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Powerless In Movement: How Social Movements Influence, And Fail To Influence, American Politics And Policy

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Powerless In Movement: How Social Movements Influence, And Fail To Influence, American Politics And Policy

Abstract

Much of the literature on social movements centers on cyclical theories of political opportunity. While such work lays an important foundation for understanding contentious politics, it fails to fully integrate movements as actors in the American political system and public policy process. As such, the ways movements exercise power in the American political system, and the ways that power is constrained, are often not clearly conceptualized. This dissertation argues that movements exercise political power in the US in three distinct but overlapping ways; pluralist interest group power, plebiscitary opinion power, and disruptive contentious power. Through public law and empirical analyses, it shows that opportunities to exercise these types of power are limited by three patterns of American Political Development; insiders building structural constraints such as tax and campaign finance laws, political inflation caused by the expansion of political resources such as campaign spending, and institutional thickening that commits government resources to existing issues and limits slack resources for new issues. Case law analysis shows that the Supreme Court's First Amendment doctrines on tax law, campaign finance law, and time, place and manner restrictions disadvantage movements. Empirical analysis of nonprofit tax filings shows that movements have increasingly relied on apolitical organizational forms such as charities. Analysis of protest news reports shows that policing policies have reduced confrontations between police and protesters in ways that lower this visibility of movements. Analysis of congressional hearings and public laws shows that an increasing share of government activity is devoted to administering existing policy commitments. The dissertation concludes that emerging constraints increasingly limit movement power in the future of American politics. As such, this project suggests that declines in social movement influence since the 1960s may not be a cyclical phenomenon, and that political outsiders must learn to adapt to a closed political system. Movement cases considered include LGBTQ Rights, Animal Rights, Disability Rights, and Antiabortion.

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POWERLESS IN MOVEMENT: HOW SOCIAL MOVEMENTS INFLUENCE, AND FAIL TO INFLUENCE,
AMERICAN POLITICS AND POLICY

Matthew Patrick Mongiello

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For Brooks

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In the end this project is for my son, Brooks. He is the absolute best little boy in the world and finishing this dissertation is about building a life for the two of us. Thank you Brooks for being my inspiration and my motivation. You are my world.

ABSTRACT

POWERLESS IN MOVEMENT: HOW SOCIAL MOVEMENTS INFLUENCE, AND FAIL TO INFLUENCE, AMERICAN POLITICS AND POLICY

Matthew Patrick Mongiello

Adolph Reed

Much of the literature on social movements centers on cyclical theories of political opportunity. While such work lays an important foundation for understanding contentious politics, it fails to fully integrate movements as actors in the American political system and public policy process. As such, the ways movements exercise power in the American political system, and the ways that power is constrained, are often not clearly conceptualized. This dissertation argues that movements exercise political power in the US in three distinct but overlapping ways; *pluralist* interest group power, *plebiscitary* opinion power, and *disruptive* contentious power. Through public law and empirical analyses, it shows that opportunities to exercise these types of power are limited by three patterns of American Political Development; insiders building *structural constraints* such as tax and campaign finance laws, *political inflation* caused by the expansion of political resources such as campaign spending, and *institutional thickening* that commits government resources to existing issues and limits slack resources for new issues. Case law analysis shows that the Supreme Court's First Amendment doctrines on tax law, campaign finance law, and time, place and manner restrictions disadvantage movements. Empirical analysis of nonprofit tax filings shows that movements have increasingly relied on apolitical organizational forms such as charities. Analysis of protest news reports shows that policing policies have reduced confrontations between police and protesters in ways that lower this visibility of movements. Analysis of congressional hearings and public laws shows that an increasing share of government activity is devoted to administering existing policy commitments. The dissertation concludes that emerging constraints increasingly limit movement power in the future of American politics. As such, this project suggests that declines in social movement influence since the 1960s may not be a cyclical phenomenon, and that political outsiders must learn to adapt to a closed political system. Movement cases considered include LGBTQ Rights, Animal Rights, Disability Rights, and Antiabortion.

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“It only takes one Person to make a change,” you are often told. This is a myth. Perhaps one person can make a change, but not the kind of change that would raise your body to equality with your countrymen.

-Ta-Nehisi Coates, *Between the World and Me*

[P]opular insurgency does not proceed by someone else’s rules or hopes; it has its own logic and direction. It flows from historically specific circumstances: it is a reaction against those circumstances, and it is also limited by those circumstances.

-Francis Fox Piven & Richard Cloward,
Poor People’s Movements

[W]ill the social movement be absorbed and institutionalized into ordinary politics, as were the strike and demonstration in the nineteenth century? Or will the sheer volume of contention submerge the routine processes of electoral and interest group participation in a turbulent sea of unruly politics?

-Sidney Tarrow, *Power in Movement*

Chapter 1: Rethinking Social Movement Power

Early on in my graduate study, I was talking with one of my professors about possible political theory dissertation topics. She was listening patiently as I outlined a project surveying the place of animals and nature in the canon of modern political thought. I thought it was an interesting proposal that built on important political theory traditions and filled holes in the literature. Specifically, I wanted to explore how the role of “human nature” in the work of Hobbes Locke, Rousseau, Marx and others is predicated on versions of a “man vs. beast” dichotomy. I still think it was an interesting proposal. But my professor didn’t think interesting was enough, or rather, she didn’t think it interested me enough. She pushed me to consider why I’d entered graduate school in the first place and what political questions kept me up at night. Before long I found myself talking—and talking and talking—about the issue of social movement institutionalization. In particular, I was fascinated by disagreements over whether building large national advocacy organizations was a path to power or to cooption. Many of these organizations—such as the Humane Society of the United States and the Human Rights Campaign—were near and dear to my heart, but I took seriously critiques of these groups by more radical activists and scholars. After I’d gone on about these issues for about ten minutes my professor stopped me and said this was the most passionately she’d ever heard me talk about political science, and I’d clearly found my topic, one that spoke to me on a personal and professional level. That was the day I became an Americanist and the day I embarked on this dissertation project. I like to think what follows shows that I made the right choice.

My core motivation in writing this dissertation is my desire to better understand how social movements can best achieve their goals. A number of contemporary movements champion political causes near and dear to my heart, while other push causes that I find wholly repugnant. Still other movements fight for causes largely removed from my personal politics, yet

I still find myself compelled by the ardency and devotion with which they press their claims. The fate of movements matters. In my view, movement activism is a central piece of active citizenship and democratic politics. Activism is necessary for justice and the key method by which a democratic polity can carve out political space for marginalized groups.

The stakes in social movement politics are as high as they come, and yet it remains notoriously difficult to determine if and how activists impact politics and policy. As political outsiders, activists are not the ones making decisions, and decision-makers have every reason to avoid attributing their decisions to the actions of the disaffected, lest they encourage further outsider challenges to the status quo. Consequently, activists and movement scholars are largely left to speculate on how activists can best impact the political system, and this speculation often produces harsh disagreements. Advocates of confrontational protest and direct action accuse the organization builders of “selling out.” Nonprofit CEOs accuse the fringe of “poisoning public opinion” against the cause. In many ways these tactical disputes within movements are harsher than the rhetoric directed at movement targets, and they can eventually sap the morale and resolve of activists.

In response to growing conflicts over movement strategy there have been “can’t we all just get along” entreaties, which argue that movements should “let a thousand flowers bloom” and embrace diversity of advocacy approaches. While I’m sympathetic to such calls, and they may indeed be correct concerning the internal diversity of movements, I believe a reflexive dismissal of these serious issues is mistaken. What if there is one best way to advance social justice causes, or at least more and less productive ways? Do we not owe it to our causes to not simply fight, but fight effectively? Valuing amity over justice seems anathema to political activity that by definition seeks to shake up the status quo. We need to understand how movements

effectively exercise power if we are going to make intelligent judgments about how to best make use of our political resources, as well as judgments about the health of American democracy. With that in mind, this dissertation focuses on two major questions.

*Question 1: How do social movements exercise power in the American political system?*¹

I'm hardly the first person to ask and answer this question, though I like to think my answer is particularly complete and accurate. As discussed in Chapter 2, I draw heavily on a rich social movement literature in sociology and political science, and I am particularly indebted to political opportunity theories that consider both movement tactics and the constraints of the political system. I draw on literatures in American political development and American public policy that seek to explain how power works for actors across the American political system. So what's unique about my answer to this first question? My project aims to blend the insights from these various literatures by adapting the political opportunity theory to the specific mechanisms by which power is exercised in American politics and policy. While there is a temptation to address movement politics as an entirely separate animal from the mainstream political system, I argue that movements are simply political actors with different resources and constraints from more powerful mainstream political actors.

My approach recognizes that movements employ "contentious politics" with a regularity and ferocity uncommon to other political actors, and pays close attention to what I call "disruptive power" (Piven F. F., 2006). However, I also engage with an American politics

¹ I'm not uninterested in comparative questions of movement power, but my approach is premised on a belief that understanding movement power in a polity requires a precise understanding of the political culture and institutions of that polity.

literature that takes elections, lobbying, and litigating to be the major sources of influence, what I “pluralist power” (Neustadt, 1991) (Truman, 1971) (Dahl, Who Governs?, 2005). In addition, I draw on political scientists who in recent decades have argued that media and public opinion are the real drivers of the political process, addressing such avenues of influences as “plebiscitary power” (Kernell, 2006). And with each type of power, my approach draws on the policy process literature, which generally holds a more nuanced picture of agenda setting and agenda implementing mechanisms than does the standard political science literature.²

Like other political opportunity theorists, I pay special attention to the constraints placed upon movements by the system’s dominant political institutions, which serve to limit the exercise of movement power (Tarrow, 2011) (Amenta, 2006). An aspect of my work that differentiates it from most of the literatures I draw on is that I pay special attention to the ways in which the American political system is dynamic and ever-changing. Thus the second major question of my project is as follows:

Question 2: How do dominant political actors and government institutions work to constrain movement power, and how do these constraints change across time?

Most political opportunity theorists believe that the system moves from periods of constraint to periods of vulnerability in a cyclical fashion (Tarrow, 2011) (Meyer & Minkoff,

² My approach is heavily indebted to agenda setting approaches including Baumgartner & Jones’s punctuated equilibrium model and John Kingdon’s multiple streams model (Baumgartner & Jones, Agendas and Instability, 2009) (Kingdon, 1995). I also draw on heavily on the bureaucracy and implementation literature, especially the organizational theory of James Q. Wilson (Wilson, 1973).

Conceptualizing Political Opportunity, 2004).³ For example, the civil rights movement is seen as having struck major legislative victories in the 1960s because it was acting during period of political openness—and civil rights was an “early riser” in this open period—an environment which created opportunities for movements of all kinds. This perspective suggests that since the 1960s the system has steadily grown less vulnerable to challengers, but most political opportunity theorists take for granted that the current trough in the cycle will soon give way to a new peak of opportunity. However, a half century after the last peak, as we wait patiently for the next peak in the cycle of political opportunity, I am struck by the lack of serious evidence for the cyclical assumption.⁴ Observers of political opportunity cycles seem to take for granted not just the existence of the cycle but also the proximity of new opportunities.⁵ By contrast, instead of beginning with an assumption of cyclical constraints, I have taken a more systematic American political development approach that examines patterns of change across time. Those patterns may be cyclical, but they may also be constant, progressive, or something less orderly.

³ To be clear, I consider myself a political opportunity theorist, though I am skeptical about the concept of cycles of contention. I don't consider the cyclical dynamic to be essential of the perspective and believe the two ideas are wedded together in large part because Sid Tarrow's foundational work argues for both.

⁴ The situation strikes me as reminiscent of waiting for the second coming of Christ: not only do most Americans assume Christ will eventually return to earth, but a 2010 PEW Research Center Survey found that 47% of the faithful (equal to 41% of Americans) assumed his return will happen in their lifetimes. There is a natural bias to assume we live in special times and it is difficult to project important positive events into the distant future (conversely, it is easy to project negative events such as global warming into the distant future). If all we are saying in the language of cycles is that eventually in the next century or two we are likely to see a period of heightened protest, then perhaps such a theory offers us little traction for understanding contemporary movement politics.

⁵ Tarrow essentially argues that contention spreads like a fire, as information, tactics, and frames spread across activists of various movements, but eventually burn out as activist elements become institutionalized and/or exhausted and the broader society increasingly desires a return to order. The fuel burned away in the conflagration and a new peak relies on a new generation of activists and organizations (Tarrow, 2011, p. Ch.9). But nothing in this explanation predicts that new waves of contention will emerge. They are assumed as something of a natural political phenomenon, which runs counter to the basic spirit of political opportunity theory. It seems reasonable to me that a political system might very well fall into a pattern of controlled burns that undercut rise and fall of contentious politics and leave a more steady and enduring environment of political constraints.

In this project, I have identified three patterns of political development that seem to be present across American history. The first is a constant pattern of building structural constraints, which use laws, rules, and norms to restrict movement activity. The second is a cyclical pattern of political inflation, in which new types of power are innovated by movements but gradually coopted and absorbed into mainstream politics. The third is a progressive pattern of increasing institutional thickening, in which the growth of government renders policy more entrenched and less dynamic. These three trends are observable across time, and taken together suggest growing constraints on movement power that are largely not cyclical.

My general answer to both above questions is that social movements can and do exercise political power of three distinct types, and that movements maximize their influence when the types of power are employed in synergistic ways. However, while well-managed movements still have opportunities to achieve the policy goals, I find that these opportunities are increasingly limited by the three patterns of political development.

My research suggests that we should expect movements to innovate new forms of power in the future, as they have previously done with pluralist and plebiscitary power. At the same time, I raise significant doubts that the American political system can be opened up to change to the degree it was in the 1960s. Social movements are facing a constrained future and I would suggest they hone their power strategies to make the most of those realities.

The remainder of this dissertation is laid out as follows:

Chapter 2 lays out the theoretical groundwork of the project, beginning with a look at the concept of “power” in the political theory literature, with special attention to the American tradition of democratic theory from Madison to Rawls. I adopt an approach to power that draws heavily on Robert Dahl and Bachrach & Baratz, arguing for a definition of power as *the exercise of force and/or agenda control over political opposition*. After defining power, I move on to argue for my three types of power framework—pluralist, plebiscitary, and disruptive—showing how they build on literatures in social movement theory, American politics, and policy process theory. Finally, I draw on the American political development literature to argue for three patterns of institutional development—the constant pattern of *structural constraints*, the cyclical pattern of *political inflation*, and the progressive pattern of *institutional thickening*—that together increasingly constrain movement opportunities.

Chapters 3-5 address disruptive, pluralist, and plebiscitary power respectively, with each chapter considering structural constraints, political inflation, and institutional thickening. In each case I use empirical data covering the broad spectrum of contemporary movements, combined with system wide analysis of public laws and Supreme Court cases. I argue that disruptive power is especially impacted by structural constraints like police procedures and anti-terrorism law, but resistant to political inflation because status quo forces have difficulty coopting disruptive tactics; plebiscitary power is especially vulnerable to political inflation because of the increasing flood of information across various media sources; and pluralist power is heavily subject to both structural constraints like IRS regulations and political inflation like increases in the cost of political campaigns. I show that institutional thickening impacts each type of power in similar ways because it reduces the spare time and resources policymakers have to address new issues.

Chapters 6 & 7 apply the power framework to four important contemporary social movements: LGBT Rights, Anti-Abortion, Disability Rights, and Animal Rights. For each movement, I analyze the power strategies used across different periods of movement activity, paying special to the three patterns of political development and interactions between the three different types of power. I draw a number of ancillary conclusions about how movement power functions, including that different types of power can be employed in ways that are either synergistic or in conflict with one another. Successful movements tend to avoid conflicts, particularly disruptive and plebiscitary tactics that undercut movement messaging or organizational reputations. Importantly, I also show that LGBT and Anti-Abortion activists maximized their power resources in ways that Disability and Animal Rights activists have not. Thus we see that while all movements are significantly constrained by institutional trends, organizational agency still plays a large role in determining movement success or failure.

Chapter 8 concludes by summarizing the previous chapters' findings, speculating on future developments in movement power, and laying out future avenues for research. In particular, I consider the cyclical nature of the political inflation pattern, which predicts that the cooption of plebiscitary power by political insiders heralds the development of a new type of political power. In all likelihood, the seeds of such development are already in play, and I consider a few potential contenders, chief amongst them are the use of international coalitions within causes that magnify movement strength by pitting global activists against national institutions and domestic alliances across causes that seek to gain control over major party nominations.

“To assume that this country has remained democratic because of its Constitution seems to me an obvious reversal of the relation; it is much more plausible to suppose that the Constitution has remained because our society is essentially democratic.”

-Robert Dahl, *A Preface To Democratic Theory*

“[T]he strong do what they have the power to do and the weak accept what they have to accept.”

-Thucydides, *The Melian Dialogue*

“Innovations in form and method can provide political advantages to otherwise disadvantaged groups. Initial advantages may flow from the capacity of new forms of organizing to disrupt taken-for-granted procedures or from tactical innovation that exploit new opportunities or help to mobilize new resources.”

-Elizabeth Clemens, *The People’s Lobby*

Chapter 2: Theory

This dissertation wears many hats. At times it fits squarely into the core “how do movements matter?” social movement literature, which is mostly a political sociology literature. At others it seems clearly a work of American political development, identifying patterns of institutional change. And in yet other sections it engages First Amendment doctrine in sustained public law analysis. Each of these characterizations is a key piece of the whole. But at its heart

this is a work of democratic theory. It is a work about how political power is exercised in American democracy and how changes in power distribution impact the health of American democracy. While the subsequent chapters attempt to be descriptive in addressing the normative claims of particular movements, and avoid taking sides in substantive debates, the foundation of my work is the normative view that social movements play an essential and valuable role in the operation and maintenance of democracy, and specifically American democracy.

I see this project as part of a rich tradition in American politics and political science of intertwining normative democratic theory and empirical institutional analysis, reaching back to the American Revolution and beyond. Most notably, *The Federalist Papers* and the writings of James Madison are considered to be both an authoritative account of the design and function of the US Constitution, as well as a theoretical account of the meaning of American democracy. “Madisonian democracy” has become shorthand for institutional designs that seek enduring solutions to the fundamental political conflict between the right of majorities to rule and the right of minorities to be secure in their fundamental liberties. It is a democratic theory that recognizes political equality and individual liberty must be balanced, and that institutional design is at the heart of maintaining and cultivating that balance.

Mine is a Madisonian project, a project that asks how we can maximize the will of the people without falling victim to the tyranny of the majority. Mine is a project that asks, what fills the space between acquiescence and revolution? What is the recourse of minorities that judge political institutions to be unbalanced in favor of the majority? What are the minorities to do when their essential interests are denied by the casual (or spiteful) preferences of the majority (Dahl’s “problem of intensity of preference”)? The Madisonian project has struggled to

articulate stable solutions to such perennial issues. *My contention is that the solution is to be found in healthy social movements with ample and varied sources of political opportunity.*

But what constitutes ample and varied sources of movement opportunity? It's a question not easily answered. Some guideposts we may find helpful are previous historical periods where strong pushes for social and political change were met by relatively open or closed political systems. For America's most enduring subject of social conflict, race, we can consider the antebellum years running up to the civil war, and the era of civil rights reform in the 1950s and 1960s. I would suggest that in the years preceding the Civil War, America lacked openness to minority contention, leading to a breakdown in commitment to the political system, and ultimately to rebellion.⁶ Dahl stresses that "the constitutional system did not work when it finally encountered, in slavery, an issue that temporarily undermined some of the main social prerequisites" that tied together the pluralist forces of American democracy (Dahl, 1956, p. 143).⁷ Conversely, I believe the 1960s represent a period of openness when dramatic and largely peaceful change was possible.⁸ It seems clear to me that a political system that invites change, like we saw in in the 1960s, is preferable to one that produces rebellion and revolution,

⁶ For example, the Gag Rule in Congress prevented consideration of abolitionist petitions. Southern states banned advocacy of abolition in speech, press, and through the mail. The Missouri Compromise attempted to permanently shelve the issue of slavery by removing the principle venues of activist contention: decisions over the status of new States and territories. And most notably, the Taney Court's Dred Scott decision sought to remove issues of black citizenship from all democratic control.

⁷ Dahl further makes the interesting claim that the ante-bellum United States is perhaps history's clearest example of social agreement on core social principles except for on the question of race and slavery. This is perhaps overstated to the extent that disputes over federalism contained an element independent of the slavery question, but the point I wish to make is that failure to resolve the challenge of minority oppression is perhaps the greatest threat to the health and survival of democracy.

⁸ The 1960s are generally held up as the principle modern example of openness in the American politics. See Tarrow's account in the ch. 9 of *Power in Movement* (Tarrow, 2011). "Largely peaceful" is a relative phrase, which I contrast to episodes like Bloody Kansas and the Civil War itself. The civil rights movement was a period of significant turmoil and contestation that nevertheless avoided war, rebellion, or the breakdown of governing institutions and broader rule of law. There were certainly riots and violence against activists, but the polity bent without breaking and made concessions to avoid revolution.

and I will argue that we should aim toward a system that either offers regular robust opportunities for movement influence or less regular but more dramatic opportunities. The absence of both types of opportunity is a threat to democracy and to stability. This is both a moral and practical argument about what we should value as a democracy.

The political environment today appears to be somewhere between the two extremes of being ideally open and unacceptably closed, as most observers would agree that movement influence in American politics has substantially declined since the heyday of the 60s & 70s (Piven F. F., 2006) (Tarrow, 2011). But does this decline in influence constitute a democratic deficit for outsiders? Is it temporary or cyclical? Is it driven by institutional patterns, or is it simply the result of fewer outsiders with less pressing social and political grievances? This dissertation seeks to answer these questions, concluding that opportunities for movement power are indeed closing, and there is good reason to worry about the long term future of dissent in American democracy. I believe the institutional space for effective dissent is not simply at the low point of a cyclical process, but instead, the evidence suggests an increasingly constrained future. By understanding how movement power functions and what developmental trends limit it, we can better prepare for these changes and make informed decisions about institutional reforms that support the vital role of outsider politics in our democracy.

In the rest of this chapter I look first at theories of democracy, including the work of Locke, Madison, Calhoun, Dahl, Rawls, and Iris Young. I argue that Dahl's emphasis on the social prerequisites of democracy is critical, but that these social conditions are mediated by institutional factors. In the case of marginalized minority interests, I argue that in a functional

democracy those institutional factors need to be sufficiently open to the influence of intense minorities seeking change.

I next consider the concept of power, focusing first on the three faces of power—face, agenda control, and ideology—and explaining why I limit my analysis to the first two faces. I argue that a combination of analytic (force) and social (agendas) approaches to power is the most useful for considering movements in the context of American political institutions. While I also briefly consider more postmodern perspectives on power, I ultimately find them interesting but untenable in this analysis. In addition, I consider whether power should be viewed as conflictual and/or consensual, as well as in terms of exercise and/or capacity. I opt for a view limited to the former choices. In doing so I end up with a definition of power as *the exercise of force and/or agenda control over political opposition*.

From here, I consider a typology of movement power, identifying three types of power—disruptive, pluralist, plebiscitary—that I argue provide a solid framework for operationalizing our theoretical understanding of outsider power. I explain how my framework draws inspiration from the work of Stephen Skowronek and the broader presidential power literature, as well as how my approach fits into the social movement literature. Social movement theory is not always the most contiguous area of study, but one of its basic questions is: do movements matter, and if so, how? I argue that the literature on this topic often lacks specific mechanisms of movement influence, in part because so little of movement literature considers American political institutions and the policy process. My approach seeks to remedy that weakness.

Finally, I consider movement power in terms of political opportunity theory. I argue that instead of a cyclical approach focused on cycles of contention, movement opportunities are best understood as constrained by three patterns of American political development—enduring structural barriers, political inflation, and institutional thickening—which frame the most important conclusions of my project. I argue that these patterns identify “durable [shifts] in government authority” that have profound repercussions for social movements and American democracy (Orren & Skowrone, 2004). In addition, I argue that my insights about social movements should reshape our views on American political development and what drives major changes in how political power is exercised in American political institutions. My contention is that movements develop new power strategies and resources that are then co-opted by the system’s major institutional players. As such, movement innovation should be a key focus for those of us interested in how American institutions may undergo significant transitions. I return to considering potential current and future institutional shifts in the dissertation’s final chapter.

Democracy and Social Movements

On the face of things social movements are not democratic forces.⁹ Rather, they are sustained pushes by the losers in the democratic process to reverse social and political outcomes. They are the recourse for groups who have lost through traditional democratic channels and feel unfettered democracy is oppressive, or at least not liberating. In some part,

⁹ The obvious exceptions are cases where powerful elite minorities dominate the social and political landscape, as was the case in some southern states during slavery and Jim crow, or in cases where minorities utilize super majoritarian rules to block change. In these cases social movements may represent the interests of a majority of citizens. In such cases movements are democratic forces because they are struggling against undemocratic government.

they are a corrective to democracy. Of course, few political theorists would suggest that “best democracy” and “most democratic polity” are the same things. There is a long tradition of handwringing in political theory over the excesses of democracy. Aristotle famously classified democracy as the degenerate form of republican government, in which the numerical majority’s unfettered power breaks down the limits imposed by constitutional government, itself a less than ideal form of government for Aristotle (*The Politics*, Book V). This fear of democratic excess carried through to the framers, who largely shunned the word “democracy” when advocating their new republic in works like the *Federalist Papers*.¹⁰

But what exactly is the problem with rule by an unfettered popular will? It begs the question to simply call it “unbalanced” or “excessive.” From Aristotle to Madison, the real heart of this fear of democracy has been worry over the abuse of the rich at the hands of the numerous poor. In his most well known work, Federalist 10, Madison stresses that “the most common and durable source of factions has been the various and unequal distribution of property.” However, Madison’s *Federalist 10* does also address sectarian religious passions and in doing so opens up consideration of more modern and progressive concerns over “tyranny of the majority.” That is to say, Madison offers some consideration to the problem of social or cultural majorities oppressing marginalized minority groups.¹¹ And more generally, Madison’s abstract formulation of the problem of minority rights, regardless of the social divisions that most concerned him, is so well stated that it continues to resonate today with students of

¹⁰ Madison refers “pure democracy” as having a number of failings, but most centrally having “no cure for the mischiefs of faction.”

¹¹ Of course Madison’s willful avoidance of racial oppression in this context should be noted.

democratic theory and American Constitutionalism. In *Federalist 51*, Madison states bluntly, “If a majority be united by a common interest, the rights of the minority will be insecure.”¹²

An argument can be made that Madison’s work, particularly *Federalist 10 & 51*, provides the ideal mix of theory and practice in considering how a democratic polity can pursue both justice and stability. Madison’s approach recognizes that the concept of democracy contains an inherent conflict between equality and liberty, and that these values can be balanced in a number of theoretically acceptable ways. Instead of seeking some ideal mix of liberty and equality (democracy), Madison essentially argues that how those concepts are balanced should be decided largely in favor of producing stability.¹³ That is to say, in facing questions of justice in which there is no single abstract best answer, Madison points out that pragmatic theorists and statesmen should side with political and social institutions that shield democracy from corruption, degeneration, and decay.¹⁴ Institutions that prevented democracy from sliding into tyranny can thus be seen as the best democratic institutions, regardless of whether they tip the scales slightly toward liberty or toward equality. In this vein, Madison considers not simply the constitutional design of the institutional separation of powers and checks and balances, but also innovative ideas like expanding the geographic size of a polity.

Madison believed that the size and diversity of the American nation would fragment “factions” into manageable sizes and prevent their coalition into stable majorities capable of sustaining the systematic exploitation of minorities (*Federalist 10*). The importance of “a large

¹² And realistically, to the challenge of fitting our values to the institutional designs produced by politics and compromise.

¹³ By contrast, John Locke’s approach in his *Second Treatise on Government* seeks a more exact formulation by attributing certain liberties to God given natural law, asserting that they must be accepted in an acceptably just society, and rendering all other matters subject to majority rule.

¹⁴ In addition to *Federalist 10 & 51*, see also *Federalist 37* on the practical difficulties of balancing different virtues at the Constitutional Convention, *Federalist 63* on the decline of Sparta, Rome and Carthage.

republic” in Madison’s thought should not be underestimated because while checks and balances might prevent degeneration of the nation’s political institutions, they did not in themselves prevent a permanent occupation of the seats of power by the same unified majority interest. Of course the development of national political parties and improvements in communication technology (like roads) quickly rendered Madison’s limited social checks defunct by allowing diverse American social groups to form stable and enduring political coalitions. The idea was innovative, brilliant and ultimately wrong.¹⁵ Still, Madison’s focus on designing and nurturing social checks on institutional power is perhaps the defining contribution of his political thought.

The practical failings of Madison’s theory and design for the social control of factions gave direct rise to the political theory of John C. Calhoun and the crisis of nullification.¹⁶ Calhoun’s *Disquisition on Government* follows Madison’s work as the major modern political theories produced by American thinkers, arguing that Madison’s scheme to control factions was doomed to failure, because the existence of government itself inevitably “[divides] the community into two great classes” (Calhoun, 1992). Calhoun’s arguments in many ways anticipated Marx’s work on class, but in Calhoun’s America politics was fundamentally divided between the interests of the free soil industrialist North that clashed with those of the slave-

¹⁵ It is worth noting that Madison’s theory of the large republic cut sharply against the tradition of democratic theory, most notably Rousseau and Montesquieu, but including virtually all democratic/republican thought. I point this out to stress how truly revolutionary Madison’s position (and the founding of the American republic) truly were, but also to stress Madison’s willingness to consider more intricate interactions between social and institution design.

¹⁶ Notably, Calhoun’s doctrine of nullification is substantially similar to Madison’s support for “State interposition” in his *Virginia Resolution of 1798*, as well as Jefferson’s *Kentucky Resolution of 1798*. Calhoun praised Madison’s support for State’s rights in refusing to enforce the Adam’s administration’s *Alien and Sedition Acts*, and was dismayed by Madison’s refusal to extend this support to the broader doctrine of nullification later in life.

holding agrarian South.¹⁷ Calhoun's proposed solution to this problem was to alter constitutional mechanisms to give a decisive advantage to the minority, or as he called it, the "concurrent majority." Calhoun proposed giving the minority a negative, a veto, over all policymaking decisions. In practice, he proposed the States be the vehicle of this theory, embracing the concept that states could "nullify" federal policies within their borders, an idea first floated by Madison and Jefferson in the Virginia and Kentucky Resolutions of 1798 and 1799.

Calhoun's theory is a clear theoretical heir to Madisonian democracy—he "out-Madisoned Madison" in Dahl's words—but an heir rendered illegitimate by its thinly veiled allegiance to perpetuating the slavery of millions of African-Americans, a minority conveniently ignored in Calhoun's calculus of two great national interests.¹⁸¹⁹ Like Marx after him, Calhoun's

¹⁷ Richard Hofstadter calls Calhoun "The Marx of the Master Class" and stresses that Calhoun's disquisition emphasizes a basic economic division in society between those who extract value and those from whom value is extracted. Calhoun asserts that this basic division cannot be eliminated so long as the State exists, and therefore majoritarian democracy will always be reduced to a kind of group (class) warfare. Hofstadter calls Calhoun the Marx of the master class because Calhoun argued that contemporary US policy extracted from southern agricultural interests, which were dominated by the southern slavocracy. Thus while the logic of the arguments are similar, Marx and Calhoun identify with classes that are fundamentally at odds.

¹⁸ *A Preface to Democratic Theory* (pp. 29-30). Dahl asserts that Madison is America's greatest democratic thinker, but that his fear of mass democracy and majority tyranny lead to Calhoun as their purest expression. Dahl writes that Calhoun identifies "a fundamental element in American ideology" (FN35, p29). However, Dahl laments this element as Madison's fundamental blunder, and notes that Calhoun's "doctrine of concurrent majorities seems to me prone to all the weaknesses of the Madisonian system, which in many respects it parallels" (FN37, p30). So to clarify, while Dahl is no fan of Calhoun, he recognized the centrality of Calhoun's theory to American political thought.

It is interesting to note that Dahl's pervasive concern with "pseudo-democratization" in works like *How Democratic is the US Constitution?* is rhetorically very similar to Calhoun's critique of the "numerical majority" (*Union and Liberty*, 25, 35). Dahl argues that contemporary plebiscitary politics give the false appearance of being more democratic than representational democracy, but fails to fulfill the underlying principles of democracy. Of course he rejected the concurrent majority or consociational democracy as reasonable solutions.

¹⁹ Race is only alluded to in two sections of *the Disquisition*. First, Calhoun makes the claim that freedom is only a good for those with the character to make use of it. He writes, "No people, indeed, can long enjoy more liberty than that to which their situation and advanced intelligence and morals fairly entitle them." (p.42) For "ignorant, degraded, and vicious" peoples like barbarians and black slaves, Calhoun claims too much freedom invites self-destruction and anarchy. Following Aristotle and the "Great Chain of Being" tradition, Calhoun asserts that only likes should be treated alike, at least in terms of liberty. Then, without

unwavering commitment to a political world defined by a single divide simply does not seem to capture our modern pluralist world, where class, race, gender, religion, disability, and other identities create significant social and political cleavages. However, Calhoun's basic insights about the justice of giving minorities a constitutionally proscribed veto remain theoretically powerful. Indeed, Iris Marjan Young reformulated this approach to minority rights as “deep democracy” in *Justice and the Politics of Difference*, arguably the most significant contribution to late twentieth-century democratic (and/or feminist) theory. Young's call for special representation for minority groups, and specifically a veto over policy concerning each group, is in many ways a progressive pluralist version of Calhoun's philosophy.²⁰

The Calhoun-Young response to Madison rejects the idea that social forces alone can be harnessed to prevent majority tyranny, and doubles down on the goal of building institutional protections for minorities into the checks and balances of constitutional design. While I have a healthy respect for this approach, I believe it suffers from some serious flaws. First, the multiplying of vetoes threatens to further choke a political system that arguably already lacks sufficient democratic responsiveness.²¹ It's difficult to get much done in the American system,

discussing how it is to be accomplished, Calhoun asserts that such populations must be paternalistically prepared for greater freedoms, but that “the progress of a people rising from a lower to a higher point in the scale of liberty, is necessarily slow.” (p.43) Calhoun's point is not difficult to grasp: slavery is best for the inferior black race, and we should not expect that to change anytime soon. Why continued slavery will bring uplift, and not further degradation, remains unexplained.

²⁰ In his recent book *Calhoun and Popular Rule*, Lee Cheek notes that theorists concerned with minority rights and power have repeatedly returned to Calhoun, and offers the example of Stokely Carmichael reading the Disquisition approvingly from a black power perspective (p.22). Yet Cheek is unable to offer an example that is either more contemporary or more systematic. Indeed, I have not uncovered any political or social thinker of minority rights invoking Calhoun. Most interestingly, neither Lani Guinier nor Iris Young engage with Calhoun in developing their own democratic theories, which both advance rights of minority veto or group representation.

²¹ America's bifurcated legislature and independent executive are undeniably less democratically responsive than parliamentary systems like the UK's. Throw in federalism, staggered elections, the filibuster, and an independent Supreme Court exercising judicial review, and it's easy to see why the US system is often considered a recipe for gridlock. Today's political polarization and relatively even support

and it seems likely that new veto points might produce unrelenting gridlock. Second, the institutionalization of these protections for newly recognized groups seems to presuppose those groups have already mustered the influence to assert their status. Certainly one might prescribe mechanisms for identifying deserving minority groups and the policy issues germane to their interests, but it seems such issues of recognition and ownership are inevitably reducible to exercises of power.²² And third, this focus on institutional representation inherently favors negative power when most minorities groups are generally looking for positive change. The ability to stop new policies that abuse one's group is of limited value when status quo public policy already abuses one's group. These three reasons—more than for the blanket complaints over the "practicality" of such complicated constitutional designs—lead me to favor a second heir to the Madisonian tradition.

Robert Dahl is unquestionably one of James Madison's biggest fans, but at the same time, one of his harshest critics. In his *Preface to Democratic Theory*, Dahl stresses that Madison's writings were brilliant political polemics that birthed and sustain America's political culture, but as political theory he finds Madison's work somewhat lacking in rigor and clarity. He writes, "as political science rather than ideology the Madisonian system is clearly inadequate" (31). Indeed, he points out that Madison's Federalist 10 & 51 persuasively argue against the efficacy of written constitutional prohibitions in checking the growth of tyrannical factions, yet his large and diverse republic provides an undertheorized solution that was patently false. He

for the two parties only serves to highlight the check points built into the US system. See Mann & Ornstein, 2016 for a front row seat of how this process is playing out in Congress and American politics.

²² Indeed, I would argue that feminist political theory has become mired in unproductive battles over voice and representation, with Marxists like Nancy Hartsock and liberals like Susan Okin and Martha Nussbaum attempting to represent "women's" interests while intersectional and postmodern theorists like Judith Butler seek to problematize the category of "woman" (and increasingly all subcategories like "black women" "gay women" "third world women" etc.).

argues that Madison's system ultimately fails because "tyranny" remains an ambiguous term (7), faction has no coherent meaning (25), and the separation of powers and institutional checks have proven neither necessary nor effective in protecting minorities (22). The conflict between equality and liberty remains unsolved. But where Calhoun sought to bolster Madisonian institutions, Dahl sought to shed new light on the *social prerequisites of democracy* that relies on "social checks and balances" and a "social separation of powers" (83).

In Dahl's view, even the best constitutional system is dependent on the commitment of the citizenry to participate and respect the results of the institutional process. Democratic institutions work when all the major social and political players value liberty and equality, but moreover, they work when those players believe that working through the system offers them opportunities to win. A functional democratic system must "adapt to fit the changing social balance of power" and incorporate new groups, as Dahl argues the US system did successfully with Jacksonian expansion of suffrage (143). The social focus argues that one could not simply transplant a functional constitution like that of the United States to a nation like Iraq or Afghanistan and expect it to function in the absence of democratic norms and traditions. Conversely, one could expect that American democratic norms and traditions would be strong enough to sustain a functional democracy under any number of constitutions. An ancillary conclusion based on the first two, is that America's constitution may be far from optimal, a conclusion Dahl has pressed in works like *How Democratic is the US Constitution?* (spoiler: Dahl's answer is not democratic enough).²³

²³ The social prerequisite view appears to draw support for comparative studies of democratization, which have found that countries without strong democratic commitments and an educated citizenry almost universally fail to sustain democratic transitions. See Mansfield and Snyder's *Democratic Transitions*,

Dahl's view of democracy finds that a constitution errs when it "[distributes]...benefits and handicaps to the wrong groups." Constitutional rules are at their best when they preserve and strengthen the preexisting social harmony between social groups, and at worst when they subvert the commitment of citizens to the "normal American political process" (143). The later happens when rules stack the deck for the "wrong groups" whose influence is already outsized. For Dahl, democratic social harmony is based upon broad agreement between the various segments of society over basic core values, institutions, and policies. The Constitution and a society's political institutions best serve democracy when they don't overly advantage the strong and disadvantage the weak, insuring "a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision (145)." Indeed, Dahl concludes that the American system's main virtues are that its diffused power and multitude of policy venues do a remarkable job allowing most interests a foothold in the policymaking process, and moreover, that the America "is not a static system" and has evolved to offer new institutional avenues to accommodate the growing strength of previously marginalized political elements.²⁴

Here is the point where Madison and the Framers, Dahl's polyarchical social democracy, and my own work come together. All of us believe a—if not *the*—main function of an effective democratic system is to channel conflict into political channels that produce peace, justice, and stability. As movement theorist David Meyer puts it in *The Politics of Protest*,

Institutional Strength, and War (2002) for a perspective that seems increasingly correct in the wake of the failures of the Arab Spring.

²⁴ Dahl's major work on American pluralism, *Who Governs?*, documents the political coalitions that dominate discrete policy areas in New Haven Connecticut, and is essentially an extended argument that in America any group with a passionate interest in a specific policy area can, and often do, have an outsized role in policymaking on their core issues.

In essence, the Madisonian design was all about *institutionalizing dissent*, bringing political conflict into the government in order to confine the boundaries of claims that activists might make and to invite partisans to struggle using conventional political means rather than taking up arms or opting out of the system. The Theory was that conflict inside government is preferable to conflict between the government as a whole and dissenters (Meyer, 19).

While Madison and Dahl are primarily concerned with the inclusion of "legitimate" political players in the political process, Dahl also notes that the system should insure that groups "excluded from the normal political arena by prohibitions against normal activity may nevertheless gain entry (138)." Dahl notes that these groups may employ "abnormal" political activity, such as violence, "threaten to deprive groups already within the arena of their legitimacy" or "acquire legitimacy" themselves and become incorporated into the mainstream political system (138). Notwithstanding, there is a significant parallel between Dahl's three options and my own three sources of movement power. Violence can be disruptive, plebiscitary appeals are certainly tied to the legitimacy of opponents, and pluralist power is a straightforward attempt to join the normal political process.

Dahl is especially concerned with how the system adapts to incorporate new interests, as it did when the Jacksonian revolution in the franchise brought masses of unpropertied males into the system. Such institutional shifts are, in Dahl's mind, crucial for the maintenance of democracy. But Dahl only skirts this topic briefly, saving most of his concerns for "legitimate"

social interests. In this respect, my project attempts to flesh out part of the democratic system already addressed in the canon of American democratic theory, but addressed incompletely. My contention is that to secure peace, justice, and stability a democratic system must offer effective political opportunities for marginal interests to impact policy and eventually become incorporated into the mainstream political process. And to the extent that those opportunities are not present, a democratic polity risks its legitimacy, prosperity, and security. Before I can argue that America has seen a troubling closing of such opportunities in recent decades, I first need to ask by what standard we might judge a system *too* closed.

The first response, one I touch upon at the beginning of this chapter, is that we may consider openness and closeness as relative terms within the spectrum of American historical experience. Specifically, we might consider the late antebellum period to be unacceptably closed to outside challengers and the 1960s as successfully open to contentious challengers. The basic idea here is that the former period failed to secure peace, justice, or stability for the nation, resulting in a bloody civil war. By contrast, the 1960s saw movements for race, gender, peace, and environmental justice accommodated and pacified by a system that bent instead of breaking. Perhaps a more closed system could have weathered those challenges equally well, but I find it far more compelling to view the period as successfully resolving both long simmering grievances of race and gender, as well as emerging new social problems like pollution and nuclear proliferation. In each case, movements found homes in the political parties and US bureaucratic structures, which were able to adapt and stabilize in more inclusive arrangements. In this light, more openness seems the healthier social option.²⁵

²⁵ Conversely, the rise of Nixon's "silent majority" and the push for law and order politics could be judged as evidence that the system was too open to minority challengers, resulting in a less-than-optimal

It is interesting to consider if a political climate *more open* to political challenge than that of the 1960s might be detrimental to peace, justice, and stability. On its face, I'm inclined to say, yes, at some point a political system too open to challenges by outspoken minorities would likely become volatile and erratic and vulnerable to mass support for authoritarianism and/or demagoguery. However, a major premise of this study is that American democracy is by design, and by happenstance, resistant to policy change.²⁶ That is to say, America's standing bias toward its radical elements is largely conservative, making the question of a "too open" system more theoretically interesting than a practical normative concern.

The second response is to consider more abstractly what standards of openness our institutions should meet. A useful starting point for such inquiry is John Rawls's Original Position.²⁷ Rawls famously argues that a just set of political institutions are those that would be agreed to by a citizen placed under a "veil of ignorance" that prevented her from knowing her place in society (Rawls, 1999, p. 118). That is to say, a citizen unaware of her race, class, gender, and so forth, would choose a distribution of rights and privileges she viewed as fair to any

sequence of progressive leaps and regressive retrenchment. Or alternatively, the conservative perspective might legitimately accuse me of silently inserting progressive values into this analysis, and might argue left forces can and should have been more fully repressed. However, I have argued that accommodating changing social norms is among the greatest virtues of a democracy. It's a normative claim I embrace openly.

²⁶ This has been a major strain of critique running through American political science from mid-century calls by the American Political Science Association to adopt strong parliamentary style parties, to persistent concerns over divided government and party polarization, to longstanding criticisms of Senate representation, the Electoral College, the filibuster, and other anti-democratic elements of the American political system. As mentioned earlier, Dahl's *How Democratic is the US Constitution?* sums up many of the perennial issues, and it is a basic assumption of most introductory undergraduate texts on American Politics. But see also the policy literature, such as Pressman and Wildavsky's work *Implementation on federal economic development policy in Oakland*, which argues it is a miracle that our system accomplishes any of our policy goals **Invalid source specified.**

²⁷ One reason I favor Rawls, as will be made clear later, is that his normative theory of justice is rooted in the social contract tradition in a way that minimizes the idea of an actual historical contract, while still incorporating the idea that we might not cooperate with a supposedly democratic polity if we woke up in it and assessed it to be organized by unfair principles. In a sense movements are composed of individuals who have "woken up" or as they often say had their "eyes opened."

particular citizen, because that citizen might be her. Rawls himself argues that two principles would be chosen to guide the design of just institutions. First, basic rights would be universally protected, and second, institutions would be arranged to maximize the welfare of the least well off (TJ, 53). Enough ink has been spilled over whether Rawls's two principles would actually be chosen in the original position, and I won't seek to resolve the long-standing debate in a few paragraphs. That said, it seems to me both Rawls's thought experiment, and the principles he believes follow, have special purchase on the topic of minority politics.

Consider from the perspective of the Original Position that you might be an advocate against abortion, for animal rights, for LGBT rights, or for disability rights, but that you may also support the status quo on any or all of these issues. What principles might you think an acceptable foundation for a just democratic polity? Certainly not, "the minority always gets its way, including a general veto on public policy it opposes." That was Calhoun's answer, but it is one that seems incompatible with the idea that one might be a member of the majority in a democratic polity. Such a system defeats the core goals of collective action highlighted by the social contract tradition. At the same time, one would presumably not choose a system of pure majority rule, in which the issues most central to one's social and political identity were completely vulnerable to the whims of 51% of voters. It seems a middle ground would be preferable, but just what middle ground?

Rawls's two principles give us a good place to start. The first principle states that all citizens (and groups of citizens by extension) are to have the same basic rights, including rights of speech, assembly, voting, due process and access to the courts (TJ, 53). These rights protect the basic contours of the democratic process by ensuring that everyone can participate in the marketplace of ideas and can make use of electioneering, lobbying, and litigating. This first

principle provides an excellent starting point, but as Rawls himself recognized, the first principle still allows for institutions and policies to be set up in ways that allow for arbitrary advantages, which can then be leveraged to create greater and greater inequalities (TJ, 63).²⁸ Consequently, Rawls proposes a second principle, the difference principle, in which society's major institutions are designed to promote equality, except where inequality is to the advantage of the least well off. In economic terms this principle translates into some form of welfare capitalism or democratic socialism (or specifically for Rawls "property owning democracy").²⁹ The argument here is that the masses are better off (that is richer, as Rawls is primarily interested in economic justice) in a society that harnesses the productivity of free markets by allowing individuals to pursue extra wealth, than they would be in an economy where all financial incentive for entrepreneurship is taken away.³⁰

So are these two principles adequate in helping us decide the ideal distribution of power resources between majorities and minorities? In particular, does the second principle transfer from a focus on economic institutions to a focus on political opportunities? For the most part, I think both principles apply. The first principle, equal basic rights, is an easy fit. But I think the second principle also has a lot of purchase for the distribution of power resources. Power

²⁸ See John Gaventa's devastating account of the "accumulation of bias" across generations of Appalachians for how small inequalities can grow into a near caste system if left unchecked. **Invalid source specified.** For Rawls, this natural and accumulated wealth is morally arbitrary, and thus unfair.

²⁹ Rawls introduced the idea of "property-owning democracy" in his revisions for the French edition of *A Theory of Justice*, noting that his ideas had come to be identified with welfare state capitalism, but that he really favored a system in which human capital like education was widely dispersed as a way of distributing opportunities for wealth, lessening the need to redistribute wealth to the poor. See Rawls's Preface to the French Edition of TJ (1987) for an explanation of the differences between different economic systems (Rawls, 1999).

³⁰ For example, in terms of taxation, if you raise top tax rates from 70% to 90%, there is arguably reduced incentive to work and tax funds plunge below the 70% level, thus less funds are available to redistribute to the lower classes. This is not an endorsement of the infamous "Laffer Curve," which uses this basic argument to make specific claims about tax rates and revenue that have not been supported by empirical research, and which have been abused politically by advocates of lower and lower tax rates.

resources are not evenly distributed across the population, including resources like wealth and talent, but extending to social status, legal standing, bureaucratic representation, and other institutional areas. It seems reasonable that these resources should be distributed in ways that help the weak, but which do not render the system unworkable to the detriment of everyone. Calhoun's concurrent majority system fails the second part of the test by ensuring unrelenting gridlock.³¹ Of course, this brings us to the sticky question of just how we determine whether institutions of power are more unequal than they need to be to function well for majority and minority alike. It is the kind of question that is troublesome for the original position exactly because it is difficult to answer from the position of ignorance. There is likely no easy abstract answer.

I would argue that the question of minority dissent is one of the most difficult, not simply for Rawls, but for social contract theory more generally. Going all the way back to Locke and the beginnings of *democratic* social contract theory, we find the ideas of consent and dissent uncomfortably deployed. In his *Second Treatise on Government*, Locke explains that the populace in any democratic state gives their "tacit consent" to the social contract structuring their state in three main ways. First they make use of the security, roads, and other public goods provided by the state. And second, they decline to exercise their right of exit and leave the state; in other words, they vote with their feet. And finally, they don't overthrow the government and dissolve the contract.³² Now, by most accounts these are pretty weak

³¹ Rawls always stresses that his principles are "lexically ordered" and that the First Principle has primacy in cases where the two principles conflict. It should also be stressed that Calhoun's system offends Rawls's First Principle with respect to the basic political equality of citizens. It might also be noted that comparing our principles to our considered convictions on the concurrent majority is a good use of Rawls's process of reflective equilibrium.

³² At least the second stage of the contract where it the basic agreement for common governance is translated into a specific constitutional form. Tacit Consent, Ch. 8, Sec. 119-122. The agreement to form

arguments. Using public goods is unavoidable in democracies and dictatorships alike. Exiting a state requires abandoning one's social, cultural, and economic supports and having an open and superior international landing spot. And revolution is hard, often bloody, and reliant upon significant support from other dissidents. So clearly Locke cannot mean that these three conditions are sufficient for showing the social contract is just, and I don't think he does. Rather, Locke leans heavily on his understanding of God-given natural rights as the real standard for separating just from unjust societies.³³ Such a standard is inevitably messy in application.

So from Locke to Rawls we see social contract theory producing strong abstract standards for judging a just democratic society—most importantly protections for individual liberty and democratic participation—but we see little in the way of procedural safeguards for numerical minorities. In practice there seems to clearly be a large gray area where society is not irredeemably tyrannical but also not adequately just. That is to say, we get little guidance for judging our democratic institutions in the borderline cases where revolution may not be warranted, but justice remains elusive. In such cases, I propose that where a minority feels public policy is persistently unjust but the constitutional system is overall reasonably just, opportunities for effective political action outside majoritarian politics are warranted. These opportunities should inflict costs on the majority to maintain the status quo and reward intense

society, and the tacit consent to join an existing society, are by all accounts irrevocable, but the form of the commonwealth may be dissolved if a majority of citizens judge it perverted against the ends for which society was originally formed, namely the protection of all citizens' natural rights.

³³ Locke's majoritarian bias is magnified by the unique two-part design of his contract. Arguably, majoritarian political institutions are "smuggled" into Locke's theory when he separates the contract to form society (stage 1) from the contract that creates government (stage 2). Stage 1 is based on consensus norms, and only once society exists as a purely voluntary (but binding) entity does the majority have the power to create government (on its own terms) in stage 2. The minority of society is then presented with a choice to obey the majority's government or to (unjustly) revolt and become the enemy of society (and God). In essence, they give up all their leverage by joining society before the rules of government are up for discussion. See Ch.8 Sec. 98-9 of *The Second Treatise*.

and sustained effort by dissenters, but they should also leave majorities with the tools to sustain policies that are broadly and deeply popular.

While these goals may seem a tall order, I believe their practical expression amounts to rules that provide dissent a privileged First Amendment position, facilitate political organizing and activity by non-nonprofit interest groups, and increase access to America's major policy venues. The Court's First Amendment doctrine provides a good example of the possibilities. Legal theorist Steven Shiffrin has long advocated a "politically centered conception of the First Amendment" that takes "dissent, as opposed to content neutrality" as the core value that should be protected in free speech cases (Shiffrin, 1999, pp. 10-11).³⁴ Such a stance would shift the Supreme Court on many of the cases I deal with in later chapters, but would generally leave constitutional jurisprudence intact. For example, a dissent focus would further protect speech by movement nonprofits from IRS regulation, while at the same time pushing the Court to reverse course on *Citizens United* and allow greater FEC campaign finance regulation of corporations. A second interesting example concerns civil disobedience, which is a classic outsider method that imposes severe costs on dissenters, but rewards intense opinions. Police policies that both allow and punish civil disobedience create ideal conditions that prevent over-use of the tactic while enhancing its dramatic impact. By contrast, "safe spaces" and faux-detainments serve mostly to diffuse conflict and render civil disobedience low-cost and easily ignored.³⁵

³⁴ Shiffrin argues convincingly that the First Amendment is a cornerstone of American political culture, and that a commitment to dissent in our understanding of free speech would ripple throughout our political institutions and behavior. See also Cass Sunstein's work on dissent, the First Amendment, and our political culture **Invalid source specified.**

³⁵ See Rawls on Civil Disobedience, *TJ* Ch. 6, "Duty and Obligation." I think his take on it is astute, and I like his phrasing of, "dissent at the boundary of fidelity to law" (*TJ*, 322). I think civil disobedience is important

Favorable conditions for political dissenters do not threaten majoritarian policy when the majority is unified, motivated, and attentive, but it opens room for influence when majorities are small, fragmented, or largely apathetic. An open system is still one in which the majority usually wins, and wins easily, but also one where intensity of opinions matters.³⁶

So where does this commitment to minority dissent leave us? What does it look like expressed in the terms of democratic theory? It seems unlikely that we're going to find specific institutional solutions between outright majoritarianism and the concurrent mechanism of Calhoun and Young. What we are left with are general principle that state: *1) All citizens should be guaranteed equal basic social, political, and economic rights, and 2) institutions should be structured in ways that facilitate minority power and reward intense dissent, but still allow stable majorities to govern.*

In this project we will encounter many such instances in which such general axioms are applicable. As noted, IRS restrictions on political speech by nonprofits clearly do not favor minority dissent. In order identify just where and how minority dissent can be facilitated we need a broader view of both minority political power and patterns of American political development. And this brings us to the theory of power that animates much of this project.

Power

to social contract theory because it serves as a kind of marker or commentary about the limits of the social contract. That is to say, individuals and groups could be interpreted as saying that they would rather be in the state of nature than agree to a social contract that included the terms they are protesting. If they are willing to give up safety and liberty in their protest, then it seems they might very well reject the goods of political society that ground the political community.

³⁶ See Dahl's *Preface* on the problem of intensity. It's essentially a restatement of the problem of minorities, which Dahl struggles to solve.

If there is a core theoretical concept that underlies the discipline of political science, it is likely the concept of *power*. It is a pervasive term used across the subfields of the discipline and is a concept more at home in departments of political science than in philosophy, economics, sociology or law. Realist political scientist Hans Morgenthau writes, “The concept of interest defined as power imposes intellectual discipline upon the observer, infuses rational order into the subject matter of politics, and thus makes the theoretical understanding of politics possible” (Morgenthau, 1985, p. 5). Morgenthau is suggesting that a common language of power can keep political scientists from talking past one another, which is a persistent problem in many fields. But as with many widely used terms, power is often an amorphous and undertheorized notion, and there is little agreement on Morgenthau’s realist formulation.

My own project takes its title “Powerless in Movement” from Sidney Tarrow’s classic work *Power in Movement: Social Movements and Contentious Politics*. One main point I make is that Tarrow, and the social movement literature that builds upon his work, does not clearly theorize a concept of power or the mechanisms by which it works.

A strength of my approach is that it draws on insights from multiple literatures that I view as complementary but which are rarely in dialogue with one another. My theorizing of power draws on theories of American pluralism and the policy process, as well as a broad political theory power literature. This complements a movements literature steeped in historically grounded theories of political sociology and American political development. Altogether, I feel I construct a theoretical approach that captures both the dynamics of contemporary movement politics and explains previous shifts in those dynamics across American history. And while I am hesitant to oversell the predictive ability of my theoretic

model, I do believe I offer some purchase on the question of what the future holds for the power of political outsiders.

There are many theoretical issues surrounding the concept of power. Is power present in the *capacity* for influence, or must it be *exercised* to exist? Is power necessarily *conflictual*, or can it be cooperative and *consensual*? If you convince someone to change her mind and agree with you is this no longer a power relationship, or is it the ultimate power relationship? If your ideological commitments are shaped by large social structures, is power being exercised upon you and are you powerless if you seek influence based on your *false consciousness*? These and other questions about power are vast and can be maddening because they generally lack objectively true answers. But gaining conceptual clarity does make the work of democratic political science more practical and impactful. Thus my goal is not to find out what power really means, so much as find out *what I mean* by power.³⁷

Beginning with a basic analytic approach to power, such as Dahl's, we can start by saying that A exercises power over B when A makes B act in a way she would not otherwise. When my behavior controls your behavior, directly or through the construction of public policy, I am powerful and you are weak. We are talking here about *power as force*, and this is very close to

³⁷ My relationship with the power literature is an odd and conflicted one. When I put on my political theorist hat I find myself gravitating to Marxist social theories of power as ideology, including its more contemporary feminist and critical race theory offshoots. By contrast, when I put on my Americanist hat, a more analytic approach to power seems a far more useful way to describe how the American political system functions, or how it should function. Floating in the background are the postmodern approaches, which are theoretically somewhat interesting, but which offer minimal practical leverage. At least on the surface, it strikes me that seeking a more "complete" understanding of power may be at odds with developing a "useful" concept of power.

In settling on a definition of power, it seems to me the object is to balance richness with usefulness, and to settle on a definition that is honest and transparent. A rich definition of power is important because narrow definitions can mask subtle forms of power that serve to normalize the oppression of marginal populations. On the other hand, definitions of power with a heavy focus on the internalization and normalization of ideas tend to be more useful in critiquing institutional arrangements than in understanding how those institutions evolve and how political players navigate them.

our commonsense lay use of the term. This is our basic definition of power and it is undeniably useful for understanding much of American politics, particularly issues that appear prominently in elections and lawmaking. Any view of power that abandons and muddles this core view of power as force is likely to be unacceptable for our purposes. But there are approaches that usefully expand upon the concept of power as force without undermining it. Here I am thinking first and foremost of Bachrach and Baratz's *Two Faces of Power* (Bachrach & Baratz, 1962).

The second face of power critique, specifically aimed at Dahl, argues that while the exercise of force is clearly an important form of power, there is a second face of power that is less easily observed. Bachrach and Baratz remind us that those who favor the status quo can win power struggles by simply keeping them off the agenda. That is to say, A exercises power over B when B would be able to control A's behavior in a choice situation, but A prevents that choice situation from occurring. By keeping vulnerable issues off of the political agenda, a dominant political coalition can win issues they otherwise might lose in a popular vote. Simply put, *agenda control* is a separate and important facet of power that is clearly built into our political institutions and processes. By considering both faces of power, force and agenda control, we can paint a richer picture of power in the American political process.³⁸

Beyond the second face of power we encounter more Marxist traditions and what Lukes dubs the third face of power (Lukes, 1974). The third face is *ideological power*, or what Marxist called false consciousness.³⁹ This approach argues that power is pervasive not just in the

³⁸ Agenda focused models of the policy process are increasingly prominent in the field of policy studies. In particular, multiple streams models (Kingdon, 1995) and punctuated equilibrium models (Baumgartner & Jones, *Agendas and Instability*, 2009) have made a compelling case that periodic shifts in attention and issue framing are responsible for the most interesting moments in American politics.

³⁹ While Marx never explicitly used this phrase, it captures an important dimension of his work on ideology, specifically the claim that the proletariat's socialization under the given means of production

operation of political institutions, but in the way social and political institutions shape our individual beliefs and desires. Our acceptance or endorsement of the policy status quo, it is argued, is not so much our own free choice as it is a choice forced upon us by the social structures that permeate our lives. The Foucaultian tradition extends the third face to epistemology and our basic concepts of what counts as legitimate sources of truth and knowledge.⁴⁰ The postmodern tradition extends the third face to language and the way the very building blocks of our thoughts lead us to accept beliefs as given. These are powerful approaches, and social movements and the social movement literature rightly focus heavily on the contestation over ideas, knowledge, and language.⁴¹

Unfortunately, the third face often suffers from a reliance on underlying comprehensive claims about truth and morality. Classic Marxist variants posit class interest as the absolute

indoctrinates them with ideas of property rights, meritocracy, and other ideological contracts that buttress the capitalist system. These assertions depend on Marx's stark views of class and class interest as tangible products of history that can be objectively observed. I find much attractive about Marx's approach and the label of false consciousness, but primarily as a speculative and rhetorical concept. I remain uncomfortable classifying broad segments of society as brainwashed and asserting their true interests and unadulterated beliefs from my personal vantage point.

⁴⁰ For example, Foucault's most famous work, *Discipline and Punish*, argues that modern surveillance leads prisoners (and citizens) to internalize the gaze of authority, which may or may not be on them at any given time **Invalid source specified**. This concept is extremely interesting concerning movements, where activists are often cowed by the idea that law enforcement, tax auditors, or other officials may be monitoring their words and deeds. Indeed, it is commonplace for executives at SMO to tell employees, "don't write anything you don't want the FBI or IRS reading." This control of behavior extends beyond times when the state is not watching, to times when the state is never watching. In the broader public we have adapted to the idea that the NSA is observing all our communications when the available evidence simply doesn't support that belief. "Could observe" has become "does observe," and public behavior and discourse is constrained by those beliefs.

⁴¹ For example, the animal rights movement is at its heart engaged in a struggle over the boundaries of inclusion in our moral theories. The charge of "speciesism" attempts to shift this boundary by pointing out prejudiced logic in peoples' worldviews. Similarly, these activists challenge our dependence on human rationalistic perceptions of the world to judge truth and value, pointing out that other ways of being in the world, such as relying on a deeper and less filtered sensory experience, are not necessarily lesser ways of being. Finally, the teleological bias of language like "farm animals" is pointed out, as is the denial of subjectivity in the use of the pronoun "it" to describe an animal. All these points of contention have importance in long term movement goals, but they blur the concept of political power in ways that may hinder our understanding of major forms of political activity.

divide, while Marxist gender theorists like Nancy Hartsock add gender interest into the dynamic, and still others focus on race, sexuality, or other identities (Hartsock, *Money, Sex, and Power*, 1983). Such theoretical approaches quickly run into charges of essentialism and of prioritizing some divisions over others. In response, intersectional and postmodern theorists have attempted to multiply or abolish the group dynamic approach. In doing so they empower individual perspectives at the expense of our understanding of group struggle.⁴² For an analysis like this one, which takes democratic pluralism as the essential core of American political struggle, both essentialist and postmodern approaches end up distracting us from attending to the groups that are *actually* struggling to influence public policy. The heart of my project is part of the *group theory* tradition of American political science popular in the mid-20th century, and consequently I am committed to viewing social groups as fluid but real and important.⁴³ Thus while ideological power is a critical element of social transformation—or the lack thereof—this project confines itself to the first two faces of power.⁴⁴

So I consider power in terms of agenda control and force, or put another way, the ability to control public attention (and issue framing) and the ability to secure desired policy decisions and implementation.⁴⁵ We should also consider the question of whether our definition of power

⁴² Judith Butler jumps to mind. Her work *Gender Trouble* does a brilliant job problematizing the category of “woman,” particularly in terms of the essentialization of sexuality, but in deconstructing the idea of group power Butler does little to replace it with anything constructive **Invalid source specified.**

⁴³ (Dahl, *Who Governs?*, 2005) (Truman, 1971)

⁴⁴ I would also stress that fighting for and making policy change is arguably the best way to shift public ideology on an issue. The fight over policy is a fight for legitimacy and recognition, and the fight for public attention is also a fight over the framing of that attention. One might argue that adding a focus on ideological power would be “double counting” or would introduce endogeneity problems.

⁴⁵ These aspects of power correspond to the three basic parts of the policymaking process as represented in the American public policy literature; agenda setting, decision making, and implementation. For my purposes, policymaking remains the benchmark for movement influence because movements rarely see their work translate into direct electoral victory or control over governance. So our theory of power should ideally address each point of the policy process where players might exert leverage to cause or stymie change, and force and agenda power satisfy this standard. Some policy scholars might take issue

should include only the active *exercise* of influence, or should it also consider the *capacity* for influence. Dahl tends to use the term power interchangeably to mean both exercise and capacity, and some have criticized this usage as inexact (Haugaard, 2002). I think we can be generous to Dahl here and assume he considered it obvious that both exercise and capacity are expressions of power (as force). But there is also reason to question whether such a move is warranted. Certainly we would consider an actor powerful who never exercises force, but always gets her way because her capacity for force deters challengers. Conversely, we might not wish to call an actor powerless, who loses a battle because she chooses to conserve her expansive resources for other contests (this observation seems to support viewing capacity as power). On the other hand, talking about capacity saps some precision from our efforts because the potential for influence is always an assumption until we can empirically observe it in action. Such claims rely on dubious assertions of what actors really want and their prospects for winning if they acted. It seems to me the solution here is to reserve the term power for the exercise of influence, but at the same time allow for the identification of *power resources* that we may reasonably assert are necessary or useful to the exercise of power. This also prevents confusion over “double counting,” in which resources are viewed as a type of power both when accumulated and when used. Power as exercise seems the safe route, and one that does not limit our ability to discuss movement capacities.

A final point to consider is that power may be considered both zero-sum and non-zero-sum. That is to say, power may be viewed as *conflictual*, with the exercise of power only present in cases where one party produces a result contrary to the efforts of another party. Or

with my reliance on the “outdated” policy cycle model, but I am not making claims about policy proceeding through these three phases in an orderly linear fashion. I feel strongly that the policy cycle model continues to function as a useful heuristic, as argued by Peter deLeon **Invalid source specified.**

alternatively, power could also be viewed as consensual, when different parties work together to produce an outcome all parties favor. Conflictual power is typically how we view policy decisions where different interests line up behind different alternatives or behind the “for” or “against” sides of a particular bill. This is typically the case for regulatory and fiscal policy because costs and benefits are rarely distributed evenly. Taxes redistribute from payer to public. Clean air laws charge industry (and their customers) to clean the air for the broader public. Even when everyone gets clean air, not everyone pays equally. This is why Harold Laswell famously described politics as “who gets what, when, how” (Laswell, 1936). Consensual power is about empowerment through collective action. If three parties all want to lift a boulder, but none can alone, lifting together increases all of their power at the cost of none. Consensual power advocates argue that often all groups involved in an issue are dissatisfied with the status quo and can collectively empower themselves to produce a new policy norm that all sides endorse. Everyone achieves their goal and nobody loses. We might think consensual power is confined to flag day proclamations and other symbolic goods, but consider also the near unanimous support for entering WWII following the bombing of Pearl Harbor or national projects like the Apollo Space Program.⁴⁶ Might one argue that these are clearly collective exertions of power?

Some feminist theorists have made a compelling case that conflictual theories of power justify and entrench the oppression of vulnerable groups (Hartsock, 1999). If politics is a zero-sum game, then the exercise of political power inherently subordinates the losing side, and oppression can be normalized as part of the political process. By contrast, consensual power seems to offer alternatives in which everyone can be powerful and oppression can be

⁴⁶ I suppose one might argue that rapists are an identifiable group that loses in this situation, but I think it’s reasonable to note that in such situations it is not uncommon to have no identifiable interest publicly oppose a policy. As noted previously, our understanding of power focuses on the exercise of power and requires a group to act in some recognizable way, even simple public discourse.

stigmatized and condemned. I am sympathetic to this critique because power is clearly used to oppress vulnerable minorities and competitive language, even the language of democratic competition, can be used to normalize oppression. However, I prefer to frame the call to avoid conflictual power as simply a call to avoid the exercise of power all together. Working together to achieve common goals is something we could use more of in the governance process, but for our purposes I will refrain from calling this power. And in cases where a vulnerable population is “empowered” by consensual politics, what we are really seeing is the withdrawal or absence of power from actors that might otherwise push for oppressive alternatives. I think this observation further confirms that we are correct not to consider capacity for influence as power, because the act of not exercising that capacity creates significant opportunities for cooperation in the absence of power politics.

To summarize, in this project I use the term *power* to mean, *the exercise of force and/or agenda control over political opposition*. This use is far from the only legitimate interpretation of power and I freely admit that it excludes theoretical perspectives that are valid and important. However, this definition seems to me to present the best combination of theoretical breadth and practical applicability, at least for my topic.

Movement Power, Political Opportunities, and American Political Development

With a definition of power in hand we can turn to constructing a framework for how that power is wielded by social movements in the American political system. What does it look like in action and application? Asking this question pushes us to consider both the broad dynamics of power in the American system and the space inhabited by movements for change.

My starting point for understanding power in American politics is perhaps not intuitive given my subject, but I nonetheless draw heavily on Stephen Skowronek's analysis of presidential power in *The Politics Presidents Make* (Skowronek, 2002). While Skowronek's focus on the single most powerful person in the world may seem to offer little insight into the struggles of political outsiders, a deeper look at his framework reveals a number of insights that can be appropriated for social movement studies. Specifically, Skowronek shows that power in the American system consists of multiple resources that *emerge and diffuse* across different parts of the system in recognizable patterns. Moreover, while Skowronek identifies the presidency as the institution driving patterns of power innovation for the whole American system, I will argue that movements are in fact the overlooked element that is the actual first mover behind the innovation power resources.⁴⁷ Finally, Skowronek's suggestion that the cyclical pattern of political development he identifies may no longer be functioning has heavily shaped my own arguments challenging the continued relevance cyclical models of political opportunity for movements.

Skowronek stresses that power comes in a number of types that function in distinct, but interacting ways. He counters a political science tradition where scholars compete to show "the real source" of institutional power, be it the patrician reputations of great men, partisan patronage, bargaining and persuasion (Neustadt, 1991), public appeals (Kernell, 2006), or direct action (Howell, 2003) (Meyer K. , 2001). By contrast, Skowronek acknowledges that all these types of influence can be at play and we need not subsume one form of power under another (52). I begin my own analysis by considering the type of power Skowrownek sees at play in the

⁴⁷ In fairness, Skowronek notes that the development of power resources by the presidency "tracked secular changes in the nation more generally" (52). Basically he argues that presidents build with the materials present in society, such as the growth of national television viewership. I am making a bolder claim about who first develops these social trends into political power resources.

system. Of course, we don't want to simply adopt these forms of power, as the President is in a unique position to wield influence as the head of her political party and a figure with independent constitutional prerogatives. Movements cannot simply make policy with the stroke of a pen. Conversely, the President bears special burdens as the Chief of State and executer of our laws, and these roles limit a president from engaging in actions that may be open to marginal populations. Despite these limitations, there are some clear overlaps, specifically *pluralist* and *plebiscitary* power.

Skowronek argues that pluralist power developed along with the capacity of modern bureaucratic state, and involves bargaining between relatively autonomous "centers of power in the expanding Washington establishment" including the President, Congressional committees, the Court, the bureaucracy and the major client groups in society (54).⁴⁸ Of course, Skowronek analyzes this type of politics from the vantage point of the presidency, which looks somewhat different from that of marginalized interest groups. Still, the idea of power as a negotiation between interests inhabiting and seeking control over various institutional venues is fundamentally akin to the way I seek to use the concept. Movements clearly are players in this interest group game, engaging in lobbying, electioneering, and litigating along as players in Washington games of horse trading and alliance building.

Many social movement scholars argue that adopting the institutional forms and practices of mainstream interest groups is the key to movement power, arguing that institutionalized movements can best sustain mobilization over long periods of time and engage with policymakers. This perspective is most clearly associated with John McCarthy and Mayer

⁴⁸ See also his work *Building a New American State* (1982) on the relationship between the state's bureaucratic capacity and the growth of organized interests.

Zald's classic 1977 paper "Resource Mobilization and Social Movements: A Partial Theory"

According to Resource Mobilization Theory (RMT), movements gain power by adopting the tools of the powerful (McCarthy & Zald, 1977). Formal organizations become repositories of experience, skill, and money, sustaining movements during ebbs in public interest and rallying participants during flows of public concern. In sociologist William Gamson's language, movements best succeed by maintaining their resources in a "combat ready" state of perpetual mobilization (Gamson, 1990). From this perspective, politics is a marathon and challengers need to organize to participate in the pluralist process over the long haul. While RMT is no longer at the center of theoretical debates about movement theory, that is in large part because its conclusions have been accepted as background assumptions in theoretical debates over political opportunity theory and other contemporary topics.

Skowronek describes plebiscitary power as developing alongside the growing importance of mass media in politics, and consisting of efforts by the president to "cultivate a direct political relationship with the public at large" allowing her to shape and leverage public opinion against other institutional actors (55). The president is, of course, in a unique institutional place to shape the public agenda. When she speaks, the nation listens and her party falls in line (generally speaking). But shaping public opinion on policy controversies is hardly the sole province of the chief executive. Movements clearly seek to harness public opinion to force the hands of policymakers. Activists often assume the role of the nation's conscience, identifying and defining problems in ways that demand public redress. For Skowronek, plebiscitary power is the most recent power resource to come to dominate the political system, with pluralist politics developing prior. Thus it should be unsurprising that these central types of influence are two of the three types of power I see as central to movement politics. These

resources are the prime currency of the modern political system, and all political actors trade in them in one form or another, including movements.

The movement literature doesn't use the term "plebiscitary," but many scholars have long considered media based appeals to be the central power resource of activists. Most notably, Michael Lipsky argues that activist protests mainly exercise power by appealing to sympathetic observers who already occupy traditional positions of power in the system (Lipsky, 1968). Importantly, the mechanism here is more about *attention* than it is about *persuasion*. Plebiscitary power is about using media to put issues on the public agenda framed in ways that favor a movement's views on the nature of the problem and the appropriate solution. Media appeals are generally accepted as an important source of influence, but movement scholars often simply classify media access as another resource to be mobilized, which can undercut a deeper appreciation for the unique role of plebiscitary agenda setting.

The third type of power I identify in my framework, *disruptive power*, has little relationship to the resources of the presidency and is not grounded in Skowronek's work.⁴⁹ In a way, the focus on disruptive power harkens back to political science views that saw protest as incoherent expressions of rage, but reframes this activity as a reasonable and effective power strategy. In contrast to the RMT approach, and to a lesser extent media-focused approaches, disruptive power is found in leveraging non-cooperation with political and social institutions to force political concessions. Essentially movements undermine key institutions through protest,

⁴⁹ Skowronek addresses presidents as disruptive actors, but does not claim this is a power resource. It is simply a pattern of behavior. Though it is worth pointing out that the candidacy of Donald Trump raises the distinct possibility of a President using disruptive tactics punitively against his opponents. One can picture the Donald shutting down government or using federal police and security forces to sow discord and increase his cult of personality. Such approaches have been unthinkable for politicians building power through party unity, interest group coalitions, and messaging with broad public appeal. It is unclear that these constraints would hold in a Trump presidency, as they do not seem to in a Trump candidacy.

strikes, riots, etc. until they are appeased. This view is most closely associated with the work of Frances Fox Piven and Richard Cloward, prominent critics of the RMT tradition (Piven & Cloward, *Poor People's Movements*, 1979 [1964]). According to Piven and Cloward, structural barriers prevent socially and politically disadvantaged groups from marshaling the resources to compete in electoral and interest group politics. So for Piven and Cloward, advising the politically disenfranchised to mobilize resources is like advising the hungry to mobilize food. It is unhelpful advice that distracts from the institutional sources of power inequality. So disruptive power complicates the picture by suggesting that movements must choose a power strategy, which like with the presidency literature, has pushed debates towards finding the “true” source of movement power.

My position is that the three types of power—pluralist, plebiscitary, and disruptive—are not incompatible with each other. Rather, they can be employed independently of one another, in support of one another, or in conflict with one another. This means that movements need to develop power strategies that maximize the synergy between power resources, reduce conflicts between them, and that simple either-or and all-of-the-above approaches are likely to squander movement potential. This position finds support in the four cases laid out in chapters 6 & 7, and I think it improves upon movement scholarship that stresses a single power approach at the expense of the others.

The power dynamics discussed above are by no means static, and a proper understanding of them requires looking at how institutions change across time. One reason I began with Skowronek is that he places this dynamism at the heart of his model, and I try to follow suit. Skowronek offers an American political development perspective that seeks to explain how types of power arise and how they change across time. Specifically, he posits a

pattern in which Presidents occupy the most dynamic position in the system because “the presidency is a governing institution inherently hostile to inherited governing arrangements” (20). He argues that the ambitions of, and expectations placed upon, the president generally outstrip the powers available to the office, which lead officeholders to innovate new forms of political power, and cultivate those pioneered by their predecessors.⁵⁰ It is this focus on the innovation of power resources that attracts my attention.

For Skowronek, the presidency occupies a unique position to drive the development of power resources because of its unique capacity and need for more power. But just as importantly—I would argue more importantly—the nature of the American pluralist system means that other political actors can and will adapt and adopt successful presidential power strategies for their own use. And as power resources diffuse amongst the system’s political actors, they cease to be a unique advantage of the office that pioneered them, sapping presidents of power relative to their institutional competitors.⁵¹ Extending and refining power strategies that are widespread in the system offers decreasing marginal returns, eventually pushing presidents to innovate new power strategies. In this way, Skowronek describes the institutional development of power as cyclical, though he stresses it is an “emergent” pattern in that the cycle adds new resources on top of older power strategies, which continue to function as pieces of the president’s repertoire (52-54).

⁵⁰ It should be noted the Skowronek differentiates between authority and power, stressing that Presidents often do not have the authority to use the full powers of the office due to political constraints. He finds patterns of authority are a major factor driving power innovation, but for our purposes we can simply note a lack of usable power (30). Since we are not principally interested in the institution of the presidency, I find focusing on the language of power sufficient for our purposes, especially as functional plebiscitary power seems to involve an element of moral authority.

⁵¹ Some of this is not altogether well fleshed out in *The Politics Presidents Make*, but is more centrally addressed in the later book, *Presidential Leadership in Political Time***Invalid source specified**. Perhaps the clearest example is President Clinton’s plebiscitary mojo being hijacked by the rise of Speaker of the House Newt Gingrich and his Contract with America. This specific example of the diffusion pattern is even more clearly articulated in Kernell’s work (Kernell, 2006).

This pattern of innovation and diffusion is essential. It organizes much of my thoughts about how American political institutions develop and function across time. Where I take issue with Skowronek's characterization, and where I find a foothold to advance my own work as a broad theory of American political development, is with the idea that presidents are the central innovators of power resources. I contend that power innovation is, in fact, tied most closely to the powerless. Social movements are constantly at a power disadvantage and their commitment to their causes presses them to constantly seek influence in new and unexpected places.⁵² And where the president remains bound by certain standards of decorum, movements are free to seek power in behaviors broadly seen as illegitimate by the ruling classes. It is outsiders who have the room and motivation to make radical shifts in their power strategies, and the multiplicity of movement causes and groups makes this institutional position the mostly obvious source of political innovation. As movements innovate, Presidents observe and interact with challengers—as Kennedy, Johnson, and Nixon did with the media strategies of civil rights and other protesters—and stand ready to coopt successful strategies for their own purposes.

So do the empirics bear out this twist on Skowronek's logic? I think they do. At the most basic level we simply need to see movements developing types of power resources at earlier movements than presidents. This is a relatively easy lift. A more demanding standard is finding something closer to a causal connection showing that presidents and other institutional actors did not simply develop similar power strategies at later moments independent from movement examples. This is the kind of historical sleuthing that requires thick tomes by scholars in American political development and political sociology. Fortunately, at least one such study

⁵² Notably, there is a structural similarity here to the way Skowronek describes presidential psychology. But both the need and the willingness to take risks is greater with true political outsiders desperate to find some leverage on the political system.

exists in a form that seems custom built to support the movement-first hypothesis. *Elizabeth Clemens* painstakingly researched book, *The People's Lobby*, offers us a thoroughly convincing account of how social movements developed (public) interest groups during the Progressive Era as an alternative to a system of partisan political power, from which they were largely shut out.⁵³ As Clemens beautifully puts it,

Those who felt disadvantaged, ignored, or oppressed by the parties sought to dismantle the party system in the hope that this would usher in a more responsive, democratic government. In the Process, they institutionalized new opportunities for political access and new models for political organization, but they secured a monopoly over neither. Innovation led to imitation, and many onetime insurgents found that they were increasingly defeated in a game whose rules they had helped to invent” (Clemens, 1997, p. 13).

Clemens's account shows not merely that the modern interest group system grew out of movement organizing, but that the diffusion of pluralist interest group politics undercut the ability of movements to leverage the organizational forms they pioneered. In sum, we find perfect case study support for our theory of innovation and diffusion in terms of pluralist power, one of our major types.

Pluralist power traces its initial development to the organization of labor, prohibition, and other progressive era movements, with Teddy Roosevelt and subsequent presidents quickly recognizing that that interest groups formed independent sources of power in a system of

⁵³ Or rather, movements found organizing as single issue minor parties was increasingly a dead end political strategy, and nonparty political organizations offered new leverage on the political process. Essentially, activists found they could wield more interest by having Democrats and Republican compete for their votes than by seeking to compete directly with both parties.

weakening political parties. Similarly, we can clearly see plebiscitary politics becoming a major source of political power exercised by the black civil rights movement and other protesters before Nixon and his “silent majority” made public appeals a cornerstone of presidential governance on issues like drugs and crime.⁵⁴ Civil rights protesters were able to use the spreading medium of television to grab the public agenda, including international eyes, and shame President Kennedy into pushing forward a civil rights legislative agenda, which was completed by Johnson. This moment changed the power dynamics of Washington politics, and presidents quickly became ringmasters of the media circus. And in both power cases we have seen these types of power spread throughout the political system, leaving every exercise of pluralist or plebiscitary power contested by similar and opposing exercises of the same type of power from other institutional positions. As Chapters 3-5 show, movements have been squeezed by “political inflation” in their attempts to use these fully mature and diffused forms of political power.⁵⁵

I start with Skowronek because his work is central to the genesis of my work and he was front and center in my thoughts as I was teaching the Presidency while formulating this project. It was my starting point, but my framework is by no means simply an application of his presidential analysis to other political actors. First, while I use the categories of pluralist and plebiscitary power, I interpret them through a framework that draws more directly from social movement scholarship. Second, I include a third category of power, disruptive power, which is

⁵⁴ Certainly earlier presidents made use of public appeals, and Skowronek acknowledges as much in discussing FDR’s fireside chats and JFK’s energetic use of television. But only with Nixon did media control become a major tool of governance, and this was a clear appropriation of the strategies pioneered and successfully executed by leftist movements in the decade prior.

⁵⁵ For example, Daniel Gillion has shown that movements inevitably give rise to countermovements that offer competing information and issue framings. Moreover, Gillion stresses that political elites make use of movement information and messaging for their own purposes, which may coopt not only the method of communication, but also coopt the message itself **Invalid source specified.**

more centrally the province of social movements. And third, I consider other patterns that constrain the exercise of power beyond diffusion and inflation. While I must again admit that Skowronek's weaving together of patterns of American political development influences both my language and perspective, my approach to these patterns parts way with his significantly.

While the social movement literature is centrally concerned with power strategies, in recent decades considerations of power have increasingly focused on the ways in which the political system is open or closed to the exercise of movement power. This approach is referred to as *political opportunity theory*, and it has come to dominate the field, led by Sidney Tarrow's work in *Power in Movement*. Tarrow argues that while movement power is important, that power can only be effectively used at times when the political system, and the political coalitions that run it, are vulnerable. During political moments in which the status quo is weak, movements of all stripes can leverage their resources to exploit existing political divisions. Conversely, during periods where the ruling political class is strong and unified, movement agitation is likely to be ignored or repressed. Consequently, he writes, "movements succeed or fail as a result of forces outside of their control" (Tarrow, 2011, p. 24).

Tarrow's views on opportunities and constraints have come to dominate much of the movement studies field, and as noted, this project takes its title and much of its focus from Tarrow's book.⁵⁶ However, a main criticism I take with Tarrow is that he characterizes the ebb and flow of movement opportunity as cyclical, with change concentrated in periodic moments

⁵⁶ For example, major recent theoretical efforts like Edwin Amenta's excellent *When Movements Matter*, still accept Tarrow's framework almost whole cloth, introducing a "political mediation model" that attempts to argue different strategies are more or less effective given different levels of political opportunity in the system (Amenta, 2006). But for all its new label, Amenta's is still a political opportunity variant, and one that I am not convinced generalizes well beyond his case study of the Townsend movement. But in many ways, my effort is similar to Amenta's, as I seek to also reconsider the relationships of power and constraint, and the patterns that define them, but find myself fundamentally still part of the political opportunity theory camp.

of system vulnerability.⁵⁷ In my view, Tarrow does not provide a satisfying explanation for the mechanisms that produce these periods of vulnerability, and neither does he offer us a way to know when, or if, such a period might arrive.⁵⁸ Tarrow points to America in the 1960s as the most recent peak of opportunity and details the first “modern cycle” occurring in Europe 1848 (Tarrow, 2011, p. 150). Beyond from these examples, and his abstract discussion, it’s unclear what other political moments constitute other American cycles. The Democratic surge that swept in Jackson? The abolitionist push before the civil war? The lengthy progressive era studded with movements for temperance, women’s suffrage, and more? The Depression era that swept in the Townsend movement and the New Deal?⁵⁹ Tarrow’s limited examples hardly paint a convincing picture of opportunity cycles, let alone point us towards clear mechanisms that give us anything like predictive power. So even if we accept that the cyclical pattern has been operating throughout American history, can we be confident it is still operating? My answer is that a closer look at the institutional mechanisms and patterns of American political

⁵⁷ I’m far from the only voice criticizing the logic of cycles in movement scholarship. Meyer and Minkoff make a strong case that as Tarrow’s model has spread across the movement literature it has lost coherence like a message in a game of telephone. Specifically, they charge that scholarship is routinely sloppy in using cycles to describe both individual movement arcs and system-wide developments, which are two very different concepts (Meyer & Minkoff, *Conceptualizing Political Opportunity*, 2004). A lack of conceptual clarity has prevented the development of a robust theoretical and empirical account of opportunity cycles.

⁵⁸ Tarrow gives a pretty good account of the rise and fall of movement peaks in Chapter 9, but this doesn’t include the initial vulnerability of the system. Carmines and Stimson give us a much more precise explanation as to how civil rights activism exploited fissures in the Democratic party to both fracture the party and produce major advances civil rights legislation. But it is difficult to identify a major political issue today that could both fracture one or both political parties AND leave in place a political coalition capable of passing major reforms.

⁵⁹ By contrast, Piven does offer a somewhat clearer account US movement influence being defined by specific short peaks followed by long periods of retrenchment (Piven F. F., 2006). But Piven’s argument ties progress to brief moments of often violent contention, which break out periodically. Based on my understanding of power, as well as Tarrow’s model, it is at best a partial account of movement influence. And even Piven speculates on when and if American social movements can find the space and leverage for a new movement of political process. She is far from certain the disruptive mechanism remains fully available and adequately far reaching. She concludes somewhat pessimistically, “Injustice is not even injustice when it is perceived as inevitable” and turns her hope to the development of global and digital activist networks (139).

development that facilitate movement power suggests that the narrowing of political opportunities since the 1960s is likely *not* cyclical. Instead—to use Orren and Skowronek’s famous phrasing of American political development—we see “durable shifts in governmental authority” that leave outsiders increasingly shut out (Orren & Skowronek, 2004).

In identifying patterns of constraint on movement power, I again draw heavily upon Skowronek’s theory of the presidency, but also part ways with him. Skowronek’s theory of American political development is built upon the duality of power and authority, which are subject to three independent patterns of development that interact in ways that defy predictions based solely on the development of institutional *powers*. These are the *persistent* pattern of presidents seeking to reshape politics in their image, the *emergent* pattern of developing new power resources, and the *recurrent* pattern of forging new sources of political authority that decline sharply following their initial use. It is an elegant theory, but the focus on the authority of America’s prime political mover takes it in a different direction than we need to go in considering America’s marginalized political voices. So I focus more exclusively on patterns of power development, specifically three patterns I see functioning throughout American history.

The first pattern I identify is a *enduring* pattern of structural constraints placed on political challengers by policymakers. While the particulars of the laws, policies, and legal decisions shift over time, these shifts serve to help the same basic constraints endure despite changes in America’s social and political structures. The pattern is a constant in political systems for two reasons. First, those in power typically seek to entrench their political control and keep those with differing policy preferences out of power. This is the basic game in politics, and it would be naïve to think these efforts extend only to electoral competition and not the design of

the rules that govern institutional access. And second, part of the legitimate goal of governance is securing peace, stability, and order for the public. This goal puts those in power naturally at odds with movements, particularly those employing disruptive tactics. For example, in 1950 President Truman issued an executive order instructing the military to seize and operate key railroads in anticipation of a railway strike. We should not conclude from this action that Truman was anti-labor, so much as that Truman viewed it as his duty to secure a functioning US infrastructure as the nation geared up to fight the Korean War. The nature of disruption is almost always at odds with interests and the responsibilities of the ruling class, and so we see laws, policies, and court rulings that limit disruption and insurgent political campaigns at all points of American history.

The second pattern I identify is a *cyclical pattern of political inflation*, driven by the cycles of power innovation and diffusion discussed at length above. Movements expand their power resources by innovating new approaches to wielding power, but as these approaches prove successful mainstream political actors co-opt them for their own use. Since I conceive political power as a conflictual zero-sum game, increases in political resources across the political system serve to devalue those resources for early adapters. The most obvious example is campaign spending. As status quo forces spend more and more in each election cycle, each dollar spent is worth relatively less and shows diminishing marginal returns. And those at the fringes of the resource arms race generally find themselves least able to keep up with this inflation, let alone increase their relative position in the system. Eventually movements are squeezed out and forced to innovate new forms of power, starting the cycle over, and layering new resources on top of those currently at play in the system.

The third pattern I identify is a *progressive* pattern of *institutional thickening*, in which the expanding size of government renders the system less dynamic and malleable.⁶⁰ As government grows, institutional resources and political commitments are increasingly locked into existing public policies, leaving less resources for new initiatives, and lessening the appetite of the public or policymakers for changes that may upset the applecart. Social Security and Medicare are legacies of past social movements, but they dominate the political landscape in ways that limit opportunities for advocates of free college tuition, single-payer health care, or green infrastructure investment. This is a phenomenon noted by Skowronek, but he posits it less as an independent developmental pattern, and more as a constraint upon his recurrent cycle of political authority.⁶¹ By contrast, I see this pattern not simply as a constraint on presidents, but more broadly as a constraint on those who wish to dramatically alter public policy. Thickening may limit the president's ability to overhaul the political system, but it is even more limiting to movements who encounter a system where nondiscretionary spending and administrative legislation dominate governance.

At face value, my three patterns of political development may seem overly pessimistic, as they are all constraints. And indeed, it is my contention that opportunities for movements to exercise power in the American political system continue to narrow. On the other hand, this is not to say that opportunities for movement power are absent or will permanently be in decline. First, well established movements for issues like civil rights, feminism, and environmentalism may escape some structural barriers because they have made inroads into the status quo. For

⁶⁰ To be clear I mean "progressive" like a disease that spreads, not like leftist politics. This pattern hits political progressives much harder than conservatives, as Skowronek notes in his own discussion of the "waning of political time" in Part III.

⁶¹ He writes, "the institutional universe of political action has gotten thicker all around—at each stage of development of the office there are more organizations and authorities to contend with, and they are all more firmly entrenched and independent." (Skowronek, 55)

example, animal rights “terrorism” has been targeted for repression in ways that ideologically and tactically related environmental “terrorism” has not been.⁶² Moreover, such movements may already have significant access to the structural resources that are favored when insiders restrict outsider political access. For example, laws restricting outside political spending and favoring traditional political organizing may not impact movements who have developed significant PAC resources, such as feminism’s deep pocketed Emily’s List. These movements may even reap some relative benefits from the exclusion of new radical challengers from the political stage.

Similarly, institutional thickening is less problematic for movements that have an institutional foothold in terms of legislation, committee structure, and bureaucratic representation. The presence of the EPA means that new environmental causes have a permanent venue for new issues, as well as fungible budgets, standing committees, judicial precedent, and legislation requiring reauthorization and amending. For example, the existence of the Clear Air Act regulatory regime provides a vehicle to address climate change through executive, bureaucratic, and judicial rulings on carbon dioxide emissions. So even movements pushing radical, unpopular, or strongly opposed policies may find institutional footholds in battles that were fought during more open periods.⁶³

Finally, while structural constraints and institutional thickening are constant progressive patterns, political inflation has functioned in a cyclical pattern of innovation and diffusion.

Consequently, we are likely to see new developments in power innovation that will reinvigorate

⁶² Animal Liberation Front and Environmental Liberation Front activity in the 1990s shared many traits in common, but animal activists found themselves explicitly targeted by the Animal Enterprises Protection Act (later the Animal Enterprises Terrorism Act) while the far for destruction ELF was not targeted by specific federal legislation.

⁶³ Disability, bureaucratic rep.

movement power resources. The precursors to these developments may already be underway, though I remain hesitant to offer anything like a prediction as to the form and timing in which such innovations may come about. Still, in Chapter Eight I return to this possibility and hazard a few guesses as to where movements might find (or already be finding) new paths to political power, including leveraging global institutions and advocacy networks, forming electoral coalitions across largely unrelated movements, developing approaches that leverage local policy venues, or increasing the reliance on direct democracy through initiatives and referendums.

An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.

-John Stuart Mill, *On Liberty*

“Every idea is an incitement...The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.”

-Oliver Wendell Holmes, *Gitlow v. NY*

“The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges ...”

-Anotole France (quoted by Antonin Justice Scalia, *Hill v. CO*)

Chapter 3: Disruptive Power and Movement Protest

On July 15, 1991, the anti-abortion group Operation Rescue began its “Summer of Mercy” campaign in Wichita, Kansas. For six weeks protester surrounded the area’s three abortion clinics, chanting, picketing, quoting scripture, and physically blocking clinic entrances. Organizers went as far as to have children lie down in front of moving vehicle to prevent women from entering clinic parking lots (Associated Press, 1991). During this period, the act of “blockading” abortion clinics emerged as one of the anti-abortion movement’s most

controversial and combative tactics. More than 2,000 “rescuers” were arrested during the Kansas summer, and the group claims some 75,000 arrests in Operation Rescue actions from 1986 to 1994 (Steiner, 2006, p. p.8). Blockading was highly effective at reducing abortion access, financially undermining clinics, and raising the profile of the abortion issue. But in 1994 Operation Rescue abandoned the blockade tactic, which largely disappeared from the broader movement’s tactical repertoire. What happened in 1994? The federal government made two landmark decisions, one judicial and one legislative.

On Jan. 24, 1994 the Supreme Court ruled in *National Organization for Women v. Scheidler* that clinics had standing to sue anti-abortion groups under the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970.⁶⁴ This unanimous ruling gave clinics the legal means to recover damages (including declines in revenue and increased security costs), court costs, and large punitive sums from groups engaging in blockade campaigns. This judicial policy meant that if anti-abortion groups succeeded in financially harming clinics through criminal trespass, they would end up funding abortions with hundreds of thousands of dollars from their own treasuries. Moreover, group officers, volunteers, and even donors were potentially left liable for their roles in a “criminal conspiracy,” even if they had never directly broken the law (Lewin, 1994).

While the RICO ruling raised long-term doubts about the viability of using civil disobedience against abortion clinics, it was the Freedom of Access to Clinic Entrances (FACE)

⁶⁴ 510 U.S. 249 (1994)

Act that ultimately snuffed out the blockade tactic.⁶⁵ FACE Section (a) provides automatic criminal and civil penalties for protesters who,

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

Violators of FACE were subject for first offenses to maximum penalties of 6 months in prison and/or \$10,000 in fines for “nonviolent physical obstructions” and 18 months and \$25,000 fines for subsequent offenses. Violations other than “nonviolent physical obstructions” carry double the prison time.⁶⁶ Under these guidelines protesters could conceivably receive three years in prison for letting the air out of the tires of a vehicle seeking to access an abortion clinic. These penalties allowed Federal prosecutors to pursue penalties far greater than the misdemeanor state trespass charges commonly leveled at blockade protesters. The law also made cases rather open and shut, as it specifically addressed blockade behavior, leading to easier prosecutions and harsher plea deals.

From 1994 to 2013, the DoJ obtained 89 FACE convictions and brought 27 successful civil suits against prolife activists (National Abortion Federation, 2014). While many of these convictions related to threats, bombings, and other violent activities, they were most effective

⁶⁵ 18 U.S.C. § 248

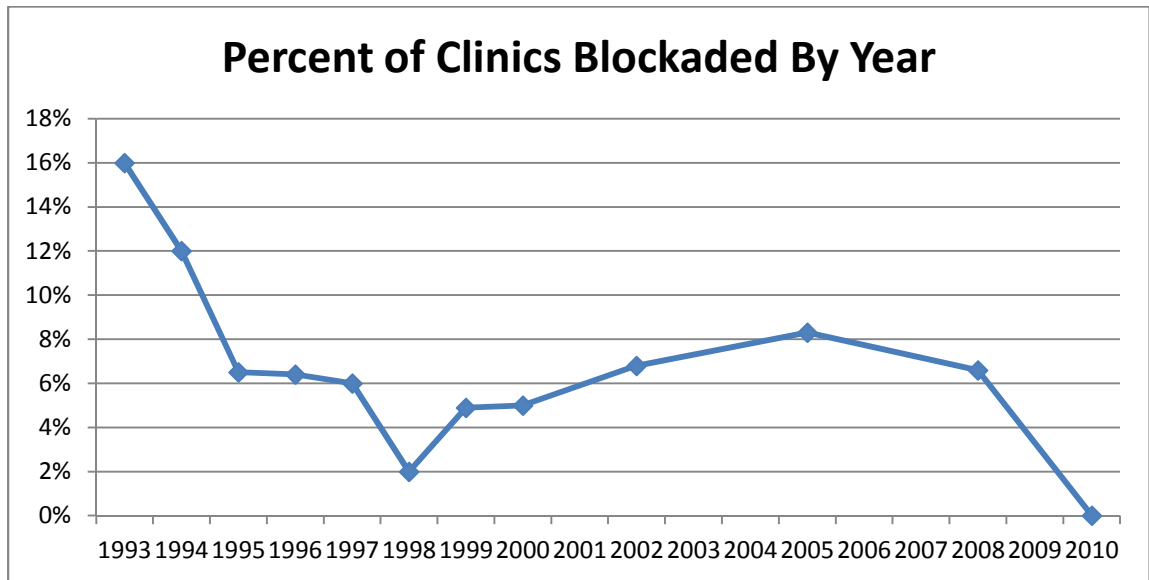
⁶⁶ The Act also included optional statutory damages for civil suits, meaning plaintiffs did not have to prove damages. It also allow state Attorney Generals to bring civil cases on behalf of harmed parties. These measure significantly streamline the process of civil litigation.

in suppressing blockade behavior.⁶⁷ Whereas violent attacks and property destruction were generally clandestine, the open nature of blockading made arrest and prosecution a rather straightforward matter.⁶⁸ As Figure 3.1 shows, FACE took a heavy toll on the popularity of blockades, with the percent of clinics facing blockades dropping by 88% from 1993 to 1998. While there is an uptick in the number of clinics dealing with blockades after 1998, qualitative reports show these “blockades” typically consist of at most a handful of activists acting independently of any movement organizations. And by 2010, even these mini-blockades appear to have vanished from the anti-abortion movement’s tactical repertoire.

⁶⁷ While blockades were certainly a main target of FACE, the law gained traction primarily in response to an uptick in clinic bombings and some high profile attacks/murders of doctors.

⁶⁸ Indeed, blockading protesters envision themselves as following the civil disobedience tradition of King and Gandhi, and being arrested was in many ways an essential aspect of their protest. It’s perhaps instructive to consider Henry David Thoreau’s foundational essay on this issue, *Civil Disobedience*. Thoreau’s own protests against slavery and American imperialism were highlighted by a short stay in jail for refusal to pay taxes. That jailing represented an existential choice for Thoreau and the most potent way he could disassociate himself from the evils he saw government perpetuate in his name. Similarly, abortion activists often seek arrest to show that their opposition to abortion extends beyond those directly involved to the State that sanctions and protects the practice. However Thoreau spent but one night in jail and had his taxes paid by a sympathetic relative. A year in prison and a \$25,000 fine is a different matter. Up against FACE, the majority of blockaders found themselves backing down or off to prison. And by design, penalties multiplied for the movement core most willing to face arrest.

Figure 3.1⁶⁹



Blockading was considered a powerful tactic by both opponents and defenders of abortion, and it only disappeared because the US government extinguished it through legislation, prosecution, and judicial holdings. This example shows a fundamental dynamic of movement politics: at the heart of movement-government relations we find challenges to, and assertions of, law and order. Movement contention threatens core law and order functions of the state, and as such the state inherently seeks to tame and control social movement activity.⁷⁰ This chapter examines the extent to which social movements effectively use challenges to law and order to achieve public policy goals, whether the use of confrontational tactics is increasing or decreasing, and what systemic factors may constrain movement contention. I begin with a

⁶⁹ Data taken from the Feminist Majority Foundation's annual Clinic Violence Survey Reports 1993-2000,2002,2005,2008, and 2010. The survey asks clinics about their experiences in the first 7 months of each year, and so likely underreports. Clinics that deal with blockades typically experience multiple blockades. The reports note that the number of protesters engaging in each blockade declines sharply after the initial years of the survey.

⁷⁰ It is a much more amorphous dynamic than government has with the other main challengers of law and order, criminals and revolutionaries. Criminals seek to evade law and order, while revolutionaries challenge the sovereignty that underlies law and order. Movements occupy a gray area that does not attempt to overthrow the state, but openly challenges the legitimacy of its law and order functions.

theoretical look at what I term *disruptive power*. I then suggest that contemporary movements have seen a significant decline in disruptive activity and power. I suggest three main sources of this decline are the three patterns discussed in the second chapter: 1) the building of *structural barriers* to outsider participation, 2) *political inflation* devaluing outsider resources, and 3) *institutional thickening* rendering major policy shifts more difficult.

In this chapter I try to focus on systemic shifts in the political order that impact all social movements. While I draw data and examples from particular causes, these are intended to be representative. I leave deeper consideration of particular movements for chapter 6.

Movement Protest and Disruptive Power

The study of social movements in political science and political sociology is typically organized under the label of *contentious politics*.⁷¹ The defining political characteristic of movements is usually viewed as their willingness to violate the norms of political behavior and potentially the norms of law and order. David Meyer calls movement politics "the politics of protest," and surely the idea of "protest" is the contentious activity most commonly associated with social movements (Meyer D. , *The Politics of Protest: Social Movements in America*, 2006). But where is the *power* in protest?⁷² How does protest reshape political opportunities and produce policy outcomes? How do we know when protest is an exercise in power and when it's just spitting into the wind? The mechanisms by which protest changes public policy and political coalitions remain largely unspecified.

⁷¹ See for example the volume *Contentious Politics* (2006) edited by Charles Tilly and Sidney Tarrow, or the volume *Dynamics of Contention* (2001) edited by Doug McAdam, Tarrow, and Tilly.

⁷² Either in terms of "power over" competing interests, or the more constructivist/feminist conception of "power to" achieve goals or outcomes. See the theoretical discussion of power as a concept in chapter 2.

Perhaps the most compelling theorization of power and contentious politics comes from Frances Fox Piven. In her 2006 book, *Challenging Authority*, Piven defines *Disruptive Power* as “the leverage that results from the breakdown of institutionally regulated cooperation” (Piven 2006, p.21).⁷³ This is the definition of disruptive power that I adopt in this chapter and in the larger work. In a nutshell, Piven is pointing out that those losing a game always have the final option of quitting, or overturning the game board, and thus ruining the game for everyone. This final option gives the losers leverage to demand concession from the winners in turn for continuing the game. In essence, this perspective is an extension of classic western social contract political theory. But instead of imagining a people agree to the terms of society in a hypothetical state of nature, we are instead considering very real people withdrawing their consent from a social contract they believe to be unjust.⁷⁴

⁷³ Disruptive power is certainly not the only potential impact of protest on politics. Dan Gillion (2012) demonstrates that local protest is statistically correlated to Congressional roll call votes, suggesting that members of Congress likely interpretive protest as an “informative cue” about constituent preferences.

⁷⁴ Perhaps the least palatable part of Locke’s *Second Treatise on Government* is the lack of a practical remedy provided to minorities who feel their rights violated. Locke was willing to grant them a right of exit (as long as they took no property with them), but believed resistance or revolt against a majoritarian republic to be an affront to both society and God. Indeed, Locke instructed minorities who felt their natural rights violated to appeal to God for divine judgment in building their cause or vindicating them in heaven.

A more satisfying contract theory, in terms of its treatment of dissent, is Rawls’s *A Theory of Justice*. Rawls argues that just social institutions are those that a rational individual would chose in a hypothetical “original position,” in which the chooser is blind to her place in society. Rawls argues that in such a situation, the chooser would pick institutions that would most benefit her if she turned out to occupy the most disadvantaged social position. While Rawls himself discouraged direct parallels between his hypothetical situation and real world politics, one might reasonably interpret the withdrawal of social cooperation as a judgment by a movement that the relevant institution has not met Rawls’s minimum standard of justice. That is to say, when those in a subordinate social position chose to blow up an institution rather than continue to occupy their social position, it is probably a good indication that nobody would agree to that structure in the original position. Rawls writes, “When the basic structure of society is reasonably just, as estimated by what the current state of things allows, we are to recognize unjust laws as binding provided that they do not exceed certain limits of injustice” **Invalid source specified..** Rawls is to be applauded for recognizing the situation as morally ambiguous (or conflicted) and I think he’s right to point to civil disobedience in chapter 53-59 of *A Theory of Justice* as one approach to resolving the conflict. However, not all disruptive acts count as civil disobedience and not all civil

What forms of “institutionally regulated cooperation” are at issue in this analogy? They come in two basic flavors, *active* and *passive* cooperation.⁷⁵ Active cooperation involves institutions in which movement participants are actively participating. The most obvious example is labor and consumer participation in the economy. The Montgomery bus boycott of 1955-56 is a classic withdrawal of consumer participation that rendered the city’s segregated transit system economically unviable. Passive cooperation involves non-interference with social arrangements that may not directly involve movement participants. The respecting of property rights, civil, and criminal law are key examples of such passive cooperation. Abortion clinic blockaders withdrew their cooperation from property and trespassing legal regimes, making it impossible for those clinics to conduct business and overburdening local police and courts.⁷⁶

It is important to distinguish disruptive acts from *merely* violent, unorthodox, or dramatic tactics. Protesting in funny costumes can be unorthodox and spectacular. Large “marches” on Washington, D.C. are usually dramatic, though decreasingly so. Assaulting police officers at a protest is certainly violent. But these acts do not *necessarily* pose a significant challenge to major forms of “institutionally regulated cooperation” such industry, commerce, governance, and basic law and order. By contrast, the refusal to work—strikes—directly disrupts industry. The refusal to purchase goods or patronize businesses—boycotts—can directly disrupt commerce. The mass refusal to abide by criminal law and police authority—most dramatically in

disobedience is disruptive. As, such Rawls’s framework provides only a starting point for a normative theory of civil disobedience.

⁷⁵ The corollary is that the withdrawal of *passive* cooperation typically involves action, and the withdrawal of *active* cooperation tends towards inaction. Of course many form of protest combine active and passive elements. A successful boycott generally requires action elements such as outreach, education, and even coercion, not merely an inactive stoppage in purchasing.

⁷⁶ It is worth noting that “social norms” may be counted as institutions as well. For example, disrupting the norms of segregation through freedom rides, sitting at white-only lunch counters, etc. was disruptive to the core social rhythms of southern life. These “institutions” are more ephemeral, but non-the-less are important targets of disruptive power.

riots—can disrupt virtually all the major functions of society. If citizens refuse to work, buy, or obey, it threatens the wealth, comfort, and safety of those in power. In such cases, decision-makers will need to wait the crises out, repress it, or appease it through policy concessions.

Piven argues that disruptive power only really achieves policy change through *dissensus politics*, a process by which movements divide and shatters political coalitions. The classic examples of dissensus politics are the abolitionist movement splitting the Whig party over the issue of slavery, and later the civil rights movement splitting the mid-twentieth century Democratic Party over the issue of segregation. In each case movement protests forced divisive issues to the fore of the public and party agenda, where existing party coalitions could no longer suppress internal conflict. The process is traced with convincing precision in Carmine and Stimson's *Issue Evolution* (1989), and I am convinced that movements can achieve dramatic victory by pushing party realignment.⁷⁷ However, Piven's focus on dissensus largely dismisses the issue of power between times of realignment and writes off these periods as times of inevitable retrenchment. Piven's move is problematic for two reasons.

First, I argue that disruptive power remains an active force even during times of "ordinary" politics, regardless of whether retrenchment occurs. As the wave of 1960s protests ebbed, new movements continued to emerge, and these movements relied heavily on disruption. The anti-nuclear movement emerged in the late 1970s and in addition to disruptive protests, activists repeatedly disrupted nuclear testing by trespassing in restricted testing areas. This movement has been largely successful in pushing for an end to nuclear weapons testing and a moratorium on the construction of nuclear power plants in the United States. Furthermore, as

⁷⁷ If there is a flaw in Carmines and Stimson's account it is that their treatment of "activists" focuses too narrowly on party "activists" to the exclusion of movement activists (though in some cases these are the same individuals).

chapter 6 details, the anti-abortion, gay rights, disability rights, and animal rights all employed disruption in their emergence and beyond. Whether or not this disruption is ultimately effective in winning major policy concession, it is clearly an exercise in power that needs to be accounted for to understand movement politics.

Second, it is quite possible that Piven's recurrent pattern of consensus punctuated by dissensus is no longer active (if it ever truly was). We have not seen a period "open" to a dissensus break since the 1960s, and it is unclear a new one is on the horizon. Political opportunity theorists, such as Sidney Tarrow, often describe past "cycles of protest" but have little to say on when and how the wheel turns. Indeed, the concept has become muddled in the literature, being applied to individual movements and the larger polity with little consistency.⁷⁸ Moreover, one theme of this chapter, and the larger work, is that movement methods of organizing and the "thickening" of American political institutions have rendered the system less dynamic. Under such conditions it seems reasonable to focus on how disruptive power functions without creating dissensus. The "times in between" may be all that remain for movements, and these times may yet be productive. As such, I focus in this chapter on how structural barriers constrain movement uses of disruptive power.

Declines in Disruptive Protest – an Empirical Look

It is difficult to measure disruption in any empirically reliable sense, particularly over time. As noted above, 100,000 marchers on Washington may be highly disruptive in one era and

⁷⁸ See (Meyer & Minkoff, *Conceptualizing Political Opportunity*, 2004) for an excellent critique of how movement scholars have begun to talk past each other by failing to define their terms and by misapplying the terms of each other.

just a matter of course a few decades later.⁷⁹ As such measures of disruption tend to be highly qualitative and case specific.⁸⁰ Moreover, most social movement research on disruption tends to focus on non-US cases exactly because tactical repertoires are more volatile in most other nations.⁸¹ There are some notable exceptions. William Gamson's classic book *The Strategy of Social Protest* first made the case four decades ago that protest correlates with policy change. Gamson also found that the use of violence was associated with policy success, which is particularly intriguing for the disruptive hypothesis. But Gamson's study lacks size and a convincing causal mechanism.⁸² More recently, Daniel Gillion has convincingly demonstrated that protest activity, aggregated by congressional district, correlates significantly with the policy positions of Members of Congress. He posits that protest may function by communicating intense constituent opinions to representatives, which would not be a disruptive form of power (Gillion, 2014). Instead, Gillion's views on protest may fit better with the discussion of pluralist power in Chapter 4.⁸³

All that said, it bears looking at some basic data on arrests, violence, and property damage related to movement activity over time.

To the extent we consider protest to be a core act of contentious politics, simply measuring the number of major protests over time can be used as a very rough measure of

⁷⁹ Later I will discuss how changes in policing regimes have even rendered arrests a suspect measure of disruption.

⁸⁰ Piven (2006) is a good example of quality qualitative work built on a series of cases.

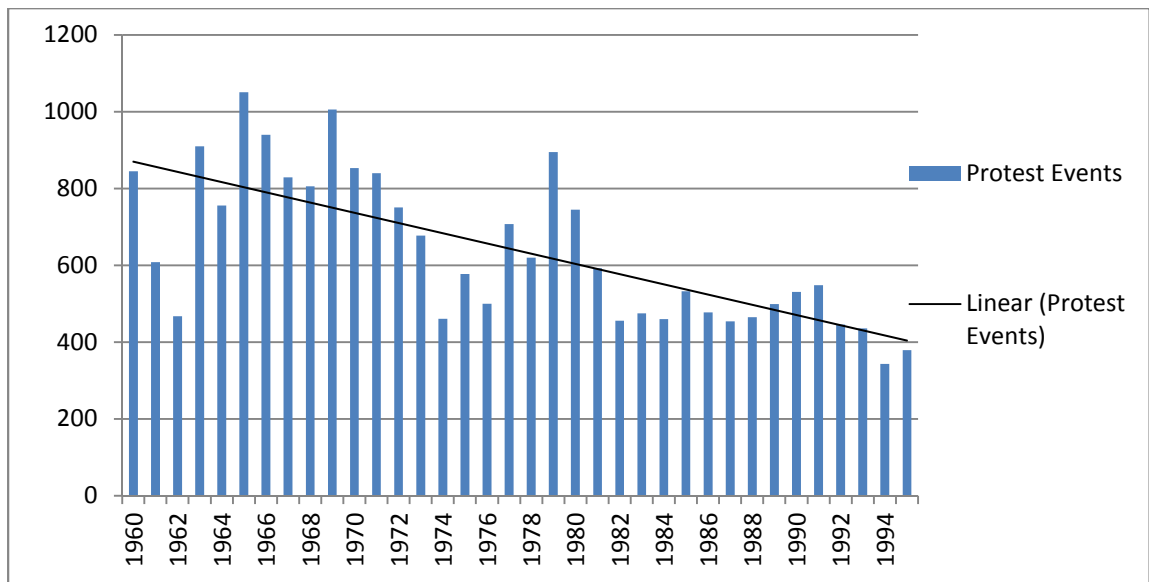
⁸¹ Donatella della Porta's work on political violence is perhaps the best example of non-US research in this area **Invalid source specified..**

⁸² Marco Guigni attempts to refine Gamson's study by increasing the number of observations and using a time lag between movement mobilization and policy measurement, which focuses on movements as agenda setters **Invalid source specified..** This mechanism fits more with chapter 5 on plebiscitary power. Guigni also focuses most of his empirical work on Europe.

⁸³ There is certainly room for debate over the interpretation of this data. Gillion's project is not directly concerned with teasing out the mechanisms at work in protest influence, so much as establishing that such an effect is real and measurable.

continuous politics. In figure 2 we see that the number of protests covered by *The New York Times* has declined significantly since the 1960s from an average of more than 800 annual events to around 400 annual events.⁸⁴ Chapter 4 will argue that movement organizational and financial resources have grown rapidly over recent decades, and this appears to contrast sharply to the decline in major protest activity in figure 3.2. I strongly suspect this trend has continued over the past two decades, as this chapter has argued the spike in confrontational anti-abortion, animal rights, and environmental activism in the late 1990s and early 2000s has been effectively suppressed. This admittedly a very rough measure, but it provides an interesting starting point.

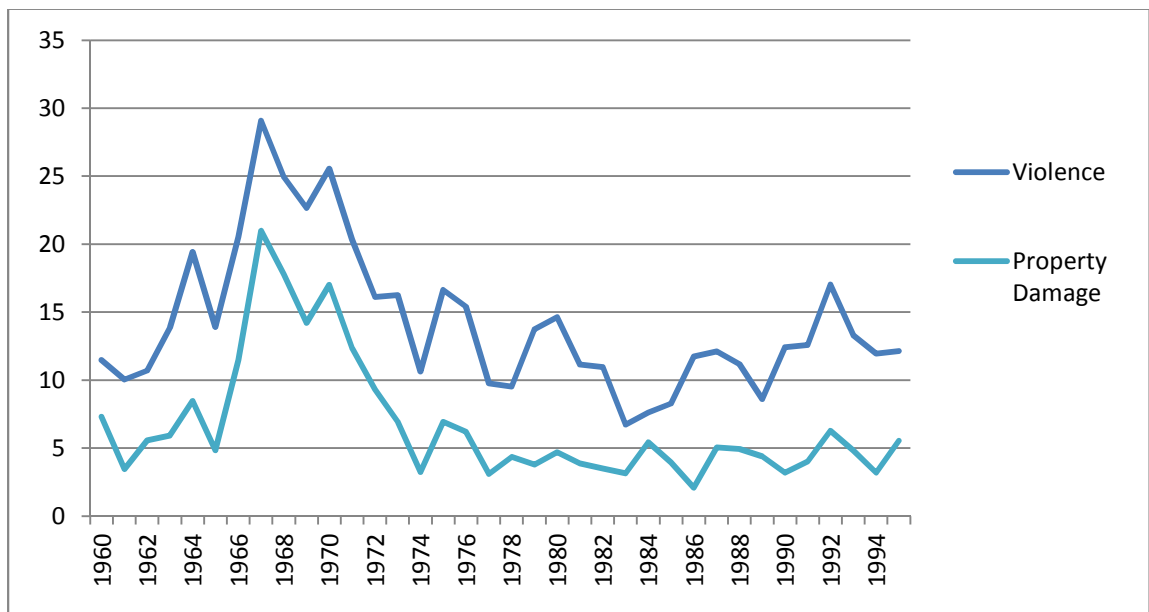
Figure 3.2: New York Times Covered Protest Events by Year



⁸⁴ There are obvious problems with using newspaper event reporting as a measure of protest activity. The social movement literature is extensive on this methods topic, with several compelling lines of criticism, yet these reports remain the standard in social movement research. Moreover, the Dynamics of Contention database of New York Times reports is considered to be the gold standard of event reports, though it certainly has a regional bias and ignores local and regional movement events. From my perspective the most obvious issue is that chapter 5 of this work argues that political inflation should lead to a decline in attention to protest activity even when actual events remain constant or increase. It would seem that I cannot have my cake and eat it too, and would rather concede that this analysis is moderately suspect than back away from my theoretical position of plebiscitary power.

Figure 3.3 provides a richer look at trends in the types of protest activity that have occurred over time. Not only was protest activity more common in the late 1960s, but protests were significantly more likely to involve violence and property destruction. In 1967, 29% of protests involved violence and 21% involved property destruction. Recent levels of disruptive activity are far lower, and I suspect currently levels are lower still. Remember, laws like FACE and AETA have effectively targeted these behaviors for elimination since the mid-1990s, as shown earlier in Figure 3.1. Again, these measures are rough proxies for disruptive activity, but it is notable that we find both a decline in protest volume and a decline in the proportion of protests utilizing the most confrontational tactics.

Figure 3.3: Disruptive Measures of Protest 1960-1995⁸⁵



⁸⁵ Data taken from the Dynamics of Contention data set at Stanford University, which collects and codes all protest activity covered in the New York Times 1960-1995.

The above data are only able to tell a limited story about disruptive power. A fuller picture requires examining the three patterns of American political development discussed in chapters 1 & 2, which combine to increasingly constrain movement power. First and foremost for disruptive power, *structural barriers* erected by elites criminalize and punish disruptive behavior using laws ranging from trespassing to racketeering, as well as more subtle barriers that channel disruptive behavior into forms that are principally symbolic and expressive, such as “free speech zones.” Second, *political inflation* dulls the impact of disruptive activities as social and political institutions adapt to frequent disruptions.⁸⁶ I argued in Chapter 2 that disruptive power largely resists cooption by other actors in the political system, which somewhat limits the impact of the inflationary pattern and suggests a potential rebirth of disruptive opportunities in each generation. However, this potential may be undercut by the scorched earth political strategy that has taken root in the contemporary Republican Party, which suggests that political elites are finally incorporating disruption into to their repertoires. Third, *institutional thickening* entrenches public policy more deeply and renders significant change a ponderous process. By slowing political change, thickening renders it less likely that movements will be capable of sustaining disruption through the necessary steps of the policy process.

Structural Barriers

⁸⁶ It might be argued that this description fits poorly within my category of political inflation. Specifically, political inflation suggests that increase in disruptive activity will render each disruptive behavior *less impactful*, rather than institutional adaptation rendering those behaviors *less disruptive*. This may be a legitimate complaint and I will need to consider the issue further. At the very least, adaptations in expectations—citizens becoming less bothered by, and reactive to, routine disruptions—seems to fit my general definition of political inflation.

James Madison argued in the *Federalist # 10* that government exists to pursue the “public good” of providing order, liberty, and justice. While the Federalists gave little shape to the amorphous concept of justice in their papers and in the Constitution itself, the dual threats of anarchy and tyranny put order and liberty front and center in their designs. Madison and Hamilton devoted extended attention to arguing for a government strong enough to control the populace and prevent anarchy, while also checked and balanced to preserve individual liberties and prevent tyranny. Assuring a balance between the “energy” to insure order and the restraint to preserve liberty was the framers’ central dilemma, and it is one that persists today. When government exercises its core law and order functions, the space for disruptive powers is generally constrained, as perceptions of public danger, disorder, and nuisance are necessarily those of the elites and/or ruling majorities. Alternatively, the growth of judicial power has typically corresponded to a growth in the civil rights and liberties of dissenters, opening opportunities for disruptive protest.

American history is full of examples of government using heavyhanded police tactics to suppress and punish disruptive dissent. The British opened fire on a colonial mob in the Boston Massacre, and passed the "Intolerable Acts" to punish Bostonians for the Boston Tea Party. George Washington used military force against the so-called "Whisky Rebellion" and other challenges to the nascent republic's fiscal authority. Escaped slaves in the antebellum south—as well as black operators on the Underground Railroad—faced whipping, hanging, or even burning if caught in their attempts to undermine slavery. State and Federal forces, independently or in conjunction with private forces like the Pinkertons, repeatedly broke Progressive Era labor strikes with fist and club. Civil rights marchers and freedom riders faced attack dogs, fire hoses, beatings, arson, and murder at the hands of police or police supervised white mobs.

In each case these events stick in our collective consciousness because the government used or sanctioned extraordinary force against dissenters. But in each case we also remember these conflicts because government repression tended to add to the disruptive impact of the movement. Many of these instances are cited by Piven as successful examples of disruptive power at work (Piven F. F., *Challenging Authority*, 2006). While some would conclude that the decline in violent police confrontations with movement activists is evidence of a system open to disruptive power, I caution that it may denote the exact opposite. In this section I concentrate on the less extraordinary laws, court rulings, and policing policies that subtly constrain disruptive power without risking further conflagration. I begin with in the late 1960s and the first of several federal efforts dubbed the “war on crime.”⁸⁷

War(s) on Crime and the Professionalization of American Law Enforcement

The phrase “war on crime” has long been a staple of American political discourse. While crime is in many ways a perennial public issue, before the 1960s the federal government played a relatively small role in what was traditionally a core function of state and local government (Dilulio, 1992). One might reasonably ask if the struggle against organized crime that flared up in the 1920 and 1930s was the original “war on crime,” and the exploits of Eliot Ness in *The Untouchables* certainly make it seem likely.⁸⁸ But Eliot Ness and his “G-men” were only a handful of prohibition agents empowered to enforce prohibition under the 18th Amendment. Their

⁸⁷ Certainly the failings of law enforcement during the 1960s were a major reason police forces began to modernize their methods and procedures, which would lay the groundwork for the struggles of the 1960s.

⁸⁸ Following the passage of the 18th Amendment prohibiting the manufacture and sale of alcohol, organized crime exploded in America’s urban centers. While “gangsters” were nothing new in America, prohibition handed the likes of Al Capone control over an industry with hundreds of millions of dollars in annual revenue. These revenues bought virtual immunity from local police and courts, as well as control over influential labor organizations.

resources and authority were limited and their influence was more on the silver screen than the urban jungle. In a pre-New Deal era the Supreme Court allowed the federal government relatively little leeway in encroaching on state police powers. J. Edgar Hoover's FBI famously had to pursue gangsters like Al Capone on tax fraud, mail fraud, contempt of court, and other ancillary charges where federal authority was on solid footing.

In the late 1930s, the Supreme Court abandoned its restrictive *Lochner* era understanding of the Commerce Clause opening up new possibilities for federal policing in relation to commerce. The most significant law in this vein was the Hobbs Act, signed by Harry Truman in 1946.⁸⁹ The Hobbs Act targeted racketeering by creating federal penalties of up to 20 years in prison for robbery and extortion that affect, attempt to affect, or conspire to affect interstate commerce. While the Act was ostensibly aimed at mafia related activity, the Hobbs Act allowed federal law enforcement to reign-in the semi/extra-legal pressure tactics of labor unions. The old saying, "give a man a hammer and every problem starts to look like a nail," is surely applicable here. As government policing resources and authority expand, they generally become institutionally entrenched and find application to other socially disruptive elements of society. The Hobbs Act is an early example of the persistent pattern of structural constraints placed on disruptive movements, and one that would intensify when crime eventually catapulted to the top of the public agenda in the mid-1960s, then again in the 1980s and 2000s (Simon, 2007).⁹⁰

The Nationalization of Policing

⁸⁹ 18 U.S.C. § 1951

⁹⁰ Hoover's FBI also turned their increasing post-mafia resources to monitoring and undermining civil rights leaders, including Dr. Martin Luther King Jr., whose extramarital affairs were famously recorded and disseminated by federal agents.

Barry Goldwater carried only six states in the 1964 presidential election, but the Goldwater campaign undoubtedly impacted American politics and policy in profound ways. As mentioned earlier, Carmines and Stimson (1989) have persuasively shown how the Goldwater nomination represented a watershed realignment in party politics around the issue of race. Goldwater was not himself an overt racist in the cast of George Wallace (although many of Goldwater's supporters were), but was instead a fervent supporter of states' rights, economic liberties, and tough on crime policies. The practical consequence of Goldwater's positions was an opposition to federal civil rights legislation and the advocacy of federal "tough on crime" policies in urban centers rocked by racial protests and riots. While Lyndon Johnson and the victorious Democratic Party continued forward with civil rights legislation, including the 1965 Voting Rights Act, they largely followed Goldwater's lead in making crime prevention a major federal goal.⁹¹

Johnson appointed a *Commission on Law Enforcement and Administration of Justice* in 1965—generally known as the Crime Commission—and followed the its recommendation to dramatically increase direct and indirect federal involvement with crime prevention and control. The result was the 1965 Law Enforcement Assistance Act, establishing the Office of Law Enforcement Assistance (OLEA) within the Justice Department, which in addition to distributing funds, aided local law enforcement in the modernization of training, policies, and procedures. As the 1960s progressed, the increase in race riots and the rise of antiwar civil disobedience shifted the focus of crime prevention towards the prevention and control of mass "civil disturbance."

In 1968, following the "Long Hot Summer of 1967" and the 1968 riots that followed Dr. King's assassination, Johnson appointed a new *Commission on the Causes and Prevention of*

⁹¹ Note: See Naomi Murakawa's *The First Civil Right: How Liberals Built Prison America*.

Violence, which shifted the federal focus towards fighting urban crime. The 1968 *Omnibus Crime Control and Safe Streets Act* significantly increased federal aid to state and local police and courts, as well as direct federal spending through agencies such as the FBI.⁹² The 1968 legislation replaced the OLEA with the more active and substantial Law Enforcement Assistance Administration (LEAA). LEAA helped local and state police implement crowd control and “use of force” protocols that were designed to minimize altercations between police and protesters, and helped equip police departments with non-lethal crowd control technologies that proved more effective and less visible than the infamous attack dogs and firehoses used on civil rights demonstrators.⁹³ More than 10,000 law enforcement officers from across the country participated in training courses designed by the U.S. Army Police School and funded by LEAA (McCarthy & McPhail, 1998).⁹⁴ Since 1991, the Department of Defense has also been supplying local and state law enforcement agencies with surplus military equipment at reduced or no cost through The Department of Defense Excess Property Program (1033 Program). Since 1997 that program has provided more than \$5 billion in military hardware (Levine, 2014). In sum, it is clear that the federal government was a driving force behind the diffusion of modern police methods at the state and local levels.⁹⁵ The institutionalized constraint of disruptive movement activity has been a deliberate and effective government strategy.

⁹² P.L. 90-351

⁹³ Much of the crowd control technology used today by law enforcement was developed by DoD’s Non-Lethal Weapons Program (formally “Less-Lethal”), or by private military contractors.

⁹⁴ Sometimes information sharing involves spreading tactical developments from police forces in major metropolitan areas like Los Angeles and Chicago to agencies across the country. For example, the US Department of Justice has issued reports detailing DoD and civil law enforcement weapons that function like shopping catalogues for state and local police. See <https://www.ncjrs.gov/pdffiles1/nij/205293.pdf> (accessed on 9/11/2014).

⁹⁵ McCarthy and McPhail stress that the near universal adoption of such practices is inconsistent with mere passive diffusion according to basic organizational theory. In other words, the evidence does not support the idea that local governments developed these policing strategies independently or simply copied those of other localities.

John McCarthy and Clark McPhail call these “institutionalized solutions to the recurring problem of protest,” *Public Order Management Systems* or POMS, and argue that they have systematically transformed the nature of protest activity in America into something minimally disruptive (McCarthy & McPhail, 1998). McCarthy and McPhail argue that POMS are characterized by three key principles: negotiation between parties, planning by authorities, and planning by activists. These three principles serve to make protest routines predictable and orderly, creating physical spaces and norms of behavior that separate activists, their targets, and the authorities. The effect has been to move from policing characterized by “escalated force”—where police *respond* to increasing activist disruption with increasing force—to policing characterized by “negotiated management”—where police proactively avoid conflict with protesters.

A central example of the POMS shift is the ubiquitous use of protest permits, which today are almost always granted, provided the space/time is not already committed to other events or protests.⁹⁶ Permitting procedures have become the cornerstone of POMS because they force protesters to plan in advance and negotiating the rules of a protest long before the first placard is raised. A related development is the spread of “free speech zones,” which confine advocacy to specific (often out-of-the-way) locations, and have proliferated in National Parks and universities. McCarthy and McPhail document a number of other POMS practices that reduce conflict, including, pre-negotiating arrests, efficiently processing and releasing arrestees,

⁹⁶ The National Parks Service (NPS) has restricted protest in some ways that are worth noting. As discussed later, the Supreme Court upheld an NPS refusal to allow Community for Creative Nonviolence, a homelessness advocate group, to conduct an overnight protest on the National Mall. The NPS has come under fire for not allowing demonstrations at certain sites, such as around Independence Hall in Philadelphia and the Statue of Liberty. NPS also lost a 2010 case in Federal Appeals Court over the practice of requiring single individual advocates or small groups to obtain permits before speaking to park-goers, handing out literature, or gathering signatures. These restrictions were seen as overly burdensome given the lack of a real government interest in these cases.

designating protest leaders as “marshals” responsible for their fellows, cordoning off protest (and separate counter protest) areas, and more. Working from the same data source I use in *Figure 3*, McCarthy and McPhail present protest event data from 1991-1995 (non-linear), which shows a great deal of protest by notably “aggressive” groups (Queer Nation, Act-Up, Justice for Janitors, and Operation Rescue), with very little conflict or violence. While police were present at 212 out of the 213 protests by these SMOs, and arrests were made at 180 protests, only 42 events saw the use of police force.

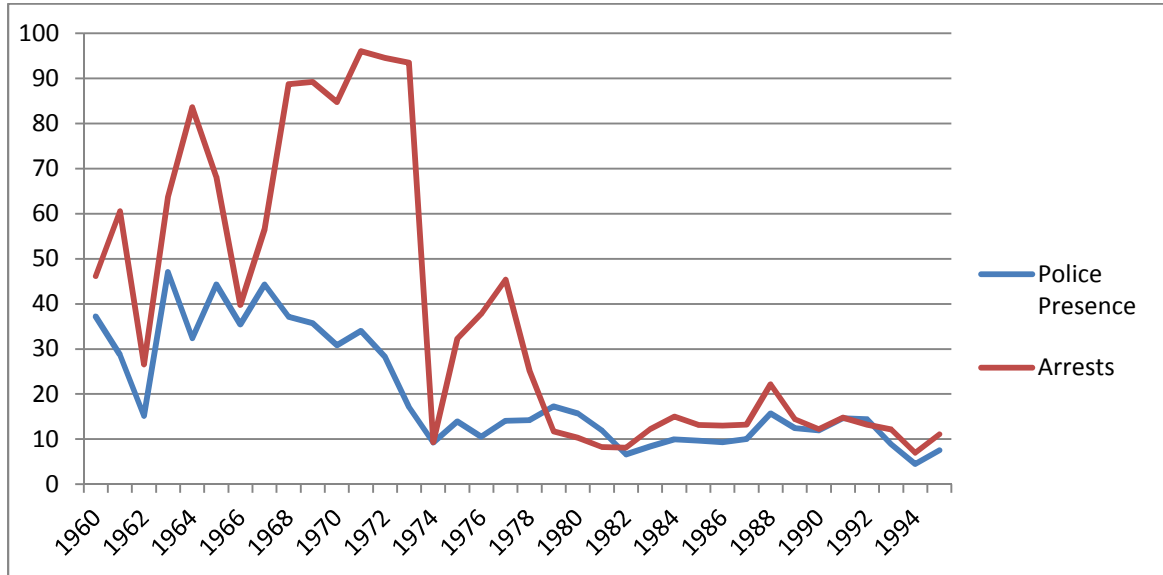
Many of these events undoubtedly produced significant social and political disruptions. Janitors for justice created traffic jams with their signature highway blockades. Act-Up activists shut down legislative offices, churches, and even the New York Stock Exchange by chaining themselves to furniture and railings. And as previously discussed, Operation Rescue temporarily shut down abortion clinics with their persistent entrance blockades. But few activists were assaulted by police or counter protesters at these events, and protesters spent little if any time in jail.⁹⁷ Police managed these disruptions and did everything in their power to avoid escalating conflict. As such, disruptions tended to be localized and brief, minimizing their impact. This is not to say that these disruption were without power, but merely that institutional developments in policing serve to facilitate protest while significantly constraining opportunities for disruptive power. Broader empirical analysis bears this out.

Looking over the complete Dynamics of Contention data from 1960-1995, we see strong evidence of negotiated management. Figure 3.4 shows that police presence at protests has

⁹⁷ It is also worth noting that mass civil disobedience is in part disruptive because it overwhelms local jails and courts. This was certainly the case in the Deep South during civil rights movement of the 50s and 60s. As today’s modern prison system has vastly expanded, the ability of cities and states to hold and process protesters has greatly expanded. Combined with POMs promoting plea deals and the dropping of charges, it is rare to hear of protesters “clogging the jails” these days.

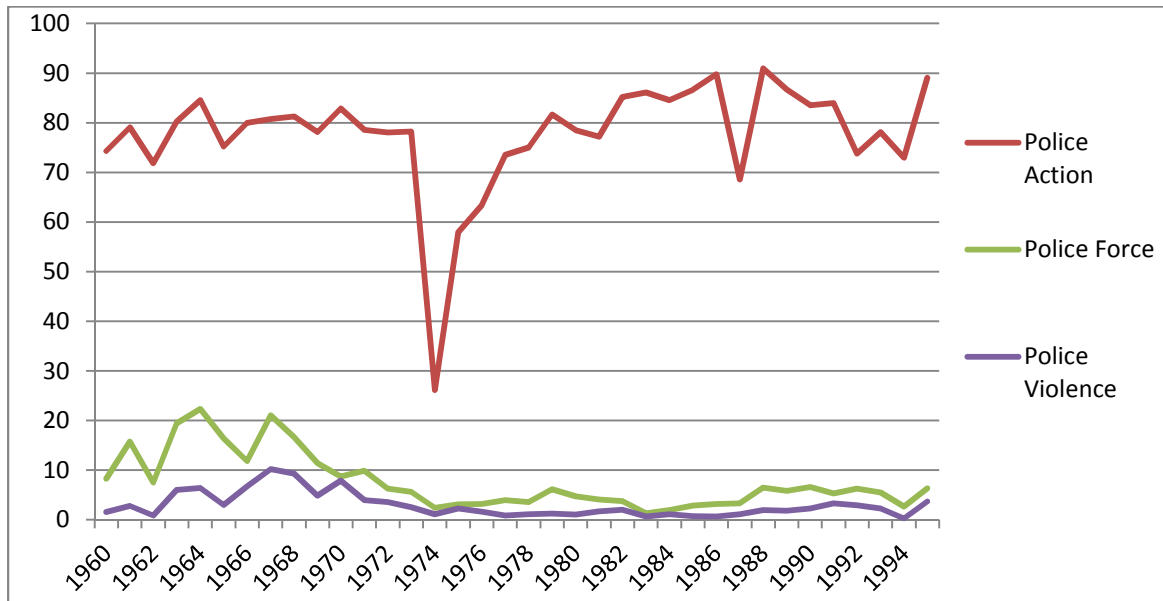
plummeted from around 45% of protests to fewer than 10% of protests. Similarly, the amount of protests involving arrests has declined from heights of more 90% in the early 1970s to around 10% in the 1990s.⁹⁸ These trends suggest both that most protest lacks a significant likelihood of disruptions and that most protests are controlled through negotiated management rather than reactive police intervention. Furthermore, Figure 5 demonstrates that when police were present at protests, they are actively involved in managing protests. Some 90% of contemporary protests, slightly higher than the rate in the 1960s, were subject to police actions. Such actions cover the full spectrum from directing protesters to approved locations, to arresting protesters, to using force against protesters. But as Figure 3.5 makes clear, the percentage of protest subject to police use of force or violence declined over the same period.

Figure 3.4: Percentage of Protests with Police Presence and Arrests



⁹⁸ It needs to be stressed that these are protests that garnered coverage in America’s flagstone national newspaper, *The New York Times*. Consequently, the data over represent the figures involving police, arrests, and other dramatic activity. However, these volatile protests should be over represented in all years, meaning the trends remain a useful measure of protest dynamics.

Figure 3.5: Percentage of Protests with Police Actions



Empirically, it seems rather clear that social movement disruption has declined over time. But numbers do not tell the full story. Turning back to structural constraints, we can see that the limits on disruptive power go far beyond the institutionalization of POMS.

Pro-Life Racketeers and Environmental Sailor Mongering

The development of POMS is at its heart a story of government developing its law enforcement capacities to address very real problems with crime, and then applying those capacities to reduce both criminal and noncriminal activist disruptions. Modernized law enforcement presents a significant constraint on disruptive power. This same story can be seen more directly in the way federal laws targeted at criminal enterprises have been repurposed to constrain disruptive movements. Perhaps the most extreme example of this practice was the

second Bush administration's use of an obscure 1872 "sailor mongering" law against the environmental SMO Greenpeace.

Sailor Mongering was the practice of illegally boarding a ship heading into port in hopes of enticing sailors into frequenting one's tavern or brothel. Equal parts solicitation and piracy, sailor mongering had not been prosecuted under US law since the 19th century. But when Greenpeace activists boarded the ship *APL Jade* to protest the importation of prohibited rainforest mahogany, Attorney General John Ashcroft filed charges against Greenpeace. Importantly, the Bush administration targeted the organization itself, which threatened the group's nonprofit status and could potentially designate Greenpeace as a "criminal organization" required to report to its activities to the Justice Department. A U.S. District Court Judge ultimately threw out the case on the grounds that the boarding took place some 6 miles out to sea, and thus did not count as "about to arrive" at port under the law. However, Judge Alderberto in no way suggested the origins of the law or the identity of the defendant were barriers to future prosecutions (Huus, 2003).

The bizarre facts of the Greenpeace case represent an extreme but useful example of how laws can be repurposed to target SMOs. A far more significant example is the Organized Crime and Control Act of 1970, which contained the Racketeering and Corrupt Organizations Act, or RICO, amending the 1946 Hobbs Act.⁹⁹ Signed by President Nixon as part of the above-discussed war on crime, RICO would eventually turn its attention from mobsters to movements. Anti-racketeering laws are designed to punish organizations that use criminal activities in a systematic way to extract money from their victims. The quintessential example is a mafia organization using assault, property destruction, murder—and the threat of these crimes—to

⁹⁹ P.L. 91-452,

extort “protection money” from businesses. RICO allowed the federal government to prosecute the organization itself (and its leadership) with heightened penalties if its members were shown to engage in a “pattern of racketeering activity” (two or more crimes). So instead of simply sending low level muscle to prison, prosecutors could target decision makers and their front organizations, such as corrupt unions.

RICO was, and is, devastating to organized crime.¹⁰⁰ But in the 1980s RICO was also turned against movement activists, SMOS, and organized labor.¹⁰¹ RICO and its amendments allow for targets of racketeering to file civil RICO complaints and seek damages and injunctions independent of criminal prosecution. In 1989, the National Organization for Women (NOW) added a RICO claim to an existing suit against anti-abortion activist Joseph Scheidler, the Pro-Life Action League, the Pro-life Direct Action League, and additional defendants Randall Terry and Operation Rescue.¹⁰² The plaintiffs argued that pro-life activists and SMOs conspired to use

¹⁰⁰ The Sopranos had an ongoing RICO plotline that did a good job capturing the mechanics of the law and the lethal threat it posed to organized crime. See David Remnick’s interesting New Yorker piece on the show that notes the success of RICO is the major factor driving the Italian Mafia into extinction **Invalid source specified.**

¹⁰¹ There is a long history of RICO use against unions engaged in mafia-related extortion—i.e. give us an inflated contract or these thugs break your knee caps. But more recently, Civil RICO has been used by corporations claiming that union organizing—when it involves libel, slander, or other minor legal violations—constitutes conspiracy to commit extortion because employment concessions necessarily involve obtaining corporate property. While RICO claims were dismissed in the key case of *Cintas Corp. v. Unite Here* 601 F.Supp.2d 571 (2009), these lawsuits have arguably served as another tool for suppressing and burdening union organizing. Benjamin Levin argues that these suits have both an immediate deterrent effect on unionization and also a longer-term sociological effect of spreading negative social constructions of organized labor **Invalid source specified.** These dual effects are equally problematic for SMOs whose influence and financial viability is built upon their public standing.

¹⁰² The existing case is yet another example of the legal pattern discussed in this section. NOW originally brought the suit as an anti-trust violation of the 1890 Sherman Act, claiming that attempts to shut down abortion clinics were an unlawful attempt to reduce competition in the reproductive services market. This claim was eventually dismissed and the case came to focus on the RICO claim of extortion. And while NOW is itself certainly an SMO, in this capacity it is clearly using the framework of government to constrain disruptive movement challenges. A central contention of this dissertation is that movements that have already claimed a strong position *within* the system are often benefited by constraints on new challengers.

blockades, arson, violence, and threats of violence to deprive abortion clinics of revenue. The key questions in the case were the extent to which advocacy of actions amounted to directing them, and whether the defendants needed to actually profit from these activities to fit the statutory definitions of “extortion” and thus “racketeering.”

In 1994, the Supreme Court decided *NOW v. Schneider* 9-0, ruling that the plaintiffs application of RICO was not facially inappropriate. This ruling essentially gave a green light for RICO cases against SMOs associated with direct action or civil disobedience. In *NOW v. Schneider* itself, a 1998 jury produced a guilty verdict on a number of racketeering charges, leading to a nationwide injunction against protests by the defendants and treble damages of \$257,000 to the two clinics who were co-plaintiffs with NOW. The verdict led to another five years of appeals bringing the case back to the Supreme Court. In 2003 the Court reversed its 1994 ruling and held that pro-life activism did not qualify as extortion because the defended obtained neither money nor property from the actions. In 2006, the Court heard the case a final time to consider whether the 1998 verdict could be sustained on charges of violence unrelated to extortion. The Court rejected these charges as covered under RICO, putting the major questions of public law to bed.¹⁰³

As discussed at the start of the chapter, the *NOW v. Schneider* case was instrumental in the demise of Operation Rescue, and more broadly, in the end of blockade tactics by the pro-life movement. Even though abortion activists prevailed in the end—even recovering some court costs—the burden of two decades of litigating, temporary judgments, injunctions, and a cloud of threatening uncertainty were effectively silencing. And while the anti-abortion case is the most

¹⁰³ Litigation over court costs dragged on until 2014.

famous, and most significant from a public law standpoint, it is not alone. A second example, this one involving the animal rights movement, goes even further in revealing the reach of RICO.

In 1998 People for the Ethical Treatment of Animals (PETA) launched a campaign against the contract animal testing firm Huntingdon Life Sciences (HLS). The campaign was based on video, photos, and testimony by Michelle Rokke, a PETA undercover investigator employed at HLS's New Jersey lab. Undercover investigations are a staple tactic of social movements that address social issues where the acts in question occur exclusively on private property out of the public eye. Animal rights SMOs are likely the most vigorous users of this method, infiltrating labs, fur farms, factory farms, slaughterhouses, circuses, and more. But the HLS campaign produced a stunning result. HLS filed a RICO suit against PETA, alleging that Ms. Rokke (and other PETA investigators in other investigations) repeatedly violated her employment contract, constituting a pattern of racketeering activity.

The implications of the HLS RICO suit are staggering. Under RICO, any damages that PETA's public campaign caused to HLS were subject to treble damages. That is to say, if PETA's protests and media appearances cause \$1 million in clients to withdraw business from HLS, PETA could be on the hook for \$3 million in damages. The nature of a RICO charge poisons the fruits of legal activism. The longer PETA's HLS campaign continued, the more a potential RICO judgment grew. As such, the suit challenged the basic feasibility of activists engaging in public campaigns based on undercover investigations and other tactics where minor criminal penalties (say for trespassing or breach of contract) would otherwise be born solely by the investigator. In the end, PETA reached a settlement with HLS in which it surrendered all undercover pictures, videos, and testimony to HLS, agreed not to publicly discuss the HLS investigation, and guaranteed they would not infiltrate HLS for a full five year period (Kolata, 1998). While

monetary damages were not part of the deal, PETA was effectively forced to abandoned what was arguably the most important animal rights campaign against animal experimentation since the protests that produced the Animal Welfare Act Amendments of 1985.

The HLS campaign spawned an animal rights offshoot name Stop Huntington Animal Cruelty (SHAC), which would lead one of the most aggressive direct action campaigns of any modern SMO. I will turn to the SHAC example in the next section of this chapter, but it is important to note here that the PETA-HLS settlement cut off any support to the fringe direct action group from PETA, the movement's most radical mainstream group. With no other national animal rights SMO willing to test the RICO waters, SHAC was left isolated from the resources of the broader movement. In the end, RICO's most constraining aspect is likely that it forces movements to quarantine their most disruptive elements off to prevent contaminating the movement's major financial and organizational assets.¹⁰⁴ If we turn to one last example we can clearly see the threat RICO poses to a movement's core SMOs.

¹⁰⁴ It is not unusual for movements to have interactions between fringe mainstream organizations and clandestine networks of extremist. In many cases, the relationship goes something like this. The clandestine network commits criminal activities and turn over pictures, videos, and property taken from their targets to the formal organization, which then publicizes the events and any exposes industry or government secrets. When these clandestine activists are arrested, the formal organization often covers legal fees for their defense. Movement insiders also provided important legitimacy for the networks, which made supporting their activities acceptable to much of the sympathetic public. SMOs are shielded in this relationship by claims that they did not know the identities of the activists or any of their plans in advance. Moreover, providing legal resources is generally justified under the sweeping American ideal that all defendants are innocent until proven guilty and entitled to competent legal representation. The most prominent examples of these relationships in the 1980s and 1990s were the Animal Liberation Front (ALF), which had an ongoing symbiotic relationship with People for the Ethical Treatment of Animals (PETA), and the Earth Liberation Front (ELF), which maintained ties with Earth First (which eventually slid into the ELF half of the equation) and Greenpeace. These relationships were highly productive for both sides, enabling clandestine activists and raising the profile of fringe SMOs compared to their centrist counterparts. What RICO and related legal efforts have succeeded in doing is making these relationships too legally and financially costly for SMOs, allowing the clandestine networks to be marginalized, prosecuted, and broken up. See (Best, Nocella II, & editors, 2004).

Our third example of RICO's effective use against SMOs also involves animal rights groups, this time in their fight to end the use of elephants in circuses. The importance of this example is that it shows how RICO—again, a law aimed at mobsters—even constrains SMOs engaged in public interest litigation. In 2000, a coalition of animal rights/welfare SMOs that eventually included the Animal Welfare Institute (AWI), The American Society for the Prevention of Cruelty to Animals (ASPCA), and the Humane Society of the United States (HSUS) sued Feld Entertainment for violations of the Endangered Species Act (ESA). The SMOs argued the Feld's Ringling Bros. circus mistreated its elephants, constituting an illegal "taking" under the ESA. The litigation eventually began to fall apart as it became clear the cases star witness would be legally viewed as a paid witness.¹⁰⁵ This prospect raised the specter that the animal groups might not simply lose the case, but be stuck with Feld's court costs. So where does RICO come in?

In 2007, Feld filed a civil RICO claim against its opponents in the ESA case. Feld claimed that each and every payment of the litigation's star witness constituted an act of fraud, producing 1,360 "predicated acts that constitute racketeering activity" by the SMOs. As *NOW v. Shneider* shows, Feld would have to show the SMOs committed these alleged crimes to extort money or otherwise take Feld's property, a difficult burden of proof.¹⁰⁶ Still, the threat of RICO treble damages (multiplying actual damages up to three times) and injunctions was enough to lead the parties to settle the ESA and RICO suits together. In 2012, the ASPCA paid Feld \$9.3 million to settle, and shortly after, HSUS and the remaining litigants paid a \$15.75 million

¹⁰⁵ During the lengthy litigation various SMOs paid former Ringling elephant handler Tom Rider some \$190,000 dollars for room and board, living expenses, air travel, media appearances, etc. The groups argued that they covered Rider's expenses because participation in the suit rendered him unemployable in his field, but by all accounts the payments were sloppy and lacked transparency. They were at the very least poor legal practice. Having met Rider myself, my impression is that Rider was essentially extorting these groups by threatening to walk from litigation the groups had invested millions in.

¹⁰⁶ Though not entirely implausible depending on how the courts view attempts to have the elephants removed and/or attempts to fundraise based on the litigation.

settlement (Alexander, 2013). The other terms of the settlement are not public knowledge. Typically, SMOs forced to settle RICO suits or similar litigation agree to a gag order on regarding the facts of the case (such as pictures, video, and testimony of the alleged cruelty) and a set period in which the SMO cannot campaign against the other party. The result is that most of the major animal rights SMOs are effectively abandoning a major front of their social movement. It is a setback of years, or perhaps decades on an issue that had previously shown significant momentum.¹⁰⁷

While RICO cases against SMOs are not an everyday occurrence, the threat of RICO is ever present, encouraging SMOs to avoid association with even the mildest crimes. This effect has only been heightened by the professional legal culture of institutionalized SMOs, as described in Chapter 4. It is not in any sense hyperbolic to wonder which of the black civil rights leaders and SMOs of the 1950s and 1960s would have faced RICO challenges had the law been in place at during that period.

Terrorists Abound

In 21st century America, charges of racketeering seem anachronistic and even quaint (although clearly such charges remain legally and financially devastating). Just as well throw around charges of syndicalism and communism these days. RICO remains a powerful legal tool, but one that lacks a certain resonance. If you really want to damn a group in contemporary America, you don't call them racketeers, you call them terrorists. While the public generally

¹⁰⁷ As discussed later, Ringling has in fact begun to phase out the use of elephants. I do not believe this development undermines the points made in this section.

associates this rhetorical shift with the events of 9-11-2001, anti-terrorism had already become a main focus of federal law enforcement in the 1990s.¹⁰⁸ And as mentioned in the section of the “war on crime,” definitions of domestic terrorism are readily applicable to disruptive social movement tactics. In the mid-1990s—despite the Oklahoma City bombing—domestic terrorism prevention came to focus on what FBI Deputy Assistant Director, Counterterrorism Division referred to as “special interest extremist movements.” Lewis declared that “The No. 1 domestic terrorism threat is the eco-terrorism, animal-rights movement,” focusing FBI resources on these groups, as well as anti-abortion activists engaging in “direct action” campaigns (Schuster, 2005). These issue-based movements contrast with revolutionary movements that challenge the sovereignty of the state, such as America’s right-wing militia movement and Oklahoma City bomber, Timothy McVeigh.

In 2004 and 2005, Lewis gave revealing Senate testimony on FBI efforts “working to detect, disrupt, and dismantle the animal rights and environmental extremist movements that are involved in criminal activity.” He notes doubling of counterterrorism agents from 1993 to 2003, disseminating 64 intelligence reports and 19 strategic assessments to local state and federal agencies from 2003-2005, employing the FBI’s Terrorist Financing Operations Section to track movement resources, established 103 joint task forces with state, local, federal and international agencies, and as of 2005 were conducting 150 active investigations at 35 FBI

¹⁰⁸ This is not to say that the 2001 PATRIOT Act did not enhance the powers of law enforcement, quite the contrary. In the twenty-first-century, activists have come to believe that they may be under surveillance at any time. During my time in the mid-2000s working at an SMO, we were told not send any electronic communications we would not want read by the FBI or IRS. It remains somewhat unclear the extent to which domestic law enforcement has made use of the PATRIOT Act in its operations against domestic extremists and this lack of transparency is a major complaint voiced by many activist communities. For movements that are involved in transnational advocacy—particularly in the middle-east, Africa, and South-East Asia—the PATRIOT Act more clearly allow federal agents in the NSA and FBI significantly expanded access to international communications and financial records.

offices. Lewis goes on to offer numerous examples recent arrests and prosecutions, highlighting the role of the Animal Enterprises Protection Act.¹⁰⁹

RICO was never designed to target social movements, let alone any particular movement. It is a leading example of a broad pattern in which the tools of law enforcement are repurposed to address movement disruptions. But not all of the key laws constraining movement disruption fit this pattern. Some are targeted responses to disruptive movements. The two central examples being the Freedom of Access to Clinic Entrances Act of 1994 (FACE) and the Animal Enterprise Protection Act of 1992, Amended to the Animal Enterprises Terrorism Act of 2006 (AETA). In each case, these laws were designed to address types of disruptive activism that lawmakers felt were not sufficiently constrained by general criminal statutes. I looked at FACE to start the chapter, and will now look at AETA.

AETA works on logic similar to that of RICO or hate crime laws. The idea is that the social threat presented by a group or network is worse than the sum of their individual crimes. As such, general criminal statutes are insufficient and special criminal and civil penalties must be added to crimes that are part of a larger collective undertaking. AETA covers acts that aim at “damaging or interfering with” a business that uses or supports the use of animals, including violence, property damage, threats, vandalism, trespass, harassment, intimidation, as well as conspiracy to commit any of these acts.¹¹⁰ Interestingly, the statute specifically includes

¹⁰⁹ Pub.L. 102–346. Later amended to the Animal Enterprises Terrorism Act.

¹¹⁰ Covered actions must be (1) for the purpose of damaging or interfering with the operations of an animal enterprise; and (2) in connection with such purpose—
(A) intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise;
(B) intentionally places a person in reasonable fear of the death of, or serious bodily injury to that person, a member of the immediate family (as defined in section 115) of that person, or a spouse or intimate

“records” as property, which would likely include much of the information targeted by undercover investigations. Also of note, the statute covers “intentionally [placing] a person in reasonable fear of the death of, or serious bodily injury to that person” which is far more expansive than explicit threats, and can include actions like publishing the home address of a campaign target. AETA is full of such subjective and expansive clauses, which has led to significant anxiety (even paranoia) amongst more radical activists. When triggered, AETA penalties include fines and federal prison sentences that range from one year to life in prison, with five years possible for causing a mere \$10,000 in property losses .¹¹¹

The most notable use of AETA was in the aforementioned prosecution of the fringe group Stop Huntingdon Animal Cruelty (SHAC), which had waged one of the most prominent and successful disruptive campaigns in recent memory. Huntingdon Life Sciences is a British contract testing company, and the world’s largest user of laboratory animals in pharmaceutical, cosmetic, and product testing. UK SHAC activity in the 1990s pushed the company to relocate a significant portion of their operations the US, resulting in the founding of a US SHAC branch. SHAC’s US organizers coordinated a loose network of activists who harassed and intimidated Huntingdon officers, and then broadened their campaign to target businesses working with SHAC (Kocieniewski, 2006).¹¹² This last tactic drew particular government attention in part because of its unsavory guilt-by-association nature, but also for its remarkable effectiveness.

partner of that person by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation; or

(C) conspires or attempts to do so;

¹¹¹ Note, this is property damage or lose, which includes lost profits and extra expenses. So adding a night watchman in response to trespassing (or threats) could easily pass the \$10,000 – 5 year penalty level in a matter of weeks or months. The original AEPA had penalties roughly half as harsh, with sentences starting at 6 months.

¹¹² These tactics combined with more traditional, yet highly charged, protests that were attended by hundreds of supporters. Such protests were much more disruptive than most contemporary US protests, drawing heavy police presence, and leading to dozens of confrontations and arrests.

SHAC's accomplishments included getting Huntingdon dropped by their bank and insurance company, as well as lowering the Company's market capitalization to a level that prevented a planned listing on the New York Stock Exchange. The disruptions of this small group nearly crippled a corporation with hundreds of millions of dollars in annual revenue, potentially sending shockwaves through related sectors of the economy.

In the end, the FBI was able to contain the disruptive threat of SHAC through AETA prosecution. Six officers and members of SHAC, along with the organization itself, were indicted as terrorists in 2004. Several defendants pleaded out, and three were convicted and sentenced to between four and six years apiece. The organization itself was ordered to pay \$1 million in restitution to Huntingdon, but dissolved in anticipation of the verdict and the loss of most of its officers (Mansnerus, 2006). These convictions were based primarily on the group's website activity, which served to *indirectly* coordinate and encourage criminal behavior. While that information was also used for legal protests, the courts judged that the defendants were aware the site would produce illegal activity and aimed for it to do so. As such, the defendants were found guilty of conspiracy to destroy property and place victims in fear of death or serious bodily injury. Importantly, the Federal Circuit Court ruled in *US v. Fullmer* that SHAC's web postings of target personal information, documents about direct action tactics, and positive reports of illegal direct actions amounted to "true threats" unprotected by the First Amendment.¹¹³

The significance of AETA and the SHAC case is far-reaching, as it directly impacts the ability for movements to make use of the Internet organizing for disruptive activity that Piven

¹¹³ 584 F.3d 132 (3d Cir. 2009). True threats is a category of speech similar to, but distinct from, incitement, which is also unprotected by the First Amendment.

anticipates. The decision reinforced an earlier 9th Circuit ruling that found the anti-abortion “Nuremberg Files” website a true threat for listing the names of abortion doctors and striking a line through those that were murdered (Liptak, 2002). Combined, the cases set a precedent that prominent movement speakers on the Internet are responsible for the foreseeable actions of their readers. Such a doctrine means that activists working in those gray areas of encouraging volatile disruptive protests, legal harassment and shaming, and even civil disobedience are left on precarious legal footing. The “true threat” doctrine is one piece of a larger shift in Constitutional law that may significantly constrain activist disruption. I turn to this shift next.

Dangerous and Disruptive Speech under the First Amendment¹¹⁴

The American story of free speech and the First Amendment typically focuses on the freedom of speech’s humble 18th century beginnings and its meteoric rise over the course of the 20th century. All in all it is told as a happy tale in which liberty and progress struggle against, and eventually triumph over, the forces of censorship and repression. The saga ends with 21st century Americans enjoying unparalleled First Amendment protections, which extend to even the most subversive and hateful forms of expression.¹¹⁵ It is an account that I generally accept, but also one that bears further interrogation. In particular, I am concerned that recent Supreme Court decisions (and non-decisions) may be quietly undermining the *value* of speech even as the *right* to speak is affirmed.

¹¹⁴ Make sure this is not too redundant when addressing the First Amendment in Chapter 2.

¹¹⁵ It is perspective common to all the First Amendment surveys I’ve come across, with O’Brien (2010) a prime example.

In this section I look at the development of the Supreme Court’s contemporary free speech doctrine as it concerns disruptive speech and protest, and I argue that while speech rights have expanded they do not robustly protect speech by weak and dissenting groups. I argue that developments relating to hate speech and time, place and manner regulations are subtly allowing content based regulation to undermine the speech of marginalized groups.

The traditional narrative by First Amendment scholars starts from the Sedition Act of 1798, which reminds us that the framers had a somewhat truncated notion of free speech that was deemed consistent with the Adams administration criminalizing criticism of the president by his Jeffersonian opposition (O'Brien, 2010, p. 1) (Sunstein, *Democracy and the Problem of Free Speech*, 1995, p. xiv). At the founding free speech and press merely codified English common law and the views of English jurists such as William Blackstone, which only prohibited government from issuing prior restraints. Throughout the 19th and early 20th century speech rights expand haltingly until Justice Holmes wrote his famous “clear and present danger” dissent in 1919’s *Abrams v. US* and Justice Sanford incorporated free speech rights to the states in 1925’s *Gitlow v. New York*¹¹⁶. Driven by the opinions of Justices Holmes and Brandeis, free speech quickly assumed a “preferred position” as a fundamental constitutional liberty in the first half of the 20th century, with the Court steadily raising the bar for what constituted dangerous and unprotected speech.

At mid-century First Amendment traditionalists in the Stone and Vinson Courts rolled back the expansiveness of free speech doctrine, provoking impassioned dissents from absolutist Justices Black and Douglas. Writing for the Court in *Dennis v. US* (1951), Chief Justice Vinson favored redefining the clear and present danger test as a balancing approach more friendly to

¹¹⁶250 U.S. 616 (1919); 268 U.S. 652 (1925)

the regulation of speech, in this case upholding the Smith Act's criminalization of communist advocacy.¹¹⁷ But this moment of retrenchment was short-lived, as the second half of the 20th century would be shaped by the Warren Court's move away from the clear and present danger test and towards a new two-tier First Amendment doctrine of "definitional balancing" set down in *Brandenburg v. Ohio*.¹¹⁸ The definitional balancing approach offers near absolute protection to socially and politically relevant speech and applies balancing only to categories of unprotected speech including obscenity, defamation, incitement, fighting words and later on true threats. The judicial origin of such categories was *Chaplinsky v. New Hampshire* (1942), an earlier "fighting words" case where Justice Murphy wrote, "There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."¹¹⁹ While *Chaplinsky* aimed at narrowing the scope of the First Amendment, *Brandenburg* relied on the "classes of speech" approach to render the vast majority of speech protections absolute. But as I will show, the Court's embrace of absolutism has been consistent with judicial policymaking that continues to allow the suppression of "dangerous" advocacy.

Brandenburg v. Ohio is rightly considered one of the 20th century's landmark Supreme Court decisions because it fundamentally shifted how the Court would address the problem of dangerous, disruptive, and hateful speech. While the Court's unanimous per curiam decision lacks the philosophical gravitas of key First Amendment writings by Justices Holmes, Brandeis or Douglas, its holding was profound. Clarence Brandenburg was a leader of an Ohio Ku Klux Klan chapter who was convicted under Ohio's 1919 Criminal Syndicalism statute for a speech

¹¹⁷ 341 U.S. 494 (1951)

¹¹⁸ 395 U.S. 444 (1969)

¹¹⁹ 315 U.S. 568 (1942)

advocating violent and unlawful behavior against blacks and Jews. Ohio's law criminalizing the advocacy of crime was representative of a wide array of laws passed during World War I, World War II and the Cold war. The Court had long held such laws to be consistent with the First Amendment and specifically addressed this question in *Whitney v. California* (1927).¹²⁰ The Court in *Brandenburg* explicitly overruled *Whitney*, vacating Clarence Brandenburg's conviction and declaring that no law criminalizing "mere advocacy" of criminal or revolutionary behavior was consistent with the First Amendment.

In place of the rhetorically malleable "clear and present danger" test *Brandenburg* declared that dangerous speech is fully protected unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." This test has two important aspects. First, the "directed to inciting" clause follows *Terminiello v. Chicago* (1949) in shielding speakers from responsibility for the disorderly actions of *hostile* crowds. And second, the "likely to incite or produce" clause" protects speakers in all theoretical and speculative speech against the unexpected behavior of sympathetic listeners.¹²¹ This high standard for incitement is rarely met in practice. As Justice Douglas sardonically notes in his concurrence, in the dangerous speech cases the courts have heard, "The threats were often loud, but always puny, and made serious only by judges so wedded to the status quo that critical analysis made them nervous." Unsurprisingly it is the concurrence by Justice Douglas that best fleshes out the import of an opinion that seems otherwise content with minimizing its own implications.

Justice Douglas's *Brandenburg* concurrence offers nothing less than a 50 year history of the "clear and present danger" doctrine and a cutting analysis that lays bare its judicial and

¹²⁰ 274 U.S. 357 (1927)

¹²¹ 337 U.S. 1 (1949)

philosophical inconsistencies. He traces the Court's troubles with the doctrine to a failure to heed Justice Holmes's insistence in *Gitlow* that "Every idea is an incitement...The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result." Douglas argues that the Court's efforts to differentiate advocacy of ideas from advocacy of political action in cases like *Yates v. US* (1957) and *Scales v. US* (1961) respectively were doomed to failure because they turned on conviction and required the government to "invade the sanctuary of belief and conscience."¹²² Such inquests were untenable and violated the core of the First Amendment. Thus Douglas points us back to the old stalwart example of "someone who falsely shouts fire in a crowded theatre," which is what he calls an example of when "speech is brigaded with action." It is only when speech and action are inseparable that speech can be regulated. And for Douglas the standards for incitement laid out by the Court call for just such a brigaded situation. Incitement is a command to lawlessness. It is akin to a general ordering her troops into battle or a mafia boss ordering a hit on a rival. It is the ability for one's words to directly cause crime that makes incitement an action that can be regulated by government. Douglas reminds us that while "Action is often a method of expression," speech is very rarely an action.

Douglas's concurrence in *Brandenburg* focuses on the distinction between speech and action, and in it he rightly points our attention back to the previous term when the Court made its landmark symbolic speech decision, *US v. O'Brien* (1968). The case concerned David Paul O'Brien who in 1966 publicly burned his draft card in protest of the Vietnam War. The destruction of the card violated a 1965 amendment to the Military Training and Service Act, which specifically prohibited mutilating or destroying the government issued cards. O'Brien

¹²² 354 U.S. 298 (1957); 367 U.S. 203 (1961)

appealed his conviction arguing that his act was a form political speech and the 1965 Amendment was an unconstitutional abridgment of free speech because its purpose was suppressing dissent.

Chief Justice Warren wrote for the Court in *O'Brien* with only Justice Douglas dissenting. Warren held that the 1965 Amendment was not unconstitutional, rejecting the idea that “an apparently limitless variety of conduct” could seek shelter under the First Amendment simply because it seeks to “express an idea.” The view that symbolic actions could be protected as speech had been established since *Stromberg v. California* (1931) struck down an anti-communist law banning the display of red flags.¹²³ But the Court had also routinely upheld laws that impacted symbolic speech and Justice Warren took this opportunity to establish clearer guidelines on what constituted protected and unprotected symbolic speech. His four prong test came to be known as the O’Brien Test and remains controlling law for symbolic speech issues.

The O’Brien Test asks four questions of a law impacting speech. First, is the law “within the constitutional power of government?” Second, does the law further an “important or substantial government interest?” Third, is that interest “unrelated to the suppression of free expression?” And fourth, is the law narrowly drawn so that its impact on expression is “no greater than necessary” to achieve the government interest? If the answer to these four questions is yes then the law does not violate the First Amendment. In this case, Warren upheld the ban on destroying draft cards as justified under Congress’s power to raise an army, furthered the important interest in aiding the “smooth and proper” administration of the draft, was not targeted at suppressing anti-draft dissent, and was narrowly written with no alternative that would allow more expressive conduct. At the heart of the O’Brien test is an attempt to

¹²³ 283 U.S. 359 (1931)

discern whether the government seeks to regulate action or speech. Laws that target the “noncommunicative” part of action are generally upheld from First Amendment challenges.

Justice Douglas’s dissent in *O’Brien* is uncharacteristically flat. He seizes on the first prong of Court’s new test by arguing that the constitutionality of the draft has not been established and thus bears reargument. His argument is largely procedural and addresses the only one of the four prongs of the test applicable to all judicial review. Douglas misses the opportunity for thoughtful criticism of prongs 2-4 of the *O’Brien* test. He fails to ask why the speculative administrative burden of identifying draft dodgers qualifies as a “substantial government interest” under prong two, which would seem a logical question given his judicial perspective. However, Douglas does take up the issue of the remaining two prongs in his *Brandenburg* concurrence, noting that government’s targeting the destruction of draft cards instead of their nonpossession in *O’Brien* suggests that expression was in fact being targeted. As such the 1965 draft Amendment would fail prong three and possibly prong four of the *O’Brien* test rendering the law not “consistent with the First Amendment.” It is unclear why Douglas returned to the issue of *O’Brien* a year later in *Brandenburg*, but I believe he may have recognized the joint implications of the two historic rulings.¹²⁴ And to me, Douglas’s criticism cuts to the heart of the trouble with *O’Brien* and some of its subsequent applications decades later.

Prong 3 of the *O’Brien* tests asks that lawmakers not target expression, but leaves open the possibility that muting *the impact* of that expression is a legitimate government interest. This leaves us with the disturbing possibility that the government may legitimately suppress

¹²⁴ It is unclear to me from my reading of these cases and analysis of these cases. I have not at this point looked deeper into Douglass’s writings and writings on his judicial philosophy and record.

forms of speech that it finds threatening so long as that suppression targets the impact and not the ideas underlying the speech.¹²⁵ In this way the *O'Brien* decision lays the groundwork for government to bypass the otherwise formidable protections erected a year later in *Brandenburg*. As we turn now to our contemporary cases we find some evidence that the reasoning in *O'Brien* is in fact being used allow the regulation of dangerous and disruptive speech.

Most commentators point to the Court's protection of flag burning in *Texas v. Johnson* (1989) as evidence that the *O'Brien* test provides solid protection to symbolic protest.¹²⁶ Similarly, the Court's decision to strike down a Minnesota hate crime law in *R.A.V. v. St. Paul* (1992) is often taken as evidence that dangerous speech protections continue to grow, with the Court in that case narrowing the category of "fighting words" to near irrelevance.¹²⁷ This argument carries a lot of weight, but we can also see this moment in the late 1980s and early 1990s as a turning point in the Court's approach to dangerous and disruptive speech. Conservatives were incensed by the flag burning issue and intent on carving out space for common sense law and order regulations. Liberals were frustrated by limits on their ability to suppress reactionary hate group activity. The time was ripe for retrenchment of speech rights, and each side found a majority on the Court willing to accommodate this desire with the increasingly important "time, place and manner" (TMP) doctrine.

¹²⁵ It might be argued that you cannot target one without the other, but this is perhaps an overly rationalistic view of ideas, which believes their power is inherent in their rationality. At least some of an idea's impact is clearly associated with its presentation, including the manner and setting of delivery. As the J.S. Mill quote at the beginning of this chapter stresses, to say that corn dealers starve the poor can have a very different impact when generally espoused compared to when it is delivered to a mob in front of a corn-dealer's house.

¹²⁶ 491 U.S. 397 (1989)

¹²⁷ 505 U.S. 377 (1992)

The Court has always acknowledged the government's right to prohibit speech and protest at specific time, places, and using certain methods of communication. Before the Court moved away from its balancing approach to the free speech, such regulations blended in with all the other order and decency arguments the Court accepted as reasonable justifications for regulation restricting speech. But with the shift to definitional balancing, the TPM doctrine took on new significance. Justice Goldberg's decision in *Cox v. Louisiana* (1965) lays out the foundations of the doctrine, explaining:

The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

In the 1970s, the doctrine would begin to take on a more definite shape, with the contemporary standard for valid TPM laws solidifying in *Clark v. Community for Creative Non-Violence* (1984)'s ruling that such restrictions are valid if they are "justified without reference to the content of the regulated speech that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."¹²⁸ Moreover, the Clark ruling tied TPM doctrine more closely to the O'Brien test,

¹²⁸ We come close to the *Clark* standard in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) where Justice Blackmun writes, "We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that, in so doing, they leave open ample alternative channels for communication of the information." This definition makes no reference to "narrow tailoring," which is increasingly the battle ground for divisive cases in this and other First Amendment areas. Rulings before *Virginia* sometime required only a "legitimate" government interest, and did not use the phrase "ample alternative channels." The exact standards of *Clark* do appear a year earlier in *Perry Education Assn. v.*

with the Court laying out a firm position embracing the content neutrality of restrictions that impact a single group disproportionately. In *Clark*, CCNV requested a permit for an overnight “sleep-in” protest in Washington DC’s Lafayette Park and “the Mall” to raise awareness of the plight of homeless persons forced to sleep outdoors in the elements.¹²⁹ Arguably, such a tactic is particularly effective because of the close association between the symbolic speech and the message. CCNV argued that the Park Service’s denial of their permit did not leave them opportunities to express the same qualitative message with anything like the same impact. The Court was unmoved by the CCNV position.

In 1988 the Court took TPM doctrine a significant step further with *Frisby v. Schultz*. The case centered on anti-abortion home demonstrations—referred to as “home demos” by activists—in front of the residence of a Wisconsin doctor who performed abortions. Because the demonstrators stuck to the sidewalks—a public forum—and violated no state or local ordinances concerning obstructions, noise, harassment, etc., the municipality passed a law specifically prohibiting protest in front of residences. What is notable is that lawmakers were explicit in their goal of prohibiting specific protest activity, and yet the Court did not feel this raised significant issues regarding content neutrality. This move appears to accept the statutory justification of a law irrespective of both legislative intent and the consequences of enforcement. The law may target protesters in its inception, and the effect may be to shut down

Perry Local Educators’ Assn.(1983)—and it is possible I have missed the wording in a yet earlier case—but it is with *Clark* that we see the language of the standard begin to be applied consistently and precisely.
¹²⁹ It is noteworthy that National Park Service’s permitting process for the “The Mall” and other central D.C parks has become both a national model for the institutionalization of protest and the key example advocates of TPM doctrine use in support of their position.

specific disruptive protests, but the law remains content neutral because it *could* apply to any home demonstration.¹³⁰

In 1989, the Court further clarified the narrow tailoring requirement of TPM doctrine. In *Ward v. Rock Against Racism*, the Court considered a case in which the City of New York required that musical acts performing at a Central Park venue use city sound equipment under the control of city sound technician. The ordinance had been struck down in Federal Appeals Court in large part because the ordinance was not the “least restrictive” method of securing the government interest of preventing excessive noise. The Appeals Court posited several alternative regulations, including setting a maximum decibel level, requiring a maximum decibel regulator be attached to equipment, or even providing a concert supervisor that could “pull the plug” on noise violators. Justice Kennedy, writing for the conservative majority of the Court, rejected the lower court logic. He stressed that narrow tailoring only requires that a “regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” In stressing that this “effectiveness” standard is all that is required under the *O’Brien* and *Clark* precedents, Kennedy presses that lower Courts should defer to legislative judgment on narrow tailoring “so long as the [it] could reasonably have determined” the regulation is the most effective approach.¹³¹ This deferential approach to TPM restrictions would hold sway for the next quarter century.

¹³⁰ By contrast, O’Connor’s opinion that same year in *Boos v. Berry* (1988) struck down a DC law prohibiting “the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into ‘public odium’ or ‘public disrepute.’” The law—reminiscent of the Sedition Act of 1798—was clearly not content neutral by plain wording of the law and thus faced strict scrutiny. By striking down the law O’Connor showed just how crucial the determination of content neutrality can be.

¹³¹ Kennedy does not define effectiveness for us. Is it cost-effectiveness? Is it most fully fulfilling the government interest? Presumably the definition is flexible, giving more deference to legislative choice.

As with much of contemporary First Amendment jurisprudence, it is the issue of abortion that most clearly defines the parameters of modern TPM doctrine. Following the *Frisby* decision, the Court upheld an injunction setting a 36 foot buffer zone around a Florida clinic and the homes of its employees. The decision in *Madsen v. Women's Health Center, Inc.* (1994) was authored by Chief Justice Rehnquist and once again showed the flexibility of TPM restrictions ruled content neutral. The protesters argued that the injunction could not be content neutral because it only prohibited the speech of anti-abortion activists. Rehnquist dismissed this argument, writing, "To accept petitioners' claim would be to classify virtually every injunction as content or viewpoint based. An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group."¹³² As such, Rehnquist sees the *Ward* standard, as applied in *Frisby*, to be controlling and declared the injunction passed *Ward's* requirements for content neutrality.

Notably, Rehnquist argues that the injunction must "burden no more speech than necessary to serve a significant government interest" as a basic standard for valid injunctive relief, but he is very clear that this "least restrictive test" is an additional requirement because "standard TPM analysis is not sufficiently rigorous" to meet the separate injunctive standard. It was under this least restrictive means standard that the Court struck down the injunction's 300 foot "no approach" zone and its blanket ban on displaying images/signs during business hours. Rehnquist's analysis suggests that such measures would not run afoul of TPM doctrine alone.

¹³² Importantly, Rehnquist is rather dismissive of the privileged position of speech in the way he groups "perhaps the speech" in with other group activities. While he goes on to note that injunctions on speech raise special concerns about censorship, he rejects the idea that these concerns required heightened scrutiny. By contrast, Justice Scalia's dissent argues that even if we judge an injunction content neutral, the targeted nature of injunctions should require strict scrutiny analysis. The Chief Justice pushes back hard against Scalia's position on scrutiny, highlighting a shift in the Roberts Court, in which Scalia's position is now a mere one vote from holding a majority.

And even applying the least restrictive means standard, Rehnquist lets stand the fixed buffer zone and a strict noise prohibition, writing, “some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review.”¹³³ Indeed, during the Rehnquist Court, the Chief Justice and Justice O’Connor regularly joined the more liberal half of the Court in endorsing such local deference regarding the regulation of speech.

In 2000, the Court again visited the issue of abortion clinic buffer zones in *Hill v. Colorado*. In *Hill*, the Court considered a 100 foot “no approach” zone law, which prohibited protesters from coming within 8 feet of clinic patrons.¹³⁴ Justice Stevens writes for a majority composed of the four liberal justices, Justice O’Connor, and Chief Justice Rehnquist, upholding the Colorado law. The *Hill* ruling sees the Court’s divide solidify, and sets a precedent that buffer zones will generally be allowed under the First Amendment, provided they avoid overt discrimination and are practical in application. Significantly, Stevens frames his opinion in terms of striking “an acceptable balance between the constitutionally protected rights of law-abiding

¹³³ Here the state court is in the role normally occupied by the legislature when considering the constitutionality of laws. The deference to local knowledge concerning the necessity of provisions would seem to apply equally to laws and injunctions.

¹³⁴ In 1997 the Court had decided *Schenk v. Pro-Choice Network*, which had struck down a 15 foot “floating buffer zone” injunction against Project Rescue activists. Once again, the Court applied the least restrictive means standard as they did in *Madsen*. The floating buffer zone was found to restrict more speech than necessary because it created significant uncertainty for protesters wishing to comply. Most importantly, what must a protester do if a patron is walking toward them, perhaps intentionally using the floating zone to herd protesters away? Presumably protesters must retreat. But what of multiple patrons moving in different directions? The injunction lacked language that would allow protesters to simply stay still in these situations where it would be difficult to maintain the 15 foot zone. While striking down the floating zone, the Court upheld the fixed buffer zone, as it did in *Madsen*. Importantly, Rehnquist is quite clear that in *Schenk*, as in *Madsen*, the Court is employing the least restrictive means test because of the nature of injunctive relief, not because it is required by TPM doctrine under *Ward*. This is particularly important because *McCullen v. Coakley* (2014) relies on *Madsen* and *Schenk* in applying the least restrictive means test to an MA statute as part of the narrowness clause of TPM doctrine. It is a subtle shift, but one that allows Chief Justice Roberts to move away from the more permissive interpretations of the Rehnquist Court.

speakers and the interests of unwilling listeners.” This claim is notable both because balancing approaches are generally permissive of government regulation and because the government argues an interest in protecting unwilling listeners from upsetting messages.¹³⁵ Stevens draws on Brandeis’s famous “right to be let alone” dissent in *Olmstead v. US* (1928), which is a somewhat odd use of fourth amendment search and seizure doctrine.¹³⁶ When it comes to applying *Ward*, Stevens is somewhat casual in determining the government’s interest, whether the law is narrowly tailored, and what alternative channels of communication are left open. He argues that while large fixed buffer zones may close off some opportunities for expression, “A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself.” Here he stresses that narrow tailoring under *Ward* need not require the least restrictive means, as was applied in *Madsen* and *Schenk*. At its core, Stevens’s argument is that the Court “must accord a measure of deference to the judgment of the Colorado Legislature” in judgment whether a “prophylactic rule” is necessary and appropriate. Under *Hill*, buffer zones would remain largely intact for the next decade and a half.

¹³⁵Recall that Chief Justice Vinson used a focus on balancing to weaken speech protections under the clear and present danger test. Arguably a similar approach is at work here.

¹³⁶ Justice Kennedy’s dissent skewers Stevens’s appropriation of Brandeis as a “right to avoid unpopular speech in a public forum” For Kennedy, Scalia, and Thomas, Stevens’s opinion implicitly endorses the targeting of disruptive or dissenting speech as a legitimate government interest. Scalia biting writes, “The strictures of the First Amendment cannot be avoided by regulating the act of moving one’s lips; and they cannot be avoided by regulating the act of extending one’s arm to deliver a handbill, or peacefully approaching in order to speak.” My analytic position in this chapter is quite similar to Scalia’s critique, though I am not claiming the majority is legally or normatively incorrect in its interpretation of the First Amendment.

It should be noted that Brandeis also wrote passionately about the right to be free of government interference concerning First Amendment issues of speech and assembly in *Whitney v. CA*. While he does not use the *Olmstead* phrasing, he does essentially argue the First Amendment creates a right to have one’s ideas left alone. But Brandeis is making a civil liberty claim about government interference with speech, not about the government protecting citizens from the speech of their fellows.

In 2014 the Court picked up the buffer zone issue once more with *McCullen v. Coakley*, this time considering a Massachusetts law creating a 35 foot buffer zone around clinic entrances. For all intents and purposes, the case was a re-argument of *Hill*.¹³⁷ But in 2014, Rehnquist and O'Connor had been replaced by Roberts and Alito, which gave the Roberts Court a 5-4 majority highly skeptical of the validity of buffer zones. While the Court's decision in *McCullen* was 9-0 in favor of striking down the MA buffer zone statute, it seems certain that this unanimous decision was leveraged by Chief Justice Roberts.¹³⁸ Roberts likely brought in the four liberal justices onboard with the threat of writing a 5-4 decision more fully in line with Scalia's sweeping views.¹³⁹ Roberts bases his opinion primarily upon two shifts from *Hill*. First, he jettisons Steven's "right to be let alone" as a compelling state interest, arguing that the state's only real interests are in insuring access to healthcare and preventing harassment. Second, Roberts interprets the narrow tailoring prong of TPM doctrine to implicitly apply a least restrictive means test, although *Ward*, *Frisby*, and *Hill* all rejected the test as a requirement for narrow tailoring. Roberts writes, "the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective." By constraining the government's legitimate interests and increasing the requirements of narrow tailoring, the Chief

¹³⁷ Justice Scalia argues that *McCullen* should overturn *Hill*, but the Chief's Majority chose to skirt the issue and avoid any *stare decisis* debates.

¹³⁸ I have yet to find any clear account of the Court's internal negotiations, but one may be available now or in the future. However, this is the only way I can understand the Court's split and lack of liberal concurrences. Ginsberg in particular has been on a tear in 2014, writing with passion and often anger. Her dissent in *Buwell v. Hobby Lobby*, handed down the same week as *McCullen*, forcefully accused the Court's conservatives of devaluing the rights of women. I can only see her silence *McCullen* as a sign of pragmatic compromise.

¹³⁹ Roberts is well known for his efforts as Chief to produce unanimous decisions. As of July 2014, after *McCullen* and *Hobby Lobby* were handed down, about 2/3 of Court's 2014 cases had been unanimous. That rate is unprecedented for a Court that has typically produced 20-50% unanimous rulings over the past half century **Invalid source specified.**

Justice abandons the deferential approach of the Rehnquist Court and places a difficult burden of proof on the state.

Justices Ginsberg, Breyer, Sotomayor, and Kagan presumably signed on to the Chief Justice's opinion because the alternative was 5-4 split with Roberts writing for the conservative half of the Court.¹⁴⁰ Scalia and Alito wrote concurrences, with Kennedy and Thomas joining Scalia, which argued that buffer zones are inherently content-based and viewpoint-discriminatory. It is essentially the position laid out by the Scalia, Thomas, and Kennedy in the *Hill* dissents, but their arguments have grown in force as Alito embraced their logic and Roberts embraced their result. If the Scalia faction were to gain one more vote on the Court, it seems entirely possible that all TPM restrictions aimed at limiting the effects of disruptive speech would be ruled to lack content neutrality. In such a case most TPM restrictions targeting protesters would likely fall under strict scrutiny. However, at this time Roberts remains the swing vote, and favors a more case by case approach under his more demanding interpretation of *Ward*. While the Court's recent shift opens up more political opportunities for disruptive protest, it must be noted that decades of a more permissive TPM doctrine have left an indelible mark on the tactical repertoires of contemporary social movements and have reshaped public expectations about the legitimacy of disruptive protest.

Shifts in TMP doctrine raise the possibility that unpopular groups will be targeted by regulations with an intentionally disparate impact. A related development impacting unpopular

¹⁴⁰ Of course the Court could have produces a 1-4-4 decision, such as when Justice Powell joined two separate majorities in *Regents of the University of California v. Bakke* (1978). Roberts had recently found himself in a similar position in *National Federation of Independent Business v. Sebelius* (2012), where Roberts found himself upholding the ACA's individual mandate with the four liberal justices and striking down its Medicaid expansion requirements with the four conservative justices. Presumably no dressing of unanimity could be found in that case.

groups is a recent shift in hate crime law. *Virginia v. Black* (2003) the Court revisited the issue of cross burning prohibitions a decade after *R.A.V.* found cross burning to be protected speech outside the fighting words exemption.¹⁴¹ The Court in *Virginia* was highly divided with Justice O'Connor only able muster a plurality for her opinion. The case consolidated two violations of Virginia's cross burning statute. In one, a Barry Elton Black led a Klan rally at which a 25-foot cross was burned on private property but in public view. In the other, Richard Elliot and Jonathan O'Mara burned a cross in their black neighbor's yard after he complained about their backyard gun range. The consolidation of cases only furthers the complexity of the Court's ruling.

While Justice Souter's dissent argued that *R.A.V.* was controlling and prohibited cross burning bans as the regulation of symbolic speech, Justice O'Connor's opinion for the Court held that cross burning statutes could be sustained under the unprotected speech category of "true threats" as established in *Watts v. US* (1969).¹⁴² While the Virginia statute was struck down as "overbroad" for declaring that all cross burning is "prima facie evidence of an intent to intimidate a person or group," Elliot and O'Mara's convictions were upheld because their use of cross burning as intimidation was proven on different grounds than the "prima facie" clause. O'Connor wrote for a seven justice majority vacating Black's conviction and a very different six justice majority upholding the Elliot and O'Mara convictions. Overall the thrust of O'Connor's opinion was that hate crime laws could pass constitutional muster as "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs

¹⁴¹ Interestingly, the *R.A.V.* decision did consider the relevance of TPM doctrine, and found that its content neutrality requirement leant weight to striking down the cross burning ban as viewpoint biased. (Do I need a paragraph on the *RAV* holding/logic here?)

¹⁴² 394 U.S. 705 (1969).

a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”

O’Connor’s opinion is built upon two strains of argument that are in significant tension with one another. First, she details a long history of racial conflict to argue that “burning a cross is a particularly virulent form of intimidation” and thus a true threat. On the other hand O’Connor argues that cross burning statutes are content neutral because “It does not matter whether an individual burns a cross with intent to intimidate because of the victim’s race, gender, or religion, or because of the victim’s ‘political affiliation, union membership, or homosexuality.’” (Quoting *R.A.V.*). O’Connor continues that a state “may choose to regulate [a] subset of intimidating messages” without raising viewpoint discrimination concerns. The decision’s curious marriage of arguments derives in part from the odd consolidation of cases, with Black’s Klan activity anchoring the historical narrative of cross burning as a true threat and Elliot and O’Mara’s supposedly non-racial neighborly dispute establishing that such laws can be content neutral.

Justice Souter’s dissent rightly calls the O’Connor ruling a “pragmatic doctrinal move” that is “content based” and suggests that “official suppression of ideas is afoot.” The dressing of content based regulation in content neutral clothing is potentially more troubling than the transparent content based balancing tests of the 1950s. This is the possibility that Justice Douglass first saw back in *O’Brien*. By ignoring that viewpoints are tightly associated with particular activities and symbols we open the door to viewpoint discrimination under the guise of untargeted laws. In addition to traditional hate crime laws, examples of such supposedly content neutral laws include the previously discussed 1994 Freedom of Access to Clinic Entrances (FACE) Act and Animal Enterprise Terrorism Act (AETA) of 1992 (amended 2006),

which apply enhanced sentencing to crimes associated with abortion clinics and animal related businesses respectively. Such acts are classified as content neutral because they follow *Virginia v. Black* in focusing on the target of speech instead of the viewpoint of the speaker. This pattern continues in a 2010 ruling that combines elements of hate speech regulation and TPM doctrine, one that is generally—and in my view somewhat mistakenly—viewed as a vindication of the rights of our most repugnant speakers.

Snyder v. Phelps (2010) addresses the speech rights of Pastor Fred Phelps and his Westboro Baptist Church, which engages in high profile protests at military funerals to voice disapproval over the United States's sinful tolerance of homosexuality.¹⁴³ Their contention is that god kills American soldiers to punish the nation for its gay-friendly public policy. Phelps led his congregation at one such rally outside the Maryland funeral of Marine Lance Corporal Matthew Snyder, who was killed in action during the Iraq war. The Westboro protesters held signs with statements including "Fags Doom Nations" but remained on public property away from the service. Upon watching news coverage of the protestors Matthew Snyder's father filed a successful civil claim against Phelps, his daughter, and his group for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. Phelps claimed First Amendment protection.

The Court laid down a firm 8-1 opinion authored by Chief Justice Roberts vacating the jury's multimillion dollar ruling against Phelps. Citing *New York Times v. Sullivan* (1964), *Texas v. Johnson* (1989) and series of other landmark speech cases Justice Roberts held the defendants immune from civil torts because their speech addressed "matters of public concern," namely the nation's moral, social and political treatment of LGBT citizens. The decision is rather straight

¹⁴³ 131 S. Ct. 1207

forward from a constitutional law perspective and most commentators find it notable primarily because the Westboro Church is widely held to have the most despised viewpoint in the contemporary American society. Moreover its views are widely seen as bizarre and nonsensical, which was part of Synder's claim that the protest should be construed as a private attack on him and his family. By protecting Phelps under the First Amendment, the Roberts Court is seen as firmly declaring that virtually all speech will be protected absolutely. However I read the decision somewhat differently.

Yes, Roberts protects hate speech from court action as one would expect following the *Brandenburg* precedent. But Roberts also goes far out of his way to note that "time, place, and manner restrictions" upheld in *Clark w. Community for Creative Non-Violence* (1984) and elaborated in *Ward v. Rock Against Racism* (1989) can constitutionally resolve the issue by removing the offending speech from proximity to its target. Such restrictions do not inhibit the content of expression, but as previously discussed, they greatly impact the reach and force of said expression. At the time of the ruling, Maryland, 43 other states and the federal government had passed laws placing restrictions on funeral picketing.¹⁴⁴ Roberts throws the Court's backing behind such bans, citing earlier bans on home demonstrations upheld in *Frisby v. Schultz* (1988) and buffer zones around abortion clinics in *Madsen v. Women's Health Center* (1994) and *Hill v. Colorado* (2000). This leads me to believe the Roberts Court will continue the trend of allowing

¹⁴⁴ Admittedly, Westboro's targeting of military funerals lacks the kind of historical or logical connection found between white supremacy and cross burning or between prolife ideologies an abortion clinic blockades, but these laws do primarily target Phelps and his followers. And as *Virginia v. Black* makes clear, neither *Brandenburg* nor *O'Brien* are interpreted as prohibiting target/symbol based regulations regardless of historical associations between specific groups and those targets/symbols.

issue-based and group-targeted legislation to pass as content neutral, despite the shift on abortion buffer zones.¹⁴⁵

Brandenberg v. Ohio expanded to breadth and depth of free speech protections in a historic way. Those protections largely carry through to today and the protection of Fred Phelps's vile speech is a testament to the enduring legacy of the Warren Court. But Justice Douglas astutely recognized that the very strength of protections offered by *Brandenberg* would exert pressure on the speech-action divide laid out in *O'Brien*. Cases like *Virginia v. Black*, *Hill v. Colorado*, and *Snyder v. Phelps* show that this pressure is being relieved through disingenuously content-neutral hate crime and TPM laws. Such laws leave dissenting and marginalized voices vulnerable to government repression.

Political Inflation

The cyclical pattern of inflation discussed in Chapter 2 argues that tactics developed by political outsiders will inevitably be adopted by political insiders if they prove effective. This adoption by insiders leads to a crowding out of marginal players and a loss of any relative advantage the tactics once gave to dissenters. However, disruptive tactics are especially resistant to this pattern because disruption is generally harmful to those in power. Riots are never good for business and are never good for elected officials. Disruption is in this sense the

¹⁴⁵ Roberts's move in *Snyder* seems somewhat inconsistent with his later *McCullen* decision, and supports the idea that the validity of TPM restrictions now hinges significantly on subjective application by the Supreme Court. Vagueness and subjectivity tend to be generally presumed to have a chilling effect on speech. Indeed, I am hesitant to conclude the *McCullen* shift will spread beyond abortion policy in the near future. Moreover, the increasing permissiveness of the Court concerning hate crime regulation in *Virginia v. Black* suggests that the Roberts court might find a kind of synergy between hate crime and TPM restrictions, which allows significantly more regulatory flexibility under the first Amendment.

primordial power of the dispossessed and cannot be coopted. As such, there is less to say about political inflation in this chapter than will be said in chapters 4 and 5. But there are three trends in this area that may serve to blunt movement power: disruption fatigue, social acclamation, and insider disruption.

Disruption Fatigue

Social movement activists will often discuss *activism fatigue* or *activist burnout*. The idea is that even a movement's core adherents often eventually tire of making social conflict the center of their lives. Eventually, most activists refocus their energies on work, family, and leisure because activism is stressful for most of us.¹⁴⁶ Periods of heightened disruptive protest are often associated with short term recruitment followed by significant attrition. Activism fatigue is certainly a limiting factor in disruptive politics, and it's one of the major forces that has pushed movements to institutionalize using nonprofit organizations. As discussed in Chapter 4, these organizations let activists center work, friends, and even family around stable employment at activist organizations. However, this social and financial support can be jeopardized by participation in high risked activism because resource rich SMOs are particularly vulnerable to repression, as discussed in Chapter 4. Furthermore, there is a corollary to activism fatigue that organization forms do not address: disruption fatigue. *Disruption fatigue* refers to the public's tolerance of disruption by activists.¹⁴⁷

¹⁴⁶ This observation builds on the idea of "biographic availability" as developed by Doug McAdam. See his "Recruitment to High-Risk Activism: the Case of Freedom Summer" or *Political Process and the Development of Black Insurgency*. See also my own significant decline in activism after I became a father!

¹⁴⁷ Closely related is "war fatigue," in which public support for military ventures declines after extended US engagements. We say this with Vietnam, as well as more recently with Iraq and Afghanistan. War

At first glance it may seem illogical to worry about public tolerance of disruption when the point of disruptive power is to render the status quo intolerable. While such a challenge accurately describes the mechanism of disruptive power, it ignores that fact that disruption is generally repressible in the absence of some public support. Here Sidney Tarrow's pairing of political opportunity theory and cycles of protest has the most explanatory power.¹⁴⁸ For Tarrow, vulnerable political regimes invite a wave of outside challengers because the regime lacks the clear authority to repress those challengers. But as the turmoil of peak protest years drags on, the public eventually tires of volatility and the regime becomes more resilient. The result is fewer concessions and more repression, which works to demobilize movements. The classic cycle example is social movements of the 1960s being followed by Nixon's silent majority push for law and order.

If we pull back from the cycle model, we can conclude that disruption fatigue is a constant threat to disruptive power. In an age where protest norms focus on opportunities for expression, the public has little patience for ongoing disruption. In the case of Occupy Wall Street, initial public support protected protesters from being expelled from their encampments. However, as the weeks dragged on the public came to feel the protesters had "made their point" and major cities like Las Angeles, New York and Philadelphia were able to quietly clear protest sites overnight with little public outrage (Nagourney, 2011). In cities like Washington

fatigue was arguably the major force behind the public opposition that kept President Obama from intervening in the Syrian Civil War in 2013.

¹⁴⁸ I have been critical of Tarrow's protest cycle hypothesis primarily because it appears to employ shifting definitions and mechanisms, at least as employed by other scholars. Tarrow seems to generally press the idea that the unit of analysis for protest cycles is the polity, and that all movements should experience state vulnerability and resilience in roughly the same way. Yet many scholars, and at times Tarrow himself, quickly fall into using the cycle concept to describe the mobilization and abeyance of specific movements. These uses seem conceptually distinct and dependent upon very different mechanisms. My own opinion is that Tarrow's state-wide concept is most clearly seen in the recurrent pattern of innovation, diffusion, and cooption of tactics.

D.C., where occupiers remained in McPherson Square well into the winter, residents and tourists generally came to resent the protesters as an eyesore and a traffic hindrance. When Occupy groups tried to shift strategies and issues following the end of their formal occupations, they found a public that was largely derisive and apathetic towards their efforts, national support for the movement having dropped from around 30% in November 2011 to around 15% in April 2012. Importantly, public opinion shifted even more harshly against Oakland protesters, where Occupy tactics were their most disruptive (Enten, 2012).

Does this pattern of disruption fatigue fit well with the concept of political inflation? Perhaps not on its own. But when added to social acclimation and insider disruption, the effect can be seen as quite inflationary.

Social Acclamation

On Saturday, Oct. 31, 2010, comedians Jon Stewart and Steven Colbert hosted a satirical political rally on the Mall in Washington, DC Dubbed “The Rally to Restore Sanity.” The event is estimated to have drawn more than 200,000 attendees, roughly the same attendance as the 1963 March on Washington for Jobs and Freedom (Carr, 2010). Despite the similar numbers and a similar performative repertoire, there is no equating the disruptive impact of the two events. Stewart and Colbert cause delays on DC metro lines approaching downtown stations. The March on Washington shut down Washington DC and had the American people collectively holding their breaths. Would there be riots in the capital? Would police clash with marchers? Would

unrest spread to major American cities across the country (Barber, *Marching on Washington: the Forging of an American Political Tradition*, 2002, p. 101)?¹⁴⁹

How did we get from the 1963 March on Washington to Stewart and Colbert? And why contrast this satirical rally with one of America's defining historical protests? And for that matter, what was so funny about The Rally to Restore Sanity? The answers to these questions are linked. The Stewart/Colbert rally was a response to conservative commentator Glenn Beck's August "Restoring Honor" rally, which drew almost 100,000 attendees to support a blend of conservative Christian and Tea Party politics. Stewart and Colbert were mocking Beck and media coverage that claimed Beck's rally was a politically significant barometer of public opinion. The comedic punch line was that Beck's rally was meaningless because any cause-of-the-day can and will draw tens or hundreds of thousands to a DC march or rally. Stewart and Colbert staged a rally about nothing—that frankly had little in the way of entertaining jokes or performances—and they more than doubled Beck's attendance. Marches and rallies at the Capital have become so standard, repetitive, and innocuous that they lack the power they had in earlier eras. This is especially true of disruptive power, which relies in large part upon the volatility of an event to unsettle the routines of daily life. When events become a routine part of daily life, they become no more disruptive than road work, a parade, or any other modern inconvenience.

Marching on Washington is a key example of *social acclimation*, the process of people and institutions adjusting their practices and expectations to accommodate disruptions that

¹⁴⁹ Thirty Years prior in 1932, 15,000 "Bonus March" participants seeking veterans' benefits for WWI service were even more disruptive. The group's occupation of the capital and nearby Anacostia Flats led to General Douglas McCarthy burning down the group's encampment and driving off marchers with tear gas and bayonets. The Bonus March was instrumental in the crumbling of the Republican regime under Hoover and in the rise of New Deal politics. While not the first "March on Washington," the bonus march established the act as a powerful political tactic. Today 15,000 marchers would likely be local news at best.

become commonplace. This process can occur formally, as with the National Parks Services permitting process for events on the Mall and other popular sites for protest. Or it can happen informally, as with DC residents learning to better navigate the city during marches. In many cases formal and informal acclamation work together, such as Parks Service policies rendering protest procedures more uniform and routine, making it easier for residents to learn how to adjust their schedules.

This process is by no means exclusive to marches. A common tactic by many movements is to use graphic or shocking images and displays to make the public uncomfortable with specific practices or policies. Pro-life protesters use images of aborted fetuses. Peace activists use images of children killed in war zones. Animal rights protesters use images of abused or slaughtered animals, often relying on undercover video. These images are designed to disrupt our peace of mind until we sign a petition, donate money, or boycott the targeted practice. But we soon grow desensitized to these images and protesters must do something even more shocking to impact us.¹⁵⁰ Activists quickly confront escalation problems where they either run out of new horrors to show, or they violate social norms in a way that brings repression and condemnation. The animal rights case is a classic example. The first undercover video one sees of a factory farm is often shocking and disturbing, but what about the second, third, or tenth? People become numb to the images and develop coping mechanism to rationalize or dismiss the

¹⁵⁰ There has been a significant amount of psychological research in recent decades on the desensitizing effect of exposure to violence through television, movies, video games, and other types of media. While still a controversial area of study, findings suggest that exposure to violent images can render people numb to the pain and suffering of others. See **Invalid source specified.** for an account of two experimental studies showing that exposure to violent media reduced or slowed the reactions of test subjects to real world suffering.

disturbing information.¹⁵¹ The inflationary effect becomes particularly problematic when movements utilize similar imagery or tactics. For example, “die ins,” in which large numbers of activists present lay down in public spaces to symbolize corpses, are utilized by abortion, human rights, animal rights and other activists. These protests have quickly lost their shock value bystanders may pass by without even noting the cause at issue.¹⁵²

Insider Disruption

I began this section by noting that disruption is relatively resistant to political inflation because insiders cannot readily adopt these tactics. Those in positions of traditional power and privilege simply have too much to lose when social institutions break down, and therefore are extremely hesitant to disrupt the political order over policy disputes. When Wall Street traders objected to the Dodd-Frank Act, they didn’t hold a sit-in shutting down financial markets. When Republicans failed to capture the Presidency in 2012, Mitt Romney didn’t chain himself to the White House fence. These actors understand that the cost of undermining financial markets and elections are too high to consider disrupting them. Moreover, such actors always have the prospect of winning in the next election cycle or pushing back through lobbying and litigating. While this characterization is accurate for the most part, it is not always the case. In times of

¹⁵¹ An additional area of social psychological research relevant here centers on how people experience and reduce cognitive dissonance. Cognitive dissonance occurs when one’s conception of the world and experiences of the world conflict. For instance, I may think of myself as a person who cares about the welfare of animals and also enjoys certain animal products, but am confronted by images that suggest they products are not ethically produced. When these two ideas conflict, they cause me anxiety and discomfort until I change one. Because conceptions of self tend to be very resilient, in most cases I will alter my understanding of the images I have seen. They are altered. They are not representative. They are not directly impacted by my choices. Animals do not really feel pain. And so on. **Invalid source specified.** is an excellent account of this phenomenon and the theories underlying it.

¹⁵² For example, Pro-Palestinian protesters staged coordinated die-ins in major US cities during the Israel-Hamas conflict in the summer of 2014 **Invalid source specified.**

great political upheaval major political factions may be willing to turn to disruption. The clearest historical examples would be Southern Democrats' willingness to break the Union over the issue of slavery and block desegregation of schools by police and/or mob force. Indeed, during periods in which the Klan was entrenched in mainstream southern political life, lynching and other forms of violence were used to disrupt efforts to develop black political power. These are generally exceptional times and circumstances. But more recently, disruption has become an increasingly central tactic of the modern Republican Party and its quasi-party adjunct movement, the Tea Party.

As Republican politics post-Reagan has embraced a philosophy of "government is the problem" it has become increasingly feasible to get elected to office on a platform of disruption. If a candidate runs on a platform that government is never in the right, then causing government dysfunction only plays into her re-election narrative. Perennial Congress watchers Thomas Mann and Norman Ornstein have gone so far as to identify this shift in Republican ideology as the defining characteristic of contemporary American politics and the central factor driving government dysfunction (Mann & Ornstein, 2012). They trace the problem to Newt Gingrich's Speakership, which famously led to government shutdowns in 1995-6, pioneering the contemporary Republican practice of breaking government in order to save it. In the two decades that followed, the Republican Party has shifted further to the right, particularly in solidly red House districts. Mann and Ornstein point to the Debt Ceiling crisis of 2011—in which the Republican House threatened to default on America's debt if the Obama administration did not grant policy concessions on entitlement reform—as the clearest example of the Republican Party's willingness to hold America's political and economic well-being hostage. But does this kind of disruption really compete with movement activities? I would argue yes. To the extent

that government is forced into a state of constant political, fiscal, and monetary crisis Americans are less apt to pay attention to more modest movement disruptions and their accompanying grievances. However, it is true that this kind of insider disruption is far from the kind of cooption we might expect with other forms of political inflation. A much more important type of insider disruption is that practiced by the Tea Party.

The Tea Party styles itself as a grassroots social movement with a radical antigovernment message. However, the 2009 emergence of the Tea Party is in many ways simply a rebranding of ideas that had already become pillars of the contemporary Republican Party. For example, in the 113th Congress 219 members of the House and 39 Senators have signed Grover Norquist's Americans For Tax Reform pledge to oppose all tax increases or deduction reductions (Americans for Tax Reform, 2013). Those numbers show a majority of the House and two votes shy of unbreakable filibuster in the Senate publically pledging to carry out the central fiscal policy demand of the Tea (Taxed Enough Already)Party. So when people call the Tea Party a social movement, what they really mean is not that the Tea Party represents outsider ideas, but that the Tea Party adopts outsider tactics. In essence, the Tea Party has become a subsidiary of the contemporary Republican Party, set up to coopt disruptive social movement tactics without discrediting GOP officials and institutions.¹⁵³

The Tea Party, in some form or another, has protested most of the Obama Administration's policies. It also marched on Washington in 2009, drawing tens-of-thousands of participants. But without a doubt the clearest example of successful Tea Party disruption is the

¹⁵³ Some critics would dub the Tea Party an "Astroturf" movement, suggesting is a fake grassroots movement. In truth it appears that the Tea Party phenomenon is a complex mixture of bottom up and top-down forces. See **Invalid source specified.** for a concise analysis of the movement makeup and **Invalid source specified.** for a more precise account.

relentless 2009 assault on congressional town hall meetings during the healthcare reform debates. Democrats and Republicans were at loggerheads over the Obama Administration's proposal to overhaul the American healthcare system and members of Congress had broken for summer recess. Democrats and moderate Republicans involved in legislative negotiations held town hall style meetings to try explain their positions on the proposed legislation and gain constituent support.

Tea Party protesters packed the town hall events, waving signs and shouting down Representatives attempting to explain their positions. In a number of cases meetings degenerated into shouting matches, and in a few fights broke out. At one Maryland rally a Democratic congressman was even burned in effigy (Urbina, 2009). By all accounts, Tea Party members were highly successful in disrupting these events and undercutting any attempt to build momentum for reform. As intended, the chaos of these meetings reflected poorly for members of Congress in marginal districts and states. These members were, at least in part, blamed by the public for pushing forward an apparently divisive political issue. In the face of such optics, support for reform narrowed and some of the most ambitious elements of the reform were dropped, including a public insurance option and an Independent Payment Advisory Board utilizing comparative effectiveness research to determine what treatments the government would cover.¹⁵⁴ The latter was gutted over Tea Party charges that Obama was assembling "death panels" to force euthanasia and "ration" healthcare. The public option and these expert panels were the primary cost saving mechanisms of the Patient Protection and

¹⁵⁴ The PPACA did create an IPAB with some authority to restrict Medicare payments.

Affordable Care Act, meaning the Tea Party challenge undercut one of the central goals of the legislation.¹⁵⁵

While some maintain that the Tea Party's origins and activities were unrelated to Republican Party activities, this claim seems difficult to maintain. The theme of the Boston Tea Party has been used by conservative elites for decades to push an anti-tax, anti-regulatory agenda. The contemporary Tea Party can be traced to tobacco company efforts in the 1980s to raise opposition to cigarette taxes and regulations. In addition to smokers' rights advocacy, these groups funded nonprofits like Citizens for a Sound Economy (CSE), which later split into the groups Americans for Prosperity (AFP) and Freedom Works, which were principle organizers and funders of early 2009 Tea Party protests (Fallin, Grana, & Glantz, 2013).¹⁵⁶ Freedom Works and AFP played key roles in organizing the town hall disruptions (Urbina, 2009). In addition to the tobacco industry, billionaire energy tycoons, the Koch brothers, helped found CSE and have donated millions to it, AFP, and Freedom Works, while at the same time being major donors to Republican candidates and political committees (Mayer, 2010). These groups, their industry backers, and their political point men like CSE Chairman former House member Dick Armey represent the nexus of insider and outside conservative politics. In addition

¹⁵⁵ The PPACA was premised primarily on reducing the cost of healthcare and insuring universal access to quality healthcare coverage. It is ironic that the Tea Party efforts effectively killed the cost saving measure, presumably the part of the legislation most in line with Tea Party efforts. In reality, Tea Party insurgents were inches from the goal line in killing the bill entirely following the special election victory of MA Senator Scott Brown. Only masterful political maneuvering by House Speaker Nancy Pelosi, who avoided the need for conference committee by passing a less-than-popular Senate bill unaltered, kept the Tea Party from fully disrupting the legislative process.

¹⁵⁶ The Tea Party fits well into the Multiple Streams (or garbage can) theory of the policy process, as advanced by John Kingdon. Kingdon noted that policy ideas often develop before the problems they are eventually paired to, and these policy ideas are relentlessly pushed for years or decades before a political moment allows them to seize the agenda. In this case, Rick Santelli's CNBC rant calling for a Chicago tea party to oppose the Troubled Asset Relief Program (TARP) and the taxes that fund it, seems to wedded tobacco company proposals to the problem of government spending to combat the 2008 financial collapse and recession.

to these nonprofit organizations, prominent Republican media figures such as Glenn Beck, Sean Hannity, Rush Limbaugh, and Vice-Presidential candidate Sarah Palin helped rally Tea Party protesters. Hannity's website declared "Become a part of the mob!" and "Attend an Obama Care Townhall near you!" (Urbina, 2009). Fox News and conservative talk radio offer yet another link connecting the Tea Party and Republican Party, pointing to a significant degree of coordination.

The Republican Party's embrace of disruptive politics is one of the more significant recent developments impacting social movements. Most of the emphasis on institutionalization focuses on movements adopting the forms of insider interest groups, but here we see that the converse is also happening. As insiders adopt disruptive movement tactics, movements no longer have a monopoly over this type of power. This is of particular concern for movements seeking government spending and regulation, as these conservative disruptions seem aimed at preventing government from taking on new responsibilities. With disruptive forces pushing in multiple directions the safest course for politicians is to duck and cover, leading to gridlock and inaction. And in the end inaction serves the status quo.

Insider disruption may put especially large inflationary pressure on social movements, as studies have shown that protests surrounding issues that are already on the political agenda are more salient to the public.¹⁵⁷ Similarly, disruptions to the ongoing legislative process are naturally more disruptive to most Americans. Because insiders are already enmeshed in decision making, their disruptions are likely to make bigger waves, diminishing the relative weight of outsider disruptions.

¹⁵⁷ This point will be addressed in detail in the chapter 5 discussion of political inflation and media attention.

Institutional Thickening

As America's economic and political institutions grow, it has two contrary effects upon disruption. First, as institutions become linked into intricate networks, whole networks become vulnerable when they hinge on key links that can be targeted for disruption. The major economic example is the modern supply chain, where manufacturing depends upon "just in time" delivery of components fabricated across the globe. For instance, following the Fukushima nuclear disaster in northern Japan, a Louisiana GM auto plant was among the many US institutions to shut down because a few key parts were no longer being produced in the disaster zone (Lohr, 2011). If activists are able to disrupt these key points in national or global networks, then they can potentially produce outsized disruptive pressure on political leaders.

The second effect of institutional growth is that activists increasingly face massive entrenched institutions that are difficult to disrupt and are so valued that disruption may produce a massive public backlash. As government and business become "too big to fail," the state may no longer suffer the periods of vulnerability that characterize Tarrow's cycles of protest. The Occupy Wall Street movement is a compelling example of this second effect. The Zuccotti Park encampment just down from the New York Stock Exchange was designed to disrupt the functions of national and international finance by heaping scorn on Wall Street traders and bankers. The idea was to be visible and audible to their targets as they entered and left their offices and trading floors day in and day out, robbing them of peace of mind by building up anxiety, tension, and hopefully shame. Yet the size and scope of the financial system meant that these traders and bankers were really only minor cogs in a machine that involved

exchanges and traders across the globe linked together by virtual networks with an enormous amount of flexibility and redundancy. So while it is true that the collapse of financial giant Lehman Brothers in 2008 shows the financial system to be a network with key points of vulnerability, these points seem largely removed from public access. Could protesters ever truly replicate such a disruption, or must those disruptions spring from the institutions of power themselves? Perhaps a more violent struggle by protesters might have actually shut down the NYSE, disrupting the stock market, but it seems such an action would almost instantly bring public condemnation and government repression.¹⁵⁸ In almost any conceivable scenario, markets would resume functioning within days, if not hours.

Fox Piven ends her treatise on disruptive power by struggling with the contrast of these two trends. She notes that traditional protest methods, particularly strikes, are rendered powerless by multinational corporations that can shift production offshore to escape disruption and punish disrupters. But Piven ends on a hopeful note suggesting new tactics like transnational movements and “hacktivist” utilizing internet disruptions may yet reach the system’s vulnerable linkages (Piven F. F., *Challenging Authority*, 2006, pp. 144-146). Given the polemical nature of Piven’s work, it is unsurprising she reaches for an optimistic tone to inspire her readers. But my take sees the constraints of institutional thickening outweighing any potential vulnerabilities of a networked world.

¹⁵⁸ Part of the institutional thickening argument is that institutional reach spreads to almost all Americans, making disruption universally painful. In this case most people are invested in the stock market either personally or through pensions and other institutional investors. Furthermore, the DOW has come to stand in as a barometer for economic health, meaning that drops in the stock markets result in real labor contractions that threaten broad swaths of the American public. The logic of disruptive power suggests that disruption needs to be buttressed by support from significant elements of the public and/or significant political coalitions. In the absence of that support government regimes are left highly resilient and capable of utilizing the full weight of law enforcement (or even the military) against protesters that lack any proportional force.

When it comes to government policy, institutional thickening presents special barriers to effective disruptive power for two reasons. First, as government grows programs become complex and interconnected. As discussed above, this means that assigning responsibility for grievances and singling out specific targets becomes problematic. Looking again to the Occupy movement, it is clear that one of the movement's greatest challenge was defining what they wanted and whom they wanted it from. Who is behind income inequality and who can do something about it? Is it the banks and traders? Is it the SEC or the IRS or Congress or President Obama or city/state government? Is it the "1%" of wealthy Americans, and if so, are they expected to give their wealth away? Gallup polling revealed a majority of Americans were uncertain about the purpose of the movement, and news interviews with participants showed many were themselves uncertain (Gallup, 2011). Many commentators skewered the occupy protesters as fools unable to understand their own issue, but a more sympathetic take is that income inequality is reproduced by such a vast array of entrenched institutions that no simple answers were possible.¹⁵⁹ Overlapping and divided governance responsibilities present a special problem for disruptive power, because public support and tolerance for disruption depends public perceptions of the legitimacy of the target. If no one is responsible, no one need take action.

Thick and complex government structures also mean that major policy changes impact many provisions from numerous separate programs. As such reform legislation requires more

¹⁵⁹ This phenomenon is not isolated to broad class based movements like occupy, but applies to more specific movement interests as well. Take for instance the animal rights push to reduce/end experimentation on animals. Activists might try to blockade a specific laboratory conducting testing, or the FDA in Washington for mandating testing in drug development, or the USDA over application of the Animal Welfare Act, or HHS over the NIH's enforcement of its Animal Care and Use Guidelines, or the Association for the Assessment and Accreditation of Laboratory Animal Care (AAALAC) for their independent accreditation of these facilities, or Federal or State lawmakers. Who should protesters target, and would that target have the authority to accommodate protester demands?

committee time, lengthier bills, and extended implementation. It takes time to change our institutionally thick government, and disruptive power is notoriously difficult to maintain over long periods. This is particularly true once policymakers take up an issue, as continued disruption is undercut by the appearance of government action. Surely the *threat* of resumed disruption might be held over policymakers, but for how long? Just consider the massive difficulty of restarting the occupy movement after the 2011-2012 winter decampment. Occupiers vacated their encampments as winter rolled in, confident that their message about the 1% would be a dominant theme in the upcoming 2012 elections. As spring turned to summer, and the Obama-Romney election kicked into full swing, it became apparent that income inequality would not be a major campaign issue.¹⁶⁰ Faced with multi-year political and policy challenges Occupy groups were unable to remobilize their members, reclaim their physical encampments, or recapture the public agenda.

A second barrier of institutional thickening deals with the scarcity of slack resources for social programs and new regulatory regimes. Most movement activists—along with the most Americans in general— support programs like Medicare, Medicaid, and Social Security. These programs, along with defense spending, account for the vast majority of government spending, leaving the government with sparse funds for discretionary projects or new entitlements. This puts most protesters in the position of robbing Peter and pay Paul, with the exception of some anti-government elements of the Tea Party. This problem particularly impacts disruptive power because disruption is a blunt tool that unsettles the status quo, which is unpalatable to

¹⁶⁰ Granted, Romney's 1% status became a liability following his 47% of Americans are dependent comment, but Occupy was unable to maintain any influence over Obama and his policies.

movement supporters. In issues with existing policy networks, disruption alone is likely to have little success in reshuffling the larger policy matrix.¹⁶¹

Conclusions

John Locke's description of the social contract in his *Second Treatise on Government* argues that a people have the right and duty to overthrow their government if it persistently violates natural rights of life, liberty, and property. This idea was the guiding light for Jefferson's American Declaration of Independence. But what if abuses and injustices stop short of the need for revolution? Both Locke and the American Founders had little to say here, with Locke suggesting that oppressed minorities should obey the government and direct their appeals to God. This has always struck me as a normatively and empirically poor vision of liberal democracy. Disruptive power fills in the gaps. Where a significant minority feels the system is unjust, they can gum up the system to everyone's detriment. Instead of hitting the reset button on the polity, they can hit pause button and disrupt the game without ending it. From this perspective disruptive power is an ideal adjunct to the democratic process because it is risky and painful for the disrupters who use it, meaning it provides an appeal of last resort, but one unlikely to be abused.

In this chapter I have argued that disruptive power is the original power of social movements, and one that remains relevant today. However, I have argued the disruptive power is increasingly constrained by structural barriers, political inflation, and institutional thickening.

¹⁶¹ These same themes will be developed more in the next two chapters. I'm having a slight problem with having developed some of these sections more fully in the following chapter, which I wrote first.

Compared to other types of movement power, disruptive power is constrained relatively heavily by structural barriers. By contrast, political inflation is a relatively light constraint on disruptive power because it is not readily co-opted by political insiders. Institutional thickening places some special burdens on disruptive challengers, but its effects are somewhat uniform in constraining all types of outsider challenges. Of particular interest in this chapter were policing methods and the First Amendment framework they navigate. I argued that authorities have taken much of the bite out of disruptive power by simultaneously adopting POMS to protect and encourage non-confrontational protests, while at the same time cracking down on disruptive protests through statutes and injunctions upheld by the courts as content neutral. These developments place social movements in somewhat of a bind, as declines in disruptive power must be offset by the development of more institutionalized approaches, yet this further institutionalization renders disruptive activity all the more difficult. In Chapter 6 I will revisit this dilemma and consider how four contemporary social movements have combined disruptive power with pluralist and plebiscitary power in their real world advocacy.

“[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”

-Justice John Marshall Harlan II
NAACP v. Alabama (1958)

“[M]ajor public policies...constitute important rules of the game, influencing the allocation of economic and political resources, modifying the costs and benefits associated with alternative political strategies, and consequently altering ensuing political development.”

-Paul Pierson

Chapter 4: Movement Organizations and Pluralist Power

On Thursday, June 9, 1966 The Sierra Club took out full page ads in *The New York Times*, *The Washington Post*, *The San Francisco Chronicle*, and *The Las Angeles Times*. The ads criticized the Department of the Interior’s plans to build hydroelectric dams on the Colorado River in and around Grand Canyon National Park, proclaiming,

“If they can turn Grand Canyon into a “cash register” is any national park safe? You know the answer. Now only you can save Grand Canyon from being flooded ... for profit.”

The environment group urged concerned citizens to contact their congressional representatives. While appeals to “contact your representatives” are a commonplace and rather innocuous fixture in American politics, these ads produced a rather remarkable result. Sierra Club lost the ability to offer its donors income tax deductions for their charitable contributions (Cohen 1988).

Sierra Club’s largely successful attempt to shift public opinion on a legislative issue was considered “grass roots lobbying” by the IRS and lobbying is restricted under Internal Revenue Code 501(c)3. As a *nonprofit public charity* organized under IRC 501(c)3, Sierra Club was prohibited from engaging in “substantial” lobbying activities. Although the ads amounted to only a small fraction of Sierra Club’s annual budget, the IRS chose to suspend the group’s tax deductible status pending an investigation. The controversy came at a time when the modern environmental movement was just taking shape. Sierra Club was struggling to shift its identity from a “club” for outdoor enthusiasts to a mass membership public advocacy group. Club President David Brower recognized that advocacy required political engagement, but was it far from certain that his donor base of wilderness adventures would put up with a significantly increased tax burden.¹⁶² As such, the group faced a defining choice between political relevance and fiscal security. In the end, Sierra Club opted for political engagement by changing its incorporation from a 501(c)3 public charity to a 501(c)4 social welfare organization (Cohen, 1988).¹⁶³ The C4 classification allows for unlimited lobbying and limited involvement in electoral politics—electoral activity is *strictly* prohibited for C3 organizations—but this freedom comes at

¹⁶² Back in 1966 the top federal income tax rate was 70%, meaning that wealthy donors could effectively give \$1 to a tax deductible charity or \$0.30 to a non-deductible group and \$0.70 to the government.

¹⁶³ C4 organizations are also sometimes referred to as “social advocacy organizations.”

the cost of tax deductible status for donors, which is often essential for attracting large contributions.¹⁶⁴

Two more recent examples serve to illustrate just how limiting the charitable ban on *electioneering* can be in practice. The National Association for the Advancement of Colored People (NAACP)—a C3 public charity—was subject to a two-year IRS investigation over charges of electioneering in the 2004 presidential election. The investigation followed anti-Bush remarks made in a speech by NAACP Chairman Julian Bond at the organization’s annual meeting. The IRS alleged that “Mr. Bond condemned the administration policies of George W. Bush on education, the economy and the war in Iraq” in a manner that could be interpreted as opposing Bush’s reelection. These statements violated the C3 prohibition on “directly or indirectly participating or intervening in any political campaign,” which includes critical or supportive statements made to group members, the media, or the public (Fears, 2006).¹⁶⁵ The NAACP survived what Mr. Bond called an “enormous threat” that “would have reduced our income remarkably,” but Operation Rescue—perhaps the most aggressive organized arm of the Anti-abortion movement—was stripped of its tax-exempt status for electioneering in the same year. The C3 anti-abortion group was reproached for using anti-John Kerry appeals in their fundraising efforts and picketing Democratic events using a billboard truck with an image of an aborted fetus captioned “Kerry’s Choice” (Strom, 2006). Operation Rescue now only exists as an

¹⁶⁴ The Sierra Club is one of several prominent groups that eventually split its operations between C3, C4, and PAC organizations. While this approach does avoid some tax constraints, I argue that this strategy works only if the principle organization is a C4, as it is now with Sierra Club. If the mass membership is organized under the C3 organization then members cannot be mobilized in elections and in support of lobbying. Michael Cohen argues that Sierra Club did especially well absorbing the costs of their tax status change because they benefitted from the publicity that surrounded the tax controversy, rallying new supporters to replace lost revenue.

¹⁶⁵ A similar anti-war example from the 2004 election involved the All Saints Episcopal Church **Invalid source specified.**

unincorporated (and greatly diminished) group.¹⁶⁶ In these two cases, the IRS singled out relatively mild political activity, emphasizing just how little charities are permitted to engage in American electoral politics.¹⁶⁷

These opening examples illustrate a basic truth of politics: government policy fundamentally shapes the opportunities that challengers have to organize and participate in the political system.¹⁶⁸ This chapter examines the extent to which social movement organizations (SMOs) effectively engage with the mainstream political system, whether opportunities for effective political participation are expanding or contracting, and what systemic factors may

¹⁶⁶ In 2004 the group was still formally organized under the name *Operation Rescue West* and had previously been involved in a protracted dispute over the name “Operation Rescue” with the group *Operation Rescue National (now Operation Save America)*. Regardless of which group could claim the clearest lineage to Randal Terry’s original 1986 organization, the *West* group is best known for maintaining and extending the original direct action tactics that are most clearly associated with Operation Rescue.

¹⁶⁷ Even more recently, the Obama administration has been under fire for the IRS targeting conservative “Tea Party” groups while processing nonprofit applications for tax-exempt status. The IRS had no clear guidance for personnel on how groups applying for C3 and C4 status should be screened for unacceptable political or partisan aims and activities. As such, local officials—specifically in the IRS Cincinnati office—developed their own ad hoc system for identifying applications that needed further scrutiny. The core of their approach in 2010 was to create a “Be on the Lookout for (BOLO)” list of suspect terms, including “tea party” and “patriot,” and to subject these groups to further review. This alone was an unacceptably subjective approach, but because the local office was still unsure what standards to apply they requested guidance from DC. Unfortunately, this guidance never came, resulting in processing delays of 1 to 2 years. Moreover, when these flagged applications were finally processed, the IRS requested inappropriate information, including the names of donors, whether donations had been received from political candidates and how such donations were used. **Invalid source specified.** While there does not appear to be any targeted repression of conservative activists by the Obama Administration, vague regulations and bureaucratic bubbling clearly placed disproportional hardships on conservative SMOs just as they were seeking to transition street protests into political organization. Since the IRS-Tea Party scandal other groups from progressive and nonpartisan movements have come forward claiming similar application problems, suggesting the Tea Party list out of Cincinnati may just be the most egregious example of a persistent problem (Jones, 2013).

For more on the details see the IG report: *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*. May 14, 2013. Reference Number: 2013-10-053. TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION.

For more on progressive groups see Representative Elijah Cummings’s letter to Representative Darrell Issa, Chair of the House Committee on Oversight and Government Reform, July 12, 2013. <http://democrats.oversight.house.gov/Letter.pdf>

¹⁶⁸ This phenomenon is sometimes termed *policy feedback*. **Invalid source specified.**

constrain the power of SMOs. As the opening example suggests, I take the regulation of organizational forms to be a central factor impacting movement politics, but this regulation needs to be understood in terms of the broader shifting landscape of American pluralism. I start with a theoretical look at what I call *pluralist power*. I then argue that movement power has been somewhat constrained by the three trends in American political development laid out in the second chapter: 1) the building of *structural barriers* to outsider participation, 2) *political inflation* devaluing outsider resources, and 3) *institutional thickening* rendering major policy shifts more difficult.¹⁶⁹

This chapter considers movements as whole. That is, it treats social movements collectively as a segment of the American political system. In the chapter six I look more closely at variations between movements, but for now my focus is on system wide factors and aggregate trends.

Pluralism and Movement Power

Pluralism argues that in free societies no single interest consistently divides the public into majority and minority segments.¹⁷⁰ Instead, political power is dispersed amongst a

¹⁶⁹ As detailed in Chapter 2 these three trends/patterns impact each type of power in unique but related ways..

¹⁷⁰ Major statements of American pluralism include James Madison's *Federalist #10*, David Truman's *The Governmental Process* (1951), and Robert Dahl's *Who Governs?* (1961). While the "group theory" approaches to political science that dominated the mid-twentieth century have fallen out of favor in the discipline, these works remain central to understanding the role of interest group politics in liberal democracies. Pluralism contrasts most notably to Marxist thought, which asserts a fundamental division of interests based on class. In the American tradition, pluralism is perhaps best contrasted with the political tradition advanced by John C. Calhoun during the second party system. Calhoun's *A Disquisition on Government* argues that government policy inevitably divides society into two great segments, with the government redistributing wealth and power from minority to majority. In the American case,

multitude of overlapping groups competing directly with one another for influence over various public policy areas of relevance to their particular interests. In parliamentary political systems, such as Britain's, strong parties typically lead interests to combine into stable electoral coalitions controlled by party organizations. But the American system of strong federalism and separation of powers leaves parties relatively weak and leads interests to organize more independently.¹⁷¹ American pluralism is often referred to as *interest group pluralism* because formal organizations like labor unions, chambers of commerce, trade associations, and public interest groups play an especially prominent role in both elections and governance.¹⁷²

Interest groups participate in politics in a wide variety of ways, but the most important fall under three categories: electioneering; lobbying; and litigating. These three activities are exercises in what I call *pluralist power: the ability to influence public policy through direct interaction with the core political institutions that control elections, decision making, and policy implementation*. They are the channels of influence built into the system to make government responsive to the people. They are the overt levers of power. When Exxon-Mobile wants to influence U.S. energy policy the company donates money to political candidates, hires an army of Washington lobbyists, and files legal challenges to onerous EPA and DoI regulations. When we say colloquially that a group or sector—such as the oil industry—is a particularly powerful

Calhoun identified the great divide in sectional terms, with the Northern mercantilist (and free soil) policy redistributing wealth from the slave-holding South to the industrialist North. Writing in the mid-nineteenth century, neither Marx nor Calhoun were able to anticipate vast growth in the role of government (and the expansion of citizenship across race and gender lines) that would create the complex intersecting interests at the heart modern pluralist democracies.

¹⁷¹ This view is exemplified by the American Political Science Association's (APSA) 1950 report, "Toward a More Responsible Two-Party System," which generally lamented the contrast between weak ideologically-diverse US parties and strong ideologically-pure European parties. It is important to stress that the strength of parties is a function of political systems and not of ideology or some other factor. Furthermore, it is important to note that the growth of the Federal government following WWII shifted the power balance further towards independent interests, resulting in an explosion of interest group organizing in the 1970s.

¹⁷² The term interest group pluralism was coined by by political scientist Ted Lowi.

interest group, what we typically mean that they have lots of resources directed at these three parts of the political system. In this way, pluralist power can be seen as the power of wealthy and well-connected insiders. It leverages money, connections, and specialized knowledge to play the game of politics in a direct and normatively acceptable way.¹⁷³ Yet increasingly, social movement organizations (SMOs)—by definition social and political outsiders—are pushing to become pluralist players.

In recent years, a number of social movement scholars have noted the increasing institutionalization of American social movements.¹⁷⁴ Sid Tarrow goes so far as to identify institutionalization as one of the two defining developments of late 20th and early 21st century social movement politics.¹⁷⁵ Movements for causes such as gay rights, animal rights, and environmentalism have built themselves around large professional advocacy organizations that blur the lines between social movement and interest group politics. Many of these groups have annual revenue streams in the tens or hundreds of millions of dollars. They have legal, communications, and campaign departments filled with highly educated full time staff. Press releases and letters to Cabinet Secretaries are more likely the order of the day than sit-ins and protests. When you walk into the corporate headquarters of The Human Rights Campaign (HRC) in downtown Washington D.C. you might understandably think you've wandered into an ad agency, a law office, or perhaps the offices of the U.S. Chamber of Commerce. Even the

¹⁷³ This is not to say that campaign executives, lobbyists, and lawyers are popular in contemporary politics. Rather, they are normatively accepted in that they are legally sanctioned and otherwise institutionalized in the system.

¹⁷⁴ See Dalton, Russell. 2013. *Citizen Politics: Public Opinion and Political Parties in Advanced Industrial Democracies*, 6th ed. CQ Press; Meyer, David. 2007. *The Politics of Protest: Social Movements in America*. Oxford; Skocpol, Theda. 2004. *Diminished Democracy*. University of Oklahoma Press; Tarrow, Sidney. 1998. *Power in Movement: Social Movements and Contentious Politics*. Cambridge University Press; Meyer, David & Tarrow, Sidney. 1998. *The Social Movement Society*. Rowman and Littlefield.

¹⁷⁵ The other defining shift according to Tarrow is the globalization of movements and causes.

famously anti-establishment Occupy Wall Street movement—in many ways a throw-back to the counter culture movements of the 1960s—quickly found itself occupying a \$5,400 a month Wall Street office after its Zuccotti Park eviction (Friedlander, 2011).¹⁷⁶

Movement scholarship has argued that the 1970s saw the rise of the so-called “new social movements,” whose participants draw increasingly from America’s upper middle class and focus on “post-material” issues.¹⁷⁷ Consequently, most contemporary movements can marshal significant money, time, and political expertise in ways that movements of previous eras could not. As Figure 4.1 shows, movement organizational expenditures are now several billion dollars annually, and their growth has significantly outpaced overall US economic growth in recent decades.¹⁷⁸ The movements of today appear resource rich compared to those of the past, but we need to be cautious in assuming that resources automatically translate to pluralist power.¹⁷⁹

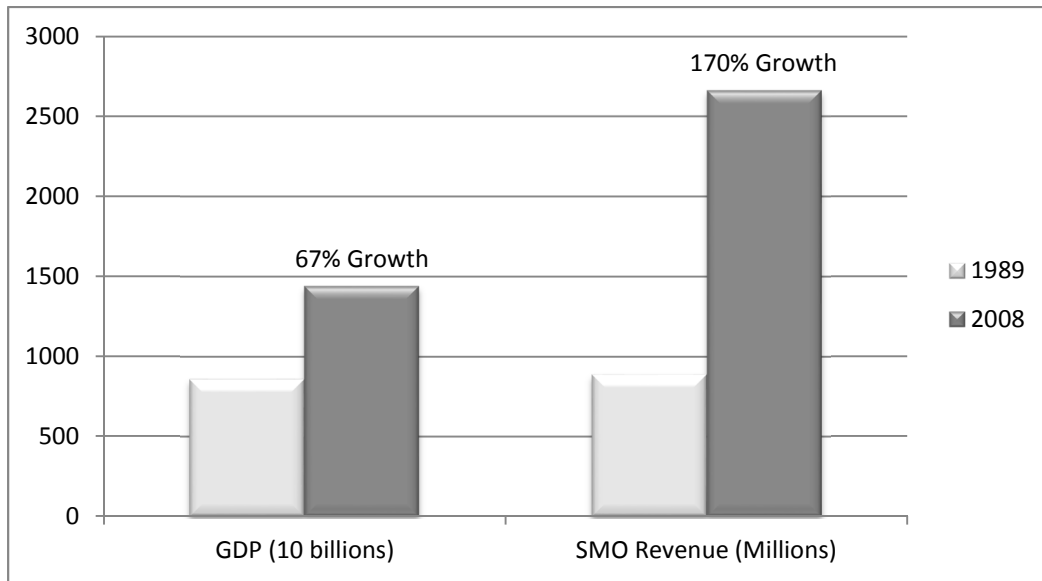
¹⁷⁶ Occupy casts the institutionalization trend in an interesting light because taking to the streets both made the movement unusually captivating and unusually brief. If the streets do not fill up as the weather warms, we may take Occupy to be an example of the danger of shunning formal organization.

¹⁷⁷ See Larana, Johnston, and Gusfield (editors). 1994. *New Social Movements: From Ideology to Identity*. Philadelphia: Temple University Press. There has been somewhat of a pushback against differentiating between “new” and “old” social movements, and in many respects the 21st Century literature has moved on from this debate. I personally do not find much traction in such distinctions, but do find it useful to note the increasing socio-economic status of many movement participants.

¹⁷⁸ For many movements, industries are their main political adversaries. Environmental and animal rights movements are clear examples, but even movements like disability rights look to impose regulatory and administrative costs on business. As such, GDP growth is a useful rough measure of the increasing resources available to other interest groups. The LGBT movement is one of the few that does not necessarily fit this model, as I will address in chapter 6.

¹⁷⁹ Recall the discussion in Chapter 2 about the active versus potential use of power. Dahl calls these power and power resources respectively. Morriss calls them influence and power.

Figure 4.1: Movement Growth v. GDP 1989-2008¹⁸⁰



These numbers suggest that today's SMOs have revenue sources that are sizable, reliable, and expanding. But whether these resources can be harnessed for political purposes and whether they are adequate to compete with traditional moneyed interests are somewhat different questions.

In chapters 1 & 2, I argued that pluralist power is a fully matured part of the American political order, and as such, access to it is dispersed across the political system. Consequently, it is not surprising that we find movements are mobilizing significant pluralist resources. But I suggest these resources offer only limited political opportunities for three general reasons. First,

¹⁸⁰ Data about overall movement resources are for the subset of seven movements discussed throughout: animal rights, environmentalism, anti-abortion, disability right, LGBT rights, minority rights, and women's rights. Because I am working with a subset of movements I try to focus primarily on change in resources over time.

there are **structural barriers**: insiders continue to exert institutional pressure on social movements to channel their resources into apolitical actions. This happens most clearly through IRS oversight of SMOs, FEC campaign finance law, and the First Amendment regime that sustains the selective regulation of political speech. Second, there is **political inflation**: while SMO resources have increased, so too have the resources of traditional interest groups. The amount of money in politics continues to increase at a rate that devalues, and often outpaces, the growth of outsider organizational resources. This point stresses that pluralist strength is largely about relative advantage. Furthermore, as more resources pour into the system from a more expansive group of political players it becomes increasingly difficult for any side of an issue to gain a decisive advantage. Each additional dollar simply has a declining marginal value. Lots of money on each side of an issue is generally a recipe for stalemate, which benefits status quo interests.¹⁸¹ Third, there is **institutional thickening**: When government grows the system tends to become less dynamic, which favors status quo interests. As governing institutions expand and mature they layer commitment upon commitment in terms of allocated resources, administrative capacity, and political capital. These commitments decrease the slack resources available for the new initiatives that social movements seek. Arguably, progressivism is stretched to its limits simply maintaining the current welfare state.¹⁸² Moreover, the growth in the size and scope of programs and regulations increases the disruptive nature of fundamental

¹⁸¹ Baumgartner et al. (2009) develop this argument in terms of lobbying and find significant empirical support for the proposition that money only influences policymakers on the rare case of a severe imbalance. The authors only find such imbalances on issues concerning the poor, providing more evidence in support of Piven and Cloward's position.

¹⁸² This is the tentative thesis Stephen Skowronek has advanced in his work on presidential power and leadership, which calls into doubt the possibility of revolutionary political reforms in the future.

reforms.¹⁸³ Increased disruption tends to quickly undermine political and public appetite for reform.

These three trends can, to a limited extent, work in favor of movements that have already achieved a significant measure of insider status. However, they present daunting barriers to movements aiming for radical policy change.¹⁸⁴ I consider each trend in turn.

Structural Barriers - Regulating Outsider Power

Those in power typically seek to limit challenges by those out of power. This is the kind of axiomatic political rule that brings out the realist in all of us. Sometimes these limits are overt. President John Adams famously tried to silence his Jeffersonian critics with the 1798 Sedition Act, which criminalized public criticism of the President. From 1836 to 1844 the House of Representatives held in place the notorious “Gag Rule” preventing the consideration of abolitionist petitions. The Espionage Act of 1917 (Amended 1918) recriminalized sedition to quash critics of US entry into WWI. From 1910-1920, twenty US states criminalized

¹⁸³ As discussed in Chapter 3, institutional thickening may raise the stakes of disruption, making disruptive power difficult and dangerous to employ, yet strengthening the potential impact if disruptive forces can be harnessed.

¹⁸⁴ As Baumgartner and Jones (2010) argue, long periods of political stability are punctuated by sudden dramatic political shifts. The shifts determine the major frames, players, and institutions that control a policy area during periods of stability. When activists gain an authoritative presence in the policy community they may continue to implement their values through the existing institutional structure. For example, the environmentalist movement of the 1960’s and 70’s was institutionalized in a number of ways, but most clearly in the Clean Air & Water Acts, the creation of the Environmental Protection Agency, and the granting of legal standing to environmentalist groups. During periods of political stagnation during and after the Reagan Administration, environmental goal continued to be implemented by existing bureaucratic and legal mechanisms. The inflexibility in some ways insulates these bureaucratic footholds from challenges by other interests or movements that may have competing policy goals.

“syndicalism” in an effort to suppress agitation by socialists and other political radicals. The 1940 Smith Act and the subsequent era of McCarthyism made communist and socialist suppression a priority at the highest levels of government.¹⁸⁵ These efforts to suppress dissent are rightly notorious, but often counterproductive; perhaps more important are the more subtle rules and regulations that entrench power in bi-partisan and non-issue specific ways.

While there are a wide variety of policies that entrench status quo interests, two areas of policy are of particular importance to SMO influence: *campaign finance regulation* and *nonprofit tax law*. These two policy domains are the major areas of public law restricting and channeling “special interest” participation in American politics. I argue that policymakers have attempted to use both areas to limit interest group influence, but have been disproportionately successful at regulating through tax law, especially IRC section 501(c)3. This disparity is in large part due to some slapdash legislating by Congress and the Supreme Court’s very different First Amendment standards for tax regulations versus campaign finance law. While campaign finance regulations have received an “exacting” or “strict” level of heightened scrutiny, tax regulations have received only the lower level of “rational basis” scrutiny. Consequently, while campaign finance law has been limited by First Amendment protections for political speech and association, the Court has consistently upheld (or ignored) speech restrictions tied to voluntarily assumed tax status. In particular, the Court views 501(c)3 status as a government subsidy, which can be conditioned upon any speech restrictions that avoid content bias. As social movements are disproportionately invested in the C3 form, they are most constrained by the comparative

¹⁸⁵ Piven (2006), especially chapter 6, provides an interesting account of repression and retrenchment by the status quo across American history.

strength of the tax law regime. The following sections briefly trace the diverging development of nonprofit tax regulation and campaign finance regulation.

The Nonprofit Tax Code

The regulation of nonprofit organizations by the IRS dates back to Revenue Act of 1913 and birth of the modern IRS. Prior the passage of the Sixteenth Amendment Congress had no power to level income taxes and the then Bureau of Revenue had little interaction with individuals or corporations.¹⁸⁶ The progressive 1913 Revenue Act laid the first standing income tax on individuals and corporate groups, but included language drawn from earlier tariffs that exempted groups “free of private inurement.” In this way the modern nonprofit was born as something of an afterthought, and no legislative history exists regarding the treatment of nonprofits in the 1913 Act. The subsequent 1917 War Revenue Act allowed individuals to deduct from their gross income contributions made to “religious, educational, scientific, or charitable” organizations, which was extended to estate taxes in the 1918 Revenue Act.¹⁸⁷ The following year the Department of the Treasury clarified with no further explanation that “associations formed to disseminate controversial or partisan propoganda are not educational within the meaning of the statute.”¹⁸⁸ While there are perhaps innocuous interpretations to the Treasury regulation—particularly for the exclusion of partisan political groups—the most obvious

¹⁸⁶ The Supreme Court ruled federal income taxes unconstitutional in 1895’s *Pollock v. Farmers’ Loan & Trust Co.* Up to this point the federal government had only used income taxes as an infrequent temporary measure to finance wars.

¹⁸⁷ Paul Arnsberger, Melissa Ludlum, Margaret Riley, and Mark Stanton. “A History of the tax-exempt Sector: An SOI Perspective,” IRS SOI Bulletin, Winter 2008.

¹⁸⁸ T.D. 2831,, 21 Treas. Dec. Int. Rev. 285 (1919).

understanding of the exclusion of “controversial” advocacy is an attempt to suppress socialist and communist organizations.

In his survey of nonprofit tax law and political activities, Oliver Houck has argued that in the following decade the clearest understanding the 1919 exemption rule was that “propaganda” simply meant ideas that “were unpopular, and against the status quo.”¹⁸⁹ In keeping with this view, we find that temperance, labor, and women’s suffrage groups were amongst those denied exemption on these grounds in the 1920s. In the seminal case of *Slee v. Commissioner* the American Birth Control League challenged the “propaganda” exclusion to the US Second Circuit Court of Appeals.¹⁹⁰ In *Slee*, Judge Learned Hand famously upheld the denial of the League’s tax exemption, writing, “Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.” Hand would go on to note that non-controversial aims like the prevention of cruelty to children and animals may rightly seek legislative redress within the meaning charity, but that groups concerned with “prohibition, the League of Nations, or any other of the many causes in which ardent persons engage” should not expect tax-exempt status.

Senator David Aiken Reed of Pennsylvania pushed to codify the judicial understanding of charitable exemption from *Slee* in the 1934 Revenue Act. Senator Reed was a main proponent of extending veterans benefits following the struggle between President Hoover and the “Bonus Army” of veterans that descended upon the Capital in the summer 1932. Amongst the major opponents of such benefits was the National Economy League, a conservative educational

¹⁸⁹ Houck (2003). Houck further notes that there was a double edged sword at work for many groups because the less “controversial” an issue becomes, the more likely it is to be associated with a partisan position (or indeed an actual political party in the early twentieth century).

¹⁹⁰ 42 F.2d 184 (2d Cir. 1930)

organization. After years of public struggle with the League over veterans issues and tax policy, Reed explicitly sought to alter the tax code to ensure the League's tax exempt status would be removed. The Senator pushed for strict lobbying and electioneering bans, but the Senate Finance Committee struggled to produce language that would strike organizations like the League while sparing traditional charities. In the end, the 1934 Revenue Act prohibited "substantial lobbying" and set aside the issue of electioneering. It was enough to revoke the National Economy League's exempt status, but left significant uncertainty beyond the lobbying issue.¹⁹¹

In 1954 the issue of tax exempt electioneering quietly returned to the Senate. This time the Senate's new Majority Leader, Lyndon Johnson, sponsored an Amendment to the 1954 Revenue Act with no explanation, debate, hearings, or apparent opposition. The Amendment conditioned charitable tax exemption on an outright prohibition on electoral participation. By most accounts, Johnson was furious over McCarthyist accusations made against him by exempt groups including the Committee for Constitutional Government during his 1954 reelection campaign. Accounts differ on the extent to which Johnson actually felt electorally threatened by the Committee's activities in the 1954 Democratic Primary, but it is clear his personal experiences were a primary motivation for the Tax Amendment.¹⁹² The circumstances of the legislation force us to ask, would a more modest prohibition have been produced had the measure been subject to the kind of scrutiny the 1934 Amendment received? Or conversely, had

¹⁹¹ See Houck 2003, pp.19-22 for an excellent account of the development of the 1934 Amendment and pp. 23-29 for an account of LBJ's role in the 1954 Amendment (subsequent paragraph).

¹⁹² See Woods (2007), p. 278 and Dallek (1991), p. 448-451. It appears that as the primary campaign progressed LBJ became less and less concerned about his reelection prospects, but also more and more infuriated by the rhetoric of the challenger, Dudley Dougherty, and his right wing supporters.

Congress been able to reach an accommodation back in 1934 would we have inherited a more moderate regulation comparable to the prohibition on “substantial” lobbying?

The 1954 Revenue Act was the beginning of the modern 501(c) nonprofit classification system we continue to use today. In addition to clarifying the 501(c)3 category, it created the category of “social welfare” organization under section 501(c)4 as one alternative to seeking charitable exemption. However, the parameters of C4 status were not clearly laid out at the time and were only clarified through a number of later IRS rulings. In the mid to late 1950s the nonprofit sector began to use the C4 classification for groups wishing to engage in more lobbying than allowed under 501(c)3, and this use was given increasing support by IRS ruling throughout the 1960s and 1970s.¹⁹³ It wasn’t until 1981 that the IRS clearly specified that electioneering is compatible with C4 status provided it is not coordinated with candidates and is not the primary purpose of the organization.¹⁹⁴

The story that emerges about tax regulation of nonprofit politics is an odd one. It begins with open hostility to dissent in the form of “propaganda” exclusions. In an attempt to codify those exclusions and strike a blow against the troublesome National Economy League, Congress inadvertently produced a modest restriction on charitable lobbying and punted on the question of electioneering. Later, LBJ quietly banned all electoral involvement by charities to spite an electoral thorn in his side. Finally, the IRS was left largely on its own to define C4 requirements

¹⁹³ Rul. 60-193, 1960-1 C.B. 195; Rev. Rul. 67-293, 1967-2 C.B. 185; Rev. Rul. 76-81, 1976-1 C.B. 156

¹⁹⁴ Rev. Rul. 81-95, 1981-1 C.B. 332

through piecemeal rulings. This is not the story of a thoughtful and comprehensive legislative process. It's one of caprice, happenstance, and neglect.¹⁹⁵

When Congress and the bureaucracy combine to produce capricious public policy that touches squarely upon core First Amendment issues of political speech, one expects clarification from the courts. But the very fact that we look at a 1920s Circuit Court ruling like *Slee* as “seminal” speaks to the general neglect the Supreme Court has paid this area of law. The Court has only casually addressed the First Amendment issues raised by the electioneering ban for C3 groups, and we are left mostly to draw conclusions from a handful of cases addressing other tax issues and the regulation of charitable lobbying.

Where the Court has taken a firm position is on content-based tax denials. In 1958's *Speiser v. Randall*, the Warren Court considered California's denial of a veteran's property tax exemption based on his refusal to sign a loyalty oath pledging not to advocate the overthrow of the government (effectively excluding communists).¹⁹⁶ The State argued that the tax benefit was a privilege and its denial raised no speech issues. Justice Harlan disagreed, writing for the eight justice majority, “To deny an exemption to claimants who engage in certain forms of speech is, in effect, to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.”¹⁹⁷ Harlan acknowledges that California may reasonable identify

¹⁹⁵ Perhaps the real exception in this narrative is the 1976 Revenue Act, which attempted to clarify what counts as “substantial lobbying” by allowing C3 groups to choose “h-election” with specific lobbying allowances. A concerted attempt was also made with H.R. 2942, Tax-Exempt Organizations' Lobbying and Political Activities Accountability Act of 1987, to further restrict political activities of charities following nonprofit involvement in the Iran-Contra scandal, but the bill died in committee.

¹⁹⁶ 357 U.S. 513(1958)

¹⁹⁷ The Warren Court generally held that denying benefits was a punitive measure on par with criminal penalties. Most notably, *Sherbert v. Verner* (1962) ruled the denial of unemployment benefits to a woman refusing to work on her Sabbath to be free exercise violation.

classes of citizens who are eligible and ineligible for special benefits, but stresses that these classes cannot be based upon citizens' social and political opinions.

The *Speiser* ruling raised the possibility that the Court might strike down some or all speech restrictions tied to 501(c) organizational forms. However, only eight months later Harlan wrote for a unanimous Court in *Cammarano v. United States*, refusing to apply *Speiser* protections to the denial of income tax deductions for lobbying on public initiatives.¹⁹⁸ The Cammaranos, part-owners of a Washington state wholesale beer distributor, contributed to a trust organized to oppose a state initiative limiting retail alcohol sales to state run stores. The couple tried to deduct their contribution from their gross income as normal business expenses, but the deduction was denied. They claimed the denial violated the First Amendment under *Speiser*, but Harlan sharply distinguished the cases, writing, "Speiser has no relevance to the cases before us. Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets." While the facts of *Cammarano* ostensibly have little to do with charitable lobbying and electioneering, the case firmly established the precedent that government could deny tax benefits over political activities, provided the denials were content neutral.

In 1972, the Burger Court finally considered the question of politicking by a 501(C)3 organization. In *Christian Echoes National Ministry v. United States*, the Court considered whether the revocation of a church's C3 status over lobbying and electioneering violated the First Amendment.¹⁹⁹ The case was ultimately dismissed by the Court, and some commentators

¹⁹⁸ 358 U.S. 498 (1959)

¹⁹⁹ 404 U.S. 661 (1972)

have interpreted the decision as the Court denying 501(c)3 political prohibitions present a First Amendment issue.²⁰⁰ A closer reading of the Court's brief *per curiam* decision shows that Court more or less punted on the First Amendment issue. Essentially, it holds that the District Court only ruled on the application of 501(c)3 in this case, not on the constitutionality of Section 501(c)3. While the lower court decision contained criticism of the IRS understanding of 501(c)3 as applied, the Burger Court denied the lower court opinion raised constitutional concerns about the statute itself. The Court wrote, "This holding restricts freewheeling enforcement and may make it more difficult to revoke certain tax exemptions. But it does not call into question the validity of the underlying statute." Upon dismissal the case was returned to the Tenth Circuit, which then reversed the District Court ruling, writing, "In light of the fact that tax exemption is a privilege, a matter of grace rather than right, we hold that the limitations contained in Section 501(c)(3) withholding exemption from nonprofit corporations do not deprive Christian Echoes of its constitutionally guaranteed right of free speech." The Supreme Court's subsequent denial of *certiorari* to the case could be read as approval of the lower court position, but need not necessarily be read that way. An equally plausible interpretation is that the accommodationist Burger Court had no stomach for considering the implications of *Christian Echoes* for the First Amendment's religion clauses.²⁰¹

²⁰⁰ For example, Houck (2003, p. 43) blends quotes from the Circuit Court decision that followed the Supreme Court's dismissal, treating the lower court statements as views of the Supreme Court. This seems less than sound legal analysis, and does not provide a sound basis for claiming the Court has established a broad precedent rejecting First Amendment implications of nonprofit tax policy.

²⁰¹ Specifically, the Burger Court held in 1970's *Walz v. Tax Commission* that providing 501(c)3 tax exemptions to religious organizations did not violate the Establishment Clause, and 1971's *Lemon v. Kurtzman* stressed that "government entanglement" would be the central piece of the Court's new establishment test. Consequently, the Court could not readily sanction executive and judicial branch investigations to monitor statements from the pulpit for political content. Indeed, the Court's logic in *Walz* depended on the idea that a blanket approval of religious tax exemptions was less constitutionally problematic than forcing the IRS to consider when a group's purpose crossed the line in becoming too

If we leave *Christian Echoes* aside, the Supreme Court's sole statement on political activities by C3 groups is the 1983 case *Regan v. Taxation with Representation of Washington*. In the case, the nonprofit group Taxation with Representation of Washington (TWR) was denied in their application for C3 status because a substantial portion of their activities were deemed to be lobbying. TWR challenged the "substantial lobbying" prohibition as a violation of their First Amendment rights under the *Speiser* precedent. Justice Rehnquist wrote for a unanimous court rejecting TWR's position and citing *Cammarano* as controlling. Rehnquist argues the government has no obligation to "subsidize lobbying," and "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." As such, Rehnquist sees no fundamental rights at stake and applies only rational basis scrutiny to the regulation. Moreover, he accepts Senator Reed's 1934 rationale for the bill that "exempt organizations might use tax-deductible contributions to lobby to promote the private interests of their members."²⁰²

With *Regan* we have our first and best answer as to the constitutionality of conditioning nonprofit tax status upon political prohibitions. Of course we are yet to hear directly from the Court on C3 electioneering prohibitions. While it may seem to be a straightforward application of *Regan's* logic, I would argue that the electioneering ban raises different, and more pressing, First Amendment issues. While one might reasonably extend *Regan's* holding to independent expenditure such as television advertisements, it's unclear in what way the president of a C3

religious. *Christian Echoes* raises the possibility that the IRS would have to consider when a group was not religious enough (in other words when it became too political).

²⁰² In a concurring opinion, Justice Blackmun is joined by Justices Marshall and Brennan in conditioning support for the Court's opinion on the IRS providing no barriers to the formation and use of a C4 affiliate by charities interested in lobbying. Blackmun stresses, "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." Specifically, Blackmun is concerned that C4 affiliates may be prevented from lobbying explicitly on behalf of their C3 counterparts. It appears that the IRS may have somewhat loosened their standards for C3/C4 interconnectedness in part to satisfy this concurrence.

organization saying, “I support the reelection of Barack Obama,” involves a government subsidy to that speech. It is pure speech and its power is almost entirely found in public (and member) regard for the opinions of the speaker. As such, I believe the political restriction in 501(c)3 to be overbroad.²⁰³ My views aside, the Court has made no indication it plans to reconsider the issue. So for our purposes the tax regime facing SMOs solidified in the early to mid-1980s and presented substantial barriers for movements utilizing the C3 nonprofit form.

Campaign Finance

In contrast with nonprofit tax law, campaign finance law has received a great deal of considered attention from Congress and the Supreme Court. Campaign finance law emerged in its modern form with the 1907 passage of the Tillman Act, which prohibited direct contributions to candidates from corporations and banks. The Tillman Act sought to limit the rising influence of interest groups at a time when party control of the political system was in decline. Anti-corruption reforms, chief among them the 1883 Pendleton Civil Service Reform Act, were choking off the patronage system that dominated 19th century politics. As party funds declined, and the use of direct primaries spread, the parties sought to prevent corporations from developing direct financial ties to political candidates. The Tillman ban became the centerpiece of the 1910 Federal Corrupt Practices Act (FCPA), which remained the backbone of US campaign finance law until the 1970s. In that time, the two major additions to the FCPA regime were the 1943 Smith-Connally Act and the 1947 Taft-Hartley Act, passed over the vetoes of FDR and

²⁰³ See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) for foundation of the overbreadth doctrine. See also *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), as discussed in Chapter 3, and *United States v. Stevens*, 559 U.S. 460 (2010), as discussed in chapter 5.

Truman respectively. The former act extended the Tillman ban on corporate contributions to unions. The latter act banned independent campaign expenditures by both corporations and unions.

The generally nonpartisan (or perhaps bipartisan) nature of campaign finance reform is striking. While the Tillman Act was a classic progressive measure and Smith-Connally was clearly anti-labor, both bills drew strong bipartisan support toward the goal of insulating elections from outside contributions. The Taft-Hartley expenditure ban was a further effort to prevent participation in elections by forces across the political spectrum. One might reasonably ask why rational politicians would want to limit their access to business or labor money. Why did a Republican Congress pass Democratic Senator Benjamin Tillman's anti-business regulations? Why did a supermajority of a Democratic Congress pass labor restrictions over FDR's veto? The simplest answer is that incumbent politicians control core political resources and so naturally benefit from restrictions on outside funding and activity. This is particularly true in primary races where challengers typically must secure funds without party support. Encouraging broad direct participation by outside groups is simply an unnecessary risk for most incumbents.²⁰⁴

The second major regime in US campaign finance law began in 1971 with the passage of the Federal Election Campaign Act (FECA). The original 1971 FECA sought to formalize and clarify the FCPA regime, to increase disclosure requirements for candidates and parties, and to extend

²⁰⁴ David Mayhew's *Congress: The Electoral Connection* goes so far as to argue that every decision made by Members of Congress is best understood as an attempt to secure reelection, and this simple argument has remained the cornerstone of congressional studies for half a century. It's not difficult to find examples. Redistricting by legislatures creates safe seats for both parties. Pork barrel politics and logrolling let representatives deliver pet projects to their districts. Staff and franking privileges fuel a perpetual incumbent campaign on the government's dime. And a high public profile allows for early fundraising, which often scares off potentially viable challengers. These incumbent advantages lead to congressional reelection rates regularly topping 90%.

those requirements to political action committees (PACs). While FECA's initial goals were modest, the law was significantly enhanced in the wake of serious violations in President Nixon's 1972 reelection. Nixon had organized his campaign behind his own Committee to Reelect the President (CRP), which rested control away from the party apparatus and opening the door to more direct connections between the candidate and outside groups. In addition to the notorious Watergate shenanigans, 18 American corporations were found to have violated FECA contribution rules. Perhaps most notably, American Milk Producers, Inc. split \$2 million in contributions into hundreds of committees hoping to gain favorable price supports from the Nixon Administration.²⁰⁵ In 1974 Congress amended FECA to place firm limits on contributions and expenditures, limit personal contributions by wealthy candidates, and create the Federal Election Commission (FEC) to enforce the new campaign finance regime. Once again the legislative effort was bipartisan and once again it overrode a presidential veto, this time Ford's. However, significant aspects of the FECA regime have been constrained or undone by the Supreme Court's entry into the fray.

Buckley v. Valeo is a critical juncture in this story.²⁰⁶ The Court had previously ruled on the constitutionality of campaign finance restrictions, most notably 1921's *Newberry v. US* in which federal regulation of state primaries was struck down. However, previous cases like *Newberry* primarily addressed Ninth and Tenth Amendment concerns about the limits of Congress's Article 1 powers. In *Buckley* the Burger Court took a different approach by focusing on the First Amendment. Its 7-1 *per curiam* decision applied a speech plus conduct analysis

²⁰⁵ Hearings before Senate Select Committee on Presidential Campaign Activities, 93rd Congress, 1st Session (1973).

²⁰⁶ 424 U.S. 1 (1976)

following *US v. O'Brien*, which found campaign spending deeply “intertwined” with speech.²⁰⁷ Moreover the speech analysis was buttressed by a freedom of association argument following *NAACP v. Alabama*.²⁰⁸ As such, regulation of both contributions and expenditures were considered under “exacting scrutiny,” which requires campaign finance laws to be “substantially related” to “sufficiently important” non-speech government interests.²⁰⁹ FECA’s contribution limits met these criteria because contributions create a direct relationship with candidates, raising a clearer possibility of *quid pro quo* corruption. Moreover, the amount of speech being limited was seen as minimal since, “[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution.” For the Court, giving \$5,000 or \$10,000 to a candidate expresses comparable symbolic support for their politics. By contrast, the Court felt expenditures created a less dangerous indirect link between candidates and supporters, while “expenditure ceilings impose direct and substantial restraints on the quantity of political speech.” Consequently, “quantity restrictions” on expenditures by candidates, parties, and PACs were found to be unconstitutional under the First Amendment.

In my view, the Court in *Buckley* correctly characterized Congress’s aims in the FECA Amendments as “restricting the voices of people and interest groups who have money to spend,” and to “exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication.” This assessment casts a shadow of illegitimacy across the entire enterprise of campaign finance regulation. Furthermore, Chief Justice Burger’s concurrence suggested the Court would indeed

²⁰⁷ *United States v. O'Brien*, 391 U.S. 367 (1968)

²⁰⁸ 357 U.S. 449 (1958)

²⁰⁹ The Court did stress that expenditure regulation raised greater concerns than contribution regulations. While the Court is somewhat vague in its language, it could be interpreted as suggesting a higher level of scrutiny for expenditure regulations. By contrast I interpret the Court as meaning that contribution regulations more easily pass the exacting standard.

need to go further than it did in *Buckley*. He argued that it was untenable to regulate only some organizational forms because “the First Amendment does not ‘belong’ to any definable category of persons or entities: It belongs to all who exercise its freedoms.”²¹⁰ Burger’s view of *Buckley* would eventually gain a majority of the Court, but not for another thirty years.

In 1978, Justice Powell wrote for the Court in *First National Bank of Boston v. Bellotti*, which ruled 5-4 that corporations had a constitutional right to make expenditures regarding voter initiatives and referendums.²¹¹ The case did not touch on electoral expenditures, but Powell’s rationale affirmed that corporate political speech warranted every protection afforded to the speech of individuals. Justice Powell drew upon Burger’s logic in *Buckley*, writing, “The inherent worth of the speech in terms of its capacity for informing the public does not depend

²¹⁰ For Burger, the use of corporate forms by the press (and visa versa) made it untenable to differentiate between types of speakers based on their organizational form. Drawing parallels to the pamphleteers of the American Revolutionary era, Burger recognized that in the modern communications era political speech and speakers would come from every facet of society (though surely he did not foresee the development of the internet and social media). As such, he saw the free speech and press clauses of the First Amendment working together to create a broader “liberty to disseminate expression” that goes further than *Buckley*. While not in Burger’s time, this vision of *Buckley* would one day win out in the Roberts Court.

The *Buckley* case put the Court and Congress at odds over campaign finance in a struggle that persists to this day. Over the next decade the Burger Court assembled majorities to chip away federal and state campaign finance laws, with Justice White the lone voice consistently opposing the basic logic of *Buckley*.

Justice Blackmun also expressed a fundamental discomfort with *Buckley*’s logic of treating contributions and expenditures differently. Liberal justices Brennan and Marshall were at times more amenable to the regulation of wealthy and corporate donors (*Bellotti*). Justice Rehnquist opposed the incorporation of the First Amendment to the states as concerned campaign spending (*Bellotti*), and Rehnquist and O’Connor generally took a case-by-case approach to each regulation. But these elements rarely produced a pro-regulation majority in the Burger Court.

²¹¹ While the right of corporations to lobby elected officials was long recognized as protected by the First Amendment right to petition the government for redress, the petition clause does not easily extend to the public as lawmaker in referendums. It’s an awkward category combining lobbying and electioneering. Thirty-two years later the Roberts Court would essentially merge the *Buckley* and *Bellotti* logics into the *Citizens United* ruling striking down bans on election expenditures by corporations. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

upon the identity of its source, whether corporation, association, union, or individual.”²¹² As with Burger’s *Buckley* Concurrence, the full impact of *Bellotti* would not be felt for a full three decades.

In 1985, *FEC v. National Conservative Political Action Committee* fully extended *Buckley*’s expenditure protections to PACs.²¹³ Writing for the Court, Rehnquist argued the First Amendment guaranteed “PACs unlimited independent expenditure – to do less would disadvantage collective speech to individual speech.”²¹⁴

The following year saw Chief Justice Burger retire, and among the first cases heard by the new Rehnquist Court was *FEC v. Massachusetts Citizens for Life*.²¹⁵ The case further extended expenditure protections to 501(c)4 social welfare groups that meet the following three specific criteria: 1) it is a political nonprofit organization; 2) It has no shareholders; and 3) It is neither founded by a for-profit corporation nor funded by contributions from for-profit corporations. This standard sought to draw a “bright-line rule” between political and non-

²¹² Importantly, the Court rejected arguments that this right of corporations to speak be limited to issues “materially affecting” the corporation’s business. Powell, argued, “If a legislature may direct business corporations to ‘stick to business,’ it also may limit other corporations—religious, charitable, or civic—to their respective “business” when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.” True to these words, the Court would soon take up the question of speech by these other corporate forms.

²¹³ The specific issue was Congress’s attempt to hold PACs accountable to candidate agreements under The Presidential Election Campaign Fund Act, which promised candidates matching funds contingent upon a voluntary expenditure ceiling. The Act sought to cap PAC expenditures at \$1,000 when supporting a publically financed candidate. The Court found repugnant the idea that Congress would finance one speaker (the candidate) at the cost of silencing a separate speaker (an ideologically aligned PAC), while at the same allowing wealthy individuals unlimited expenditures under *Buckley*.

²¹⁴ For our purposes it is important to note that in *FEC v. National Right to Work Committee* (1982), a unanimous Court led by Justice Rehnquist ruled that C4 organizations like NRWC could only solicit funds for a PAC from “members” with ongoing active ties to the group. This sharply limited the capacity of C4 groups to fundraise for their segregated political funds. The 1986 *MCFL* ruling (discussed in the next paragraph) was in part an acknowledgment that PACs are not in themselves a fully adequate outlet for nonprofit political speech. We see this problem compounded by the fact that C3 charities cannot directly establish PACs and must first establish a sister C4 that can then establish a PAC. These many layers of bureaucracy make nonprofit political speech cumbersome and less effective.

²¹⁵ 470 U.S. 480 (1986).

political organizations, with political organization speech wholly unrestrained. PACs, C4s, and political parties fall on the political side, while businesses and charities fall on the nonpolitical side. Writing for a bare majority, Justice Brennan argued “Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form,” and found no evidence of corruption involving MCFL type groups.²¹⁶

Throughout the twenty years of the Rehnquist Court (1986-2005), the *MCFL* dichotomy between political and nonpolitical groups held. It was affirmed in 1990’s *Austin v. Michigan Chamber of Commerce*, in which the Court refused to extend expenditure rights to for-profit corporations and their non-profit representatives such chambers of commerce.²¹⁷ In 1996’s *Colorado Republican Federal Campaign Committee v. FEC*, the Court reaffirmed that independent expenditures by parties were protected speech, and in a subsequent 2001 case between the same parties confirmed that coordinated party expenditures could be regulated.²¹⁸ Between the *CRFCC* cases, *Nixon v. Shrink* upheld Missouri’s campaign contribution limits, which

²¹⁶ Importantly, the Court also seemed to broaden its understand of how campaign finance regulation burdens speech, writing, “*MCFL* is subject to more extensive requirements and more stringent restrictions than it would be if it were not incorporated. These additional regulations may create a disincentive for such organizations to engage in political speech.” This practical disincentive is deemed sufficient to qualify as a burden or core political speech. The importance of *MCFL* is that it expanded the reach of the First Amendment under *Buckley*, while at the same time reaffirming the government’s interests in preventing business corruption.

²¹⁷ This is not to understate the importance of *Austin*, which shored up a *Buckley* regime that was struggling to adapt the 1970s doctrine to more recent campaign finance realities. Conservative members of the Court immediately took issue with *Austin*’s addition of an “antidistortion interest” as akin to and implied by *Buckley*’s corruption, appearance of corruption, and shareholder rights compelling state interests. Eventually, the Court would reverse itself on the matter and overrule *Austin* in *Citizen’s United v. FEC*. It is, of course, a matter of intense debate whether *Austin* legitimately or illegitimately halted the extension of First Amendment doctrine that had preceded it and subsequently resumed in the Roberts Court. For our purposes the important point is that the Court in *Austin* maintained the status quo in terms of what regulations were constitutionally permissible.

²¹⁸ 518 U.S. 604 (1996), 533 U.S. 431 (2001)

were more strict than FECA allowances.²¹⁹ These rulings maintained the FECA regime in a more or less stable condition for the two decades of the Rehnquist Court.

While the Court was in a holding pattern, by the mid-1990s individuals, parties, unions and corporations had figured out that the speech protections granted by the Burger Court could be exploited to the tune of hundreds of millions of dollars beyond what hard contribution limits would allow. Congress responded with the Bipartisan Campaign Finance Reform Act of 2002 (BCRA), which sought to close the loopholes the Court had opened in its FECA decisions. BCRA, commonly known as McCain-Feingold, contained two main pieces.²²⁰ First, it banned “soft” money contributions and expenditures by parties and candidates.²²¹ In conjunction with this ban, BCRA significantly raised “hard” money contribution limits, reminding us that campaign finance reform legislation typically is intended to channel and redistribute campaign funding, rather than simply to limit it.²²² BCRA’s second major reform banned the use of “issue ads” by unions and corporations, which criticize (or congratulate) a candidate on her issue positions, but avoid being classified as independent expenditures because they do not take an overt position

²¹⁹ 161 F.3d 519 (2000).

²²⁰ BCRA also contained two lesser restrictions that bear mentioning. First it banned contributions by minors. And second, it contained the so-called “millionaires provision” in which a presidential candidate receiving public funding would receive additional public funding if facing a challenger spending over \$1 million in personal funds. Both were subsequently been ruled unconstitutional.

²²¹ These are activities not explicitly related to a specific candidate’s campaign and thus not regulated by the FEC. This includes activities like “get-out-the-vote” drives, state party office expenditures, and advertisements promoting a party and/or its issues. The problem with these activities is that a campaign can use “vote Democratic” advocacy as the functional equivalent of “vote Democratic Senator X” advocacy. As Gerber and Green (2008) have rather convincingly shown that increasing turnout is much more efficient than persuading non-supporters, soft money can be used just as effectively as hard funds.

²²² One consequence of this channeling was to shift significant amounts money from party control to candidate controlled PACs. One might well argue that declines in party power further insulate members of Congress from outside influences, especially in light of the “millionaires provision,” which hamstring wealthy wildcard challengers.

on the election.²²³ Both aspects of BCRA aimed to, in John McCain's words, "limit the influence of special interests in federal campaigns."²²⁴ While who qualifies as a "special interest" is always a matter ripe for debate, BCRA does seem to maintain the FECA focus on controlling business and union influence.

BCRA was predictably met with a slew legal challenges that were consolidated into 2003's *McConnell v. FEC*.²²⁵ The *McConnell* decision sees the Court splitting more clearly on ideological lines than we see in the decisions of the 1980s and 1990s.²²⁶ With Justice O'Connor increasingly shifting her votes from the Court's pro-speech faction to its pro-regulation faction, a solid five Justice liberal majority had emerged by 2001's *FEC v. CRFCC*, and carried the same bare majority into *McConnell*.²²⁷ Justice O'Connor was simply convinced by campaign funding developments that the compelling government interests identified in *Buckley* now applied to new practices. As O'Connor and Steven note in their joint opinion, soft money had increased from 5% of party spending in 1984 to 40% of party spending in 2000. Moreover 60% of that money had come from a mere 800 wealthy and corporate donors in 2000, raising exactly the appearance of corrupt influence discussed in *Buckley*. As for issue advocacy, the Court argues that *Buckley* made no determination on the permissibility of issue ads, and limited itself to

²²³ The class of advocacy groups known as MCFL nonprofits was not initially spared. BRCA's "Wellstone Amendment" included all non-profits in the expenditure ban. The Court in *Beaumont v. FEC* 278 F.3d 261 (2003) narrowed the interpretation of the ban to exclude MCFL groups, a move the *McConnell* ruling affirms. This move was anticipated by Congress, which included the "Snowe-Jeffords exemption" for MCFL groups in the event that Wellstone was not deemed constitutional.

²²⁴ Senate Floor statement, 1-4-2004.

²²⁵ 540 U.S. 93.

²²⁶ Rehnquist, Brennan, Marshall, Blackmun and O'Connor took case by case positions on campaign finance that found each supporting small expansions and contractions of First Amendment protections. The Justices that joined the Court in the late 1980s and early 1990s tended towards more fixed ideological positions. Scalia, Kennedy, and Thomas voted consistently to strike down campaign finance regulations, while Ginsberg, Breyer (usually), and Souter(usually), joined justice Stevens to uphold most regulations.

²²⁷ O'Connor regularly voted to strike down regulations in contentious campaign finance cases prior to 2001. She cast the deciding vote in *MCFL* and joined Kennedy's dissent in *Austin*. Her positions seem to have somewhat straight forwardly responded to the increase in unregulated campaign funding.

considering express advocacy merely to prevent a reading of the 1974 FECA Amendments that was either vague or overbroad. Thus the Court in *Buckley* is said to treat express and issue advocacy separately simply as a “statutory interpretation rather than a constitutional command.” As BCRA now explicitly addresses issue advocacy, O’Connor and Stevens judge the government has a compelling interest in regulating business and union issue ads because they are the “functional equivalent” of express advocacy.

From *MLCF* to *McConnell*, the Rehnquist Court pushed to preserve a version of *Buckley* that extended both the concern for First Amendment burdens and the acknowledgement of money’s potential to corrupt the electoral process. But with the retirement of Justices Rehnquist and O’Connor, two moderate voices on campaign finance issues, the Roberts Court produced a five Justice majority that viewed campaign finance regulation with a presumption of unconstitutionality. Chief Justice Roberts and Justice Alito—along with longtime campaign finance opponents Kennedy, Thomas, and Scalia—have voted as an unwavering block in favor of striking down every major piece of campaign finance legislation they have considered.

The key shift in the Court’s approach came in 2007’s *FEC v. Wisconsin Right to Life*, in which Chief Justice Roberts argues, “Because BCRA §203 burdens political speech, it is subject to strict scrutiny,” and “Under strict scrutiny, the Government must prove that applying BCRA to WRTL’s ads furthers a compelling interest and is narrowly tailored to achieve that interest.” Applying this heightened standard, *WRTL* struck down BCRA’s issue advocacy ban. Roberts argued that “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or

against a specific candidate.²²⁸ More broadly, Roberts warned that “a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny.” In other words, the Government would likely need to present specific evidence of corruption for its interests to be considered narrowly tailored and compelling. Thus in applying strict scrutiny the Roberts Court cast into doubt every campaign finance regulation previously upheld under *Buckley’s* “exacting scrutiny” standard.²²⁹

The conservative bare majority that solidified in *WRTL* carried over three years later into the most significant campaign finance case since *Buckley*.²³⁰ In 2010’s *Citizens United v. FEC*, the Court struck down BCRA’s independent expenditure ban for business corporations, unions, and nonprofits with business connections. Writing for the Court, Justice Kennedy rejected the political/apolitical organization dichotomy that grew out of *MCFL* and justified *Austin’s* refusal to extend expenditure rights to nonprofits with corporate ties. Kennedy argued that the Court’s case law contains both “a pre- *Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post- *Austin* line that permits them.” The latter he views as inconsistent with the Court’s ruling in *Bellotti* and unable to survive heightened scrutiny.

Taking up Chief Justice Burger’s position in his *Buckley* concurrence, Kennedy stresses that the

²²⁸ *McConnell* had previously rejected arguments that the ban was facially unconstitutional, accepting the government’s claim that issue ads were the “functional equivalent” of express advocacy, which could be regulated under *Austin*. Furthermore, Roberts argues that *McConnell* only rejected claims that the ban was not “facially unconstitutional,” not as applied in specific controversies. In addition, Roberts rejected any “intent-based analysis” relying on the context of the speech to clarify its meaning as “amorphous considerations of intent and effect.” By this standard only “magic words” that explicitly state an electoral intent qualify as an electioneering communication. Without the equivalency to express advocacy, the Court was left with no convincing evidence that *WRTL* style speech produced any corruption.

²²⁹ Many of the Court’s decisions in this area make no reference to level of scrutiny, or employ somewhat vague descriptions of heightened scrutiny. But it is significant that the Court’s speech protections strengthen with the first addition of “strict scrutiny” language.

²³⁰ In 2008, the same 5-4 majority ruled BCRA’s millionaire’s provision unconstitutional in *Davis v. FEC*. The language of Justice Alito’s opinion is somewhat less ambitious than *WRTL* or the upcoming *Citizens United*. This is understandable given the fact that *Buckley* struck down a similar provision and *McConnell* likely would have done the same had the complaint not been dismissed for lack of standing.

use of corporate forms by the press (and vice versa) is proof enough that corporate identity is an untenable ground for restricting political speech. Channeling Burger, Kennedy writes, “Rapid changes in technology—and the creative dynamic inherent in the concept of free expression— counsel against upholding a law that restricts political speech in certain media or by certain speakers.” If regulating expenditures by organizational form is unacceptable, any expenditure ban is going to be almost by definition too broad to meet the requirement for narrow tailoring under strict scrutiny.

Kennedy’s opinion appears to require clear and specific evidence of corruption to justify restrictions on political speech. In examining the legislative and judicial histories surrounding BRCA Kennedy finds no such evidence of expenditures buying influence, and “only scant evidence that independent expenditures even ingratiate.”²³¹ In 2014, a plurality of the Court, led by Chief Justice Roberts, took the significant step of extending the expenditure logic to the constitutionality of campaign contribution restrictions. In Roberts’s *McCutcheon v. FEC* opinion, the Court struck down FECA cumulative campaign contribution limits as unconstitutional because of a lack of quid pro quo corruption.²³² It appears likely that that cumulative

²³¹ Kennedy’s opinion is most forceful in rejecting Austin’s “anti-distortion” rationale for limiting corporate speech, which argues that unrestrained business expenditures can purchase quantities of speech that are disproportionate to their public support. But in rejecting anti-distortion, Kennedy also brushes off Buckley’s “appearance of corruption” rationale as overly dependent upon unconstitutional presumptions about the “right” sources and amounts of speech. Indeed, Kennedy implies that quid pro quo corruption is the only reasonable basis for regulating campaign expenditures, and cites the lower court finding that, “The McConnell record was ‘over 100,000 pages’ long, *McConnell I*, 251 F. Supp. 2d, at 209, yet it ‘does not have any direct examples of votes being exchanged for . . . expenditures,’ *id.*, at 560 (opinion of Kollar-Kotelly, J.). This confirms *Buckley*’s reasoning that independent expenditures do not lead to, or create the appearance of, quid pro quo corruption. In fact, there is only scant evidence that independent expenditures even ingratiate.”

²³² While *Buckley* found clear evidence of corruption involving contributions back in the 1972 election, the Court dismissed those examples as an outmoded vestige on Nixon-era government corruption. There is a cause and effect problem with legislation that prevents undesirable activities. If the legislation works it becomes nearly impossible to determine if the legislation is continuing to suppress the activities or if the activities are gone for good. In the latter case the legislation may no longer be justified by a compelling

contribution limit will not be the last contribution ban struck down. but regardless, the end of expenditure bans essentially means that all potential political actors can now spend freely throughout the election process. This new reality was driven home later in 2010 when the DC Circuit Court handed down a unanimous decision in *SpeechNow.org v. FEC*.²³³ The DC Court applied *Citizens United* to the question of PACs that only engaged in protected expenditures, ruling that so-called “Super PACs” were entitled to make unlimited expenditures and *receive unlimited contributions* unencumbered by FECA’s PAC donation limit. As such, FECA no longer provides a substantial barrier to interest group electioneering, a shift so significant we can consider ourselves in a new post-Buckley campaign finance regime.

When we compare the trajectory of campaign finance law and nonprofit tax law we see that Congress has rather consistently sought to place constraints on outside political spending. When seeking to control business and union interests this legislation has been deliberate, precise, and thorough. The 1974 FECA Amendments and the 2002 BCRA legislation were major efforts to produce a desirable *balance* of political voices. By contrast, nonprofit law has been reactionary, vague, and haphazard. It banned “propaganda” by charities in 1917, “substantial” charitable lobbying in 1934, enacted a blanket prohibition on charitable political speech in 1954, and allowed sections 501(c)4 and 527 restrictions evolve through a series of non-comprehensive IRS rulings. The result is that while business and union organizations were prohibited from

interest if it is impinging on civil liberties. In 2013’s *Shelby County v. Holder*, the same five justice majority as in *Citizens United* struck down key provisions of the 1965 Voting Rights Act because there was insufficient evidence that those provisions were continuing to suppress racial discrimination. It’s entirely possible that the VRA was unable to meet heighten scrutiny because it was working too well in suppressing the behaviors that would justify its continued application. Arguably the same logic could be turned against FECA contribution limits.

²³³ 599 F.3d 686 (D.C. Cir. 2010).

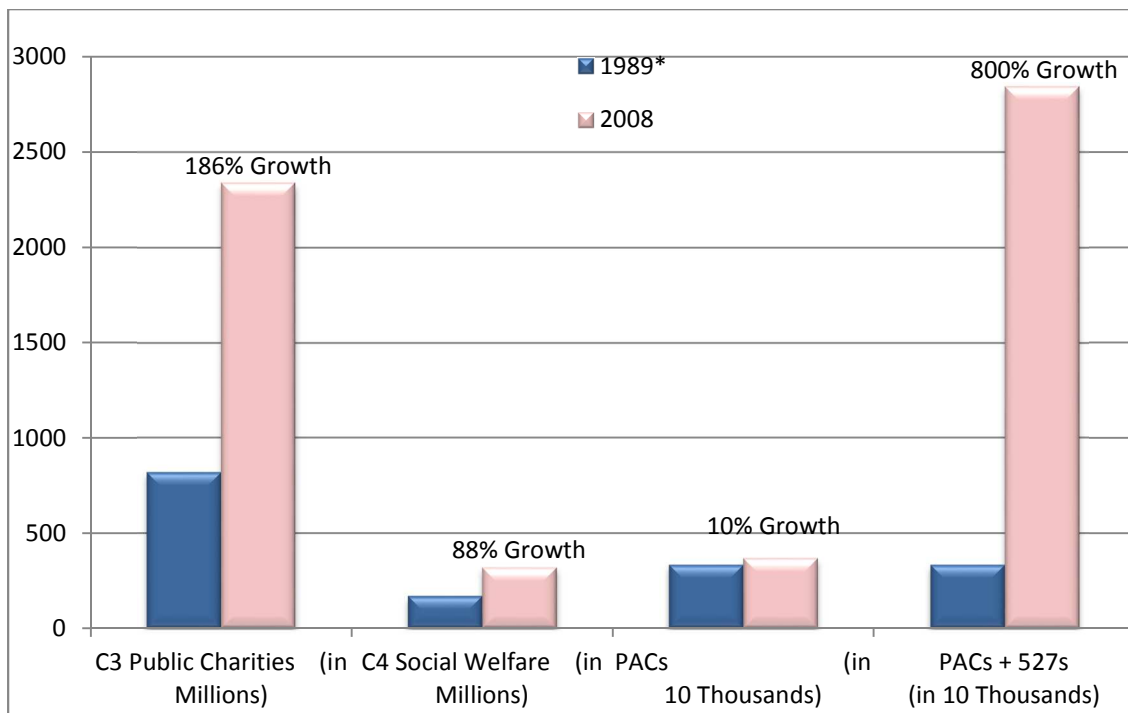
purchasing campaign ads from their general treasury funds, charities were prohibited from even uttering a word of pure speech around elections. But if Congress has held a firmer line against charities than businesses and unions, they have generally sought to contain and suppress all forms of interest group speech.

Like Congress, the Supreme Court applied very different standards of review for IRC restrictions and campaign finance law. The Court's very brief *Cammarano*, *Christian Echoes*, and *Regan* rulings apply regular scrutiny and essentially conclude that nonprofit tax law cannot violate the First Amendment unless it is content-based. By contrast, *Buckley*, *McConnell*, and *Citizens United* are amongst the lengthiest analytical treatments of public policy and civil liberties the Court has undertaken. The result is charitable speech restrictions are upheld whole cloth while campaign finance restrictions have been picked apart in phases. From 1976 to 1985, the Burger Court unleashed direct speech by candidates, parties, PACs, and individuals, while at the same time upholding restrictions on businesses, unions, and nonprofits. This period served to limit the potential influence of movements. From 1986 to 2005, the Rehnquist Court largely maintained the Burger Court regime, but the MCFL loophole created a notable opportunity for social movements that chose to organize in the C4 form. From 2006 to the present, the Roberts Court extended direct speech rights to all organizational forms, opening the flood gates to a tide of business, union, and wealthy individual expenditures.

Viewed in isolation the twenty-year span of the Rehnquist Court could be view as an open period from a political opportunity theory standpoint. MCFL C4 organizations could participate directly in elections while, trade groups, chambers of commerce, businesses, and unions were forced to navigate the unwieldy PAC landscape. But in combination with the IRC ban on charitable lobbying that *Regan* cemented in 1983, the Rehnquist era is better seen as a

conditionally open period. To take advantage of their political opportunities, movements needed to make basic choices about resource allocation. As figure 2 makes clear, SMOs did not invest in C4 or PAC forms during this period.²³⁴ And now that the Roberts Court has unleashed the polity's major moneyed interests, movements are at an even greater relative disadvantage.

Figure 4.2: Movement Growth by Organizational Type



*The earliest comprehensive PAC values available are from 1998. Non-PAC 527 money was not a major factor before the 2004 election cycle and factors only into the 2008 PACs + 527s figure.

How do we explain social movements shunning C4 and PAC organization during the relatively open period from 1986-2007? It is tempting to interpret this trend as indicating little

²³⁴ Movement use of 527 political orgs is largely a post-Rehnquist-Court phenomenon. It is a significant development, but does not change the fact that movements did not make heavy use of political organizations during the long period of relative advantage.

social movement interest in political forms. But a more fruitful approach to this question takes into account that organizational decisions are individually made and must make organizational survival a priority. As James Q. Wilson reminds us, organizations that focus on mission over organizational maintenance will eventually cease to exist, and will cede the field to more self-interested rivals.²³⁵ Just as Mayhew pointed out that Congressmen can only achieve their political aims by securing reelection, institutionalized SMOs can only achieve social change by keeping the lights on and the doors open.

If we consider a group's choice of organizational form purely in terms of financial maintenance, the incentive of choosing the C3 form is obvious. But if we consider those incentives in terms of a non-zero sum mixed-motive game in which two groups are competing for resources, we see that the incentive to choose C3 form is even greater. Figure 3 models such a situation, with each organization having a preference order of $C3/C4 > C3/C3 > C4/C4 > C4/C3$. Not only is C3/C3 pareto efficient and the only Nash equilibrium, but C4/C3 is a sucker's bet in which the C3 group siphons resources from the C4. To put it another way, in choosing C4 form an organization not only must worry about donors decreasing support due to a tax penalty, but they also must worry about donors being poached by C3 groups working in the same movement.²³⁶ These incentives strongly discourage C4 organization.

²³⁵ Wilson's 1973 work *Political Organizations* brings a rational choice approach to bear on the behavior of interest groups and bureaucratic agencies. He further argues that organizations will tend to view increasing resources as a central goal in itself.

²³⁶ In fact, groups must worry about support being poached by groups working for other causes as well. Realistically, donors often support a number of causes from a common checkbook.

Figure 4.3: Financial Incentives of Organizational Choice

	Org B	Organize Politically (C4)	Organize Charitably (C3)
Org A			
Organize Politically (C4)		2	1
		2	4
Organize Charitably (C3)		4	3
		1	3

Preference Order: C3/C4 > C3/C3 > C4/C4 > C4/C3

Nash Equilibrium: C3/C3

Pareto Efficient: C3/C3

Dominant Strategy: C3

Figure 4.3 is of course an abstraction that focuses only on one organizational goal:

maintenance. A clearer picture of organizational choice requires us to also consider the issue of movement power. Figure 4.4 considers organizational choice in terms of its impact on movement power, arguing that a balance of C3 and C4 organizations is likely more effective than investing solely in C3 or C4 forms. The preference order in such a game would be C4/C3 = C3/C4 > C4/C4 > C3/C3.²³⁷ This is a classic coordination game. While communication and iteration easily produce an ideal solution, it is worth pointing out that groups typically only make an incorporation decision once, hindering coordination. As such, there are two Nash equilibria, meaning that there is no dominant choice strategy for each group. So if we consider that organizational maintenance councils a clear strategy of charitable organization, and organizational power/efficacy councils an ambiguous strategy, it is unsurprising that most

²³⁷ The idea is that C3 movements attract more resources than C4 organizations that can be directed towards litigating and other activities that are not restricted by the IRS. As such, a mix of prominent C3 and C4 organizations would be more efficient than using C4 organizations exclusively. While I picture C4/C4 as having more utility than C3/C3, the logic of the game plays the same if we were to assume C4/C4 = C3/C3.

groups see the C3 form as a clear choice. The choice situation is expressed in Figure 5, where each group prefers a C3/C4 outcome, and consequently they produce a C3/C3 outcome that is not pareto optimal.²³⁸ Even though C4 organizing carries the same utility to the group as C3 organizing ($C4/C3 = C3/C3$), if organizational choice is uncoordinated then it remains rational to opt for C3 form. There is no risk and a potential advantage. The C3/C3 position is admittedly a weak and unstable Nash equilibrium in this model, but it is enough to explain a sub-optimal amount of C3 organizing, in spite of the recognized collective advantage of a diverse C3/C4 movement.

Figure 4.4: Power Incentives of Organizational Choice

	Org B	Organize Politically (C4)	Organize Charitably (C3)
Org A			
Organize Politically (C4)		2	3
		2	3
Organize Charitably (C3)		3	1
		3	1

Preference Order: $C3/C4 = C4/C3 > C4/C4 > C3/C3$

Nash Equilibrium: C3/C4; C4/C3

Pereto Efficient: C3/C4; C4/C3

Dominant Strategy: None

²³⁸ I have written the payoffs so that each group prefers all outcomes other than C3/C4 equally. While this assumption is debatable, it seems more accurate than some classic alternatives like the prisoner's dilemma or chicken.

Figure 4.5: Combined Financial and Power Incentives of Organizational Choice

Org B	Organize Politically (C4)	Organize Charitably (C3)
Org A		
Organize Politically (C4)	4	4
	4	6
Organize Charitably (C3)	6	4
	4	4

Preference Order: C3/C4 > C4/C4 = C4/C3 = C3/C3

Nash Equilibrium: C3/C4; C4/C3; C3/C3

Pareto Efficient: C3/C4; C4/C3

Dominant Strategy: C3

A sub-optimal amount of C4 organizing is indeed what we find. If we parse movement data by organizational type it from 1989-2008 it becomes clear that SMO revenue growth has been heavily concentrated in C3 organizations. As Figure 4.2 shows, C3 charities grew 186% over the period studied while C4 advocacy groups grew only 88%. This means that SMOs with the ability to participate in electoral politics grew only slightly faster than the overall economy. Another way of looking at the situation is that in 1989, 17.3% of movement resources were devoted to C4 organizations, but by 2008 this percentage had dropped to just 12.0%. This trend hardly suggests that social movements are working to increase their political presence.

The most important structural barriers movements face are neither hidden nor particularly malicious. Since the turn of the 20th Century Congress has made clear that it aimed to subsidize charity but not “propaganda” and dissent. Over time charitable status was extended to more and more dissenting ideologies, and the propaganda exclusion became tied to political

activities instead of political *ideas*. The tax structure's siren song promises SMOs cold hard cash to forsake key speech rights, which in itself is such a soft form of political suppression that it barely deserves the name. But when we consider that SMOs compete for their lifeblood with other nonprofits within their movements and across the charitable landscape, we see that the incentives to organize charitably are far more pressing. When combined with campaign finance regime that has protected the speech rights of movement competitors, we see developments that have put movements at an organizational disadvantage. And with the Roberts Court removing outside speech almost entirely from FEC control, we are entering a period where charitable speech restrictions have become a profound disadvantage for movements that have invested heavily in the C3 organizational form.

Political Inflation

In the previous section I focused abstractly on speech rights, with expenditures serving as a vehicle for, and a metric of, political speech. I now aim to contextualize that election spending within the political system. Political spending is in many respects an issue of *relative power*, where the absolute amount of money spent by one side is far less important than the amount spent relative to the competition. If an environmental group spends \$10,000 opposing the election of a pro-drilling candidate, that means very different things if pro-drilling trade groups spend \$10,000 vs. \$100,000 in support of the candidate. It also means very different things if the candidates themselves spend \$2 million vs. \$10 million in a given race. Just as regular inflation means your dollar buys less, political inflation means your electoral dollar buys less votes and less influence.

The relevant baseline for social movement pluralist power should be the general expansion of political spending. Movements need to maintain their share of political spending just to stand still. If we look at Figure 4.6, we see that after adjusting for economic inflation, total election spending increased 227% from 1988 to 2008. Moreover, “outside spending,”—the independent expenditures that interest groups, unions, business councils, PAC (super and regular), party committees, and C4s engage in—has increased an astounding 1838% over the same period. These figures mean that social movements need to increase their political resources at a substantial rate just to break even with competing interests.

Figure 4.6: The Growth of Money in Politics (in millions)

	1987-8	1989-90	1991-2	1993-4	1995-6	1997-8	1999-00	2001-2	2003-4	2005-6	2007-8	Growt h
President	168.0		294.1		328.7		428.9		818.4		1,325.7	689%
Congress	835.4	736.4	1,040.7	1,051.5	1,048.5	977.3	1,257.0	1,123.6	1,318.8	1,514.4	1,375.1	65%
Outside²³⁹	na	12.0	30.3	13.9	40.6	22.0	68.3	37.1	510.9	320.8	585.2	1,838%²⁴⁰
Total Election	1,003.4	748.4	1,365.1	1,065.5	1,417.7	999.4	1,754.1	1,160.6	2,648.1	1,835.2	3,285.0	227%
Lobby						1,900.8	1,950.0	2,184.0	2,485.2	2,803.4	3,300.0	74%
PAC²⁴¹	277.0	251.4	281.5	267.3	298.4	290.3	324.8	338.4	354.0	398.1	412.2	42%²⁴²

Figure 4.6 also includes the numbers for lobbying and PAC expenditures, which I considered only passing in the previous section. Despite a very modest increase in overall PAC expenditures of 42% from 1998-2008, this increase is more than quadruple that of SMO PACs over the same period. This is a good example of how slow growth can translate into relative decline in a competitive electoral environment. The figures for lobbying are more difficult to analyze, but look far better for movements. Our sample movements increased their lobbying by

²³⁹ This includes independent expenditures and coordinated activities by 527s, C4s, and PACs

²⁴⁰ This value is quite conservative because I am using the 1992 election as a baseline, as it is the first Presidential election year for which we have reliable outside expenditure numbers. As the 2010 midterm election saw \$489 million in outside spending, I think it is safe to say 2008 would have seen approximately 400 million in spending were it a non-presidential year. As such, we might conservatively estimate a 3,000% increase from the 1989-90 baseline of \$12 million.

²⁴¹ I do not include PAC activity in the "Total" category to avoid double counting money dispersed to candidates or covered as independent expenditures.

²⁴² I use 1998 for the base amount, as that's where our movement data begins.

C3 organizations 153% from 1989-2008.²⁴³ While this growth outpaces the 74% increase in congressional lobbying from 1998-2008, political inflation eats away at half of C3 SMO gains.²⁴⁴

Another important comparison is between SMOs and the larger nonprofit sector. While movements often find their clearest opposition in industry groups, other charities and social welfare groups are their most direct competition for *agenda space*. The overall C3 sector grew 126% from 1989-2008, somewhat less than SMO C3s. But lobbying by all charities increased a whopping 378%, well over double the rate of SMO lobbying growth. During the same period the overall C4 sector grew 185%, also more than double SMO C4 growth. In each case we see the SMO share of political resources losing ground to their direct competitors. The data suggests that movements are actually being crowded out of their own lobbying niche by the American Cancer Society, the United Way, and various other traditional charities, as well as by partisan organizers in the C4 sphere.²⁴⁵

Perhaps the most important way to look at all the political inflation we see is to note that the political system is simply awash in money these days. As Baumgartner et al. (2009) has shown, most policy issues tend to draw coalitions of moneyed interests to both sides of the

²⁴³ C3 organizations are required to report lobbying expenses to the IRS, though the standards for determining the amount spent on lobbying are somewhat ambiguous. If the group president flies to Washington to speak to Congressmen, her airfare might be counted, but none of her annual salary would be. Dossiers distributed to members would be, but the in-house computers used to design the materials would not. By contrast, all these expenses are included in when groups hire outside lobbyists. As such comparisons are inexact and the development of in-house resources can mask lobbying activity.

Lobbying disclosure was not precisely tracked prior to 1998 so direct comparisons should be with SMO lobbying from 1998-2008.

²⁴⁴ Political inflation also outpaces C4 expenditure growth, and C4 organizations often view lobbying as their central mission.

²⁴⁵ I have argued elsewhere that without any electoral leverage C3 SMOs are essentially pleading for support when lobbying. As such, other charities become their most direct competitors for time, funding, etc.

debate, which typically results in static issue frames. Money only buys effective agenda space when it faces resource poor opposition.

Institutional Thickening

Institutional thickening has two elements, which I refer to as “crowding out” and “locking in.” Crowding out refers to existing government commitments limiting the resources available for new initiatives. Locking in refers to the resistance new initiatives receive because they disrupt popular existing programs or influential agencies. The two elements work together to create an inverse relationship between government size and government dynamism. I will deal with each element in turn.

In the last section we considered campaign spending in terms of relative power, suggesting that pluralist power requires outdoing the competition. We also considered that competition does not necessarily mean political opposition because SMOs must compete with each other and non-movement causes for government attention and services. We can expand on this idea by considering that yesterday’s agenda items continue to occupy government long after the initial decision making process ends.²⁴⁶ Since the American public and its political institutions have limited financial and personnel resources, increased interest group competition since the 1970s must necessarily lead to each issue receiving a smaller slice of the pie or new issues finding only an empty pie tin on the table. The latter is more often the case

²⁴⁶ In Chapter 6 I deal with the closely related phenomenon of limited agenda attention caused by policymakers addressing and readdressing items that have gained a permanent spot on the public agenda.

with established interests crowding out newcomers. *Crowding out* is the dominant pattern because many issues like defense, infrastructure, and public lands occupy a consistently large and irreducible percentage of government activity. If we imagine government capacity as hotel capacity, we might say that several floors are occupied by permanent residents, making it tough to get a room. If we envision government as a dinner party, the late arrivals are scrambling for the last open seats at the table. Either way, crowding out ensures that as ongoing government commitments increase there are simply less slack resources for new contenders.

The logic of crowding out is built on two assumptions. First, government has limited capacity. And second, new policy issues arise more quickly than old ones disappear (if they ever do). The first assumption is somewhat easily shown. The three branches of the federal government are headed by a set number of officials. We've had 435 House members since the Apportionment Act of 1911 and had 50 Senators since 1959 when Alaska and Hawaii gained statehood. We've got a single President and a single Supreme Court, which has numbered nine Justices since 1869. At the highest levels these institutions have a relatively fixed capacity. It might be reasonably countered that lower-level personnel have increased with the size of government. While this is true if we look across the whole span of American history, it is not if we consider only the past two or three decades. Non-military executive branch personnel peaked in 1990 with just over 3 million employees, and has steadily declined to a current level of around 2.7 million. Legislative and judicial personnel peaked in 1992 with around 66 thousand employees, and have more or less held that level since then.²⁴⁷ But perhaps government is

²⁴⁷ Data taken from the US Office of Personnel Management website on 10/03/2013.
<http://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962/>

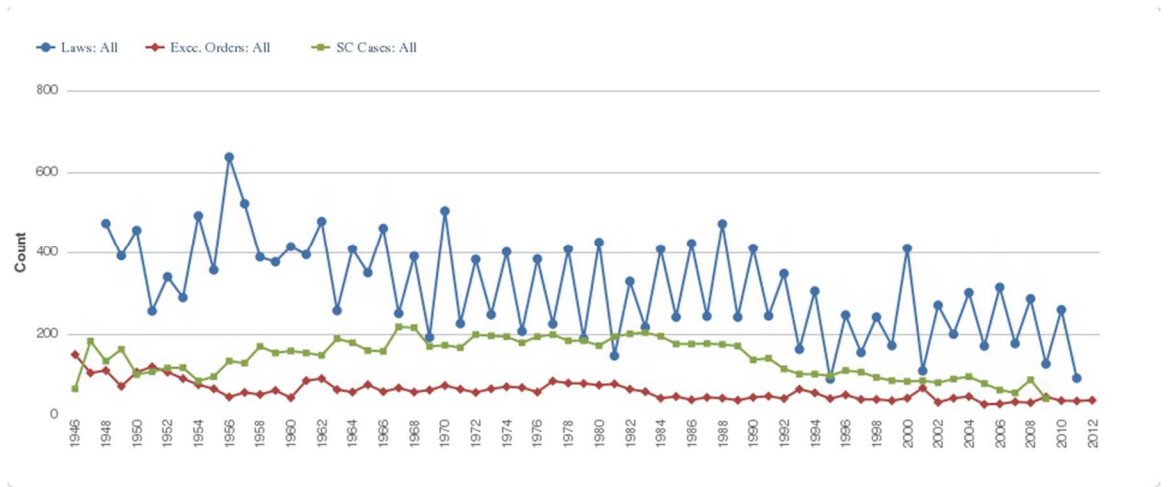
simply more efficient today. After all, the “reinventing government” craze of the early 1990s was all about doing more with less.

A look at government policy outputs suggests that the federal government is actually becoming steadily less productive over time. As figure 4.7 shows, the number of public laws produced by Congress, Executive Orders by the President, and rulings by the Supreme Court are all at or near record lows. The number of Congressional hearings held and bills produced have also fallen steadily since peaks in 1979 and 1969 respectively.²⁴⁸ While some may look to explain this decline in productivity in partisan terms—perhaps as a result of polarization or increased conservatism introduced by the Nixon and Reagan administrations—I follow Baumgartner and Jones in looking for more systemic explanations.²⁴⁹

²⁴⁸ Data taken from the University of Texas Policy Agendas Project website on 10/03/2013. <http://www.policyagendas.org/page/trend-analysis>

²⁴⁹ In Chapter 5, I more directly address Baumgartner and Jones’s argument that institutional capacity limited by the “bounded rationality” of policymakers, which forces them to attend to issues serially. Here I am making a related argument that focuses on resource allocation. Admittedly, when I suggested to Frank Baumgartner my “crowding out” interpretation of this data implied there would be no new cycle of federal productivity, he responded, “huh, I suppose anything is possible.” He and Jones contend that new policy comes in spurts, and that we are merely in a recurring static period before the next flurry of new government. I believe my suggestion that policy productivity may not be cyclical is a contribution of my work, similar to my argument against Tarrow’s political opportunity cycles.

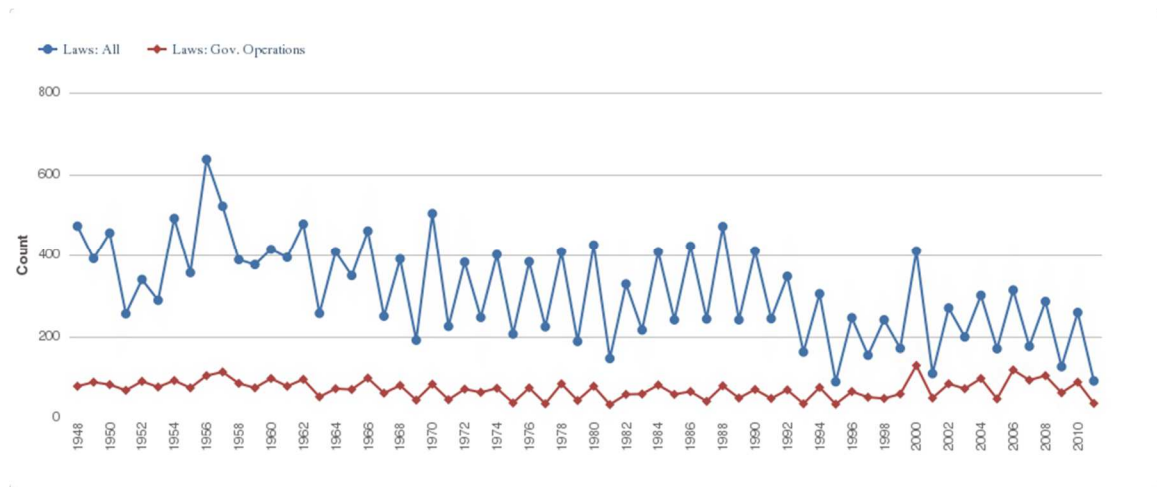
Figure 4.7: Policy Output: Publics Laws, Executive Orders, and Supreme Court Cases 1946-2012



Turning to our second assumption, we must consider the possibility that a constant (or even declining) output of policy does not limit new initiatives provided the government can shed old business. Limited capacity at a hotel or dinner party is no trouble if there is a constant turnover in guests. But that is not what the evidence indicates is happening with federal policy. Instead we find clear evidence of crowding out.²⁵⁰ Perhaps the clearest evidence comes from measuring the percentage of laws devoted to “government operations,” which support ongoing government functions. As Figure 4.8 shows, government operations laws represented 10-20% of US public laws up until the early 1990s. But starting in the mid-1990s this ratio shifts to 25-50% of all laws passed by Congress. As the total number of laws passed has declined, government operations laws have stayed steady or increased in number. Other major policy areas, such as public land & water management, defense, and transportation show similar patterns. For the most part, once an issue becomes public policy it remains an active concern for policymakers indefinitely.

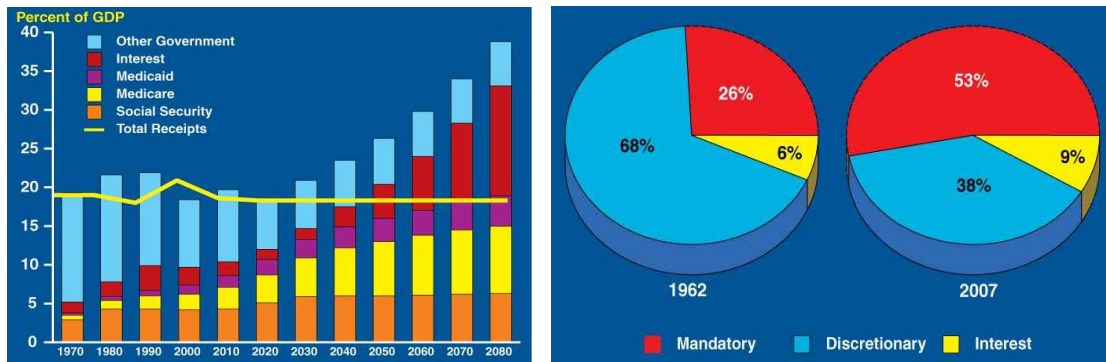
²⁵⁰ Or conversely this could be construed as the result of Locking in, which will be discussed next. I feel this evidence I cite is best interpreted as persistent responsibilities, many administrative, taxing the system. Regardless, both interpretations support institutional thickening as a force constraining new business.

Figure 4.8: Government Operations Laws v. Total Laws



The evidence of crowding out can also be seen in federal budget expenditure trends. As Figure 4.9 makes clear, given current trends, mandatory expenditures on Social Security, Medicare, and Medicaid will increasingly crowd out virtually all other budget items. And as interest rates retreat from the historic lows caused by the 2008 recession, interest payments will also become a significant crowding factor. Moreover, roughly half of discretionary spending goes to defense, which although more flexible than mandatory expenditures is nonetheless resistant to cuts. Taken altogether we have a budgetary picture in which deficits are growing, entitlement spending is growing, defense spending is robust, and *slack resources are increasingly scarce*. It is important to clarify that Social Security, Medicare, and Medicaid are themselves products of past social movement success. The point is that this past movement success is institutionalized in ways that crowd out future initiatives.

Figure 4.9: Historic and Projected Federal Budget Expenditures²⁵¹



While crowding out is part of the story of institutional thickening, it is not the whole story. The growth of government also reduces its dynamism because major policy shifts disrupt an increasingly extensive and complex network of existing programs. These programs are likely popular with the public and form essential commitments of the government coalitions that have enacted and maintained them.²⁵² Public opinion polls consistently show high public approval rates for all major federal agencies, with about 2/3 of Americans approving of agencies like the CDC (70%), NASA (68%), and DoD (65%) and nearly half of Americans approving of the much maligned IRS (45%) (Pew Research Center, 2015). As Skowronek puts it, “More has to be changed to secure a break with the past, and those adversely affected by the changes will be able to put up more formidable resistance.” (Skowronek 1993, p. 56).²⁵³ Movements are especially impacted by this thickening because their policy initiatives typically do not fit neatly

²⁵¹ Taken from the Whitehouse’s Office of Management and Budget website (accessed 10/3/2013). <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/budget/fy2009/outlook.html>. I intend to eventually make my own charts that say the same basic thing, but these get the point across.

²⁵² Certainly the size and complexity of the modern economy and other large non-government institutions also contributes to this phenomenon.

²⁵³

into previous legislative and bureaucratic categories. Take, for example, the Organic Foods Production Act of 1990.

The organic food movement emerged in response to the “green revolution” in mid-twentieth century agriculture that introduced the widespread use of chemical fertilizer, herbicides, and pesticides.²⁵⁴ The movement achieved its major legislative goal with the 1990 Organic Foods Production Act, which on its face appears to create a simple USDA certification for chemical-free agriculture. However, it took twelve years for regulations to be put into effect, in large part because the USDA held so many existing policy commitments. At its core, the USDA is charged with the dual missions of promoting the sale of US agricultural products and promoting the nutritional health of US consumers. Under the former mission there are programs ranging from disaster assistance and crop insurance, to direct payment and federal purchasing. Under the latter mission the USDA tracks foodborne illness, sets standards for school lunches, and funds programs like WIC and Food Stamps. In addition, other sub-missions such as enforcing the Animal Welfare Act and encouraging the conservation of land and water have been layered onto the USDA’s primary goals. Each of the USDA’s seventeen agencies was in some way impacted by the addition of the National Organic Program (NOP), even if merely through indirect budgetary concerns. Moreover, each program impacts multiple interest groups, as well as other federal and states agencies.²⁵⁵

²⁵⁴ Discussion of the “organic food movement” raises the persistent question, “what counts as a movement?” The push for organic food standards can largely be considered a sub-movement of modern environmentalism. Some might consider it a coalition movement drawing support from environmentalist, small farm, and slow/local food movements.

²⁵⁵ The following are some of the questions the USDA faced. Will organic certification hurt sales of conventional agricultural products? Will the cost of certification price out small farmers? Will organic crops be more or less resistant to infestations and weather events covered by government insurance? Will the push for land and water intensive organics undermine environmental efforts to reduce water use and promote reclamation of wildlife habitats? Are organics more or less susceptible to bacterial

In the case of the NOP, the regulatory process was repeatedly derailed by opposition from major agricultural trade groups, anti-GMO environmentalists, and other factions across the political spectrum. After twelve years of conflict, the USDA produced a series of watered-down regulations designed to service corporate organic agriculture while intentionally minimizing the impact of regulations on the broader US agricultural sector.²⁵⁶

Locking in is a story we also see in the legislative process, where the average bill passed by Congress went from two-and-a-half pages in the mid-twentieth century to over fifteen pages long in the early twenty-first century.²⁵⁷ The length of legislation has become a central point of contention in contemporary debates, with the backlash against the 2010 Patient Protection and Affordable Care Act being the prime example.²⁵⁸ The push for the PPACA, President Obama's most significant legislative achievement, was stalled in large part due to a highly effective opposition strategy that focused on the length of the bill. Conservative opponents of "Obamacare" focused relentlessly on the more than 2,000 page length of the House version to

contamination? Should schools be encouraged to use organic products? Should WIC cover organics? Should animal welfare standards be part of organic certification? How will import standards be upheld? Will organics produce WTO non-trade barrier violations? How much of federal R&D and advertising should be diverted to organics? Should the USDA defer to the EPA in deciding what chemicals are unacceptable. Should it defer to the FDA on antibiotics use in livestock and on the safety of genetically modified organisms (GMOs)?

²⁵⁶ See Ingram and Ingram's fascinating account of the organic movement's implementation battle in "Creating Credible Edibles" (in Meyer et al. 2005).

²⁵⁷ Christopher Beam. "Paper Weight," Slate Magazine. August 20, 2009.

http://www.slate.com/articles/news_and_politics/explainer/2009/08/paper_weight.html

²⁵⁸ Perhaps it is odd to choose an example of legislation that passed. However, the PPACA only passed due to an extraordinary effort by House Speaker Nancy Pelosi, who managed to whip House Democrats into passing the Senate version of the law without conference. This despite Democratic control of the White House, House, and a supermajority in the Senate. Furthermore, the final version of the law did not contain many of the most transformational aspects of reform floated in the House. Moreover, it should be noted that in pursuing health care reform, the Obama administration was forced to abandon many other major reforms, including climate change legislation.

argue that comprehensive health care reform is, as *The Weekly Standard* put it, “a project too large, too complicated, too expensive, and *too disruptive* to succeed.”²⁵⁹²⁶⁰

While the Senate version of the PPACA that eventually became law was less than half the length of the longest House version, it was still 25 times the length of the Original 1935 Social Security Act.²⁶¹ Many Republican claimed the length of the PPACA to be an indicator of botched legislating, but a more reasonable assessment is simply that any major legislative effort is likely to impact dozens of existing programs and thousands of pages of existing regulations. It is a structural issue. While institutional thickening may inherently hamstring progressives more than conservatives, it is not a function of contemporary politicians or political parties. It is simply the result of the growth of government. Major governance change is getting increasingly more difficult, and this limits the opportunities for social movements to reshape the system to reflect their goals.

Conclusions

In this chapter I have argued that social movements face an increasingly closed political system, which limits their opportunities to effectively employ pluralist power. These declining pluralist opportunities result from three trends. First, movement organizing is structurally repressed through tax and campaign finance public law. Second, movement resources are

²⁵⁹ Yuval Levin. “Real Health Reform,” *The Weekly Standard*.” Vol. 14, No. 45, August 17, 2009.

²⁶⁰ In addition, the need to bring the insurance industry, small businesses, hospitals, doctors, nurses, labor and other interests on board limited how radical the PPACA could be. Core proposals supported by liberal reform movements—particularly single payer systems and a competitive “public option” competing in private insurance markets—were early casualties of the crowded interest group space. This is explained by Underdal’s Law of the least ambitious program. Marie Gottchalk (2000) offers a fascinating account of how the interests of labor and business undermined the Clinton’s health care reform efforts in the 1990s.

²⁶¹ As judged by word count: 389, 369 v. 15,264. (NOTE: find word count of 65 SS amendment)

drowned out by political inflation in a system where pluralist power is a fully mature part of the political system. And third, institutional thickening favors established interests by rendering the system less dynamic.²⁶²

Despite the closed nature of the system, I will argue in chapters 6 & 7 that some movements have done significantly better at mobilizing political resources. But first, I turn to the issue of plebiscitary power.

²⁶² The three trends will correspond to similar ones in chapters 3 (disruptive power) & 5 (plebiscitary power) and be explained in terms three larger pattern in chapter 2 (theory).

“On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum - whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency. For in the absence of an effective means of communication, the right to speak would ring hollow indeed.”

-Justice William Brennan, *CBS v. DNC* (1973)

“Once politics was about only a few things; today, it is about nearly everything”

-James Q. Wilson, “American Politics, Then & Now” (1979)

Plebiscitary Power: Leveraging the People

In February 2013, Amy Meyer was driving past a Utah slaughterhouse and saw a horrific sight. A downer cow—one unable to walk from the transport truck to the slaughter floor—was being pushed across the grounds by a front-loading tractor. Meyer, an animal rights activist, filmed the scene on her cellphone until confronted by the facility manager and police (Meyer A. , 2013). Ultimately, Meyer was charged with violating Utah’s 2012 Agricultural Operation Interference Act for “without consent from the owner of the agricultural operation, or the owner’s agent, knowingly or intentionally [recording] an image of, or sound from, the agricultural operation” (Oppel Jr., 2013).²⁶³ Meyer was the first activist prosecuted under the so-called “Ag-Gag” laws that have been proposed in 24 states and passed in 7 of them (Pitt, 2014).

²⁶³ Utah Criminal Code 76-6-112

These laws criminalize taking audio, video, and photographs of “animal facilities” or obtaining employment at such facilities for such a purpose. The goal of these laws is to prevent animal rights activists from using undercover investigations and other forms of surveillance against agribusiness and other animal-using industries.

The case against Meyer was eventually dropped, largely because it produced a First Amendment firestorm that involved other movements and free speech advocates like the ACLU. However, the recent spread of Ag-Gag laws remains a significant recent phenomenon.²⁶⁴ These laws seek to constrain the animal rights movement’s most effective tactic for rallying public support, publicizing videos of animal cruelty. They show how the state can directly and profoundly limit the ability of social movements to appeal to the masses. This chapter examines what I term *plebiscitary power: the ability to influence public policy by leveraging public support through mass communications*. I start with a theoretical look at the concept. I then look at how the following three patterns, laid out in Chapter 2, constrain movement opportunities to wield plebiscitary power: 1) the building of structural barriers to outsider participation, 2) political inflation devaluing outsider resources, and 3) institutional thickening rendering the public agenda static and major policy shifts more difficult.

In this chapter I try to focus on systemic shifts in the political order that impact all social movements. While I draw data and examples from particular causes, these are intended to be representative. I leave deeper consideration of particular movements for Chapter 6.

²⁶⁴ Kansas and Montana passed Ag-Gag bills in 1990 and 1991 respectively, but the vast majority of bills have been introduced from 2012-2014.

Movement Protest and Plebiscitary Power

When Michael Lipsky published “Protest as a Political Resource” in 1968, it turned political science conceptions of protest and social movements upside down. Political scientists had long held to a crude understanding of protest that resembled a caricature of Frances Fox Piven’s views on disruptive power.²⁶⁵ That is, protest was largely viewed as mob behavior and considered separate and largely unrelated to traditional politics. What Lipsky showed is that protest can be understood as an appeal by the politically weak for the support of the politically strong.²⁶⁶ Protests are a way of seeking political alliances and political representation, which puts them squarely within the realm of traditional democratic politics.²⁶⁷ The 1968 study considers civil rights protests, and notes that black protesters had neither the resources nor votes to win traditional political battles, but through televised coverage the protesters reached a sympathetic northern white liberal audience that did wield money, votes, and political connections. For Lipsky, movement power primarily functions by *activating sympathetic third parties* through the mass media. My understanding of the plebiscitary power of movements takes Lipsky as a key starting point (Lipsky, 1968).

There is a temptation when focusing on plebiscitary power of equating *attention* with power and not delving deeper into the mechanisms involved. Simply by making a scene, by drawing the public’s gaze, do movements necessarily increase the likelihood of achieving their

²⁶⁵ Early works in social movement theory struggled against the idea that protest was not really a form of politics. William Gamson’s *The Strategy of Social Protest* (1975) is perhaps the best example, along with the piece by Lipsky that I draw on in the next section of this chapter.

²⁶⁶ Lipsky’s full model considers four audiences for protest; 1) organizational members, 2) the broad public, 3) potential third party supporters, and 4) decision makers. All four are significant, but I focus here on the third audience as Lipsky’s real insight into plebiscitary power.

²⁶⁷ Lipsky’s work builds on E.E. Schattschneider’s insights about expanding conflict to third parties. For Schattschneider losers win not through persuading adversaries, but by altering the scope of conflict. When the weak fight the strong, Schattschneider points out that the weak party’s only chance is to involve the fight’s audience and hope they side with the weak **Invalid source specified.**

policy goals? Is *any* type of media coverage better than no media coverage? It seems to me that Lipsky got things largely correct in stressing that protesters wield power through *activating* spectators who are already likely to side with the cause. In many ways Lipsky's views on "activation" are being born out in the contemporary presidential literature on plebiscitary politics. In particular, Canes-Wrone has shown that the President cannot simply bend the public to his purposes, but can successfully leverage plebiscitary power when his views are already popular with the masses, but Congress is unwilling to take action (Canes-Wrone, 2001).²⁶⁸ In other words, the President can activate a sympathetic public, just as Lipsky argued with movements. This makes plebiscitary politics more an *agenda setting* force than a persuasive one

As discussed in Chapters 2 & 4, I largely follow Baumgartner and Jones's punctuated equilibrium model of the policy process. That model posits that public attention and issue reframing are the key factors driving major policy shifts. According to B&J, policymaking is generally confined to bureaucratic issue networks of political insiders and resists change based on outsider interests and ideologies. However, when the broader public focuses its attention on an issue decision-making shifts to the major democratic institutions, particularly Congress and the Presidency (though the Supreme Court also provides a venue shift that is more sensitive to public sentiment and invites direct participation by challengers as litigants and *amicus curiae*). When issues shift venues new interests have an opportunity to reframe the values by which we judge the policy. For example, civil rights protesters were able to capture national attention and

²⁶⁸ As discussed in Chapter 2, as well as the political inflation section of this chapter, Stephen Skowronek's work on the presidency was highly influential on my thoughts about the innovation and cooption of types of political power. His analysis of plebiscitary power, along with the more fleshed out work of Samuel Kernell, convinced me that the presidency entered the plebiscitary period around the time of Nixon's presidency, which I argue is in many ways a cooption of the plebiscitary tactics pioneered in the early 1960s by civil rights activists and other movement actors. Going public and appealing directly to the people are insider strategies that developed in response to a period with insiders lost control of the public agenda when confronted by nationally televised protests.

reframe civil rights legislation a matter of justice, social stability, and as an anti-communist measure needed to strengthen the US position with non-white nations in Southeast Asia and elsewhere.²⁶⁹ Previously, frames of local culture and self-governance (states' rights) had kept many northern white liberals out of the conflict despite their support for civil rights.

To the extent that the policy process is driven by attention and reframing, plebiscitary power has become the central tool of contemporary social movements.²⁷⁰ But when can we expect movement protest and other visible actions to both shift public attention and reframe an issue? A good rule of thumb is that issues grab public attention when they are dramatic or when they impact people directly.²⁷¹ Violence, confrontation, and danger are dramatic. Protesters clashing with police is nearly always deemed a news worthy event. And when protest events encroach upon the places people live, work, commute through, the impact becomes personal.²⁷² Celebrity, spectacle, and novelty can also be dramatic. When a protest involves Alec Baldwin or nude bike riders people are interested. But do violence, nudity, and Alec Baldwin provide the proper framing for movement issues?

²⁶⁹ I follow Klinkner and Smith's account of the civil rights movement in *The Unsteady March*. The K&S account notably shows the way plebiscitary and disruptive politics are often intertwined.

²⁷⁰ More precisely, plebiscitary politics has become a central tool of all actors on the political scene. My work in this chapter draws heavily on Samuel Kernell's book *Going Public*, and to a lesser extent Skowronek's *The Politics Presidents make*. Both work argue that plebiscitary politics emerged in the 1970s (with Nixon) as the primary form of power wielded by presidents. As argued in Chapter 2, I see the presidency as the primary institutional adapter of power strategies pioneered by outsiders, in this case principally the civil rights movement. I deal with the consequences of this cooption in this chapter's section on political inflation.

²⁷¹ Ruud Koopmans argues that media uses three "selection mechanisms" when choosing to cover movement protests: visibility, resonance, and legitimacy **Invalid source specified**.. Visibility roughly corresponds to my category of "drama" and resonance to "personal impact." I believe legitimacy bears primarily on the nature of the coverage and the frame employed.

²⁷² I would also argue that one reason protest around issues already on the policy agenda is news worthy is because people are better able to see the protest as impacting real laws in the immediate future. For example, the 2009-2010 health care reform debate promised to directly impact millions of Americans, making Tea Party protests more clearly relevant to people's lives.

Positive framing primarily concerns focusing on the aspect of the issue on which your side wins. Remember, plebiscitary power is more about activation of existing views than about persuasion. As John Zaller has convincingly shown, every issue has multiple aspects, and rational people will naturally take different positions based on which aspect is most salient to them (Zaller, 1992). When the Westboro Baptist Church holds anti-gay protests, one may naturally oppose their views but support their free speech rights. News coverage with a *legal* framing will lead to defense of the protesters, while coverage with a *moral* framing will produce condemnation of the protesters. Baumgartner et al. has shown that the anti-death penalty movement has made its greatest strides by shifting the framing of the debate to the costs of maintaining capital punishment and the appeals system required to administer it. As conservatives began to focus on the tax burden of execution (an aspect they had clear negative feelings about) instead of the need for retribution (an aspect they had generally positive feelings about), support for the death penalty cratered in many states (Baumgartner, DeBoef, & Boydston, *The Decline of the Death Penalty and the Discovery of Innocence*, 2008).

A central dilemma faced by movements is how to create drama and impact the public without simultaneously producing an unfavorable framing. Todd Gitlin's classic work, *The World is Watching*, documents how the desire to hold and expand media attention led the leadership of Students for a Democratic Society (SDS) to pursue increasingly radical tactics. This radicalization eventually led to public backlash, group fragmentation, and the breakup of SDS. Jackie Smith, John McCarthy and colleagues have empirically shown that protest behavior deemed more "news worthy" is least likely to frame movements in a positive light (Smith, McCarthy, McPhail, & Augustyn, 2001). The essential problem appears to be that as tactics become more aggressive and compelling, the nature of the tactics becomes the dominant media

frame. Furthermore, as protest has been increasingly institutionalized as a commonplace and orderly form of expression, the public has increasingly viewed aggressive protests as illegitimate.²⁷³ Consequently, while American politics is undoubtable awash in plebiscitary power, and that power remains essential to the prospects of social movements, movement opportunities to exercise that power appear increasingly constrained.

I turn now to the three patterns of political development that I argue constrain movement political power: the persistent pattern of structural constraints, the recurring pattern of political inflation, and the emerging pattern of institutional thickening.

Structural Constraints

In contrast to disruptive and pluralist power, plebiscitary power faces far fewer structural constraints. The obstacles movements face when attempting to go public are largely subtle and indirect. The proliferation of “Ag-Gag” laws discussed at the start of this chapter are not the norm, but remain a significant exception.²⁷⁴ More pervasive are laws and policies that decrease the visibility of protest and reduce movement access to media, as well as the First Amendment speech and press regime that sustains these laws and policies. While Ag-Gag laws

²⁷³ This idea is explored in Chapter 3, where I argue that the state’s protection of passive forms of expressive protest undercuts moral legitimacy of disruptive protest in the public’s eyes.

²⁷⁴ Another comparable issue is the right to film police, which impacts a wide range of movements, but is most centrally related to police brutality and civil rights. While some states are passing laws mandating body and vehicle cameras for police, Illinois is considering Senate Bill 1342, which specifically bans recording police and prosecutors under eavesdropping law.

draw significant attention, there is little public concern over more general state-by-state recording laws. These laws often target paparazzi, “shock jocks,” or pornographers, but they have significant indirect impacts on movements. In 12 states it is illegal to record audio or video unless all persons involved have consented to the recording (Reporters Committee for Freedom of the Press, 2012). Such laws make undercover recording virtually impossible. All 50 states have laws regulating hidden cameras to various degrees (private property, unattended, with or without audio, etc.), with most states criminalizing recordings in which the recorder is not a party. The FCC bans recordings of phone conversations without full consent. And various states and the FCC provide criminal and civil penalties both for making illegal recordings and for broadcasting/distributing illegal recordings. Such penalties are particularly significant because even when individuals are willing to break recording laws, distribution penalties can sever their access to SMO and media outlets.

Beyond the regulation of recordings, state policies dramatically shape the nature of protests, and thus how those protests appeal to media. As discussed in Chapter 3, the emergence of Public Order Management Systems (POMS) has removed most violent and volatile conflict between protesters and police. This lack of visible police repression denies movements a major source of drama that produces sympathetic issue frames. Images of civil rights protesters being assaulted by southern mobs and police armed with clubs, fire hoses, and attack dogs produced national and international outrage and generated a powerful moral framing for civil rights demands. While a legal/constitutional frame had produced some support for southern claims states’ rights against civil rights claims of equal protection, a frame focused on morality activated broad support for civil rights demands. This effect was spread and magnified by coverage on national television news and national newspapers, which reached sympathetic

northern white voters. POMS have greatly reduced the amount of televised police violence that today's protesters can generate, even in their most aggressive and provocative actions.

In the same vein, the Occupy movement made its most significant gains, in terms of sympathetic media attention, after a University of California at Davis police officer was videoed pepper-spraying a docile group of seated protesters (Seelye, 2011). The Occupy sit-in on a liberal college campus would have garnered little local attention, let alone a national and international spotlight, had police not used excessive force. And because the coverage was framed in terms of police misconduct, movement claims of elite oppression were front and center. While this incident proves POMS can never fully remove the unpredictable human element from police-protest interactions, rest assured UC Davis strengthened their officer training and SOPs to prevent any such future fiascos. Indeed, one can assume that every police force in the country was hard at work in November 2011 reviewing and revising their own crowd control policies. By rendering protest routine and boring, police have forced protesters to stir the pot themselves, reliably generating media frames that focus on protester misbehavior.²⁷⁵

While the state has generally not been heavy-handed in suppressing movement access to media that does not mean that state policies are neutral. Government creates the framework

²⁷⁵ While the 2014 "black lives matter" protests following the deaths of Mike Brown in Ferguson, Missouri and Eric Garner in Staten Island, NY (and lack of officer indictments that followed) may seem to be examples of police violence, they are not violence directed at protesters. While initial displays of militarized police in battle armor and assault vehicles in Ferguson did create useful plebiscitary frame that captured national sympathy, police quickly demilitarized their response to produce better optics. Despite vigorous and sustained protests across the country, leading to hundreds of arrests, there was notably little evidence of police violence against protesters. This allowed a significant amount of media coverage to be framed around the "Ferguson riots" and the unsympathetic behavior of some protesters. My argument is not that conflict between police and protester can be eliminated, but only that police have come to understand that POMS prevent the stoking of public outrage and encourage the media to move on to pressing matters like the "Black Friday" shopping coverage that quickly supplanted Ferguson news.

within which media operates and exercises significant control of mass communication through the FCC. Four trends have combined to create a media climate unfavorable to political challengers. First, the federal government has moved away from communications regulation that requires media companies to provide public access. This trend has been exacerbated by technological shifts away from broadcast media that have broadened access, making these equal time regulations appear obsolete. Second, the U.S has largely abandoned its commitment to providing media access through public broadcasting. Third, the government has allowed intense media consolidation that has not been undercut by recent developments in Internet and social media communication, which instead have produced a troubling coexistent trend toward media fragmentation. And fourth, the Supreme Court has interpreted the First Amendment to advance the first three trends and to provide no rights to media access under the free press clause. I will look at each of these trends in turn.

Public Broadcasting and Public Interest Requirements

In 1912 the Titanic sank in the North Atlantic Ocean killing more than 1,500 passengers. The tragic event played a central role in framing broadcast regulation as a matter of public interest. While Congress had recently passed the 1910 Wireless Ship Act, mandating large vessels be equipped with radios, there remained little regulation of how those radios, and the spectrum they broadcast on, would be used. Arguably, radio interference and unmanned radio equipment prevented ships from aiding the Titanic in a timely manner, costing hundreds of lives. In response, Congress passed the Radio Act of 1912 and got into the business of managing America's broadcast spectrum (McGregor, 2012).

As commercial and recreation radio exploded in the 1920s, it became clear that the federal government needed to take a heavier hand in managing access to spectrum, as signal interference was becoming bad enough as to raise doubts about the viability of radio as a medium of mass communication. In 1927, Congress passed a new Radio Act, which established explicitly that the public airways belonged to the public, but also established that broadcasters would not be regulated as common carriers. This meant that while the state would dole out access to spectrum, licensees would remain free to deny broadcasting access to whomever they chose. So while phone companies could not withhold services from homes with communist occupants, radio stations could refuse to sell advertising time to communists or any other group they disagreed with or found offensive. The Communications Act of 1934 would establish the FCC, which continues to oversee the relationship between government and media licensees to this day. Over the years, new technologies would be included under the FCC's jurisdiction, most importantly, television.

While broadcasters were not made subject to strict common carrier restrictions, the Radio Act directed that the public spectrum be regulated to serve the "public interest, convenience, or necessity." In practice this meant revoking licenses for those who abused the public airways, such as snake-oil salesmen giving dangerous medical advice over the radio.²⁷⁶ In 1946, the FCC attempted to formalize public interest requirements in a "Blue Book" issued to licensees. While significant for its precedent, the Blue Book never resulted in any license revocations and was abandoned in 1960 for a stricter "formal programming statement" that included 14 programming categories that must be provided by licensees, which notably included the category of "service to minority groups" (McGregor, 2012).

²⁷⁶ *KFKB Broad. Ass'n v. Fed. Radio Comm'n*, 47F.2d 670,671 (D.C. Cir. 1931)

While 1960s and 1970s saw the FCC attempting to insure that radio and television provided broad access to many groups and had significant “public affairs” content, the 1980s saw a dramatic policy reversal under President Reagan. In the hands of Reagan’s FCC Chairman from 1981-1987, Mark Fowler, the FCC adopted the philosophy that the telecommunications landscape had grown diversified enough that market competition would effectively provide for the public interest. While the Reagan administration made sure that the FCC would continue to prevent the use of the word “fuck” on radio and television, positive content requirements were largely dropped, and the “Fairness Doctrine” requiring equal time for political candidates was scrapped.²⁷⁷ As public interest regulation narrowed to focus on public decency, it provided increasingly little benefit to political outsiders. Indeed, the restriction of shocking content serves only to restrain movements in their quest to capture public attention through drama and conflict.

FCC Chairman Mark Fowler argued that the emergence of cable television had completely reshaped the broadcast landscape and rendered the existing public interest regulatory regime obsolete. While conservative politics clearly drove this deregulatory swing, the technological shift away from over-the-air communications is certainly a key contributor to the trend. With the emergence of cable and satellite technologies, the share of mass communication carried by broadcast television and radio continues to decline. According to the National Association of Broadcasters, only 15% of households now rely solely on over-the-air broadcast for their television needs.²⁷⁸ At such low levels, applying public interest requirements

²⁷⁷ By positive requirements I mean content stations must provide, in contrast to content they must avoid. As in Isaiah Berlin’s use of the terms positive and negative liberty.

²⁷⁸ A somewhat higher percentage supplement cable or satellite with broadcast. This mixed use seems to have somewhat stabilized broadcast viewership, not is small part due to the adoption of HD broadcasting and the persistence of live broadcast sports.

merely to spectrum-based communications is no longer an effective means of promoting public interest media goals. Faced with this change, the federal government could have attempted to extend its broadcast regulatory approach to non-broadcast technologies, but instead has largely chosen to abandon the regime. Certainly such a move would raise thorny First Amendment issues, which I will turn to shortly, but the political climate of the 1980s prevented the FCC from pursuing this potential path.

Abandoning Public Broadcasting

An alternative to forcing commercial media companies to provide access to political outsiders would be for government to simply provide that access itself. This is not to say that government should be the main source of news and information—ala the Ministry of Truth in *1984*—but that establishing and financing public broadcasting can create open media channels that focus exclusively on serving the public interest. Public broadcasting is a major part of the media landscape in most developed countries, but is only a marginal player in the United States. Comparing developed nations, Hallin and Mancini note that public broadcasting accounts for just a 2% share of America’s television viewership, by far the lowest of any country studied. By contrast, in most European countries public broadcasting captured 30-50% of viewership, with only Greece below the 20% mark. The U.K. and its flagship BBC came in at 39% and Denmark topped the list at an astounding 69% (Hallin & Mancini, 2004). So why is public broadcasting such a minor part of the American media landscape?

The United States has a long broadcast history, stretching back past FDR’s famous fireside radio chats. But it was LBJ’s Public Broadcasting Act of 1967 that first established the

Corporation for Public Broadcasting (CPB) as a government created and supported entity independent of the federal government. CPB's primary function is to distribute funding to the Public Broadcasting Service (PBS) and its local stations, National Public Radio (NPR), Public Radio International (PRI), and various smaller public broadcasting entities. In 1967, Congress appropriated a mere \$5 million for the CPB, but that amount quickly grew to \$103 million by 1977. In the nearly 40 years that followed, CPB funding has grown to \$445 million, which is an inflation adjusted increase of just over \$40 million (Corporation for Public Broadcasting, 2014). So essentially, as the media landscape has gone from the basic programming of the big three (ABC, NBC, & CBS) to a vast array of billion-dollar major, minor, and specialty networks, the federal government has left public media's funding unchanged.²⁷⁹ A central point of this project is that in the struggle for power, if your competitors are moving faster than you are, you are really moving backwards. So why has support for public broadcasting been so stagnant?

As with the FCC's public interest regulatory regime, funding for public broadcasting was in large part a casualty of the Reagan revolution. 1983 is the first year in the history of the CPB that funding declined, in this case from \$172 million in 1982 to \$137 million the following year. In 1984-1986, the Reagan administration included further cuts in public broadcast funding in their annual budget proposal. A second decline in CPB funding occurred from 1995-1999 during the Speakership of Newt Gingrich (Corporation for Public Broadcasting, 2014). More recently, ending funding for public broadcasting has become a salient issue for the Republican base, with Mitt Romney famously saying during his first presidential debate with Barack Obama, "I like PBS. I love Big Bird" but that he would "stop the subsidy to PBS" if elected (Stelter & Jensen, 2012). As conservative efforts succeed in halting or rolling back government support of public media,

²⁷⁹ The Sports Network ESPN alone is worth approximately \$50 billion dollars **Invalid source specified..** More values of media? Maybe just the big three

these potential outlets for political challengers fall further off the radar of more and more Americans.

Media Consolidation & Fragmentation

The Reagan Administration argued that government involvement in the media industry was unnecessary and unfruitful because the market would provide communication channels for all voices and listeners. However, the promise of diversified media has been somewhat undercut by the concentration of media under a few corporate entities, as well as the attrition of investigative and local reporting. In 1983 the largest 50 media corporation controlled a majority of media outlets (as measured by audience), but by 2003 this number had fallen to just five corporations: Time Warner (now owned by Comcast), Disney, Viacom, News Corp (now News Corp and 20th Century Fox) and Bertelsmann (Bagdikian, 2004). These names shift periodically due to mergers and acquisitions, but the consolidation trend has held steady. Big corporations are not inherently evil boogymen, but this concentration of media power under major corporate control presents some problems for political outsiders.

The first problem is that massive corporate conglomerates create conflicts of interest. The NBC comedy *30 Rock* had a running joke that NBC's (now former) owner GE required the network to promote their products and bury stories (or jokes) that played up GE corporate scandals. While fictional, the show raises a valid point about conflicts of interest and the micromanagement of parent companies. This critique is most often made against News Corp, where CEO Rupert Murdoch has been accused of managing his properties to advance a personal

conservative agenda and minimize personal scandals.²⁸⁰ There is certainly some truth to these allegations, but perhaps more important are the biases that all major corporations share. These can include biases against taxation and regulation, which can cut into bottom lines, as well as a bias toward “infotainment” to attract consumers and sell advertising space.²⁸¹ Contrary to popular opinion, the primary bias in media is bottom-line bias, not partisanship.

As FCC Chairman Mark Fowler’s “market forces” have gone to work on a deregulated media landscape, one of the main result has been an increase in soft news stories about sports, entertainment and human interest matters, along with shrinking sound bite coverage of social and political issues.²⁸² As James Hamilton argues, an economic theory of profit maximization in news production predicts that programmers will lean toward soft news offerings because advertisers value this content more and because it costs programmers less to produce. Hamilton argues that hard news is generally a public good that is underprovided by the market and regulatory policy and public media can successfully increase public exposure to important social and political issues (Hamilton, 2003).

Hard news gathering is expensive and increasingly lacks economic viability for many outlets. This means fewer investigative reports and less coverage of legislative and bureaucratic

²⁸⁰ The documentary *Outfoxed* (Brave New Films, 2004) is perhaps the best known case for Murdoch micromanaging his news assets, particularly Fox News. On personal scandals, see *Hack Attack: The Inside Story of How the Truth Caught Up with Rupert Murdoch* **Invalid source specified..**

²⁸¹ The case that media bias is less about ideology and more about finances is perhaps best laid out in Eric Alterman’s book *What Liberal Media?* **Invalid source specified..** Alterman argues that while some news persons may have liberal biases, corporate ownership/management bias is far more influential. He further argues that this bias tends to be business and status quo friendly because of both the interests of ownership and the interests of advertisers.

²⁸² It has been well documented that news coverage of electoral campaigns dropped from an average candidate clip of 43 seconds in 1968 to just 9 seconds per clip by 1988 **Invalid source specified..** It has further been show that coverage has since remained attenuated and shifted to rely far more heavily on “image bites” than verbal communication **Invalid source specified..** Such trends in news coverage are not limited to elections alone, and generally favor familiar issue frames, as well as frames focusing on the tactics of protestors.

issues, particularly at the state level. A recent report from Pew Research's Journalism Project found that the number of full-time newsroom staff at newspapers fell 30% from 2003-2012 and the number of full time Statehouse reporters declined 35% from 2003 to 2014 (Enda, Matsa, & Boyles, 2014). And when the fat (and muscle) are trimmed at news organizations, it is often investigative reporters that are first to go. These trends make it hard for movements to take advantage of frequent and deep news attention to their issues, leaving them with sporadic coverage using ready-made issue frames.

During the same period the media landscape has consolidated, it has also diversified and fragmented. On the surface these trends appear contradictory, but they merely describe two coexisting sectors of media. While the majority of media interests are controlled by a shrinking handful of big companies, the minority share has fractured into a dizzying array of new and niche media that blurs the lines between news reporter and news consumer.

Most Americans and movement activists view the rise of Internet and social media communications as a democratizing force that benefits political outsiders. There is certainly much truth to this narrative, but there are also reasons to remain skeptical. While the Internet creates substantially lower entry costs for media production and dissemination, it also dramatically fragments audiences, which limits the ability to capture mass audiences, promotes self-selection bias, and in the end allows traditional media interests to dominate Internet news as well.

If you run an SMO in the 21st century then you have a website, a twitter account, and a facebook page (at least one of each). You probably also post videos on Youtube and take advantage of a wide variety of other internet and social media platforms. The advantages of

these new media forms are obvious. Movement organizers can communicate instantly with existing supporters, recruit new supporters through “links” and “sharing” by supporters or media outlets, and movement content can “go viral” saturating the tech savvy public. The gay rights movement saw a perfect storm of online activism surrounding the issue of gay marriage in 2014. The Human Rights Campaign (HRC) was able to reach mass audiences with its campaign asking supporters to change their Facebook profile pictures to a red version of the HRC “=” logo.²⁸³ Millions of Facebook users participated, bombarding their friends with a steady stream of HRC logos. The campaign successfully focused mass attention on the issue of gay marriage and reframed the two 2013 gay marriage Supreme Court cases under the frame of national public opinion (Penney, 2014). That is to say, HRC helped focus debate on the fact that in the past few years a majority of Americans had come to firmly support gay marriage, as opposed to legal issues of states’ rights and equal protection. It has been argued that the logo campaign did successfully grow the gay rights community and put the issue front and center for its supporters (Jones, 2013). I would go so far as to argue that the social media work of HRC in general, and the logo campaign in particular, impacted judicial politics on the Supreme Court.²⁸⁴

While the benefits of social media and online communication are real, so are the limitations. Perhaps the central overarching limitation is media fragmentation. As more and

²⁸³ The HRC logo is a yellow equal sign on a blue background, but they produced a logo with pink equal sign on a red background to symbolize the specific issue of marriage equality.



²⁸⁴ I strongly believe that public opinion influenced the Court’s recent gay marriage decisions, as demonstrated by the fact that Kennedy’s opinion in *Windsor v. United States* (2013) lacked a clear and coherent constitutional logic and seemed to understand that 14th Amendment equal protection precedent did not support striking down DOMA. Kennedy opted for a “the time has come” “it’s no longer acceptable” kind of living constitution approach that implicitly (and at times explicitly) takes shifting public opinion as a major justification for shifting constitutional law doctrines.

more sources of media emerge, each outlet gets a smaller and smaller piece of the pie.²⁸⁵ For every HRC success story, there are a hundred movement groups reaching fewer eyeballs per story. Consider the trend in nightly news broadcasts. From the 1950s to the 1980s, ABC, NBC, and CBS dominated the television landscape, particularly in terms of nightly news. With the emergence of other networks and cable programming in the 1980s, the “Big Three” saw their share of the nightly news audience decline, but as of the early 1990s, the Big Three still accounted for a majority of the evening news audience. Fast forward two decades and that number drops below one-third, as seen in Figure 5.1. Consequently, a movement getting covered on ABC’s evening news in 2013 reaches roughly half the Americans in 2013 that it would have reached in 1993. So to the extent that media outlet coverage is out of sync, it becomes more difficult to influence large swaths of the American public.²⁸⁶ Figure 5.2 shows the same trend with newspaper readership, which has lost readers to broadcast and cable news, and more recently to online news sources. Similar trends can be found for most regional/city newspapers and most national news magazines. For example, circulation of *Time* magazine and *The Economist* have both dropped by 50% just from 2008 to 2013 (Pew Research Center Journalism Project, 2014).

²⁸⁵ This idea is similar to *political inflation*, as discussed in the next section of this chapter.

²⁸⁶ John Zaller has argued that media coverage does periodically converge on a single issue in a “feeding frenzy” that serves as a kind of “burglar alarm” focusing public opinion on pressing public problems **Invalid source specified**.. Zaller’s “monitorial citizen” model assumes people have better things to do than pay constant attention to public policy, and so a media that simply covers all the important issues at all times is worse than useless. Instead, a fragmented soft news media can entertain the public without sapping their civic reserves, then unleash them on the rare issue that strikes the public’s nerve. For a counter argument claiming these feeding frenzies neither identify truly pressing issues, nor frame public issues usefully, see W. Lance Bennett’s critique of Zaller **Invalid source specified**..

Figure 5.1: “Big Three” Percentage of Evening News Audience over Time²⁸⁷

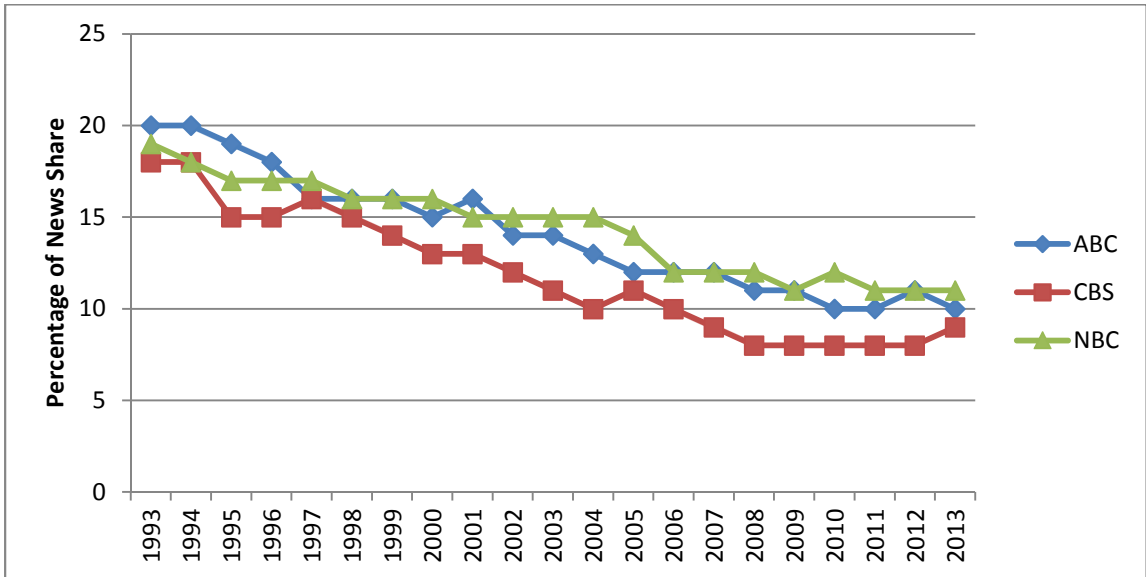
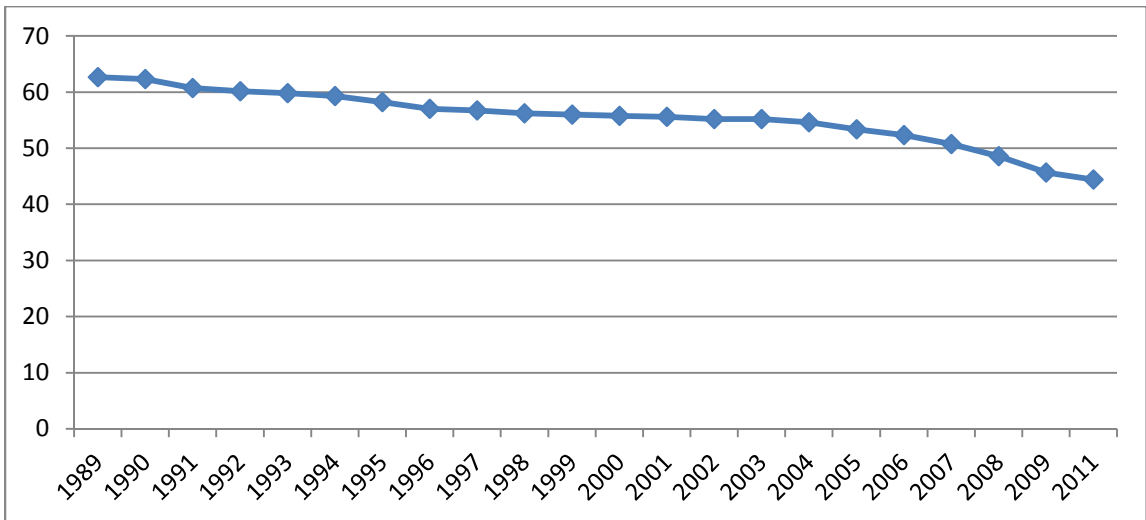


Figure 5.2: Total U.S. Daily Newspaper Circulation (in Millions)²⁸⁸



²⁸⁷ Data taken from the Pew Research Journalism Project (<http://www.journalism.org/media-indicators/evening-network-news-share-over-time/>). Accessed 10/8/2014.

²⁸⁸ Data taken from the Newspaper Association of America: <http://www.naa.org/Trends-and-Numbers/Circulation-Volume/Newspaper-Circulation-Volume.aspx> (accessed 11-04-2014).

The problems of fragmentation are exacerbated by widespread selection bias in the way people consume media. Cass Sunstein has been one of the loudest voices arguing that with the rise of the Internet “people are increasingly able to avoid general interest newspapers and magazines and to make choices that reflect their own predispositions” (Sunstein, *Going to Extremes: How Like Minds Unite and Divide*, 2009, pp. 79-83). Sunstein’s major concern is that media fragmentation and selection bias will further political polarization and extremism because in-group communications between like-minded individuals promote group shifts away from moderation. At first glance this may seem beneficial to movements, who may be able to recruit more ideologically committed core members, and this is likely the most significant benefit movements derive from the Internet. However, this recruiting advantage is at odds with the way plebiscitary power functions. As I have defined it, plebiscitary power works by grabbing the attention of the sympathetic masses and framing the issue in a way that secures their support. But if more and more people are gravitating toward news stories and sources that they are already actively interested in, the opportunities for activation shrink. In addition, Sunstein also worries that the “echo chamber” effect can create a “crippled epistemology” as movements build their beliefs, strategies, and arguments in relative isolation. Such movements may not adequately understand their own issues, be blind to new information, and unable to communicate their positions to opponents or third parties.

While fragmentation and selection bias mean that much of the Internet is composed of small niches, there remain some large media sites that account for a significant chunk of Internet news, either directly or through reposting of content. The top Internet news sites year after year continue to be those of newspapers (New York Times, Washington Post, LA Times, USA Today, Wall Street Journal), cable news networks (CNN, MSNBC, FOX News), and Search

Engines (Yahoo News, Google News, Bing News), with a scattering of digital-only giants like the Huffington Post. These sites are fed by traditional media, The Associated Press and routers and in turn are selectively cherry-picked by the various niches of the Internet (Olmstead, Sasseen, Mitchell, & Rosenstiel, 2012). As much as we might like to think of the Internet as a bottom-up font of democracy, in many ways it replicates the top-down distribution of traditional corporate-owned media channels.

In sum, while Internet communications and social media are a dynamic and ever changing part of the media landscape, they continue to be shaped by two contrary forces: fragmentation and consolidation. While news production and distribution capacities have become more broadly distributed, this has in many ways only strengthened the role of major media players who still control central positions in the media food chain. It is difficult to describe these two trends without sounding a bit schizophrenic, but they nonetheless define the state of American news media, new and old alike. And together they present challenges for movements hoping to “go public” on their issues.

The First Amendment: A Right to Speak, Not a Right to Be Heard

Like the right to free speech, the First Amendment right to free press began its life in a rather attenuated form. Following the tradition of English common law, the right to freedom of the press was originally a mere right against *prior restraint*. Congress could not *prevent* citizens from publishing their views, and could not seize and *censor* these publications before their distribution, but publishing opinions on specific issues could still be *criminalized*. So at the founding of the American Republic, citizens had the right to print a pamphlet criticizing the

government and then be arrested and imprisoned upon distribution of that pamphlet. Indeed, the Sedition Act of 1798 made it a crime,

“To write, print, utter or publish, or cause it to be done, or assist in it, any false, scandalous, and malicious writing against the government of the United States, or either House of Congress, or the President, with intent to defame, or bring either into contempt or disrepute...”

At the time, most prominent political figures considered there to be no conflict between the law and the Constitution, though Madison and Jefferson famously and strenuously objected.

Clearly, the First Amendment has come a long way from its relatively humble origins. In 1931, the Supreme Court incorporated the press clause to the states in *Near v. Minnesota* and in 1964, *New York Times Company v. Sullivan* the Court held that the press was shielded from libel claims unless it can be proven that reporting errors were the result of “actual malice” resulting from speech that is “knowingly false or with reckless disregard for the truth.” Soon after, in 1969, *Brandenburg v. Ohio* shifted the Court’s First Amendment jurisprudence to the doctrine of definitional balancing. Under definitional balancing, all speech and press received near absolute protection, with the exception of a narrow set of specific speech categories that are unprotected. And in 1971, the “Pentagon Papers” case *New York Times Company v. United States* held that “national security” was not grounds for prior restraint on a publication unless the government could prove the danger specific and serious. Taken together, these cases have produced one of the freest media systems in the world.

In general, America’s free press helps open up the political opportunity structure for movements to exercise plebiscitary power. The two New York Times cases serve to shield the media from damages that could otherwise result from publishing movement claims against

government and non-government targets. *Sullivan* concerned The Times running a civil rights advertisement that made accusations of brutality against Alabama police.²⁸⁹ *Times v. U.S.* concerned the paper's right to print leaked information concerning the Vietnam War. In these cases we see the civil rights and anti-war movements' plebiscitary power being enhanced and protected by the Supreme Court. However, there are two limiting trends of note that push in the opposite direction. First, the Supreme Court has allowed Congress and the FCC to place public morality restrictions on broadcasters. And second, the Court has not interpreted the First Amendment as requiring the government ensure or promote public access to media.

In 1978, the Supreme Court put the brakes on an expanding free press clause by upholding FCC public decency standards in *FCC v. Pacifica*. While in many ways an anomaly in the broader sweep of First Amendment Jurisprudence, *Pacifica* nonetheless came to define the relationship between the FCC and television networks in a way that was entirely unhelpful for social movements. As discussed above, the FCC has long enforced public interest requirements on radio and television broadcasters as a condition of using public spectrum. But following *Brandenburg v. Ohio*'s shift to "definitional balancing" it was unclear if the FCC could prohibit

²⁸⁹ The civil rights group Committee to Defend Martin Luther King and the Struggle for Freedom in the South placed a full page ad entitled "Heed Their Rising Voices" in the March 29, 1960 edition of The New York Times. This ad called for donations and described the movement's violent suppression in a number of southern cities. One such city was Montgomery, Alabama where the ad claimed local police had suppressed mass student protests at Alabama State College using "truckloads of police armed with shotguns and tear-gas" and by "[attempting] to starve [students] into submission." Montgomery Commissioner L. B. Sullivan disputed the factual accuracy of both the size of student protests and the nature of the police response. As the city official responsible for supervising the police department he claimed the ad falsely defamed his character and sued four civil rights leaders and The New York Times for libel. Justice Brennan writes, "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable." Brennan finds that in this case "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law." The proof is found lacking because the ad did not reference the respondent by name, no evidence was presented that the Times believed the information published to be false and no evidence is presented that the Times showed "reckless disregard" by violating its own editorial standards of review.

broadcasters from airing content that did not fit into one of the suspect categories of speech. In the *Pacifica* case, the Court deals with indecent content that falls short of the standard for obscenity laid out in *Miller v. California*. While the Court allows the regulation of obscene material, the *Pacifica* case concerned a radio broadcast of comedian George Carlin's "filthy words" monologue, which involved profanity that both lacked appeal to "prurient interests" and had clear social and political value as commentary on censorship.²⁹⁰ While clearly not obscene, the FCC nonetheless felt empowered to prevent children from being exposed to "patently offensive" materials under its charge to serve the public interest.

Justice Stevens's *Pacifica* opinion takes an odd approach in pointing out that speech of certain types may be limited. He specifically cites fighting words (*Chaplinsky v. New Hampshire*), libel (*Gertz v. Roberts Welch, Inc.*), and Obscenity (*Miller v. CA*), which are chief among the suspect categories singled out in definitional balancing doctrine, and not general justification for regulating harmful speech. Stevens does not attempt to argue that indecency represents a new category of speech lacking First Amendment protection, but does suggest that Carlin's indecent comedy is deserving of only limited First Amendment Protection, which must be *balanced* against the public interest in regulation. Justice Stevens then notes that a long history of (pre-*Brandenburg*) precedents for public interest regulations on broadcasters, and argues, "Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." This talk of "privacy of the home" and

²⁹⁰ The Court actually denies that Carlin's comedy involves any social or political commentary, writing, "If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required. But that is simply not this case." I just don't think Justice Steven gets Carlin's humor.

television as “an intruder” employs a rhetoric that invites government to protect the people from unwanted media messages. Essentially, the Court in *Pacifica* reaches back to defunct “bad tendency” theories of speech regulation that had not been controlling since the Vinson Court.²⁹¹

Pacifica did not lead to an immediate wave of FCC fines, but did encourage and justify more aggressive self-censorship by television and radio networks. Networks were encouraged to move all questionable material to after 10PM, which the FCC considered a “safe harbor” time unlikely to include young viewers. But broadcaster decisions on content remained highly subjective and influenced by considerations of who might complain to the FCC. If showing or implying sex on television is offensive, is showing or implying interracial or gay sex more offensive if more people complain?²⁹² If so, we see immediate barriers to civil rights and gay rights movements gaining an important outlet for advancing their social and political goals. At the very least, avoiding “sexual” or “excretory” depictions serves as cover for avoiding particular sexual or bodily content that may be subject to the biases of network executives, sponsors, or vocal elements of the public.²⁹³ Movements that rely on graphic and disturbing depictions are also impacted by decency standards, including the animal rights and anti-abortion movements. As discussed in Chapter 3, disturbing images play a central role in the strategies of these movements. Animal Rights groups have been largely unsuccessful in getting videos of factory

²⁹¹ The Dissent smartly notes, “if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.”

²⁹² The FCC complaint process has been dominated by the conservative groups the Parents Television Council and the American Family Association. While some would call these groups right wing social movements, I would argue these groups are essentially defenders of the status quo. Their advocacy in this area is small “c” conservative in that it fights to preserve established decency standards, not inject new ideologically based standards. Of course this question is an open and interesting one, and highlights the persistent challenge of deciding what constitutes a social movement for social movement studies.

²⁹³ Were the Supreme Court to take a firm stand that the FCC is prohibited from banning certain content, that would not in itself force networks to carry that content, but it would further the norm that refusal to air programs or advertisements should be viewed as corporate censorship.

farming and slaughterhouses on air, as have anti-abortion groups looking to air images of aborted fetuses. Broadcasters are able to avoid any controversy in these decisions by pointing to FCC policy under the *Pacifica* ruling.²⁹⁴

While the FCC did not immediately focus on indecency standards following *Pacifica*, this changed during the Reagan administration, when the FCC decided its indecency rules were “unduly narrow” and it would adopt a more “generic definition of broadcast indecency” that was based upon “contemporary community standards” for “patently offensive” materials (Levi, 2008). In addition, Reagan signed into law a bill sponsored by Senator Jesse Helms, which eliminated the safe harbor approach to indecency and directed the FCC to ban indecency content 24-hours a day. And finally, the Reagan administration abandoned the “fairness doctrine,” which required broadcasters to provide equal time to dissenting points of view on political issues covered on air. Essentially, Reagan’s FCC shifted its mission from promoting political discourse to policing deviancy. And while not all of Reagan’s policies have survived judicial and political scrutiny, it is telling that the FCC’s most prominent function over the past few decades has been laying out fines for cursing and “wardrobe malfunctions” during live broadcast television and radio.

To understand the Supreme Court’s role in shaping the FCC, and media regulation in general, we need to step back and look at the development of the public interest doctrine, starting with *National Broadcasting Co. v. US* (1943). In *National Broadcasting Justice*

²⁹⁴ An important loophole has been uncovered by antiabortion advocates, who have successfully argued that stations must broadcast some graphic images if they are presented as campaign advertisements. A number of such activists have run noncompetitive congressional election campaigns solely with the intent to bypass indecency concerns. In the 1990s a GA candidate for house used images of aborted fetuses in his ads. As of now the courts have favored election rules requiring broadcasters to sell time to each candidate (section 315 of the Communications Act) when the material in question is not specifically ruled indecent (only offensive). *Becker v. FCC*, 95 F.3d 75, 81 (D.C. Cir. 1996)..

Frankfurter wrote for a 5-2 majority adopting the “spectrum scarcity” rationale as the legal justification for placing public interest requirements on broadcasters under Congress’s Commerce Clause powers. As mentioned above, the regulation of radio and television broadcasting came about largely because unregulated use of the airwaves had produced a tragedy of the commons in which overuse by the public had created unacceptable signal interference, rendered the airwaves nearly unusable for mass communications. This situation arose because the universe has provided a magnetic spectrum with a limited range, placing natural limits on the number of broadcast frequencies available. As such, the *usable* spectrum can be seen as a public good only obtainable through government regulation. The Court seized upon the fact that any allocation of spectrum rights would inevitably leave some citizens with access and some without, and the inclusion by Congress of a requirement that the allocation serve the “public interest, convenience, or necessity” would not increase the number of citizens who lacked access to the airwaves. Frankfurter writes,

“Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis.”

Frankfurter pushes this logic to conclude, “The right of free speech does not include, however, the right to use the facilities of radio without a license.” In the end, public interest doctrine rests squarely upon the principle that the public has no right to access the public airwaves.

In 1969, the Court addressed the most contentious element of the FCC's public interest requirements, the fairness doctrine. The fairness doctrine required that broadcasters to devote time to controversial issues and give adequate time to opposing views. One specific requirement of the doctrine was to provide an opportunity for public figures to respond to personal attacks, a requirement that was at issue in the seminal fairness doctrine case, *Red Lion Broadcasting v. FCC* (1969).²⁹⁵

An oft overlooked fact of Supreme Court history, the Court's *Red Lion* decision was handed down on June 9, 1969, the same day as *Brandenburg v. Ohio*. In one sense, *Red Lion* was the first decision of our contemporary First Amendment regime. But in a larger sense, *Red Lion* was an essential part of establishing the boundaries of the new *Brandenburg* regime because it demonstrated that definitional balancing would provide less-than absolute protection, even for speech falling squarely under the First Amendment's purview. *Red Lion Broadcasting Co.* was licensed to operate a radio station in a Pennsylvania. The station aired a 15-minute segment entitled "Christian Crusaders" in which Reverend Billy Hargis harshly criticized the book "Goldwater—Extremist on the Right" and its author journalist Fred Cook. Cook requested that *Red Lion* allow him to respond on air to Hargis's personal attacks but the station refused. The FCC ruled that under the fairness doctrine *Red Lion* was required to provide Cook with time to respond, and *Red Lion* appealed the ruling all the way to the Supreme Court

Justice White argues that the nothing in the First Amendment prevents the government from requiring that licensed broadcasters share their frequency with others who do not have access to the airwaves. He writes,

²⁹⁵ 395 U.S. 367, 89 S. Ct. 1794; 23 L. Ed. 2d 371 (1969)

“It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions.”

The unanimous ruling confirmed that even the cumbersome public interest requirements of the fairness doctrine were consistent with the new Brandenburg standard. However, White also emphasizes that spectrum scarcity remains the core justification for this approach, which tethers the public interest standard to technological circumstances with a limited shelf life. Still, *Red Lion* is a ringing endorsement of the government’s constitutional authority to promote access to media communications and diverse debate on controversial issues. In these respects, a more circumscribed First Amendment *allows* government to open up political opportunities for movements to exercise plebiscitary power. But *Red Lion* does not *force* Congress or the FCC to promote media access.

The possibility of a First Amendment right of access to communications platforms was addressed by the Court in *CBS v. Democratic National Committee* (1973), where the Court considered if a broadcaster could reject paid radio advertisements by the groups Business Executives Move for Vietnam Peace (BEM) and the Democratic National Committee (DNC). While the DC Circuit held "a flat ban on paid public issue announcements is in violation of the

First Amendment, at least when other sorts of paid announcements are accepted," the ruling was reversed by a heavily divided Supreme Court. Chief Justice Burger cobbled together a shifting majority on the four parts of his opinion, with four justices penning consents, including Justice Douglas concurring in judgment only. Finally, Justice Brennan dissents, joined by Justice Marshall, arguing that CBS's refusal to air editorial advertisements violated "the people's right to engage in and to hear vigorous public debate on the broadcast media." Brennan's dissent was a stillborn case for a First Amendment right of media access, which fell on the deaf ears of the increasingly conservative Burger and Rehnquist Courts.

Perhaps the most important phrase employed by Brennan is "effective self-expression." As laid out in Chapter 2, and touched upon in Chapters 3 and 4, the Court's First Amendment doctrine has often expanded rights of self-expression, while allowing or promoting government policies that constrain *effective* expression. Brennan's *CBS* dissent suggests that an efficacy requirement is implied in the First Amendment. He argues, "the First Amendment embodies, not only the abstract right to be free from censorship, but also the right of an individual to utilize an appropriate and effective medium for the expression of his views." The dissent rightly notes that denying all editorial advertisements does not create a level playing field, as it privileges commercial advertising, which often promotes values and behaviors antithetical to the prohibited editorials.²⁹⁶ For Brennan, by facilitating private broadcasters in denying dissenters access to "the most effective means of reaching the public" the Court and the FCC "necessarily

²⁹⁶ Imagine a situation where an animal rights advertisement condemning factory farming is not aired, but an advertisement for bacon is aired. Dissenters would point out that the latter needs no editorial position only because it speaks from a position of privilege where its values are assumed to be universal. Or rewind to the antebellum South when abolitionist petitions were banned, while slave auctions were freely advertised.

renders even the concept of ‘full and free discussion’ practically meaningless.” Consequently, Brennan views *CBS* as a sharp shift away from the spirit of *Red Lion*.²⁹⁷

While *CBS* was a messy decision—with three justices seeing no First Amendment issue, three seeing FCC policy as constitutional under the First Amendment, Justice Douglas seeing no regulation of speech as constitutional, and two justices seeing the policy a violation of the First Amendment—the case laid to rest any First Amendment theories that include a right to media access and *effective* speech. In this area the Court has *allowed* Congress and the FCC to create policies that limit movement plebiscitary power. However, *CBS* does not in itself *prevent* government from providing media access, it simply does not require it.²⁹⁸ It is conceivable that in an alternate political environment access requirements could have been written into broadcast regulations, as Justice Burger himself stresses in *CBS*. But the political winds were not blowing in that direction. When an Administration finally took office with an interest in vigorous FCC oversight, it was Ronald Reagan’s, which took the FCC in a very different direction.

As discussed above, Reagan’s FCC generally moved towards deregulation, including ending the fairness doctrine.²⁹⁹ It did, however, reassert the public interest doctrine in one

²⁹⁷ Brennan captures the spirit of plebiscitary power well, writing, “For our citizens may now find greater than ever the need to express their own views directly to the public, rather than through a governmentally appointed surrogate, if they are to feel that they can achieve at least some measure of control over their own destinies.”

²⁹⁸ The lack of regulatory direction in the FCC in the mid-to-late 1970s had more to do with the decline of the liberal political regime and the growth a new conservative one. During the Carter year, FCC Chairman Ferris quietly began a deregulatory shift that is typically associated with the Reagan revolution. Indeed, many of the deregulatory policies of the 1980s have their roots in the 1970s. Arguably Carter and the Democrats were responding to anti-government public sentiment, but I also believe the growth of aggressive conservative social voices gave liberals pause about leaving robust bureaucracies in the hands of their political successors. In this light, FCC deregulation could be viewed as a kind of scorched earth tactic of leaving no resources behind for the enemy as one retreats.

²⁹⁹ Following *CBS*, the Federal Courts held that rescinding the fairness doctrine was fully compatible with the First Amendment. *Syracuse Peace Council v. FEC*, 867 F.2nd 654 (D.C. Cir. 1989); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430 (8th Cir. 1993).

area; the censorship of offensive material. On the issue of indecency, Reagan enlarged the scope of public interest doctrine until it again collided solidly with the First Amendment. In 1987, the FCC moved to a strict policy of confining even single utterances of indecent content, under a broad “generic definition,” during the “safe harbor” hours of midnight-6am. The channeling policy was upheld in *Action for Children’s Television v. FCC* (1988) by Justice Ginsburg, then on the D.C. Circuit, though the expansion of safe harbor from a 10PM start to midnight start was remanded for improper rulemaking procedures.³⁰⁰ In *ACT* and two follow up cases (*ACT II* & *ACT III*), the Courts affirm the ability of government to channel speech to times when significantly fewer viewers/listeners are attending to it.

Under the second Bush Administration, the indecency controversy flared again, this time forcing the Supreme Court to reconsider the limits of the indecency classification set out in *Pacifica*. The Bush FCC made the unprecedented move of applying indecency fines to single expletives and unscripted moments of live television, as well as dramatically raising fines against violators. This shift began with the FCC ruling against NBC for airing a broadcast of the Golden Globes in which U2 singer Bono uses the nonliteral expletive, “Fucking brilliant”. Previously, indecency had only been applied to content that referenced literal sexual or excretory acts or body parts, per the definition of indecency applied in *Pacifica*. But in the wake of the Bono ruling, the FCC laid down an increasing number of rulings for the use of “fleeting expletives,” in

³⁰⁰ On the heels of Ginsburg’s ruling, Reagan signed an appropriations bill that included an amendment by Senator Jesse Helms that instructed the FCC to enforce indecency standards 24 hours a day. This total ban would be struck down in *ACT II* (1991) as failing to meet the narrow tailoring requirements of strict scrutiny, with the DC Circuit Court holding that the far more significant speech costs were unjustified by the purported claim of protecting a handful of child viewers from late-night indecency. Not daunted, Senator Helms added a provision to the 1992 Telecommunications Act moving the safe harbor start time from 10PM to midnight. In *ACT III*, the DC Circuit ruled that this shift would have been constitutional had the regulation not exempted broadcasters that go off the air before midnight. The Court found this disparate treatment of speakers was not justified by the government’s stated compelling interest of protecting children from indecency.

some cases reaching back prior to the Bono incident. Two cases would play out over the following decade, which would largely uphold this expanded FCC policy: *FCC v. Fox* (2009) and *FCC v. CBS* (2012).

Fox concerned the 2002 and 2003 Billboard Music Awards, in which singer Cher told the audience “fuck ‘em” in regard to her critics, and socialites Paris Hilton and Nicole Richie commented, “Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.” The broadcaster argued that these expletives did not meet the definition of indecency under *Pacific*, however, Justice Scalia argued for a 5-4 majority that an expletive like fucking “inherently has a sexual connotation” regardless of the context of use. Moreover, Scalia argues that it is reasonable to crack down on fleeting uses of expletives because the first exposure to indecency may be the most damaging, widespread social use of expletives increases the importance of broadcast media as an important refuge from indecency, and a soft policy on fleeting use would encourage rampant violations. Scalia’s opinion draws support from the four other most conservative justices, and opposition from the four liberals, which is a common theme seen in speech cases discussed in Chapters 3 & 4.

In a case deeply intertwined with *Fox*, *CBS v. FCC* eventually dismissed the \$550,000 fine resulting from Janet Jackson’s Super Bowl halftime show “wardrobe malfunction.” But while the fine was dismissed as an arbitrary and unexpected departure from previous FCC policy, Justice Roberts warned “It is now clear that the brevity of an indecent broadcast — be it word or image — cannot immunize it from F.C.C. censure.” Despite Justice Ginsburg’s suggestion in *CBS* that the Court may wish to consider abandoning the *Pacific* indecency doctrine, for now the Court continues to hold a significant degree of moral censorship allowable under the First Amendment.

So what do these First Amendment developments mean for social movement power? First, as I have noted, a First Amendment regime that allows the FCC to suppress shocking or offensive content takes away one tool that movements use to grab public attention. In fact, by forcing broadcasters to develop technologies like broadcast delays, government facilitates broadcasters' ability to censor spontaneous movement disruptions at live events. If an activist runs on stage at an award show with a sign, the broadcaster will likely have the ability and the motivation to edit the disruption out of the broadcast.³⁰¹

Second, movement issues often center around bodily issues that may be censored as indecent. Abortion concerns reproduction, bodily autonomy, and the excretion of aborted fetuses. Gay rights concerns issues of sex, including the taboo of sodomy. Disability rights concerns the body, including norms of sex and excretion. Animal rights concerns the dismemberment of (nonhuman) bodies. In each case, movement activists seek to bring attention—and either horror or social acceptance—to practices that the FCC deems inappropriate for most broadcast times. Telling for our purposes, one of the initial three actions under the new 1987 FCC rules was against an LA radio play, "Jerker, or the Helping Hand," which featured explicit descriptions of gay sex, and touched on themes of AIDS advocacy and disability advocacy. Or consider Janet Jackson and "nipplegate," where the FCC asserted that displaying a part of a female body is categorically indecent, throwing up roadblocks to some feminist efforts

³⁰¹ A perfect example is the 2010 Westminster dog show, which was interrupted by animal activists with signs that read, "Mutts Rule" and "Breeders Kill Shelter Dogs' Chances." Westminster is the biggest dog show of the year, but more importantly it is virtually the only nationally televised dog show watched by millions of casual dog lovers. The activist disruption was seen by 15,000 show attendees, but these pure-breed partisans do not include any of those sympathetic third parties that Lipsky discusses. The broadcast edited out the disruption, which occurred during the crucial final judging, preventing activists from reaching millions of at-home watchers who might have been sympathetic to reframing the issue as one of breeding (and euthanasia of shelter mutts) vs. adoption. The activists plebiscitary reach was neutered—to speak—by broadcast technology and policy.

to de-stigmatize the female body. In most cases government censorship based on status quo majority morality works against social movements.

Third, and perhaps most important, the FCC's focus on indecency censorship has come to define the agency's mission, set public expectations for government's role in the media landscape, and has monopolized the Supreme Court's jurisprudence on the First Amendment and media. The Court left open the possibility that Congress and the FCC could push for broader public access to broadcast (and perhaps cable and satellite) media under the public interest doctrine, but the Courts are essentially a reactive enterprise, and in the absence of legislative and bureaucratic action pressing a compelling government interest in promoting media access the Courts simply cannot develop precedent on the matter.³⁰² And the longer the Court has remained silent concerning media access following its 1973's *CBS* ruling, the more the presumption builds that media access claims must be based on the decaying rationale of spectrum scarcity, and thus have only grown weaker since being rejected in *CBS*.

Political Inflation – Has the Public Seen It All?

³⁰² Even in the area of indecency, which the government has pushed its prerogatives, there has not been a credible compelling interest advanced. In *U.S. v. Playboy* (2000) the government tried to argue that cable subscribers did receive an unwanted intrusion of indecent material into their homes—like from broadcast signals in *Pacifica*—from the problem of “signal bleed.” But without proposing an alternative theory to “spectrum scarcity” the government's case falls on deaf ears, with Justice Kennedy's decision flatly pointing out that broadcast precedent does not apply in the same way to cable television transmitted on privately owned wires directly to consumers. To carve a space out for public interest regulation the government would need to argue that there is a compelling interest in providing media to the public, which is not served by the market. It would have to be something akin to an antitrust argument, which is not farfetched given that most areas are served by a single cable provider. Note, I had the good fortune of attending the oral arguments for this case during a high school field trip! The case was very well argued on Playboy's side, and the government struggled mightily.

Of the various types of movement power I have discussed, plebiscitary power is likely the most susceptible to political inflation. The nature of going public requires grabbing mass attention, and the attention game is largely *zero-sum*. As discussed in Chapter 2, I follow Baumgartner and Jones in believing that bounded rationality makes attention shifts the primary driver of policy change, not broad shifts in public belief. The main idea is that the people can only effectively focus their attention on one (or a few) issues at a time, and only on one (or a few) aspects of that issue. This capacity is essentially fixed, and it means that policies on most issues will be static most of the time. And significantly, as more issues seek public recognition, either more will be ignored or the public will be forced to shift its attention between issues more quickly. Either way, movements are being shut out of opportunities to control the public's attention in ways that can push their issues through the policy process.

As competition for "eye balls" increases, it is unsurprising that social movements find themselves in something of an arms race, constantly escalating their attention grabbing tactics. To seize the public's gaze, activists cannot simply be interesting and shocking, they must be more interesting and shocking than the next group. Furthermore, this arms race tendency is at times more active within movements than between. As discussed in Chapter 4, SMOs within a movement compete for members and supporters, a goal dependent in large part upon their level of public recognition. All this competition can be viewed as healthy in the sense that it encourages diligence and tactical innovation, but I am arguing that these benefits are outweighed by the effects of political inflation.

While competition within and between movements is one driver of plebiscitary inflation, another is competition from mainstream interest groups. As plebiscitary politics has become a dominant part of the political landscape, lobbyists and trade groups have moved

beyond the closed doors of smoke-filled back rooms. Today, issue advertising is a massive part of the media landscape, with groups like oil and coal producers advertising the merits of their preferred policies directly to the American public. In Chapter 4 I discussed the massive influx of campaign spending from interest groups in the form of issue advertising. These advertisements are often seen as thinly veiled campaign advertisements, but they are also clearly a form of “going public” on specific policy issues.

The third, and most significant, driver of political inflation in plebiscitary politics is the adoption of media relations as a tool of officials at all levels of government. The driving force behind the political inflation concept is essentially a diffusion of successful tactics throughout the political sphere. In an where every politician takes to twitter at the drop of the hat, the diffusion of media-based politics seems rather complete.

Attention is Finite

In a multitasking world, it may seem like our attention can be split between infinite directions. But as discussed in Herbert Simon’s “Human Nature in Politics,” psychological research supports a bounded rationality view of humans as *serial processors*. That is, humans can only effectively attend to one decision (focusing on one aspect of that decision) at a time. Consequently, the number of issues people can judge is limited by the amount of time they can (and will) spend attending to policy issues. And despite the spread of news sources and the availability of internet news, Americans are not spending more time consuming news. As PEW’s Center for the People and the Press has reported (Figure 5.3), American media consumption has

remained largely flat since the mid-nineties. So despite the emergence of on-demand, on-the-go, 24-7 news availability it seems that public attention to the news is a finite resource.

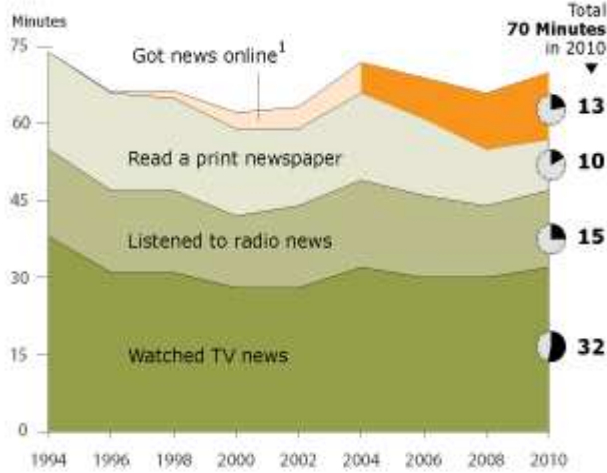


Figure 5.3: Daily Time Spent on News

Consumption

PEW RESEARCH CENTER June 8-28, 2010.
 Estimated time getting news from each source. Online news includes newspapers read online. Online news "yesterday" not asked prior to 2004. Pre-2004 figures estimated from other data.

As Chapter 4 argued, the number

of active social movements and social movement organizations has steadily

increased in the past few decades.³⁰³ A

big reason for this trend is that once

established, movements rarely disappear.³⁰⁴ While the civil rights movement of the 1950s and

1960s has atrophied due to success, civil rights issues and advocacy continue to command a

significant amount of media attention, including on issues of affirmative action, voting rights,

police brutality, and a wide variety of issues.³⁰⁵ One reason established movements are able to

³⁰³ Frankly, this growth in issues is as old as the polity. While demands for the expansion of social, political, and economic rights wax and wane, the general trajectory is towards expansion. As the role and size of American government has increased so to have the demands placed upon government. However, Chapter 4 deals primarily with data reaching back only until 1989.

³⁰⁴ An exception would be a movement like Temperance, which was wildly successful in its ultimate legislative goal of national prohibition. Had their success not been so absolute, and subsequent failure, been less absolute the Temperance movement could easily exist today in a more viable form, either continuing the fight over alcohol or battling other perceived vices.

³⁰⁵ As noted earlier, the late 2014 police killings of unarmed black men in Ferguson, MI and Staten Island, NY thrust civil rights issues back into the media spotlight, much as the Trevon Martin killing had done in

remain in the media spotlight is that media coverage of movement advocacy has been shown to track issues already on the policy agenda (Oliver & Maney, 2000).³⁰⁶ Past agenda success primes the system for future success because both media frames and public institutions are already equipped for to address these issues. For example, the Supreme Court's consideration of affirmative action in *Fisher* (2012) and *Schuette* (2014) and voting rights in *Shelby County* (2013) have primed the public to attend to civil rights movement claims. Furthermore, as highlighted in Chapter 4, the institutionalization of social movement organizations has allowed movements to survive long beyond peaks in mass action. These SMOs allow and encourage movements to turn their attention to new issues as old ones are solved or shelved. The environmental movement is an excellent example.

The modern environmental movement took shape in the late 1950s and early 1960s, and initially focused on conservation of wilderness and the hazards of pollution. Early policy victories like the National Environmental Policy Act, the Clean Air Act, the Clean Water Act, the Marine Mammal Protection Act, and the Endangered Species Act made the implementation, reauthorization, and altering of these policies continual sites of activism and contestation. Those issues haven't gone away, but new issues have been layered on top of them, with which the old issues must split time. These "new" issues include nuclear and toxic waste, renewable/sustainable energy, acid rain, global deforestation, organic food, genetically modified organisms, and of course, global warming. The consequence? We get exposed to a little of each

2012 and 2013. This issue shows no sign of disappearing and will sadly continue to reemerge on the agenda for the foreseeable future. During the media frenzy around Ferguson, a women's rights campaign around street harassment and catcalling burst into the media conversation, but simply could not sustain attention in light of more visible race politics. The point being that the social issues that dominated the 1960s continue to fight for recognition and attention today, and these issues still jockey for attention between themselves and with newer contenders.

³⁰⁶

of these issues, one at a time, and arguably not enough to sustain a push for public action on expansive issues like global warming. In sum, we have more movements and issues per movement competing limited public attention.

Arms Race Sensationalism

As mentioned above, media attention often focuses on activism related to issues *already on the agenda* of major political institutions. Looking over all The New York Times articles from 2010 referencing animal rights, about half of them concern the enforcement of animal cruelty laws, wild horse management, and other existing public policies.³⁰⁷ The second most common type of article concerns international practices that are shocking and exotic to American readers, including eating dogs and cats in China, seal hunting in Canada, bullfighting in Spain, and Islamic animal rights activism in Egypt. One article mentions the scholarly work on animal rights of Cass Sunstein, whose appointment as Obama's "regulatory czar" was being opposed by Republicans. Another article concerns Philadelphia Eagles quarterback Michael Vick's conviction for dog fighting.³⁰⁸ Mixed in was a pair of articles on reforming the use of battery cages in egg production, an article on the use of chimpanzee in biomedical research, and an article on puppy mills. These last four articles directly addressed issues activists were seeking to put on the public agenda, but were spread across three unrelated issues.

³⁰⁷ This is a cursory search that does not include articles on animal rights issues that do not contain "animal rights" in the title or body. I include this information only to illustrate a view of media coverage that I base on the work of others and my own impressions. I hope to provide more systemic evidence in the future.

³⁰⁸ Media coverage of movement issues often concerns celebrity endorsements or confrontations. This case is perhaps an exception to the rule in that Vick's notoriety provided a steady stream of articles discussing dog fighting over several years. The coverage is typically somewhat more superficial. But still, it is notable that the only dog-fighting story has a celebrity frame (specifically a celebrity redemption frame).

Faced with an uncertain media landscape many SMOs have seized on the media's love of scandal, conflict, and celebrity to gain attention. Actor endorsements, nude protests, strange costumes, and disrupting high-profile but unrelated events have all become common place. I once jokingly suggested that SMOs could maximize Internet clicks simply by splicing their message into free pornography. Lo w and behold, in 2007 a prominent SMO began producing an annual "State of the Union Undress," in which a women parodying the president's State of the Union speech stripped fully nude while talking about the group's positions. But after a few years, the media and public were no longer shocked and the Undress was discontinued due to poor media exposure (so to speak).

Political sociologist Sarah Sobieraj's excellent book, *Soundbitten: the Perils of Media-Centered Political Activism*, provides an ethnography of 50 diverse activist groups pressing issues during the 2000 and 2004 election cycles. Her conclusions are must the same as mine, as she finds for those organizations,

"[Rampant] media-centrism proves ineffective and in some ways even destructive. Activists' often-outrageous attempts to lure journalists politicize public spaces in memorable ways, but for most groups the pursuit of media attention is largely futile, brings with it important organizational costs...and comes at the expense of other political activities."

Essentially, Sobieraj expands on Gitlin's initial observation that movements change their strategies in self-destructive ways to play for the camera, but Sobieraj further finds that the amount and quality of news coverage gained is paltry. She notes the biggest event of her study saw 400 activists arrested, but The New York Times coverage focused only on tactics and never mentioned the specific claims the activists were pressing. She notes a large immigration reform

rally where news cameras focused almost exclusively on a single youth garbed in “black-box” anarchist attire. And importantly, Sobieraj noted that while immersed in these organizations she felt like she was watching “historic events” unfold and was surprised to discover just how few people were watching with her (Sobieraj, 2011, pp. 2, 129-131). As I noted earlier, media fragmentation often leads activists to feel like they are on the main stage when they are in reality at best a side show.

Everyone Goes Public

At the risk of belaboring the point, political inflation works through the diffusion of successful political tactics across the different actors in the political system. Stephen Skowronek has argued that the Presidency is the primary source of innovation in political power, but I argue in Chapter 2 that the president adopts tactics originally developed by political outsiders. In this case, LBJ and JFK’s engagement with civil rights and antiwar protesters made the power of the media clear to the office, and led to the first plebiscitary president in Nixon. Samuel Kernell details Nixon’s use of the media to advance his election and policy goals independent of the party apparatus, but notes that just as Clinton’s presidency perfected media management, other office holders were stealing some of the plebiscitary spotlight.³⁰⁹ Specifically, Gingrich’s speakership saw a congressman consistently challenging the president’s control of the media agenda.³¹⁰

³⁰⁹ See **Invalid source specified.** for an inside account of the Clinton White House’s management of the media.

³¹⁰ See **Invalid source specified.** on the Gingrich and the public role of the Speaker of the House.

Since Gingrich, Speakers and Senate Majority Leader, House and Senate Minority Leaders, Party Chairs, potential presidential candidates, governors, and more have become fixtures on the national political stage. Competition between these actors has created its own media arms race where politicians struggle to expand e-mail lists, Facebook, Twitter and YouTube followers, and maximize their news exposure through appearances, interviews, and press conferences. As Kernell notes, plebiscitary politics has become a double edged sword that always threatens to be turned on its user. And if the president is unable to hold media attention to a specific framing of a specific issue, what chance do SMOs have? There is at best a stalemate in the plebiscitary world, where no actor can gain and sustain a decisive advantage. As I have pressed again and again, such stalemates inherently favor the status quo.³¹¹

Institutional Thickening

In the Fall of 2013, Frank Baumgartner and Bryan Jones separately presented their latest work from the Policy Agendas Project at the University of Pennsylvania. This was of course very exciting and useful to me, as their work is clearly foundational to my own. When Jones presented the charts included here as Figures 3, I was floored. They showed that the number of issues Congress deals with annually peaked in the late 1980s and has since declined dramatically by key metrics. In my mind, Jones was providing me with the empirical data I was looking for to show the effects of institutional thickening on his own model of the policy process. Jones himself argued that the trends of increase and decline in legislative capacity are cyclical, and

³¹¹ Jure Leskovec et al. have developed a method of data mining language use across news, blogs, and social media to track the rise and fall of ideas in the news cycle. They report that the dramatic rise of twitter in the 6 months prior to the 2008 election dramatically sped up the news cycle **Invalid source specified..**

powerfully pressed the position that institutional factors, not political factors, dominated trends in legislative productivity. In other words, the focus on gridlock between Democrats and Republicans mostly misses the forest for the trees. While I agree that partisan gridlock is not the main cause of this trend, I believe the mechanism at work is progressive rather than cyclical, suggesting we will not see a return to earlier levels of issue diversity.

In this section I will flesh out the argument that Baumgartner and Jones's data supports the proposition that institutional thickening is limiting movement opportunities to place new policy issues on the political agenda. The basic argument goes something like this: Legislators, like other humans, have natural limits to the amount of issues they can attend to during a given period of time. The number of federal legislators has not increased since Alaskan and Hawaiian statehood brought the Senate to 100 seats and the Apportionment Act of 1911 set the House at 435 seats. Moreover, the time members of Congress commit to legislating has shrunk, as the demands of campaigning and district work have continually grown.³¹² In addition, the rapid growth of the state means that the established responsibilities of government will occupy a larger percentage of legislative attention, placing greater claims on member time. The combined effect is less legislative time for more standing issues, limiting the opportunities for new issues to shoulder their way onto the agenda.

Consider the US Budget, an annual bill that grows every year, as every program passed in earlier congresses must receive annual appropriations. In Chapter 4 I argued that the growth of existing US budget commitments was a limiting factor for new programs seeking funding, but these commitments are just as much a limiting factor for new issues seeking legislative

³¹² While attention to their districts is surely at the heart of representation **Invalid source specified.**, the truth is fundraising and campaigning are increasingly the activities shrinking the congressional work week.

attention.³¹³ Yes, congressional staff has ballooned, and is bolstered by the Congressional Research Service (CRS) and Congressional Budget Office (CBO), but all of that research must still be channeled through 535 Congressmen and Senators. And those representatives still need to push bills through committee, floor, and conference, all the while hearing testimony, debating, negotiating, and voting (not to mention attending to the media and constituents). If these activities on recurring issues have maxed out legislative capacity, then movements face significant challenges in translating media coverage into government action.

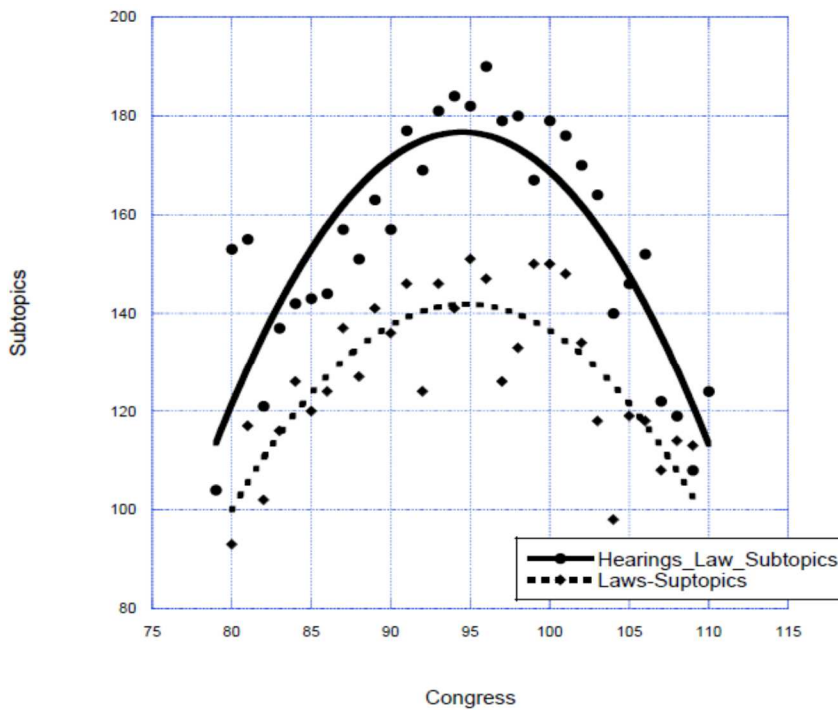
The Baumgartner and Jones data are *plausibly* explained by the institutional thickening hypothesis. Figure 5.4 shows that the number of issues addressed in congress rose sharply from the late 1940s to the late 1970s, before leveling off and then dropping sharply from the late 1980s until today. The second chart in Figure 5.4 shows that roll call votes and non-legislative hearings also leveled off during the 1980s, but have not significantly declined. My argument is that legislators simply maxed out their capacity and as some issues fell from the agenda they were replaced by more hearings and votes on existing issues, not new ones.³¹⁴ None of this is to

³¹³ Legislation need not recur annually to take up consistent space on the congressional agenda. Consider the Farm Bill, passed once every four years. The Farm Bill typically occupies agenda space for multiple years, as price supports, environmental controls, and food assistance are tweaked and debated. Most environmental legislation requires reauthorization and involves debates on what should be covered. Issues like education, entitlement, and tax reform never get solved to anyone's satisfaction and take up constant agenda space. The list goes on and on.

³¹⁴ An alternative explanation of this data is simply that the period of issue expansion coincides with the period of New Deal dominance, and that decline is simply the success of the Reagan "revolution" of the 1980s. Even granting the premise that Reagan reigned in the reach of government, there is a bit of a chicken and egg issue at play here. Did the rise of modern conservatism constrain views on the role of the state, or did the over-extension of state capacities fuel the rise of modern conservatism? For me, the causality here is somewhat mute, as either way it appears that the opportunity to expand the agenda is somewhat constrained by management of—and contestation over—the expansive modern government agenda. Another potential critique is that government is dealing with fewer subjects because there are simply fewer subjects that demand government attention. This mirrors the claim that social movements are less influential these days because there all the important issues have been addressed. I simply do not buy the proposition that there are a limited number of topics appropriate for government to address of a limited number of social ills facing society. Life is simply too dynamic for such logic to hold.

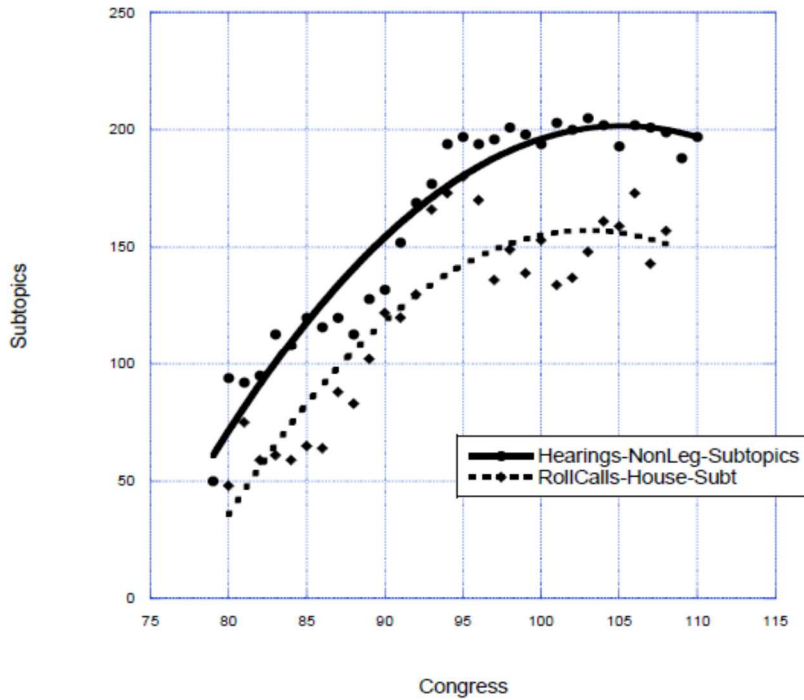
say that new issues cannot seize the public agenda, particularly when focusing events bring near universal attention to an issue and present an obvious movement friendly framing.³¹⁵ But an overextended agenda exerts pressure on members of Congress that makes taking on new issues less attractive.

Figure 5.4: Number of Subtopics Addressed by Congress over Time³¹⁶



³¹⁵ Again, think of the Fukushima nuclear accident and how it created weeks of nightly news coverage under the frame of nuclear safety. Nothing anti-nuclear activists did put nuclear safety on the public radar, but they were certainly able to take advantage of the agenda access to kill plans to expand the number of US nuclear facilities.

³¹⁶ Charts Taken from **Invalid source specified.**



Conclusion

Most activists and SMOs have embraced plebiscitary power as the primary source (and metric) of movement power. Sure, seeing specific legislative victories is the ultimate goal, but such victories are few and far between. Day to day and year to year, media coverage, Twitter followers, and website hits provide quantitative evidence of a movement impact. Where pluralist power is slow and disruptive power is risky, plebiscitary power appears to offer immediate results to activists creative and determined enough to get noticed. This chapter takes a step back and questions the effectiveness of media-based movement power, and argues that developments over the past fifty-years limit plebiscitary opportunities.

I have argued that Lipsky first got to the heart of plebiscitary power, when he noted that civil rights protesters were primarily activating powerful sympathetic allies who had previously avoided battles over race. It was a real and effective form of power that, while always in existence, jumped to the forefront of movement politics with the advent of modern mass communications. Movements rightly acknowledge that shift, but too often ignore more subtle recent changes in the media landscape. In many ways movement politics and movement scholarship remains in the shadow of the civil rights movement. We consider what the activists of the 1950s and 1960s did, note their overwhelming political success, and try to apply those lessons today. This observation is especially true of plebiscitary politics, where today's movements conclude that if civil rights activists were able to leverage the emergence of national television, then harnessing cable news, Internet news, and social media must offer even greater opportunities.

This chapter has shown that movements should be skeptical about the opportunities offered by media exposure. The diversification of media, which so excites movements, carries with it a fragmentation of viewership that makes capturing a broad audience difficult. And with government focusing on media censorship, instead of promoting media access, movements hoping to hold a national gaze face a daunting task. In practice, media coverage of movements is more likely to be an adjunct to coverage of issues already being debated by politicians. And with politicians and interest groups of all stripes attempting to play the plebiscitary game, it seems unlikely movements will see in improved media access in the future. Finally, with a massive permanent agenda occupying our political institutions the prospects for plebiscitary agenda setting are ultimately limited.

All this is not to say movements should ignore the power of media. Limited power is not the absence of power. Chapters 3, 4, & 5 have stressed that all of the dominant approaches to exerting political influence are of limited use, and that those limitations are likely to increase in the immediate future. In light of this somewhat closed political opportunity structure, it seems to me that successful social movements are most likely the ones taking advantage of all their power opportunities. In Chapter 6 I flesh out the way four contemporary movements have utilized disruptive, pluralist and plebiscitary power and make some preliminary observations about which strategies seem most likely to lead to political success.³¹⁷

A constant challenge in the social sciences, and particularly in social movement studies, is to learn from the past while remaining open to the possibility that today's patterns and trends might be entirely different. It remains possible—even probable—that new forms of movement power are emerging now, or will emerge in the near future. I return to this prospect in Chapter 7.

³¹⁷ I am very much trying not to give them impression that my work makes firm causal claims about what movement strategies lead to political success. At the same time it seems reasonable to generate hypotheses and speculate on their respective merits.

“I have been to this point unwilling to sign on to same-sex marriage primarily because of my understandings of the traditional definitions of marriage. But I also think you’re right that attitudes evolve, including mine.”

-President Barack Obama, 2010

“We don’t make frontal attacks. Never attack where the enemy is strongest. We don’t want to re-create Pickett’s Charge at Gettysburg. We pick our battles. What we do is very much under the radar screen and not very sexy.”

-Charmaine Yoest, CEO of Americans United for Life

Chapter 6: The LGBTQ and Antiabortion Cases

Up to this point I have considered movement power primarily in the aggregate, drawing on scattered supporting examples from a number of American social movements. Hopefully, this approach has helped demonstrate that the conceptual model of power types is not merely a description of one particular movement (or even a handful). However, unless the model provides a useful description of actual movements—one that fits well with qualitative accounts—such a model would lack facial validity. In the next two chapters I take a more extended—yet still relatively brief—look at four important contemporary social movements and describe their interactions with the political system in terms of our three types of power. In doing so I also draw a number of additional conclusions about how movement power works and can be strategically maximized.

I have chosen to examine the LGBTQ Rights and Antiabortion movements in this chapter, followed by the Disability Rights and Animal Rights movements in Chapter 7. The four movements I look at are of great personal and professional interest to me. Though not all of them align with my own politics, I consider them all to capture essential elements of modern

movement dissent. These cases are not intended *primarily* to be empirical data, in that the choices and presentation do not meet social science standards for hypothesis testing. Rather, they are intended to show the explanatory value of my model. In each we see the use of disruptive, pluralist, and plebiscitary power constrained by patterns of structural barriers, political inflation, and institutional thickening. However, we also see that these constraints do leave opportunities for movements to exercise power. In particular, a look at these four movements suggests that effective exercises of power usually involve drawing on multiple types of power to overcome the limitations of any one type. In addition, examining the trajectory of these movements reminds us that luck, not power, is sometimes the decisive factor in securing policy wins.

For each movement I offer a brief chronological narrative highlighting major policy goals, events, organizations, and tactics. These narratives are periodized in an attempt to highlight dominant movement power strategies at different points in their development. While some of the themes explored are consistent across movements, at other times I highlight particular developments within each movement that offer unique lessons.³¹⁸

LGBTQ Rights³¹⁹

The movement for LGBTQ rights has experienced so much political success in the past 5 to 10 years that it is tempting to believe these good fortunes inevitable. Gay marriage, open military service, hate crime and anti-discrimination protections top a list of state and federal accomplishments that have some movement observers declaring victory. Moreover, public opinion polling now shows a stable national majority favors marriage equality, with analysts chocking the shift up to generational replacement (prejudices dying with the elderly voters and

³¹⁸ There is an admitted lack of uniformity in the four treatments, and I stress again that these are not cases in the traditional hypothesis testing vein.

³¹⁹ I use the terms LGBTQ Rights and Gay Rights interchangeably because the terms have been fluid throughout the periods studied. I consider both phrasings inclusive of lesbian, gay, bisexual, transgender, and queer identities.

tolerant young folks coming of age).³²⁰ While replacement is certainly an important phenomenon in general, and for LGBT acceptance in particular, it is a bit of a *deus ex machina* narrative that fails to explain why youth views developed as they did and ignores very real shifts in broader opinion. Moreover, such explanations ignore the fact that neither public opinion nor political progress follows a simple upward linear trend. While “It gets better” has become the hopeful slogan for bullied gay youth, simply assuming that things get better for progressive causes in a liberal democratic state seems to me to be an analytically poor approach.³²¹ Instead, I hope to explain the gay rights movement’s successes (and failures) in terms of its use of power.

In looking at the history of the gay rights movement in terms of power, I find six periods that help us understand the shifts in the movement’s power resources. Before 1969 we had the “Pre-Stonewall Era” in which no recognizable mass movement existed. From 1969-1979 we had the “Stonewall Era,” which was characterized primarily by its use of disruptive power. From 1980-1986 we have the “AIDS Era,” in which conservative political forces rolled back movement gains and the emerging AIDS epidemic further revealed the movement’s pluralist weakness. From 1987-1995 we see the “Resurgence Era” that again mobilized disruptive power, but also sought to develop more significant pluralist resources. From 1996-2008 the movement built up significant pluralist resources, particularly in the legal world, and buttressed these efforts with a plebiscitary focus on hate crimes and civil rights frames. I call this the “Legal Era” because movement gains came primarily through the courts, while conservative forces battered the movement legislatively. Since 2009 we have seen the movement enter a “Majoritarian Era” in which a majority of the nation has come to support all the movement’s key policy goals, and gay rights finds itself a political asset in contested areas of the electorate.

Before I explore each of these eras in more depth, it seems worth noting a few basic observations, which I will return to at the end of this section.

³²⁰ Linda Hirschman titled her recent history of the movement, *Victory*, and defends the choice in a stirring epilogue that stresses how truly profound the success of the movement has been, and how dark things had and could be.

³²¹ Note, the antiabortion movement has had considerable success rolling back progressive laws on reproductive rights. Moreover, in a number of Middle East countries we see examples of theocratic shifts away from liberal rights, particularly woman’s rights and speech rights. We should be dubious about repeating the mistakes of historical materialism and assuming history has a clear trajectory.

1. Power of each type is increasingly constrained, but opportunities to influence politics and policy persist.
2. When a single type of power is exercised in isolation, gains are limited, movements are vulnerable, and those in power are able to undermine activist opponents.
3. While movements need to employ different types of power in support of one another, the danger exists that different types will undermine one another.
4. Most major victories have been dependent upon activists infiltrating existing institutions and grafted their demands onto existing policy structures.
5. Opposition matters. Movements have significantly greater opportunities when they are not opposed by well-funded organizations that take that opposition as central to their organizational mission.

The Pre-Stonewall Era

Before 1969, gay rights was not a mass social movement. This is not to say gays weren't widely oppressed. To the contrary, gays faced "Blue Discharges" from army psychiatrists, a ban on Federal employment, and targeted arrests for "cruising" and "disorderly behavior" at bars.³²² But there was no organized or sustained challenge to these practices, and the three types of power were not exercised in significant ways. Gay was generally not a social identity that was embraced by potential movement participants and gays individually and collectively pursued a strategy of duck and cover. Avoid drawing attention. Hope to be left alone. Pass. Certainly there were gay individuals standing up for their own social and political rights during this period, and even a handful of small organizations, but American gays were overwhelmingly closeted.

In terms of pluralist power, the Mattachine Society and the Daughters of Bilitis represented a couple of hundred gay members. Their actions were minor and generally conservative, with the original Mattachine Society largely dissolving over a divide between members wishing to support or oppose McCarthyist anti-communist measures. The Society's

³²² There were also some pro-gay policies that passed during this period, including Illinois becoming the first state to decriminalize sodomy in 1962. However, these early victories were hardly displays of movement power. Illinois was simply the first state to reform its criminal statutes along the guidelines of the American Law Institute's 1962 Model Penal Code. The ALI was progressive for the time in suggesting that statutes criminalizing consensual sexual behavior be dropped.

One Magazine did achieve a notable victory in *One v. Olson*, which established that materials promoting or celebrating homosexuality were not automatically obscene under the Court's new standard in *Roth v. US*. This allowed *One* to be distributed through the US mail and opened up basic opportunities for organizing a geographically dispersed gay population. However, the small victories of Pre-Stonewall organizations were confined to basic applications of the rights of other citizens, as with the application of *Roth*, in which gay activists rode the coattails of pornographers. In other words, there was minimal *power* being exercised.

In addition to these early organizations, some gays with resources and/or connections were able to use their rights as American citizens to challenge unjust arrests, firings, and other forms of overt discrimination.³²³ Frank Kameny, who would revive the largely defunct Mattachine Society in the 60s, was an astronomer fired from the Army Map Service in 1961 for his sexuality. Kameny challenged his dismissal in court, "modeling his claim on NAACP challenges to racially-based firings," but the Supreme Court refused to hear his appeal in 1968 (Hirshman, 2012, p. 3). While some lower courts did reverse civil service dismissals, the policy of dismissing gays from federal service remained firmly in place. And while public officials were pushed to publicly state that "cruising stings" and "gay in public" bar raids were not state policy, police harassment remained the *status quo*. With no plebiscitary or disruptive threats to contend with, the rule of law was a paper thin protection even for gays with the resources to press their legal rights.

What plebiscitary power did exist at the time was weak and reactionary. For example, the papers went wild when a New York City undercover cop arrested a priest for "cruising" in an overzealous act of entrapment. Such incidents forced public officials to renounce entrapment strategies, but the coverage was not sustained and gays lacked the organizational resources to ensure accountability. Simply put, nothing changed. Kameny and his Mattachines held small protest rallies, for example 10 white males in business suits quietly holding a sign in front of the White House reading, "Fifteen Million U.S. Homosexuals Protest Federal Treatment." Kameny's largest march before Stonewall had just 55 participants (Hirshman, 2012, p. 83). There was

³²³ An unsurprising pattern in civil rights movements is that those individuals with higher socio-economic status are able to use the system to secure the rights and privileges of other citizens well in advance of most group members. This functions through access to legal resources to enforce due process, personal connections, and other insider resources.

nothing attention grabbing about these tactics, and they stayed as far away from disruption as possible.³²⁴

The Stonewall Era

Stonewall changed everything. I am normally skeptical of narratives that reduce critical junctures in politics to a single event in one time and place, but the Stonewall Inn riots changed everything for the gay rights movement in America. The event is so crucial that many of the details have passed into myth and apocrypha, but the basics we know. The Stonewall Inn was a Mafia owned New York City gay bar, which was periodically raided by police, as were all such “disorderly” establishments in the city. In the early morning hours of June 28, 1969, police conducted a raid that surprised patrons for its timing and its violation of certain norms in the relationship between the police, mafia, and clientele. When the arrests for cross-dressing began, the crowd grew large and angry, and some youths started throwing pennies at the police. Pennies *allegedly* gave way to rocks and bricks, and a full scale riot quickly broke out. The police barricaded themselves in bar, police cars were flipped, and rioters battled riot police for control of the streets. Protests and riots flared on and off over the course of three days, with the number of participants swelling and eventually drawing in straight elements of the left (Hirshman, 2012, pp. 98-99). It was the first significant exercise of gay power in America.

The Stonewall riots were a pure and simple display of disruptive power. In the absence of just treatment, gay American’s withdrew their participation from the norms of law and order. As argued in Chapter 3, disruptive power is the primordial power of movements because it always lurks on the edges of possibility and cannot be coopted by status quo forces. With no planning or calculation, gays told the city of New York (and the broader country) that price of police harassment would be violence and chaos, where formerly there was no cost at all. The raw, unfocused, and unorganized power of Stonewall revealed to potential movement members that power was there for the taking, and thus sparked the mobilization of a mass movement.

³²⁴ Before a movement is fully mobilized, disruption carries a heightened risk of severe, or even deadly, repression. Lynching of vocal blacks in the post-bellum, pre-civil rights South is perhaps the clearest and darkest example.

Gay Americans had embraced the “duck and cover” strategy of the Pre-Stonewall Era because there seemed no alternative. Those days were over.

The Stonewall Era (1969-1979) of the gay rights movement was defined primarily by its use of disruptive power. While rioting is generally an unsustainable tactic that invites repression, gay rights activists quickly replaced it with a signature disruptive tactic, the zap. Zaps were theatrical disruptions of high profile officials and groups that combined the civil disobedience of sit-ins with the playful subversive elements of drag culture. The phrase often used to start the confrontations was “Zap! You’re Alive,” which established the playful non-violent character of the disruptions. But disruptions they were. New York Mayor John Lindsay was repeatedly zapped at fundraisers and galas, including high profile media-packed events at the Metropolitan Opera and Radio City Music Hall. Activists would infiltrate these events, chain themselves to railings, and confront the Mayor over police harassment, employment discriminations, and other rule of law issues (Hirshman, 2012, p. 121). These tactics were remarkably effective, in part because Lindsay’s *public* stance was that his administration did not support harassment or discrimination against gays. Stonewall Era activists were able to repeatedly leverage disruption to create costs for officials who could grant concessions without making public moves that might be criticized as “pro-gay.”

Another target of disruption was the American Psychiatric Association, whose inclusion of homosexuality as a psychological disorder in the Diagnostic and Statistical Manual (DSM) provided scientific cover for discriminatory public policy. By more or less shutting down the ASA’s 1971 annual meeting and other conferences, activists managed to get homosexuality removed from the 1973 revision of the DSM. This key victory would set the stage for key policy change, such as the 1975 removal of the US civil service hiring ban. Without the justification that mental illness was a de facto reason for exclusion, such bans lacked any basic justification (Hirshman, 2012, p. 131).³²⁵

³²⁵ Of course the military carried on with its own unique appeals to morale and institutional culture until the Obama administration eventually ordered an end to Don’t Ask, Don’t Tell in 2010. Even then, congressional hearings were required so that key military personnel could report their findings that open service would not impact troop solidarity and cohesiveness.

Importantly, zaps and other disruptive actions were always conceived of as opportunities to also exercise plebiscitary power. The presence of media raised the costs to targets because activist messages were carefully scripted to frame the confrontations in friendly terms, such as fairness and the rule of law. With the APA disruptions, articulate professional gays were able to refute the mental illness classification through their presence and presentation. Moreover, gays framed their request to the APA in terms of *participation in the process* of DSM revision, which reinforced their position that the psychological community lacked any significant experience with gays who were not already undergoing treatment for other psychological problems.

This modest plebiscitary force functioned more as an adjunct to disruptive efforts than as an independent avenue of influence. By controlling the framing of their disruptions, and conducting them in the presence of media, activists constrained how their targets could react. Heavy-handed reactions by targets play poorly in media, particularly with a minority seeking basic rule of law protections and a stake in defining their own mental health. But whereas Chapter 5 discusses plebiscitary power in terms of winning policy support from third parties, here we see public attention functioning more purely as a type of punishment. Gays did not yet have public respect and professional organization to wield decisive plebiscitary force. Yet the targets did not need to feel overwhelming support for the policies activists wanted, but simply needed to fear the embarrassment and ridicule of being shamed by their lowly adversaries and pushed to behave badly. In this way, plebiscitary power served to defend and enhance the exercise of disruptive pain.

Activists also blended plebiscitary power with pluralist power, particularly on the issue of criminal sodomy. The “Felons 6” in California is the prime example. These gay Californians admitted to committing sodomy and offered themselves up for arrest, all in front of the media. While the formal intent of the activists was to challenging the issue in the courts, the real goal was to embarrass and shame the public officials who would have to publicly prosecute the cases. While the activists’ cause may not have been particularly popular, no official wanted to be known as the sodomy prosecutor. The Felon 6 couldn’t get themselves arrested, and to

eventually the California legislature repealed the sodomy ban in 1975.³²⁶ During the Stonewall Era 19 states other than CA decriminalized sodomy, but in those cases gay activists played only minor roles in legislation designed to modernize criminal codes on sex following the sexual revolution of the 1960s (Eskridge Jr., 2008).³²⁷

Perhaps the most dramatic plebiscitary effort came in 1979, when some 75,000 activists marched on Washington in the movement's first grand national display. But consistent with Chapter 5, the impact of medium-large marches on Washington was already waning in the late 70s (Barber, *Marching on Washington: the Forging of an American Tradition*, 2004). The march produced only scant media coverage, include a brief Page 17 New York Times article that gave significant response space to Christian conservative opponents (Thomas, 1979). Absent any disruptions (like the bloody Southern marches of the Civil Rights movement that framed the 1963 March on Washington) or any significant lobbying or electioneering pressure, the march was simply not a significant source of power.

The disruptive nature of the movement during the Stonewall Era mobilized participants and accomplished some of the basic early gay policy goals. However, that disruptive nature also made organization building problematic and prevented the development of pluralist and plebiscitary resources. The newly mobilized activists thirsty for dramatic disruptions and skeptical of authority had little patience for developing organizational rules and norms. Groups like the Gay Liberation Front and Radicalesbians displaced the establishment Mattachine Society following the Stonewall riots, but GLF folded after just 9 months due to organizational struggles. GLF would discuss positions for hours in open rules meetings before taking a member vote, only to have the vote's loser reintroduce the issue at the next meeting. Unable to plan or act, GLF divided or disbanded (Hirshman, 2012, p. 107). Organizations with little in the way of hierarchy or decision-making process where the loci of public attention, activist energy, and the movement's scant resources, but such groups did little to build a more permanent agenda or strategy.

³²⁶ Similar efforts were conducted in Minnesota, New York and the District of Columbia, but none were successful.

³²⁷ This is another example of how the gay rights movement was able to achieve goals by piggybacking on more established movements. Here the feminist movement of the 1960s and 1970s pushed hard to decriminalize sexual and reproductive behavior.

The Stonewall Era did see the emergence of some of the movement's core pluralist advocates, including the Lambda Legal Defense Fund and the Gay Rights National Lobby (GRNL was the precursor to the Human Rights Campaign Fund). In San Francisco, gay activists turned out to elected gay ally Diane Feinstein as City Council President in 1972, and eventually openly gay activist Harvey Milk to City Council. Gays made tentative strides in broader California politics with the Alice B Toklas Democratic Club, becoming a minor player in statewide Democratic primaries. And perhaps most importantly, gay activists worked their way into more established liberal organizations like the National Organization for Women (NOW) and the American Civil Liberties Union (ACLU), which had firmly resisted incorporating gay issues at the beginning of the Stonewall Era (Hirshman, 2012, pp. 159-164). These organizational achievements set the stage for a strong pluralist movement, but the movement's organizational standing in the 1970s is well captured by the GRNL, which had its phones cut off for non-payment in 1978.

The period did see a scattering of local legislative victories, with Miami (1977), Aspen (1977), Berkeley (1978), and San Francisco (1978) passing antidiscrimination ordinances. The casual observer will note that these victories came unsurprisingly in localities with exceedingly liberal populations and an overrepresentation of gay citizens. These narrow victories galvanized statewide and national opposition that revealed gay rights groups to be relatively weak and unprepared. Religious conservative groups like the Focus on the Family and Save our Children emerged in 1977 to push back against gay rights in Colorado and Florida respectively. These groups, supported by an ascendant Republican Party, would soon prove the gay rights movement extremely vulnerable to democratic politics by repealing gay rights ordinances in initiatives/referendums in Miami (1977), St. Paul (1978), Wichita (1978), and Eugene (1978) (Hirshman, 2012, p. 245).

When Harvey Milk, the movement's first real political player, was assassinated in 1978 his killer, Dan White, received only a slap on the wrist conviction, manslaughter. While pundits have distorted the history of the trial to claim White got off on the famous "Twinkie defense," in actual fact it appears a conservative jury simply felt that killing a gay man was something less than murder. Upon seeing their lack of fair access to the courts or the media, San Francisco's gay community rioted. Police eventually put down the riot, and retaliated by raiding a prominent

gay bar in the district, bringing the Stonewall Era to a close in an episode eerily similar to its beginnings.

*The AIDS Era*³²⁸

From 1980-1986 the gay rights movement struggled against two challenges that overwhelmed the movement's meager resources. First, the Reagan revolution united a small government ethos with religious social conservatism, and put gay rights protections squarely on the Republican hit list. Second, the emerging AIDS crisis dramatically expanded the rights and services the gay community needed from government, an expansion that especially taxed a movement built around requests to be left alone by government. The result was that the AIDS Era was a period of retrenchment, where the movement's power was overwhelmed by its adversaries.

The disruptive power that characterized the movement in the 1970s did not carry-over into the 1980s, which is hardly surprising given the realities of activist fatigue discussed in Chapter 3. The problem of fatigue was exasperated by the transient nature of Stonewall Era organizations and the lack of more permanent activist networks for mobilizing activists. Save Our Children was shifting the venue of contention to state level voter initiatives, which are not ready targets for disruption. It is difficult to inflict pain on voters and then turn around and get them to vote for your cause, which again highlights the tensions that can exist between different forms of power. In addition, the rise of AIDS as a public health crisis in the gay community raised confusing questions about what the movement wanted and who could deliver. I have argued that if disruption is not based on clear targets and deliverable goals, then the public will have little tolerance for the disrupters. All these factors tempered disruptive power in the early 1980s.

The AIDS Era saw both progress and retrenchment in state and federal politics. The movement began to build pluralist resources and made tentative pushes in electoral, legislative, and judicial venues. On the electoral front, gay groups continued to build their presence in

³²⁸ While the AIDS epidemic extended well past 1986, this period of gay rights activism was defined by the movement's difficulty responding to the crisis. The following period saw a more effective response.

California. Gay signatures were a major reason Gary Hart was able to secure the top ballot position in the 1984 Democratic Presidential Primary, and gay votes helped Hart narrowly carry California over the eventual party candidate, Walter Mondale (Hirshman, 2012, p. 218). While Hart failed to secure the nomination, the Democratic Party began to recognize gay money and votes as a cohesive segment of the party that candidates would need to court. However, this budding electoral influence did not produce policy, or even significant promises, for some time.

On the legislative front, in 1982 Wisconsin passed the first statewide antidiscrimination law covering sexual orientation, almost a decade ahead of any other state. The Wisconsin effort was largely an inside job pushed through by State Representative David Clarenbach, with most gay rights groups viewing state legislation as a losing cause. Clarenbach, the son of NOW founder Kathryn Clarenbach, was not openly gay during his time in office, but later claimed most players in Madison were aware of his sexual orientation. He pushed relentlessly for several years to pass the legislation, along with measures decriminalizing various forms of consensual sex. The success in Wisconsin is a notable exception, as was the passage of 1984 hate crime legislation in California. Other victories tended to come in insulated liberal localities, such as Boulder, Colorado, which in 1981 followed joined Aspen in banning discrimination against gays (Hirshman, 2012, p. 247).

While small legislative victories were achieved in the early 1980s, the broader political environment became markedly more conservative. Following the example of Save Our Children in the late 1970s, conservative activist groups like the Moral Majority passed referendums repealing gay rights legislation in Santa Clara (1980), San Jose (1980), Duluth (1984), and Houston (1985). In the case of Houston, the anti-gay measure received a whopping 82% of the vote. Anti-gay activists were even able to secure a bipartisan vote of 281-119 by the House of Representatives, with the approval of President Reagan, to overturn a District of Columbia municipal law removing sodomy from the sex crime code.³²⁹ The brief national campaign saw gay rights advocates completely outgunned in terms of financial and political resources, and in 1981 sodomy was re-criminalized in the nation's capital. Beyond the laws they passed, the surge in anti-gay activism effectively tied up movement resources in defensive measures and halted

³²⁹ The Supreme Court has since ruled that single house vetoes of DC legislation are unconstitutional, however, the Congressional campaign still points to how overmatched gay rights advocates were on the national stage.

movement progress on issues like *decriminalizing* sodomy (Eskridge Jr., 2008, pp. 209-219). As I have stressed throughout, stagnation and inaction are always victories for those holding power and privilege.

At the same time the activists were hitting a wall on sodomy and antidiscrimination laws, the AIDS epidemic shifted the priorities of the movement and taxed its weak organizational resources. It turned disruptive power in on the movement as discussions of sexual restraint produced a mass withdrawal of support from activists concerned with preserving hard fought sexual freedoms. This infighting undermined the authority of movement leaders on the AIDS issue, such as the group Gay Men's Health Crisis, who increasingly looked to the government for a cure. Where previously activists were seeking an end to harassment, criminalization, and discrimination, now they were actively seeking government money and support. This switch in goals did not gel well with movement frames of non-intervention or with disruptive tactics. Channeling disruptive power to produce action from policymakers on legislation and bureaucratic rulemaking takes careful targeting by savvy groups employing clever plebiscitary frames. It takes groups that know what they want and how they want it to happen. The gay rights movement simply lacked the organization and power resources to push such an agenda at the start of the 1980s.

As discussed in Chapter 5, plebiscitary power can be a double edged sword, and activists always risk losing control of media frames. This was certainly the case with AIDS. By 1981, an emerging group of rare and aggressive cancers, infections, and respiratory conditions was being identified in New York and California's gay communities. The unfortunate name settled on by researchers, the CDC, and the NIH: Gay-Related Immunodeficiency or GRID. Gay rights advocates asked for government action, and the government responded by addressing the health crisis as a gay disease. Anti-gay opponents were quickly able to parley GRID into three devastating frames: public health, public morality, and divine judgment. The public health frame claimed that anal sex leads the development and spread of disease, which even many liberals found a compelling reason to leave sodomy laws in place. The morality frame argued that gay culture promoted promiscuity, as evidenced by GRID, and thus public policy should not legitimate gay life choices through legal protections. Finally, Jerry Falwell and the Christian right pushed a frame of divine judgment that argued the emergence of a disease afflicting only the

gay community was evidence that the Christian God had singled out homosexual sin for retribution. This final frame worked not only to stymie overall movement progress, but also justified public health policy that simply let GRID do its deadly work. After all, you don't try to stay the hand of God.

For the first few years of the AIDS crisis, the Reagan administration did virtually nothing. No public statements. No research funding. No public health programs. The gay rights movement found itself largely powerless to force Reagan's hand. They had neither effective media frames nor organizational muscle, and without these resource the movement could not harness its disruptive potential. Adding insult to injury, a number of constitutional challenges to sodomy bans were percolating up through the lower courts, leading to the devastating 1986 Supreme Court Ruling, *Bowers v. Hardwick*. The *Bowers* ruling upheld sodomy laws as consistent with the Constitution's right to privacy, and further asserted that the regulation of moral tradition was a valid role for government. *Bowers* also appeared to foreclose Fourteenth Amendment equal protection challenges to anti-gay laws. Although a close 5-4 ruling, *Bowers* made clear that the Courts would not provide an alternative venue for a movement struggling to influence democratic politics.

The Resurgence Era (1986-1996)

In the wake of *Bowers v. Hardwick* the gay rights movement came to terms with its lack of political power. For many, it felt like a return to the days before Stonewall. Unsurprisingly, this meant a renewed focus on disruption, but this time it would be more deliberately pared with organizational structure and precise messaging. These efforts would not turn the tide in the movement's favor overnight. There would still be a number of brutal defeats in this era. However, the movement that emerged from this period was set upon a path to greater power and influence.

This era could also be called the "Act-Up" era. The *AIDS Coalition to Unleash Power* delivered on its name: it unleashed power. Where Larry Kramer's previous group, The Gay Men's Health Crisis, had proved largely impotent, Act-up succeeded in pushing gay rights onto

the national stage and held it there until government responded. The group is most well known for its use of direct action protests that disrupted major institutions in attempts to increase the availability of AIDS drugs. Starting in 1987, the year of its founding, Act Up shut down the streets surrounding the New York Stock Exchange three times in as many years. Well over a hundred activists were arrested in these protests, and in 1989 members even managed to chain themselves to VIP balconies inside the Exchange. In 1988, over a thousand activists surround the FDA's headquarters and shut down operations for a full day. Two years later hundreds of activists held a die-in in front of the NIH. These early actions typify Act Up's central tactic of "shutting down" targets and highlight the centrality of disruption in late 1990s gay rights activism.

While Act Up built its reputation through disruption, a fuller picture of the NYSE, FDA, and NIH protests demonstrates that the movement's resurgence was tied tightly to better use of organization building and media appeals. Act Up made significant use of strict meeting rules, developed a formal committee structure, including an Action Committee and a Treatment and Data Committee, and actively sought to incorporate skilled professionals, either within its own committees or through support from groups like Lambda Legal. From the very start Act Up sought to avoid the disorder that had quickly sunk the Gay Liberation Front, and further sought to build the resources and expertise to leverage their disruptions in negotiations with policymakers. For example, Lambda filed Freedom of Information Act requests so that Act Up was fully informed about potential AIDS drugs and their progress through the FDA process. The Treatment and Data Committee was led by pharmaceutical chemist Iris Long, who taught the group the details of the drug approval process they hoped to influence, and made Act Up a legitimate authority on the state of AIDS research. They turned the FDA protest into a form of grassroots lobbying that gave specific reasons for the expedited approval of specific drugs. And during the NIH protest, "AIDS Czar" Anthony Fauci, head of the Nation Institute of Allergy and Infectious Disease, invited the Treatment and Data leadership to begin a collaborative process that revolutionized how experimental drugs for terminal illnesses are ushered through clinical trials. Act Up was an institutionalized pluralist organization in a way that previous radical gay rights groups were not.

Equally important, from the very start Act Up seized upon effective plebiscitary frames and strategies. As discussed in Chapter 3, disruptive actions are most easily ignored or suppressed when the public does not clearly understand why the target has been selected and what the target is supposed to do about the grievance. During the Retrenchment Era there was little agreement amongst movement activists about targets or demands, and the available action frames were coopted by the opposition to focus on regulating sodomy and gay culture. But in 1987 AZT was approved by the FDA for the treatment of AIDS and all at once the movement's message crystalized: make AZT available to everyone who needs it and hurry new drugs to market. The maker of AZT, Burroughs Wellcome, could sell the only available AIDS treatment at a less obscene profit margin, and Congress could subsidize costs. The FDA could stop dragging its feet in approving new AIDS drugs. The NIH could make clinical trials more flexible to give more patients access to experimental treatments. And for each of their demands they hit on the key frame: life and death. Act up employed phrases like "we die, they do nothing," "you're killing us," the Act up moto "Silence=Death," and adopted the Pink Triangle symbol co-opting of the sign the Nazis used to mark gays in the Holocaust.

Act Up founder Larry Kramer was able to place an op-ed in The New York Times the day before the group's first Wall Street protest. Act up borrowed the services of HRC media personnel to distribute media kits nationwide before the FDA protests. The centerpiece of the NIH protest was a massive "die-in" that perfectly framed the group's message. In each case we see a movement that has become increasingly savvy and understands that temporary disruptions can be leveraged as agenda setting moments if the media adopts the desired issue framing.

As important as Act-Up was in reenergizing gay rights activism, it was hardly the whole story of the Resurgence Era. The disruptive ethos of the period extended both to establishment and fringe elements. In 1987, HRC shut down Pennsylvania Avenue across from the White House in a call for increased AIDS drug access. Marty Robinson, pioneer of the movement's direct action "zaps," resurrected the tactic with his new group, The Swift and Terrible Retribution Committee, as well as its informal counterpart known as "The Lavender Hill Mob." The mob targeted Catholic Church officials, Senators, CDC officials and anyone they viewed as responsible

for the silence on the AIDS issue. The success of their “Silence=Death” motto would lead to its adoption by Act-Up.

Beyond disruption, we see a more complicated picture emerge, in which the gay rights movement increasingly intertwined pluralist and plebiscitary power.³³⁰ A key example is the movement’s success in piggybacking on Jewish hate crime tracking legislation. The National Gay Task Force, after much cajoling, was able to secure a partnership with the Anti-Defamation League in 1987. Their joint lobbying produced the 1990 Hate Crime Statistics Act, which tasked the FBI with tracking hate crimes against groups, including gays. This lobbying effort succeeded in large part because activists embraced an informational issue frame, which undercut opposition claims that gays did not need special protections. If gays were not being widely targeted for violence, the FBI would confirm it. But activists knew the data would show significant victimization of gay Americans, and it did just that. The Statistics Act would go on to show that hate crimes against gays are prevalent, involve particularly high rates of assault, and include a number of murders.³³¹

Another area where plebiscitary power was able to thrive in conjunction with pluralist power is in the movement’s resurgent use of the courts. After Denver passed an anti-discrimination ordinance in 1992, Colorado conservatives rallied to pass Amendment 2, a statewide law prohibiting Colorado municipalities from protecting gays as a class. The case would be challenged in *Romer v. Evans* as a violation of the 14th Amendment right to Equal Protection, and wind its way through the appeals process until the Supreme Court decided the case in 1996. While the ruling striking down Amendment 2 was itself historic, also notable were the televised lower court proceedings, which presented the country with a striking contrast of upstanding model gay plaintiffs v. thinly veiled and factually challenged prejudice of the law’s

³³⁰ The movement continued to build its more conventional political giving, even being courted by Bill Clinton for his ‘92 and ‘96 election campaigns. But while these efforts built a foundation for future political influence, movement money was just a drop in the bucket at this point, and a drop with no other bucket to fill.

³³¹ For example, 1996, while there were roughly the same number recorded gay (1281) and Jewish (1209) victims of hate crimes, 78% of crimes against gays were against their persons, while only 34% of crimes against Jews were against their persons. If we look at assault numbers, 41% of hate crimes against gays were assaults, while only 4% of crimes against Jews involved assault. So whereas Jews suffered from a high incidence of vandalism and property destruction, gays suffered from high rates of bias motivated violent crime. In this respect the plight of gays looked similar to that of black victims of hate crimes. See the FBI’s 1996 Unified Crimes Report.

proponents. As stressed in Chapter 5, access to the political agenda is the clearest way for activists to secure meaningful media attention for their issues.

Romer v. Evans was a surprising and historic ruling that breathed significant pluralist and plebiscitary power into the movement. The ruling was surprising in that *Bowers v. Hardwick* had so recently appeared to squash any hope gay activists had of using the 14th Amendment's Equal Protection clause, specifically by denying that gays could constitute a "suspect class" that could only be singled out in legislation with a compelling state interest. *Bowers* give governments permission to treat gays differently, provided legislators offered a minimal rational justification for that treatment. Under this standard, and given the Court's endorsement of encouraging "traditional" values in *Bowers*, how could Colorado lose in *Romer*? The answer is the Court decided that the only justification for the Colorado law was to discriminate and demean gay Coloradans, and as Justice Kennedy wrote, "animus towards the class that it affects" does not qualify as a legitimate interest of the state. By rejecting moral and cultural rationales for differential treatment, the SCOTUS presented anti-gay forces with a kind of Sophie's choice: they could abandon moral/religious rhetoric in their legislative campaigns and risk losing popular support, or press forward with anti-gay moralizing and risk defeat in the Courts. This frame shift mirrored the one that followed SCOTUS decisions on racial housing discrimination and school segregation. More than any other moment, the *Romer* decision allowed the gay rights movement to escape a cumbersome morality frame on sexuality issues and assume the potent plebiscitary mantle of the generation's defining civil rights cause.

The Hate Crime Statistics Act and *Romer v. Evans* victories both involved two intertwined forms of power. When movement activists tried to press their claims with a single power approach, the result was often failure. For example, Bill Clinton's unwillingness to fight on the issue of gays in the military stunned many gay supporters. Clinton had won key financial and electoral support over his primary opponent, longtime gay ally Paul Tsongas, after Clinton appeared to promise sweeping military reforms (amongst other policies) in a 1992 speech to Access Now for Gay and Lesbian Equality (ANGLE).³³² Movement activists were emboldened by an apparent friend in the White House and the establishment of new electoral and lobbying

³³²In the California primary, gays raised \$4 million for Clinton, turned out thousands of canvassers, and by some reports produced 1/7 of the Clinton vote through their ballots and those of friends and families (Hirshman, 2012, p. 224).

organizations like the 501(c)4 Human Rights Campaign Fund in 1989 and the Victory Fund in 1990. But when the issue of gays in the military hit the agenda in 1993, military brass was hugely successful in framing the issue in terms of military culture and moral. Caught off guard, movement organizations were unable to shift the debate away from issues of military preparedness, and the Commander in Chief was unwilling to expend his political capital on the issue. The result was the unfortunate institution of “Don’t Ask, Don’t Tell,” which further entrenched the idea that homosexuality was incompatible with patriotism and public service. With no plebiscitary game plan, pluralist efforts at military reform were a flop.³³³

³³³ Two other examples of movement efforts stumbling without plebiscitary support are the push to shift the Catholic Church’s position on safe-sex AIDS prevention and the push to pass gay marriage laws at the state level. In the former case, the conflict came to a head in 1989 when 4,500 Act-Up protesters disrupted a mass by Cardinal John O’Connor New York’s St. Patrick’s Cathedral. With the streets blocked by a die-in, inside, activist Michael Petrelis screamed “O’Connor, you’re killing us! You’re killing us, just stop it! Stop it!” while other activists laid down in the aisles or chained themselves to pews. Police removed the “dead” protestors and took 111 activists into custody. The “Stop the Church” action produced one of the biggest media moments in the movement’s history, but almost all press coverage was harshly critical of Act-Up (Hirshman, 2012, pp. 205-206). Coverage framed the issue as religion v. homosexuality, with activists framed as anti-religious. Mayor Ed Koche’s statement, “If you don’t like the church, go out and find one you like - or start your own,” succeeded in undermining activist attempts to draw attention to the complex connection between the Church and public health policy (DeParle, 1989). While some movement activists to this day take the “any media is good media” view that Stop the Church was a success, it seems clear that Act-Up did not have a practical plan to support their disruption with a well-framed media message. While a “sell us the drug” protest of a pharmaceutical company and a “approve more drugs” protest at the FDA make intuitive sense, Stop the Church lacked the clear target and policy connections that Chapter 3 discussed as essential to disruptive power.

Our second example concerns gay marriage. In 1993, Hawaii’s Supreme Court declared that same sex marriage was required under the state’s equal protection clauses of the Hawaii Constitution. This stunning pluralist victory came sooner than most movement groups anticipated possible, and there was no significant framing of the marriage issue present in mass media. In the rush to capture public opinion on the ruling, activists ran into religious opposition that was far better positioned. The Christian Right pressed forward with dual frames that had proven successful in the past. First, they claimed that the state was siding with gays in a dispute between religion (the traditional keeper of marriage) and the anti-religious gays of Stop the Church. Second, the trope of Save Our Children reemerged arguing that gay marriage would place children in harm’s way because “kids do best with a mom and dad.” While the legal issue in Hawaii remained muddled for years, until voters amended the Constitution in 1998 to ban gay marriage, the national issue of gay marriage surged forward under the religious and family framing. After Newt Gingrich and the right took Congress in the 1994 election, there would be a rush amongst Democrats and Republicans to show who was the most “family values” friendly on the marriage issue. The tellingly named federal Defense of Marriage Act (DOMA) would eventually sail through Congress with only 67 nays in the House and 14 in the Senate. And once again, erstwhile ally Bill Clinton signed anti-gay legislation. While this vignette certainly shows that movement pluralist power was not adequately organized for the marriage battle, it is unlikely any movement could muster the money and votes to overcome such a poisonous plebiscitary framing.

A final point worth noting on the Resurgence Era is the light it shines on institutional thickening, particularly as discussed in Chapter 4. I noted there that institutional thickening was likely to shut out challengers from institutional channels, but that the phenomenon may actually work to the advantage of established movements who already have a seat in these institutions. What we see in the Resurgence Era is that this later point can be extended to robust institutional channels that have largely outlived their original function. As James Q. Wilson points out, the drive of organizations to survive and grow often leaves the organizational mission malleable and fungible. In the case of hate crime legislation, gay activists were able to graft their policy goals onto the far more established and moneyed Jewish and Black interests. A far more telling example centers around the *Romer* case, which drew legal support from top of America's legal minds, most notably in Professor Laurence Tribe's influential *Amicus Brief*. One interpretation behind the surge of law school interest in gay rights, one I find compelling, is that a new generation of lawyers working in the shadow of the great civil rights cases was champing at the bit to lay down their own markers on history. That is to say, the law school system, and its connections to judging and clerking, had built its position in the American polity based on its defense of minority civil rights. As opportunities to break new legal ground on black and women's civil rights have been exhausted, gay rights presented the best opportunity for the kind of profound legal work that defines a career. Why gay rights? I would argue that the Resurgence Era pressed forward claims to marriage, military service, and antidiscrimination in housing and employment. These issues mirror many of the great civil rights cases of the past. Finally, the AIDS epidemic lent a life or death urgency to gay rights that attracted the "white knights" of the legal community.

The Legal Era (1997-2008)

The two major policy events of 1996 would set up movement dynamics that remained in place for more than a decade. First, movement opponents discovered effective ways to harness public opinion into legislative victories. DOMA (as well as DADT) was a prominent and public national affirmation of restricting gay rights, and it opened the floodgates for repressive state laws, including state DOMAs. Second, the movement hit upon a successful venue to press its

claims in the courts. The *Romer* decision laid out a legal rationale and for state and federal courts to strike down laws based on *animus* towards gays, but just importantly it gave the high court's seal of approval to lower courts looking to push the boundaries of permissible judicial activism.

During this era, disruptive tactics receded in prominence and pluralist and plebiscitary power worked in tandem. The movement turned the *Romer* precedent and issue frame on state sodomy laws, specifically targeting the handful of laws that only criminalized homosexual sodomy. Lambda Legal and the ACLU initiated legal challenges to sodomy laws in six states, including the Texas suit that would make its way up to the Supreme Court. In 2003, SCOTUS handed down its decision in *Lawrence v. Texas*, which stated that sodomy laws violate the "Right to Privacy," but drew much of its logic from *Romer's* discussion of animus against minority groups.³³⁴ Animus, discrimination, persecution. The movement had established its narrative at the judicial level, and this judicial framing would provide a one-two punch of eliminating some anti-gay legislation and painting a frame of prejudice on opposition efforts. The prejudice/civil rights frame would be essential in slowly eroding the opposition's public opinion advantage. Most people don't want to be on the wrong side of civil rights history.

As SCOTUS was considering *Lawrence*, the Massachusetts Supreme Court was considering *Goodridge v. Dept. of Public Health*, a suit advanced by Gay and Lesbian Advocates & Defenders (GLAD), which argued the equal protection clause of the MA State Constitution required the legalization of same sex marriage. Justice C.J Marshall held off ruling on *Goodridge* until *Lawrence* was handed down, and then preceded to quote *Lawrence* in the second paragraph of her opinion. So we can clearly trace the judicial civil rights frame from *Romer* to *Lawrence* to *Goodridge*, with gay rights advocates litigating as pluralist insiders and leveraging their victories into a plebiscitary advantage that would eventually shift the overall political landscape in their favor.³³⁵

³³⁴ Only Justice Ginsberg's Concurrence favored a direct adoption of the Equal Protection Clause as in *Romer*.

³³⁵ The role of the courts in this social transformation and others is regularly disputed. Judges are often considered fundamentally conservative because they are appointed by elected officials at one political moment and serve to institutionalize those views in offices that in many cases carry life appointments. When their rulings appear to be at the leading edge of change, critics suggest that the courts are simply

I stress the plebiscitary aspect of the movement's judicial strategy because there was nothing inevitable about the movement's gains in public support. In the wake of *Lawrence* and *Goodridge*, opposition forces organized one of the most dramatic state legislative campaigns in American history. Earlier democratic frames of "majority rule" were successfully pressed, as they often are when court rulings run counter to public opinion. Defense of Marriage Acts amending state constitutions to prohibit gay marriage were placed on the 13 state ballots through initiatives and referendums. All of them passed. In 2005, Kansas and Texas passed gay marriage bans, and in the 2006 midterm elections, 7 more states followed suit. And in 2008, California, Florida, and Arizona passed marriage bans. In most of these public votes, the outcome was not even close. In Alabama, a striking 81% of voters favored prohibiting gay marriage. Perhaps more surprising, 57% of voters in liberal Oregon also favored banning gay marriage (McKinley & Goodstein, 2008). In all, 25 states took dramatic and popular legislative steps to halt the advance of gay rights. Zero states voted pro-gay on DOMA measures. This period was a legislative drubbing.

If we look public opinion polling on the gay marriage issue we see a significant uptick in support for gay marriage following legalization in Massachusetts. I argue that the civil rights frame of the courts was impactful, particularly for a receptive element of liberal America. Moreover, the policy presence of gay marriage in Massachusetts was a visible rebuttal to opposition "the sky is falling claims" that played on people's worst fears of social decline. In the opposite direction, the opposition's legislative efforts starting in 2004 breathed new life into the democracy frame that legitimates majority values. Movement gains in public opinion ground to a stop for the rest of the Litigation Era following the 2004 election season. The legislative and judicial battles of the Era are a good demonstration of the way in which pluralist efforts both depend upon and reinforce key issue frames.

While the gay rights movement was losing legislative contest after legislative contest, it continued to build its pluralist electoral and lobbying capacity. As discussed in Chapter 4, gay

trying to maintain their institutional legitimacy by avoiding rulings that will shortly become reviled and overturned. Better to seek the crest of the wave than be swamped by it, regardless of your personal feelings about the wave! *Romer*, *Lawrence*, and *Goodridge* make the gay rights movement a compelling example of the courts producing significant social policy *and* working substantially alter the trajectory of public opinion. Later SCOTUS cases certainly seem to be riding a shift in public opinion, but a strong can be made that these early case were instrumental in producing that shift.

rights organizations concentrated significantly larger percentages of movement resources in political active C4 organizations and PACs. In particular, The Human Rights Campaign amassed the money, activist network, and professional expertise to engage on federal issues and set up field operations in states with ballot initiatives. The Equality Federation took on the role of coordinating actions between states. Gill Action spent millions as a political hit squad targeting vocally anti-gay politicians. The Service Members Legal Defense Network defended and documented DADT discharges and built an expertise in military culture that could challenge DoD characterizations. As the years past, HRC and these other players developed an election ground game that significantly outpaced opposition organizations. During the Legal Era, the gay rights movement moved almost entirely away from disruptive power and institutionalized to a remarkable degree. While the black civil rights movement achieved its greatest legislative victories with a constant threat of disruption hanging over the country, the gay rights movement appears have followed a somewhat different trajectory. This should give us pause in concluding that any specific constellation of power strategies is “the right one” across time and circumstance.

The Majoritarian Era

In 2009, the gay rights movement turned a corner as its pluralist reach began to extend to legislative victories. The 2009 Hate Crime Prevention Act was the fruit of two decades of hate crime statistics tracking. More importantly, 2009 saw the Vermont legislature, the Maine legislature, and the Washington DC city council all legalize gay marriage.³³⁶ In each of these cases, the civil rights frame had taken firm hold in liberal circles and movement organizations brought significant resources to bear. As public opinion inched forward on gay issues, state battles shifted from defense battles in conservative states to offensive pushes in liberal states.

On March 1st, Maryland Governor Martin O’Malley signed The Civil Marriage Protection Act of 2012 into law, making the Old Line State the 8th in the Union to legalize same-sex marriage. The Act squeaked through both Houses of the MD legislature, with the critical votes in the House of Delegates only secured in the final hours of the campaign. In such a close political

³³⁶ Though the Maine law would be overturned by referendum.

battle, any number of factors might be seen as decisively shifting the outcome, but in this case I see organization as key. After an unsuccessful 2011 effort, the state group Equality Maryland ceded control of the campaign to The Human Rights Campaign (HRC), which spent some \$500,000 dollars and countless staff hours lobbying key members of the MD House of Delegates prior to the vote (Linskey, 2012). In a similar show of lobbying strength, the organization had previously devoted 30 full time organizers to lobby New York's state representatives over a 2011 marriage equality bill, which also passed by the slimmest of margins. I stress these marginal victories because they offer clear evidence of the movement using skilled lobbying and electioneering to swing critical votes and pass legislation. One could hardly ask for a more obvious display of pluralist power.

It is also worth noting the increasing electoral presence of the gay rights movement starting in 2008. HRC flexed its muscles in the 2008 election by endorsing Barack Obama for president and spending some \$7 million to turnout Democratic voters.³³⁷ But perhaps more importantly, HRC did not endorse a candidate in the highly competitive 2008 Democratic primary, and the gay rights community was able to position itself as a key demographic courted by both Obama & Hillary Clinton at high profile HRC events. Promises were made, and the movement was organized to see those promise were kept. HRC's political mobilization undoubtedly contributed to the White House's decision to expend some of its waning political capital in 2010 pushing for the repeal of the military's "Don't Ask, Don't Tell" policy. The call for repeal, following the grueling battle over health care reform, was widely seen as a move to shore up the wavering support of the gay rights movement ahead of the 2010 and 2012 elections.³³⁸

As figure 6.1 shows, gay marriage, the movement's most important and divisive policy issue became a majoritarian issue 2011, pushing President Obama to explain that his views on the issue were "evolving" and essentially switch his position from support of the civil union middle-ground to full support for marriage equality. The combination of legislative victories and favorable public opinion served to undercut the key frame of the movement's opposition. The

³³⁷<http://www.hrc.org/the-hrc-story/our-victories>. Accessed on March 2, 2012

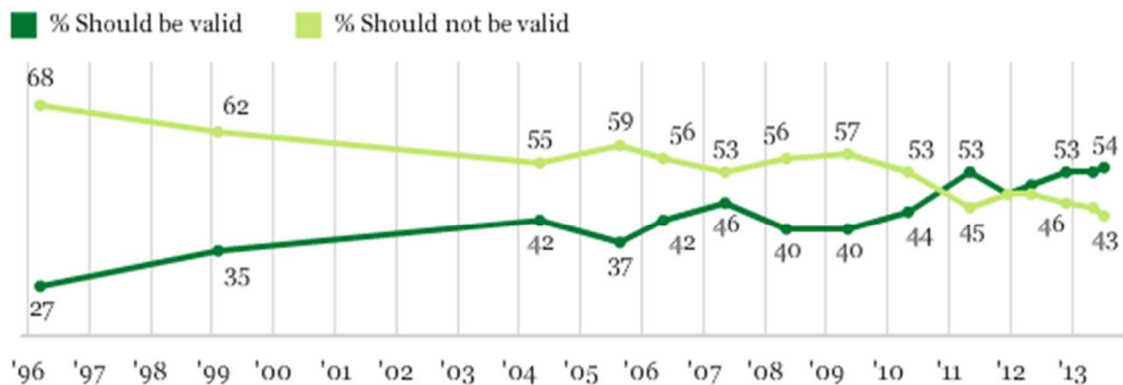
³³⁸ Simmons, Christine (October 10, 2009). "Gays Question Obama 'Don't Ask, Don't Tell' Pledge". USA Today. Associated Press. Retrieved December 10, 2009.

plebiscitary importance of the national frame is key, as even states with strong majorities opposing gay marriage were unable to successfully deploy democratic frames. Their best alternative was “states’ rights,” which is suspect frame on many issues, let alone an issue advancing a civil rights frame. As argued in Chapter 5, the impact of this plebiscitary surge arguably reached all the way up to the Supreme Court, where the Justices affirmed a significant expansion of the *Romer* equal protection animus logic in *Windsor* and *Perry*. *Windsor* and the shift in public opinion drive a new wave of state and federal court decisions overturning most of the gay marriage provisions passed from 2004-2008. Finally, in 2015 the Supreme Court ruled in *Obergefell v. Hodges* that marriage is a fundamental right of all Americans, regardless of sexual orientation, requiring all 50 states to grant and recognize same sex marriages. It is a stunning reversal, but one that makes sense in terms of shift power dynamics.

Figure 6.1

U.S. Support for Same-Sex Marriage

Do you think marriages between same-sex couples should or should not be recognized by the law as valid, with the same rights as traditional marriages?



Note: Trend shown for polls in which same-sex marriage question followed questions on gay/lesbian rights and relations

1996-2005 wording: "Do you think marriages between homosexuals ... "

GALLUP

In the second decade of the 21st Century, a positive position on gay rights became good politics for Democrats and no-win situation for Republicans. Gay organizations had developed

money and public support, and had shed most stigmas in the eyes of independents and even moderate Republicans. Add to this electoral and legislative strength a growing body of pro-gay law, and we see a movement entering its majoritarian phase, where implementation and budget battles will soon be the chief concerns.³³⁹ What lessons can we draw from the most successful movement considered in this chapter?

First, power of each type is increasingly constrained, but opportunities to influence politics and policy persist. I began with the gay rights movement because most of the constraints discussed in Chapters 3-6 are clearly at work, and yet the gay rights movement is arguably the biggest social movement success story of the late 20th and early 21st centuries. The key point to note is that limitations on power do not entail the absence of power. This observation should lead us to avoid placing too much faith in cyclical theories of political opportunity structures. Political outsiders are still impacting the system, and it is worth paying attention to which groups seem to be weathering the constrained political system best.

Second, when a single type of power is exercised in isolation, gains are limited, movements are vulnerable, and those in power are able to undermine activist opponents. In particular, we saw that episodes where the movement did not have adequate plebiscitary messaging and the opposition was able to frame movement efforts as anti-religious, anti-family, or anti-country/national security. In these cases, movement demands went nowhere and activists were often faced with an active surge in opposing activity, such as state amendments banning gay marriage. We might consider this pattern evidence that the types of power deployed by movements serve different and complementary roles, as employing different types of power can constrain the response options of targets more than simply overpower them.

Third, while movements need to employ different types of power in support of one another, the danger exists that different types will undermine one another. When types of power came into conflict, the movement floundered. For example, the “Stop the Church” campaign undercut public support the more it disrupted the highly esteemed (literally sacred) workings of the Catholic Church. Disruptive actions seem to have the greatest potential to undermine

³³⁹ As well as the implementation of policy goals with broad public support like anti-bullying and anti-discrimination legislation. These goals are not always simple and easy to achieve, but they are widely accepted as public problems requiring policy solutions.

plebiscitary frames and pluralist negotiations, which is consistent with the discussion of the challenges of institutionalization in Chapter 3. Of course, the dynamic also runs in the other direction, which we saw when Act Up activists were included in NIH decision-making, disruptive elements essentially caused the organization to implode. Pluralist and plebiscitary elements seem to mostly work in tandem, however, not always. Activist victories in the courts fueled opposition “democracy” frames in state initiatives/referendums and in Congress that battered the movement for a decade. This last example is important because it forces us to recognize that power tradeoffs may be an unavoidable and necessary part of movement strategy, not simply the result of poor planning and execution.

Fourth, major victories have been dependent upon activists infiltrating existing institutions and grafted their demands onto existing policy structures. On one hand, the idea that insider connections are import seems to move us beyond the realm of outsider power and back into the realm of politics as usual. But on the other hand, Chapter 4 makes clear that institutional thickening should advantage those with access to established political channels. What the gay rights movement shows us is that access to these channels need not come from a decades long push to become a valued piece of one or both party coalitions. Instead, access may be gained through structural similarities to existing legislation or legal theory. Hate crime law allowed for a—to put it bluntly—“us too” approach. Another perspective is that gay rights seems to provide an excellent example of John Kingdon’s multiple streams policy-making model, in which civil rights law was a policy solution in search of a problem, and was coupled to gay rights by legal policy entrepreneurs like Laurence Tribe. While this example may seem to lead us again away from outsider agency, it must be stressed that gay rights advocates positioned themselves as the prime candidate for this legal attention. One more path to insider access is through personal connections to power players. With gay rights this came in the form of closeted politicians like Representative Barney Frank who became entrenched in the halls of power long before their sexuality became an electoral issue, as well as politicians with gay family and friends. Perhaps the best example is Vice President Dick Cheney, whose gay daughter pushed him to break with Republican opposition to gay rights and blunt his party’s vitriol on the issue. This last kind of insider access appears to be immensely important, and not evenly available across movements.

And fifth, the opportunities movements have are shaped in large part by the nature of the opposition that they face. Movements often face reluctance from the general population and political officials, as well as sharp opposition for organized interests. This organized opposition can be divided into those groups who make opposition one of several policy goals, and those groups organized entirely in opposition to a movement. The gay rights movement faced widespread dislike and disregard from the American public and its representatives, often captured in a vague “ick factor” emotion many people felt towards homosexual sex. It was a *moral opposition*, but these vague aversions proved somewhat malleable and were particularly vulnerable to the “replacement” effect of new generations entering the body politic. Consequently, political party opposition to gay rights has always been opportunistic and subject to change based on the winds of public opinion. Opposition by organized interests has been fiercer, but centers on religious right organizations with a number of policy priorities. So while these organizations wielded significant public influence and money, there was never any guarantee that these resources would be channeled towards gay rights issues. As issues become losers for the organization, a shift in policy focus to other areas is likely, and we have seen just that since 2009.

Finally, the LGBTQ movement has only been opposed by a handful of organizations focusing specifically on gay rights issues. Anita Bryant’s initially successful, but short-lived Save Our Children and the more recent National Organization for Marriage (NOM) are the two major examples, as well as other temporary groups formed to push specific referendum votes, such as ProtectMarriage.com, which supported CA Proposition 8.³⁴⁰ NOM, also formed to support California’s 2008 gay marriage ban initiative, is an excellent example of the narrow and limited nature of the movement’s core opposition. While NOM has spent millions supporting various pieces of legislation, it is not a mass membership organization and draws the majority of its funding from just a few anonymous donors. This narrow foundation limits NOM’s ability to match the gay rights movement’s plebiscitary and disruptive actions, which typically require a broad and/or ideologically committed activist base. NOM’s narrow financial base also leaves the group unstable and unable to build reliable professional resources. If the whims of a single individual control 40% of your budget, organizational survival is a constant issue. And even with

³⁴⁰ ProtectMarriage.com was heavily funded by the Mormon Church and partner with the Catholic Church and other religious organizations in support of Prop 8.

NOM generating \$5-10 million in annual revenue, its financial resources are dwarfed by movement players like HRC. In facing a purely moral opposition, gay rights advocates do not find themselves facing the significant pluralist resources of any particular industry, or business in general.³⁴¹ In sum, the gay rights movement faced an opposition with significant vulnerabilities and an inability to counter all forms of movement power.

The Anti-Abortion Movement

The United States Constitution protects a woman's right to abortion under the right to privacy, generally seen today as a 14th Amendment liberty right. This is a high hurdle for a movement to face, and indeed, the anti-abortion movement is the only one of the four movements in Chapters 6 & 7 that finds itself directly stymied by the seemingly insurmountable barrier of having its ultimate aims explicitly ruled unconstitutional. In this sense, the antiabortion movement faces a far more powerful opposition than the popular majority that confronted gay rights activists. Despite this challenge, the anti-abortion movement has managed to wield significant power of all three types and accomplish substantive policy wins. In this sections we support for the same five observations made about the LGBYQ movement, but I also draw five additional lessons at the end of the chapter.

The Pre-Roe Era (1967- 1972)

In a very real sense, there was no anti-abortion movement before the Supreme Court's 1973 decision in *Roe v. Wade*. When national and state public policy and public opinion have

³⁴¹ In fact, as strides have been made in employment protection, business has gravitated to the position that uniform employment laws protecting gay rights encourage commerce and reduce labor conflicts. See 2015 religious freedom controversies, including Walmart opposition.

been on your side for all of American history, you are not the political outsider. But the nascent anti-abortion movement began forming in 1967 when Colorado liberalized its abortion laws, which began mobilizing forces in a more active defense of the status quo. This period is notable because it was dominated by the Catholic Church, which commanded a prominent place in moderate-liberal politics and the Democratic Party and had access to significant financial, professional, and member resources. The National Right to Life Committee (NRLC) was founded in 1967 as the first national organized effort on the abortion issue, and was notably established and funded by the National Conference of Catholic Bishops. The effort was one of insiders with significant political access and a long established institutional role. So while we may associate anti-abortion politics today with aggressive tactics, shocking images, and right wing politics, the movement was birthed out of a middle-left institutional heritage on nuns and housewives opposing war and supporting Great Society anti-poverty programs.

Needless to say, social movements rarely grow out of establishment interests with strong institutional support. For one that did, it should be unsurprising that its formative years involved mostly traditional lobbying and some plebiscitary appeals concerning the sanctity of life. Essentially, the pre-movement movement functioned as a kind of interest group defending status quo morality against a genuine budding pro-choice movement that passed 19 state laws liberalizing abortion from 1967-1972. While these state level battles did galvanize local antiabortion activists in tandem with Church efforts, it was the 1973 decision in *Roe v. Wade* that birthed a vigorous national mass movement.

The Roe Era (1973-1985)

The case of *Roe v. Wade* is likely the most famous Supreme Court case since *Brown v. Board of Ed.* While *Roe's* impact on the larger political alignments of American politics remains vigorously debated, it is undeniable that the ruling completely redefined the politics of abortion. *Roe* argued that the "Right to Privacy" established in *Griswold v. Connecticut* also covered the decision of a woman and her doctor to continue or terminate a pregnancy. While the legal foundation of Right to Privacy remained and remains disputed, the Court's three trimester division of pregnancy rights was rather unambiguous banning abortion regulation absolutely in

the first three months of pregnancy and in all cases other than maternal health for the next three months. With the weight of the U.S. Constitution falling clearly on the side of pro-choice politics, there was a dramatic reversal in which advocates were insiders and which were outsiders. *Roe*, even more clearly than Stonewall for gay rights, allows us to delineate the start of the modern antiabortion movement.

Despite the upheaval caused by the *Roe* decision, the early antiabortion movement was built largely upon the preexisting moderate insider heavy-Catholic foundation of the Pre-*Roe* period. The NRLC officially gained independence from the Catholic Church in a move of both symbolic and practical significance, but its personnel and tactics carried over significantly from its pre-*Roe* days (Williams, 2015). This meant that power was primarily exercised in pluralist ways; specifically legislative attempts to overturn *Roe*, or at least contain its impact.³⁴² In 1973 it remained unclear just what kinds of abortion regulation would run afoul of *Roe*, and whether refusal to fund abortions by government institutions was prohibited. Moreover, most US states still had strong antiabortion majorities, and antiabortion views remained nationally majoritarian for some time. Consequently, the movement met with some significant legislative success without resorting to more aggressive plebiscitary and disruptive tactics.

Perhaps the biggest early victory of the movement was securing the Hyde Amendment to the 1977 Appropriations Act, which barred federal Medicaid funding from paying for abortions.³⁴³ At the state level, similar laws were passed restricting public funding and services from facilitation abortions. SCOTUS generally upheld these funding restrictions as consistent with *Roe*, most importantly upholding the Hyde Amendment in *Harris v. McRae* (1980) (Shimabukuro, 2015). These measures were a central goal of antiabortion moderates who were most concerned about encouraging or paying for abortion with their tax dollars. Indeed, these laws and their companion court rulings opened up a path for Democrats and independents to

³⁴² There were certainly acts of aggressive and sometimes violent activism, particularly from 1977-1979, which included arson, vandalism, and assault (Sheppard Jr., 1982). However, these actions were largely the work of isolated individuals and never garnered significant support from movement activists or organizations.

³⁴³ Over the years, Hyde and Hyde-like abortion restrictions have been expanded from HHS to spending by the Department of the Treasury, the Department of Defense, and other federal agencies. The overall impact has been to remove federal participation from almost all abortion related programs, domestic or abroad. These restrictions are sometimes collectively referred to as the Hyde Amendments.

support abortion choice as a private liberty while claiming personal moral opposition to the practice. In this way, the more radical elements of the antiabortion movement were primed to assert control over the next set of movement issues and tactics.

A second legislative push involved restrictions on abortion that fell short of outright prohibitions. At the state level, numerous laws were passed requiring waiting periods, informed consent requirements, spousal consent, parental consent for minors, fetal viability testing, abortion provider medical requirements, and other administrative hurdles. Some of these measures were upheld as consistent with *Roe*, but most were struck down as impermissible. The application of the right to privacy to abortion rights remained a murky business, as it continues to be today. However, by the mid-1980s it was becoming clear to activists that wherever the line between permissible and impermissible abortion regulation lay, *Roe* would protect “abortion on demand” in the vast majority of cases.³⁴⁴ Repeated attempts to pass “Life Amendments” striking abortion rights from the Constitution foundered on super-majoritarian rocks, and abortion activists began losing faith in pluralist power (George Jr., 1985).

The Direct Action Era (1983-1994)

As the 1980s progressed, abortion views became roughly sorted along partisan lines, with Democrats increasingly embracing the *Roe* status quo (Williams, 2015).³⁴⁵ Supreme Court nominee Robert Bork was famously denied Senate confirmation in no small part because of his commitment to overturn *Roe*. 1983 saw the last significant push at a Human Life Amendment, which garnered only 49 votes in the Senate, well short of the 2/3 supermajority needed. As the majority of the American public, and its representatives, settled into moderate views on abortion, a core of antiabortion activists began to lose faith in insider power. While legislative efforts continued, and changing the composition of the Supreme Court remained a major goal, the energy of the movement shifted to more aggressive tactics.

³⁴⁴ Of course then as now, the vast majority of abortions occur squarely back in the first trimester.

³⁴⁵ See also James Stimson’s *Tides of Consent* (2015) for a broader account of how partisanship slowly teaches people what their views on an issue should be based on party identification. The sorting out of views on abortion between Democrats and Republicans is one of Stimson’s most compelling examples.

A year earlier, in 1982, three individuals calling themselves the “Army of God” had kidnapped abortion provider Dr. Hector Zevallos and his wife, finally releasing them after eight days (Sheppard Jr., 1982). The incident captivated the nation and reminded activists of the potency of disruptive power. While few would emulate the Army of God’s extreme tactics, a growing segment of the movement mainstream privately applauded the group’s militancy. After several years of pluralist efforts with little disruptive activity, widespread movement dissatisfaction with the pace of change was shifting views on which tactics were appropriate.³⁴⁶ A year later, In 1983, activist Joseph Grace set an abortion clinic in Norfolk, VA ablaze. The following year an Alabama clinic had its employees assaulted and its equipment smashed with a sledge hammer and a Florida clinic was bombed on Christmas morning (Cohen & Connon, 2015). This escalating disruption sent shockwaves through a movement bitter over the failure of the major 1983 push for a Human Life Amendment and struggling to come to terms with a dramatic increase in Democratic support for abortion ahead of the 1984 elections.

The founding of Operation Rescue by Randall Terry in 1986 marks a major shift in antiabortion activism, with disruption becoming an organized tactic supported by increasingly large numbers of activists. The group’s slogan, “If you believe abortion is murder, act like it’s murder,” would become the movement’s dominant ethos, and seemed not only to justify direct action, but to demand it as moral necessity. Slowly but surely, Operation Rescue and other radical groups started pulling housewives, priests, grandmas, and other social respectable activists into their direct action approach. Importantly, these activists drew on frames of civil disobedience and personal sacrifice that channel black civil rights and peace activists. The plebiscitary support of these frames legitimated significant disruptions that might otherwise have been repressed. As discussed in Chapter 3, Operation Rescue was able to ramp up their disruptive actions, culminating in more than 1200 arrests at the 1988 Democratic National Convention and many thousands more during the 1991 “Summer of Mercy.” These arrests produced relatively few prosecutions in large part because of the protective mantel of a “civil disobedience” framing.

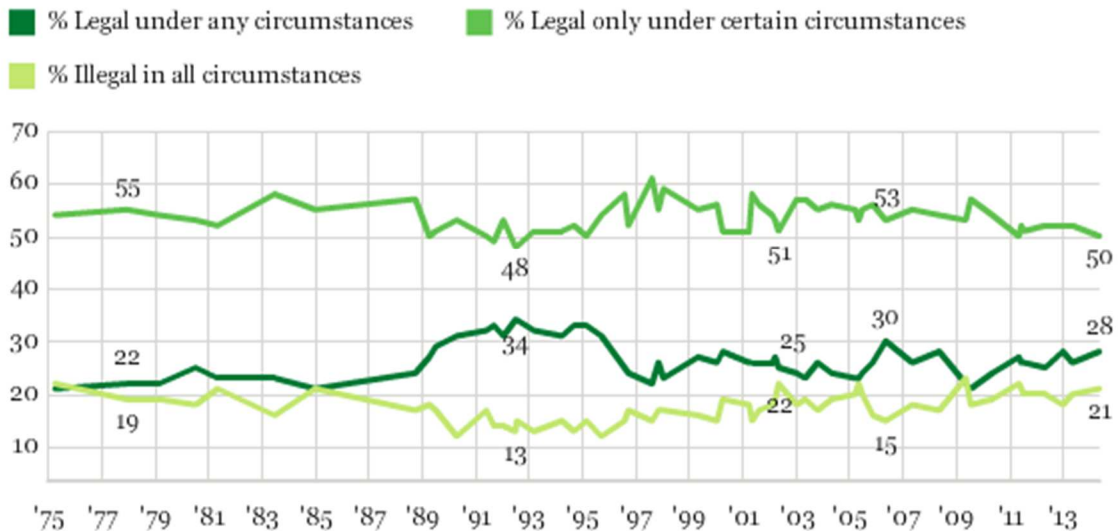
³⁴⁶ Sequence? The reception of certain tactics depends heavily on the tactics that have previously been employed. The, “we tried to play nice” effect.

A key point about the Direct Action Era is the relationship between the moderate mainstream and the extreme fringe. The Operation Rescue faction stood between the moderate NLCR faction and the extreme Army of God Faction. Moderates provided pluralist and plebiscitary cover for the civilly disobedient faction, but this faction was effectively able to share their credibility with more violent extremists. It is exceedingly difficult to legislatively target some law-breaking protesters and leave others unaffected. I argue that this intra-movement coalition effectively sustained a lengthy extreme application of disruptive power against vulnerable women and healthcare professionals. Of course, this raises the important question of why antiabortion disruption was eventually suppressed by the Freedom of Access to Clinic Entrances (FACE) Act, along with RICO suits and other measures. Chapter 3 and the previous section of this chapter suggest that disruptive power will be suppressed when a movement fails to buttress it with plebiscitary or pluralist power. Is this prediction born out in the antiabortion case?

For the most part it is. The central shift in abortion politics seems to be the election of pro-choice President Bill Clinton, who campaign on the slogan that abortion should be “safe, legal, and rare.” Clinton’s centrist approach to abortion astutely rode growing public resentment with the “abortion as murder” Operation Rescue issue frame and the terroristic tactics of more extreme antiabortion factions. A look at Figure 6.2 shows support for the movement position of no legal abortions was around 20% during the Roe Era, but Declined into the low teens as the Direct Action Era progressed. Public opinion data also captures the continued development of a sizable minority supporting legal abortion in all cases during the Direct Action Era. What Clinton did was not so much to drive these shifts in popular and elite opinion, so much as to channel them into a moderate prochoice Democratic establishment and stake out an issue frame that appealed to both the 30+% of Americans who supported abortion on demand and the half of all Americans who preferred significant but limited abortion access. The hodgepodge of (often popular and successful) abortion regulation pushed by antiabortion moderates simply did not provide a useful overarching frame to counter “safe, legal and rare.” Clearly the antiabortion movement was unable to sustain its previously strong plebiscitary and electoral advantage, but the question remains, is this development causally related to the emergence of disruptive antiabortion activism? I think so.

Figure 6.2

Do you think abortions should be legal under any circumstances, legal only under certain circumstances, or illegal in all circumstances?



GALLUP

Causality here is extremely difficult to unravel because I am arguing both that the emerging center on abortion radicalized the antiabortion movement and that movement radicalization ceded pluralist and plebiscitary advantage to abortion moderates. What is undoubtedly true is that the emergence of the FACE Act on the early 1990s legislative agenda and its relatively easy passage (69-30 in the Senate, 241-174 in the House) shows the movement was not able to suppress “violence,” “extremist,” and “terrorist” frames or secure the votes of moderate Republicans and Democrats. In addition, the use of civil RICO charges discussed in Chapter 3 was successful in part because antiabortion disruptions were carried out by groups and individuals lacking significant organizational resources. Even Operation Rescue, the most prominent direct action group, never grew beyond about a million dollars in revenue and a couple of dozen employees, with much of these resources committed to paying fines levied against the organization. Such relatively minor resources do not prepare a movement for protracted legal battles, particularly when multi-issue civil liberty groups like the ACLU are not supportive (as they were for gay rights). Moreover, these legal battles insured that the direct

action wing of the movement had little, if any, slack resources to devote to complementary lobbying and electioneering. In the end, what we see is that while the movement's direct action elements initially sustained its radical fringe, these elements were ultimately unable to maintain both their militant orientation and their public legitimacy. Arson, assault, and murder are powerfully disruptive, but are clearly undermine plebiscitary and pluralist avenues.

While disruption defined the antiabortion movement in for the decade preceding 1994, pluralist efforts pushed forward in states with large religiously conservative populations. State laws placing restrictions on the *process* of getting abortions inevitably led to lawsuits by women seeking abortions, Planned Parenthood and other parties asserting a violation of the Right to Privacy under *Roe*. In one key flashpoint, Pennsylvania's 1982 Abortion Control Act was amended in 1988 and 1989 to include more stringent restrictions on abortion access, including a spousal notification requirement. These regulations were challenged in *Planned Parenthood v. Casey* (1993), which upheld the core Right to Privacy holding of *Roe*, but laid out new standards for judging if abortion restrictions violate a woman's right to an abortion. Seeking to set clear new standards, Justice O'Connor wrote for the Court, "Liberty finds no refuge in a jurisprudence of doubt" and set "viability" of the fetus as the clear dividing line separating when the State could and could not regulate abortion. Before viability, states could only pass measures that did not create an "undue burden" on a woman seeking an abortion. In *Casey* itself, informed consent, parental consent for minors, a 24 waiting period, and a variety of clinic reporting requirements were all deemed acceptable. Only Pennsylvania's requirement that married women seek spousal consent was struck down as an undue burden that could potentially expose women to domestic violence and prevent women from obtaining abortions they strongly and surely desired.

Casey's impact on the antiabortion movement was immediate and profound. On one hand it squashed movement hopes that pluralist and plebiscitary pressure might push the Court to overturn *Roe* and eliminate constitutional protections for abortion. On the other hand, the Court signaled that many regulations on abortion would not run afoul of the undue burden standard. The Court stressed that spousal-notification measures raised issues of physical violence against women, which invites interpretations of a high bar for constitutional offense. With the disruptive elements of the movement reeling, and the parameters for legislative

battles set by SCOTUS, the antiabortion movement embraced pluralist power with renewed vigor.

The Burden Era

The Burden Era was principally an attempt to legislatively regulate abortion to the full extent allowed under *Casey*. Certainly disruptive actions continued, but as detailed in Chapter 3, government repression largely ended the effective use of disruptive power.³⁴⁷ It was a pluralist era in that the major battles were fought through lobbying, litigating, and electioneering, but it was also a plebiscitary era in which the *intent* of legislation became central in determining its permissibility. A burden is not “undue” if can be justified as ensuring informed consent or improving the safety of abortion as a medical procedure. The battle over the interpretation of *Casey* is essentially a matter of framing.³⁴⁸ Applying those frames to ever-more intrusive and unorthodox restrictions, and maintaining the information and safety frames when everyone involved knew that reducing abortions was also a central goal, were plebiscitary tasks requiring significant skill and organization.

During the Burden Era, activists expanded the concept of informed consent to include mandatory counselling on potential health risks of abortion based on thin and unconfirmed research, to listening to fetal heart beats and looking at sonograms, to multiday waiting periods, and other requirements that made the abortion process long and emotionally taxing. Activists astutely played legislators and the press, asking how more information and more time could be a burden to a woman truly set on securing an abortion. This framing generally beat out

³⁴⁷ This is not say disruption stopped as a strategy. It continued in the form of “sidewalk counseling,” direct or veiled threats, vandalism, and occasional violence. But much of this disruption abandoned public policy (or even social change) as a goal and focused on stopping individual abortions. Such behavior does not well fit the definition of disruptive power laid out in Chapter 3.

³⁴⁸ This shows again that activist cannot simply create effective frames from the ether, they usually must adopt or adapt frames that already carry significant political or cultural resonance. SCOTUS makes such frames for a living and is more than happy to latch onto their own words when they are fed back to them in future cases.

competing frames that argued the dubious and irrelevant information was necessarily “undue” because it served only to scare and confuse women seeking medical help (Trumpy, 2014).

Similarly, activists asked how “more safety” could be a burden, framing their attacks on late term abortion procedures, emergency contraception, and other types of abortion as protections *for women’s health*. In addition, more stringent licensing and operating standards for clinics were pressed as a means of ensuring abortions were as safe as possible. Again, opponents claimed that these measures were “undue” because they eliminated access to procedures that were medically very safe, but these pro-choice frames did not resonate as well with the public.

By contrast, legislative measures that were framed clearly as bans seeking to prevent abortions of “babies,” “infants,” or “unborn children” because they are “immoral,” “murder,” or because “life begins at conception” often became flashpoints of controversy and generally fell in federal court. Among the most important of these was a Nebraska ban on so-called “partial-birth” abortions, which was laws struck down by the Supreme Court. In *Stenberg v. Cahart* (2000) Justice Breyer wrote for a bare majority arguing the law was “vague” in describing which procedures would be banned and why they would be banned, and also appeared to thumb its nose at *Casey’s* requirement that post-viability bans contain exceptions for women whose lives are endangered by carrying their pregnancies to term.³⁴⁹ *Stenberg* served as the most prominent marker for the continued application of the *Roe* tradition and the *Casey* undue burden standard, but not one that would stand unchallenged.

While antiabortion advocates lost on *Stenberg*, “partial-birth abortion” proved an exceedingly popular issue frame, and the 2000 and 2002 election cycles saw near universal opposition to D&X procedures from Congressional conservatives and moderates, as well as President George W. Bush. In 2003, Congress passed the Partial-Birth Abortion Ban Act 64-33 in the Senate and 282-139 in the House, and President Bush very publicly signed the measure into law. It was the first federal abortion restriction since *Casey*, and signaled the movement’s state pluralist organizing had built a national powerbase behind regulating (at least some) abortions. The Federal Ban, while substantively very similar to the Nebraska law in *Stenberg*, more fully

³⁴⁹ By the time of the decision, 30 states had passed partial birth abortion bans of various sorts.

embraced what Alexa Trumphy calls the “Pro-Woman, Pro-Life” framing of abortion regulation as protecting women’s health (Trumphy, 2014).³⁵⁰ Justice Kennedy notably bought into the movement’s position on women’s health by acknowledging the goal of protecting the mental (moral? spiritual?) health of women who may later “come to regret their choice.” Additionally, the Act’s proponents take advantage of the appeal to scientific and “medical uncertainty” which Kennedy finds an appealing defense against claims that the Act prohibits procedures that would be in the best health interests of some women.³⁵¹ Indeed, as the movement seized upon the medical uncertainty frame, activists realized that exploiting the “precautionary principle” would allow them to dramatically limit access to abortion services in sympathetic states. The mental health and medical uncertainty frames combined to open up dramatic new opportunities regulate procedures that were far safer than carrying to term and delivering a baby.

The Limiting Access Era (2007-present)

A quarter-century after *Casey*, some commentators judged that the movement had played itself out, with public opinion, constitutional law, and public policy finding equilibrium around the compromises of *Casey*. Most notably, Neal Devins proclaimed that the movement’s sweeping success in passing *Casey*-approved state laws “(pretty much) settled the abortion wars” (Devins, 2009). But just as Devins penned his own Francis Fukuyama “end of history” proclamation, the antiabortion movement was shifting into a new phase where it attempted to eliminate abortion by restricting access, rather than through criminalization. After 2007’s *Carhart II*, the movement began a renewed push for legislation that both burdened individual women seeking abortion and made running clinics difficult. This legislation led to higher clinic costs, difficulties securing physicians and support staff, and lower revenue from patients and government programs. As Planned Parenthood’s attorneys in *Casey*, Wharton and Kolbert, have

³⁵⁰ Trumphy documents a contentious intra-movement struggle over the dominant antiabortion frame, with pro-woman challenging traditional fetal rights frames. I argue that the Burden Era was in many ways about the movement learning to accommodate and channel the pro—woman frame strategically to neutralize pro-choice frames and meet the “due” burden standards of *Casey*.

³⁵¹ Scientific and medical uncertainty is an increasingly common frame employed in support of (or defense against) more robust issue frames. While it is often associated with conservative activism (for example, climate change denial) it is readily deployed by anti-GMO environmentalists, anti-vaccine health advocates, and other movements that draw heavily on left leaning supporters.

stressed, these regulations “operated cumulatively” to close clinics and make those that remain open less accessible to women (Wharton & Kolbert, 2013).

The Access Era is interesting because it layers the three types of power in subtle ways. Pluralist power remains at the forefront, with activist groups lobbying and electioneering intensely at both the state and federal level. Gridlock in 2009 over federal health care reform and the subsequent conservative swing in the 2010 midterm elections proved an opportunity for antiabortion activists to flex their pluralist muscles. The movement stalled, and threatened to kill, the President’s signature initiative in the Patient Protection and Affordable Care Act over concerns that healthcare exchanges would promote and subsidize insurance plans covering abortions. In the healthcare debate and in the 2010 election cycle activists successfully pushed abortion as a litmus issue, despite the fiscally conservative nature of the Taxed Enough Already (TEA) Party rhetoric driving conservative momentum.³⁵² Moreover, the movement astutely introduced sweeping antiabortion ballot measures in an election that promised heavy Republican turnout and a disproportionate presence from the extreme right wing of the party. At a moment when the “small government” wing of the Republican Party was ascendant, the movement still managed to position itself as one of the biggest winners.³⁵³

State legislation was a hallmark of the Burden Era and the Access Era. So what change is really behind the shift in abortion politics in this era? What changed were the plebiscitary frames that supported pluralist activities and the continued decrease in highly visible disruptive activity. As discussed in the last section, *Carhart II* endorses the application of “informed consent” and “women’s health” frames to a new expansive category of regulations. For example, laws requiring that doctors performing abortions have admitting privileges at a local hospital were successfully presented as ensuring women received the highest quality medical care, when their central purpose and effect was to disqualify a significant number of the already small pool of providers.³⁵⁴ Such burdens on clinics work in synergy with laws that reduce patient

³⁵² Whatever the movement’s origins, there is ample evidence that social conservatism was a central motivation for most supporters of the TEA Party **Invalid source specified.**

³⁵³ The question arises, is this simply a matter of riding the political tides? A moment of political opportunity with Republicans ascendant? While the opportunity structure was open, I think it is clear that movement mobilization produced unexpectedly large dividends during this period.

³⁵⁴ Admitting privileges are generally not deemed necessary by most medical professionals because the vast majority of abortions are simple outpatient procedures and attending doctors at local hospitals can

demand through informed consent laws like waiting periods, fetal ultrasound and heartbeat viewing/listening requirements, and more invasive gynecological exam requirements. Higher costs and fewer patients leads to an unviable economic model that closes many clinics in the absence of criminalization (Soffen, 2015).³⁵⁵ What the movement has discovered is that pursuing these regulations piecemeal under narrow frames minimizing the practical impact of legislation serves to reduce conflict and undercut opposition. As stressed in Chapter 5, plebiscitary politics is about the control of attention, and what the antiabortion movement teaches us is that suppressing broad attention can be a successful strategy for pursuing policy change, not merely for defending the status quo.³⁵⁶

The role of disruption in the current era is complicated, but is perhaps best captured by the rise of “sidewalk counselling” as the public face of antiabortion direct action. Activist continue to use harassment of patients and clinic staff as a means to reduce the number of abortions performed and make operating clinics less feasible in terms of practical operations. In these ways, disruptive power is being successfully paired with pluralist power to reduce abortion access. And like pluralist efforts, disruptive actions have framed themselves as “informing women” about the choices they face and “informing the community” about the practices conducted at clinics. Information and pro-women frames downplay the intimidation and harassment inherent in many of these interactions, particularly those that play on the veiled threat of sporadic violence and the past experiences of the abortion provider community. In this way, antiabortion direct action takes on a kind of double-meaning, with those involved experiencing the frontlines as a kind of war, and the general public viewing these exchanges as a

easily admit women in the case of a medical emergency. The real effect is to add a significant cost to practicing in these locals and to disqualify doctors who work part time covering understaffed clinics spread across the state.

³⁵⁵ In a notable recent development, the Court recently struck down Texas’s abortion provider restrictions in *Whole Woman’s Health v. Hellerstedt*, which directly addresses the antiabortion strategy outlined in this Limited Access Era section. The case is the first major reassertion of the undue burden standard since *Casey* and it is entirely possible that this ruling will shift the state of the abortion battle in a new direction. Time will tell.

³⁵⁶ By contrast, “personhood amendments” continue to be soundly defeated, even in highly conservative states like Mississippi **Invalid source specified**. These laws resurrect the old frames of fetus v. women, which continue to attract only a minority of voters in all US regions, and mobilizes broader public debate and participation in elections. However, these laws arguably demonstrate the return of more extreme elements of the movement to the pluralist arena, energized by significant victories achieved under more palatable frames.

dialogue, as a speech issue. This transition has allowed the antiabortion movement to remain one of the most aggressive users of disruptive power in American politics, while avoiding the plebiscitary damage that can derail pluralist efforts.

More recently, the movement has used its newfound messaging acumen to push complete bans on abortion earlier into pregnancy, in many cases well before the earliest standards for viability. So-called “fatal pain” and “heartbeat” bans attempt to reframe the issue of viability in terms that are salient with the public, but attached to earlier stages of fetal development. An audible heartbeat or the ability to feel pain conjure up images of viability, but the related legislation has mainly targeting cutoffs from 18-20 weeks, a full month before the earliest current realistic estimates of viability. Most notably, the House passed the Pain-Capable Unborn Child Protection Act in 2015 (Hetteman, 2015). As medical advances continue to blur the line of viability and push it earlier—now flirting with 22 weeks—the emotionally salient frame of “pain” or the easily understand and implemented frame of “audible heartbeat” are being pressed as stand-ins. And with Justice Kennedy’s nod to “medical uncertainty,” these frames may soon allow the movement to significantly reinterpret *Casey’s* viability standard in its favor.

So what does the antiabortion example teach us about movement power? Let’s look at the five observations taken from the gay rights movement. *First, do opportunities continue to exist in our constrained contemporary political environment?* It would appear so. While total policy victory does not seem to be on the horizon, as with the gay rights movement, the antiabortion movement seems another clear example of effective movement power. It confirms the observation that movements continue to exercise power in contemporary American politics.³⁵⁷

³⁵⁷ Indeed, the success of the antiabortion movement in the face of a constitutional prohibition on its goal raises the question of whether movement power is as constrained as I have suggested. It perhaps remains too soon to tell, but it should be noted that the anti-abortion movement is uncommon in that it emerged in a majoritarian position. So while their gains are impressive, the movement has been unable to achieve its main policy goal despite an advantaged starting point.

Second, are isolated types of power vulnerable? To some degree, it appears so. In particular, the early movement focused almost exclusively on pluralist pushback against *Roe*, allowing the pro-choice position to win the public over with the “safe, legal, and rare” frame. The movement missed its opportunity to force action from its political supporters during the Reagan years, lacking the disruptive or plebiscitary means to punish inaction from conservatives and moderates. Overall, the antiabortion movement has always displayed a strong balance of the three types of power, a balance which it has recently perfected. As such, its success can be partly attributed to not relying too heavily on a single power strategy.

Third, do different types of power sometimes undermine each other? Here we see an emphatic *yes*. During the *Roe* years, the movement’s strong pluralist position clearly prevented organized disruptions, and more importantly, that pluralist strength tied the movement to past religious frames expounding on the sacredness of human life. Such frames made it difficult for politicians to act without appearing to be legislating their faith. And even more than with gay rights, antiabortion disruption undercut pluralist and plebiscitary attempts in the early 1990s. At a time where the Republican House and Reagan/Bush Court were ascendant, Congress was passing FACE and SCOTUS upholding *Roe*. The violence and extremism frames compared poorly to the moderate pro-women rhetoric of Clinton’s Democratic Party. The current success of the movement can in large part be attributed to the three types of power being employed in synch, adopting intense but low-profile disruptive tactics that do not poison plebiscitary rhetoric.

Fourth, is insider access essential? Clearly the antiabortion movement has leaned on heavy connections to state and national politicians and on the Republican Party as a whole. As I have stressed, wholesale opposition to abortion was the status quo majoritarian position amongst the public and its representatives through the 1970s. With legislative majorities and bill sponsors at the state and federal level, it is easy to attribute the movement’s success to insider support. Moreover, a movement-sympathetic SCOTUS and lower court system has provided protection for “sidewalk counselling,” and helped insulate the movement from repression. Of course this is support that the movement has itself cultivated with its exceptionally vigorous and persistent pluralist push to secure a sympathetic judiciary.

Fifth, does opposition matter? Here, I think we gain significant insight and confirm the finding that the type of opposition faced matters a great deal. In the case of gay rights, movement opposition came from religious and political organizations that addressed many issues, along with a small and under-resourced set of groups specifically opposing gay rights. When public opinion began to shift, the opposition shifted away from the issue and the core opponents were eventually steam rolled.³⁵⁸ In the antiabortion case, opposition came initially from a budding abortion-rights movement and from a well-established feminist infrastructure. These groups have prevented significant progress in state legislatures in liberal states, made the centrist Clinton approach to abortion appealing, spread the initial “pro-choice” frame that successfully countered pro-fetus framings, bankrolled vocal pro-choice candidates, and spearheaded legal and legislative crackdowns on antiabortion violence. NOW’s role in dismantling direct action networks through RICO is a particularly notable example of the opposition flexing its pluralist muscle. More recently, women’s groups successfully pushed the “war on women” frame to discourage national Republican politicians from supporting some of the more extreme antiabortion legislation.

While Democratic pro-choice allies have often become complacent, taking the defense of *Roe* as their main goal and letting abortion slide off the party agenda, Pro-choice advocates maintained a resource rich organizational core that has mobilized attention and votes in key confrontations.³⁵⁹ Facing “combat ready” opposition that tracks antiabortion actions and seeks to counter them has had two significant consequences for the antiabortion movement. First, it pushes the movement to evolve and adapt more quickly than it might otherwise have to, as the opposition learns to counter frames and disruptions, or deploys pluralist resources to contested venues. The second consequence is that abortion politics has more readily sorted itself into partisan politics, with each side entrenching itself at the opposite ends of the political spectrum. The result has been a highly resilient regime that has pushed the movement towards a state policy strategy centered in highly red states.

Beyond the five observations made in the section on LGBT rights, the antiabortion case highlights five additional points. First, history is not progressive, or not deterministically so. The

³⁵⁸ It has become acceptable for mainstream politicians to refer to groups opposing gay rights as hate groups, which demonstrates the lack of political capital these groups now possess.

³⁵⁹ EMILY’s List, NOW, NARAL are key examples of the politically resource rich pro-choice camp.

antiabortion movement is by most accounts a regressive movement, seeking to reverse post-1960s social liberalization. Such movements, including most notably white supremacists, are often dismissed as going against the tide of history or being on the wrong side of history. But the antiabortion movement has reversed that tide in what may be more than a temporary shift towards limited abortion access. Beyond simply reversing the trend in abortion politics, it should be noted that movement progress has not been steady and has been subject to significant reversals.³⁶⁰ The success of choice advocates in pushing the “war on women” frame, which killed the candidacies of a number of vocal antiabortion candidates in 2014, is good example of how momentum can quickly turn on a movement. These shift further highlight the importance of movement power and agency, and warn us against assuming any movement’s victory or defeat is inevitable.

Second, the origins of movements matter. As already discussed, the antiabortion movement emerged out of a majoritarian position under the wing of the Catholic Church. As such, the antiabortion movement did not rely on dramatic disruptions like the Stonewall riot to mobilize participants and disruptive tactics were not significantly integrated into the core movement in its first decade. The movement did turn to disruption when its pluralist push stalled in the 1980s, which leads us to the intuitive conclusion that disruptive power is only *mobilized* by groups that feel otherwise powerless, though disruption may continue alongside other types of power once mobilized. This observation about movement origins should lead us to expect more traditional types of political power from movements that arise because of changes in technology (anti-GMO), laws (anti-free trade), or other social or physical circumstances (climate change). These issues are likely to mobilize existing interest groups and their resources. By contrast movements that emerge for longtime ignored or powerless interests (including poor peoples’ movements) are more likely to employ disruption as a means for jumpstarting mobilization.

Third, the types of power employed by movements can be dramatically shaped and reshaped by government policy, including policies enacted by supporters and/or detractors. The early 1990s experience of the antiabortion movement is remarkable in that we see government strongly suppressing disruptive behavior through FACE and RICO, while at the same time *Casey*

³⁶⁰ See **Invalid source specified.** and (Piven F. F., 2006)

lays out a clear legislative blueprint for incremental pluralist measures, complete with Court approved issue frames. The federal government was essentially telling the movement which avenues to change would be open and which would be closed, and the movement responded by shifting its efforts toward open political opportunities. While these developments helped the movement achieve some victories, they also channeled movement activism into safe spaces that conformed with majority public opinion, and may have detracted from efforts to achieve the movement's more radical central aims. In recent years, the movement has expanded its legislative program in ways that appear more in line with its core abolitionist goals, but this shift has been at least partially shepherded in by a Court that has endorsed an expansion of regulations under an altered *Casey* regime. The question arises, what if the Court had chosen to strengthen the *Casey* regime instead? Would the movement have had the will or the power resources to challenge such a shift? Or is the movement too dependent upon the opportunities fed to it by political insiders? I would suggest that partisan sorting is a double-edged sword for movements, but one which antiabortion activists have thus far not been cut by.

Fourth, regardless of our answers to the preceding questions, it is clear that an institutionalized incremental policy can be adapted to pursue abolitionist goals. The "reform v. abolition" debate is one of the primary internal divides between activists within a number of contemporary movements.³⁶¹ These debates loosely parallel Piven's concerns that institutionalization and attempts to wield pluralist power will undermine a movement's capacity to respond disruptively when denied more than symbolic gains. The antiabortion movement appears to have married reformist methods with abolitionist goals, all the while maintaining a supportive undercurrent of disruptive power. I have argued that the movement's success in bridging reform and abolition is due largely to its layering the three types of power in a synergistic way, but the question warrants further inquiry.

Fifth, while I have followed Schattschneider in arguing that movements can change their fortunes by *expanding* the scope of conflict and drawing more attention to an issue, the antiabortion movement shows that they can also succeed by shrinking the scope of an issue.

³⁶¹ As noted in my introduction, a schism in the animal rights movement between advocates of incremental welfare reforms and their abolitionist critics was the debate that first brought me to this dissertation topic. In my own view, the evidence seems to side with incrementalism as a viable, though perhaps not necessary, path to dramatic social and political change.

Until the 1980s the movement had concentrated its push on a Constitutional Amendment either overturning *Roe* or granting 14th Amendment rights of citizenship to fetuses at conception. Both their issue and their venue were pursued at the broadest level, but by 1983 it became clear that public opinion in support of their push was insufficient and trending in the wrong direction. Subsequently, the movement shifted back to state venues with public audiences that overwhelmingly supported their policy proposals. Furthermore, the movement's recent success has largely resulted from its ability to frame legislation in small piecemeal ways, avoiding discussion of the practical consequences of layer upon layer of regulatory red tape. As more abortion restrictions have passed, news coverage and public debate has not kept pace, and this has worked to the advantage of a movement with a strong core of politically active supporters. Moreover, this is not merely venue shifting, as discussed by Baumgartner and Jones, because the movement has also minimized attention within chosen venues to maximize its advantage. These observations confirm the importance of controlling attention, but show that increasing participation is not the only effective manipulation of the public gaze.

LGBTQ rights and antiabortion are very dissimilar movements in obvious ways (participants, subjects, affiliated political ideologies, etc), and the fact that we see similar power dynamics at work in both movements is a good sign for the framework presented in this project. Both movements have organized effectively and made significant policy gains in spite of the constraints I argue apply to all social movements today. They have not escaped those constraints, but rather, they show that effective power strategies allow movements to cope with a constricting political opportunity structure. I turn from here to the animal right and disability rights movements, which have been less vigorous in cultivating power resources, and offer some additional insights.

I also want to say a special word to our friends in the business community. You have in your hands the key to the success of this act, for you can unlock a splendid resource of untapped human potential that, when freed, will enrich us all.

-President George H.W. Bush, Speech at the Signing of the Americans with Disabilities Act

Chapter 7: Animal Rights & Disability Rights

In Chapter 6, I looked at the power strategies of the LGBTQ and Antiabortion movements, and made 10 observations about how power dynamics relate to movement outcomes. In this chapter I look at 2 additional movements, the Animal Rights and Disability Rights movements, and further develop last chapter's observations. I also draw some additional conclusions from these two movements, which have not eschewed developing some important power resources.

The Animal Rights Movement

Along with the antiabortion movement, the animal rights movement has been amongst the most consistently disruptive since the 1970s. However, the animal rights movement has not achieved the same influence as antiabortionists, and by many measures can be considered highly unsuccessful at wielding power. Are the differences in effective power do to internal

characteristics of the movements, or to the political opportunity structures they each face? This account offers a mixed answer.

The US animal rights movement can be traced back to the late 19th century when concerns over the treatment of urban draft horses and the use of animals in medical experimentation led to the founding of the American Society for the Prevention of Cruelty to Animals (ASPCA) and the American Anti-Vivisection Society (AAVS) (Beers, 2006).³⁶² From its somewhat radical origins, this movement settled comfortably into what is more typically called the “animal welfare” movement, a moderate movement concerned with curbing *unnecessary* suffering.³⁶³ This moderate social cause dominated animal concerns until the 1970s when more radical “liberationist” concerns surfaced, in large part imported from British activists. Most observers date the modern movement to the 1975 publication of *Animal Liberation* by philosopher Peter Singer. This first stage could be termed the *Vivisection Era*, lasting 1975-1985. The next phase lasted from 1986-2001, and can be called the Institutional Era. Finally, from 2002-present we have the current Pluralist Era.

The Vivisection Era

Britain has a long history of producing the progressive edge animal movements, in no small part because fox hunting was a perennial issue that raised passions on both cruelty and

³⁶² I find it striking that the issues that gave rise to the movement are very much still alive today. Animal research and the use of carriage (but not cargo) horses in NYC and other cities remain hotly contested a century and a half later (Beers, 2006).

³⁶³ The animal welfare movement has gone through its own evolutions, with the modern version emerging after WWII and continuing to exist alongside the contemporary animal rights movement.

class grounds. In the early 1970s hunt-saboteurs expanded their activities to laboratories using animals, and the modern animal liberation movement emerged. On the other side of the pond, utilitarian Philosopher Peter Singer (actually an Australian exposed to animal liberationists while doing post graduate work at Oxford) was publishing *Animal Liberation*, a book of practical ethics grounded in academic philosophy but written for a popular audience. Readers of *Animal Liberation*, often previously active in animal welfare/sheltering, slowly gravitated to animal rights activism. But Singer's impact on the emerging animal rights movement was even more direct. Singer's earlier article "Animal Liberation" in *The New York Review of Books* had caught the attention of high school teacher Henry Spira, who subsequently signed up for a continuing education class taught at NYU by Singer in 1974. The relationship between the intellectual and the working class New Yorker spawned the first organized campaign of the new animal rights movement, an effort to end a series of sex experiment on cats at New York's American Museum of Natural History (Singer, 1999).

This initial campaign, and the early movement more generally, deftly balanced all three types of power. Spira organized a grassroots campaign (purposefully avoiding incorporating his group) that relied on highly visible demonstrations in front of the prominent museum. From the very start disruptive power was key, but Spira also proved a plebiscitary whiz. His choice of the cat experiments was deliberate, choosing a much beloved species and the suggestive nature of sex research. He played up "unnecessary" and implied "perverse" in his message framings, threatening the reputation of an institution that trades heavily on public goodwill.

Spira also chose his target in part because the experiments were funded by the National Institutes of Health, which enabled Spira to obtain detailed descriptions of the work through the Freedom of Information Act. Understanding the relationships between public and private

sectors, and using those relationships to create leverage is a type of soft-touch pluralist power that movements often need to deftly employ. Spira showed exactly this deft touch as he subsequently balanced campaigns against companies doing product testing on animals with campaigns to push the FDA to reform its recommendations on LD50 toxicity and Draize eye irritancy testing. In many ways, these campaigns resembled gay rights efforts to impact AIDS drug development and approval, and they utilized similar power strategies.

What the early AMNH campaign and subsequent product testing cases primarily accomplished was reframing scientific, health, and economic issues as moral issues on which the public had a right to participate in policymaking. And in keeping with the theme of this dissertation, Spira's actions were significant because they were clear exercises of power that produced clear victories. Building on these early wins, the animal rights movement initially displayed an impressive balance of the three types of power. In the late 1970s or early 1980s (depending upon how you classify the first events) lone activists began engaging in direct actions against animal laboratories, collectively coming to identify as the Animal Liberation Front (ALF). In 1980 People for the Ethical Treatment of Animals (PETA) was founded and quickly became a plebiscitary channel for framing ALF actions in movement friendly terms. Images, records, and stolen animals were provided to the 501(c)3 nonprofit, which held press conferences pushing the frames of unnecessary suffering and investigator corruption. This disruptive/plebiscitary partnership began with the famous Silver Spring Monkeys case, in which 17 monkey were removed from a Maryland lab in 1981 and used by PETA for publicity and animal cruelty litigation (Rowan & Kenneth, 1996). This partnership between direct action activists and nonprofits was further supported by the founding of the Animal Legal Defense Fund in 1981, which provided legal support for activists prosecuted for civil disobedience, trespassing, and

other crimes. During this first era the three power strategies were largely aligned and the movement was very effective.

The ALF-PETA partnership peaked with a 1984 break-in at the University of Pennsylvania's primate head injury laboratory.³⁶⁴ Activist stole countless hours of experimental footage, footage that also captured investigator misbehavior, which PETA edited into a devastating video entitled "Unnecessary Fuss," named in reference to head researcher Thomas Gennarelli's previous public dismissal of protests against the head injury clinic. The media release of the video was coordinated with a three-day sit-in by PETA activists inside the National Institutes of Health's Washington, DC offices. The protesters were not forcefully removed in large part because media coverage was sympathetic and driven by a PETA-produced video narrative of the lab footage provided to media. The sit-in eventually resulted in Health and Human Services Secretary Margret Heckler being shown the video and shutting down the lab under the oversight authority the accompanies NIH funding (Jasper & Nelkin, 1992). The closure was a clear result of effective disruptive and plebiscitary power, but more importantly, activists were able to parlay this victory into national legislative reform.

In 1985, Senator Bob Dole brought his considerable political influence to bear in support of amending the Animal Welfare Act of 1966, a largely symbolic law that covered only animal suppliers and had no jurisdiction over the actual use of animals in research and testing. The '85 Amendment, while an incrementalist welfare measure, legitimated movement input upon the use of animals in research, establishing animal advocates as members of that policy community. Although many activist would come to be disillusioned with the implementation and impact of

³⁶⁴ Because of my interest in animal rights, a faculty member at Penn warned me at the beginning of my graduate study that she could not associate with me if I intended to break into any animal laboratories. Clearly there is a strong institutional memory of this event!

the 1985 legislation, it remains arguably the movement's most significant exercise of power, and serves as a key example of the advantage of balancing the three power types.³⁶⁵

The Institutional Era (1986-2001)

Animal rights ideology has been applied to a wide variety of public and private issues, but the successful concentration on vivisection in the 1970s and early 1980s suggests that movements may need narrow their focus in order to function effectively. After its success on the national stage in 1985, the animal rights movement diversified its focus to include animal agriculture, fur, circuses, and other institutional uses of animals. These fresh campaigns allowed the movement to keep itself consistently in the public's consciousness and to attract resources for institutional growth. Moreover, as the movement shifted focus to issues of fur, meat, circuses, product testing and other issues, consumer boycotts increasingly became a dominant movement strategy. While there are certainly power dynamics involved in boycotts of companies and product classes, it is a tactical approach that minimizes the importance of political power, particularly pluralist power.

Here we come to a trend touched on briefly in Chapter 6, but particularly relevant in the animal rights case: the privatization of movement targets. Following the 1985 AWA Amendment, movement organizations such as the ALDF and HSUS became bogged down in a

³⁶⁵ I would actually argue that the Marine Mammal Protection Act of 1972 is the most impressive animal rights law in the federal code because it provides blanket protection for a wide class of species, without reference to the rarity of those species as in the Endangered Species Act. The MMPA, in my view, protects individual animals under the view that each should not be harmed, whereas the ESA is more explicitly concerned with preserving types of animals for ecological diversity. But both of these sweeping laws were passed by the environmentalist movement with the goal of conserving wildlife. Each predates the modern animal rights movement.

protracted and largely unsuccessful implementation process. The legislation directed the USDA to draft rules to implement the legislation's broad goals, a process involving public comment from activists and industry alike, which over years produced severely watered down standards and requirements.³⁶⁶ HSUS and ALDF subsequently sued the USDA in federal court over rules that violated the statutory intent of Congress, winning in the lower courts only to have the cases dismissed upon appeal due to lack of standing (Carbone, 2004, pp. 69, 71, 98, 212, 227).³⁶⁷ By

³⁶⁶ A regular pattern involved the USDA producing specific requirements for housing, enrichment, and other welfare concerns that involved detailed requirements in terms of size, time, and other measurable. As rulemaking dragged on these specific enforceable standards were consistently replaced with vague flexible language that allowed facilities to make their own interpretations as to animal needs and largely self-regulate their own practices. It is worth detailing these shifts in rulemaking to show just how important and underappreciated policy implementation can be. The following summarizes the six years of USDA rulemaking that followed the 1985 legislation:

- The USDA abandoned firm "engineering standards" for welfare, such as larger cages, in favor of "performance standards" like the ability assume "normal laying postures", which allowed industry to largely interpret these requirements for themselves. The Reagan/Bush administration favored this approach as a form of executive deregulation in multiple policy areas (Carbone 2004, pp.104).
- Performance standards rendered the job of USDA inspectors virtually impossible, shifting animal care decisions to the regulated institutions, and leading to USDA reports focusing on maintenance and sanitation issues such as dirty floors and peeling paint (still the bulk of citations). USDA performance standards similar to those in the UK translated to cage sizes roughly 1/3 to 1/5 the size used by the British (Carbone 2004, p.108).
- Institutional self-regulation was concentrated in Institutional Animal Care and Use Committees (IACUC) mandated by the 1985 Amendments (like IRB for humans). The USDA mandated at least three IACUC members, including a member "unaffiliated" with the institution. Activists expected one of their own to hold this seat, but institutions almost never gave the seat to a critic on animal research, and the committee typically marginalized the community member (Carbone 2004, p.175, 181). The 1985 Health Research Extension Act, passed just months before the AWA was amended, mandated five person IACUCs at institutions receiving NIH funds, further marginalizing the single unaffiliated member.
- The Congressional mandate to provide exercise for dogs was stripped of socialization and enrichment components, and its performance standard is now satisfied by actions like putting the dog in pen while cleaning his cage (Carbone 2004, p.227).
- The Congressional mandate to provide for the psychological well-being of primates, was reduced to performance standards were vague and unenforceable. Revised standards providing detailed species specific enrichment standards were proposed but never finalized (Carbon 2004, p.228).
- Finally, the USDA regulations continued to exempt rats, mice, and birds from the definition of "warm-blooded animal, as the Secretary [of Agriculture] determined is being used, or is intended for use, for research, testing, experimentation...". These species accounted for approximately 90% of animal used in U.S. labs at that time, and that percentage has continued to climb. (Carbone 2004, p.70-71). To stress the perversity of the incentives created by this exclusion, IACUCs are essentially directed to consider 10 rats as a "non-animal alternative" to the use of a single guinea pig or hamster.

³⁶⁷ Key point, no standing presents a structural deficit that undermines pluralist action. Importantly, it is a structuralist constraint to pluralist power that is created by government. In the 1971 National

most measures the animal rights movement saw their most significant pluralist victory dissolve in front of their eyes. Moreover, with the AWA now applied to laboratory animals, the movement was unable to successfully frame future exposés of individual laboratories as representing systemic problems. The push for large scale policy reform on experimentation issues was done, played out, and the results were lackluster. Unsurprisingly, many activists concluded that political engagement was pointless because even when you win, you still lose. Consequently, the movement found itself in a moment where participants wanted to directly engage the parties using and abusing animals, while simultaneously finding the issue attention cycle for animal experimentation—the issue with the least direct connection to the public—had played itself out. Corporations and their customers replaced Congress and the bureaucracy as the movement’s primary targets across all issues.

How did the movement tackle fur farming? It did not seek USDA regulations on cage sizes, enrichment, or bans on taking specific animals. Instead disruptive activists threw paint on fur coats, disrupted fashion shows, released animals from fur farm cages, and even burned down facilities. SMOs in the mid-to-late 1980s began demonstrating outside of furriers and department stores like Macy’s, which sold furs as a minor part of their clothing lines. These protests often featured graphic depictions of skinned animals, in similar fashion to the shocking images used in anti-abortion protests. In addition, in 1991 PETA began its “I’d rather go naked than wear fur” campaign, originally featuring nude photos of the female pop group, The Go-Go’s (Jasper & Nelkin, 1992). Media coverage of PETA’s nude celebrity campaign was prodigious, and

Environmental Protection Act Congress specifically granted standing to environmental nonprofits to sue for non-enforcement of the Act and subsequent environmental protection measures. The fact that Congress had previously addressed this standing issue in a related regulatory area should lead us to consider not granting animal organizations standing under the AWA is a deliberate structural constraint (the same applies to other movements in which the participants are not defending/advancing their own rights).

arguably framed opposition to fur as “cool” in direct opposition to traditional conceptions of furs as glamorous. The movement made a successful plebiscitary push to associate fur with gruesome death and opposition to fur with youth and style, along with a disruptive push that created costs for buying, selling, or wearing fur. Together these tactics significantly suppressed fur sales by the mid-1990s. This was an exercise in power in the pursuit of political goals. But it wasn’t political power. It did not bank movement gains in the form of political institutions that are durable, self-sustaining, and can be easily utilized by future activist absent continued plebiscitary or disruptive power. At the turn of the twenty-first century, the rise of realistic faux fur and spread of fur in unusual colors and as trims undercut movement’s plebiscitary and disruptive advantages. What was real? What was faux? With public shaming undercut and new youth centered trim styles making fur cool, companies and consumers returned and fur sales rebounded dramatically. Fur seems a prime example of the perils of relying on apolitical market power in the absence of political power.³⁶⁸

As stressed in Chapter 4, the animal rights movement is notable in that it not only failed to build pluralist-oriented C4 organizations in the 1990s and early 2000s, but it actively dismantled the C4 organizations that were prominent in the late 1980s. The movement shunned pluralist organizing, lobbying, and electioneering during this period and focused almost exclusively on disruptive and plebiscitary strategies backed by increasingly well-funded C3 SMOs.

³⁶⁸ Circuses perhaps provide a counter-point, but that tiny niche industry is dominated by a handful of companies that may be more vulnerable to direct attack. Moreover, a major driver of circuses like Ringling Bros. phasing out elephants from their shows has been city ordinances that have made such performances either explicitly prohibited or impossible do to regulating the use of training equipment or methods.

PETA continued to play a linkage role, bridging the activities of the radical disruptive fringe and an institutional core with strong roots in the era of moderate animal welfare politics. But this core concerned itself in large part with direct service provision through animal control and sheltering. As explained in chapter 3, PETA provided plebiscitary cover and assistance to the ALF and other underground activists by publicizing their activities and framing them in terms of America's tradition of civil disobedience.³⁶⁹ PETA also engaged in its own undercover investigations, which blended disruptive and plebiscitary power in ways similar to the unofficial ALF partnership. But following Huntingdon Life Science's RICO suit against PETA, the organization severed its public relationship with the ALF and approached undercover work with a newfound caution.³⁷⁰ So while disruption continued, the most threatening forces were left isolated, and FBI programs like Project Biteback were able to systematically repress the movement fringe (Best, Nocella II, & editors, 2004).

As PETA was losing much of its disruptive leverage on the vivisection issue, it was simultaneously pushing forward with farmed animal campaigns that targeted corporate restaurants, starting with its "Murder King" campaign against fast food giant Burger King. The image heavy campaign relied on dramatic but minimally disruptive protests aimed at securing steady stream of local media coverage, which in 2001 convinced the corporation to adopt basic animal welfare standards for its meat suppliers. A slew of other major corporations, from Wendy's to McDonald's, would make similar concessions after copycat campaigns or simply at

³⁶⁹ PETA also provided legal assistance to activists, including Rod Coronado, who would be convicted of arson and cause PETA decades of legal and public relations problems.

³⁷⁰ As covered in Ch. 3, RICO's "pattern of criminal activity" charge made crimes like trespassing or fraud existential threats for major organizations, who could not afford to even associate with activists engaged in these activities. The settling of the HLS Rico suit against PETA was a turning point in movement dynamics.

the treat of such a campaign.³⁷¹ The same basic strategy would become a template for other issues and campaigns by other groups, often in conjunction with undercover footage. Once again it is worth noting that the movement is clearly exercising power here, but it is a marginal power aimed at private interests, and its use is diffused across many corporate targets functioning in disparate issue areas. Such actions tend to make activists and their organizations look especially active and productive, but such gains are quickly eroded when the spotlight shifts to the next target, as discussed above in terms of fur farming.

The same year that PETA was making headlines with its win over Burger King, 2001, Congress was quietly passing an Amendment to the AWA formally exempting mice, rats, and birds—which are somewhere between 90-99% of the animals used in research and testing—from coverage (Carbone, 2004, p. 26).³⁷² The Amendment, introduced by Senator Jesse Helms, undercut a decade long push by advocates to get the USDA to cover these animals under the 1985 mandate. Just as it looked like the USDA was going to draft rules for that would fix one of the central implementation problems with the AWA, Congress quietly pulled the rug out from under the movement’s feet. And apart from the objections of vegan congressman Dennis Kucinich, the Amendment produced no organized push-back from the movement or its allies (Carbone, 2004, pp. 71-72). There was no public outcry and no electoral consequences. A

³⁷¹ A favorite PETA tactic is to create mock-ups of potential campaign materials to help targets envision the damage to their brands.

³⁷² Larry Carbone estimates the number of mice involved in genetically altered animal models reached between 80-100 million by 2002, and has continued to steadily increase (Carbone 2004, p.26). The current number is likely significantly higher than 100 million. By contrast, just over 1 million regulated animals were used annually around the turn of the century. Numbers are compiled from the yearly USDA APHIS AC, Animal Care Annual Report of Activities, Fiscal Year 2007. See also Madhusree Mukerjee’s review, “Speaking for the Animals: A Veterinarian Analyzes the Turf Battles That Have Transformed the Animal Laboratory,” *Scientific American*, Aug. 2004.

movement that was not organized or oriented toward pluralist politics was pushed around and found the results of its protests and marches vulnerable to retrenchment.

The 2001 AWA defeat brings us to the ultimate critique of movement power strategies that shun pluralist activity and target private sector decision-makers: gains are quickly undermined by policy drift in the public or private spheres, or by outright reversals in public or private policy that is no longer in the public spotlight. More specifically, power strategies that seek to entrench change by shifting social attitudes are unlikely to achieve lasting success when their targets are inextricably wed to opposing motives, particularly profit motives.

The Pluralist Era (2002-present)

In 2002, the animal rights movement began an important shift to reintegrate pluralist power into its strategic repertoire. Local and national activists teamed up to pass a Florida ballot measure banning the use of gestation crates in hog farming.³⁷³ Notably, groups like PETA provided professional and financial resources without attaching their names to the effort, thus preserving local framings and excluding broader publics with greater interests in animal agriculture. The effort was similar to some state abortion restriction efforts covered in Chapter 6. The Florida ban benefited from targeting an extremely cruel industry practice in a state with only a minor hog farming industry. The immediate regulatory impact was minor, but the precedent was significant. The Florida law was the first US agricultural practice regulated based

³⁷³ Gestation crates largely immobilize pregnant and nursing sows for a number of reasons, chief among them preventing the mothers from crushing their piglets on the floors of their concrete enclosures.

solely on animal welfare concerns.³⁷⁴ The statute sent shockwaves through the animal agriculture industry, with top brass choosing to no longer invest in constructing multimillion dollar gestation crate facilities that could be outlawed come the next election.³⁷⁵ This industry reaction shows the power of government regulation to lock in and spread reforms that industry cannot simply wait-out or skirt.

Since 2002, the movement has passed or attempted pass a number of state agriculture regulations, most notably the passage of sweeping humane legislation in a 2008 California initiative. The battle over 2008's Proposition 2 saw the animal rights movement mobilizing resources for a pitched battle in America's largest agricultural state, and as noted in Chapter 5, the movement began its first push to utilize C4 nonprofits since abandoning that organizational form two decades earlier. All indications are that these new organizational forms will persist and give the movement new muscle in federal and state politics. At this point in time, the state legislation approach has focused on welfare reforms, and the movement's internal critics have argued that these incremental reforms hold little chance of producing the kind of abolitionist advances we have seen in recent anti-abortion politics. Such critics point to the failures of laboratory animal efforts under the 1985 AWA Amendments and suggest that farm animal welfare campaigns are likewise securing minor improvements while facilitating more intensive use of even larger numbers of animals. Part of this internal critique suggests that incremental pluralist measures necessarily undercut plebiscitary attempts to push effective movement

³⁷⁴ The federal Humane Slaughter Act could be considered the first such law, but arguably it concerned the processing and not the raising of animals.

³⁷⁵ I had personal correspondence with animal welfare scholar Bernie Roland, who attended industry trade conferences 2005 in which representatives reported all the major pork producers had decided to no longer invest in gestation crate infrastructure that was design to be used over multiple decades. The Florida law and similar mounting legislative efforts had convinced the industry that new facilities would be too risky and a shortened lifecycle for major infrastructure would cut deeply into profits. All this is not to say that industry wasn't deeply committed to preserving the practice for use in existing facilities.

frames, as well as public toleration for disruptive measures. These empirical questions require further study, but the path of the anti-abortion movement seems to confirm that incrementalism and abolition are at least compatible.³⁷⁶

Critics of movement institutionalization, in the tradition of Piven, have argued that the animal rights movement has engaged the system at the expense of its own disruptive power. There is certainly some evidence of this, particularly the media skewering and federal prosecution of the aggressively disruptive Stop Huntingdon Animal Cruelty (SHAC) campaign. As detailed in Chapter 3, the movement's disruptive fringe was largely isolated from the movement's mainstream pluralist and plebiscitary resources, which allowed the government to squash what had previously been a highly successful campaign.³⁷⁷ The pluralist era has mostly seen disruption confined to undercover exposés, and even these have shifted their function to serve mainly plebiscitary strategies. Returning to the observations from the previous two cases, what does the animal rights case add?

First, do opportunities for movement power persist? Clearly they do, with the 1985 AWA being a classic exercise of movement power and the more recent state initiatives pointing toward an effective strategy that we have also seen with the anti-abortion movement. That said, the animal rights case brings up important examples of how victories can be *undone* and how status quo interests can outlast and outmaneuver the piecemeal efforts of activists.

³⁷⁶ However, it should be noted that I argue in Chapter 5 that we should expect plebiscitary tactics to lose impact over time simply because novelty is a key component of saliency, and so repeated exposes with similar images will usually produce diminishing returns. As such we should be wary about attributing declining public attention to judgments that a problem has improved beyond the point where further action is pressing.

³⁷⁷ The SHAC campaign sought to put HLS out of business by raising costs and making it impossible for the company to get insured, maintain basic supply and service contracts, and attract and retain personnel. The strategy seemed to be working, and arguably might have radically recast the possibilities of corporate targeting.

Retrenchment seems almost inevitable if movements do not put in place the interest group resources to defend policy gains.

Second, are movements more vulnerable when using a single type of power? Again we find evidence supporting this proposition. In particular, the HLS direct action campaign, which was one of the more powerful sustained displays of disruptive power in contemporary movement politics, was readily repressed by the FBI and the courts without any plebiscitary or pluralist protection. Another example is the failure of the movement to ensure proper implementation of the 1985 AWA Amendments. In the absence of any pluralist or disruptive checks, the movement was steamrolled during rulemaking and litigation. Similarly, advocates were left powerless in the face of the 2001 Helms Amendment, although this instance might be best characterized as an across-the-board power failure.

Third, do different types of power sometimes undermine each other? Well, the current period has seen disruption isolated by a focus on other types of power, as just discussed, but I do not believe the evidence is in the disruption has been undermined by insider approaches.³⁷⁸ However, there is evidence that ALF, SHAC, and other direct action activity has served to burden insider efforts with “extremist” or even “terrorist” frames, as evidenced by the rebranding of the Animal Enterprises Protection Act of 1992 as the Animal Enterprises Terrorism Act of 2006. As discussed in Chapters 3 and 4, the focus on animal activists as domestic terrorists clearly undermined the movement’s pluralist potential and dominated the frames that captured policymaker attention. So we have yet another example that suggests disruptive power poses the most direct threat to other forms of power. Perhaps more interesting is the impact of PETA’s

³⁷⁸ One interesting wrinkle is that while disruptive activity continues, it may be receiving less attention, limiting the reach of disruptive power beyond its immediate targets.

plebiscitary strategy on pluralist efforts during the same period. As detailed in Chapter 5, PETA embraced the concept of attention based activism and developed an extreme strategy that privileged quantity of media attention over quality of the media frames produced. Critics from diverse backgrounds have persuasively argued that much of this coverage has been framed in terms of the extreme, shocking or silly nature of the tactics employed, and that substantive issue frames have been relegated to a distant second. Apart from questioning if such an approach is self-defeating from a plebiscitary standpoint, it seems obvious that it makes serious work with policymakers more difficult.

Fourth, do major victories require inside access? Here we get a strong yes, but with an important caveat. The 1985 AWA Amendment process clearly owes much of its success to the support rising Republican star, Senator Bob Dole. Just two years later Dole would become minority leader, on his way to eventually being the Party's candidate for president in 1996. The value of having a politician of that stature willingly sponsor your legislation cannot be overstated. Conversely, having no supporters, short of the dynamic but marginalized Dennis Kucinich, allowed the disastrous 2001 AWA Amendment to sail though unchallenged. So the animal rights movement achieved its sole major federal legislative achievement with inside leadership. On the other hand, recent state legislation from Florida to California has succeeded primarily through outside independent organizing. While state politicians have signed onto these issues, activists did the heavy lifting in taking their policy positions straight to the voters. So while federal legislation does seem to be tied to insider support, state efforts do offer a more flexible alternative in which activists play the role of legislative sponsor.

Fifth, how important is the nature and strength of the opposition? Here I think the animal rights case teaches us something the other cases only hint at. Opposition is crucial, and

industry opposition is a whole different beast than social opposition.³⁷⁹ The animal rights movement's disparate issues confront agribusiness, the academic and pharmaceutical industries, the fashion, cosmetic and home good industries, the movie and live entertainment industries, a host of smaller business interest, and even its erstwhile ally the pet industry (That doggie in the window? The one with the waggly tail? He's from a puppy mill).³⁸⁰ On each issue, specific industries invest heavily in pluralist resources to fight regulation that might impact the bottom line, and once an issue leaves the public agenda, business works tirelessly to undermine or circumvent new rules. This is not a condemnation of businesspersons, but instead a simple description of human behavior given market forces, or corporate behavior given the basic institutional form of the corporation.³⁸¹ The undermining of the AWA's animal research regulations is a key example, but perhaps more profound, is the fact that federal agricultural animal care regulation has never come close to passing, despite the fact that the farm bill keeps agricultural regulation a constant part of the congressional agenda.³⁸² Issues surrounding fur, veal, and other practices that seemed largely settled in public discourse in the late 1980s and early 1990s have returned largely because industry maintains on a constant search to reopen

³⁷⁹ Additionally, since the 1970s, "business" has begun to function as unified interest across industry sectors. Threats to beef profits are treated as threats to agriculture, which are treated as threats to American business. The lobbying and electioneering forces put into action on these circumstances are immense. See Hacker and Pierson 2011.

³⁸⁰ I'll call academia an industry in this sense because while the pursuit of knowledge remains a central goal in academic animal research, it is also a segment of the university system that brings in significant revenue in the forms of grants and pharmaceutical contracts. There are complex layers of incentives that make academic animal use difficult to classify.

³⁸¹ For all his predictive shortcomings, Marx was basically correct in his description of capitalism as a system that demands exploitation when it is profitable, with kind employers going out of business in the face of more pragmatic competition. When it comes to animal exploitation, one of the underlying dynamics is that adequate facilities, caretakers, and enrichment raise costs in virtually all cases across virtually all industries. See Bob Torres's Marxist take on animal exploitation.

³⁸² It is worth noting that the Humane Slaughter Act, a relic of the Eisenhower era, does not cover chickens or Turkeys, who account for over 95% of the animals slaughtered in the US (excluding fish, who also are not covered). Industry has quietly maintained this exclusion, which has no real basis other than cost.

market spaces. I would argue that where religious conservative opposition to gay rights is able to shift away from increasingly unpopular views on gay rights, industry targets face a more existential threat from animal and environmental activists.

Sixth, is history progressive? This one is interesting for animal rights. Certainly, the movement of the 1970s and 1980s seemed to take on an air of inevitability, one which many participants believe is rooted in the sound moral philosophy that underlies the modern movement. But the account of the animal research and testing issue, once the movement's most promising front and now largely abandoned, certainly suggests that nothing is inevitable.³⁸³ Similarly, issues like fur and veal, once viewed as inevitable victories, have suffered significant reversals. Once again I am drawn to the idea that victories over industry are neither inevitable nor irreversible, which makes questions of effective movement power raised in this project all the more pressing.³⁸⁴

Seventh, do a movement's origins matter? Yes. The animal rights movement was clearly shaped at its outset by a number of factors. First, the US had developed a strong system of humane societies, SPCAs, and moderate animal charities run by people of means (often derisively referred to as the "little old ladies" running things). This institutional base provided significant resources for the young movement, but also drained potential resources from more radical channels. The humane movement of the mid-20th century was both ally and challenger rolled into one. The animal rights movement also drew significant membership from the

³⁸³ Here as elsewhere it can be challenged that the goal of this movement is not progressive, yet I would counter that at the very least, reductions in the use of animals in medical and product testing is a generally recognized good. That little money, regulation, or public pressure are pushing that goal forward, is a clear failure of the movement to exert significant power.

³⁸⁴ The labor movement is perhaps the premier example of a 20th century mass movement that saw its progress stalled and reversed in the latter half of the century. It is also the American movement, along with its more far-reaching socialist counterpart, that most directly confronts industry.

environmental movement of the 1960s and 1970s, which contained overlapping ideologies and policy goals. In some cases, radical direct action animal rights groups like Sea Shepard emerged from splits over tactics and ideology within environmental groups, in this case Greenpeace. Still another influence was the British animal rights movement, which formed earlier and built on a more disruptive tradition that was imported as the ALF. Finally, the movement was jump started by academic philosophers, with a large percentage of movement leaders and participants reading their works, giving intellectual arguments an unusually strong hold on the movement from inception. These disparate influences account for a movement that was born with an organized underground disruptive element, a small set of ideologically driven groups, and a larger set of conservative charities struggling to adapt to an ideological shift. Mixed into all these segments were well educated middle class white activists drawn into the movement by the philosophical discourse. This constellation of influences, I argue, allowed the movement to harness multiple types of power from the start, but also foreclosed opportunities to build more radical political organizations from the ground up.

Eighth, are movement tactics profoundly shaped by insider decisions? Here we're looking for more than the soft-handed influence of tax law or police SOPs. We are looking for government actions that encourage one avenue of activism, while strangling another. The anti-abortion case was particularly striking, but there are similar elements with the animal rights movement. Animal rights disruptions have been targeted at all levels of government, from the AEPA/AETA to a heavy FBI focus on ALF and SHAC activity. But where is the encouragement of alternate channels? One area might be the willingness of federal, state, and local lawmakers to address fringe issues that impact relatively few animals and do not effect significant industries. Animal cruelty laws have been slowly and surely strengthened, but also continue to exempt

standard industry practices. Dog fighting and cock fighting are cruel practices primarily associated with poor communities of color, and is telling that these issues have come under the harshest attack from politicians of all stripes. But perhaps the clearest example is the willingness of local government to pass-off sheltering and animal control responsibilities to private groups, including such notable advocacy groups as the ASPCA. America's first, best known, and nearly best funded advocacy group broke its back for decades attempting to handle an animal control contract with the city of New York. That grueling financial, administrative, and psychic burden has played a large role in removing the ASPCA from national conversations on animal issues.³⁸⁵ I think what we see confirmed in this case, is that while "government" writ large does not conspire to control activist decision-making, there are clear impacts from actively discouraging some avenues while encouraging others.

Ninth, are incremental approaches compatible with abolitionist goals? As discussed earlier, this is very much a (the?) open question concerning the animal rights movement. Certainly there is some initial evidence that welfare victories and increased exploitation are fully compatible. Just from a numbers standpoint, animal use has measurably increased in agriculture and testing as activists have fought the worst industry practices and pushed for new regulatory regimes. But on the other hand, the push to eliminate fur farming never relied heavily on incrementalism, and that area has suffered very similar setbacks. So the animal rights case does not offer anything decisive on this point.³⁸⁶

³⁸⁵ I think the animal rights case is perhaps the best example of how government can kill two birds with one stone (excuse the metaphor) by slashing government services and counting on private individuals to pick up the slack, who would otherwise be amongst the most likely individuals to challenge government policy and decision maker power.

³⁸⁶ My own opinion is that the sharp line between reform and abolition is often a false one, and the framing of reforms is often crucial. Does the elimination of experimentation of Chimpanzees, a recent

Tenth, can movements shift their fortunes by shrinking the scope of conflict? Certainly the animal rights movement provides more strong evidence that movements can succeed by shifting from a nation discourse to state and local legislation. However, one might reasonably counter that unlike the high profile abortion debate, bringing animal rights issues to a state vote still counts as expanding the audience for the issue beyond the activists and industries that are typically involved. Still, I find this case supports Baumgartner and Jones's views on venue shopping, which identify important opportunities not addressed in Schattschneider's model. Another interesting wrinkle in the animal rights case is the tactic of shrinking the scope of protest in order to convince local media of the novelty of the action, and thus its newsworthiness. PETA most clearly employs this tactic in its campaigns against chain stores and restaurants, where cadres of activist travel around the country staging the same events over and over in front of stores in each media market. The result is dozens, and eventually hundreds, of small media pieces that aim at producing a plebiscitary impact that is more sustained than a single national piece.³⁸⁷

So are there any additional insights we can glean from the animal rights case? A key one is the role of globalization, which Tarrow identifies as the second major contemporary trend in social movements, alongside institutionalization (Tarrow, 2011). While the animal right

victory, reform or abolish a practice? Certainly, other primates will be substituted for the protected ones, but at the same time activists have succeeded in securing the end of a specific practice that their opponents wished to continue. I see it as an incremental abolition, which helps maintain movement frames that do not endorse disputed practices that remain legal.

³⁸⁷ These tactics are often combined in practice, with a push at national media with the release of an investigation or the start of a campaign, followed by a series of local demonstrations. PETA even uses the local/regional media strategy when running contests like "Most Vegan Friendly Ballparks" or "Cutest Vegan Kids," selecting finalists and winners that tap different media markets and multiply the amount of likely coverage.

movement has made significant progress in setting up transnational activist networks, the darker side of globalization is the erosion of power within the state. Specifically, movement power is undercut by the ability of industry to outsource ethically problematic practices to countries with few regulations and little activist presence. China, for example, is a rising center for animal testing with corporations and academic institutions partnering with Chinese laboratories. Particularly controversial practices, such as primate experimentation, appear especially likely to follow this migration.³⁸⁸ In general, the patterns of business migration are the familiar ones we have watched for decades concerning labor and environmental costs. An evolving area of interest is role of free trade agreements and institutions, which have a long treated activist supported domestic regulations as illegal forms of trade protectionism. For example, the US famously lost its WTO bid to ban the importation of dolphin unsafe tuna from Mexico. As multi-country agreements like the Trans Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) increasingly supplant the role of the WTO, it will be important to watch how old movement victories are incorporated and what doors are open or shut for new regulation.³⁸⁹

The Disability Rights Movement

Disability Rights provides a final case that at first appears to be a curious fit with my focus on movement power. The disabled have achieved a remarkable level of political success,

³⁸⁸ China has also become the world's largest fur producer. Interestingly, China also requires a thick battery of animal testing on all cosmetics sold in the country, which has led a number of American and European companies to abandon longtime pledges not to test on animals in order to sell their products in China.

³⁸⁹ Europe bans cosmetic testing on animals or the import of tested products. China does the opposite. How the US manages new trade deals with both countries may be a canary in the coal mine for these issues.

including major civil rights legislation, despite exerting relatively little power on the political system. The Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and the ADA Amendments of 2008 are legislative achievements of significant importance, and yet none of them were the product of sustained actions by the disability rights movement. Certainly the movement was active in the processes that produced each measure, and shaped the elite understandings of disability that underlie each law, but each case also lacks the element of arm twisting that we associate with genuine power. In American politics we simply do not expect groups with little power to get their way, particularly when the group's interests do not seem to align with those of government agencies or the business community. To put it simply, my project assumes power is sort of important in politics, so how do we explain this case?

My clearest answer is that the movement did apply some significant power early on in the 1970s, relied heavily on insider support, benefited from some lucky breaks, and avoided burdening business or government with overly onerous costs or regulations. In a sense, almost everything seems to have broken in the movement's favor, and power has been less at issue than in other causes. But what I would point out is that the disability rights movement will still be required to exercise power if it hopes to achieve goals with significant costs, for example in closing gaps in health care coverage or reducing the sky-high unemployment rate amongst disabled Americans. Moreover, the movement remains vulnerable to reversals, particularly on issues like education mandates, where federal "unfunded mandates" for special education are an increasingly large percentage of cash strapped state and local education budgets. Given the trend in granting exemptions to federal education mandates in programs like Race to the Top, and the push for charter schools, there is reason for concern that services in these and other

areas could on the chopping block. Marginalized groups only don't need to be powerful until they do.

Independent living (62- 1972)

The modern disability rights movement is generally seen as beginning when Ed Roberts enrolled as an undergraduate at the University of California, Berkeley. Roberts, who had been left a quadriplegic from polio at the age of 14, required a heavy motorized wheelchair and had to sleep with an iron lung. Despite admitting him, Berkeley claimed it could not (and would not) accommodate Roberts's housing needs, but Roberts pushed to make his own arrangements and thrived as a student. With his support other disabled students enrolled and began calling themselves the rolling quads. The group went on to found the US Berkeley Physically Disabled Students Program, which eventual would become the Center for Independent Living, which would lead the shift in disabled advocacy from a focus on medical care to one that included *social* functioning and self-advocacy (Shapiro, 1993, p. Ch.2).³⁹⁰

Roberts and CIL, along with its New York counterpart Disabled in Action (DIA), would make the dual move of putting disabled advocates at the center of disability advocacy and

³⁹⁰ Roberts and his allies recognized that America had a modest infrastructure of disability support dating back to WWI and the 1918 Veterans Rehabilitation Act and the 1920 Civilian Rehabilitation Act. These laws set up federal-state partnerships focused on vocational training for Americans with physical disabilities, and were expanded with passage of the Social Security Act in 1935, and still further expanded during WWII with the Vocational Rehabilitation Amendments of 1943. Rehabilitation clearly rode the coattails of the veteran's lobby, which is particularly potent during times of war. And over the course of the first half of the 20th century the care givers and social service providers supported by rehabilitation funding, along with private charities funding treatment and research, became the de facto representatives of the disabled community. These representatives understandably focused on securing funding to address the medical and health needs of those they cared for, but this perspective increasingly chafed with able minded disabled adults who were also concerned about their independence and social and economic opportunities.

stressing that social needs were as important as physical ones. This shift in composition and focus was the beginning of a modern movement, but from a power standpoint there was no dramatic shift in the 1960s. There was nothing analogous to the Stonewall riots, Roe v. Wade, or the American Museum of Natural History cat experiment campaigns. Federal and state laws continued to be passed, including Vocational Rehabilitation Act Amendments in 1965, 1967 and 1968, but they relied on older alliances, including increased veteran lobbying accompanying the Vietnam War.³⁹¹ Indeed, while the independent living movement had directly transformed the lives of countless disabled Americans, and in doing so had pushed people with disabilities and their caretakers to reevaluate their goals and values, the movement still remained only minimally political.

Civil Rights (1973-1990)

Everything changed for the disability rights movement in 1973.³⁹² That year, the Democratic Congress and President Nixon negotiated a modest \$1.55 billion two-year spending bill to fund the governments various disability related functions, with Nixon vetoing the first two versions of the bill. This legislation was more-or-less business as usual, with neither decision-makers nor disability advocates pushing a transformative agenda. However, in the fiscal horse-trading all the parties apparently overlooked Section 504, a provision added relatively late in the process, which read, in part,

³⁹¹ The 1968 Architectural Barriers Act and the 1970 Urban Mass Transportation Act also pushed forward with accessibility demands that would become central to the movement.

³⁹² In 1972, Representative Charles Vanik and Senator Huber Humphrey tried to amend the 1964 Civil Rights Act to cover people disabilities, but the effort lacked strong support, and was opposed by many supporters of black civil rights who worried changes might water down their own movement's most important political victory.

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

This largely ignored provision was the first federal civil rights protection for people with disabilities, an enormous achievement, but one which can hardly be attributed to movement power.³⁹³ Senate liberals led by Harrison Williams added the provision, modeled on language from the 1964 Civil Act and Title IX of the 1972 Education Amendments (Scotch, 1984). Despite the weight of the language, the addition was low profile to the point where there remains some uncertainty who specifically drafted and added the provision.³⁹⁴ It seems that most congresspersons who voted for the bill and the president who signed it were simply unaware of what they were doing. This cannot be considered an exercise of activist power, but rather a stroke of luck or chance, combined with deep dependence on political insiders. The flip side to this observation is that no institutional interests that receive government funding picked up on the provision and raised red flags, which ironically is probably the case because there was no

³⁹³ Disabled in Action had blocked traffic in front of Nixon's 1972 NYC campaign headquarters to protest his initial veto of the Rehabilitation Act, but as stated, this was a dispute over support funding, not disability rights. DIA protests were media friendly, but their small numbers lacked force, and did not stop a second Nixon veto in 1973. However, these were important seeds in the eventual growth of a more political movement.

³⁹⁴ In fact, sociologist Richard Scott conducted extensive interviews with policymakers and staff involved with the 1973 Rehabilitation Act and reports that no one involved was sure who even added the 504 provision. Given the parallels to black civil rights laws concerning services like housing and education it seems inconceivable the author of the provision was unaware of the weight of his or her language. This uncertainty about origins and intentions adds noise to any analysis such as mine, but I feel confident concluding that the provision aspired to be taken seriously as mandating civil rights.

organized movement lobby behind its insertion. I am hesitant to endorse the idea that the absence of movement power is an effective means to political victory, but this remains an important counterfactual to consider.

Activist support would play a more significant role in the 1975 passage of the All Handicapped Children Act (AHCA), which guaranteed all children a “free and appropriate education” regardless of special needs, but that key legislation was also an inside job, if one done with more visible public and political support. In neither case did the movement play a leadership role, let alone do any arm-twisting. However, while disability rights activists did not play a direct role in pushing Section 504 or the AHCA, they played a major role in their *implementation*. The Nixon administration had no intention of pushing a new civil rights agenda, particularly one that was potentially costly to both government and business, and failed to draft necessary regulations with key agencies. Activists began to organize, and set their sights on the 1976 election, in which Jimmy Carter was pushed to explicitly promise to put in place much-delayed 504 regulations. But as the first year of the Carter presidency arrived and passed it looked like Carter was in no rush to push the disability issue on a business community already skeptical of his domestic agenda. The main burden of implementation fell of the Department of Health, Education and Welfare (HEW), which had spent years drafting and redrafting rules that were now presented to incoming Secretary Joseph Califano. Califano was surprised by the reach of 504, considered the department’s interpretation too expansive, and asked for time to rewrite the proposed regulations in a narrower and more limited way. This was the moment when the disability rights movement coalesced and first flexed its political muscle.

The American Coalition of Citizens with Disabilities (ACCD) staged a candlelight vigil outside Califano’s home, followed by demonstrations at HEW’s DC and eight regional offices.

300 protesters took over office for over 24 hours and the occupation in San Francisco lasted for 25 days (Shapiro, 1993, pp. 66-7). Califano finally relented and signed the current versions of 504 and AHCA regulations into effect.³⁹⁵ It was a major movement victory and a clear use of disruptive power backed by strong plebiscitary images of sympathetic but determined disabled protesters putting their health and safety on the line.³⁹⁶ In a sense, the ready imagery of wheelchairs, amputations, and other visible signs of physical disability offered disabled protesters a direct channel to the frames of protester suffering that were so effective during the push for desegregation.

Ensuring implementation is one of the key tests of movement power, but it is rarely a one and done situation. Consequently, disruptive power alone is often undone in the pluralist long-game. In the case of section 504, movement victories under Carter were threatened by the election of Ronald Reagan, who made deregulation a centerpiece of his domestic agenda. The job of slashing 504 coverage was left to vice president George H.W. Bush, who ran the Administration's Task Force for Regulatory Relief. Bush received over 40,000 cards and letters asking that he protect existing disability provisions and met with disability groups across the country to curb any potential political fallout. In the process Bush became convinced of the justice of the cause, the threat posed by a movement backlash, and the potential political advantage of courting an untapped segment of the voting public. The Task Force subsequently dropped all objections to 504 and AHCA regulations. Bush and Reagan would also go onto

³⁹⁵ In an effort to prevent future standoffs over disability policy implementation, the Carter Administration would go onto established the National Council on the Handicapped within the Department of Education, charged with reviewing disability policy and making future recommendations. The NCH was authorized in the 1978 Amendment to the Rehabilitation Act. In attempted to pass the buck on future decisions, Carter almost casually put in place a bureaucratic agency that would drive much of the progress in disability rights for decades to come.

³⁹⁶ Many of the protesters suffered from medical complications without proper medical equipment and care.

transform the National Council on the Handicapped into an independent agency, the National Council on Disability, which would go on to play a crucial role in securing disability rights. Moreover, Bush made friends and allies during the process that would stay with him throughout the remainder of his political life, most notably disability activist Evan Kemp, Jr. It remains an open question whether Bush would have become an ally to the movement without his Task Force experience, but it certainly raises the specter of Fortuna yet again in this narrative.

Shortly after section 504 was protected, the push for more expansive civil rights protections began. But once again, it did not begin with the movement. Or more precisely, it began with disability rights advocates *inside* the federal government. The newly independent NCD would be the catalyst and initial architect of what became the 1990 Americans with Disabilities Act (ADA). In 1986, the NCD would recommend comprehensive civil rights legislation, and drafted a first version of the ADA, which was introduced to Congress in 1988. In many ways what is most interesting about the story is that the 13 Reagan appointees on the NCD pushed the disability agenda in a direction Reagan himself neither expected nor endorsed. How could such a coup happen? Was Reagan simply asleep at the wheel, so to speak? It seems that a latent desire for civil rights protections was present in many of the Council members, a desire that clearly cut across party lines. The principle author of the 1986 report *Toward Independence*, which recommended comprehensive civil rights legislation, as well as the first draft of the ADA was disability attorney Robert Burgdorf, Jr., who had sought his appointment with a long held private agenda of enacting a law like the ADA. Along with Burgdorf was another disability rights ideologue, Justine Dart, Jr. whose appointment was likely helped by his father's strong ties to Reagan and the California Republican Party. (Shapiro, 1993, pp. 106-111) The two activist

Council members united their colleagues behind Burgdorf's work and the NCD, now an independent agency, moved forward without Reagan's knowledge or approval.

The NCD bill introduced at the end of the 100th Congress in 1988 had virtually no chance of passing for a number of reasons, not the least of which was Reagan's lack of interest in, or even awareness of, the bill. The 1988 bill found sponsors in Connecticut Senator Lowell Weicker (R) and Representative Tony Coehlo (D) of California. Unfortunately, Weicker would lose his 1988 reelection bid and Coehlo would resign his seat over a savings and loan scandal, requiring new sponsors for the ADA to get another shot. Fortunately, Representative Steny Hoyer (D) and Senators Ted Kennedy (D) and Tom Harkin picked up the bill and then received a boost of Republican support from Senators Bob Dole and Orrin Hatch. Equally important, 1988 saw ally George H.W. Bush take the White House after making disability rights part of his platform at the RNC nominating convention. Suddenly the bill was packed with heavy hitters from both sides of the aisle, ensuring relatively easy passing for the 1990 Americans with Disability Act.³⁹⁷ Bush promptly signed the legislation and issued regulations implementing it (Shapiro, 1993, pp. 118-119). While the disability rights movement did mobilize to play a roll of pushing the legislation forward, in the end, we are confronted with another largely inside job.³⁹⁸

³⁹⁷ The House presented more of a challenge than the Senate, but even there the debate concerned more the shape of the bill than the broader question of whether or not to pass the civil rights legislation. Bush's support was ultimately decisive in winning over House Republicans.

³⁹⁸ 180 national disability organizations endorsed the legislation. Some groups bused in members to speak with members of Congress. The legislation's supporters harnessed this grassroots lobbying to grab new sponsors and win over fence sitters. ADAPT staged a series of sit-ins in front of the White House and in the Capitol Rotunda (Senator Dole famously chastised the protesters as "not helping" those working for passage). While striking images of wheelchair users dragging themselves up the Capitol steps produced some nightly news coverage, the movement's largest demonstration attracted only around 700 persons, and was not even covered by the Washington Post. Another notable instance of disruptive power that I have not focused on in this narrative came in 1988 when Gallaudet University students demanded a deaf president be appointed and shut down the school until the board relented. This successful protest raised the national profile of the movement.

What explains ability of the movement to draw such significant insider support? The key answer here is that just about everyone involved had a disability or a close family member with a disability. Bush had grown up with an uncle left quadriplegic by polio, had one son with a learning disability, one with part of his colon removed, and had lost a daughter to leukemia. Coehlo has epilepsy. Weicker had a daughter with Down's Syndrome. Hoyer was best friends with Coehlo, had a deaf brother, and his wife was a prominent disability advocate with epilepsy. Kennedy's son lost a leg to cancer, his sister Rosemary was mentally retarded, and his other sister, Eunice, was a renowned disability advocate and founder of the Special Olympics. Dole was wounded in WWII and left with a paralyzed arm. Hatch's brother-in-law suffered a number of disabilities after contracting polio. Harkin's brother was deaf. These were the key players, but many other decision-makers were also personally touched by disability. Coehlo was known to say there was a "hidden army" of disability advocates everywhere one turned, including government (Shapiro, 1993, p. 118). The hidden army was especially fortunate to include Republican leadership in President Bush and Senate Minority Leader Dole, as well as Democratic heavy hitter Ted Kennedy.

Burgdorf and Dart got the process rolling through the NCD and recruited Coehlo and Weicker. Coehlo then recruited Hoyer, who was pivotal in attracting other members of Congress. On the executive side, Bush's friendship with Kemp was perhaps most crucial. So while disability advocates did play a key role in activating latent insider support, they did it by cultivating personal connections and securing positions inside of government. One might reasonably call this a pluralist approach to power, but it is a soft touch that depends on good fortune and weak opposition.

The litigation Era (1991-)

While business interests did not push hard against the ADA during the legislative process, they quickly took to the courts to hollow out much of its impact. By most accounts, the central loophole in the original ADA is that it underspecified the definition of “disabled.” Lawmakers and disability rights advocates intended the ADA to function as a piece of civil rights legislation, and assumed the category “disabled” would not be interrogated by judges, just as categories of gender and race have not been (racial discrimination cases don’t typically begin by challenging the plaintiff’s status as “black”). By contrast, the courts chose to interpret “disability” in a manner more consistent with Social Security Disability Insurance, which defines disability as the *inability to work* due to impairment. For SSDI cases, establishing disability is the whole game. The Supreme Court’s definition of disability creates an ADA “paradox” in which disabled status is reserved only for those individuals too disabled to work, and thus offers no substantive protection from discrimination for disabled individuals in the workplace (Fleischer & Zames, 2011, pp. 102-105).³⁹⁹⁴⁰⁰ This is not to undersell the significance of the ADA, only to stress that narratives around movements are often condensed to a single victory—the 1964 Civil

³⁹⁹ SUTTON V. UNITED AIR LINES, INC. 527 U.S. 471 (1999).

The Court held that mitigating measures could be considered in the definition of “disabled.” The airline had a policy against employing pilots with uncorrected vision below a certain threshold. Sutton and her sister were refused employment under this policy and sued under the ADA. The Court held that the plaintiff was not disabled because corrective lenses mitigated the impairment. It’s the catch-22 case. There are two related cases: Murphy v. United Parcel Service (1999) and Albertson’s, Inc. v. Kirkingberg (1999), and the three are sometimes referred to as the “Sutton Trilogy.”

⁴⁰⁰ In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* 534 U.S. 184 (2002), the Court offered a narrow construction of the key phrases “substantially limits” and “major life activity,” which dramatically limited the types of conditions qualifying for disability. In the case, Williams was terminated because she was unable to do certain manual labor requiring her to raise her arms to shoulder level for several hours a day. The task was not deemed a major life activity (most people don’t need to do it), nor was her condition seen as a substantial limit on any more general life activity (she could still do many other manual tasks).

Rights Act (or *Brown v. Board of Ed.*), *Roe v. Wade*, etc.—that ignore the long hard years of contestation and legislation that follow.

The public narrative around the ADA has largely been one of the public patting itself on the back, which while not altogether undeserved, leaves activists with few options beyond litigation. In the time since the ADA, the disability rights movement has not built significant political organizations. It has not maintained a disruptive tradition. It has not wielded plebiscitary agenda power, in no small part thanks to the public perception that the ADA solved the problem and persistent public concern about SSDI disability fraud. The coalition of groups that came together around passage of the ADA dissolved following its passage and quick implementation and what was left is a barebones movement with little appreciable power, apart from significant new pluralist access to the Courts.

But in 2008 the ADA was amended in a comprehensive attempt to address its inadequacies.⁴⁰¹ Where did this second legislative push come from? The answer is similar to the one for the 1990 legislation. Specifically, the NCD issued a report in 2004 titled “Righting the ADA” that largely guided a bipartisan legislative response. That response took a modest two years from its 2006 start, and gained near unanimous support from the House, Senate, and President, as well as business and disability rights communities. A key to the ADAAA seems to be the fact that the original congressional architects of the 1990 ADA (on both sides of the aisle) have kept their seats and gained seniority. The process was shepherded along by Steny Hoyer, who had risen to House majority leader. Harkin and Hatch had gained seniority and Ted

⁴⁰¹ My account is drawn primarily from documents from Georgetown Law’s ArchiveADA project <http://www.law.georgetown.edu/archiveada>. Along with the text of the law, the article, “The ADA Amendments Act of 2008” by Feldblum, Barry, and Benfer was far and away the most useful source. <http://www.law.georgetown.edu/archiveada/documents/ADAAMendmentsActArticle.pdf>

Kennedy was the Democratic Party's elder statesman looking to protect a key piece of his civil rights legacy.

New faces also emerged for reasons that mirror the 1990 process. On the Republican side, the ADA Restoration Act of 2006 was first introduced by conservative Republican Rep. Jim Sensenbrenner, whose wife Cheryl is Chairman of the board of the American Association of People with Disabilities (AAPD). Cheryl was partially paralyzed in a car accident at age 22, and took a lead role lobbying and testifying for the ADAAA. The public and private push by the Sensenbrenners rekindled much of the bipartisan agreement achieved in the 1990 legislation. Rep. Jim Langevin, who is paralyzed from the waist down and is accommodated on the House floor by a special chair that raises him to speak, was an important supporter of the ADAAA, and colleagues mentioned him and former member Tony Coelho numerous times while speaking in support of the bill. Coelho and Dole were key supporters of the legislation from outside Congress. It seems that Coelho's silent army had grown, and I believe the relatively high levels of diagnosis, treatment, and functioning of disabled persons in wealthy and well educated families means that the ADA disproportionately touches many congressional families of both parties.⁴⁰² And perhaps the biggest boon to ADAAA passage was the support of lame duck President George W. Bush, who while being a great friend of the business community, desired above all to preserve a centerpiece of his father's domestic legacy. These individuals were personally and professionally committed to the ADA, and were genuinely angered by the perceived failures in ADA implementation. The bill's sponsors credibly spoke for the Congress of 1990, and

⁴⁰² Policy feedback is likely at work in how the ADA (and IDEA/504) strengthen identity and opportunity for the disabled, increasing their cohesion as a single group and turning them towards politics. Before these policies were in place, disabled persons were more likely to identify with the subgroup sharing their particular impairment, and linkages between dissimilar populations like autistic individuals and the hearing impaired were loose and weak.

successfully framed the bill as a “restoration” of congressional intent. When framed like that, who wants to stand in the way of *restoring* landmark civil rights legislation? In the end, the ADAAA was more or less a pluralist and plebiscitary slam dunk.

Given a 2007 House bill starting with 143 co-sponsors (including a significant minority of Republicans), gaining more than 100 additional co-sponsors during the process, and heading to the desk of a sympathetic President, the business community was fighting a losing battle. After initially opposing the legislation, business groups wisely accepted the invitation by Representative Hoyer to enter into negotiations on the bill’s final content. In those negotiations, the business community succeeded in securing language that would ensure the ADAAA would not expand the ADA much beyond 1990 levels. Specifically, language exempted eyeglasses and contact lenses as acceptable mitigating circumstances and temporary or minor impairments (like the flu) were exempted for the definition of disabled. Moreover, specific language was retained from the ADA that individuals must be “qualified” for their positions and that disabilities must “substantially limit” major life activities (not completely rejecting *Williams v. Toyota*). In the end, the business/HR community had more to gain by establishing moderate but stable definitions of disability than by fighting costly legal battles over narrow but ever-shifting definitions.⁴⁰³

⁴⁰³ Notably, objections to the ADAAA (and its precursors) were always premised on the claim that the legislation would significantly expand the ADA beyond its 1990 intent. Genuine or not, this framing by the opposition meant that proponents of the bill were able neutralize opposition by specifically addressing their most extreme examples (i.e. eyeglasses and colds). These issues were hammered out ahead of time, and when the bills reached the House and Senate floors there was no real debate. Everyone who spoke praised the legislation and the process. In the battle over “issue definition,” the proponents very popular “restoration” frame proved resistant to their opponents more controversial “expansion” frame. Beyond the merits of broadening ADA coverage, Congress embraced the ADAAA as an assertion of institutional prerogative over an “activist” judiciary. The legitimacy of this framing was supported by the NCD’s involvement, a body involved in drafting the original ADA, as well as the support of a number of

The disability rights movement vocally supported the ADA Amendment process, but the larger coalition behind the original ADA push did not re-emerge. Even more than in 1990, this was an insiders' gambit, and again raises complicated questions about the role of movement power. The political agenda was set by a federal agency. The bill was both framed and advanced by party leadership. The NCD and the bill's sponsors were clearly reacting to information from within the disability community, but this is not necessarily the portrait of movement power I have been painting. It is difficult to know what to make of a movement winning without exercising power, but I will look briefly out how these facts mesh with my previous observations.⁴⁰⁴

In the absence of effective arm twisting by the movement, it is difficult to confirm or deny that opportunities for power persist, that isolated power types are vulnerable, or that different power types can undermine each other. We do find exceptionally strong evidence that insider support is crucial. We also find that opposition commitment is crucial, as there was no real organized opposition to business rights other than a somewhat apprehensive business community. Still the lack of business opposition calls for further examination. While this account may seem to suggest liberal causes progress steadily, a closer look shows long periods of stagnation and retrenchment. It remains an open question whether the current period of stagnation gives way to progress or retrenchment. The origins of the movement are important in that the vast network of service provision organization has clearly pushed the movement to

legislators who were involved in the 1990 bill (notably, original ADA sponsors Senators Tom Harkin, Ted Kennedy, and Orrin Hatch, and Representatives Steny Hoyer and Jim Sensenbrenner provided direct continuity). Moreover, Disability Rights groups were largely able to unify around the "restoration" frame. Under the Consortium for Citizens with Disabilities, the umbrella group behind the original 1990 legislation, the disability rights community shelved complaints unrelated to the definition of disabled.⁴⁰⁴ It is worth noting that a different definition of power from the one adopted in Chapter 2 might consider these developments a form of consensual power, but I reject that approach because I think it papers over the real and important difference between this case and those in Chapter 6.

organize charitably and not focus on politics. Additionally, we find that insiders in Congress and the Executive have played a very large roll in channeling movement activity away from confrontation and towards insider strategies like litigation. Concerning incrementalism, we do find small advances paving the way for broader gains, particularly in the field of education. In fact, we find a policy feedback mechanism at work where small policy victories have worked to mobilize the disabled and their families as a constituency and produce sweeping advances like the ADA. Finally, we find an interesting bit of confirmation for the scope of conflict, as the ADA succeeded in large part by flying under the radar of most of the Reagan Administration. Stealth can clearly be a virtue in some venues. Beyond these existing observations, what further insights can we draw?

First, luck matters. In talking about open and closed political opportunity structures, it is tempting to try and force all the relevant factors into patterns and types. But there remains an irreducible element of political chance, the kind lead John Kingdon to conclude that many policy windows would open at unpredictable times for unpredictable reasons. Often this means an agenda setting event like a natural disaster or an international terrorist incident. But with movements focused on narrow policy questions, such events can be a little considered bureaucratic appointment or a well-placed politician with an unexpected personal tie to an issue.

Second, critical junctures can produce path dependence. Section 504 of the Rehabilitation Act was essentially an afterthought, with no activist participation, and no public mandate. But 504 laid the foundation for the civil rights model that has dominated disability advocacy ever since, as well as focusing policy attention disproportionately on education and public access, with little attention paid to employment, poverty, and other serious socio-

economic deficits. In addition, the largely accidental (or perhaps incidental) partnership between Democrats and Republican in the mid-1980s, especially George H.W. Bush's involvement has led to the persistence of disability rights as a rare bi-partisan issue. The 2008 ADAAA is largely a legacy of these unexpected partnerships decades earlier.

Third, bureaucratic representation is a powerful agenda setter. The role of the NCD is particularly striking in the disability narrative. Although created initially as a largely symbolic advisory committee, the NCD repeatedly shouldered the burdens of problem definition and agenda setting, and to use Kingdon's language, they repeatedly *coupled* problems to solutions that legislators subsequently adopted. The mandate of the NCD was to represent and advocate for a disadvantaged population, like the NLRB, the EPA, or the Civil Rights division of the DOJ. Having an institutional advocate is clearly one of the best ways to advance a movement's agenda in an age of constrained opportunities.

Fourth, business interests may prefer new regulation to an uncertain status quo. When movements manage to problematize the business environment through mismatched state regulations, lawsuits, and the threat of ever evolving standards, business may prefer to participate in a more comprehensive federal effort to produce common standards, even when those standards are not their preferred ones. Disability policy in employment, public accommodation, and discrimination was able to win over an initially resistant business community. So while business opponents may be potentially the fiercest opposition a cause can face, we should not paint business as universally hostile to progressive causes. Moreover, strategic advances at the state and local level can be leveraged to coopt a business community that values stability and clarity in regulation.

Fifth, insider access is above all personal. As with LGBTQ rights or cruelty protections for dogs and cats, being part of the family is decisive. When we speak of movements and luck, there is no bigger advantage than accidents of birth, injury, or illness transforming powerful insiders into deeply committed allies. Power is not always necessary if your interests align with those of the powerful.

“At this moment, I would like to thank the evangelical community who have been so good to me and so supportive. You have so much to contribute to our politics, yet our laws prevent you from speaking your minds from your own pulpits.

An amendment, pushed by Lyndon Johnson, many years ago, threatens religious institutions with a loss of their tax-exempt status if they openly advocate their political views.

I am going to work very hard to repeal that language and protect free speech for all Americans.”

-Donald Trump, *2016 Republican National Convention Acceptance Speech*

"Sometimes there are days like this when that slow and steady effort is rewarded with justice that arrives like a thunderbolt,"

-President Barack Obama, 2015 comments on the *Obergefell v. Hodges* gay marriage ruling

Conclusion: So It's Come to This...

This dissertation has occupied me for the better part of the past decade. The funny thing about a project of that length is that while you work the world continues to change. New evidence presents itself. Institutions evolve even as you attempt to pin them down and crystalize them at the point of first analysis. Some of your analysis proves misguided. Some proves prescient, or rather, it would have had you published before events unfolded. And some proves dated, as fate and fortune alters the political landscape in unexpected ways. All these

developments have happened as the project slowly moved toward completion. And on balance, these developments seem to bear out merits of this dissertation.

In the earliest versions of my work, back in 2010, I noticed that LGBTQ Rights organizations had spent the last 20 years investing in politically oriented C4 and PAC organizations at a truly phenomenal rate. My tentative conclusion was that more than any other movement, LGBTQ Rights groups had pursued power strategies that should maximize their influence. At that moment in time, Proposition 8 in California had just banned same-sex marriage by popular vote in one of the nation's most progressive and diverse states. It was difficult to see LGBTQ activists as particularly powerful right then. But what followed were a series of sweeping victories in states, courts, Congress, and the Federal Executive that allowed for open military service, made gay marriage the law of the land, and sent politicians scrambling to prove their gay-friendly bona fides. By the 2016 election season, Democrats were scrambling to assert LGBTQ rights as a wedge issue one final time before the GOP can rebrand itself as gay-friendly. In my mind, political organization clearly paid off for the movement, supporting my framework.

To a lesser extent, the explosion of state level restrictions on abortion access seemed to validate my early observations that antiabortion activists were avoiding C3 organizational forms more than most other movements and investing heavily in state and local political activity. Antiabortion activists have also remained on the cutting edge of disruptive tactics, particularly direct action harassment of abortion providers. Their movement has had remarkable success given the constitutional barriers they face. Conversely, the rather apolitical Disability Rights and Animal Rights movements have failed to translate significant public support into much in the way of public policy. All this fits with my early expectations.

In 2011, Occupy Wall Street was widely heralded as a new era of activism, which seems to fly in the face of my own proclamations that trends in political development were increasingly constraining activist possibilities. But with little organizational staying power, little conflict with generally restrained police forces, and media cycles flooded with competing stories, Occupy lost steam and quickly sputtered out. In many ways, the Occupy story might be my best fit. And while some reasonably credit Occupy with priming the pump for Bernie Sanders's improbably presidential campaign, it never-the-less remains true that the traditional repertoire of contention did not produce results, and activists were forced to innovate new methods aimed at hijacking a major party nomination. Is this a hint at the future of power innovation? I will return to this question at the end of the chapter.

Is the Occupy pattern playing out again with the Black Lives Matter movement?

Commentators have been quick to dub BLM the most significant development in race activism since the decline of peak activity in the 1960s and 1970s. But it seems a bit early to crown this movement a game changer. While their core issue of police violence has been thrust onto the national stage, there has been surprisingly little movement on policy and no indication that results are imminent. Moreover, the 2016 election cycle seems to have largely eclipsed a movement that may lack organizational staying power, and revived thinly veiled racial appeals to "law and order" against a movement whose aggressive tactics leave it open to negative framing.⁴⁰⁵ It seems to be BLM is likely to be ignored, waited out, repressed, or symbolically appeased, but only time will tell.

⁴⁰⁵ Of course the movement's most serious framing problem is outside their control, with the murder of police officers in Dallas and Baton Rouge striking what may be a fatal blow for the young movement.

Other trends have been more ambiguously supportive of my arguments. *Citizens United* did indeed release an avalanche of money into the political system, which arguably supports my political inflation argument. Yet early evidence seems to suggest that this money is not buying elections, as candidates supported by vast SuperPac money have not fared especially well. This observation does seem compatible with the position that political inflation undermines activist resources, but the reality also suggests that perhaps infusions of money serve primarily to dysregulate the system and undermine the control of major institutional players. It remains possible that such a loss of equilibrium could advantage radical change. The situation certainly bears watching.

Finally, there are those events that were unpredictable, but which dramatically alter the purchase of some conclusions. In my case, the death of Supreme Court Justice Antonin Scalia looms largest. First Amendment analysis is a major aspect of my work, and Scalia's absence from the Court could have far reaching impact. *Citizens United* the most obvious central case that could face reversal with a new Obama or Clinton appointment to the Court, but other cases and trends will be deeply altered as well. The Court has been poised to extend its protection of campaign expenditures to campaign contributions. That shift may be derailed. Scalia's push to protect antiabortion sidewalk counseling had gained majority support on the Court, but the logic Scalia pushed that threatened the doctrine of time, place, and manner restrictions probably died with its chief proponent. Already Scalia's absence has prevented a ruling in *Friedrichs v. CA Teachers Association* that would have expanded the First Amendment in a way that would dramatically undercut public union finances by ruling nonmember fees to be forced political speech. Such a ruling would have fit perfectly into my claim that an expanding First Amendment is not always good for movement power, but perhaps this trend has been arrested for now.

While these developments render some of my analysis and predictions still-born, my work also gains relevance in helping us navigate an uncertain judicial future. Dramatic First Amendment developments are likely on the horizon.

Turning back to the project at hand, just what have I shown in the preceding seven chapters? What are the accomplishments and limitations?

Chapter 2 lays out a theoretical groundwork for the project as a whole. In it, I make the case that a healthy democracy is best achieved when social movements are relatively powerful. I ground this claim in the Madisonian tradition, tracing it forward through American theorists like Dahl, Rawls, and Iris Young. This American focus is important to me because Chapter 2 also lays out the case that movement power needs to be analyzed based on the specific political institutions and culture of each policy. I argue that a proper understanding of movement power requires a broader perspective on power in the American political system, but also that analysis of mainstream political institutions and processes is profoundly incomplete if it ignores the role of movements. If my argument is correct, movement innovation is the primary source of new power strategies and resources in American political development, and we should look to movement activists to discover the politics of the future.

Chapter 3 argues that disruptive power is the original power of outsiders, the power to disrupt the institutions, norms, and routines that serve the powerful; the power to break things. Disruptive power can be viewed as a temporary withdrawal of cooperation from the social contract, and as such it has a special role in democratic theory. I argue that disruption is generally immune to cooption because by its nature it is inconsistent with the mantle of

governance and undermines the authority of insider actors. Yet recent politics leaves this immunity suspect, as Donald Trump has staked his bid for the presidency on disruption, threat, and fear. On the other side of the aisle, Democratic congresspersons staged a 2016 sit-in on the floor of the House, demanding a vote on a series of gun control measures. It would seem that even disruptive power may be potentially diffusing through the political system, which is a somewhat troubling development for a system built of the rule of law.

The most obvious threat to disruptive power is repression through structural barriers, which though enduring, ebb and flow in strength as the system adapts to changing times with new institutional constraints. The two most significant structural barriers involve policing strategies that limit confrontation with protesters and anti-terrorism activity that quietly suppresses extreme forms of activism. The latter is a trend that should only intensify in the wake of mass shootings in San Bernardino and Orlando, as the US government shifts its antiterrorism focus towards preventing online radicalization and sniffing out potential “lone-wolf” terrorists. Such law enforcement tactics provide a ready model and rationale for undermining ideological radicalization at the fringes of movements of all stripes, and I think my analysis of First Amendment trends surrounding time, place, and manner restrictions, hate speech, and true threats suggests that the Supreme Court will allow the war on terror to spill over into broader government control of speech activities. But perhaps more interesting than antiterrorism policy is the trend in state and local policing tactics.

I provide significant evidence in Chapter 3 that the policing of protest has shifted away from confrontational tactics, and that this shift has undermined some of the disruptive potential of contentious protest. Fewer arrests, less aggressive crowd dispersal, and limited police violence are all apparent over the past several decades. But this brings us back to the question

of Black Lives Matter, a movement that is specifically making claims about rampant police violence. How do we square the trend I describe with the experiences giving rise to this movement and the flashpoints of conflict in cities like Ferguson and Baltimore? The short answer is that BLM is perhaps the perfect example of the constraints I describe. First, police harassment and violence against African Americans is a very real problem, and one that seems obvious to those who experience it personally in their own lives. Second, the vast majority of BLM protests have been peaceful and police have by-and-large exercised restraint. Third, the episodes of severe disruption that have occurred have primarily been defined by protester aggression and rioting, with cases like Baltimore showing police opting to pull back from conflict zones in order to avoid violent confrontations with protesters.⁴⁰⁶ The end result of these three factors is that even in the face of systemic police violence, BLM has been denied widespread opportunities to disrupt the peace without taking actions that produce harshly negative plebiscitary frames. State violence is confined to confrontations with individuals, while organized dissent is “protected” but police projecting themselves as defenders of both speech and order. While the BML example gave me pause at first, I am increasingly convinced it only serves to strengthen my case.

Chapter 4 argue that pluralist power is an essential part of movement repertoires, and not simply a path to co-option. I take a rather firm stance against the Piven line of critique that largely dismisses organization building and resource mobilization. Organization matters, a lot. And I think that the recent developments surrounding gay marriage, Occupy, and elsewhere

⁴⁰⁶ It must also be noted that as conflict flared in Ferguson and Baltimore, politicians across the country pushed for the adoption of body cameras. While at best a partial solution, this development does seem to show disruptive power actively at work.

support this position.⁴⁰⁷ I further believe that the data I present on non-profit organizing provides strong evidence that, broadly speaking, activism is being channeled into the least political forms available.

The fact that Donald Trump, a major party candidate for the presidency, has made repeal of the ban on political activity by 501(c)3 organizations one of his only concrete policy pledges is astounding. I think the chances are small that Trump both wins the 2016 election and follows through on his promise, but I think the circumstances surrounding his pledge are telling. Specifically, a candidate whose biography and behavior is at sharp odds with the values of religious conservatism has seemingly made a deal with major evangelical leaders. These leaders appear willing to essentially make a deal with the devil to secure their ability to preach politics from the pulpit. Clearly religious activists believe that escaping the IRS constraints of C3 status is the best way to achieve major policy victories on issues like abortion. I feel this development validates much of my argument. On the other hand, Trump's pledge also exposes a major weakness of my analysis in Chapter 4. I do not adequately address constraints of 501(c)3 status on religious organizations. In some areas, unburdening the faithful would strengthen movements, most clearly the antiabortion movement. On the other hand, many movements would be confronted by new organized voices supporting stasis on social issues and further constraining opportunities for movement power. The results may not be the net increase of power I suggest, but something more complicated and less predictable.

⁴⁰⁷ I also think the decline of unions is the central story behind the collapse of left politics and the shifting of both parties to the right starting in the late 1970s. See Hacker and Pierson's *Winner-Take-All Politics* for an extended version of this agreement. One limitation of my project is the absence of labor from my analysis. Labor often straddles the boundary between insider and outsider interests, which leaves its relationship to my framework somewhat ambiguous. I hope to clarify this dynamic further in the future.

Chapter 5 argues that plebiscitary power is the most recent type of movement power and is crucial to agenda setting in the policy process. In many ways this chapter is the most counter-intuitive, as the average citizen likely sees movement organizations constantly splashed across the media. But the chapter argues that these splashes are often just that, with movements vying against each other and a constant stream of sports, entertainment, and social media. Our media is increasingly fragmented and our attention increasing short. When politics does hold our interest for an extended time, it is typically a spectacle like Donald Trump's candidacy, a hard fought election, or a legislative showdown. The evidence is clear that the statements and actions of the system's major institutional actors are the main drivers of media attention to politics and policy. So even when activists grab public attention, it is difficult for them to hold it. Black lives Matter and Occupy Wall Street both appeared to capture national attention, as did gun control after repeated mass shootings, but none held public attention to the degree required by policy process. And as institutional thickening renders policy change a more and more complex process, the public's shortened attention span becomes more and more problematic.

It is certainly worth considering what the vastly changing media landscape means for the future of plebiscitary politics. In particular, a media landscape driven by social media platforms and consumer generated and/or spread content may hold new movement opportunities. Certainly the ubiquity of cell phone video is the impetus behind a BLM movement addressing a very old social problem. Animal and environmental activists have also begun using drones to video previously inaccessible industrial sites. And globalization has increased the international audience for domestic political activism. But at the same time, it seems the spread of media technology is only serving to numb us further to this flood of images. Can we sustain

the outrage and mobilization as videos of black men shot, beaten, and killed become common place in our lives, or will we begin to numbly scroll past their appearance in our digital lives? And our international audience challenges us with issues of its own, often including horrific footage of war-zone violence and a steady stream of terrorist attacks. Domestic political narratives are regularly overshadowed for weeks at a time as Americans pause to assert symbolic support for France, Turkey, Belgium, or elsewhere (though we are generally already numb to violence in Iraq, Syria, Afghanistan and other active war zones). Overall, I am not at all convinced these trends are a net positive for movements, but they certainly create an evolving media landscape for the exercise of plebiscitary power.

Across chapters 3-5, I presented analysis of the First Amendment that ended up occupying far more of this project than originally intended. The more I dug into the case law the more I became convinced that while America may have among the most robust speech and assembly protections in the world, they are not as robust as they have been, or could be. I believe the dissent model laid out in Chapter 2 is normatively preferable to the Court's content neutral approach, and would both advantage movements and disadvantage business and other status quo players. But even the Court's content neutral doctrine has been more dissent friendly in the past. Content neutrality is fully consistent with narrower use of time, place, and manner restrictions, protections from IRS speech regulation, the *Austin* standard on regulating corporate speech, mandatory public access to media channels, limits on hate speech and true threat laws, and other dissent-friendly Court positions. The cumulative effect of these numerous issues is significant, and I believe my analysis here is a central contribution of this study and a useful point of departure for future work.

Chapters 6 & 7 are in many ways exploratory and theoretical. They do not include much in the way of original research, but instead attempt to show that the preceding four chapters provide a useful framework for analyzing movement activity. They do provide some important speculative conclusions about the relationship between power types, in particular that types of power can work in synergy or can undermine each other, with the former relationship associated with movement success. One of the biggest challenges I see for movements is utilizing disruptive power in ways that do not undercut pluralist alliances and plebiscitary issue frames. Plebiscitary power rarely seems enough on its own, but when it is turned against a movement, policymakers are quickly shielded from the costs of inaction or repression. The way the antiabortion movement has used state and local conflicts to avoid poisonous national frames is perhaps one of the most interesting development in this regard over the past several decades. But each of the four movements I look at offers lessons, each deserves more precise study, and each bears watching in the future.

All this brings us to the question of future trends. Does the analysis through Chapter 7 help us predict what comes next for American social movements? Well, yes and no. I am clearly predicting that movement opportunities will not expand to rival the peak mobilizations of the 1960s. I see the trends in American political development as largely linear, and I have severe doubts about the coming opportunities for movements to stop climate change, decrease class, race, and disability based economic inequality, or achieve other major political objectives that cut against entrenched interests. But not all is doom and gloom for outsiders. First off, chapters 6 & 7 show that there is plenty of room for movements to achieve policy victories when there is little organized opposition, when there are existing policy footholds to build upon, when good fortune smiles, or when activists deftly apply power to achieve specific limited objectives. These

are real opportunities, and when movements are organized to sustain themselves, little victories can add up to real change. Second, I do believe that activists will find new sources of power to mitigate some of the power deficit that has accrued in recent decades. What might those sources look like?

The globalization and the internet revolution are likely possible drivers of new developments in movement power. Certainly these factors create new opportunities to apply existing power strategies. Social media allows for the organization of disruptive flash mobs or global boycotts. Activists can reach out to international counterparts for sources of money, expertise, or for policy models. Media images reach foreign publics and leaders, amplifying plebiscitary leverage. Moreover, international governance offers opportunities for activists to bypass domestic pluralist politics. Despite the recent troubles of the European Union, the EU has served as a vehicle for bypassing domestic constraints on some issues for some European activists.⁴⁰⁸ Trade agreements, the United Nations, and international courts may someday offer some similar opportunities for US activists. Certainly, we can imagine a future world where the US gives up political autonomy to organizations like the UN, IMF, or World Court, but for now these seem like institutional venues for the US and US activists to spread their visions globally with little skin in the game for US domestic politics. So what more likely sources of power might be on the horizon in US domestic politics?

One possible answer is presented by the 2016 presidential primaries. Donald Trump's candidacy has certainly exposed the weakness of GOP party control, but far more interesting is the activist coalition behind Bernie Sanders's challenge to the Democratic establishment.

⁴⁰⁸ Of course, it is also a vehicle for powerful interests in countries like Germany and Britain to suppress movements in other countries, including those with more vibrant socialist movements.

Movement activists appear to have realized that Washington gridlock and the internet's capacity for fundraising, messaging, and organizing have created space for insider insurgencies within the party apparatus. While *Senator* Sanders was by many counts himself an insider force, his candidacy was built primarily on the resources of those at the margins or outside the Democratic party. Of course, one might argue that a leftist shift in the Democratic Party is not in itself an example of movement influence, so much as a realignment of the polity's major political cleavages. Perhaps this is so. Yet it seems to me that the Sanders campaign could also be considered a political alliance between movements addressing climate change, income inequality, single payer health care, and other activist elements of the left. Whether or not these elements can be considered an alliance of leftist movements, I see this campaign as revealing the opportunity for movements to organize such campaigns to hijack America's major political parties.

As noted in Chapter 2, during the era of party machines movements often attempted to organize their own alternative parties to compete in elections. This was an acknowledgement of the fundamental control that parties wielded during the era of patronage. What we might potentially see in the future is something far different, where the weakness of parties invites activists to attempt coups from within. Of course, as Bernie detractors note, winning a presidential election is not the same thing as winning hundreds of congressional and thousands of state and local elections. I am not raising this objection to suggest a party takeover is impossible, but simply to suggest that the ultimate form of leverage it would take could be unexpected. Moreover, such a development would require movements to gain greater electoral loyalty amongst their supporters, who would then pool their support behind specific candidates or party factions. Single issue voters are somewhat difficult to recruit, as most activists tend to

be on the far right or left, and tend to fall into line with the major party candidates come general elections. Still, primaries are the wild west of electoral politics and we should not discount the opportunities offered by these low participation contests. I think a development to watch is whether formal or informal sub-party organizations will develop to house and sustain coalitions of activist officials within the umbrella parties, as caucuses do in congressional governance.

The difficulties of securing governing coalitions by occupying party primaries brings us to a much more workable alternative: direct democracy. Twenty-six states and the District of Columbia offer some form of direct democracy through voter initiatives and referendum. Movements have long taken advantage of one-off electoral activity in strategic states. Animal rights activists leveraged a Florida vote to push the pork industry to phase out the use of gestation crates nationally. They have used city circus bans to financially undercut traveling animal circuses. They have used a major California initiative to push for an end to battery cages of laying hens. Drug legalization advocates seem on the verge to national marijuana legalization after successful votes on recreational use in Alaska, Oregon, Colorado, and Washington, as well as many other medical marijuana victories. Single payer is on the 2016 ballot in Colorado. Using states and localities as the leading edge to secure diffusion and eventual nationalization seems like more than a useful tactic than pursuing national office. It seems like potentially the prime venue for movement power, and eventually for power more generally in the American system. In a world where electoral politics often produces gridlock, perhaps movements are on the leading edge of a transformation of where political change occurs. Will other states amend their constitutions to allow for more direct democracy if it becomes the clearest path to national

influence? Are we 20 years away from Presidents leading primarily through intervention in state and local initiatives? It certainly seems possible.⁴⁰⁹

As I bring this project to close I find myself excited about the next steps in my research. I am convinced there is a broad question about the relationship between the First Amendment and political dissent that requires more sustained and systematic attention. Additionally, I believe the Supreme Court bears close watching in the coming decade as both seats and doctrines look to be resettled. I am excited to look closely at the potential new avenues of power explored in the previous few paragraphs, and believe keeping a close watch on movements is a good way to keep ahead of the curve in understanding American political development more broadly. Finally, I look forward to digging into individual movement and applying my framework more precisely. I feel there is much to be said about the vast network that is the American environmental movement, and specifically the movement to fight climate change. The size and complexity of that movement limited its treatment in this work, something I hope to remedy. I also feel the disability rights movement remains somewhat understudied in political science, and both my personal and professional passions are increasingly pushing me to concentrate in this area. In sum, while I feel this project has been a good first step, there remains much work to be done.

⁴⁰⁹ Though Achen & Bartels have recently argued in *Democracy for Realists* that direct democracy is even more susceptible to capture by well organized and financed business interests. Assuming they are correct, movements would need to fundamentally alter their approach to these venues and innovate new strategies beyond the types of campaigns we have seen up to this point.

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