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## HUMAN RIGHTS, POVERTY, AND CARE OF GIRLS AND WOMEN WITH THE PROSPECT OF A BABY

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## HUMAN RIGHTS, POVERTY, AND CARE OF GIRLS AND WOMEN WITH THE PROSPECT OF A BABY

Catherine M.A. McCauliff\*

*Human rights provide the lens used here to examine the treatment of women and girls at a time in their lives when they deserve the utmost respect, understanding and assistance, when they are early in a pregnancy, wanted or not, the result of violence or not, or a miscarriage of a wanted child. We live in a society where “[e]ssentially, people will have children if they feel they have job security, a stable economy, and feel supported in starting a family.”<sup>1</sup> Some countries and cities provide assistance to a mother upon the birth of a child in the form of monthly checks to assist in the care of the child.<sup>2</sup> These*

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\* Professor Catherine M. A. McCauliff's interests in human rights started in ancient history and English literature classes at Bryn Mawr College. Cicero and the Roman jurists were deeply concerned with these issues, but the trouble was always enforcement and not being faithful to the attitude that we humans always are in need of reform and renewal, so that we don't fall out of love with the rule of law. That is Catherine's intellectual bio but to add a fact or two, she received her A.B. from Bryn Mawr College, her M.A. and Ph.D. from the University of Toronto, and her J.D. from the University of Chicago. She has taught at Seton Hall School of Law since 1984: first as a tenured professor and now as an adjunct and emerita professor where she teaches fundamentals of business law and constitutional law survey in the Masters in Legal Studies program. One of her relevant recent articles is about Jacques Maritain's negotiations on behalf of UNESCO's Universal Declaration of Human Rights. She continues her central interests in human rights.

The author wishes to thank Angela C. Carmella and Waldemar G. Sandoval for their comments and suggestions.

1. Chloe Wilt, *Governments Are Paying People to Have Babies: Low Birth Rate*, MONEY \*Oct. 28, 2019), <https://money.com/government-pays-have-a-baby-low-birth-rate/#:~:text=Demographers%20study%20birth%20rates%20as,hand%2C%20can%20spell%20economic%20doom>.

2. Kathy Gifford, Jenna Walls, Usha Ranji, Alina Salganicoff & Ivette Gomez, *Medicaid Coverage of Pregnancy and Perinatal Benefits: Results from a State Survey*, KFF (Apr. 17, 2017), <https://www.kff.org/womens-health-policy/report/medicaid-coverage-of-pregnancy-and-perinatal-benefits-results-from-a-state-survey/>.

payments seem small in relation to childcare costs in the United States because many countries have not only various other provisions for children but also lower costs for basic necessities.<sup>3</sup> Equivalent payments in the United States in 2019 would be \$14,000 annually, compared to 1,000 euros in other countries.<sup>4</sup>

Not only are costs higher in the United States but this country also in 1787 drafted a socially and politically still colonial constitutional document in which most people beyond men of property were left to their own devices but still subject to the duty to provide military service when called upon.<sup>5</sup> Such attitudes die hard. The phrase “if one doesn’t work, one doesn’t eat” guided many people’s attitudes to colonial American society.<sup>6</sup> If, for pregnant women and girls the opposite assumption operated, it is a fair question whether fewer girls and women would select an abortion.<sup>7</sup> Perhaps support of mother and fetus, without state force against these mothers/mothers-to-be, might allow them to make an actual choice of their own not to abort the fetus.

This article argues that the failure to discuss the question of lack of aid to the poor, and its consequences, widely in the public square constitutes a serious democratic deficit. The lives and careers of Margaret Atwood (1939—) and Phyllis Schlafly (1924-2016) set forth the two opposite positions, the non-worker is not fed, and the poor should be cared for so that they may flourish (and they will then naturally contribute to society). Ms. Schlafly looked back to the traditional privileges which conservative, well-to-do, and wealthy women enjoyed, as in colonial times. She founded the organization Stop Taking Our Privileges in 1972 to work against the passage of the Equal

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3. Roosa Tikkanen, Munira Z. Gunja, Molly FitzGerald, Laurie C. Zephyrin, *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, THE COMMONWEALTH FUND (Nov. 18, 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries>.

4. Wilt, *supra* note 1.

5. U.S. Const.

6. THE JOURNALS OF CAPTAIN JOHN SMITH: A JAMESTOWN BIOGRAPHY 139 (John Thompson, ed. 2007).

7. Margot Sanger-Katz, Claire Cain Miller & Quoctrung Bui, *Who Gets Abortions in America?*, NYTIMES (Dec. 14, 2021), <https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html> (About half of women who had an abortion in 2014 were below the poverty line, with another quarter very close to poverty. “Guttmacher surveys show low-income women have been a growing share of abortion patients in recent decades.”)

*Rights Amendment (“ERA”).<sup>8</sup> Ms. Atwood, on the other hand, with a literary career, writing in several genres, explored and continues to explore the role of women in the world and in their personal relationships over several novels presenting some of the traps and pitfalls a woman may be likely to face. She founded an organization called Writers’ Trust of Canada.<sup>9</sup> The influence and approaches of these two women have reached beyond North America and are felt, known, and taken virtually around the world. Each presents the consequences of her position: privilege versus the pressure of society on women without alliances and without the help of a community.*

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8. Arbora Johnson, *Phyllis Schlafly*, NATIONAL WOMEN’S HISTORY MUSEUM, (2022), <https://www.womenshistory.org/education-resources/biographies/phyllis-schlafly>.

9. *Margaret Atwood*, BRITANNICA, <https://www.britannica.com/biography/Margaret-Atwood> (last update Jan. 21, 2024).

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## I. INTRODUCTION

This article examines the current reproductive rights situation in the United States from a broad perspective of human rights, which complements the many helpful discussions presenting medical alternatives and technical ways to address both *Dobbs*<sup>10</sup> and other issues women and girls may face today concerning their reproductive healthcare. Women and girls' healthcare and flourishing involve much more than isolated considerations of abortion, miscarriage, and

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10. See *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Contraceptives and abortion pills are the major choices girls and women have since the decision in *Dobbs*. Some contraceptives protect against sexually transmitted diseases. "Oral contraceptives ... reduce the risk of endometrial and ovarian cancer and protect against acute pelvic inflammatory disease and ectopic pregnancies. ... [but] increase the risk of cardiovascular disease [venous thrombosis]." National Research Council (US) Committee on Population, *Contraceptive Benefits and Risks*, NCBI (1989), <https://www.ncbi.nlm.nih.gov/books/NBK235069/>. "Before 23 weeks, a baby's rate of survival remains low, even with interventions: only 5 to 6 percent. At 23 weeks, the rate increases to 23 to 27 percent. At 24 weeks, a baby's survival rate reaches 42 to 59 percent. By 25 weeks, the survival rate is as high as 67 to 76 percent." Sarah Bradley, *When can my baby survive outside the womb?*, BABYCENTER (Sep. 15, 2022), [https://www.babycenter.com/baby/premature-babies/when-can-my-baby-survive-outside-the-womb\\_10419991](https://www.babycenter.com/baby/premature-babies/when-can-my-baby-survive-outside-the-womb_10419991). Survival itself does not mean freedom from disabilities and complications or reach the question of how long some of these conditions may last. Like contraceptives, abortion pills may have other uses: mifepristone has "multiple biological effects, ... [and] could work for conditions as unrelated as veterans with brain injuries and pregnant women seeking abortions. In addition to blocking progesterone, it also blocks the hormone cortisol," used to treat Cushing's Syndrome under the name Korlym since 2012. See Caroline Hopkins, *The 'abortion pill' May Treat Dozens of Diseases, but Roe Reversal Might Upend Research*, NBC (June 25, 2022), <https://www.nbcnews.com/health/health-news/abortion-pill-may-treat-dozens-diseases-ro-reversal-might-upend-researchna34812>.

fertility. This article concentrates on a question of social justice: as science proceeds with its discoveries and applications, why should poor girls and women, pregnant or not pregnant, with or without children, not be aided so that they may also find a place and a voice at the public table of social, economic, and political discussion about the government of the country? This article argues that the failure to discuss the question of lack of aid to the poor, and its consequences, widely in the public square constitutes a serious democratic deficit.<sup>11</sup>

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11. “A democratic deficit occurs when ostensibly democratic organizations or institutions, in fact, fall short of fulfilling what are believed to be the principles of democracy.” Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 860 (2007). Democratic deficit occurs when the electorate recognizes a lack of accessibility for the ordinary citizen, or lack of representation of the views of the average or ordinary citizen in the legislature or other branch of government, and lack of accountability of such branches of government as Congress and state legislatures. In the United States, the three branches of government may be said to have clogged arteries. The Court may suddenly refuse to recognize previously enjoyed fundamental rights or even threaten to revoke previously recognized rights when no case involving such rights is now before the Court. When the Constitution fails to operate properly to provide needed remedies, democratic political action in the form of legislation should be expected. If, however, Congress is also unable to reach consensus on legislation, we are faced with a large and even dangerous democratic deficit which threatens both political instability and financial disruptions.

For example, the democratic deficit and breakdown may be seen when Congress and the state legislatures are *inaccessible to the ordinary citizen because of gerrymandering in both Congress and state legislatures and their complex methods of operation. Some states do not even allow members of the other party to speak during debates of bills. Threats to eligibility to vote extend beyond gerrymandering and include the loss of statutory voting rights as in Shelby Co. v. Holder, 570 U.S. 529 (2013). Congress has equally convoluted methods of bringing bills to the floor with the result that the party not in control has almost no say whatsoever in some issues. Issues of gun control, growing violence in society, voting, aid to the poor and bills on the environment are prominent examples of strangleholds on bills when in many instances the silenced party represents nearly as many voters as (and in the case of electoral votes, even more voters) than the controlling party.* One author argues that separation of powers, large numbers of veto points in the legislative process, and highly detailed and judicially enforceable legislation constitute a combination of characteristics which prevents each state from exercising control over the regulation in its own jurisdiction. R. DANIEL KELEMEN, *THE RULES OF FEDERALISM: INSTITUTIONS AND REGULATORY POLITICS IN THE EU AND BEYOND* Kelemen’s “abstract” on book Jacket (1-st ed. 2004).

However persuasive the theory of federal abuse of the states in interpreting regulation this view may be, the state legislatures and Congress behave little differently in acting undemocratically toward their own constituent voters, as the legislatures of Oklahoma (Mauree Turner, Mar. 2023), Tennessee (Jones &

Society itself has grown more complicated during the last century with greater interdependence on international trade and relations. Many countries after the Second World War developed a set of common values to be followed among national trading partners, including sharing some of the profits of trade with the peoples of the different national trading partners, in effect a continuation after World War II of the New Deal and industrialization Europe did not achieve during the fascist 1930s, when Europe developed the coal and steel community and markets.<sup>12</sup>

Nevertheless, several widely different approaches to life and work remained possible amid the sharing of some common

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Pearson, Apr.), and Montana (Zooney Zephyr, Apr.) demonstrate. See Sanya Mansoor, *Rep. Zooney Zephyr: My Censure Was an Attack on Democracy*, TIME (May 2, 2023, 2:43 PM), <https://time.com/6276449/zooney-zephyr-interview-censure/>. Decreased freedom of the press and lack of local news often accompany undemocratic state legislatures as well as an increase across the society in low level violence. Jay Jennings & Meghan Rubado, *Newspaper Decline and the Effect on Local Government Coverage*, MOODY COLLEGE OF COMMUNICATIONS (Nov. 2019), [https://moody.utexas.edu/sites/default/files/Strauss\\_Research\\_Newspaper\\_Decline\\_2019-11-Jennings.pdf](https://moody.utexas.edu/sites/default/files/Strauss_Research_Newspaper_Decline_2019-11-Jennings.pdf). (Key finding # 4, at 1). Policies which arise in non-democratic state governments include lack of equal representation for all in government (gerrymandering), unequal school systems and difficulty in accessing medical care and health insurance, generating the notion that government is not serving the people. With the lack of trust in government comes a coarsening of society in general and a lack of civility and respect for others, even in neighborhoods not plagued by guns and violence.

12. These countries later became the member states of the EU. European Commission. See *Robert Schuman: The Architect of the European Integration Project*, EUROPEAN COMMISSION (2023), [https://european-union.europa.eu/system/files/2021-06/eu-pioneers-robert-schuman\\_en.pdf](https://european-union.europa.eu/system/files/2021-06/eu-pioneers-robert-schuman_en.pdf). This is similar to the need in Europe as well which the cooperation of Western European countries shows in the steps toward a union on policies and international trade within Europe. *Id.* (Robert Schuman, the French Foreign Minister, drew up the internationally renowned Schuman Plan, which he published on May 9, 1950, the date now regarded as the birth of the European Union. He proposed joint control of coal and steel production, the most important materials for the armaments industry. The basic idea was that whoever did not have control over coal and steel production would not be able to fight a war. Schuman informed the German chancellor Adenauer of the plan who accepted the opportunity.) See also Simon Kuznets, *Economic Growth and Income Inequality*, 45 AM. ECON. REV. 1 (1955) (tracing the need for workers with more education as mass industrialization became more sophisticated and the consequent share in 1) economic wealth of the educated poor, that is people without inherited wealth to invest and 2) political power which brought forth taxation, the revenues from which could be distributed to a wider group, most prominently during the Great Depression when President Franklin Roosevelt proposed many social innovations in “the New Deal,” including Social Security). For a current look at the political intellectuals of this post-war period, see SAM MOYN, LIBERALISM AGAINST ITSELF COLD WAR INTELLECTUALS AND THE MAKING OF OUR TIMES (2023).

values and circumstances after the end of World War II. The lives and careers of Margaret Atwood (1939—) and Phyllis Schlafly (1924-2016) symbolize two divergent major pathways women took during the 1950s-1970s.<sup>13</sup> Ms. Schlafly looked back to the traditional privileges which conservative, well-to-do, and wealthy women enjoyed. They worked at home without a recognized economic worth of their daily contributions to the running of the household and family enterprises but expected unquantified economic and moral/emotional support from their husbands.<sup>14</sup> Schlafly founded the organization Stop Taking Our Privileges in 1972 to work against the passage of the Equal Rights Amendment (“ERA”) and in 1975 the Eagle Forum, for the same purpose, to uphold or restore one popular post-war strain of conservative viewpoints.<sup>15</sup> Ms. Atwood, on the other hand, has been following a literary career, writing in several genres, in which she explored and continues to explore the role of women in the world and in their personal relationships over several novels presenting some of the traps and pitfalls a woman may be likely to face. She founded an organization called Writers’ Trust of Canada.<sup>16</sup> The influence and approaches of these two women have reached beyond North America and are felt, known, and taken virtually around the world.<sup>17</sup>

Just as Phyllis Schlafly emphasized the wealthy woman’s privilege of staying home and her conservative need to impose that behavior on women who worked or needed a job, including the prohibition on abortion, without the extension of societal support for those poor women, Margaret Atwood set forth the consequences for women of bearing children at the behest of the state, not necessarily Texas, Florida or other states but any non-democratic state by showing the inhumane treatment of these servants of the state who were farmed out to the wealthy

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13. Atwood, *supra* note 9; Johnson, *supra* note 8.

14. Henry Kokkeler, *Phyllis Schlafly and the End of the Equal Rights Amendment*, BOUNDARY STONES (Apr. 19, 2022), <https://boundarystones.weta.org/2022/04/20/phyllis-schlafly-and-end-equal-rights-amendment>.

15. *Id.*

16. WRITERS’ TRUST OF CANADA, <https://www.writerstrust.com/about/> (last visited Feb. 1, 2024).

17. Sophie Gilbert, *We’re Living in Phyllis Schlafly’s America*, THE ATLANTIC (Apr. 17, 2020), <https://www.theatlantic.com/culture/archive/2020/04/hulu-mrs-america-phyllis-schlafly-long-shadow/610129/>. (still after her death, Ms. Schlafly remains famous around the world. “The character of Serena Joy in Margaret Atwood’s *The Handmaid’s Tale*, . . . was partly inspired by [Schlafly].”)



to bear children, consequences shown most clearly in the novel *The Handmaid's Tale*. The circumstances of the women with little political voice or social and economic support shown in the novel are also present in the victims facing complications from miscarriages which may in some states be denominated abortions rather than naturally occurring events for which the mothers needed immediate help but are made to sit in the hospital's waiting room with partial miscarriages and dying fetuses posing life-threatening risks to the mother while the ambiguously drafted new laws are willing to risk the death of the mother to allow the nonviable fetus to die naturally even though it has become a toxic threat to its mother. This post-*Dobbs* environment is explored in the body of this article, beginning with the description of the poverty which prevents at least half the pregnant women or girls who seek abortions from being able to help her baby and even fetus to flourish and grow.

## II. POVERTY REVEALS THE NEED FOR CARE: REASONS FOR RESISTANCE TO THAT PROPOSED CARE

In the United States, the story of a shared prosperity is roughly similar to the situation in Europe, even in the years of seeming prosperity after World War II during the 1950s and 1960s. The deep separation we see now, among at least a significant minority of one party and the average person in the middle of the political spectrum, was equally visible in the refusal during the 1950s and 1960s of a significant minority of the population on the political right to accept President Lyndon B. Johnson's civil rights and social justice programs.<sup>18</sup> Johnson

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18. *Lyndon B. Johnson Defeats Barry Goldwater for Presidency*, HISTORY <https://www.history.com/this-day-in-history/johnson-defeats-goldwater-for-presidency> (last updated Oct. 30, 2020) ("During the 1964 campaign, Barry Goldwater was decidedly critical of Johnson's liberal domestic agenda, railing against welfare programs and defending his own decision to vote against the Civil Rights Act passed by Congress earlier that year. However, some of the most dramatic differences between the two candidates appeared over the issue of Cold War foreign policy."). Again, "which post-World War II presidential elections predicted the political trends we see today... some of the techniques that still power our very partisan politics 50 years later had their origins in 1964's deeply polarizing contest.... Goldwater's intense appeal in the South produced a realignment in post-Reconstruction party loyalties, on which both Richard Nixon and Ronald Reagan would later capitalize." Larry J. Sabato, *How Goldwater*

“dedicated himself to eradicating the Ku Klux Klan and finding the killers of civil rights activists.”<sup>19</sup> Similar to Donald Trump’s resistance to Joseph Biden’s victory in 2020, Johnson’s defeat in 1964 of Barry Goldwater did not bring anything like complete assent. The difference was that instead of an insurrection, complete with the murders of police officers and significant destruction of property inside the halls of Congress, during the Sixties, the filibuster was frequently used to keep Johnson’s bills from coming up for a vote at all.<sup>20</sup> Instead of contesting a lost election, the dissenters to domestic programs in the 1960s worked on preventing the victor from obtaining all of his party’s legislative proposals.<sup>21</sup> The Great Society and the Civil Rights legislation reflected President Johnson’s and his supporters’ concern that human rights be recognized in the proposals to enact legislation inclusive of all people.

One of Johnson’s programs facing the most resistance was the plan to provide fair housing regulations.<sup>22</sup> Housing and education were tied together in the neighborhoods. Louise Day Hicks, like her father, invested in mortgages, and did not want the pressure on the black schools relieved. Similar to partisan people today, Hicks made up “evidence,” calculated to convince people to follow her views. Although of “223 murders in Boston from 1973 to 1974 . . . [only] two dozen involved blacks killing whites,” but Hicks raised the numbers to a more alarming percentage and claimed that, “at least one hundred black people walking around in the black community . . . killed white

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*Changed Campaigns Forever*, POLITICO (Oct. 27, 2014), <https://www.politico.com/magazine/story/2014/10/barry-goldwater-lasting-legacy-112210/>.

19. Kent Germany, *Lyndon B. Johnson and Civil Rights*, MILLER CENTER AT THE UNIVERSITY OF VIRGINIA, <https://prde.upress.virginia.edu/content/CivilRights>.

20. JULIAN E. ZELIZER, *THE FIERCE URGENCY OF NOW: LYNDON JOHNSON, CONGRESS, AND THE BATTLE FOR THE GREAT SOCIETY* (2015, paperback) (describing the fight for Civil Rights and the socio-economic programs of the Great Society as well as the strong resistance to President Johnson’s programs).

21. *Id.*

22. *Id.* at 228-30. See J. ANTHONY LUKAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* (1st Vintage Books ed.1986) (see Chapter 9. The Chairwoman - Boston School Committee Chairwoman Louise Day Hicks opposes school desegregation, establishes Restore Our Alienated Rights (ROAR).) See also RONALD P. FORMISANO, *BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S* (2004).

people.”<sup>23</sup> In Brooklyn and Queens, at roughly the same time as Hicks was visibly protesting desegregation, the FBI investigated the Trumps in “the 1970s [for] alleged racial discrimination in housing units.”<sup>24</sup>

Nevertheless, today, the wealthiest “top one percent” has about twenty percent of the global income, after ordinary salaries imperceptibly started to stagnate during the early 1980s, followed by little blips upward here and there until after the Great Recession (2007-2009)<sup>25</sup> when the dramatic change was obvious to all.<sup>26</sup> Matthew Desmond, a sociologist of poverty, talks about two levels of poverty: 1) the official poverty line, which covers about eleven percent of the American population, and 2) an additional nineteen percent or so, some making as much as \$55,000 in 2021, “many of ...[whom] aren’t officially considered poor.”<sup>27</sup> Desmond focuses on the centrality of affordable housing as a route out of poverty and analyzes poverty as, “an injury, a taking. Tens of millions of Americans do not end up poor by a mistake of history or personal conduct. Poverty persists because some wish and will

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23. DOMINIC SANDBROOK, *MAD AS HELL: THE CRISIS OF THE 1970S AND THE RISE OF THE POPULIST RIGHT* 53 (2011).

24. Megan Wilson, *FBI Releases Documents Related to Trump Apartment Discrimination Case*, THE HILL (Feb. 15, 2017, 7:02 PM ET), <https://thehill.com/homenews/news/319788-fbi-releases-documents-related-to-trump-apartment-discrimination-case/>; David Choi, *The FBI Released Hundreds of Pages Related to a 1970s Housing Discrimination Lawsuit Against Trump*, BUSINESS INSIDER (Feb. 15, 2017, 8:53 PM), <https://www.businessinsider.com/fbi-report-trump-housing-discrimination-2017-2> (“The FBI made available 389 pages from a 1970s investigation of racial discrimination accusations against Trump Management.”).

25. Liaquat Ahamed, *The Rich Can’t Get Rich Forever, Can They?*, THE NEW YORKER (Sep. 2, 2019), <https://www.newyorker.com/magazine/2019/09/02/the-rich-cant-get-richer-forever-can-they>.

26. *Id.* (explaining that the increase in the share of income of the top one percent in the United States and in other parts of the world may be due to the opening of newly industrializing areas of the world with cheap labor such as China in the 1970s, on the one hand, and increasing technology in the United States, on the other, both of which squeeze workers with the lowest skills).

27. Dave Davies, *Private Opulence, Public Squalor: How the U.S. Helps the Rich and Hurts the Poor*, NPR (Mar. 21, 2023, 12:45 PM), [https://www.npr.org/sections/health-shots/2023/03/21/1164275807/poverty-by-america-matthew-desmond-inequality?utm\\_source=pocket-newtab](https://www.npr.org/sections/health-shots/2023/03/21/1164275807/poverty-by-america-matthew-desmond-inequality?utm_source=pocket-newtab) (discussing Desmond’s book *Poverty, by America* (2023), which examines housing segregation, predatory lending, the decline of unions and tax policies that favor the wealthy as factors in American poverty).

it to.”<sup>28</sup> In that, Desmond reminds us of Chief Justice John Marshall’s words that “[t]he 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.”<sup>29</sup>

The statement that poor mothers-to-be need the equivalent of a family’s support, coupled together from the services of several agencies, might be of interest to anti-abortion groups insofar as half the abortions have been found to be among poor girls and women.<sup>30</sup> If these laws were in place for all women and girls, the number of abortions might decline substantially whether or not abortion remains illegal in many states, even before *Dobbs*, as in Texas.<sup>31</sup> After *Dobbs*, women

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28. Alec MacGillis, *In Matthew Desmond’s “Poverty, by America,” the Culprit Is Us*, N.Y. TIMES (Mar. 13, 2023), <https://www.nytimes.com/2023/03/13/books/review/poverty-by-america-matthew-desmond.html>.

29. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). See generally, Keith E. Whittington, “Interpose Your Friendly Hand:” *Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POLITICAL SCI. REV. 583 (2005).

30. Theresa Ghilarducci, *59% of Women Seeking Abortions are Mothers Facing High Poverty Risk*, FORBES (Dec. 24, 2021, 8:21 PM), <https://www.forbes.com/sites/teresaghilarducci/2021/12/24/59-of-women-seeking-abortions-are-mothers-facing-high-poverty-risk/?sh=85fb783264f8>.

31. Chloe Atkins, “Lifelong consequences:” *What happens to people who can’t get abortions*, NBC (Sep. 12, 2021, 1:30 AM), <https://www.nbcnews.com/politics/politics-news/lifelong-consequences-what-happens-people-who-can-t-get-abortions-n1278838> (reporting that one study found that people denied an abortion had almost four times greater odds of being below the federal poverty level and setting forth the consequences for females unable to obtain an abortion under the six-week (fetal heartbeat) law in effect in Texas since Sept. 1, 2021, but still popularly called Senate bill 8).

What do we have in *Dobbs* and the laws following in its wake? The majority returns to the consideration of punitive practices in earlier periods in time, a failing coercive program. The real solution to abortion is a better, kinder and gentler society that takes seriously supporting the poor and enabling them to become flourishing, functioning members of society who pay taxes rather than receive subsistence aid from the states which politically, at least, have little to contribute to the poor. Statistically, about 50% of those seeking abortions do not wish to have an abortion but feel constrained by their lack of ability to nurture and protect a baby when they can hardly feed themselves. If we enacted the programs to provide the young girl or woman with enough help and support to become self-sufficient and able to care for a family, these women and their children would be able to become tax-paying members of society with jobs. The current carceral attitude toward women—she attracted a rapist by being outside her house at a time when a rapist could attack her and now she must accept the penalty of her criminal behavior by raising her child in poverty—is punitive and carries with it a carceral attitude toward women insofar as an unaided person below the poverty line (or not much above it) is not actually in a jail or prison, but

facing spontaneous miscarriages are disbelieved in many states and are treated as suspects of a crime.<sup>32</sup> Instead, they should never have been mistreated. As it is, there should be aid for these patients who have suffered a miscarriage and who are in no way criminals, including treatment for depression and dealing with other fallout from the egregiously hurtful treatment of a woman/girl awaiting motherhood with joyful expectations. The carceral model for women expecting to be mothers should be replaced by a more appropriate caring model rather than the misogynistic condemnation that she made her bed, now let her get up and get a second job to support the consequences of her actions, with nothing to be said about the father's actions.<sup>33</sup>

Every attempt at expanding social/economic programs brings fierce resistance, particularly from wealthy taxpayers who fear that food for all the poor families would not so much lead to flourishing and then integration of more people into the workforce who pays taxes. Instead, these wealthy people fear that vigorous, well-fed (or at least no longer suffering from food insufficiency) young people would be content to stay home waiting for the next food coupon. Many wealthy people are afraid of the sturdy beggar or young person, who in their own minds only, wishes to eat as freeloaders, at the same time that many wealthy people are themselves too greedy to share even a small percentage of their surplus, which they deem a necessary part of their fortunes.<sup>34</sup>

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is functionally because of her limited ability to do enough to provide herself with any social connections or other benefits of a psychologically and economically self-sufficient person. Samuel Moyn, *Economic Rights Are Human Rights*, FOREIGN POLICY (APR. 9, 2018, 8:00 AM), <https://foreignpolicy.com/2018/04/09/the-freedom-america-forgot-populism-human-rights-united-nations/> (explaining that political human rights are not able to be carried out and put into effect without social and economic rights, such as food shelter, education and healthcare).

32. Robin Levinson-King, *US Women are Being Jailed for Having Miscarriages*, BBC (Nov. 12, 2021, 04:40 PST), <https://www.bbc.com/news/world-us-canada-59214544> (Brittney Poolaw was just about four months pregnant when she lost her baby in the hospital in January 2020... convicted [in Oct. 2021 during pregnancy loss awareness month] and sentenced to four years in prison for the first-degree manslaughter of her unborn son.... Some ... compared the case to Margaret Atwood's dystopian novel "The Handmaid's Tale.")

33. See generally MARGARET ATWOOD, *THE HANDMAID'S TALE* (Vintage Books, 2018). In the *Handmaid's Tale*, a handmaid gives birth and must give up her child as part of her punishment to repay her debt to society for her sins.

34. For example, Leon Cooperman would rather eliminate the Department of Education than be subject to a wealth tax, on the ground "that the country doesn't

III. THE PROBLEM OF GIVING POOR GIRLS AND WOMEN NO CHOICES (AFTER RAPE, INCEST, MISFORTUNE, ILLNESS, OR MENTAL OR PHYSICAL ABUSE)

Some strains of anti-abortion views are grounded in the position that the country should not spend tax money on poor women who have every kind of need. Because she has little and sometimes nothing, she needs every kind of medical care (including mental health assistance, pre- and post-natal care for the mother and the baby), socialization, healing from abuse, rehabilitation from drugs and alcoholism (including the extreme suffering of babies born with fetal alcohol syndrome and the deficits in the ability of their brains to function, sometimes at any human level), job training, training in how to take care of a baby, emotional support for herself, affordable housing, nutritious food, baby supplies from diapers to child care, development of interpersonal and communication skills, as well as mentoring.<sup>35</sup> All of those prerequisites and more are necessary, if the mother is to succeed at job training or remedial education.<sup>36</sup>

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need to progress in ...[education] anymore.” Juliana Kaplan, *Billionaire Leon Cooperman Slams Elizabeth Warren’s Wealth Tax Again, Suggests Eliminating the Education Department* Instead, BUSINESS INSIDER (Apr. 30, 2021, 9:11 AM), [https://www.businessinsider.com/billionaire-leon-cooperman-wealth-tax-elizabeth-warren-education-department-cnbc-2021-4#:~:text=Ultimately%2C%20?&utm\\_source=facebook&utm\\_medium=share&utm\\_campaign=facebook](https://www.businessinsider.com/billionaire-leon-cooperman-wealth-tax-elizabeth-warren-education-department-cnbc-2021-4#:~:text=Ultimately%2C%20?) (despite obvious flaws in the “winner-take-all” nature of the tax code (for example, private-equity partners are entitled to have most of their compensation for managing others’ investments taxed at the lower capital-gains rate, see *First Step Job Training Program*, COALITION FOR THE HOMELESS, <https://www.coalitionforthehomeless.org/our-programs/first-step-job-training/first-step/>) as MacGillis, *supra* note 28 points out.

35. Meg Wiggins et al., *Postnatal Support for Mothers Living in Disadvantaged Inner City Areas: A Randomized Controlled Trial*. 59 J. EPIDEMIOL. COMMUNITY HEALTH 288, 291-92 (2005).

36. *First Step Job Training*, COALITION FOR THE HOMELESS <https://www.coalitionforthehomeless.org/our-programs/first-step-job-training/first-step/> (explaining the conditions of the community served: “The majority of those living in NYC homeless shelters are families — mostly single mothers and their children. These women face a tremendous array of obstacles to stability, including a lack of full-time employment, low educational attainment, and self-esteem shattered by domestic abuse.” See *U.S. v. Morrison*, 529 U.S. 598, 625-27 (2000), for what (but not why) Rehnquist, C.J. and his majority removed from women.

*Morrison* is discussed in the text, *infra* at notes 27-28.

*A. The Underlying Situation for All Women and Girls Bound to the Service of the Fifty States*

Margaret Atwood's *The Handmaid's Tale* (1985) allows us to conclude with some reason that if male conscription entails training in combat, self-protection, food, shelter, clothing and a small salary, so too is any state government (forcibly enrolling pregnant girls and women to carry a fetus to maturity) responsible for providing the same to women in service to the state as the armed services must do for male conscripts. In the *Handmaid's Tale*, the army of women in domestic service to the state must be fed, clothed, and housed.<sup>37</sup> Women in the United States today who are poor do not have much if any support in these areas, nor in job training, since babies born alive will need eighteen years of care, but a poor mother with a baby not receiving help and support will fall below the poverty line before the baby reaches kindergarten.<sup>38</sup>

It is difficult to erase or deny the powerful, authoritarian image of civil or military service to a state in relation to that state's forcing girls and women, even mentally or physically ill, to bear a child she may never have thought of or consented to bear, especially when she is a victim of rape or incest, or if she becomes ill while she is pregnant. *Dobbs*, under the post-*Roe/Casey* framework, no longer allows her to choose an abortion in all 50 states.<sup>39</sup> Even girls or women who suffer an incomplete miscarriage may have to wait to be treated until their lives are at stake from sepsis.

For a short time before *Dobbs*, a *Healthline* article on "natural miscarriage" was able to advise the sufferer of a miscarriage that "the way you manage your miscarriage is up to you."<sup>40</sup> This is no longer so, in part due to the harsh implementation of *Dobbs* in many states. Doctors are afraid of losing their licenses or being criminally charged, even if they

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37. Atwood, *supra* note 33.

38. C.P. Larson, *Poverty During Pregnancy: Its Effects on Child Health Outcomes*, 12 PAEDIATR. CHILD HEALTH 673 (Oct. 2007) (In countries around the world, poor women, after giving birth, fall into deeper levels of poverty. For example, in Canada, a mother who becomes single has a 50% chance of becoming poor *within 12 months*). See also G.W. Evans, *The Environment of Childhood Poverty*, 59 AM. PSYCHOL. 77 (2004)

39. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

40. Ashley Marcin, *What You Need to Know About Miscarrying Naturally at Home*, HEALTHLINE (Apr. 24, 2020), <https://www.healthline.com/health/pregnancy/natural-miscarriage>.

perform a therapeutic abortion, and even if the health consequences for a woman with an incomplete miscarriage may be quite dangerous and even life-threatening.<sup>41</sup> The fears of doctors are not unfounded, because many supporters of pre-born life in all circumstances are focused not on the health of the woman who has a miscarriage and who hopes to conceive again once she has recovered her health, but on preventing any female from disguising an abortion as a miscarriage, so that women who have miscarriages must wait to obtain treatment until their own health is in serious danger.<sup>42</sup> For example, Dr. Christina Francis of the American Association of Pro-Life Obstetricians and Gynecologists “believes that loosening regulations on mifepristone could mean more abortions.”<sup>43</sup>

The Center for Reproductive Rights filed a lawsuit in a Texas County Court on March 8, 2023, with five individual women seeking clarifications of abortion restrictions in two state anti-abortion laws.<sup>44</sup> Several of the plaintiffs’ stories provide a strong, comprehensive picture of the extent of the harm, tragedy, and confusion for the residents of the state of Texas which ensues from having no specific medical exceptions listed in the legislation itself. These laws, however, do provide “criminal and civil charges that could lead to up to 99 years in prison, six-figure fines, and the loss of their medical license.”<sup>45</sup> For example, Amanda Zurawski was “diagnosed with cervical

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41. *Id.*

42. *Id.*

43. *New Treatment For Miscarriages Is Complicated By Abortion Debate*, NPR (Jan. 10, 2019), <https://www.npr.org/transcripts/683861967>, (explaining that those concerned about an increase in abortions wonder whether women will hide their abortions by claiming they suffered a miscarriage: “CHRISTINA FRANCIS: That’s not why I’m questioning this article as far as changing my practice. But I do think, as a side issue, more women are probably going to be able to obtain medical abortions.”)

44. Niki Griswold, *Five Women Sue Texas, Say the State’s Abortion Ban Put Their Lives and Fetuses at Risk*, AUSTIN AMERICAN STATESMAN <https://www.statesman.com/story/news/politics/state/2023/03/07/texas-abortion-ban-lawsuit-five-women-sue-state-say-it-endangered-their-lives/69977280007/> (last updated Mar. 8, 2023, 6:03 PM). Because the online version of the article has no internal referencing, all quotations in this and the next paragraph in the text of this article are simply stated here to be from the same *Austin American Statesman* article. *Zurawski v. State of Texas* is the name of the suit. *See also* Stephania Taladrid, *In the Post-Roe Era, Letting Pregnant Patients Get Sicker—by Design*, THE NEW YORKER (May 6, 2023), <https://www.newyorker.com/news/dispatch/in-the-post-roe-era-letting-pregnant-patients-get-sicker-by-design>.

45. *Id.*



insufficiency and preterm prelabor rupture of membranes,” and her husband heard the doctors say that therefore “the loss of their baby was inevitable and her life was in danger.”<sup>46</sup> Nevertheless, her doctors could not “provide an abortion due to the state’s restrictions” until Amanda developed sepsis, “a life-threatening infection, three days later. She then spent days in a hospital intensive care unit. As stated in the lawsuit, “the infection left such severe scarring on her reproductive organs that, despite doctors’ efforts, one of her fallopian tubes remains permanently damaged.”<sup>47</sup>

The second plaintiff, Lauren Hall and her husband, heard their sad news from the doctors: at eighteen weeks’ gestation their fetus “had anencephaly, a condition [that means the baby] does not develop a skull and is incompatible with life. ... continuing her pregnancy came with health risks, including hemorrhage and preterm birth.”<sup>48</sup> The Halls traveled to Washington State so she could receive an abortion. Another Lauren, Lauren Miller, was pregnant with twins “when at her 12-week ultrasound her doctors told her one of the babies had a severe genetic condition and wasn’t going to survive, threatening her life and her other baby.”<sup>49</sup> Ms. Miller said, “I’ll never forget when one specialist tore off his gloves and threw them in the trash. ‘I can’t help you anymore,’ he said, ‘You need to leave the state.’”<sup>50</sup> None of these fetuses had a chance of survival but each mother was in grave danger of losing her own life. Ms. Miller traveled to Colorado for an abortion, fortunate to have the time and money to travel and family who could take care of her first child.<sup>51</sup>

A third plaintiff, Ann Zagarian, was carrying twins, one of whom was so sick as to endanger the lives of both the healthy sibling and the mother. She too traveled to have an abortion

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46. *Id.*

47. *Id.* See also Jacqueline Howard and Tierney Sneed, *Texas Woman Denied an Abortion Tells Senators She “nearly died on their watch”*, CNN (Apr. 26, 2023, 8:24 PM) [https://www.cnn.com/2023/04/26/health/abortion-hearing-texas-senators-amanda-zurawski/index.html#:~:text=Amanda%20Zurawski%20told%20senators%20on,d denied%20an%20abortion%20in%20Texas.&text=%E2%80%9CBecause%20I%20wasn%20t%20permitted,is%20paralyzing%2C%E2%80%9D%20she%20said.\(%20I%20nearly%20died%20on%20their%20watch%20:W oman%20calls%20out%20absent%20Senators%20Cruz%20and%20Cornyn%20at%20abortion%20...\)](https://www.cnn.com/2023/04/26/health/abortion-hearing-texas-senators-amanda-zurawski/index.html#:~:text=Amanda%20Zurawski%20told%20senators%20on,d denied%20an%20abortion%20in%20Texas.&text=%E2%80%9CBecause%20I%20wasn%20t%20permitted,is%20paralyzing%2C%E2%80%9D%20she%20said.(%20I%20nearly%20died%20on%20their%20watch%20:W oman%20calls%20out%20absent%20Senators%20Cruz%20and%20Cornyn%20at%20abortion%20...)).

48. Griswold, *supra* note 44.

49. *Id.*

50. *Id.*

51. *Id.*

of the fetus who would not live and later delivered the healthy twin. All these plaintiffs could travel, but the inability of women and girls who are poor or alone to escape the jurisdiction of Texas is tragic with life itself at stake.<sup>52</sup> While these plaintiffs themselves suffered hardships in obtaining the treatment they needed, they were still among the privileged classes. Their ability to provide for themselves the medical care they needed which their poorer sisters in Texas cannot do underlines the necessity now more than ever to provide at least the basic safety nets for all women who are too poor or sick to obtain for themselves necessary care.

From these examples, a poor woman with one healthy and one unviable twin is in danger of losing her own life and both twins or if she lives, may still lose both babies and, besides the tragedy of losing the healthy twin, might also be unable to have another child later because of the damage to her reproductive system from this experience without being able to have medical treatment in her circumstances, namely poverty itself. Such ghastly consequences, completely unjust, and impoverishing society as well by these losses of life, occur because we fail to provide the medical, social, and economic assistance and support our poor neighbors' needs. We continue to bear this shame without doing anything to remediate the situation, even though the solutions are not difficult to ascertain but require an allocation of tax money to the poor to repair the breach. Texas may be a large state early to this game of punishing women and girls at their most vulnerable, but it is providing a bad model for other states such as Oklahoma which is also engaging in this warfare against ill pregnant women.<sup>53</sup> That is not modern legislation with fact finding but simply harassment written into the state statute books. No state,

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52. *Id.*

53. Bob Felder, "I felt so alone": Women Flee Oklahoma for Live-Saving Abortions, THE OKLAHOMAN (Apr. 25, 2023, 10:00 AM), <https://www.oklahoman.com/story/news/politics/government/2023/04/25/abortion-ban-oklahoma-women-seek-live-saving-emergency-pregnancy-care-supreme-court-roe-v-wade/70131031007/>. (relating that Jaci Statton had vaginal bleeding, high blood pressure and intense nausea, symptoms of a partial molar pregnancy, a condition where the egg does not fertilize correctly and the fetus will never become viable. This article provides yet another example of the many things that can go wrong during pregnancy which politicians who, without taking the time to consider their legislation and hold hearing on the number of pregnancies which go wrong and the causes, ignorantly simply prevent abortion, even to clean up a miscarriage of an unviable or already dead fetus).

including Texas and Oklahoma, should produce such embarrassing and dangerous words and dare to enter such torture into the statute books of the twenty-first century United States. How long will it be before more small-minded, misogynistic state legislatures, whatever their size, follow suit in wasting their human capital in the warfare to kill defenseless women, girls, babies and fetuses, who in their poverty have no voice to speak back, much less to fight this unjust situation?

Margaret Atwood sees some of the same societal pressures at work today as Salem, Massachusetts faced in 1692, when the town hanged as many as nineteen poor women as scapegoats for the troubles arising from land disputes, hunger and other social ills. In terms of the desecration of human bodies (to say nothing of the execution of innocent women), this is one step up from being burned at the stake as in the century before in Merrie Olde England, to say nothing of Germany and France. *The Handmaid's Tale* seems quite plausible and familiar to us. Indeed, it is a thinly disguised description of Ronald Reagan's morning in America with a sad gloss from the future which had not yet occurred in 1985 when the novel was written, mourning in America.<sup>54</sup> At the time, President Reagan's pleasant personality brought many people to embrace that vision of morning in America, but as the falling birthrate among many communities brought a sense of unease, grievances, victimhood, revenge, violence, and dark views brought to wider attention that unshakable feeling of mourning in America in those people who did not follow

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54. "Prouder, Stronger, Better", commonly referred to by the name "Morning in America", is a 1984 political campaign television commercial, known for its opening line, "It's morning again in America." The ad was part of that year's presidential campaign of Republican Party candidate Ronald Reagan. George Raine, *Creating Reagan's image / S.F. ad man Riney helped secure him a second term*, SFGATE (June 9, 2004), <https://www.sfgate.com/business/article/creating-reagan-s-image-s-f-ad-man-riney-2715098.php>. During Super Bowl LIII, Hulu aired a trailer for the third season of *The Handmaid's Tale* inspired by "Morning in America" but focused on women and their newborn children and interrupted by scenes of the series' dystopian and totalitarian Republic of Gilead—where women are required to act as sex slaves—and concluding with lead character June Osbourne / Offred stating "Wake up America, morning's over." Nat Ives, *Hulu's Dark 'Morning in America' Interrupts a Saccharine Super Bowl Ad Roster*, THE WALL STREET JOURNAL (Feb. 3, 2019, 7:41 PM), <https://www.wsj.com/articles/hulus-dark-morning-in-america-interrupts-a-saccharine-super-bowl-ad-roster-11549237427>.

Reagan's voters into that dark place eventually leading to carnage in America. Equality, not even of opportunity, much less a broader sense of equality gave way to preserving "our" culture and way of life.

Schlafly had already brought into prominence her upper class version of the return to nineteenth-, and even later-eighteenth-, century views of the family, specifically the role of women as providers of private comfort, while men have a work life as well as a presiding role at home as head of the family.<sup>55</sup> The revolution in *The Handmaid's Tale* and in society shows the hardships for women from their unequal role in society and, therefore, by definition, lack of rights, even though the privileges of the rich allowed those wealthy women to live in golden cages and influence their husbands subtly, or at least unofficially. Misogyny and looking for scapegoats for real or perceived grievances against the larger society dehumanize all women and fall even more heavily on women of color. When people fail to treat each other equally, those seeking control of other people, most often the rich and politically connected, prey upon the poor, who cannot walk away and find a better, or even a better-paying job, with drastic individual and societal consequences. Equal justice is the secular interpretation of Jesus's injunction to love our neighbor (any and every other human being) as oneself.<sup>56</sup>

*United States v. Morrison*<sup>57</sup> provides a strong illustration of good legislation taken away for political rather than policy

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55. Lesley Kennedy, *How Phyllis Schlafly Derailed the Equal Rights Amendment*, HISTORY <https://www.history.com/news/equal-rights-amendment-failure-phyllis-schlafly> (last updated Sept. 29, 2023).

56. One recognizable basis for any human right is natural law. Biblical law makes that same recognition when Jesus recites the Jewish law with extra emphasis. ". . . thou shalt love thy neighbor as thyself." Matt. 19:19 (KJV).

57. See generally 529 U.S. 598 (2000). A program giving federal aid to the states to rehabilitate battered women was declared unconstitutional under the Commerce Clause. The distribution of the powers of government among the three branches is the driving force behind the denial of aid to women, not the health or welfare of the human taxpayers. The taxes the wealthiest individuals pay could be lessened by eliminating federal programs based on the Commerce Clause. Reducing the scope of the Commerce Clause puts those in need in a vise because those in need then have no escape from their condition, injured and poor. Without rehabilitation, the injured women will never return to work and the dependence of these women and their children on food handouts rather than food bought from the mother's salary will keep the women as depressed socially and economically as it does the states giving meager food aid instead of collecting taxes from rehabilitated women back at work. The greed of the privileged

reasons or any necessity. Chief Justice Rehnquist was interested in originalism and keeping “the government” (Congress, every member elected by the people) small but increasing the power of the judiciary among the three branches.<sup>58</sup> In that quest the Chief Justice enlisted the states, many of which had little possibility of taking on the expenses of the powers Rehnquist removed from Congress, thus demonstrating the drastic individual consequences for many battered women needing physical and other rehabilitation to return to work in order to provide for their children. Why was Rehnquist so against Congress giving aid to the states? Linda Greenhouse covered the *amicus curiae* brief of thirty-five state attorneys general asking the Court not to get rid of the federal money allocated to the states for rehabilitating battered women.<sup>59</sup> How long will those states remain autonomous if they have to take on funding mandates for many more cases like *Morrison* “giving” the very reluctant states senior partner status to the federal government in helping citizens and residents? Originalists envision a government of privilege rather than rights. Such a government is as small as its taxes for the well-to-do.

*B. The Intransigence of Opponents in the Face of the Facts of Each Woman’s Case*

In addition to the self-interest of people who do not want tax revenue used to help needy people reach a better life and thereafter become contributors to the revenues the IRS collects, those who take a punitive stance often include views prejudicial to all women, prominently including misogyny. Ignoring rape, incest, and other situations involving force, some people deem the hardships of poverty and

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excludes the rights of all when a Chief Justice acts as Rehnquist did in *Morrison* rather than as Marshall did in *Marbury*. On originalism, see Peter L.P. Simpson, *Political Illiberalism: A Response to My Critics*, 62 AM. JUR. 125–142 (2017).

58. *Morrison*, 529 U.S. at 614.

59. See Linda Greenhouse, *Justices Cool to Law About Women*, THE NEW YORK TIMES (Jan. 10, 2000), <https://archive.nytimes.com/www.nytimes.com/library/politics/scotus/articles/011200woman-violence.html>; Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, THE NEW YORK TIMES (Jan. 1, 2005), <https://www.nytimes.com/2005/01/01/politics/rehnquist-resumes-his-call-for-judicial-independence.html>.

the state's neglect of children born poor<sup>60</sup> just punishment for a woman, painted in similar terms to Phyllis Schlafly's description of young women who held jobs: "they" simply want to be irresponsible and go out on dates rather than finding a husband and staying home to prepare the husband's dinner.<sup>61</sup> Schlafly was a lawyer, conservative activist, vigorous agitator, and career woman, if an unconventional one. Schlafly tore down the concept of career women and reproductive rights.<sup>62</sup> She may also have in large measure destroyed the path to the Equal Rights Amendment, for which feminists tirelessly fought, in the hopes of influencing public opinion to force women to stay home.<sup>63</sup> Schlafly thought that, as in earlier ages, wives in the 1970s ought to submit to their husbands in

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60. Statistics show that women poor at the time of the birth of the baby descend below the poverty line before the child reaches kindergarten age. See Christal Hamilton, Laurel Sariscsany, Jane Waldfogel, & Christopher Wimer, *Experiences of Poverty Around the Time of a Birth: A Research Note*, DUKE UNIVERSITY PRESS (2023), <https://read.dukeupress.edu/demography/article/60/4/965/379020/Experiences-of-Poverty-Around-the-Time-of-a-Birth>.

61. Victoria Nourse, *A Devastating Supreme Court Decision on Sexual Assault Shows Why the U.S. Needs the ERA Now*, MS. MAGAZINE (Oct. 21, 2021), <https://msmagazine.com/2021/10/21/equal-rights-amendment-supreme-court-sexual-assault-era-violence-against-women-vawa-united-states-v-morrison-christy-brzonkala/#SnippetTab>. (in the article, Victoria F. Nourse wrote:

"Since *Morrison* was decided, the Supreme Court has only become more conservative. Now six justices, including former President Donald Trump's three appointments to the Court, believe in 'originalism': the theory that the meaning of the Constitution was fixed more than 200 years ago in 1787, when women were legally regarded as the property of their husbands and fathers."

Thus we may state the holding in *Morrison* as: Violent criminals who battered women did not intend economic harm and therefore women who suffered economic consequences from being battered could not be helped by the aid available through the Violence against Women Act since the Commerce Clause does not apply to the perpetrator's intent, leaving the women to the unfilled coffers of state treasury departments. Originalist men knew women got no economic support in 1789 and they cannot be so supported in 2000. *Morrison*, 529 U.S. at 598, 607-627: *Held*: Section 13981 cannot be sustained under the Commerce Clause or § 5 of the Fourteenth Amendment at 607-627.

62. "What is so frightening about equality?" *Cate Blanchett on playing a historic anti-feminist in Mrs. America*, THE INDEPENDENT (Jul. 7, 2020), <https://www.independent.co.uk/arts-entertainment/tv/features/mrs-america-cate-blanchett-interview-bbc-drama-feminism-true-story-phyllis-schlafly-a9605601.html> (explaining that "Schlafly attacked career women and reproductive rights, and taught wives to submit to their husbands." Starting in the 1970s as a housewife, Mrs. Schlafly became a leading conservative activist and ally of Ronald Reagan).

63. Kennedy, *supra* note 55. ("Schlafly's strategy to defeat the ERA was to convince women that equality between men and women was undesirable.").

domestic service to keep the species going.<sup>64</sup> According to Schlafly, “woman’s main role should be that of a mother, even in this modern century;” she stated, “[m]arriage and motherhood have their trials and tribulations, but what lifestyle doesn’t? . . . The flight from home is a flight from self, from responsibility, from the nature of woman, in pursuit of false hopes and fading fantasies.”<sup>65</sup> Schlafly objected to what she saw as “the feminist assertion that women are paid less than men or are otherwise discriminated against in the work force;” she said, “a deceitful propaganda campaign has been orchestrated by the feminist movement to convince the American people that” women who take paying jobs receive fewer wages on the dollar than men who do the same work.”<sup>66</sup> This, she claimed, “is part of the feminists’ denigration of the role of motherhood. . . [It] is designed to eliminate. . . motherhood by changing us into a society in which women are harnessed into the labor force both full-time and for a lifetime.”<sup>67</sup>

According to Schlafly, marriage and motherhood provided conservative women with advantages which they didn’t want to give up in exchange for equality but rather these women intended to protect their socioeconomic and cultural power.<sup>68</sup> The best way to defend her position was to work for the defeat of the Equal Rights Amendment. Schlafly began her campaign early in 1972 to stop the ERA, using as the symbol of her movement the traffic stop sign and adding ERA to the word STOP.<sup>69</sup> Schlafly wanted to preserve her social prestige,

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64. *Phyllis Schlafly Explains Why Feminism Has Made Women Unhappy*, NPR (July 21, 2014, 1:53 PM) <https://www.npr.org/2014/07/21/333582322/phyllis-schlafly-explains-why-feminism-has-made-women-unhappy>. (“I told the feminists the only person’s permission I had to get was my husband’s”). See also Annie Goldsmith, *Revisiting the STOP ERA Movement—and Its Leader, Phyllis Schlafly—in Photos*, TOWN & COUNTRY MAGAZINE (Apr. 26, 2020), <https://www.townandcountrymag.com/leisure/arts-and-culture/g32147431/stop-era-phyllis-schlafly-movement-photos/>.

65. PHYLLIS SCHLAFLY, *FEMINIST FANTASIES* 197 (2003).

66. *Id.* at 98.

67. *Id.*

68. PHYLLIS SCHLAFLY, “WHAT’S WRONG WITH EQUAL RIGHTS FOR WOMEN?,” *THE PHYLLIS SCHLAFLY REPORT* (1972), <https://eagleforum.org/publications/psr/feb1972.html>. (asking “Why should we lower ourselves to ‘equal rights’ when we already have the status of special privilege?”).

69. Amélie Ribieras, “*Stop Taking Our Privileges*”: *Phyllis Schlafly’s Narrative of Traditional Womanhood and the Fight for Socioeconomic Hegemony*

cultural influence and economic advantages over other women in her own class and to preserve their prominence over clever women who worked and might rise to greater positions within an organization by working steadily for a number of years.<sup>70</sup>

I see Schlafly and Atwood as representatives of the opposite sides of the role of women in society, either leading from the comfort of home exercising their views and influence; if they are members of the leisure classes or contributing according to their own wishes as stay at home mothers without being forced to stay home; to work in the larger economy or to combine both roles, as each woman is able to do; poor or more comfortable; or working if she wishes or if economic need requires her to work. The imposition of Schlafly's view on all women was impossible, especially among the women who needed to work. But her and others' punitive and misogynistic views of women have consequences for society and individual members in society. Women who are not equal may have privileges if they belong to a privileged class, but their rights are unrecognized in government and society. Women have no protected say in the shaping of their roles, which are deemed narrow, if not rigid. The model is the woman who can conceive and bear children and who therefore does not work since she supervises the care of the children, including the cook and the nanny or nannies. Both middle class women seeking invitro fertilization because of difficulty bearing a child and often poor women raped without their being able to overcome their attackers must be subject to the luck of the draw. What does such an ironic set of circumstances reveal about the attitude toward both groups of women, all needing and deserving

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in the 1970s–1980s, *USABROAD* (March 4, 2021) <https://doi.org/10.6092/issn.2611-2752/11614>.

70. *Id.* The similarity of Schlafly's ideas and means of preserving them to what was soon to be called originalism is striking. Schlafly applied her approach to defeating the recognition of a right in the Constitution. The attitude toward constitutional interpretation later called originalism seeks to preserve the privileges and immunities of the small wealthy classes existing at the time of the Constitutional Convention (1787) before any political rights amended the Constitution. It is no surprise since Schlafly was a lawyer who supported Barry Goldwater and others who held similar ideas. For a slightly later version of originalism, see Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 *U. HAW. L. REV.* 385, 398 (2000) (explaining that in Scalia's view the original meaning of constitutional provisions was to be found in the historical practices and understandings of the times, rather than in the drafters' views).



individual help in their different sad circumstances? In accordance with Schlafly's extolling the role of motherhood, a woman without a child can only stand in line waiting for an adoption which may never come her way. She is otherwise condemned to look from the outside into the glass window where happy women are glad to have the then-new disposable babies' diapers, which Schlafly praised as they became popular in the 1960s.<sup>71</sup> Infertile women can only envy this lucky mother while remaining excluded. "Defeat the ERA, female genitalia will get you nowhere," said one professor in 1973.

Atwood herself gives two powerful examples of unjust control over other peoples' lives. First, the dictator Nicolai Ceausescu in Decree 770 (1967) insisted on increasing birth rates in Romania, which "led to the policing of women and the banning of abortion and birth."<sup>72</sup> Second, the "idea of 'giving' the offspring of lower classes to the ruling class came from Argentina, where a military junta seized power in 1976, subsequently 'disappearing' up to 500 children and placing them with selected leaders."<sup>73</sup> Is this not precisely what the dictator Vladimir Putin has done in spades in Ukraine?<sup>74</sup>

Poverty is a cruel taskmaster: it allows poor people to fall under the power of unscrupulous rulers, public and private.<sup>75</sup> These include employers who, as Adam Smith

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71. Ginia Bellafante, *At Home with Phyllis Schlafly: A Feminine Mystique All Her Own*, NY TIMES (March. 30, 2006), <https://www.nytimes.com/2006/03/30/garden/a-feminine-mystique-all-her-own.html>.

72. Karl Thompson, *The Handmaid's Tale – Possible in Real Life?*, REVISESOCIOLOGY <https://revisesociology.com/2020/07/29/the-handmaids-tale-possible-in-real-life/> (last updated Jan. 28, 2021).

73. *Id.* Iran did something similar in 1979 when the revolution instituted an Islamic dress code for women and instituted the morality police. Sepideh Zamani, *Struggling for the Rights Their Mothers Lost in the Revolution*, THE WASHINGTON INSTITUTE (Jan. 13, 2023), <https://www.washingtoninstitute.org/policy-analysis/iranian-daughters-struggling-rights-their-mothers-lost-revolution>.

74. Deborah Amos, *Russia deports thousands of Ukrainian children. Investigators say that's a war crime*, NPR (Feb. 14, 2023, 1:01 PM), <https://www.npr.org/2023/02/14/1156500561/russia-ukraine-children-deportation-possible-war-crime-report>. ("The Yale team says it has verified at least 6000 Ukrainian children detained by the Russian government, although researchers believe there are thousands more. The report identifies 43 camps, although some children have been 'adopted' by the politically connected and wealthy.")

75. We are now back in income inequality at the same differential level as occurred during those years after the revolt against Reconstruction, when the top one tenth of one percent owned one fifth of the wealth. This again leads to instability in political institutions, thereby increasing the numbers who live in

recorded their perennial behavior, are inclined to underpay and overwork employees.<sup>76</sup> Titans of business, moguls, dictators, oligarchs in their various incarnations and officious intermeddlers, such as Schlafly, with money (who enjoy controlling the fates and destinies of other people less well-positioned in society than they) enjoyed much the same range of control, including the present period when this kind of person who wields outsized power may be known as influencers.<sup>77</sup> These predecessors of, and successors to, Schlafly

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and below the poverty line. The Tax Cut and Jobs Act of Dec. 2017 is one of the worst promoters of inequality in this country and involves removing many of the already too slim safety nets. Those in favor of this tax law are the oligarchs who deem themselves originalists, or “influencers” in online parlance. If whatever is in question now was not available in 1787, we cannot alter the body politic today to accept innovations which might include previously unenfranchised parties (such as women and people of color). Therefore, there is no ERA (Equal Rights Amendment empowering women legally and constitutionally). Rights to education and healthcare are considered privileges. These two denied rights, together with the also denied right to affordable housing, are the greatest causes of poverty. Bankruptcy following a serious medical event is still common in the United States. Deeming themselves originalists “whitewashes,” at least in their own eyes, the extreme greed of these privileged autocratic people.

76. ADAM SMITH, *THE WEALTH OF NATIONS* (1776) in book 1, chapter 8 concludes that employers with greater bargaining power than the employees, naturally (that is greedily) will pay the lowest possible wages in the circumstances, as amply illustrated in the hours and wages in *Lochner v. New York*, 198 U.S. 45 (1905) or Amazon’s expensive fight against unions. Steven Greenhouse, *‘People feel intimidated’: the battle to unionize second US Amazon warehouse*, *THE GUARDIAN* (Sep. 29, 2022), <https://www.theguardian.com/technology/2022/sep/29/amazon-us-workers-battle-unionize-second-warehouse>. Amazon denies violating any laws in fighting the union. As for the economics the Court protected in *Lochner*, *laissez-faire* economics effectively means whatever shortcuts and risks wealthy people want to take with other people’s money are acceptable within the prevailing norms of the time in question. This non-interference with business risks and practices leads to destruction and disaster for many people on whom the consequences of the risks the entrepreneurs take. Taking away the Bakeshop Act in *Lochner* was a disaster for bakers, who suffered some of the worst working conditions, especially when the ovens were in the basement which often had no floors and were built into the mud. Water was frequently sloshing around the mud floor and the men oftentimes stood in mud, breathing microparticles into their lungs from the flour, a variation on the same condition miners suffered. See SAMUEL FLEISCHACKER, *ON ADAM SMITH’S WEALTH OF NATIONS: A PHILOSOPHICAL COMPANION* (Paperback, 2005) (demonstrating Smith’s unusually strong belief in human equality which led him to “anticipate, if not quite endorse, the modern doctrine of distributive justice”).

77. The Supreme Court often has a very “originalist” bent which in their own eyes allows them to disregard the wishes of an overwhelming number of residents and citizens who are after all affected by what the Court does. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375 (2013) (explaining that today originalism is less tied to “the importance of judicial

are the successors to the privileged classes of the 1780s, when the Constitution was being written at the Constitutional Convention of 1787, mentioning no rights for citizens, who only received some protection with the recognition in the first eight amendments to the Constitution in the Bill of Rights of 1791.<sup>78</sup> We must seriously ask ourselves whether such people, including employers acting in the same way as Joseph Lochner did,<sup>79</sup> should have such a large measure of control over other people's lives, simply because their own greed, coupled with their comparative wealth, gives them such command over the weakest in society.

#### IV. CONCLUSION

The democratic deficit in human rights in the United States has only grown in recent years. Whatever dates different scholars choose, ranging from 1980 to the invasion of Iraq in 2003, the democratic deficit has only snowballed after

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restraint than it once was" but now emphasizes a "public meaning of the constitutional text.").

78. George Thomas, *What the Constitution Doesn't Say*, THE ATLANTIC (Feb. 3, 2022), <https://www.theatlantic.com/ideas/archive/2022/02/unwritten-constitution-originalist/621410/>.

79. The author (Justice Peckham) of the majority opinion in *Lochner* in 1905 willfully could not comprehend modern economics. Instead, he took a recent amendment from just after the Civil War, under forty years before *Lochner*, and applied its concept of equality to a 17th-century political concept, that only those with privileges and immunities have a constitutional right to contract. In the 17th century and well beyond, the differences in equality and economic clout forbade the laborer from exercising any contractual bargaining power, particularly not by joining together in solidarity to bargain with others similarly positioned. Those with privileges and immunities in 1905 were the employers, but employees stayed in the condition of having no power because of the artificial law that no one without privileges and immunities could join with anyone else for the mutual profit of those joining together. *Lochner v. New York*, 25 S.Ct. 539. 540-547.

Finally, what is the common approach of Justices Peckham, Rehnquist (*supra*, notes 33 and 34), and Roberts? They are all bound to the past, calling themselves, since around 1980, originalists. Why is this destructive? The reason originalists say things they know are not true, such as "if God had wanted us to fly, he would never have given us the railroad," is because they want to keep their own oligarchic, anti-democratic group in power, wealthy investors and employers today who take from the revenues at the outset several hundred times what the line workers are paid. Why else would they not wish to share a small percentage of their great wealth in the public interest or for the public good so that we have a larger percentage of the people working for wages that allow them and their families to flourish above the poverty line and even beyond the working poor, themselves now paying taxes and no longer receiving food aid?

2003.<sup>80</sup> The expansion of Medicaid is one important example which may stand for other similarly vital instances of the democratic deficit in recognizing rights for the poor, as “in almost every state, voters prefer Medicaid expansion, but because of gerrymandering, state legislatures tend to be far more conservative than the population they serve. Despite fiscal incentives for expanding Medicaid, states with conservative governments have prevented its expansion in a variety of ways.”<sup>81</sup> According to the Kaiser Family Foundation, “[s]ince the enactment of the Affordable Care Act (ACA) in 2010, more than 2,000 legal challenges have been filed in state and federal courts contesting part or all of the ACA.”<sup>82</sup>

This democratic deficit is in fact quite serious with consequences for citizens deprived by the legislature who otherwise would have had some of their health problems relieved with Medicaid at the same time that wealthy entrepreneurs, investors, senior company executives and wealthy corporations had their lobbyists make campaign

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80. Daniel Calingaert et. al., *The Democracy Support Deficit: Despite Progress, Major Countries Fall Short*, FREEDOM HOUSE (Nov. 20, 2023), [https://freedomhouse.org/sites/default/files/2020-02/GSD\\_Overview\\_and\\_Country\\_Reports.pdf](https://freedomhouse.org/sites/default/files/2020-02/GSD_Overview_and_Country_Reports.pdf) (recommending greater attention to human rights abuses and ensuring “that major democracies take the lead in firmly addressing democratic setbacks and gross human rights violations in their own regions.”).

81. For democratic deficit, see *supra* note 1. *Republican-Controlled States Continue to Block Medicaid Expansion*, BERKELEY PUBLIC HEALTH, <https://publichealth.berkeley.edu/news-media/research-highlights/republican-controlled-states-continue-to-block-medicaid-expansion/>. When voters pass ballot initiatives to expand Medicaid eligibility, lawmakers sometimes “simply refuse to implement Medicaid expansion or overturn the effects of the ballot initiative as soon as they can.” *Id.*

82. Laurie Sobel et al., *Explaining Litigation Challenging the ACA’s Preventive Service Requirements: Braidwood Management Inc. v. Becerra*, KFF (May 15, 2023), <https://www.kff.org/womens-health-policy/issue-brief/explaining-litigation-challenging-the-acas-preventive-services-requirements-braidwood-management-inc-v-becerra/>. The Affordable Care Act federal guidelines in 2020 set the eligibility requirements for Medicaid for those with incomes up to 138% of the federal poverty level, which is \$35,535 annual income for a family of four. Berkeley, *supra* note 81. States vary in how they enforce who is eligible for Medicaid. For example, see Greg Allen, *Florida is 1 of 11 states declining to accept federal money to expand Medicaid*, NPR (Mar. 15, 2023), <https://www.npr.org/2023/03/15/1163617435/florida-is-1-of-11-states-declining-to-accept-federal-money-to-expand-medicaid>. (explaining that Florida still refuses to accept federal money to expand Medicaid but with the end of the emergency COVID program, 1.7 million people must lose Medicaid health coverage. The legislature does not plan to change its position, despite surveys showing the people wish Medicaid to be expanded).

contributions to state and federal legislators, thereby assuring themselves of a hearing on various kinds of tax deductions and exemptions, including access to lands and easements for their businesses and exemptions from observing various safety rules, and the carriage of dangerous chemicals and safe working conditions.<sup>83</sup> They thereby shift the risk to individual persons who often cannot assume the medical and other costs associated with the accidents and disasters resulting from the exemptions from the legislatures, when the legislatures are denying expansion of Medicaid in order to fund the exemptions and deductions for the wealthy.<sup>84</sup>

In fact, the democratic deficits in recognizing the fundamental human rights of ordinary citizens while honoring the privileges of the wealthy, who pay low and sometimes no federal income taxes, have grown so large that in several ways the government is autocratic rather than democratic.<sup>85</sup> It would be a travesty in the wake of the third branch of the government's removal of abortion as a federally protected choice not to pass legislation providing aid to poor women and girls in any circumstance to improve their abilities to succeed in life without the worry of hunger, lack of medical care, and access to education. But when pregnant girls/women are given no choice, and no aid tailored to their circumstances, this situation is one of several very serious willful or reckless democratic deficits and even failures which risk other people's health and lives at the same time they destroy trust in government and governmental institutions. The political instability created by the government's failure to provide necessary outreach to poor girls and women who are pregnant is as immoral and damaging to individuals and the nation as the tax preferences granted to the wealthy who lobbied for this ever-greater inequality.<sup>86</sup> The unequal treatment of taxpayers

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83. *Top Legislative Recipients of Contributions from Lobbyists, 2022 Cycle*, OPEN SECRETS, <https://www.opensecrets.org/federal-lobbying/top-recipients?cycle=2022&type=P>.

84. *Id.*

85. *NEW REPORT: Authoritarian Rule Challenging Democracy as Dominant Global Model*, FREEDOM PRESS (Feb. 24, 2022), <https://freedomhouse.org/article/new-report-authoritarian-rule-challenging-democracy-dominant-global-model>. (“Freedom in the World 2022 finds that autocracy is making gains against democracy and encouraging more leaders to abandon the democratic path to security”).

86. Catherine Thorbecke, *How our tax codes let the rich get richer: ‘We need better tax laws’*, ABC NEWS (June 14, 2021), <https://abcnews.go.com/Business/tax->

(poor taxpayers receiving little aid, while wealthy taxpayers receive exemptions from their regular costs of doing business at the expense of the average and poor taxpayers) allows greedy entrepreneurs to cut corners and shift the consequences of that legislative action to those often already without Medicaid and other necessities of daily living.<sup>87</sup> How long can the wealthiest country continue to live in and with the shame and sorrow created by national and state neglect of the poorest girls and women carrying a fetus who are unable to provide for themselves, let alone another person?

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codes-rich-richer-tax-laws/story?id=78182056#:~:text=While. (“While the median American household paid 14% of their income in federal taxes, according to ProPublica, the wealthiest 25 Americans had a “true tax rate” that on average came out to 3.4% of the amount their wealth grew each year between 2014 and 2018.”).

87. Mark J. Roe & Jordan Siegel, *Political Instability: Effects on Financial Development, Roots in the Severity of Economic Inequality*, 39 J. COMP. ECON. 279 (2011) (explaining that structural conditions generating long-term inequality lead to political instability and lack of financial development).

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