

WHAT MAKES A MARKET PLACE TRUSTWORTHY?

CATHERINE M.A. MC CAULIFF *

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I. INTRODUCTION

What is a market other than a forum, or platform, for exchange? Two major characteristics keep the platform honest. First, the most central requirement is disclosure of all relevant information so that all participants enter the market on the same terms. This proposition has been dicey even in the early days of this republic since John Marshall (1755-1835), Chief Justice of the United States, writing unanimously for the Court, did not protect the integrity of markets, a characteristic fraught with difficulty over the ages, with a duty to disclose material information within the possession of one trading party.¹ Leaving one contracting party at the mercy of the other in the absence of a duty to disclose does not encourage those who know that in contracts, “every man [acts] for himself and let the devil take the hindmost” or “I am not my brother’s keeper,” to engage enthusiastically in contracting.

Disclosure of relevant, material information, along with equal treatment in access to markets free from the imposition of secret terms and conditions, is crucial in establishing the

* Professor of Law, Seton Hall University School of Law; A.B. Bryn Mawr College, M.A. & Ph.D. University of Toronto, J.D. University of Chicago. The author wishes to thank Angela Carmella, Richard Winchester, Brendan Mc Cauliff, Jackie Nolan-Haley and Eddie Cando. This article is dedicated to the memory of Tommaso Padoa-Schioppa (1940-2010), economist, banker and strong human embodiment of the post-World War II values of the European Union and Atlantic alliances such as NATO. Padoa-Schioppa spent some of his last days in the fall of 2010 speaking in his capacity as head of Notre Europe at seminars in American universities about these important human values. (A European thinktank based in Paris, Notre Europe, promotes these same values and interacts with similar organizations. Padoa-Schioppa served after founder Jacques Delors (1996-2004) and Pascal Lamy (2004-2005) and was succeeded by Antonio Vitorino.)

¹ *Laidlaw v. Organ*, 15 U.S. 178, 195 (1817). *Laidlaw* in effect allowed the functional equivalent of insider trading in the tobacco market at the end of the War of 1812. In broader terms, *Laidlaw* is commonly said to have put a thumb on the scale of justice in any market by endorsing *caveat emptor*, let the buyer beware, in the fight for information. Lying was deemed acceptable, thus making the markets untrustworthy. See generally EDWARD CHANCELLOR, *DEVIL TAKE THE HINDMOST: A HISTORY OF FINANCIAL SPECULATION* (First Plume Printing eds., 1999) (exploring the origins of the speculative spirit starting with ancient Rome). For this phrase, see FRANCIS BEAUMONT & JOHN FLETCHER, *PHILASTER, OR LOVE LIES A-BLEEDING* act 5, sc. 1 (a tragic comedy featuring the line "They run all away, and cry, 'the devil take the hindmost'" perhaps used in a game).

public's trust in any market. Disclosure and equal access are the twin pillars of a good, trustworthy market. The particular facts in each type of market transaction differ from market to market.

The three markets covered in this article concern first-time home buyers, entry-level jobs and public-school teachers' basic pay. Examples of non-disclosure include:

1. The mortgage market's widespread deception during the Great Recession of deliberately stating a temporary low mortgage rate, as though the rate persisted throughout the length of the mortgage;
2. A depressed minimum wage per hour in the fast food and large chain and franchisee labor markets, without disclosing lack of over-time pay for additional hours; and
3. Often in the elementary and high school public education markets of many states, a starting teacher's salary is so low that student teachers and masters students apply, while older, more experienced teachers are already working part-time after school in a variety of jobs, from grocery store cashier to security guard or fast-food worker.

These monopoly markets—markets with no real bargaining power—indicate the extraordinary variety of lack of trust on the part of the general public and the workers and lack of disclosure in the markets, extending far beyond the familiar and notorious suits alleging non-disclosure in the sale of corporate securities.

This article will be organized in the following manner: Part II will discuss the fundamental basis of a market (which by definition carries risk): trustworthiness; Part III will describe the three markets; and Part IV will urge as many entrants as possible to adhere to the principles of trustworthiness inherent in a market by complying with reasonable regulations in accordance with the rule of law.

II. FIRST PRINCIPLES: THE ELEMENTS OF TRUSTWORTHINESS

The proverbial expressions about “every man for himself” and “let the devil take the hindmost,” point in general terms to the nature of trust. These proverbs allow us to consider, as the story is known among the public and not as part of chapter and verses in formal translation, the quintessence of trust as Abraham, whose God asked him to sacrifice his own child, experienced the command to sacrifice. Abraham trusted in God and at the same time assumed the risk that God would not merely test Abraham's faith but also accept his offer to sacrifice his son Isaac on the altar of God. The trusting Abraham may in many situations not be a good model, especially if trust in the people or institutions seeking an individual's commitment is to actors not in compliance with reasonable guidelines in regulations. At least in more secular applications of trusting a contracting party, cautious people keep their hands in their pockets and hesitate to accept risk even when governments make efforts to provide some assurance for redress of fraud in courts. A trading or commercial society will secure the market to encourage more individual contracting, quite apart from any theoretical speculations about equivalents of the GDP's prosperity, with large portions of that GDP (or equivalents) going to a relatively small number of people in the society. “We already realize why we prefer information: to allocate resources.”² This leads us directly into the

² Robert L. Birmingham, *The Duty to Disclose and the Prisoner's Dilemma: Laidlaw v. Organ*, 29 WM. & MARY L. REV. 249, 266 (1988). The corrosive effects of nondisclosure on the system itself and affected individuals may be compared to the keeping of personal secrets, such as parentage, in a person's life. David J. Craig, *The Secret Research That Could Make You Healthier*, COLUM. MAG.: HEALTH & MEDICINE (2019), <https://magazine.columbia.edu/article/secret-research-could-make-you-healthier> (Michael Slepian, a professor of Management at Columbia Business School, uses the tools of social psychology to gain insights into the uncomfortable

second requirement which will encourage people to engage in the marketplace: what might the contracting party be risking in allocating those resources?

A fair market should be based on equality of terms which means that the parties interacting with each other should be able to give and receive the necessary exchanges of accurate material information in return for money payments and/or other performance. In this way, “consent” is not forced but willing. A simple contract expresses the essence of what is needed to make the market work, rather than fail, many people. Marriage may be the paradigm for these relationships as far as consent and inherent, unforeseeable risks are concerned. Either the partners or later the contracting parties themselves consented but the honest, unknown personality traits revealed themselves as the parties aged and perhaps no-fault divorce is the answer when the incompatibility exists. Furthermore, even at the beginning of a planned relationship, apparent consent may conceal intent not to behave as promised. Perhaps that is a large reason marriage contracts became very complicated, listing the property to be used to support the wife and children of the marriage. Various, hidden elements of fraud call for more than a no-fault exit.

Reasonable outcomes in markets other than marriage exclude fraudulent behavior on the part of the actors. Participants with different, hidden bargains or rules are acting on a privileged playing field and excluding the other parties from playing on a level field. The attempt to skew the market in one’s favor is a recurring difficulty underscoring the persistence of human greed over the millennia. Even today when private equity investors seeking a large profit find a product or crop in a developing country, they require one guarantee before consenting to invest: a forum that will enforce their contracts as made. Today and in ancient times, a government with strong courts provided remedies for contracting parties in a market.³

In an ordinary employer-entry level/low wage employee relationship, the employer necessarily is the more powerful party but equality of terms and information means that the employer is 1) not hiring below market rates so that the employee cannot feed, clothe and shelter h(er/im)self, 2) adding on unpaid overtime never disclosed when the employee was hired or 3) failing to pay the employee the stated pay. Thus, the employer does not suddenly split the wealth or change the salary to receive only what the entry-level employee receives. Trust and equality of terms means fair pay for the work done, without, at the time of engagement, hiding terms of employment such as unpaid overtime work. Human requirements to trust in a market are virtually the same today and throughout history because trust requires that two parties engaging in a market

or deleterious effects of isolation and disconnection on the individual who keeps serious secrets; the major advice is to reveal the secret to at least one other person to reduce the pressure and to break “[t]his self-destructive habit.”). These emotional burdens on an individual are mirrored in the dislocation in the markets when nondisclosure disfigures the integrity of a marketplace by preventing the market from working for all users.

³ The early history of other countries trading in goods with China after World War II provides an example of why investors seek stable courts backed by the government before allocating resources. Over and over individual merchants buying goods in China could not rely on the quality of the product shipped and discontinued orders of the goods after the first shipment of goods. Nevertheless, in the early history of the Roman Republic, sound contracts in a reliable market with state regulation prevailed. Alan Watson, *The Evolution of Law: The Roman System of Contracts*, 2 U. GA. SCH. L. & HIST. REV. 1, 1 (1984) (“[I]n Rome before 451 B.C.[E.] *stipulatio* [private contract] could be used to make a legally enforceable agreement. The state may also have reservations about recognizing private agreements. It may be willing to enforce only agreements with specified minimum value-only those considered to have sufficient social or economic interest to the state. Or it may restrict its recognition to agreements concluded with specified formalities, the formalities might constitute an evidentiary justification or impress on the parties the seriousness of what they were doing. Or it may restrict its recognition to agreements of a particular subject matter. For instance, in Rome, the law enforced an agreement to exchange goods for money but not an agreement to exchange goods for services.”).

transaction must have reliable information about the main features of the transaction and must be able to give their unforced consent. Certainly, ancient Rome established strong courts for contracting parties and others with injuries for which the courts provided relief, thereby marking Roman institutions trustworthy by upholding the twin pillars of contracts; disclosure and equality of terms by preventing coercive terms or undisclosed consequences when the disparity in power between the parties is great, carrying with it the temptation for the powerful party to destroy the integrity of the transaction, or if this practice is prevalent, the integrity of the market itself.

In 450 BCE, the second order of Roman society, the equestrian merchants—wealthy but not aristocratic—succeeded in pressuring to have the laws publicly available. This publication of the laws, known as the XII Tables (“Twelve Tables”), was accomplished by placing them in front of the *curia* in the Roman *forum*. “Roman law has been the most innovative and most copied system in the West This is especially true in that a contract is a private agreement, almost a private law, operating between two individuals but requiring state recognition.”⁴ Besides contracts dealing with debtors and creditors, among other personal transaction, the Twelve Tables collected laws in different civil and criminal areas, including rules for appearances in litigation and evidence, debt, children, women, guardianship, property, real and movable, injuries, public law and religion among other topics, written onto the tablets for exposition in the Forum.⁵

The publication was important because Roman merchants had long said they sought only to know the law and consequences for different risks if terms in the transaction did not come to fruition.⁶ Patricians feared that they would lose their wealth, as indicated in their suggestion that the equestrians simply had the goal of changing the terms upon which contracts are made. The patricians’ fear of losing their wealth prevented their trust in their own abilities to make a deal with equestrians on equal terms, leaving the patricians to rely on secret and coerced terms about the effect of the law on the deal and on control of the terms themselves.⁷ As that wily lawyer Cicero recounts the story, we have a timeless hypothetical of enduring accuracy involving human desires and emotions which often shape attitudes toward the law.⁸ Disclosure of the law, harsh though it was, extended the equestrians the opportunity to avoid financial exploitation. Several strands of a neutral platform come together here. The patricians desired a monopoly of information (non-disclosure of the laws) regarding terms on which contracts are made and the consequences of their breach as well as control over the terms themselves (unequal bargaining power).

⁴ *Id.* at 1.

⁵ THE TWELVE TABLES, II ROMAN STATUTES 578-83 (M.H. Crawford ed., 1996). *See generally* ALAN WATSON, ROME OF THE XII TABLES: PERSONS AND PROPERTY 11 (Princeton University Press eds., 1975) (treating the *leges XII* (duodecim) *tabularum* as well as persons and inheritance in Roman law).

⁶ PETER A. BRUNT, SOCIAL CONFLICTS IN THE ROMAN REPUBLIC (New York: W.W. Norton eds., 1971).

⁷ ANSWERS.COM, <https://www.answers.com> (last visited Dec. 26, 2019) (answer to “what was the goal of the plebeians in demanding the law of the Twelve Tables?” when putting question in “find your answer . . .” field. The answer explains that the patrician-controlled Roman state had failed to respond to demands for protection against the abuse of defaulting debtors by creditors who imprisoned, tortured and sometimes even sold them as slaves). *See* ALAN WATSON, ROME OF THE XII TABLES: PERSONS AND PROPERTY 11 (Princeton University Press eds., 1975) (treating the *leges XII* (duodecim) *tabularum* as well as persons and inheritance in Roman law).

⁸ The original text/tablets of the XII Tables, a collection or code of laws in different civil and criminal areas, were lost or destroyed, presumably during invasions after the fall of Rome but with written versions of parts of the code in scattered manuscripts extant. In the generations before Cicero, school boys were learning (*discebamus enim pueri*) various parts of the XII Tables as required reading (*ut carmen necessarium*), but even in his time, this practice was beginning to die out (*quas iam nemo discit*) in favor of the Edict of the *praetor urbanus*. *See generally* ABEL HENDY JONES GREENIDGE, THE LEGAL PROCEDURE OF CICERO’S TIME (Oxford eds., 2000).

The harshness of the struggle for information as well as the terms of the exchange itself and the consequences of default still characterizes our uneven markets in many situations, particularly in areas of consumer and retail lending.⁹ Concealed terms, complicated structures and high debt, characterize the schemes of those wishing to extract wealth or profits from unsuspecting market participants. That individual borrower, like so many other borrowers, does not realize that the mortgage terms are not being kept simple and, in fact, are not disclosed because the individual borrowers are unaware of what the disparity of bargaining power may mean to their own prospects of being able to pay off a mortgage. Nor can the borrower know that hidden inside the mortgage terms they think they are given lies great, but undisclosed, risk, so that h(er/is) own mortgage is bundled with similar mortgages to re-sell to wealthier investors, deemed “sophisticated investors.” Human greed, always present, will run rampant, unless it is restrained by regulation.¹⁰ When no government agency recognizes the risk, or regulates disclosure in these circumstances let alone additional protections to balance the lack of bargaining inequality in consumers’ willingness to listen to the optimism and nondisclosures of the mortgage brokers, the story often ends only in

⁹ In 1999, Congress passed the Gramm-Leach-Bliley Act repealing the portion of the Glass Steagall Act of 1934, which had separated commercial and investment banking because of its role in causing the Depression. Hardly seven years passed before the Great Recession at first seemed to challenge the primary position of the Depression as the most devastating economic disaster of the previous one-hundred years. Powerful interests almost always get the country’s economy into trouble (though not necessarily themselves) as soon as they succeed in watering down or abolishing purposeful and reasonable regulations. See Edward J. Balleisen & Melissa B. Jacoby, *Consumer Protection After the Global Financial Crisis*, 107 GEO. L.J. 813, 831-34 (2019) (addressing among other lenders’ fraudulent practices, “loan servicer” misbehavior, particularly in the form of “robo” signing in auto-lending, mortgages and student loans). Attempts to overthrow Sarbanes-Oxley and the Volcker rules in Dodd Frank are examples of greed, a human characteristic that challenges everything the law can devise to prevent overreaching from destroying the market platform itself. See Gregory Butz, *Treating Apples like Oranges: The Benefits of Exempting Community Banks from the Volcker Rule*, 6 TEX. A&M L. REV. 453 (2019). See also STEPHEN M. R. COVEY & GREG LINK, SMART TRUST 13, 16 (Free Press eds., 2012) (explaining that trust “makes our markets work;” and “capitalism is based on three things: Capital, liquidity, and trust” . . . in Enron’s corporate fraudulent activity, “the loss of trust was so great that it cost the life of the company” and led to more detailed accounting in corporate financial statements prescribed by Sarbanes-Oxley, said to be deemed burdensome to smaller corporations); BETHANY MC LEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (Penguin Press eds., 2005).

¹⁰ See RICHARD BOOKSTABER, A DEMON OF OUR OWN DESIGN: MARKETS, HEDGE FUNDS, AND THE PERILS OF FINANCIAL INNOVATION XII (John Wiley & Sons Inc. eds., 2007) (“A patchwork of regulators trip[] over one another to try to oversee risk-taking institutions. Many have oversight over banks, a few over investment banks, and fewer still over hedge funds. There is no central responsibility, nor do the regulators have the power to delve into the guts of the risk-taking activities, or the expertise to monitor the activities in the context of systemic risks.”). Later legislation attempted to address some of these problems. See Christine Speedy, *Dodd-Frank Implementation: Monitoring Systemic Risk and Promoting Financial Stability*, 3D MERCHANT SERVICES (May 13, 2011), <https://3dmerchant.com/blog/merchant-processing-industry-news/dodd-frank-implementation-monitoring-systemic-risk-and-promoting-financial-stability> (“The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) created the Financial Stability Oversight Council (FSOC) to identify and mitigate threats to the financial stability of the United States. . . . [T]he FSOC has promoted interagency collaboration and established the organizational structure and processes necessary to execute its duties.”). See also Alan S. Blinder, *Empower Regulators to Stop Risky Financial Business*, WALL STREET J., June 20, 2019, at A15 (explaining the Financial Stability Oversight Committee Dodd Frank established does not have the power to regulate systemic risk in the financial system, citing Anil Kashyap and Caspar Siebert and unfortunately neither does any other entity have “tools to stave off financial instability” leaving old hedge funds and new “creative financial ‘innovations’ unregulated as non-banking (but very risky) entities threatening the stability of the entire financial system.”).

ruin for millions. This paradigm situation, with variations depending on the market,¹¹ is symbolic of what happens when puffery in selling replaces disclosure of the actual terms of the deal.

Famously, Hobbes noted, “everyone appear[s] to be naturally untrustworthy and [therefore] in need of structures . . . [to] make something . . . like trust available.”¹² Such traits of human nature, as greed and the need for social curbs on greed, do not change. Social and economic circumstances do, however, change. Before the Second World War, the financing of the coal and steel industries gave rise to phrases like industrial capitalism, centering on trade in these products, as well as the financing of their production. Today finance, “once the handmaiden of industry, has become ever more associated with *capitalism* . . . , including the system of markets, private property, legal rules, and class relations Along with democracy, few ideas have been as pervasive and contentious in defining the good society as capitalism.”¹³ To overcome the worst excesses of greed and restore trust, we must have reasonable regulations tailored to the needs of both the regulated institutions and the individuals harmed, rather than helped by the mis-steps and over-reaching of financial actors. Achieving that balance in the face of powerful financial actors’ resistance to regulation is a formidable problem in today’s democracy.

The openness of the market to entry of all parties on equal terms (no one party hiding material terms from another party or parties and no unequal imposition by a more powerful party of terms on another party) should be examined in each of these markets as indications of trustworthiness, or in other words, a healthy market. The devastation that follows a breach of trust in the histories of these three markets should convince us that vigilance in regulation is the price of integrity in the market. Letting vigilance go in politics leads to dictatorship.

¹¹ For example, the elder care and nursing home market has difficulty with meaningful disclosure and standards of care. See *Hayes v. Oakridge Home*, 886 N.E.2d 928 (Ohio Ct. App. 2009) (a 95-year old patient who broke her hip was brought from the hospital to the nursing home; she was badly taken care of and the majority looked only at the formal indicia of whether an arbitration agreement was duly signed as between two merchants or other business parties, rather than treating her as the patient she was; the dissent would have applied the doctrine of unconscionability. Pfeiffer, J. in dissent said “The General Assembly has enunciated a public policy in favor of special protection of nursing-home residents through its passage of the Ohio Nursing Home Patients’ Bill of Rights. ‘[W]here there is a strong public policy against a particular practice, a contract or clause inimical to that policy will likely be declared unconscionable and unenforceable unless the policy is clearly outweighed by some legitimate interest in favor of the individual benefited by the provision.’” (citing 8 WILLISTON ON CONTRACTS 43 (4th ed. 1998))). See also Russ Bensing, *Nursing Homes and Arbitration Agreements*, THE BRIEFCASE (May 13, 2009), <http://www.briefcase8.com/2009/05/nursing-homes-and-arbitration-agreements.html> (besides the inequality in the parties’ bargaining positions, the majority also did not raise this substantive unconscionability point: the strong preference for protecting nursing home residents, as evidenced by the General Assembly’s passage of RC Chapter 3721, which includes a nursing home residents “bill of rights”); Jordan Rau, *Nursing Homes Routinely Mask Low Staff Levels*, N.Y. TIMES, July 8, 2018, at A1 (presenting a study of the documents Medicare recently collected from 14,000 nursing homes, as provided in the ACA, yielding the information that nursing homes are woefully understaffed).

¹² MARTIN E. MARTY, BUILDING CULTURES OF TRUST 68 (Eerdmans eds., 2010) (“[M]istrust and distrust come more naturally, and societies have to devise ways to take over the roles of trust . . . [by using] contracts, covenants, and constitutions that have policing and punitive powers . . .”).

¹³ ROBERT SHILLER, FINANCE AND THE GOOD SOCIETY 1-2 (2012). See also Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, N.Y. TIMES, Aug. 18, 2019, at A30 (“Around the world, there are many types of capitalist societies, ranging from liberating to exploitive, protective to abusive, democratic to unregulated . . .”). Workers’ rights, including protections for temporary workers and from being fired, also differ across capitalist countries. Of the 71 countries the Organization for Economic Cooperation and Development (O.E.C.D.) surveys, the United States tied for second from last and last in these two protections for workers. “In a capitalist society that goes low, wages are depressed as businesses compete over the price, not the quality of goods; so-called unskilled workers are typically incentivized through punishments, not promotions. *Id.*”

Letting vigilance go in regulation leads to emotional and financial hardships for millions of people due to the dominance of the unregulated, most powerful actors in both the society and the economy. These privileged actors have the power and wealth to lobby, and have lobbied, to receive legal exemptions and exceptions unavailable to others. These favorable side rules therefore reduce competition and the possibility of fair bargaining in any market in which they exist.

These exclusive side rules have serious consequences for the market and the society at large. Most recently, and more clearly, the rights of workers are threatened in order to protect 1) arbitration for the party with more bargaining power and 2) the federal court docket system, left free of those who have little enough voice that they cling together in class actions.¹⁴ Arbitration started out as an equitable means to settle disputes between peers, thus two relatively equal employees; two landlords; two neighbors, two entrepreneurs, but not usually for fairness' sake and employer and employee(s). Although arbitration is more expensive than it used to be, so also is litigation. Employers and other advantaged bargaining parties more and more frequently specify arbitration as the sole method of solving any future dispute between the parties,¹⁵ at least in part because they effectively choose the arbitrators, who, like accountants in securities cases, tend to overlook irregularities in order to be chosen again the next year. The lack of formal rules of evidence and discovery may appeal more because the employers' actions are not fully vetted. This arbitration may save several months' expense in comparison to litigation. Furthermore, arbitration is often accompanied by non-disclosure agreements ("NDA") so that conditions in a workplace or nursing home are not made public, whether there are too few workers in the nursing home, or the workplace is unsavory and conducive to sexual harassment. The right to appeal is, for the most part, unavailable and leaves the arbitrator ready to be chosen again by the same employer. Non-disclosure and outright secrecy, perhaps not in a smoke-filled room but without a court of record, that is so prized in legal literature from the 11th century onward, combine to undermine the marketplaces of free exchange.¹⁶

¹⁴ Federal Arbitration Act of 1925, Pub. L. No. 68-401, § 43, Stat. 883 (1925). For litigation involving groups of employees, consumers, citizens, a group or class of litigants may be appropriate to accommodate the larger number of people affected. Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977). For more recent history, two important developments in 2005 set the terms for the following years in the push for and pull against equitable use of class actions: 1) the Class Action Fairness Act of 2005 (CAFA) changed the rules for federal diversity jurisdiction and removal, reduced the use of product coupons in settlements with defendant companies and changed the procedures for settling class actions in federal courts. Class Action Fairness Act of 2005, Pub. L. 109-2; § 119, Stat. 4-14 (2005); 2) See *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005) (allowing, under certain conditions, supplemental jurisdiction over joined claims that do not individually meet the amount-in-controversy requirements).

¹⁵ Garen E. Dodge & David A. Alvarez, *New Federal Legislation Seeks to Eliminate Mandatory Arbitration Agreements*, NAT'L L. REV., Mar. 21, 2019, <https://www.natlawreview.com/article/new-federal-legislation-seeks-to-eliminate-mandatory-arbitration-agreements> (explaining that the Forced Arbitration Injustice Repeal Act (FAIR) proposes to prohibit forced arbitration in employment, consumer antitrust and civil rights disputes and to prohibit interference in the rights of individuals, workers and small businesses to join a class or other action in these same areas).

¹⁶ ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS, (Economic Policy Institute (EPI) eds., Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>, ("Mandatory arbitration is more common in low-wage workplaces. It is also more common in industries that are disproportionately composed of women workers and in industries that are disproportionately composed of African American workers.").

III. THREE ILLUSTRATIVE MARKETS

A. *The Entry Level Labor Market in the United States*

Like the military, in which soldiers trust in each other for their very lives, labor is a movement that might seem to depend on mutual trust among the workers themselves. Though the conflicts between labor and employers is often violent, it does not reach the extreme heat of battle and war. Nevertheless, labor has a long and fitful history in the US and now that we have been part of the “global” economy since such trade agreements as NAFTA brought down American salaries and built in no protections for workers in any of the trading partner countries. Within this checkered story is an oasis of rising salaries in the west for about three decades after World War II.¹⁷ In 1945, the United States of America and western European countries joined together in a military alliance, NATO, to support each other’s democratic governments and economic ties and overcome the devastation and deprivation of the war years with renewed markets and prosperity.¹⁸ “As a group, they chose democracy over dictatorship, integration over nationalism, social market economics over state socialism.”¹⁹

The iconic case in the United States Supreme Court is *Lochner*, dating from 1905,²⁰ but subject to conflicting interpretations starting with Justice Oliver Wendell Holmes’ dissenting opinion on the ground “that the Court had no business evaluating such legislative decisions” as “limiting how many hours bakers could work,” although the Court had “already . . . [decided] cases considering whether legislatures had exceeded the scope of their authority.”²¹ Thus the conservative majority departed from the past by cutting off the state’s authority to determine the maximum number of hours bakery employees could work. After that time, the fight between conservatives and progressives turned from hours to wages, namely whether minimum wages in favor of employees could be imposed and kept low.

This issue of wages and hours remains today for various kinds of workers exploited by employers and workers often cannot trust their state government to protect them as the weaker bargaining party pressured by the employers to deal in givebacks, less safe working conditions, and longer hours without pay, preventing a situation of trust, which employers in many situations

¹⁷ In the union movement’s heyday back in the 1950s and 1960s, labor played a pivotal role in building the American middle class. Unions bargained a series of contracts that catapulted autoworkers, steelworkers, machinists, truck drivers, carpenters, paper workers, and even some apparel workers to middle-class status. (Of course, increases in worker productivity also helped make this possible.) In recent decades, the labor movement has grown far weaker, with membership dropping to 11.1 percent of all U.S. workers (just 6.6 percent in the private sector), down from 35 percent at its peak. Labor’s weakness, numerous studies have found, has contributed substantially to wage stagnation and income inequality. Steven Greenhouse, *How to Get Low-Wage Workers Into the Middle Class*, THE ATLANTIC (Aug. 19, 2015), <https://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540/>.

¹⁸ A vast and bitter war history precedes the choice to embrace democracy, human rights and economic cooperation in a common market of coal and steel. See the Schuman Declaration, May 9, 1950, europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en. On May 10, 1940, the German Wehrmacht invaded Luxembourg, Belgium and the Netherlands. *German occupation of Luxembourg during World War II*, https://en.wikipedia.org/wiki/German_occupation_of_Luxembourg_during_World_War_II (citing ALASTAIR HORNE, TO LOSE A BATTLE: FRANCE 1940, 258–64 (1969)) [<https://perma.cc/7BFJ-X353>].

¹⁹ Anne Applebaum, *The Lure of Western Europe*, THE N.Y. REV. OF BOOKS 33 (June 6, 2019) (reviewing IAN KERSHAW, *THE GLOBAL AGE: EUROPE 1950–1917* (2019)).

²⁰ *Lochner v. New York*, 198 U.S. 45 (1905).

²¹ Keith Whittington, *The Troublesome Case of Lochner*, Mar. 1, 2012, available at: www.lawliberty.org/2012/03/01/keith-whittington-the-troublesome-case-of-lochner (reviewing DAVID BERNSTEIN, *REHABILITATING LOCHNER* (2011)).

do not seem to value. The battle of employers to keep all costs down, including the lower than “living wages” of their own employees, was not in any way new in *Lochner*, as any reader of Adam Smith can testify.²² Whatever the opinion of the Justices during the early 20th century, all the issues presented in *Lochner* continued and continue to surface, although these disputes are presented in different language from the opinions in *Lochner*.

The renewed popularity of *Lochner* dates roughly from the time around 1980 when minimum wage workers had reached their apex/apogee and when the hourly wages they commanded were declining. The lack of respect in which these workers were held and the small political recognition they received clearly indicates that the tide had turned against the prosperity of the workers and in favor of low-cost goods and low minimum wage service jobs which fail to support an entry-level worker and her child. Globalization may have been a pretext for ignoring the problem of depressed wages in an inflationary society or it may simply have given the actors in favor of lower wages cover to accomplish what they could not have done the generation before. Whether in northeast England in Hull or in southwest Irvine, California, a mother seeking to support herself and her children by working at an entry-level job can probably not do it without charity or social aid. The English mother described her situation. She “usually has no food left by the end of the week and relies on a low-cost pantry that distributes surplus food from supermarkets.”²³ Childcare is a big obstacle for such women in any country.²⁴ Rep. Katie Porter on the House Financial Services Committee put together a composite picture of many people in her Congressional District which includes Irvine, Ca.²⁵ She asked Jamie Dimon, the CEO of JPMorgan Chase, about a young, single mother with a six-year old in an entry-level teller’s job in

²² ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776) [hereinafter “WEALTH”]. “Masters are always and everywhere in a sort of tacit, but constant and uniform, combination, not to raise the wages of labour above their actual rate. . . . Masters, too, sometimes enter into particular combinations to sink the wages of labour even below this rate. These are always conducted with the utmost silence and secrecy.” (*Id.* at Ch. 8.) Because there are so many editions of Adam Smith, it is easier for readers to find a passage from a citation to the chapter rather than the page. Beverly I. Moran, *Capitalism and the Tax System: A Search for Social Justice*, 61 SMU L. Rev. 337 (2008) (“[T]he United States tax system manages to violate fundamental capitalist principles, as outlined in the extensive writings of Adam Smith . . . , particularly the current penchant for simultaneously taxing wages while exempting (or delaying) taxes on wealth and wealth appreciation”), available at: <https://scholar.smu.edu/smulr/vol61/iss2/4>. Beverly Moran, *Labor, Capital, and Human Rights*, in TAX, INEQUALITY, AND HUMAN RIGHTS 487, 498 (Philip Alston & Nikki Reisch, eds. 2019) (noting the tax preference for capital gains on capital assets compared to pensions, wages and IRAs taxed at the rates applied to ordinary income). Compare with the zoning preferences in real property for single family dwellings, *infra* note 90.

²³ Ceylan Yeginsu, *Austerity Program in Britain Has Inflicted ‘Great Misery,’ Says U.N. Poverty Expert*, N.Y. TIMES, May 23, 2019, at A11 (explaining that 1/5th of the total population in UK is living in poverty but that overall figure includes 2/5th of the children and 16% of those over age 65, despite overall prosperous GDP statistics).

²⁴ *Id.* (explaining in graphic terms the childcare problem for single mothers: “When you’re a single mum, there are very few jobs you can do that let you drop your child [at] school in the morning, then go to work and be back at 2:30 to pick them up,” she said. “I skip meals, so my daughter can eat.”); see also Nicholas Timmins, *Britain’s Welfare State Can be Adapted But It Will Cost Money*, FINANCIAL TIMES, Oct 20, 2017, available at: <https://www.ft.com/content/ca01beee-b4a7-11e7-8007-554f9eaa90ba>; Patrick Kingsley, *In Britain, Even Children Are Feeling the Effects of Austerity*, N.Y. TIMES, Sep. 26, 2018, available at: <https://www.nytimes.com/2018/09/26/world/europe/uk-austerity-child-poverty.html>. Shael Polakow-Suransky, *Child Care Should Be a Right*, N.Y. TIMES, May 25, 2019, at A19 (explaining that lack of child care is accompanied by persistent poverty, inadequate health care and below standard care which threatens intellectual and emotional development).

²⁵ Congresswoman Porter queries JP Morgan Chase CEO Jamie Dimon on whether or not his company pays their employees a living wage, Apr. 10, 2019, available at: <https://www.c-span.org/video/?c4792416/congresswoman-katie-porter-house-financial-service-committee>.

a branch of his bank in Irvine, showing her salary, rent for a one-bedroom apartment and childcare during the hours after school. Her budget shows that her salary leaves her in debt each month. Rep. Porter asked Dimon if the employee should get a bank credit card and put her debt on that. Dimon did not know. She asked if the employee should instead go for a bank mortgage and try to move out of the too-expensive starter rental. Again, Dimon did not know.²⁶

In 2018, the “average worker,” not the entry-level bank teller, got an increase in salary of 3.2%; the “median boss” got 6.3% over 2017’s salary.²⁷ Actual dollar numbers are given only for the “median boss” who “received compensation of \$18.6 million—a raise of \$1.1 million, or 6.3 percent, from the year before.” The salary of the “average private-sector worker” is not disclosed, but 3.2% gives that worker “an extra 84 cents per hour.” The average number of hours for this worker is also not disclosed. Assuming the average worker gets paid \$50,000 a year (this assumption is not based on anything in the article but is for illustrative, arithmetic purposes only), the \$ 0.84 an hour increase would yield the worker an increase of \$1,600 a year gross for the coming year. If the percentages were reversed, the average worker, if \$50,000 is again the assumed average salary, would have an additional \$3,150 gross for the next year (possibly about \$ 1.30 more an hour) but only an additional \$576,000 for 2018 for the median boss.

²⁶ Later, Rep. Porter said, capitalism means that if Jamie Dimon wants to get the best entry level workers, he will have to compete with Brian Moynihan at BOA and go from \$16.20 to Moynihan's \$20 an hour. Furthermore, Dimon’s (and other big) banks have a duty to address the housing problem, both from the point of view of affordable mortgages and affordable rent and also to address the employee's second greatest problem, childcare for her 6-year old after school and while the bank is still open. *Id.* “The CEO of a company is in a very special position, because he or she stands for an idea—the core idea behind the company’s activities, a way of thinking that defines the work of all the company’s employees, and a culture that includes its corporate values, connecting the company to the larger society.” SHILLER, *supra* note 13, at 19. Jaime Dimon, also Chair of the Business Roundtable, together with 180 other chief executives, signed a statement outlining the purpose of a corporation. The Business Roundtable was founded in 1972 to oppose regulation. Without withdrawing their opposition to regulation, 181 CEOs, not including McDonalds, signed a statement to consider the role of all corporate stakeholders (customers, employees, suppliers, communities and shareholders). Business Round Table, *Statement on the Purpose of a Corporation*, Aug 19, 2019, available at: <http://brt.org/OurCommitment>. Andrew Ross Sorkin, *How Shareholder Democracy Failed the People*, N.Y. Times, Aug. 20, 2019 (explaining that shareholder democracy seemed like a good idea at the time. What we got was shareholder supremacy. . . . For nearly a half-century, corporate America has prioritized, almost maniacally, profits for its shareholders. That single-minded devotion overran nearly every other constituent, pushing aside the interests of customers, employees and communities), available at: <https://www.nytimes.com/2019/08/20/business/dealbook/business-roundtable-corporate-responsibility.html>. David Benoit, *Move Over, Shareholders: Top CEOs Say Companies Have Obligations to Society*, WALL ST. J., Aug. 19, 2019 (Business Roundtable urges firms to take into account employees, customers and community), available at: <https://www.wsj.com/articles/business-roundtable-steps-back-from-milton-friedman-theory-11566205200>; David Gelles and David Yaffe-Bellany, *Shareholder Value Is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES, Aug. 20, 2019 (explaining that the leaders of Apple, Pepsi, Walmart and 178 others “tried on [Aug. 19] to redefine the role of business in society—and how companies are perceived by an increasingly skeptical public”), available at: <https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html>. Recent articles have provided some impetus for the Roundtable to change its statements. See Joseph L. Bower and Lynn S. Paine, *The Error at the Heart of Corporate Leadership: Most CEOs and Boards Believe Their Main Duty Is to Maximize Shareholder Value. It’s Not*, 95 HARV. BUS. REV. 50 (2017); Nell Minow, *Six Reasons We Don’t Trust the New “Stakeholder” Promise from the Business Roundtable*, <https://corpgov.law.harvard.edu/2019/09/02/six-reasons-we-dont-trust-the-new-stakeholder-promise-from-the-business-roundtable>.

²⁷ Peter Eavis, *The Highest-Paid Executives Keep Getting Richer*, N.Y. TIMES, May 26, 2019, at BU 4. See also the same phenomenon occurring even earlier. Steven Greenhouse, *Low Wage Workers’ Pay Has Flatlined While Median Pay for Chief Executives at the Nation’s Top Corporations Jumped 16 Percent Last Year*, N.Y. TIMES, Aug. 1, 2013, available at: <http://www.nytimes.com/2013/07/28/sunday-review/fighting-back-against-wretched-wages.html?ref=collection/byline/steven-greenhouse>.

Corporate lobbyists who promoted the Tax Cuts and Jobs Act of 2017²⁸ promised the average worker a one-time “bonus” amounting to about \$4,000 each from the corporations’ first year savings.²⁹ The figures from a Congressional Research Service (“CRS”) Report shows that the average worker in fact received about \$28.00 in 2018, or in total some 2-3% of corporate savings from the tax cut. In another invidious comparison like the \$0.84 per hour pay rise as opposed to the \$1.1 million pay rise, the CRS Report calculates that in fact the amount “companies spent buying back stock was over \$1 trillion, the CRS said. In other words, businesses spent 246 times as much money on their own stock as they did on worker[s]’ bonuses.”³⁰ The conclusion is therefore that “trickle down” in fact never materialized and no boom reached the average worker, estimated to be about some 157 million people in number.

Another way of describing the position of average and lower-wage workers is that low wages do not permit the low-wage worker to cover “the cost of food, child care, health care insurance premiums, and typical health care costs, housing [and] transportation.”³¹ At the beginning of the Great Recession in 2006, a seemingly prosperous country and strong economy showed many weaknesses for different sectors of the economy. “Even as the economy has continued to grow recently, some workers have accepted outright pay cuts, men have dropped out of the labor force, and debt has kept rising relative to income.”³² These weaknesses have remained with us and become more pronounced with time.

No solutions were proposed for the low wages many people faced. Bankers and government policy makers alike failed to focus on the problem.³³ Ben Bernanke, then Chair of the Board of Governors of the Federal Reserve Bank, did not expect to see increases in wages “because unequal gains were creating political opposition to the economic changes.”³⁴ Nor apparently did Bernanke see any reason to try to change that scenario, thus reinforcing the conclusion that absence of support to maintain a middle class³⁵ exacerbates a serious democratic and economic problem. Nevertheless, Republicans gave a seemingly good reason, prevalent under President Bush and also

²⁸ The Federal Tax Cuts and Jobs Act (“TCJA”), Pub. L. No. 115-97, 131 Stat. 2054 (2017).

²⁹ Irina Ivanova, *Bonuses from 2017 tax cuts amounted to \$28 per worker, Congressional researchers say*, CBS NEWS, (May 29, 2019), <https://www.cbsnews.com/news/tax-cuts-and-jobs-act-bonuses-from-2017-tax-cuts-amounted-to-28-per-worker-congressional-office-says/>. Christopher Shelton, a union spokesman testifying before Congress in March, 2019, stated: “We tried to get our major employers to sign something saying they would give our members \$4,000 in raises, because that’s what everybody was touting. Not one employer signed that.” *Id.*

³⁰ *Id.* In fact, with the tax cut, the “overall economy grew 2.9% in 2018—the same pace as it grew in 2015.”

³¹ Eric Ravenscraft, *Do You Earn a ‘Living Wage’? Cut Through the Confusion*, N.Y. TIMES, June 8, 2019, at B1, B5; *cf.* Colvin *supra* note 16 and accompanying text. Income inequality has been on the rise for decades. . . . An absence of support to maintain a middle class, an erosion of the value of wage labour, and stagnant minimum wages are a few of the many reasons for rising income inequality. Data show that inequality is highest in areas where there are growing disparities in the difference of employment opportunities between high- and low-income families. Evidence also suggests income and wealth gaps go hand in hand. Amy K. Glasmeier, *Income Inequality and Growing Disparity: Spatial Patterns of Inequality and the Case of the USA*, in THE NEW OXFORD HANDBOOK OF ECONOMIC GEOGRAPHY (Gordon L. Clark et al., eds., 2nd ed. 2018).

³² David Leonhardt, *Pockets Half Empty, or Half Full*, N.Y. TIMES (Sep. 3, 2006), <https://www.nytimes.com/2006/09/03/weekinreview/03leonhardt.html> (“United States has fallen into a new period of wage stagnation—a sequel to another such period lasting from the mid-1970’s until the mid-1990’s—that has begun to darken the public mood.”), [<https://perma.cc/WEK5-LNE5>].

³³ Catherine M. A. Mc Cauliff, *Didn’t Your Mother Teach You to Share?: Wealth, Lobbying and Distributive Justice in the Wake of the Economic Crisis*, 62 RUTGERS L. REV. 383, 444–45 (2010).

³⁴ Leonhardt, *supra* note 32.

³⁵ Glasmeier, *supra* note 31.

later President Obama, that the public's unhappiness was exaggerated when no pay problem exists since "average incomes are rising at a nice clip."³⁶

On the other hand, joining the increases in pay of the CEOs with the increases in pay of the average earner can skew the increases to appear larger for the average worker than they actually are. Statistics obscure differences when the very large increases of a few are divided arithmetically among all the workers' increases. They will never take home such pay increases. The data for one year's increase "showed strong income growth . . . only at the 95th percentile of the distribution, which [in 2006] covers families making \$166,000 a year."³⁷ At the beginning of the Great Recession, in other words, the average worker was already down and the lower middle-class was already at the precipice of slipping into poverty. By 2015, the pay for low-wage workers had not improved. Despite economic recovery, "the share of corporate income going to workers has sunk to its lowest level since 1951."³⁸ Companies since the Great Recession have deliberately kept down wages in order to consider them fixed costs and thereby maximize their profits.³⁹

Seyfarth Shaw, an employer's law firm, presents data in its blog on wages and hour litigation as well as collective and class actions. Wage and hour litigation continues to escalate during this century: "[e]ver expanding litigation exposure, particularly . . . [on] labor and employment class actions, weighs heavily on the minds of businesses operating in California, and increasingly nationwide. . . . [Over \$510 million was] spent in 2018, on wage and hour class actions . . . [businesses'] chief area of concern."⁴⁰ Possibly employees are not emphasizing separate benefits but putting greater effort more directly into increasing their minimum wage. At the same time, it is becoming harder to, in California, deem an employee an independent contractor in order to avoid extending benefits to these workers.

It should be no surprise that as prices rose and wages stayed the same, the debt of the average worker increased. In 2014, according to the Federal Reserve, the 3.3% growth in mostly

³⁶ Leonhardt, *supra* note 32.

³⁷ *Id.* ("Even at the 90th percentile, as well as the 50th and further down, according to the Labor Department, pay increases have trailed inflation over the last three years."); see Eavis, *supra* note 27, for current examples of salaries for workers and CEOs.

³⁸ Steven Greenhouse, *The Mystery of the Vanishing Pay Raise*, N.Y. TIMES, (Oct. 31, 2015), ("[Besides labor force dropouts,] many other factors that help explain America's stubborn wage stagnation. Outsourcing, offshoring and imports exert a steady downward tug on wages. Labor unions have lost considerable muscle. Many employers have embraced pay-for-performance policies that often mean nice bonuses for the few instead of across-the-board raises for the many."), <https://www.nytimes.com/2015/11/01/sunday-review/the-mystery-of-the-vanishing-pay-raise.html?ref=collection/byline/steven-greenhouse> [<https://perma.cc/K9UP-HRH5>]; see also Eavis, *supra* note 27.

³⁹ Greenhouse, *supra* note 38 ("[T]he use of more temps [not a phenomenon restricted to cabinet and other government aides as we might have supposed], subcontractors, part-timers and on-call workers—had reduced companies' costs and workers' bargaining power.").

⁴⁰ *Wage and Hour Collective and Class Actions Pose the Greatest Employment Litigation Threat to American Businesses Today*, SEYFARTH SHAW, <https://web.archive.org/web/20181009150853/https://www.seyfarth.com/Wage-Hour-Litigation>. Holger Besch, *Caveat Proprietor: Private Equity Firms Operating in California and Beyond Should Be Wary of Expanding Labor and Employment Class Action Costs*, MONDAO BUSINESS BRIEFING (June 13, 2019), <https://bi-gale-com.ezproxy1.lib.asu.edu/global/article/GALE%7CA588813954/db76e66bf520ab72b473c85d00858cfa?u=asuniv>

(discussing the standard in the recent California Supreme Court decision in *Dynamex Operations v. Superior Court*, 4 Cal. 5th 903 (2018), for determining whether workers are misclassified as independent contractors in the state). Not quite reaching 2,000 suits a year, filings of wage and hour law suits reached "almost 8,500 in 2017—far outpacing all other types of employment litigation. Most of these cases are brought as collective or class actions, many commanding settlements and resulting in verdicts often costing defendants millions, if not tens of millions, of dollars. These statistics do not include state court filings of similar claims under state and local laws that are particularly prevalent in California and other states with strong wage and hour laws." *Id.*

credit card debt “outstripped the average American's income growth of 1.7%. But consumers aren't just borrowing more on their credit cards; they're also taking on more student loan, auto, and mortgage debt, too.”⁴¹ Federal courts who interpret federal labor laws have established several rules to curtail the full scope and applicability of the statutory and regulatory remedies which would give workers protection against employers' attempts to hold down wages.⁴² The temp agency has unfortunately become the dominant model for many jobs, distracting from focus on the actual needs inherent in the service provided. Thus, homecare aides are very often not working for the patients they care for, but for agencies which simply did not pay workers for overtime work beyond 40 hours. Employers who place home care workers as their business argued that the Fair Labor Standards Act does not delegate to the Department of Labor the authority to exclude a class of employers from the Act's companionship-services and live-in worker exemptions.⁴³

At the time of the home care businesses' suit, the U.S. Department of Labor figures reported that the median annual wage for the 2 million or home care workers was under \$21,000 a year.⁴⁴ “Lobbyists for the \$84 billion [home care] industry argued that the new rules could even reduce the take-home pay of caregivers if companies decide not to send workers out for shifts longer than eight hours to avoid overtime pay.”⁴⁵ Employers' continuing threats, even when

⁴¹ Todd Campbell, *The Average American Has This Much Debt--How do You Compare?*, THE MOTLEY FOOL (Jan. 18, 2015), <https://www.fool.com/investing/general/2015/01/18/the-average-american-has-this-much-debt-how-do-you.aspx> [<https://perma.cc/L2G8-4442>]. As Ken Rogoff, an economist, explained in an interview with Javetski in 2011, “a post financial-crisis [*sic*] recession is characterized by an overhang of private and public debt that is much more severe than it is after a normal recession. There are many mortgages still under water—perhaps 25 percent—and people are more cautious about extending their borrowing than they were before 2007. That leads to slower consumption growth. Businesses in turn invest more slowly.” Bill Javetski & Tim Koller, *Understanding the Second Great Contraction: An interview with Kenneth Rogoff*, MCKINSEY QUARTERLY (Oct. 2011), <https://www.mckinsey.com/featured-insights/employment-and-growth/understanding-the-second-great-contraction-an-interview-with-kenneth-rogooff> [<https://perma.cc/4SRL-DDYW>]. See also Charles Babington, *Americans' Financial Security and Mobility: Key Factors*, TRUST (July 28, 2017) (“[Low-income families'] liabilities grew far faster than their income in the aftermath of the Great Recession. Their debt was equal to just one-fifth of their income in 2007, but that proportion grew to one-half by 2013. Even middle-wealth households held \$7,000 more in debt, on average, in 2013 than in 2001 and previous years.”) <https://magazine.pewtrusts.org/en/archive/summer-2017/americans-financial-security-and-mobility-key-factors> [<https://perma.cc/3Y3T-HPFT>].

⁴² Joseph R. Landry, *Fair Responses to Unfair Labor Practice: Enforcing Federal Labor Law Through Nontraditional Forms of Labor Action*, 116 COLUM. L. REV. 147, 194 (2016) (Legal remedies unions and workers have to redress the violation of their rights have been constrained by courts and agencies so that high barriers and delays characterize their efforts. Employees can still turn to “intermittent strikes and other forms of partial work stoppages. This understanding of protected concerted activities most effectively promotes peaceful and constructive labor relations by ensuring a stronger check against unfair labor practices that violate federal labor law and frustrate labor-management cooperation.”).

⁴³ Home Care Ass'n. of Am. v. Weil, 78 F. Supp. 3d 123, 128 (D.D.C. 2015); See Emily Munson, *Help That Hurts: How DOL's Home Care Rule Harms People with Disabilities and Care Givers*, 13 INDIANA HEALTH L. REV. 433, 433–34 (1916) (explaining that the disabled community also faces discrimination, forcing it to exploit other groups facing discrimination, such as care workers).

⁴⁴ *Court Reinstates Wage Rules for Home Care Workers*, CBS NEWS (Aug. 21, 2015, 11:01 AM), [<https://perma.cc/LW3S-R7YY>].

⁴⁵ *Id.* The threats of these lobbyists for the home care industry not to hire in order to keep the minimum wage low illustrates Shiller's explanation of how things go wrong in financial capitalism when proper societal influence is not exercised to restrain the greatest excesses of financial actors. “The goals served by finance originate within us. They reflect our interests in careers, hopes for our families, ambitions for our businesses, aspiration for our culture, and ideals for our society. . . . [T]he better aligned a society's financial institutions are with its goals and ideals, the stronger and more successful the society will be. If its mechanisms fail, finance has the power to subvert such goals, as it did

workers win a rare court victory, underlines the precariousness of the minimum wage earner's stability even with respect to food security. These workers are often forced to turn to borrowing at the end of virtually every month and to seeking charity. The debt trap piled on top of low minimum wages led to a strong campaign to increase the minimum wage which faced much opposition for a long time. "Enacting a higher minimum wage is one of the most surefire paths to lifting the prospects of millions of low-wage workers."⁴⁶

Lobbyists for employers, however, fear that profits may be down and that therefore they will have to employ fewer people. Literature about retention of employees, which itself reduces employers' costs, advocates that employers offset the higher minimum wage with happier, more productive and loyal employees: "[c]onsider the costs of constantly hiring new employees and opt to increase their pay 10 to 20 percent to eliminate the number of employees that would be tempted to leave."⁴⁷ Nor do employers always act upon such reasonable considerations as turning money spent as waste due to turnover of employees into incentives for employees to stay in the form of increased minimum pay.⁴⁸ Greater profitability from greater productivity would require more arithmetic to see the improvement. Indeed, employers in some instances would rather steal from their employees than pay them.⁴⁹ Wage theft is made possible by more than the employers' bad thinking, however.

Wage theft in expanding numbers is also made possible because of "underlying changes in the nation's business structure. The increased use of franchise operators, subcontractors and temp agencies leads to more employers being squeezed on costs and more cutting corners A[s a] result . . . the companies on top can deny any knowledge of wage violations."⁵⁰ Therefore, in the struggle for higher minimum wages, workers needed more organization, publicity and tools than they could have managed to finance on their own. Only a union could have gotten the workers the publicity for their plight and made lawsuits against companies, which persisted in keeping wages

in the subprime mortgage market of the past decade. But if it is functioning properly it has a unique potential to promote great level of prosperity." SHILLER, *supra* note 13, at 7. Economist Kenneth Rogoff agrees: "I think financial innovation has been overly blamed for everything. Financial-sector *lobbying* is another matter—regulators of the financial sector lost sight of the risks [in the Great Recession]." Javetski & Koller, *supra* note 41.

⁴⁶ Greenhouse, *supra* note 17.

⁴⁷ Amanda Griffin, *10 Ways to Improve Employee Retention to Reduce Cost*, EMPLOYEE MANAGEMENT (Oct. 10, 2015) (explaining that "The average cost to replace any employee is about \$4,000, with blue collar and manual workers being closer to \$2,000), <https://blog.granted.com/2016/10/10/improve-employee-retention-to-reduce-costs/>.

⁴⁸ RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008) (explaining psycho-economic insights that our natural instincts sometimes lead us to the wrong decisions, if assessed in accordance with reason and morality).

⁴⁹ David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECONOMIC POLICY INST. (May 10, 2017), <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/>; Steven Greenhouse, *More Workers are Claiming Wage Theft*, NY TIMES (Aug. 31, 2014), <https://www.nytimes.com/2014/09/01/business/more-workers-are-claiming-wage-theft.html>. "Many business groups counter that government officials have drummed up a flurry of wage enforcement actions, largely to score points with union allies. If anything, employers have become more scrupulous in complying with wage laws, the groups say, in response to the . . . lawsuits about so-called off-the-clock work that were filed against Walmart and other large companies a decade ago." *Id.* For a different point of view, see Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103.

⁵⁰ Greenhouse, *supra* note 49. "Business advocates see a hidden agenda in these lawsuits. For example, the lawsuit against . . . a gigantic warehouse here that serves Walmart exclusively — coincides with unions pressuring Walmart to raise wages. The lawyers and labor groups behind the lawsuit have sought to hold Walmart jointly liable in the case." *Id.* Steven Greenhouse, *Walmart Illegally Punished Workers, Judge Rules*, N.Y. TIMES (Dec. 10, 2014), <https://www.nytimes.com/2014/12/11/business/walmart-illegally-punished-workers-judge-rules.html>.

low, possible.⁵¹ Both corporations and politicians alike joined forces to keep unions out of their companies, states and cities.

Even when companies no longer felt the need to keep unions out when business conditions permitted union representation, politicians kept the ideological faith that big organizations might unite for lobbying, trade and pursuing policies toward workers should leave each worker isolated, “free” to respond individually to the company’s offer of wages, hours or working conditions but unfree to join with each other in making suggestions about their own safety, or other, conditions at work. While the politicians could see companies with thousands of employees as useful, they were unable to see the benefits of workers joining together in solidarity with each other for better working conditions. Even though better paid workers pay more state and local taxes of whatever kind apply in the state in question and are capable of buying more goods and services from stores in their home communities’ businesses, politicians themselves minimize the value of this stimulus to the local community. These politicians almost perceive the workers as conspirators, as in the late 18th and early 19th centuries.

McDonald’s “will no longer participate in lobbying designed to thwart minimum wage hikes at the local, state, or federal level” and the president of the service workers’ union praised the courage of the workers and their action on the job.⁵² In March, 2019, McDonald’s wrote to the National Restaurant Association that it would no longer lobby to defeat increases in the minimum wage, thereby saving itself the money it spent to fight any increase in entry-level pay.⁵³ In 2012, fast food workers struck for the “Fight for \$15 and Union” but McDonald’s had fought them, even though at least “52 percent of fast-food workers have to supplement their low pay by relying on public assistance to get by,” amounting to more than a billion dollars in public assistance for McDonald’s workers themselves. Furthermore, McDonald’s had fought the workers, according to the NLRB, illegally, in their attempts to join a union; argued that only its franchisees employed the workers and engaged in wage theft, as well as permitted “widespread” sexual harassment at the workplace. Workers had planned to continue their wage and union actions, since McDonald’s made no representation beyond its statement that it would cease to spend its own money lobbying to fight increases in the minimum wage.⁵⁴

⁵¹ The most prominent union seeking higher minimum wages at Walmart’s, McDonald’s and other large companies and franchises is the Service Employees International Union (“SEIU”). SEIU is “union of about 2 million diverse members in healthcare, the public sector and property services who believe in and fight for our Vision for a Just Society: where all workers are valued and all people respected—no matter where we come from or what color we are; where all families and communities can thrive; and where we leave a better and more equitable world for generations to come.” SEIU, <http://www.seiu.org/> (last visited Nov. 19, 2019).

⁵² For McDonald’s earlier behavior fighting increases in the minimum wage, see Steven Greenhouse, *McDonald’s Is Charged With Punishing Workers*, N.Y. TIMES (Dec. 20, 2014) (explaining that the NLRB brought 78 charges against McDonald’s for “retaliating against workers who protested for higher pay”), <https://www.nytimes.com/2014/12/20/business/mcdonalds-is-charged-with-punishing-workers.html>.

⁵³ Christine Owens, Opinion: *McDonald’s Surrenders as \$15 Hourly Minimum Wage Gains Steam*, CHICAGO SUN TIMES (Apr. 1, 2019), <https://chicago.suntimes.com/2019/4/1/18374781/mcdonald-s-surrenders-as-15-hourly-minimum-wage-gains-steam>. The remainder of the information in this paragraph is found at *id.*

⁵⁴ Maggie Astor, *2020 Democrats Join McDonald’s Workers Striking Over Wages and Harassment*, UPCOMING WORLD NEWS (May 23, 2019), <http://upcomingworldnews.com/politics/2020-democrats-join-mcdonalds-workers-striking-over-wages-and-harassment/> (noting that McDonald’s had done nothing beyond promising not to spend money to lobby against increasing the minimum wage).

Changing conditions in fast food restaurants may arguably have played a role in the decision of McDonald's to cooperate more than their usual resistance would have indicated.⁵⁵ McDonald's is automating more and more tasks and opening more restaurants at the same time it lowers the number of its over-all employees by introducing such features as a "self-serving (*sic*) kiosk" for patrons to do their own work checking their food out themselves, which may be part of a libertarian future.⁵⁶ The changing job market for low-wage earners remains a worry for society as a whole along with the continuing resistance of large entities to paying a real, living wage which provides food sufficiency, affordable housing, health care insurance and job training or education for their employees. The employers' resistance to paying a living minimum wage, a clear lack of corporate responsibility, leaves millions of working Americans to the charity of churches and food pantries to feed their children at the end of the month and to local welfare agencies the taxpayers support to supplement the food, milk and medicine the underpaid workers cannot buy. Here the old notions of the public trust, public interest and common good, expressed today among corporate law commentators in the awkward word "publicness," explain public pressure on over-reaching corporate actors and on the reputation of the organizations or companies they represent.⁵⁷ This concept of publicness is based on the corporate requirement of disclosure of material information, accompanied by enforcement and litigation. Corporate disclosure and enforcement are "designed to increase the odds of a strong and healthy market system—where fraud is policed and punished, and capital is allocated efficiently."⁵⁸

*Epic Systems Corp v. Lewis*⁵⁹ is an important recent example of the Supreme Court protecting the privileges of employers from their workers (and using Lochnerian reasoning to do so, even with federal statutes unrelated to the "nationalist" ethos of the original Social Darwinist freedom of contract in *Lochner* itself rescuing employers from worker-protective legislation). This *Epic* set of three cases provides current data to claim that the Court over-protects the employer, as in *Lochner*, and self-interestedly their own docket, at the expense of the employees. Justice Gorsuch's opinion sets forth a Lochnerian legal fiction of "*laissez faire* freedom of contract," that both employers and employees have freely chosen "to contract for bilateral arbitration" to save litigation expenses.

But the fact that the employees, despite the availability of arbitration, chose class actions to pursue relief for not being paid income they were owed supports the lie of the image of equal bargaining parties, such as two merchants or other businesses wishing to take advantage of the

⁵⁵ Jon Miltimore, *Why McDonald's Gave Up the Minimum Wage Fight*, FOUNDATION FOR ECONOMIC EDUCATION (Apr. 29, 2019), <https://fee.org/articles/why-mcdonald-s-gave-up-the-minimum-wage-fight> (explaining that the reduction in staff at McDonald's "began in 2014, the same year the Affordable Care Act went into effect. This was no coincidence. Nor was the installation of digital kiosks, which reportedly were installed as part of a \$2.4 billion expansion effort"). Other areas of automation at McDonald's include food delivery, now testing in usually good weather city San Diego, an FAA commercial drone test center. Kate Krader, *Uber Wants Your Next Big Mac to Be Delivered by Drone*, BLOOMBERG BUSINESSWEEK (June 12, 2019), <https://www.bloomberg.com/news/articles/2019-06-12/uber-announces-plans-to-deliver-big-macs-by-drone-this-summer> (explaining that McDonald's is working with the Uber Eats division of Uber Elevate to develop flight patterns and packaging not to jostle the burgers or melt the ice cream). A UK company, Ocado Group Plc, is selling its online grocery shopping technology to Kroger, which invested in and is using Ocado to compete with Walmart Inc and Amazon.com Inc. Sam Chambers, *Britain's Robot Grocer is Coming to the U.S.*, BLOOMBERG BUSINESSWEEK (June 14, 2018), <https://www.bloomberg.com/news/articles/2018-06-15/britain-s-robot-grocer-ocado-is-coming-to-the-u-s>.

⁵⁶ Jon Miltimore is listed as a writer at the Acton Institute, available at <https://acton.org/about/author/jon-miltimore>. For a similar view of *Lochner*, see BERNSTEIN, *supra* note 21.

⁵⁷ Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045-69 (2019). See also Applebaum, *supra* note 19.

⁵⁸ Sale, *supra* note 57, at 1065.

⁵⁹ 138 S. Ct. 1612 (2018).

“speed” of arbitration. Justice Ginsburg, in dissent, pointed out that Gorsuch failed to discuss employers’ frequent theft of their own employees’ wages.⁶⁰ Low wage employees must sign a contract accepting arbitration and waiving participating in any future class action.⁶¹ Of course, class actions are the suitable vehicles to remediate wage theft but as Justice Ginsburg pointed out, Justice Gorsuch also failed to address this issue and thus, without so stating, callously left the workers bereft of the promise in *Marbury* of the founding generation that the courts provide remedies for injured parties.⁶² *Epic Systems* invites those employers of low-wage employees, who have not already done so, to adopt these clauses and force employees to accept these clauses as a condition of employment. Justice Gorsuch made technical disclaimers about the (in some circles) discredited *Lochner* he in fact adopted. He tried to draw a distinction between the opinions in *Epic Systems* and *Lochner*, criticizing the Court in *Lochner* for “substitut[ing] its preferred economic policies for those chosen by the people’s representatives.”⁶³ But *Lochner* is back, entrenching its invidious choice of the employer over low-wage employees.⁶⁴

Sometimes there is balance in assessing how far the powerful can depress their thumbs on the scale of justice so that it will not be so lopsided, but in other ages, the various entities of local and federal government and governmental agencies all align on one side so that the courts, the legislature and the executive are all arrayed on the side of the powerful. Sometimes none, or very few, of the outlets for redress from class actions to balancing the purposes of, for example in *Epic Systems*, two statutes such as the FAA, designed to allow two entrepreneurs to access faster dispute resolution, and the federal fair labor laws (which attempt to provide workers with some voice in their own working lives) are interpreted in favor of the less powerful bargaining party. Then neither the market, here for entry-level or low-paying jobs, nor the society, is functioning well for anyone beyond those who have captured the market and political power. Surprisingly in such a bleak situation, pockets of the free market remain when a state law regulates the unrestrained attempt to capture the whole pie for one powerful bargaining party, as Adam Smith witnessed.⁶⁵ In *Chavarria v. Ralphs Grocery Store*,⁶⁶ the Ninth Circuit found that the FAA did not generally preempt California’s state law including its contract defenses. On state grounds, the Circuit Court found the employer’s mandatory arbitration agreement unconscionable on the grounds of the employee’s lack of bargaining power.

It is no wonder that employee grievances against national chains and franchises are often brought in California. Today the deficit in remedies is so striking that it is difficult to consider an advocacy litigation program with the goal of raising the issues of employees’ rights (such as wholesale theft of earners’ wages, work environments promoting sexual harassment, the

⁶⁰ *Id.* See also *Epic Systems Corp v. Lewis*, 132 HARV. L. REV. 427 (2018).

⁶¹ Mark Joseph Stern, *Epic Distortion: Neil Gorsuch’s Ruling on Mandatory Arbitration Clauses Doesn’t Reflect the Reality of American Labor Relations*, SLATE (May 22, 2018), <https://slate.com/news-and-politics/2018/05/neil-gorsuchs-ruling-in-epic-systems-v-lewis-harkens-back-to-the-supreme-courts-era.html> (editorializing that right after *Epic Systems* came down, the management law firm Ogletree Deakins announced its program “to help employers ‘quickly and conveniently generate arbitration agreements with class action waivers’”).

⁶² *Epic Sys.*, 138 S. Ct. at 1647; 132 HARV. L. REV., *supra* note 60. *Marbury v. Madison*, 5 U.S. 137, 161 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.”).

⁶³ Stern, *supra* note 61.

⁶⁴ Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015).

⁶⁵ WEALTH, *supra* note 22 (quotations on employers’ behavior) and *infra* notes 139 and 140.

⁶⁶ *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013) (echoing the important principle of Adam Smith (WEALTH, *supra* note 22) that the market should not become unbalanced unconscionably, the court wrote that federal law “favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power”).

destruction of independent small businesses due to environmental disasters or pollution). Indications of balance like *Chavarria* are not by themselves enough to bring balance to the market or to redress the democratic deficit in a plutocratic society. *Chavarria* is, nevertheless, a model that should be copied in many states across the country and in many federal and state courts to redress the severity of the imbalance in the market for minimum wage labor and the danger to democracy from the weakness of the voices of minimum-wage workers in having some reasonable say in their own wages, hours and working conditions. The pretense in *Epic Systems* that two equal bargaining parties meet over wages and dispute settlement terms sets Locke's "property as happiness" theory too much out of reach above the opportunities for the worker to acquire some property in h(er/is) own labor, which is stolen by the plutocrat's control of the market itself and then again with literal theft of the workers' over-time wages.

Employers' free-riding on local welfare and assistance for their underpaid workers does not make the food at Walmart or McDonald's taste better or richer; furthermore, employers' free-riding abuse of the capital market indicates that we still have more work to do in allocating capital efficiently to the workers who will be able to use the increased wages to feed themselves as well as their children (instead of skimping on food at the end of the month to make sure their children have food) and to pay more of their monthly bills on time. The employers' general cheating of the taxpayers in the communities these Walmart, Amazon, and fast food restaurants serve is a problem for publicness to publicize even further until the free-riding rip-offs of local communities stops.⁶⁷ While that one change alone, paying higher wages, will not make these employers good corporate citizens working with all their stakeholders, it will at least allow the local communities to use that money now diverted to feed hungry, low paid employees to provide more social and other community services which have been curtailed or forgone to feed the hungry. The irony of companies which sell and ship food not paying their workers enough to eat at the ending few days of the month is too sad to satirize with quick and catchy phrases like "Maggie Thatcher, milk snatcher."

The concept of public accountability of large market-makers is important for the wellbeing of low-wage workers: "publicness grows in response to greed When corporate actors lose sight of [the] impact [of their actions] . . . [on] society more generally, exposure and examination occur."⁶⁸ This "zone of publicness" is an important part of workers' ability to seek and reach a living, if not comfortable, wage. Corporations may later argue that 78 suits had no effect on them and that the retention and wellbeing of their workers also does not motivate their action. The corporate spokesperson may allege that achieving their business dream of eliminating large numbers of employees due to developing technology led them to drop their resistance to increasing the minimum wage they pay because the elimination of jobs makes a difference to the bottom line

⁶⁷ Sarah Jones, *McDonald's Workers Are Striking, and 2020 Candidates Are Paying Attention*, N.Y. MAGAZINE, May 23, 2019, available at: <http://nymag.com/intelligencer/2019/05/mcdonalds-workers-strike-drawing-2020-dems-attention.html>; Nina Shapiro, *Under Pressure, Afraid to Take Bathroom Breaks? Inside Amazon's Fast-paced Warehouse World*, THE SEATTLE TIMES, July 2, 2018, available at: <https://www.seattletimes.com/business/amazon/under-pressure-afraid-to-take-bathroom/>; WAREHOUSE WORKER RESOURCE CENTER, <http://www.warehouseworkers.org/about/> (Sheheryar Kaoosji, co-executive director of the Warehouse Worker Resource Center, a nonprofit in [S. Ca. advocating better working conditions], said all warehouse employers try to get workers to do their jobs as quickly as possible. But because of the way Amazon uses technology, he said, "it's definitely a whole other level.") (last visited December 17, 2019); see also JAMES BLOODWORTH, *HIRED: SIX MONTHS UNDERCOVER IN LOW-WAGE BRITAIN* (2018).

⁶⁸ Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629, 1655 (2014) (explaining that the "scrutiny is a form of publicness. Then, the demand and pressure for reform grows. The result is more changes, and they, too, are a form of publicness).

they cherish above other considerations. Therefore, resistance to a living wage is now less compelling for their business model with so many fewer workers.⁶⁹

Disclosure of such non-people oriented bottom-line concerns only unnecessarily tarnishes their corporate reputations even further. Having allowed such statements, the corporations are thereby pre-empted from taking credit for, and obtaining the public good will in their customer base from, the increased wages the employees they still have will now receive. “Corporations are permitted to wield significant economic and political power and are therefore expected to consider the implications of their choices.”⁷⁰ Continuing increases in the minimum wage will not happen without these public verdicts on the corporations which employ low-wage workers, even if the verdicts are literally given in judicial opinions after long, slow cases wind their way through the court system to jury verdicts, unless, of course, the corporation fend off trial by jury.

B. The Housing Market in the United States

“Housing costs are the single largest financial burden on the American family. Low-income families are the hardest hit: the average low-income household spent 40% of their income on housing in 2014, and low-income renters spent close to 50%.”⁷¹ Without taking account of any other expenses, 40 or 50% is too much to spend on housing. Food, transportation, education, medicines and health care, to say nothing of child care, put a low-wage earner into the red.⁷² For example, another single mother like Patricia, Arleen, “trying to raise her two sons on the \$20 a month she has left after paying for their rundown apartment . . . spending almost everything [she has] on rent, [has] fallen behind . . . Her landlord move[d] to evict Arleen and her boys a few days before Christmas.”⁷³ It has unfortunately become apparent that the use of eviction has become more aggressive. While “[e]ven in the most desolate areas of American cities, evictions used to be rare . . . today, most poor renting families are spending more than half of their income on housing, and eviction has become ordinary, especially for single mothers.”⁷⁴

⁶⁹ Miltimore, *supra* note 55, 56 and accompanying texts.

⁷⁰ Sale, *supra* note 68, at 1065 (citing, among others, Luigi Zingales, *Towards a Political Theory of the Firm 2* (Nat’l Bureau of Econ. Research, Working Paper No. 23,593, 2017)).

⁷¹ Private Affordable Housing Guide, *available at* https://myaffordablehousingguide.com/resources-and-articles; Housing Expenditure and Income, THE PEW CHARITABLE TRUSTS, available at https://www.pewtrusts.org/~media/assets/2016/03/household_expenditures_and_income.pdf; Hongwei Dong, *The Impact of Income Inequality on Rental Affordability: An Empirical Study of Large Metropolitan Areas*, 55 URBAN STUDIES 2106 (2018) (concluding that the impact of worsening income inequality on rental affordability for low-income tenant households at the county level in America’s largest 100 metropolitan areas for cross-sectional analyses with an increase of Gini coefficient by 0.1 in a county was associated with 2.2 and 4.4 percentage points more severely rent-burdened low-income households in 2000 and 2008–2012, respectively, and for longitudinal analyses was associated with faster growth of severely rent-burdened low-income tenant households by 2.9 percentage points).

⁷² “By 2014, median income had fallen by 13 percent from 2004 levels, while expenditures had increased by nearly 14 percent.” REPORT, *supra* note 71, at 1. “[T]his spending can impose a tremendous stress level on households, with parents working multiple jobs and often leaving their children unsupervised just to pay the rent or mortgage. For many families, eviction, foreclosure, and homelessness are imminent threats. Families that are trying to move up into better living situations encounter the obstacle of poor credit ratings left from struggles years in the past.” PRIVATE AFFORDABLE HOUSING GUIDE, *supra* note 71.

⁷³ MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).

⁷⁴ *Id.* Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity among the Working Poor*, 63 SOCIAL PROBLEMS (2016) <https://scholar.harvard.edu/files/mdesmond/files/desmondgershenson.sp2016.pdf?m=1452638824> (seeking to understand “why workers lose their jobs [, w]e explore the role of housing insecurity in actuating employment

If Jamie Dimon spent 10% of his gross income maintaining his Manhattan home, the amount would be only \$3.1 million, leaving him with nearly \$28 million for investing, saving, and spending. If Dimon hypothetically gave 1% of his 2018 salary of \$31 million to entry level tellers in the lower pay entry-level tier cities of his bank, he could give 31 of them \$10,000, taking away Patricia's deepest worries and difficulties for the year by bringing her rent slightly under 50 % of her gross. Assuming again that the "average" worker makes about \$50,000 and pays no more than one third of his salary for housing, he would spend \$16,666 a year in rent, allowing a maximum of \$1,400 a month.⁷⁵ But "Patricia," Dimon's entry level teller in Irvine, makes \$2,425 a month (about \$29,100 a year) and pays \$1,600 a month, the lowest going price in Irvine to rent a one bedroom apartment, putting her over the 50% ceiling for rent and leaving her permanently in debt.⁷⁶

For Patricia, and her six-year old daughter, affordable housing is crucial.⁷⁷ The economic insecurity of many American families "[r]aises questions . . . [a]bout the American ethos that 'you can get ahead if you play by the rules.'"⁷⁸ With such monthly deficits (short falls) and low wages that Patricia has, homelessness will probably befall her, if nothing positive, such as government aid, especially in housing and foodstuff, a solution to Patricia's child care needs, or a raise in pay, intervenes to change her circumstances. Besides heavy debt from a variable-rate mortgage, credit card, or monthly shortage, an emergency in physical or mental health,⁷⁹ including depression or

insecurity, investigating if workers who involuntarily lose their homes subsequently involuntarily lose their jobs . . . [and] find the likelihood of being laid off to be between 11 and 22 percentage points higher for workers who experienced a preceding forced move, compared to observationally identical workers who did not. Our findings suggest that initiatives promoting housing stability could promote employment stability").

⁷⁵ See *supra*, text between notes 22 and 23 for a possible average salary. "[F]amilies that appear secure—those with, say, a steady job, a good car, and a house—can live so close to a financial precipice that one bit of bad luck might send them toppling. The factors contributing to this insecurity include people's expenditures outpacing income, not the least of which is higher housing costs; difficulty saving for retirement and other needs; and struggles in making financial plans when incomes vary unpredictably from one year to the next, as they often do." BABINGTON, *supra* note 41.

⁷⁶ "Overall median household expenditures grew by about 25 percent between 1996 and 2014, returning to pre-recession levels." BABINGTON, *supra* note 41. "Low-income households are particularly unprepared for emergencies. The typical family at the bottom of the income ladder has the equivalent of less than two weeks' worth of income in checking accounts, savings accounts, and cash on hand." BABINGTON, *supra* note 41. See also *supra*, text between notes 40 and 44 for struggling low-wage workers.

⁷⁷ REPORT, *supra* note 71, at 1 ("In 2004, typical households at the bottom had \$1,500 of income left over after expenses. By 2014, this figure had decreased by \$3,800, putting them \$2,300 in the red. The lack of financial flexibility threatens low-income households' financial security in the short term and their economic mobility in the future."); Emily Badger & Jim Wilson, *These 95 Apartments promised affordable rent in San Francisco. Then 6,580 people applied*, N.Y. TIMES, May 13, 2018, at BU1 (exploring the instability of inadequate housing availability for the poor and the Tax Cuts and Jobs Act of 2017 which provided a much lower corporate tax rate at the expense of hundreds of thousands of affordable rental units nationwide). *Id.* (citing changes in the tax code lowered incentives to build affordable housing units, making it more expensive for cities to come up with money for affordable housing).

⁷⁸ BABINGTON, *supra* note 41.

⁷⁹ Housing and mental illness are connected insofar as people may find themselves homeless when they become mentally ill because their condition may not allow them to work and therefore have the funds to pay the rent bill. What are we doing to keep the mentally ill from losing their homes during their illnesses? Certainly, landlords often fail to sympathize with the ill tenant. The roles are reversed in a 2013 case in Washington, D. C. when a property owner (mentally incapacitated, but only later put under guardianship) gave a lease in March 2001 to a couple at a low rent with an option to buy. At the end of the last century, a property dealer had already purchased a tax sale certificate for the same property for \$2,103 and was subsequently issued a tax deed in August 2001. The dealer contended that the owner could not have made a valid lease to the couple. While many states had adopted a rule that leaves it to the ill

schizophrenia (or a drug/alcohol crisis), divorce, death of a spouse, loss of a job or retirement, can force others in Patricia's circumstance into homelessness. The stress of coping with monthly shortfalls, combined with any other circumstance or condition on this list, especially if the person is on h(is)/(er) own without strong family support can hasten this "rudderlessness."⁸⁰ A person without support from her family was in a worse condition than rudderlessness when she was unable to handle the applications for government aid (where were the social workers in this situation?)⁸¹

This current economic system has little in common with "state capitalism," other than the limited participation capitalism in this situation currently allows: financial institutions today exercise such great control of the market in their own favor, that the current economic system is deemed "financial capitalism."⁸² People must have "the ability to participate in the financial

person to disavow a contract, D.C. had not yet done so.. See *Sullivan v. Flynn*, 20 D.C. (9 Mackey) 396 (1892) *overruled by* *Hernandez v. Banks*, 65 A.3d 59 (D.C. 2013). The change in the law is not necessarily favorable to mentally ill tenants, although here the couple was deemed to have a valid lease from the mentally ill property owner. In any event, help with eviction for all reasons including foreclosure will aid more people seeking to remain in their homes, but lobbying is often an obstacle to dealing with eviction.

⁸⁰ Sarah Marsh, *How I Became Homeless: Three People's Stories*, GUARDIAN, (Aug 15, 2017, 07.00 EDT), <https://www.theguardian.com/society/2017/aug/15/how-i-became-homeless-three-peoples-stories> ("There's a feeling of powerlessness when you're homeless; you feel lost. My experience changed how I see homeless people. After a while I got over whatever it was that was going on in my head. I found a job and a flat and the friends who helped me are still, thankfully, my friends. But I have never got over the fear of homelessness, that feeling of being nowhere.") Cf. *supra* note 13 (describing the symptoms of PTSD in families, particularly children, who have lost their "moorings" (homes and schools), a feeling similar to the rudderlessness of the homeless man interviewed in the *Guardian*). Parents first teach us to trust by providing a secure home with soothing daily routines befitting the internal clocks of infants and toddlers, including calm feedings, baths and play and then later extend the circle of trust to a neighborhood and a school, hence the horror of Newtown or homelessness. Artificially low wages and high rents without money to pay for after-school care regularly disrupt the orderly, secure progression children need for millions of children in USA and many millions more around the world.

⁸¹ *Id.* ("I had been working part-time in a shop but ended up leaving. So, I had no job and rent to pay. I applied for benefits but the money got sent to the wrong account. Eventually it got sorted out but I then became ill. I withdrew from the benefits system because I found it too complicated to handle in my confused state. I soon couldn't afford the rent and had to leave my property." Here is a heavily edited version of the remainder of this woman's experience: "[O]ne [friend] tried to help me access benefits The whole experience was terrifying both times, not knowing where I was going to spend the night. I felt abandoned and alone. At times I had no one to turn to. I would ask friends if I could sleep on their floor. They came through for me at first but then the help ran out . . . I remember all my belongings being stuffed into a few bags I carried around with me. Eventually things got better and I clawed my way back to sanity and got a good job. Mental illness, poverty and homelessness were interlinked in my case – I'm sure that's the situation for a lot of people. Safety nets can fall apart and I went into a downward spiral. I would like to see an end to the stigma attached to homelessness. It can be a terrifying and devastating experience that no one should go through.").

⁸² YASHENG HUANG, *CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE* (2008) (stating that capitalism may limit participation in the capital market to itself). Financial capitalism has a different driver; See SHILLER, *supra* note 13, at vii (explaining that financial capitalism is "an economic system increasingly guided by financial institutions and that, in the wake of the severe financial crisis that began in 2007, appears to many to be broken."); Jeremy Page, *The Birth of State Capitalism: 30 Years After Tiananmen*, WALL STREET J., June 1-2, 2019, at C5. For a libertarian objection to "woke capitalism," see William McGurn, *Interview with Robert Sirico: When the Market Meets Morality*, WALL ST. J., Aug. 2, 2019, at A11 (explaining that conservatives use "woke capitalism" to challenge libertarian versions of the market because "big tech" uses its power "to stifle traditional views" since big tech supports same-sex marriage, abortion and no enforced reciting the pledge to the flag and singing the national anthem); *Compare* *Minersville Sch. Distr. v. Gobitis*, 310 U.S. 586 (1940) (forcing students to pledge allegiance to the flag). with *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); See also *Landry v. Cypress-Fairbanks ISD*, CIVIL ACTION NO. 4:17-CV-3004 (S.D. Tex., 17 July 2018) available at:

system as equals, with full access to information . . . [so] that they truly consider themselves part of modern financial capitalism, and not the victims of the aggressive and selfish acts of a cynical financial establishment.”⁸³ In other words, to accept the core benefits of financial capitalism for the society as a whole, we must make sure that small actors in the society are assured both that they are not harmed by the complications of the society and also that they may in fact be included in the market economy of financial capitalism. To accomplish the participation of all in the fruits of this system, financial capitalists cannot co-opt all the benefits exclusively for themselves and shift their own costs to the society as a whole, as do the free-riding employers of low-wage workers in businesses like Amazon, McDonald’s and Walmart, to use these names as examples and not as exclusive offenders, especially since the housing sector has different operative offenders, from lending banks to politicians and zoning boards to construction companies.

If rents rise because buying a house seems more and more out of reach, low-income earners are in a double bind: there is nothing to buy and nothing to rent; eviction often follows. “Regulations and restrictions can and should be placed on financial institutions to help them function in the best interests of society”⁸⁴ What do the best interests of the society at large include? First and foremost, financial capitalism in its positive guise must “[s]upport the goals of a robust and prosperous economy” which entails limiting the negative aspects of financial capitalism by acting “[t]o curb its excesses, to smooth its volatility, and to consider how finance can be brought to bear to address the needs of advanced and developing economies alike,” and on the domestic front to meet the needs of low and middle income, as well as high, income Americans.⁸⁵

For many years, protections in New York State for renters had declined dramatically as the lobbyists for real estate moguls grew stronger. That seemingly inexorable trend was at least temporarily halted by new legislation in New York in the face of the irritated real estate industry. The total number of renters in the state of New York is 8.2 million, of whom 2.4 million live in the city. Even with this positive reversal of fortune for renters’ legislation, the implementation of the new provisions of the Housing Stability and Tenant Protection Act of 2019 remains extremely hard to envision.⁸⁶ Regulatory supervision is integral to the usefulness of the

<https://www.casemine.com/judgement/us/5b5aeef3fe30dd519068f56b> (ruling that India may proceed with First-Amendment speech claims and a Fourteenth-Amendment due process claim. Nevertheless, India Landry was expelled from Woodfern High School in Houston on Oct. 2, 2017 for sitting during the pledge).

⁸³ SHILLER, *supra* note 13, at viii.

⁸⁴ *Id.* at 6.

⁸⁵ *Id.*

⁸⁶ Housing Stability and Tenant Protection Act of 2019, A.8281/S.6458 (C.36 of the Laws of 2019) (signed June 14, 2019); Kathryn Brenzel & Georgia Kromrei, *Cuomo Signs Landmark Rent Regulation Reform Bill, 1 Apocalypse*, THE REAL DEAL, (June 24, 2019, 04:44 PM) <https://therealdeal.com/2019/06/14/state-approves-landmark-rent-regulation-reform-bill/> (explaining “State officials delivered a massive blow to the real estate industry this month, passing an incredible series of changes to the rent law that will impact thousands of businesses in New York City. Gov. Andrew Cuomo quickly signed the bill into law, despite furtive attempts from developers (and some of his biggest donors) to convince him to veto the legislation). On the news that Cuomo had abandoned the real estate industry, one lobbyist quipped that “politicians are obviously in it for themselves,” available at: <https://muckrack.com/kathryn-brenzel/articles>; Georgia Kromrei and Kathryn Brenzel, *Creative Ways NYC Landlords Are Getting around the New Rent Rules*, THE REAL DEAL, (Aug. 21, 2019, 09:45 AM), <https://therealdeal.com/2019/08/21/creative-ways-nyc-landlords-are-getting-around-the-new-rent-rules/?utm> (“Landlords warned that the Housing Stability and Tenant Protection Act of 2019 will halt major renovations in rent-stabilized properties,” due to the new caps on rent increases and that they would find other responses), available at: <https://therealdeal.com/2019/08/21/creative-ways-nyc-landlords-are-getting-around-the-new-rent-rules/?utm>; Five

new laws covering protections in eviction proceedings (a destructive and scarring experience for any family), security deposits, notice of rent increases over 5%, and rent caps for tenants of mobile homes, even as “[t]enant organizers nationwide . . . hope[]the changes could pave the way for more tenant rights in other states.”⁸⁷ Landlords planned a constitutional challenge ready to be filed upon passage of the law.⁸⁸

Affordable housing, reinforcing anti-discrimination actions in housing, and, perhaps most challenging and daunting of all, encouraging home-ownership (a difficult feat to engineer and achieve without bringing misery and mis-steps in its wake)⁸⁹ present serious challenges for American society today. “Increasing the supply of urban housing would help to address a number of the problems plaguing the United States. Construction could increase economic growth and create blue-collar jobs. Allowing more people to live in cities could mitigate inequality and reduce carbon emissions.”⁹⁰ Homelessness among veterans, children, and young people, together with a

additional methods include combining two side-by-side rent stabilized units (if only one is vacant, monetary incentives to get a tenant to leave might be offered, although worries that harassment may also be used), so the rent would rise above \$2,775/month and thereby qualify for de-regulation. Drawbacks for the landlord might include the need to remove lead paint in moldings. *Id.* (also indicating that landlords seeking to get around high fees for credit checks have asked brokers to charge the fees); Luis Ferre'-Sadurni, 'B\$500 to Apply for an Apartment? Isn't There a \$20 Cap?', N.Y. TIMES, Sept. 3, 2019, at A17 (stating that despite the new rental laws, brokers charge high fees, possibly because legislators were unfamiliar with clear drafting and enforcement agencies such as the Division of Housing and Community renewal have not since clarified the interpretation/enforcement of the laws with regulations).

⁸⁷ Luis Ferre'-Sadurni, *Behind the Sweeping New Laws Expanding Protections for Tenants*, N.Y. TIMES, June 22, 2019, at A19 (stating that landlords, interested or not in building affordable housing, object that the legislation did not including building programs but the laws aid families receive some protection insofar they “might dissuade some landlords from bringing eviction cases against month-to-month tenants merely in order to keep application fees and security deposits”). See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (AM. LAW INST. 2012) (seeking to deter conscious wrongdoers from retaining profits from breach of contract).

⁸⁸ Josh Barbanel & Will Parker, *Landlords Challenge Rent Law*, WALL ST. J., July 17, 2019, at A14A (explaining that the suit claims the state and city governments had taken over the landlords' rent-regulated apartments). However, Prof. Mark Fenster sees the fly in the landlords' ointment (their argument that they lost control of their property) the fact that all they really lost was “regulatory control.” *Id.* Landlords can still collect large rents and make a profit and therefore “can still use [their property] for the purpose they purchased it. They can still get revenue”). Nevertheless, landlords are hopeful that this time their suit may succeed. The conservative Pacific Legal Foundation “said the Supreme Court is shifting,” citing a decision last month “that expanded the rights of property owners to sue in federal court to demand compensation for government seizures of property.” *Id.*

⁸⁹ GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY AND WHY IT MATTERS FOR GLOBAL CAPITALISM* 155 (2009) (explaining that a political appointee in the position of HUD Secretary, without knowledge about of the dangers and consequent need for safeguards for the individual mortgage applicant, promoted ownership among those who had been unfairly denied opportunities for home ownership in the past by ordering professionals in federal lending institutions to make loans despite lack of credit-worthiness and documentation from applicants).

⁹⁰ Editorial, *America Needs More Neighbors*, N.Y. TIMES, June 16, 2019, at SR 10 (pointing out that the NIMBY phenomenon leads to rigid zoning so that apartment “housing construction remains wildly unpopular” when self-appointed environmentalists “fight fiercely against urban development, complaining about traffic and shadows and the sanctity of lawns”); Binyamin Appelbaum, Editorial, *Much Ado about a Little Housing*, N.Y. TIMES, Aug. 1, 2019, at A26 (explaining reasons “why it is so expensive to live in Montgomery” Co., Md. including “the role of legal restrictions on the supply of housing [b]reserving large parts of the county for single-family homes, the county government is subsidizing the life styles of existing homeowners . . . and excluding those with less money. It is a massive welfare program for the benefit of property owners); Sarah C. Bronin, *The Golden Girls Would Violate Zoning Laws*, N.Y. TIMES, July 29, 2019, at A21 (advocating bypassing the NIMBY reactions against liberalizing zoning laws (64% of neighborhoods have “single-unit detached homes”) by recognizing the realities of new families who do not meet the zoning criteria of marriage, adoption and two parents when only 22% of children conform to the

lack of affordable places to live are the most daunting problems facing low-income and poor Americans.⁹¹ Homelessness and lack of affordable housing elude solutions merely through private law and judicial application of the human flourishing theory of ownership because the problems are systemic in nature and require structural solutions that courts are not capable of administering. Structural solutions require legislative and administrative action at all levels of government: federal, state, and local.⁹² Elizabeth Cohen, a Harvard History professor interested in urban renewal, sees the private market in affordable housing as “clearly failing” when many in large cities pay more than 50% of their income for shelter alone and many others face eviction.⁹³

Aristotelian flourishing serves much the same purpose in property law and for home ownership as publicness does for directors and CEOs or the ideal of healthy financial capitalism for lending institutions. The directors and CEOs set the ideal of healthy financial capitalism for lending institutions. The home ownership aspect of flourishing connects a family to the community and neighborhood through mutual obligations avoiding nuisances, such as noxious odors and loud night-time noises, and promoting the upkeep and beautification of the block through neighborhood associations. These obligations are rooted in the interdependence that exists between owners and their community members, a condition that is inherent in the human condition. Obligations have always been inherent in ownership.⁹⁴ Nevertheless, the better angels of our nature have no opportunity to work, if politicians give way to their own and their wealthiest constituents’ greed, the drive today overwhelming current restraints and replacing them with gifts to the wealthiest among us.⁹⁵ The difficulties in the housing area do not include lack of ideas to

family zoning rules passed in the 1950s although only the state supreme courts of California, Michigan, N.J. & N.Y. have struck down zoning ordinances refusing to recognize the functional families of today, so that federal statutes need amendment to recognize functional families). Noah Buhayar, *To Fix Its Housing Crunch, One U.S. City Takes Aim at the Single-Family Home*, BLOOMBERG BUSINESSWEEK, July 29, 2019, at 36 (describing the new zoning plan for affordable housing in Minneapolis). Anup Malani, *To Encourage New Housing, Tax It*, WALL ST. J., July 7, 2019, at A17 (expanding on the observations of Milton Friedman and George Stigler to suggest that NIMBY complaints might be addressed by charging new multi-dwellings higher property taxes to decrease the current taxes on existing property owners).

⁹¹ Monica Busch, *Julian Castro Releases A Housing Plan That Tackles Your Rising Rent*, BUSTLE.COM (June 18, 2019), <https://www.bustle.com/p/julian-castro-releases-a-housing-plan-that-tackles-your-rising-rent-18016123>; see also SARAH SMARSH, *HEARTLAND: A MEMOIR OF WORKING HARD AND BEING BROKE IN THE RICHEST COUNTRY ON EARTH* (2018) (explaining what it means to be a poor, rural child in a rich country founded on the promise of equality, having been born the year her country began a sharp turn toward greater economic inequality for rural mid-westerners from increasing poverty and wealth disparity).

⁹² Gregory S. Alexander, *Property, Dignity, and Human Flourishing*, 104 *Cornell L. Rev.* 991, 1042 (2019) (suggesting better and more affordable housing includes changes at all levels from more efficient allocation of federal money to local zoning changes); See Will Fischer & Barbara Sard, *Chart Book: Federal Housing Spending is Poorly Matched to Need*, CENTER ON BUDGET AND POLICY PRIORITIES, WASHINGTON, DC (2017), <https://www.cbpp.org/research/housing/chart-book-federal-housing-spending-is-poorly-matched-to-need>; Will Fischer, *Low-Income Housing Tax Credit Could Do More to Expand Opportunity for Poor Families*, CENTER ON BUDGET AND POLICY PRIORITIES, WASHINGTON, DC (2018), https://www.cbpp.org/research/housing/low-income-housing-tax-credit-could-do-more-to-expand-opportunity-for-poor-families#_ftnref13.

⁹³ Elizabeth Cohen, *A Market Failure In Affordable Housing*, N.Y. TIMES, A27, (July 11, 2019), (explaining the lack of affordable housing since the 1980s when strategies like using corporate tax credits to construct low-income housing, Section 8 vouchers and fees squeezed out of developers of luxury projects” allowed this housing crisis to explode without anyone in Washington trying to tackle this extremely large problem).

⁹⁴ ALEXANDER, *supra* note 92, at Ch. 10.

⁹⁵ Badger & Wilson, *supra* note 77, (referencing the repeal of the allocation of funds for affordable housing in favor of tax breaks for those in the highest incomes and wealth).

cope with homelessness and overly expensive rent beyond the reach of low income families.⁹⁶ In fact, the greatest obstacles to addressing these problems which prevent an inclusive society, deny the low-income person the opportunity to realize h(er/is) potential and recognize the fundamental principle that housing is not a reward for obtaining a job but the pre-requisite to be able to apply for a job are greed, fraud and corruption. These motivations, unchecked by regulation, intimidate and co-opt politicians who can, and should, institute regulations and legislation to encourage affordable housing rather than take incentives away.⁹⁷

“One of the most troubling aspects of finance in modern society is . . . [the financial community’s] ability to take control of the government [with] . . . lobbyists to present their case and persuade lawmakers to take their side.”⁹⁸ One fallout of lobbyists’ not thinking about the system or the investing public or people feeling the brunt of the lobbyists’ proposals on behalf of those converting even more money from tax to personal or company investments, is the degradation of the fairness and legitimacy of the financial system when it is so easy to wipe out safety nets and other safeguards. For example, Glass-Steagall’s barrier between commercial and investment banking fell so rapidly and so hard, only to be followed, in under seven years, by the Great Recession, due to immediate lowering of mortgage lending standards and the disguise of this fraudulent behavior in the securitization of the loans giving way to widespread corruption.⁹⁹ The 1% of the population with the highest income “enjoyed average real after-tax income [growth of] 275% between 1979 and 2007;” the concentration of income among the most affluent families is clear for all to see.¹⁰⁰

Professor Matthew Desmond, who as a child lived the life he brings to us so clearly, powerfully concludes *EVICTED* in a now famous passage: “This degree of inequality, this withdrawal of opportunity, this cold denial of basic needs, this endorsement of pointless suffering—by no American value is this situation justified. No moral code or ethical principle, no p[assage] of scripture or holy teaching, can be summoned to defend what we have allowed our

⁹⁶ EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY (Lee Anne Fennell & Benjamin J. Keys eds., 2017) (examining several issues such as the meaning of housing with the community for stability, change and culture, the equity of home ownership for families and the returns on housing for the financing system from several different points of view).

⁹⁷ Badger & Wilson, *supra* note 77, (noting the repeal of the allocation of funds for affordable housing. The theme of cutting the public good to private the funds in the hands of the wealthiest is a recurring arrow in the quiver of lobbyists. It makes their work easier because the poor have no voice to oppose the elimination of these improvements to society). A leading commentator in favor of tax breaks for those in the highest incomes and wealth which come from the poor is Kimberly Strassel, *In for a Penny, in for Impound*, WALL STREET J., A13, (Mar. 30, 2018), (expressing the wish to accommodate two opposing principles, outsized tax cuts for a very small but wealthy group of people saved from paying taxes and arguably acceptable budget deficits falling short of the ideal balanced budgets). The problems arising from the Act continue to attract debate as well as calls for both reform of this Act and creation of an ideal taxation model Patricia Cohen & Maggie Astor, *Democrats’ Aggressive New Tax Plans Are Finding an Audience*, NY TIMES, BU 1, (Feb.10, 2019). At every point, to sustain the tax cuts of \$ 4 trillion, one group suggests cutting Social Security, Medicaid, Medicare, food assistance and assistance to the disabled. In response, another group suggests that instead \$ 2 trillion of the tax cut should go to improve the public good by helping the poor with access to better jobs [for humane reasons to reach their potential and enjoy better lives or for Milton Friedman’s reason that the more productive worker will pay more taxes] and increase the incentives to build affordable housing. If such a move succeeded, a few hundred thousand corporate and individual tax payers, instead of receiving \$ 4 trillion, would keep \$2 billion for their group and share \$2 trillion with the perhaps 140 million other people who would stand to benefit directly or indirectly from these various now-cancelled and curtailed programs.

⁹⁸ SHILLER, *supra* note 13, at 87.

⁹⁹ AKERLOF & SHILLER, *supra* note 89, at 155.

¹⁰⁰ SHILLER, *supra* note 13, at 89, (noting that the bottom 20% of incomes saw an 18% rise over the same 27-year period, about 2/3 of 1 % a year).

country to become.” Until we summon the will to attack greed sufficiently to keep it within reasonable boundaries, we will be neither a just nor a fair society. The extreme greed some of us have tolerated and others of us have embraced may destroy the lives of millions. Indeed, the outsized greed may take the whole country with it, sacrificing its integrity, financial reputation and general trustworthiness.

C. *The Market in Teaching in Public Schools in the United States Markets*

The “GI Bill” is being discussed again both literally and symbolically to emphasize the great need for attention and aid to education.¹⁰¹ Many people who served in the military could, under the original, combine their service with education of any type that will benefit their future careers or the job skill they seek. The original “GI Bill,” designed to smooth the transition to civilian life for many of the 16 million World War II servicemen proved extremely successful and popular in helping those returning veterans it covered to secure a place in the middle class.¹⁰² The importance of education itself to the country was recognized.¹⁰³ The GI bill, however, notably did not cover African Americans who served in a segregated military, much as *Plessy v. Ferguson* stood for separation not only in elementary and high school but also in life.¹⁰⁴ While structural injunctions after *Brown v. Board*¹⁰⁵ theoretically ameliorated some of these conditions, the work is by no means nearly done. Rather education as a whole has declined in the United States even before the Great Recession but more dramatically during and after that economic crisis and a special effort was needed to draw attention to the veterans’ plight during the Great Recession.

At the beginning of the Great Recession, Vietnam veteran, and then Senator, James Webb had advocated successfully to pass a new GI Bill to provide funding for four-year state university tuition, living and housing, extending benefits to reservists and National Guard troops serving in Iraq and Afghanistan and no racial discrimination marred this bill.¹⁰⁶ In order to get attention for

¹⁰¹ Natalie Gross, *Trump Signed the ‘Forever GI Bill,’* MILITARY TIMES, Aug. 16 2017, <https://rebootcamp.militarytimes.com/education-transition/education/2017/08/16/trump-signed-the-forever-gi-bill-here-are-11-things-you-should-know/>.

¹⁰² Thalia Assuras, *How The GI Bill Changed America*, CBS, June 22, 2008 (explaining that the American Legion, which provided the purposes of the GI bill, to cover low-cost loans to buy a home and free attendance at college, wanted to set the veterans up to enter civilian working life as part of the work force and not to give them back pay for their service in the war), <https://www.cbsnews.com/news/how-the-gi-bill-changed-america/>. “In fact, many of the country's post-war leaders got their education on the GI Bill: presidents (George H.W. Bush, Gerald Ford), senators (Daniel Inouye, Bob Dole, John Warner), even Supreme Court justices (William Rhenquist, John Paul Stevens, Byron White).” All told of the 16 million veterans, about 8 million veterans took advantage of the GI bill. *Id.*

¹⁰³ *Id.* (quoting Jerome Kohlberg, a beneficiary of the original GI bill and later a billionaire businessman, giving away millions to help veterans from Iraqi and Afghani operations pursue their education. Kohlberg, affirming the value of education after World War II, remarked. “And that education paid for itself ten-fold, if not more.”).

¹⁰⁴ *See generally* *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁰⁵ *See generally* *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁰⁶ POST-9/11 VETERANS EDUCATIONAL ASSISTANCE ACT OF 2008, 110 P.L. 110-252, Enacted H.R. 2642. James Webb, *Editorial: What the GI’s Deserve*, WASHINGTON POST, June 29, 2008 (explaining that to “get Republican support for the measure, House leaders agreed to drop what would have been a perfectly reasonable tax on affluent Americans . . . the country is left with yet another unfunded entitlement program. A modification of the bill to allow some educational benefits to be transferred to immediate family members was a sensible solution to administration concerns about the bill’s impact on service retention, but it, too, added to the unfunded costs”), <http://www.jameswebb.com/articles/military-and-veterans/what-the-gis-deserve>. The estimated price-tag for an expanded benefits program, \$4-6 billion a year, is the equivalent of about one week of combat costs in Iraq and Afghanistan. *Id.*

this common sense bill, Webb had to get large numbers of co-sponsors in both houses (58 in the Senators and 302 in the House) including beneficiaries of the original GI bill.

Similarly, teachers in several states across the country marched to state capitals to get their message heard that schools are broken and salaries did not allow teachers to work only at one job. In recent years, various political factions in Kansas did not trust each other in funding schools and particularly teachers' salaries, whether to give merit increases, thereby forcing those deemed weaker teachers to take on second jobs.¹⁰⁷ In some senses Governor Sam Brownback defunded education as a whole by reducing the state budget to fund an extremely large income tax cut in 2012, including eliminating some teachers' positions entirely, but neglect of the schools preceded the imprudent tax cut.¹⁰⁸ A bi-partisan coalition had to repeal most of the tax cuts to fund the resultant budget shortfall in 2017.¹⁰⁹

Because conservative/libertarian politicians in Kansas do not wish to raise teachers' salaries across the board, the state has had difficulty in filling its vacancies: "political arguments, like those surrounding teacher salaries, are often based on selected data, thus opening the door to attacks claiming that any opposing group's data is fake, misleading or based on alternative facts."¹¹⁰ Nevertheless, comparative teachers' salaries in different states are not so subject to opinion and interpretation. The starting salary for teachers in Kansas is \$35,000, three thousand dollars below the national average, although about 40% of teachers nationally work either at a part-time or summer job. Professor Iorio suggests that a salary increase for teachers will improve the classroom, if only because the teachers will understand that the state recognizes their hard work.

Several deficiencies characterize this unwillingness to give teachers a living wage: education and teachers need a higher valuation in this society. When salaries are low and vacancies are high, the people who are hired to fill the gap are neither respected, nor is the pool of applicants well prepared. The same deficiencies characterize the attitude toward taking care of school buildings and school resources. Not enough resources, teachers, supplies, and types of courses go into the average school today, but the poorest school districts are suffering even more and need extra help. All of these improvements hinge on valuing education in this country: that means valuing both the children and the people who work in the schools with children.

Unfortunately, *San Antonio Independent School District v. Rodriguez* held that the financing system, based on local property taxes, did not violate the equal protection clause of the Fourteenth Amendment.¹¹¹ Our culture has been one of privilege, rather than right. "The state did not need

¹⁰⁷ Jaime Lowe, *The Second Shift: What Teachers Do To Pay Their Bills*, N.Y. TIMES MAG. (Sept. 9, 2018), <https://www.nytimes.com/interactive/2018/09/06/magazine/teachers-america-second-jobs.html>).

¹⁰⁸ See generally *Gannon v. State*, 420 P.3d 477, 481-85 (Kan. 2018). Gannon claimed that the State violated the adequacy requirement of Article 6 of the Kansas Constitution by inadequately funding public education grades K through 12 and that Republican legislators in control sought to have Gannon's suit dismissed to prevent the court's jurisdiction and oversight. *Id.* at 375.

¹⁰⁹ See generally Dominic Rushe, *Kansas Abandons Massive Tax Cuts That Provided Model for Trump's Plan*, THE GUARDIAN (June 7, 2017, 11:42 AM), <https://www.theguardian.com/us-news/2017/jun/07/kansas-tax-cuts-sam-brownback-trump-plan>; Geoffrey Kabaservice, *The Dream of a Republican New Deal*, N.Y. TIMES (Apr. 15, 2018), <https://www.nytimes.com/2018/04/13/opinion/sunday/trump-republican-new-deal.html>.

¹¹⁰ Sharon Hartin Iorio, *Teacher Salaries and Teacher Shortages*, SALINA JOURNAL (June 25, 2019, 1:01 AM), <https://www.salina.com/news/20190625/teacher-salaries-and-teacher-shortages>.

¹¹¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Plyler v. Doe*, 457 U.S. 202, 247 (1982) (reaffirming *San Antonio* that education is not a "fundamental right" under the Constitution). Nevertheless, the equal protection clause of the 14th Am. requires equal access to schooling when a state establishes a public-school system. Stephen

to provide for the maximization of human potential or even for the equitable distribution of its school resources; rather, the state was obliged to provide only the minimum educational opportunity necessary to achieve socialization.”¹¹² Children whose parents can afford to send their children to elite private schools have no worries about having undertrained teachers or those still studying for post-graduate teaching degrees. Children whose parents who can afford to live in a better than average public-school district and pay the real estate valuation taxes have little worry about their children’s future admission to a private college or good state university. Children whose parents are in average areas and, above all, children in the poorest school districts have much to worry about concerning their future educational and job opportunities.

When children in average, and to an even greater extent, in poor school districts, have new, inexperienced, and part-time teachers as a regular part of their educational experience, they are not getting the benefit in any of their classes of experienced teachers dedicated to one job. Turnover in teachers is much like the problem of turnover in minimum wage jobs: employers (state legislators or local councils) who wish to save money by paying the lowest wages because they consider the work so low-skilled that turnover will not decrease the quality of the output. They deliberately reject the possibility of increasing the starting salaries or minimum wage.¹¹³ In every job, experience counts. In the case of teachers, having new teachers mixed in with more experienced teachers available in the teachers’ lounge to give a guiding hand or to partner with a new teacher in a more regularized relationship makes a real difference to what the children can learn in their classrooms.

Neither the teachers nor the children themselves facing a substitute or new teacher multiple times during the year are valued in the society at large.¹¹⁴ Self-selected readers weighing in on newspaper editorials on schools and curriculum blame the disparity between rich and poor schools in this country, compared to other countries, pointing to this country’s more dominant libertarian/privileged culture, and on a non-intellectual outlook toward learning. Several “Canadian provinces distribute school funds far more equitably than American states, which tend to let school districts fend for themselves based on the wealth of their property-tax base (or lack of it).”¹¹⁵ Outside the Canadian-American comparisons, some conclusions about our various American attitudes toward teachers show that we ourselves are holding back children and their education in this country: “[t]oo many lawmakers regard teachers as “a drag on public finances,” as Ole Holsti of Salt Lake City put it, or resent that many are unionized, or disagree even with the

Lurie, *Why Doesn't the Constitution Guarantee the Right to Education?*, THE ATLANTIC (Oct. 16, 2013), <https://www.theatlantic.com/education/archive/2013/10/why-doesnt-the-constitution-guarantee-the-right-to-education/280583/>.

¹¹² Mark G. Yudof & Daniel C. Morgan, *Rodriguez v. San Antonio Independent School District: Gathering the Ayes of Texas-The Politics of School Finance Reform*, 38 LAW & CONTEMP. PROBS. 383, 383 (1974).

¹¹³ THALER & SUNSTEIN, *supra* note 48.

¹¹⁴ David Firestone, *Is American Culture to Blame for Failing Schools?*, N.Y. TIMES (Dec. 18, 2018), <https://takingnote.blogs.nytimes.com/2013/12/18/is-american-culture-to-blame-for-failing-schools/>. The author describes one responder’s statement “Americans do not support an egalitarian society” as bitter. Another responder concurred (apparently these readers emailed their own opinions without communicating with other readers): “Our best minds in the US go into hedge funds and high finance, where they figure out how de-fund education. No wonder our schools are places no one wants to be.”

¹¹⁵ *Id.* (explaining that various Canadian-Americans weighed in the advantages of their early education, including one who said “Canada has the gentle hand of government guiding it. The citizens accept and want government. They have a general view of ‘we.’ Not so in the USA”).

idea of a liberal education.”¹¹⁶ The dominance of one political view and the lack of compromise based on the common good and public interest of the children in many state legislatures has called teachers’ trust in the state government into question. Perhaps a crisis is needed to make democracy work, because it has spurred the interests of greater numbers of teachers in holding political office.

Professor Michael Sandel eloquently makes the case for a new politics of the common good, arguing that we have obligations of membership, solidarity, and loyalty.¹¹⁷ These obligations are not necessarily based on consent. He argues that although we all have unalienable rights to life, liberty, and property, a government may enforce tax laws passed by the representatives of a mere majority based on Locke, whom many of our founders followed. Locke’s response is that we give our “tacit consent” to obey the tax laws passed by a majority when we choose to live in a society.¹¹⁸

How should we characterize the role of “money and markets” in our society? Is a market society the market democracy some hope it is or do hidden dangers lurk within a market society which calibrates democracy in terms of money? Although different views within the society about education take their own place with lobbyists’ views being more directed and specific, it is clear that in education and in the labor market as well, political influence through lobbying plays a dominant role without recognizing any role for the common good, a trusting community or public transparency.¹¹⁹ The teachers’ unions have not been strong in many southern, midwestern and other areas driven by concerns to keep the government under-funded so that individuals could use more of their money to direct spending on the goods and services the individual seeks.¹²⁰ Lobbying is client-oriented and not oriented toward the common good, public disclosure or good faith and equal terms. Teachers ran in local and state races during the election of 2018, some as a continuing part of the activism and others following their increased knowledge and greater voice during the teachers’ strikes.¹²¹ In fact, this article concludes that lobbying contributes to distrust,

¹¹⁶ *Id.* Another responder expresses a similar contrast in attitude toward a good education for all between our Canadian neighbors and ourselves: “Canadians’ acceptance and indeed pride in their more egalitarian society contrast with Americans’ acceptance of having an underclass,” wrote Blair P., of Palm Desert, Calif. “It’s an Ayn Rand philosophy.” *Id.*

¹¹⁷ MICHAEL J. SANDEL, *WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS* (2012).

¹¹⁸ *Id.* Sandel does not ignore the libertarian notion that redistributive taxation—taxing the rich to give to the poor—in this case, funding public education at a working but not luxurious level, is akin to forced labor. See also JOHN TOMASI, *FREE MARKET FAIRNESS* (2012) (seeking “market democracy” which protects Locke’s version of happiness through ownership of property and a fair distribution of opportunities, that is access without guarantees).

¹¹⁹ Michael Sandel, *Why We Shouldn’t Trust Markets with Our Civic Life*, TED (Dec. 14, 2013), https://www.ted.com/talks/michael_sandel_why_we_shouldn_t_trust_markets_with_our_civic_life/transcript?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+TEDTalks_video+%28TEDTalks+Main+%28SD%29+-+Site%29

(explaining that the marketization of everything sharpens the sting of inequality and its social and civic consequence if we’re talking about nonmaterial goods and social practices such as teaching and learning or engaging together in civic life. In those domains, bringing market mechanisms and cash incentives may undermine or crowd out nonmarket values and attitudes worth caring about. Once we see that markets and commerce, when extended beyond the material domain, can change the character of the goods themselves, can change the meaning of the social practices, as in the example of teaching and learning, we have to ask where markets belong and where they don’t, where they may actually undermine values and attitudes w[e] car[e] about).

¹²⁰ Cf. Noam Scheiber, *Can Weak Unions Get Teachers More Money?*, N.Y. TIMES (May 5, 2018), <https://www.nytimes.com/2018/05/05/sunday-review/unions-teachers-money-strike.html>

(stating that there is no substitute for a strong union in a long-term struggle against powerful antagonists).

¹²¹ Madeline Will & Sarah Schwartz, *Dozens of Teachers Were Elected to State Office*, EDUCATION WEEK (Nov. 8, 2019), <https://www.edweek.org/ew/articles/2018/11/08/dozens-of-teachers-were-elected-to-state.html>.

precisely because it is slanted toward the interest of a client and therefore does not recognize any role for the common good, a trusting community or public transparency.

IV. THE URGENCY OF RETURNING THE MARKETS TO TRUSTWORTHINESS

What were the economic and political ideas current among the members of the founding generation when we started on the road to independence from the tyrant King George III in 1776? Scottish moral philosopher Adam Smith (1723-1790) was just writing *Wealth of Nations* in 1776 so the founders had not studied Smith's economic theories in detail, even if they were "in the air" already.¹²² Smith himself, in *The Theory of Moral Sentiments*, had already in 1759 laid the foundation for his economic observations, such as for peace and prosperity, free trade is superior to tariffs. It is important to understand the full context of Smith's position, which included warnings not only about governmental skewing of markets but also about the dangers of the same, if not greater, interference by vested interests in the economy and market places.¹²³ The *Theory* took a holistic look at what makes society work, recognizing the importance of moral (ethical), philosophical and behavioral (psychological) principles and observations. The discipline found in these fields assists Smith to provide a comprehensive description of the milieu in which the market and economic principles operate. Open access to jobs and professions, including freedom from slavery, which colonials, soon to be Americans, took much longer to disavow, perhaps in part since they had the political power to overcome people without a political voice. Writing during the Scottish flourishing of ideas, Smith kept human nature in mind, recognizing that the needs of all individuals to make a living had to be considered in order to promote a healthy, peaceful and prosperous society.¹²⁴

¹²² WEALTH, *supra* note 22.

¹²³ "Smith railed against monopolies and the political influence that accompanies political power." Alan B. Krueger, *The Many Faces of Adam Smith: Rediscovering 'The Wealth of Nations,'* N.Y. TIMES (Aug. 16, 2001), <https://www.nytimes.com/2001/08/16/business/economic-scene-the-many-faces-of-adam-smith-rediscovering-the-wealth-of-nations.html> (noting that not only did Adams, Jefferson, Madison and Hamilton study Adam Smith but Washington also knew Smith's work; the Princeton Rare Book Library holds a copy of WEALTH (5 ed. 1789) signed by George Washington). In his article, Krueger emphasizes that Smith accepted government intervention 'especially when the object is to reduce poverty.' *Id.* (quoting EMMA ROTHSCILD, *ECONOMIC SENTIMENTS: ADAM SMITH, CONDORCET AND THE ENLIGHTENMENT* (2001)). Krueger also stated that Smith argued "[w]hen the regulation, therefore, is in support of the workman, it is always just and equitable; but it is sometimes otherwise when in favour of the masters." *Id.* (quoting WEALTH (1789)).

¹²⁴ Lobbyists and people who write papers for trade associations and other industry groups may argue that only Smith's second volume is relevant and that the market can operate by itself (markets are markets and free markets do not need regulations to hold them back) without interference from concerns of human nature in the form of regulation in accordance with the rule of law. Although some lobbyists continue to claim they do not need regulation, the detailing of greed and non-compliance during the Great Recession refutes such requests to police themselves in the face of failing institutions requiring bailouts from the federal government to save the financial system. Still the country has struggled to find the right regulation. SHILLER, *supra* note 13, at ix (explaining that "the underlying dissatisfaction with our financial system, in the wake of the financial crisis, reflects real problems with the system that need to be fixed—problems that have not yet been solved by the new legislation and regulations put forward in the wake of the crisis.").

The second objection, also in the face of the facts, which continues to be made to regulation that America, which has no aristocratic titles, does not need the European idea of *noblesse oblige*. *Noblesse oblige*, LEXICO, https://www.lexico.com/en/definition/noblesse_oblige

Nevertheless, despite their newness, both of Smith's books, taken together rather than separately, embody much of the political and legal foundation of a good society which the founding generation had studied and wished to see flourish. The precursors of Smith's theories were available in two traditions the founding generation followed together in their education, one economic and the other the rule of law. Both traditions were important to actualizing the promises of the Revolutionary War, though not very much recognition was given to the small numbers of freed slaves, Cuban and Latino soldiers, totaling more than 3,000 men who served in that war.¹²⁵ Aristotle and Cicero, among other ancients, contributed to the notion of a fair and just society. The idea of the rule of law traveled a long journey but always featured prominently in the search for a good, stable society, including much, though hardly, if ever, all of the population. The rule of law was embodied in early Roman laws (XII Tables), elaborated in the works of later Roman jurists and codified in the works of Justinian's commission of law professors and lawyers (528-534), revived during the late 11th and 12th centuries in Bologna and brought to England by many scholars and administrators from Lanfranc of Pavia (rather than Bologna) (1105-1189) and Anselm of Aosta (1033-1109) to the English Henry de Bracton (1210-1268), trained in the revived Roman law. Bracton expressed fidelity to the rule of law, expected even from the king who often tried to escape these bounds.

Politically, although Smith was current news rather than school learning, the Founders were very familiar with the earlier tradition of the English Bill of Rights (enacted in 1689) from the Glorious Revolution of 1688. Among many other conceptions of governmental power, John Locke (1632-1704) wrote two very prominent treatises on government (1689-1690), specifying justifications for a revolution.¹²⁶ Locke, the man of property, emphasized that we are happy when we have our own property (without truly including anything about the happiness of poor people). The draft of the Declaration of Independence was changed when the word "property" became "happiness" in the phrase "life, liberty and property," leading to the wider setting for determining the role of wealth and money in society.

That wider context came in the Founders' education at about the same time the Founders studied Edward Coke (1552-1634), who added some conception of remedies beyond protection of

(last visited Nov. 20, 2019) (defining nobility obliges society as "the inferred responsibility of privileged people to act with generosity and nobility toward those less privileged"). That argument assumes away the disadvantages titles symbolize but fails to address the more recent aspects of inequality of opportunity poor Americans face, even when they work at two jobs. Our original open market now has split second timing that only wealthy operators can subscribe to and many other differences in protections of fundamental rights, protected by the wealthy for themselves as privileges they can afford. With the GI bill, middle and lower income covered workers (the GI bill originally did not cover returning African-American soldiers), soldiers returning after the Second World War did receive an equal opportunity to access a job or a career, but today minimum wages are only now starting to pick up after more than a decade of stagnation.

¹²⁵ Miguel Perez, *The Hispanic Flank of the American Revolution*, CREATORS (July 15, 2014), <https://www.creators.com/read/miguel-perez/07/14/the-hispanic-flank-of-the-american-revolution>. Bernardo de Gálvez (1746-1786), the Spanish colonial governor of Louisiana (captain general) for whom Galveston was named, received a letter from the Continental Army during the War for Independence. Erin Trickey, *The Little-Remembered Ally Who Helped America Win the Revolution*, SMITHSONIAN.COM (Jan. 13, 2017), <https://www.smithsonianmag.com/history/little-remembered-ally-who-helped-america-win-revolution-180961782/#ZAJdOuC8Z4fgQx23.99> ("In April 1777, George Morgan, the commander at . . . Fort Pitt, sent a flotilla down the Ohio and Mississippi rivers to New Orleans carrying a letter to Galvez, offering to trade with Spain and asking for aid in case the Americans decided to attack the British in Florida. The American ships sailed back up the Mississippi River that August filled with ammunition, arms, and provisions.").

¹²⁶ JOHN LOCKE, *THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE* (Paul E. Sigmund ed., Norton Critical ed. 2005) (including the treatises as well as the views of leading scholarly analyses of Locke).

individual property, real and personal. Coke updated in then-current English many Latin sources such as Bracton's treatise *On the Laws and Customs of England*, the common law and equity. Coke emphasized the rule of law which he found in Bracton. Henry de Bracton (1210-1268) carried the tradition of Roman law into the English forms of action, each one a separate and discrete cause for getting into court.

Coke updated all these traditions and emphasized in *Dr Bonham's case* (1610) that no man can be judge and jury in his own case. He also knew that judges must provide access to the people to come into court and receive a remedy for their injuries wrongly inflicted. Coke therefore made the availability of remedies part of the reading in English of the founders and therefore laid the groundwork for that most important principle that where a harm has occurred, a remedy must follow expressed in *Marbury v. Madison*.¹²⁷

Those who remember only Locke's privilege and not the protections for every man in Bracton, Coke and, to a lesser extent in William Blackstone (1723-1780), do not like either principle in *Marbury*, judicial review being the accompaniment to remedies. All these men were profoundly conservative. But they did recognize the rights of others than those in their own elite classes. That was a heritage from Roman law and several legal and political writers called out the king for failing to recognize the assembly that later became parliament and other ancient rights and privileges of "Englishmen" brought together in the Bill of Rights.

History is so important to correct the plutocratic market we have today. Participation of more people in the market on equal terms with disclosure of material information would go a long way to restoring trust. Arguably, plutocrats¹²⁸ do not so much want to democratize the king/tyrant, as they wish to supplant him with their own small, powerful group.

The possible dark side waiting for current societies in the Atlantic alliance such as U.K. and U.S.A., which had come to act together for peace and prosperity under the Schuman Declaration of May 9, 1950, after the Second World War, is prefigured in the current conditions of two failing, corrupt states, Afghanistan and the Russian Federation, both run by corrupt heads of state as criminal enterprises.¹²⁹ State corruption leads to both security concerns and the growth of populism.¹³⁰ "The state is very effective in getting what its leaders want for themselves, namely, resource wealth, . . . systematically looted by government officials Cleaning up corruption

¹²⁷ *Marbury v. Madison*, 5 U.S. 137, 147 (1803).

¹²⁸ A plutocrat is a person whose political power derives from extraordinary wealth and the ability to hire lobbyists. See generally, CHRYSIA FREELAND, *PLUTOCRATS: THE RISE OF THE NEW GLOBAL SUPER-RICH AND THE FALL OF EVERYONE ELSE* (2012).

¹²⁹ SARAH CHAYES, *THIEVES OF STATE: WHY CORRUPTION THREATENS GLOBAL SECURITY* (2015) (explaining that "corruption can no longer be understood as merely the iniquitous doings of individuals. Rather, it is the operating system of sophisticated networks that cross sectoral and national boundaries in their drive to maximize returns for their members"); LUKE HARDING, *THE MAFIA STATE: HOW ONE REPORTER BECAME AN ENEMY OF THE BRUTAL NEW RUSSIA* (2011); Jonathan Zasloff, *The Minister Did It: Thieves of State*, LEGAL PLANET (Apr. 6, 2015), <https://legal-planet.org/2015/04/06/the-minister-did-it/> ("[T]hese governments are not so much failed states but rather vertically integrated criminal enterprises, extracting wealth from the citizenry in a systematic, Mafia-like fashion."). See, e.g., Stephen Holmes, *Fragments of a Defunct State*, 34 LONDON REVIEW OF BOOKS 23, 25 (2012) (listing some characteristics of the Russian Federation such as: "The singularity of Putin's Russia is a consequence of the bureaucratic fragmentation that followed the break-up of the [Communist] Party [CPSU] in 1991, the siphoning into foreign bank accounts of money from the state treasury and state-controlled firms by rival bureaucratic and business factions, the continuing absence of socially legitimate owners of what were once state properties, the corruption of officialdom at all levels, the gap between rich and poor, the anaemic sense of national identity among the country's political and economic elite.").

¹³⁰ Zasloff, *supra* note 129 ("Just as importantly, this sort of corruption constitutes a primary — perhaps *the* primary — reason for the growth of Islamic radicalism.").

and introducing a culture of compliance with the rule of law is so much easier said than done.”¹³¹ We have not yet reached this dark place.

Articles may suggest a legislative solution the states or Congress could adopt to solve a particular technical or procedural glitch or barrier preventing justice from being done in certain circumstances. In this article, however, the analysis concerns the nature of a trustworthy market. The barriers to a full, operative, open and fair market from entry-level, low- paying jobs to accessible housing and public-school teachers’ salaries are many. 1) The desires of powerful interests to exercise their greater bargaining power over the other party (fast food chains which may seem to commit to a fair wage but which then later claim as an umbrella company to have no responsibility for paying the wages or requiring their franchises to pay a particular wage); 2) the powerful bargainer’s imposition of a thumb on the scale of justice by including secret term in a contractual relationship or acting on undisclosed information that may materially increase the other party’s risk (mortgage officers failing to disclose the impending increase of mortgages rates or landlords’ aggressive use of eviction proceedings against month-to-month tenants without a lease for a particular term); or 3) artificially paying less than a market wage so that employees are forced to work at a part-time or summer jobs to cover basic necessities (teachers, fast-food workers, renters with such high rent that one job pays too little to cover rent and food) are representative problems in the working of these three markets. Human greed is responsible for destroying trust in each of these three circumstances in which powerful bargaining party takes advantage of the party with whom the powerful party wishes to contract.

Furthermore, legislators sometimes decide not to provide remedies for these injustices since they may themselves face primary challenges from candidates backed by powerful bargaining parties who do not recognize workers or consumers’ basic rights. In these circumstances, additional barriers to suits from aggrieved parties will be included in legislations, such as compulsory arbitration before the dictating party’s chosen arbitrators. These actions leave the weaker parties without positive returns to draw them into the contract but the desperation of their own position and lack of sufficient bargaining power to resist these inequitable terms lock them into a no-win situation.

¹³¹ Press Release, OXFAM International, Billionaire Fortunes Grew by \$2.5 Billion a Day Last Year as Poorest Saw Their Wealth Fall (Jan. 21, 2019) (available at: <https://www.oxfam.org/en/pressroom/pressreleases/2019-01-18/billionaire-fortunes-grew-25-billion-day-last-year-poorest-saw>) (explaining in an Oxfam report entitled Public Wealth or Private Good, that worldwide, the growing gap between rich and poor arises in part from “underfunding public services” (including healthcare and education) while at the same time vastly “under-taxing corporations and the wealthy” (now at the lowest rates “in decades”) without even combatting “tax dodging” so that billionaires’ “fortunes increased by 12 percent last year—or \$2.5 billion a day--while the 3.8 billion people who make up the poorest half of humanity saw their wealth decline by 11 percent”). “Cutting taxes on wealth predominantly benefits men who own 50 percent more wealth than women globally, and control over 86 percent of corporations. Conversely, when public services are neglected poor women and girls suffer most. Girls are pulled out of school first when the money isn’t available to pay fees, and women clock up hours of unpaid work looking after sick relatives when healthcare systems fail. Oxfam estimates that if all the unpaid care work carried out by women across the globe was done by a single company it would have an annual turnover of \$10 trillion – 43 times that of Apple, the world’s biggest company.” See Zasloff, *supra* note 129.

V. CONCLUSION

To avoid entering this dark place, the concepts of "publicness" and "the good society" are applied to the market to link the functionality of the market to its integrity through shaping regulation in accordance with concepts of trust, good faith and the common good. The market cannot, using the unfair bargaining power of the dominant market makers, siphon off money or goods that do not belong to them. To induce large numbers of people to participate, the dominant actors in the labor (employers), housing (construction companies/landlords) or education (state legislators and governors) market, or indeed in any market, must change their habits: "consistent, open communication builds a belief [in the listener] that [s(he)] is being told everything that [s(he)] needs to be told."¹³² These dominant actors must 1) choose to disclose the material terms relevant to the market relationship they seek and must 2) accept equality of bargaining and terms by abiding with regulations consonant with the rule of law, including state and federal regulation. Compliance with the rule of law, in other words, establishing a reputation for trustworthiness, that is integrity, and reaching and maintaining a critical mass of actors in the market with trustworthiness as their hallmark must be assured with the cooperation of all, or the viability of the market will collapse. This takes long-term planning and compliance with the rule of law, encompassing much more than a quarterly approach to profits as the meaning of life.

Some circumstances or legislatures do not pose problems for legislation in the public interest or for the common good, such as California's protection of fast food workers, New York's protection for month-to-month tenants or Minneapolis' removal of exclusive zoning for single family housing, so that more land may become available for multiple dwellings. Again, the NLRB¹³³ brought 78 charges against McDonald's for punishing workers who sought higher pay, a rare action today for a governmental agency. These are models for returning local markets to fairness and trustworthiness through disclosure of material terms and risks and individual open access to these markets. In other words, the answer to distrust and excessive risk is more reasonable regulation subject to the rule of law but achieving this balance depends on a critical mass of people adhering to these principles. When no checks to and regulations of the market are authorized by the appropriate government in question, the market does not automatically work as though it were a theorem expressing perfect competition when in fact greedy human behavior operates to distort the market and divert too large a share of the profits to the most powerful bargainers.¹³⁴

Again, if we wish to avoid going to that dark place, more people than we can now count on today, including employers, landlords and politicians, must step up to embrace a culture of compliance with the rule of law, recognize the role of "publicness" and good faith and implement

¹³² JOHN BLAKEY, *THE TRUSTED EXECUTIVE: NINE LEADERSHIP HABITS THAT INSPIRE RESULTS, RELATIONSHIPS, AND REPUTATION* (2016). While the financial market is not directly treated in this Article, the essential principles are constant throughout different markets because one side may be motivated beyond making a profit from the deal, trade or exchange, to seek what should not be coming to the greedy investor. This example is from "the \$9 trillion corporate-bond market." Matt Wirz, *Bond Fight Pits Main Street Against Wall Street*, WALL STREET J. (June 28, 2019), <https://www.wsj.com/articles/bond-fight-pits-main-street-against-wall-street-11561633200> (explaining that an "SEC committee proposal to delay disclosure of large bond trades has split investors, with opponents saying it favors big Wall Street firms").

¹³³ See Greenhouse, *supra* note 52.

¹³⁴ Alan S. Blinder, *Empower Regulators to Stop Risky Financial Business*, WALL STREET J. (June 20, 2019), <https://www.wsj.com/articles/empower-regulators-to-stop-risky-financial-business-11560985117> (explaining the Financial Stability Oversight Council (FSOC) was not given enough power to do more than oversee financial activity and FSOC was left without the ability to regulate systemic risk).

the regulations that will give us the fair markets of “the good society,” built on trust through disclosure and equality of bargaining terms. Equality of bargaining terms may be encouraged by, among other actors, state legislatures to balance the greater bargaining power of employers (protection of employees’ hours and wages, as in the New York legislation in *Lochner*)¹³⁵ and landlords (New York state disclosure provisions for large rent increases and eviction).¹³⁶ The practice of some lobbyists today, frequently seeking to prevent any balance in order to capture all the bargaining power for their clients, must become subject to the rule of law through limitations on the scope of their activity and on the frequent corrupt/fraudulent activities of their worst client-landlords in accepting month-to-month tenants for their fees and deposits without allowing them to obtain the benefits of their applications and deposits by tenancy longer than two months before bringing eviction proceedings.¹³⁷

We underestimate the importance of markets with integrity to the health of the entire society. We must pay more attention to and, indeed, emphasize this role of the markets in helping to keep society stable through the willing participation of people in the various markets operating in this country. Markets in housing and labor are not discrete from the larger political functioning of society; freedom and justice, or their lack, in the marketplaces of America play their own part in maintaining freedom and stability (or giving rise to lack of choice and discontent) in society. The importance of markets with integrity cannot be overstated, just as the lack of integrity in the markets of the early Roman Republic fueled social unrest and serious strife during the fifth century BCE until the Twelve Tables were promulgated.

¹³⁵ See *supra* note 20; see also, Whittington, *supra* note 21.

¹³⁶ See *supra* note 86; see also *supra* text accompanying note 86.

¹³⁷ See Brenzel & Kromrei, *supra* note 86 (noting one lobbyist’s bitter joke: “On the news that Cuomo had abandoned the real estate industry, one lobbyist quipped that politicians are obviously in it for themselves.”). For the notorious practice of landlords’ thefts from month-to-month tenants through fraudulent eviction practices, see Ferre’-Sadurni, *supra* note 87.