practice of exclusionary zoning, a number of proposals were introduced in the New Jersey state legislature to create a statewide zoning plan. All of these proposals languished in the face of staunch opposition from

⁴²²*South Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (“*Mount Laurel I*”); *South Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) (“*Mount Laurel II*”).

⁴²³347 U.S. 483 (1954).

⁴²⁴John Charles Boger, “Mount Laurel at 21 Years: Reflections on the Power of Courts and Legislatures to Shape Social Change”, 27 *Seton Hall L. Rev.* 1450, 1451-1452 (1997).

strong, wealthy suburban interests.⁴²⁵ Former Governor Brendan Byrne, a Democrat who served in office from 1974 through 1982, attempted to motivate the legislature to act by issuing two Executive Orders⁴²⁶ linking discretionary state infrastructure grants to non-exclusionary zoning, but these efforts ultimately failed when Byrne was replaced by Thomas Kean, a Republican, who quickly rescinded the Orders.⁴²⁷

When the case made its way to the New Jersey Supreme Court in 1975, the justices issued a sweeping decision in broad terms and held that municipalities undergoing development violate the state’s constitutional mandate to exercise zoning powers for the general welfare when they fail to include an opportunity for the construction of low and moderate income housing. Specifically, the Court concluded:

“[E]very [developing] municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. . . . [I]t cannot foreclose the opportunity . . . for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the

⁴²⁵For a discussion of the various bills designed to address the practice of exclusionary zoning in New Jersey before the *Mount Laurel* decisions, see Michael N. Danielson, *The Politics of Exclusion* (Columbia University Press, 1976), at 294-300, and David L. Kirp, John P. Dwyer and Larry A. Rosenthal, *Our Town: Race, Housing and the Soul of Suburbia* (Rutgers University Press, 1995), at 114-119.

⁴²⁶See John M. Payne, “General Welfare and Regional Planning: How the Law of Unintended Consequences and the *Mount Laurel* Doctrine Gave New Jersey a Modern State Plan”, 73 *St. John’s L. Rev.* 1103, fn. 9 (1999), citing Exec. Order No. 35 (N.J. 1976)(ordering the Division of State and Regional Planning to draft state housing goals to give guidance to municipalities in adjusting their land use regulations so as to provide a ‘reasonable opportunity for the development of an appropriate variety and choice of housing to meet the needs of the [state’s] residents’, and Exec. Order No. 46 (N.J. 1076)(ordering the Division of State and Regional Planning to review and modify preliminary housing allocation goals so as to take into consideration programs designed to revitalize New Jersey’s cities).

⁴²⁷*Id.* fn.14 citing Exec. Order No. 6 (N.J. 1982)(voiding Exec. Orders 35 and 46 and any regulations stemming from those Orders).

municipality's fair share of the present and prospective regional need therefor."⁴²⁸

While the Court clearly set out its intentions with respect to low and moderate income families' accessibility to housing, the loose guidelines it drew in *Mount Laurel I* created significant implementation problems.⁴²⁹ Towns and municipalities battled with state authorities over what constituted a 'developing municipality', how the 'regional need' could be measured, and how a municipality's 'fair share' could be calculated within a particular region.⁴³⁰ Frustrated by municipal resistance, by what it viewed as an unjustified failure on the part of the legislature and state administrative agencies to enforce the mandate it had laid out in *Mount Laurel I*, and angered by what it perceived to be abuse of the legal process, eight years later in *Mount Laurel II*, Chief Justice Robert Wilentz, writing for the unanimous justices, clarified the Court's original rulings and expressed its displeasure with the drawn out litigation stating:

"The [Mount Laurel] doctrine has become famous. The Mount Laurel case itself threatens to become infamous. After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor. Mount Laurel is not alone; we believe that there is widespread non-compliance with the constitutional mandate of our original opinion in this case."⁴³¹

Instructing the state's lower courts to set targets for low and moderate income house for

⁴²⁸*Mount Laurel I*, 336 A.2d 724-726.

⁴²⁹In its decision in *Mount Laurel II*, the Court acknowledged that its doctrine was correct but its administration had been ineffective. *See* 456 A.2d 390, 411 (N.J. 1983).

⁴³⁰Payne, fn. 426 at 1107-1108.

⁴³¹*Mount Laurel II*, 456 A.2d at 410.

every town and village in the state, Chief Justice Wilentz went on to affirmatively state that there was a need to “put some steel in [the Mount Laurel] doctrine”.⁴³² In the decision, he spelled out several implementation directives, including (1) the creation of a ‘fair share’ formula to measure each municipality’s obligation to provide affordable housing;⁴³³ (2) the elimination of the developing municipality test used in *Mount Laurel I* for determining which municipalities are subject to inclusionary zoning responsibilities for low and moderate income housing;⁴³⁴ (3) the elimination of the good faith standard for judging municipal compliance;⁴³⁵ (4) the designation of specialized *Mount Laurel* judges to manage exclusionary zoning litigation;⁴³⁶ and (5) the imposition of stringent judicial remedies for a municipality’s failure to meet its *Mount Laurel* obligations.⁴³⁷

Mount Laurel II also made it clear that if a town did not establish a plan to meet its ‘fair share’ obligation, the courts could override the actions of local authorities and grant approvals or a “builder’s remedy” to developers who sought to include a substantial number of affordable housing units in their projects. In a particularly illuminating footnote, Chief Justice Wilentz suggested that a 20% set aside for affordable housing would be a “reasonable minimum”.⁴³⁸ The

⁴³²*Id.* at 410-411.

⁴³³*Id.* at 419.

⁴³⁴*Id.* at 422-436.

⁴³⁵*Id.* at 418-421.

⁴³⁶*Id.* at 419.

⁴³⁷*Id.* at 452-455.

⁴³⁸*Id.* at 452, fn. 37.

responsibility for addressing the specific details of the Court’s directives fell on the shoulders of a trio of specially designated state trial judges who heard complaints arising out of the implementation of the decision until 1986 when most cases were transferred to the Council on Affordable Housing (“COAH”) that was created when the New Jersey Legislature enacted the Fair Housing Act of 1985.⁴³⁹

In June 2011, as part of a larger overall plan to cut government costs,⁴⁴⁰ Governor Chris Christie abolished COAH and reassigned the task of enforcing affordable housing laws to the Department of Community Affairs.⁴⁴¹ The Fair Share Housing Center filed an appeal to Governor Christie’s Reorganization Plan, charging him with unlawfully consolidating power by transferring the powers of an independent agency over which he previously had no direct authority to a department run by one of his cabinet members, and the case continues to rend its way through the court system.⁴⁴²

In crafting the *Mount Laurel* doctrine, the New Jersey Supreme Court acted to abolish discriminatory exclusionary zoning ordinances because it was clear that the state legislature

⁴³⁹See N.J.S.A. 52-27D-301 *et seq.* For a discussion as to the political reaction to the dictates of the *Mount Laurel* doctrine and attempts to manipulate its directives through COAH, see Alan Mallach, “The Betrayal of Mount Laurel” at <<http://www.nhi.org/online/issues/134/mtlaurel.html>>; see also generally Kirp, et al., fn. 425; Charles M. Haar, *Suburbia Under Siege: Race, Space and Audacious Judges* (Princeton Univ. Press 1996).

⁴⁴⁰Reorganization Plan No. 001-2011, June 29, 2011 at <<http://www.nj.gov/dca/services/lps/hss/transinfo/001-2011.pdf>>.

⁴⁴¹See Megan DeMarco, “Gov. Christie Abolishes N.J. Council On Affordable Housing”, June 29, 2011 at <http://blog.nj.com/ledgerupdates_impact/print.html?entry=/2011/06/gov_christie_abolishes_nj-coun.html>.

⁴⁴²See Statement by Fair Share Housing Center, Feb. 14, 2012 at <<http://fairsharehousing.org/blog/entry/court-hearing-on-governors-coah-reorgnization-plan-tomorrow-at-930-a.m.-in/>>.

would not.⁴⁴³ In doing so, the Justices set out to address three social policy goals: to increase the supply of low and moderate income housing in New Jersey; to further the mobility of low and moderate income residents out of New Jersey's central cities and into the surrounding suburbs; and to simultaneously encourage racial and ethnic desegregation throughout the state by altering the racial demographics of its cities and suburbs.⁴⁴⁴ A number of critics have lashed out against the policymaking efforts of New Jersey's Supreme Court Justices in *Mount Laurel*,⁴⁴⁵ including New Jersey's current Governor Christopher J. Christie who identified the case as one in which the state's highest court abused its power by legislating from the bench.⁴⁴⁶ The facts reveal, however, that through the introduction of density bonuses, set-asides and other zoning devices, the *Mount Laurel* doctrine has successfully steered a portion of new housing production toward

⁴⁴³*Mount Laurel*, 456 A.2d at 417 (“... [W]e agree, that the matter is better left to the Legislature. We acted first and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them.”).

⁴⁴⁴Naomi Bailin Wish & Stephen Eisdorfer, “The Impact of the Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants”, 27 *Seton Hall L. Rev.* 1268 (1997). In *Mount Laurel II*, the New Jersey Supreme Court also expressed the power of the doctrine to relieve cities of what is described as “an overwhelming fiscal and social burden”, 456 A.2d at 415 fn. 5, and acknowledged that while cities were most directly affected by exclusionary zoning, the damage done by urban blight and decay and the spread of violent crime and drug abuse were no longer limited to inner cities. *Id.*

⁴⁴⁵See John M. Payne & Norman Williams, “Exclusionary Zoning and the *Mount Laurel* Doctrine: Making the Theory Fit the Facts”, 20 *Vt. L. Rev.* 665 (1996); Wish & Eisdorfer, fn. 444 n.42 at 19 & n. 51-52 (discussing estimates of the impact *Mount Laurel* had to new housing construction and rehabilitation).

⁴⁴⁶See David M. Halbfinger and David Kocieniewski, “Conversations With Christie and Corzine”, *New York Times*, Oct. 30, 2009 at A26 in which then-candidate Chris Christie identified both the *Mount Laurel* and *Abbott* cases as examples of the New Jersey Supreme Court overreaching and “legislating from the bench”. *Id.*

the needs of low and moderate families.⁴⁴⁷ Moreover, a recent study conducted by the Woodrow Wilson School of Public and International Affairs at Princeton University concluded that fears initially raised about the placement of affordable housing in suburban communities that would lead to increased crime, deteriorating property values, higher taxes, overwhelmed school and excessive traffic have proved to be unfounded.⁴⁴⁸

V.

MARCIA ROBINSON LOWRY AND CHILDREN’S RIGHTS, INC.

Marcia Robinson Lowry is widely recognized as one of the nation’s foremost child welfare advocates, and has been described as the driving force behind litigation throughout the country to reform the states’ foster care systems.⁴⁴⁹ Ms. Lowry began her esteemed career

⁴⁴⁷In *Mount Laurel II*, the Court noted that the doctrine it established in *Mount Laurel I* had done some good in that a number of municipalities had amended their ordinances to provide realistic opportunities for the construction of low and moderate income housing, more had recognized their obligation to provide such opportunities in their ordinances and master plans, and state and county agency officials had prepared regional housing plans that help carry out the Court’s mandate. See 456 A.2d at 411.

⁴⁴⁸See Linda Ocasio, “Safe at Home”, *New Jersey Star Ledger*, Apr. 22, 2012, at 1, section 2; see also “New Princeton University Study Says Fears About Affordable Housing in Suburbs Are ‘Unfounded’”, *Fair Share Housing Development*, May 7, 2012, available at <<http://fairsharedevelopment.org/news/entry/new-study-finds-fears-about-ill-effects-of-affordable-housing-in-suburbs-ar/unfounded>> discussing the findings of Professor Douglas Massey following a two-year long study of the Ethel R. Lawrence Homes in Mount Laurel, New Jersey.

⁴⁴⁹See Sandler and Schoenbrod, fn. 337 at 135 describing Marcia Robinson Lowry as the “owner” of foster care litigation in the United States. A life-long civil rights supporter, Ms. Lowry worked for several years as a journalist after graduating from Northwestern University’s School of Journalism. She attended New York University School of Law, and upon graduation, was awarded a public interest fellowship with the Community Action for Legal Services, part of an effort funded by the federal Office of Economic Opportunity to train young lawyers to work as advocates for the nation’s poorest citizens. At the end of the fellowship, she spent a year at the New York City Child Welfare agency before joining the New York Civil Liberties Union as Director of its Children’s Rights Project from 1973 through 1979. She continued in the same role for the American Civil Liberties Union through 1995 when she founded Children’s Rights,

protecting children's rights while working as a lawyer for a public interest group in New York City in the early seventies that provided legal services to some of the city's poorest residents. While there, she filed numerous lawsuits against the City of New York on behalf of individual clients seeking access to social services, including a case she worked on for two years in which she sought to have a troubled and neglected 13-year old Black Protestant girl living in one of New York City's homeless shelters accepted for placement into a respected residential treatment center run by a Jewish charitable organization located in suburban Westchester County, New York. After finally convincing her young client to accept the safe placement outside of the city limits, Ms. Lowry was astounded when the agency refused to accept her based upon her race and her religion.⁴⁵⁰

Children's Rights, Inc. is a national advocacy organization that seeks to reform state child welfare systems whose failures have resulted in abused and neglected children. Founded in 1995 and led by Marcia Robinson Lowry, the organization scrutinizes failing state systems and, working together with national and local policy analysts, experts and government officials, offers solutions to correct systemic deficiencies to change the lives of some of the country's most disadvantaged children. If a state fails to respond, the attorneys from Children's Rights use

Inc., a national advocacy organization that works on behalf of abused and neglected children. For an in depth discussion of Ms. Lowry's background and her role in pioneering the first body of law to protect children in foster care in the landmark case of *Wilder v. Sugarman*, *infra*, see generally Nina Bernstein, *The Lost Children of Wilder: The Epic Struggle to Change Foster Care* (Vintage Books, 2001); see also <<http://www.childrensrights.org>>. For additional insight into Ms. Lowry's background and her general philosophy, see Marcia Robinson Lowry, "Derring-Do in the 1980s: Child Welfare Impact Litigation After the Warren Years", 20 *Family Law Quarterly* 165 (Summer 1986).

⁴⁵⁰Bernstein, fn. 449 at 28.

litigation as a means to force the needed reforms and they also rely on court orders and Consent Decrees to monitor government officials' implementation of directives and mandates. When necessary, Ms. Lowry and her colleagues follow a legal path that generally involves the commencement of a class action lawsuit filed against state welfare officials.⁴⁵¹

Under most state child protective systems, the governor is directly responsible for monitoring, overseeing and ensuring that the applicable agencies are properly protecting and providing services to children in the foster care system. According to Ms. Lowry, this is often one of the main reasons the system begins to fail its young charges. Simply put, foster care children lack political power. When voters are unaware of deficiencies in the child welfare system, they do not push elected officials to make changes. The children caught in a state's foster care system do not vote. Their parents - if they are involved - have been unable to care for them and are oftentimes suffering from mental, emotional, physical or economic disabilities themselves and, typically, also do not vote. Since nobody who votes is in a position to demand attention to the plight of suffering children, as explained by Ms. Lowry, "[t]hat's why we have to go to court."⁴⁵²

There are several reasons why meaningful change dealing with even the most basic of

⁴⁵¹On occasion, Ms. Lowry has herself acted as guardian for abused individual children. Several years ago, she was appointed Guardian Ad Litem for three minor adopted brothers who were found starving in their New Jersey home, even though their parents were supposed to be under state supervision as they were in the process of legally adopting another foster child who was also living in their home. The three minor boys were discovered when their 19-year old brother, who weighed less than 50 pounds at the time, was spotted trying to retrieve discarded food from their neighbor's trash cans. *See* Reagan Morris, "Marcia Robinson Lowry, Founder Executive Dir. of Children's Rights," at <<http://www.lawcrossing.com/article/1294/>>.

⁴⁵²*Id.*

issues in child welfare are elusive, despite the threat of litigation. First, the system is fraught with bureaucratic inertia. Second, changing long-established practices is time consuming and expensive. Third, there is a lack of administrative continuity at the helm of most child welfare agencies. Finally, there is also a serious absence of political will to spend money on children who may be exploited by tactical political operatives to win votes, but who cannot return the favor by casting a ballot.⁴⁵³ According to Ms. Lowry, child welfare agencies have never acknowledged the fundamental principle that the circumstances of individual children and their families vary. Instead, large bureaucratic agencies generally adopt a single operating principle articulated by the agency's leader such as a 'commitment to family preservation' which generally translates into nothing more than leaving children with parents regardless of the problems at home and without desperately needed support services. This principle then filters its way down to the rank and file employees of the agency who operate only to fulfill that principle of keeping abused children in the care of their abusers until such time as something catastrophic occurs to garner public attention, or the agency's lead changes and ushers in a new operating principle. It is easy to see why a single-principle focus is destined to fail since it does not take into consideration the myriad of needs that may militate against the preservation of family to the exclusion of other solutions. Furthermore, too many child welfare systems in this country fail to dedicate the necessary resources to support and implement the agency's mission to protect at-

⁴⁵³Marcia Robinson Lowry, "How We Can Better Protect Children From Abuse and Neglect", *The Future of Children*: Collaboration of the Woodrow Wilson School of Public and International Affairs (Princeton University and the Brookings Institution, Vol. 8, No. 1 Spring 1998).

risk children.⁴⁵⁴

Discussed below are a few of the cases taken on by Marcia Robinson Lowry both during her time with the New York Civil Liberties Union and at Children's Rights, Inc. These cases help to illustrate the body of law that has been developed through the litigation filed by Ms. Lowry to protect the rights of foster care children beginning in 1973 in *Wilder v. Sugarman* which helped to push states to dedicate greater and improved resources and funding to their family protective services, improve the management of their child welfare agencies, and, most important, to produce better outcomes for the children for whom they are responsible.

Wilder v. Sugarman

The predecessor to Children's Rights, Inc. was the Children's Rights Project sponsored by the New York Civil Liberties Union ("NYCLU"). The Children's Rights Project began in 1973 when NYCLU leaders asked Ms. Lowry to head their newly created unit and litigate on behalf of children being discriminated against in the city's foster care system.⁴⁵⁵ Ms. Lowry's experience several years earlier in trying to find an appropriate placement for one of her young clients continued to resonate with her, and she sought an appropriate plaintiff on whose behalf she could file a class action suit to challenge the state statute and the practices of New York City in its placement of foster care children.

⁴⁵⁴*Id.*

⁴⁵⁵Following the end of the Great Depression, foster care services in New York City were essentially facilitated through sectarian organizations that engaged in open discrimination. Black children in need of foster care placement were segregated in a small number of overcrowded and understaffed all-Black institutions. For a detailed discussion of the role race played in foster care placement *see generally* David Rosner and Gerald Markowitz, "Race, Foster Care and the Politics of Abandonment in New York City", 87 *Am. J. Pub. Health* 1844 (1997).

Justine Wise Polier, a prominent children's advocate and the first female New York State Family Court Judge, was working hard at that time to secure the placement of a Black, Protestant teenage girl named Shirley Wilder into an appropriate foster care home but was stymied by the discriminatory practices of city, state and volunteer adoption agencies who denied all requests for placement based on her race and religion.⁴⁵⁶ Many years earlier, Judge Polier identified the presence of racial and class discrimination in the social services system and she had become a vocal opponent of the practice. She issued the first decision from a northern court finding that *de facto* segregation existed in New York City schools in *In the Matter of Skipwith and Rector*⁴⁵⁷ in 1958, and ruled in favor of African-American parents who challenged the city's educational system which provided inferior services to Black children.⁴⁵⁸ Judge Polier's efforts led her to the New York Civil Liberties Union at the time Ms. Lowry was contemplating bringing a class action.

In June 1973, Ms. Lowry filed a lawsuit in the Manhattan federal court naming Shirley Wilder as the lead plaintiff on behalf of all of the children in New York City's foster care system against all of the agencies providing child care services in the city and other officials involved in the foster care system.⁴⁵⁹ In the complaint, she challenged the constitutionality of the statutes

⁴⁵⁶See Susan Ware and Stacy Lorraine Braukman, eds., *Notable American Women* (Harvard Univ. Press, 2004) at 520 describing the trial blazing efforts of Justine Wise Polier.

⁴⁵⁷14 Misc.2d 325, 180 N.Y.S.2d (N.Y. Dom. Rel. Ct. Dec. 15, 1958).

⁴⁵⁸Prior to the issuance of Judge Polier's decision, the parents who filed suit in *In the Matter of Skipwith and Rector* staged a boycott of the schools in the Harlem section of New York, arguing that under the U.S. Supreme Court's *Brown* decision, their children were entitled to equal educational opportunities. Judge Polier soundly agreed with the parents. See Ware, fn. 456 at 520.

⁴⁵⁹78 Civ. 957 (S.D.N.Y., Jun. 14, 1973).

under which child welfare services were provided,⁴⁶⁰ and she also charged that the methodology under which New York placed foster children involved constitutionally prohibited selections based upon their race and religion. A three-judge panel was convened to address the constitutionality of the statute. After initially determining that the state law allowing religious preferences was constitutional as written,⁴⁶¹ the litigation continued based upon the allegations that the law, as it was applied by New York City officials, discriminated against Black and other minority children.⁴⁶²

The discovery phase of the case dragged on for many years, and the complaint was amended several times to add parties and clarify the plaintiffs' claims. In 1980, the court granted class certification to the plaintiffs.⁴⁶³ In 1983, and as the trial date drew near, negotiations began seeking a resolution short of a public trial. Three years later, the legion of lawyers involved in the case presented a detailed forty-page proposed settlement order to the federal judge overseeing the case which included negotiated compromises designed to improve the foster care

⁴⁶⁰The statutes at issue at the time of the filing of the complaint were New York Social Services Law §373(1), (2) and (5), New York Social Services Law §153.

⁴⁶¹*Wilder v. Sugarman*, 385 F. Supp. 1013 (S.D.N.Y. 1974)(per curiam)(*Wilder I*).

⁴⁶²When Marcia Robinson Lowry filed the *Wilder* case in 1973, she relied heavily on violations of the protections guaranteed to the plaintiffs by the United States Constitution as the basis for the lawsuit. The allegations made by the *Wilder* plaintiffs eventually caught the attention of federal legislators. In 1980, Congress moved to provide legal protections for foster children in enacting the Adoption Assistance and Child Welfare Act. See Pub. L. No. 96-272, 94 Stat. 500. The statute included a condition for the receipt of federal funding on adherence to its standards, and has served as a basis for institutional reform litigation in many states since its inception. See Sandler and Schoenbrod, fn. 327 at 11.

⁴⁶³*Wilder v. Bernstein*, 499 F.Supp. 980 (S.D.N.Y. 1980)(*Wilder II*).

system⁴⁶⁴ that would later be described by the Second Circuit Court of Appeals as “a blueprint to implement a broad change in municipal policy”.⁴⁶⁵

The negotiated settlement mandated widespread reform of New York City’s foster care system to improve the quality of services available to the children in the city’s care. In addition to eliminating blatant discriminatory placement practices, the settlement called for professional evaluations of children when they came into foster care, placement into foster homes on a first-come-first-served basis, the establishment of a system for ranking the comparative quality of the various agencies, and meaningful access for foster children to family planning services.⁴⁶⁶

Despite all of the hopes pinned upon the negotiated settlement, New York City’s foster care system did not improve as its administrators and directors failed to adhere to the principles spelled out in the settlement agreement. Ms. Lowry and her team of lawyers repeatedly turned to the courts for contempt orders against city officials who ignored the terms of the agreement.⁴⁶⁷

While an evaluation pilot project resolved one portion of the contempt motion filed by the plaintiffs’ attorneys in 1993, the Court declined to hold the defendants in contempt of the

⁴⁶⁴*See Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986)(*Wilder III*), *aff’d*, 848 F.2d 1338 (2d Cir. 1988).

⁴⁶⁵*Id.* at 1349.

⁴⁶⁶*Id.* Family planning services were an element that evolved and made its way into the negotiated settlement once the plaintiffs’ attorneys discovered through the litigation process the prevalence of teenage pregnancies amongst children in the foster care system. Shirley Wilder herself became a teenage mother while in foster care, and her son, Lamont Wilder replicated her life, living his childhood in the New York City foster care system. When he was 21, he too had a child who in turn fell into the city’s foster care and child protective services system. Sandler and Schoenbrod, fn. 337 at 5.

⁴⁶⁷*See e.g. Wilder v. Bernstein*, 153 F.R.D. 524 (Feb. 23, 1994), appeal dismissed by 49 F.3d 69 (2d Cir. 1995).

Consent Decree citing the attempts being made in what had then become more than two decades of legal proceedings.⁴⁶⁸

Marisol A. v. Giuliani

In 1995, the New York City child welfare system failed horrifically when six-year old Elisa Izquierdo was savagely beaten and murdered by her drug-addicted mother. The abuse by Elisa's mother was known to New York City child welfare officials since the day of her birth in February 1989 when it was determined she was addicted to crack cocaine. Immediately after she was born, social workers from the hospital assigned custody of the tiny infant to her father and alerted employees of the Child Welfare Administration, the agency responsible for reports of abuse in New York City, that they she was likely to be abused by her mother. In 1990, Elisa's mother sought, and was granted, unsupervised visits with the girl together with her new husband who was known to have abused her on many occasions including one instance in which he stabbed Elisa's mother 17 times during an argument. When she was 4, Elisa complained to her preschool teachers that her mother beat her and locked her in a closet during visits. School officials reported the abuse to the Child Welfare Administration. Elisa's father filed a petition in family court to discontinue visits between Elisa and her mother, but died of cancer before the petition was heard. Elisa's mother applied for permanent custody and her request was opposed by members of her own family who charged that she was violent and abusive towards her daughter, and Elisa's teachers wrote letters to the court stating that they have seen physical signs of abuse on the child's body. Nevertheless, Elisa's mother was awarded custody, and

⁴⁶⁸*Id.* In 1998, the defendants' obligations under the *Wilder* Consent Decree were incorporated into a court ordered settlement agreement reached by the same plaintiffs and the same city defendants in the *Marisol A.* litigation is discussed at length *infra*.

immediately removed her from the private school she had been attending and enrolled her in public school. Teachers there noted that Elisa had trouble walking and exhibited signs of physical abuse, and they too reported this information to the Child Welfare Administration. A few months later, Elisa's mother had a hysterical call with the lawyer who represented her during the custody hearing asking for Elisa to be removed from her home as uncontrollable. The lawyer contacted officials from the city's Child Welfare Administration to relay his conversation with Elisa's mother, but was told that the agency was too busy to investigate his allegations. In the summer of 1995, he took Elisa and her mother and step-father to a hospital for psychiatric counseling but Elisa's mother disappeared during the session and did not contact him again. Neighbors complained to child welfare officials that Elisa's mother and her step-father were selling their children's toys to secure drugs, and that Elisa's mother had told them Elisa was under the spell of her deceased father that needed to be beaten out of her. Neighbors reported to police that they heard screams at various times coming from the family's apartment. In the Fall of 1995, Elisa stopped attending school and officials again notified the Child Welfare Administration. Her step-father was jailed for a parole violation in mid-November 1995 and the day before Thanksgiving 1995, Elisa's mother telephoned her sister and reported that Elisa was lying still in bed but she was too busy washing the dishes to do anything about it. The following day, the sister called a neighbor who found Elisa's lifeless body. When questioned by police, her mother confessed to throwing Elisa against a concrete wall. She also told police that she forced Elisa to eat her own feces and used her head to mop the floor. Investigators reported that

there was not a spot on the child that was not covered in cuts, bruises, or cigarette burns.⁴⁶⁹

In the media frenzy that ensued, it quickly became apparent that despite years of notifications and requests for intervention by Elisa's family and teachers, officials with the Child Welfare Administration failed to take the little girl into protective custody despite mounting evidence that she was in danger. On December 3, 1995, Marcia Robinson Lowry and the lawyers from Children's Rights, Inc. filed a federal class action in the United States District Court for the Southern District of New York entitled *Marisol A. v. Giuliani* against the city and state officials responsible for administering and monitoring New York City's Child Welfare Agency, claiming that the agency's actions or inactions systemically violated constitutional and statutory duties to protect children from abuse and asking that control over the agency be turned over to a receiver to avoid the deaths of any more children.⁴⁷⁰ By requesting a takeover by receiver, the plaintiffs were sending a strong, clear message that they were committed to fundamental systemic reform of the city's system, no matter what the cost, and that they believed

⁴⁶⁹David Van Biema, Sharon E. Epperson and Elaine Rivera, "Elisa Izquierdo: Abandoned to Her Fate", *Time*, Dec. 11, 1995 at <<http://www.time.com/time/magazine/article/0,9171,983842,00.html>>.

⁴⁷⁰95-Civ-10533 (S.D.N.Y., Dec. 13, 1995). The original action was filed on behalf of eleven named plaintiffs including Marisol who was discharged from foster care when she was three and one-half years old and sent to live with her drug-addicted mother who had been recently released from prison, and who had placed her in foster care at birth. As was the case with Elisa Izquierdo, reports that Marisol was being abused by her mother went uninvestigated and undiscovered by New York City's child welfare officials until she was found by a housing inspector locked in a closet in her mother's apartment starving and near death. See Marcia Robinson Lowry, "Why Settle When You Can Win: Institutional Reform and *Marisol v. Giuliani*", 26 *Ford. Urban Law J.* 1335 (1999). The case was eventually certified as a class action. See *Marisol A. v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 372 (2d Cir. 1997). Prior to filing *Marisol A.*, Ms. Lowry had successfully litigated judicial takeovers of child welfare agencies in Washington, D.C. and Kansas City and she sought to accomplish the same thing in New York.

that the city's administration was incapable of being responsive. Within weeks after the lawsuit was filed, then-Mayor Rudolph Giuliani removed the Child Welfare Administration from the New York City Human Resources Administration, established it as a separate agency to report directly to him and renamed it the Administration for Children's Services ("ACS"), appointing Nicholas Scoppetta to serve as its Commissioner.⁴⁷¹ In June 1996, the federal judge managing the case granted class certification, and in response to a motion to dismiss filed by the defendants, he ruled in favor of the plaintiffs on virtually all of the legal claims they had raised.⁴⁷² A year after taking over the ACS, Scoppetta released a report he had completed with the assistance of Mayor Giuliani that acknowledged the systemic failures of the agency, and outlined a plan to reform the obviously broken system while retaining control over its operations. Drawing on the city's experience in the *Wilder* litigation, Scoppetta resolutely refused to enter into a Consent Decree with plaintiffs' attorneys for several years fearing that the need to seek their approval as it pertained to every detail of reformation would cause the process to grind to a halt. Additionally, he was concerned that even seeking advice from outside experts to aid in reforming the agency was constrained by the existence of the *Marisol* litigation since he feared that disclosure of the agency's problems to outside experts could be used against the City in the lawsuit.⁴⁷³

⁴⁷¹Sandler and Schoenbrod, fn. 337 at 144. Scoppetta had unique qualifications for the position as he himself had been raised in New York City's foster care system during the 1930s and had worked his way through law school as a caseworker for the Children's Aid Society, eventually assuming the role as Chairman of the Board for the organization. Although well respected by many child welfare advocates, including Ms. Lowry, she chose to continue to litigate the case while awaiting a plan from Scoppetta. *Id.* at 146.

⁴⁷²*Marisol*, 126 F.3d 372 (2d Cir. 1997).

⁴⁷³Sandler and Schoenbrod, fn. 337 at 146-149.

Marcia Robinson Lowry also recognized the shortcomings of the implementation of the *Wilder* findings and sought common ground upon which the two sides could reach an agreement. After more than two years of discovery and negotiations and on the eve of trial, the parties did negotiate a Consent Decree. Under its terms, the state was required to exercise oversight responsibilities towards New York City and the court's contempt powers were reserved in the event any of the defendants failed to comply. With respect to the city, the agreement in *Marisol* differed from others that had been entered into in different jurisdictions since it provided that control over the process of reformation would remain in the city's hands as long as it acted in 'good faith' to advance the remedial plan, which included the use of independent child welfare experts to assist in formulating the necessary reform.⁴⁷⁴ A particularly important part of the settlement with New York City was that it folded into it the requirements of the *Wilder* Consent Decree.⁴⁷⁵ Although the *Wilder* case had a significant impact on several aspects of New York City's child welfare system,⁴⁷⁶ it had not accomplished all of its goals, and the city had not complied with its terms.⁴⁷⁷ The *Marisol* settlement agreement was approved by the District

⁴⁷⁴Lowry, "Why Settle", fn. 470 at 1345-1350.

⁴⁷⁵645 F. Supp. 1292 (S.D.N.Y. 1986).

⁴⁷⁶For example, as a result of the case, the federal court changed the city's method of placing foster children through supervisory contract agencies rather than its directly operated program, and it required the city to hire hundreds of employees with master's degrees in social work. *See Wilder v. Bernstein*, 49 F.3d 69 (2d Cir. 1995).

⁴⁷⁷*Wilder v. Bernstein*, No. 78 Civ. 957 (RJW), 1998 WL 355413 at *14 (S.D.N.Y. July 1, 1998).

Court in 1999,⁴⁷⁸ and affirmed by the Second Circuit Court of Appeals the following year.⁴⁷⁹

Under the terms of the Consent Decree, an expert advisory panel was formed, jointly selected by plaintiffs' counsel and the city, and it was given complete access to all aspects of the city's child protective services. The panel was empowered to make recommendations, issue progress reports on the status of the reform efforts and it was also charged with determining whether the city was acting in good faith in implementing reform provisions. In an innovative approach, the Consent Decree reversed the usual practice which had permitted court supervision to continue indefinitely until the defendant was able to affirmatively prove that it had brought itself into full compliance an enormously difficult burden for any bureaucratic agency to meet as was plainly demonstrated by the *Wilder* litigation. Under the terms of the *Marisol* agreement, the court retained authority to issue injunctions to protect individual children and award damages in the event individual children were injured.⁴⁸⁰

Ms. Lowry and her staff were forced to turn to the courts for relief again in 2001 when

⁴⁷⁸*Marisol A. ex rel Forbes v. Giuliani*, 185 F.R.D. 152 (S.D.N.Y. 1999).

⁴⁷⁹*Joel A. v. Giuliani*, 218 F.3d 132 (2d Cir. 2000).

⁴⁸⁰*See Marisol A. ex rel Forbes v. Giuliani*, 185 F.R.D. 152 (S.D.N.Y. 1999), *aff'd Joel A. v. Giuliani*, 218 F.3d 132 (2d Cir. 2000). *Martin A. v. Giuliani* (a/k/a *Martin A. v. Gross*)(24388/85 Sup. Ct. N.Y. Co., Oct. 18, 1985) was filed in the state supreme court by Marcia Robinson Lowry on behalf of several individuals, including the survivors of a 5-year old who was beaten to death by his foster parents. In 1987, the court granted the plaintiffs' request for a preliminary injunction directing the city to develop and implement a plan for delivering preventive services. *See* 138 Misc.2d 212 (1987). The Appellate Division upheld the trial court's decision in 1989. *See* 153 A.D.2d 812, 546 N.Y.S.2d 75 (2nd Dept. 1991). Ms. Lowry sought but was denied class certification several times after the trial court concluded that there was insufficient proof in the cases of the named plaintiffs to exemplify systemic problems. Accordingly, separate trials were held on behalf of each plaintiff, and monetary damages awarded. In negotiating the *Marisol* Consent Decree, Ms. Lowry sought to protect future plaintiffs' rights to see monetary damages should they be appropriate.

they sought an Order directing the defendants to comply with specific provisions of the settlement agreement, including its failure to implement a statewide child welfare management information system. After conducting an evidentiary hearing in August 2001, the Court determined that the state had not exercised sufficient diligence in implementing the system. It extended the term of the settlement agreement in this area and directed the defendants to provide plaintiffs' counsel with periodic reports as to the progress of implementation.⁴⁸¹ Children's Rights continues to monitor the defendants' performance to this date.⁴⁸²

The Work of Children's Rights Today

Children's Rights continues its mission to protect the nation's most at-risk children. Marcia Robinson Lowry and the attorneys from Children's Rights have commenced litigation around the country seeking to bring reform to such child welfare systems as those in Missouri,⁴⁸³ the District of Columbia,⁴⁸⁴ New Jersey,⁴⁸⁵ Tennessee,⁴⁸⁶ Georgia,⁴⁸⁷ and Mississippi⁴⁸⁸ to name

⁴⁸¹*Marisol A. ex rel Forbes v. Guiliani*, 157 F. Supp.2d 303 (S.D.N.Y. 2001).

⁴⁸²See Children's Rights website for information on the cases being pursued, and the actions of the organization at <<http://www.childrensrights.org>>.

⁴⁸³*G.L. v. Stangler*, 77-242-CV-W-3-JNO (W.D. Mo., Mar., 28, 1977); 564 F. Supp. 1030 (W.D. Mo. 1983)(approving Consent Decree over Kansas City school system); 731 F. Supp. 365 (W.D. Mo. 1990); 873 F. Supp. 252 (W.D. Mo. 1994)(modifying initial Consent Decree that involved three different state administrations and four different judges). See also Ellen Borgersen and Stephen Shapiro, "G.L. v. Stangler: A Case Study in Court-Ordered Child Welfare Reform, 1997 *J. Disp. Resol.* 189, 195 (1997).

⁴⁸⁴*Lashawn A. v. Williams*, 89-CIV-1754 (D.C.C., Jun., 20, 1989); 762 F.Supp. 959 (D.C.C. 1991), *aff'd and remanded*, 990 F.2d 1319 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994), 887 F. Supp. 297 (D.C.C. 1995)(order imposing full receivership on city); appeal after remand, 69 F.3d 556 (D.C. Cir. 1995), *reh'g en banc granted, judgment vacated*, 74 F.3d 303 (D.C. Cir. 1996) *reh'g en banc*, 87 F.3d 1389 (D.C. Cir. 1996), *aff'd*, 107 F.3d 923 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997). As a result of the horrendous conditions in the district's child welfare system, the federal court ordered a takeover of its management in 1995. The district was finally able to regain control after it established the cabinet-level Child &

Family Services Agency and committed itself to reform in 2000. Progress has been extremely slow, however, and the plaintiffs' lawyers have been forced to seek contempt orders from the federal district court. In October 2008, to avoid contempt sanctions, the school district was ordered to submit itself to periodic monitoring. In April 2010, the District attempted to be released from federal court oversight, but that request was rejected, and the District and then-Mayor Fenty were finally held in contempt. Today, the District continues to struggle to make the mandated improvements to its foster care system, and the most recent monitoring report issued by the Center for the Study of Public Policy blames the extremely slow progress on the District's failure to appoint a permanent director to oversee the system. See "D.C. Still Struggling To Make Improvements To Foster Care, Needs Stable Leadership Now", Dec. 6, 2011 found on the Children's Rights website at <<http://www.childrensrights.org/dc>>.

⁴⁸⁵*Charlie and Nadine H. v. Cody*, 99-3678 (D.N.J., Aug. 4, 1999); 83 F. Supp.2d 476 (D.N.J. 2000); 213 F.R.D. 240 (D.N.J. 2003). Details as to the New Jersey litigation are discussed *infra*.

⁴⁸⁶*Brian A. v. Hathaway*, 149 F. Supp. 2d 941 (M.D. Tenn. 2000). Following the entry of a settlement agreement in 2001, the group responsible for monitoring the state's progress reported that its Department of Children's Services had placed 90% of the children entering into its custody in foster homes and not institutional settings, and was ensuring that 85% of the siblings who enter foster care together remain together in their foster placements. See Children's Rights Newsletter, Spring 2009 at 1. The Commissioner of the system has stated publically that "[t]here's no way we would have made the kind of progress we've made at the speed that we've made it without Children's Rights and the pressure of the court order". *Id.* at 2.

⁴⁸⁷*Kenny A. v. Purdue*, 02-CIV-1686 (N.D. Ga., Jun. 6, 2002); 218 F.R.D. 277 (N.D. Ga. 2003); 2004 WL 5503780 (N.D. Ga. 2004)(unreported); 356 F. Supp.2d 1353 (N.D. Ga. 2005). Details as to the Georgia litigation are discussed *infra*.

⁴⁸⁸*Olivia Y. v. Barbour*, 04-CV-251 (S.D. Miss., Mar. 30, 2004); 351 F. Supp.2d 543 (S.D. Miss. 2004); 2006 WL 5187653 (S.D. Miss. 2006)(unreported). A settlement agreement was entered in the case in 2008 requiring state child welfare officials to place children in permanent homes more quickly, reduce workers' case loads, increase the frequency of caseworker visits to children in foster care and develop new services, including health care for its children. Compliance was not forthcoming, so that by late 2010 monitors found that Mississippi still placed more than 10% of its foster care children in unlicensed foster homes, and more than 20% of them had moved in and out of more than 5 homes while in foster care. Moreover, the state had failed to create a reliable system for tracking children in its custody. In early 2011, motions were made by plaintiffs' counsel seeking to hold government officials in contempt of the settlement agreement. In May 2011, the district court denied the motion, but ordered the parties to negotiate modifications to the settlement agreement to address management deficits and the slow pace of reform. Details as to specifics pertaining to the litigation can be found on the Children's Rights website at <<http://www.childrensrights.org/ms>>.

just a few. They have stayed involved in an oversight capacity to ensure compliance in many jurisdictions,⁴⁸⁹ and are currently litigating in various states and counties throughout the country. Working together with co-counsel, Children's Rights also filed a class action seeking to reform the Oklahoma child welfare program.⁴⁹⁰ The defendants fought back hard against the plaintiffs and moved to have the plaintiffs' claims dismissed, a request that was denied.⁴⁹¹ In May 2009, the district court granted the case class action status ordering it to proceed on behalf of all of the children who depend on the state child welfare system for protection and care. The defendants appealed this decision to the Tenth Circuit Court of Appeals, and a unanimous panel upheld the trial court's decision on February 8, 2010. In the summer of 2011, the defendants again sought to have the case dismissed, and in December 2011, Judge Gregory K. Frizzel denied the defendants' request in part while granting it in part, ultimately leading the parties to negotiate a settlement agreement in the case which was ultimately approved by the Honorable Gregory

⁴⁸⁹See e.g. fn. 484 describing the continued litigation with District of Columbia officials over the management of its child welfare system. In addition to their court-ordered involvement in cases after the entry of settlement agreements, Children's Rights continues to participate in a major study to identify the barriers that may be keeping New York City foster children from attaining permanent placement with the city's Administration for Children's Services, the Legal Aid Society Juvenile Rights Practice, and other child welfare organizations. See Children's Rights Newsletter, Spring 2009 at 6.

⁴⁹⁰*D.G. v. Henry*, No. 08-CV-074-GKF-FHM (N.D. Okla. Feb. 13, 2008). The Oklahoma Public Employees Association, which represents hundreds of state child welfare workers, filed an affidavit supporting the plaintiffs' lawsuit stating that its employees have worked for years under excessive caseloads, staff shortages, inadequate training and supervision which left them unable to adequately supervise and monitor children and protect them from harm. See Children's Rights Newsletter, Summer 2009 at 2-3.

⁴⁹¹594 F. Supp.2d 1273 (N.D. Okla. 2009)(court dismissed two of the plaintiffs' causes of action leaving others intact).

Frizzel from the United States District Court for the District of Oklahoma in February 2012.⁴⁹²

One of the most cases pursued by Children's Rights that received a great deal of media attention involved the child welfare system in New Jersey. In 1999, the group filed a class action alleging gross deficiencies in virtually all aspects of the program. Following the filing, the state began to take steps to reform the state's child welfare system, although it would take years of litigation for practical results to be seen. Under a settlement agreement negotiated in 2003⁴⁹³ and revised in 2006,⁴⁹⁴ former New Jersey Governor Jon Corzine established a cabinet-level department, the Department of Children and Families ("DCF") to oversee the care provided to the state's foster children. DCF hired hundreds of additional caseworkers to monitor the safety and well-being of foster care children, and took steps to update their training. DCF was also charged with the task of overhauling its entire system, including the development of a state-wide model of child welfare practice with the assistance of national child welfare experts, devising plans to emphasize the importance of keeping children with their own families whenever possible, and engaging the children and their families in critical decisions about their future.⁴⁹⁵ When the lawsuit was initially filed, foster children in New Jersey were reported to have suffered abuse and neglect as high as twenty times above the national average, and children

⁴⁹²Specifics pertaining to the progress of the litigation can be found on the Children's Rights website at <http://www.childrensrights.org/ok> and on the docket for the U.S. District Court for the Northern District of Oklahoma under civil action no. 4:08-cv-00074-GKF-FHM.

⁴⁹³*Charlie H. v. Cody*, 213 F.R.D. 240 (D.N.J. 2003).

⁴⁹⁴*Charlie and Nadine H. v. Christie*, Modified Settlement Agreement, U.S. District Court for the District of N.J., Civ. Action No. 99-3678 (SRC), July 18, 2006.

⁴⁹⁵Children's Rights Newsletter, Summer 2009 at 4. Included as part of the plan to reform the state's child welfare system was a complete redesign of the existing computer programs to reflect all of the policy changes being introduced. *Id.*

languished in emergency shelters for years that were only intended to be a source of temporary refuge.⁴⁹⁶

The panel of experts formed to oversee the state's progress under the Consent Decree, together with representatives from Children's Rights continue to monitor the progress of reform in the state. In December of 2011, the tenth monitoring report since 2006 was issued by the Center for the Study of Social Policy to evaluate the progress made by New Jersey officials over the six month period between January 1st and June 30, 2011. This report found that progress in problem areas remains "far too slow". Foster children in the state were not receiving enough visits with their caseworkers and/or parents; case plans for them were not being completed in a timely fashion, and safety and risk assessments are not being completed before the case files were administrative closed.⁴⁹⁷

The action brought by Children's Rights and others to reform the foster care programs in DeKalb and Fulton Counties in Georgia in 2002 led to the establishment of an independent Child Advocate Attorney's Office to act on behalf of the children living in the system.⁴⁹⁸ Significantly, one of the conditions of the Settlement Decree negotiated by the parties, was an extension of the availability of legal services to abused and neglected children which arose out of a landmark ruling from the federal court in 2005 that children have a constitutional right to zealous and

⁴⁹⁶*Id.*

⁴⁹⁷See "New Jersey Foster Care Reform Efforts Face Challenges, Report Shows", Dec. 14, 2011, found on the Children's Rights website at <<http://www.childrensrights.org/nj>>. This and earlier monitoring reports can be found at <<http://www.cssp.org/publications/final-nj-report-period-x-dec-14-11.pdf>>.

⁴⁹⁸The Settlement Agreement is described at length in *Kenny A. Ex rel. Winn v. Perdue*, 454 F. Supp.2d 1260, 1269 (N.D. Ga. 2006).

effective legal counsel through every stage of their time spent in foster care.⁴⁹⁹ Local officials significantly increased the number of attorneys assigned to represent abused and neglected children in court proceedings, and soon thereafter saw a dramatic reduction in the high case loads that had prevented child welfare attorneys from adequately representing their young clients.⁵⁰⁰

Looking back on the work undertaken and accomplished by Marcia Robinson Lowry and Children's Rights, the power of institutional reform litigation is very apparent. Ms. Lowry and her colleagues have forced states to undergo profound systemic changes to their child welfare systems, and in so doing, they have secured critical and life-saving services for their otherwise defenseless clients. One may argue that litigation of this type comes with a high price for governments struggling to balance their budgets, but what price can be put on the life of the child who has been saved as a result of the dedicated efforts of their tireless advocates.

CONCLUSION

So where do we end up when trying to answer the question of whether courts are an effective agent for generating institutional reform and force for changing public policy? We have observed courts on both the federal and state level affirmatively acting to abolish discriminatory conduct aimed at those with the least amount of political power or financial

⁴⁹⁹See *Kenny A. v. Purdue*, 356 F. Supp.2d 1353 (N.D. Ga. 2005). DeKalb County successfully exited the settlement agreement with Children's Rights in October 2008, having met its obligation to significantly reduce attorneys' caseloads and improve the quality of legal representation for children in juvenile courts. Fulton County still operates under the settlement agreement and continues to be monitored although much progress has been made. A description of this progress can be found at <<http://www.childrensrights.org/ga>>.

⁵⁰⁰Children's Rights Newsletter, Summer 2009 at 6.

resources, particularly when the other two branches of government are paralyzed by political fears associated with controversial social issues or bureaucratic inertia. For many victims of discrimination and abuse, courts stand as the last refuge for assistance before disaster occurs. Lawsuits brought on behalf of the powerless can also be the leverage needed to garner the attention of the legislative and administrative branches of government to move the bureaucracies that stand in the way of much needed relief. This was the case with the United State's Supreme Court decisions in *Brown v. Board of Education* and other decisions that sought to put an end racial discrimination in this country and laid the foundation for the 1964 Civil Rights Act, the 1965 Voting Rights Act and the 1964 Fair Housing Act. Furthermore, the existence of a lawsuit can elevate the visibility of issues that some would rather remain hidden, and its continued force can provide sustained pressure for change, particularly in circumstances such as the national fight for child welfare reform undertaken by Marcia Robinson Lowry and Children's Rights.

We have also noted that the refinement of constitutionally guaranteed civil liberties to conform to the cultural and moral norms of the day may best be articulated by those who are sworn to uphold the Constitution without succumbing to political or ideological pressures. Divisive issues are rarely resolved when they enter the political fray. While there are many people, including the vast majority of White Southerners, that opposed the decisions of the United States Supreme Court in *Brown v. Board of Education* which led the way to the cessation of segregationist practices in this country, there is no one today who would argue that the cases were wrong to strip the blinders away and reveal the blatant discriminatory practices that were rampant in this country during the fifties and the sixties.

It is elemental that courts must make a decision when presented with a dispute between

two adverse parties. Lawmakers and legislatures, on the other hand, are by their very nature fractured caucuses driven by the desire to remain in office or retain their power, oftentimes rendering them incapable of enacting meaningful legislation capable of promoting social change. When the legislative and executive branches of government fail to enact or uphold laws to counter society's ills, judges should, and, indeed, they must, act as policymakers in deference to the democratic ideal. Moreover, while ours is a system of law based on precedent, judges must be free to stimulate policy as a means to complement existing law in the administration of justice. This was the path chosen by the Justices of the United States Supreme Court in *Brown* and as demonstrated in this paper, it was the path followed by many other courts in its aftermath.

What we may conclude then, is the simple principle that courts are legitimate agents of institutional reform and catalysts for public policy change, but they may lack the capacity to implement such change on their own. We have seen that doctrinal implementation following judicial policymaking is a slow, lengthy process, but it is one that satisfies the basic tenets of our democratic principles requiring participation from all three branches of government. Courts do not have to prove their decisions stand as a necessary cause in every case in order to conclude that they have been, to some extent, an effective agent of either reform or policy change. No institution can be said to be perfectly effective, and under our three-party democratic system, no single branch can set and maintain policy to the exclusion of the other two. Each branch acts within a complex system of checks and balances and in conjunction with a complex interplay of social forces.

What is critical about the decisions rendered in *Brown*, *Roe*, *Miranda*, *Jose P.*, *Robinson/Abbott*, *Mount Laurel*, *Goodridge* and *Gwendolyn*, *Wilder* and *Marisol* and similar

bellwether decisions, is how they reshaped choices, expectations, institutions, and structures. In this respect, American society was significantly different the day after these decisions were issued because courts granted legitimacy to certain claims, attached legal support or approbation to certain actions, or otherwise defined new roles for itself or for other institutions to follow. Moreover, each of them lent political power to groups, particularly to Black Americans, where they previously held little or none.

While it is true that our federal and state court dockets are congested with litigation involving a variety of civil and criminal matters, the solution offered by some who seek to close the courthouse door to individuals seeking what may be desperately needed relief, especially those who have been deprived of their constitutional rights, is, in the words of the esteemed late Supreme Court Justice William J. Brennan, “not only the wrong tool, but also a dangerous [one] for solving the problem”⁵⁰¹ since the victims of the use of such a tool are often the poor, the underprivileged and minorities most in need of judicial protection of their rights.

⁵⁰¹Brennan, fn. 12 at 498.

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